REPORTS

OF

CASES

ADJUDGED IN THE

SUPREME COURT

OF

PENNSYLVANIA.

BY HORACE BINNEY.

VOL. V.

PHILADELPHIA:

PUBLISHED BY MOSES THOMAS,

NO. 52, CHESNUT NEAR SECOND-STREET.

PRINTED BY WILLIAM FRY,

1813.

District of Pennsylvania, to wit:

SEAL. BE IT REMEMBERED, That on the fourteenth day of September, in the thirty-eighth year of the Independence of the United States of America, A. D. 1813, Horace Binney, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as author, in the words following, to wit:

"Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney. Vol. V."

In conformity to the act of the Congress of the United States, intituled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned."—And also to the act, entitled, "An act supplementary to an act, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

JUDGES

OF THE SUPREME COURT PENNSYLVANIA.

WILLIAM TILGHMAN, Esq. — Chief Justice.

JASPER YEATES, Esq. }
HUGH H. BRACKENRIDGE, Esq. } Justices.

ATTORNEY GENERAL.

JARED INGERSOLL, Esq.

TABLE OF THE CASES.

Those in Italics are cited from MSS.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Lancaster District. May Term, 1812.

ELLIOT *against* ELLIOT.

1812.

Monday, May 25.

The decree of an Orphan's Court, ordering the real estate of an intestate, at the valuation, to his oldest son, is not *void*, as against a minor child, merely because the minor did not appear by *guardian*. No act of assembly requires such appearance, and, the proceedings not being in the nature of an adversary suit at common law, notice to the minor, or to those having the care of his interests is sufficient.

But if such decree is erroneous, a minor is not concluded by his own, or his guardian's acceptance of the sum at which his interest in the estate is valued, provided as soon as practicable after his arriving at lawful age, he takes the necessary steps to question the proceeding. He is not concluded, though he accepted the purpart after he came of age, if he was then ignorant of the wrong done to him.

In a petition for the partition of such an estate, it is not essential to state the fisheries that may belong to it. It is enough if the Inquest take them into view in their valuation.

In the admeasurement of islands in the *Susquehanna*, it seems, the practice of surveyors is not to include the land which lies between the bank, and the water's edge; and therefore that a valuation, made upon the basis of a survey which did not include that land, would not for that cause be erroneous.

THIS was an appeal from a decree of the Orphan's Court for the county of *Dauphin*.

The case, as it appeared from the record, and a variety of depositions that were taken in this court, was thus: *Daniel Elliot* the father of both parties, died intestate prior to the year 1794, leaving issue *John* the appellee, *West* his second son, *Mary*, who afterwards married *James Hamilton*, and *William* the youngest son, the appellant. At the time of his death, he was seised in fee of part of an island in the river *Susquehanna*, which had been surveyed by virtue of a warrant from the late proprietaries of *Pennsylvania;*

1812.

ELLIOT v. ELLIOT.

but no patent had issued. On the 7th of *June*, 1798, *Alexander Lowry*, the maternal grandfather of the parties, obtained a patent, in trust for all the children of *Daniel Elliot*. In *December* 1799, *John Elliot*, the appellee, petitioned the Orphan's Court of *Dauphin* county, within which the land lay, to appoint an inquest to view his father's part of the island, which he alleged consisted of 220 acres 147 perches, (the quantity in the patent,) that it might be divided among all the children if it admitted of division, but if not, that it might be valued, and the whole assigned to him upon his giving security to pay his brothers and sister their proportions according to law. This petition did not state that any of the children were minors, although the appellant was then about thirteen years old, nor did it state that there were valuable fisheries appurtenant to the island, although that was the fact.

The court directed an inquest to be summoned agreeably to the prayer of the petition, and the jury, one of whom was *Hamilton* who afterwards married the daughter, viewed and valued the land, in the presence of *John* the appellee, *West* the second son, and *Alexander Lowry* the grandfather with whom *William* the appellant resided in *Lancaster* county; and being of opinion that it could not be divided without injury to the whole, they valued it at 2209*l.* 0*s.* 11*d.* which was 10*l.* the acre for the quantity mentioned in the patent. The valuation was confirmed by the Court, and by their decree it was assigned to *John*, who gave security to pay their proportions to the rest of the family.

William had several guardians subsequent to this decree, among whom were *West*, his brother, who acted until 1806, when *James Ross* of *Pittsburg* was appointed and continued during the minority. *West* received part of *Williams*' proportion of the island. Mr. *Ross* received the residue, and on his coming of age, paid the balance due to him, and was exonerated from the trust. *William* came of age in *December* 1806.

In *November* 1807, *William Elliot* presented a petition to the same Orphan's Court, stating the inquisition, valuation, and the confirmation of it; that he had arrived at lawful age in *December* 1806, and requesting them for various causes to vacate their former decree. The Orphan's Court how-

ever after hearing the petition, confirmed their former decree, and from this the present appeal was entered.

The objections here taken on behalf of the appellant, were 1. Matter of Law. That the proceedings were void, because *William Elliot*, had not appeared by guardian, to the petition of *John* in 1799;—and also because the petition did not contain a true statement and description of the property to be divided, as it omitted the fisheries.

2. Matter of fact. That the appellee had fraudulently concealed from the inquest the true quantity of land, representing it to be only 220 acres 147 perches the amount in the patent, whereas it was actually 240 acres and upwards; and if there was no fraud, still the jury made a mistake in supposing the quantity to be less than it really was.

The evidence taken in this Court, proved, in addition to some of the facts before stated, that *Alexander Lowry* the grandfather, had been very solicitous for the interest of all *Elliot's* children, had obtained the land for them by paying the arrears of purchase money, and had attended the jury. That the jury had taken into consideration the fisheries, and valued the land in connection with them, at a price which all but two of the inquest thought too high, until one of the two offered to give the price for it. That the land was surveyed by *Bartram Galbraith* prior to its being patented, when he excluded the strip between the bank and the water's edge, and made the remaining quantity 220 acres 147 perches, and allowance. That *Thomas Smith* surveyed it in 1807, and made the quantity 240 acres and allowance, measuring, as he stated in his deposition, from the top of the bank on one side to the top on the other. But one of his chain-carriers swore that he made them sometimes go below the bank, and that in 1808 the water was three feet deep in part of the line run by *Smith*. He surveyed it when the river was low. That it was surveyed in 1762, when partition was made of the island, and the quantity then estimated was 223 acres and allowance. That *John Elliot* told the jury they were to be guided by the quantity in the patent, but afterwards in 1806 offered to sell it for 50*l.* the acre, saying he had been offered 100 dollars per acre, and that there were between 240 and 250 acres *nett*.

1812.

ELLIOT v. ELLIOT.

No other member of the family but *William*, questioned the valuation.

Elder and *Hopkins* for the appellant. 1. The petition of *John Elliot* should have stated, or in some other way it should have been made known to the Court, that *William Elliot* was a minor. By the act of 1713, that court has power to appoint guardians generally, and could have provided for the case. It is incident moreover to every court to appoint a guardian *ad litem*. *Mockey* v. *Grey* (*a*). The proceeding, though by petition, is in its nature an adversary one, and involves the interests of third persons, as much as a suit at common law. Hence there is the same necessity for a guardian, and the same consequences must flow from an appearance in any other way than by guardian, as in a suit at common law; namely, the proceeding is void. It cannot be questioned that notice to the minor was essential. It has been decided in *Walton* v. *Willis* (*b*), that in this very kind of proceeding notice in fact must be given to all who are interested, that they may appear, and in any way object to, or superintend, the partition. But what is notice to an infant? Or what is an appearance by an infant? In law it is nothing. No other appearance but by guardian can be recognized; and therefore the presence of the grandfather of all the parties, was in law nothing. In point of effect also it was nothing; for the presence of a common friend, not particularly called to protect the interests of the minor, will not produce that equality in the condition of the opposing parties, which it is the object of the law to produce. The law is perfectly settled. An infant can defend only by guardian; and it is the business of the plaintiff to move the court to assign one, if a guardian is not already appointed. It is error to appear in any other way. 3 *Bac. Ab.* 616. *Infancy*, K. 2.

The petition was defective in another particular. Although it described the land by courses and distances, it omitted to notice the fisheries. It was an imposition upon the court and jury, to lead them by this special description of the property, from the consideration of an object which formed its prin-

(*a*) 2 *Johns.* 192. (*b*) 1 *Dall.* 353.

cipal value. The petition should be as precise as a declaration in partition.

2. *John Elliot* practised a fraud upon the court and jury in misrepresenting the quantity of land. He knew the real quantity. He was present at *Galbraith's* survey, when all beneath the bank was excluded, and did not mention its actual contents until it had become his own. The land to the water's edge should have been included. The survey of *Smith* made 240 acres, although he did not include the shore, but merely went on the shore occasionally, the better to measure the fast land. *Galbraith's* survey was inaccurate, and the appellee knew it. His misrepresentation defeats the partition.

But at all events the inquest made a plain mistake in the quantity, which exceeded their estimate more than 19 acres. This is fatal to their valuation, and may be relieved against. *Bingham* v. *Bingham* (*a*), *Gee* v. *Spencer* (*b*), *Cocking* v. *Pratt* (*c*).

Fisher and *Montgomery* for the appellee, made a preliminary objection to the appeal, because after payment and acceptance of the purparts, such a decree could not be opened, and because the appeal was not taken from the original decree, but from the decree confirming the original decree. They contended further, that the acts of the several guardians of *William Elliot*, in accepting his purpart of the valuation, and of himself in receiving the balance due to him after arriving at lawful age, were a ratification of the proceedings, and barred him from setting up any objection to them. For which they cited 3 *Bac.* 611. *Infant. I.* 8., *Co. Litt.* 171. *a.*

Upon the merits they argued in answer to the objections of the appellant. 1. That the proceeding before the Orphan's Court was not at all in the nature of an adversary suit at common law. That it neither called for nor permitted an appearance, strictly speaking. That at the date of this partition, no act of assembly required notice out of the county where the petition was exhibited, and therefore had it been omitted altogether, in consequence of the appellant's residence in *Lancaster* county, that circumstance would not have

(*a*) 1 *Ves.* 127. (*b*) 1 *Vern.* 32. (*c*) 1 *Ves.* 400.

1812.

ELLIOT v. ELLIOT.

affected the case. All however that could be required was an opportunity to be heard, however irregularly it might be given, or however informal the hearing; and it could not be questioned, that a hearing by the grandfather of the appellant, was equivalent to any that a guardian could have had. In fact he was the natural guardian of the appellant. Both his parents being dead, the grandfather was the guardian in socage; *Carell* v. *Cuddington* (*a*); and his powers were perfectly adequate to an appearance of a technical kind, and to many more important acts. *Co. Litt.* 88. *b. note* 66, 67., 14 *Vin.* 184. 2. *pl.* 1. *Byrne* v. *Van Hoesen* (*b*). The partition has been made fairly and without prejudice, as is proved by the silence of other members of the family; and this would be sufficient to bind an infant, because it comes within that rule that infants are bound by acts that they ought to do, although not done in form of law. *Zouch* v. *Parsons* (*c*).

The fisheries were taken into consideration by the jury, and they were estimated in the price per acre. It was not essential to mention them in the petition, because they were plainly implied. Every one knew that such an island in the *Susquehanna* had the benefit of fisheries.

2. Fraud in the mistatement of the quantity is not proved. The difference between the nominal and actual quantity, is in the strip between the bank and the water, which in the admeasurement of islands is uniformly excluded. Occasionally it is covered with water, and at all times is unfit for tillage. *Galbraith's* survey is but two acres less than that of 1762, which may be accounted for by the occasional wearing of the river. *Smith's* survey does not state the courses and distances, and we are therefore unable to compare it with the others. If there was a mistake in the quantity, the equity of the appellant's case is to have the surplus paid for at the same rate, but not to unravel the whole.

In *reply*, it was said that the 9th section of the act of 1713, 1 *St. Laws* 98, gave an appeal from every definitive sentence of the Orphan's Court; and that as to a ratification by the guardians, or the minor himself after coming of age, the former never intended to ratify the proceedings, and

(*a*) *Plowd.* 297. (*b*) 5 *Johns.* 66. (*c*) 3 *Burr.* 1801.

they had no legal authority to do it, so as to bind their ward. They did not suspect either fraud or mistake, and therefore never purposed to cure them. As to the minor, he is not bound by a settlement made immediately upon coming of age, when he is not supposed to be, and in the present case, certainly was not, conusant of the wrong done to him. This has been settled upon many occasions. *Cocking* v. *Pratt* (*a*), 1 *Fonbl.* 130, and the authorities there cited.

TILGHMAN C. J. after stating the case, delivered his opinion as follows.

The reasons which have been urged on the argument of this cause for annulling the decree of the Orphan's Court are, 1. That *William* had no guardian at the time of the valuation, and the Orphan's Court were ignorant of that circumstance, it not being stated as it ought to have been in his brother *John's* petition. 2. That *John Elliot* fraudulently concealed from the jury the real quantity of land, which was in fact 19 acres and 13 perches more than was mentioned in the patent. 3. That whether *John* was guilty of fraud or not, still, as the jury were mistaken as to quantity, there ought to be a new valuation. It is also urged as an additional reason, that there were valuable fisheries on the island, which ought to have been specified in *John Elliot's* petition, but were omitted. On the other hand the appellee contends, that *William Elliot* was sufficiently represented by his natural guardian (his grandfather) *Alexander Lowry*. That he the appellee was guilty of no fraud as to the quantity of land, and that there is no proof that the real quantity exceeds that mentioned in the patent; and as to the fisheries, he says that the jury were informed of them and took them into consideration in their valuation; he also says that the acts of *William Elliot* and of his guardian *James Ross* esquire, since the valuation, amount to a confirmation of it.

As this plea of confirmation, goes in bar of *William Elliot's* claim, it will be necessary to consider it in the first instance.

Mr. *Ross* who lived at *Pittsburg* had no particular know-

(*a*) 1 *Ves.* 400.

1812.

ELLIOT v. ELLIOT.

ledge of the island in *Dauphin* county, nor is there the least reason to suppose that he knew of any objection to the valuation, or did any act with a view to confirm what might otherwise be invalid. He took for granted that the island had been legally assigned to *John Elliot*, and consequently demanded and received from him the interest of the money which was due to his ward *William Elliot*. It appears also, that he consented to an arrangement between *John* and *West Elliot*, by which *West*, who took some land of which their father died seised in *Allegheny* county, was to become pay-master to *William* for his share of the valuation of the island. There is no pretence for an argument founded on this conduct of Mr. *Ross;* he acted with propriety and fidelity, but never had it in contemplation to give up any right of his ward's. And even if he had so intended, the law would not have permitted him. A guardian has no power to relinquish the title of his ward; his release would be of no validity. Neither do I see any thing in the conduct of *William Elliot* after he came to age, which can strengthen the title of *John*. All that he did was to settle with his guardian Mr. *Ross*. But even if he had settled with his brother *John*, soon after his coming to age, without knowing of wrongs which might have been done to him in the valuation of the island, and had petitioned for redress as soon as those wrongs were made known to him, I cannot think that a settlement under such circumstances would have stood in the way of his redress. The law looks with a jealous eye on settlements made by infants soon after their arrival at age, and before they are fully acquainted with their affairs.

Having disposed of this previous question, I will now consider the reasons offered by *William Elliot* for annulling the proceedings in the Orphan's Court.

In a petition for valuation and partition of an intestate estate, all material circumstances should be mentioned. If there are infants concerned, it should be so stated, in order that the court may appoint guardians to take charge of their interests. But the counsel for the appellant went too far in contending, that the proceedings were *void* for want of a guardian. That is a position too broad for this court to adopt, unless it could be shown that it rests on some positive injunction of law; because it would shake the foundation of

many estates. A petition to the Orphan's Court for a valuation, is not like an adversary suit at common law, where an infant defendant must appear by guardian, or it is error. But the want of a guardian is certainly an important circumstance, which makes it incumbent on the court to look well to the proceedings, and to lend a ready ear to the complaint of the infant who thinks himself aggrieved.

Although *William Elliot* had no guardian appointed by the court, and although I think it proper for the court to appoint guardians in all instances previous to the partition or valuation of an intestate's estate, yet the infant in this case cannot be considered as altogether unprotected. The grandfather, *Alexander Lowry*, was equally near to all the children of *Daniel Elliot*, and it must not be forgotten that he made very active exertions to secure the title of the land now in question, the patent for which was issued to him, in trust for his grand-children. He received notice of the time at which the inquest was to be held, and attended, professedly as the friend of *all* the children. *William* was at that time living with him; and had the Orphan's Court been apprized of his infancy, I should suppose that there could have been no person so proper as the grandfather, to be appointed as guardian. Under these circumstances it appears to me that we should confine our attention to the enquiry, whether *William Elliot* was really injured by the valuation of the island. If he was, he is entitled to redress; but if not, it would be improper to vacate the proceedings, merely because no guardian was appointed previous to the valuation.

As to the fisheries, it would have been better if they had been mentioned in *John Elliot's* petition. But as there is positive proof that the jury took them into consideration, there is no reason to say, that any substantial injury has been sustained. We must not suffer ourselves to be carried away by the present value of the island, but consider its value in the year 1799. The unexampled prosperity of the *United States* since that time, has made a prodigious difference in the price of lands, and these fisheries appear in particular to have risen in value. In considering this matter, I am struck with the circumstance, of no attempt being made by the appellant to prove that the island was undervalued, or that any person would have given more than the estimate

1812.

ELLIOT v. ELLIOT.

of the jury. On the contrary it is proved that ten of the jury thought the valuation too high, and were induced to fix it at 10*l.* an acre, only in consequence of one of their brethren's asserting that he himself would give that price. And had the *United States* been involved in the wars of Europe, instead of enjoying the blessings of peace and neutrality, perhaps at this moment few of us would be willing to pay 10*l.* an acre for the best island in the *Susquehanna*.

If then there was no wrong in the price by the acre, it only remains to be considered whether there has been any material error with respect to quantity. I do not think that the charge of *fraudulent concealment* has been established against *John Elliot*. Its support rests principally on the proof of his declaration, when he offered it for sale, that there was the quantity of between 240 and 250 acres nett. The patent mentions 220 acres 147 perches, which, with the usual allowance of six per cent., would make about 234 acres *nett*. If to this we add nine or ten acres which *John Elliot* might suppose to lie between the bank and the water, and which his counsel contend it was not the custom to include in the measurement of an island, we shall have the quantity of between 240 and 250 acres. If there is ground for the assertion, that this was the usual manner of measuring islands, it will be too harsh to charge *John Elliot* with fraud, because he told the jury that they were to value the quantity of land contained in the patent only. It must be supposed that the jury were not ignorant of the usual mode of measurement, and if so, they must have known that when the quantity of 220 acres 147 perches was talked of, the usual allowance of six per cent., and the land between the bank and the river were thrown in. The appellants say that the real quantity is 240 acres with allowance, &c., and this they prove by Mr. *Smith*, who has surveyed it. On the contrary there is the survey of the sworn officer of the commonwealth, *Bartram Galbraith*, previous to the issuing of the patent, and a survey made in the year 1763, when there was a partition of the island, agreeing with *Galbraith's* survey except as to 2 acres 13 perches, which may be accounted for by the washing away of the land by the rapidity of the current. *Galbraith* made his survey going as near to the bank as was practicable, but keeping on the bank. *Smith*, when the bank was difficult,

went down on the beach. The land between the bank and the water is intrinsically of very little value. It is useful for fisheries, but if the fisheries were in this case valued by the jury, the land on the beach could make no difference in that respect. I am inclined to think that the usual mode of measuring islands, has been as the counsel for the appellee suppose. If so, we ought not to presume that the jury were ignorant of it; and in that case the valuation was complete, for when the jury valued the quantity mentioned in the patent, they knew that the beach was thrown in. When I consider all the circumstances of this case, and that *William Elliot* is the only one of the family who complains, I cannot help thinking that the great rise of the value of land, is the real cause of this petition. *William Elliot's* loss of quantity, by his own showing, is not quite four acres, and for this he asks us to annul all former proceedings, and make a new valuation of his father's estate, under circumstances essentially different from what they were, when the possession was delivered to his brother *John*. If he had petitioned for a resurvey of the island, and an allowance at the rate of 10*l.* an acre for any surplus which could be fairly made out, with interest from the time when he ought to have received the principal, he would have had reason on his side. But after the course which he has taken, and the expense to which he has put his brother by this suit, I see no cause for reversing the decree of the Orphan's Court. My opinion therefore is that the sentence should be affirmed.

YEATES J. I have no difficulty whatever in my mind, as to the jurisdiction of this court upon the present appeal. The power is expressly given to us, by the 9th section of the act of assembly of 1713.

In considering the questions before us, I throw out of view, all that has been urged respecting the affirmance of the valuation by *West Elliot* and *James Ross* esquires, the former guardians of the appellants. It was not competent to them in their characters of guardians, to confirm proceedings in the Orphan's Court, if they were invalid, so as to bind their ward when he arrived at full age. At all events, as they were ignorant of the circumstances, which have led

1812.

ELLIOT v. ELLIOT.

to the present appeal, no acts of confirmation on their part, could produce any legal effect.

Upon the most attentive consideration of the testimony laid before us, I can see no rational grounds, from which I can infer that *John Elliot* has been guilty of an actual fraud in conducting the proceedings in the Orphan's Court.

The next inquiry is, have such mistakes occurred in this case, as on sound principles of law and equity, should invalidate the appraisement of the real estate of *Daniel Elliot* deceased, in the county of *Dauphin?* It cannot admit of a moment's doubt, that all the children of the intestate are entitled to a fair, legal and conscionable proportion of their father's property.

We well know the manner in which islands in the river *Susquehanna* have usually been admeasured. The extreme top of the bank of the river has always been deemed the point beyond which they will not go; for this plain reason, that where the soil has been washed away in a course of time by the floods, the intermediate space between the bank and the margin of the stream, being frequently covered with water, is not susceptible of cultivation. The soil too is generally carried off, and is succeeded by sand and stones deposited as its substitute. I cannot therefore assent to the position taken by the counsel of the appellant, that the admeasurement of the island should have been *usque ad filum aquæ* in common times. The beach may serve as a landing place for a fishery, but *as land* for the purposes of tillage, it cannot be placed on a footing of equality with other parts of the island.

In forming an estimate of that part of the island in controversy, we must transport ourselves back to *December* 1798, when the inquisition was taken. The rise of landed property has been so rapid, particularly in this state, that unless gross palpable injustice has taken place, we cannot permit ourselves to take into consideration the amount it would now produce upon the present dispute.

The profits of fisheries in the *Susquehanna* are uncertain and vary in successive years. But the fact is ascertained, that the fisheries appertaining to this island were taken into the view of the jury, and valued with the land. The jurors came from the neighbourhood, and could not be ignorant of

the number of pools which were made use of. They would not set a value on sandy shore, equal to the tillable portion of the island, and the valuation of the beach would necessarily be comprized in their estimate of the fisheries. We learn from the testimony, that until *George Bower* one of the jurors offered to give 10*l.* per acre for the island and its appurtenances, five sixths of them did not exceed 8*l.* per acre in their valuation.—The survey by *Bartram Galbraith* on the 12th of *April* 1798, on which the patent was founded, made the area of that part of the island, which was contracted for by *Daniel Elliot* in his life time, 223 acres 147 perches. *Thomas Smith's* survey in *November* 1807 made it 240 acres, producing a difference of 19 acres 13 perches. This was procured *ex parte*, at the instance of *James Hamilton* the guardian of the appellant, (who had been one of the jurors on the valuation) but it does not specify the courses and distances which were run, so as to enable us to compare them with those run by *Galbraith* nine years and seven months previously, and ascertain in what particulars they differ. *Frederick Zimmerman* deposed in 1808, that the water was then three feet deep, in part of the line run by *Smith*. But we have an important fact disclosed by the return to the writ *de partitione facienda*, issued by *Joseph Galloway* against *George Stevenson* and *Mary* his wife. That part of the island allotted to *Galloway*, who afterwards contracted with *Daniel Elliot*, was surveyed in 1762, and found to contain 223 acres. *Stevenson* was present at that partition, as we discover by the inquisition; and I cannot bring myself to believe, that *Stevenson*, who was an excellent practical surveyor, and had been for many years deputy surveyor of the county of *York*, would have consented to an admeasurement, different from the common and usual mode between *individuals*. Is it not more natural to conceive, that an island in the *Susquehanna* near the *Conewago* falls, where the current is swift, as we have been told, would have decreased *two acres thirteen perches* within a period of 36 years, than that it should have increased *seventeen acres* in the course of nearly 46 years, according to *Smith's* survey. My mind does not hesitate on the subject.

Take the case in the most favourable view for the appellant, it presents at most on this part of the question a *dubi-*

1812.

ELLIOT v. ELLIOT.

ous equity, which the court will not at this day relieve, according to the doctrine of this court, in *Shortz* v. *Quigley*, 1 *Binn.* 225.

It remains to be inquired, whether the want of a guardian duly appointed by the Orphan's Court previous to the valuation, is such an error, as demands of the court a reversal of this decree?

It is certainly true, that an infant must defend a suit by his guardian, and that every court has an inherent power to appoint a guardian *ad litem*. Neither of the intestate acts of 1705 or 1764, directs that a guardian shall be appointed for minors interested in a partition or appraisement of real estate in the Orphan's Court. But the principles of natural justice require, that no one's interests shall be affected without giving him an opportunity of being heard. In pursuance hereof, the usual order of the Orphan's Court has been, that notice should be given to the parties interested, of the time of the partition or valuation, and upon application to the court, guardians are appointed for the minor children. It must here be remarked, that the decree of confirmation of a valuation of lands, is not generally founded on proceedings of an adversary nature. The equal policy of our system of laws, requires a division of the lands of a father dying intestate, or their true value among his children; and an impartial jury upon their oaths and affirmations, and personal view and examination, are the means by which it is effected. I know of no case, wherein it has been decided, that under the intestate acts of 1705 or 1764, a party, or guardian of a minor who was a party, living out of the bailiwick of the sheriff, should receive notice, or the inquisition be set aside upon that ground. If Mr. *Ross* living at *Pittsburg*, had been the guardian when this valuation was made, I do not see, that a mere want of notice to him, without strong proof of injustice, would justify us in annulling these proceedings. In laying down a rule which is to operate in all cases, it may well become us to consider the influence it may have in instances previous to the adoption of the rule, because the retrospective operation of it may shake many titles. I will put an instance to exemplify my observation. I should deem it a very proper general regulation in the several Orphan's Courts, that previous to the valuation of lands held under

ancient surveys, the same should be resurveyed, in order to ascertain the true quantity; but if former appraisements are to be declared invalid merely for having a surplus quantity, it would have a serious operation in many instances.

The sheriff has returned here that the valuation of the premises was made in the presence of the parties interested: The question is, was it so made?

That the minor children of *Daniel Elliot* were represented in truth and in fact, when the valuation was made, there can be no doubt. *Alexander Lowry*, their maternal grandfather, attended for the express purpose of seeing that justice was done. *William Elliot* the appellant was brought up and educated in his family, and actually lived with him in an adjoining county, when the appraisement took place. His affection for these children, and the interest he had in their welfare, are amply demonstrated by paying a very considerable sum of his own money to complete the contract made many years before with Mr. *Galloway*, and patent the land for their use. For all his expenditures and trouble he made no claim or demand. No person whatever could be a more proper guardian for these minors, nor feel more deeply interested for their advancement in life. There is no reason to presume, that he did not contribute every effort in his power to do equal justice to all the children; and I consider the appellant as fully represented by his grandfather and nearest friend.

On the most mature consideration, I see no legal or equitable ground for reversing these proceedings, and am therefore of opinion, that the decree of the Orphan's Court should be affirmed.

BRACKENRIDGE J. gave no opinion, having been formerly guardian of the appellant.

Decree confirmed.

MARTIN and another executors of ROBERTSON *against* SMITH administrator of SMITH late ROBERTSON.

1812.

Lancaster, Monday, May 25.

IN ERROR.

55 16
12s 162

THIS was a writ of error to the Common Pleas of *Dauphin* county.

The testator, after devising one third of the surplus of his estate to his four sons, made the following bequest: "Item. "I will that one "third of the "overplus to "my three "daughters "*Margaret Car-* "*nahan* and *Eli-* "*zabeth Smith*, "and *Mary* "*Crosher*, her "*part of that* "*third* to her "children." This is a tenancy in common in the two daughters and the children of the third, and not a joint tenancy.

The defendant in error, who was the plaintiff below, married *Elizabeth* the daughter of *William Robertson*, to whom the bequest hereafter stated was made by her father; and upon her death, he took out letters of administration, and brought *account render* against *Martin* and *Robertson*, the executors of the testator, to recover the legacy, agreably to the 1st section of the act of the 21st of *March* 1772. 1 *St. Laws* 631.

The summons was returned served as to *Martin*, and *nihil habet* as to *Robertson;* and the *Narr* in the common way recited the return, and then proceeded to count against *Martin* as bailiff and receiver for the said *Elizabeth*, of the real and personal estate of *William Robertson*, and that he received of the money of that estate 300*l.* of which he had refused to render an account, "to the damage of the said *John Smith*," &c. *Elder* appeared and pleaded *ne unques* bailiff and receiver, and afterwards "fully accounted," upon which issues were joined; and upon the trial, a verdict was taken for the plaintiff for a certain sum, (*a*) subject to the opinion of the court upon the will of the said *William Robertson.*

Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint tenancy. But where it appears either by express words, or from the nature of the case, that it was the testator's intention that the estate should be divided, it then becomes a tenancy in common.

The material parts of that will were as follows. The testator, after giving in very inaccurate language, a number of legacies to his different children, proceeded in these terms: "Item. I will that any of my legatees die without a natural "heir, that my bequeathments return into my family *to* "*whom they please;* and further I also allow my personal

(*a*) This irregularity appears to have been within the view of an agreement referred to in the opinion of Judge *Yeates*.

In an action by an executor or administrator, the count may conclude "to his damage," without saying "as executor."

"estate either by vendue or otherwise, and then what ready "money is made, and likewise what bonds or notes are taken "or due, shall be equally divided among my legatees by "equal proportion at the discretion of my executors. And "further I allow that my estate personal or real shall over-"mount these my bequeathments, that then the overplus "shall fall to my four sons, whom I now name, *William*, "*David*, and *Joseph Robertson* two thirds. *Item*. I will that "one third of the overplus to my three daughters, *Margaret* "*Carnahan*, and *Elizabeth Smith*, and *Mary Crosher*, *her* "*part of that third to her children*." The question was whether the last devise was in joint-tenancy or in common; and the judgment of the Common Pleas was, that it was in common.

Elder and *Hopkins* who argued for the plaintiffs in error, contended, 1. That it was a joint-tenancy; for which they cited 2 *Black. Com.* 181, *Lady Shore* v. *Billingsly* (*a*), *Webster* v. *Webster*, (*b*), *Cray* v. *Willis* (*c*), *Willing* v. *Baine* (*d*), *The Earl of Sussex* v. *Temple* (*e*), *Aylor* v. *Chep* (*f*). 2. That the *Narr* was defective in not stating a sufficient cause of action, since an executor could not be bailiff or receiver, especially a receiver for *A* of the estate of *B*, unless the case was brought within the act of assembly, which it was not here. That it was also defective in concluding to the damage of the plaintiff individually, when the suit was representative; and that although the writ was against both executors, and the appearance general, yet the action was carried on against one only, contrary to the principle of *M'Cullough* v. *Guetner* (*g*).

Duncan for the defendant in error, argued 1. That the devise in question was a tenancy in common; for which he cited *Addison's Rep.* 327, *Sheppard* v. *Gibbons* (*h*), 2 *Cruise* 504, 505. 2. That the cause of action was sufficiently stated to bring the case within the act of assembly;—that in an action by an executor, the *narr* may conclude to his da-

(*a*) 1 *Vern.* 482.
(*b*) 2 *P. Wms.* 347.
(*c*) 2 *P. Wms.* 529.
(*d*) 3 *P. Wms.* 115.
(*e*) 1 *Lord Ray.* 310.
(*f*) *Cro. Jac.* 259.
(*g*) 1 *Binn.* 214.
(*h*) 2 *Atk.* 441.

1812.

MARTIN v. SMITH.

mage individually, *Lill. Entr.* 83, 84; and that the course of the action had been agreeable to the established practice, of proceeding against one defendant, where the other had not been found, and where, after an appearance, there had been a *narr* and plea only as to the defendant who was summoned.

TILGHMAN C. J. The first question in this case arises on the will of *William Robertson*. The testator in the first place gives legacies of different amount to his ten children, after which he expresses himself as follows. "*Item*. I will that if "any of my legatees die without natural heir, that my be- "queathments return into my family *to whom they please;* "and further I allow my personal estate either by vendue "or otherwise, and then what ready money is made, and "likewise what bonds or notes is taken and made, shall be "equally divided amongst my legatees by equal proportions "at the discretion of my executors; and further I allow that "my estate personal or real shall overmount these my be- "queathments, that then the overplus shall fall to my *four* "*sons whom I now name, William, David, and Joseph Ro-* "*bertson two thirds. Item. I will that one third of the over-* "*plus to my three daughters Margaret Carnahan, and Eliza-* "*beth Smith, and Mary Crosher, her part of that third to* "*her children.*" It plainly appears from the whole will, that the testator was an ignorant and illiterate man. Whether the devise to his three daughters was in joint-tenancy or tenancy in common, is the point to be decided. When a man is providing for his children by his will, nothing can be more unnatural than an estate in joint-tenancy. It is with good reason therefore that courts of justice have long been disposed to lay hold of slight expressions, in order to make a tenancy in common. I confess that I feel this disposition in my own mind, but it shall never influence me so far as to shake the established rules of property. Where an estate is given to several persons jointly, without any expressions indicating an intention that it should be divided among them, it must be construed a joint-tenancy. But where it appears either by express words or from the nature of the case, that it was the testator's intent that the estate should be divided, it then becomes a tenancy in common. The counsel for the defendants in error have relied on that part of the will, in

which it is said that if any of the legatees die without natural heir, the bequeathment should return to the testator's family, *to whom they please*, that is to say, the legatee dying without issue might devise it to any of the family he pleased. If this provision could be applied to the subsequent devises, it would certainly afford sufficient ground for saying that there could be no joint-tenancy, because there would be an evident intent to take away the right of survivorship; but I agree with the counsel for the plaintiffs in error, who apply these expressions to the prior devises. That is the plainest and most natural construction. The defendants in error say in the next place, that at all events the surplus of the personal estate, after paying debts and legacies, was to be equally divided; but there again I differ from them. The testator's meaning, to be sure, is not very clearly expressed, but I am satisfied he intended that the legacies he had given in the first part of his will, should be paid partly in cash, and partly in notes or bonds in equal proportions at the discretion of his executors; because he speaks of a sale of his personal property at vendue, and of bonds or notes being taken. This accords with the common custom of the country, which is to make sale of the property of deceased persons at auction, and receive payment part in cash, and part in bonds or notes on a short credit. It is clear that the testator did not intend to give the whole surplus of his personal estate to be equally divided among all his children, because immediately after the devise which is supposed to contain such a disposition, he declares his belief that there would be a surplus which would *overmount his prior bequeathments*, and proceeds to dispose of that surplus whether personal or real, not among all his children, but among part of them. There is a considerable inaccuracy in the devise to his sons. The expressions are, to my *four* sons whom I now name; and yet he goes on to name but *three* only. It is said to have been decided formerly by two judges of this court, that the three sons took as joint-tenants. That question not being now before us, I throw it altogether out of consideration, except so far as it may fairly be viewed as shedding light on the devise to the daughters. In that respect I do not think it of weight, as the devise to the daughters contains expressions, which cannot by any reasonable construction be controuled by the pre-

1812.

MARTIN v. SMITH.

ceding devise. The testator gives one third of the surplus to his three daughters, naming them; but declares that *Mary Crosher's part* shall go, not to her, but to her children; this explanation makes the devise not to his daughter *Mary*, but immediately to her children. Both the *expressions*, and the *intent* of the devise, are inconsistent with a joint estate. In joint-tenancy there are no *parts*. All have an undivided interest in the *whole*. The moment you introduce the idea of *separation*, the fabric of joint-tenancy is dissolved. Any intimation by the testator of a *division* or a *severalty* of interests, is sufficient to make a tenancy in common. Now what must have been the intent in the present instance? It would be absurd to suppose that the testator knew any thing about the legal import of his words; but it is very clear, that he did not intend to give an equal right of survivorship, between his daughters *Margaret* and *Elizabeth* and the children of his daughter *Mary*. The children of *Mary* were to take *among them* one third of a third of the surplus; but *Margaret* and *Elizabeth* were to have *each* one third of a third. Consequently, if one of the children of *Mary* died, the interest of that one would go to his surviving brothers and sisters, to the exclusion of his aunts *Margaret* and *Elizabeth*. Thus the share belonging to the children of *Mary* must be considered as detached from the shares of their aunts, and this is to all intents and purposes a tenancy in common. But it has been urged, that whatever may be the case as to the children of *Mary*, there will be a joint-tenancy between *Margaret* and *Elizabeth*, because there is no intimation of several interests between them. To this argument I cannot accede. The joint-tenancy, if it exists at all, is created by the same devise which must be applied to all the devisees. There is no colour for contending that the testator meant to create a joint-tenancy between *Margaret* and *Elizabeth* only, and to give a separate interest to the children of *Mary*. On the contrary the fair conclusion is, that if there was a severalty as to one, there was a severalty as to the others. In other words, that this remaining third part of the surplus was to be divided into three parts, one of which was to go to *Margaret*, one to *Elizabeth*, and one to the children of *Mary*. Whether those children took their portions in joint-tenancy, or in common as between themselves, I give no opinion. I am clear

1812.

MARTIN v. SMITH.

that it was the testator's intent to divide the surplus in the manner I have mentioned, and that his expressions will warrant us in construing the will accordingly.

There remains to be considered the objection to the declaration in this cause. The suit is founded on an act of assembly by which an action of account render is given to a residuary legatee. We are bound to support the judgment, if possible, because the cause has been tried on its merits, and the legislature have shown great anxiety to overrule exceptions founded on matters of form, in the sixth section of the act "to regulate arbitrations and proceedings in courts of justice," passed the 21st of *March* 1806, 4 *Smith's Laws* 329. It appears by the declaration, that the summons was issued against *John Martin* and *Daniel Robertson*, executors of *William Robertson* deceased, and the process having been served on *Martin* only, the suit was carried on against him alone. This is according to the long established practice of our courts. The declaration sets forth that the defendant and the other executor who was not summoned, were the bailiffs and receivers for the said *Elizabeth Smith* of the real and personal estate of the said *William Robertson*, and received of the money of that estate 300*l.* &c. Perhaps the case might have been set out with more clearness, but enough is shown to bring it within the act of assembly on which the action is founded. It was contended by the counsel for the plaintiffs in error, that the conclusion was wrong, laying the injury "to the damage of the said *John Smith*" without adding "as executor of the said *Elizabeth Smith*." This objection has no weight. In actions brought by executors or administrators, the usual conclusion is to the damage of the plaintiff, without saying more.

I am of opinion that the judgment should be affirmed.

YEATES J. *William Robertson*, after devising his real estate, and bequeathing divers specific and pecuniary legacies, uses the following words in his will:—"I allow that my "estate personal or real shall overmount these my bequeath-"ments; that then the overplus shall fall to my four sons, "whom I now name, *William*, *David*, and *Joseph Robertson*, "two thirds. Item. I will that one third of the overplus to "my three daughters *Margaret Carnahan* and *Elizabeth*

1812.

MARTIN v. SMITH.

"*Smith*, and *Mary Crosher*, *her part of that third to her* "*children.*"

Elizabeth Smith died after her father, before his executors had settled their administration account; and the first question is, whether her share survived to her sister *Margaret* and the children of her sister *Mary*, or whether it vested in her husband *John Smith*, who had since taken out letters of administration on her estate?

There is no doubt, but that there may be joint-tenants of personalties; as where a horse is given to two, they are joint-tenants. But if one sells his share to another, this severs the joint-tenancy, and the vendee and the other person are tenants in common, and no survivorship. *Lit. sec.* 282. 321., 1 *Vern.* 482., 2 *Blackst.* 399. But joint undertakings in the way of trade or the like, are not liable to survivorship. 1 *Vern.* 217., 1 *Cha. Rep.* 31., 2 *Fonbla.* 106.

The properties of a joint estate are derived from its *unity*, which is fourfold, of *interest*, *title*, *time*, and *possession*. 2 *Bla.* 180. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all;* that is, they each of them have the entire possession, as well of every parcel, as of the whole. They have not one of them a seisin of one half or moiety, and the other of the other moiety; neither can one exclusively be seised of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. *Ib.* 182., *Lit. sec.* 288. 5. *Co.* 10.

Joint-tenancies were formerly favoured at law, because they were against the division of tenures; but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law now incline against them as much as is done in equity. They are a kind of estates that do not make provision for posterity. Chancery will decree in favour of a tenancy in common as much as it can. If indeed there are no words that will point at a tenancy in common, the rule of survivorship in a joint devise must take place; but a joint-tenancy will never be inferred, where a testator meant division. Hence it is that in wills, the words "equally to be divided," make a tenancy in common, according to the intent of the devisor, although they never make any partition *in facto;* for his intent appears, that it

shall be divided, and by consequence that there shall be no survivor. 3 *Co.* 39. *b.* So of the word "equally" alone, without other words. 3 *Atk.* 733. So of the word "alike," *Cowp.* 357, determined in 1775. And so also in other cases, where the word "among" or "between" has been used. It is laid down that the expressions "share and share alike" have been held these two hundred years to create a tenancy in common; by *Parker* justice. 2 *Atk.* 122.

The inaccuracy of language, as well as orthography of the will under consideration, clearly mark the drawer of it to be an illiterate person; but the intention of the testator as to the matter in controversy can readily be collected. When he "devised to his three daughters *Margaret Carnahan*, *Elizabeth Smith* and *Mary Crosher*, *her part* of that third to her children," one third of the surplus of his estate, he evidently points to a division between them. These words are synonimous to the expressions I have already cited, which have been held to create a tenancy in common. *Part* is the contrary of whole; and *Margaret*, *Elizabeth* and *Mary's* children (representing the mother) cannot be said to hold an undivided third part of the whole, when an undivided ninth part is plainly given to those children. I am therefore of opinion, that *Elizabeth* did not take in joint-tenancy under the true meaning of the will.

The plaintiff below had a good cause of action against the executors under the act of assembly "for the more easy "recovery of legacies" passed the 21st of *March* 1772, 1 *Dall. St. Laws* 631. The latter were individually bound to render an account to the former, and personally responsible to him, to the extent of the money received for him in right of his wife. This case is not analogous to those cases wherein it has been held, that an executor cannot be charged *as such* either for money had and received by him, money lent to him, or on an account stated of money due from him *as such*, those charges making him personally liable; nor to those other cases wherein such counts have been joined to other counts in assumpsit against executors, on promises made by the testator. When a balance is found due by auditors in account render, they are liable personally to that amount to the legatee.

1812.

MARTIN *v.* SMITH.

After a trial on the merits, the party comes too late to question the declaration for informality; but advantage should have been taken hereof by demurrer. I do not however see such defect in point of form, according to our usual method of declaring, where one of the defendants has not been taken or summoned on the original process. Here *Martin* was returned to be served with the summons, but *Robertson* was not to be found, and the declaration recites these facts specially, and proceeds against *Martin* alone. Mr. *Elder* appeared and pleaded that *he* was not the bailiff or receiver of *Elizabeth Smith*, and issue was joined thereupon. The defendant afterwards added, that *he* had fully accounted, upon which issue was also joined. Upon trial the jury found for the plaintiff 79*l.* 17*s.* 2*d.*, on which judgment was entered. Whether any agreement took place between the counsel, which justified the jury in finding a precise sum, or whether that sum was to be settled by auditors, remains to be determined upon our view of the original paper, which is referred to in the record before us.

BRACKENRIDGE J. gave no opinion, having been prevented by sickness from being present at the argument.

Judgment affirmed.

RUHLMAN and others *against* The Commonwealth.

Lancaster, Monday, May 25.

IN ERROR.

A writ of error does not lie to the judgment of the Quarter Sessions upon an appeal by supervisors of roads from a summary conviction by a justice of the peace; the proceedings in such cases not being according to the course of the common law.

HOPKINS for the Commonwealth, moved to quash the writ of error in this case, upon the ground that the proceeding below did not warrant that writ.

The plaintiffs in error were supervisors of highways in *Manheim* township, in the county of *York*, and had been summarily convicted and fined by a justice of the peace, under the 12th section of the act of the 6th of *April* 1802.

The rule is, that where a new jurisdiction is created by statute, and the court or judge exercising it proceeds in a summary method, or in a new course different from the common law, a writ of error does not lie, but a certiorari.

3 *Smith's Laws* 517. That section enacts, that "all and every "supervisor and supervisors of the highways, who shall "refuse or neglect to do and perform his or their duty, as "directed by this act, and for which penalties are not herein "before provided, shall be fined in any sum not less than four "dollars, nor exceeding fifty dollars, to be recovered *in a* "*summary way*, before any justice of the peace of the county, "to be applied towards repairing the public roads and high-"ways, within the respective townships where such fines "and penalties are incurred. Provided that if any supervi-"sor or supervisors shall conceive himself or themselves "aggrieved by the judgment of a justice of the peace, he or "they may *appeal by petition* to the next Court of Quarter "Sessions, *who shall take such order thereon, as to them* "*shall appear just and reasonable, and the same shall be con-*"*clusive.*"

From the conviction by the justice, the plaintiffs in error appealed, in conformity with this law, to the Quarter Sessions, where, the charge being preferred against them in an informal way, they pleaded not guilty, and were upon a trial by jury again convicted. It was from the judgment of the Sessions upon this verdict, that the writ of error was brought.

On behalf of the motion, it was contended, 1. That the proceeding being summary, and not according to the course of the common law, the remedy, if any existed, was by *certiorari*, and not by writ of error; and that it was not like an appeal from a justice in a civil case, where the action in the Common Pleas was on the footing of an original suit, and was prosecuted in the same manner from the declaration to the issue and trial; but it was a proceeding wholly under the statute, in which no formality was used, and where the justices of the Sessions without regard to the course of the common law, were instructed to do what should appear just and reasonable. The trial by jury below was not a matter of right. 2. The defendants below have no remedy, the judgment of the Sessions being conclusive.

Duncan contra, argued 1. That the proceeding, though summary before the justice, was formal before the Sessions,

1812.

RUHLMAN v. COMMONWEALTH.

and, no course being prescribed by the statute, was subject to the rules of the common law. It was completely analogous to the cases in which this court had sustained writs of error to judgments of the Common Pleas upon appeals from justices in civil suits. *Beale* v. *Dougherty* (*a*), *The Commonwealth* v. *Judges of the Common Pleas* (*b*). The trial was by jury, which is a method exclusively of the common law, and therefore brings the case within the rule of *Greenvelt* v. *Burwell* (*c*). Besides, it was not essential that common law *forms* should be used, if the court was a court of record, and rendered its judgment according to the course of the common law, as was the case here. *Martin* v. *The Commonwealth* (*d*). This court has all the powers of the King's Bench in *England*, as to the examination and correction of all manner of errors of the Sessions, and to extend the remedy, writs of error were made grantable of course. Act of 1772. 1 *Smith's Laws* 139. 2. That nothing was meant by the concluding phrase of the section on which this proceeding was founded, but to make the judgment of the Sessions conclusive as to matters of fact, not as to matter of law. The same position which the Commonwealth has taken here, was held not to be tenable, in *Lawson* v. *The Commissioners of Highways* (*e*).

TILGHMAN C. J. This case comes before us on a motion to quash the writ of error. The plaintiffs in error, supervisors of the highways in *Manheim* township in the county of *York*, were convicted before a justice of the peace of a breach of duty in not repairing and amending one of the highways within their district. The jurisdiction of the justice is founded on the 12th section of the act for laying out, making and keeping in repair, the public roads and highways, &c. passed the 6th of *April* 1802. The act provides that if any supervisor shall conceive himself aggrieved by the judgment of a justice of the peace, he may appeal to the next Court of Quarter Sessions, who shall take such order thereon as to them shall appear just and reasonable, and the same shall be conclusive. The general rule is, that where a new jurisdic-

(*a*) 3 *Binn.* 432.
(*b*) 3 *Binn.* 273.
(*c*) 2 *Saund.* 101. *a. note.*
(*d*) 1 *Mass. Rep.* 386.
(*e*) 2 *Caines* 182.

tion is created by statute, and the court or judge exercising it, proceeds in a summary method, or in a new course, different from the common law, a writ of error does not lie, but a *certiorari*. There is no doubt but that the proceedings before the justice are not removable by writ of error; but the plaintiffs in error contend, that when the cause was removed to the Court of Quarter Sessions, the proceedings were in that court, according to the course of the common law; and several cases were cited from *Binney's* Reports, to shew that proceedings before a justice in civil cases, having been carried by appeal to the Court of Common Pleas, a writ of error to this court lies on the judgment of the Court of Common Pleas. But these cases are not applicable to the point in question. When a civil cause is removed to the Court of Common Pleas, the whole proceedings there are *de novo*, and exactly according to the course of the common law. There is a declaration, plea, issue, and trial by jury, just as if the suit had been commenced originally in that Court. Not so in the present instance. The intent of the act of assembly plainly appears, to bring these charges against supervisors of the highways to a speedy decision, and from the nature of the case a speedy decision is necessary, because the people suffer while the cause is delayed. The Court of Quarter Sessions are authorised "to take such "order as shall appear just and reasonable," which may be very different from the course of the common law. It is true, that they did proceed by jury trial; but it cannot be said that the exact course of the common law was preserved. There was no indictment; but the appellants having pleaded not guilty to a charge which does not appear to have been exhibited with any kind of certainty, were tried and convicted by a jury. Taking into view the whole record, it does not appear to be a proceeding according to the course of the common law. I am therefore of opinion that the writ of error should be quashed.

YEATES J. The plaintiffs in error have been convicted of a breach of duty as supervisors of the highways in *Manheim* township in *York* county, before a justice of the peace, and have been fined twelve dollars. They appealed by petition to the Quarter Sessions, pleaded not guilty to the charge, and

1812.

RUHLMAN v. COMMONWEALTH.

were convicted on a trial by jury without indictment. They have sued out a writ of error, and a motion has been made on the part of the Commonwealth to quash it.

These proceedings have taken place under section 12 of the act of the 6th of *April* 1802, 5 *St. Laws* 188., which has provided, that supervisors neglecting to perform their duty, shall be fined in any sum not less than four dollars nor exceeding fifty dollars, to be recovered *in a summary way* before any justice of the peace of the county; but has allowed the supervisors, conceiving themselves aggrieved by the judgment of the justice, to appeal by petition to the next Court of Quarter Sessions, "who shall take such order "thereon as to them shall appear just and reasonable, and "the same shall be *conclusive*."

The distinction is thus taken in *Greenvelt* v. *Burwell*, 1 *Salk.* 263. 144. *S. C.*, *Carth.* 494., *Com. Rep.* 80., 1 *Lord Ray.* 469. Wherever a new jurisdiction is erected by act of parliament, and the court or judge that exercises this jurisdiction, acts as a court or judge of record, *according to the course of the common law*, a writ of error lies on their judgments; but where they act in a *summary method*, or in a *new course*, *different* from the common law, a writ of error does not lie, but a *certiorari*.

The justice here is directed to proceed in a summary way, and the sessions on the appeal are to take such order as to them shall appear just and reasonable. In the language of Lord *Holt* in the case cited, as reported in 1 *Lord Ray.* 469., for the purpose of an appeal under this act, "it was a court "newly instituted, empowered to proceed by methods un-"known to the common law, as there is no need to have an "indictment, or such formal judgment as in other cases; as "there is no need to say, *ideo consideratum*, &c., but only "*quod solvat*, &c." Such appears to be the plain meaning of this act.

It seems therefore irresistibly to follow, that a writ of error will not lie in the present instance; and I am of opinion that the same should be quashed.

BRACKENRIDGE J. gave no opinion, having been prevented by indisposition from sitting at the argument.

Motion allowed.

BUCKMYER *against* DUBS.

1812.

IN ERROR.

Lancaster, Monday, May 25.

THIS was a writ of error to the Common Pleas of *Dauphin* county. In that court it was a proceeding by *certiorari* to a justice of the peace, to remove the record in a case in which *Dubs* was plaintiff and *Buckmyer* defendant.

Upon a certiorari to a justice of the peace, this Court may inquire into the evidence given before him; but no parol evidence can be heard upon a writ of error to the Common Pleas to remove a judgment there rendered upon a certiorari to a justice.

By the record it appeared that a summons was issued by the magistrate on the 4th of *September* 1804, returnable the 11th, to answer *Dubs* of a plea of demand for service rendered to *Buckmyer* by the plaintiff's son, under 100 dollars. The entry of the subsequent proceedings was thus—"5th "September, summons returned. Parties appear. Defendant "refuses to leave it to men, and after having examined into "the cause, judgment against defendant for 50 dollars." In the margin of the entry "Evidence. *Henry Sneevely*, *Frederick Heefinger*, sworn."

A justice may give judgment before the return day of his process, if the parties voluntarily appear, and proceed to the hearing.

The errors assigned were 1. That the justice gave judgment without any legal proof to warrant him. 2. That the judgment had no date. 3. That if dated, it was given on a day and at a time, when the justice had no authority to give it. 4. That no cause of action appeared on the record.

A justice must set forth the date of his judgment; but if the day of appearance is mentioned, and then the judgment is set forth without day, this court will presume that it was rendered on the appearance day.

Elder in support of the first exception, after citing *Sharpe* v. *Thatcher* (*a*), and *Vansciver* v. *Bolton* (*b*), offered the depositions of *Sneevely* and *Heefinger*, taken since the decision in the Common Pleas, to shew what passed before the magistrate.

Laird for the defendant in error, objected to the evidence, and urged that the transcript of the record shewed that witnesses had been sworn and the cause examined. The decision must be presumed to have been well founded in fact.

TILGHMAN C. J. This is a writ of error to the Court of Common Pleas. We are to decide on the record, and can

(*a*) 2 *Dall.* 77. (*b*) 2 *Dall.* 114.

1812.

BUCKMYER v. DUBS.

hear nothing out of it. The cases cited from *Dallas's* Reports, do not go the length that is now contended for. They only shew that this court, having issued a *certiorari*, has, to prevent injustice, made inquiry into the evidence given before the magistrate. This was going full as far, in my opinion, as any principle of law will warrant; and I think it would be inconvenient and illegal to go further. We have never received parol evidence upon a writ of error to the Common Pleas. I am therefore against receiving the evidence now offered.

YEATES J. I am of the same opinion.

The depositions were accordingly rejected. *Elder* then proceeded to the second exception. The judgment should bear a date, because, without it, neither the stay of execution, nor the time for entering an appeal, can be ascertained. Besides, a justice's judgment is within the second section of the statute of frauds. 1 *Smith's Laws* 390. 3. The justice must strictly pursue his power. He could not, until specially authorised by statute, give judgment by warrant of attorney, but must have proceeded by capias or summons. *Alberty* v. *Dawson* (*a*). Neither can he give judgment before the day prescribed by the warrant. Consent cannot give jurisdiction. If any date can be assigned to the judgment, it is the 5th of *September*. The 4th exception was not pressed.

Laird for the defendant in error, answered to the second exception, that the judgment was evidently rendered on the fifth, that date being annexed to the appearance, and then without any interval of time, the trial and judgment. 3. The justice had authority to give judgment then, by the consent of the parties. The warrant and the demand gave him jurisdiction, which is all that concerns the public; the appearance of the parties justified his giving judgment immediately, that being a matter which concerned them alone. 4. The cause of action was services rendered by the plaintiff through his son, to the defendant.

(*a*) 1 *Binn.* 105.

1812.

BUCKMYER v. DUBS.

TILGHMAN C. J. The plaintiff in error has taken four exceptions to the judgment of a justice of the peace, which was affirmed by the Court of Common Pleas of *Dauphin* county, having been removed to that court by *certiorari*. 1. That the judgment was given without any legal evidence to support it. 2. That it has no date. 3. That if it has a date, it was of a day when the justice had no authority to give judgment. 4. That no cause of action appears in the proceedings returned by the justice to the Court of Common Pleas.

1. It is not necessary that a justice of the peace should enter on his docket the evidence on which his judgment is founded. It is not required by any law, and would increase the costs of suit for no useful purpose. But there is no reason to suppose that the judgment in this case was given without legal proof. The parties appeared, witnesses were produced, and the cause was heard, or to use the expression of the justice, the cause was *examined*. The defendant might have appealed from the judgment if he had thought proper. Not having done so, we ought not to exercise too much ingenuity in creating presumptions which do not fairly arise from the record. I am of opinion that we should not be warranted in saying that this judgment was given without legal evidence.

2. It seems to me that the date of the judgment sufficiently appears. The summons was issued *September* 4th, returnable *September* 11th. It is set forth in the justice's docket, that the summons was returned by the constable on the 5th of *September*, and immediately after it is added, that the parties appeared, the defendant refused to submit the cause to arbitration, and the justice having examined it, gave judgment for the plaintiff for fifty dollars. In fair construction, I must suppose, that all these proceedings took place on the 5th of *September*, because that day and no other day is mentioned. The entry taken altogether, will very well bear this meaning; and we ought so to understand it, because it was the duty of the justice to mention the date of his judgment.

3. Taking it for granted then, that judgment was given on the 5th of *September*, I will consider the 3d exception, which is, that the justice had no authority to give judgment on that day, because the summons was not returnable till the 11th

1812.

BUCKMYER v. DUBS.

of *September*. He certainly could not have proceeded to judgment without the voluntary appearance of the parties; but as they thought proper to appear and go to the trial, I see no reason why judgment might not be given. The jurisdiction of the justice is derived from an act of assembly. He is not confined to any particular periods; there are no fixed terms for holding his courts. The length of time between the issuing and return of the summons is intended for the benefit of the defendant, and if he thinks proper to waive that benefit, and appear in a shorter time, and the plaintiff consents, no person is injured. The jurisdiction of the justice attaches on the issuing of the summons; the time of appearance and trial was a matter in which the parties were principally concerned, and with their consent the justice might fix it on any day he thought proper, though different from that which he had originally appointed. Consent takes away error.

4. The fourth exception is without foundation. The cause of action is expressly stated in the summons. It is for services rendered by the plaintiff through his son to the defendant. There was no occasion to be more particular.

I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

YEATES J. The settled rule of this court has been on the removal of proceedings before justices of the peace, in cases where their jurisdiction evidently appears on the face of the record, to form no presumption against the accuracy of such proceedings. When the judgment of the justice has been removed into the Court of Common Pleas, and there affirmed, and afterwards brought here by writ of error, the rule holds with much additional strength.

It appears by this record, that a summons was issued by *Jacob Meily* esquire, on the 4th of *September* 1804, for a good cause of action; that it was returned on the next day, and the parties appeared before him; that the defendant refused to submit the controversy to arbitrators, and after examining into the cause, the names of the two witnesses being mentioned in his docket, he rendered judgment for the plaintiff for fifty dollars and costs.

What error is there in this? The justice has undoubted

jurisdiction of a demand under 100 dollars, for services done for the defendant, and had issued his summons, upon the return whereof the parties appeared before him on the same day, (*voluntarily*, as we are bound to presume, in the absence of all proof or even suggestion to the contrary,) and upon hearing the case, gave a decision in favour of the plaintiff for fifty dollars. He is not bound to set out the evidence on which his judgment was grounded; and I can see no reason whatever for reversing the judgment entered in the Court of Common Pleas.

1812.

BUCKMYER *v.* DUBS.

BRACKENRIDGE J. was not present at the argument, being unwell; and gave no opinion.

Judgment affirmed.

CLARK and others administrators of BITTINGER *against* HERRING.

IN ERROR.

Lancaster, Monday, May 25.

THIS was a writ of error to the Common Pleas of *York* county.

Assets are a sufficient consideration for a *personal* promise by one who is executor, to pay a legacy, and to charge him *de bonis propriis.*

A moral or equitable obligation is sufficient consideration for an assumption.

Under the 6th section of the act of 21st of *March*, 1806, the damages in the declaration may be increased *on* the trial of the cause.

Assumpsit will lie for an ascertained money legacy; and the plaintiff may in the same count go for an unascertained residuary legacy.

The defendant in error, who was plaintiff below, issued a summons in case against *Clark* and others surviving administrators of *Nicholas Bittinger* deceased; and counted against them in the following manner:

"*Philip Wendell Herring*, son and legatee of *Henry Her-*
"*ring* the elder, late &c., complains against *John Clark* &c.
"surviving administrators of *Nicholas Bittinger* deceased,
"*who was the surviving executor* of the last will and testa-
"ment of the said *Henry Herring* &c. for this, that the said
"*Henry Herring* the elder, in and by his last will and testa-
"ment in due form of law made &c., did give and bequeath
"unto his son *Philip Wendell Herring* his heirs and assigns,
"the sum of *forty pounds* lawful money of *Pennsylvania*,
"and also did order and direct in and by his said last will

1812.

CLARK v HERRING.

"and testament, that the remainder and residue of his es-
"tate if any, be equally divided between his three children,
"to wit, the said *Philip Wendell Herring*, &c. and of his
"said last will and testament did therein appoint the said
"*Nicholas Bittinger* and *Adam Peiffer* executors, as by the
"said will recorded, &c. appears, which said last will and
"testament, after the death of the said *Henry Herring*, was
"on the fourth day of *June* in the year &c. duly proved,
"and remains of record in the register's office &c. And the
"said *Philip Wendell Herring* avers, that the said *Nicholas*
"*Bittinger* and *Adam Peiffer*, the persons appointed execu-
"tors in the said will, on the day and year last aforesaid, at
"the county aforesaid, took upon themselves the burden of
"the execution of the said will, and became the executors
"thereof; and that afterwards to wit &c., the said *Adam*
"*Peiffer* died, by reason whereof the said *Nicholas* became
"sole executor of the said will; and that he, the said *Nicho-*
"*las*, afterwards, to wit &c. at the county aforesaid, *received*
"*into his hands and possession, goods, chattels and effects of*
"*the said Henry Herring the elder, not only sufficient to pay*
"*the debts, funeral expenses, and ascertained pecuniary*
"*legacies given and bequeathed by the said will, but also con-*
"*stituting a large balance, being the residue and remainder*
"*of the said estate of the said Henry Herring the elder, be-*
"*queathed by his said will to his said three children to be equal-*
"*ly divided among them, amounting to the sum of four hundred*
"*and ten pounds nineteen shillings and sixpence;* by reason
"whereof, and by force of the act of assembly &c., he, the
"said *Nicholas*, surviving *executor as aforesaid*, in his life
"time, to wit, on the first day of *May* in the year &c.
"at the county aforesaid, became liable to pay unto the said
"*Philip Wendell Herring* the said forty pounds, and one
"third part of the said four hundred and ten pounds, nine-
"teen shillings and sixpence, and so being liable, he the
"said *Nicholas*, then and there, in consideration thereof
"undertook, and faithfully promised the said *Philip Wendell*
"*Herring*, that he the said *Nicholas*, would well and faith-
"fully pay the said *Philip Wendell Herring* the said several
"sums of money when he should be thereto lawfully re-
"quired. Nevertheless the said *Nicholas* in his lifetime, and
"his administrators aforesaid since his death, have not &c."

The defendants pleaded *payment*, on which issue was joined; and on the day when the cause was tried, though whether before or after the jury was sworn, the record did not set forth, the Common Pleas permitted the declaration to be amended, by increasing the damages from 600 to 900 dollars. The jury found a verdict for the plaintiff, damages 720 dollars 57 cents, and judgment was rendered *de bonis* of *Bittinger*.

The errors assigned in this court, were

1. The permission to amend on the trial of the cause.

2. That an action of *assumpsit* was not a proper action to recover a specific money legacy. It should have been *debt*.

3. That the promise declared upon, was a personal promise by the executor, in consideration of assets; whereas the promise could only be co-extensive with the consideration, namely as executor, and would not charge him *de bonis propriis*.

C. Smith and *Duncan* for the plaintiffs in error.

Hopkins for the defendant in error.

TILGHMAN C. J. This is an action on the case, founded on an assumption by *Nicholas Bittinger* deceased, who was surviving executor of *Henry Herring* deceased, to pay to *Philip W. Herring* a legacy bequeathed to him by the will of his father the said *Henry Herring*. The declaration alleges, that before the making of the assumption, assets sufficient to pay all the debts and legacies of the said *Henry Herring* had come to the hands of *Nicholas Bittinger*. The defendant pleaded *payment*, with leave to give the special matter in evidence, whereupon issue was joined. On the trial of the cause, the court permitted the plaintiff to amend the declaration by increasing the sum laid for damages, although the defendant's counsel objected to it. The counsel for the plaintiffs in error (who were defendants below) assigned several errors, but in their argument relied upon two. 1. The allowance of the amendment of the declaration without costs. 2. The entry of a judgment against the defendant *de bonis propriis*.

1. The amendment was allowed by virtue of the sixth sec-

1812.

CLARK v. HERRING.

tion of the act to regulate arbitrations and proceedings in courts of justice, passed the 21st of *March* 1806. By this act, the court are authorised to permit amendments *before* the trial, or *on* the trial, where it appears to them that the merits of the case require it. But if such amendment puts the adverse party to inconvenience, or takes him by surprise, the cause is to be continued to the next court. The defendant did not pretend that he was taken by surprise, or put to inconvenience; indeed it was impossible that such should have been the case. The defence remained the same after the amendment as before. The plea of payment was relied on, which confessed the assumption. The only object of the amendment was, to enable the plaintiff to recover as much as should appear to be due to him. As to costs, the act does not say that they shall be given in all cases. The defendant asked no costs, but contented himself with objecting to the amendment. There does not appear to me therefore to be any weight in this point.

2. The defendants are sued, not as representing *Henry Herring*, but as administrators of *Nicholas Bittinger*, who was executor of *Herring*, on his personal promise to pay the legacy. *Bittinger* had received assets sufficient to pay all debts and legacies, and this legacy might have been recovered against him, by virtue of the act "for the more easy reco-"very of legacies," passed the 21st of *March* 1772. This is not denied; but it is said that being liable only *as executor*, his promise was co-extensive with his liability, and therefore only bound him to answer as *executor;* that as a promise to bind him *personally*, it was *void* for want of consideration. This argument has been very warmly pressed. But after attentive consideration, I do not think it sound. An executor who has assets in hand, is bound, is under a *moral* obligation, and in this commonwealth he is under a *legal* obligation, to pay a legacy. But a moral obligation alone is sufficient consideration for an assumption. Without doubt a promise to pay a debt barred by the statute of limitations is binding; and why? because no honest man would refuse to pay it. If an infant contracts a just debt, although not for necessaries, and after arriving at full age, promises to pay it, he is bound by his promise; and yet he could not have been compelled to pay it. But where a man promises to pay

what may be recovered against him by law, the argument is *à fortiori*. There is no need of deciding at present, whether an action for a legacy under our act of assembly may not be supported against an executor personally. But suppose it brought against him *as executor*, and judgment against him as executor, assets having been proved to have come to his hands. In that case, the execution will go against the goods of the testator, but if no goods are found, the executors will ultimately be *personally* liable. But this roundabout way of coming at an executor who has been guilty of a devastavit, would be extremely inconvenient to the legatee. The executor has the funds in his hands, and knows them better than any body else. It is his duty to make payment out of those funds. Why then may he not bind himself personally? I confess I can see no reason. He may, if he please, restrict his promise, so as to avoid personal responsibility. But we must take it that in this case there was no restriction. The declaration alleges a general promise. If an executor making a promise of this kind, was deprived of any legal defence by being subject to an action in his personal capacity, I should pause before I sanctioned the action. But that is not the case. The receipt of assets is the ground on which the assumption stands; this must be averred in the declaration, and may be contested by the defendant, and if a want of assets is proved, the promise fails for want of consideration.

I have thus far considered the matter upon principle. Let us now see how far this principle is supported by authority. In the case of *Trewinian* v. *Howell*, *Cro. El.* 91., it was decided that assets in the hands of the executor, made a good consideration for his *personal promise* to pay a debt of the testator, and judgment was entered against the executor *de bonis propriis*. In 1 *Vez.* 125., *Reech* v. *Kennegal*, Lord *Hardwicke* thus expresses himself: "At law if an executor "promises to pay the debt of his testator, a consideration "must be alleged, *as of assets come to his hands*, or forbear- "ance; or if admission of assets is implied by the promise, "otherwise it will be *nudum pactum*, and not personally "binding on the executor." In *Atkins and wife* v. *Hill*, *Cowper* 284 (*A. D.* 1775), the very point now in question was decided on demurrer and full argument. In *Hughes* v. *Rann* it was decided by the Court of King's Bench (A. D.

1812.

CLARK v. HERRING.

1774) that an executor was liable to an action on his personal assumption to pay a debt of his testator, and judgment was entered *de bonis propriis*. There is an act of assembly of this state, which prohibits the citing of *British* precedents or adjudications subsequent to the 4th of *July* 1776, excepting in questions depending on the marine law or the law of nations. But this case of *Hughes* v. *Rann* must, from its nature, form an exception from the general rule intended to be established by the act of assembly, because, although it was decided by the Court of King's Bench in 1774, yet that judgment was reversed in the exchequer chamber, *Michaelmas* 1776, and that reversal affirmed in the House of Lords in 1778. It is, I presume, on the ultimate decision of this case, that the plaintiffs in error rely. In order therefore to understand it fully, we must get all the information that can be collected from the *English* books. Now it is said by Lord *Mansfield* in the case of *Hawkes and wife* v. *Saunders*, *Cowper* 291., that in *Hughes* v. *Rann* there were no assets, nor any averment of assets stated in the declaration. And it appears by a note in 7 Term Reports 350., in which the same case is reported, that one of the defendant's pleas was *plene administravit*, which was found *for him*, so that it appeared on the face of the record, that there was a deficiency of assets. This circumstance makes a striking difference between that case and the one we are now to decide. But if it be objected, that the Lord Chief Baron *Skinner*, in delivering the opinion of the judges in the House of Lords, goes the whole length of the principle now contended for by the plaintiffs in error, I answer, that although I have thought it proper to trace that case to its conclusion, yet no adjudication of a *British* court since the 4th of *July* 1776 is an authority here, and in my opinion, the ground taken by Lord *Mansfield* and Justice *Buller* is too strong to be shaken; that is to say, that a *moral* or *equitable* obligation is a sufficient consideration for an assumption. I am therefore for affirming the judgment.

YEATES J. The first error assigned on these records, is, that an action on the case will not lie for an ascertained pecuniary legacy, under the act of assembly of the 21st of *May* 1772. No cases were cited to prove this position; and

it is manifest that the act contemplated no change of the law in this particular. It is true, that an action of debt can only be maintained by a demand for a sum certain; but it is not correct to say that case will not also lie for an ascertained sum. On the contrary, it is clear that assumpsit will lie in many cases where debt lies, and in many where it does not lie; and that a main inducement *originally* for encouraging actions of assumpsit was, to take away the wager of law. 2 *Burr.* 1008. Where one is bound in an obligation, and afterwards promises to pay the money, assumpsit will lie on this promise. *Cro. El.* 240., *Cro. Car.* 343.

If assumpsit would be a proper form of action for the recovery of the legacies of 40*l.* each, there can be no misjoinder of actions, in including the demands of the plaintiffs below, for their respective third parts of the residue of 410*l.* 9*s.* 6*d.*, which is the second ground of error assigned.

But the great objection is, that the declarations are not sufficient in point of law to support the judgments entered thereon (*a*). They are the same in substance in each suit, varying only in the names of the plaintiffs below. The declaration states the bequests by the last will of *Henry Herring* senior, the nomination of the said *Nicholas Bittinger* and *Adam Peiffer* as his executors, that they proved the will and took upon themselves the burthen of the execution thereof, that the said *Nicholas* survived the said *Adam*, and that the former afterwards received into his hands and possession, goods, chattels and effects, not only sufficient to discharge the debts, funeral expenses, and ascertained pecuniary legacies given by the will, but also constituting a large balance of 410*l.* 9*s.* 6*d.* By reason whereof, and by force of the act of assembly, he the said *Nicholas*, surviving executor as aforesaid, in his life time became liable to pay the said legacies; and so being liable, he the said *Nicholas*, promised to pay the said sums of money when &c. Nevertheless, &c. The form of this declaration is professed to have been taken from *Atkins et uxor* v. *Hill*, determined in *May* 1775, *Cowp.* 284., though it varies somewhat therefrom.

(*a*) There was, besides the case here reported, a suit by the executors of *Henry Herring* junior, against the same defendants, in which, except the question of amendment, the same points occurred, and were argued by the same counsel. One decision of course settled both.

1812.

CLARK v. HERRING.

The defendants below pleaded payment to the two actions, which admits all the substantial facts laid in the declaration; viz. the gift by will, the executors taking upon themselves the trust, the sufficiency of assets which came to the hands of the surviving executor, his liability to pay the sums demanded, and his *personal* promise to pay the same; and this admission is further confirmed by the finding of the jury. A demurrer to the declaration would not produce a stronger effect. If in consequence of the course of pleading, the defendants below have been precluded from going into the real merits of the case so fully as they might otherwise have done, it may be a cause of regret to us, but as a court of error we cannot remedy the evil. They should have changed their plea before trial, under the leave reserved to themselves, to add or alter. The suit falls within the principles laid down in the case cited (*Cowp.* 288). The defendants have admitted, that *Nicholas Bittinger* had sufficient assets to pay these legacies; and it is the case of a promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. I forbear mentioning particularly the case of *Hawkes et ux.* v. *Saunders* in the same book page 289, cited through oversight by the counsel for the defendant in error, the same having been determined *January* 28, 1782, and inserted in the book out of the order of time.

The counsel for the plaintiff in error, have placed much reliance on the notes of *Williams*, subjoined to 1 *Saund.* 210, (note 1,) and 2 *Saund.* 137, (note 2). He cites the case of *Rann* v. *Hughes*, wherein it was ultimately determined that a bare promise to pay by the executor, does not make him liable to answer out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been, had no such promise been made. That action was brought in *B. R.* to *Hilary Term* 1774, and judgment was entered for the plaintiff in *Michaelmas Term* 1774, which was afterwards reversed in the Exchequer Chamber, *Michaelmas* (*November*) 1776, and the judgment of reversal affirmed in the House of Lords in *May* 1778. Without attempting to reconcile the system of reasoning of Lord Chief Baron *Skinner*, who delivered the opinion of the judges in the House of Lords, with that

of the Court of *B. R.* in *Atkins et uxor* v. *Hill*, it is sufficient to observe, that the jury found that *Isabella Hughes* the defendant, had fully administered, except as to certain goods, &c., which were not sufficient to pay an outstanding bond debt of the intestate's. Here the plea and verdict establish that *Nicholas Bittinger* had not fully administered; and that at the time of making the promise, he had sufficient assets in his hands to pay the funeral expenses, debts and legacies of the testator. And the case in *Cowp.* 284., is the last case that we know of, decided in the *English* books on this subject. *Talliaferro* v. *Robb* (2 *Call.* 263.,) was determined in 1800 in the Court of Appeals of *Virginia*, on the same principles.

One further supposed error remains to be considered, which is confined to the action of *Philip Wendell Herring* in the court below. It is objected that on the 7th of *April* 1808, (the day of trial) the court, on motion, permitted the damages in the declaration to be increased from 600 to 900 dollars, though the defendant's counsel objected thereto; and that the case of *Thompson* v. *Musser*, 1 *Dall.* 464., shews this to be error. It does not distinctly appear by the record, whether this amendment took place before or after the jury were sworn. But admit that it was done during the trial of the cause. By section sixth of the act of the 21st of *March* 1806, "the plaintiff may be permitted to amend his declaration or "statement, and the defendant may alter his plea or defence, "*on or before* the trial of the cause; and if by such alteration "or amendment, the adverse party is taken by surprise, the "trial shall be postponed until the next court." The court therefore had the unquestionable power of directing the amendment, and must necessarily have had the right of judging, whether it would effect any surprise. The amendment introduced no new merits into the case. The quantum of the demand, if any thing was due, was to be ascertained by the jury; and the defence would be precisely the same, whether the damages were laid at 600 or 900 dollars. Besides, though the plaintiffs in error have disagreed to the alteration, they did not ask for an imparlance. They also moved for a new trial, which was overruled. On such motions, the court takes every equitable circumstance into view, in order to do complete justice to the parties.

1812.

CLARK v. HERRING.

On the whole, I am of opinion, that the judgment of the Court of Common Pleas be affirmed.

BRACKENRIDGE J. Different causes of action may be joined, where the process, the plea, and the judgment are the same; though not in all cases, as trespass *vi et armis*, and case. 1 *Tidd.* 11. I am not prepared to go into a consideration of this rule, and the reason on which it is founded; but so the rule is. There is one reason that is obvious to common sense, which is, *the easier and more perfect investigation of matters taken singly*, and brought before a court and jury, than where perplexed, being multifold, and of a different nature. But I do not know that this reason is ever given. The fine payable on the purchase of the writ, being different in different kinds of process, is mentioned. With us, that reason does not hold; and though we have the proverb, *the old six and eight pence*, we have not the thing itself, *the fine payable* in some cases.

The right to a legacy does not arise *ex contractu;* and *indebitatus* assumpsit would not lie for it; for there can be no debt express or implied, to be considered as incurred. It could not be detinue unless a specific article was demanded, such as a diamond, &c. But by the act of assembly of the 21st of *March* 1772, case, debt, detinue, or account render, may be brought *as the case may require.* Here it would be debt for the 40*l.*, and assumpsit for the distributive share. Multiplicity of actions are to be avoided, and to avoid two actions, it requires *case* here. If a different judgment became necessary, the declaration being against the defendant in different capacities, personal in one case, and representative in the other, the causes of action could not be joined. But the same judgment here, is called for in the case of the legacy of 40*l.*, and the distributive share of one third of the assets over and above.

The principal question in the case, is, whether the judgment, in this declaration, can be against the defendant *in a personal capacity.*

The preamble or introductory part of the declaration is against the defendant in his *representative* capacity. But it is alleged, that, after stating his capacity of executor, and the consideration of assets come to hand, and his assumption

1812.

CLARK v HERRING.

to pay, it is not laid, that, *as executor* he assumed. But the assumpsit cannot but be understood as relating to the capacity in which, according to the declaration, he was requested to pay, *and that was as executor.* The writ was against him as executor, and a declaration cannot fairly be considered but as an amplification of the writ; and there is no special consideration, as forbearance of suit, or otherwise, alleged, to ground an action *in a personal capacity.* The judgment ought to have been *de bonis testatoris.*

As to the amendment in one of the cases, of enlarging the damages laid in the declaration, to accord with the verdict, it is merely for the sake of technical consistency. The verdict may be for less than are laid; and why not for more, and the judgment good? The amendment could only be for the sake of form, and in the power of the court to allow, and so not error. Damages are released where beyond the declaration; but it accords more with justice to increase the damages as laid, and I do not see what there is to oppose it. *I think common sense, in these cases, a better guide than precedent.*

Judgment affirmed.

HAWK and wife *against* HARMAN and wife.

IN ERROR.

Lancaster, Monday, May 25.

Action will lie against husband and wife, for slanderous words spoken by the wife before marriage.

ERROR to the Common Pleas of *Dauphin* county.

Upon the trial of this cause, which was an action by *Hawk* and wife for slanderous words spoken of *Elizabeth* the wife of *Hawk*, *dum sola*, by *Catharine* the wife of *Harman*, (whether sole or covert at the time, the *narr* did not state) the Common Pleas reserved the point, whether a husband is liable for slanderous words spoken by his wife before marriage. The verdict was for the plaintiff, forty shillings damages, and six cents costs; and the court, after argument upon the reserved point, set aside the verdict, and gave

1812.

HAWK
v.
HARMAN.

judgment of nonsuit, upon which this writ of error was brought.

Goodwin for plaintiffs in error.

Elder for defendants in error.

TILGHMAN C. J. The only question in this case is, whether an action will lie against a man and his wife for slanderous words spoken by the wife before marriage. It is a question which does not admit of a doubt. The wife cannot be sued without her husband; and if the action does not lie against both, it follows that a woman by her own act may defeat the plaintiff's action, a principle not to be endured, unless a positive adjudication on the point could be produced in support of it. But the defendant in error relies on the general position to be found in some books of authority, that a man is liable to answer for his wife's *contracts* before marriage. To be sure he is, but it must not be inferred, that he is not answerable for her *torts* also. The expressions do not necessarily bear that import, and in candid construction, they ought not to be so expounded. It would be attributing to respectable authors an unaccountable mistake, for there is not wanting express authority to the contrary. If a *feme sole* is sued for a trespass, and marries, the action shall proceed against her, and if she is found guilty, judgment and execution shall be had against her alone without naming her husband. *Doyley* v. *White*, *Cro. Jac.* 323., cited in *Buller's Ni. Pri.* 22. But if the suit is brought *after* the marriage, for a trespass committed by the *feme while sole*, it shall be against the *husband* and *wife*, and what is somewhat singular, the writ charges the trespass as having been committed by *both*, because there is no other form of writ in the register. It was so decided 22 *Ass. pl.* 87., *Jenk. Cent.* 23. *pl.* 43., cited in 4 *Vin.* 185, *C. l. pl.* 14. So if a *feme* disseisoress marries, the writ against the husband and wife shall be, *quod disseisiverunt*, and not *quod uxor dum sola disseisivit*. In these cases there was no question about the action lying against the husband and wife; the only doubt was, whether the form of the writ was right. I am therefore of opinion, that the judgment should be reversed, and judgment entered here for the plaintiff below on the verdict.

1812.

HAWK v. HARMAN.

YEATES J. The plaintiffs in error brought an action of slander against the defendants for defamatory words, spoken by *Catharine* of *Elizabeth*, while the latter was sole, and recovered at the trial 40*s*. damages and costs. The declaration does not state whether *Catharine* was single or married, when she spoke the words. But though the record is very obscure, and wants precision on this point, I shall assume the facts, which it was confidently asserted would appear by the notes of the judge who tried the cause, and not denied on the other side, that it appeared by the evidence that the words were spoken by *Catharine* before her intermarriage with *Harman;* that the objection was made during the trial, that this action could not be supported, and a nonsuit prayed for, that the legal question was reserved, whether the husband was liable for the tortious acts of the wife done before marriage;—and that afterwards upon argument, the Court of Common Pleas directed a nonsuit to be entered, upon which the present writ of error was brought. The question then is, whether under these circumstances this suit was maintainable?

There is no maxim better established in law, or more congenial to the common understanding of mankind, than that every person of sound mind and discretion, should be responsible for what he says or does injurious to others. Even an infant of the age of seventeen years, who in general is protected by the laws, is liable for slanderous words spoken by him; because *malitia supplet ætatem. Noy.* 129. It is true, a single woman may, by uniting herself in marriage, cast a responsibility for her former acts on her husband. According to Sir *William Blackstone*, 3 *Bla. Com.* 414., if an action be brought against an husband and wife, for the debt of the wife, when sole, and the plaintiff recovers judgment, the capias shall issue to take both the husband and wife in execution. *Moore* 704. But if the action was originally brought against herself, when sole, and pending the suit she marries, the capias shall be awarded against her only, and not against her husband. *Cro. Jac.* 323. Yet if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehaviour of the wife during the coverture, *Cro. Car.* 513., the capias shall issue against the husband only, and this is said to be one of

1812.

HAWK v. HARMAN.

the many great privileges of *English* wives. But what authority, or even dictum, can be shewn in the books, to warrant the assertion, that the tortious acts of a single woman are completely purged, and all right of action destroyed by her subsequent intermarriage. I own that I have not met with a case, wherein it has been adjudged that an action of slander will lie against husband and wife, for words spoken by the wife before marriage; most probably because the question has never been before made: but I have discovered no authority from whence the negative of the proposition may be inferred. The reason however of the law, and a variety of analogous cases, strongly support the doctrine that such an action may be maintained. The grounds on which the law presumes it reasonable, that the husband should be liable to the wife's debts contracted before marriage, whether he got any portion with her or not, are, that by the marriage, the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; and whatever accrues to her, by her labour or otherwise, during the coverture, belongs to him. 1 *Bac.* 292, 1st *ed.* By marriage he adopts her and her circumstances together. 1 *Bla. Com.* 443.

The husband is by law answerable for all actions for which his wife stood *attached* at the time of the coverture; and also for all her torts and trespasses during coverture, in which cases the action must be joint against them both. 1 *Bac.* 307. If a man marries an administratrix to a former husband, who in her widowhood wasted the assets of her intestate, the husband is liable to the debts of the intestate during the life of the wife, and this shall be deemed a devastavit in him. *Cro. Car.* 603. Trover will lie against husband and wife on a conversion of the *feme* before marriage; so of detinue for goods taken by the wife before coverture. *Co. Lit.* 351. If a *feme sole* disseises me, and makes a feoffment to her use, and takes baron, I shall have an assise against both. *Bro. Pernour de profits*, pl. 22. Writ of trespass done by the *feme* before marriage, and writ of account of receipt by her before marriage, lies against husband and wife. *Thel. Dig.* 45. *lib.* 5, *c.* 4. *s.* 24., cites *Mich.* 4 *Ed.* 4. 26. Trover well lies for conversion of the *feme* before the co-

verture, or by the *feme* only during the coverture; for she may do a tort singly, but the husband shall be sued with her. *Cro. Car.* 254. See also *Bro. Responder et Responder ouster, pl.* 29., who cites 36 *Hen.* 6. 1.

The reason of the cases which I have cited, must necessarily govern the decision of the question before us. The torts of the wife committed before marriage must be subject to the same legal principles. But if there had been an entire dearth of cases on the subject of torts, my mind would require very high authority, before I could give my assent to the proposition, that whatever outrage might be committed by a single woman on the character of another, the law would afford no redress to the injured party, in case the slanderer should form a connection by marriage before the commencement of the suit. I can never bring myself to believe, that the law is subject to such reproach, and therefore am clearly of opinion that the present suit is maintainable, that the judgment of nonsuit in the Common Pleas be reversed, and that judgment be entered for the plaintiffs on the verdict.

BRACKENRIDGE J. It would certainly be a circumstance favourable to the entering into the marriage state, and "a consummation devoutly to be wished," on the part of females, if it afforded them a *sanctuary* from all bygones of defamation, or other wrongs to society; so that, as during marriage, no action could be brought against themselves separately, so neither against them and the husband joined. It might facilitate *the leading to the altar*, in a case where a young lady had indulged herself more freely than was strictly justifiable in a conversation, or had transgressed the bounds of a *molliter manus imposuit*, and committed an assault and battery. An immunity from her contracts or debts, the lover cannot expect, *accouplè en loyal matrimonie;* but the being subject also to actions for her *torts*, to use the legal term, must augment the inconvenience. Nevertheless, with all the inclination of my mind, it may be difficult to make out this *privilegium matrimoniale*, shall I call it, which is claimed in the present instance. Even the *privilegium clericale*, which is analogous to it, does not extend so far. In the case of one

1812.

HAWK v. HARMAN.

who becomes a monk, an action, though not against himself, may be brought against the head of the monastery, the abbot, for *misdemeanors* by the professed, previously committed, as well as for contracts made. And who can charge the law with a want of gallantry, if nothing more is denied to the ladies than to a *religious?* Though we cannot allow these to be *spiritual* persons, nor, I take it, would they wish to be so considered, yet, as in the cases of the consecrated, they are privileged from arrest; and, though nominally coupled with the husband in the suit brought, yet the baron, which is the law term, can alone be taken on the capias, or be the subject of the service of the summons; and against his person, or his goods, can the execution alone go. That this is the case of those *religious*, who, by entering into holy church, loose to some extent a civil existence, is expressly laid down in the year book, 20 *H.* 6. 22. *Mettons que femme seule soit oblige a moy, et prend baron, le baron sera charge del debt durant la vie sa femme; mes si elle devie, le baron est decharge. Et en mesme le maniere, un homme fait a moy transgressionem, et entre in religionem, l'abbe sera charge vers moy durant la vie son commoin; et s'il devie devant que jeo recovrie, l'abbe sera decharge. Viner* cites this, and refers to the year book which I have consulted, and it bears him out. But it can only be by inference and analogy that he can deduce the law to be the same in the case of a trespass by the *feme*, as of a debt; *arguendo*, that it being the same in the case of the professed, it is also the same in the case of the *feme*. And the reason being the same, why should it not be? They are put as examples of the same doctrine. But in another place it is laid down in so many words, cited by *Viner*, and which in the year book to which he refers, is in these words; "*Si une femme fait obligation, ou fait a moy* trespass *et prend baron, jeo averois mon action vers eux. Car per son prendre un baron n'est raison que jeo suis ouste de mon action.*" 4 *Vin.* 94.

The *feme* and the regular are here put upon the same footing as to *an obligation*, and as *to trespass*. For the words, in construction, will refer to both, though what respects the monk is the next antecedent; but the reason is the same; and the case of the professed *is introduced to il-*

lustrate the law as laid down with respect to the feme. The construction seems to have been so understood by the abridgers, for no distinction is taken. The year book is cited by *Roll*, and by *Viner*, who translates it, "*Feme sole* binds herself in an obligation; baron is chargeable. So if a man enters into an obligation, and after enters into religion, *the abbey shall be chargeable* for this during the life of the monk. *The same law of a trespass.*"

But the weight of authority is derived from this, that the law is expressly laid down to be, that in case of contracts of the *feme sole*, the baron is chargeable; and the limit is not drawn *excluding torts;* but, on the contrary, the boundary is passed, and trover, detinue, waste, and tortious entry by the *feme sole*, are grounds of recovery against the baron. If trespass *vi et armis* is maintainable, which must be in the case of a tortious entry, how shall we exclude trespass on the case, of any denomination? In the spiritual court, in which, though having cognizance of slander "*merely spiritual*," the common law must govern as to the person to be affected in damages, we have an express authority in the case of slander. "Citation in the spiritual court against a "*feme sole* on slander, and 10*l.* awarded for defamation. *Feme* takes baron; he is answerable." 4 *Viner* 122, cites 12th *H.* 7th, 22. It is impossible therefore for me to say that, on espousal, a damsel is not taken with all her slanders on her head, and all her *trespasses*, and that the baron is not answerable. Nor can I say that, by losing a substantive existence by her own act, it would be reasonable that she should escape from all responsibility. Nor do I know that it can well lie in the mouth of the baron to complain, since he cannot but be considered as a party to the act of withdrawing on her part, and the taking shelter under the marriage state; more especially in the action on the case *for a breach of promise of marriage;* because the successful lover cannot but be considered as a party to the *fœdifragium*; for it cannot but be presumed, that but for him there would have been no *jilting*. It is however to the credit of the sex, that so little occasion has there been to pursue for *words, or breaches of the peace*, against the *feme* covert and *the baron joined*, that it should be made a question whether an action would lie at all; and that even at this late day, the law is to

1812.

HAWK v. HARMAN.

be deduced, rather from *principle* than precedent; unless we suppose that the chivalry of gallant men has led them to compromise, and satisfy on behalf of *their half*, if I may play upon a word; so that few or no actions have been brought, or at least left upon record, of the *more atrocious wrongs*, personal or otherwise. I will acknowledge, I have not made an extensive search through books of entries; but I take it from the little said in the abridgments, with a reference to cases, that they have not been *numerous*. I have only looked so far as to see, that it cannot be avoided to be laid down, that marriage neither *extinguishes nor suspends the right of action*. I mean that the right of action is not so far suspended, but that it may be brought against the *femme*, though with a joinder of the husband. For I take it, that though, on the death of the baron, the action would survive against the *feme*, yet, quere, in a case where the statute of limitation intervenes, *would not the suit be barred by not having brought it in the time of the husband?*

It is a consolation that his responsibility is confined to prosecutions merely *civil*, and that he is not *criminally* liable for her misdemeanors, or wounds inflicted, or thefts committed before coverture. Even in the case of a misdemeanor, he is subjected to no part of the imprisonment, if such be the sentence; nor would the law allow of his vicarious substitution. But if a fine is to be paid, it amounts to a levy upon him, since he must discharge it to keep her out of jail. In all affairs of human life, the sweet and the sour must be taken together; *qui sentit commodum, sentire debet et onus*. According to the marriage ceremony, she must be taken for better or worse; though I will not say, that in drawing up the form, there was a reference to this principle of law; but the words are broad enough to comprehend it, and it would look like a subtilty to explain away and exempt it. But the notion of marrying a lady in her shift free from incumbrances, may be set down amongst vulgar errors. The law being settled on this head, if there was any doubt of it before, it may lead to greater caution, and *put the unexperienced upon enquiry*, as to the conduct of the *inamorata* before the nuptials; and may lead the female to a single attention to her morals, as wrongs and breach of the peace may prevent her matrimony. It is true, the husband may

1812.

HAWK v. HARMAN.

with more propriety call her his *dear* wife, if some of these drawbacks should come upon him; and with a safe conscience he may use the term as an *equivoque*, even if his affections should not be the strongest after marriage. By the common law also it is allowable to give due chastisement, which I take it, may extend to what was done before marriage as well as after, and take personal satisfaction; though on this head I will not undertake to be as clear as I am on the principal point, that he is answerable for her torts before marriage as well as after, which is all that it is necessary to decide in this case.

Judgment reversed.

EBERSOLL *against* KRUG and Wife.

IN ERROR.

Lancaster, Monday, May 25.

A *venire facias de novo* cannot be awarded by this court, if the cause below was tried by arbitrators, and not by a jury. Nor can it be awarded, where, to enable the plaintiff to recover at all, he must state a cause of action different from that which has been already submitted to the jury.

LAIRD on behalf of the defendants in error, moved the court to award a *venire facias de novo*.

The action was brought in the Common Pleas of *Dauphin* by *Krug* and wife, who in the same declaration joined slander of the wife with slander of the husband. The cause was then arbitrated; and after an award of twenty dollars, and judgment for the plaintiffs, the defendant below brought this writ of error. The court reversed the judgment for the defect in the declaration, and upon this the present motion was made.

Laird argued that this case was within the rule of *Shaeffer* v. *Kintzer* (*a*), and those stated in a note to *Davies* v.

(*a*) 1 *Binn.* 537.

The object of a *venire de novo* is to submit the same cause of action to another jury, an error which took place upon a former trial being corrected. As where there has been irregularity in choosing or returning the jury,—error in rejecting competent, or admitting incompetent evidence,—error in the court's opinion upon the law arising from the evidence,—entire damages assessed upon several counts, some of which are bad,—and the like.

The act of the 21st of *March* 1806, does not extend so far as to authorise the court to permit a declaration to be withdrawn, and one for a different cause of action to be substituted. A declaration in malicious prosecution cannot be substituted for one in slander; nor can a declaration for a slander of husband and wife, be withdrawn, and one for slander of the wife, introduced; although the writ might justify either.

1812.

EBERSOLL v. KRUG.

Pierce (*a*). It was the case of a defective declaration, which by leave of the court below, could be amended, or under the act of the 21st of *March* 1806, withdrawn, or supplied by another; for within the comprehensive power given to the court by that act, the Common Pleas might permit a declaration for the slander of the wife alone, or for any cause of action which could be embraced by the writ.

Elder and *Hopkins* contended that there were two invincible objections to the motion. 1. That the case had never been before a jury, but had been decided by arbitrators. There could be no *venire de novo*, where there never had been a *venire* at all. 2. That a *venire de novo* was never awarded, but to submit to a second jury the cause of action already submitted; and this was a motion to obtain a jury for a different cause, as the cause before submitted, however displayed upon the record, would not entitle the plaintiffs to a verdict. The motion could not succeed unless the court should be of opinion that the power of amendment went so far under the act of 1806, as to authorise the substitution of a totally different cause of action, which would make law suits endless. That act permits amendments in matter of form, not of substance. It has already been decided, that such an amendment as the plaintiffs must ask, to derive any benefit from the *venire*, cannot be granted. *Grasser* v. *Eckart* (*b*), *Shock* v. *M'Chesney*, at the *Sunbury* district, *July* 1808.

TILGHMAN C. J. The court having given their opinion in this case in favor of the plaintiff in error, a motion has been made on the part of the defendants in error for a *venire facias de novo*. Considering that there never was a trial by jury, the cause having been decided by arbitrators, it is not in the power of this court to award a *venire de novo*. Under the circumstances of the case, such an order would be an absurdity. Whether we might not send it back in some shape, to receive another hearing, it is unnecessary at present to consider, because I am of opinion, that if the cause had been tried by jury, it is not one of those cases in which

(*a*) 2 *D. & E.* 126. (*b*) 1 *Binn.* 575.

a *venire de novo* would be proper. The object of such a writ is to submit the *same cause* to the consideration of another jury, having corrected an error which took place with respect to the former trial; as where there has been some irregularity in choosing or returning the jury, or where there has been error in law in rejecting competent, or admitting incompetent evidence, or the jury have been misled by an erroneous opinion of the court with respect to the law arising from the evidence. And of late the same remedy has been extended to cases where entire damages have been assessed on several counts, some of which are bad, in order that the jury may have an opportunity of assessing the damages on each count severally. But here the defendant in error has no such object in view; he wishes to have another and quite different cause submitted to the jury. His idea is, that when the court below get possession of the record, they will permit him to withdraw the declaration already filed, and introduce another for any cause of action which may be covered under the form of an action on the case; that is to say, he may declare in trover, slander, libel, malicious prosecution, or upon any species of contract not under seal. A practice of this kind would produce infinite confusion, vexation, expense and delay. A single suit would be a business for life. Such could never be the intent of the act of assembly, which has been relied on, and which was only intended to correct matters of *form*, standing in the way of the *merits* of the case, but by no means to alter the cause of action. This principle has been already established in *Shock* v. *M'Chesney*, where this court, having awarded a *venire de novo* to the Circuit Court, at that time held before one of themselves, refused an amendment by which an action of slander was to have been converted to malicious prosecution. My opinion therefore is, that the motion should not be granted.

YEATES J. The court have reversed the judgment given in this action, on the ground of there having been a misjoinder of actions by uniting a count for slanderous words spoken against the husband, with other counts for slanderous words spoken against the wife.

The counsel for the defendants in error have now moved

1812.

EBERSOLL v. KRUG.

the court to award a *venire facias de novo*, which has been opposed.

It is not contended that this motion, if successful, could be attended with any beneficial effects to the parties in whose favour it has been made, under the present state of the record; but the avowed object is, to attempt the expunging of the count for the slander of the husband, in the Court of Common Pleas of *Dauphin* county, and proceed to trial for the slander of the wife. Nor has it been contended, that this expedient would be justifiable under any principle of the common law, or under any of the provisions of the *English* statutes of jeofail, which have been extended by our practice. But the motion is grounded on the sixth section of the act "to regulate arbitrations and proceedings in courts of justice," passed on the 21st of *March* 1806. It is therein provided, "that no suit shall be set aside for *informality*, if "it appear that the process has issued in the name of the "commonwealth, and that the said process was duly served; "nor any plaintiff nonsuited for any *informality* in any state- "ment or declaration; but the plaintiff shall be permitted to "amend his declaration or statement, so as to reach the "merits of the cause in controversy, &c." But the object of the legislature was to give an opportunity to cure defects in form, not in substance; and I am not at liberty to suppose, that they meant to abolish the recognised appropriate method of bringing actions. The joining of the two species of complaints in one suit is a palpable incongruity: the wife cannot join her husband to recover damages for a slander published against the latter.

It has been urged, that the writ purchased here will well support the demand for the slander made against the wife, and that the husband may cease to go on for the injurious words spoken against himself. In *Shock* v. *M'Chesney*, the same observation was made in the Middle District at *Sunbury*, *July* Term 1808, but did not prevail. The plaintiff there recovered damages in slander, where the court were of opinion the proper action would have been for a malicious prosecution. His counsel moved under the act of assembly, that he might be permitted to drop the slander, and declare for the malicious prosecution, alleging that the writ would maintain such a proceeding, and that this was within the

fair meaning of the act. But the court refused it, as the amendment would give the plaintiff a new substantive ground of action, which might be then barred by the limitation act.

The case has also been compared to *Shaeffer* v. *Kintzer*, 1 *Binney* 537., where entire damages having been assessed upon several counts in slander, one of which was bad, the court awarded a *venire facias de novo* on reversing the judgment. But it will be found upon examination, that the analogy does not hold.

In cases where no material evidence is given, except what goes in support of the actionable words, the court, to support the intent of the jury, will direct the verdict to be entered for the plaintiff on those counts only which are good. *Kennedy* v. *Lowrey*, 1 *Binney* 397.

Or the jury may sever in their damages on the different counts. They may find for the defendant on the bad count; or if they find damages thereon, the plaintiff may release them, and in either case the plaintiff would be entitled to judgment. The award of a *venire de novo* in slander, when one of the counts is vicious, would conduce to the ends of justice, and prevent delay; but from the radical defect which has crept into this proceeding, such an award could answer no other purpose than to harass the party against whom the suit was brought. A court of error will not order a new trial without just grounds; but it would be attended with this strange inconsistency in the present instance, that a *venire de novo* would be directed where no former *venire facias* had issued. The plaintiff below elected that the cause should be determined by arbitrators; and by no part of the record can it be ascertained whether the parties at this moment do not prefer that species of tribunal for deciding the controversy.

Nor are the defendants in error without remedy, in case they mean to prosecute this suit to vindicate the reputation of the wife. The second section of the limitation act of the 27th of *March* 1713, 1 *Dall. St. Laws* 97., provides, that if a judgment of the plaintiff shall be reversed for error, he may commence a new action within a year after the reversal of the judgment, to which the limitation act shall be no bar.

Upon the whole therefore, I am of opinion that the present motion should be denied.

1812.

EBERSOLL v. KRUG.

BRACKENRIDGE J. gave no opinion, having been unwell during the argument.

Motion denied.

BERRYHILL and MURRAY *against* WELLS and wife administrators of WALLACE.

IN ERROR.

Lancaster, Monday, May 25

A justice of the peace may issue a *scire facias*, as well to introduce new parties, as to enforce a recognisance of bail.

Where one plaintiff dies after judgment, the survivor may have execution without *scire facias*, suggesting the death of his co-plaintiff on the record, or reciting it in the writ. *Secus* if the survivor is a *feme*, who afterwards takes baron.

It is not error to give judgment upon a *scire facias* for the amount of the preceding judgment and *interest* up to the judgment on the *scire facias*.

Whether *debt* or *scire facias* be brought on a judgment, interest is recoverable; though in *scire facias* it is usual to give judgment only that the plaintiff shall have his execution, and the act of 1700 gives interest without a special direction.

IN error to the Common Pleas of *Dauphin*, the case was thus:

Isabella Wallace and *Richard Fulton*, administrators of *Richard Wallace*, on the 30th of *September* 1805, obtained judgment before a justice of the peace, against *Berryhill* and *Murray*. Before the stay of execution had expired, *Fulton* died, and *Isabella Wallace* intermarried with *Alexander Wells*. The justice then issued a *scire facias*, in the names of *Wells* and wife, the now defendants in error; and upon the return of that writ, gave judgment for the amount of the original judgment and costs, and *interest* upon them. This judgment was removed by *certiorari* to the Common Pleas, where after its affirmance, the defendants in error released all the interest beyond that which was due on the original judgment.

Elder for the plaintiffs in error, contended for the reversal of the judgment upon four grounds. 1. That a justice of the peace had no power under the "hundred dollar act," of the 18th of *March* 1804, to issue a *scire facias*, except against special bail; that being expressly stated, and no other. 2. That the writ of *scire facias*, if within his power in a proper case, was not so here, because execution might have issued without new parties; for which he cited *Withers* v. *Harris* (*a*), and *Brace* v. *Pennoyer* (*b*), where it was held,

(*a*) 7 *Mod.* 68. (*b*) 5 *Mod.* 338.

that if one of two plaintiffs dies after judgment, the survivor may have execution; and *Doyley* v. *White* (*a*), which decided that execution may go against a woman who marries after judgment, without altering her maiden name, or joining the husband; the converse of which was the present case, and therefore the same rule applicable. 3. That the judgment on the *scire facias* should have been, that the plaintiffs have execution of the original judgment, without including interest. That could be given only in debt upon the first judgment. The *scire facias* is merely to shew cause, why execution should not go upon that judgment. 4. That interest had been added upon the costs, as well as the amount recovered; and that the defendants in error could not release after affirmance below. But this point was not pressed.

Laird for defendants in error, answered, 1. That a *scire facias* was incident to the power of issuing execution, if it became necessary to constitute new parties, otherwise the death or marriage of a party might defeat the judgment. It was implied in the authority to issue execution. 2. That it became necessary here to constitute new parties, because not only one of the plaintiffs died, but the other had married. Her husband must be introduced, because the wife could not alone sue execution. 2 *Att. & Plead. Treas.* 381. 3. That interest was an incident to every judgment in *Pennsylvania*, by virtue of the act of 1700, 1 *Smith's Laws* 7.; and therefore the judgment in effect would have carried interest, though it had not been named. It is not error to spread upon the record what is the legal effect of the judgment, though it may be contrary to form. 4. The excess of interest, was released; and it would have been competent to the defendants in error to have cured that error by a release even in this court, as has been many times decided.

TILGHMAN C. J. The plaintiff in error has rested his case on three points. 1. That the act of the 28th of *March* 1804, (the Hundred Dollar law) gave the justices of the peace no power to issue a *sci. fa.* 2. That if the act did give power to issue a *sci. fa.*, this was a case in which such writ was unnecessary. 3. That the judgment rendered on the *sci.*

(*a*) *Cro. Jac.* 323.

1812.

BERRYHILL v. WELLS.

fa. was erroneous, because it included interest on the original judgment.

1. The reason assigned for supposing, that the act gives no authority to issue a *sci. fa.*, is, that it gives express authority to issue such writ against *special bail*, but mentions no other case. This reason is not good. The act authorises the justice to render judgment and issue execution. And it must be understood, from the nature of the case, that it likewise authorises such process as is a necessary foundation for an execution. It never could have been intended to dispense with a *sci. fa.* previous to an execution, in all cases. This would leave the defendant at the mercy of the plaintiff. I consider the power of issuing a *sci. fa.*, as appurtenant to the power of issuing an execution, and included in it, though not expressly mentioned.

2. Cases were cited to shew that where one plaintiff dies after judgment, the survivor may have an execution without a *sci. fa.* This is very true, because there is no new party to the execution; the death of the deceased plaintiff appears either by suggestion on the record, or by recital in the execution, and no person but the survivor is entitled to the execution. But that is not the present case. One of the plaintiffs died after the judgment; but that is not all. The survivor, who was a widow at the time of the judgment, took a husband afterwards. It became necessary therefore, to introduce her husband into the subsequent process. This is the criterion for ascertaining the necessity of a *sci. fa.* After her marriage, she ought not to have taken an execution in her own name. Of course she was put to a *sci. fa.*, in order to introduce her husband.

3. In support of the third point it is said that the *sci. fa.* calls on the defendant to shew cause why an execution should not be issued against him, and consequently the plaintiff can be entitled to an execution for no more than the precise amount of the judgment. This argument might hold good in *England*, where interest on the judgment is not a matter of course. There the plaintiff may either bring an action of debt on the judgment, in which case he may recover interest by way of damages; or he may proceed by *sci. fa.*, in which no damages are recoverable, and of course no interest. But we are to decide according to our own law.

1812.

BERRYHILL v. WELLS.

By an act of assembly, passed in the year 1700, the plaintiff who takes out an execution, is entitled to levy to the amount of his judgment and *interest*, from the time of obtaining it, to the time of sale of the defendant's property, or till satisfaction be made. His being put to a *sci. fa.* does not deprive him of the right which the law gives him of recovering interest. Therefore when the justice of the peace gave judgment on the *sci. fa.* for the amount of the original judgment, and the interest on it, he did no more than the law would have done without him. He did no more than expressly direct that, which would have been tacitly directed by law, if he had been silent. If he had simply given judgment that the plaintiff should have his execution, interest to the time of sale of the defendant's property would have been included by operation of law.

I am of opinion, that the plaintiff in error has failed in all his points, and therefore the judgment should be affirmed.

YEATES J. It has been assigned for error, that the justice of the peace who rendered judgment in the cause, was not authorised by the law of the 28th of *March* 1804, to issue the *scire facias* to revive the judgment, that act giving no power to issue a *scire facias* except against special bail.

The facts which appear on the record are, that *Richard Fulton* and *Isabella Wallace*, as administrators of *Richard Wallace*, obtained judgment against the now plaintiffs in error, before the justice, on the 30th of *September* 1805, for 78 dollars and 42 cents; that *Fulton* died before the stay of execution was expired; and that *Isabella* afterwards intermarried with *Alexander Wells*, in whose names the *scire facias* issued, returnable on the 7th of *July* 1806. I apprehend this proceeding to be perfectly regular and correct. It is a settled principle that in no case where the parties to a judgment are changed, ought execution to be sued out by a different writ, without a *scire facias*. 2 *Lord Ray.* 808. It is inconsistent with common sense, that a judgment obtained by two or more persons, should warrant an execution in the names of others, not parties to the original proceedings, and where the change does not appear on the record. The remedy by *scire facias post annum et diem* in personal actions, was given by statute of *Westm.* 2. *c.* 45. At common law

1812.

BERRYHILL v. WELLS.

previous thereto, the action must have been brought on the judgment after the year and day. 2 *Inst.* 469., *Gilb. Cas.* 393.

It has been further assigned for error, that the judgment rendered on the *scire facias* included interest as well on the amount of the original judgment, as on the costs thereby recovered, which the law will not warrant; and that it was not competent to the attorney of the plaintiffs below to release the interest on the costs after the proceedings had been removed into the Court of Common Pleas by *certiorari*.

In modern times, courts of justice have been very liberal in granting amendments, where injustice is not thereby done. In *Short* v. *Coffin*, the Court of King's Bench were all clearly of opinion, to amend a judgment against an executor *de bonis propriis*, by making it *de bonis testatoris si*, &c. *et de bonis propriis si non*, &c. And this was after a writ of error had been brought, *in nullo est erratum* pleaded, and an argument had in the Exchequer Chamber. 5 *Burr.* 2730. In *Burrows* v. *Heysham*, 1 *Dall.* 133., a judgment upon a *scire facias* against special bail, was removed by writ of error into this court. Upon the issuing of a *certiorari* to bring up the record, the plaintiffs moved in the Common Pleas to amend the *scire facias* by the record, substituting *September* 1782, for *December* 1781; and the same was allowed by the court, who thought it proper upon the liberal principles of modern practice, and indeed for the honour of common sense. When the damages found by the jury, exceeded those laid in the declaration, this court permitted a remittitur to be entered for the excess, after a writ of error to the Common Pleas of *Berks* county. *Furry* v. *Stone. September* Term 1792. That amendments would be allowed after error brought, was also established in *Prevost* v. *Nicholls*, in *March* Term 1808. And in *Douglass et al.* v. *Bearn's executors*, at *Sunbury*, *July* Term 1809, it was declared by the Chief Justice, that after error brought, the court where the record remained, might order an amendment on proper grounds.

As to the recovery of interest on the amount of the first judgment under a *scire facias*, I admit that this cannot be done by the *English* law. The formal entry of judgment there on the *scire facias* is, *quod fiat executio* of the debt originally recovered. *Lilly's Ent.* 340. 398. 522. Damages cannot be given in a *scire facias*. 1 *Roll. Abr.* 574. *pl.* 6. In a

scire facias, no damages shall be recovered, 2 *H.* 6. 15.; nor could costs until the statute of 8 & 9 *W.* 3. *c.* 11. *s.* 3. In *Henriques* v. *The Dutch West India Company*, 3 *Stra.* 807., 2 *Ld. Ray.* 1532, the judgment was reversed for the damages. But even there, though damages for the delay of execution could not be given in a *scire facias*, yet the judgment might be reversed for the damages, and affirmed as to the rest on error. 3 *Burr.* 1791.

However, an act of assembly of this government, made as far back as 1700, has made an important alteration in the *English* law. The second section thereof provides, "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, till the time of sale, or till "satisfaction be made." 1 *Dall. St. Laws* 13. I take the practice under this law to have been, both before and since the *American* revolution, to ascertain the real debt at the time of the judgment entered, and to calculate interest thereon as a new principal. So it was upon an obligation or note carrying interest, and on book debts, which, unless secured by special contract, were formerly supposed not to carry interest until judgment. Such also was the practice during the revolutionary war, when executions were directed to be issued for instalments of debts in a manner provided for by law. Since the argument, I have conversed with most of the elder gentlemen of the profession in the city, and their recollection accords with what I have stated to be the practice, as well upon writs of *scire facias* brought to revive judgments, as in actions of debt founded on them. In *Fitzgerald* v. *Caldwell's Exrs.*, which was a *scire facias* brought to enforce a judgment, *Shippen*, Chief Justice, after repeating the above provision of the act of 1700 says, "In- "terest is therefore, generally speaking, a legal incident of "every judgment." 4 *Dall.* 252.

It is true, that judgments amongst us, unless grounded on verdicts or the reports of referees, are seldom rendered for a specified sum. But if the judgment given in a *scire facias* is considered as given for the mere amount of the first judgment, it necessarily follows that any debtor may defeat the intentions of the legislature in their law of 1700. Because he may tender the sum for which the original

1812.

BERRYHILL v. WELLS.

judgment was obtained, and the costs, and may insist on satisfaction being entered on record. But if the creditor is entitled to interest on his judgment, I can see no solid ground of objection to that interest being included in the judgment on the *scire facias*. I am of opinion, on the whole matter, that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. was prevented by sickness from being present at the argument, and gave no opinion.

Judgment affirmed.

MILLER and another, executors of CHRISTOPHER MILLER, *against* THOMAS MILLER.

Lancaster, Saturday, May 30.

IN ERROR.

Arbitrators have no authority to award a nonsuit. If the plaintiff fails to attend, the proper award is that he has no cause of action.

THIS was a writ of error to the Common Pleas of *Dauphin*. By the record it appeared that the judgment had been entered upon the following award of arbitrators. "We "the referees within named, met at the time and place ap- "pointed, and were severally sworn. It appearing that the "plaintiffs had no notice, we continued the cause to *October* "15th then next, at which time we again met; and it being "duly proved to us, that the plaintiffs were legally notified "of the time and place of meeting, and they not attending, "we are of opinion, that the plaintiffs be *nonsuited*." The error relied upon was the award of *nonsuit*, which *Laird* for the plaintiffs in error, contended, was beyond the authority of arbitrators.

Elder for the defendant in error.

TILGHMAN C. J. This suit was submitted to arbitrators, under the act of 20th *March* 1810. The question is, whether there is error on the face of the award. It appears, as set forth by the arbitrators, that the plaintiffs had no notice of the time and place of their first meeting. They therefore adjourned to another day, when the plaintiffs not appearing,

1812.

MILLER v. MILLER.

and proof being made that they had been served with notice, the arbitrators *were of opinion that the plaintiffs should be nonsuited.* These are their expressions, which are in the style of a court of justice, rendering judgment on a default. The act of assembly gives them no such power. They are sworn to try and decide the cause, and the very case of one of the parties not appearing is provided for. In such case, unless the absence of the party is occasioned by sickness, or other unavoidable accident, of which the arbitrators are to judge, they are directed *to investigate, examine and decide the cause.* They have acted in direct contradiction to this provision, for without investigation or examination, they made an order that a nonsuit should be entered. I am therefore of opinion, that the award is erroneous, and the judgment should be reversed.

YEATES J. The controversy between the parties is narrowed down to a single point, whether an award by arbitrators duly chosen under the act of 20th *March* 1810, wherein they say, "that having met according to adjournment, and "it being duly proved to us that the plaintiffs were legally "notified of the time and place of meeting, and they not "attending, we are of opinion that the plaintiffs be nonsuit-"ed," is good and valid?

This depends on the true construction of the tenth section of the act, which directs that the arbitrators shall, upon the appearance of both parties before them, or if one of them be absent, unless prevented by sickness, or some unavoidable cause, "proceed to investigate, examine and decide the "cause, suit or action to them submitted, and report their "determination, and make out an award," &c.

Have they then a power to award a nonsuit?

The arbitrators are sworn or affirmed to try all matters in variance submitted to them, justly and equitably, and to decide the law and the fact that may be involved in the cause; but I do not find any authority given to them to direct a nonsuit in the manner accustomed in courts of law. They have not all the powers of a court of law; and if they had in the particular case we are now enquiring about, it ought to be exercised in such a manner as not to superinduce a legal incongruity. Both parties have a right to appeal under the

1812.

MILLER v. MILLER.

restrictions contained in the eleventh section; but it seems absurd, that a plaintiff nonsuited and put out of court by his own default, should have that benefit. A plaintiff suffering a nonsuit voluntarily, will not be heard on a motion for a new trial; though when he has been nonsuited by the mistake of the judge in point of law, the court have in several instances ordered the nonsuit to be set aside without costs. 1 *W. Bl. Rep.* 670., 3 *Wils.* 338.

A plaintiff on a jury trial may refuse to receive a verdict, and may suffer a nonsuit; but such a right cannot be exercised when a cause has gone before referees, and they have decided on it. This point has been solemnly determined in this court, upon argument. The doctrine of nonsuits therefore does not seem applicable to such tribunals, nor have I found any case wherein referees, either in England or here, have awarded a nonsuit.

It is true, the arbitrators cannot pursue the literal expressions of the act, by "investigating, examining and deciding "the cause to them submitted," when the person instituting the suit will not attend and shew his ground of action, and exhibit the proofs in support of his demand; but it appears to me much more correct, and congenial to the true spirit of the arbitration act, in such case to state in the award, the nonattendance of the plaintiff after due notice, and that in consequence thereof they found he had no cause of action. This is the usual method pursued by referees in such instances, and much preferable to what has been done here, in every point of view. I am therefore of opinion, that the judgment should be reversed.

BRACKENRIDGE J. gave no opinion, having been unable from sickness to attend the argument.

Judgment reversed.

WERFEL and others *against* The Commonwealth.

1812.

Lancaster, Saturday, May 30.

IN ERROR.

Where an act of assembly appropriates in a certain way, a fine to be inflicted upon persons convicted of a certain offence, it is error if the judgment appropriates it in a different way.

An indictment for erecting &c. a *mound*, made of logs and stones, in the river *Susquehanna, for the taking of fish in the said river, to the great obstruction and hinderance of the fish, fry and spawn in passing up and down said river, and to the common nuisance of all the liege citizens &c.* is within the 4th section of the act of the 9th of *March* 1771, which prohibits the erection &c. of any wear, rack, basket, dam, pound, *or other device or obstruction whatsoever, whereby the fish may be obstructed from going up said river* &c. and therefore a judgment that the fine shall be paid to the commonwealth, instead of going to the informer and commissioners in that section mentioned, is erroneous.

THE plaintiffs in error were indicted in the Quarter Sessions of *Lancaster* county, for that, "on the 5th "of *April* 1810, at the township of *Conostogoe* in the said "county, with force and arms they did erect, build, set up, "repair and maintain, and did assist and abet in erecting, "building, setting up, repairing and maintaining a certain "*mound*, made of logs and stones, of the height of seven "feet, and length of eighteen yards, commonly called a fish-"ing battery or wharf, in the river *Susquehanna*, in that "part thereof declared to be a public highway, to wit, be-"tween *Burkholder's* island, and the eastern shore of the "said river, in the said township and county, *for the taking* "*of fish in the said river;* and the said mound, made and "erected as aforesaid, from the said fifth day of *April*, until "the day of taking this inquisition, with like force and arms, "at the township aforesaid have kept up and still do keep "up, *to the great obstruction and hinderance of the fish, fry* "*and spawn in passing up and down said river, and to the* "*common nuisance of all the liege citizens of this common-*"*wealth*, contrary to the acts of the General Assembly in "such case made and provided &c." To this they pleaded Not Guilty; and upon conviction the sentence of the court was, that the defendants "should pay each a fine of ten "pounds to the commonwealth, pay the costs of prosecution, "abate the nuisance, and stand committed till the sentence "was complied with."

Upon a writ of error from this court, the defendants below assigned for error:

1. That no *venire facias juratores* issued to return a jury

If the record of the court below set forth, that before a bill of indictment was submitted to the grand jury, the sheriff had returned the precept to him directed, in all things duly executed, and so in like manner as to the petit jury, by whom the prisoner was tried, it it sufficient, without stating the precept and return at large; nor can it be alleged for error, that no precept was issued.

1812.

WERFEL et al. v. COMMONWEALTH.

at the sessions, when the indictment was found, nor when the indictment was tried.

In relation to this exception, the record stated that a *precept* had been returned by the sheriff, in all things duly executed, "whereupon the following persons were sworn and "affirmed as grand inquest" &c.; and so in like manner as to the petit jurors who tried the indictment; but no *venire facias* with the panels was set forth, or annexed, with the sheriff's return.

2. That the indictment was defective; especially, that the offence described was not within the act of assembly, upon which the indictment was founded.

3. That the judgment rendered was not warranted by the act of assembly upon which the indictment was founded, or by any other act, or by the common law.

Montgomery and *C. Smith* for the plaintiffs in error.

1. The first section of the act of 29th *March* 1805, 4 *Smith's Laws* 237, directs, that after jurors are drawn from the wheel, the usual *venire* shall be made out by the prothonotary, and delivered to the sheriff, who shall summon the persons named at least ten days before the first day of the court; and by the seventh section, the sheriff is commanded, upon return of the *venire*, to annex a panel to the writ, containing the christian and surnames, additions and places of abode of a competent number of jurors &c. This record does not state a *venire*, nor a panel, and therefore this court cannot say that the act has been complied with. *Non constat* that the precept stated, was the *venire* required by law. The objection was taken in the *Commonwealth* v. *Hoofnagle* (*a*) and sustained.

2. The offence described is not within the act of assembly. That act was passed on the 9th of *March* 1771. The first section makes the *Susquehanna*, "as far down as *Wright's* "ferry," a public stream and highway for the purposes of navigation; and it declares that all obstructions and impediments "to the passage of his majesty's subjects up and down "the same," shall be deemed common nuisances. 1 *Smith's Laws* 324. The act of 31st *March* 1785, 2 *Smith's Laws* 312,

(*a*) *Brown's Rep.* 201. *note.*

makes that river a highway in all parts of this state. Now the indictment is not within this section, because it does not state the mound to be an obstruction to the navigation, or passage of any of the citizens of this commonwealth; but that it was made for the purpose of taking fish, and to their hindrance and obstruction. It must therefore come under the fourth section of the act of 1771, if any. That section punishes in a particular manner any person who shall erect &c., any "wear, "basket, dam, pound, or other device or obstruction," within the said river, or that shall fasten any net or nets across the same, whereby the fish may be obstructed from going up. But the offence laid in the indictment is the erection of a *mound*, *fishing battery*, or *wharf*, not averring it to be a *device* or obstruction, within the meaning of that act. The general rule is, that the offence charged must be brought within the material words of a statute. 2 *Hawk. P. C.* 249. *sec.* 110.

3. But if within the fourth section, the judgment is erroneous. The act of 1771, fines the offender 5*l.*, one moiety to the informer, the other to the commissioners of the river, for the purpose of clearing it. This is doubled by the act of 1785. Here is a new offence created, with a specific remedy; it can therefore be punished only as the act prescribes. *Rex* v. *Robinson* (*a*). But the judgment gives the fine to the commonwealth. It also requires the defendants to abate the nuisance, which they cannot do by reason of the imprisonment. The commissioners are required by the second section of the act of 1771, to remove the nuisance; it was therefore their duty.

Jenkins and *Hopkins* for the commonwealth.

1. The first exception is that no *venire* issued, not that it has been irregularly executed. Now the record does state that it issued and was duly executed. It is in the usual form, the *venire* and panel never being set out, upon the return to a writ of error. The case of the *Commonwealth* v. *Hoofnagle*, was in the Oyer and Terminer, not in the superior court. This exception is therefore in contradiction to the record.

2. The indictment is founded upon the first section of the act of 1781. The river is laid to be a highway; all ob-

(*a*) 2 *Burr.* 803.

1812.

WERFEL et al. v. COMMONWEALTH.

structions in it are common nuisances by the act; and this mound is so described as to shew it is an obstruction to the passage of the citizens. It is expressly stated to be to their common nuisance. It may be supported also under the fourth section, for it shews what is both a device and obstruction, and by description brings the offence within that section, which is as well as if it had been done by averment.

3. The exception as to the abatement of the nuisance, has no force. It is part of every sentence in cases of common nuisance; and the party's imprisonment does not stand in his way, as he may execute the order by an agent. The argument proves too much. A felon is always adjudged to restore the stolen goods; but he has not them in gaol with him. The only mode of enforcing any part of the sentence is by imprisonment. As to the fine to the commonwealth, it is a proper part of the sentence, under the first section, which does not specify the punishment, but leaves it at common law.

TILGHMAN C. J. The error assigned, that no *venire facias* issued in this case, is contradicted by the record. For it is set forth in the usual manner, that the sheriff returned the precept to him directed duly executed. I do not think it necessary to be more particular on this point, as my opinion is founded on another part of the record. The indictment is for erecting a mound in the river *Susquehanna*, of the height of seven feet, the length of eighteen yards, and the breadth of fifteen yards, commonly called a *fishing battery or wharf*, for the purpose of taking fish in the said river, "to the great "obstruction and hindrance of the fish, fry and spawn in "passing up and down said river, and to the common nui- "sance of all the liege citizens of this commonwealth." It is enacted by the act of 9th *March* 1771, sec. 1. that the river *Susquehanna* as far down as *Wright's* ferry, shall be a public stream and highway, and, "that all impediments and "obstructions to the passage of his majesty's liege subjects "up and down the same, erected or hereafter to be erected, "should be deemed, held, and adjudged common nuisances." And by another act of 31st *March* 1785, the whole river throughout its course, from the *Maryland* line upwards is made a public highway. By the fourth section of the act of 1771, if any person shall erect "any wear, rack, basket,

"dam, pound, or other device or obstruction within the said "river, or shall fix or fasten any net across the same or any "part thereof, whereby the *fish* may be obstructed from go- "ing up the said river," he shall upon conviction, forfeit and pay the sum of 5*l.* or suffer three months imprisonment, one moiety of which forfeiture shall be paid to the informer or prosecutor, and the other moiety to the commissioners for the said river, to be applied towards clearing the said river; this penalty was increased to 10*l.* by the act of 1785. The judgment in this case is that the defendants shall each pay a fine of 10*l.* to the commonwealth, pay the costs of prosecution, abate the nuisance, and stand committed till the judgment is complied with. If the indictment is founded on the fourth section of the act of 1771, the judgment certainly cannot be supported; for without mentioning other objections, it is wrong in not appropriating the penalty according to the provisions of that section. But it is contended by the counsel for the commonwealth, that it is a good indictment under the first section, by which the river is declared to be a public highway, and no particular penalty affixed for its obstruction. I am not quite satisfied that the penalty in the fourth section, is not attached to every kind of nuisance embraced by the first section, for it is difficult to conceive a nuisance that is not an obstruction. But without giving an opinion as to that, it is clear that this indictment is founded and may be supported on the fourth section, for it describes the mound erected in the river in such a manner, as shews it to be a palpable and great obstruction, and expressly declares it to be an obstruction to the *fish* in passing up and down the river; and what is more, it is not said to be an obstruction to *persons* passing up and down the river, although it is said to be to the common nuisance of the citizens of the commonwealth. Now suppose that the indictment may be good both under the fourth and first sections, which may very well be the case, because undoubtedly many of the acts described in the fourth section, fall within the provision of the first, the court would then be obliged to appropriate the penalty according to the *fourth section*, otherwise the intention of the law would be plainly violated. Besides we have an act of assembly by which it is forbidden to inflict a punishment at common law, in any case in which there is a

1812.

WERFEL et al. v. COMMONWEALTH.

punishment prescribed by act of assembly. I am therefore of opinion, that inasmuch as the offence described in the indictment falls within the fourth section, the judgment should have been conformable to the same section. It is consequently erroneous and must be reversed.

YEATES J. The first error assigned, is that no *venire facias juratores* issued to return a jury at the sessions, when the indictment was found, nor at the sessions when the indictment was tried.

Facts are stated in this exception, which are in direct contradiction to the record returned. It appears thereby, that before the bill was submitted to the grand jury, the sheriff had returned the precept to him directed, in all things duly executed, whereupon the following persons were sworn and affirmed as grand inquest. An entry of the like nature is made as to the petit jury. The precept to summon either the grand or traverse jurors, is never returned with the record. When it is made up in proper form, the award of process for summoning the juries only appears, as will be seen in the record of an indictment and conviction of murder, at the assizes, drawn up at large in 4 *Bla. Com. Appen.* 4. It is not competent to the plaintiffs in error, to assign for error, facts which are in direct opposition to the record which is returned. They are concluded thereby; and when the sessions have returned to this court, that the precepts for returning the juries have been in all things duly executed, we are bound thereby, and will look no further in order to reverse the conviction of a jury, and the judgment rendered thereupon.

The second error assigned is that the indictment is defective; and especially that the offence described is not within the act of assembly upon which the indictment is founded.

The act alluded to, is that passed on the 9th of *March* 1771, 1 *Dall. St. Laws* 556, which has two professed objects in view; the one to declare certain parts of the river *Susquehanna* and other streams public highways, for the purposes of navigation up and down the same, the other for the preservation of the fish therein. The first section of the act refers to the former object, declaring that all obstructions and impediments to the passage up and down the same, erected or thereafter to be erected, shall be deemed, held and adjudged

common nuisances. It imposes no specific fine, but leaves the offenders to be punished as at common law for a nuisance. The fourth section was calculated for the preservation of the fish and spawn, and inflicts a penalty of *5l.*, or three months imprisonment, on any person who shall be convicted before any justice of the peace of the proper county, of erecting or maintaining, or aiding or assisting therein, any wear, rack, basket, dam, pound, or other device or obstruction whatsoever, within the said rivers or streams, or any of them; "one "moiety of the forfeiture to be paid to the informer or pro- "secutor, and the other moiety to the commissioners for "the respective rivers or streams, to be applied towards "clearing them."

A subsequent law passed the 31st of *March* 1785, *sec.* 6, doubles the specific penalties prescribed by the former act, and declares that offenders under it shall be prosecuted in the Court of Quarter Sessions of the peace of the proper county, and not in a summary way. 2 *Dall. St. Laws* 292.

It becomes necessary to ascertain under which of the sections of the original act, this indictment was framed. Several precedents are to be found in the books, of indictments for nuisances in highways and navigable rivers, and on recurrence to them it will be found, that after laying the obstruction, they uniformly proceed in either saying, "so "that the liege subjects &c. in and through the said high- "ways, with their horses, carts, and carriages, could not pass, "ride, and labour, as they ought to do, and were accustom- "ed," or conclude, "to the common nuisance of all the liege "subjects &c. in and through the said common highway, "with their boats, ships, and other vessels, about their neces- "sary business with their goods, chattels, and merchandizes, "sailing and labouring &c." Among other precedents, see *West's Symbol. sec.* 159. *Off. Cler. pac.* 162. 201., *Term Pl. Cor.* 196., *Stubb's Cro. Circ. Comp.* 288, 289, 290. 292, 293, 294. 296. 300.

In this instance, I apprehend the indictment is formed on the fourth section of the law, pursuing the words thereof minutely, except that it states the defendants to have erected a certain *mound* (without averring it to be a *device* within the act) *for the taking of fish in the said river*, and kept up the same, *to the great obstruction and hinderance of the fish*,

1812.

WERFEL et al. v. COMMONWEALTH.

fry and spawn in passing up and down said river &c. Unless a defect may be ascribed to the indictment for want of this averment, concerning which I deem it unnecessary to express any opinion, an offence against this section is clearly described.

An indictment would certainly lie for obstructing the river *Susquehanna* in such parts of it as are declared highways, and the common law would warrant a judgment like the present, on a conviction thereon. If one be convicted of a nuisance done to the highway, he shall be commanded by the judgment to remove the nuisance at his own costs. 2 *Rol. Abr.* 84, *pl.* 15., 1 *Hawk.* 200, (*fol. ed.*) Indeed in *Rex* v. *Pappineau*, (1 *Stra.* 686., 2 *Sess. Ca.* 39.) it was contended that the judgment was erroneous, for want of an adjudication, that the nuisance should be abated, that being the end of the law in such prosecutions, and avoiding a multiplicity of actions. The majority of the court got rid of the objection, by saying that it was not a permanent nuisance, but that the injury to the public, arose from the abuse of the mole, in dipping stinking sheep skins in it. They all however agreed, that where the erection is the nuisance, there ought to be a demolition.

I see no force in the remark, that the judgment amounted to an imprisonment for the lives of the plaintiffs in error, inasmuch as they could not, while they remained in the gaol, abate the nuisance by their own personal efforts. The same observation would be applicable, where a fine was imposed for an offence committed by a poor man, who earns his bread by his daily labour, or where a horse thief convicted, has been adjudged to restore the horse stolen to the owner, the object feloniously taken being at a distance. It is the invariable rule in judgments for criminal offences, that the parties stand committed till the judgment be complied with. If the fine is paid by others, or the stolen horse be returned by a third person, in the instances which I have put, or the obstruction here be removed by the instrumentality of the defendant's servants, it could not be denied that the judgments would be so far executed.

The error however in this record consists in the judgment not being conformable to the act of assembly. The offence laid in the indictment is clearly, in my idea, against

the provisions of the fourth section. It does not necessarily follow, that a mound for taking fish is an obstruction of the navigation of the river; I can readily conceive that a device of such a nature may be constructed, which though it may destroy the fish, fry, and spawn, may really improve the navigation, by swelling the water in shallow parts of the channel, where boats usually pass. The defendants here are fined severally 10*l.* for the use of the commonwealth; but the act directs that one moiety of the forfeiture shall go to the informer or prosecutor, and the other moiety to the commissioners for clearing the river. In this particular I am of opinion that the judgment is erroneous, and ought to be reversed.

BRACKENRIDGE J. was sick during the argument, and gave no opinion.

Judgment reversed.

NUMAN *against* KAPP.

IN ERROR.

Lancaster, Saturday, May 30.

THE plaintiff in error, gave his bond for the payment of 400*l.* to Kapp, with a warrant of attorney, under which judgment was confessed for 800*l.* the penalty. The judgment was revived by an amicable *scire facias*, and the lands of the obligor sold to *Peter Gloninger*, one of his creditors. The money levied was brought into court, and, according to the record, the Common Pleas of *Lancaster* county, upon the application and affidavit of *Gloninger* and *Moore*, the creditors of *Numan*, were "let in to a defence, *as to the* "*quantum of this debt*, to be tried on the plea of *payment* "and *non solvit*," the judgment and money levied to remain as a security until the determination. The issue was accordingly tried in *April* 1809, when it was proved, that the bond was given to *Kapp* for a larger sum than *Numan* really owed

Though a bond, given for a larger sum than is due, for the purpose of defrauding creditors, is wholly void against creditors, yet if creditors are permitted to take defence *as to the quantum due*, upon the plea of payment, the obligee is entitled to a verdict for the sum due, though the plea of payment in form goes to the whole.

It is not a ground for reversing a judgment, that the judge below erred in his charge, upon a matter not pertinent to the issue.

1812.

NUMAN v. KAPP.

him, to protect the property of *Numan* from one *Leiss*, to whom he was also indebted; and the president of the district charged the jury, among other points which are immaterial, that in a case of fraud, of this sort, if it appears that there is money due to the plaintiff, the jury may give such sum as appears to be due, although the bond was taken for too much, and for the purpose of defrauding creditors. To this the creditors excepted, and the jury found a verdict for *Kapp* 240*l.* 1*s.* 3*d.*

Godwin and *Duncan* for the creditors, argued, that this opinion was without warrant in the law, as the bond, being given to defraud creditors, was, under the statute of 13 *Eliz. c.* 5. *sec.* 2, "clearly and *utterly* void, frustrate and of none effect," as against *them.* 3 *Bac.* 307. *Fraud. C.*, *Cadogan* v. *Kennett* (*a*), *Chapman* v. *Emery* (*b*), *Tonkins* v. *Ennis* (*c*), *Pow. on Mort.* 296., *Sugden* 433., *Roberts on Fraud. Con.* 591—596. A fraudulent conveyance is as no conveyance against the persons intended to be defrauded. *Sands* v. *Codwise* (*d*). "The statute is like a tyrant; where he comes *he makes all void.* But the common law is like a nursing father, makes void that part where the fault is, and preserves the rest." *Maleverer* v. *Redshaw* (*e*). This is not the case of an objection raised by the obligor, but by persons who claim paramount. The plea of payment went to the whole matter, and the entry as to the quantum is overruled by it. At all events the opinion of the judge in his charge was wrong.

Bowie and *C. Smith* contra. If the direction of the court was right on the issue joined, or not wrong on the issue joined, this court will not reverse the judgment. Now the issue joined, though it might go to the whole, yet by the order of the court, and at the instance of the creditors, went but to part, the excess beyond what was due. The creditors had a discretion to ask what they pleased; they asked and obtained an issue to try the *quantum* under a certain plea. But certainly the judge was not wrong as to the issue; for the proposition he stated was not pertinent to the issue trying,

(*a*) *Cowp.* 434.
(*b*) *Cowp.* 278.
(*c*) 1 *Eq. Abr.* 334.
(*d*) 4 *Johns.* 598.
(*e*) 1 *Mod.* 36.

but to a different issue. Besides, here was a judgment, execution and sale under the bond. After going thus far, creditors come in merely under the equity powers of the court; and therefore, whatever may be the effect of the statute generally, they could not be permitted to come in, but upon the terms of allowing what was due. *Maxims of Eq.* 3, 4., 1 *Fonbl.* 22, 23. 128., *Townsend* v. *Lowfield* (*a*), *Herne* v. *Meeres* (*b*). The judge therefore was not wrong.

TILGHMAN C. J. This case has been perplexed by wandering from the record. It will be attended with no difficulty if we consider the issue joined, and recollect that the charge of the court below is to be applied to that issue. *Kapp*, the plaintiff below, had entered judgment against *Numan* the defendant, on his judgment bond for 800*l.* conditioned for payment of 400*l.* This judgment was afterwards revived by an amicable *sci. fa.*, an execution issued, and the land of *Numan* levied on and sold to *Peter Gloninger*, a creditor of *Numan's*. After these proceedings, a rule was granted for bringing the money proceeding from this sale into court, in order that it might be appropriated and paid as the court should direct; and on the application and affidavit of *Gloninger*, the creditors of *Numan* were let in to a defence *as to the quantum of the debt* due from *Numan* to *Kapp*, to be tried on the plea of payment. Accordingly issue was joined on this plea, and the cause brought to trial. The error assigned, is in that part of the judge's charge in which he says, that the jury may find for the plaintiff the amount of the debt justly due to the plaintiff, although they should be of the opinion, that the bond was given for more than was due, with an intent to defraud the creditors of the defendant. This is very good law applied to the issue, which was on the *quantum* of the debt, but would be very bad on an issue which brought the validity of the bond into question. It was for the creditors who complained of the bond, to ask relief in what manner and to what extent they pleased. They might have reasons of their own, unknown to us, for consenting that *Kapp* should receive the money that was fairly due to him. But we have no right to conjecture on the subject. It is stated in the record, that the creditors were let in to dispute

(*a*) 1 *Ves.* 35. (*b*) 1 *Vern.* 465.

1812.

NUMAN v. KAPP.

the quantum of the debt, and so we must take it. The judge could not alter the issue, and, if he was right with respect to that, we ought not to reverse the judgment, although, in some part of the charge, he may have given an erroneous opinion on a matter not pertinent to the issue. My opinion is that the judgment should be affirmed.

YEATES J. It is beyond all doubt, that a deed, made with the purpose or intent to *delay*, *hinder*, or *defraud* creditors of their lawful actions and demands, is utterly void, both at common law and under the statute of 13 *Elizabeth*. It is binding as between the parties; but as to creditors, it is deemed to have no lawful existence, and, therefore, cannot be recognised for any lawful purpose. The real controversy therefore here is, what was the issue, and between what parties was it tried? [His honour then stated the facts, and proceeded as follows:]

To the charge of the judge to the jury, I cannot subscribe. It is obscure, and by no means explicit. But, whatever he said, which was not pertinent to the issue then trying, I consider as extraneous matter, and not to be assignable as error, in the manner in which the record comes before us, if the opinion he delivered at the trial, on the true issue joined, was correct and legal.

The record alone can give us information of the matter to be tried, and herefrom we learn, that the creditors were let in to a defence *as to the quantum of the debt*. In all probability, more was not asked for by the two creditors, and it was very natural for the second judgment creditor to require payment of the *surplus* sum beyond the true debt of *Kapp*, to be appropriated to his use. Be this as it may, I feel myself bound by the plain meaning of the docket entry; and, in that view of the case, I think the judge was warranted in charging the jury, that they might give to the plaintiff below such sum as appeared to be due.

I am of opinion that the judgment of the Court of Common Pleas be affirmed.

BRACKENRIDGE J. was sick during the argument, and gave no opinion.

Judgment affirmed.

MORRIS *against* THOMAS.

IN ERROR.

1812.

Lancaster, Saturday, May 30.

THIS was an ejectment, brought by *Morris* in the Common Pleas of *Berks*, in *April* 1808.

The plaintiff claimed under a warrant of the 29th of *May* 1742, to *Stamper Bland*, *Elias Bland*, and *John Bland*, for 600 acres, upon which a survey of 29 acres 40 perches, the land in dispute, was made on the 31st of *December* 1805.

The defendant claimed under *Ruth Thomas*, whose title was as follows: By warrant of the 3d of *April* 1750, a tract of 111 acres and allowance was returned for the use of *Mary Lloyd* widow of *Evan Lloyd*, and patented to her on the 19th of *August* 1751. *Ruth Thomas* was heir at law to *Mary Lloyd*, and her family had resided, for a considerable time, on this tract. On the 17th of *June* 1808, she made application to the land office for 30 acres, (the land in question) including an improvement, and adjoining the tract above-mentioned; and presented two affidavits, one that it was first improved in 1783, and not before, that grain had been raised thereon, and that a person at the date of the application actually resided on the same; the other, that to the best of the applicant's knowledge, no other warrant had issued for the land. On this application a warrant was granted on the 19th of *June*, interest to be computed from the 1st of *March* 1783. The survey under the warrant of 1750, clearly excluded the land in dispute; but this land had always been called *Lloyd's* land, and that family had occasionally cut firewood and made rails on the premises, and had sold timber growing thereon. They had also cleared a part on the border of their survey, and had raised grain in it. These acts commenced about the year 1783. At the time of the plaintiff's survey in 1805, about one acre of the land was included within the defendant's fence. No person had at any time prior to the survey resided particularly on the tract claimed by the plaintiff.

After the evidence was closed below, the plaintiff's coun-

Title by improvement, is merely a right of preemption, until the purchase is made from the commonwealth. Up to that time, possession is not *adverse to*, but *under* the commonwealth; and therefore though it continue twenty-one years, it is no bar by the Statute of Limitations to the commonwealth, or her grantee.

Where there is no fraud, a party is bound by the lines of his survey returned, and the acceptance of a patent thereon.

An accidental clearing over the boundary of patented land, vests no interest in the vacant lands of the commonwealth.

A clearing of land belonging to the commonwealth, without a *bona fide* settlement, does not vest a right by improvement.

1812.

MORRIS v. THOMAS.

sel requested the opinion of the court in their charge to the jury on the following points, viz.

1. Whether a man is not bound by the lines of his survey returned, and acceptance of a patent thereon, where there is no fraud.

2. Whether the accidental clearing over the boundary of patented land, vests an interest in the vacant lands of the commonwealth, or constitutes an improvement.

3. Can a clearing of land belonging to the commonwealth, without a *bona fide* settlement, vest a right by improvement?

4. Does the statute of limitations apply to the facts in this case?

There was one other point, not material.

The court stated to the jury, that it appeared, the *Lloyd* family, under whom the defendant claimed, had for many years possession of the land in dispute, as fully as farmers generally have of their woodland. That a man is bound by the lines of his survey as returned, and acceptance of a patent thereon, where there is no fraud.—That the accidental clearing over the boundary of patented land, does not vest an interest in the vacant lands of the commonwealth, or constitute an improvement.—That the clearing of land belonging to the commonwealth, without a *bona fide* settlement, does not vest a right by improvement.—That the act of *March* 26th, 1785, entitled an act for the limitation of actions to be brought for the inheritance or possession of real property &c., and the act of *March* 12th 1800, to extend the time limited in the former act, *applied* to the facts of this case, *and operated as a bar to the claim of the plaintiff*. Verdict for the defendant.

In this court, neither party questioned the opinion of the court below, except as to the statute of limitations. Upon the error in this point, the plaintiff relied for the reversal of the judgment.

Evans and *C. Smith* for plaintiff in error.

Hopkins, *contra*.

TILGHMAN C. J. The opinion of the court below was asked and delivered on five points stated in the record. On

four of these opinions, there is no question, as both parties acquiesce in them. The one which remains for this court to decide on, is, whether on the matters given in evidence, the plaintiff's action was barred by the act of limitations.

The defendant gave in evidence sundry acts of ownership exercised on the land in dispute, which is principally woodland, from the year 1783 to the time of bringing this suit. And it appears that on the 17th of *June* 1808, an application was entered in the land office, for a warrant in the name of *Ruth Thomas* under whom the defendant claims, for taking up this land, on which a survey was afterwards made. The application stated that *Ruth Thomas* claimed under an improvement commenced in the year 1783. The plaintiff claimed under a warrant issued the 29th of *May* 1742, to *Stamper Bland*, *Elias Bland* and *John Bland*, in right of *Francis Stamper*, which was laid and surveyed on the land in dispute, the 31st of *December* 1805. Taking the matter in the light most favourable to the defendant, the right under which he claims commenced in the year 1783. But what kind of right was it? Has the possession from that time been adverse to the commonwealth, so as to bar the commonwealth or its grantee? Surely not. If that kind of title bars the commonwealth by the act of limitations, then all persons who have taken possession of vacant land, may acquire title without paying a cent; for if they are protected by the act of limitations, they have no need of obtaining a patent. The woodland in dispute was adjoining the cleared plantation of *Ruth Thomas*; and if she, or others who owned the cleared land, had thought proper to trespass on the woodland for fifty years without paying any consideration, or making any application to the land office, what remedy would there be at the end of the fifty years to compel payment of the usual purchase money, with interest from the time of the first cutting? I know of none, because it might be said that there never was any intention of purchasing. The most that can be said of this kind of title is, that it gives a right of preemption, in case the possessor thinks proper to complete the purchase; and that the possession in the mean time is not *adverse* to, but *under* the commonwealth. This I say, is the most that can be said of such a title, for I am not giving any opinion on it, but only stating

1812.

MORRIS v. THOMAS.

the argument in the strongest point of view for the defendant. Whether a right of pre-emption existed under the circumstances of this case, we are not now to determine. The point is, whether the plaintiff's claim is barred by the act of limitations? We cannot say that it is, without saying at the same time, that the possession of the defendant and those under whom he claims, was for twenty-one years before the commencement of this ejectment, exclusive of, and adverse to the commonwealth, and to the plaintiff who claims under the commonwealth. This I cannot say, for the reasons which I have given, and for others which might be given, founded on the peculiar and pre-eminent rights of the commonwealth. I am therefore of opinion, that the plaintiff was not barred by the act of limitations, and consequently that the judgment should be reversed, and a *venire facias de novo* be awarded.

YEATES J. I entirely concur in the charge of the court, that a man is bound by the lines of his survey returned, and acceptance of a patent thereon, where there is no fraud; that the accidental clearing over the boundary of patented land vests no interest in the vacant lands of the commonwealth, and constitutes no improvement; and that the clearing of lands belonging to the commonwealth, without a *bona fide* settlement, vests no right by improvement.

A variety of decisions on these several points, has fully established the law. It remains to be considered, whether the plaintiff under the facts of this case, is barred by the limitation act of 26th *March* 1785. [His honour then stated the facts.]

Under these facts it cannot be asserted, that *Ruth Thomas* had an improvement on the premises in question, known to the laws and usages of this state. Its character is truly ascertained by the third section of the act of 30th *December* 1786, which conveys the correct idea of it, as far as my recollection extends. If any equitable claim could be derived by *Ruth Thomas* under the acts of those who preceded her in the possession of these lands, it is manifest that her equity originated under the commonwealth, and was not adverse thereto. That possession was no bar to the commonwealth, who might make an entry thereon, support

an ejectment therefor, or grant the lands to any other persons, who would succeed to the same rights. It irresistibly follows, that the act of limitations could not be interposed as a bar to the plaintiff's recovery.

1812.

MORRIS v. THOMAS.

I am therefore of opinion, that the judgment of the Common Pleas be reversed, and that a *venire facias de novo* be awarded.

BRACKENRIDGE J. was sick during the argument, and gave no opinion.

Judgment reversed.

---

56 81
87 298

Overseers of READING *against* Overseers of CUMREE.

Lancaster, Saturday, May 30.

An indented servant, imported from *Europe* into this state, gains a legal settlement where he first serves sixty days, either with the master to whom he was indented, or with *his assignee;* and it is of no consequence, that the *assignment* is voidable by the servant, because not duly made in the presence of a justice, provided the servant performs his service under it. If the assignment of an indented servant be absolutely void, yet a service performed to the assignee in one township, with the consent of the master in another, is a service *with* the master in the township of the assignee, and obtains a settlement there.

An order removing a married woman to the place where she was last legally settled before her marriage, is not defective, because it omits to state that her husband had no known legal settlement. This court will not presume that he had any such settlement.

No intendment is to be made against an order of removal.

On appeals to the Sessions from orders of removal by two justices, that court is to decide according to the merits, without regard to defects in the orders.

THIS was a *certiorari* to the Sessions of *Berks* county, to bring up the proceedings of that court upon an order of two justices, removing *Elizabeth Ackerman*, a pauper, from the township of *Cumree* to the borough of *Reading*.

From the evidence before the Sessions, the case was thus: The pauper, whose name before her marriage was *Hendenbrooke*, was imported directly from *Europe* into this state, and was bound on the 22d of *March* 1794, by indenture before the register of *German* passengers, to serve *John Lewis Barde* and his assigns for two years and nine months, in consideration of 20*l.* 2*s.* 0*d.* paid for her freight from *Amsterdam*. She served with *Barde* in the township of *Robeson* forty-seven days, and on the 7th of *May* 1794 was by him assigned to *William Whitman* of *Robeson*, who on the 8th of *May* 1794 assigned her to *John Whitman* of *Reading*. These assignments were by indorsement upon the indenture,

1812.

READING v. CUMREE.

not under seal, and not made in presence of a justice of the peace.

She served with *Whitman* in the borough of *Reading*, until she was free. She was then married to *Ackerman*, and lived in the township of *Cumree*, where she was likely to become chargeable. Her husband had abandoned her. The order of two justices removing her to *Reading*, as the place where she was last legally settled before her marriage, was upon appeal to the Quarter Sessions, confirmed.

Evans and *C. Smith* for the overseers of *Reading*, took several exceptions to the confirmation of the order.

1. That no settlement was obtained by the service in *Reading*, because it was not with the original master, but with his assignee; and the act of the 9th of *March* 1771, sec. 18, does not permit a settlement to be gained by service with the assignee, except where there has been a service for the space of sixty days, with the master. It enacts that "every indented servant, legally and directly imported from *Europe* "into this province, shall obtain a legal settlement in the "city, borough, &c. in which such servant shall first serve "*with* his master or mistress the space of *sixty* days; and if "*afterwards* such servant shall duly serve in any other "place for the space of twelve months, such servant shall "obtain a legal settlement in the city &c. where such service was last performed either with his or her first master "or mistress, or *on an assignment.*" 1 *Smith's Laws* 332. In this case the service *with* the master was but forty-seven days.

2. That the assignment was not according to law, and therefore there was no legal assignee, with whom the service could take place. The indenture was under seal; and the assignment without seal passed nothing. By the act of 1700, 1 *Smith's Laws* 10, no servant can be assigned over to another in this state but in the presence of one justice of the peace of the county. The servant may avoid a different assignment. *Commonwealth* v. *Flanegan* (*a*). Not only so, the law contains a prohibition and inflicts a penalty, which makes the assignment void, and prevents this court from giving it effect in any way. 5 *Vin.* 507. *C. pl.* 15., *Mitchell* v. *Smith* (*b*).

3. The pauper is married. Her husband's settlement is

(*a*) *Brown's Rep.* 295. (*b*) 1 *Binn.* 188.

1812.

READING v. CUMREE.

her settlement. The order should have adjudged that he had no known legal settlement. It only states that she was married, and had a place of legal settlement before marriage.

F. Smith and *Hopkins* for the township of *Cumree*, answered,

1. That the original service with an assignee, was as much within the spirit of the act of 1771, as a service in the second instance. The law did not regard the party served, but the party serving, and the township to whom the benefit was rendered. The service is also within the words, for an assignee is a master, and where he first serves with him, is where he first serves with his master. But supposing the law otherwise, the service to the assignee in *Reading* with the consent of the master in *Robeson*, was a service with the master, and gained a settlement in *Reading*. A person may serve his master in another place. *St. Olaves* v. *All Hallows* (*a*), *St. Luke's* v. *St Leonard's* (*b*).

2. That the assignment if void, leaves the service in *Reading* upon the footing of a service with the consent of the first master, and is already noticed. But in fact, the act of 1700 was made for the servant's benefit, not to prevent him from gaining a settlement where he has served. He may avoid the assignment; but if he does not, surely the township where he has duly served, and whom he has benefited, cannot say he was not so assigned as to acquire a settlement. The point has already been decided under a parallel statute, the 5th *Eliz. St. Nicholas* v. *St. Peter's* (*c*).

3. The court will not intend that the husband had any known legal settlement; and of course that objection fails. *St. Michael's* v. *Nunny* (*d*), is in point. Besides, the act of the 20th of *March* 1810, sec. 4, directs that upon appeals from the determination or order of two justices to the Common Pleas or Sessions, the cause is to be decided on its facts and merits only, without regard to deficiency in form or substance.

In reply, it was said, that the service with the assignee was not a service with the master, in Pennsylvania, so as to gain a settlement. The English cases were distinguishable, because there the last forty days service gives a settlement

(*a*) 3 *Burn's J.* 391. (*b*) *Id.* 396. (*c*) *Id.* 384. (*d*) *Id.* 489.

1812.

READING v. CUMREE.

in the place where the service is performed; but here, the settlement is where the master lives.

As to the defect in form being no objection, it was said that the clause in the act of the 20th of *March* 1810, the hundred dollar law, did not apply to orders of removal in pauper cases.

TILGHMAN C. J. It is enacted by the act "for the relief of "the poor" (9th *March* 1771) that "every indented servant, "legally and directly imported from *Europe* into this pro- "vince, shall obtain a legal settlement in the city, borough, "township or place, in which such servant shall first serve "with his or her master or mistress for the space of sixty "days; and if afterwards such servant shall duly serve in "any other place for the space of twelve months, such ser- "vant shall obtain a legal settlement in the city, borough, "township or place where such service was last performed, "either with his or her first master or mistress, or on an "assignment." The pauper in this case was bound by a legal indenture in the township of *Robeson;* and having served there less than sixty days, was assigned to a person living in the borough of *Reading*, where she served sixty days; so that *Reading* is the place where she first served her master sixty days. But it is objected, that in order to gain a settlement by a service of sixty days, such service must be to the master to whom she was bound, and not to an assignee. There is no reason for this distinction, nor is it supported by the words of the act, which do not restrict the service to the *first* master. The master under the assignment is as much a master as the person to whom the servant was originally bound; and so the legislature considered him, for in the last part of this very clause, mention is made of the first master and the master under the assignment. It is not in the power of the servant to prevent an assignment; and it would be most unreasonable to torture the words of the law, so as to prevent the gaining of a settlement, where there has been a legal binding and a service under it for sixty days.

A second objection to the settlement in *Reading* is, that the assignment was not legal, because not made in the presence of a justice of the peace. The act of 1700 enacts that "no servant shall be assigned over to another per-

"son, but in the presence of one justice of the peace of "the county, under the penalty of 10*l.*" This act was intended for the benefit of the servant, and ought not to be construed to his prejudice. The assignment may be avoided by the servant, but it is not declared by the act to be absolutely void; and when both parties have chosen to abide by it, I consider it as a good assignment for the purpose of gaining a settlement. The township of *Reading* has had the benefit of the pauper's service, as much as if the assignment was in strict legal form. This rule of construction has been adopted in a much stronger case, *Parish of St. Nicholas* v. *Parish of St. Peters*, 3 *Burn's Justice*, 384, 385, where an indenture, declared to be absolutely null and void by the statute 5 *Eliz.*, was held to be good for the purpose of gaining a settlement. But even if this assignment was absolutely void, the settlement might be supported, because in that case, the service being performed in *Reading* with the consent of the first master, might be considered as service to the first master, or, as the act expresses it, service *with* the first master, for I consider the word *with* as synonimous with *to*. If the master lives in one township and employs the servant in another, the settlement will be in the township where the servant resided, for that is the township which has reaped the fruit of the service.

There remains one more objection to be considered. It is this: that the pauper, being a married woman, could have no settlement of her own during the coverture, and that although the 19th section of the act for the relief of the poor, provides, that if the husband has no known legal settlement, the wife shall be deemed to be legally settled, in the place where she was last legally settled before her marriage, yet the order in this case is bad, because it is not expressed that the husband had no known legal settlement. To this objection two answers have been given, either of which is sufficient. In the first place, it ought not to be presumed for the purpose of avoiding this order, that the husband had a settlement when none appears. This is a reasonable principle, and is supported by the cases cited from 3 *Burn's Justice* 489; and in the next place, it is provided by the 4th section of the act of the 20th of *March* 1810 (commonly called the consolidating hundred dollar act) that on appeals

1812.

READING v. CUMREE.

from the order of two justices to the court of Quarter Sessions, the court shall decide according to the merits, without regard to defects in the order either as to form or substance. Some question has been made, as to the kind of order intended by this act. But as it embraces an order of removal in its terms, and I know no reason for excluding such an order, I consider the act as comprehending it. We have the evidence before us on which the Sessions decided, and there is nothing in it, which proves that the husband of the pauper had any settlement. I am of opinion that the judgment of the Court of Quarter Sessions should be confirmed.

YEATES J. It appears to me that the present case is fairly embraced by the first branch of the 18th section of the poor act. The pauper was an indented servant, legally and directly imported from *Europe* into this state, and first served with her master the space of sixty days within the borough of *Reading*. At all events I think the defect of an assignment before a justice of the peace cannot be taken advantage of by that borough on a question of settlement. The present indenture was executed before the register of *German* passengers, and its validity cannot be questioned. The servant, having served under it twelve months, gained thereby a legal settlement. *Reading* had the benefit of her services during that period, and cannot now urge a default on the part of the original master, in order to affect her claim of support when she has become poor and impotent. This appears so just and reasonable in itself, that an act of the master over which the servant had no control should not materially injure the latter, that high authority would be necessary to establish a contrary doctrine. But the cases cited fully support it; and the words of Lord *Hardwicke* are, that an indenture may be voidable at the election of the parties themselves, if they think fit to take advantage of it, and not by a third person. *St. Nicholas* v. *St. Peter's*, *Bur. Set. Ca.* 91. See also *St. Petrox* v. *Stoke Fleming*. *Ib.* 250. On any other construction, the pauper, according to the language of one of the cases, must *starve in the name of God*, which I cannot accede to.

If the order of removal should be supposed defective by reason of its not appearing therein that the husband of the

pauper had no known legal settlement, the same might have been amended, both in form and substance, by the express provisions in section 4th of the act of the 20th of *March* 1810, or the Sessions might have proceeded to hear the appeal on its merits. It was competent to the borough of *Reading* to have shown the settlement of the husband upon the appeal, and if they had so done, the order of the justices must have been quashed. This court will not make any intendment against the order. 3 *Burn's Just.* 489, (16th *ed.*)

I am clearly of opinion that the order of Sessions should be affirmed.

BRACKENRIDGE J. having been sick during the argument, gave no opinion.

Order of Sessions confirmed.

5b 87
6b 457
6b 459
1sr192
1sr195
2w150
5w171
6ws398
6 470
7 44
30 33
32 224
71 412
82 350
85 459
97 332
108 563
113 241

The Commonwealth on the relation of GRIFFITH *against* COCHRAN, Secretary of the Land Office.

Lancaster, Saturday, May 30.

AT the last term of this Court for the *Lancaster* district, a rule was granted upon the defendant to shew cause on *Monday* the 27th of *May*, why a *mandamus* should not be issued, "commanding him to prepare and deliver patents to *Robert E. Griffith*, who survived *Philip Nicklin*, (which said *Robert* and *Philip*, in the life time of the said *Philip*, were assignees of *Joseph Boone*, who was assignee of *John Nicholson*) for sixty-eight tracts of land, situate in what was formerly called the Eighteen Districts, and which were surveyed on sixty-seven warrants of one thousand acres each, and one warrant for four hundred acres, dated the 19th of *March* 1805;—the purchase money for which warrants

Where a ministerial act is to be done, and there is no other specific remedy, a *mandamus* will lie to do the act required; but where the complaint is against a person who acts in a judicial or deliberative capacity, he may be ordered by *mandamus* to proceed to do his duty, by deciding and acting according to the best of his judgment, but the court will not direct him in what manner to decide.

Hence a *mandamus* will lie to the secretary of the land office, to compel him to make the calculations of purchase money and interest on lands sold, if he has omitted or wholly refused to do it; but it will not lie to command him in what manner to make the said calculations, that act not being merely ministerial; nor, if he has already, under the direction of the board of property, made the calculations in an erroneous manner, will it lie to compel him to make them in a proper manner.

1812.

GRIFFITH v. COCHRAN.

was paid at the time they issued, and the surveys made thereon, returned into the surveyor general's office on the 3d of *February* and the 16th of *March* 1808, and accepted; the said warrants being issued on the application of the said *John Nicholson*, and in pursuance of two decisions of the board of property, one dated the 14th of *January* 1804, and the other the 25th of *January* 1805;—on the said *Robert E. Griffith*, paying into the treasury of the commonwealth, the purchase money due for the surplus quantity of land contained in the surveys made on said warrants, with interest upon the same, from the time of the surveys being made, respectively, until the 5th of *November* 1810, when a sum of 1800 dollars in specie, equal to the payment of the whole thereof, and the fees of patenting the said tracts, was tendered to him, with an offer immediately to pay the whole purchase money, and interest as aforesaid due, with the said patenting fees, into the treasury, for the purpose of obtaining patents for the said tracts, upon being furnished by the said secretary, with the requisite certificates to the treasurer for that purpose, which the said secretary refused."

To this rule the secretary returned on the 27th of *May*, in substance as follows:—"That he has no cause to shew, excepting that the said *Robert E. Griffith* has not paid a balance of purchase money, interest and fees due on the lands, which the act abolishing the offices of receiver-general and master of the rolls, requires to be done, before patents can lawfully issue. The said secretary has always been ready, and now is ready, to perform every act and thing on his part, towards preparing and delivering said patents, any representation or false statement made to the honourable court to the contrary notwithstanding. Had the secretary been required to shew cause why calculations were not made agreeably to the directions of Mr. *Griffith's* agent, several good reasons might have been furnished; but as the making of calculations, or causing them to be made, is exclusively the duty of the said secretary, he claims the right of making them, subject to the control of the board of property, who have in the case of *Nicklin* and *Griffith's* warrants directed him how to proceed. And if the secretary has refused to make calculations agreeably to the wishes of said agent, being so instructed by the board, under whose con-

trol he is, the refusal, of course, was a refusal of the board, and not of the secretary of the land office; and although he, as well as the other members of the board, are ever ready to respect the decisions of the court, and in a certain degree consider themselves bound thereby, yet when duties are pointed out by express and written acts of the legislature, the said secretary considers himself bound to adhere to them &c."

On the 30th of *May* 1811, a second rule was granted on the secretary, to shew cause on *Saturday* the first of *June*, why a *mandamus* should not be issued, pursuing the terms of the first rule, with the following variations, viz. "commanding him to prepare and deliver *the usual certificates and calculations of the purchase money and interest* due for the surplus quantity of land contained in the surveys made upon sixty-eight tracts of land, together with the patent fees for the said tracts, *towards enabling him to obtain patents for the same on the payment thereof;*"—further alleging, that "*regular certificates for the purpose of patenting, had been issued by the surveyor-general on the said surveys respectively, and deposited on and previously to the 5th of November last, with the said secretary;*"—then stating the tender of the money as before, and concluding "*which certificates and calculations then were demanded of the said secretary, and refused by him.*"

To this rule the secretary returned on the 1st of *June*, as follows:—"On the 30th of *May*, a notice was served on the secretary of the land office, to shew cause this day why a *mandamus* should not be issued &c.; wherein it is stated that the usual certificates and calculations of purchase money &c. for sixty-eight tracts of land &c. were demanded of the said secretary, and refused by him."

"The said secretary says, that on the sixth of *November*, 1810, sixty-one calculations had been made on so many of said tracts, and the usual certificates made out therefor, and severally signed by the said secretary, and no objections made as to delivering the same, which the said secretary stands prepared to prove."

"Seven of the said sixty-eight tracts, however, at that time, could not be acted upon, because they contained a

1812.

GRIFFITH v. COCHRAN.

greater surplus than by law could be received. But that difficulty is now removed by an act passed last session."

This return, not meeting the real point in controversy, viz. the dispute respecting the time from which the interest was to be calculated, a *mandamus* was awarded on the 1st of *June* 1811, returnable the third *Monday* of *May* 1812, to shew cause, &c.

To this *mandamus* the following return was made.

"Whereas a *mandamus* was awarded by the said court, against the secretary of the land office on the 1st of *June* 1811, commanding him to shew cause on the third *Monday* of *May* 1812, why he had not conformed to, and complied with a rule, granted the 30th of *May* 1811, which rule required him to shew cause, why he did not prepare and deliver to *Robert E. Griffith*, the usual certificates and calculations for sixty-eight tracts of land &c."

"The said secretary, with all due deference to the honourable court, in return to said writ answers, that he thought he had superseded the necessity of issuing the said rule, by having answered to a previous rule in the same case, wherein he had stated, that he had never refused, but was ready and willing at all times to do and perform every act on his part, towards preparing and delivering patents for said tracts, (preparing of which certificates was a part of his duty towards the issuing of patents,) as soon as said *Griffith* had paid the respective fees and balances due the state. The said secretary also thought he had superseded the necessity of issuing the said writ, by having in his return to said last rule, stated, that calculations had been made out for sixty-one of said tracts, with certificates to the treasurer for the same, which had been severally signed, and ready for delivery when called for; and that the difficulty respecting seven others had been removed by an act of the legislature. The said secretary therefore, thought the honourable court would not have commanded him to do, what he had not only not refused to do, but had actually done and performed; which will appear by the annexed *affidavit*."

"There is no person more ready than the said secretary, to obey the constituted authorities of government; but the present case being an irregularity, touching an imperfect

title, the said secretary (as at present advised) thinks the exclusive power of deciding thereon, is vested in the board of property, and consequently any thing touching the same, is not within the jurisdiction of the honourable court. It is a case between the commonwealth and an individual, wherein the treasury is interested several thousand dollars; and the said secretary considers it taking by indirect means, the commonwealth into court, without the consent of her immediate representatives, which the said secretary believes cannot constitutionally be done. By the sixth section of the fifth article of the constitution, the legislature are authorised to distribute the judicial powers as they shall judge proper. And by an act passed the 5th of *April* 1782, the board of property are constituted a court 'to hear and determine in all cases of controversy on *caveats*, in all matters of difficulty, or irregularity, &c. touching imperfect titles, or otherwise &c.,' and these powers are by subsequent laws (since the adoption of the present constitution) transferred to the existing board."

"This, then, being clearly an irregularity, touching an imperfect title, the power would appear to be clearly given to the board to decide thereon. It cannot be said, this comes under the provisions of the third section of said law, which authorises either party to enter his suit at common law, after a decision."

"By another act, passed the 29th of *March* 1809, it is made the exclusive duty of the secretary of the land office, to make, or cause to be made, all calculations &c.; and by another act passed the 21st of *March* 1806, it is declared, 'that in all cases where a remedy is provided, or duty enjoined, or any thing directed to be done, by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued &c. The board, with full powers, have corrected the irregularity in the present case, and directed the manner that the calculations shall be made; and the secretary of the land office has caused the same to be made accordingly. The honourable court will not then, he presumes, command the said secretary to disrespect the directions of the board, and direct him to make calculations in a different manner, and thereby prejudice the state, by preventing a large sum of money from going into the trea-

1812.

GRIFFITH v. COCHRAN.

sury. If the said secretary were to disobey the directions of the board, in a case where they had decided on an imperfect title, he would consider himself guilty of a misdemeanor in office, and consequently liable to impeachment by the third section of the fourth article of the constitution. He cannot therefore knowingly be guilty of a breach of his *official duty*."

The affidavit referred to in this return, sworn to before president *Franklin*, by the deputy secretary of the land office, stated the facts of presenting the tickets, and requesting the calculations and certificates to the state treasurer for the 68 tracts, in *November* 1810. That calculations were made on sixty-one of the tickets &c. as directed by the secretary of the land office, and the usual certificates made out, dated the 6th of *November* 1810, and signed by the secretary, &c. That three or four days afterwards, the agent came to the office, and enquired if calculations on the tickets left by him, had been made; which was answered in the affirmative, and the certificates offered to him. That he enquired on what terms the calculations were made, and was answered by deponent, that they were made agreeably to the terms directed by a minute of the board of property, a copy of which he shewed to the agent, who read it, and said, that as they were in conformity to that decision of the board, he would not take the certificates, as he did not intend to pay the amount therein stated to be due. That the said certificates have ever since remained in the office, and would at any time have been delivered to the agent, had he demanded them.

The minutes of the board of property, at different times, material to this case, are as follow:—*January* 14th, 1804. The board resumed the consideration of the application of *Joseph Boone*, assignee of *John Nicholson*, to have warrants granted him on the application of *John Nicholson*, made the 21st of *April* 1794, for two hundred and six warrants, containing 202,400 acres, in the Eighteen Districts, when the following facts appeared.

That on the said 21st day of *April*, the said *John Nichol-*

son made a regular application for the said two hundred and six warrants, which was entered, and the said *Nicholson* then gave the then receiver-general, a check on the Bank of *Pennsylvania* for 27,838 dollars, 13 cents, including the surveyor-general's and secretary's fees, on which he was credited in the cash book of the receiver-general for the amount. But the check, when presented on the 29th of *April*, for payment, being dishonoured, the receiver-general obliterated the entry, on the blotter, of said lands, and refused to pass his receipt to *John Nicholson's* credit in the premises. That the said *John Nicholson* on the 14th day of *June* 1794, tendered at the receiver-general's office, to the then receiver-general of the land office of *Pennsylvania*, the sum of money aforesaid, on the aforesaid application, which the receiver-general refused to receive, with which the said *John Nicholson* was dissatisfied, and applied to the attorney general respecting the same; that no money was ever paid by the said *John Nicholson* on the said application; that the said *John Nicholson* (who is now dead) on the 16th of *April* 1798, assigned and transferred the said applications, to the said *Joseph Boone*, who now applies for the said warrants, and offers to pay the purchase money for the same to the commonwealth.

The board taking the premises into consideration, on due advisement had, do order and decree, that the said tender by the said *John Nicholson*, of the purchase money and fees to the said then receiver-general, and his refusal to receive the same, were, as to rendering the said application good and effectual in law, equivalent to payment, being all the said applicant had in his power to do. That by the assignment and transfer of the said application to the said *Joseph Boone*, the right to prosecute and carry the same into effect, became vested in him. The board, therefore, order that warrants issue to the said *Joseph Boone*, as assignee of the said *John Nicholson*, upon the said application, he paying the purchase money agreeably to law.

January 25th, 1805.—The petition of Messrs. *Nicklin* and *Griffith*, stating "that by a decree of the board of property, made on the 14th of *January* 1804, it was ordered that war-

1812.

GRIFFITH v. COCHRAN.

rants for two hundred and two thousand, four hundred acres, should issue to *Joseph Boone*, as assignee of *John Nicholson*, in the eighteen districts, he paying the purchase money according to law. That the right of the said *Joseph Boone*, in the said decree, has been in due form of law, transferred to the petitioners, who believe they have discovered vacant and unappropriated lands in the said districts, to the amount of thirty thousand acres, on which a like portion of said warrants may be laid, and requesting warrants to the amount of thirty thousand acres to issue to them, as assignees of the said *Joseph Boone*, in part execution or satisfaction of the said decree, upon their paying the purchase money according to law, on that portion of the said warrants decreed to the said *Joseph Boone*—was read—whereupon the board considered: That according to the opinion of the attorney-general, *John Nicholson*, upon payment on or before the 15th of *June* 1794, of the purchase money for two hundred and six warrants, applied for by him on the 21st day of *April* 1794, "became entitled to the warrants applied for; and the tender and refusal of the money on or before that day, was equal to the payment, so far as to vest the right in Mr. *Nicholson;* his assignee therefore is entitled to the warrants for the lands applied for, upon payment of the purchase money." And that the tender for the same was so made. And the board further considering that the act, intitled "an act to prevent the receiving any more applications, or issuing any more warrants, except in certain cases, for land within this commonwealth," passed the 22d day of *April* 1794, declares "that all applications for lands that remain on the files of the land office, after the said 15th of *June* (then) next, and for which the purchase money shall not have been paid on that day, shall be null and void &c.," thereby giving the space of fifty-four days from and after the passing of that act, for such payment to be made, and no more, there appears reasonable ground to doubt, whether, consistent with the spirit of that act, the board may allow unlimited time for the lands so applied for by the said *Nicholson*, at the discretion of the assignees. Therefore, ordered, that for so much of the lands, so applied for by *John Nicholson*, as shall be paid for into the hands of the receiver-general within fifty-

four days from this time, warrants to issue to the assignee or assignees of the said *John Nicholson.*"

1812.

GRIFFITH v. COCHRAN.

The substance of the minute or decision which gave immediate rise to the present controversy, is as follows:

October 26th, 1810.—On the 8th of *October* (instant) *Robert E. Griffith* applied to the secretary of the land office, by his attorney, for patents of confirmation to lands in *Clearfield* county, surveyed on warrants dated the 19th of *March* 1805, granted to *Philip Nicklin* and *Robert E. Griffith.* The secretary of the land office had doubts as to the propriety of granting patents, until the board has held the subject under advisement till this time, and have examined the laws and facts relating thereto; and find, that on the 21st day of *April* 1794, *John Nicholson* applied to the receiver general for 202,400 acres of land in the eighteen districts. The act of the 8th of *April* 1785, directs that "every such applicant shall set forth in words at length, and not in figures only, the number of acres asked by each applicant respectively." The same law says, that the secretary of the land office "shall receive and file all applications made to him for lands within the late purchase." The application of *John Nicholson* was made to the receiver-general, and not to the secretary of the land office; his application does not set forth in words at length the number of acres asked for. (It then proceeded to state the facts set forth in the preceding minutes, the opinions of several gentlemen of the professsion, the issuing of the warrants to the relator, the application for patents of confirmation, the arguments of the board to shew that the warrants had issued irregularly, and then concluded as follows.) Under all these circumstances, however, as the warrants have been issued, and a considerable sum of money paid, (although as the board conceive, not agreeably to law) yet being convinced that no evil, (injurious to the commonwealth) can arise by confirming the title, and that some inconvenience might arise to the warrantees by not doing it, and also believing the powers given the board by law, sufficient to warrant them in so doing:—and the board also considering, that as said *Nicholson* did not take any legal step to obtain a redress after tendering the money, within a reasonable time; and that he ought not to be bene-

1812.

GRIFFITH v. COCHRAN.

fited by his own wrong acts, and thereby injure the commonwealth, by holding his claim to the land, and withholding the money from the public treasury,—The board do therefore direct that patents issue to the said *Griffith* for the same, as surviving joint-tenant, he first paying into the state treasury, the balance that may be found due on each of the tracts surveyed on said warrants, *including interest on the same from the 21st of April* 1794, together with the price of the legal surplus land and office fees.*

Hopkins for the relator, and *the Attorney General* (*Ingersoll*) for the secretary of the land office, agreed to go into the whole merits, without regard to any exceptions to the return.

Arguments for the relator. There are two questions, 1. Whether the relator does not sustain an injury by the conduct of the secretary. 2. Whether he is not entitled to the remedy of *mandamus*.

1. The dispute is in relation to the interest, which the secretary would charge upon the whole land in the warrants of the relator, from the date of the applications by *John Nicholson* in 1794; and which ought not to be charged except for the surplus in the surveys, and upon that only from the date of those surveys until the 5th of *November* 1810, when that amount was tendered and refused.

The commonwealth as to this question is upon the footing of an individual; and if interest to an individual would be barred by tender and refusal, so will interest to the commonwealth. The tender by *Nicholson* on the 14th of *June* 1794, was perfectly in time by the act of 22d *April* 1794. Had payment been then made, the applications would have remained effectual, and no interest would have accrued. But payment could not be made, unless the receiver-general would accept. It was his duty to accept a payment offered at that time; and since it was his duty to accept, and all that was in the power of *Nicholson* was to tender, tender

* The returns made by the secretary of the land office, and the documents connected with the present question, I have abstracted from the fifth volume of Mr. *Smith's* late excellent edition of the laws of *Pennsylvania*, where they may be found at large.

and refusal to accept were equivalent to payment, as to the question of interest. Tender and refusal are equivalent to actual performance. *Blackwell* v. *Nash* (*a*), *Jones* v. *Barkley* (*b*). He who prevents a thing from being done, shall not take advantage of its not being done. *Fleming* v. *Gilbert* (*c*). A tender at common law suspends interest until a subsequent demand and refusal have taken place. *Johnson* v. *Hocker* (*d*).

There is another objection to the interest. If a creditor accepts the principal without interest, he cannot afterwards recover the interest. *Tillotson* v. *Preston* (*e*). This rule is well settled. Here the officers of the commonwealth, by order of the board of property of the 25th of *January* 1805, accepted the principal of the purchase money, upon such of the warrants as were taken out by the relator, issued those warrants, and at a subsequent day accepted the surveys. The rule prevails *à fortiori* in the present case; because a demand of the interest would have deterred the relator from taking his warrants then, as it does from taking his patents now. He has paid the purchase money to an amount exceeding 10,000 dollars upon the faith of this rule, and the recognition of it by the board of property.

2. The question of remedy is by far the most important. Titles to an immense amount depend upon the interference of the court in cases of this kind. The will or caprice of an individual may otherwise constitute the law of the land; and the settlement of the state, as well as the property of its citizens, receive a severe and irreparable injury.

By the act of 22d *May* 1722, 1 *Smith's Laws* 139, the justices of this court have full power and authority, as often as there may be occasion, to issue all remedial and other writs and process, and to minister justice to all persons, as fully as the justices of the King's Bench, Common Pleas, and Exchequer at *Westminster*, or any of them may or can do. A more comprehensive endowment of legal power cannot be imagined. It certainly includes, and has long been practically held to include, the authority to issue writs of *mandamus*.

(*a*) 1 *Stra.* 535. (*c*) 3 *Johns.* 531. (*e*) 3 *Johns.* 229.
(*b*) *Doug.* 661. (*d*) 1 *Dall.* 407.

1812.

GRIFFITH v. COCHRAN.

This writ issues in all cases where the party has a right to have any thing done, and has no other *specific* means of compelling its performance. 3 *Bl. Comm.* 110. It ought to be used, says lord *Mansfield*, upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. *Rex* v. *Barker* (*a*). It has been of late liberally interposed for the benefit of the subject, and the advancement of justice. It is used for the control of inferior courts, jurisdictions, and magistrates; to compel judges to seal a bill of exceptions, to grant letters of administration, and all officers to do those legal acts, which it is their duty to do. *Rex* v. *Leicester* (*b*), *Sikes* v. *Ransom* (*c*). It is peculiarly the writ to enforce obedience to acts of parliament, and in such cases is demandable *ex debito justitiæ*. 4 *Bac. Abr.* 496. 507. *Mandamus D.*, *Bull. N. P.* 199. Wherever a new jurisdiction is erected, by public or private act, it is subject to the inspection of the King's Bench, and in this commonwealth of the Supreme Court, by writ of *mandamus*. *Lawton* v. *Commissioners of Highways* (*d*).

By the act of 29th *March* 1809, 5 *Smith's Laws* 46, which abolished the office of receiver-general, it is made the duty of the secretary of the land office from time to time, as the same may be necessary, to make or cause to be made, all calculations of the purchase money and interest due on lands sold, and to direct the payment of the money into the treasury.

The question is, what is the nature of this duty? It is merely ministerial. The price of the land is fixed by law. The interest is a matter of arithmetical calculation, upon the surplus land surveyed, from the date of the survey. The secretary alone has the authority to make it; and the intervention of the board of property, to give to the calculation the colour of a judicial act, is not warranted by law, and was improper.

Has he performed the duty, and has he not refused to do it? There can be no doubt. It is a fallacy to call his act, a calculation of the interest due. He might as well have named

(*a*) 3 *Burr.* 1267.
(*b*) 4 *Burr.* 2088.
(*c*) 6 *Johns.* 279.
(*d*) 2 *Caines* 182.

a round sum. It is not a calculation, but the assertion of a false principle. He has refused to make the calculation. Suppose he has a discretion and judgment to exercise, this is nothing, for discretion and judgment are essential to every official act. He has no deliberative or judicial power; and the knowledge of this has induced him to bring in the board of property. Although this court may not possess the right of commanding that board how to decide, yet precisely as the King's Bench may issue a *mandamus* to the ordinary to grant administration to one who is next of kin, so may this court enforce obedience to its judgment upon the true principle of calculation, by *mandamus* to the secretary.

The commonwealth is surely no party in any sense within the constitution. The commonwealth has already ordered the secretary to perform this duty. He is refractory, and will not perform it. It is the commonwealth, through its court, that would compel him to perform it.

The relator has no other remedy, certainly no other specific remedy. His title must remain incomplete for want of a patent; and while the controversy is suspended, he loses the use of his property, and the state an increase of her settlement, and population.

Arguments for the defendant.

1. On the merits, the relator is not entitled. The principle of tender and refusal does not apply to a case like this, in which *Nicholson*, from the 14th of *June* 1794 to the 16th of *April* 1798, manifested by no act whatever an intention to prosecute his claim, and then only manifested it by assigning it as something of value, to one who also slept over it until the 14th of *January* 1804. The relator was silent in like manner until *January* 1805. What were the commonwealth officers to do? How could they compel payment of the money? What authority had they to demand it, and according to the principle of the common law to set the interest in motion again? They could not, and therefore the rule by which interest ceases, does not apply.

2. He is clearly not intitled to the remedy. In the first place, he does not want it, because he has another, if his principle is sound. He has a warrant, and survey accepted, and purchase money paid. It is indeed only an equitable

1812.

GRIFFITH v. COCHRAN.

title; but he may maintain an ejectment upon it to obtain possession; and he may defend possession against the commonwealth, and litigate the question of interest, in an ordinary suit at law. That he cannot obtain a patent by such a proceeding is true; but many are the cases in which the legal title, in spite of all this court can do, must continue distinct from the equitable ownership. In the case of articles of agreement to convey, or of an expired trust, the legal owner may if he chuses, refuse a conveyance. But the *cestuy que use*, as to every question of remedy, and of substantial property, is, in this state, as well without it as with it; and when the rule of the *English* law is transferred to this commonwealth, that a *mandamus* will lie, where there is no other specific remedy, this court must understand the term *remedy* in reference to its own laws. The relator has a specific remedy by ejectment, because without patent, he may obtain or defend possession. In *Rex* v. *Blooer* (*a*) it issued to restore a curate to a chapel, endowed with lands, solely because he could not maintain ejectment. It was granted to supervisors, in the *Commonwealth* v. *Johnson* (*b*), because there was no other remedy.

In the second place, a *mandamus* will not lie, under the circumstances of this case.

The authority of the court to issue writs of *mandamus* is not questioned; but it never goes to a person acting in a judicial or deliberative capacity, to tell him how to decide. It goes to compel the visitor of a corporation to exercise his visitorial power, but not to point out the *manner*, in which he shall exercise it. *Philips* v. *Bury* (*c*). Though it may be granted to an inferior court to decide, yet it cannot compel a particular decision. *Commonwealth* v. *Judges &c.* (*d*). Its use is to enforce obedience of courts, jurisdictions, and officers, who either will not exercise their judicial or deliberative power at all, or have no such power to exercise, but decline doing a ministerial act: as to enter up judgment, 3 *Bla. Comm.* 110, 111; to compel the meeting of a corporation, *Green* v. *Mayor of Durham* (*e*). But it is never used to control the deliberations of inferior officers or courts;

(*a*) 2 *Burr.* 1043.
(*b*) 2 *Binn.* 279.
(*c*) 1 *Ld. Ray.* 5.
(*d*) 3 *Binn.* 273.
(*e*) 1 *Burr.* 131.

and it has been the disposition of this court, to prevent its multiplication, because it is not a convenient mode of trying questions of title. *Commonwealth* v. *Rossiter* (*a*).

The power of the secretary of the land office as to the calculation, is not ministerial. The terms of the purchase, the conditions of the sale, the conduct of purchasers and surveyors, may all affect the question, and he must deliberate upon, and decide, the rule that is proper for the case. He has decided. He has made calculations, and tendered them. If a *mandamus* goes, it can only be for the purpose of telling him how to make them.

But he has called in the board of property, and with great propriety. When difficulties occur in relation to titles, it is his duty to consult that tribunal, and to follow their instructions; and so he has done in this instance. The decision of the secretary, has therefore been the decision of the board of property, a species of court, possessing judicial powers, large discretion, and in some instances great authority. By the act of 5th *April* 1782, 2 *Smith's Laws* 13, they are to hear and determine in all cases of controversy on *caveats*, in all matters of *difficulty* and irregularity, touching escheats, warrants on escheats, warrants to agree, rights of pre-emption, promises, *imperfect titles, or otherwise*, which may arise in transacting the business of the land office. They may by the act of 6th *February* 1804, 4 *Smith's Laws* 113, administer oaths to witnesses. They hear parties and counsel, they deliberate, they decide; and they have done all in this very case. This court cannot issue a *mandamus* to direct the judgment of that body. Writs of *mandamus* have issued it is true in like cases; but it has been with the acquiescence of the board of property, to obtain an opinion of this court, and for no other reason.

Finally the commonwealth is interested as a party. Her officers assert a right on her behalf to receive a large sum of money, which the relator denies. It is the very point in issue here. To grant a *mandamus*, is to compel the commonwealth to submit as a party to the decision of this court, against her consent.

(*a*) 2 *Binn.* 362.

1812.

GRIFFITH v. COCHRAN.

TILGHMAN C. J. Although this court has in several instances granted rules on the secretary of the land office, to shew cause why a *mandamus* should not issue, commanding him to make out patents, yet no *mandamus* has ever issued; because these rules have been made in consequence of the wish of the board of property to know the opinion of the court, and to comply with it. In the case of the *Commonwealth* v. *Tench Coxe, secretary of the land office*, the propriety of this remedy was brought into question, but not decided on, as the *mandamus* was denied on the merits of the case. The power of the court to issue writs of *mandamus* is confessed; it is grounded on an old act of assembly (22d *May* 1722), by which we have all the powers of the Courts of King's Bench, Common Pleas, and Exchequer in *England*. But it is contended that this is not a case in which that power can be properly exercised. It becomes necessary therefore, to consider the nature of the case. Without entering unnecessarily into its merits, it appears that on the 21st of *April* 1794, *John Nicholson* deceased, under whom Mr. *Griffith* claims, entered applications for two hundred and six warrants, containing 202,400 acres of land, for which he gave his check on the Bank of *Pennsylvania*, for 27,838 dollars 13 cents, to the receiver-general. On the 29th of *April* the check was presented, and payment refused by the bank. On the 14th of *June* of the same year, *Nicholson* tendered the amount of the check to the receiver-general who refused to receive it, having obliterated the credit entered to *Nicholson* in his books, at the time the check was given. The right of *Nicholson* under those applications, has after several assignments, become vested in Mr. *Griffith*. In 1805 the board of property made an order that warrants for 80,400 acres, should issue on payment of the *purchase money according to law*. The warrants were accordingly issued, the usual purchase money paid, and surveys have since been returned, containing the quantity called for by the warrants, and a considerable surplus. Mr. *Griffith*, wishing to obtain patents on these surveys, applied to the secretary of the land office, to make calculations ascertaining the sum to be paid to the treasurer. A considerable difference of opinion prevails between the secretary and the agent of Mr. *Griffith* with respect to the balance due to the commonwealth, the secretary contending that interest should be paid from *April* 1794,

when the applications of *John Nicholson* were entered. The matter of interest I understand to have been the sole point of controversy, Mr. *Griffith* having been always ready to pay the balance of the principal, and all fees of office. The cause shewn against the *mandamus* is, that the secretary has always been ready to make the calculations, according to the principles laid down by the board of property to whom the case was submitted, and that in fact the calculations were made and offered to the agent of Mr. *Griffith*, who refused to receive them.

The principles which govern the court, in issuing writs of *mandamus*, are well understood, and the counsel who argued this cause have not differed in that respect. Where a ministerial act is to be done, and there is no other specific remedy, a *mandamus* will be granted to do the act which is required. But where the complaint is against a person who acts in a judicial or deliberative capacity, he may be ordered by *mandamus* to proceed to do his duty, by deciding and acting according to the best of his judgment, but the court will not direct him in what manner to decide. This was the principle adopted by the Supreme Court of the *United States* in the case of the *United States* v. *Lawrence*, and it has been frequently recognised by this court, particularly in the case of *the Commonwealth* v. *the Judges of the Court of Common Pleas of Philadelphia county.* 3 *Binn.* 272.

But it is said, that the act required of the secretary is purely ministerial, and enjoined on him by the third section of the act of the 29th *March* 1809. By this act, the office of receiver general is abolished, and it is directed that the secretary of the land office, "shall make all calculations of "purchase money and interest on lands sold or that shall be "sold by the state, and direct the payment of the money by "the applicant, with the price of the warrants, into the state "treasury." These calculations were formerly made by the receiver-general, who, as well as the secretary of the land office, was a member of the board of property. As the objection to the *mandamus* rests in a great measure on the order of this board, it will be proper to consider its nature and its powers. The late proprietaries established a board of property for superintending the business of the land office, which consisted of the principal proprietary officers, that is to say,

1812.

GRIFFITH v. COCHRAN.

the governor for the time being, the secretary of the land office, the surveyor-general, the receiver-general and the auditor. This board was applied to, and decided in all matters of difficulty, and although not recognised as a judicial tribunal, yet the business brought before it was very important, and such as required great deliberation. We shall find however, that after the commonwealth took the affairs of the proprietaries into their own hands, they thought proper to clothe the board of property with judicial authority. By the act of the 5th of *April* 1782, the board of property was established and its powers defined, that is to say, they were "to "hear and determine in all cases of controversy on 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 said land office;" but it is provided that the courts of law shall be open to any party who is dissatisfied with the sentence of the board, as fully as if no sentence had been given. There are other legislative provisions, by which they have power to administer oaths in causes depending before them, and their decisions on caveats respecting lands in certain parts of the state, are conclusive, unless an ejectment is brought in six months, by the party against whom the decision is made. The constituent members of the board have been varied from time to time. It consists at present of the secretary of the commonwealth, the secretary of the land office, and the surveyor-general. According to the true intent of the act of 1782, if a difficulty arises in any particular department, it is the duty of the officer to refer the matter to the board, and such has been the conduct of the secretary of the land office on the present occasion. I do not consider the calculation of the purchase money as an act merely *ministerial;* for in order to ascertain the amount, the contract must be examined. The price of land has been different at different times, and in different parts of the state; and sometimes conditions have been annexed to the purchase, besides the payment of money. I can conceive many difficulties which may arise from these circumstances. Besides, the secretary of the land office may have reason to think, that there has been something wrong in the conduct

of the applicants for land, or of the deputy surveyor or other officers, and in such case it would be his duty to stop the calculations till the matter is decided by the board. If the secretary had in this case refused to make any calculation, or take any step whereby the business of the applicant might be dispatched, it would certainly have been our duty to compel him by *mandamus;* but having taken measures for the decision by the proper authority, of a matter in which he conceives there is difficulty, and having offered to act according to the decision of that authority, he has shown sufficient cause against a *mandamus*, unless there is some other principle by which we are called upon to interpose. It has been said that there is such a principle, and that our interposition is necessary to prevent a defect of justice. If by a defect of justice, it is meant, that no action lies against the commonwealth, it is clear that this would be no ground for a *mandamus*. For if the commonwealth by our constitution is not subject to an action, but with its own consent, then we have no right to do that *indirectly* by *mandamus*, which we have no power to do *directly;* and we might as well be called on to issue a *mandamus* to the state treasurer, to pay every debt which is claimed by an individual from the state. But although no suit can be brought directly against the state, yet the case of Mr. *Griffith* is not entirely without remedy; for having tendered the money to which the state is justly entitled, he may enter on the lands and hold them, or in case the state grant them to other persons who take possession, he may support an ejectment against such persons. His situation, indeed, as to obtaining a complete title by patent, is not much different from what it would be, if his contest was with an individual; for we have no court of chancery to compel a specific performance of a contract for the purchase of land. When the party entitled to a conveyance, does every thing necessary to be done, in order to obtain a decree for a specific performance, he stands with us in a situation to support or defend an action for the possession of the land. But even if there was a total defect of justice, I do not conceive that that consideration would authorise a *mandamus* against a member of the board of property, acting under the direction of the board, in a matter on which they had a right to decide. Such a defect would

1812.

GRIFFITH v. COCHRAN.

deserve the serious attention of the legislature; but they alone would be competent to provide a remedy. I have considered this case very attentively, because I am sensible that the state may suffer great injury from the suspense in which titles to large quantities of land is held. Uncertainty of title prevents the improvement of the country. But, on which ever side I view it, I find insuperable objections to a *mandamus*. My opinion is, that the secretary of the land office has shewn sufficient cause, and therefore this court should abstain from any farther proceeding.

YEATES J. The present case comes before us, on a rule to show cause why a *mandamus* should not issue, commanding the secretary to prepare and deliver to *Robert E. Griffith*, the usual calculations &c., preparatory to patenting certain lands. Return has been made thereto, that those calculations had been made agreeably to the decision of the board of property, on the 26th of *October* 1810, computing the interest on the whole purchase money from the 21st of *April* 1794, when the lands were applied for by *John Nicholson*.

The relator, *Robert E. Griffith*, who is the surviving assignee of the warrants, has objected thereto, inasmuch as a former board of property before whom the matter was brought, have in their minutes made on the 14th of *January* 1804, recognised a tender of the large sum of 27,838 dollars 13 cents, in full of the purchase money of 206 warrants applied for by the said *John Nicholson*, as made on the 14th of *June* 1794; and that he and his assignees are exempted by reason thereof, from the payment of interest in the intermediate time. The secretary in his return, has relied on his conformity to the decision of the board, in *October* 1810, whose directions in the case of an imperfect title to lands to be completed in the land office, he was bound to pursue. And it is now insisted by the attorney general, that this being a case wherein the fiscal concerns of the commonwealth are to be affected, the secretary of the land office, independently of the merits, ought not to be compelled to answer in this court, without a special law enacted for the purpose.

Under these facts, the question is, whether a writ of *mandamus* ought to be awarded? The case has been minutely stated by the Chief Justice.

It is a high prerogative writ, which issues in all cases where the party has a right to have any thing done, and has no other specific means of compelling its performance. But such writs are not so convenient for the trial of title, as the usual common law actions, and are not to be unnecessarily multiplied. 2 *Binney* 262. Though a *mandamus* will lie to an inferior jurisdiction to compel that tribunal to proceed to judgment, it will never issue to prescribe what judgment shall be given. 3 *Dall.* 53., 3 *Binney* 275. It would be a waste of time to cite further authorities upon the point. But I cannot avoid mentioning, that shortly after I came on the bench, the court refused in *July* term 1791, to award a *mandamus* against *Matthew Clarkson* and others, commissioners of bankrupt, directing them to grant a certificate of conformity to one *Freeport*, who had been examined before them, though the court differed with the commissioners as to his answers.

It is alleged here, that Mr. *Griffith* may enter on these lands if vacant, and defend himself at law, if attacked; and if any other person enters adversely to his title, he may prosecute his writ of ejectment against him, and try his right. It is true that he cannot by these means obtain his patents, whereby he may convey a complete legal title to purchasers; but he has the same remedies, and stands in the same situation, as any other person who claims lands under articles of agreement, if from the circumstances of his case he would be entitled to specific execution, in a court of equity.

By an act of assembly passed the 5th of *April* 1782, a board of property was constituted, with power "to hear and deter- "mine in all cases of controversy on *caveats*, in all matters "of difficulty or irregularity touching escheats, warrants on "escheats, warrants to agree, rights of preemption, pro- "mises, imperfect titles, or otherwise, which heretofore "have, or hereafter may arise, in transacting the business "of the land office."

Other organizations of the board, have been made by two other laws, passed the 8th of *January* 1791, and the 29th of *March* 1809; but their powers continue as granted under the first law.

It is contended on the part of the relator, that the secretary of the land office is merely a ministerial officer, in making

1812.

GRIFFITH v. COCHRAN.

these calculations, and that the law must be his guide in that particular. Judicial knowledge certainly is not required in the performance of arithmetical operations: but whoever will carefully examine the act of the 8th of *April* 1785, (2 *Dall. St. Laws* 30,) which is one of the laws under which these warrants issued, will find it to be one of the most unintelligible contradictory acts, which appear in our statute books. This I well know, that in the discussion of a motion for a new trial, between the *Lessee of Willinck and others*, and *Morris and Nicholson*, in *December* term 1800, the members of this court, after full argument by learned counsel, expressed very different opinions of the true construction of it.

It appears to me, that if any difficulty occurred to the secretary in the investigation of the relator's title to these lands, or as to the principles upon which the calculation of the purchase money should proceed, he was justifiable in convening the board of property, and requiring their directions in the premises, to which he was afterward bound to conform; and that though this court should entertain an opinion very different therefrom, we ought not to enforce our decision upon the secretary by a writ of *mandamus*. Mr. *Griffith* is not concluded by the decision of the board, but may contest it at law, when the legal question will come before the court between proper parties. It cannot be the wish of the legislature to hang up the title in suspense, and thereby injure the public interest; and I should presume, that the legislature upon a proper application to them, would put the matter in a train for a speedy decision.

I have cautiously avoided saying any thing on the merits of the case, which might lead to prejudice the claim of either party. At present, I am of opinion, that the *mandamus* prayed for should be denied.

BRACKENRIDGE J. having been unable to attend the argument, in consequence of ill health, gave no opinion.

Peremptory *mandamus* denied.

END OF MAY TERM, 1812.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Middle District. June Term, 1812.

5b 109
5s r436
6s r535
13s r225
2w 227
2w 407
13 491
24 66
34 314
59 289

REICHART *against* CASTATOR and others.

1812.

IN ERROR.

Sunbury, Tuesday, June 9.

ERROR to the Common Pleas of *Northumberland* county.

Declarations by the grantor at the time of executing a deed, that *he only did it for a sham, so that the people could not come at it*, are not evidence, if made in the absence of the grantee, unless a ground is previously laid, by shewing a trust in the grantee, or his participation in the fraud.

A deed made to defeat and defraud creditors, is void as against creditors; but not so against the grantor himself, or his children.

This was an ejectment by *Castator* and others, who were plaintiffs below, to recover part of a tract of fifty acres of land, which it was admitted had been duly vested in one *Henry Reichart.*

The plaintiffs represented the daughters of *Henry Reichart;* the defendant, *George Reichart*, was his son, and gave in evidence a deed from his father to himself, dated the 29th of *December* 1803, for the fifty acres, reciting that *George* had paid sundry debts for his father according to a schedule said to be annexed, (but which was not) and had for a long time past supported the wife of his father; and in consideration of these, and five shillings, the deed was made.

The plaintiffs then offered in evidence the deposition of *Mary Reichart* the widow of *Henry*, who deposed "that the the deed was executed by her husband in the jail of *Northumberland* county, where he was a prisoner; that he did not ask her to execute it; and that he told her, *he only did it for a sham, so that the people could not come at it.*" This evidence

1812.

REICHART v. CASTATOR.

was objected to by the defendant, but admitted by the court, who sealed a bill of exceptions.

The facts came before this court in a very imperfect state; but from the charge of the presiding judge, which was brought up with the record, it appeared that he instructed the jury as follows, viz. that the plaintiffs, who were *Henry Reichart's* daughters, did not stand in the same situation with their father in relation to this deed; that as it would be void against creditors, if there were creditors whom he intended to defraud, so it ought to be void against his female children. Next to the claim of creditors, the claim of nature ought to be considered. The verdict was for the plaintiffs.

The questions in this court were therefore two, 1. Whether the deposition had been properly admitted. 2. Whether, supposing the deed to have been made to defraud creditors, as to whom it would be void, it would also be void as to the plaintiffs.

Duncan argued for the plaintiff in error. 1. On the first point he contended that the declarations of the grantor were not competent to establish a trust; but if they could be under any circumstances, they were not when made in the absence of the grantee. He cited *Bartlett* v. *Delprat* (*a*), *Peake's Ev.* 96. 104. 105., *Sugd.* 116. 2. On the second, he contended that if there was a fraud, the children could not set it up, and take advantage of it. Fraud is irrevocable by him who commits it, and by those who claim as his heirs or representatives. 1 *Fonbl.* 128. 264. *note*, *Max. in Eq.* 2*d max.*, *Hawes* v. *Leader* (*b*), *Osborne* v. *Moss* (*c*), *Montefiori* v. *Montefiori* (*d*).

Huston and *Watts* contra. Declarations at the time of executing a deed, may be given in evidence to shew fraud, or to prove a trust. No exception lies to them, in consequence of their being parol, for it is the only mode in which fraud can be proved; and the circumstance of their being made at the time of executing the deed, of itself makes

(*a*) 4 *Mass. Rep.* 702.
(*b*) *Cro. Jac.* 271.
(*c*) 7 *Johns.* 161.
(*d*) *W. Black.* 363.

them evidence. Lessee of *Dinkle* v. *Marshall* (*a*), *Hutchins* v. *Lee* (*b*), *Willis* v. *Willis* (*c*), *Young* v. *Peachy* (*d*), *Gregory's Lessee* v. *Setter* (*e*), *Lessee of German* v. *Gabbald* (*f*). 2. This deed was fraudulent and void. The grantor was in jail for burglary, and supposed his estate liable to forfeiture. He therefore intended to defeat the commonwealth. Such a conveyance cannot stand; *Young* v. *Peachy* (*g*); and not only creditors and purchasers, but younger and unportioned children, are objects for whom, in equity, it will be set aside. 1 *Bac. Abr.* 112. *Agreements*, *B.* 2.

TILGHMAN C. J. In this case there is a bill of exceptions to the admission of *Mary Reichart's* deposition as evidence, and also an exception to the opinion of the court on the evidence, in their charge to the jury. Before the deposition was offered, *Reichart*, the defendant below, had given in evidence a deed from his father *Henry Reichart* to himself, for the land in dispute. The deed was expressed to be made in consideration of sundry debts paid by the son for the father, and in consideration that the son had, for a long time, supported his father's wife, and also of 5*s.* paid by the son to the father. The deposition went to prove, that at the time of the execution of the deed, the grantor declared "that "he only did it for a sham, so that the people could not "come at his land." It does not appear that the grantee was present at the time of this declaration, or in any manner assenting to it, so that I cannot conceive any principle of law under which it was admissible. The question is not (as the counsel treated it in the argument) whether parol evidence might be admitted to show a fraud, or a secret trust, but whether *ex parte* declarations of the grantor were evidence to contradict his deed. There is no occasion to say, whether such declarations might be admitted as supplementary evidence, a ground having been laid by previous testimony tending to show a trust, for the case on the record stands on the naked unsupported deposition. Under these circumstances, I am clearly of opinion that it was not evidence.

(*a*) 3 *Binn.* 587. (*c*) 2 *Atk.* 71. (*e*) 1 *Dall.* 193. (*g*) 2 *Atk.* 258.
(*b*) 1 *Atk.* 447. (*d*) 2 *Atk.* 254. (*f*) 3 *Binn.* 302.

1812.

REICHART v. CASTATOR.

In considering the judge's charge, it appears that the whole evidence is not set forth in the record; for in stating the facts, he mentions that *Henry Reichart* was in jail, and had suspicions that his property would be forfeited to the commonwealth. There is nothing of this in *Mary Reichart's* depo ition. She only says that her husband was in jail, and declared that he made the conveyance to prevent the *people* from coming at his land. I should rather understand from this, that he meant to defraud his creditors, or, perhaps, if he was charged with felony, those persons who, on his conviction, would be intitled to restitution of their stolen property, and may be considered in the light of creditors. It is impossible to form a satisfactory opinion on the case as it really stood before the court of Common Pleas, because we are left to guess at it. But, taking it on the deposition, which is the only evidence on the record, it appears that *Henry Reichart* made a conveyance to his son with an intention of defrauding some persons who had just claims on his property. That being the case, the deed would be void as to the persons intended to be defrauded, but good against himself and his daughters claiming under him. The judge was mistaken in his opinion, when he placed the daughters on the footing of creditors. Creditors have a legal right to take the property of their debtor in execution; and any conveyance made to defeat them is void, not only by statute, but at common law. But children have no such right. What they receive from their father is his bounty, and he has the undoubted right of disinheriting them, either by deed or will. The judge concluded his charge by telling the jury, that if they believed the deposition of *Mary Reichart*, as he did, their verdict should be for the plaintiffs. In this he was wrong, for it is only proved by that deposition, that the grantor declared the conveyance to be intended by him as a sham &c., but not that the grantee considered it as a sham. Now if a man makes a voluntary conveyance to his son, and delivers to him the deed and possession of the land, the conveyance cannot be avoided, either by the father or the other children claiming under him, whatever may have been the secret intention of the father, uncommunicated to the son. Upon the whole of this record, I am of opinion that there is error, both in the admission of the deposition of *Mary*

Reichart, and in the charge of the court. The judgment must therefore be reversed, and a *venire facias de novo* be awarded.

YEATES J. The law on principles of general policy, will not permit the grantor of lands to invalidate his own conveyance by declarations subsequently made, nor will it suffer a man to make evidence for himself. The assertions of a vendor of lands in the presence of his vendee, have been received in evidence, on the grounds contained in the maxim of "*qui tacet, consentire videtur.*" It is true, where reasonable grounds have been previously laid before the court, to induce a belief, that a fraud has been committed to the injury of third persons, testimony is admissible of the declarations of either of the parties to such fraud in the absence of the other party, in like manner as is done in charges of conspiracy. Applying these rules to the case before the court, it not appearing that *George Reichart* was present when *Henry Reichart* made the declarations detailed in the deposition of *Mary Reichart*, nor any circumstances shown, which would evince a meditated fraud on others, before the paper was offered in evidence, I am of opinion that the same was improperly received.

If the object of the parties to the deed in controversy was really to establish a trust for the benefit of the father and his family, unaccompanied with any intention of defrauding others, a court of equity would grant relief against the defendant, who unconscientiously refused to execute that trust, by claiming the lands for his own benefit. But I am not aware of any decision, wherein equity has interposed in favour of the parties to the fraud. I see not, however, any thing in this case, which would justify me in considering the conveyance as a mere trust, nor what purpose it could possibly answer in the family, in that point of view. It was considered in the charge of the court below, "that as the "deed would be void against creditors, so ought it to be "void against his female children, whom it is impossible "to suppose the father intended to defraud. Next to the "claim of creditors, the claim of nature is be regarded." From hence it was inferred, that the plaintiffs, the daughters of *Henry Reichart*, did not stand in the same situation

1812.

REICHART v. CASTATOR.

as their father. To this system of reasoning, I cannot subscribe.

It is not explicitly stated in the charge, what was the cause of *Henry Reichart's* confinement. It is barely mentioned, that he was in jail, and under the suspicion that his property would be sacrificed in some way or other to the state; and he then seems to have determined to cheat the commonwealth, whom he erroneously supposed would be intitled to his landed property. It has been said during this argument, that he was committed on suspicion of felony or burglary, and broke gaol before trial. I do not see that we can take notice thereof, unless that fact appears on the record before us, though most probably some such matter was admitted upon the trial, which gave rise to the observations made by the court. Under the 30th section of the act of the 31st of *May* 1718, the persons intitled to the restitution of stolen goods on a conviction of larceny, may take out execution against the lands and chattels of an offender, and levy the amount thereof. And under the 9th section of the act of the 23d of *September* 1791, the same remedy is given on a conviction of robbery or burglary, to the owners of the goods stolen, and the residue of the lands and chattels of the offender is forfeited to the commonwealth. Upon a conviction therefore of either of these offences, the owners of the stolen goods might lawfully proceed against the lands of the offenders; and, in cases of robbery or burglary, there would be a forfeiture to the state. A conveyance made to elude those provisions would be fraudulent and void at common law, as well as under the statute of 13 *Elizabeth*, which was made in affirmance thereof, as to the parties intended to be injured thereby.

The question then before us is reduced to one single point, on this part of the case: do the daughters of *Henry Reichart* stand in a different situation from their father as to this deed? The deed, however fraudulent as to creditors, *as to him* is valid and binding; and neither courts of law nor equity would relieve him against his own iniquity, voluntarily practised. His daughters claim under and through him; and, however innocent and unoffending they must be considered of the trick intended by their father, cannot, in a legal sense, be deemed his creditors. His crime will be

visited on them, and the law points out to them no mode of redress, which was not open to their father. Hence I conceive, that the charge of the court was erroneous in this, that the plaintiffs below stood in a different situation from their father as to the deed under consideration.

I am of opinion, that the judgment of the court of Common Pleas be reversed, and a *venire de novo* awarded.

BRACKENRIDGE J. was prevented by sickness from attending, and gave no opinion.

Judgment reversed.

WEISHAUPT and wife *against* BREHMAN and another.

IN ERROR.

Sunbury, Tuesday, June 9.

THIS cause came before the court upon a case which stated, that *Andrew Freyberger*, by his will dated 15th of *October* 1803, after devising a plantation to his son *John*, during the life of the testator's wife, made the following bequest,—"and to my two sons *John* and *Jacob* aforesaid, "*I do further give and bequeath* 100*l. each in cash.*" He then gave to the three sons of his daughter *Magdalen*, 80*l.* each, to be paid to them by his executors in the year 1816, "or to the survivors or survivor of them at that time, that "is, if any of them should die before that time, the survivor "shall have his or their part;" after which the will proceeded, "after my death no vendue shall be made, till after the "death of my wife *C*, at which time also the plantation shall "be sold, and the remainder of all the money arising from "the sale of my plantation, and the personal estate, *after the* "*aforesaid portions* are paid, *shall be equally divided among* "*my six children, now residing in the state of Pennsylvania,* "OR THEIR HEIRS."

The testator by his last will, bequeathed to his son *J.* 100*l.* cash; and then directed that "the remainder "of all the money arising "from the sale "of his plantation and the "personal estate, after the "aforesaid portions were "paid (of which "*John's* was "one) should be "equally divided among "his six children *or their* "*heirs.*" Prior to the date of the will, the testator paid his son 50*l.* and took his receipt for 50*l. portion.*—*J.* died before the testator.—*Held* that the legacy of 100*l.* to *J.* had lapsed.

On the second of *August* 1802, *Andrew*, the father, paid *John* the son, 50*l.*, and took from him a receipt in these words, "Received of my father the sum of 50*l.* portion."

1812.

WEISHAUPT v. BREHMAN.

John, the son, died about four weeks before the father, leaving three children, and a widow, the wife of the plaintiff in error.

The question was whether the legacy of 100*l.* to *John*, was a lapsed legacy. Judgment was rendered in the Common Pleas in favour of the defendants, upon the ground that it was a lapsed legacy.

Hale and *Duncan* for the plaintiffs in error, contended that the word "*heirs*," in the residuary devise, should be connected with the devise of the preceding legacies, by which the children of *John* would take; but if this could not be done, the payment of 50*l.* to *John*, shewed that the father had promised him a portion, and the will was intended to carry the promise into effect; it was merely the instrument by which the promise was performed. The case therefore did not stand upon the common footing of a legacy, but of a promise executed by the will, and not affected by the death of the promisee. If a testator says "I forgive *A. B.* a debt, or my "executor shall not demand it," the death of the debtor before the testator does not alter the case. *Elliot* v. *Davenport* (*a*), 1 *Eq. Abr.* 296. *Sibthorp* v. *Moxom* (*b*).

Huston contrà. There is nothing in this will to take the case out of the general rule. The word *heirs* in the residuary devise, is exclusively confined to the devise of the residue. That devise could not be ascertained until after the widow's death, and *heirs* were introduced to provide for the children of such legatees as might die after the testator; whereas the legacy to *John* was payable in the ordinary time. Besides, there is an intervening devise between that to *John* and the residue, where the survivor expressly, and not the heir, takes. Now *heirs* in the residue cannot be annexed to one, without being annexed to all the preceding legacies. The receipt can have no effect, because it was prior to the will. No such thing as a promise appears. This case is provided for by the act of the 19th of *March* 1810; but that act has no retrospect.

(*a*) 2 *Vern.* 521. (*b*) 3 *Atk.* 581.

1812.

WEISHAUPT v. BREHMAN.

TILGHMAN C. J. I should have been very glad to find any thing in this will, to prevent the lapse of the legacy of 100*l.* given to the testator's son *John*. But I see nothing which can exempt it from the operation of the general rule, that a legacy becomes lapsed by the death of the legatee in the life time of the testator. The receipt of 50*l.* given by *John* to his father, can have no effect on the construction of the will, because it bears date above a year before the will was made, and because it seems applicable rather to the general share which *John* would have been entitled to, in case of his father's dying intestate, than to any particular legacy. In case of intestacy, the advances made by the father to each child, are taken into consideration in the division of the estate. I should suppose that when this receipt was given, it was the testator's intention not to make a will.

The counsel for the plaintiffs in error, would connect the devise of the *residue* of the real and personal estate to the testator's six children, *or their heirs*, with the previous bequest of this legacy, so as to shew an intent that in case of death, the legacy should not be lapsed. But this is too forced a construction. The expression *their heirs*, is clearly confined to the devise of the residue of the estate. This residue could not be ascertained, till after the death of the testator's wife, for the estate was not to be sold, nor were the devisees to divide the residue among them till then. Consequently there was a probability, that some of the children would die before they received their share of the residue, and to provide for that event, the *heirs* were introduced; but not so as to this legacy, which was payable immediately, or at farthest, in a year after the death of the testator. Besides, there is another circumstance, which proves incontestably, that the words *their heirs*, cannot be connected with the preceding legacies. A legacy of 80*l.* is given to each of the three sons of *Magdalen Kline*, to be paid to them in the year 1816, *or to the survivors or survivor of them at that time;* this shews that there was no intention that the heir of each legatee should take in case of the death of the ancestor, and it is to be remarked, that the legacy to the *Klines* stands between the legacy to the son *John*, and the devise of the residue. I am therefore of opinion, that the legacy to *John* falls within the general rule, and was lapsed by his death in

1812.

WEISHAUPT v. BREHMAN.

the life of the testator. The judgment of the Court of Common Pleas must be affirmed.

YEATES J. No point is better settled, than that a devise of land or personalty to a person who dies in the testator's life time, becomes thereby lapsed, by the general rules of the common law, unless the event is provided for in the will itself. The act of assembly of the 19th of *March* 1810, has very properly altered this law, in the case of a child or any other lineal descendant of a testator, with a provision, that it shall not have a retrospective operation.

I can discover nothing whatever in the will of *Andrew Freyberger*, which can exempt the legacy of 100*l.* devised to his son *John* from the general rule. The devise to his six children, *or their heirs*, of the remainder of all the money arising from the sale of his plantation after the death of his wife, and of the personal estate, can have no operation thereon, by any reasonable construction. For this clause only relates to the surplus of the estate, after the payment of the legacies before bequeathed, on the event of his wife's decease.

It is also perfectly clear, that the son's receipt of 50*l.* portion, dated *August* 2d, 1802, can have no influence whatever on the construction of this will, which is dated the 15th of *October* 1803. It preceded the execution of this will fourteen and a half months, and was no doubt intended by way of advancement to his son during his life, but cannot be connected with the legacy of 100*l.*

It follows, that the general rule of law must control this bequest, and that the same is lapsed by the death of *John* during his father's life; and I am of opinion, that the judgment of the Court of Common Pleas of *Mifflin* county, should be affirmed.

BRACKENRIDGE J. was prevented by indisposition, from giving any opinion.

Judgment affirmed.

CAINES and another *against* The Lessee of GRANT. 1812.

5b 119
7 86
19 40

IN ERROR.

Sunbury, Tuesday, June 9.

THIS was a writ of error to the Common Pleas of *Northumberland*, where judgment had been rendered in favour of the lessee of *Grant*, the plaintiff below, upon the following special verdict:

A and *B* take out a warrant to survey 200 acres of land, pay the purchase money in equal proportions, and obtain a survey. Before a patent is granted, *A* dies. *Held* that *B* has no right of survivorship, but that *A's* estate descends to his heir.

Where two or more take out a warrant, pay the purchase money, and obtain a survey, they hold as tenants in common, unless the contrary is set forth; and either of them may require that the patent shall be made in that way.

"The jury find, that a warrant issued on the 7th of *June* 1773, to *William M'Murray* and *George Grant*, for 200 acres of land on the north side of *Penn's* creek above the *Laurel* run, near to, or including the waters of a large run which *Thomas Paschall* is on, in *Buffaloe* township, *Northumberland* county. That a survey of the land in question was made on the 24th of *August* 1773. That *George Grant* died intestate in 1779, and without issue, leaving *Thomas Grant* the lessor of the plaintiff his heir at law, and *William M'Murray* his survivor. That the purchase money was paid in equal portions, by the said *George Grant* and *William M'Murray*. That the defendants are in possession. But in whom the right is, the jury are ignorant, and pray the opinion of the court thereon. If the court should be of opinion, that the right to the whole did not survive, then they find for the plaintiff for one equal undivided moiety, with six cents damages, &c.; but if the court should be of opinion, that *William M'Murray* took the whole by survivorship, then they find for the defendants."

Duncan for the plaintiffs in error.

Watts for the defendant in error.

TILGHMAN C. J. The right of survivorship between joint-tenants is frequently unknown to the parties, and bears hard on the heirs of the one who dies first. In modern times it has not been favoured; but where a case falls within the reason of established principles, the courts have never ventured to alter the law. If a patent had been issued to *William M'Murray* and *George Grant*, I incline to think, that the circumstance of their having paid the purchase money

1812.

CAINES *v.* Lessee of GRANT.

equally, would not have been sufficient to render the estate a tenancy in common in equity. Such is the opinion of Lord *Hardwicke*, in 3 *Atk.* 375, although the contrary seems to have been taken for granted, in the argument of counsel, in 1 *Vern.* 361. But there are cases, where in equity, an estate will be considered as in common, although at law it is a joint-tenancy. In such cases, courts of equity proceed on the intention of the parties deduced from the nature of the transaction; as where several persons engage in an enterprise, which requires large advances besides the original purchase money, the draining of marshes for instance, or the erection of mills or manufactories. The case of *Lake* v. *Craddock et al.*, 3 *P. Wms.* 158, was a purchase of lands overflowed with water, for the purpose of reclaiming them. This was considered as a tenancy in common, although the legal transfer was in joint-tenancy. So if two advance money on a mortgage, though the estate is conveyed jointly, it shall be a tenancy in common. The case under consideration, is not embarrassed with a *legal joint-tenancy*, although the counsel for the plaintiffs in error have argued it on that principle. He contends, that a warrant and survey, with payment of purchase money, is the same, *in all respects*, as the legal estate. To this doctrine I never can accede, nor is it warranted by the case of *Sims's Lessee* v. *Irvine*, 3 *Dall.* 457, cited in support of it. The words of Chief Justice *Ellsworth*, in delivering the opinion of the Supreme Court of the *United States*, are these: "In *Pennsylvania*, payment and a survey, "though unaccompanied by a patent, give a legal *right of* "*entry*, which is sufficient in ejectment." It is certain, that it has been long held that a warrant and survey returned and accepted, even without payment of purchase money, gives a right of possession against all but the commonwealth; and an estate of that kind, is subject to the same rules of descent and conveyance, as a strictly legal estate, and also to the wife's right of dower &c. But it never has been held, that any thing short of a patent divested the commonwealth of the legal title. Nor is there any thing in a warrant and survey, which looks like a transfer of the estate. On the contrary, the warrant is no more than a direction to the surveyor to make a survey of the land applied for, and make return thereof &c. *in order for confirmation.* Where several

persons apply for a tract of land, there is no occasion to designate the interests which each is to have, because that will be more properly expressed in the patent by which the legal estate is granted. But if one dies before the issuing of the patent, we are led to inquire what was the probable intent of the parties. It is by no means to be inferred, that they intended to take an estate in joint-tenancy, from the circumstance of joining in the application for the warrant and survey. It is more reasonable to suppose, that this was done to save the expense of several surveys and patents. A tract of 300 acres will make two good farms, and I cannot help supposing, that the object is to take an estate in common, unless the contrary is expressed. Consider the nature of the purchase, unimproved land, which is not to be rendered valuable, but by considerable expenses in cutting down the woods, erecting buildings &c. The case is not quite so strong as that of land covered with water, but bears a strong resemblance to it. If either party, when the patent came to be made out, had insisted on the grant being made to both as tenants in common, I do not see how it could have been refused. If this principle is correct, it is decisive of the present question. For if *George Grant* had a right to demand a tenancy in common, that right must descend on his heir. We are to consider the case, as if application was now made for a patent. Where a patent is taken in joint-tenancy, there is no ground for conjecture as to the intent of the parties. They must be presumed to know the law, and to have made their election to take the chance of survivorship. But without some evidence of this intention, stronger than what arises from the warrant survey and payment of purchase money, it appears to me that the scale inclines in favour of an estate in common. I am therefore of opinion that the judgment should be affirmed.

YEATES J. after stating the case, delivered his opinion as follows:

The question is, whether *M'Murray* took the whole of the tract by right of survivorship?

It is said to be the rule in equity, that where two or more purchase lands, advance the money in equal proportions, and take *a conveyance to them and their heirs*, this is a joint-

1812.

CAINES v. Lessee of GRANT.

tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to one of them as well as the other. But where the proportions are not equal, and this appears in the deed itself, it is otherwise. 1 *Equ. Ca. Ab.* 291. But does this doctrine apply to the circumstances of the present case? Here are no words of grant, or absolute investiture of any defined tract of land. A survey was indispensably necessary, before a title could vest, and even then, according to the terms of the warrant, "both it and "the survey, in case the warrantees fulfilled the agreement "within six months, were declared to be valid, otherwise "void." The warrant was an authority to the surveyor-general and his deputies, to separate the tract from the general mass of proprietary property, and was the inception of right, which, when duly followed up, would confer a good title. But it is evident, that the nature of the estate when perfected, would depend on the previous or subsequent agreement of the warrantees, united with the assent of the lords of the soil. Such would be the result, if there had been a written contract, which was not minute and particular as to the kind and quality of the estate intended to be purchased. For articles are considered in equity as minutes only. 2 *Atk.* 545. Many cases establish that articles are not to be considered in the same manner as formal dispositions. In case of a formal disposition, the lord chancellor has nothing to rectify by; but in case of articles, he has to consider what is the contract which the parties intended to enter into; and where the words are short or defective, to presume what was the probable intent. *Scho. and Lef.* 87. Great hardships and injustice often occur on the right of survivorship taking place; and courts of equity have taken a latitude in construing a tenancy in common, without the words *equally to be divided*, on the foot of the intent; and therefore determined, that if two men jointly and equally advance a sum of money on a mortgage, suppose in fee, and take that security to them and their heirs, without any words *equally to be divided between them*, there shall be no survivorship; and so if they were to foreclose the estate, the estate should be divided between them, because their intent is presumed to be so. 2 *Vez.* 258.

In ancient times, courts of law favoured joint-tenancies, in order to prevent the splitting of tenures and services.

1 *Wms.* 21. But the statute 12 *Car.* 2. *c.* 24, *s.* 1, has reduced the several sorts of tenure, to socage tenure only, and the reason of the law having ceased upon the abolition of tenures, courts of law incline the same way with chancery. 1 *Wils.* 165., 3 *Atk.* 525. Courts of equity however, had long before been favourable to tenancies in common, whereever they could lay hold of any words to construe it so, from its being a greater equality, a better provision, and preventing estates from going by accident contrary to the intent. 1 *Vez.* 166. While the laws of this commonwealth continue in their present state, and certain words in conveyances and wills, have the legal operation of conferring an estate in joint-tenancy, we are imperiously bound so to declare it. But where two or more persons, with or without families, have joined together, to take up or purchase lands, in order to advance their fortunes in life, I should require strong proof to satisfy my mind, that they meditated survivorship in their transactions, and gambled their lives respectively against each other.

During the argument, it was admitted by the counsel for the plaintiffs in error, that the general practice in modern times in the land office, in cases of patents founded on warrants to more persons than one, was to state therein, that they had applied to the commonwealth as tenants in common; but nothing was asserted of the usage before the *American* revolution. This court had no difficulty in determining the question before them, but wished to have the proper offices consulted, before they gave their opinions. I have applied to the secretary of the land office, and also to the surveyor-general, for that purpose; and the former, at my instance, has searched the records of his office. I have not been furnished with any case, wherein words of severalty have been used, on the application of two or more persons for a warrant, or that the warrantees have been styled joint-tenants therein. In some instances, on a warrant obtained by *A* and *B*, the patent has been made out, *to them, their heirs and assigns for ever;* and in others, the words *as tenants in common* have been superadded. But I have met with no case, wherein a warrant has issued in favour of two or more persons, and one of them has died, so as to ascertain the form of the patent thereon. On the whole of the

1812.

CAINES v. Lessee of GRANT.

researches which have been made, I am abundantly satisfied that no settled practice or usage on this subject, has obtained in the proprietary land office, upon which we can with safety rest our decision in the present suit. In *Cuyler et al.* v. *Bradt et al.*, in the court for correction of errors in the state of *New York*, where several patentees bore in equal proportions the expense of obtaining a patent, and by the recital of deeds among themselves, it appeared they intended to purchase in common, it was adjudged that they should be taken as tenants in common, and not as joint-tenants, though the patent was to them jointly. 2 *N. Y. Cas. in Err.* 326. In that case it was said by *Benson*, Justice, who delivered the opinion of the court,—"it might be insisted, "that *G. V.*, having contributed an equal fourth of the ex- "pense in acquiring the land, that fact therefore was in itself "sufficient to imply an existing trust in favour of him; that "he was to have an equal fourth part of the land in seve- "ralty, and that a court of equity would accordingly, in case "of his death, have compelled the surviving patentee to have "conveyed a fourth part to his representatives," &c. *Ib.* 334.

In *Higbee et al.* v. *Rice*, in the Supreme Judicial Court of *Massachusetts*, *Parsons*, Chief Justice, draws a distinction between grants by the legislature of that state, and those by private persons, founded on universal practice, which has given it the force of law. It is there held, that grants by virtue of acts or resolutions of the legislature, to two or more persons in fee, are construed as conveying to the grantees estates in common, unless a different tenure should be expressed in the grant. 5 *Tyng.* 350. But a different doctrine has obtained in *Virginia*. In *Jones* v. *Jones*, determined in the Court of Appeals in 1793, (1 *Call.* 458) a father and two sons obtained separate patents for 400 acres of land each, adjoining one another; the father afterwards obtained another tract of 400 acres, and the three afterwards take one *inclusive* patent to them and their heirs, for the several tracts, and another tract adjoining of 1162 acres; and it was adjudged, that this destroyed the separate estates in the first three tracts, and created a joint-tenancy in the whole 2762 acres, comprized in the last patent.

Should a case be brought before us, wherein the naked abstract question of law, would arise on a grant of lands by

patent *to A and B, and their heirs and assigns for ever*, without any other words indicative of intention, and in the absence of all proof whatever relative thereto, and our opinions be required, whether an estate in joint-tenancy, or tenancy in common passed thereby, it is to be hoped, that we should decide as befitted our judicial stations. But the present is not that case; and circumstanced as we find it, I have no hesitation in declaring, that the lessor of the plaintiff in the court below was entitled to recover one moiety of the lands surveyed under this warrant, as heir at law of his brother *George Grant;* and that therefore the judgment rendered in the Common Pleas should be affirmed.

BRACKENRIDGE J. There would seem to me to be some reason for the right of survivorship, in the case of joint property, in a personal chattel, such as a horse or a servant. But whatever reason there may have been for the principle in the case of real estate, *under feudal tenures*, it would seem to be weakened considerably from what it once was. In *England*, from whence we derive our jurisprudence, there has been long a leaning against it. It is even termed *odious;* and no wonder; for that the longest liver should take all, can be reasonable only where the tenant dying first, has left no issue to be provided for. But this *jus accrescendi*, or right of survivorship, takes place to the exclusion of even immediate issue, as well as the right of dower.

The courts of law have long leaned against it; and in many cases have restrained its existence. In a devise to two, *equally to be divided, or share and share alike*, these words have been construed a tenancy in common. It is not yet got the length of being so construed in a deed, but seems to be in full march towards it.

It would seem to be understood, that it has been introduced into *Pennsylvania;* though certainly it is a principle that might well have been considered as left behind in our colonization. It was certainly not con-natural with our state of society, or at least necessary for it. The tenancy of property in severalty, the subdivision of property, the providing for the issue, was favourable to our population, and more congenial with the spirit of our laws in other cases. Much

1812.

CAINES v. Lessee of GRANT.

more is it allowable here to lean against it than in England, where it has so long struck root.

It is in equity cases in *England*, that the courts have found it in their power to restrain the principle. It is a maxim, that the right of survivorship is not *favored in equity*. In a mortgage, there shall be no survivorship. 2 *Vez.* 258. The *indulgence of a court of equity*, is an expression in 3 *Peere Wms.* 161. The payment of money creates a trust for the parties advancing the same; and this shall be construed a trust for them in common. A covenant by a joint-tenant to sell, though it does not sever the joint-tenancy *at law*, does *in equity*.

The law as it stands at this day on this head in *England*, is precisely as laid down in an equity case, which I cannot cite, viz. "Great doubts have been entertained by judges both at law and in equity, as to words creating a joint-tenancy; and it is clear *the ancient law was in favour of a joint-tenancy*, and that law still prevails. *Unless* there are some words to sever the interest taken, it is at this moment a joint-tenancy, notwithstanding the leaning of the courts lately in favour of a tenancy in common. For the courts seeing the inconvenience, wherever they could find any *intention* of severance, have been desirous to avail themselves of it, and have laid hold of *any words* for that purpose. Many distinctions have been raised in equity; as where persons are in trade and have joint debts due to them. the courts say, it could not be *intended;* and therefore *in equity* they say, *it could not be the agreement.* So, if two people join in lending money upon a mortgage, equity says it could not be the *intention* that the interest should survive. *From the nature of the contract*, the intention of severance may appear."

I take it to be now understood to be the common law of *Pennsylvania*, that any evidence of grant from the land office, *short of a patent*, can amount but to an *agreement to convey*, and is but in the nature of an *equitable interest;* though, for all purposes, *except that of conclusively entitling*, it is considered as a legal estate. It carries with it the incidents of descent, dower, curtesy, lien, &c. Even an improvement right, is now held to be the subject of these; and requires an inquisition in proceeding to a condemnation for

sale, as in the case of a freehold. But there is one case, in which nothing short of a patent has been considered as more than an equity. On motion to quash a writ of *capias* against a freeholder, *the patent must be produced.*

But the principal point of view in which it is considered but an equity, is with relation to interfering claims at the office. Until the patent is obtained, there is in contemplation of law *a right to refuse it.* The having paid the whole purchase money in the case of a warrant, or but a dollar in the case of a lottery ticket, and survey thereon, can make no difference. A distinction has been taken, but it has no foundation in reason or in principle; for the common law governs in the case of this contract, as in that of any other. The *whole*, or a *part* consideration paid, cannot affect the propriety of the term legal or equitable, or the nature of the interest. It results from the nature of the grant, subject to the proceedings of the office, that it could not be in the power of the parties grantor or grantee, to make it otherwise than an *equitable interest.* For even in the case of a warrant for a precise spot, it may have been previously appropriated by a settlement, so as to found an equity which would prevail against the warrant. There was no time when the grantor might not have said, you did not inform me that there was a settlement on this ground, when you made your application, *I will not confirm it.*

In few cases have warrants ever been *precise.* It is but in the nature of an order to measure off from the mass, what, when measured off, comes to be so distinguished as to be the subject of an absolute conveyance. It is one thing to have a grant absolute as to the *quantity*, and *interest* of estate, and another thing to have it absolute as to *the description of the place where.* The description has seldom been so particular, but that other ground may have been taken. It usually amounts to no more than *thereabouts.* The warrant is but *ambulatory* until fixed by *a survey and return;* and is to be understood subject to the exceptions of the claims of others. Between these claims, why shall not the maxim apply of *vigilantibus subvenit lex;* and a prior equity be barred in favour of a later, by a period *short of the statute of limitation?* In other words, shall not circumstances justify giving the legal estate to the greater equity? We talk of *dis-*

1812.

CAINES v. Lessee of GRANT.

continuing an improvement, *abandoning* an application. Why not a survey, or at any other stage of perfecting the claim? As in any other case, may not the purchase be considered waved? For the purpose of hearing claims on all these grounds of equitable consideration, evidence of office right *short of a patent*, cannot but be considered in the nature of a claim in equity. Otherwise all question of who shall have the patent, would be at an end. By an act of assembly of 1797, warrant and survey and seven years possession, gave a title, though *no patent;* but that act is repealed. 1 *St. L. Appen.*

Are there not objects for which an office is kept up, and a right to fees on taking out patents? The public has an interest in every one completing his title. Why not an ejectment to enforce compliance with the paying for *the making out and enrolling the patent?*

Take it, that the name of one is used in a warrant, and another has paid the purchase money, does not the office hear, and give the patent to the *cestui que* use? Is not this exercising the power of Chancery? What but a chancery case could give this equitable jurisdiction? If an appeal lies from the board of property, it is because we have not a Chancery Court.

If two have paid money on a warrant, is the office bound to make out the patent, but *as tenants in common?* Why is it that it has been so usual for two or more to join in taking out a warrant? The poverty of the settlers. The office fees were the same in a smaller or a larger grant. The expenses of surveying, provisions and chain carriers, little less. It never was the *understanding* here, that a right of survivorship existed.

In an act of assembly in the year 1797, confirming certain grants, it was with this qualification: "that if either party "dies, the survivor takes but his purpart." 1 *St. L. Appen.*

By the act of 1705, under the statute of distributions, or sale by agency of law under execution, land shall be holden in severalty, and not in joint-tenancy. These provisions shew the legislative sense with regard to this principle.

Chief Justice *Parsons*, 5 *Mass. Rep.* says, that in the case of a public grant in that state to one or more, a joint-tenancy is not to be construed. *The intent is to be looked at;* and it

has been invariably considered from the first settlement of the country, as vesting in the grantee but an *estate in common.*

Judgment affirmed.

1812.

CAINES *v.* Lessee of GRANT.

5b 129
3s r323
2r 94
2w274
2w275
6w318
7w272
8w441
9w507
1wh318
6wh161
1 475
6 253
7 508
9 158
8 240
2 461
5 57
5 546

Lessee of BILLINGTON *against* WELSH.

Sunbury, Tuesday, June 9.

THIS was an ejectment for one messuage, one barn, one garden, twenty acres of arable land, ten acres of meadow, and seventy acres of woodland, in the county of *Centre.*

Where a parol sale of lands has been made, money paid, and possession delivered, the contract is good between the parties; but to make it good against a *bona fide* purchaser, there must be clear evidence of notice to him, either actual or *legal.* *Legal* notice exists only where there is a violent presumption of *actual* notice. Undisturbed possession by the equitable owner, has generally been considered legal notice; but it must be a clear unequivocal possession. *Hence,* where *A* bought by parol from *B,* a corner of *B's* tract, paid for it, was put into possession and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to certainty, and on *B's* own part there was a forge, dwelling house, grist and saw mill, and buildings for the workmen, which with *A's* buildings, might strike the eye as one establishment, the possession of *A* was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against *B.* The equity of a second purchaser will prevail over such a title as *A's,* under these circumstances, particularly if *A* gave no actual notice of his title, when he probably knew of the judgment, execution and sale.

The cause was tried before *Yeates J.* at a Circuit Court in *Bellefont* in *June* 1809, when the following case was in evidence:

In 1787, one *Daniel Turner* made a slight improvement, and obtained a private survey of between 800 and 900 acres, including the premises in question. He married the sister of the defendant *Welsh;* and in consideration of the latter having paid about 20*l.* for him, he agreed to let *Welsh* have 50 acres of land on the west side of *Spring* creek, part of his improvement, and put him in possession where there had been a deadening of 12 or 15 acres made by *Turner.* On the 14th of *September* 1787, *Turner* obtained a warrant for 200 acres, including his improvement, on the great falls of *Spring* creek, on which a survey was made on the 18th of *November* 1802, of 234 acres 27 perches. Previous to this, *Welsh* worked the lands, erected a house and still house, carried on the business of a distillery, and had resided there ever since, having cleared about 15 acres of land. The survey of 1802 was made in strict conformity to the warrant, and included the fifty acres; but it was not intended that

1812.

Lessee of BILLINGTON v. WELSH.

Welsh should have any right in the warrant, *Turner* meaning at the time to take out other warrants to secure his claim by improvement. *Turner* after the warrant, erected a forge, a grist mill and saw mill, with buildings for their accommodation, and for some time carried on business in good credit. On the 5th of *February* 1798, *Billington*, the lessor of the plaintiff, obtained a judgment against him for 1785*l.* 8*s.* 8*d.*; and in *April* following one *Charles Drum* obtained another judgment for 50*l.* Upon this judgment a *fi. fa.* issued, and was returned "levied on 300 acres more or less in *Patton* township, with a forge, grist, and saw mill thereon." A *pluries vend. exponas* issued returnable to *August* 1801, upon which the premises were struck off to a purchaser, who did not comply with the conditions of sale, and the sale was therefore set aside. A second *pluries venditioni* was awarded to *November* 1801, when the lands were bought for the lessor of the plaintiff, to whom a conveyance was made in *December* following. The defendant's claim involved a control over the water of the creek, which might be of serious detriment to the iron works.

Upon the trial, it was argued for the defendant, that he had a good equitable estate as against *Turner*, and all the world, having notice; and that his actual possession was constructive notice to the lessor of the plaintiff, who was by this circumstance put upon inquiry into the title.

On the other hand it was said, that the omission of *Welsh* to give actual notice of his title, when from his connection with *Turner*, his residence on the land, and the general notoriety of executions and public sales, he must have known of the proceeding against the land as *Turner's* property, was a fraud; and that as to the possession, it was not of that distinct and separate kind that would constitute notice of a distinct title, being in the first place unascertained as to limits and boundary by a survey, and in the next place, combined with a possession by *Turner*, and his workmen, whose different buildings would with those of the defendant strike the observer as one establishment.

His honour charged the jury, that if the defendant really had notice of the execution and sale, it was a fraud to omit warning all persons against purchasing the part claimed by himself. That as to notice from possession, an adverse un-

1812.

Lessee of BILLINGTON v. WELSH.

mixed possession was certainly constructive notice to a purchaser, as in the case of a sale by a trustee out of possession. But here the debtor was in possession also; and though this was not so strong as the case of the lord of a manor, and his cottagers, yet the nature of *Turner's* property required houses &c. for the accommodation of colliers, workmen, and the like; and a possession under such circumstances, would not be such notice as in a common case it might be. As however no cases exactly similar had been shewn, his honour recommended a verdict to be taken for the plaintiff, subject to the further consideration of the question, as a point reserved; but the defendant's counsel not assenting to this, the Court instructed the jury to find for the plaintiff; and after the verdict was so found, it was agreed by the counsel on both sides, that the case should be taken into this Court upon the judge's notes, and here argued as fully as it could be in the circuit court, as upon a motion for a new trial.

Huston and *Watts* for the plaintiff.

Burnside and *Duncan* for the defendant.

TILGHMAN C. J. The plaintiff was a purchaser at the sheriff's sale, by virtue of an execution levied on a tract of land belonging to *Daniel Turner*. The defendant claims under *Turner* by a parol agreement accompanied with possession. Although our act of assembly requires all contracts concerning land to be reduced to writing, yet under the decisions which have been made, there can be no doubt, but that where the contract has been executed and carried into effect by payment of a valuable consideration and delivery of possession, the contract is binding between the parties. But where a third person is to be affected, the case is more difficult. In order to bind *him*, something must be shown, which makes it unequitable to break the parol contract. The defendant undertakes to show that the plaintiff purchased with notice of the contract; and if so, it would certainly be against equity that he should recover in this suit. But it behoves a person who stands on a defence of this kind, to make out a clear case. No actual notice has been proved, but it is contended that the possession of the defendant was notice *in law*.

1812.

Lessee of BILLINGTON v. WELSH.

These *legal* notices, being sometimes contrary to the *fact*, are confined to cases in which violent presumption of actual notice arises. The undisturbed possession of land, has generally been considered as legal notice, because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possessor. But to intitle the bare possession to such weight, it ought to be a clear unequivocal possession. Let us examine what kind of possession has been proved in the present case. The defendant is the brother-in-law of *Daniel Turner*, and lived at the time of the sheriff's sale, and for a considerable time before, on one corner of *Turner's* tract. *Turner* had erected a forge, grist mill and saw mill, with all those small buildings, which are connected with works of that kind. It is well known that in such cases, the workmen frequently occupy houses with small portions of land annexed to them. And when a person throws his eye over a forge and mills, and the adjacent buildings and inclosures, it naturally occurs to him, that they all belong to the proprietor of the works. The defendant has been guilty of extraordinary negligence; for not only has he omitted to survey and mark the bounds of his claim, but he has given no decided evidence of boundary. His contract was to have fifty acres of land somewhere about his house; but whether he was to cross the stream and include the land on both sides, so as to have the command of the water, was not proved. Now this is a most important circumstance. For if he has the command of the water, which it is said he claims, he may exercise it in such a manner as to do material injury to the iron works erected by *Turner*. The defendant's claim is principally woodland, consequently the knowledge of his possession is so much the more difficult. Under all these circumstances, it would be going too far to say, that such a possession is notice to all the world. How could any man reasonably suppose, that *Turner's* brother-in-law, occupying a small parcel of land at no great distance from the iron works, had good title, not only to the land on which his house and fences stood, but also to the water, to such a degree as to deprive *Turner* of the right of using the stream, to the full extent that his works might require. There is another circumstance unfavourable to the defendant. Connected as he was with *Turner*,

1812.

Lessee of BILLINGTON v. WELSH.

it can hardly be imagined that he was ignorant of the judgment against him, and it became his duty to make known to the world this secret title to part of the land which passed for *Turner's*. It does not appear that he made any publication on this subject. Not having done so, it seems to me, that he acted at his peril, and that he has no right to complain, if his title is impeached by persons who had not actual notice of it. Perhaps in another ejectment, he may make a stronger case. But, on the evidence produced at this trial, I think the judge was right in advising the jury to find for the plaintiff. I am therefore against granting a new trial.

YEATES J. after stating the case, delivered his opinion as follows:

It was admitted that *Welsh* gave no notice of his equitable title to the sheriff at the time of the levy, or at either of the sales; though it was proved by four witnesses, that the sales intended to be had, were known in the neighbourhood of the land. I thought it reasonable to presume, and so instructed the jury, that the defendant *Welsh* knew of what was going forward, and that he ought to have given notice of his claim to the sheriff, and warned all persons against purchasing, if he really knew of the intended sales. Failing herein, a legal fraud would be imputed to him. This presumption was founded on the notoriety of the premises being taken in execution, and of the intended sales under the sheriff's advertisements;—on the delay to sell till above two years after both judgments;—on one sale being set aside; and on the defendant's living on good terms with his brother-in-law on the same tract of land, and who could not therefore be supposed ignorant of his embarrassments. But it was strenuously contended on the part of the defendant, that his actual possession of the lands, and carrying on a distillery, was constructive notice to a purchaser at the sheriff's sale, and that he was bound to examine into that fact before he bought. No law cases were produced on this point, and my mind was unsettled on the subject. I well recollected that a trustee in *possession* of the estate, conveying for a valuable consideration without notice, the purchaser would hold the estate against the *cestui que* trust; but not so if the latter was in possession at the time. 2 *Fonbl.* 170., 2 *Bla. Com.* 337. But

1812.

Lessee of BILLINGTON v. WELSH.

how far the law obtained as to constructive notices in general cases, or whether it would extend to a case circumstanced like the present, I was not prepared to assert. I therefore advised that the point should be reserved for further consideration. This the plaintiff's counsel acquiesced in, but the defendant's counsel refused to agree thereto. The jury found a verdict for the plaintiff, subject to the Court's opinion on the question of law, considered as a reserved point; and it was agreed by mutual consent, that the argument should be carried into bank, to be there proceeded in, as fully as it might be done in the Circuit Court, on the notes of the trial.

I have had sufficient time to consider the question, which is merely of a legal nature, whether upon the facts disclosed on the trial, there was implied notice to the sheriff's vendee of the defendant's equitable title.

Constructive notice is no more than evidence of notice, the presumptions of which are so violent, that the court will not allow even of its being controverted. If a man confesses notice, that the estate at law was in a third person at the time when he purchased, he is bound to take notice what the trust is. 2 *Freem.* 137, *pl.* 171. It has been determined that a purchaser, *being told* particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had which was a surprise upon him. 2 *Ves. jun.* 440. It was sufficient to put the purchaser upon inquiry, that he was *informed* the estate was not in the actual possession of the person with whom he contracted, that he could not transfer the ownership and possession at the same time, that there were interests as to the extents and terms of which it was his duty to inquire. But notice of a tenancy will not it seems affect a purchaser with constructive notice of the lessor's title. *Sugd. Law of Vend.* 499. And a purchaser *bona fide* and without notice cannot be affected by the mere circumstance of the vendor being out of possession many years. Thus in *Axwith* v. *Plummer*, 3 *Bac. Ab.* 644. *first ed. Mortgage E. s.* 3, where *A* covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made, and *A* thirteen years afterwards, surrendered the same lands to *B* for valuable consideration, without notice of the covenant, *B* was held

1812.

Lessee of BILLINGTON v. WELSH.

to be intitled to the lands, and the covenantees were left to their remedy at law. This authority, which is marked with approbation by *Sugden* in the page already cited, goes the full length of deciding the present question. It is of peculiar importance, that notice should be given at sheriff's sales of adverse claims; and the observation of lord commissioner *Rawlinson*, 2 *Vern.* 159, that "equity has always been careful not to impeach purchasers by presumptive notice," holds with appropriate force, where lands have been sold by process of law. The interests of debtors, creditors, and purchasers are all involved in the principle. Here no notice whatever was given of the defendant's claim. The advertisement was of 300 acres more or less in *Patton* township with a forge, grist and saw mill thereon, and the lands were so conveyed by the sheriff. A tract of 234 acres 27 perches was surveyed to *Turner* under his warrant for 200 acres on which he dwelled and made valuable improvements: and it is now sought to reduce the quantity sold to 134 acres 27 perches, and to affect the right of the purchaser as to the water of *Spring* creek, which is indispensably necessary to the carrying on of his manufactories. At best the possession of the defendant was of a mixed nature. His pretensions were not defined by marked boundaries or an actual survey. If one inclining to purchase, had previously viewed the premises, he would have seen nothing but what usually occurs, where forges, grist and saw mills are carried on, out-houses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner, as an exclusive unmixed possession, in common cases might reasonably seem to give.

In every view which I have been able to take of the case, I am of opinion, that judgment should be rendered for the plaintiff on the verdict.

BRACKENRIDGE J. being unwell, gave no opinion.

Judgment for plaintiff.

1812.

Sunbury, Tuesday, June 9.

GORDON *against* the Lessee of MOORE.

IN ERROR.

Before a settler ascertains his boundaries by warrant and survey, he may, so far as concerns his neighbours, ascertain his limits by lines marked on the ground These lines are notice to the neighbourhood, and unless some particular objection should occur to them, must be adhered to, when the title comes to be completed by warrant, survey, and patent. It is therefore competent for one of two interfering settlers, to give evidence, that before the other had taken out a warrant, the former had declared his intention to extend his claim in a certain direction by a marked line, of which the other had notice.

THIS case came before the court upon a bill of exceptions to the Common Pleas of *Centre* county, who rejected evidence offered by the defendant below, under these circumstances:

John Moore, the lessor of the plaintiff, and *Gordon* the defendant, had each commenced an improvement, and each by taking 300 acres, including his improvement, might embrace the land in dispute. *Moore*, who was an unmarried man, built a small house in the autumn of 1803. In the spring of 1804 he brought his father and his family to the land, and built another house in which they resided. *Moore* was a wood cutter at a neighbouring iron works, but his home was the house in which his father's family lived. In *March* 1805, he took out a warrant, by virtue of which a survey was made on the third of *July* 1805, of 255 acres, 139 perches, including his improvement and also the land in dispute.

Gordon gave evidence of his own improvenent, and then offered to prove, that in the autumn of 1804, he and *James Moore*, the father of *John*, agreed to a division line and marked it on the ground; but the Court rejected the evidence, upon the ground, that *James Moore* had no power to fix the boundaries of his son's land.

Huston argued for the plaintiff in error.

Burnside contra.

TILGHMAN C. J. This case comes before us on a bill of exceptions, and turns on the admissibility of the parol evidence of a division line made between *Gordon* the defendant below and *James Moore* father of the plaintiff, which was offered on the part of the defendant and rejected by the court. In order to determine this, we must take a view of the preceding evidence, which was to the following effect. [The Chief Justice here stated the facts.]

1812.

GORDON v. Lessee of MOORE.

We must take into consideration the peculiar nature of this title acquired by improvement and settlement. A settlement having been commenced, the settler gained a right of pre-emption of 300 acres of land, provided there was so much vacant and unappropriated adjoining his improvement. But as *John Moore* and *Gordon* had an equal right to 300 acres, it might become necessary that each should abate something of that quantity. It is understood to be the law, that before a settler ascertains his boundaries by warrant and survey, he may, so far as concerns his neighbours, ascertain his limits by lines marked on the ground. Before this is done, it is impossible to say what land is intended to be included in the settlement. For it may be laid off in various directions, and less than 300 acres may be taken at the pleasure of the settler. The lines being marked, notice is given to the neighbourhood; and unless some particular objection should occur, it is reasonable that those lines should be adhered to, when the title comes to be completed by warrant, survey and patent. Now granting that *James Moore*, the father of *John*, had himself no right of pre-emption, and that he could do no act to fix the boundaries of his son, without authority derived from him, it was material for *Gordon* to prove, that previous to *John Moore's* taking out a warrant, he *Gordon* had declared his intention to extend his claim, as far as the line agreed on with *James Moore;* and as *John Moore* was generally absent and employed in wood-cutting, and his father was always on the land, it was very proper that the father should receive notice of the extent of *Gordon's* claim. *Gordon's* improvement was to the eastward of *Moore's*. He might for aught that appears, have taken up what land he wanted by going to the eastward of his improvement, without touching the land now in dispute. It was his duty therefore, if he meant to go to the westward, which would bring him in contact with *John Moore*, to give early notice of his intention, in order that *Moore* might govern himself accordingly. In this point of view, I am clearly of opinion, that the evidence offered by *Gordon* was competent, and ought to have been received. At the same time, the Court should have informed the jury, that the act of *James Moore* had no effect on his son's title, unless autho-

1812.

GORDON v. Lessee of MOORE.

rised by him. My opinion is, that the judgment should be reversed, and a *venire facias de novo* be awarded.

YEATES J. Whether the consentible line established between *James Moore* and *Robert Gordon*, which was offered to be proved on the trial, was binding on *John Moore* under the circumstances of the case, would depend on the fact of ownership of the improvement under which the claim was set up by the plaintiff below. But that the same was admissable evidence to designate the claim of the plaintiff in error under his improvement, previous to the warrant taken out by the adverse party, there can be no doubt whatever. The plaintiff below might have demanded of defendant's counsel for what purpose this evidence was offered. But not having done so, if the fact attempted to be established was properly receivable for any purpose, it is manifest error if the evidence was rejected.

I am of opinion, that the judgment of the Court of Common Pleas be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. was sick during the argument and gave no opinion.

Judgment reversed and *venire de novo*.

HARTZELL, surviving administrator of BROWN, *against* BROWN's heirs.

Sunbury, Tuesday, June 9.

Administrators, who for their own interest, contest the claim of persons asserting themselves to be heirs to the intestate, are not intitled in case of failure, to charge the expenses of the suit, to the intestate's estate. *It seems* otherwise, if the defence is made from a sense of duty as trustees.

THIS was an appeal by the surviving administrator of *Engelhart Brown*, from a decree of the Orphan's Court of *Mifflin* county.

In a supplemental account filed by the administrators, they charged the estate of their intestate, with various sums expended for costs, fees of counsel &c. in several suits brought against them by persons claiming as next of kin to *Engelhart Brown*. These suits were defended upon the ground that the plaintiffs were not the next of kin.

It appeared that on the 30th of *May* 1803, the administrators, agreeably to the ninth section of the act of 29th

September 1787, in relation to escheats, filed information in the office of the secretary of state, that *Engelhart Brown* had died intestate, without heirs or any known kindred, whereby his estate had escheated to the commonwealth; and in this manner entitled themselves to one third of the nett proceeds of his personal estate. More than one half of the expenses, were incurred subsequent to this information and claim; and before the suits were brought, a refunding bond with good security was filed with the proper officer, and notice given to the administrators. By the depositions there was some reason to doubt whether the plaintiffs in the suits were next of kin; but the weight of evidence was that they were, and so was the ultimate decision.

The Orphan's Court disallowed the charges, for the following reasons.

1. Because it appeared from the proofs and depositions, that the administrators had sufficient evidence before them, before the bringing of any suit, that the plaintiffs were the legal heirs of their intestate, and that the defence of the suits which were afterwards brought, was intended for the purpose of securing a portion of the profits for themselves.

2. Because more than one half of the expense incurred, was subsequent to filing the claim of the administrators with the secretary of the commonwealth, as an escheated estate; and by the provisions of the act about escheats, the whole expense of securing the escheated estate, is to fall on the persons who made the information, as they are to have a portion of the escheated estate.

3. Because a sufficient refunding bond with good security was lodged with the proper officer, before any suits were brought, and notice of the same given to the administrators.

4. Because by no law can an administrator dissipate the very estate which is the object of the suit, in defending against a supposed claim, when there is an ultimate failure in supporting such defence. That the administrators cannot become parties in court in any contest as to who is the legal heir, but are merely stakeholders.

The Court therefore decreed that the whole of the said supplemental account should be rejected, except forty dollars, which might be considered as reasonable compensation for advice to the administrators how to proceed.

From this decree the administrators appealed.

1812.

HARTZELL v. BROWN'S heirs.

TILGHMAN C. J. The question is, whether the administrators shall be allowed the expenses of several suits brought against them by the next of kin of the intestate, to recover their shares of his estate. They defended these suits, on the ground of the plaintiff's not being the next of kin, and there appears to have been reason for doubt on this subject. I would not lay it down as a principle, that an administrator shall in no case be allowed the costs of defending a suit against persons setting themselves up as heirs. Every encouragement should be given to defend the estate against all unjust claims. But at the same time every discouragement should be given to attempts of trustees to carry on speculations for their own private interest, at the expense of the estate entrusted to them. It is clear that the administrators in this case had an eye principally to their own interest. The investigation of the fact, whether the persons claiming, were the real heirs of *E. Brown*, was to be at the expense of the estate. But one third of the estate was to go into the pockets of the administrators. To secure this, they filed an information in the secretary's office, stating that *Brown* died without heirs, in consequence of which his estate became liable to escheat. They took no further steps on this information, but lay by until it should be determined in the suits at law, whether or not the persons setting themselves up as heirs, could make good their claim. These suits having been tried, with various success, the point was finally determined against the administrators. And now they want to throw the whole costs on the estate, pretending that they acted for the best, and as their duty required. The filing of the information throws a cloud over their conduct. It tended to lead them astray from the path of duty. Although the persons claiming the estate might not have been the heirs, yet it was probable that there were heirs of *E. Brown* in *Germany*, the country from whence he emigrated. Now, can any one suppose, that after interesting themselves in the escheat of the property, the administrators would have taken pains to defeat their own object, by an enquiry in *Germany?* On the contrary, it is not uncharitable to conclude, that they consulted their own interest, more than the interest of the estate they represented. The allowance of costs in such cases, is a good deal discretionary, and should

depend very much on the purity of the administrators' conduct. In the present instance, on a full consideration of all circumstances, it appears to me, that the Orphan's Court were right in refusing to let the costs be a burthen on the estate. I am therefore of opinion that the judgment should be affirmed.

1812.

HARTZELL v. BROWN'S heirs.

YEATES J. In all cases of expenditures by executors or administrators touching the estates of the persons committed to their care, the laws of this government, and the practice of courts of justice, have ever been to make them full allowance for the sums of money by them disbursed *bona fide* in the transaction of the business of their several trusts. Where such persons have been unsuccessful in repelling claims brought against the estates of their decedents, but have proceeded with that caution and circumspection which might reasonably be expected from them in their own private concerns, their conduct will not be weighed in the nicest scale. The great test of propriety of action in them is industry, prudence, and fidelity to their trust. The information of *John Hartzell* and *Joseph Yotter*, the administrators of *Engelhart Brown*, filed with the governor on the 30th of *May* 1803, declaring that *Brown* had died intestate in 1797, leaving no heirs, whereby his estate had escheated to the commonwealth, and entitling themselves thereby to a certain proportion thereof, cannot be justified under all the circumstances of the case, consistently with these rules. The Orphan's Court of *Mifflin* county, on a full review of all the evidence, have considered forty dollars as a reasonable compensation for the expenses of the administrators since the settlement of their former account.

I concur that the decree of the Orphan's Court be affirmed. At the same time I cannot avoid saying, that from what passed on the trial of one of the suits before me, I should be inclined to think that the disbursements of the administrators up to the time of filing the information, might have been allowed. The justices of the Orphan's Court might be better acquainted with the views and acts of the administrators, than I can possibly be; I do not feel disposed at this day to disturb their decision, under all the circumstances of the case.

1812.

HARTZELL *v.* BROWN'S heirs.

BRACKENRIDGE J. was prevented by sickness, from giving an opinion.

Decree affirmed.

Lessee of BIDDLE *against* DOUGAL and others.

Sunbury, Wednesday, June 10.

IN ERROR.

Although the terms published at the opening of the land office on the 3d of *April* 1769, made all locations void, upon which a survey was not made in six months, and the purchase money paid in twelve, yet these terms were so uniformly relaxed, that in the case of a survey returned before the land had been duly acquired by another, and payment of the purchase money and interest at any time, the courts of law would have prevented the proprietaries from insisting on the forfeiture.

Hence where a loose location of the 3d of *April* 1769 was surveyed on the 15th of *May* 1772, and returned into office on the 3d of *July* 1772, but no purchase money was paid until the 27th of *Feb.* 1800, when a warrant of acceptance issued, and a patent was granted, it was held not to be competent to a person claiming under a descriptive location of the same date, surveyed on the 4th of *July* 1774, returned on the 16th and patented on the 17th of *August* 1774, to allege a forfeiture by delay of survey, or non payment of purchase money.

The non payment of purchase money, being a matter between the purchaser and the owner of the soil, no third person can take advantage of it, or has any thing to do with it.

The omission to pay the purchase money, after a survey returned, is not evidence of an abandonment.

THIS was a writ of error to the Common Pleas of *Northumberland* county.

It was an ejectment for sixty-eight acres of land, within the purchase of 1768, to which the plaintiff claimed title under a lottery application of the 3d of *April* 1769, No. 657, in the name of *Philip Harding*, for 300 acres of land upon *Chilisquaque* creek, about three miles from the mouth, in the forks of *Susquehanna*. Upon this a survey was made the 15th of *May* 1772 of 301 acres of land, about one mile from *Chilisquaque* creek, in the forks of *Susquehanna*. It was returned into office the 3d of *July* 1772, and on the 27th of *Febrary* 1800 the purchase money was paid to the commonwealth, a warrant of acceptance issued, and on the 28th a patent was granted.

The defendants claimed under a lottery application of the same date, No. 2732, in the name of *John Blair*, for 300 acres of land "adjoining *John Gillespie* on the east, "bounded by barrens, where he has an improvement in "the forks of the *Susquehanna*." On the 4th of *July* 1774, a survey of 278 acres was made, including 68 acres of the plaintiff's survey. On the 16th *August* 1774 it was returned and accepted, and the purchase money paid: on the 17th it was patented.

In both cases the title was regularly deduced from *Harding* and *Blair*.

To impeach the defendants survey, (which though posterior to the plaintiff's, was upon a location descriptive of the land in controversy, whereas his own was shifted) the plaintiff gave in evidence the field notes of *Jonathan Lodge* an assistant of *William Scull* the deputy surveyor, to prove that upon the 11th of *October* 1769, he made a survey of 210 acres on *John Blair's* location, which excluded the land in question. And to shew that the survey upon *Harding's* had been an actual and not a chamber survey, he produced a survey for *Joshua Virgin* on the 28th of *November* 1772, calling for lands of *Philip Harding*, which survey for *Virgin* was made by *Lukens*, who made the second survey for *Blair*. There was also evidence of marked trees, conforming to the survey. *Blair* lived upon the land in 1769 when *Lodge's* survey was made.

The defendant on the other hand endeavoured to impeach the plaintiff's title, by raising a question as to its having been made on the ground, and by producing the advertisement at the opening of the land office on the 3d of *April* 1769, in which it was stipulated, that if there was a failure in the party applying, in either procuring his survey and return to be made within six months, or in paying the purchase money and taking out a patent within twelve months, after the application, the proprietaries were to be at liberty to dispose of the land to any other person; and here, long before the purchase money had been paid by the lessor of the plaintiff, they had disposed of the land to *Blair* by accepting his survey of 1774, on payment of the purchase money by him.

The presiding judge in his charge to the jury, countenanced the defendant's objection, and stated the court's opinion to be, that as the survey of neither party was within six months, nor the payment within twelve months, the proprietaries had a right to exact a forfeiture, and to grant the land to whom they pleased; and they had accordingly granted it to *Blair* in 1774.

The court was thereupon requested by the plaintiff's counsel to charge the jury on the following points.

1. Whether in the case of a shifted or removed applica-

1812.

Lessee of BIDDLE v. DOUGAL.

tion, the right does not commence from survey made and returned, and whether a survey returned is not notice to all the world.

The court charged the jury on this point affirmatively; but remarked that if the plaintiff's survey was forfeited by his own neglect and delay in completing his title, and the defendant took advantage of that forfeiture, by completing his title, it did not apply to the present case.

2. Whether a survey made and completed on the ground, can be opened or extended so as to include land surveyed or returned on a posterior or removed warrant.

The court charged, that if the survey was made with the knowledge and approbation of the owner, and not fraudulent, and the other survey was not forfeited and void against a *bona fide* purchaser, it could not be opened.

3. Whether a survey being made for *Blair* in 1769, and completed by *Scull*, and a survey afterwards made for *Harding* and returned, *Lukens* his successor, in 1774 could extend the lines, and include lands in such subsequent right.

The charge of the court was, that if the survey made in 1769 by *Jonathan Lodge*, of the completion of which by *Scull* there was no evidence, was with the knowledge and approbation of *Blair* and not fraudulent, and if the survey of *Harding* was valid and good in 1774, he could not; but if void, the proprietaries could grant the land to whom they pleased.

4. Whether the acquiescence by *Blair* from 1769 to 1774 in the survey made by *Lodge* was not fatal; and whether there could be any extension so as to affect the rights of others fairly acquired.

This was presuming the survey made by *Lodge*, to have been known to *Blair*. It became a nullity by not being returned, and no legal right intervened in 1774, according to the conditions of sale, to prevent the land being granted to *Blair*.

5. The lessor of the plaintiff being a purchaser for a valuable consideration without notice, could he be affected by any latent equity or supposed mistake as to the quantity surveyed on *Blair's* prior right.

Both plaintiff and defendant are *bona fide* purchasers for

a valuable consideration; and if *Blair* obtained a legal title, the equity does not come into question.

6. The survey by *Lodge*, must it not be supposed to have been made with *Blair's* consent; and if he was dissatisfied, ought he not to have immediately complained, and had an order of resurvey or additional survey? If he lay by, until third persons obtained rights, could he affect such rights?

Whether the survey was with the consent of *Blair* or not, is not very material, as *Blair* applied upon the survey in 1774, at which time, it was optional in the proprietary to grant him the land or not.

7. Whether it is essential that all the lines of a survey should be marked on the ground? If any mark is found which designates a survey to have been made on the ground, is it not sufficient? And is not the return, evidence of a survey, until the contrary is established by clear testimony?

It is not essential to mark all the lines. If any mark is found which designates a survey, it is sufficient. The return is evidence until the contrary is clearly proved.

8. If a man holds by improvement, may he not circumscribe it by a survey; and if he does so, can he extend his lines, so as to affect titles acquired in the interim?

He may circumscribe his improvement by a survey, and cannot so extend it as to affect titles so acquired.

9. If a survey is made on a shifted application, and returned, though no purchase money is paid, and the return is after six months, will it not prevail against all who had not a good and subsisting title at the time of return? Does any forfeiture in such a case accrue to the proprietaries or the state, and can the proprietaries or the state consider the land as vacant, and grant it to another by warrant, location, or patent?

Under the conditions of opening the land office at the time of these applications, the survey will not so prevail, and the proprietaries may grant the land over.

There were two other opinions prayed, not material; and the plaintiff excepted to the charge in all the points in which the decision of the court was adverse to him.

The defendants also asked the opinion of the court upon several points, which are not material, except in one respect, the court inclining to think, that by so great a lapse of time

1812.

Lessee of BIDDLE *v.* DOUGAL.

as intervened between the plaintiff's survey in 1772, and the payment of the purchase money in 1800, there had been an abandonment. Verdict for the defendants.*

It was argued in this court by *Watts* and *Duncan* for the plaintiff in error, and by *Fisher* contra.

TILGHMAN C. J. This case appears to have been very warmly contested in the Court of Common Pleas. The opinion of the court was asked on no less than eleven points on the part of the plaintiff, and on four on the part of the defendant. However, as the opinions delivered on most of these points, have been acquiesced in, it is unnecessary to decide on any other questions than those which have been argued in this court.

The plaintiff claims under a location entered by *Philip Harding*, the 3d of *April* 1769, No. 657. A survey of 301 acres was made on this location the 15th of *May* 1772, which was returned to the surveyor-general's office, the 3d of *July* 1772. On the 27th *February* 1800, the purchase money was paid to the commonwealth, and a warrant of acceptance issued; and on the 28th of *February* 1800, a patent was granted to the plaintiff, to whom the title of *Harding* was deduced by a regular chain of conveyances. The plaintiff's location, is not applicable to the land in dispute, but is what is called a shifted location.

The defendants derive their title from a location entered by *John Blair* the 3d of *April* 1769, No. 2732, sufficiently descriptive of the land in dispute. On this location a survey was made by *Charles Lukens*, (deputy surveyor) of 278 acres the 4th of *July* 1774. This survey was returned the 16th of *August* 1774, and the purchase money having been paid to the late proprietaries, a patent issued the 17th of *August* 1774.

Thus it appears, that although the plaintiff's location was preferable in its number, yet the defendants had the right of laying their survey on the land in dispute, because their location called for the land, and the plaintiff's did not. In order to remove this objection to the plaintiff's title, he gave evidence that on the 11th of *October* 1769, a survey was made, but not returned, on *Blair's* location, by *Jonathan*

* *Vide* 2 *Binn.* 38.

1812.

Lessee of BIDDLE v. DOUGAL.

Lodge, an assistant of *William Scull*, at that time deputy surveyor of the district, *excluding the land in controversy*. This opened the way for the plaintiff's survey, which being made and returned two years before the survey under which the defendants claim, it became a question before the court below, whether the plaintiff had not forfeited all right to the benefit of his location, by his neglect to have his survey returned and the patent taken out in due time. The court were of opinion, that a forfeiture had been incurred, and that the late proprietaries possessed and exercised the right of granting the land included in the plaintiff's survey, on the ground of his not having complied with the terms on which his location was entered. It would have given me great pain, if in considering this question, I had found any room for doubt, because I am sensible that the peace of the country would have been disturbed by it. But I am well satisfied, that the vast mass of property, depending on location and survey, without payment of purchase money, rests on foundations too firm to be shaken by any principle of forfeiture. It is true, that the proprietaries, who at different times disposed of their lands on different terms and in different manners, were owners of the soil, and might sell how they pleased. But their sales are not to be compared to the sales of private persons. The great extent of their possessions, and the multiplicity of their contracts, made it necessary to establish public offices, in which certain customs prevailed, which in the course of time acquired strength enough to be binding on both parties, and which being known both to seller and purchaser, may be fairly considered as tacitly embodied in the contract. On the opening of the land office the 3d of *April* 1769, for the sale of the lands purchased of the *Indians* at *Fort Stanwix* in *November* 1768, the mode of selling was by location, survey and patent. A location was a short written application for a certain quantity of land, not exceeding 300 acres in a certain place; and the defendants' counsel are right in saying that the title acquired by a location must be construed according to the terms published by the secretary of the land office in *February* 1769. These terms were, that unless the survey was made and returned in six months, and the purchase money paid in twelve months, the contract should be void. I will not say what would have been the

1812.

Lessee of BIDDLE v. DOUGAL.

consequence, if the proprietaries had thought proper to insist on these terms, because it is notorious that they did not insist on them. We need not trouble ourselves with the consideration of conditions precedent and conditions subsequent; because be they what they may, those who imposed them, had a right to dispense with them, and they did dispense with them. In the first place they received so many locations on the very day of opening the office, (the 3d of *April* 1769,) that the making of surveys in six months was impossible, considering the small number of surveyors appointed by the proprietaries; and no others could make surveys. In the next place, they continued to receive and accept surveys on locations of the 3d of *April* 1769, down to the closing of their offices at the time of the revolution; nor do I believe, that a single instance can be produced of a survey being refused because not made in six months, or a patent denied because the money was not paid in twelve. Where there were conflicting claims, the board of property decided between the parties according to justice and equity; but the idea of excluding one party because he had not strictly complied with the terms of the contract, and granting to the other because it was the will and pleasure of the proprietaries to do so, was never entertained. And if it had been entertained, the courts of law would have interposed, because the proprietaries by their uniform conduct, had given just grounds for supposing that they had relaxed the original terms of purchase, and were willing to confirm the title on receiving compensation, that is to say, their principal with interest from the end of six months after entry of the location. I will not enter into the question whether the proprietaries formerly, or the commonwealth now, might not re-grant the land after public notice to the purchasers to come forward and pay their money at a fixed and reasonable time; or whether having parted with the possession in consequence of a survey, they would be put to their action of ejectment to regain it. No step of this kind has been taken by one or the other, and until it is taken, the purchaser has a right to insist on the confirmation of his title, paying principal and interest and the fees of office for issuing a patent.

I have spoken of the general custom of the land office. Let us now examine the conduct of the proprietary officers

1812.

Lessee of BIDDLE v. DOUGAL.

in the particular case before us. The first thing that strikes us, is that the surveyor-general received the survey of the plaintiff, although not made till upwards of two years after the entry of the location, and the survey of the defendants, although not made till after more than five years delay. When the defendants' patent issued, does any thing appear from which it may be inferred that it was grounded on the principle of *forfeiture?* I see nothing like it. The facts stand thus: *Charles Lukens* the deputy surveyor did not act properly. He and all other surveyors had standing instructions not to survey lands which had been surveyed before. It appears that he knew of the survey for *Philip Harding*, because he called for it in a survey made by him for *Joshua Virgin* in *November* 1772. It was his duty therefore when he returned the survey on *Blair's* location, to note the interference with *Harding's* survey. This would have given notice to the land officers, in consequence of which they would have called the parties before them and decided after a fair hearing. But the survey for *Blair* being returned without any note of interference, a patent issued of course. It seems then that the forfeiture on which the defendants rest their claim, never entered into the heads of the proprietaries from whom they derive title. And as little has it entered into the contemplation of the commonwealth, for the title of the plaintiff has been confirmed by patent in the year 1800. The former proprietaries were indulgent to their debtors. Their system was liberal, and the people of *Pennsylvania* prospered under it. The commonwealth who succeeded, was sensible of this; and far from insisting on a rigid compliance with the terms of sale, the very act by which she invested herself with the proprietary estate, confirmed those imperfect titles which rested on warrants, locations and surveys. It would be tedious and useless to enumerate the many acts by which these titles have been recognised. Suffice it to say, that time after time the day of payment has been prolonged for those immense arrears, which still remain on lands sold in the time of the late proprietaries. It appears very clearly, then, that the title of the plaintiff cannot be impugned on the ground of forfeiture. Neither do I think, that it can be impeached on the principle of a supposed abandonment. The survey being returned, all that remained to complete the title,

1812.

Lessee of BIDDLE v. DOUGAL.

was the payment of the purchase money; and that being a matter between the purchaser and the owner of the soil, no third person can take advantage of it, or has any thing to do with it. The plaintiff might have made an actual entry immediately after the survey; but if he did not enter, no inference is to be drawn to his prejudice, because we know very well that great quantities of land were taken up by persons who expected no present profit, but meant to keep them unimproved as a provision for their children, or with a view of selling at a distant period. There may indeed in all cases be circumstances in the conduct of the parties, which may impeach the legal title, on equitable considerations. If such circumstances exist in the present case, they are unknown to me, because the parol evidence alluded to in the judge's charge, is not placed on the record. From every thing that appears, the case ought to have been submitted to the jury in the same situation that it would have stood before the board of property, if a *caveat* had been entered by *James Biddle*, on the return of *Blair's* survey in the year 1774. The parties are all purchasers for valuable consideration, without imputation of fraud, and therefore on a footing. I am very clear that the opinion of the Court of Common Pleas on the point of forfeiture was erroneous; therefore the judgment should be reversed, and a *venire de novo* awarded.

YEATES J. The court in their charge to the jury on the trial of this cause declared their opinion, that under the conditions contained in the advertisement of the secretary of the land office on the 23d of *February* 1769, the survey made for *Philip Harding* became forfeited; that it was competent to the late proprietaries to exact that forfeiture and grant the lands surveyed to other persons; and that the 68 acres of land in question legally passed to *John Blair* by their patent of 17th of *August* 1774.

The written papers given in evidence are fully expressed in the charge of the court, and have already been detailed. It remains for us to decide on their legal operation.

A variety of judicial decisions has established certain general principles as to the titles of lands accruing under contracts made with the agents of the late lords of the soil. As owners of the great mass of the landed property within

the province, they had an undoubted right to grant portions thereof in such manner as they thought proper. But when certain settled usages prevailed in their land office, they were as much bound by them, as those who had contracted for their lands, and were as strongly subjected to them as to their concessions made to the first adventurers.

Applications for vacant lands, after the death of *William Penn*, and his sons arriving at full age, began on the 1st of *August* 1716. They were the inceptions of right; but of themselves merely conferred no title to any defined tract. They have been called "the expressions of wishes to hold lands at or near a certain spot;" but not being followed up with due diligence, all pretensions of title under them cease, and abandonment of claim is presumed. A close precise *location*, (as it is now called) or one where the lands are sufficiently described, has always been preferred to an undescriptive location though prior in date, if it has not been reduced to certainty by a survey. The right on a descriptive location commences from the time of making the survey; on a shifted location, from the time of its acceptance into the surveyor-general's office. After the occurrence of these facts, the contract between the late proprietaries and the applicants became fully completed, and such portions of land were subtracted from the general mass of property. The former might have maintained a suit for the purchase money; the latter might on tender of the purchase money, interest and fees of office, have compelled the proprietaries in a court of equity to convey to them by patent. These are settled principles, from which it would be highly dangerous now to depart. The interests of the proprietary family and of the inhabitants were happily blended. The former never hunted for forfeitures, nor would such a practice have been beneficial to them; because as they sold their lands at the same prices, they must necessarily have lost the interest accruing on sales already made. The lands thus contracted for, remained chargeable to their just demands into whose hands soever they came.

Why is it to be presumed, that the proprietaries insisted on the literal expressions contained in the advertisement of 23d of *February* 1769? We well know they were liberal landlords, and did not press for escheats for defect of natu-

1812.

Lessee of BIDDLE v. DOUGAL.

ralization of aliens, to whom they had granted their lands. They gave every encouragement to the cultivators of the soil, and extended their credits; and in these particulars their example has been wisely followed by the legislature in several successive laws. For above forty years past, ejectments have been maintained on locations and surveys, without any part of the purchase money being paid; which clearly evinces the sense of the courts of justice, that such rights were not avoided by defect of payment of the stipulated sums: and there can be little doubt, that if the proprietaries had brought suits to recover the possession, the proceedings would be staid on the defendant's bringing into court the purchase money, interest, fees of patenting and costs of suit. In this manner full compensation would be made for breach of the condition.

The case of the *Lessee of John Ross* and *John Vaughan* v. *Robert Eason* and *James Morrow* is a solitary instance, wherein the governor for the time being refused to complete a contract made with the officers of colonel *Turbutt Francis's* regiment, so far as it operated in favour of ensign *Morrow*, on the ground of his being charged with the rescue of *Stump* and *Ironcutter*, who had been committed to the gaol of *Cumberland* county for the murder of certain friendly *Indians* on *Middle Creek*. The plaintiff however failed in that action, upon a demurrer to evidence argued fully in this court, though the lessors claimed under a patent granted to captain *Jacob Kern*, another officer of the regiment, which had passed into their hands as *bona fide* purchasers without notice. There the express direction of the governor to annul the special licence so far as it respected the survey drawn for *Morrow*, appeared clearly in evidence. But here no such intention appears. On the contrary, I am fully persuaded from the known practice of the land office, that if *Charles Lukens* the deputy surveyor, had returned on the survey made for *John Blair* on the 4th of *July* 1774, that it comprehended 68 acres of land previously surveyed for *Philip Harding* on the 15th of *May* 1772, which had been returned on the 3d of *July* following into the surveyor-general's office, no such patent would have issued to *John Blair*. At all events, it would not have issued, until Mr. *James Biddle* had an opportunity

of being heard before the board of property; when it would have been in his power to shew that *Blair* was concluded by the marked boundaries of his survey made on the 11th of *October* 1769, and which he had acquiesced in until the 4th of *July* 1774, nearly four and a half years.

Besides, if by rigid rules of law, not applicable to the usages of the land office, a forfeiture was worked by non execution of the order of survey of *Harding* within three years, that forfeiture must be considered as waived by the surveyor-general's acceptance of the return of survey into his office on the 3d of *July* 1772. And if a loss was incurred, and an abandonment presumed as to the sixty-eight acres of land in question, it must necessarily pervade the whole survey and not a portion of it; but this cannot be pretended.

I view an adherence to the general principles of decision which ought to govern the present case, as essentially necessary to the security of landed property, resting originally on applications. A deviation from settled established rules is at all times attended with danger, and peculiarly so when many titles depend on them. Under the circumstances of this case disclosed by the written evidence, I am clearly of opinion that *Philip Harding's* survey was not forfeited; that no advantage was meant to be conferred on *John Blair* for any supposed laches or delay or the part of *Harding*, and that the patent granted to *Blair* was neither intended nor could possibly have the operation of destroying the right of *Harding*, by way of exacting a forfeiture.

I therefore concur in opinion that the judgment of the Court of Common Pleas be reversed, and that a *venire facias de novo* be awarded.

BRACKENRIDGE J. gave no opinion, having been prevented from sitting during the argument.

Judgment reversed.

1812.

Sunbury, Saturday, June 13.

5o 154
2w 400
5w 397
19 40
118 126

Lessee of MACLAY *against* WORK and another.

IN ERROR.

Before the recording act of 1775, no man was obliged to record his deeds. The purchaser was to look to the title at his peril; and notwithstanding he obtained a patent from the commonwealth, before notice that the warrant and survey, or a part of it, had been conveyed to a third person, yet this did not avoid the third person's title.

THIS was an ejectment in the Common Pleas of *Mifflin* County, for the moiety of a tract of 412 acres 158 perches of land in *Union* township.

The plaintiff gave in evidence a warrant in the name of *Casper Weitzell*, for 275 acres, dated the 24th of *February* 1773, and a survey of 412 acres 158 perches, made on the 12th of *May* 1773. *Weitzell*, on the 17th of *March* 1773, conveyed three warrants, of which the above was one, to *John Whitmer* and *Christian Voght*, who on the same day conveyed one moiety of the same warrant, to *William Maclay*, the lessor of the plaintiff.

The defendants, whose title had the same origin with the plaintiff's, gave in evidence a patent to *Whitmer* and *Voght*, for the tract above-mentioned, dated the 15th of *March* 1774, and a deed in consideration of 200*l.* from them to *Nathan Patton*, under whom the defendants claimed, for the whole tract, dated the 23d of *May* 1775.

The principles of the law of *England*, must not be applied in their full extent to the case of a legal estate acquired in this commonwealth by patent. The question here is generally, not who has got the patent, but who on principles of law and equity ought to have had it, when it issued. It is not true that he who obtains a patent, shall avoid all titles by warrant and survey of which he has no notice; for a warrant and survey are in most respects considered as a legal estate, except as against the commonwealth. They are subject to the same laws of descent, devise and conveyance as the legal estate. They are subject to dower and curtesy; and an ejectment may be maintained on them.

By the parol evidence, it appeared that *William Maclay* had given *Weitzell* a description of three tracts of land, for which the latter was to take out warrants, and *Maclay* was to have half. That accordingly *Weitzell* had taken out the warrants, sold them to *Whitmer* and *Voght*, and obtained a conveyance of one half from them to *Maclay*, on the day he conveyed to them; but no communication took place between *Maclay* and those persons at the time of the conveyance; or until after the patent was taken out. He was not consulted about taking out the patents. *Maclay's* deed was not put on record; and *Patton* was a purchaser for a valuable consideration, and without notice.

The proceedings before the Supreme Court, under the act of the 6th of *March* 1778, by a person claiming an interest in an estate alleged to be forfeited, though conclusive against all persons claiming under the commonwealth by virtue of the attainder, are not so against persons claiming paramount the attainder.

1812.

Lessee of MACLAY v. WORK.

To support his title, the plaintiff also produced the record of the petition of *William Maclay* to this Court, on the 2d of *May* 1780, claiming a moiety of this land, which had been seized as belonging to *Voght*, and forfeited by his attainder for treason, upon which this Court had proceeded in a summary way agreeably to the act of the 6th of *March* 1778, 1 *Smith's Laws* 458, and had decreed the claim to be just and legal.

The counsel for the defendants prayed the opinion of the court to the jury on the following points:

1. Whether the proceedings of the Supreme Court on the petition of *William Maclay* in *May* 1780, could have any effect on the title of *Nathan Patton's* heirs, who had no notice, and were not parties to their proceedings?

By the Court. We are of opinion, these proceedings cannot affect the title of *Patton's* heirs.

2. Whether *William Maclay*, having made the discovery of the location to *Weitzell*, and *Weitzell* having transacted the whole business with *Whitmer* and *Voght* in the absence of *Maclay*, and *Maclay's* title being acquired by the acts and agreements of *Weitzell*, *Maclay* is not bound by the acts and conduct of *Weitzell*, as much and as fully as if he had personally done all that was done by *Weitzell?*

We answer that *Maclay* is affected by the acts of *Weitzell.*

3. Whether the purchaser of the tract of land in question patented to *Whitmer* and *Voght*, who paid his money and got his conveyance, can be affected by any title which *Maclay* had in that patent, and land contained in it, by virtue of the deed to him read in evidence, which title neither appeared on the records of the land office, nor on the records of the county, and of which the purchaser had no notice?

The purchaser cannot be affected.

4. Whether *Patton*, having paid his money and got his conveyance, without notice of *Maclay's* claim, can be affected by any subsequent notice of *Maclay's* title?

Patton cannot be affected by subsequent notice.

These opinions were expressed by the two associate judges. The president (*Walker*) concurred in the first, and fourth, agreed so far in the second, as that *Maclay* was bound by the acts of *Weitzell*, until he got his deed for one

1812.

Lessee of MACLAY v. WORK

half the land from *Whitmer* and *Voght*, but totally dissented from the third.

The questions were brought up by a bill of exceptions to the charge of the court, and were argued by

Hale and *Watts* for the plaintiff in error, and by

Huston and *Duncan* for the defendants in error.

TILGHMAN C. J. The Court of Common Pleas delivered an opinion on three points, which are now the subject of consideration. I will first consider the second and third points, which are in some measure connected and run into each other. *William Maclay* furnished *Casper Weitzell* with a description of three tracts of land for which the warrants were to be taken out by *Weitzell*. It is not in proof what consideration passed between *Maclay* and *Weitzell*, but it appears that *Maclay* was to have half of the lands. On the 24th *February* 1773, the warrants were taken out, and a survey of the tract in question, containing 412 acres 158 perches, was made and returned the 12th of *May* 1773. On the 17th of *March* 1773, *Weitzell* conveyed his right to the three warrants to *John Whitmer* and *Christian Voght*, who, on the same day, conveyed a moiety of the whole to *William Maclay*. It appears by the deposition of *Voght*, that the agreement made with *Weitzell*, was that *Whitmer* and *Voght* were to take out warrants for the land, and convey one half to *Maclay*. After the conveyance to *Maclay*, on the 15th of *March* 1774, *Whitmer* and *Voght* took out patents for the three tracts in their own names, and on the 23d of *May* 1775 they conveyed the *whole* of the tract in dispute to *Nathan Patton*, under whom the defendants claim. It does not appear that *Whitmer* and *Voght* had any communication with *Maclay*, at the time of their contract with *Weitzell*, or at any other time, until long after the patent was taken out, or that they ever received from *Maclay*, directly or indirectly, any authority to take out the patents in their own names. That a principal is bound by the acts of his agent, there is no doubt. How far a man is agent for another, is matter of fact, and when the jury have ascertained the fact, the conclusion follows of course. If *Maclay* had authorized *Whitmer* and *Voght* to take patents for the whole in their

own names, in confidence that they should convey a moiety to him, after they had received the patent, and they had deceived him, and conveyed the whole to a purchaser for a valuable consideration without notice, the purchaser would have held against *Maclay*, and he must have looked to those in whom he had placed trust, for indemnification. But it is not to be taken as a legal inference that he authorized *Whitmer* and *Voght* to take out patents, merely because he trusted to *Weitzell* to take out the warrants. *Weitzell* appears to have been true to his trust, for, although he conveyed the warrants to *Whitmer* and *Voght*, he took care that they should immediately convey a moiety to *Maclay*, and both these conveyances are to be taken as one transaction. It is objected that *Maclay*, by not applying for a patent for his moiety, or recording his deed, left it in the power of *Whitmer* and *Voght*, to procure the legal title, and deceive innocent purchasers. But it is very material, that when *Maclay* obtained his deed, there was no law obliging him to put it on record, and the same objection lies against every one, who, at that period, purchased a *legal* estate, and did not record his deed; for he left it in the power of the seller to defraud purchasers, without a possibility of notice. Yet it is certain that before the recording act of 1775, no man was obliged to record his deeds, and the purchaser was to look to the title at his peril. A very great defect it was, but so was the law. As to the circumstance in this case of the purchaser having acquired the legal estate, we must not apply the principles of the *English* law in their full extent, to the case of a legal estate acquired in this commonwealth by patent. Land to a vast amount has been held for a great length of time without patent, and it would have ruinous consequences, if it were established, that he who first got hold of the patent, should avoid all titles of which he had no notice. Patents are often obtained without much enquiry into the title. It has been the custom to suffer their validity to be contested, and when the litigant parties appear in a court of justice, the question generally is, not who has got the patent, but who was entitled to it on principles of law and equity, at the time it was issued. I say this is generally the question, but I must not be understood as laying down an universal rule, not to be affected by gross negligence or other

1812.

Lessee of MACLAY v. WORK.

misconduct of the parties. An estate held by warrant and survey, or other imperfect title without patent, is of a singular nature. In many, and indeed in most respects, it is considered as a legal estate against all persons but the commonwealth. It is subject to the same laws of descent, devise and conveyance as the legal estate. Tenancy by the curtesy and in dower are attached to it. An ejectment may be supported on it. It is unreasonable therefore to confine *William Maclay* to a greater degree of strictness as to recording his deed, than if he had been the holder of the legal estate; or to raise a legal presumption that *Whitmer* and *Voght* were his trustees for the purpose of obtaining a patent, merely because he did not apply for a patent himself. This is the extent to which the law was carried by the Court of Common Pleas, and I think their opinion was erroneous.

The next point to be considered, respects the consequences of the proceedings of the Supreme Court on the petition of *William Maclay*, under the act "for the attainder of divers traitors," &c. passed the 6th of *March* 1778, 1 *Dall. St. Laws* 750. These proceedings were instituted to protect the estate of *Maclay*, against the forfeiture incurred by the attainder of *Voght*. They were conclusive against all persons claiming under the commonwealth by virtue of the attainder, but could have no effect on the heirs of *Patton*, who were not before the court, and claimed by title paramount. The object of this act was to secure those persons who purchased under the commonwealth, against all claims to estates seized and sold as the property of traitors. For this purpose, it was necessary that these claims should be brought forward in a short time, and decided in a summary manner. If, after the allowance of *Maclay's* claim to a moiety, the officers of the commonwealth had proceeded to sell the other half, the purchasers would have held against the heirs of *Patton*. But it was not within the scope of the law, that the Supreme Court should decide, except between the commonwealth and those who preferred claims against the confiscated estates. I am therefore of opinion, that on this point, the Court of Common Pleas decided rightly, but for the error in the other points, the judgment should be reversed, and a *venire facias de novo* be awarded.

1812.

Lessee of MACLAY v. WORK.

YEATES J. It appears to me, that the proceedings in the Supreme Court, on the claim of the lessor of the plaintiff, were evidence merely to shew that he prosecuted his pretensions to one moiety of the lands in question, but had no conclusive effect on the title of the heirs of *Nathan Patton*, who were not parties to those proceedings. Whether *Patton* was living or not, or whether his children were minors in *May* 1780, when the decree was made, does not appear. But it is the manifest intention of the fourteenth section of the Attainder Act of 6th March 1778, to give a summary jurisdiction to the justices of this court, to enquire into claims made against the estates of persons attainted in pursuance of that act, and to decide thereon, for the protection of persons purchasing from the agents of forfeited estates. It was designed to prevent fraudulent conveyances and improper dispositions made by the traitors; and if their lands were sold by the agents, they passed to the purchasers, freed from the pretensions of persons claiming under such traitors, but not of those claiming by paramount title. It never was intended, that when the commonwealth did not insist on a forfeiture, a decision made on the petition of one person against the agents, should have effect against other persons unrepresented and unheard. If I may be indulged in conjecture, I should suppose that the sale to *Patton* was known at the time of the decree; otherwise the agents would have proceeded to sell the remaining interest of *Voght* in this tract of land.

It is perfectly clear, that the acts and agreements of *Casper Weitzell* as agent of *William Maclay*, were binding upon his principal. Nothing however has been done by the former, prejudicial to the interest of the latter, having acted with the most perfect good faith towards him. It appears by the evidence given on the trial, that *Maclay* furnished the discovery of 700 acres of vacant land, and that *Weitzell* was to take out the warrants for their joint benefit. *Weitzell* transferred his interest in this partnership to *John Whitmer* and *Christian Voght*, but was not unmindful of the obligations incumbent upon him. On the 24th of *February* 1773, three warrants were taken out:—One in the name of *Casper Weitzell* for 275 acres, one other in the name of *Whitmer* for 300 acres, and one other in the name of *Voght* for 125 acres.

1812.

Lessee of MACLAY v. WORK.

On the 17th of *March* 1773 *Weitzell* conveyed the warrant issued in his name to *Whitmer* and *Voght* in consideration of 25*l.*, and on the same day, *Whitmer* and *Voght* by deed with proper recitals, convey the undivided moiety of the three several warrants to *Maclay* in fee. This was done in the absence of *Maclay*. The deed was not recorded, nor did any existing law make it necessary to register it. Upon the 15th of *March* 1774, a patent issued to *Whitmer* and *Voght* for the three tracts of land, and on the 23d of *March* 1775, they sold and conveyed the tract of land for which a warrant had issued in the name of *Casper Weitzell*, to *Nathan Patton* and his heirs, in consideration of 200*l.*, with covenant of *general* warranty. On these facts, two of the judges below, against the opinion of the president of the district, delivered it in charge to the jury, that *Patton* and his heirs could not be affected by any title which *Maclay* had in the land by virtue of his deed, which title neither appeared on the records of the land office, nor on the records of the county, and of which *Patton* had no notice. This opinion has been attempted to be justified, upon the grounds that *Whitmer* and *Voght* were the agents of *Maclay*, and substituted as such by *Weitzell*, for the purpose of patenting the land in the office; and that this mode of procedure having led to the injury and deceit of *Patton*, an innocent purchaser, those who reposed the trust in *Whitmer* and *Voght*, ought to suffer by their improper conduct. The reasoning would have much force, if the facts would warrant the inference that *Whitmer* and *Voght* were the agents of *Maclay* to patent the lands. But neither the written nor parol evidence establishes the fact. *Weitzell* executed his authority with fidelity; but from aught we can learn, he was not directed to patent the lands, nor to authorise others so to do. *Maclay* was not present when the transfers were made. As tenant in common, his interests were considered by him as distinct from his co-tenants, and he appointed *William Brown* his agent. We look in vain into the testimony, to discover any recognition by *Maclay*, either by word or deed, of the agency of *Whitmer* and *Voght*.

How far a purchaser *bona fide*, without notice of a legal estate, shall be protected, has been often agitated, and under certain circumstances he has prevailed amongst us. But that the conveyance of a title by patent will draw after it all the

1812.

Lessee of MACLAY v. WORK.

consequences of the transfer of a legal estate in *England*, I totally deny. There, a party claiming by an equitable right, can neither recover nor defend himself against the person holding the legal estate. Here, daily experience demonstrates, that recoveries may be had and defences set up against the patentees, their heirs and assigns, under an equitable imperfect title, even by settlement and improvement. It has been correctly admitted by the counsel for the defendants, that the true point of enquiry amongst us, is, who *ought* to have the patent under all the merits of the case; and not, who has it at the time of trial. From our local situation, our laws and customs differ in many particulars from those of *England.* A first mortgagee, suffering the title deeds of the estate to remain in the hands of the mortgagor, who afterwards executes a second mortgage, shall be postponed in *Great Britain;* but the case has been decided otherwise here, on solemn argument.

It has been urged here, that the heirs of *Patton* ought to prevail, because their ancestor bought the patent right to the lands, without notice either express or implied of the title of *Maclay* to one moiety thereof. By what law was the latter compelled to put his deed upon record? None. It was a defect in our code, that such obligation was not imposed on a grantee, until the supplement to the recording act was passed on the 18th of *March* 1775. What laches or neglect could justly be imputed to *Maclay?* None. He appointed an agent to superintend his interests in this farm. He prosecuted his claim thereto, when the right of *Voght* was considered to be forfeited by his attainder. *Patton* was subjected to no other risks than purchasers in general, who at their own peril were bound to look to and guard against former sales of their grantors. He chose his own mode of security, and his heirs must recur to that alone: a covenant of general warranty has been inserted in his deed, on which a suit may hereafter be brought, in case of an eviction as to part of the lands.

I am of opinion that the majority of the judges of the Court of Common Pleas erred, when they asserted that the title of *Nathan Patton* could not be affected by the operation of the unrecorded deed to *Maclay;* that the judgment

1812.

Lessee of MACLAY v. WORK.

below be reversed, and that a *venire facias de novo* be awarded.

BRACKENRIDGE J. having been unable to attend the argument, gave no opinion.

Judgment reversed and *venire de novo*.

5b 162
1s 525

WHITE and another *against* the Lessee of KYLE.

IN ERROR.

Sunbury, Saturday, June 13.

A settlement made on lands not purchased from the *Indians*, cannot be the foundation of any title, legal or equitable, unless connected with a special promise from the proprietaries or their agents.

A warrant calling for an improvement made by *A*, cannot be supported by an improvement made by *B*, nor can it be so connected with any after purchased improvement as to vest a title.

Persons settled upon land not purchased of the *Indians*, and receiving from the proprietary agent a promise of confirmation, were bound to apply for the confirmation at the opening of the land office for those lands, or within a reasonable time afterwards, or they lost the benefit of the promise.

THIS was an ejectment for lands in *Mifflin* county, the title to which on both sides is stated in the first volume of these Reports, p. 247.

Upon the trial of the cause, the opinion of the court below was requested upon various points, of which two only are material. 1. Whether any improvement, made before the land on which it was made was purchased from the *Indians*, can vest any interest either in law or equity, unless connected with a special promise from the proprietaries or their agents. 2. Whether a warrant calling for an improvement made, can be supported by an improvement made by any other than by him named in the warrant? And whether an improvement purchased after the date of the warrant, can in any wise support an equity claimed under the warrant?

On the 1st point, the court gave their opinion that such an improvement would vest an equity, without a special promise. On the 2d, that a warrant calling for an improvement made, could be supported by an improvement made by another person than by him named in the warrant; and that an improvement purchased after the date of the warrant, will vest an equitable as well as a legal claim.

The defendants tendered a bill of exceptions; and the points were here argued on their behalf by *Watts* and *Duncan*, and by *Huston* for the defendant in error, who was plaintiff below.

1812.

WHITE et al. v. Lessee of KYLE.

TILGHMAN C. J. On the trial of this ejectment, the opinion of the Court of Common Pleas was asked on seven points on the part of the defendant, who is plaintiff in error in this court. But our decision is requested on only two of those points, viz. the 1st and 5th.

The 1st question is whether any title, legal or equitable, could be acquired by a settlement made on lands before they were purchased by the late proprietaries from the *Indians*, without a special promise from the proprietaries to the settler. The opinion of the court below was that an equitable title might be acquired.

This is a question of very easy solution. It was the uniform custom of the late proprietaries, not to exercise any act of ownership in the soil contained in their charter limits, before they had come to an agreement with the natives. They made no surveys on the unpurchased lands, either for themselves or others, without the consent of the natives; and this policy, founded on the plainest principles of justice and good sense, was adopted by the legislature. So early as the year 1700, an act of assembly was passed, declaring void all purchases of land made by private persons from the *Indians*, without permission of the proprietary. It appears that great discontent prevailed among the *Indians* at the intrusion by the white people on the very lands now in dispute. So much so, that in order to appease them, *Richard Peters*, then secretary of the land office, went with some magistrates, for the express purpose of removing the settlers, and they were removed, and their houses burnt. But in order to conduct the matter as speedily and with as little disturbance as possible, Mr. *Peters* promised some of the settlers, particularly *William White*, deceased, under whom the defendants claim, who had great influence, that if they would remove quietly, their lands should be granted to them after the proprietary should purchase them of the *Indians*. Now how is it possible, that a settlement made against law, against justice, against policy, and manifestly tending to involve the country in war, should be a ground of any title in law or equity? The very point was decided by this court before, when a new trial was ordered in this cause, 1 *Binn.* 246; and if it had never been decided, it is too clear to admit of the least doubt. It is one of those self-evident propositions,

1812.

WHITE et al. v. Le see of KYLE.

which cannot be rendered plainer by any process of argument. So at least it appears to me, and I cannot help supposing, that when the court below passed their opinion upon it, they took into view some facts not appearing on the record.

The other decision, which has been objected to, is as follows. That a warrant calling for an improvement may be supported by an improvement made by a person different from the one named in the warrant, and that an improvement purchased *after* the date of the warrant, will vest not only an equitable but a legal title.

In order to understand this opinion, which stands in the form of an abstract proposition, we must consider the evidence to which it referred. *James Kyle* took out a warrant the 23d of *October* 1765, for 200 acres *including his improvement*. Previous to that time, he had made an improvement *of his own*, to which the warrant was applicable. But in *September* 1766, he obtained a conveyance of the right of *George Gabriel*, who is said to have made some kind of improvement before the proprietary's purchase from the *Indians* in the year 1754, and the plaintiff's counsel contended that Mr. *Peters* had promised *Gabriel* that his title should be confirmed. It was competent to *Kyle* to purchase as many titles as he pleased, and to defend himself under all or any of them. But they must be considered as *distinct titles*. He cannot take a warrant for his own improvement, and connect it with an after purchased improvement, because such was not his contract with the proprietary, who might have reasons for confirming the title of one improvement though not of the other. But as to *Gabriel's* improvement, if he received a promise of confirmation from Mr. *Peters*, he ought to have applied to the land office, at its opening for the sale of these lands in *February* 1755, or within a reasonable time afterwards. By not making such application he lost the benefit of the promise. It would be altogether unreasonable to call for a confirmation after a delay of ten years. In no point of view, therefore, could *Kyle* attach the improvement of *Gabriel* to his warrant taken out in the year 1765.

I am of opinion that the decision of the court below was erroneous on both points, and therefore the judgment must be reversed, and a *venire facias de novo* be awarded.

1812.

WHITE et al. v. Lessee of KYLE.

YEATES J. It has been admitted in the course of this argument, that no right of pre-emption could be founded on a settlement made on lands comprehended in the *Indian* purchase of *November* 1768, at *Fort Stanwix;* but a distinction has faintly been attempted between that and other purchases made of the natives. I can see no ground whatever for a difference between the cases. At all times it has been declared unlawful to settle upon lands unpurchased from the *Indians;* even hunting upon them has been prohibited by law. The proclamations of the different governors were opposed to such conduct, as inimical to the interests of the late proprietaries, and of the province in general, and of sound policy. In *Bonnett's Lessee* v. *Devebaugh and Smith*, 3 *Binn.* 187, I have endeavoured to show that the origin of improvement rights was to be imputed chiefly to the uniform usages of the land office, and the encouragement given by the proprietaries and their agents to settlements; but it will not be hazardous to assert, that no encouragement has ever been given by the proprietary officers, to settlements on lands unbought from the *Indians*, unless under military permits for the convenience of the army, and that no decision of the board of property, or of any court of justice, has ever favoured a different doctrine. I have no hesitation therefore in declaring, that the opinion of the Court of Common Pleas, that an improvement made on land before it was purchased from the *Indians*, would vest an interest in equity, without a special promise from the proprietaries or their agents, was erroneous.

The court's answer to the fifth question proposed by the defendant's counsel, I also consider as erroneous. This will be more intelligible by attending to the evidence given on the trial.

The lessor of the plaintiff claimed under two warrants, one dated the 3d of *June* 1762, and the other dated the 28th of *October* 1765. It is material to consider the latter only, on the present question. It issued to *James Kyle* for 200 acres of land, including *his* improvement on the north side of *Juniata*, settled in 1754, interest to be computed from the 1st of *March* 1755. On the 22d of *September* 1766, *George Gabriel* executed a deed poll to *Kyle* of his improvement right in consideration of *5l.* And the point of enquiry was, whether

1812.

WHITE et al. *v.* Lessee of KYLE.

the plaintiff could *connect* the warrant right of *Kyle* with the claim of *Gabriel*. From the pronoun *his* in the warrant, it is evident, that it must refer to an improvement then belonging to *Kyle*, and not to one bought up by him nearly one year afterwards. It is admitted that a suitor may buy in an elder right to strengthen his own claim; but he can succeed to no greater interest than the vendor himself had. If *Gabriel* therefore was entitled to any of the advantages, promised to the settlers on *Juniata* by the proprietary agents on the condition of quitting their settlements, he ought to have pursued his claim by applying for the land when the office opened on the 3d of *February* 1755. Failing herein, and not resuming his possession, he forfeits his claim by abandonment, and the warrant of *October* 1765 would be no prosecution of his supposed equitable interest. The claim under it must stand on its own merits, independently of the warrant, and *Kyle*, as the purchaser of the improvement right, must stand precisely in the same situation as *Gabriel* on the 22d *September* 1766.

I think the Court of Common Pleas erred in saying that the improvement purchased after the date of the warrant, would support an equity claimed under the warrant; and therefore concur in opinion that the judgment of the Court of Common Pleas should be reversed and a *venire facias de novo* be awarded.

BRACKENRIDGE J. gave no opinion, having been unable from sickness to attend the argument.

Judgment reversed.

END OF JUNE TERM 1812.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Western District. September Term, 1812.

1812.

Pittsburg, Wednesday, Sept. 9.

Ex parte MEASON and another, administrators of ASHMAN.

THIS was an appeal from a decree of the Orphan's Court of *Fayette* County.

Since the act of 1794, an administrator has no right to retain his whole debt against creditors in equal degree, when there is a deficiency of assets.

Under the 14th section of the act of the 19th of *April* 1794, 3 *Smith's Laws* 149., the administrators of *James Ashman*, applied to the Orphan's Court, representing the insufficiency of their intestate's estate, to pay his bonds and specialties, and other debts; and the court appointed auditors to settle and adjust the rates and proportions of the remaining assets due and payable to the creditors.

The term "*servants*," whose wages are by the act of 1794 to be paid out of an intestate's estate, in the same rank with physic, and funeral expenses, embraces those only who in common parlance are called servants, persons who make part of a man's family, and whose business it is to assist in the economy of the family, or in matters connected with it. But it does not comprehend *workmen*, employed at iron works, and the like.

By the report of the auditors, one of the administrators was allowed to retain the *whole* amount of a simple contract debt, due to him by the intestate, although other creditors in the same degree, took *pro rata;* and the claims of persons who were employed by the intestate in manufacturing iron, and in the business incident thereto, amounting to 2112 dollars 18 cents, were treated as *servant's wages*, and as such preferred to all other claims, except those for physic and funeral expenses.

1812.

Ex parte MEASON.

In both these particulars, exceptions were taken to the report, and sustained by the opinion of the court, who rectified the report accordingly; and from their decree the present appeal was entered.*

* The opinion of the President of the District, and the decree of the Orphan's Court, were as follows:

ROBERTS President. The right of *retainer* is doubtless coeval with the law:—It is mentioned by Judge *Blackstone* as one instance in which redress is obtained by *mere operation of law* (*a*). That it exists in *Pennsylvania* at the present day, I have no hesitation in saying; and if we consider the *reason* upon which the right is founded, we shall not only be convinced that no act of assembly has, or justly could deprive an executor or administrator of it, but may be led to a conclusion important in the present case, as to the *extent* of the right.

The reason assigned for allowing an executor or administrator to *retain* is, that he cannot without an apparent absurdity commence a suit against himself, to recover, that which is due to him, in his own private capacity; but having the whole personal estate in his hands, so much as is sufficient to answer his own demands, is by operation of law applied to that particular purpose (*b*).

It is observable that the law gives an executor or administrator that *preference*, which he might give to a creditor, or which a vigilant creditor might obtain, and no *other* or *greater* preference.

"He cannot (says Judge *Blackstone*) retain his own debt, in prejudice "to those of a higher degree; for the law only puts him in the *same situa-* "*tion*, as if he had *sued himself as executor, and recovered his debt;* which "he never could be supposed to have done, whilst debts of a higher na- "ture subsisted (*c*).

If this then be a correct view of the subject, we have only to inquire what a vigilant simple contract creditor might *recover*, in order to ascertain what the administrator may *retain*. If such creditor might *recover* his whole demand, the administrator may retain the whole of his; but if a *part* only could be *recovered*, a *part* only can be *retained*.

Now in the case before the court, the assets being insufficient to pay all the creditors by simple contract, no one of them could *recover* his whole demand;—so neither can the administrator *retain* his whole demand, but the one must *retain*, and the other be *paid pro rata*, agreeably to the act of 1794.

The words of the act of assembly are:—"If there shall not be assets to "discharge and pay such bonds and specialties, and other debts, then, and "in such case the same shall be averaged, and the said creditors paid *pro* "*rata*, or an equal sum or proportion in the pound, as far as the assets "will extend; first paying the bonds and specialties." There is nothing in the act to countenance the idea of preferring the claim of an executor or administrator, to that of any other creditor of the same degree; there would be no equity in such discrimination; and it is conceived that the doctrine of *retainer*, furnishes no pretence for it.

(*a*) 3 *Bl. Comm.* 18. (*b*) *Ibid.* (*c*) 3 *Bl. Comm.* 19.

Ross for the appellants. 1. The authority of an administrator to retain his whole debt against creditors in equal degree, certainly existed before the act of 1794. It is coeval with the law, 3 *Bl. Comm.* 18., *Wentw.* 143., 1 *Com. Dig.*

In respect to the second point, there seems to be considerable difficulty in determining what class of persons were intended by the legislature to be comprehended in the description of "servants," to whom this extraordinary preference is given, that their claims should rank in the first class, with physic and funeral expenses.

The word "servant," in its legal acceptation has a very comprehensive import:—It not only applies to domestics, but to a variety of other persons, who are employed by any one to do service for him. This doctrine of master and servant applies to those relations which subsist between a principal and an attorney, an owner and the master of a ship, a merchant and his factor, &c.—It not only applies to persons hired for a certain time, but even to journeymen mechanics employed to work by the piece. In the case of *Hart* v. *Aldridge*, trespass was held to lie for enticing away journeymen shoemakers employed for no determinate time, but only by the *piece*, and who at the time the defendant persuaded them to enter into his service, had each a pair of shoes unfinished. And in that case *Aston*, Justice, observes, that even if such persons were residing in their own houses, and were employed to finish a certain number of shoes, for a particular person, by a fixed time, and a third person should entice them away, he was of opinion that an action would lie, and that a person so employed, was a *servant quoad hoc*.

On the other hand we are told that in *common parlance*, in *Pennsylvania*, it applies merely to slaves and registered or indented servants.

Now that the legislature should mean by the term "servant" to designate the latter description of persons, is impossible, for to them no wages are payable; and it is inconceivable that it could be intended, by the term, to comprehend *all persons* of the former description.

There is in the books a marked distinction between servants that are *menial*, and those that are *not menial*.

Menial servants are the domestics living *intra mœnia*, within the walls of the house.

Servants *not menial*, or not domestics, are labourers &c.

That those of the former description, are the class intended by the act, I am strongly inclined to believe.

If we advert to the law as it stood prior to the act of 1794, it appears that the order of paying the debts of a deceased person was as follows:—"1. Funeral expenses. 2. Debts due to the king—the proprietary and "governor. 3. Judgments. 4. Debts due by recognisance. 5. Obligations. "6. Bills. 7. Rents. 8. Servants and *workmen's* wages. 9. Merchants and "traders book debts, and promises by word, arrears of account and such "like."

Now by the act of 1794, debts due to the public, which theretofore constituted the second class, were placed in the *last;* it being, probably, conceived that if a loss must be sustained, it were better it should be borne by the community at large, then by an individual.

1812.

Ex parte MEASON.

351. It is permitted where the administrator claims merely damages for breach of a covenant, or the nonperformance of marriage articles. *Plumer* v. *Marchant* (*a*), *Loan* v. *Casey* (*b*). The act of 1774, contains no provision in regard to

By the same act, *physic* and "*servant's wages*" are brought into the *first* class, with funeral expenses. Why was this done? Is it not presumable that this was done with a view to encourage, promote and reward those engaged in discharging the necessary offices of humanity, towards persons languishing on the bed of sickness? If the advice and assistance of physicians are necessary to the sick, the services of nurses and other attendants are no less so. It was then wise, perhaps, to adopt a regulation, which, by securing the wages of domestics, might prevent them from abandoning the house of their expiring master, at the moment when their services might be most essential. But if this be the *reason* of giving a preference to "servants' wages," it marks the *extent* of that preference, and confines it to *menial* servants.

There ought to be strong ground for giving a preference to any one class of creditors over another. The party who claims it, ought to shew that he is strictly entitled to it; especially if there be no equity discoverable in the claim. Now, to my mind it appears, that there is not a *scintilla* of equity in the claim of these *labourers*, to have the demands of other creditors postponed to theirs.

It has been urged that these men could only look to the estate of their employer for a compensation; they having no *lien* upon the property, on which their labour was employed. If the circumstance of having no lien, gives them an equitable pretension to a preference, it is believed, that many creditors fall within the same equity, who do not pretend to a preference. What lien has a gardener, a pavier, or (except in particular places) a mason, a carpenter, a painter, or a glazier, upon the freehold on which his labour may have been expended?

Indeed, where the legislature have expressly and plainly declared that any particular class of creditors shall be preferred, such preference must obtain, however irreconcilable it may be with our notions of equity. But, where the language of the law is obscure and doubtful, such a construction ought to be put upon it, as may be conceived best to accord with the intention of the legislature. Now the general object of the legislature, in this section of the act, evidently was, to do equal justice to all the creditors of the deceased, due regard being had to the nature of their respective claims. They designed to do that, which Judge *Blackstone* speaks of as clearly the most equitable method, of distributing the assets of a deceased person (*c*). To give, then, such a construction to their words, as would do injustice to some creditors, by giving others an undue proportion, would have a tendency to defeat the main object of the legislature.

In this instance, in addition to the reasons which have been noticed in favour of the construction given, it is worthy of remark that the old law, which was to be corrected, classed servants and *workmen* together; as-

(*a*) 3 *Burr.* 1384. (*b*) 2 *W. Black.* 965. (*c*) *Bl. Comm.* 19.

debts due to the executors or administrators. It directs how debts shall be paid *by* them, but the debt due to an administrator, is not paid; it is extinguished by operation of law. The spirit of the law is not in favour of equality of payment, for there are several classes of creditors, and there is no reason for favouring any one so much as the administrator. But it is sufficient that there is nothing in that act clearly altering the old law. The rule of construction applied to the act of 1794, has been to take the old law as the guide, unless clearly altered. *Johnson* v. *Haines's Lessee* (*a*), *Cresoe* v. *Laidley* (*b*). The heir takes in all cases not specifically enumerated in that act; and the administrator is within the same reason.

2. The term *servants*, must be taken in a *legal* sense. This is either restricted or free. The restricted sense will not answer; because in *Pennsylvania* it embraces only *imported* servants and people of colour, bound to serve to the age of twenty-eight, and no wages are due to such persons. The free sense, that sense in which the term is used in elementary treatises of the law, in statutes, and in the decisions of courts, and which is justified by its etymology, embraces all persons engaged for hire to perform labour, work, or service, under the direction of a master. This is a fair medium between the restricted, and the large sense, in which it embraces many relations not at all within the view of the legislature.

signing to them the eighth grade; and the legislature, in the latter act, when they raise "*servants*" to the first class of creditors, do not notice "*workmen*." This circumstance appears to countenance the idea, that there was an intention to distinguish between the *workman or labourer*, and the *menial servant*, giving to the latter a preference to which the other had no pretension.

We are, therefore, of opinion, that on both these points the auditors have erred, and of course that their report cannot be confirmed by the Court.

The Court order and decree that the administrator in this case be allowed to retain *pro rata* merely:—and that all persons, other than *domestics* or *menial servants*, who may have claims by simple contract, for labour done in the life-time of the intestate, be paid *pro rata*, or an equal proportion in the pound with other simple contract creditors.

And now, to wit, on the twenty-third day of *August* in the year eighteen hundred and eleven, the administrators aforesaid, appeal from this order and decree.

(*a*) 4 *Dall.* 64. (*b*) 2 *Binn.* 279.

1812.

Ex parte MEASON.

It comprehends all who would justify an action *per quod servitium amisit*, if enticed away.

The statute 23 *Edw.* 3. c. 2., among *servants*, expressly includes reapers, mowers, or other workmen. The 5th *Eliz.* c. 4. does the same in effect. By our own law, hiring and *service* for a year give a settlement; no doubt this includes service in iron works or on a farm. The term *indented servant* in the same law, shews that the legislature used a qualification when they wished to restrain the meaning. Act of 9th of *March* 1771. 1 *State Laws* 569. sec. 17, 18. Journeymen shoemakers employed by the piece are servants, for whose seduction the master may maintain trespass. *Ex vi termini* a man's journeyman is his servant. *Hart* v. *Aldridge* (*a*). In iron works, colliers and wood cutters work by the *piece*. Many others work by the month; but they are all servants, because their labour is subject to a master. In what respect do they differ from a coachman? Labourers, waggoners, ploughmen, on a farm, who are lodged in the house, are certainly servants; then why not the same description of persons at iron works? By the ancient law *servitia servientium et stipendia famulorum*, were first paid. *Famuli* were the house servants, *servi* the labourers in husbandry, handicraft, and the like. *Servants* includes all, but certainly the workmen in question. The omission of the term *workmen* which was used in the act of 1705, and the transfer of *servants* from the ninth to the first class, are of no effect. The legislature, by using the terms *workmen and servants*, might be understood as enumerating all the particulars they intended; the rejection of all but the general and comprehensive term, avoids that difficulty. The transposition was not because the legislature had changed the meaning of the terms, but their policy as to preference. Workmen and servants of all descriptions living subject to a master, accumulate little, live from day to day, and merit protection, one class as much as another.

Campbell contra. 1. There is no question as to the right of an administrator to retain, by the old law, against creditors in equal degree. But the reason of the rule, the principle from which the privilege arose, must regulate its extent.

(*a*) *Cowp.* 54.

1812.

Ex parte MEASON.

He could retain against creditors in equal degree, because formerly a vigilant creditor might by activity gain a preference over creditors in equal degree; and an administrator or executor who could not sue himself, was invested with the privilege of the most vigilant creditor. But what can the most vigilant creditor obtain under the act of 1794? Simply a *pro rata*. An administrator therefore can only retain *pro rata*. That law provides that *all the debts* of an intestate shall be paid in a certain manner and order; and if he has not assets sufficient to discharge and pay bonds and specialties, which is the last of the privileged classes, and other debts, then the same shall be averaged, and the creditors paid *pro rata*. Certainly the debt due to the administrator, is a debt of the intestate; the administrator is a creditor, and here a simple contract creditor. Can he possibly take more than his proportion? Retainer is in effect a payment.

2. The term "servants," means menial or domestic servants. It is the popular signification. Any other must embrace every relation, the factor or commission merchant as well as the footman. There is no middle sense.

The restriction of the term to menial or domestic servants, is justified by various considerations. It is connected with physic and funeral expenses; the charges incident to the last scene of life. Domestic servants alone are called to act in this scene; and it is to give self-interest a motive for performing the offices of humanity to a dying insolvent, that the law has granted the servant this protection. A workman at iron works, a merchant's clerk or accountant, stands on a very different footing.

By the act of 1705, workmen and servants' wages were placed in the ninth class. Workmen are omitted in the act of 1794; and yet the appellants argue that they are embraced by the term servants in the first class. A reason must be found for this alteration of the law; and it seems impossible to find any but this, that the legislature intended to narrow the description of persons embraced under the terms *workmen* and *servants*, and to exclude all but those who in common parlance were *servants*, and had a particular claim to preference, from the nature of their duties. In this change of the law, the legislature have reverted to the ancient rule. The *famuli* and *servientes*, who, as *Bracton* and *Fleta* say,

1812.

Ex parte MEASON.

were to be first paid, do not include workmen in manufactories, but servants specially retained for the house within, and such as perform services without, but connected with the household arrangements. The former are footmen, maid servants, and the like; the latter would comprehend coachmen, grooms, gardeners and the like.

TILGHMAN C. J. This is an appeal from the Orphan's Court of *Fayette* county. The first question is, whether an administrator, having a debt of the nature of simple contract due to him from the intestate, may retain his *whole* debt, in a case where the assets are not sufficient to pay all debts of a similar nature. This depends on the act of assembly of 1794. Although it was not the intent of this act to put all creditors on a footing, yet it introduced a greater equality than had prevailed before. It gives a preference to debts due, 1st, for physic, funeral expenses and *servant's wages;* 2d, rents not exceeding one year; 3d, judgments; 4th, recognisances; and 5th, bonds and specialties. All other debts are put upon the same footing. Prior to this act, an administrator had undoubtedly a right to retain his whole debt against all creditors in an *equal degree.* The reason was this, that he could not bring a suit against himself, and therefore, unless he had the right of retainer, he would be in a worse condition than any other creditor. The right of retainer only placed him in the same situation in which he would have been, if the law had permitted him to bring an action. He could not retain against a creditor of a *superior* nature, because if he had been allowed to bring an action, he could not have recovered in prejudice of such a creditor. Apply this principle to the act of assembly, and the question before us is easily answered. If the administrator were permitted to bring suit against himself, could he recover his *whole* debt? He could not, because the act directs that the creditors shall be paid *pro rata.* Then he can retain only to the amount that he could have recovered, that is to say, *pro rata.* But, says the counsel for the appellant, the act makes no mention of debts due to executors or administrators. It only directs the order in which debts shall be *paid.* But in case of an administration, there is to be no *payment,* the debt is extinguished by operation of law; the case there-

1812.

Ex parte MEASON.

fore, is not touched by the provisions of the act. This argument is ingenious but not satisfactory. Call it by what name you will, the administrator does in *fact pay* himself, he receives the money of the intestate, and applies it to the payment of his own debt. There is nothing in the act which looks like a distinction between the administrator and any other creditor, and where equality of payment is the object, I am inclined to give a liberal construction. There is no reason why the administrator should be favoured in payment of his debt, as the law allows him an adequate compensation for his services in administering the estate.

Another point is made on this appeal, which does not admit of so easy a solution. The act of assembly gives a preference to *servants' wages*. The intestate Mr. *Ashman* was concerned in iron works, and the persons employed in these works claim a preference as *servants*. The term *servants*, in its largest extent, is very comprehensive. It includes not only all those employed by another to do any kind of work or labour, but even agents in mercantile and other branches of business, in which bodily labour is not exerted. It has not been contended that the act of assembly is to be construed in the utmost extent. We must therefore seek for some more limited and reasonable sense. I know none so proper as the common understanding of the country, which seems to confine servants to that class of persons who make part of a man's family, whose employment is about the house or its appurtenances, such as the stable, &c., or who, residing in the house, are at the command of the master, to be employed at his pleasure, either in the house or elsewhere. We find that in ancient *English* statutes, a distinction is made between *servants*, *labourers and workmen*, although in a large sense they are all servants. The statute 23 *Edw.* 3. *ch.* 2, is in Latin, of which the following is a literal translation: "and if a reaper, mower, or any other *work-*"*man* or *servant* of whatsoever state or condition he shall "be, retained in the service of another, shall depart from "his said service before the end of the term agreed on, "without reasonable cause or license, let him undergo the "pain of imprisonment." The statute of 5 *Eliz. ch.* 4, speaks of "servants, workmen, artificers, apprentices and labourers." And the statute 1 *Jac. ch.* 6, declares that the sta-

1812.

Ex parte MEASON.

tute 5 *Eliz.* shall extend to the rating of wages of all "la- "bourers, weavers, spinsters, and workmen or workwomen, "either working by the day, week, month or year, or taking "any work by the *great* or otherwise." I am induced to think that the word *servants* in the act of assembly on which this case arises, was intended to be used in the limited sense I have mentioned, from a comparison of it with the act of 1705, which must have been directly within the view of the legislature, when the act of 1794 was made, because they not only repealed it, but introduced considerable alterations. The act of 1705 comprehended ten classes of creditors, according to which the priority of payment was regulated. *Servants* were placed so low as the *ninth* class, and were coupled with workmen; *servants' and workmens' wages* are the expressions. The act of 1794 has but six classes, of which *servants*, together with *physic* and *funeral expenses*, make the *first;* but there is no mention of *workmen.* It cannot be supposed that *workmen* were omitted by accident. On the contrary, it is more reasonable to conclude, that *servants* being raised to the *first* grade, it was intended to confine them to those who in common parlance are so called. It is not to be forgotten, that although this act gives some preferences in payment, yet there is an evident intent pervading it, to lessen the number of these preferences, and to introduce equality as far as justice and convenience would permit. There is a great variety of persons employed in iron works, managers, colliers, wood-cutters, waggoners and those whose business is out of doors, beside a numerous tribe engaged in melting, casting, and forging within. Of those persons the wages are different. Some are paid by the year, month, or week, and some by the job or piece, but all are unconnected with the domestic scene; all may be properly called workmen, and none are commonly called servants. I am therefore of opinion, that the Orphan's Court were right in denying them a preference, and that the decree should be affirmed.

YEATES J. I entirely assent to the opinion delivered by Mr. President *Roberts* in the Orphan's Court of *Fayette* county.

The policy of the act of the 19th of *April* 1794, in sec. 14,

1812.

Ex parte MEASON.

was to place all creditors, whose debts were of equal dignity at the time of the death of the deceased, upon one common footing. This court have so decided in several instances. The legislature have declared the classes of debt which are entitled to a preference, but are wholly silent as to any special claim of priority by executors or administrators over other creditors of equal degree. It has been urged in the course of the argument, that on the immediate death of the party, the demand of the personal representatives is extinguished by assets coming to their hands, provided creditors of superior dignity are not injured thereby. But however plausible this argument may seem in the case of executors, it is by no means applicable to administrators. The former derive their authority under the will of the testator, and are complete executors before probate for every purpose, except filing a declaration, on account of the profert of letters testamentary therein contained. But the powers of the latter arise from the time of granting administration to them. 1 *Salk.* 301., *Comy.* 151. Indeed the usual mode in suits brought against executors, in case of an apprehended deficiency of assets, where they have demands against their testator, is to plead a retainer of their own debt, though it must be admitted, they may either plead it or give it in evidence. 3 *Burr.* 1383., 5 *Co.* 60. No privilege is granted to an executor or administrator different from what they might confer on other creditors, or which such creditors themselves might procure by due vigilance. It is plain to me, that the claim of one of the administrators in the present instance to be allowed the whole of his simple contract debt, is in direct opposition to the law, and unfounded in any principle of justice or equity.

The great difficulty of this case, is to affix a correct and precise meaning to the words *servants' wages* in this law. Upon all hands it is agreed, that they cannot be confined to slaves, or indented servants, who are not entitled to wages; and that they cannot be extended to the relation of master and servant in the general legal sense of those terms, where one acts under the direction or command of another, because no reasonable ground of preference can be assigned to the character of servants in such large and comprehensive acceptation.

The ancient common law was highly favourable to the

1812.

Ex parte MEASON.

demands of servants in the order of administration, inasmuch as it said they were to be paid among the first debts. *Bracton, lib.* 2. *c.* 26., *Fleta, lib.* 2. *c.* 57. *s.* 10. By those authors they are called *servitia servientium et stipendia famulorum.* An action of debt might be brought by a servant for his wages, against the executors or administrators of a deceased person, because in such cases the deceased could not have waged his law as he might in matters of simple contract in general. *Swinb.* 458, (*6th ed.*) *Godolph.* 221. Debts for the wages of a servant within the statutes of labourers, shall be paid before simple contracts. 1 *Roll. Abr.* 927. *l.* 35. But a quere is put in the same page, *l.* 45, whether a debt by simple contract should be paid after a debt for wages by a servant who is not within those statutes. A distinction has been taken between one retained by a testator to paint for a year, and a common labourer, who may be driven to work against his will, his salary being put in certain by the statute. *Bro. Executor* 87. cites 4 *H.* 6. 19. And the same distinction is taken between the salary of a labourer or servant, and of a priest. *Bro. Executor* 163, cites 11 *H.* 6. 48. In *Went. Office of Executors*, edited by *Curson*, *c.* 11. *pa.* 121, it is thus expressed. "When the testator retaineth servants in husbandry or otherwise, and dieth, there being wages due to these so retained, the executor is liable to an action of debt for the same, by reason that the parties were compellable by statute thus to serve, and therefore the testator could not have waged his law. But in case of servants not compellable, as *waiters* or *serving men* as we call them, no action of debt lieth against the executor for their wages, though against the testator himself it doth, for the contract is sufficient to charge him who made it."

It is worthy of observation, that under the old act of 1705, "directing the order of payment of debts of persons deceased," *servants' and workmen's wages* were placed on an equal footing, and put in the ninth grade, being preferred to debts arising "on merchant's and tradesmen's books, and "promises by word, arrears of account and such like." But in the act under consideration, *physic, funeral expenses and servants' wages*, rank together in the first grade, and the term *workmen* is wholly omitted. We are bound therefore to conclude, that the intention of the legislature was, that there-

1812.

Ex parte MEASON.

after workmen's demands should not rank in the same degree of dignity as those of servants; and are naturally led to inquire into the grounds of legislative preference of the first creditors.

Decency, as well as regard to the public health, point out the necessity of consigning the dead body to its original earth. Medical aid is obtained with more facility when there is a reasonable prospect of remuneration for services, whatever may be the event of the disorder. The same observation is applicable to servants, who are indispensable in most families; their attention and attachment to their master in all the vicissitudes of life well deserve to be rewarded. Besides, it strikes me forcibly, that the inferior humble sphere in which they move, and their dependence on their masters, intitle them to legal protection. These are probably some of the reasons which influenced the legislature in the formation of the first class of creditors.

I am then satisfied on the fullest reflection that the word *servant*, used in the 14th section of the act of the 19th of *April* 1794, must be restricted to its common and usual sense, as understood by householders. It signifies a hireling, one employed for money to assist in the economy of a family, or in some other matters connected therewith. I count it of no moment that the party hired does not sleep or eat within the walls of the house. I denominate a gardener, coachman, footman, &c., who live out of the family, as servants within the true meaning of the act. Not so of a clerk or book-keeper, who, however meritorious his services might be, would scorn to be placed in the rank of servitude. Nor can I conceive the smallest propriety in calling those persons who were employed by *James Ashman* in his life time in the manufacture of iron and business incident thereto, *servants*, and therefore intitled to a preference as such. They would justly be styled *workmen*, under the operation of the act of 1705.

On both grounds therefore, I am of opinion, that the Orphan's Court acted correctly in setting aside the report of the auditors, and that their decree be affirmed.

BRACKENRIDGE J. "Among these simple contracts," says *Blackstone*, 2 *Com.* 54, "servants' wages are by some, with

1812.

Ex parte MEASON.

reason, preferred to any other; and so stood the ancient law, according to *Bracton*, and *Fleta*, who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum*." Are *servientes* and *famuli* the same description of persons, or different classes of those that serve? The terms in the *Latin* language which is used, import different classes or conditions. The *familia* amongst the *Romans*, was the body of household servants. They were called *familiares*, and *famuli* or *famulæ*, men or maid servants. The *servi*, who were by far the most considerable, were those employed in husbandry and manufactures. See *Adams' Antiq.* 35, and the authorities there cited. Though slavery was not known to the common law, yet the different kinds of servants would seem to be referred to, under the *servientes* and the *famuli*. It would be tautological, if there was not a distinction.

When we come to the statute law, we find the term *servants* used in a more extensive sense than that of *domestic servants*. 23 *Edw.* 3. "If a workman or servant depart from service before the time agreed upon, he shall be imprisoned." This is the title of the chapter. In the chapter itself it is "*si messor, falcator, aut alius operarius*, aut serviens *cujuscunque status vel conditionis fuerit, in servitio alicujus retentus*."

Passing over a number of other statutes in which the term *servant* would seem to be used in a *more extensive sense* than that of *domestic servant*, we come to that of 5 *Eliz. c.* 4, which refers to preceding statutes, and purports to substitute more effectual provisions for both master and servant. It is entitled "an act containing divers orders for artificers, labourers, servants of husbandry and apprentices." The preamble is, "that although there remain and stand in force presently a great number of acts and statutes concerning the retaining, departing, wages and orders of apprentices, as well in husbandry as in divers other arts, mysteries and occupations, yet partly for the imperfection and contrariety that is found and doth appear in sundry of the said laws, and for the variety and number of them, and chiefly for that the wages limited and rated in many of the said statutes are, in divers places, too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and labourers, the said laws

1812.

Ex parte MEASON.

cannot conveniently, without the great grief and burthen of the poor *labourer and hired man*, be put in good and due execution, therefore, &c. that, as much of all the statutes heretofore made, and every branch of them, as touch or concern the hiring, keeping, departing, working, wages or order of servants, workmen, artificers, apprentices and labourers, are repealed." By the third, fourth, fifth and sixth sections the new provisions are made, and, the services which they shall respect, enumerated. Amongst these we find husbandry, digging, seeking, finding, getting, melting, filing, working, trying, making of any silver, tin, lead, *iron*, &c. *The workmen, in the case before us, were retained in the manufacture of iron.*

The statute of *Elizabeth* has not been introduced in *Pennsylvania;* and I refer to it only as shewing the *extent* in which the term *servant* was used, and that it is not confined to *domestic* service; and as showing also, that workmen, labourers, artificers, &c. are used as expressing kinds of service, and not as distinguished from servants: so that I can draw nothing from the use of the terms "*servants and workmen*" in a former act of assembly, and the omission of the term workmen, in the act of 1794. If any thing, I would infer, that the term *workmen* was omitted as being synonimous; or, lest the enumerating one species of service might seem to exclude any other species; for *expressio unius exclusio est alterius*, and *it is dangerous in a general law to attempt to enumerate and descend to particulars.* It is safest to give the *genus*, as the legislature of 1794 may have thought adviseable, and in using the term *servants only*, to have left it to the courts to say who should be considered servants, so as to be entitled to a priority in the payment of wages; and which must depend on the common law extent of the term servants. In this particular there could be no change of the common law of *Pennsylvania* from that of *England*, unless by act of assembly. If any principle whatever could remain unaffected by the change of *situation*, it must be the relation of master and servant, and the correspondent rights. These are detailed, 1 *Blac.* 428. *First*, "The master may maintain, "that is abet and assist his servant in any action at law "against a stranger. *Second*, A master may bring an action "against any man for beating or maiming his servant. A "master may likewise justify an assault in defence of his

1812.

Ex parte MEASON.

"servant, and a servant in defence of his master also. *Third*, "If any person do hire or retain my servant being in my "service, for which the servant departeth from me and goes "to serve the other, I may have an action of damages both "against the new master and the other, or either of them." The reason and foundation upon which all this doctrine is built, says the commentator, seems to be the property that every man has in the service of his *domestics*, acquired by the contract of hiring, and purchased by giving them wages.

Here would seem to be an inconsistency and oversight of the commentator in the introduction of the word *domestics*, as if this were the only class of servants to which the reason extended. In stating the different "sorts of servants acknowledged by the law of *England*," these are mentioned as the *first*, "so called from being *intra mœnia* or domestics;" but this is not the only class. He goes on to enumerate others; *second*, apprentices; *third*, labourers who are only hired by the day or by the week, and do not live *intra mœnia* as part of the family. Will it be said that an action in *Pennsylvania* will not lie for enticing away a labourer at husbandry hired by the day, week, month or year? Much less that it will not for enticing away hands employed at a manufactory? *This I take it will be the proper criterion, and best test of the meaning of the term servant.*

Then with regard to the policy; for I will admit that the *reason and policy of a construction* in the extent to be given to the term, ought to weigh in ascertaining what was the extent intended by the legislature. And in this view of the question, it would seem to me that in the case of domestic servants there is the least reason for a preference in the payment of wages; because it is seldom, if ever, that arrears of wages are due. *Domestics* are usually paid by the week or month, and a household establishment of servants seldom consists of more than one or two; the bulk of the people being obliged to be their own servants, and as to work within doors oftentimes without any at all. The wages of *domestics* therefore, or what are called menial servants, would seem to be too small an object to require the interposition of a statute. The inducing such to continue in service during *a last illness*, though a consideration of humanity, yet does not appear to me to be an object of such extensive policy, as the

1812.

Ex parte MEASON.

security which a man may have in his dependence upon servants in *agricultural improvements, or the establishment and carrying on of manufactures.*

The lien which tradesmen may have on the materials furnished to customers, may distinguish them in reason from persons hired at wages for the time, or by the job, as the phrase is.

On what ground shall we *restrain* the common law meaning of the term *servants*, and in this act of assembly confine it to domestics, or those employed in the drudgery of the household, or waiting on the person? Will not popular acceptation and common parlance restrain it still more? For we do not call even apprentices servants. Speaking *of* hired persons, we may call them servants; but not speaking *to* them, but at the risque of losing their service. I know of no description of persons, those bound by indenture to *serve* excepted, who would be willing to be called servants, unless members of assembly in *a political meaning*. The popular application of the term therefore would be too uncertain, where the rights of persons, whatever may be the names of things, are interested. It is remarkable that in the act of assembly of 1794, the grade in the order of payment of servants' wages, is changed from what it was at common law; and a rank is given higher in the order of paying debts, and also higher than in the act of 1709. Is it the inference that from this advancement of the grade, the extent which had been given to the denomination of servants is to be *contracted?* If it had been the intention of the legislature to contract, it would seem to me, that the term *domestic servants* would have been used. But the term *servants* having been more extensive at common law, and under the statutes, and, as I take it, the *construction* having been more extensive under the act of assembly of 1709, are we at liberty to confine the term to a more contracted application? It is remarkable that by the act of 1709 the *commonwealth* has a preference after funeral expenses and physic, and takes the place of the *prerogative of the king* at common law. In the act of 1794, the *commonwealth* has the last place. But it will not be inferred that any thing more than the *grade* was changed, and not the *nature of the debts.*

1812.

Ex parte MEASON.

I just note an authority from *Rolle's Abridg.* 1 *Roll.* 927, *viz.* "that debts for servants' wages within the statute of "*labourers*, shall be paid before simple contract debts." This puts *labourers* within these statutes, upon the footing of other servants; and it has been already seen what labourers within these statutes are specified as servants. These are not only in-door but out-of-door servants of husbandry, *manufactures* &c. I must therefore think that in the case before us, which is that of *hired persons in the manufacture of iron*, the construction of the court below is too narrow, in restraining the priority to *menial or domestic servants*. Under the other head, the *retainer*, I incline to affirm their judgment, and on this to reverse.

Decree affirmed.

5b 184
10s r409
17s r357
17s r359
17s r360
1r 444
6w 552
6ws 514
59 327
64 247

CARMACK and others *against* The Commonwealth, for the use of BOGGS and others.

Pittsburg, Wednesday, Sept. 9.

IN ERROR.

The sureties of a sheriff are liable in damages for the sheriff's trespass, in seizing and selling the goods of *B*, under an execution against *A*; but a judgment in trover against the sheriff alone, for the same cause, is not binding upon the question of damages in a suit against the sheriff and sureties.

A judgment in trover against the sheriff, is neither an extinguishment of his official security, nor a bar to a suit against his sureties. It is but one of several remedies, which the injured party may use successively, until he obtains satisfaction.

THIS was a case stated in the Common Pleas of *Erie* county, with liberty to either party to bring a writ of error; and the judgment of that court having been rendered against the defendants below, they brought this writ of error.

The material circumstances set forth in the case were these: In *June* 1805, a suit was brought in the Common Pleas of *Erie* against one *Thomas Wilson*, upon which judgment was obtained, and a *fi. fa.* issued to *December* 1806. This execution was levied upon one hundred barrels of salt as the property of *Wilson*, which were claimed by *Boggs* and others as their property, and notice of their claim given to *Carmack* the sheriff, who nevertheless proceeded to sell the salt, and paid the proceeds to the plaintiff in the execution. In *January* 1808, *Boggs* and the other proprietors of the salt, brought trover against *Carmack*, and recovered a

verdict for 752 dollars 80 cents damages, and six cents costs, upon which final judgment was entered. This suit was then brought, which was a *scire facias* against the sheriff and his sureties, on his official recognisance, to recover from them the amount of the judgment in *trover*.

The question submitted to the court was, whether *Patrick M'Kee* and another, (two of the sureties who were served with process) were liable for the same, in consequence of the bond and recognisance entered into by them as sureties for the said *Jacob Carmack*, in pursuance of the act of assembly of the 28th of *March* 1803.

If the court should be of opinion that they were so liable, then judgment to be entered against all the defendants, for the said sum of 752 dollars 80 cents, with interest and costs; but if the court should be of opinion that the sureties were not so liable, then judgment to be entered against *Carmack* only, for the above amount; or for the defendants generally, if the court should be of opinion that judgment could not be legally entered against *Carmack* in this action.

By the act of the 28th of *March* 1803, 4 *Smith's Laws* 45, it is enacted that the sheriff, before he shall be commissioned or execute any of the duties of his office, shall enter into a recognisance, and become bound in an obligation with at least two sufficient sureties. The form prescribed for the recognisance is as follows: "You do acknowledge, &c. &c., "upon condition that if you (the sheriff) shall and do without delay, and according to law, well and truly serve and "execute, all writs and process of the commonwealth of "*Pennsylvania* to you directed, and shall and do from time "to time, upon request to you for that purpose made, well "and truly pay or cause to be paid to the several suitors "and parties interested in the execution of such writs or "process, their lawful attornies &c., all and every sum and "sums of money to them respectively belonging which shall "come to your hands, and shall and do from time to time, "and at all times during your continuance in the office of "the sheriff of the county of ——, *well and faithfully exe-* "*cute and perform all and singular the trusts and duties to* "*the said office lawfully appertaining*, then this recogni- "sance to be void, otherwise &c." The condition of the bond is in similar terms. The act further provides that

1812.

CARMACK v. COMMONWEALTH.

whenever "any individual shall be aggrieved by the *mis-*"*conduct* of any sheriff, it shall be lawful, as often as the "case may require, to institute actions of debt or of *scire* "*facias* upon such recognisance, against such sheriff and his "sureties, and if upon such suits it shall be proved what "damage hath been sustained, and a verdict and judgment "shall be thereupon given, execution shall issue for so "much &c."

Foster for the plaintiffs in error.

1. The sureties are not answerable for the trespass of the sheriff. The preamble of the act of 1803 recites, that the security should be proportioned to the trusts confided to the sheriff. There is no trust confided to him that he shall not commit a trespass. Suppose in execution of his office, he should commit an assault and battery, will it be said his sureties are liable? The persons entitled to remedy on the recognisance, are the plaintiff who puts the writ in his hands, and the defendant on whom it is served. The duties which he has to perform are active, not negative. If he commits a trespass, it is not in the execution of his office; his office does not justify him; he stands as an individual, and as an individual must answer. Vindictive damages are often recovered against him in trespass; it would be enormous to make sureties liable to this extent.

2. After the recovery in trover the sureties are not liable. The remedy upon the recognisance is extinguished, or barred by the election of another remedy. If the grantee of rent recovers in an action of covenant for non-payment, it is a bar to an action of debt for the same rent. 1 *Roll. Abr.* 353., 4 *Bac.* 115. So a recovery in assumpsit is a bar to debt for the same cause of action. *Ashbrooke* v. *Snape* (*a*), *Lee* v. *Mynne* (*b*). No suit on the recognisance can be supported against the sheriff, and therefore not against him and his sureties. Judgment against one on a joint and several obligation, is no plea to an action against the other, but it is a good plea to an action against both.

3. The recovery in trover was not conclusive against the sureties. They had no notice; and it is against natural justice, to condemn them unheard.

(*a*) *Cro. Eliz.* 240. (*b*) *Cro. Jac.* 110., *Yelv.* 84. *S. C.*

Baldwin for defendants in error.

1. It is contrary to the duty of the citizen to resist the sheriff. If his goods are wrongfully taken, he can neither replevy them, nor obtain a suspension of the execution until the question of property is tried. 1 *State Laws* 795. *Insurance Company of Pennsylvania* v. *Ketland* (*a*). Miserable is his condition therefore, if he has not a remedy against the sheriff. But the act intended that wherever the sheriff was bound to answer, his sureties should answer for him. They are to answer for his *misconduct*, and for his not faithfully executing all the duties of his office. Is it possible to contend, that he faithfully executes his duty, when upon a writ against the goods of *A*, he takes the goods of *B*?

2. The judgment in the action of trover is no bar. The injured party has many remedies, and he is entitled to exhaust them all, until he obtains satisfaction. The case frequently occurs. Judgment on a bond is no bar to a *scire facias* upon the mortgage given to secure it. Judgment in debt for rent, is no bar to a distress for the same cause. *Transit in rem judicatam* is true only of the particular cause of action in suit.

3. Undoubtedly as against the sheriff, the judgment in trover is conclusive. But if conclusive against him, how can the others be distinguished in the case of a joint *scire facias*? It is an inconvenience to which they are exposed by their suretyship; but the principal being concluded, so must principal and surety be in a suit against them.

TILGHMAN C. J. This is an action against the sheriff and his securities on his official recognisance, for an injury sustained by his levying on the property of the plaintiffs, by virtue of an execution for *John M'Koy* v. *James Wilson*, after having received notice that the goods belonged to the plaintiffs, and not to *J. Wilson*. Previous to the commencement of this suit, the plaintiffs had brought an action of trover against the sheriff, in which they obtained a verdict and judgment, but received no satisfaction. There are two questions for the decision of this Court. 1. Whether the plaintiffs were entitled to recover in the present action to

(*a*) 1 *Binn.* 499.

1812.

CARMACK v. COMMONWEALTH.

the amount of the damages recovered in the action of trover? 2. Whether the securities of the sheriff are answerable for an injury of this kind?

1. I consider this action as totally distinct from, and unconnected with the action of trover against the sheriff, with which the securities had nothing to do, nor does it appear that they even had notice of it. The action of trover was not necessary as a foundation for this suit, because the act of assembly by virtue of which the sheriff entered into a recognisance with security, enacts, that when any person is aggrieved by the conduct of the sheriff, he may institute an action of *scire facias* on the recognisance, and recover to the amount of the damages he shall prove that he has sustained. It is contended, however, that inasmuch as the sheriff was the defendant in the action of trover, he certainly is bound by the judgment in it, and therefore the other defendants in this *joint action* must likewise be bound. This is a very subtle attempt to cut off the securities from all possibility of being heard; but it is too unreasonable to be sanctioned by the law. It is much more just to say, that the plaintiffs having thought proper to join the sheriff in this action with other persons not parties to the action of trover, they have thereby relinquished the estoppel against the sheriff, because that estoppel cannot be insisted on without injustice to the other defendants. I am therefore of opinion, that the defendants were at liberty to make their defence in this suit, in the same manner as if the action of trover had never been brought.

2. Are the securities in the recognisance liable to this action? I will first consider a previous point made by the counsel for the plaintiffs in error, viz. that the judgment in the action of trover was an extinguishment of the recognisance, or rather a bar to this suit. I think it was neither the one nor the other. An extinguishment it cannot be, because it was not an action on the recognisance, and nothing but a judgment on the recognisance could operate as an extinguishment. Neither is it a bar, because no satisfaction has been received. A man may have two securities or two remedies for the same debt, and pursue both till satisfaction obtained. The common security for money lent, is by bond and mortgage; yet it was never supposed, that judgment

without satisfaction on the bond, was a bar to a suit on the mortgage. Having disposed of this previous question, it remains to be considered whether the securities are liable at all. That will depend on the true construction of the recognisance, which is in the following words. [The Chief Justice here read the recognisance]. Has the sheriff failed in a good and faithful performance and execution of the duty appertaining to his office? If he has, the plaintiff's case is within the recognisance. The words are very comprehensive, and it seems reasonable, that the securities should be liable for any illegal act of their principal, done in the execution of his office. Here was a writ put into the sheriff's hands, commanding him to levy on the goods of *Wilson*. By virtue of this writ he levied on the goods of *other persons*, after receiving notice, that they were not the goods of *Wilson*. It may be fairly said, that this was not a faithful performance of his office. The case falling within the words of the law, what will be the convenience or inconvenience of the construction one way or the other? It appears to have been the intention of the law, that the community should have security for redress against the sheriff in all cases of injury received by his official misconduct. And there is great reason for such security. Persons with small property are frequently elected sheriffs; nay, the smallness of their property is apt to excite compassion, and thus promote their election. Add to this, that the canvass is expensive, so that they frequently come to the office with little or no estate. This evil was felt, and therefore the act of assembly which we are now considering, increased the sum in which security was to be given, very considerably. The sheriff has great powers, and the public good requires that he should not be resisted in the execution of his office. What could the plaintiffs do in the present instance? The law armed the sheriff with the authority of seizing their property, and deprived them of the right of taking it out of his hands even by legal process; for the act of the 3d of *April*, 1779, 1 *St. Laws* 795, renders it unlawful to replevy the goods. Under such circumstances, nothing can be more reasonable than that the plaintiffs should have security for redress. Take away that security, and you lay the foundation for resistance

1812.

CARMACK v. COMMONWEALTH.

of the sheriff and disturbance of the public peace. I am therefore of opinion, that the securities are liable.

YEATES J. Two questions arise on this record. 1. Are the sureties of a sheriff liable in damages for his unlawful act in levying and selling the goods of a stranger, instead of the defendant's against whom the execution issued? 2. Are such sureties bound to pay the damages recovered against the sheriff by such stranger, in a suit brought against him alone?

1. The form of the recognisance to be given by a sheriff and his sureties, is prescribed by the third section of the act of the 28th of *March* 1803. The condition consists of three distinct branches. 1. That the sheriff shall well and truly execute all writs and process to him directed:—2. That he shall pay over all money which shall come to his hands, to the persons entitled to receive the same:—and 3d. That at all times during his continuance in office, he shall well and faithfully execute and perform all and singular the trusts and duties to the said office lawfully appertaining.

It has been contended, that the preamble to the law shews the intention of the legislature, to confine the benefit of the recognisance to those persons alone, who may be said to be in privity with the sheriff in the execution of his official duties;—that the two first branches respect the persons interested in the monies arising from the suits, and the last branch cannot be carried beyond the different defendants;—and that there is no trust reposed in him, that he will not commit a trespass, nor is such precaution within the scope of his official bond. I give a different construction to the preamble, the first part whereof runs thus:—"Whereas the "*public security* requires, that sheriffs and coroners should "give sureties proportioned to the trusts confided, for the "faithful execution of their official duties." The *public security* was the great object of the law; and though the parties to the suit would more generally be interested in the faithful execution of the duties of the sheriffalty, yet other persons might also be affected thereby. The words of the condition are large and extensive, and are confined to no denomination of persons. "He shall from time to time, and at "all times during his continuance in the office of sheriff, well

"and faithfully execute and perform all and singular the "trusts and duties to the said office lawfully appertaining." The fourth section contains expressions equally general. "Whenever the commonwealth, or *any individual* or *indi-* "*viduals*, shall be aggrieved by the misconduct of any sheriff "or coroner, it shall be lawful, as often as the case may re- "quire, to institute actions on such recognisances," &c. The office of a sheriff is exposed to great risks, in cases of escape, after every reasonable precaution has been used; and it is well known that from want of legal knowledge, and due diligence in the discharge of their duties, many sheriffs have terminated their career in insolvency. Shall such persons punish one man for the crime of another, arrest or detain in prison, under mesne or judicial process, a stranger instead of the real defendant, sell one man's goods on a *fieri facias* issued against another, and the injured parties be wholly remediless? Upon what grounds of sound policy could the law have drawn a line of discrimination between the litigant parties, and other inhabitants of the county, when the most injurious consequences might spring from the sheriff's illegal conduct to the latter, as well as to the former? The public security would not thus be provided for. The strong hold which the community have on a ministerial officer, is by subjecting his sureties to responsibility for his official misconduct. I am therefore of opinion, that the sureties are liable in damages for the unlawful conduct of the sheriff, in the present instance.

But secondly, whatever may be the liability of the sureties, it is not consistent with the principles of common justice, that they should be condemned unheard. It appears unnecessary to consider what would be the legal effect of their having received notice of the action of trover brought against the sheriff, and co-operating with him in his defence of that suit. No such fact is stated, or even pretended, in this case. They had an undoubted right to question the illegality of the act complained of, and to contest the damages consequent thereon. This is rendered more plain, if possible, by the positive terms of the fourth section of the act; if in actions of debt or *scire facias* upon such recognisances, or actions of debt upon such obligations, against such sheriff or coroner and their sureties, "*it shall be proved what*

1812.

CARMACK v. COMMONWEALTH.

"*damage hath been sustained*, and a verdict and judgment "shall be thereupon given, execution shall issue," &c. The act therefore points out the mode in which damages are to be recovered from the sureties; and this not being complied with in the present instance, the consequence is, that the judgment of the Court of Common Pleas must be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. By the act of the 23d of *March* 1803, the condition of the *obligation* to be entered into by the sheriff and his sureties, is precisely the same with that of the condition of the *recognisance;* and why both obligation and recognisance, I do not see, unless for the greater security of those interested, the proceedings on the bond being against the person in the first instance, *which may be followed any where*. But be that as it may, it marks the solicitude of the legislature to secure to the citizens, a faithful execution of the duties of his office. Whether this security shall extend beyond a nonfeasance, and comprehend the doing what he was not bound to do, and ought not to have done, makes the first question in the case. As, for instance, where he is commanded by the writ to take the goods of *A*, and takes the goods of *B*, which is a trespass, are the sureties liable?

In giving a statute a strict *or a liberal construction*, what shall guide? It must be our idea of the policy of the act, in the extent to be given it. To say that the sureties shall be liable for the malfeasance of the sheriff, in the execution of his office, is extending the responsibility. But is it a matter of difficulty to procure persons to undertake this office, and to provide sureties, even under this responsibility? Until an inconvenience of this nature stands in the way, or it can be foreseen that it will inevitably follow, there can be nothing drawn from the argument *ab inconvenienti* of such a construction.

It is remarkable that no qualification of *property* has been thought necessary for the sheriff. This is confined to his sureties, with regard to whom great precaution has been taken. Their "sufficiency shall be submitted to and ap- "proved by the judgment of the Court of Common Pleas "of the proper county, or any two or more of them *for that*

"*purpose convened;* and no commission shall be afterwards "granted, before the governor shall have approved of the "sufficiency."

The sheriff may be an insolvent person; and in that case has not every *citizen* as well as *suitor* an interest in this security against his trespasses *under colour of authority.* If that be the case, and it seems reasonable, it will decide the first question as to the sureties being liable for his doing what he ought *not to have done*, as well as not doing what he *ought to have done.*

A second question will arise, whether, on the action against a sheriff, notice was not necessary to be given to the sureties in order to fix their responsibility, and to conclude them by the judgment both as to the fact of the trespass or delinquency, and the amount of the damages. Are not the sureties to be considered as identified with the sheriff in his official conduct, and to be supposed cognisant of what he does, so as to supersede the necessity of notice? It is a principle of law, that where *notice in the nature of the case is supposed to be in the possession of the party, farther is not necessary.* The sureties are to be considered the *keepers* of the sheriff, and bound to follow him up, and attend to his performance of his duty, as well as to hinder his transgressions. It is most for the convenience of the suitors and the people, that it be considered in this point of view, and I am willing so to consider it. *When sureties know the risque, they will attend to it.*

But shall the judgment against the sheriff be conclusive, or only *prima facie* evidence against the sureties? To consider it otherwise than conclusive, would be letting in the traverse of the fact *ab origine*, which would render it more advisable to have sued on the bond or recognisance in the first instance. But an action of trespass could not be brought on the bond, though in an action of debt on the penalty, a trespass or delinquency might be alleged as a breach of the condition *whereby action accrued.* But the law delights in simplicity. It would introduce much special pleading to get at the issue to be tried in this way; and it would be more convenient to ascertain the damages against the sheriff in the first instance, which, if not discharged by him, would justify the calling on his sureties as a collateral security in

1812.

CARMACK v. COMMONWEALTH.

the last resort. To allow them an opportunity of going into the original merits in the action on the bond, or the *scire facias*, would involve all the inconveniences before mentioned of special pleading, and averment, to get at the issue; and unless put specially upon the record by a particular statement, *it could not be pleaded in bar of another action for the same trespass, or case.* It is the most natural and simple proceeding, and most convenient for all concerned, to ascertain the fact and the damages, and to call upon the sureties only, on the sheriff having failed to satisfy. It is thus in the analogous proceeding against bail in court. The condition of the recognisance supposes that the debt or damages shall be ascertained, which they are to pay on not surrendering the principal. It cannot escape our consideration, that it is the duty of the sheriff, where the property of goods levied on is contested, to take a bond of indemnity from him at whose suit he levies, which will be for the benefit of the sureties.

Need I observe on what was thrown out in the argument, that by the judgment the property is vested in the defendant in the judgment, and the cause of action merged? *The judgment is no satisfaction;* it is but the evidence of the satisfaction which the law says ought to be made.

On these general grounds I am of opinion, that judgment be entered against all the defendants for 752 dollars 80 cents, with interest and costs of the original action, and the present.

Judgment reversed, and *venire de novo.*

MEADE *against* M'DOWELL.

1812.

IN ERROR.

Pittsburg, Wednesday, September 9.

IN error to the Common Pleas of *Crawford*, the case was as follows: It was *assumpsit* to *December* term 1807, by the defendant in error, who was plaintiff below, to recover from *Meade* the sum of 572 dollars and interest, due to the plaintiff by one *Wilson*, for whom the defendant had made himself responsible. Pleas *non assumpsit*, and *non assumpsit infra sex annos*.

Upon the trial of the cause, the plaintiff gave in evidence the following letter from the defendant to him.

"Dear Sir,

"Mr. *Wilson* having proposed to go to *Philadelphia*, in "order to purchase goods, I wish you to give him any as- "sistance in your power, by letter or otherwise. You may "consider me accountable *with him* to you, for any contract "he may make. I am, &c.

"DAVID MEADE.

"*August* 15, 1798."

He then offered the following letter and memorandum from *Wilson*, to prove the contract, and the amount due from *Wilson*, which was objected to by the defendant, but admitted by the court.

"*Pittsburg*, *April* 23d, 1799.

"Sir,

"Annexed I have given you an exact statement of the se- "veral sums for goods bought by me in your name. I have "likewise recited and confirmed the agreement made on "my part, which I shall consider to all intents and purposes "as binding as an agreement in any form whatever. *I have* "*mentioned no time for the payment of the advance agreed on*, "in confidence that you are disposed on that head, to be as "favourable as I could reasonably request. I hope likewise "you will be disposed to use any influence that you can with

If *A* guarantees to *B* the performance of any contract he may make with *C*, and six years elapse after the contract between *B* and *C*, and before the bringing of suit against *A* upon his guaranty, no acknowledgment by *C* subsequent to the contract, can take the case out of the statute of limitations as to *A*. But the declarations of *C* are evidence against *A* to prove the contract between *B* and *C*, though made subsequent to the contract.

A requested *B* to give *C* any assistance in the purchase of goods, by letter or otherwise, saying "you "may consider "me accounta- "ble *with him* "to you, for any "contract he "may make." *Held*, that a contract by *C* to pay *B* a premium for guaranteeing a contract by *C* with a third person, was within *A*'s promise, but that it did not make *A* a *joint* debtor with *C* to *B*.

If one man confides to another the power of making a contract, he confides to him the power of furnishing evidence of the contract; and if the contract is by parol, subsequent declarations of the party are evidence, though not conclusive.

"propriety, to dispose the several creditors to be as indul-
"gent as the nature of the business will admit. A small
"addition to the assortment, appears necessary to suit the
"demand of this place; on this I have taken the liberty to
"write down, mentioning the articles wanting, stating at the
"same time that you were not present, but that the first op-
"portunity I did not doubt your concurrence. The amount
"would not exceed 300*l.* at highest. Should this meet your
"approbation, the terms as relates to you may be considered
"so far as relates to dry goods the same as before. As to
"groceries, or articles bought at 90 days, they will not bear
"an advance. I am, &c.

"THOMAS WILSON."

"Received, *Philadelphia*, by means of letters of credit
"from *Alexander M'Dowell*, Esq. of *Franklin*, of sundries,
"merchandize to the following amount. viz.

1798, *Nov.* 13th } (enumerating the vendors)
23d } whole amount, 1870*l.* 2*s.* 6*d.*

"And whereas at the time of receiving from the above
"named *Alexander M'Dowell*, letters empowering me to
"purchase the goods, which constitute the above amount,
"*there was a verbal agreement* with the said *M'Dowell*, I
"do hereby acknowledge and confirm the same, which was
"as follows: In consequence of a letter from *David Meade*,
"esq. of *Meadville*, the said *M'Dowell* agreed to order on
"his own credit, such goods and to such an amount as I
"might have occasion to procure for my sole use and dis-
"posal, I on my part agreed, and do now hereby agree and
"bind myself for the amount of the dry goods, which is
"1376*l.* 9*s.* 4*d.*, to pay to the said *M'Dowell* an advance
"of twelve and a half per cent. making 170*l.*, I say 172*l.* 1*s.*
"2*d.*, and to defend and keep safe the said *M'Dowell* from
"all loss, damages or suits, in or on account of the property
"which constitutes the whole amount, which is 1870*l.* 2*s.* 6*d.*

"THOMAS WILSON.

"*Pittsburg*, *April* 23d, 1799."

The plaintiff, to take the case out of the statute of limitations, then offered the following memorandum, which was also objected to by the defendant, but admitted by the court.

1812.

MEADE v. M'DOWELL.

"*Franklin*, *June* 25th, 1802.

"Mr. *M'Dowell* and myself have this day taken up the invoices of all goods purchased by me on his credit, in pursuance of the agreement alluded to before, and find that the total amount of dry goods, &c. for which I am to pay him an advance of twelve and a half per cent., is 1715*l.* 19*s.* 1½*d.* which makes the amount due him for said advance 572 dollars.

"THOMAS WILSON."

The court charged the jury, that the defendant's letter of *August* 15th, 1798, rendered him liable for the contract in question, if made; that the letter and memorandum of *Wilson* of the 23d *April* 1799, were proof of that contract in this suit, and that the acknowledgment under date of the 25th *June* 1802, took the plaintiff's demand out of the statute of limitations:—to all which the counsel for the defendant tendered a bill of exceptions. Verdict for plaintiff, damages 536 dollars 32 cents.

Foster, argued for the plaintiff in error.

Baldwin, contra.

TILGHMAN C. J. After stating the facts, delivered his opinion as follows:

This cause was tried on the issues of *non assumpsit* and the act of limitations, and three questions arose on the trial. 1st, Whether the writings signed by *Wilson* were legal evidence against *Meade*? 2d, Whether *Meade* was responsible for the premium of twelve and a half per cent.? 3d, Whether the writing of the 25th of *June* 1802 took the defendant's case out of the act of limitations?

1. I have no doubt of the writings signed by *Wilson* being evidence against *Meade*. *Wilson* was to make the contract, and *Meade* to be responsible. *Meade* having confided to *Wilson* the making of the contract, confided to him of consequence the power of furnishing evidence of the contract. The contract having been made by parol without witnesses, it was impossible to prove it in any other manner than by subsequent declarations of the party. But although these declarations were evidence, they were not *conclusive*. If there

1812.

MEADE v. M'DOWELL.

was any collusion between *Wilson* and *M'Dowell* to the prejudice of *Meade*, it was competent to *Meade* to show it.

2. It is very clear that *Meade* was answerable for the premium of twelve and a half per cent. It falls within the words of his engagement, which was to be responsible for any contract which *Wilson* should make with *M'Dowell*. It falls also directly within the spirit of the engagement, because nothing could be more reasonable than that *M'Dowell* should receive a compensation for the risque he ran, in making himself liable for the goods purchased on account of *Wilson*.

3. As to the act of limitations, there are cases which have gone great lengths to prevent its operation, but none which come up to the present point. *Meade's* assumption was made in 1798, and the contract for which he was to be responsible was made in the same year, the subsequent written acknowledgment of which, bears date the 23d of *April* 1799. This is more than six years before the commencement of the action. It does not appear at what time the premium of twelve and a half per cent. was to be paid, and if that had been left to the decision of the jury, and they had found for the plaintiff, it would have been all right. But the court gave it in charge, that the writing of the 25th of *June* 1802 took the case out of the act of limitations; so that the point is reduced to this, whether the act of limitations having once attached, it was in the power of *Wilson* to deprive *Meade* of the benefit of it. I cannot think that it was. The farthest that any case has gone, is that where two persons make a *joint* and *several* engagement, the acknowledgment of *one* shall take the case out of the statute as to *both*. The reason of which is, that the contract being *joint* as well as *several*, there is an absurdity in its being in force as to one, and not as to the other. It must either be in force against *both*, or its joint nature is destroyed. But, in the present case, I consider *Meade* as having made an engagement *by himself*. He was in no kind of *partnership* with *Wilson*, but promised that he would be responsible for any contract which *Wilson* should make. *Wilson* then made the contract for himself alone; so that each acted *severally* and not *jointly*. When *Wilson* made the contract, *Meade* became bound to see it performed, and there all authority given by *Meade* to

1812.

MEADE v. M'DOWELL.

Wilson ended. But it is said, that the words of *Meade's* engagement are, "that he might be considered as accountable *with Wilson* to *M'Dowell*," and therefore it was a joint contract. I thought at first there was weight in this remark. But upon reflection, I am satisfied that the contracts of *Meade* and *Wilson* were *entirely several.* The true construction of *Meade's* engagement is, that he would be accountable for any contract made by *Wilson.* To make a *joint* contract, there must be a *joint act.* One partner may act for both. But there was no partnership between *Meade* and *Wilson*, nor had *Meade* any authority either directly or by implication of law to act jointly for himself and *Wilson.* His engagement was therefore simply for himself. That being the case, it was not competent to *Wilson* to bind *Meade* by a new assumption after the act of limitations had attached. I am of opinion, that there was error in that part of the judge's charge which respected the act of limitations. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

YEATES J. I see no solid ground of objection against receiving in evidence the letter of *Thomas Wilson* to the defendant in error, dated the 23d of *April* 1799. Under the letter of the plaintiff in error to the defendant, dated the 15th of *August* 1798, he undertook to be accountable to *M'Dowell* for any contract he might make with *Wilson*, respecting his giving him assistance by letter or otherwise, in the purchase of goods in *Philadelphia.* He had therefore constituted *Wilson* his agent to make the contract; and of course the written declarations of the latter, as to all acts done within the scope of his authority, are admissible against his constituent, and binding upon him. Nor do I feel any difficulty in asserting that *Meade* became liable for the last goods purchased under the credit of *M'Dowell*, as well as the premium of twelve and a half per cent. The guaranty is unlimited in its terms, and we find no expressions in it, restrictive of dealing with individuals at any one time.

The only remaining question is, whether the right of recovery by the plaintiff below, was barred by the act of limitations. The plea of the defendant below, that he did not assume within six years, was unquestionably defective, and might have been taken advantage of on demurrer. In all ac-

1812.

MEADE v. M'DOWELL.

tions brought for breaches of promises founded on collateral and executory considerations, the proper plea is that the cause of action did not accrue within six years; for it is immaterial when the promise was made, if the cause of action in such cases arose within the limited period. *Bull.* 151., 2 *Saund. Williams's note* 63 *b.* Where a declaration stated, that in consideration the plaintiff would receive *A* and *B* into his house as guests, and diet them, the defendant promised to pay him a certain sum of money, &c., and the defendant pleaded *non assumpsit infra sex annos*, to which the plaintiff demurred, the court held it to be no plea, and gave judgment for the plaintiff. *Gould* v. *Johnson*, 2 *Salk.* 422., 2 *Ld. Ray.* 838. *S. C.* But in this instance, the matter went to the jury on the statute of limitations, and the point now to determine is, whether that statute was a bar to the demand, however defectively the same was pleaded.

The statement sets out the substance of the letter of guaranty of the 15th of *August* 1798, and then proceeds to aver, "that *M'Dowell* did give his assistance to the said *Thomas* "*Wilson*, and in consideration thereof the said *Wilson* did "on the 25th *June* 1802, by his statement in writing ac- "knowledge that there was due to *M'Dowell* 572 dollars, "for the assistance which he had given &c. By reason "whereof &c."

It appears by the bill of exceptions, sealed by the President of the Court of Common Pleas, to have been the opinion of that Court, that the adjustment of the 25th of *June* 1802 took the then plaintiff's demand out of the statute of limitations.

To judge correctly hereof, we must look to the period of time when *M'Dowell's* cause of action accrued. There can be no doubt that this took place in *November* 1798, when the last parcel of goods was contracted for and delivered under the guaranty, and that the act of limitations then began to run. Unless some new subsequent promise on the part of *Meade*, either express or implied, to pay this demand, can be shown, within six years before the commencement of this action, the law prevents the right of recovery. After the goods were laid in by the assistance and through the credit of *M'Dowell*, *Wilson* could no longer be said to represent the interests of *Meade*. His character as agent for a particular

purpose, was then *functus officio*. He might still bind himself by a settlement made with *M'Dowell*, but he could not bind *Meade* three years and a half after the transactions under the guaranty had closed. If it was competent to him to revive the liability of *Meade* after that period of time, he might equally do it after the lapse of twenty or thirty years, which is wholly inadmissible. That responsibility arose from the collateral engagement of *Meade* in favour of *Wilson;* but though when the goods were laid in upon the credit of *M'Dowell*, *Wilson* and *Meade* became equally his debtors, they were *separately* liable to him on *distinct* grounds; and the subsequent acts of *Wilson* respecting the original transaction, could not be imputed to *Meade* any further than those of a mere stranger. The present case appears to me to be directly within the principle established in *Bland* v. *Hasling*, 2 *Vent.* 151; and though I always experience pleasure, when the rules of law subserve my ideas of substantial distributive justice, yet I do not find myself at liberty to decide against the plain words of a statute, calculated to promote the most beneficial effects, from my private notions of equity in the abstract.

I cannot therefore concur with the Court of Common Pleas, that the adjustment of the 25th of *June* 1802 took this case out of the act of limitations, and am of opinion that the judgment of that Court should be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. An exception to the evidence in this case, might seem to arise on the ground of its being evidence of an assumpsit by *Wilson*, not by *Meade singly;* that is as much as to say, the action ought to have been against both on a joint assumpsit. An exception of this nature does not go to mere matter of form; for it is of substance that a party is not liable singly, but ought to have another proceeded against, who is also liable, and ought to bear his part of the burthen. Thus a party in a joint bond has a right to call for a proceeding against his obligor, that his estate may also be liable under the judgment. In the case of a note of hand by two or more persons, the same law. In the case of partners in trade the same law. Nor is it according to the truth of the case, to allege, that one became bound, or did assume, where

1812.

MEADE v. M'DOWELL.

the obligation or assumpsit is by *two or more*. It is a right which the quo-contracting party has, that all may be made equally liable to have their property taken in execution, and contribute to satisfy the demand. But as to the party with whom the contract is made, he can have no interest in considering it joint or several, but as it will tend to satisfy his demand; and, in strictness, where several are bound, each is bound, and the agreement may be said to be, in the nature of it, *joint or several*. But for the sake of the substance, and that all shall contribute, it is settled as a principle, that unless said to be several, or understood to be so in the nature of the undertaking, at the same time, and to the same extent, all must be sued. Applying these principles, there might be some difficulty in this case, to say whether *Meade* ought to be considered a party to the contract which *Wilson* made with *M'Dowell*, so as to be liable to be joined in a suit by *M'Dowell* v. *Wilson;* or whether the assumpsit with *Meade* ought not to be considered *collateral and distinct*, and to arise on *Wilson* having made a contract with *M'Dowell*. On strict principle I would take it to be most tenable to consider the assumpsit of *Meade* as *collateral;* and in that case, the evidence would not support a joint assumpsit, but as the case is, will best correspond with the allegation of an assumpsit singly.

But though something on this head was thrown out in the argument, I do not find that the exception to the evidence was taken on this ground at the trial; at least it is not stated in the bill of exceptions, which goes to other matter, *the liability of Meade on his letter to answer for the contract.* The letter on which the plaintiff considers him so liable, and which is of the 15th of *August* 1798, speaks of *Wilson going to Philadelphia to purchase goods, and wishes the assistance of him, M'Dowell, by letter or otherwise.* It was not of *M'Dowell* the goods were purchased, or to be; but of merchants to whom *M'Dowell* might be known, and who might be induced to give credit on *Wilson's letter, or otherwise.* What was *M'Dowell* to get for this risque, but an interest in the sales of the goods, or a premium in the nature of insurance? *Meade* might have in view only a contract for a *contingent interest in the profits;* but the terms of his letter will go to *any consideration*, on which *M'Dowell* might be induced to lend his name.

1812.

MEADE v. M'DOWELL.

The premium being a per centage, depended on the amount of goods purchased. The books of the merchants, or abstracts proved by those who kept the books, by deposition and cross examination on notice given, &c. might have been evidence. But an abstract acknowledged by the contracting party, *Wilson*, is not inferior. Why should *M'Dowell* be driven to the delay, expense and trouble of other proof?

But *Meade* had not notice of all these matters, the ground of demand, *before suit brought*. The case was not of that nature to require *notice and demand, before a cause of action could arise*. *Meade* must be presumed cognisant of all the transactions, and to follow up and know from *M'Dowell* from time to time, to what extent he considered him, *Meade*, liable, and what of the contract that might have been made, remained unperformed. Notice and demand are necessary where a party cannot be supposed to know the duty that he is to perform, or contract to fulfil. Can this be supposed to be the case where *Meade* had *identified himself in the liability?* Suspecting a collusion of *Wilson* with *M'Dowell*, he might have given notice to produce the evidence of the merchant's accounts. It is an affectation of surprise in him, to say that he is surprised on their not being produced. It would be a *real surprise* on *M'Dowell* to call for this proof, on the trial, without having had notice to produce it.

On the last head of exception, there is as little difficulty as in any of them, the statute of limitations.

In *Wilson's* letter of the 23d of *April*, 1799, he not only solicits the influence of *M'Dowell* as to a delay on the part of the merchants, but he speaks of "*no time mentioned for the payment of the advance agreed upon, in confidence that he is disposed on that head to be as favourable as could reasonably be requested.*" This gives the transaction an executory nature, and it would be impossible to say what time would raise a presumption in favour of *Wilson*. It must be a fact for the jury. As to *Meade*, certainly not a less time than six years from the close of accounts, and the final settlement of *Wilson* and *M'Dowell;* and this, which was 1802, brings the matter within the six years. I must therefore be of opinion that the judgment be affirmed.

Judgment reversed.

1812.

Pittsburg, Wednesday, Sept. 9.

WRIGHT and another *against* The Lessee of SMALL.

Where a judgment is reversed, this Court gives no costs; and if levied by execution, will order the different officers to refund them.

IN this case a judgment had been rendered in the Common Pleas of *Mercer* county, against the present plaintiffs in error, which was afterwards reversed by this Court, and a *venire de novo* awarded. An execution was then issued from this Court, to levy the costs, which accordingly were paid. But upon application by the party who had been compelled to pay them, *The Court*, upon the ground that where a judgment is reversed, this Court gives no costs, quashed the execution, and ordered the money received by the different officers, to be refunded.

Lessee of DAWSON *against* BIGSBY.

IN ERROR.

Pittsburg, Saturday, Sept. 19.

A made application to the secretary of the land office for a tract of land particularly described, lying north and west of the *Ohio* &c. On the 3d of *April* 1792, a warrant issued, which by mistake of the office, was filled up with lands lying elsewhere. On the 10th of *April* 1792, the warrant was delivered to the deputy surveyor of the district, who, perceiving the mistake, did not enter the warrant in his book according to its description, but according to the description in the application, and surveyed it on the 29th of *August* following. Prior to the survey, but subsequent to the 10th of *April*, *B* made a *bona fide* actual settlement upon the same land. *Held*, that the entry made by the deputy surveyor had no effect against third persons, and that *B* was entitled to recover.

THIS was a writ of error to the Common Pleas of *Beaver* county.

It was an ejectment for 100 acres of land lying north and west of the river *Ohio*, &c., which the plaintiff claimed under an actual settlement and improvement, begun after the 10th of *April* 1792, and before the 29th of *August* in that year.

The defendant claimed under an application of the 3d of *April* 1792, by *George M'Cormick*, "for 100 acres on the "west branch of *Ohio* river, beginning on the said river "where the western boundary of *Pennsylvania* crosses the "same, and up the said river, and along the said river, for "quantity." On the same day a warrant issued to him upon that application, "for 100 acres on the west branch of *Ohio* "river, beginning nearly opposite the mouth of *Raccoon creek*,

"and to extend down the river for quantity." This warrant was thus filled up by mistake of the clerk, or other person in the secretary's office. On the 10th of *April* 1792, it was delivered by *M'Cormick* to *John Hoge* the deputy surveyor of the district, who, knowing the application of *M'Cormick*, made an entry of it in his book, not according to the description in the warrant, but according to the application; and on the 29th of *August* following he surveyed it upon the land described in the application, which was the land in dispute.

The Court below gave it in charge to the jury, that unless the improvement of the plaintiff was made prior to the 10th of *April* 1792, or his settlement was connected with an inception of title before that date, the defendant was entitled to a verdict, which the jury accordingly found; and it was agreed by the counsel on both sides, that this point, as well as some objections to testimony, which are not material, should be argued in this Court, in the same manner as if bills of exceptions had been regularly taken.

The question turned upon the 3d, 4th, and 5th sections of the act of the 3d of *April* 1792, 3 *Smith's Laws* 70.

The third section enacts, that "upon the application of any "person, who may have settled or improved, or is desirous "to settle and improve a plantation within the limits there "mentioned, to the secretary of the land office, *which appli-* "*cation shall contain a particular description of the lands ap-* "*plied for*, there shall be granted to him a warrant for any "quantity of land within the said limits, not exceeding 400 "acres, requiring the surveyor-general to cause the same to "be surveyed for the use of the grantee" &c.

The fourth, after requiring the surveyor-general to divide the territory into districts, and to appoint a deputy surveyor for each district, enacts "that every deputy surveyor who "shall receive any such warrant, shall make *fair and clear* "*entries thereof* in a book, to be provided by him for that "purpose, distinguishing therein the name of the person "therein mentioned, the quantity of land, date thereof, and "the day on which such deputy surveyor shall receive the "same; which book shall be open at all seasonable hours "to every applicant, who shall be entitled to copies of any

1812.

Lessee of DAWSON v. BIGSBY.

"entries therein, to be certified as such, and signed by the "deputy surveyor."

The fifth requires the deputy surveyor to proceed to survey the lands in such warrants described, as nearly as might be, agreeably to the respective priorities of warrants, "provided that they shall not by virtue of any warrant, survey "any tract of land, that may have been actually settled and "improved *prior to the date of the entry of such warrant* "*with the deputy surveyor of the district*, except for the "owner of such settlement and improvement."

Campbell for the plaintiff in error, argued that the warrant was never legally entered by the deputy surveyor, that he had no authority to make the alteration he did, and that an illegal entry was not notice, which the law intended, by requiring the deputy surveyor to keep the book. It was like the registry of a deed in a wrong county, or under a defective acknowledgment. That of course the Court erred, in saying that the settlement of the plaintiff gave no right, unless made before the entry.

Baldwin contra, contended that the Court was right, because the application was the basis of the title, the warrant containing on its face a plain clerical mistake, which the clerk of the office might correct, and in like manner the surveyor. That the settler had substantial notice of the lands applied for, because they were truly stated on the deputy's books; and that the warrantee was entitled to peculiar favor, as he had been guilty of no fault or laches whatever.

TILGHMAN C. J. gave no opinion, having been prevented by sickness from attending the argument.

YEATES J. It has been mutually agreed by the counsel on both sides, that the errors assigned as to the admission of testimony on the trial, as well as to the charge of the Court, shall be taken in the same manner as if the facts had regularly come before us on bills of exceptions duly sealed. In that light I shall consider them.

[The first and second exceptions noticed by his honour, related to the testimony, which is not material.]

1812.

Lessee of DAWSON v. BIGSBY.

The last exception is taken to the charge of the Court upon the merits of the case. It is agreed, that the warrant in the name of *M'Cormick*, under which and his actual settlement the defendant claimed the land, was filled up by a clerk in the land office *by mistake*. It most materially varied from the application, which is identified by *Hoge*. He therefore undertook to make an entry in his book corresponding with the terms of the application which he had put in, but not with the warrant itself. This in all probability was done from a sense of justice; but the question now, is not as to the purity of his views, but what legal operation that act superinduced, as to the litigant parties.

As between the Commonwealth and *M'Cormick*, I have no hesitation in declaring, that there was a contract binding on the state for 100 acres of land, on the west bank of the *Ohio*, beginning on that river where the western boundary of the state crosses it, which embraces the land in controversy. This was the tract which he applied for, and the proper officer by receiving and filing the same, must be supposed to have assented to it upon the usual terms. If Mr. *Hoge* was justified as deputy surveyor of the district, to vary the descriptive part of the warrant by an entry made in his book, then would the contract be also valid according to its priority, against all the world, "except such persons as had actually "settled and improved the land, prior to the date of the "entry of the warrant." There would have been an union of minds as to the sale of these lands, which the application precisely and exclusively called for. On the other hand, if the act was unauthorised, it could not divest the rights of others, who became *bona fide* actual settlers, antecedent to the time of survey. The time of entry was on the 10th of *April* 1792, and the survey was made on the 29th of *August* following.

The duty of the deputy surveyor of the district is pointed out by the fourth section of the act of the 3d of *April* 1792. Upon receiving the warrants, he is to make *fair and clear* entries thereof in a book to be by him provided for that purpose. But changing the most material part of a warrant, which locates the land accurately and distinctly, can with no kind of propriety be denominated *making a fair and clear entry thereof*. The manifest object of the legislature in directing the entry of the warrants, in the book of the deputy

1812.

Lessee of DAWSON v. BIGSBY.

surveyor of the district, was to ascertain the places which the warrants severally called for, and their priorities, and to serve as modes of information to all appliers, of what lands were vacant. Imperious duty therefore compels me to pronounce, however hardly it may operate on *M'Cormick*, or the defendant claiming under him, that the manner of the entry was unauthorised by law. The case thus presented to our view, bears a strong analogy to *Heister's Lessee* v. *Fortner*, reported in 2 *Binn.* 40., and determined on great consideration by this Court. There a deed recorded in *Northumberland* county, under an acknowledgment unknown to the law, was held not to operate as constructive notice to a subsequent purchaser; and the principle must obtain here, that this erroneous entry of the warrant cannot be deemed implied notice to actual settlers on this land.

The President of the Court of Common Pleas, has in his charge accurately delineated the improvement which can be connected with a personal resident settlement, in order to constitute an inception of title, by representing it to be an actual and *bona fide* preparation for real cultivation and habitation; that it must progress without any unnecessary delay, and be made with a view to an immediate resident settlement. Whether if express or circumstantial proof of notice can be brought home to the plaintiff, of the application of *M'Cormick* for the lands in dispute, and of the mistake committed in filling up the warrant prior to his inception of title (if such ever took place), the same may cure the erroneous entry which has been made here, or contaminate his claim as an actual settler, are matters foreign to our present inquiry. Our attention is called to the broad proposition laid down in the charge of the court, that unless the plaintiff's improvement should appear to have been made prior to the 10th of *April* 1792, the defendant would be entitled to a verdict, and it is demanded of us whether the observation is correct according to its plain meaning. On the fullest reflection, I cannot accede to the proposition in the extent in which it is laid down. I think an efficacy is thereby ascribed to the entry in the book, to which it is not legally entitled, under all the circumstances of the case. I cannot consider it as constructive notice of a contract for, or a grant of the lands in dispute; and therefore I am of opinion,

that the judgment of the Common Pleas be reversed, and a *venire de novo* be awarded.

1812.

Lessee of DAWSON v. BIGSBY.

BRACKENRIDGE J. Taking up the act of assembly of *April* 3d, 1792, and diligently considering it with a view to its construction, I could have no idea that any thing short of an application so descriptive and special as to take the land, would be received in the office. I could not have conceived, that an application special only by reference, could be received as a leading application, and applications on the back of them; because the distance north, south, east or west, which the leading application might take, could not be known. In short, I had taken it that in no case, except where a natural boundary was given, could it be possible to locate *descriptively* according to the words of the act, unless by previous marking of some tree, or setting some post or stone, or by stating the course and distance north, south, east or west, which the warrant *special by reference*, was intended to embrace. Had the office been held to this strictness by the courts, as in my opinion it ought to have been, all the confusion that has taken place under this act, would have been avoided. I would have regarded no application, or entry of warrant according to it, that was not *special* in some such way as this. The application in this case however is special; it cannot be more so. But the warrant is not taken out according to the application. There was a mistake of a clerk. What have we to do with the word *clerk?* It is the act of the principal. The secretary of the land office must be considered as making the mistake. But shall that affect the applicant, who according to his application was entitled to a different warrant? Not so far as the commonwealth has any claim, by whose officers the mistake is alleged to have been made; but as to *third persons*, it is impossible to say that it shall not affect, to whom notice cannot be traced of the truth and existing fact of the case. And even if it could be traced, how can it be said, that third persons may not have taken the advantage of this defect, in complying with the law, when it was a scramble with purchasers and settlers who should first obtain the advantage of a legal appropriation. *Vigilantibus et non dormientibus subvenit lex.* It did behove the applicant instantly to have taken his mistaken warrant back

1812.

Lessee of DAWSON v. BIGSBY.

to have it rectified; and until this was done, I cannot conceive that the surveyor had any right to make an entry of it in his books, and until this entry was made, it could not take effect as an appropriation of the land. It was short of this, and but the entry of *an application*, which the surveyor was not directed by the law to make. *Non constat* but that the application might have been abandoned, as many were, no warrant according to it having made its appearance. As to the mistake of the office, the applicant made the mistake his own, when he accepted it with that error. It behoved him to examine and have it amended, before he took it out of the office. But be it the mistake of the applicant or of the office, it must not affect third persons, who have acquired a clear right. An intention to do this or that cannot affect. I do not think the entry can be supported. Where there is a race between warrantees, or settlers and warrantees, my knowing that another has made the first application, and has obtained an agreement to convey specifying other land, will not be such an equity as will rebut mine, who have also made application, and obtained an agreement or conveyance according to my application. He perhaps knew of a prior intention on my part to make application and obtain a warrant, or I knew of his; but *prior in tempore*, *potior in jure;* the swiftest horse takes the purse. He has made a blunder, and I may take the advantage of it. As to the knowledge of a grant not recorded, it is the knowledge of a grant made. But here it is only the knowledge of an intention to take a grant, by me who may have, and as it would appear, had the same intention to take, and have been more fortunate in getting that first, which by the law attaches to the lands. I concur therefore to reverse the judgment.

Judgment reversed.

1812.

STOCKMAN *against* BLAIR and others.

IN ERROR.

Pittsburg, Saturday, September 19.

THIS was an ejectment in the Common Pleas of *Beaver* county, for 200 acres of land on the waters of *Big Beaver*.

An actual settler cannot maintain an ejectment for his improvement, without an official survey, or a private one, if by due exertion he was unable to obtain the former.

The plaintiff claimed under an improvement and settlement, commenced by one *Jordan;* but it did not appear that any survey had ever been made for *Jordan*, or any one claiming under him. It was in evidence however that a line of the depreciation survey, had been considered as a boundary between one of the persons under whom the plaintiff claimed, and one of the defendants.

A survey may be made by a deputy surveyor without possession of the warrant at the time, if he has once had it, and entered it in his book.

The defendants made title as follows: one hundred and twenty-six warrants or orders of survey, for the *Pennsylvania Population Company*, were delivered to *John Hoge* the deputy surveyor of the eleventh district, on the 10th of *June* 1793. Immediately after the receipt of them, *Hoge* delivered all the warrants to *Jonathan Leet*, deputy surveyor of the ninth and tenth districts, in order that it might be ascertained what number of these warrants could be located in his district, the leading warrant in the name of *Matthew M'Connell*, being special, and descriptive of a spot in *Leet's* district adjoining *Hoge's*. *Leet* entered the leading warrant and twelve or thirteen others in his book, and re-delivered the whole to *Hoge*, by whose assistant *Redick*, *all* of them were entered in his book. The warrants entered by *Leet*, were by him located in his district, of which number was a warrant in the name of *Joseph Magoffin*, under which the defendants claimed; and the survey of this tract, *which was made after the return of the warrants* to *Hoge*, was returned by *Leet* to the surveyor-general's office, accepted by him, and a patent issued.

Where a leading warrant plainly describes land in one district, it is in no respect a fraud upon the act of 3d *April* 1792, that the same and many adjoining warrants were previously delivered to the surveyor of another district into which some of them might run, who handed them to the surveyor of the first district; and that the whole, after he had entered twelve or thirteen in his books, were by him returned to the surveyor from whom he got them, who entered them *all* in his own book.

The defendants objected to the plaintiff's recovery, because he had no survey, for which they relied on *Bond's Lessee* v. *Fitz-Randolph* (*a*), *Dawson's Lessee* v. *Laughlin* (*b*), and *Cosby* v. *Brown's Lessee* (*c*).

(*a*) 2 *Smith's Laws* 207.
(*b*) *Ibid.*
(*c*) 2 *Binn.* 124.

1812.

STOCKMAN v. BLAIR et al.

The plaintiff asserted that a survey was unnecessary; but if otherwise, here was a line of a legal survey, the depreciation line, which brought the case within *M'Rhea's Lessee* v. *Plummer* (*a*). He objected to the defendant's title, that the survey was illegal because the warrant was not in *Leet's* hands then or afterwards, and because the warrants were all previously delivered to *Hoge*, who had no authority to hand them over to *Leet*. The entry in the books of both surveyors was a fraud upon settlers, and upon the act of the 3d of *April* 1792.

The President of the Common Pleas (*Roberts*) charged the jury in favour of the defendants upon both points; and a bill of exceptions was sealed, which was now argued by

A. W. Foster for the plaintiff in error, and

Allison and *Baldwin* for the defendants in error.

TILGHMAN C. J. having been unwell, was not present at the argument, and gave no opinion.

YEATES J. The bill of exceptions in this case presents two questions to the Court for their decision.

1. Was the survey under which the defendants claimed the land, illegal and unauthorised under all the circumstances?

2. Was the plaintiff competent to support an ejectment?

1. It has been contended, that the survey made by *Leet* was unauthorised and void, because it did not appear that at the time the survey was made, the warrant was then in his possession. I admit that it does not so appear. But what then? Does the act of the 3d of *April* 1792 require it? By no means. The meaning of the law on this point cannot be mistaken. The fourth section directs, that the deputy shall reside within or as near as possible to his district, and when he receives a warrant, shall make fair and clear entries in a book to be provided for that purpose, distinguishing the day on which he received it, which book shall be open at all seasonable hours, to every applicant. The fifth section directs that the deputy surveyor shall proceed to survey the lands described in the

(*a*) 1 *Binn.* 227.

warrants according to their priority, but shall not survey any tract of land, that may have been actually settled and improved prior to the date of the entry of the warrant, under such warrant. He shall keep a survey book, which shall be liable to be inspected by all persons on paying a certain fee for the search or copies of surveys. The intention of the law then was to give locality to the warrants thus entered, and to give notice thereof to all appliers. If the intended actual settler wished to appropriate to himself a particular spot, he could by inspecting the book of entries, ascertain whether it had been applied for by a special warrant previously entered, and in case of an indescriptive warrant unaccompanied by a survey, he might seat himself down and commence his improvements. Here would be full notice and perfect security, and the object of the legislature would be attained. It would be of no advantage to any adverse claimant to see the copy of the warrant, when he could inspect the entry book, which contained an abstract of all its material parts. As to the deputy surveyor, he had received the warrant which was duly entered, and it could be of no moment either to him or others, whether he kept the copy in his hands, or delivered it over to another person. In either case his authority was precisely the same.

But it has been urged, that *Hoge's* entry of these thirteen or fourteen warrants already entered by *Leet*, tended to deception by holding out false colours to appliers. This cannot be. How could the entry of a leading warrant accurately and precisely descriptive of a particular spot, several miles distant from the known line of *Hoge's* district, and of a dozen other warrants adjoining and adjoining, serve to mislead a man of the plainest understanding? Such a person would at once see, that the palpable design of the entry was to give information of the leading warrant, and in what manner the succeeding ones would probably be connected and strung together. He would obtain every light he could desire by consulting the survey book of *Hoge*, who necessarily would be confined to surveys upon warrants within the limits of his own district. Upon this point I think the Court of Common Pleas judged correctly.

2. We know not by the bill of exceptions, when or where the plaintiff made his settlement, or what improvement he

1812.

STOCKMAN v. BLAIR et al.

or his predecessors had made; but this we know, that his settlement was undefined by any survey *official* or *private*, and we are not informed of any consentible lines established between him and the adjoining neighbours. In *Bond's Lessee* v. *Fitz-Randolph* at a Court of *Nisi Prius* in this place in *May* 1797, I expressed the sentiments of Judge *Smith* and myself, as to the necessity of an official survey, or a fair attempt to procure one by an actual settler, whereon to found his ejectment. The same determination was given by us in *May* 1799 in *Dawson's Lessee* v. *Laughlin* upon full consideration. The first decision, which it is admitted has regulated the practice since, and has been acquiesced in above fifteen years, though at *Nisi Prius*, is intitled to *some weight*. It is of great moment that the law should not be in a state of fluctuation. But were it *res integra*, I see no reason, after the elaborate argument which the subject has undergone this term, to retract the opinion I had before formed. I think the doctrine is founded on the true spirit of the act of the 3d of *April* 1792, is bottomed on sound policy, and tends to prevent litigation. The pretensions of a plaintiff suing for his supposed right in a court of justice should be known and certain. Considered as a part of a new system for granting vacant lands, there is the same reason for requiring an official survey on the improvement of a settler, as that upon a warrant. No ejectment would lie by the limitation act, unless a survey had been made thereon, and with the same implied exceptions. Such settler evinces "his conformity to the provisions of the act," by complying with this pre-requisite. A contrary doctrine tends to retard the settlement of the country. The person first occupying the land with an intention of settling, would keep others desirous of settling at bay, unless his boundaries were circumscribed by some public and notorious act. In whatever direction they might choose to fix their improvements, in the same direction might he advance his claim, under the pretext of his prior settlement being intitled to a *reasonable extent*. These are some of the evils which were experienced before the *American* revolution, from a crude notion entertained by a few persons respecting the doctrine of improvements. Law suits were thus promoted, and the permanence of landed titles was shaken. I do not assert however, that the unbending rule is, that in

all cases the official survey should be made previous to the institution of an ejectment by an actual settler. If he uses every reasonable endeavour to procure a survey, but fails in the attempt, he might circumscribe his boundaries as claimed by him, by some open act, which would be binding on him at a future day. He would thus do all that would lie in his power.

But we have been told that the plaintiff has *adopted* the line of a depreciation survey as one of his boundaries, and that the case falls within the principle laid down in *M'Rhea's Lessee* v. *Plummer*, 1 *Binn.* 227. In that case the lines had been before run and marked by legal authority, and the deputy surveyor after receiving the warrant, had gone upon the ground and proved the correctness of some of the lines which had been run. Here was an unequivocal act of adoption, and the running again and re-marking the lines, would have been an idle ceremony. But how is this depreciation line adopted here by the plaintiff? What portion of space will a single line contain? We cannot substitute the arguments of counsel as the facts of the case; and no facts are set out in the bill of exceptions, from which we can infer a privity between the plaintiff, and *Blair* and *Baker* two of the defendants, from which he can derive a benefit from any line agreed upon between the two latter.

In every point of view, in which I have been able to consider this case, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. Having been at the bar in this country, and having, with a view of being able to give advice to clients, considered the law of *April* 3d 1792, and formed a system of construction in my office, it will not be wondered at if I have been prepossessed by my own, opposed to the construction of others. It would be inconsistent with the opinions delivered to those consulting me, to say that in the capacity of judge I approve of contrary opinions, otherwise than in contemplation of law, where I may be bound to concede to the majority, and this for the sake of uniformity of decisions, that the maxim of the *non quieta movere* may be observed. I will only say in justice to myself, and for the sake of clients, that I could have anticipated no idea of the

1812.

STOCKMAN v. BLAIR et al.

construction in many particulars put upon this law by the courts. In the particular before us, I could have had no idea that a settler could not recover in an ejectment without an official survey. I had thought it would be sufficient if he had in any way designated his boundary. This was the old law of the doctrine of improvements, and I had not conceived, nor can I now conceive, that the act of 1792 made any change in this particular. Nor did the case of *Fitz-Randolph* and *Bond*, so far as I can recollect, or now observe, hold out the idea of the necessity of an *official survey*, where lines agreed upon, or in the popular language *consentible lines*, had designated the boundary. The same in the case of having made a *private* survey by marked lines. As to *the attempt* to get an official survey, how that could help I cannot comprehend. The object of a designation of boundary was twofold, to give notice to the public of the extent of the occupancy north, south, east or west, to the end that others wishing to appropriate from the general mass might know what remained; and in the second place, to ascertain for what it was an ejectment was brought, and of what on recovery an officer might give possession. But that an ejectment could not be sustained for an actual *occupancy by settlement*, without an official survey or any other designation of boundary, but that of the fence or line of the improvement, I could not have conceived. Much less could I have had any idea that a survey could be made, otherwise than by going on the ground and marking the lines. As to the taking the lines of an old survey, and draughting them in the surveyor's chamber, it did not enter into my mind. In this and other particulars of construction, I have dissented in my own mind, when they have been made by the courts. *Montesquieu* speaking of the *British* constitution, which he traces from its *Saxon* origin, applies the terms, "*ce beau systeme a eté trouvé dans les bois;*" "this beautiful system has been found in the woods." But it is impossible for me to apply this eulogy to that system which has been found in the woods of our new settlement, because it does not appear to me to have been the best. But as has been said, it would be perhaps a *greater evil* to reverse it, than to let it now stand. I shall therefore leave it to those who have contributed to form the system, to say whether in this case, the judgment of the court below is within the rule

1812.

STOCKMAN v. BLAIR et al.

of it. As to an entry with sundry surveyors of different districts, I would take it to be a *fraud*, because it was calculated to mislead the settlers, if it could be supposed that any notice was given by the entry, of what was meant to be taken by a survey under it. And hearing of no decision on this head, I may be at liberty to reverse the judgment on this ground, and which I think it will be advisable to do.

It not appearing also that the question of the being able to support an ejectment for a possession by actual occupancy, and so far as the improvement extends, has received other than a *Nisi Prius* or Circuit Court decision, and not that I know of, having been at any time considered in term, I may also on this ground be at liberty to reverse the judgment of the court below. For it is impossible for me to comprehend, that under the act of *April* 1792, one half the object of which, it is acknowledged on all hands, was the settlement of the country, a person who had entered and settled, when put out of his messuage or possession, could not proceed by ejectment to recover that certain extent, without an official survey or any survey at all, or other designation of boundary than what his possession gave. As to the extent from his possession, whether according to the distance or the square of the distance, north or south, which is the ratio of gravitation, it might be difficult to say without a designation; and therefore I would have no objection to the confining his evidence and his recovery to this portion. But for this portion, I can see no principle of law, or fair construction of the act of assembly, which can hinder his recovery. There was not a surveyor for every settler, to accompany him when he went to look out for the place where, and to survey when he fixed upon it. What is more, it would seem from the act, that he must have a settlement before the officer would be justifiable in surveying for him. And being put off this by an intruder, who would say he had the better right to have an official survey? Was the officer under the necessity of determining between them, or to leave it to an ejectment to try the right? The fact is, that official surveys could not be got in the first instance or for a long time; and must the law be suspended as to all right of regaining possession until this was obtained? It would seem to me that this at least well deserves a reconsideration.

Judgment affirmed.

1812.

M'Clurg *against* Ross.

5b 218
3sr257
3sr261
32 275

IN ERROR.

Pittsburg, Saturday, Sept. 19.

With certain exceptions as to persons in office, special damage &c., *words* are not actionable un less they contain a plain imputation of some crime liable to punishment. And unless the words, in their natural and obvious meaning, impute a crime, no *inuendo* can help them.

Hence to say of a man, that "he was an "*United Irish-*"*man, and got* "*the money of* "*the United* "*Irishmen into* "*his hands, and* "*ran away with* "*it,*" is not actionable, because it imputes a breach of trust, rather than a felony. And if it might be considered to impute a felony in a common case, yet the jury having found that the United *Irishmen* were an association formed in *Ireland* for the purpose of overturning the government, it could be no felony to dispossess them of their funds.

THIS was an action in the Common Pleas of *Alleghany* for words.

The declaration alleged, that the defendant *Ross*, on the 6th of *October* 1808, uttered the following false scandalous and malicious words of and concerning the plaintiff, in the presence of divers citizens, to wit "*Joseph M'Clurg* (the "said *Joseph* meaning) *was an United* Irishman, *and got* "*the money of the United* Irishmen *into his hands*, *and ran* "*away with it;* (meaning that the said *Joseph* had absconded, and had feloniously appropriated the said money, to "his own use, and thus had committed a felony) *and is now* "*a rich man at Pittsburg.*"

The jury gave a special verdict, in *August* last, in which they found the publication of the words, in manner and form as the plaintiff had declared; and that the plaintiff was a member of an association of United *Irishmen* formed in *Ireland*, the object of which was to effect by force of arms a revolution in the government of that kingdom. But whether the words so spoken were actionable, they were ignorant, and prayed the advice of the court. If upon the same matter it should seem to the Court that the words were actionable, then they found the defendant guilty, and assessed the damages at 20 dollars, and six cents costs; otherwise, they found him not guilty.

The Court below, being of opinion that the words were not actionable, gave judgment for the defendant; and now, upon this writ of error, the case was argued by

Mountain and *Wilkins* for the plaintiff in error.

A. W. Foster and *Baldwin* contra.

TILGHMAN C. J. after stating the finding of the jury and the words laid in the declaration, delivered his opinion as follows:

There is no doubt but these words if believed, must very

much injure the plaintiff's character. Take them in the mildest sense, and they imply a breach of trust, which is highly dishonourable. This is one of the grounds on which the plaintiff's counsel have rested the support of the action. Cases from the civil law were cited, but we are not governed by the civil law. The common law must be our guide. There is a great difference between words spoken and words written. It is actionable to charge a man in *writing*, with any thing which may degrade him in the estimation of society. But many things may be *spoken* which afford no cause of action, although they contain charges of wicked and disgraceful conduct. This distinction is not without reason. Words are often spoken in heat, in haste, and with very little reflection or ill intention, and frequently forgotten or repented of as soon as spoken. But writing requires deliberation, and is therefore more injurious to the character attacked. We are apt to suppose that before a man reduces an accusation to writing, he has satisfied himself of the truth of it; and if he has not satisfied himself, his conduct is certainly very reprehensible. Besides the scandal is more permanent and more widely diffused. So that whether we consider the injury itself, or the mind of the person by whom the injury is committed, a libel is entitled to less allowance than a slander by words. It would be a waste of time to cite cases in support of this distinction. Every one knows that to say of a man that he is a *rogue* or a *liar*, is not actionable. It may be asked then, what is the rule by which words are determined to be actionable or not. I will not say that the cases to be found on this point are in perfect unison. But from a full consideration of them, I think myself warranted in laying it down, that (with certain exceptions as to persons in office, special damage &c.) words are not actionable, unless they contain a *plain imputation of some crime liable to punishment.* Such was my opinion in the case of *Shæffer* v. *Kintzer*, 1 *Binn.* 542, and I have found no reason for altering it. Let us then test the words in this declaration by that rule. It is not said that the defendant *stole* any person's money, but that being an United *Irishman* himself, *he got the money of the United* Irishmen *into his hands, and ran away with it.* Taking these expressions in their natural and obvious meaning, which is the fair mode of construction, they do not seem

1812.

M'Clurg v. Ross.

1812.

M'CLURG v. Ross.

to import a felonious taking. I should rather understand that *M'Clurg* had got money into his hands by the consent of the association of which he was a member, and then broke his trust and absconded; very dishonourable conduct to be sure, but very different from felony. But it is said that we must now take it to be a felony, because the declaration avers that the charge of felony was *intended*, and so the jury have found it. It was decided by this Court in *Shæffer* v. *Kintzer*, that an *inuendo* cannot alter or extend the fair meaning of words. Unless the words therefore without torturing them, imply a charge of felony, neither the *inuendo* nor the verdict will help them. The case of *Borman* v. *Boyer*, 3 *Binn.* 515, was relied on by the plaintiff's counsel. But there the words were much stronger than they are here, for they plainly insinuated a taking in a *secret* manner and not *without guilt*. But there is another very striking feature by which this case is distinguished from *Borman* v. *Boyer*. The plaintiff was an United *Irishman*, and it was the money of the United *Irishmen* that he got into his hands. As an *American* judge, I know nothing of the dissensions which have distracted the *British* empire. It is not for me to offer an opinion in this place, whether the government or the people were in the wrong. But so far as the jury have introduced the subject into their verdict, I am bound to take notice of it. The jury then have found, that the United *Irishmen* were an association formed in *Ireland* for the purpose of *overturning the government by force of arms;* in other words, that they were in *rebellion*, or what could have had no other name from the *British government*. The charge against the plaintiff is, that he got the money of this association into his hands; for such is the plain meaning of the words. It is refining too much to say, that the words may be applied to the *private property* of the members of the association. Now then, when a body of men are associated for a *treasonable purpose*, and have provided money for effecting their object, is it a *felony* to dispossess them of their funds? Would it be so construed by the *British courts*, for that is the question? It appears to me that it would not; and therefore I cannot see how the words laid in the declaration import a *crime*, which rendered the plaintiff liable to *punishment*. They do not come within the rule which I have laid down, and con-

sequently give no cause of action. I must be of opinion then, that the Court of Common Pleas were right in giving judgment for the defendant.

Yeates J. Uniformity of decision in the administration of justice under every well regulated government, is of the utmost importance to the general weal. The law is no longer vague or uncertain, the rights of individuals are precisely ascertained, and the streams of justice flow in their accustomed channels.

It is freely conceded, that the cases in our books respecting actions of slander cannot be reconciled. The prevailing opinion formerly was, that defamatory words were always to be construed in their milder sense; but this has been long exploded, and a more correct principle introduced, that their construction shall be governed by their plain and ordinary import, according to the common understanding of mankind. The law in *England* seems to have been settled in *Onslow* v. *Horne* in 1771, 3 *Wils.* 186, that the words must contain an imputation of some crime liable to punishment, as well as a precise charge. But though the words be not actionable in themselves, yet if spoken of one in any trade, profession or office, which may be of probable ill consequence to such person, they will afford a ground of suit. The imputation of the mere defect or want of virtue, or the disregard of moral duties or obligations, which render a man obnoxious to mankind, is not actionable. *Ib.* 187. This doctrine has been recognised in *Pennsylvania* in repeated instances, both before and since the *American* revolution, as well as in our sister states generally; and if a wise and prudent legislature would fix the law on this matter by positive institutions, I do not know, that a more convenient or proper system could be adopted. To give encouragement to the vindictive passions, by sustaining actions for general expressions of censure by individuals in their daily intercourse with their fellow citizens, would not conduce to the peace of society. But it is not for this court to new model the law; we are bound to pronounce it as it is written.

The jury have here found that the defendant maliciously spoke these words, "*Joseph M'Clurg* was an United *Irish-man*, and *got* the money of the United *Irishmen* into his

1812.

M'CLURG v. ROSS.

"hands and *ran away* with it, and is now a rich man in *Pitts-*
"*burg*." They have also found, "that *M'Clurg* was a member
"of an association of United *Irishmen* formed in *Ireland*, the
"object of which was to effect by force of arms, a revolution
"in the government of that kingdom;" and by adopting the sense attributed to the words in the *inuendo*, they have thought the expressions imported a charge of felony. This is of some weight, but not conclusive. The duties of our office enjoin on us to determine, whether the words are actionable or not.

What meaning then would the common understanding of mankind affix to these expressions? I admit without hesitation, that the words convey a charge of moral turpitude and depravity against the plaintiff. But it must be brought to a closer test; and to ascertain whether the words are actionable or not, we must inquire whether they impute a crime liable to punishment, and charged with precision. On this head the counsel have argued with much ingenuity. It is admitted on both sides, that the *inuendo* cannot change or vary the meaning of words spoken. In this disquisition it is evident, that much will depend on the true meaning of the verb *got*, construing the whole sentence fairly. Because if *M'Clurg received* the money of the United *Irishmen* for the use of that association, but converted it to his own use, it would be a breach of trust base and dishonourable to himself unquestionably, but not punishable by indictment. The verb *get* in its common and ordinary sense signifies to *procure*, to *obtain*, according to Dr. *Johnson*. It may sometimes mean, *to seize by force*, where the context will justify that meaning. The counsel for the plaintiff in error have admitted, that *got* standing alone would not imply a *felonious taking*, but that connected with running away with the money and being enriched thereby, a construction is stamped on the expressions, of a felony committed. This is their strong ground; and they further insist, that it does not appear on the whole record, *where* the money was got, whether in *Ireland* or elsewhere. It is true, the words do not expressly charge the place where the transaction happened; but by comparing the expressions with the fact found by the jury, that the plaintiff was a member of the association formed in *Ireland* to subvert the *Irish* government by force, we are irresistibly led to

fix the scene of action in that kingdom. *Running away* with the money of another, does not necessarily involve the guilt of larceny; but it is usually applied to a person indebted, who has absconded. It implies a defect of moral obligation, but not that the party stole such money in the first instance. This construction more naturally arises in the present instance, when we consider the plaintiff as a member of the affiliated society of *Irishmen*, actively engaged in effecting a revolution against the known and established laws of that country.

Much reliance has been placed on the decision of this Court in *May* 1811, between *Bornman* and *Boyer*, 3 *Binn.* 515. But in that instance, the words spoken evidently implied a charge that *Bornman* took the leather out of the cellar of *Boyer secretly*, without his *consent*, and we could not infer hat a charge of trespass merely was intended. I then expressly said the case was not free from doubt, but on the fullest consideration, I am not dissatisfied with our determination. I never will agree that a man shall escape making compensation, who *indirectly* slanders the reputation of another, by using expressions which plainly imply a felony, and cannot reasonably be taken in any other sense. But my mind is not satisfied that the present case is of that nature. On the contrary, it appears to me that the plain and natural import of the words spoken, is, that the plaintiff in error was charged with a breach of trust, in converting to his own use the money which he had received for the purposes of supporting the cause of the United *Irishmen* in *Ireland*. However gross and unjustifiable the charge may have been, I cannot pronounce that the words afford a ground of action under all the circumstances of the case, and the declaration and verdict. As a man I may condemn the conduct of the defendant in error, but as a judge I cannot say that the words are actionable. I am therefore of opinion, that the judgment of the Court of Common Pleas of *Allegheny* county should be affirmed.

Brackenridge J. The elementary mind of the counsel (Mr. *Mountain*,) has led him to investigate the decisions on the law of slander, and to shew that many of them have been founded in error. Certain it is that early decisions have not

1812.

M'CLURG v. ROSS.

always had good reason; for it is on this ground, that they have been alleged to be reversed in many cases, by the subsequent. And it is by a re-examination and change of determination, upon better ground of political or moral reason, that the common law has come to be considered the perfection of reason. *Errores ad sua principia referre, est refellere.*

Whether it is error, that the criterion of what shall be considered actionable in slander, shall be that of *a malum in se*, punishable by law, or be carried farther, will deserve investigation. It shocks the mind to think, that that alone, the imputation of an indictable offence, shall be the criterion, when other words that may be spoken, are equally provoking, *and may lead to a breach of the peace.* I would be willing to adopt this as a criterion; that defamatory words which would impel a man of a reasonable mind to inordinate passion, and the meditation of revenge, might warrant the seeking a redress by action. This it is true, would exclude a general rule, and put every case for words on its own bottom.

I have heard, says Chief Justice *Holt*, (2 *Ray.* 960,) Justice *Twisden* say, that he knew of no rule to go by, in an action for words; and said *Gould*, Justice, so said my Lord *Hale*, for all words stand on a different bottom. And continues *Holt*, where words tend to slander a man, and to take away his reputation, I should be for supporting actions for them, *because it tends to preserve the peace.* He remembered a story told by Mr. Justice *Twisden*, of a man who had brought an action for scandalous words spoken of him; and upon a motion in arrest of judgment, the judgment was arrested, and the plaintiff being in the court at that time, said, that if he had thought he could not have recovered in his action, he would have cut the throat of his adversary.

But it will not be necessary for me to take this more extensive consideration of what shall be accounted slander, since I incline to be of opinion, that the charge found in this special verdict, is that of *an imputation of a crime.* "Having got," does not absolutely imply the having received it without consent, or having got it, the money of the United *Irishmen*, by unfair means. But it has a looking to it, and would rather imply that it had not been given to him; or if given to him, it was not for the purpose for which it was used by

him.—But "the running away," leaves it without doubt that he had not leave to take it with him; but that he ran away for the purpose of concealing himself and it, from those whose property it was.—This carries with it an imputation of stealing.

"If a horse were upon sale, and the owner let the thief "mount him in order to try him, and the thief rode away "with him, it was felony." 2 *East's Crown Law*, 687, *cites Thel.* 82. But if the taking stood indifferent, it is concluded by the finding of the *inuendo*. For the taking of the money does not exclude a felony, from the nature of the property; nor does the whole sentence, or any part of it, exclude the idea of a felony. "He got the money of the United *Irish-* "*men* into his hands and ran away with it, and is now a rich "man in *Pittsburg*." *The fact, coupling the inuendo with the words spoken, is for the jury; and the court are excluded.* It cannot now be inquired of by the Court on a writ of error, what the *manner* or the *motive* was of getting the money into his hands; for the jury having found the *inuendo*, it must have been with an *intention* of *stealing* it, for otherwise felony could not be predicated of it. But, supposing the money originally put into his hands and intrusted to him, the moment that he takes a step with it, not according to the original custody, but with a view of abstracting it from its original destination, he is a trespasser and a thief; and therefore, putting myself in the place of the jury, I do not see how I could infer any thing also from the words, but that the so *getting* it, and running away and not refunding, but the having used it, and by means thereof being *a rich man in Pittsburg*, did import a *stealing*, according to the *inuendo* laid.

But the main and principal question in the case will be, could a member of the association of United *Irishmen* formed in *Ireland*, the object of which was, to effect by force of arms, a revolution in the government of that kingdom, be guilty of a crime, in purloining the funds of that association? Certain it is, that with the *home* government, the event stamps the name and the character. According to this, it is patriotism, or it is rebellion. But with those not of that government, it will be considered according to the cause of the resistance and the ground of the opposition. Other countries

1812.

M'CLURG v. Ross.

will say, and the posterity of the same country will say, "*Victrix causa diis placuit, sed victa Catoni.*"

They will reverse attainders, or restore estates, according to their sense of the right and wrong of the resistance. Are we at liberty in these states, to call in question the right of the people of *Ireland* to resist the oppression of the *British* government, after the solemn appeal made to them in our own behalf, by the Congress of the *United States* of the 10th of *May* 1775, the address to the people of *Ireland?* In this address, they have been considered as labouring under a like oppression with ourselves. Could there be a doubt of their right to resist the government in which they had no part, to resist laws in which they had no voice? In the emphatic language of that address it is said, "You are not "without your grievances; we sympathize with you in your "distress, who can have nothing to expect from the same "*common enemy*, but the humble favour of being last de-"voured."

Will it not, in a court of justice in this country, be considered slander to say, that one associate for such a purpose, had "run away" with the funds, or a part of them, that were to carry on the war? Or will it be considered the same thing as if it were said, that one of a gang of robbers had robbed the bag which was the plunder of the whole?

Independent of the *cause* of the United *Irishmen*, and I think, in this country, it cannot be unfavourably considered, it would be felony to take their goods. This being out of the way, and it being the same thing as taking the goods of any other person or association in that kingdom, it would be felony so to take, and run away or abscond. But even admitting that felony could not be committed of the goods of United *Irishmen*, and that on a charge of taking such goods, the United *Irishmen* would be acquitted under the government and in a court of *Ireland* yet on a charge of running away for the alleged felony, of which he was supposed guilty, he could be convicted. For by the common law of *England*, "if a man that is innocent be accused of felony, "and for fear fleeth from the same, albeit he judicially ac-"quitteth himself of the felony, yet if it be found that he fled "for the felony, he shall notwithstanding his innocence, for-"feit all his goods and chattels, debts and duties; for as to

"the forfeiture of them, the law will admit no proof against "the presumption in law, grounded upon his flight." *Coke Littleton* 373, 4. The imputation, therefore, of flying for being a United *Irishman*, or for robbing them of their funds, or for flying itself, would be held slander in that kingdom; and if found not true, as was the case here, would be accounted defamation, and intitle to an action.

Be that as it may, certain it is that with the people of this country, and particularly of *Irish* colonization, of which these settlements where the words were spoken chiefly consist, there could not be a greater slander, or which would work a greater defamation, than deserting the cause of the United *Irishmen*, and detracting from the means of their defence. Who could say that it was not owing to this very act, that they failed at that time, and became the victims of that tyranny which they resisted? Will it do to say that it was better for the nation not to have obtained liberty, because they might have made a bad use of it? It is even said in this country now, that we are in a fair way, by our *mobs*, to make a bad use of our independence; yet this cannot affect the principle of our revolution. I will not admit for a moment that the union erred, I speak of the union of the patriots in this cause.

Did *they* err, said the orator, (*Demosthenes*) who fought for the liberties of *Greece*, at *Salamis*, at *Platea*, at *Marathon?* No, by those who fought at *Marathon*, they did not err. Shall we then say, did the United *Irishmen* err? The question will recur, did we ourselves err in our revolutionary contest? The cause was the same. We had our heroes, *Warren*, *Montgomery*, and others. Shall we say these patriots erred, shall we say that they were in the wrong? No, by the shades of *Washington* and *Greene*, it may be said, they did not err, they were not in the wrong! At this moment of our contest with the *same foe*, for the freedom of the seas, shall we say that we erred in the principle of our resistance? A principle supported even in the *British* parliament, by the highest power of law, and talent of eloquence! The natural rights of man, and the immutable laws of nature, are all with that people. A power resulting from a *trust arbitrarily* exercised, may be lawfully resisted, whether the power is lodged in a collective body or in a single person, in the few

1812.

M'CLURG v. ROSS.

or the many, said Lord *Camden* in the house of lords. However modified, it makes no difference. Whenever the trust is wrested to the injury of the people, whenever oppression begins, all is unlawful and unjust, and resistance of right becomes lawful and just. If the principle is the same, shall we say that the cause of *Ireland* is bad, or suffer it by implication, to be inferred from our adjudication? Shall we say that it was less than slander to have deserted this association, and to have run away with the money of United *Irishmen*, and to have appropriated it to his own use in this country, and in so doing to have been guilty of felony, which *inuendo* the jury have found? And it is peculiarly the province of the jury to determine with what intention any act is done. 2 *East's Crown Law*, 685.

I am of opinion, therefore, to reverse the judgment.

Judgment affirmed.

SHAFFER *against* SUTTON.

IN ERROR.

Pittsburg, Saturday, Sept. 19.

A lease for nine months, or any time certain less than a year, is a lease *for one or more years* within the landlord and tenant law; and if the rent is "payment of taxes and daubing and chinking a certain house," it is a *certain rent* within that law.

THIS was a writ of error to the Common Pleas of *Somerset* county, in a proceeding between landlord and tenant, removed thither by *certiorari*, and the judgment in favour of the landlord, the defendant in error, affirmed.

There were nine exceptions taken to the proceedings, by the plaintiff in error, only one of which is material: "That "it appeared from the face of the proceedings, that the lease "alleged in *Sutton's* bill of complaint, was not a term *for one* "*or more years, or at will, rendering a certain rent*, in which "cases alone the justices could have jurisdiction, and that "therefore the proceedings were *coram non judice*." The lease was of a messuage &c. from the 10th of *August* 1803 to the 1st of *April* 1804, paying the taxes of the last year, and *chinking and daubing the house*.

The act of the 21st of *March* 1772, 1 *Smith's Laws* 370, upon which the proceeding was founded, gives authority for it, "where any person or persons, having leased or demised

"any lands or tenements to any person or persons for a term "*of one or more years, or at will, paying certain rents*, shall "be desirous upon the determination of the lease, to have "again or repossess his or her estate so demised."

S. Riddle for the plaintiff in error.

Forward for the defendant in error.

TILGHMAN C. J. There were a variety of exceptions to the record in this case, most of which were overruled during the argument, being too plain to admit of much discussion. [The Chief Justice then stated and answered the immaterial exceptions.]

The sixth exception is the only one which requires consideration. The act of assembly speaks of leases for a *term of years*, in some parts, and in others, leases for a term of *one or more years*. The recital in the twelfth section of the landlord and tenant law under which the process issued, is, "whereas it "frequently happens that lessees or tenants *for years*, or at "will, hold over &c." In the enacting part of this section it is said, that "where any person having demised lands or tene-"ments, to any other persons for a term of *one or more* "*years*, or at will &c." And in a subsequent part of the same section, speaking of the facts necessary to be found by the jury, it is said, "where it shall appear to them, that the "lessor had demised the lands or tenements *for a term of* "*years* or at will &c." From all this it is manifest, that when the law speaks of a *term for years*, and a term *for one or more years*, the same thing is intended. Now if we consider the spirit of the law, and the mischief intended to be remedied, we can have no doubt that the remedy was meant to be applied to leases for less than a year. The mischief was, that tenants unjustly held possession after the expiration of their leases, and demand of possession by the landlord. The injury to the landlord was full as great, if possession was withheld after the expiration of a lease for nine months, as after the expiration of one for a year. And we shall find, that supposing the legislature to have intended to include leases for less than a year, the expressions which they have made use of are sufficient for their purpose, according to their

1812.

SHAFFER v. SUTTON.

known legal acceptance. In 2 *Bl. Com.* 140, it is said, that "if the lease be but for half a year, or a quarter, or any less "time, the lessee is respected as *a tenant for years*, and is "styled so in some legal proceedings." In the same book p. 143, "Every estate which must expire at a period certain "and prefixed, by whatever words created, is an estate for "years." I shall only add on this point, the decision on the statute of *Gloucester* (6 *Edw.* 1. *c.* 5). This is a *penal* statute, by which it is enacted that a writ of waste shall lie against him who holdeth *for term of years*, and if he is convicted of the waste, he shall forfeit the thing that is wasted, and *recompense thrice so much as the waste shall be taxed at.* This extends to leases for half a year, a quarter of a year, &c. *Co. Lit.* 52, 53, 54. There was one more point made by the plaintiff in error though not much insisted on. The act of assembly speaks of a lease for one or more years, or at will, *paying certain rents.* In this case, the rent was *payment of taxes, and daubing and chinking a house of certain dimensions.* This, it is said, is not a lease within the act. But I cannot see the force of the objection. There was certainty in the rent, the taxes could be exactly ascertained, and the work to be done on the house was accurately described. On the whole, I am of opinion that the plaintiff in error has not supported any of his exceptions, and therefore the judgment should be affirmed.

YEATES J. Five of the exceptions taken by the counsel for the plaintiff in error have been readily disposed of by the Court, during the argument. They were not warranted by the record.

It remains for the Court to consider the sixth error which has been assigned, which asserts that the justices had no cognisance of the particular case. The objection is founded on the lease of the premises from the 10th of *August* 1803, to the 1st of *April* 1804, a period of seven months and three weeks, under the conditions of chinking and daubing the house, and paying the taxes of the last year. It is said, that this lease is not such a one as is enumerated in the act of 21st *March* 1772, not being for *one or more years*, or at will, and that the rent is not *certain.* The last observation is susceptible of a ready answer. There could be no difficulty in

the jurors, as to assessing the damages for not chinking and daubing a house of known dimensions; and the last year's taxes could be readily ascertained by a reference to the books of assessment. The object of the law appears fully in the preamble, to have been to give a summary remedy to landlords against their tenants *for years* or *at will*, who unjustly refused to deliver up the tenements to their landlords on the determination of their leases; and the enacting section, speaking of the proof to be made to the justices and freeholders, states that if it shall appear to them that the lessor had demised the premises for a *term of years* or *at will*, &c. A critical reliance on the words of the first part of the section has been insisted upon; "where any person or "persons in this province, having leased or demised any "lands or tenements to any person or persons for a term "of *one or more years* or at will, paying certain rents &c." It has been urged that mentioning *one year* excludes the idea of a lesser term. But the whole of this *remedial* act must be taken together; and no possible reason can be assigned for a distinction as to a term of one year, or half a year, that in the latter instance the landlord should be put to his ejectment on his tenant's holding over, and not in the former. In the latter case the reason for giving a summary remedy would seem to be the strongest. It is clearly within the spirit of the law, and in a legal sense it is within the words. Leases for years are generally contradistinguished from leases for lives, and may comprehend a period of time less than one year. If a lease be but for half a year, or a quarter, or any less time, the lessee is reputed as a tenant for years, and is styled so in some legal proceedings, a year being the shortest time of which the law will in this instance take notice. 2 *Bl. Com.* 143., *Litt. s.* 67.

For these reasons, I am of opinion that there is no weight in the sixth error which has been assigned, and that the judgment of the Court of Common Pleas of *Somerset* county be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

1812.

Pittsburg, Saturday, September 19.

Solomon and another *against* Kimmel.

IN ERROR.

The assignee of a bond takes it subject to all the equity which the obligor had against the obligee, unless the obligor promoted the assignment; and therefore in a suit by the assignee, it is competent to the obligor under the plea of payment to shew that the bond was given for lands to which the obligee had no title. But if the obligor at the time of purchase took a bond with surety for the conveyance of a good title, and a suit on that bond is pending, he cannot object the failure of consideration, unless he proves the insolvency of both principal and surety in the suit he has himself commenced, or proves that he has sustained a damage, in addition to the loss of the title.

THIS was a writ of error to the Common Pleas of *Somerset* county.

Kimmel, the plaintiff below, as assignee of *Casper Kitzmiller*, brought debt upon two bonds, one for the payment of 50 dollars on the 25th of *April* 1802, the other for the like sum on the 5th of *April* 1804. The defendants in error, who were the obligors, pleaded *payment*, and gave notice of the special matter they intended to prove under this plea; and in conformity with the notice, at the trial of the cause they offered to shew, that the bonds in question were given for lands bought by them from *Kitzmiller*, to which he had no title, and that they had thereby sustained damage.

The plaintiff, in support of his objection to this evidence, among other things, produced articles of agreement between the defendants and *Kitzmiller*, in which the latter had covenanted to give security for the conveyance of a good title to the lands, and the record of a suit then pending by the defendants against *Kitzmiller* and his surety *Keffer*, upon a bond given in conformity with the articles.

The defendants in answer gave evidence of *Kitzmiller's* insolvency, but not of *Keffer's;* and the court thereupon overruled the evidence, and sealed a bill of exceptions.

S. Riddle and *Forward* for the plaintiffs in error, contended that the evidence should have been admitted, because where in equity money ought not to be paid, the court will direct the jury to presume that it is paid. That the evidence tended to shew a failure of consideration, which defeated the bond in the hands of the assignee as well as the obligee; and that the suit against *Kitzmiller* and his surety was no bar, because there were damages distinct from the mere loss of title, which might properly be recovered in that suit. They cited *Dunlop* v. *Sheeler* (*a*), *Kachlen* v. *Mulhallon* (*b*), *Addison's Reports* 127, and *Boyd's executors* v. *Thompson's executors* (*c*). Whatever would be a ground of injunction in

(*a*) 3 *Binn.* 173. (*b*) 2 *Dall.* 237. (*c*) 1 *Smith's Laws* 52.

equity, is a defence in *Pennsylvania;* and it is plainly against equity to demand payment of a bond, the consideration of which has failed.

Ross contra, answered that after the articles of agreement were made, security was given to the satisfaction of the vendees, and that it was against equity to permit a defalcation, when they had an action for damages depending, that would cover their whole equity. This was an election not to defalcate against these bonds. The plaintiff, who is the assignee, ought rather to be favoured; his case is a hard one; and as a remedy has been elected against the vendor and his surety, who was not shewn to be insolvent, this should conclude the defendants as against the assignee.

TILGHMAN C. J. This is a writ of error founded on a bill of exceptions. The action was brought by *Kimmel* the plaintiff below, against *Solomon* and *Moor* the defendants, on two bonds given by the defendants to *Kitzmiller*, and by him assigned to *Kimmel.* It appears that *Solomon*, one of the defendants, had purchased land of *Kitzmiller*, in consideration of which the defendants had given him these and other bonds; and *Kitzmiller*, in pursuance of the articles of agreement between him and the defendant *Solomon*, had on his part given to *Solomon* a bond with security, conditioned for making good the title to the land sold by him. The plaintiff proved that an action had been brought and was then depending against *Kitzmiller* and his security, on this indemnifying bond. The defendants gave evidence to prove the insolvency of *Kitzmiller*, but no evidence to prove the insolvency of his security. They also offered evidence that *Kitzmiller's* title to the land sold, was not good at the time of sale, and that in consequence thereof, *Solomon* had sustained damage. To this evidence the counsel for the plaintiff objected, and the court rejected it, on which a bill of exceptions was taken to their opinion.

It has often been decided that where a bond is given on the purchase of land, and the title is bad, the obligee cannot recover on the bond because the consideration has failed; and the assignee standing in the place of the obligee can be in no better condition. If the consideration has really failed

1812.

SOLOMON et al. v. KIMMEL.

in the present instance, and the defendants had contented themselves with withstanding the payment of the bond, they would have had the law with them. But the case is very different. Suit has been brought to recover damages of the vendor, on account of the defect of title, so that the defendants are endeavouring to obtain a double satisfaction for the same injury. They had their election to proceed in either manner, and having thought proper to bring suit on the indemnifying bond, it would be unjust that they should be permitted to defend themselves against this action. It is possible indeed, that injury may have been sustained, so that *Solomon* would be intitled, not only to withstand payment of the bond, but also to recover damages, which could only be done by resorting to the indemnifying bond. And if the case appeared plainly to be so, the action on the indemnifying bond would have been no bar to the defence now set up. But that does not sufficiently appear on the face of the bill of exceptions. The matters are so blended that it is impossible to separate them. So that as the case stood before the Court when the evidence of the defendants was offered, it appears to me that they were right in rejecting it. I am therefore of opinion that the judgment should be affirmed.

YEATES J. It is the settled law, that the assignee of a bond takes it subject to all the equity which the obligor had against the obligee, unless such obligor has encouraged the assignment. Our defalcation act has much larger and more comprehensive words than the *British* statutes of set-off, and many matters are received in evidence amongst us by way of defence, which would be rejected in the *English* courts. But I know of no case wherein a defendant has been allowed to bring forward any counter-debt, bargain or promise, to defeat the action brought against him either in the whole or in part, while *at the same time* he carries on a suit for the recovery of such debt, or damages for the non-performance of such bargain or promise. Such double proceedings are incompatible, and repugnant to the spirit and policy of the law. Defalcation is at the option of the defendant. No man can be compelled to make a set-off; but when he elects so to do, he must plead it or give notice of his in-

tention under the general issue. In this case, it appears by the bill of exceptions, that the defendant had brought his suit upon the articles of agreement made between the original parties, returnable to *November* term 1802, to recover the damages he supposed himself intitled to. During the pendency of that suit, he could not urge those damages by way of defence to his bond. He had determined his election, and until that suit was discontinued, the testimony offered could not be received. I apprehend that the Court of Common Pleas acted correctly in overruling the evidence offered by the defendant below, and am of opinion that their judgment be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

WEBSTER *against* M'GINNIS.

IN ERROR.

Pittsburg, Saturday, September 19.

A wife who is entrusted by her husband to transact *the ordinary business of a tavern*, has no authority to bind the husband by a special contract to find oats and hay for stage horses, and board for drivers, at less than the usual rates.

THE defendant in error instituted an action before a justice of the peace of *Somerset* county, to recover the balance of a book account for boarding the stage drivers of the plaintiff in error, and for hay and oats furnished to his stage horses. The justice gave judgment against the plaintiff in error, who appealed to the Common Pleas. On the trial before that Court, *M'Ginnis*, having given in evidence his book of original entries to support his demand, and it being admitted by his counsel, that his wife in his absence transacted the ordinary business in the tavern, the defendant offered to prove, that previous to the first accommodation furnished by the plaintiff to the defendant, the latter applied to the plaintiff's wife in his absence, and entered into a special contract with the wife for a certain rate per week at which his stage drivers should be boarded, and certain rates at which hay, oats and other necessaries should be furnished for his use.

1812.

WEBSTER v. M'GINNIS.

The Court rejected the evidence, and sealed a bill of exceptions.

S. Riddle for the plaintiff in error.

Weigley contra.

TILGHMAN C. J. It is a well settled principle, that the husband is not bound by the contract of his wife, unless by some act or declaration prior or subsequent to the contract, his consent may be fairly inferred. In the present instance, the defendant relies on the circumstance of the wife's being entrusted with the ordinary business of the tavern. The question then is, whether this was ordinary business or not? It appears to me that it was not. Ordinary business is the selling in the usual way such articles of provision and liquor as are called for in taverns, and receiving the money for the same, and perhaps it may reasonably be extended to the purchase of provisions necessary to the support of the house. But this was an extraordinary contract. The usual prices were dispensed with, and accommodation for the drivers and horses of the defendant was to be afforded at a less price than the plaintiff usually charged. The plaintiff therefore ought to have been consulted before such a contract could bind him. No proof of his assent having been offered, I am of opinion, that the evidence of the wife's contract was properly rejected.

YEATES J. The contract of a married woman is not binding upon her husband, unless made by his consent either express or implied. Here there is no express consent: but it has been urged, that such consent shall be inferred from the fact admitted, "that the wife of the defendant in error "in his absence transacted the ordinary business of the ta- "vern." It is certain, if the wife usually made contracts of a similar nature, which he afterwards executed or agreed to, that the husband would be concluded thereby, unless his dissent at the time clearly appeared. She would be considered in such instance as his *agent*, or, in the more uncourtly though legal phrase, as his *servant* acting by his command.

The natural idea arising from doing the ordinary business

of a country tavern, is that the party furnished the usual provisions, refreshments and provender to travellers, and received payment therefor; but it would be straining the expressions very far, to extend it to any case of contract respecting a public house of entertainment. Furnishing a line of stages with hay and oats, and the driver with refreshment for months to come, exhibits a case very distinct from the common accommodations of an inn; and I should suppose could no more involve the assent of the husband, than if his wife had agreed to purchase a quarter cask of wine or a barrel of whiskey. I do not consider the articles furnished to the plaintiff in error, to be within the usual routine of the business of an inn; but am of opinion, that we cannot deem the wife the agent or servant of the husband, that the testimony offered was properly overruled, and that the judgment of the Court of Common Pleas be affirmed.

BRACKENRIDGE J. concurred.

Judgment affirmed.

END OF SEPTEMBER TERM. WESTERN DISTRICT, 1812.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Southern District. September Term, 1812.

1812.

Chambersburg, Monday, October 5.

ALEXANDER and others *against* JAMESON and others.

IN ERROR.

A jury may take out with them any writings that have been given in evidence, without distinction as to sealed or unsealed, except the depositions of witnesses.

UPON a writ of error to the Common Pleas of *Franklin* county, the case was thus:

An issue was directed between the plaintiffs and defendants in error, by the Orphan's Court of that county, to try who were the heirs of one *John Alexander* deceased. Upon the trial, the defendants gave in evidence a manuscript book found in the trunk of *Alexander*, after his death; and their counsel proposed, when the jury were about to retire, that they should take this book out with them. To this the plaintiffs objected, but the Court overruled the objection, permitted the jury to take out the book, and sealed a bill of exceptions.

J. Riddle and *Watts* for the plaintiffs in error. No papers can go out with the jury without consent of parties, unless they are sealed; and if they are permitted to go by the Court *against* the consent of either party, it is error. The *English* authorities are full to this point. "If the jury carry "with them any writing *unsealed*, which was given in evi- "dence in the court, it shall not avoid the verdict, although "*they ought not* to have carried it with them." 21 *Vin.* 449., *pl.* 7., *Co. Litt.* 227. 6. "Writings or books which are not

"under seal, cannot be delivered to the jurors, without the "assent of both parties." 21 *Vin.* 372. *pl.* 10. "Any paper "under seal, or not under seal, may be given in evidence; "but nothing may be *delivered* in evidence to a jury, but "that which is of record, or under seal, but by consent." *Olivi* v. *Gwin* (*a*). "No *copies of books* shall be delivered "to the jury, but with the consent of both parties." 21 *Vin.* 372. *pl.* 7. "The jury cannot carry any evidence from the "bar without consent of both sides, except writings under "hand and seal." *Lord Petre* v. *Heneage* (*b*). To the same point are 1 *Trials per Pais.* 257., 21 *Vin.* 448. *pl.* 6., 2 *H. H. P. C.* 306, 307. The current of authorities in *England* is unbroken; and as *stare decisis* is the duty of our courts, and nothing can be more dangerous than too nicely to criticise the reason of decisions, and where the law is well settled, to reject any thing because it has not the sanction of modern approbation, it is sufficient to cite the adjucations without comment. Nothing to the contrary of the *English* rule has been decided in *Pennsylvania.* The question stands here as a question relating to the common law of jury trials, which we have taken in *extenso* from the *English* code.

Crawford and *Duncan* for the defendants in error. Whatever may be the law at this day in *England*, it certainly has undergone a change in *Pennsylvania.* The complexity of many commercial transactions, the variety of papers which in a question of account or of insurance must occur, beyond the power of any memory to retain with accuracy, has probably produced a change at *Guildhall;* it has beyond doubt at *Nisi Prius* in this state. There is an unvarying practice in opposition to the authorities cited by the plaintiffs in error. We have never borrowed that part of the common law of jury trials. It does not bind our courts. Why should it bind them? The distinction between sealed and unsealed instruments is at this day a name merely. In ancient times, *seals* distinguished individuals; and as juries, from the vicinage of the parties, though they could not write, could recollect and identify armorial bearings, sealed instruments were committed to them, and unsealed were not. *Gilb. Ev.* 14.

(*a*) 2 *Sid.* 145. (*b*) 12 *Mod.* 520.

1812.

ALEXANDER et al. v. JAMESON et al.

Not a vestige of this reason is left any where; but in *Pennsylvania* such a reason never existed. Seals of wax, the only kind of seal to which such a reason could apply, have never been essential here. An ink seal, or flourish of the pen, is as good as any. *M'Dill's Lessee* v. *M'Dill* (*a*). There can therefore have been no motive for introducing a rule inapplicable to any state of things in this province: and certainly, if it ever was introduced, there is none for retaining it after the reason has ceased. To set such a rule aside, is not attended with the danger of a rash overthrow of rules affecting property. It is a rule of mere practice, perfectly arbitrary, highly inconvenient, if not impracticable, in modern times. Even by the authorities cited, though unsealed instruments are given to the jury, and against the consent of parties, the verdict will stand; which shews that the rule is of no use. *Bull. N. P.* 308. *Vickary* v. *Farthing* (*b*). What in fact constitutes a seal? What statute defines it? What practice has fixed it? None. Whether made with wax, or as is supposed in *Jones* v. *Logwood* (*c*) to have been the original mode, with the eye tooth, is equally immaterial. Such a circumstance cannot have the least weight upon the question, whether a jury shall or shall not have a certain paper out with them. Depositions are alone excepted, because it is not fair that the written testimony of one party shall go out, when the oral testimony of the other cannot.

TILGHMAN C. J. This was an issue directed by the Orphan's Court of *Franklin* county, to try who were the heirs of a certain *John Alexander* deceased. The defendants gave in evidence a manuscript book found in the trunk of the said *Alexander* after his death. When the jury were about to retire, the counsel for the plaintiffs objected to their being permitted to carry this book out with them; but the court were of opinion that the jury should have it, to which opinion an exception was taken, on which we are now to decide. It is no longer a question whether the book was legal evidence, but the naked point is, whether, having been given in evidence, the Court might permit the jury to take it out with them. It

(*a*) 1 *Dall.* 63. (*b*) *Cro. Eliz.* 411. (*c*) 1 *Wash.* 42.

is undoubtedly laid down as a principle in some of the *English* cases, that the jury are to take no papers not under seal, without the consent of both parties; yet the same cases say, that if the Court permit them to be taken, it shall be no cause for setting aside the verdict. We are somewhat in the dark as to the reason of this distinction between sealed and unsealed writings, but it is certain that it originated under circumstances not applicable to the present times. The best account of it is to be found in the writings of Lord *Hale* and and Lord *Gilbert*. They say that in ancient times, men of rank and property had seals by which their families were distinguished. Those were not numerous; and as causes were tried by men in the neighbourhood, it was supposed that the seals were so notorious as to be well known to the jury. Papers under seal therefore, carried their own evidence along with them; and indeed it is probable that in many instances it was thought sufficient to affix a seal without any subscribing witness, so that the instrument was authenticated by the seal alone. But the notoriety of seals has long ceased. Every man now takes what seal he pleases. They are no longer a family distinction, and so far has it been carried in this and some other states, that a flourish with the pen in the place of a seal has been held equivalent to a seal. It is to be observed, that although the rule is laid down as I have mentioned in the *English* books, yet it does not appear that the point has been brought before any court for the last half century, during which period the commerce of the world has been prodigiously enlarged, and commercial people make very little use of seals in their transactions. I have never known this question expressly decided in *Pennsylvania;* but I take it, that in practice, the *English* rule has not been extended here. It has been our custom to deliver to the jury all written papers except depositions taken under rule of court. These have been withheld, because it has been thought unequal, that while the jury were not permitted to call the witnesses before them who had been examined in court, they should take with them the depositions of other witnesses not examined in court. After the uniform practice which has prevailed in this state, I cannot consent to the establishment of a rule which in many cases would produce confusion and injustice. I have

1812.

ALEXANDER et al. v. JAMESON et al.

witnessed the trial of many causes, particularly of the mercantile kind, in which the jury could not decide without the aid of unsealed papers; causes which required the minute and laborious investigation of a variety of books and papers, in which long calculations were necessary, founded on accounts and entries. To tell the jury that they must form their verdict on the recollection of what had passed at the bar, would be imposing on them a most unreasonable duty. Under such circumstances, they could do no more than make a vague guess at the truth, and their verdict might be an *abuse*, instead of a *satisfactory administration* of *justice*. I am of opinion therefore that the Court of Common Pleas had a right to permit the jury to take out with them the book which had been given in evidence, and that the judgment should be affirmed.

YEATES J. I would not agree to remove an unbroken pillar of the common law, which might serve in any degree to support the general system, or to change the grounds upon which property has rested permanently for ages, merely because we cannot at this day discern the correctness of its principles. But I profess no veneration for the rubbish of antiquity, resting on foundations inapplicable to the present state of society.

The cases cited during the argument, shew that unsealed writings given in evidence in the course of a trial, cannot regularly be taken out by the jury, unless by consent; but that this will not avoid the verdict. The ancient law paid great respect to seals, as it is said by Lord Chief Baron *Gilbert*, that jurors might ascertain thereby on their own view, whether the instruments were genuine or not. In modern times, impressions on wax cease to give us any useful information, and of the few persons who have their family arms on their seals, fewer still are tenacious of affixing those seals to their bonds or conveyances. But seals on wax or wafers, which no longer distinguish the parties who have used them, have given way in many instances in the country to circles of ink, which have been adopted as substitutes. In this state of things there can be no utility in preserving the old distinction, that sealed instruments may to be taken out by the jury, to be inspected in their chamber, but not unsealed

ones. Whether a paper proved to be genuine and shewn in evidence to the jury has a seal or not, the facts imparted by its contents must produce the same effects on considerate minds. The reason for the distinction has long ceased, and with it the law has also changed.

Hence it is, that the practice for many years has been in *Pennsylvania*, that all papers which have been read to the jury, have been delivered to them on their retiring from the bar, and such has been the direction of the court when they have been appealed to. The single exception is the case of depositions; which rests on the ground, that it would not be fair and equal, that the oaths of witnesses reduced to writing on one side, should be permitted to go out, and witnesses examined *viva voce* on the other side, should be prohibited from accompanying the jury. I frankly own, that I know of no instance in the course of my experience, wherein the court have directed unsealed papers to go out, where the adverse party has absolutely opposed it; and this is the first instance which I can recollect of such opposition, after the sentiments of the court have been declared. But I am abundantly satisfied, that the court possess this inherent power for the purposes of justice, whether the adverse counsel assent or refuse their assent thereto. Can it be competent to one of the litigant parties to withdraw from the jurors the only means of settling the matters in dispute fairly? How can complicated accounts between merchants be adjusted? How is a question of loss on a policy of insurance, or those arising on the many commercial transactions which occupy our attention, to be justly terminated, unless the jurors in their chambers are permitted to have inspection of original entries, invoices, bills of lading, letters of correspondence, receipts, &c.? Upon full consideration thereof, a *true* verdict must necessarily depend, and by denying a jury the means of information, they are prevented from doing equal justice between the parties. The court therefore must possess the lawful power of ordering that the papers admitted in evidence may be delivered to the jury, whether the counsel assent thereto or not: and I have no difficulty in saying that the judgment of the Court of Common Pleas in this case should be affirmed.

1812.

ALEXANDER et al. v. JAMESON et al.

BRACKENRIDGE J. All law is founded on reason, natural, moral, or political. The exchange or barter of a cow or a sheep, was the early mode of commerce. The image of a cow, or a sheep, or other animal stampt upon leather by wood, or metal, represented the exchange, and hence the *Latin* term *pecunia*, from *pecus*.

Gold or silver, or other scarce metal weighed, was early a medium of commerce. Pieces stampt and purporting to be of a certain value, came in place of the actual weighing, in a particular community. This was one use of stamps. Contracts to do or perform, from the nature of things, must have early taken place. The transmission of property by conveyance or devise must also have taken place at an early period. The attestation of these could not but be by being stampt, where chirography was not known, or the individual could not write. This was the origin of *seals*, every individual being supposed to have his own seal, or where he had not, he had his teeth; and hence perhaps the phrase, I will prove it to your teeth, or by your teeth I will prove it. For it has been said, that the impression of the teeth, was in rude ages equivalent to the stamping by a seal. I have not had leisure to consult the authority which has been adduced, (*Washington's Reports*) that the cutting of the eye tooth had an allusion to this, whether the eye tooth being cut at a certain age, it might denote the being of the age of discretion, or whether it related to the impression of that tooth as a mark, being a tooth of signal impression. On abstract principle, the only reason that I could give why a seal should give a greater *credence* to writings, is that the calling for wax to make an impression on, and the application of a seal, may be an evidence of greater deliberation, and give a greater solemnity to the instrument. But the reason given by *Gilbert* why it should go out with the jury, is doubtless the true one; viz. that a jury of the vicinage might be supposed to know the seals of those using them.

Illi robur et æs triplex.
He was a bold fellow,

who first in these colonies, and particularly in *Pennsylvania*, in "time whereof the memory of man runneth not to

1812.

ALEXANDER et al. v. JAMESON et al.

the contrary," substituted the appearance of a *seal*, by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some *effigies*, or inscription on stone or metal. It would seem but a small advance to dispense with it altogether. *Il n'y a que le premier pas qui coute.* The first deviation was all. How could a jury distinguish the hieroglyphic or circumflex of a pen by one man, from another? In fact the circumflex is usually made by the scrivener drawing the instrument, and the word seal inscribed within it. The reason for the law has ceased, and why should it continue to be the law. The science of the law is improved in proportion as it is brought nearer common sense and the understanding of mankind. We have seen the struggle of the legislature to get quit of fictions and technical subtleties, and why should not courts reform in *practice* what they may reform? Why should it be left to a dwarf, according to the expression of *Junius*, to do the work of a giant? I speak of what the courts may do, compared with what is practicable by the legislature, in respect of reforming rules of construction, rules of evidence, and usages of practice. There is an extent to which the courts cannot go, which is to abolish the *technical* distinction in the use of seals altogether, because acts of assembly recognise them; such as the distinction between notes not under seal, and bonds with the annexing of seals. This, as regarding the statute of limitations, or other presumption of the effect of seals. Seals might be of use, where there were seals distinguishing identity. Coats of arms came in with the *Normans*, taken from the engraving on the shields; and these cut on stone or metal, or other material, might be of notoriety, and distinguish persons. But this has ceased to be a use of them, with the greater mass of the people, even in the countries of chivalry; and here in these states, never could be said to have had much existence. Few of the emigrants could boast an ancestry. There is no magic in words, said a learned judge, meaning *mere terms;* much less I would say can there be magic in seals. To talk of seals ascertaining any thing now, or assisting to ascertain, cannot be comprehended, unless it could be thought that there was some *charm* in them, some spell *to work evidence.* It is as unmeaning as to any effect of this nature, as the word

1812.

ALEXANDER et al. v. JAMESON et al.

Abracadabra put at the end of a signature. Why should writings go to a jury at an early period, when they could not read? It saved the neck of a felon to be able to read a verse. They could examine a seal as to its form, or what was cut upon it, so far as respected images of substantial things; but the arbitrary marks of letters were unknown to them. The excluding unsealed instruments or papers might be said to be founded in one reason, according to the technical notions of the times. Every writing not under seal, came under the denomination of parol. And because oral testimony could not go but in the mind, this other parol could not go by the hand. But there is a use in letting all go by the hand that can be carried; for it will assist the recollection, and refresh the memory. Startled by some doubt on this subject, I have heard of a judge, a president of the Common Pleas, ruling that a letter might go, because in fact *it had been under seal.* But I believe we should smile, or wring the face with a grimace irresistible, to talk of *letters* going under this subtlety. And yet, in mercantile causes especially, there would be no possibility of a fair examination without letting them go, whether the counsel objected or otherwise. In land trials, what is to be done with field notes, drafts, and scrapings of office, unless by a fiction, we could suppose them as drawing with them the seal above in the office to which they belong. But there was a time, when there was no seal in the office; and this auxiliary would not suffice. How could juries judge of original books of entries, of accounts or calculations, and set off, without having them with them? Every case of this kind would have to go to auditors or referees. An agreement not under seal, could not go, though it contained many stipulations. We do not sit here, said a learned judge, to take our rules from *Siderfin* and *Keble*, nor do *we* sit here to be bound by every rule of a former period. We are not *cerfs adscript* to the clods of decisions. If we thought ourselves bound by every rule of the common law, it would furnish the best reason for abolishing it. The reason of the law, says Lord *Coke*, is the life of the law. And will not the reason cease with a change of situation and circumstances? In an enchanted island we might not find ourselves at liberty. But however judges might be bound by every rule of jurisprudence in the island of *Great*

1812.

ALEXANDER et al. v. JAMESON et al.

Britain, we have crossed the ocean, and are at the distance of three thousand miles. Our situation is changed, and it is only such parts of the common law as have been introduced by usage, that we are to regard. And not all that; for we have the right to change a usage, so far as respects our rules of practice. Will common sense and sound policy exclude writings from the jury that are not under seal, and carry the distinctions of rude times into our jurisprudence? Though *Holt* and *Hale* and *Coke* may have been entramelled by them, we ought not to be. It would be like taking the skin of a dead horse for a horse. I can have no doubt but that in this case the books ought to have been carried out by the jury, and therefore I affirm the judgment.

Judgment affirmed.

BLYTHE and another *against* JOHNS.

IN ERROR.

Chambersburg, Monday, Oct. 5.

The certificate of a bankrupt's conformity, is *conclusive* evidence of the trading and bankruptcy &c. in a suit between the assignees and a debtor of the bankrupt; but in a suit by a creditor against the bankrupt himself, it is but *prima facie* evidence; and under a plea that it was *unfairly* obtained, the creditor may prove that the defendant was not a trader within the meaning of the bankrupt law.

ERROR to the Common Pleas of *Franklin* county.

The plaintiff below, *Johns*, brought an action of debt on two bonds, to which the defendants pleaded *payment*, with leave to give the special matter in evidence; and *Blythe* for himself pleaded, that he was a certificated bankrupt. The plaintiff replied to this plea, that *Blythe* was not a certificated bankrupt, and that the certificate was obtained unfairly and by fraud; upon which issue was joined.

Upon the trial of the cause, the defendant, *Blythe*, having produced his certificate of conformity duly certified agreeably to the act of Congress, the plaintiff offered a witness to prove that *Blythe* had not, between the first day of *June* 1800, when the bankrupt act came into force, and the 7th of *September* 1803, the date of the commission, been a *trader* within the meaning of the act of Congress, entitled "an act to establish "an uniform system of bankruptcy throughout the *United States*." This testimony was objected to by the defendant, but admitted by the Court, who sealed a bill of exceptions.

The exception turned upon that part of the 34th section

1812.

BLYTHE v. JOHNS.

of the act of Congress, which provides, that in case a bankrupt be impleaded for, or on account of the debts specified in that section, "the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions "of this act, shall be, and shall be allowed to be sufficient "evidence, *prima facie*, of the party's being *a bankrupt* "within the meaning of this act, and of the *commission* and "*other proceedings* precedent to the obtaining such certificate; and a verdict shall thereupon pass for the defendant, "*unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud &c.*" 5 *U. S. Laws* 69.

The question was, whether it was only *prima facie* evidence of the *trading* also.

Brown and *J. Riddle* argued for the plaintiffs in error.

Duncan contra.

TILGHMAN C. J. This is an action of debt upon bond, brought by *Johns* the plaintiff below, against *Blythe* and *Nicholson*. *Blythe* pleaded that he had been discharged as a certificated bankrupt, under the act of Congress of the *United States*, and that the cause of action accrued previous to the time of his bankruptcy. The plaintiff replied that the certificate was unfairly obtained, and thereupon issue was joined. On the trial, the plaintiff offered evidence to prove that *Blythe* was not a trader within the meaning of the act of bankruptcy. This evidence was objected to, and admitted by the Court, to whose opinion the defendant took an exception; and the question now to be decided is, whether the certificate of the commissioners is *conclusive evidence* of the trading and bankruptcy? It is not a new question, but has been well considered and determined in other courts, though not in this.

The act of Congress, so far as concerns this point, is substantially the same as the *British* statute of 5 *Geo.* 2. *c.* 30, and the former bankrupt law of this state. The thirty-fourth section of the act of Congress is thus expressed. [The Chief Justice here repeated the section.] It is very evident, that when a matter is allowed to be *prima facie sufficient evidence*, it is not intended to be *con-*

clusive evidence. Such a construction would be a violation of the plain meaning of the words. Besides, where Congress meant the evidence to be conclusive, they have taken care to say so; for in the 56th section it is declared, that in all cases where the assignees shall prosecute any debtor of the bankrupt for any debt, the commission or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be *conclusive evidence* of the issuing of the commission, and of the person named therein being a trader and bankrupt at the time mentioned therein. The reason why the proceedings were made conclusive evidence in one case and not in the other, is very obvious. In an action against a *debtor* of the bankrupt, it was of no importance to the *debtor* to whom he paid the money, provided the debt was due. It was very proper therefore to make the proceedings of the commissioners conclusive evidence in that case. But in an action by a creditor to recover a debt due from the bankrupt, it is of the utmost consequence to enquire whether the defendant was really an object of the bankrupt law; for if he was not, the plaintiff ought not to be barred from his recovery. In such cases it was right that the proceedings of the commissioners should be *prima facie* evidence, because it saved the trouble of summoning witnesses, who might live in remote places; and some credit was reasonably due to the acts and opinions of the commissioners, who must be supposed to be impartial and respectable judges, deciding upon evidence produced to them. The burthen of proof would be thus thrown where it ought to be, upon those persons who objected to the proceedings. Let us return then to the act of Congress, by which it is expressly permitted that evidence may be given of the certificate having been *unfairly* obtained. This is the very same expression used in the *British* and in the *Pennsylvania* statute. And the meaning of that expression was brought directly before the Court of Common Pleas, in the case of *Pleasants* v. *Meng et al.*, 1 *Dall.* 380. That case was decided by Mr. President *Shippen*, who delivered a very able opinion. He held, that *unfair* was tantamount to *illegal*, because if a man had not been a trader, or had not committed an act of bankruptcy, it was *unfair* to grant him a certificate. This construction accords with the spirit of the act of Congress, be-

1812.

BLYTHE v. JOHNS.

cause, when it is said, that the certificate shall be "*prima* "*facie* evidence of the party's being a bankrupt within the "meaning of the act," it must be understood that it is *prima facie* evidence of the *trading*, and all those other circumstances necessary to constitute a bankrupt. Of course, it being only *prima facie* evidence, it must be competent to the creditor who sues the bankrupt, to oppose this *prima facie* evidence, by other contradictory evidence. So that to make the whole provision in the 34th section consistent, the expression obtained *unfairly*, must be construed so as to permit the plaintiff to shew, that the person who obtained a certificate was not a trader, and consequently not a bankrupt within the meaning of the act.

I am therefore of opinion, that the Court of Common Pleas were right in admitting the evidence, and that the judgment should be affirmed.

YEATES J. I have heretofore, in the case of *Rugan et al. assignees* v. *West*, 1 *Binn.* 269., expressed my ideas pretty much at large, of the 51st section of the act of Congress of the 4th of *April* 1800, upon which the plaintiffs in error rely in this case. I shall therefore content myself with observing at present, that it became necessary by the provisions of a positive law, to declare that certified copies of the proceedings of commissioners of bankrupt, when finished and filed in the clerk's office of the District Court, "should be ad- "mitted as evidence in all courts, in like manner as the "copies of the proceedings of the said court are admitted "in other cases." At common law, they were inadmissible as against persons who were strangers to those proceedings. But there is nothing in this section, from which we can infer, that the facts set out in these proceedings are to be considered as incontrovertibly true. Like other species of evidence, they may be contradicted or explained by other proofs, or repelled by circumstances. When the legislature intend that the commission and the assignment of the commissioners of the bankrupt's estate, shall be *conclusive* evidence (in cases where the assignees shall prosecute any debtor of the bankrupt, for any debt) of the issuing the commission, and of the person named therein being a trader and bankrupt at the time mentioned therein, they say so in

precise terms. Indeed, by the very words of the 34th section, all doubt seems to be removed in this instance. "If a "bankrupt shall be arrested, his certificate of conformity "and the allowance thereof, shall be sufficient evidence, "*prima facie*, of his being a bankrupt within the meaning of "the act." The object of the legislature was to obviate the hardship to which the debtor would be subject, in procuring parol proof of his trading and conformity, in places far remote from his former residence; but not to conclude his creditors who were not parties to the proceedings. The same doctrine is uniformly asserted under the *British* statutes of bankruptcy, and by Mr. President *Shippen* in *Pleasants* v. *Meng et al.*, 1 *Dall.* 380., under the former bankrupt law of this state. So also by Judge *Washington* in the case of *M'Laws* a bankrupt, as cited in 1 *Binn.* 268, on this act of Congress, upon proof that the whole was a matter of concert between the bankrupt and his friends. I am therefore of opinion, that the testimony offered by the plaintiff below, on the trial, to prove that *Samuel Blythe* had not been a trader between the 1st of *June* 1800, and the 7th of *September* 1803, was correct and legal, and that the judgment of the Court of Common Pleas be affirmed.

BRACKENRIDGE J. A reference has been made in the argument to a case, *Assignees of West* v. *West*, tried before me at a *Nisi Prius*, *Philadelphia*, *December* 1807, in which a nonsuit was directed, on the score of the deposition of a certain *Fisher not being admitted in evidence*. The motion in bank was to set aside the nonsuit, and on the ground of the rejection of this testimony, it was set aside. The deposition was over-ruled on the ground of having been taken *in the course of proceedings before the commissioners of bankruptcy, and filed*, and not in the suit between the parties; and that it was not admissible, not having been taken on an examination between the parties, with the opportunity of a cross examination. It had no relation to the question of the trading &c., which in any case might be contested. What was laid down on these heads, was sanctioned by the Court above according to the opinion filed, which is not reported, but the substance only. So that it is not inconsistent with any thing ruled by me in that case, to concur with the opi-

1812.

BLYTHE v. JOHNS.

nion of the Court in this. On the contrary, it was ruled by me, that as between assignees and debtor the proceedings were conclusive; but as between creditor and debtor *prima facie* only. That was the case there; it is the same here.

Judgment affirmed.

5b 252
2sr 63
13sr 206
7 18
10 252
64 14

HOLMES *against* The Lessee of HOLMES and others.

Chambersburg, Monday, Oct. 5.

IN ERROR.

The testatrix gave to her grandson *H* her "plantation, "with the appurtenances, "to hold to his "heirs and assigns forever, "to be entered "upon and taken possession "of by him as "soon as he arrives at the "age of twenty-one years, or "the day of his "marriage, "which shall "first happen;" directing that "if he shall die "under age, *or* "without issue, "his estate "shall descend "to his next "brother and "his heirs; but "if he leaves no "brother, then "to his sisters "and their "heirs, share "and share "alike." *H* entered into possession and died seised, *of full age*, but unmarried, and *without issue*. *Held* that *H* took an estate in fee simple, with a good executory devise over, in case of his death under age *and* without issue; and that on his attaining the age of twenty-one, his estate became indefeasible, and on his death descended according to law.

THIS was a writ of error to the Common Pleas of *Cumberland* county, to bring up the record and proceedings in an action of ejectment. By a special verdict, under which the case was decided below, the jury found—

That *Agnes Graham*, on the 4th of *January* 1768, was seised in her demesne as of fee of the premises in the declaration mentioned; and being so thereof seised, on the same day made her last will and testament in writing, in which, after ordering her debts and funeral expenses to be paid, she devised as follows: "I give devise and bequeath "unto my grandson *William Graham Holmes*, *my plantation* "*and tract of land situate on Letart Spring above Carlisle*, "*with the appurtenances*, *to hold to his heirs and assigns* "*forever*, *to be entered upon and taken possession of by him*, "*as soon as he arrives at the age of twenty-one years or the* "*day of his marriage*, *which shall first happen.*" "I do will "order and direct, that if my grandson *William Graham* "*Holmes* shall *die under age* OR *without issue*, that his es- "tate shall descend to his *next brother and his heirs;* but if "he leave no brother, then to his sisters and their heirs "share and share alike." That the testatrix gave small legacies to several persons, and the residue to her said grandson, ordering "that the herein before mentioned legacies be "paid out of the rents and profits of my plantation, arising "before my said grandson arrives at the age of twenty-one

"years or marriage." That *William G. Holmes* the devisee entered and took possession, and died seised thereof on the 30th of *July* 1804 intestate, *of full age*, unmarried and *without issue*, leaving a father, *Andrew*, and a mother, both in full life. That the said *Andrew*, on the 12th of *February* 1805, conveyed the same to the lessors of the plaintiff, and the defendant, as tenants in common. That *W. G. H.* had a brother *John* of the whole blood, who was born on the 27th of *March* 1768, and died the 26th of *December* 1801, of full age, unmarried and without issue. That the lessors of the plaintiff are the sisters, younger brothers &c. of the said *W. G. H.*, and the defendant is and was the oldest surviving brother of the said *W. G. H.* at the time of his death. The jury found also the lease entry and ouster, and that the defendant was in possession.

Upon this verdict, the Court below rendered judgment for the plaintiff, and the defendant took a writ of error.

The points here made for the plaintiff in error, were 1. That *William Graham Holmes* took an estate tail, with a contingent remainder in fee to his next surviving brother that should be alive at the time of his death without issue; viz. the defendant below. 2. That if he took a fee, there was an executory devise over to the next surviving brother, in the event of his dying *without issue living at the time of his death.*

For the defendants in error it was argued, 1. That *William Graham Holmes* did not take an estate tail, but a fee simple, with an executory devise over, on the event of his dying under age *and* without issue, which had not happened; and that the fee became indefeasible at twenty-one. 2. But if the event had happened, on which the executory devise was to take place, the estate went to the heirs of *John*, the oldest brother of *W. G. Holmes*, who died in the life time of the latter; and the lessors of the plaintiff were his heirs, in part.

The case was elaborately argued by *Watts* for the plaintiff in error, and *Duncan* contra; but as the whole ground is gone over by the Judges in their opinions, it is unnecessary to give a note of the argument.

1812.

HOLMES v. Lessee of HOLMES.

TILGHMAN C. J. The question in this case arises on the will of *Agnes Graham*. The point to be decided is, whether the devise of a tract of land to *William Graham Holmes*, grandson of the testator, carries an estate in fee simple, indefeasible on his attaining the age of twenty-one years.

To ascertain the intention of the testator, is the great point in the construction of wills. The intention being ascertained, is to be carried into effect, unless forbidden by law. In order to discover the testator's meaning, we must place ourselves in the situation in which he was at the time the will was made. Subsequent events being unknown, could not have entered into his mind, nor influenced his will. In considering the will now before us, there are several things which the testatrix appears clearly to have intended. 1st. That her grandson should take a fee simple. 2d. That he should enter into possession at the age of twenty-one, or marriage, whichever should first happen. 3d. That upon certain events, the estate in fee simple was to pass to another person. But upon what events? Upon the devisee's dying *under* age, or *without issue*. In strict construction then, the estate would go over, if the grandson died before twenty-one, or if he died without issue. Suppose he was to die before twenty-one, *leaving issue?* Was it the intent that in such case the issue should be disinherited? Certainly not. How then is the intent to be effected? The most rational way of construing such a devise, that which upon the whole will best accords with the testator's intention, is, to reject the particle *or*, or to give it a copulative meaning, and then the estate of the devisee becomes indefeasible, unless *both* the contingencies happen, that is to say, unless the devisee dies without issue, and also before twenty-one. This would appear to me the best construction, if it were a new case. But it is not. On the contrary, devises so like the one before us as not to be distinguished from it, have received the construction which I have mentioned, at various times and by various judges, for the last two hundred years. In *Soulle* v. *Gerrard*, 38 and 39 *Eliz. A. D.* 1596, *Cro. El.* 525., *Moore* 422., *A* having issue four sons, devised land "to *B* (one of "them) and his heirs forever, and if *B* died within the age "of twenty-one years, *or* without issue, then the land to be "equally divided among his three other sons." *B* had issue,

and died *within the age of twenty-one*. Held that the issue should take. The word *or* was construed *and*. In *Price* v. *Hunt*, 36 *Car*. 2. *A. D.* 1684, (*Pollex*. 645) one devised land "to his son and his heirs, and in case his son die before "he attain to twenty-one, *or* have issue of his body living, then to another person." The son lived to twenty-eight years of age, and then died without issue. Held that the land went to the heir of the son. In *Barker* v. *Suretees*, 15 *Geo*. 2. *A. D.* 1743, 2 *Str*. 1175, *A* devised "to his grand-"son, his heirs and assigns, but in case he dies before he "attains the age of twenty-one years, *or* marriage, *and* with-"out issue, then and in such case to another person." The grandson attained twenty-one and died, having never been married. Held that on attaining twenty-one, the estate of the grandson became absolute. In *Walsh* v. *Peterson*, *A. D.* 1744, 3 *Atk*. 193, *A* devised "to his son and his heirs, but in case "his son should happen to die before he attained the age of "twenty-one years, or without issue," then to the testator's wife. The son died after the age of twenty-one, but without issue. Held by Lord *Hardwicke* that the estate in fee became absolute in the son, as soon as he arrived at the age of twenty-one. In *Framingham* v. *Brand*, *A. D.* 1746, 1 *Wils*. 140, the devise was "to *R. F.* my son, and his heirs and as-"signs for ever, and in case the said *R. F.* my son happen "to die in his minority, or unmarried, or without issue, "then I give the inheritance in fee to *H. B.*" The son attained the age of twenty-one, but died unmarried and without issue. Held by Lord *Hardwicke*, that both the words *or* should be taken in a copulative sense. I forbear to trace the *English* cases lower down, because an act of assembly forbids the citing of any cases adjudged since the revolution. But what will be more satisfactory, I will mention the opinions of courts in various parts of the *United States*, all coinciding with the *English* decisions. In *Ray* v. *Enslin*, *A. D.* 1799, 2 *Mass. Rep*. 554, the devise was "to my daughter "and her heirs for ever, but in case my daughter should "happen to die before she comes to age, *or* have lawful heir "of her body begotten, then over." The daughter attained the age of twenty-one and had issue; held by the Supreme Court of *Massachusetts* unanimously, that the daughter took an estate in fee simple, defeasible upon a contingency deter-

1812.

HOLMES v. Lessee of HOLMES.

minable in a reasonable time. The question in this case was between the issue, and the alienee of the daughter. The issue claimed under the idea of their mother having taken an estate tail, and I mention the case, because in the argument before us, it was also contended that the devisee took an estate tail. In *Jackson* v. *Blansham*, *A. D.* 1810, in the Supreme Court of *New York*, 6 *Johns. Rep.* 54, *A* devised the residue of his estate "to his six children, and their "heirs, to be divided between them share and share alike; "but if any one or more of them should die, before they "arrive to full age, or without lawful issue, the part of the "one so dying, to be divided among the rest of the surviv- "ing children, and to their heirs and assigns for ever." One of the children, after attaining the age of twenty-one years, died without issue, having mortgaged his share of the estate. The Court were of opinion, that on attaining the age of twenty-one, the estate in fee became absolute. This case carries very great weight, because the Court, on a former occasion, had expressed a contrary opinion when the same point was brought before them in a collateral way, and not fully argued or considered. But whoever reads Chief Justice *Kent's* opinion, delivered after mature reflection, will be satisfied, that his ultimate judgment was not formed without a thorough investigation of the subject. The last case which I shall mention, is that of *Hauer's Lessee* v. *Sheetz*, 2 *Binn.* 532, decided in the High Court of Errors and Appeals in this state. There the testator devised, "to "his son *Francis*, his heirs and assigns for ever, but in case "he should die under the lawful age of twenty-one years, "or without lawful issue, then to his son *Peter*." It was held that *Francis* took an estate in fee, which became indefeasible on his attaining the age of twenty-one. I know very well that there were other parts of the will, which afforded ground for powerful arguments; but the consideration of the clause which I have cited was brought home to the Court, and I am well satisfied that they all adopted the construction which prevailed in the cases which I have mentioned. It has been said that it is in vain to cite cases on wills, because they are of no authority, unless exactly similar to the one under consideration. But this principle, though true to a reasonable extent, may be carried too far.

If two cases are substantially the same, it is sufficient. Repeated decisions on the effect of certain words, ought to establish a rule of property, unless, (which no wise man would wish) we mean to set every thing afloat, which depends on last wills and testaments. It is very rarely that we see such coincidence of opinion as is found on the cases which have been mentioned, and I confess I am not able to distinguish them from that which we are to decide. I am satisfied therefore that *William G. Holmes* took an estate in fee simple, subject to an executory devise over to his next brother, in case he died under the age of twenty-one, and without issue. Having attained the age of twenty-one, his estate became indefeasible, and on his death descended to his heirs, so that the plaintiff in error has no title. This was the opinion of the Court of Common Pleas of *Cumberland* county, and I am for affirming their judgment.

YEATES J. The questions in this case arise on the will of *Agnes Graham*, which has been stated. The counsel for the plaintiff in error have attempted to maintain two propositions. 1. That *William Graham Holmes* took an estate tail in the lands in question; and that the word *or* in that clause of the will, which directs, that if the testatrix's grandson *W. G. H.* should die under age *or* without issue, that his estate should descend to his *next* brother and his heirs, shall be taken as it stands in the will in the disjunctive, and not in the conjunctive; and consequently that on either contingency of the death of the first under age, *or* of his dying without issue, the estate must go over to him as remainder man according to the limitation: and 2dly, If *W. G. H.* did not take an estate tail, that a good remainder is limited over to *Andrew Holmes*, as his next surviving brother, by way of executory devise.

It would be idle affectation to cite authorities to shew that no rule of law is better settled, than that the intention of a testator expressed in his will shall govern its construction, if the nature of the estates thereby devised be not incompatible with the policy of the law; and that this intention must be collected from the words of the will taken altogether. We must first search for the *general* intent, and give effect thereto. If there be a *secondary* intent, which

1812.

HOLMES v. Lessee of HOLMES.

interferes with *that*, we are bound to reconcile the whole will as far as we are able, but at all events we are to give effect to the primary and general intent. We are authorised to construe a disjunctive word into a conjunctive, and *vice versa*, where it is necessary to give effect to the true meaning of a testator; but unless there be something in the will or the subject from which it may be fairly collected, that the testator did not use such words in their grammatical sense, the grammatical sense must prevail. We cannot from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply the omissions. 3 *Burr.* 1634. We cannot make wills and insert words arbitrarily or by conjecture. *Ib.* 1635.

The strong argument urged by the counsel of the defendants in error, against the construction set up by the adverse party in the case before us, is, that the specific words made use of by the testatrix have gained a fixed legal import; and that a variety of decisions have established, that where an estate is given to a man and his heirs, and in case he die before twenty-one, or without issue, then over, unless there are plain words in other parts of the will shewing a different intention, it forms but one contingency; and that the will here must be read as if the testatrix had said, if my grandson *W. G. H.* shall die before he attains his full age, *and* without issue, conjunctively, and not disjunctively; for this obvious reason, that if the first taker should die under age, leaving children, the testatrix could never have meant, that those children should be stripped of the property devised to their father. It is not asserted that adjudged cases upon wills have the same binding force on the Court as other precedents, devises being so infinitely diversified; but it has been insisted with great strength of reasoning, that where certain expressions in a will, have received on full consideration a decided settled meaning as to the nature of the estate created thereby, such meaning ought not to be departed from in other instances, unless the testators have clearly manifested an intention to the contrary. Much reliance has been placed on *Hauer's Lessee* v. *Sheetz*, determined in the High Court of Errors and Appeals in *July* 1807, reversing the unanimous decision of the members of this Court in *September* Term 1801, 2 *Binn.* 532. The

cases of *Chew's Lessee* v. *Weems et al.* determined in the Provincial Court of *Maryland* in 1772, and the judgment reversed in the Court of Errors in 1775, 1 *Har.* & *M'Hen.* 463.; of *Brewer et uxor* v. *Opie*, determined in *Virginia* in 1798, 1 *Call.* 212., and of *Ray* v. *Enslin and Ray*, determined in *Massachusett's Bay* in 1799, 2 *Mass. T. R.* 554., were not then published. That of *Fairfield Lessee of Hawkesworth et uxor et al.* v. *Morgan*, 5 *Bos.* & *Pul.* 38, was determined in the House of Lords in 1805; and of *Jackson Lessee of Burhans et uxor* v. *Blanshan*, in *New York* in 1810. 6 *Johns.* 54. I have examined these different authorities with all the attention in my power, and think none of them come up to the case of *Hauer's Lessee* v. *Sheetz*. I may be permitted to say with all due deference to a Court of Error, that though our decision has been reversed, my judgment remains unconvinced. I view the will and codicil of *Peter Sheetz* the father, as affording, on a minute examination of all the clauses therein, strong internal evidence, that he did not intend his son *Francis* should take a fee simple in the lands on his barely coming of age. Even admitting that the testator in that case contemplated the improbable events that within less than twelve months he should die, and that his son *Francis* should marry and have a child within that period, the fixing the payment of the 500*l.* to his daughter *Elizabeth* by his surviving son, as a cotemporary act with his taking the land, manifests his intention to exclude the daughter from taking the land, in case the brother died without issue. The mutuality of survivorship between the two sons, on the occurrence of the events pointed out, strongly marked the mind of the testator. But if *Peter* should not succeed to *Francis* on his dying without issue, the 500*l.* could not be raised for the daughter, as the two estates would continue divided, and her husband surviving her would have held the lands during his life, notwithstanding the jealousy expressed of him in the will. No part of the 2300*l.* devised to *Peter*, was payable on *Francis's* coming of age, nor was any part of it paid at the time of his decease. If *Francis* had died in his minority, leaving issue, or had paid to *Peter* any part of the money to which the lands were subjected, I should feel no hesitation in assert-

1812.

HOLMES v. Lessee of HOLMES.

ing that in either case a fee simple would have vested in him:—But neither of those events had happened. It is generally true, that a devise shall stand as at the time of making the will, and shall not be construed by any after-act, collateral contingency, or subsequent circumstance. But it is equally true, that the rule is not universal, and that we meet with several cases in our books, wherein limitations over have been construed *according to the event*, in order to support the intention of the testator. *Forrest.* 50., 1 *Atk.* 581., 2 *Ves.* 249., 2 *Fearne* 494 to 498. Courts of justice, through the medium of additional words or concomitant circumstances, will be anxious to escape from the trammels of technical reasoning, by the force of fair argument, founded upon specific and obvious differences, in favour of evident intention. 2 *Fearne* 258., *Hob.* 29. Lord C. J. *Wilmot*, has thus expressed himself in *Kerby* v. *Fowler*, (*ib.* 245). "We are bound to an artificial and technical "sense of words, unless there is an *apparent intention* in "the testator of using them in their natural meaning, and "for that purpose, which is in favour of *common sense*, the "*most trifling circumstance* is sufficient." And another chief justice, in a late case on a will wherein a father devised lands to a natural son, and the heirs of his body, and if he died before twenty-one, *and* without issue, then over, puts this striking interrogation:—"Is there not a rule of *common* "*sense* as strong as any rule can be, that words in a will "are to be construed according to their natural sense, unless "some obvious inconvenience or incongruity would result "from so construing them?" And the other members of the court concurred with him.

I have thus given a general outline of the grounds on which my opinion was formed in *Hauer's Lessee* v. *Sheetz;* and I have been more minute therein, from being well informed, that the questions upon that will cannot be again revived.

The present case however has none of these strong predominant features, which influenced my former judgment, or which, in my idea, would form an exception to the general rule of construction. Here *W. G. H.* the first taker, was an infant not three years old, at the time of his grand-mother's making her will, and at her decease. From the usual

perils of childhood, she might reasonably suppose that there was a considerable chance of his not surviving eighteen years. Here was no favourite brother to whom the testatrix anxiously wished to extend her bounty, upon the death of the person, who bore her name, without issue. No mutuality is preserved between the brothers,—nor is any money to be paid by the second taker to either of his brothers or sisters. In short, I see no words or circumstances, which justify me in inferring, that unless both contingencies, the arriving at full age and having issue, should happen, the lands should not absolutely vest, according to any reasonable construction which can be given to the will. No one who reads the will, can deny that *W. G. H.* was the *primary* object of her regard, or that his brothers were the *secondary* objects in preference to the sisters; and yet, under the construction set up by the plaintiff in error, it would necessarily follow, that if all the brothers of the first taker had died in his life time, and had severally left children, those children must have given way to their surviving aunts. This appears to me totally inadmissible, obviously inconvenient, and incongruous with the whole scope of the will. I therefore am led to conclude, that under the true meaning of the will under consideration, *W. G. H.* took an estate in fee simple in the lands devised to him, on his arrival at full age.

But supposing the event not to have happened, which completed the entire interest of the first taker in the lands, I do not see how the plaintiff in error could make out his pretensions to the lands. The limitation over is to the *next* brother and his heirs, the natural meaning of which is *next brother in point of age*, and not the brother surviving *W. G. H.* on his dying without issue. If a contrary doctrine should prevail, and *John*, the next eldest brother, had died leaving children in the life time of *W. G. H.*, such children would lose all claim to the lands, which is also inadmissible.

I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. I take no exception, *in substance*, to construing *or*, *and*, or construing *and*, *or;* but to the appearance of what is *arbitrary*, when the analysis of language would lead to the same result. In common speech, or writ-

1812.

HOLMES v. Lessee of HOLMES.

ing, every word that is used in the first branch of a sentence, is not usually brought forward, and repeated in the last; but is left out, to be understood and supplied in the mind of the reader or hearer. This omission, or deficiency, is called by the grammarians an elipsis, than which there is not a more common abreviation; and all that is to be done is the filling up, according to what will appear from the whole of the sentence, or from the whole of the speech, or writing, to have been the meaning. Thus in the case before us, "*If he shall die under age or without issue*," I fill up the elipsis, after the word *or*, by bringing forward such words from the first branch of the sentence, as may seem to have been omitted; and the only question will be, whether I shall bring forward the whole that preceded the word *or*, or but a part. If I bring forward the whole, it will read, "If he shall die under age, or if he shall die *under age* without issue." If I bring forward a part only, it will read, "*If he shall die under age, or if he shall die without issue.*" This last is my filling up, because it is not necessary to supply the whole, in order to reach the case of a dying under age, *leaving issue;* which was the case to be reached, where, on a different construction, such issue would have been left unprovided for; and the filling up in this manner lets in the whole *intention*, which was to give a fee to the devisee, *defeasible on his dying without issue.* How does that appear? From the taking the two clauses of the will together, which respects the devise of the real estate, and considering the import of the terms, "unto my grandson *W. G. Holmes* &c. to hold to his "heirs and assigns forever, to be entered upon and taken "possession of by him as soon as he arrives at the age of "twenty-one years, or the day of his marriage, which shall "first happen." I presume we must supply the words, of *these events;* that is, which of these events shall first happen; for she did not mean to say, that it shall be a condition precedent that he shall marry before he was twenty-one; in other words, that his marrying shall be before he is twenty-one, though this is something like *the technical* manner of construing wills. But the will goes on in a succeeding clause, "If he shall die under age, or without issue, that "his estate shall descend to his *next* brother and his heirs; "*but if he leaves no brother*, then to his sisters and their

"heirs, share and share alike." *Heirs* carries a fee; and the meaning is evident, that the devisee should take a fee simple interest, the possession to vest the day of marriage, or the coming of age. It is not a *fee tail;* for it is not to him and his *issue*, but to him and his heirs, *on his having issue;* on which event the estate became absolute, subject nevertheless to the going over on his dying not leaving lawful issue, and not having disposed of the fee simple. It not being a fee tail, there can be no *remainder*, and the devisee over must take by way of *executory devise.* But the devisee over was the *next brother* and his heirs, which next brother was *John*, who had deceased before the *contingency happened* on which the estate was to go over. But an interest had vested which could go to his heirs. But what shall we do with the words "*if he leave no brother.*" It cannot mean no *next brother John;* for that would be supplying the word *John*, or at least restraining the provision to him only. And what was there in *John*, more than in any other brother but the relation? We have as good a right to supply the word every, and then it will read every *next* brother; and we shall be more justifiable, as it will accord with what follows, "*if he leave no brother.*" I think we are bound to do it; because, otherwise, there can be no meaning in the conditional "*if he leave no brother.*" It would be absurd to say that it means, if he leave no *next brother John.* It is evident that *next* after *next* is intended, and that every brother shall take the place of the preceding as he shall be in succession. I take it then, that though *John* had a vested *interest*, yet it was also defeasible; and, on his dying without issue, might come to the brother next to *him*, who is *Andrew* the defendant. *This by way of executory devise.*

What is in the way of this; the rule of law, *or rule of construction?* No rule of law can be pretended. For there is no fee mounted on a fee. The lives were all in being. No putting the fee in abeyance, &c. *What rule of construction* is there in the way, though it may seem a strange thing to people not scientific, to talk of *understanding by rule.* We know what is meant;—but the question will be, *whether we ought to know it.* We are wrong in understanding what is written, unless the rules of art give us leave. But let the technical

1812.

HOLMES v. Lessee of HOLMES.

terms have their appropriate meaning, I can find nothing in them, that forms the least impediment to take the words in their popular acceptation, and construe them as ninety-nine out of a hundred of the bulk of mankind would do. Taking it up then as it will appear to the common sense of the community, I will ask what did the testatrix mean? Was it to give a contingency after the eldest, *William*, to the second (*John Holmes*) only, and to drop the rest? Or was it *to continue the contingency to all the brothers, that she might preserve the estate in the family, and in the name of Holmes?* I think it was.

"If he leave no brother, then to his sisters and their heirs share and share alike." *The devise over to the sisters, shews that she considered herself to have comprehended every brother* under the preceding contingencies; every *next* to take *toties quoties* as the second brother *John* would have done. The words "*leaving no brother*," are with me conclusive, *that while there was a brother left, he had a contingent interest in this estate.*

I have preferred considering the devise in this case as an executory devise, rather than as a contingent remainder; because in that case, I must have construed the estate given in the first instance to be an *estate tail.* It is in this last light that the counsel for the defendant seem to have thought that it ought to be taken. In that light it would equally serve them, for the defendant is the heir in tail, and the estate has not been barred by a *recovery.* But I cannot believe that the testatrix ever thought of entailing. Taking into view her *sex*, her *residence*, the *unlearned language of the will*, I cannot think it likely that she had ever heard of such a species of interest, and which is so little known to this country. But it will be said *that she has entailed without meaning it.* Doubtless the *English* Judges will tell you, that words may be *construed* otherwise than they *mean;* that though you may hear or see without rule, you cannot understand without rule, and you must submit *to the rule of construction*, let you think what you will of a *possible intention.* But this kind of language begins to be scouted in their courts; and it is an expression of Lord *Ellenborough* lately, "is there "not a rule of common sense as strong as any rule, that words "in a will are to be construed according to their natural

"meaning, unless some obvious inconvenience, or incon-
"gruity would result from so construing them?" But take it that the estate devised is an estate tail, the words heirs and assigns being so qualified by the dying without issue, as to constitute an estate tail, it will equally, as has been argued, serve the defendant. And I might be willing to take it in that light, as it would not be inconsistent with the main object of the testatrix, *the continuing the estate in the name of Holmes;* but I am opposed to the construing an estate any thing, *vi terminorum*, which I cannot infer from *a consideration of the whole will* to have been intended.

I believe nothing has been thought to depend in this case on the construction given to the words on *the dying without issue*, meaning without issue *at the time of the death.* The *English* decisions have a quibble in the case of dying without issue, or dying without *leaving* issue, and leaving issue *behind*, as if any thing could be *left* that was not *behind.* But this begins to be the subject of ridicule at their own bar, as in a late argument of counsel may be seen; and I only notice it as marking the progress of common sense in the jurisprudence of that country, in which, I presume, one cannot be said to err, that would be disposed to follow them; and which, having no prejudice against them, I am disposed to do in every improvement of the science, overwhelmed with no veneration for what they themselves must feel to be the remains of early imperfection in rules laid down, or in the application of them.

In this case my opinion will be to reverse the judgment.

Judgment affirmed.

LITTLE and another *against* The Lessee of DELANCEY.

IN ERROR.

1812.

Chambersburg, Monday, Oct. 5.

A return to a *fi. fa.* "levied on "grain, house-"hold furniture "&c. (describ-"ed) and left at "the plaintiff's "risk," is not evidence that the judgment was completely satisfied, so as to make an *alias* for the residue void.

A general return of "levied "on goods as "per inven-"tory," does not, by the practice in *Pennsylvania*, discharge the defendant, and make the sheriff liable for the whole debt. He is liable only for the value of the goods upon which a levy was made, or might have been made; and on his paying the nett sales, an *alias* goes for the residue, without application to the court.

A purchaser at sheriff's sale, cannot give parol evidence of a deed by which the title was conveyed to the defendant in the execution, unless he lays the usual ground for secondary evidence. He stands as to proof of title, on the same footing as other purchasers.

THIS was an ejectment in the Common Pleas of *Franklin* county.

Upon the trial of the cause, the plaintiff gave in evidence 1st, an application of the 16th of *May* 1768, and a survey on the 8th of *November* 1786, in the name of *Barbara Zantzinger*, who was the step-daughter of *Charles M'Cormick*, and who at the time of the application resided in his family, and was about fourteen years of age. 2d, The record of a judgment in *Cumberland* county, by *George Brown* against *Charles M'Cormick*, on the 26th of *January* 1770. On this judgment, a *fi. fa.* issued to *April* term 1770, to which the sheriff returned "levied on grain in the barn, and grain in "the ground, and on sundry articles of household and kitchen "furniture (particularly specified) and left at the risque of "the plaintiff;" but the amount of the levy was not specified. The plaintiff then offered in evidence an *alias fi. fa.* for the residue to *October* term 1797, returned "not levied;" and a *pluries fi. fa.* to *April* 1798, under which the land above mentioned was condemned, and afterwards sold to the lessor of the plaintiff in *January* 1799. To this evidence the defendants objected, but it was admitted by the Court, and an exception taken.

He further offered a witness to prove that he had seen in the hands of *Charles M'Cormick*, between 1770 and 1773, a release from *William Morrow* and *Barbara* his wife, formerly *Barbara Zantzinger*, to the said *Charles M'Cormick*, for the lands in question, acknowledged by the parties before a justice of the peace for the county. The defendants also objected to this evidence; but it was admitted by the Court, who sealed a bill of exceptions.

Crawford and *J. Riddle* for the plaintiffs in error.

First Exception. Until the levy made on the first *fi. fa.*

is disposed of, it operates as an extinguishment of the debt. If the sheriff take goods in execution by virtue of a *fi. fa.*, whether he sells them or not, yet the defendant may plead that taking in his discharge, and shall not be liable to a second execution. 2 *Bac.* 720. *Execution D.* A return that "he had seized goods to the value of the debt, and that "they remained in his hands *pro defectu emptorum*," is a discharge of the judgment. *Clerk* v. *Withers* (*a*). The plaintiff must look to the sheriff, not to the defendant, *Rook* v. *Wilmot* (*b*). *Atkinson* v. *Atkinson* (*c*). In the present case the levy is to an indefinite amount, which must be presumed until the contrary is shewn, to equal the debt; and though left in the defendants' hands, yet by the levy the property vested in the sheriff for the plaintiff's use.

Second Exception. No parol proof of the contents of a deed can be received, until it is shewn to be lost, and that exertions have been made to find it, by searching for it, and by calling upon those to produce it, in whose possession it is likely to be. *Peake's Ev.* 96, 97. A purchaser at sheriff's sale is bound to look to his title, and to see that there is an unsatisfied judgment against the person, in whom the title is. He is upon a common footing with others as to proof of title, at least as to the deduction of it to the person as whose property the land is sold. Here there was no examination of the recorder's office, no call upon the defendants, no evidence that they came into possession under *M'Cormick* subsequent to the sale. The case of *Edgar's Lessee* v. *Robinson* (*d*), if correctly stated, cannot be law. It is a *Nisi Prius* case only, and intitled to no more weight than is due to the private opinions of the judges who tried that cause. It is full of danger to permit a purchaser at sheriff's sale to trace title to the defendant, by parol testimony, without laying a ground for secondary evidence.

Watts and *Duncan* contra, answered to the

First Exception. That if the *fi. fa.* was irregular, still the purchaser at sheriff's sale was intitled to give it in evidence, because he holds the land free from this objection. *Jeanes* v. *Wilkins* (*e*). It was the duty of the defendant in the exe-

(*a*) 2 *Ld. Ray.* 1072. (*c*) *Cro. Eliz.* 391. (*e*) 1 *Ves.* 195.
(*b*) *Cro. Eliz.* 209. (*d*) 4 *Dall.* 132.

1812.

LITTLE et al. v. Lessee of DELANCEY.

cution, or those holding the land under him, to apply to the Court for relief. But there is nothing to shew even irregularity. The goods levied, were left with the defendant *M'Cormick*, as is frequently done in *Pennsylvania*, at the risk of the plaintiff; and under such a return it is impossible for the defendant to say he was discharged, and the sheriff liable. If there were any fraud between him and the purchaser at sheriff's sale, to cut out intervening rights, that would alter the case; but this only shews that the record of the *alias* and *pluries fi. fa.* was not conclusive; if it was evidence for any purpose, the Court were right in admitting it. The present plaintiffs in error, must have known of the levy and inquest; it was their duty, if any thing was wrong, to apply to the Court; they cannot, after omitting to do this, prevent a *bona fide* purchaser at sheriff's sale, from claiming the benefit of his purchase.

Second Exception. The case of a purchaser at sheriff's sale, is peculiar. He buys generally against the will of the defendant, who has the title deeds, and who cannot be compelled to give them up. He ought not to be held to the necessity of producing them, or even of proving their loss; for he does not know in what direction to prosecute an inquiry for them. The law has been accordingly held in *Edgar's Lessee* v. *Robinson* (*a*), by two judges of this Court, that parol evidence may be given of a deed conveying the land to the defendant in the execution, without calling upon even the persons in possession to produce it. In addition to this, the present title originated in a mere location, for which the name of *Barbara Zantzinger*, then an infant of fourteen years, must have been used for *M'Cormick's* benefit. The estate was not a legal one, nor was it an equitable one. It was a non-descript. It is sufficient in such cases to prove that the name of the applicant was used for the benefit of a third person; and this may be proved by parol. So may that which is equivalent, be proved in the same way, that the person whose name was used, released to the owner in possession.

TILGHMAN C. J. after stating the case, and the exceptions to evidence, delivered his opinion as follows.

(*a*) 4 *Dall.* 132.

First. The reason urged against the admission in evidence of the proceedings subsequent to the first execution is, that the sheriff having returned the first *fi. fa.* levied, without specifying to what amount, it must be taken for a levy to the full amount of the judgment, and thus the judgment was satisfied. This reason does not appear to me to be conclusive. Although there was a levy, there was no sale; and we know very well that it has been a common practice to suffer the property to remain in the hands of the defendant after a levy. There is no entry on the record shewing satisfaction of the judgment, nor can we suppose that it was satisfied, when the Court suffered subsequent executions to be issued. If these executions were improperly issued, the Court should have been applied to, and they would have given redress on motion. An inquest having been held, and the land condemned, we must suppose that *M'Cormick* and those who were in possession had notice. At any rate I can see nothing on the record authorizing this Court to say, that the proceedings under which the land was sold, were absolutely void; and if not void, it was proper that they should be read in evidence. The effect of them was matter for the consideration of the Court and jury. If there was fraud in the case it was competent to the defendant to shew it. I am of opinion that the Court below were right in admitting this evidence.

Second. The second point is of very considerable importance, as it embraces a broad principle by which real property to a great amount may be affected. It has been contended by the counsel for the plaintiff, that inasmuch as *John Delancey* purchased the land of *M'Cormick* at a sheriff's sale, he has a right to give parol evidence of a deed by which title was deduced to *M'Cormick*, without shewing that any steps have been taken to come at the deed, or giving any evidence of its loss, merely because they are not intitled to the possession of it. If this be true to the extent contended for, it is an alarming circumstance to land holders in general; because executions are often levied on claims which the defendants in the execution have to land in the possession of others; and thus the door will be opened for the admission of a dangerous kind of testimony in deducing titles to land. It does not appear in the present case that *M'Cormick* was in possession at the time of the judgment and sale, or that he *ever* was in

1812.

LITTLE et al. v. Lessee of DELANCEY.

possession, or that the defendants derive their title under him. When the purchaser at sheriff's sale has to bring his ejectment against the person whose land was taken in execution, or any person coming into possession under him, he need do no more than shew the judgment and proceedings under it. But if the suit is against a stranger, the title must be made out. The argument of the plaintiff's counsel is founded on the assumption that the purchaser at a sheriff's sale is not intitled to the title deeds, and that the law which compels no one to do useless things, dispenses with all obligation even to apply to the man who has the deeds in possession, and to try to obtain them. That those persons whose lands are sold by the sheriff, often withhold the title papers, I can readily believe; but that they *always* do so, I will not allow, and I am sure they *never ought* to do it, because the land having been sold by authority of law, the title papers ought to be delivered to the purchaser. It is the duty of every one who purchases of the sheriff to look to the title. If the title is afterwards brought in question, and deeds are wanted under which it is deduced, I will not say at present, because there is no occasion, what steps are necessary to be taken in order to let in parol evidence; but it may be laid down in general, that before such evidence is admitted, the Court must be satisfied, that all reasonable endeavours have been used. In the present instance the deed is said to have been acknowledged, and yet not even the trouble of searching the recorder's office appears to have been taken; although the acknowledgment must be supposed to have been made for the purpose of having it recorded. It must be supposed also that the plaintiff knew of this deed, because his own witness testified that he had seen it. At all events, if he looked into the title at all, he must have seen that the land was taken up in the name of *Barbara Zantzinger*, and it was his business to inquire how it went from her. He should have inquired of the family of *M'Cormick;* and for aught that appears, the deed might have been obtained, or if it was lost, evidence of the loss procured. I should not have thought it necessary to say so much on the subject, had it not been for the case of *Edgar's Lessee* v. *Robinson*, reported in 4 *Dall.* 132, and decided by two judges for whose memory I have the highest respect. The decision was at *Nisi Prius*,

1812.

LITTLE et al. v. Lessee of DELANCEY.

and for aught that appears, with very little argument or consideration. The report is short, and I am satisfied that the reporter was not present at the trial, or the case would have been stated with more clearness and precision. The ejectment was against *James Robinson* junior, and *William Robinson*. The plaintiff claimed under a judgment and execution against *James Robinson* senior, (uncle of the defendants) who was in possession at the time of the judgment, and against whom a former ejectment had been brought, but how it was ended does not appear. Probably he was dead. Neither does it appear whether the defendants claimed under their uncle. If they did, they would have been estopped from controverting his title. The Court permitted parol evidence to be given of a deed by which the land in controversy was conveyed by *James Rowland* to *James Robinson* the uncle. The Court said, "that there was no occasion to give notice "to the defendants to produce the deed, because they were "not *parties to it.*" If the uncle was dead and the defendants claimed under him, it was to be presumed that the deed was in their possession, and therefore notice ought to have been given to produce it, although they were not parties. And what renders the case more obscure is, that the Court afterwards seem to suppose that the defendants *had the deed in their possession*, for they say, "there is no way of getting "at the title but by parol evidence, if the defendant in an "action chooses under such circumstances to *conceal* the "muniments of the estate." Upon the whole, there appears to have been something particular in the circumstances of that 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, establishing the principle contended for by the plaintiff's counsel in this cause. I am of opinion, that the parol evidence ought not to have been admitted, and that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. Two errors have been assigned in the record of this case. 1st, That the proceedings upon the judgment entered by *George Brown* against *Charles M'Cormick*, sub-

1812.

LITTLE et al. v. Lessee of DELANCEY.

sequent to the *fieri facias*, returned "levied on certain goods," ought not to have been received in evidence.

2d, That the contents of a deed poll from *William Morrow* and *Barbara* his wife to *Charles M'Cormick*, were proved by the oath of *Owen Aston*, without having proved any efforts used to procure the original, or shewing that it was destroyed or lost.

Upon the first question I cannot bring myself to entertain a doubt. A *pluries fi. fa.* was offered in evidence for the residue of the sum recovered by *Brown* against *M'Cormick*, upon which the lands in controversy were levied, as *M'Cormick's* property, and afterwards sold by the sheriff. No objection is made to the manner in which these executions were certified, and the levy was made on the lands mentioned in the ejectment. Clearly they were competent evidence to go to the jury; their legal effect and operation were proper subjects for the Court's decision afterwards.

I deem it proper however to express my ideas, upon the particular objection stated by the counsel of the plaintiffs in error, as to the effect of the testimony. They have contended that under a general return of goods levied, whereby it does not clearly appear that they were insufficient to pay the debt and costs, that the defendant in the execution is discharged from the debt, and the remedy of the creditor is against the sheriff alone; and they have therefore assimilated the present case to one where the execution has issued without a judgment. The former part of the observation may be true as it applies to the practice of the *English* courts; but it never was held so here. In few instances indeed, in this country before the *American* revolution, were goods sold before the return of the *fi. fa.*, and in fewer still were goods levied on, appraised. If the sheriff paid the fair amount of the sales, after deducting the costs, to the plaintiff, it was all that was required of him; and the plaintiff's attorney, after giving credit for the sum paid, issued an *alias fi. fa.* or *ca. sa.* on the judgment for the residue, without further application to the court, as a matter of course. The great *desideratum* was to procure the sheriff to account for the goods he had seized in execution, which was no easy thing to effect in many cases. But I have never heard it supposed, that he was responsible beyond the amount of

the personal estate, which he either actually levied, or might have levied, upon the *fieri facias*.

Admitting that irregularities appear on the face of the different executions, and such is certainly the case, they are not *void* if founded upon a judgment, but only *voidable*. The vendee under a sheriff's sale is protected by the common law, upon solid grounds of substantial policy, where he is no party to the proceedings, *Goodyer* v. *Junce*, *Yelv.* 180. A strong case of this kind occurs in 1 *Ves.* 195, where a term of years was sold by the sheriff, while the party was detained in custody under a *ca. sa.* issued in the same suit; and the sale was held good. And by the ninth section of the act of 1705, when a judgment is reversed, which would warrant the awarding of executions, on which lands have been sold, the lands shall not be restored, nor the sale be avoided, but restitution be made only of the money for which the same were sold.

The only difficulty I have had on the second question, arises from *Edgar's Lessee* v. *Robinson*, as reported in 4 *Dall.* 132, and from the high respect justly due to the character of the two judges who decided it. The facts of the case are not fully stated, nor the particular exceptions made to the parol evidence, which was offered to shew that *James Rowland* had conveyed one third of the premises to *James Robinson* senior, the uncle of the defendants. It is barely stated, that it was 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. The arguments of counsel are wholly omitted, and there must certainly have been other facts, upon which the judgment of the Court turned.

The Court are made to say, "the present defendant, "*James Robinson* jun. is not the party to the alleged deed, "and therefore no notice could be given to him 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."

It does not appear precisely whether *James Robinson*

1812.

LITTLE et al. v. Lessee of DELANCEY.

against whom the judgment was obtained, upon which the sale was had, was the uncle or nephew. If he was the uncle, and in possession of the premises at the time of the judgment and sale, as is stated in the case; or if he was dead, (as may be presumed from a second ejectment being brought) and the nephews came in under him, either as his devisees or heirs at law, then the plaintiff would clearly be entitled to recover the possession upon shewing a judgment, execution, and a sheriff's deed, under the uniform course of our decisions. But if these defendants claimed under a title adverse to their uncle, their right might have been tried in opposition to their uncle's possession, without shewing any conveyance to him from *Rowland.* If the original judgment had been obtained against *James Robinson* the nephew, one of the defendants, he could make no defence, unless he could make out a strong case of fraud in the sheriff's sale. Unquestionably parol proof may from the necessity of the case be given of a conveyance of real estate, when it is fully shewn, that it once existed, and that it was afterwards burned or destroyed; so where it is shewn to have been lost, and every reasonable effort has been used to find it. This species of evidence will always be received with caution and jealousy, on account of the abuses which may be practised under the indulgence. Parol evidence of the contents of deeds is said to be one of the things which the law most abhors. No man shall avail himself of his negligence or laches to entitle himself to the privilege. The Court here are supposed to say, that the defendant *James Robinson*, not being the party to the alleged deed, notice to him was not necessary. But if such circumstances existed in the case as would induce a reasonable mind to presume that he was in possession of the deed, he would certainly be within the general rule entitled to notice to produce it. His being merely a witness to the deed, induces no presumption that the deed was in his custody. Their last observation would seem to suppose, that the deed was in the possession of one the defendants, but that he concealed it as one of the muniments of his estate. This is the very instance put in our books wherein notice is held to be necessary. A man having a deed in his possession, will not be permitted to give the inferior evidence of its contents; but if he can trace it to the

possession of his adversary, and he refuses to produce it on proper notice, he is then allowed that privilege. For nothing else can he do.

The law will make every reasonable allowance in the case of purchasers at sheriff's sales not having the regular chain of title to the debtor. But it will not wholly prostrate its rules to suit their negligence or convenience. Here no single step was taken to entitle the plaintiff below to give parol evidence of the contents of this deed. *Morrow* and his wife might have been applied to; so of different branches of this family of *Charles M'Cormick*, or his personal representatives, if such there were. The recorder's office at *Carlisle* might have been searched, the deed was acknowledged for some purpose. At all events, it was incumbent on the plaintiff below, to show by satisfactory testimony, that he had used all reasonable diligence to procure the deed, before he could be permitted to go into the inferior species of testimony of the contents of it. I much fear, I have been tedious on this head. My great veneration for my valuable and esteemed friends, who have paid the debt of nature, is my only apology. This case appears to me very plain.

It has been said very truly that slight evidence will be sufficient to shew, that one has made use of the name of another in entering an application for vacant lands; and also that the plaintiff below has made out a good case under all the circumstances, independently of the contents of this release. I will not take upon me to deny this assertion. But the question on the bill of exceptions before me, is, not what would be sufficient evidence to entitle the plaintiff below to recover, but whether *Owen Aston* ought to have been permitted to prove that he had seen in the hands of *Charles M'Cormick* between 1770 and 1773, a release from *Morrow* and his wife to *M'Cormick* for the lands in question, duly acknowledged, without laying a previous ground work for the introduction of this testimony. On this question I entertain no doubts, upon established principles of law, founded on the safety and security of property, that the testimony was improperly received; and therefore I am of opinion, that the judgment of the Court of Common Pleas should be reversed, and a *venire facias de novo* be awarded.

1812.

LITTLE et al. *v.* Lessee of DELANCEY.

BRACKENRIDGE J. It is a struggle in the mind to get over a general rule, where the application of it is mere matter of form, and not of substance. No presumption can arise in this case, that this writing of release has not been enquired after, lest something might appear from it unfavourable to the plaintiffs. For it would be an inutility to have enquired after it, when no notice could have compelled the production of it. The having been recorded at a time when the law did not make it necessary, was but a possibility.

It was the interest of those who might be supposed to hold it, to keep it back, or suppress it. It was the interest of the plaintiff claiming under *M'Cormick* by the sheriff's sale, to produce it if he could. It would have put an end to all difficulty of proving the use by parol evidence; for the evidence of a legal transfer would then exist. But how shall we avoid breaking down a general rule, that a party proving the *existence* of a deed by parol evidence, must go on to shew the loss, or that it cannot be found, before this proof of its existence *can go to the jury*. It goes to the *Court only*, before this is done. The ingenuity of the counsel has not been able to furnish me with a precise answer, and I am at a loss to do it. The proof of a deed having existed, is made to the Court as I have said; and not until evidence is given of the loss, or the not being able to procure the deed, can evidence of the existence go to the jury. That is the rule where there is a *possibility*, however small that may be, of being able to produce it. The question is, whether the hardship in this particular case shall not give way to the general inconveniency of breaking down the rule. I am not able to take the case out of the general rule, by forming an exception; for I cannot say there was not a *possibility* of being able to procure the original, or a recorded copy of this deed of release. The degree of *probability* of being able to procure, cannot be estimated and fixed, so as to form an exception. It must appear and be fixed by proofs of using due means for that purpose. On other points I have thought it unnecessary to dilate, as I concur for the reasons given.

Judgment reversed.

The COMMONWEALTH *against* TAYLOR.

1812.

Chambersburg, Monday, Oct. 5.

IN ERROR.

THE defendant was indicted in the Quarter Sessions of *Franklin* county for "that he, on the 24th of *August* "1809, about the hour of ten of the clock *in the night* of "the same day, *with force and arms* at *Lurgan* township, in "the county aforesaid, the dwelling house of *James Strain* "there situate, unlawfully, maliciously, and *secretly* did "break and enter, with intent to disturb the peace of the "commonwealth; and so being in the said dwelling house, "unlawfully, vehemently, and turbulently *did make a great* "*noise*, in disturbance of the peace of the commonwealth, "and greatly misbehave himself, in the said dwelling house; "and *Elizabeth Strain*, the wife of the said *James* greatly "did frighten and alarm, by means of which said fright and "alarm she the said *Elizabeth*, being then and there preg- "nant, did on the 7th day of *September* in the year afore- "said at the county aforesaid miscarry, and other wrongs "to the said *Elizabeth* then and there did, to the evil ex- "ample, &c."

An indictment charged that *A* unlawfully, *secretly*, and maliciously, with force and arms, broke and entered *at night* the *dwelling house* of *B*, with intent to disturb the peace of the commonwealth; and after entering the house, unlawfully, wilfully, and turbulently, *made a great noise* in disturbance of the peace of the commonwealth, and did greatly misbehave in the said dwelling house, and did greatly frighten and alarm the wife of the said *B*, whereby she miscarried &c. *Held*, that the offence laid was indictable as a *misdemeanour*. *Quere* whether the indictment could be supported as describing a *forcible entry*.

The jury having found the defendant guilty, the Quarter Sessions arrested the judgment, upon the ground that the offence charged was not indictable; and the record was brought up to this Court by writ of error.

Maxwell and *Duncan* contended that the offence laid was indictable. 1. As a forcible entry. 2. As a malicious mischief.

1. It is a forcible entry for which an indictment may be maintained, at common law. *Vi et armis* does not in a common case imply the requisite force; but here the entry is into a *dwelling house*, with intent to disturb, and in actual disturbance of the peace, which brings it within *The King* v. *Bathurst* (*a*). The distinction between a *close*, or *yard*, and a *dwelling house*, is pointedly taken in *The King* v. *Storr* (*b*),

(*a*) 3 *Burr.* 1699. (*b*) 3 *Burr.* 1698.

1812.

COMMONWEALTH v. TAYLOR.

and in *The King* v. *Bake* (*a*). The time of night, and the turbulence of the party, are strong circumstances in the case.

2. But it is clearly a malicious mischief. The offence described is a wanton malicious injury to the peace of a family, perpetrated in the night, accompanied with great noise, and ending in a severe personal injury to the wife of the prosecutor. It is indictable from the *malicious motive*, which was to disturb the peace, the *means*, which were turbulence, vehemence and noise in the night time, the *tendency*, which was to excite the family to violent acts of resentment, and the *effects*, which were the fright and miscarriage of the wife. A great noise with a speaking trumpet, to the disturbance of the neighbourhood, is indictable as a nuisance. *Rex* v. *Smith* (*b*). The King's Bench refused to quash an indictment for unlawfully and violently knocking at the door of the prosecutor for two hours, whereby his wife was frightened and miscarried. *Rex* v. *Hood* (*c*). So for unlawfully entering a house, and p——g on the floor when the wife of the prosecutor was present. *Rex* v. *Rollo* (*d*). In the *Commonwealth* v. *Teischer* (*e*), an indictment was supported for maliciously, wilfully, and wickedly killing a horse. Any offence is indictable which is malicious, mischievous, and of public evil example; all of which is charged of the offence in question. *Crown Circuit Comp.* 696., 3 *Bac.* 549. *A. Indictment.*, *U. States* v. *Ravara* (*f*). 4 *Blac. Comm.* 243.

Dunlop and *Watts contra*. No case has carried the law so far as is now attempted. This is a mere private injury, in which the public are not at all concerned, in point either of injury or example.

1. It cannot be supported as a forcible entry. To constitute that offence, there must be actual violence; and it must either be laid to be done *manu forti*, or the circumstances stated must imply force. The common allegation of *force and arms* is not sufficient. It was so held in *Rex* v. *Storr*, and *Rex* v. *Bake*. In *Rex* v. *Bathurst*, which was an entry into a dwelling house, it was not this circumstance which

(*a*) 3 *Burr.* 1731.
(*b*) 1 *Stra.* 704.
(*c*) *Say.* 167.
(*d*) *Say.* 158.
(*e*) 1 *Dall.* 335.
(*f*) 2 *Dall.* 297.

governed the court. The indictment stated that the prosecutor was kept out of possession by three persons, which implied force. Here, not only is any thing of that kind wanting, but the offence is laid to have been committed *secretly*, which negatives actual force.

2. It is not good as an indictment for malicious mischief. All the cases cited from the *English* books, are cases of public offences, or of motions to quash, on which the courts exercise a discretion; but when the motion is in arrest of judgment, they must decide according to law. *Rex* v. *Wheatly* (*a*). The present count is too uncertain. A mere intent to disturb the peace of the commonwealth, or the charge of an actual disturbance without saying how, will not answer. The allegation is of misbehaviour without saying in what manner particularly, and of noise, vehemence and turbulence, without describing the manner in which it was produced. In *Rex* v. *Hood* it was by violently knocking at the prosecutor's door. In *Rex* v. *Smith* by using a speaking trumpet. The latter was a public nuisance. In the former, though the indictment was not quashed, it does not appear that judgment was ever given. In the *Commonwealth* v. *Teischer*, the offence of maliciously killing a horse was public and of evil example. Divesting this offence of the words of aggravation with which the indictment is loaded, and it becomes a mere entry without force into a dwelling house, and there making a noise. It is a trespass punishable in damages to the extent of the injury, but not by fine and imprisonment.

TILGHMAN C. J. It is contended on the part of *James Taylor*, that the matter charged in the indictment is no more than a private trespass, and not an offence subject to a criminal prosecution. On the other hand it has been urged for the commonwealth that the offence is indictable; 1st, as a forcible entry,—2d, as a malicious mischief.

1. I incline to the opinion that the matter charged in the indictment does not constitute a forcible entry, although no doubt a forcible entry is indictable at common law. There must be actual force to make an indictable offence. The

(*a*) 2 *Burr.* 1129.

1812.

COMMONWEALTH v. TAYLOR.

bare allegation of its being done with force and arms, does not seem to be sufficient; for every trespass is said to be with force and arms. In the *King* v. *Storr*, 3 *Burr.* 1698, the indictment was for unlawfully entering his yard and digging the ground and erecting a shed, and unlawfully and with force and arms putting out and expelling one Mr. *Sweet* the owner from the possession, and keeping him out of the possession. This indictment was quashed. The *King* v. *Bake and fifteen others*, 3 *Burr.* 1731, was an indictment for breaking and entering with force and arms, a close (not a dwelling house), and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession. This also was quashed, and the rule laid down by all the court, was, that there must be force or violence shewn upon the face of the indictment, or some riot or unlawful assembly. It appears indeed that in the *King* v. *Bathurst*, cited and remarked on by the judges in the *King* v. *Storr*, the court laid considerable stress on the circumstance of entering a *dwelling house*. We have no report of that case, but Lord *Mansfield's* observation on it (3 *Burr.* 1701) is, that it does not seem to him to lay down any such rule, as that *force and arms* alone implies such force as will *of itself* support an indictment. "There," says he, "the fact itself naturally implied force; "it was turning and keeping the man out of his dwelling "house, and done by three people." In the case before us, there is the less reason to suppose actual force, as the entry is charged to have been made *secretly*. This might have been done through a door which was open, and yet in point of law, it was a breaking and entry with force and arms, which is the allegation in every action of trespass.

2. But supposing the indictment not to be good for a forcible entry, may it not be supported on other grounds? In the case of the *Commonwealth* v. *Teischer*, 1 *Dall.* 335, judgment was given against the defendant for "*maliciously, wilfully and wickedly killing a horse.*" These are the words of the indictment, and it seems to have been conceded by Mr. *Sergeant*, the counsel for the defendant, that if it had been laid to be done *secretly*, the indictment would have been good. Here the entering of the house is laid to be done "*secretly, maliciously, and with an attempt to disturb the* "*peace of the commonwealth.*" I do not find any precise line

by which indictments for malicious mischief are separated from actions of trespass. But whether the malice, the mischief, or the evil example is considered, the case before us seems full as strong as *Teischer's* case. There is another principle however, upon which it appears to me that the indictment may be supported. It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a *deceased person* is an offence against the public, because it may stir up the passions of the living and produce acts of revenge. Now what could be more likely to produce violent passion and a disturbance of the peace of society, than the conduct of the defendant. He enters *secretly after night* into a private dwelling house, with an intent to disturb the family, and after entering makes such a noise as to terrify the mistress of the house to such a degree as to cause a miscarriage. Was not this enough to produce some act of desperate violence on the part of the master or servants of the family? It is objected that the kind of noise is not described; no matter, it is said to have been made *vehemently* and *turbulently*, and its effects on the pregnant woman are described. In the case of the *King* v. *Hood*, (*Sayers' Rep. in K. B.* 161) the court refused to quash an indictment for disturbing a family by violently knocking at the front door of the house for the space of two hours. It is impossible to find precedents for all offences. The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbours. To this invention must be opposed general principles, calculated to meet and punish them. I am of opinion that the conduct of the defendant falls within the range of established principles, and that the judgment of the Court below should be reversed.

YEATES J. I am perfectly satisfied that an indictment will not lie for a mere civil injury, although some of the precedents in *West's Symboliography* seem to wear a dif-

1812.

COMMONWEALTH v. TAYLOR.

ferent aspect. It is much to be wished that a precise line of discrimination could be drawn between public prosecutions for misdemeanours, and actions of a civil nature; but we are bound to proceed with the best lights our books afford us on this subject. We must adhere to the mode of redress pointed out by the wisdom of the law, for every injury.

I am inclined to think, that the second count in this indictment, whereon the defendant has been convicted, may be supported as an indictment for forcible entry at common law, under the authority of *Rex* v. *Bathurst et al.* cited by the court in *Rex* v. *Storr*, 3 *Burr.* 1699. Three of the judges lay a stress upon the circumstance of its being an entry into a *dwelling house*, though Lord *Mansfield* did not seem to adopt that sentiment. Here the entry is laid to have been in a *dwelling house*, without using the words *with a strong hand.* In these two particulars the cases agree.

Be this as it may, it appears to me, that other facts are stated in this count which are proper subjects of a criminal prosecution. The jury have found by their verdict, that the defendant in the *night time*, *unlawfully*, *maliciously*, and *secretly*, with force and arms broke and entered the dwelling house of *James Strain*, *with intent to disturb the peace* of this commonwealth; and so being in the said house, *unlawfully*, *wilfully*, *vehemently*, *and turbulently* did make a great noise, *in disturbance of the peace* of this commonwealth, and greatly misbehave himself in the said dwelling house, and *Elizabeth Strain*, the wife of the said *James Strain* greatly did *frighten and alarm;* by *means* of which said fright and alarm, the said *Elizabeth*, being then and there *pregnant*, did *miscarry* within fourteen days afterwards, and other wrongs to her then and there did to her great damage, to the evil example of all others in like cases offending, and against the peace, &c.

The several circumstances of *time*, *manner*, *temper of mind*, *the deliberate act*, *breach of the peace*, and the *injurious consequences* attendant thereon, form strong characteristical features of a public offence punishable by the criminal law. The intention to disturb the peace and the actual disturbance thereof, to the evil example of others, are expressly charged and found. At the same time I admit that the charge of misbehaviour in the house generally is too vague,

without laying particular facts; yet the indictment will not be vitiated thereby, if other matters of a criminal nature are correctly and precisely charged therein. Human prudence cannot guard against such outrageous and unlawful acts as are here stated. Making a noise in the street with a speaking trumpet in the night time, 1 *Stra.* 704, does not exhibit so strong a case as the present. So the knocking violently at the outer door of a dwelling house. *Rex* v. *Hood*, *Say.* 161. The same observation applies with much force to *Respublica* v. *Teischer*, 1 *Dall.* 338, wherein an indictment for maliciously, wilfully and wickedly killing a horse, was adjudged to be good; and also to the cases cited in the opinion of the Chief Justice, of the poisoning of chickens, cheating with false dice, tearing a promisory note, &c. All those instances partook more of the nature of private injuries than the present, which as established by the verdict, appears to have been wanton malicious mischief, practised in the night time, upon a defenceless pregnant woman, endangering her life, and as an evil evample to others highly detrimental to society. For these reasons I am of opinion, that the judgment of the Court of Quarter Sessions, on the reasons filed in arrest of judgment of the indictment, be reversed, and that the record be remitted to the Sessions to render judgment thereon for the commonwealth.

BRACKENRIDGE J. It cannot be inferred, *vi termini*, that the word *break*, means more than a *clausum fregit*, or a breaking of the close in contemplation of law, even though a dwelling house was the close broken; because the trespass might be by walking into it, *the door open*. But the court might refuse to quash, because it might appear *on the evidence*, that the *breaking* amounted to more than a *clausum fregit* in trespass. But taking the entry to amount to nothing more than a walking in, the door open, may not the motive of his entry, and the use he made of it, constitute a misdemeanour? What is he alleged to have done, after entering the house? "Wilfully, vehemently, and turbulently did make a great noise." How is a noise occasioned that is perceptible to the ear? It must be by an impulse of the air on the organs of hearing. And what is it, whether it is by the

1812.

COMMONWEALTH v. TAYLOR.

medium of *air*, or water or earth, that an *assault and battery is committed?* The impulse of the air may give a great shock. Birds have fallen from the atmosphere struck by a mighty voice. This happened at the celebration of the *Isthmian* games, as related by *Plutarch* in his life of *Paulus Emilius*. Are we bound to consider the noise gentle? Are we not at liberty to infer the mightiest effort of the human lungs? But the power of imagination increases the effect. Armies have been put to rout by a shout. The king of *Prussia* in the seven years' war, won a battle by the sound of artillery without ball. Individuals have been thrown into convulsions by a sudden fright from a shout. The infant in the womb of a pregnant woman has been impressed with a physical effect upon the body, and even *upon the mind*, by a fright. *Mary* queen of *Scots*, from the assassination of *Rizzio*, communicated to her offspring the impression of fear at the sight of a drawn sword. *Peter* the Great of *Russia* had a dread of embarking on water from the same cause. Shall we wonder then that death is occasioned to the *embryo*, in the womb of a pregnant woman, by a sudden fright? If, in this indictment, it had been stated, that the woman was pregnant with a *living child*, it might have been homicide. But she is stated to have miscarried, which is the parting with a child in the course of gestation. Will not the act of the individual maliciously occasioning this, constitute a misdemeanour? A sudden fright even by an entry without noise, presenting the appearance of a spectre, might occasion this, even though in playful frolic; yet after such effect, would not the law impute malice? No person has a right to trifle in that manner to the injury of another. But in this case why not a civil action? Because the woman might have been *alone*, and we have a right to infer that she was alone, because that would be a situation most likely to accomplish the purpose, the alarming by a fright. If alone, what other testimony but that of the woman could be had to substantiate the injury? From the necessity of the case she must be a witness, and that could only be in the shape of a prosecution by indictment. But alone or not alone, the offence laid is that of a *malicious mischief*, which is indictable, and the jury have found the outrage to have been intentional, and maliciously committed. I can have no doubt therefore, but

that it amounts to a misdemeanour, and is prosecutable by indictment. Why is it that a malicious mischief is indictable, but because it carries with it the *mala mens*, which is of the essence of a crime? The perpetrator may be regarded in some measure as *hostis humani generis*, and regardless of social duty. It requires that his conduct should be considered in a light of infamy, in a degree a malefactor, and be stigmatized as such, rather than as a mere *wrong doer* in trespass, and answerable only in damages. This is the real policy, and the principle at the bottom of the distinction.

The judgment was accordingly reversed; and the Court directed that the record should be remitted to the Quarter Sessions, that they might proceed to give judgment against the defendant.

STULTZ *against* DICKEY.

Chambersburg, Monday, Oct. 5.

THIS was an action of trespass *quare clausum fregit* against *Dickey*, for breaking and entering the plaintiff's close, and cutting and carrying away sixty-nine acres of rye, and twenty-four acres of wheat there growing, of the value of 659 dollars. It was tried under the general issue before the late Mr. Justice *Smith* at a Circuit Court holden for *Franklin*, in *April* 1808; and it was upon an appeal from his decision that the cause came before this Court.

In an action of trespass for cutting and carrying away his grain, a lessee for years may give evidence that by the custom of the country, he is intitled to the *way going crop*, though it is not specially stated in his declaration, and though he held under a *written lease*, which gave no such right. That custom extends throughout this state, and enters into every contract to which it applies.

Upon the trial of the cause, the plaintiff proved, that on the 3d of *October* 1798, he obtained from *Robert Stockton* an assignment of a lease by *Robert Montgomery* of a plantation in *Franklin* county, for the term of five years from *April* 1, 1799. In 1802 *Montgomery* sold the land to the defendant. Prior to the expiration of the lease, and in opposition to a warning by the defendant, the plaintiff sowed wheat and

A tenant intitled to the way going crop, who enters and warns a third person against cutting it, may maintain trespass *quare clausum fregit* against the wrong doer, notwithstanding he had, previously to the trespass, given up to his landlord possession of the farm, in a part of which the crop was growing.

But a tenant who has underlet a part of his farm to another, and has then surrendered possession as before, cannot recover damages for cutting the crop put in by his under-tenant.

1812.

STULTZ v. DICKEY.

rye in part of the land, and in another part rye was sown by one *Miller*, who took an underlease from the plaintiff. After the lease had expired, and *Stultz* had given possession of the premises generally to *Dickey*, he entered at the succeeding harvest, and warned *Dickey* not to cut the grain in question, which had been sown before the lease expired. *Dickey* however did cut and carry away as well the crop put in by the plaintiff, as that by *Miller;* and it was for both injuries that the plaintiff claimed damages in this action.

In the course of the trial, the plaintiff's counsel offered a witness to prove, that by the general custom of the country, a tenant for a term certain, is intitled, after the expiration of his lease, to enter and take away the crop of grain which he had put in the ground the preceding fall. To this the defendant's counsel objected, upon the ground, that if there was such a custom, it should have been stated by the plaintiff in his pleadings, and further that it was not competent evidence in opposition to a written lease. His honour however admitted the evidence, because it was a general custom that the witness was offered to prove. Many witnesses then swore to such a custom. It was also in evidence that the plaintiff had agreed to support *Miller* in the enjoyment of his right to the grain put in by him.

In his charge to the jury, the Judge gave his opinion in favor of the custom, and of the plaintiff's right to recover in this form of action, for the grain put in by himself; but said he would reserve the questions for consideration in bank. In relation to *Miller's* grain, although in strictness *Stultz* could not recover for a trespass to *Miller's* close, yet being consequentially liable to *Miller*, the jury he said might consider that injury in estimating the damages.

The jury found for the plaintiff, 1036 dollars 50 cents damages, and a motion was made in the Circuit Court for a new trial on the following grounds:

1. That evidence of the custom should not have been received under these pleadings, and against a written contract.

2. That the action if founded at all, should have been *case*, and not *trespass*.

3. That no damages could be recovered for *Miller's* grain.

4. That the Judge had expressed himself erroneously, in saying that two of the defendant's witnesses were not to

be believed, it being the exclusive province of the jury to estimate the credit of witnesses.

5. Excessive damages.

The motion was refused; and the defendant appealed to this Court, where the case was argued at the last *September* term by

Watts and *J. Riddle* for the appellant, and

Dunlop and *Duncan* for the appellee.

Cur. adv. vult.

On this day the judges delivered their opinions.

TILGHMAN C. J. after stating the facts, proceeded to say: On the trial, several points of law arose which were decided by Judge *Smith*, before whom the trial was had, but reserved for the opinion of this Court.

1. The defendant's counsel objected to the admission of evidence to prove the custom of *Pennsylvania* by which the tenant was intitled to the "*way going crop*," that is the crop of grain sown by the tenant during the lease and coming to maturity after its expiration.

2. It was contended on the part of the defendant, that the action of trespass *quare clausum fregit*, did not lie, even if the tenant was intitled to the crop.

3. It was also contended on the part of the defendant, that at all events the plaintiff ought not to recover for that part of the crop which grew on the land leased to *John Miller*.

On all these points the Court decided in favor of the plaintiff.

1. When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted. Both parties are supposed to know it, and to be bound by it, unless provision to the contrary is made in the contract. It appears to me therefore that it was proper to admit evidence of the custom concerning the "*way going crop*." I understand that this custom had been recognized by a decision at *Nisi Prius* prior to this action, and that the law had been held as it is laid down in the case of *Wigglesworth* v. *Dallison*, *Douglas* 190. There the custom was limited to a particular part of *England*. With us it is sup-

1812.

STULTZ v. DICKEY.

posed to extend throughout the state. In the nature of the thing it is reasonable, that where a lease commences in the spring of one year, and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop. If the parties intend otherwise, it is easy to control the custom by an express provision in the lease

2. The distinction is nice between those cases in which trespass *quare clausum fregit* does or does not lie. On a consideration of the cases, I take the law to be, that where one is intitled to the exclusive profits, or crop growing on land, he may support trespass *quare clausum fregit*. Such right is equivalent to a right of possession. It is said in *Co. Litt.* 4, that the grantee of the *vesture* or *herbage* of land, may support trespass *quare clausum fregit*. So where one has the exclusive right of digging ore in a certain place. 1 *Black. Rep.* 482. *Harper* v. *Burbeck*. The same principle was decided in *Wilson* v. *Mackreth*, 3 *Burr.* 1824, the last decision in the *English* courts before our revolution. That was trespass *quare clausum fregit*, brought by one who was intitled to the exclusive right of cutting, digging and carrying away turfs in a certain place. The court were clearly of opinion that the action lay. In the case before us, the tenant had the exclusive right to the crop, while it was growing, and until it was ripe, cut and carried away. If it be objected that he had given up the possession of the plantation on the expiration of the lease, it may be answered, that he still retained the right to the crop, and this right was reduced to actual possession by his entry at the time of harvest. I am of opinion therefore that the action may be supported.

3. As to that part of the land leased by *Stultz* to *John Miller*, the action does not lie, because *Miller* was intitled to the crop, and consequently to the possession. It was a field of about twenty acres, for which *Miller* was to pay a rent of 15*l.* It was urged by the counsel for the plaintiff, that damages ought to be given for this field for a loss *consequential* to the trespass, because *Stultz* would have to answer to *Miller* for the loss of his grain. But consequential damages cannot be recovered, unless there was a trespass; take away the trespass, and the consequential damages are also taken away. Now here there was no trespass, because the plaintiff was

not intitled either to the crop, or the possession of the land on which it grew. I am clearly of opinion that damages ought not to have been given for *Miller's* grain, and so the judge ought to have directed the jury. The judgment must therefore be reversed, and a *venire facias de novo* be awarded.

YEATES J. The present appeal naturally divides itself into three questions:

1. Is a tenant for a term certain intitled to his way-going crop, without special provision for that purpose in his lease?

2. Can such tenant maintain trespass *quare clausum fregit* against his landlord, who has cut and carried away such crop, after the tenant has surrendered to him the possession of the premises?

3. Ought a new trial to be granted under the circumstances of this case?

1. I take the first question to have been fully put to rest by the decision of the Court at *Lancaster Nisi Prius* in *June* 1782, between *Michael Diffedorffer and others, plaintiffs, and John Jones, defendant.* There the agents of forfeited estates had leased to the defendant the lands of *Michael Whitman*, an attainted traitor, for one year from *May* 1778 till *May* 1779, at a certain rent, and the lease was continued for a second year ending the 1st of *May* 1780. The agents, under the order of the Supreme Executive Council, sold the lands to the plaintiffs in *August* 1779, and for the wheat and rye put in during the fall of that year, and reaped in the following year, the *replevin* was brought. Several witnesses, including two of the jurors, were examined as to the custom of the country, that tenants for years who did not receive crops at the commencement of their leases, were intitled to take off the crops which had been sown during the continuance of their leases. The Court were clearly of opinion that the defendant was intitled to the crop, which he had put in during his lease, and the jury found accordingly. Though I was dissatisfied with the opinion then delivered, I have never heard the doctrine questioned since. I have adverted to this case in *Carson* v. *Blazer et al.* reported in 2 *Binn.* 487. Such custom is said in our books not to alter or contradict the agreement in the lease, but only to superadd a right, which is consequential to the taking, although not mentioned therein. There can be no doubt if the tenant was restricted by the

1812.

STULTZ v. DICKEY.

terms of his lease, from removing the grain after his time was expired, that he would be bound by his contract; and I apprehend the privilege of the tenant in general is confined to a reasonable quantity of the lands, in proportion to the residue thereof, according to the course and usage of husbandry in the same parts of the country. The privilege is founded on the highest equity, and conduces to the extension of agriculture.

2. It is admitted that an interest in the soil is not necessary to support an action of trespass. It is sufficient if the party has an interest in the profits. But all the books agree, that a plaintiff, in order to maintain trespass on lands, must have an entire *actual* or at least *constructive* possession in himself. A general property, in the case of real estate, is not as in the case of personal, sufficient to support this action. 1 *Johns.* 512. It appeared fully in the course of the trial, that the plaintiff, previous to the cause of action accruing, had surrendered up the possesion of the demised premises to the defendant, reserving his right to this crop, and had removed to other lands. It has been contended that these lands could not with any propriety be called the *close* of the former, and that he could not support trespass for breaking it; that trespass is founded on the possession only; case lies by the reversioner, and trespass by the tenant in possession, for the same trespass. *Biddlesford* v. *Onslow*, 3 *Lev.* 209. Trespass *quare clausum fregit*, will not lie by grantee of the ear-grass for breaking of his close, but trespass will lie for spoiling of the grass. *Hitchcock* v. *Harvey*. 2 *Leon.* 213. See also 1 *Ld. Ray.* 739.

The case of *Charles Torrance* v. *Joseph Erwin*, determined at *Chambersburg* in *April* 1797, was cited by the defendant's counsel, but the facts were not stated. There the plaintiff being intitled to certain lands in *Peters* township, leased them to *Joseph Grubb* for two years under certain rents, but restricted his lessee from cutting green timber. The lease was continued by successive assignments, and the tenant was in possession when the trespass was committed. The landlord brought trespass for breaking and entering his close, and cutting down and carrying away his trees, and on the trial an objection was made to the form of action. *Smith* Justice and myself decided at *Nisi Prius*, that the suit could

not be maintained, and a verdict passed for the defendant. A new trial was afterwards moved for in bank, on the ground of a supposed error in our opinions, which came on to be argued in *December* Term following; but the Court unanimously rejected the motion.

I frankly admit that my opinion as to the form of action has been changed since the first argument. I had at first conceived, that if the law was considered as a science, and the boundaries of actions adhered to, that the form of action had been misconceived; and that the plaintiff should have brought a simple action of trespass for the taking and carrying away the grain, or trover and conversion, or *replevin*, in either of which modes he would have had a full and complete remedy.

Upon adverting to the circumstances of this case as disclosed in evidence, we find that the plaintiff's lease expired on the 1st of *April*, 1803, and that he paid to the defendant 60*l.* his full year's rent, on the 8th of that month. He quitted the premises and left his way going crop standing in the ground, which he claimed as his right at the time under the settled custom of the country. This he was desirous of reaping, but was prevented by the defendant, who put in his hands and cut and carried away the same, except about ten acres, which, as *John Dickey* the son of the defendant swore, were supposed to have been taken away by the plaintiff in the clouds of the night. Here then the plaintiff had an exclusive right to the possession of the grain, which he had sown in peace, and to enter upon the land whereon it was growing, and cut it down and remove it for his own benefit. He actually entered for that purpose, and was disturbed and prevented from exercising that right, except as to a small part thereof, by the unlawful acts of the defendant. Here also was a possession, which would maintain trespass *quare clausum fregit.* In *Wilson* v. *Mackreth*, 3 *Burr.* 1824, it was adjudged that trespass *quare clausum fregit* would lie for digging and carrying away the plaintiff's turf and peat, although he had no ownership in the land. And in *Clap* v. *Draper*, 4 *Mass. T. R.* 266, it was determined on full argument, that under a grant to one, his heirs and assigns, of all the trees and timber standing in a particular close, for ever, with liberty to cut and carry them away at pleasure, an es-

1812.

STULTZ v. DICKEY.

tate of inheritance passed thereby to the grantee, and that he might support trespass for breaking his close, against the owner of the soil, for cutting down the trees. The reason given by the Chief Justice, applies to the case immediately before us; which is, that he had a separate interest in the soil for a *particular purpose*, although the right of soil was not in him; and when injured in the enjoyment of his particular use of the soil, he might maintain trespass for breaking his close; but not, if his interest had been in common with others. So such action would lie for him as had the herbage, although not a right to the soil; but it would be otherwise if he was intitled to a portion of the herbage for a particular part of the year, in which case he could only maintain trespass for spoiling his grass, and not trespass for breaking and entering his close. The principle upon which these cases were decided, seems fully established at law, and receives confirmation from *Foote* v. *Colvin*, 3 *Johns.* 216, that the owner of lands, and the sower of it on shares, may maintain a joint action of trespass by reason of their joint possession. I feel myself therefore warranted to conclude, in a case of technical form, where the partition line between the forms of different actions is so extremely slight as scarcely to be discerned, that the present suit may be supported.

3. It is obvious, that the same grounds upon which the plaintiff's right of action rests as to receiving compensation for the injury done to him by the defendant, apply also to *John Miller*, who was a sub-tenant under him. Now *Miller* had possession of twenty acres or thereabouts, part of a field of twenty-five acres, which had grain growing on it, and which the defendant cut and carried away. Of these twenty acres, *Stultz* had not the exclusive possession, but had leased them to *Miller* for a certain rent. Exception was taken at the trial, and pressed by the defendant's counsel, that for the grain growing on these twenty acres, no damages could be recovered at the suit of the plaintiff. This was overruled by the Judge, but the point was reserved. Entire damages were given by the jury, which cannot now be separated. The defendant had a right to avail himself of any technical defect in the form of the action; and if he was dissatisfied with the decision of the Circuit Court thereon, he had the benefit of an appeal to this Court under the 4th section of the act of the 20th of *March* 1799. The Circuit Court having been an

emanation from this Court, and subject to its control, we are bound to do what that Court ought to have done upon a legal question made before them. I feel myself therefore constrained, though with regret, to give my voice that the judgment of the Circuit Court be reversed, and a *venire facias de novo* be awarded.

BRACKENRIDGE J. By the common law "If tenant for years, knowing the end of his term, doth sow the land, and his term endeth before the corn is ripe, in this case, the lessor, or he in reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end." *Litt. sec.* 68.

But the custom of a particular place may vary this law. "Whether the lease is by parol, or by deed, does not vary the case." The custom of a particular place must be pleaded specially. In the case before us it was not the custom of a particular place that was relied on, but the general custom of *Pennsylvania*, and needed not to have been pleaded, but might be given in evidence. A general custom is a general law.

Exception has been taken to the form of the action; that admitting the custom to give the way going crop, yet for hindering an entry to take it, or the landlord taking it himself, the action ought to be case. "If the lessee be disturbed of his way, he shall have his action upon his case." *Litt.* 56. Where he is *hindered by menaces* to enter, it would seem to me that it ought to be case. But here it is not hindering to enter, but the entering himself, the landlord, and taking the crop. Trespass would seem to be, in strictness, the proper action, though I do not see but that it might be waved, and case brought. Why not either trespass or case? "If the lessor enter upon land leased, and cut down the timber trees, and carry them away, whereby the lessee will lose the loppings and shade of them, he may have *an action of trespass or upon the case.*" 1 *Saund.* 323. The boundary of trespass and case is subtle; and, like a colour in the rainbow, runs into its next. I see no necessity for applying a glass to distinguish where the one begins, and where the other ends. If the naked eye cannot at once see the reason of distinguishing, the giving notice of the injury alleged, and giving the advantage of any plea by the defendant that exists in his case, let it pass. The difference is not worth the microscope. Trespass would not lie in this case, unless the crop could be considered as

1812.

STULTZ v. DICKEY.

still in the possession of the tenant; and if in his possession, the close which contains it must be considered his. The custom would be imperfect, and would not go the length of serving him, unless keeping this close for him, until he shall have taken away the crop. The landlord by entering, may be considered as having broke the close of the tenant.

The second reason filed for a new trial, is "for misdirection of the Judge in stating to the jury that the testimony of two witnesses uncontradicted by any testimony, and who were proved to be of good character, ought not to be believed." What evidence have we that the Judge did so direct. It is said the reasons filed must have been read to him; or, he must have seen them when filed, and no contradiction appearing, it may be inferred that he did so direct. How should a contradiction appear? And how can it be inferred that the Judge ever saw, or heard of these reasons?

By the Circuit Court law, no appeal from the judgment of the Circuit Court is sustainable, "unless the counsel for the appellant shall have stated in writing his reasons for said appeal." But the appeal is after judgment, and the reasons of such appeal are filed after judgment. The Court who gave the judgment had no control over the reasons, nor right to call for them. Execution goes of course unless reasons are filed. The judge from whom the appeal is made, is not supposed to hear of them, nor in fact ever does. It furnishes no circumstance therefore, from whence to infer an admission by the Judge that any statement made in these reasons is correct. Nor are they taken to be correct on the appeal. It must depend on other evidence, the notes of the Judge himself, the charge filed, or noticed in a bill of exceptions. In the case before us, we have nothing of all these. But, admit that the Judge did express himself in the manner stated, which does not appear from his notes, it is his direction *in the matter of fact* that is alleged, of which we cannot take notice. A doctrine totally novel has been introduced in the argument, *that a judge has no right to contrast the testimony, and to weigh evidence.* I say this is novel; for I had always supposed, that the power in the Court to grant a new trial, *on the ground of being against evidence*, proves, that, in the first instance, a Judge has a right to consider the weight of it. If he can be called upon to set aside what is done, why not discover the inclination of his mind as to

what ought to be done, the conclusion to be drawn from the facts in evidence. On the contrary, the Judge has a right to assist the jury in weighing *the credit of the witnesses*, as well as the effect of written evidence. I have known in a single case, and for the first time a single Judge, (*Yeates*) *Wites* v. *Leightner*, give his opinion in favour of a new trial, on the ground of the Judge who tried the cause having expressed himself too strongly as to the *credit of the principal witness*, on contrasting her testimony with that of others, and with circumstances. I avail myself of this opportunity of protesting against this as a ground whereon to grant a new trial; for what the Judge said to the jury on the trial as to the weight of evidence, is not supposed to come forward, and to be before the Court. It is the *verdict itself* that is to be attacked as being against evidence, and whether the Judge directed strongly or weakly, or *not at all*, on the evidence, is out of the question. It was a matter within his discretion, after summing up the evidence, to communicate his impressions of the weight of it; and I know of no limit to this but his own prudence. There is danger of giving the jury a set against his conclusions if too strongly expressed, even though correct. My memory does not serve me as to any such thing in the books as a ground for a new trial; and on principle it must be seen that it cannot be.

But amongst the reasons filed is this also, "misdirection of the Court for stating to the jury, that although in the opinion of the Court the plaintiff was precluded by law from recovering damages for as much of the grain stated in the declaration to have been taken by the defendant as had been sowed by *J. Miller*, an under lessee of the plaintiff, (between twenty and thirty acres) that it was still a matter for the consideration of the jury in assessing damages." The point of law intended to be reached in this case, is, whether a tenant abusing this privilege by the custom, by putting in an unreasonable portion of the land, with a view to the way going crop, shall have a right of action where he is disturbed in taking it away. On this head, the direction of the Judge appears to me perfectly correct; viz. that it will be a matter for the jury, who may mitigate the damages in consideration of this, or give none at all. A custom ought to be reasonable itself, and reasonably used. The circumstance of underleasing,

1812.

STULTZ v. DICKEY.

would look as if a tenant was grasping at an over crop; but it may have been because he could not himself work what of the ground he might have reasonably put in crop, and this the jury will weigh.

We come then to the last reason alleged for a new trial, that "the damages found by the jury are excessive." I find it impossible to ascertain for myself, whether so or not. It would require an investigation of the matter which I have not an opportunity of making. The whole circumstances were before the jury; the Judge who tried the cause has expressed no dissatisfaction. On the contrary he refused a new trial on any ground, and the appeal is from his judgment, which it it would seem to me, ought to be affirmed.

Judgment reversed.

Chambersburg, Monday, Oct. 5.

Lessee of M'INTIRE *against* WARD.

A deed by husband and wife, executed in *Baltimore* county in the state of *Maryland* where they resided, and acknowledged before two justices for that county, whose certificate was accompanied by the attestation of the clerk of the County Court, under *the seal of the court*, "that the persons who took the acknowledgment "were justices of the peace, and that there were no magistrates superior to them in *Balti-* "*more* county," is duly acknowledged within the act of the 24th of *February* 1770, which gives effect to acknowledgments of deeds by husband and wife, "made before any mayor "*or chief magistrate or officer* of the cities, towns or *places*, where such deeds are or shall be "made or executed, and certified under the *common or public seal* of such cities, towns *or* "*places*."

THIS was an ejectment in the Circuit Court of *Bedford* county, tried before Mr. Justice *Yeates*, and the late Mr. Justice *Smith*, in *November* 1803.

The title to the premises in question was proved to have been in *Robert Callender* in fee simple, who, on the 7th of *June* 1773, in consideration of natural love and affection, and five shillings, granted the same to *William Neill* and *Isabella* his wife (now *Isabella M'Intire* the lessor of the plaintiff) in fee, as joint-tenants.

It is not essential that the words of the act of the 24th of *February* 1770, in relation to acknowlegments by *femes covert*, should be used by the magistrate; it is sufficient if the directions of the act are substantially complied with; and therefore if it appears from the whole certificate that the contents of the deed were known to the wife, it is as effectual as if the magistrate had certified that he read or otherwise made them known to her. *Hence* if it is said that she acknowledged the premises "within mentioned" or the like, to be the right &c. of the grantee, it is good.

Qu. Whether it is necessary that it should appear at all on the face of the certificate, that the contents of the deed were made known to the wife?

The defendant then offered in evidence, a deed, dated 17th *February* 1779, from the said *William Neill* and *Isabella* his wife to *Samuel Todd* for the same premises, and executed in *Baltimore* where the grantors then resided. On this deed was endorsed a certificate in the following terms:

"*Baltimore* county *ss.* On the 17th day of *February* 1779, "before us the subscribers, two of the justices of the peace "for said county, came *William Neill* and *Isabella* his wife, "and acknowledged the within indenture of bargain and "sale to be their act and deed, according to the true in- "tent and meaning thereof; and the *lands and premises* "*therein mentioned* to be bargained and sold, with all and "every the appurtenances, to be the right, title, interest, "estate, and property of the within named *Samuel Todd* his "heir and assigns forever. And the said *Isabella* being by "us privately examined apart from her said husband, and "out of his hearing, acknowledged that she joined in the "execution of the within deed of bargain and sale, of her "own free and voluntary will and accord, without being "thereto compelled or induced by any fear, threats, or ill "usage of her said husband, or through fear of his displea- "sure. Acknowledged before James Calhoun, Peter "Shepherd."

To this was annexed a certificate of *William Gibson*, clerk of *Baltimore* county, *under the seal of the County Court*, dated the 18th *February* 1779, stating that *James Calhoun* and *Peter Shepherd*, were justices of the peace for *Baltimore* county.

A certificate from the same person was also produced, dated the 30th of *September* 1802, setting forth that the said *Calhoun* and *Shepherd* were principal magistrates and justices of the Common Pleas of *Baltimore* county, and that no superior magistrates or peace officers were in the said county in 1779.

A similar certificate was produced from *Ninian Pinkney*, clerk of the Executive Council of *Maryland*, dated the 8th of *November* 1802. The deed had been recorded in *Pennsylvania* on the 10th of *May* 1792.

The plaintiff's counsel objected to its being read, upon two grounds. 1st. That the acknowledgment had not been made before a competent officer, and was not duly certified.

1812.

Lessee of M'INTIRE v. WARD.

2d. That it did not appear that the contents had been made known to the wife.

The Court overruled both objections, and admitted the deed, upon which a verdict passed for the defendant. A motion for a new trial was then made and overruled, and the defendant appealed to this Court.

Duncan for the appellant, urged the same objections that were taken below.

1st. The act of the 24th of *February* 1770, gives effect to acknowledgments of deeds, by husband and wife, made out of the state, only where they are made before any mayor or chief magistrate, or officer of the cities, towns, or places, where such deeds are executed, and certified under the common or public seal of such cities, towns, or places. It must be chief magistrate, or *chief officer*, and the justices of *Baltimore* county being all equal, there could be no *chief*. This is the introduction of a new power of a judicial kind, to persons out of the state, and should therefore be construed strictly. The word *place* does not include *county*. County is more extensive than *city* or *town;* and where things of inferior rank are particularized, and then a general term is used, the general term does not include things of a higher nature. The acknowledgment must also be certified as well as made; certified under the public seal of the city, town, or *place*. The person who takes the acknowledgment, must certify. Here the certificate is by a stranger, not under the public seal of the *place*, even if county is included by *place*, but under the seal of a court.

2d. But the contents must be made known to the wife. In the *Lessee of Watson* v. *Bailey* (*a*), the court disregarded the acknowledgment, because it did not pursue the requisitions of the act. Making known the contents is essential. The wife may be deceived. It is the duty of the magistrate to inform her, and it should appear that he did. It does not appear here that she knew what lands she was conveying.

Brown and *Watts* contra.

1st. The words are mayor, chief magistrate or officer, not

(*a*) 1 *Binn.* 470.

1812.

Lessee of M'Intire v. Ward.

chief officer. Mayor refers to city, chief magistrate to town, officer to any place, which includes county; it can mean nothing else, for we know no other municipal divisions of the smaller kind. It was well known to the legislature that there were many places, where there was no mayor or chief magistrate; and it was their intention to facilitate acknowledgments out of the state. It is sufficient if the officer has no superior. *Baltimore* was not incorporated at the date of this acknowledgment; there was of course no chief officer but a justice of the peace, and no public seal of the county, but the seal of the County Court. That is the public seal of the county for judicial purposes. It gives all the authenticity to the act that the law requires, and is duly annexed.

2d. It is sufficient that it appears that the wife knew the contents, not that the officer made them known to her. Here she acknowledged the lands *mentioned in the deed* to be bargained and sold, to be the right of the grantee. She therefore must have known what lands are mentioned in the deed, and to whom they were conveyed. *Watson's Lessee* v. *Bailey*, was a very different case. There the wife did not state that she had voluntarily consented to the deed, which it was the principal if not exclusive object of an acknowledgment to ascertain.

Tilghman C. J. This case depends upon the acknowledgment of a deed made by the lessor of the plaintiff *Isabella M'Intire*, and her former husband *William Neill*, on the 17th of *February* 1779, whereby the lands claimed in the ejectment were conveyed to *Samuel Todd* in fee. The deed was executed in *Baltimore* county in the state of *Maryland*, where *Neill* and his wife then resided, and acknowledged before *James Calhoun* and *Peter Shepherd*, two of the justices of the peace for the said county of *Baltimore*. At that time, the town of *Baltimore* was not incorporated, and the only magistrates of the county were justices of the peace, who were all of equal dignity, and were judges of the County Court. A certificate was produced from *William Gibson*, clerk of the County Court, under the seal of the Court, declaring that *Calhoun* and *Shepherd* were justices of the peace, and that there were no magistrates superior to them in the county of *Baltimore*. Two objections are made to the acknowledg-

1812.

Lessee of M'Intire v. Ward.

ment of this deed. 1st. That the justices of the peace had no power to take it under the act of assembly of the 24th of *February* 1770. 2d. That if they had power, it is not taken in the manner prescribed in the act.

1. The third section of the act permits deeds made by husband and wife, not residing within the province, to be acknowledged before "any mayor or chief magistrate, or "officer of the cities, towns, or *places*, where such deeds or "conveyances are or shall be made or executed," and directs that "such acknowledgment shall be certified under the "common or public seal of such cities, towns, or places." The law had in view cities and towns, in which there was a mayor or chief magistrate, and places, not cities or towns, in which there were civil officers concerned in the administration of justice. Such a *place* I take a county to be, which although not strictly a body corporate, is something in the nature of one, being bounded by certain limits, within which the justices of the peace have jurisdiction. It was the intention of the law to facilitate conveyances of land by persons living out of the then province. There was at that time but one city (*Annapolis*) in the adjoining province of *Maryland*, and I believe not more than two in *New York;* and it cannot be supposed that our legislature intended to subject all persons executing conveyances, to the trouble of going to a city to make their acknowledgments. Indeed unless we understand the word *places* in the manner I have mentioned, I know not what meaning to affix to it. But a difficulty still remains. This acknowledgment was not made before the chief magistrate or chief officer, for I agree that the word *chief* is to be applied to officers as well as magistrates. If there had been a chief magistrate, or officer in *Baltimore* county, and this deed had not been acknowledged before him, the objection would have been fatal. But where several are equal, there can be no chief. In such case a literal compliance with the law is impossible, but its meaning is satisfied, when the person who takes the acknowledgment has no superior. It has been also objected that the acknowledgment is not certified under the public seal as the law directs. It is true the justices do not say that they have caused the seal of the County Court to be affixed, because this was out of their power. The seal is not intrusted to their cus-

tody, but to that of the clerk. The certificate of the justice is however accompanied with the public seal, which is affixed in the only manner the nature of the case admits, and carries with it all that credit which the seal can confer. It appears to me therefore that there is no weight in this objection.

2. The second point respects the form of the certificate of acknowledgment. The act directs (*sect.* 2,) that the person taking the acknowledgment, "shall read to the wife, or otherwise make known to her the full contents of the deed," and this, it is said has been omitted, or at least does not appear to have been done. In support of this objection is cited the case of *Watson and wife* v. *Bailey*, 1 *Binn.* 470. I gave no opinion on that case, because I had decided it in the Circuit Court, where my opinion was agreeable to that of the Supreme Court. It was a case very unlike the present; for it did not appear by the certificate of acknowledgment, that the wife declared that she had executed the deed voluntarily. It was only said that she acknowledged the deed, and was examined separate and apart from the husband. This was a defect too glaring to be got over. I do not think it necessary to decide at present, whether it should appear on the face of the certificate, that the contents of the deed were made known to the wife; and I desire it to be understood, that I do not consider that point as having been determined in *Watson* v. *Bailey*. But supposing it to be so, it is enough if it in any manner appears. No particular form is necessary. The words of the act need not be used, if its directions are substantially complied with. This Court would be departing from the line of its duty, if it were studious to avoid conveyances, by objections founded merely upon form. Now it is certified in this case, that the wife "acknowledged the "indenture of bargain and sale to be her act and deed, ac- "cording to its true intent and meaning, and the land and "premises therein mentioned to be bargained and sold, with "all and every the appurtenances, to be the right, title, in- "terest, estate and property, of the within named *Samuel* "*Todd* his heirs and assigns for ever." She knew then that the land was conveyed to *Todd* in fee simple, which is the essential part of the deed, and it may be fairly presumed that this was communicated to her by the justices who took

1812.

Lessee of M'Intire v. Ward.

her acknowledgment, although I do not conceive that to be material, provided it appears that she had the knowledge. But it is said that it does not appear she knew what the lands were which were included in the deed. This is a severity of criticism, which I confess seemed to me to be unnecessary. When the justices certify that she acknowledged the lands *within mentioned* to be the right &c. of the grantee, it may be reasonably presumed that the lands were particularly mentioned at the time of taking the acknowledgment, although they are not particularly mentioned in the certificate. Considering the whole of this certificate then, it sufficiently appears, that the contents of the deed were known to her. I am therefore of opinion, that the Circuit Court was right in permitting the deed to be read in evidence, and that the judgment should be affirmed.

Yeates J. gave no opinion, having already decided in favour of the acknowledgment below.

Brackenridge J. When this point came before me at a Circuit Court in *Bedford* county, I did not consider myself at full liberty to say what the construction ought originally to have been, because I had a knowledge of what had been done in taking acknowledgments, that the words of the act had not in all cases been strictly pursued, or at least set forth in the certificate of those who took acknowledgments, so that estates might be shaken, some deviation appearing, or even some substantial defect in the recital. And in fact it did not appear to me, but that it might be sufficient to set forth that the acknowledgment had been taken; it being presumable that all things had been done according to the requisite of the acts, and that in this case the *omnia rite et solemniter acta* might be presumed. But in the case of *Watson* v. *Bailey*, it being decided that the words of the act of assembly must be substantially set forth, as having been pursued in the examination of the justice or other person taking the acknowledgment, I do not think myself at liberty now to depart from it; and I am not able to say that the not having certified that the contents were made known, is not a substantial defect in this acknowledgment which we have before us. The examining apart and inquiring as to the being free and

1812.

Lessee of M'Intire v. Ward.

voluntary in the act, was with a view to save against compulsion, the making known the contents is equally necessary to preserve from imposition by the subscription of a different writing.

Much less am I able to say, taking up this case upon original grounds, as we are at liberty to do, it being a point *primæ impressionis*, that the acknowledgment has been before those authorised to take it, or that it has been certified in the form and under the solemnities by law required. I construe the law, *chief officer* of the place; the mayor, chief magistrate, or chief officer of the place. There is an elipsis in the language, and after or, *chief* must be supplied. It will then read, mayor, chief magistrate or chief officer. For there is the same reason that chief be applied to officer, as to magistrate, or more; for it will avoid the taking by a very subordinate officer in some judicial station. Nor do I think the word can be applied but to some place of which there is a common seal, and an officer entrusted with it, in whose custody it is, or who has a right to use it. It behoves the party to come into the state to have the deed executed, or to have the deed executed where there is such an officer, with the custody and the right to use such a public or common seal. The act has no reference to a certificate under seal, that such a person taking an acknowledgment was an officer or chief officer. It must carry its *own evidence with it, that he was a chief officer, by having the custody of it, and the right to use it.* On these grounds I am of opinion, that the judgment of the Circuit Court be reversed.

Judgment affirmed.

END OF SEPTEMBER TERM. SOUTHERN DISTRICT, 1812.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. December Term, 1812.

1812.

Philadelphia, Friday, December 18.

Ex parte LAWRENCE.

PHILLIPS on behalf of *Ann Lawrence*, petitioned the Court for a *habeas corpus* under the act of 1785, to one *Joseph Vogdes*, to bring up the body of *Adam Lawrence* then in his custody as a slave, whereas, according to the suggestion, he was free.

This court is not *bound* by the act of 1785 to grant a *habeas corpus*, where the case has been already heard by another court, upon the same evidence that is suggested to this.

It was stated by the counsel, that the case had been already heard upon a *habeas corpus* by the Common Pleas of *Philadelphia* county, who remanded the prisoner; and that there was no new evidence to lay before this Court.

It is not *expedient* to grant it where the case has been once so heard, and the party has a remedy by *homine replegiando*.

Per Curiam. We do not think that the act of assembly obliges this Court to grant a *habeas corpus*, where the case has been already heard upon the same evidence by another court; and we do not think it expedient in this case, because it has been already heard upon the same evidence, and the party is not without remedy, as he may resort to a *homine replegiando*. The Court are not however to be understood as saying, that they have not authority to issue a *habeas corpus* in such a case, if they should think it expedient.

Habeas corpus refused.

1812.

MORGAN *against* STELL.

Philadelphia, Wednesday, December 23.

THIS was an ejectment for a lot of land containing about four acres, in the Northern Liberties of *Philadelphia*, tried before *Brackenridge* J. at a *Nisi Prius* in *November* 1811, when a verdict was found for the defendant.

A and *B* his wife, on the 12th of *December* 1797, by letter of attorney authorised *C* and *D* jointly and severally to make leases of a large estate belonging to the wife in the neighbourhood of *Philadelphia*.

Upon a motion for a new trial by the plaintiff, his honour now reported the material facts as follows:

On the 12th of *December* 1797, *Turner Camac* and wife, (the real plaintiffs in the cause) then residing in *Ireland*, sent out to this country one *Nicholas Halliday*, under a *joint* and *several* power of attorney to him and *Thomas Law*, to enter upon the lands of the wife in the Northern Liberties, to make leases, receive rents, and the like. The estate was in the immediate vicinity of the city, of great extent and value.

This power was recorded on the 15th of *September* 1799, and *C* acted separately under it, making various leases for 99 years, and receiving the rents. On the 30th of *November* 1801, *A* and *B* executed another power to the same effect to *C*, *D*, and *E*, or any two of them jointly *but not severally*.

On the 15th of *September* 1799, the power was *recorded* in the county of *Philadelphia;* and Mr. *Law*, not being able, on account of non-residence, to join in the agency, Mr. *Halliday* separately made leases, collected rents, and superintended the estate, *residing* at the same time upon it. Under this power he leased lots to the defendant, not now in dispute.

This power was known to *C* on or before the 5th of *May* 1802; *D* declined acting, and *E* accepted the power merely to prevent *C* from acting alone; but the power was never recorded, nor any public notice given of it,

On the 30th of *November* 1801, Mr. and Mrs. *Camac*, still being in *Ireland*, made a *second* power, to *Nicholas Halliday*, *Thomas Law* and *Benjamin Chew*, or any two of them, *jointly*, *but not severally*, to sell and convey in fee simple, a part of the estate to *Joseph Sims*, to sell and convey to the *United States* another part for a navy yard, and to *lease* the estate generally; but it contained no words expressly revoking the *first* power.

nor was any lease or conveyance ever made under it. *C* resided on the estate as usual, collecting the rents, and making leases as formerly; and on the 9th of *June* 1802, he leased the premises in the ejectment, to the defendant, for ninety-nine years, reserving a fair rent at the time.

Held that as between the principals and their attorney *C*, the second power was a revocation of the first; but the defendant being a *bona fide* purchaser without notice, and the principals being guilty of great negligence in taking no steps to give notice of a revocation, when the first power was so notorious, it was not to be considered a revocation as to him, and therefore he was intitled to hold the land.

1812.

MORGAN v. STELL.

This *second* power was known to Mr. *Halliday*, probably in the month of *March* 1802, when he wrote to Mr. *Chew* that as the 1st of *April* was approaching, it would be necessary for them to settle the form of their leases. It was certainly shewn to him by Mr. *Chew*, on the 5th of *May* 1802. Mr. *Law* positively refused to act; Mr. *Chew* refused to act in conjunction with *Halliday*, but, as he stated to the jury, he accepted the power for the purpose of preventing *Halliday* from acting alone. No conveyance or lease was made under it, but there was a conference by Mr. *Chew* with commissioners on the part of the *United States*, which proved abortive, and he gave notice to Mr. *Sims* not to pay *Halliday* the purchase money of the land contracted for by him. The power was never *recorded;* it was placed in the recorder's office by Mr. *Chew*, on the 27th of *July*, 1802, and afterwards withdrawn. No notice was given of it in the public papers, or otherwise; and *Halliday* continued to reside on the estate, receiving rents &c. in apparently his former character.

On the 13th of *August*, 1802, Mr. and Mrs. *Camac* executed a *third* power to *David Lenox* and *Benjamin Chew*, expressly revoking all former powers. This power was recorded on the 18th of *November* 1802, and notice of the agency published in the newspapers on the 27th of *January* 1803.

Before the date of the *third* power, *Halliday* on the 9th of *June* 1802, leased the premises in question to *Matthew Feesey* for ninety-nine years, the defendant making the contract as attorney to *Feesey*, and taking possession for him. The rent reserved was a fair one at the time, but owing in part to the exertions of *Stell* in attracting purchasers to that quarter, and in improving this and the adjacent land, it had increased considerably in value. There was no evidence whatever that the *second* power was known to *Stell*, or to any person on the estate. *Halliday* received rent from one tenant to whom he had made a lease on the 2d of *August* 1802.

Mr. and Mrs. *Camac* subsequently came to the *United States*, and an action being instituted by him against *Halliday*, his counsel at the call of *Halliday's* counsel, exhibited on the 24th of *May* 1811, an account headed in the follow-

ing manner. "*Nicholas Halliday* Dr. to *Turner Camac* Es- "quire, for the following rents which he did or *ought to* "*have received*, the leases being granted by him *as agent*." It contained columns, at the top of which respectively was written, 1. "Tenant's names," 2. "Leases when granted," 3. "Payments from the commencement of Leases, *till ter-* "*mination of agency*," 4. "Amount of rents." By the 3d column the rents were charged in every instance up to a period subsequent to the arrival of the *third* power in the *United States*. The first column contained the names of *Stell* and *Feesey*, in several instances, and in one instance Mr. *Feesey* was named as a tenant under a lease of the 25th of *May* 1802. The last lease recognized was under date of the 2d of *August* 1802. But the lease in question was not mentioned at all; and at the foot of the account there was a deduction of "the rents of *Matthew Feesey* and *James Stell*, "their leases being now disputed by Mr. *Camac*."

His Honour, after commenting upon the facts to the jury, and shewing a considerable leaning to the case made out by the defendant, told them that it gave rise to the following questions:

1. Whether *Halliday* had authority under the *first* power, in connection with the circumstances attending the second power, to make the lease in question; or in other words, whether in the understanding and by the acts of the parties, the *first* power was any more than conditionally revoked by the *second*, namely, in case the second should be acted under. This as a question of fact, he left to the jury.

2. Whether by the exhibit of the 24th of *May* 1811, it was intended by *Camac* to assert the general authority and duty of *Halliday* as agent up to the date of the *third* power, and as ratifying his acts generally to that time, or only in particular cases.

3. Whether it was the duty of *Camac* to record the *second* power, and to give public notice of it in the gazette. The jury, his Honour said, might consider the recording and publishing as unnecessary; he would reserve that point for the defendant, who might urge it in bank, if the verdict should be against him.

1812.

MORGAN v. STELL.

After thus stating to the Court the facts and points above mentioned, Judge *Brackenridge* proceeded as follows:

In making this report, it will be expected that I should say whether I am satisfied with the verdict, or dissatisfied with it. Were I to say aye or no, it would not convey my mind on the subject; for if satisfied, it is *sub modo*, and under circumstances. It cannot but be discovered, that in what I said to the jury on the trial, the inclination of my mind was in favour of such a verdict, and that the impressions communicated had a leaning that way. And it might perhaps be said that there was something like an *astutia* with that view in suggesting the idea of a conditional revocation. And now that the defendant has gotten a verdict, between him and the plaintiff, I might be unwilling to deprive him of it. But why was it that I had this leaning? It was because I thought it a hard action, as it respected the defendant, an innocent purchaser without notice or a pretence of it, even if there had been a revocation. I thought he ought to be protected. But abstracting myself from the hardship of the case as respects him, and excluding all consideration but that of the fact of a revocation, I am not so clear on reflection that I can justify my own impressions, and approve the verdict. If the case was between the plaintiff and his agent for damages, for going on after he had such reason to think that it was the will of his principal, that he should be superseded as to his individual and separate agency, I might think he had due notice, and ought to be answerable. And yet such a verdict on the question of notice, would be inconsistent with that in this case. But whence is it that such embarrassment did arise, and that such dilemma in consequence of it presents itself to the mind? It is owing to the not disposing of the reserved point as a question of law in the first instance. For if the defendant shall be protected by his want of notice of the revocation, actual or constructive, the hardship of paying a valuable consideration and losing the land will be removed, and will not force itself upon the mind in considering the fact of revocation. For it cannot but be felt as against conscience that he should lose the land and not recover the recompense: and though he might have his action against the agent for undertaking to sell, yet it is more reasonable that he should hold the land, and leave the plaintiff

to his action, who originally gave the trust, and was in default in not having given publicity to his revocation; a publicity at least co-extensive with that originally given of the power, which was not only by recording, but by the gazette. In reserving the point, it was ruled *pro forma* for the plaintiff; that is, the case was to be considered as if the plaintiff was not bound to give such publicity; for it was not pretended that there was evidence of the recording the second power, revoking impliedly the first, nor any advertisement in the gazette.

It being a point of law whether there ought not to have been notice to the public of the revocation, and a question of fact, whether there had been such notice to the public, and there being no evidence of that, I think I ought to have directed a nonsuit. But I suffered the matter to go to the jury on the fact of notice of the revocation to the agent, at the same time telling the defendant, that even if the verdict should be against him, he had a right to move the Court in bank to set aside the verdict, and have a nonsuit entered. If on the argument of the reserved point, which I think ought to come first in order, the Court shall be of opinion that notice, express or constructive, of the revocation to the defendant, is out of the question and was not necessary, nor ought to have been looked at by the Court or jury in considering the fact of notice of revocation to the agent, there may be ground to set aside the verdict, in order that it may again come forward, disembarrassed with all that feeling derived from that impression. For I will acknowledge that on analysing my impressions on the trial, it seems to me that I felt strongly, and the jury may have done so also, the great force of this; and had a nonsuit been moved for, I was much inclined to have directed it. For though I had not any distinct recollection of any law reading directly on this head, yet in the analogous cases of a dissolution of a partnership in mercantile concerns, the principle would seem to bear, which is a common law principle; and in the case of sales of real estate and personal property will apply. It is against equity that any one should suffer from the default of one who has not given the notice that he might have given of the revocation of authorities which have passed under him. If these ideas are correct, and the law point

1812.

MORGAN v. SETLL.

shall be determined against the plaintiff, the setting aside the verdict will be nugatory, for in that case the Court will be bound on setting it aside to order a nonsuit to be entered. The Court will do now what it may have been the duty of the Court at *Nisi Prius* to have done, and what it was in the power of the Judge to have done.

Hopkinson and *Rawle* on behalf of the plaintiff, contended, that the verdict was against law and evidence. The first power was revoked by the execution and delivery of the second, because the second was to three or any two of them jointly and *not separately;* of course it negatived the authority of *Halliday* to act alone in the matter referred to in the *second* power. It was inconsistent with the first, and therefore annulled it. This effect was produced from the moment it was *known* to *Halliday*, which was in *March*, or at latest in *May*, and certainly before the execution of the present lease; and hence, unless the defendant's objections to this position are valid, he has no title whatever, and the jury were wrong.

Two objections are taken: 1. That to constitute a revocation, it was necessary that the second power should be accepted; or as it was stated by the Judge, the second power might be considered a conditional revocation only. 2. That it was essential to record, publish in the gazette, or otherwise generally make known, the second power.

1. The second power was in fact accepted. It was accepted by *Halliday* in *March*, when he wrote to Mr. *Chew*, that as the first of *April* was approaching, *they* must settle the form of *their* leases. It was accepted also by Mr. *Chew* to prevent *Halliday* from acting alone. Acts under it were not necessary to make it a revocation. Revocation depended on the intention of the principals, not on the acts of the attornies. Mr. *Chew* however did act, by holding a conference with commissioners of the *United States*, and by giving notice to *Sims*. His authority to do either of these depended wholly upon the second power, and of course he acted under that power.

2. It lies on the defendant to show the necessity of recording and publishing the second power. No act of assembly requires the former; and independent of statutory regulation,

it is not necessary to record any instrument. Recording would be useless, because not being required, it would not amount to notice. Publication in the gazette is not prescribed by statute, and is alike unnecessary. In what paper should it have been published, and how many times? Unless actually brought to the knowledge of the defendant, such publication would amount to nothing. To whom then should private and personal notice have been given? Here lies the fallacy of the objection. It requires notice to the defendant, when all the world were as much intitled to it as he. Who was to give notice to all the world? No one. Where no one is bound to give notice, the defendant ought to take notice at his peril. 16 *Vin.* 11. *c.* 2. But it is not notice to the purchaser, that constitutes a revocation; notice to the attorney is sufficient. Our act of 1705, 1 *Smith's Laws* 69, is explicit. "No sale of lands made by virtue of a power of attorney, "shall be good and effectual, unless made while such power "is *in force;* and all such powers shall be accounted deemed "and taken to be in force, until the *attorney* or agent shall "have *due notice* of a countermand, *revocation*, or death of "the constituent." He who deals with an attorney, trusts to the attorney. If the attorney has received notice, it not only terminates the power, but it is notice of the termination to him who derives through the attorney. The defendant must look to the person who has defrauded him, not to the principal, who gave to the attorney due notice of a countermand. A contrary doctrine compels the principal to follow the steps of his discarded agent forever, for the purpose of interposing notice to all whom he may attempt to defraud. The account exhibited by *Camac* makes not the least impression on this cause. It was exhibited in another suit, and between other parties. It was a mere charge against *Halliday*, prepared and offered by counsel, and is analogous to a bill in Chancery, which is not evidence against the complainant in another suit. Besides, *Camac* had a perfect right to affirm some leases, and to disaffirm others. In this exhibit he expressly excepts all leases to *Stell* and *Feesey*, and does not even state the existence of the present lease.

1812.

MORGAN v. STELL.

Binney and *Wallace* contended for the defendant, 1. That upon principles of equity, the Court ought to refuse a new trial. 2. That at law the defendant had a title.

1. The defendant is a *bona fide* purchaser, for a valuable consideration, without notice. Not a fact appeared to the contrary at the trial, and the jury have settled it by their verdict. His exertions redeemed the property from a waste, and improved the estate of *Camac* in its neighbourhood; and he has strong equity in this circumstance, especially as the rise in value is the only motive for the suit. This Court are now in the situation of a court of equity that is asked to lend its powers to a plaintiff to overcome the title of such a defendant; for a new trial is wholly in their discretion. They may, and they ought to refuse their assistance. A court of equity will not take the least step against such a purchaser. If there is a shadow of blame in the plaintiff, they will not do it; *à fortiori*, where by his gross negligence, his confidence in his own agent, his continuing him in the agency generally, he produced the whole mischief. *Camac* indirectly encouraged the defendant to purchase, and if it were necessary, might be compelled to confirm the title. He originally gave credit to *Halliday*, and reposed confidence in him. He alone could prevent *Halliday* from abusing the trust. He invited others to confide in him, and took no step to inform them when that confidence ought to cease. A court acting with equity powers, or to whose discretion such a party applies for aid, should leave him with the jury. 2 *Salk.* 644., 2 *Cas. in Chan.* 108. 156., 1 *Vern.* 156., 2 *Vern.* 599.

2. But the defendant has a title at law, for several reasons. The first power was not revoked by the second, even as to *Halliday*. The second power contains no words of revocation; if it has the effect of revoking, it must be from the intention and acts of all the parties as they appeared in evidence. But from these the contrary followed. Mr. and Mrs. *Camac* did not intend to be without an agent in *America*; they therefore meant that, if the first power ceased, it should cease in consequence of the creation of another agency to supply its place; and if that other agency did not take effect, the old one was to continue. Their confidence in *Halliday* was not gone, or they would not have connected him with *Chew* and *Law*. Did the second agency take effect? It can-

not be pretended. Two must have agreed to act, or it was of no effect. *Law* declined. *Chew* would not act with *Halliday*. Then *Halliday* alone was left. It is said *Chew* accepted to prevent *Halliday* from acting alone; but it was a novel idea to accept a power with a determination not to act under it. *Camac* did not consider the second power as a revocation, as is shown by his account that charges *Halliday* as agent up to the third power. *Chew* did not consider it so, or after putting the second power into the office for registry, he would not have withdrawn it. *Halliday* did not consider it so, or it is to be presumed he would not have acted alone. There is then the intention of the principal, his subsequent declaration, and the opinion of both attornies, that it was not a revocation; and the instrument says nothing to the contrary.

But it was not revoked as to the defendant. The circumstances are to be considered. The estate was a very extensive one; the agency notorious; the power of the agent recorded; his residence on the land. Such an authority is not revoked by mere notice to the agent. The rule of law is that every one is bound to take notice, where no one is bound to give notice; but where there are public evidences of authority, a recorded power, residence on the estate, possession of title papers, the principal is bound to give notice. Where one has been so long the agent of another as to become generally known as such, the principal must make the revocation as notorious as the power, or the acts of the agent will bind him. It is so as to partners in trade, who are the agents of each other. *Peake's N. P.* 42. 154. It is so generally by the civil law. *Pothier on Obligations* 80. *Liv.* 12. *s.* 2. *and Liv.* 32. *ff. de solut.* In the case of domestic servants. *Bolton* v. *Hillersden* (*a*). And also in the case of agents appointed for commercial purposes, such as drawing bills, and the like. In —— v. *Harrison* (*a*), a servant had power to draw bills in his master's name, and afterwards was turned out of the service. If he draw a bill, said Lord Chief Justice *Holt*, in so little time after, that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master. Here the second power was kept secret. Where a thing lies

(*a*) 1 *Ld. Ray.* 224., 3 *Salk.* 234. *S. C.* (*b*) 12 *Mod.* 346.

1812.

MORGAN v. STELL.

more properly in the conusance of the plaintiff than the defendant, notice is necessary. 16 *Vin. 5. pl.* 12. *pl.* 19. 16. 18. 9. 2. 4., *Pothier* 302. *No.* 448., 47. *No.* 79. 81. Certainly the power of attorney might have been recorded. It was a deed relating to lands. So it might have been published in the gazette, it might have been made known to the tenants on the land, of whom the defendant was one. If notice was necessary in any way, the plaintiff fails, because it was not given at all. The act of 1705, which respects notice to the agent, does not apply. That act by the preamble was intended to secure purchasers, not to say when they should be defeated. It appears to have been made under a belief that a countermand, or death, without notice, might revoke a power of attorney; and was intended to quiet this apprehension only.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

It is contended on the part of the plaintiff, that the second power, differing essentially from the first, operated as an implied revocation from the moment that *Halliday* received notice of it, and that consequently the lease under which the defendant claims, was made without authority. On the other hand, the defendant urges, that being a purchaser for valuable consideration without notice of the revocation of the first power, the plaintiff ought not to recover against him. There is no doubt but that as between the principal and his attorney, the first power was revoked as soon as notice was received of the second. From that moment *Halliday* ought to have ceased to act, and any person injured by his acting may support an action against him. But it is not so clear that the first power is completely extinguished as to third persons, who have no means of knowing of the revocation of it. I do not find any express decision on this subject with regard to powers of attorney which operate upon land. As to agents, whose power extends to personal effects, we have authorities founded in strong reason. It is said by Lord Chief Justice *Holt* in 12 *Mod.* 346, that if a merchant authorises his servant to draw bills in his name, and then dismisses him from his service, and the servant draws a bill in so short a time that the world cannot receive

notice of his dismissal, or if the dismissal is kept secret, and the servant draws a bill a considerable time after, the master is bound. So it seems to be agreed, that if partners in trade dissolve their partnership, those who deal with either partner without notice of the dissolution, have a right of action against both. The law was so laid down by Lord *Mansfield* in *Fox and others* v. *Hanbury*. *Watson on Part.* 201. It seems unjust that when one has authorised another to act for him by a writing, which is left in possession of the agent, third persons should be affected by a revocation of which they have no possibility of notice. The civil law requires notice, as appears by *Pothier on Obligations*, No. 79, 80, 81. and 448. But it is said that *land* differs from *personal effects;* that the title of land is transferred with more solemnity, and the purchaser is to look to the writings, and seeing from them that the person with whom he deals does not pretend to any thing more than an authority to act for another, he trusts to the good faith of the agent, against whom he has his remedy, if he is deceived by him. It is asked too, to whom and in what manner the principal is to give notice? As to the persons to whom, and the manner in which notice is to be given, the difficulty is no greater with regard to land, than to personal property. A court and jury may judge of the reasonableness of the notice in the one case as well as the other. As to the confidence which the purchaser puts in the agent, it is to be remarked that the principal puts confidence in him likewise, and puts in him the *original confidence*, which gives the opportunity of deceiving others. No act is omitted by the purchaser which prudence or justice could require; he is guilty of no negligence; he conceals nothing by which his neighbour may be injured. Not so the principal. His revocation is known to himself, and he cannot but be conscious that unless made known to others, they may be subject to great injury. But independent of general principles, the plaintiff relies on an act of assembly made in the year 1705, by the fourth section of which it is enacted, that no sale of lands made by virtue of a power of attorney shall be good, unless made while such power is in force, "and all such powers shall be accounted, deemed "and taken to be in full force, until the attorney or agent "shall have due notice of a countermand, revocation, or "death of the constituent." It appears by the title of this

1812.

MORGAN v. STELL.

act, that one of its principal objects, *was the confirming sales of lands made by attornies or agents.* The legislature were probably not learned in the law, because it seems to have been a doubt whether acts done by the attorney after the death of the principal, or revocation of the power, and before notice, was good. The act very properly removes all doubt on that subject; but it cannot be supposed that it was intended to lessen any obligations, which by the general principles of law or equity, were imposed on the constituents for the benefit of innocent purchasers. I do not think it necessary on the present occasion to lay it down as a rule, that in no case is the revocation of a power of attorney effectual, without notice. It is enough to say, that where there has been great negligence, innocent purchasers should be protected. There were particular circumstances which called for notice in the present case. The property was large and adjoining a populous city, so that many persons might be expected to take leases. *Halliday* resided on the estate, and we must suppose that this was known to his constituents. Having resided there and acted as agent several years, he was continued as an attorney in the second power, which gave him a pretence for remaining in the same habitation, and justified the world in supposing that his original authority was undiminished. The first power was on record, the second remained unrecorded, and unknown, for several months after it was in possession of the persons appointed to act with *Halliday.* Here is a combination of circumstances, tending to put the public off their guard, and, taken altogether, they appear to me to amount to that kind of negligence, which intitles the purchaser to the protection of the law. There is no imputation on the integrity of Mr. *Camac*, or any of his attornies except *Halliday*, who certainly acted dishonestly in making leases after notice of the second power. The misfortune is, that too much reliance was placed on him. It was taken for granted that he would cease to act alone. Somebody must suffer by him; and under all the circumstances of the case, I am of opinion that the loss should fall on his constituents. I am therefore against a new trial.

YEATES J. The defendant contends that he holds the lands in question under a legal right. He insists that at all

events, such equitable circumstances exist in his case, as would restrict the Court in the exercise of their discretion from awarding a new trial.

The defendant claims under a lease for ninety-nine years dated the 9th of *June* 1802, from *Nicholas Halliday*, esquire, as attorney in fact of *Turner Camac*, esquire, and *Sarah* his wife, to *Stell* as attorney in fact of *Matthew Feesey*, under the yearly rent of five dollars per acre. The letter of attorney to *Halliday* was duly acknowledged before the Lord Mayor of *Dublin*, and recorded in *Philadelphia* county on the 15th of *September* 1799. The title to the lands antecedently to the lease, is admitted to have been in Mr. *Camac*, and the plaintiff contends that the first letter of attorney was revoked by a subsequent one, dated the 30th of *November* 1801, constituting the said *Nicholas Halliday*, *Thomas Law*, and *Benjamin Chew*, junior, their attornies, and empowering them or any two of them to lease this property. The second power was exhibited to *Halliday* by Mr. *Chew* on the 5th of *May* 1802, but was neither recorded, nor advertised, nor generally known. There was no express revocation in it of the first power; but it was so far inconsistent therewith, that it restrained the power to lease to *two* of the agents. Mr. *Law* never acted. It was urged, that this second power upon common law principles countermanded the authority under the first power, and that the act of assembly of 1705, 1 *Dall. St. Laws* 73, removed all doubt on this subject. It is declared by the fourth section thereof, "that all sales of "lands shall be accounted, deemed and taken to be in force, "until the attorney or agent shall have *due notice* of a coun- "termand, revocation or death of the constituent;" and hence it was inferred, that notice to the attorney *ipso facto* of either of these events, determines his authority to all legal purposes. To this it is answered with much strength of argument, that the consequence is not necessarily drawn from this old law. The professed object of the legislature was to render the purchasers of lands from the agents of foreign owners more secure in their titles, but not to specify the instances wherein their titles would be defective. The foreign owner confides in the fidelity of his agent here; and if the latter abuses his trust, it is more equitable and reasonable that the constituent should suffer thereby, than inno-

1812.

MORGAN v. STELL.

cent persons, wholly without the means of information as to the validity of the powers delegated. If the first power be recorded, let him procure the countermand or revocation to be recorded also, or let him give it publicity on or near the lands. By adopting the principle insisted on by the plaintiff's counsel, palpable injustice would be often done. Take the case of an attorney in fact duly authorised to collect debts, and suppose his power to be countermanded by some secret act of his principal, or of his death, made known to himself, but unknown in this country,—shall the payment of a debt to such attorney be thereby invalidated? On whom should the loss fall, if the attorney should become insolvent?

A case occurred in this Court a few years after I had commenced the study of the law, involving principles similar to those which form the subject of our present inquiry, and made a strong impression on my mind. It is briefly reported in 1 *Dall.* 9, and was in substance thus. *Benjamin Albertson*, claiming certain lands by descent in *Bucks* county, brought an ejectment against *Septimus Robeson* for their recovery. The title of the lands was clearly shewn to have been at one time in the ancestor of the lessor of the plaintiff; but at a subsequent period the lands were decreed to the defendant, by this Court, in pursuance of certain chancery powers, delegated to them by an old act of assembly. The royal assent was refused to this law in *England;* and it so happened, that the repeal *preceded* the decree of this Court above two months, but the repeal was not known here when the decree was made. The Court determined upon full argument, that the unknown repeal could not affect the right of the defendant under the decree, and the jury found accordingly. I well recollect, that the decision gave general satisfaction to the profession.

I know no precise rule which can safely be laid down in cases of this nature. Every case must be decided on its own peculiar circumstances; though great hardships may arise on either side of the question. I do not hold it indispensably necessary, that the countermand or revocation should be recorded in order to obtain that legal effect; but it is highly prudential so to do, where the original power has been entered of record. I think I am safe when I assert, that where the countermand, revocation or death of the constituent, is

not generally known, nor can be traced to the knowledge of the fair lessee or purchaser, and where they cannot justly be charged with laches or negligence as to receiving information of either of those events, they ought to be protected upon every principle of sound legal policy.

In the case before us, *Halliday* was the known agent of Mr. and Mrs. *Camac*, under their letter of attorney of 1797, duly recorded, living in their mansion house on the premises, and in the actual exercise of powers legally delegated to him. Mr. *Chew* was co-agent with him under a new letter of attorney dated in 1801, but no publicity whatever was given to it, nor was it recorded. Carelessness or inattention cannot be ascribed to the defendant under these circumstances. The account of Mr. *Camac* against *Halliday* furnished in *May* 1811, ratifying his acts done in certain instances after the 5th of *May* 1802, and charging the termination of *Halliday's* agency in *October* and *November* following, are strong additional circumstances in favour of the defendant's possession.

Upon the whole I am of opinion that the motion for a new trial should be denied, as well on equitable as legal principles.

BRACKENRIDGE J. I have expressed my ideas on this case in my report to the Court, with the notes of the evidence. I said on the trial, that should there be a verdict for the plaintiff, yet if, in arguing the reserved point, it should appear that he was not entitled to retain it, it should be set aside, and a nonsuit entered. This seemed to strike the counsel, or some of them, as what could not be done, as the plaintiff may in all cases refuse a nonsuit, and elect to take a verdict.

The verdict in this case is for the defendant, and it is the same thing to him that a new trial should be denied. But for the reasons given in my report to the Court, I should like the course better to set aside the verdict, and direct a nonsuit to be entered. And with a view to shew the power of the Court to take this course, I shall take the liberty of making a few observations.

The question comes to this. Can a plaintiff in all cases refuse to be nonsuited, and say to the Court, charge the jury,

1812.

MORGAN v. STELL.

I will answer and take a verdict? Can the Court in no such case say, let the jury be discharged, and a nonsuit be entered?

It is admitted, that where there is evidence material to the issue, and where the conclusion of fact must be drawn by the jury, before a question of law can arise on that conclusion, the Court cannot direct a nonsuit. But where there is no evidence at all given, or where there is none to a fact, without which being found the action cannot be maintained, has not the Court a right to direct a nonsuit? The plaintiff, it will be said, must be called in all cases; and does not this imply that he has a right to answer and defeat the nonsuit? But what is this answering? Is it not to prosecute his suit by giving evidence? Is it not in this way only, that he can be considered, as in contemplation of law, *answering?* Would not his answering orally, and under the old law, with a view to defeat an *amercement*, claiming a verdict, be a contempt? The cases in which nonsuits are usually ordered, are where there is no evidence material to the issue, or to what is necessary to maintain the action; and without the proof of which, whatever else may be proved, the verdict must be for the defendant, or be set aside by the Court. To what purpose charge the jury, if, on matter of law, not arising from the conclusion of matter of fact to be drawn by them, it clearly appears to the judge, that the verdict, if not for the defendant, must be set aside? These cases are where, on the evidence disclosed, the Court will appear not to have jurisdiction, where the plaintiff has mistaken his process, cases of variance between the writ and declaration, the declaration and the evidence, or the nature of the action, *turpis contractus*, *malum prohibitum*, *malum in se*, *contra bonos mores*, *nudum pactum*, and the like; or where something was necessary to be done, or offered to be done, in order to entitle to bring the action; or where the *requisitus* is not merely matter of form, but notice, and demand must precede; notice at common law in the nature of the case, or notice under statute, compliance with a condition precedent in a covenant, cession or abandonment in an insurance case. In all or any of these cases, no evidence appearing, shall the judge be bound to carry the matter further, and not say he will nonsuit the plaintiff?

Shall he be bound to hear the matter of law argued to the jury, and to charge them on it, or not at once to take it from them, and *nolente volente* the plaintiff, discharge the jury, and direct a nonsuit to be entered? This at least is fit in the modern understanding of the *English* courts. In the language of the present Chief Justice of the Court of King's Bench, "when it is clear the action will not lie, the "judges are in the habit of directing a nonsuit, even though "the objection appears on the record, and might be taken "advantage of on a motion in arrest of judgment." Does not the right which the defendant has, and exercises, to move for a nonsuit *ex adverso* to the plaintiff, imply that the Court have the power to order it? And this is done, either where there is no evidence to support the issue, or where there is no evidence to support a fact material to it, or without establishing which, in the first instance, there can be no recovery, whether it be from the person of the defendant, the mistake of action, incongruence of proof, nature of the demand, or any other of that infinity of grounds which will go to defeat it for the present time, or altogether. An action may be brought too soon or too late, and these are clear grounds of nonsuit. In innumerable cases the verdict is taken for the plaintiff, subject to a point reserved, to be set aside if for the defendant, and a nonsuit entered. Does it not imply the power of the Court to decide on the point of law, and direct a nonsuit? For if it must depend upon the will of the plaintiff to take or avoid the nonsuit, how could this be done? The calling of the plaintiff was with a view to an amercement, which was originally matter of substance, but is now nothing more than matter of form; and the calling is but the mode of directing the nonsuit. Looking over the reports at *Nisi Prius* in the *English* courts, it will be seen that the greater number of cases go off upon nonsuits on legal grounds; and the calling of the plaintiff never supposes that he has a right to resist a nonsuit, by insisting on an argument on the law point before the jury. Hence one cause of the rapidity with which trials are despatched in those courts. Whatever may have been the understanding or principle at an early period, Courts are now considered by the modern practice, as possessing an authority, paramount to any consent by the plaintiff, to order a nonsuit

1812.

MORGAN v. STELL.

under the circumstances, and to the extent above laid down. I know that in all cases it may be said, that in strictness the Court do not order a nonsuit. But they overrule the evidence, or rule the point of law, so that the plaintiff cannot go on with the least hope of success with the jury; and this is no more than indirectly producing a nonsuit.

But I say they can directly say, call the plaintiff; and whether he answer or not, unless he fills up the gap, or shews an action that he can maintain, will nonsuit. He has been called, but answers to no purpose. The jury shall not be charged, but discharged. The calling him is but the mode of entering the nonsuit, which still remains when the reason of the form has ceased; and the plaintiff when called, is no more expected to answer, than the audience are, when the preacher calls from the pulpit, and puts a question which is but introductory to his own conclusion that he means to draw. I mean in a case where it is understood that he is called but *pro forma*, and a nonsuit having been ordered is about to be entered, where there is no evidence of fact to go to the jury, but a point of law is all that is to be considered. This doctrine does not intrench upon that of the jury having a right to judge of the law as well as of the fact in the first instance, when it is submitted to them under the direction of the Court, being involved in the general issue, and cannot in the first instance be separated from it; in which case the Court can interfere only by granting a new trial.

If the plaintiff is called, it is under the idea that he has not followed up his claim with his attendant witnesses. *Sectam non produxit;* and answering, not to produce more, but to escape amercement, is treating the Court with ridicule, and saying I have followed up and produced suit, notwithstanding your notions of the matter; charge the jury, I will take my chance with them on the law which you consider against me. This has nothing to do with the plaintiff being called to take a verdict; his answering in that case is not matter of form, but substance; for his assent to take it, is essential. A thing cannot be given, where there is not an assent to take; and it is an understanding, when the jury are sworn to give a verdict, that the party will be in court, and willing to take it. The not *taking*, as in every other case,

dispenses with the giving. Looking at the *American* reports, I find this point to have been directly before the constitutional Court of Appeals in *South Carolina*, in the great case of *Brown* v. *Frost*, 2 *Bay*. 133. It was on a motion for a new trial, because the Judge, at *Nisi Prius*, did not direct a nonsuit. A nonsuit had been moved for on the trial, on the ground of there being no evidence to connect the plaintiff's title with him in whom the estate was admitted to have been, but the recital of a deed from him in a conveyance made to the plaintiff. It was the case of a lost deed. It was objected that the Judge had not the power *ex adverso, nolente volente* the plaintiff, to order a nonsuit. The Court lay it down that he had power, but that the recital was evidence to go to the jury. It came also before the Court in *Hopkins* v. *De Graffenreid*, 2. *Bay*. 187. The defendant called for a nonsuit, the plaintiff opposing, and contending that the case should go to the jury. *Bay*, Justice, refused to suffer a case to go to the jury, where there was nothing to support the plaintiff's right. It would be a nugatory act. The Court above sustained his right to order a nonsuit, but thought there was evidence to go to the jury. In *Massey* v. *Trantham*, 2 *Bay*. 421, we have precisely the course taken, which I have in this case pointed out. The Court were of opinion, that the judge in the Court below, should have directed a nonsuit, and in that case did not go into a consideration of the motion for a new trial. On the power of the Court to order a nonsuit, I will add, 2 *Bay*. 437. It was a motion to set aside a nonsuit, on the ground of its having been irregularly ordered, and the rule was discharged by the Court above as having been regularly ordered. But looking farther on in that book, 441, I find the language that comes precisely up to my idea of the power of the Court, in regard to ordering a nonsuit. Nonsuit ordered by the presiding judge, without the consent of the plaintiff in the action, who was willing to risk his case with the jury. It was objected that when a jury is once sworn upon a cause, and charged with the evidence, the judge cannot discharge them; that if the plaintiff thought proper to risk his cause to a jury upon such evidence as he could procure, or such as he thought would bear him out in his case, a judge cannot step in between him and the jury, and prevent them from giving a verdict; nor can a judge order a plaintiff to

1812.

MORGAN v. STELL.

be nonsuit against his will and consent, so as to deprive him by such order, of the benefit of the inestimable trial by a jury of the country. To which it is answered, that it is the province of the judge to determine the law; and no legal evidence being offered to support the suit, it is his duty to direct a nonsuit; for it would be nugatory to send a case to a jury, where there was no legal evidence to support it; and whatever the old practice might have been in *England*, of the judges not ordering a nonsuit without consent of the plaintiff, when they discovered a defect of evidence, it was neither founded in good sense, nor sound reason, and modern adjudications have determined otherwise. In this country, it is invariably the practice for the judges in all cases to exercise that discretionary power, which the law has vested in them, whenever they have discovered a defect of evidence to support the plaintiff's claim. Such was the argument of counsel in this case.—And by the Court, in this case on a trial before a jury, wherein it appears that the evidence is insufficient to make out the plaintiff's case, or where there is a total failure of proof necessary for that purpose, it is the duty of a judge to enter a nonsuit, whether the plaintiff consent or not; because there can be nothing to send to a jury to found their verdict upon, and consequently any verdict they would give, would be a nugatory act. I know a distinction has been taken in the books between the ordering a nonsuit, where a point has been reserved, and where it has not; and it is on that ground, that it has been said by some judges, "that it is impossible to order a nonsuit to be entered, unless by consent, after the plaintiff had appeared, "and a verdict has been taken." But there is no reason for the distinction, and it has given way to a better and more modern practice. For what is it whether he has answered, and a verdict given, if on ground of law he must be thrown out of court ultimately in the action, wanting law or fact established to support the proceeding? But here the point was reserved, and if the objection has any thing in it, does not lie.

I could go through the courts of the union, and shew that this is the understanding of the law; but I content myself with referring to the *New York* Reports, 8 *Johns.* 25, where on a motion for a nonsuit, the judge ruled "that the evidence

1812.

MORGAN v. STELL.

"was insufficient to sustain the action, and nonsuited the "plaintiffs," on which a bill of exceptions was tendered, but affirmed in bank; for by the Court, "if the cause had gone to "the jury, the testimony would not have warranted a ver- "dict for the plaintiffs, and the motion to set aside the non- "suit, ought to be denied." Why should I labour a thing so plain, when the cases are numerous, where a verdict taken for a defendant on a point of law which the judge rules in his favour, will be set aside, and where no damages are to be liquidated, will be ordered to be entered up for the plaintiff. This proves that where a verdict is taken, or to be taken, or depends upon an *abstract* point of law, it is at the absolute disposal of the Court, without consulting the plaintiff or defendant in the case.

New trial refused.

WELLS surviving executor of HILL *against* STEWART.

Philadelphia, Monday, December 28.

THIS was an action for money had and received, tried before *Brackenridge* J. at a *Nisi Prius* in *November* last, when a verdict was found for the plaintiff, damages 457 dollars 52 cents.

The house of *A* and *B* at *Madeira*, shipped two pipes of wine to *Philadelphia* for account and risque of *S*, to whom a bill of lading was sent. The wine did not arrive until after the death of *S*, when his executors declined taking it, and requested *C*, who was concerned in the *Madeira* house, to keep it till it was paid for. It remained in the cellar of *C* until after his death. It was then delivered by the agent of the executors of *C* to the wife of *S*, upon her alleging that it was her property, and that *C* had kept it in his cellar for her use. The wife of *S* sold the wine, and received the price.

Held, that the executors of *C* could not maintain an action against the wife of *S*, for the proceeds of the wine.

Upon a motion for a new trial, his honour reported the facts to be, that on the 8th of *July* 1796, the house of *Le Mar, Hill, Bisset & Co.* of *Madeira*, shipped two pipes of wine to *Walter Stewart*, Esq. in *Philadelphia*, and for his account and risque. The wine did not arrive until the 29th of *August*, after the death of general *Stewart*. The freight was paid by his executors in *September* 1796; and *Francis West*, one of them, in his private capacity gave bond for the duties. General *Stewart's* estate was ascertained to be insolvent sometime in the year 1796. At the time of the ar-

1812.

WELLS v. STEWART.

rival of the wine, Mr. *West* requested *Henry Hill*, who was in some way concerned with or for the *Madeira* house, to take charge of it, and not to part with the possession till it was paid for. It was accordingly placed in his cellar. When the duties fell due, Mr. *West* paid them, and charged them to Mr. *Hill*. The wine remained in Mr. *Hill's* cellar, until his death in the year 1798; sometime after which, Mrs. *Stewart*, the defendant, and one of the executors of general *Stewart*, demanded it of *Gideon H. Wells*, the agent of Mr. *Hill's* executors, *as her own property;* and upon her producing an affidavit, the nature of which did not distinctly appear, he delivered the wine to her order, without the knowledge of *Hill's* executors. By Mrs. *Stewart*, the wine was delivered to a wine merchant, who sold it and paid her the proceeds.

The counsel for the defendant requested the Court to charge the jury, that the action would not lie, because the principals alone, the house of *Le Mar*, *Hill*, *Bisset & Co.*, could maintain the action, and not Mr. *Hill*, the agent, or his executors; or if *Hill* was a partner, then it should have been brought by the survivors, against Mrs. *Stewart* as executor, because by the bill of lading the property was vested in her husband. But the Court directed the jury, that under the circumstances of the case the action was well brought.

Ingersoll and *Lewis* for the defendant. The action is wrong both as to plaintiff and defendant.

As to plaintiff's testator, he made no contract with either the defendant or *Walter Stewart*. The contract was made by his principals in *Madeira*. If he was factor merely, the factor cannot sue where the principal makes the contract. If he was one of the principals, on his death, the right of action survived. Mr. *Hill* did not even make himself responsible to that house, by the delivery. *Gideon H. Wells* alone did that. Of course there is no right of action in his executors on the ground of liability over. A recovery in this action is no bar to a suit by the house in *Madeira*. As to the defendant, she received the wine as executor, the wine having been in fact transferred to her husband by the

bill of lading. *Evans* v. *Marlett* (*a*). She should therefore be sued as executor. But if a new contract was made by her individually, it was made with the executors of *Hill* individually, and not in their representative capacity. *Hill* was dead at the time. Either way there must be a new trial.

Rawle for the plaintiff. Justice has been done by the verdict, and therefore a new trial should not be granted upon a point of form.

The action lies against the defendant individually, because she claimed the wine, sold it, and received the proceeds in that character. It was not accepted by General *Stewart's* executors, upon its arrival, but was placed in Mr. *Hill's* hands to secure the payment. Of course the bill of lading did not transfer the property to General *Stewart*.

It lies by the executor of *Hill*, because he held the wine as a pledge to secure the payment of the purchase money. It was received by his executors as his qualified property; and they may maintain an action for the value, because his estate is liable for the forthcoming of the pledge. The *Madeira* house cannot maintain an action, because the defendant is a stranger to them.

It also lies against her by the executors, because she relied upon a contract and agreement between her and Mr. *Hill*, and obtained the wine on that ground.

In Reply to Mr. *Rawle's* first observation, it was said, that where a verdict is owing to a mistake of the Judge, it is of no consequence what the merits of the case are.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

It appears from the evidence, that the wine, not having been delivered to General *Stewart's* executors, during the life of Mr. *Hill*, was at the time of Mr. *Hill's* death, the property of *Le Mar*, *Hill* and *Bisset*, whose agent he was. It has been suggested, that it was in fact delivered to Mrs. *Stewart*, one of the executors, because Mr. *Hill* kept it for her in his cellar at her particular request. But this suggestion not being supported by any evidence, and being incon-

(*a*) 1 *Lord Ray.* 271.

1812.

WELLS v. STEWART.

sistent with Mr. *West's* testimony, is not to be regarded. When the wine was delivered by *Gideon H. Wells* to Mrs. *Stewart*, it was delivered to her either as executrix of General *Stewart*, or on her own private account. Take it either way, I do not see how this action can be supported by Mr. *Hill's* executors. If the delivery was to Mrs. *Stewart* as executrix of her husband, the action should have been brought against the executors. If it was delivered on her own account, a new contract arose, not between Mr. *Hill* and her, for he was dead, but between her and *Le Mar & Co.*, whose property the wine was. If Mr. *Hill* had accounted for the wine with *Le Mar & Co.*, and thus made it his own, perhaps the action might have been supported in the name of his executors, because the money when recovered, would have been assets in their hands. But there is not the least evidence of any act, by which the property could have vested in Mr. *Hill*. Nor do I see how it could be vested in those persons who were his executors, for they never accounted for it to *Le Mar & Co.*; and even if they had undertaken to deliver it without orders, by which they rendered themselves responsible to *Le Mar & Co.*, this responsibility would have been incurred not as executors of Mr. *Hill*, but in their own private capacity, and in that case, the action, if maintainable at all by them, (as to which I give no opinion) must have been brought in their own names, and not as executors. But it appears to me, that the most proper way of bringing suit, would have been in the names of *Le Mar & Co.* whose property the wine undoubtedly was at the time of its delivery to the defendant. The plaintiff's counsel contended that the action was maintainable, on the ground of a sale by an agent, in which case the action will be either in the name of the principal or the agent. But supposing the sale to have been made by the plaintiffs as agents of the *Madeira* house, (of which there is no proof,) still the action should have been brought in their own names, and not as executors, for their testator had nothing to do with their agency, nor could his estate be in any manner involved in their transactions. Mr. *Hill's* agency ended with his life. At the time of his death, the wine remained in his cellar, the property of his principals; and if after his death his executors became the agents of the same principals, it was an affair

in which his estate was unconcerned. Upon the whole, I am clearly of opinion, that the plaintiff was not entitled to a verdict, and therefore there should be a new trial.

YEATES J. It cannot be denied, that unless Mr. *Hill* could have supported this action in his life time against Mrs. *Stewart* in her own right, it cannot now be maintained at the suit of his personal representative. I see no ground of action on the part of *Hill*. He was consignee and agent of the house at *Madeira*, who shipped the wine on account, and at the risk of *Walter Stewart*, but it did not arrive here until after his death. I find no testimony from which the jury could infer a *sub-contract*, as it is called, between Mr. *Hill* and Mrs. *Stewart*. The former stored it, as we may presume, from some arrangement made between him and the executors of *Stewart*, and kept it in his possession until the time of his death. The two pipes of wine were afterwards delivered to the defendant by *Gideon H. Wells*, as the general agent of the executors of Mr. *Hill*, without any particular authority for that purpose, in consequence of some representations made by her that the wine was her own property, founded on some affidavit, the particulars of which we are wholly uninformed of. It is not pretended, that there was any sale from *Hill* to the defendant in her own right, and consequently there is no ground of suit as between the present parties. But if the original contract respecting the two pipes of wine, was rescinded, either by mutual consent, or by *Stewart's* executors finding themselves unable to discharge the amount thereof out of their testator's assets, and Mrs. *Stewart* afterwards obtained the possession thereof, I have no hesitation in declaring my opinion, that she thereby has made herself responsible to the surviving partners of the *Madeira* house.

I am of opinion, that the present verdict cannot be supported on principles of law, and therefore should be set aside.

BRACKENRIDGE J. I am under the necessity of dissenting, *totis viribus contra*, as the reporters sometimes say. The leading facts of this case are these. A *Madeira* house had shipped wine for *Walter Stewart* of *Philadelphia*, the

1812.

WELLS v. STEWART.

wine not paid for. They had signed a bill of lading, and addressed a letter of advice to *Stewart*. Before the arrival of the wine, *Stewart* had deceased, and his estate was said to be insolvent, as it has since appeared to be. An acting executor of *Stewart*, (*West*) declined paying duties or taking the wine. He desired Mr. *Hill*, not that he was interested in the house, but, as was explained, had a concern for the interest of the house, had been occasionally an agent, or for reasons was supposed to be a friend, he desired *Hill* to take the wine and keep it till paid for. *West* was not willing to give his note for the wine. *Hill* took it into his possession. *West* entered it and paid duties, but charged *Hill*, who paid afterwards, so that *Hill* became possessed of a special property in this wine, and was to hold it for the *Madeira* house until paid for. After the death of *Hill*, his executor became possessed of this wine, having the same *special* property in it which *Hill* had. The defendant, an executrix of *Stewart*, under some pretence got possession of this wine, without paying for it. The executors of *Hill*, considering her as having got possession wrongfully, bring an action. They might have brought trover, but they have waived the tort, and have laid an assumpsit. The defence set up by the defendant on the trial was, that as executrix of the estate of *Stewart*, she had a right to hold it, the bill of lading and letter of advice having vested the property in *Stewart;* and for this was read, 1 *Lord Ray.* 271. It was laid down in my charge to the jury, that a bill of lading and letter of advice did not vest the interest in the consignee *absolutely;* for in case of the insolvency of a consignee, it might be stopped *in transitu*, and for this I referred to 7 *Mass. Rep.* 453., as a strong case, where the extent of the right to stop is well explained by Chief Justice *Parsons*. But there was no stoppage *in transitu*, for it became unnecessary, the executors declining to accept; the acting executor of *Stewart*, *Hill*, or his representative, was to hold it until paid for. The representatives suffered it to slip out of their possession, and they are themselves answerable to the *Madeira* house. It was not an act of agency by which they lost possession, it was contrary to their trust. They cannot elect to consider it an act of agency, to let the property go without being paid for, and throw the loss, if there should be loss, upon the *Madeira*

house. They have therefore a right to bring their action against the person divesting them of possession without paying for the wine, in the manner that has taken place. The *Madeira* house might elect to take the defendant and bring suit; but they are not bound to do it. They may sue the executors of *Hill*, and charge them with a conversion of the property, or recover the value as money had and received to their use. The *Madeira* house will most probably not elect to take the defendant, because they will be embarrassed with her claim as executrix of the estate of *Stewart*, on the score of it being made the property of *Stewart*, by the bill of lading and the letter of advice. She will plead no assets, the estate being insolvent, and this being alleged to have gone in the mean time, to satisfy other creditors. The *Madeira* house, it is true, may take their chance of proving, as was shewn to be the case here, that the defendant did not obtain the property as executrix, but in her individual capacity, and therefore must be answerable for it without a reference to the estate. But why shall the *Madeira* house be turned round to this, when the justice of the case is already reached, by the executors of *Hill* recovering for the use of their house, as in fact cannot but be supposed to be the case? Costs must be paid before a new action can be brought. The statute of limitations may intervene, and the demand be wholly gone. I did not expect, on a motion for *a new trial*, to hear a motion *in arrest of judgment* argued. For the defence on the trial is deserted, that this wine by the bill of lading became the property of the estate of *Walter Stewart*, and that the defendant, as executrix, had a right to it. The question now made, is whether the principal or agent has a right to bring the action. But it involves no question of agency, when the agent parts with property contrary to his duty, and is answerable for it. He is liable to the principal, and the *supposed* agent may look after the wrongdoer. I say *supposed*, because the agent by negligence makes the act his own, and he is *quoad hoc* no agent. The taking was a matter between the executors of *Hill* and the defendant, and the *Madeira* house are not bound to take any notice of it. The executors of *Hill* cannot elect to say that the *Madeira* house shall take notice of it, but may sue for themselves as they

1812.

WELLS v. STEWART.

have done in this case. If they recover, they may pay over the money so recovered, and save themselves from a suit. I am therefore of opinion against a new trial, that the action was well brought, and that judgment be upon the verdict.

New trial awarded.

BOGGS and another *against* TEACKLE.

Philadelphia, Monday, December 18.

If between the return of a *ca. sa.* against the principal, and the return of a *sci. fa.* against the bail, the principal is discharged under a bankrupt or insolvent law, the bail are intitled to an *exoneretur*.

A is arrested and held to bail in *Pennsylvania* for a debt contracted in the *District* of *Columbia*. He is afterwards discharged under a general statute of *Maryland*, where he resides, from all his debts, upon the surrender of his property to trustees; and is exempted by a special statute from the necessity of giving notice to his creditors.

Held that, as the state of *Maryland* gives effect to a discharge under the law of *Pennsylvania*, the same effect ought to be given to hers, and therefore the bail are intitled to an *exoneretur*.

THE defendant was arrested and held to bail by process out of the Common Pleas of *Philadelphia* county, in the year 1808, upon a note of hand for 1000 dollars, drawn by him in the city of *Washington* on the 18th of *March* 1807, and payable there. The cause was removed to this Court, and a verdict obtained on the 19th of *November* 1811, in the plaintiffs' favour, for 1222 dollars 37 cents, on which final judgment was entered on the 13th of *December* following. A *ca. sa.* issued returnable to *March* term last, which was returned *non est inventus;* and a *scire facias* went against the special bail, returnable the last *Monday* in *July*.

During the adjourned court in *July*, and before the return day of the *sci. fa.*, *Binney* on behalf of the bail, moved for leave to enter an *exoneretur*, upon the ground of a discharge obtained by the defendant on the 2d of *June* 1812, under a general insolvent law of *Maryland*, where he resided.

The facts in relation to this discharge were these: at *April* term 1811, the defendant presented his petition to the judges of *Somerset* County Court, stating that he was in execution, and that in consequence of disasters in commerce, he was unable to pay his debts, but was willing to deliver up for the use of his creditors all his estate on the terms prescribed by law, a schedule of which, together with a list of his creditors, as far as he could ascertain them, was annexed. The Court thereupon ordered, that he should be discharged from custody, and should give notice to his creditors, by publishing a copy of the order in one newspaper in *Baltimore*, *Philadelphia*, *Washington*, and *Easton*, three months before the first

1812.

BOGGS et at. v. TEACKLE.

Saturday in *September* court, and to be continued four successive weeks.

This petition and order were made under a statute of *Maryland*, passed in *November* 1805, which directed notice either public or personal to the creditors; and upon the debtor's executing an assignment to a trustee, and obtaining the assent in writing of two thirds in value of his creditors, authorized the Court to discharge him from all debts, covenants, contracts, promises and agreements, due, owing or contracted by him at the time of his application. The law contained a provision, that if within two years after the debtor's application, any creditor should allege in writing to the County Court certain frauds against the debtor, and support the allegation upon the trial of an issue to be directed by the Court, he should be precluded from all benefit under the act.

On the 27th of *December* 1811, the legislature of *Maryland* passed a private statute, giving power to the *Somerset* County Court, to extend the benefit of the law of *November* 1805 and its supplements to the defendant, without shewing the assent in writing of his creditors, and without producing proof that he had given the notice required by the act; and on the 2*d of June* 1812, the County Court, on the defendant's executing a general assignment to a trustee, accordingly discharged him from his debts &c., in the terms of the law.

Tod and *Hallowell* for the plaintiff, made three objections to the motion. 1st. That the bail were fixed before the discharge of the principal, this having taken place on the 2d of *June* 1812, and the *ca. sa.* having been returned in the month of *March* before. 2d. That the debt, having been contracted out of the state of *Maryland*, it could not be discharged by a law of the state. 3d. That the special act of *Maryland*, was in such plain violation of the principles of justice, that no discharge under its authority should be respected in this state.

1. In *Woolley* v. *Cobbe* (*a*) the precise point was determined. Lord *Mansfield* and the whole court say, "that if "the certificate is obtained by the bankrupt, *before* the bail,

(*a*) 1 *Burr.* 244.

1812.

BOGGS et al. v. TEACKLE.

"are *fixed*, they shall be discharged; but if they are fixed be-"fore the certificate is obtained, they remain liable." The bail are fixed by the return of the *ca. sa.* The same principle was adopted by the same court, in the subsequent case of *Cockerill* v. *Owston* (*a*). If the bankrupt dies after the return of the *ca. sa.* the bail must answer; and his discharge by a bankrupt or insolvent law is within the same principle.

2. The debt in this case was contracted out of the state of *Maryland;* and no law except that which binds the person of the creditor, or emanates from an authority within whose jurisdiction the contract was made, can discharge it. The *lex loci contractus*, which creates the charge, may be allowed to create the discharge, and over the persons of creditors within their jurisdiction, every free state may have authority to legislate; but it cannot be endured that a debtor shall by the laws of a country, foreign both to the place of the contract, and to the person of the creditor whom the debt follows, obtain a discharge from the debt. The laws of no country have an extraterritorial force, except so far as the comity of other countries may permit it; and in no case has this comity been carried so far, as to give effect to a discharge in such a case as the present. In *Green* v. *Sarmiento* (*b*), a discharge of the defendant by the bankrupt law of *Teneriffe*, was held by Judge *Washington* to have no effect upon a judgment in *New York*. In *Millar* v. *Hall* (*c*), where the defendant was discharged by the law of *Maryland*, the debt was contracted in *Maryland*. Here the debt became in fact a debt in *Pennsylvania*, by the judgment, which merged the original contract, and created a new one. Besides, the discharge is not final by the act of *Maryland*, until two years after its date. If the motion obtains, the bail will be exonerated, and yet perhaps the defendant's certificate be vacated.

3. The comity of this state to the state of *Maryland* is the only reliance of the bail. But can this Court be prevailed upon to shew any comity to a law, which contrary to the principles of natural justice, gives a debtor the liberty of obtaining a discharge secretly, without affording to a creditor the opportunity of suggesting fraud, concealment of property, or any thing in opposition to it? Nay, gives him this privilege

(*a*) 1 *Burr.* 436. (*b*) *Brown's Rep. App.* 31. (*c*) 1 *Dall.* 229.

as a special favour and accommodation, against the terms of a general law, and as it were from a fear that notice to the creditors would defeat it? If in any case respect should be shewn to a foreign law, it should be only when respect is due, and where the principles of the law are intended and calculated to attain equal justice between the parties embraced by it.

Binney for the bail. 1. The final discharge of the defendant was before the return of the *scire facias*, and so was the present motion. The time allowed to the bail *ex gratia* had therefore not expired. Under such circumstances the rule is not as it has been stated by the plaintiff's counsel; but on the contrary, an *exoneretur* may be entered at any time before the return of the *scire facias*. The principle is, that the discharge of the bankrupt is equivalent to a surrender; because it would be a useless circuity to compel a surrender in fact, when the next moment after, the Court would discharge the principal. Bail are fixed by the return of the *ca. sa.* only as to certain purposes. If the principal dies, they are liable. But though he is discharged by the bankrupt law, the bail may surrender; and as the surrender would be futile, they are intitled to relief on motion. So it was held in *Olcott* v. *Lilly* (*a*). So is the uniform practice at this day in *England;* 1 *Tidd.* 240; and the cases in *Burrow* do not contradict it. In *Woolley* v. *Cobbe* the defendant was not discharged, until the money had been levied by execution against the bail, and was in the hands of the sheriff. In *Cockerill* v. *Owston* the question did not concern the bail, but the principal only; and the single point was whether his certificate discharged the bail bond, as well as the original debt.

2. With respect to the general principle urged for the plaintiffs, it is conceded; but the courts in *Pennsylvania* have held a different doctrine, by which we are bound. Uniformity of judicial decisions is essential to the safety of the citizen. No greater calamity can befal any people, than to have its rights either of person or property fluctuate with the occasional opinions or feelings of men. This question then was settled by *Millar* v. *Hall*, where the original contract on

(*a*) 4 *Johns.* 407.

1812.

BOGGS et al. v. TEACKLE.

which the defendant received the money in suit, was executed in *Pennsylvania*, and the discharge was in *Maryland*. But it was more precisely settled in *Hilliard* and *Pippet* v. *Greenleaf* (*a*), where the debt was clearly contracted in *Penn-*

(*a*) For the following note of that case, the reporter is indebted to Mr. Justice *Yeates*.

HILLIARD and PIPPET v. GREENLEAF. } MARCH TERM 1800.

5b 336
6b 367
3sr 72

Motion to discharge the defendant on common bail.

A. contracted a debt in Pennsylvania, *and then removed to* Maryland, *where he was discharged under a bankrupt law. He afterwards returned to* Pennsylvania, *and was arrested. The court discharged him on common bail.*

THE defendant, resident in *Maryland*, obtained a discharge with divers other persons from all his debts, under a certificate of the chancellor of that state, grounded on an act of assembly, which passed during a session commencing on the 5th of *November* 1798, and ending on the 20th of *January* 1799. By the terms of the act, he was intitled to be discharged as a merchant, unless one fourth part of his creditors dissented therefrom, on his giving certain notice of his intention to take the benefit of this insolvent law, by a general publication in the gazette, and executing an assignment for the benefit of his creditors generally.

The chancellor certified that he had in all things conformed to the law, made his assignment and was discharged from his debts.

It was admitted that the plaintiffs were citizens of *Pennsylvania*, that the debt for which the defendant was arrested, was contracted in *Philadelphia*, and that upon a former application to this Court for the benefit of the insolvent acts here, he had not given notice to the plaintiffs pursuant to those laws.

Gordon for the plaintiffs objected to the motion.

The *Maryland* act is retrospective on debts theretofore due. Its operation is similar to the insolvent law of *New Jersey*, in *Grimes* v. *Allen*, 1 *Dall.* 188, discharging the debtor from imprisonment in that state, but not going beyond the limits. It is local in its nature. The law of *Maryland* under which *Hall* was discharged, 1 *Dall.* 229, was framed for general purposes, and may fairly be distinguished from the present. The inconveniences of such an act are highly obvious, as is fully shewn by the argument of the plaintiffs' counsel in that case. *ib.* 230. And good policy will prevent the court from going beyond the bounds of that decision.

Ingersoll and *W. Tilghman* answered, that it appeared in the beginning of the case of *Millar* v. *Hall*, that the *Maryland* law was enacted, subsequent to the debt in question, and to the institution of the suit For nine or ten years past, that state had passed no general insolvent law, but had deemed it sounder policy to enact special insolvent statutes, as the particular occasions arose. But confined as their act is, to individual cases, its effect in those cases is general and unrestricted. It discharges the peti-

sylvania, and a discharge under a law of *Maryland* held to be decisive. If this Court should revert to the correct principle, they must overrule all the decisions of their predecessors from *Millar* v. *Hall* down; for that principle does not regard the place where the contract was made, but merely the jurisdiction over the creditor's person. The *lex loci contractus* has respect to the construction, not to the discharge of contracts. No law can in strictness discharge a debt, but a law of that state within which the creditor is domiciled.

3. As to the character of the *Maryland* statute, this Court can never criticise the motives and views of an independent legislature. No free state would submit to it. The same measure of respect upon such subjects, that we shew, will be shewn to us; and a collision will be produced, as fatal to the dignity, as it will be offensive to the independence of the respective states. We must give credit and effect to all the insolvent laws of *Maryland*, or we must reject the whole. But in fact the special statute is of little moment. Notice has not been always required by our own law. The assignment of the debtor's estate is the material act, and that was made in the present case.

In reply to the case of *Hilliard* v. *Greenleaf*, it was said to be a surprise upon the bar, to have been but imperfectly argued on behalf of the plaintiffs, and to be contrary to the very decision on which it professed to be founded.

tioner from all his debts on his complying with certain pre-requisites. It is indeed more beneficial to creditors than the law under which *Hall* obtained relief, because the dissent of one fourth part of the creditors prevents the discharge of the debtor. Here the assignment is general, and equally advantageous to all the creditors. The courts of *Maryland* pay due respect to the discharge of debtors under the bankrupt laws of this state. Major *Smith* contracted debts in *Maryland*, and obtained a certificate of conformity from the commissioners of bankrupt here. His creditors in *Maryland* were not permitted to arrest him in that state. So of *New Jersey*, Mr. *Benezet* contracted debts there, and took the benefit of the bankrupt laws here. His person was held exempted from debts barred by our act, in the judicature of *New Jersey*.

The Court observed that it was of infinite consequence their decisions should be uniform. The principal case is precisely the same in principle as that of *Millar* v. *Hall*, and we consider ourselves bound by that determination.

Let the defendant be discharged on common bail.

1812.

BOGGS et al. v. TEACKLE.

TILGHMAN C. J: This is a motion on behalf of the bail of the defendant, for an *exoneretur* to be entered on the bail piece, on the ground of the principal having been discharged from his debts, by virtue of an act of assembly of the state of *Maryland*.

Several objections have been made to this motion by the plaintiff's counsel; the first of which is, that it is too late, the bail having been previously fixed by the return of *non est inventus* to a *ca. sa.* against the principal. In support of this was cited the case of *Woolley* v. *Cobb*, 1 *Burr.* 244. Lord *Mansfield*, in delivering his opinion, does indeed say, that if the bail are *fixed* before a certificate of bankrupt is obtained by the principal, they remain liable. It is to be remarked however, that in that case there had been judgment against the bail, and a *fi. fa.* issued and the money levied, and in the sheriff's hands, before the certificate was obtained. Under those circumstances, the bail had no pretence for relief. But if Lord *Mansfield* meant to lay it down as a rule, that the bail remained liable in case the principal obtained his certificate after the return of a *non est inventus*, and before the time allowed for surrendering him had expired, he has been contradicted by subsequent cases, as appears by the authorities cited in *Oxott* v. *Lilly* in the Supreme Court of *New York*, 4 *Johns.* 407. A *ca. sa.* having been returned *non est inventus*, the bail is so far fixed, that he remains liable, unless the body of the prinpal is surrendered within the time allowed *ex gratia*, by the practice of the court. If the principal dies there is no relief. But if he becomes intitled by law to a discharge from imprisonment, an *exoneretur* will be entered without an actual surrender, on application at any time within the period allowed for surrender; because it answers no purpose to surrender a person who is intitled to an immediate discharge. This is the settled law in *New York*, and it is so reasonable, that I fully concur in it. In the case before us, the motion was made before the return of the *sci. fa.* against the bail. It was therefore in time.

2. The second objection goes to the law of *Maryland*, by which the defendant was discharged from his debts, on executing a conveyance of all his estate in trust for his creditors. It is contended that this debt, having been contracted in the city of *Washington*, the legislature of *Maryland* had no control over it. Were it a new case, I should think it well worthy of

very serious deliberation. But the law having been settled by repeated decisions in this Court, I do not think myself at liberty to disturb it. The very point was expressly decided in *Hillyard* and *Pippet* v. *Greenleaf*, where the debt was contracted in this state, and the defendant discharged by act of assembly of *Maryland*. The rule which we have adopted, is to extend the same courtesy to our sister states which they shew to us. It was so laid down in *Smith* v. *Browne*, 4 *Binn.* 203. The courts of *Maryland* have paid regard to our insolvent laws, where they have extended to debts contracted out of *Pennsylvania*. We therefore pay the same regard to their laws. But it is said, that although we ought to pay regard to the general laws of *Maryland*, yet the case of the defendant is an exception, because he was discharged by *favour*, the legislature having passed a special act dispensing with some important provisions of their general law, that is to say, dispensing with notice to the defendant's creditors, and with the assent of two-thirds of them in value, to his discharge. What were the reasons of this exemption does not appear; but the defendant was not discharged without an assignment of all his property, and his creditors may at any time within two years, invalidate his discharge, if they can convict him of fraudulent practices. But we shall take dangerous ground, if we enter into an inquiry into the reasonableness of the law of *Maryland*. Such an inquiry on our part, would lead to a similar one on theirs, with respect to our laws, and the spirit of courtesy would soon be extinguished, amidst mutual accusations and recriminations. No independent state will submit to have its motives or its policy questioned by another. There is no acting by halves; we must either give full faith to the laws of our neighbours, or reject them altogether. Upon the whole, I am of opinion that agreeably to the established practice of this Court, the motion for an *exoneretur* should be granted.

Yeates J. *Millar* v. *Hall* in *January* Term 1788, led the way to *exonereturs* being entered on the bail piece, where the defendant had been discharged under an insolvent law of the state of *Maryland*, which was in the nature of a general bankrupt law. It was the policy of that state not to pass a general insolvent law, but to enact special insolvent statutes, as

1812.

Boggs et al. v. Teackle.

particular occasions arose. The decision has been followed in other cases, and particularly in *Hilliard* and *Pippet* v. *Greenleaf* in *March* Term 1800, where the defendant was a citizen of *Maryland*, but the plaintiffs were citizens of *Pennsylvania*, and the debt was contracted here, a note of which I have taken. That case in all its essential features, cannot be distinguished from the present. It appears to me dangerous in the extreme to depart from established principles settled on due deliberation, upon a new artificial system of reasoning. It would tend to entrap those persons who rest their confidence in the uniformity of decision of the tribunals of justice, so devoutly to be wished for in every free country, governed by known laws.

I am therefore of opinion that the *exoneretur* should be entered.

Brackenridge J. I concur in allowing the motion, solely on the ground of the *stare decisis*.

Motion granted

5b 340
10s r112
3w 324
6wh 291
7ws 419
4 329
4 330
7 430
9 408
43 14
63 258
87 391

Philadelphia, Monday, December 28.

M'Corkle *against* Binns.

Evidence from a comparison of handwriting, supported by other circumstances, is admissible. On the same principle, from a comparison of the types, devices &c. of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may be authorized to infer that both were printed by the same person.

THIS was an action on the case against the defendant, for two libels published in his gazette, the *Democratic Press*, on the 9th and 16th of *September* 1808, against the plaintiff, who was editor of a gazette called the *Freeman's Journal*.

To print and publish of *A*, "that he has been deprived of a participation of the chief "ordinance of the church to which he belongs, and that too by reason of his infamous, "groundless assertions," is a libel.

So is any malicious printed slander which tends to expose a man to ridicule, contempt, hatred, or degradation of character.

If after a jury are sworn, and before the verdict, one of the parties learns that a juror before he was impannelled, declared that he had made up his mind against him, he must make it known at once, if he intends to rely on it. He must not take the chance of a verdict in his favour, and upon its being the other way, move for a new trial upon the declarations of the juror.

The juror implicated, may be examined to shew that he did not make the declarations imputed to him; but neither he, nor any of the jurors can be asked, whether he was not in favour of the lowest sum that had been named for damages by any of the panel.

1812.

M'Corkle v. Binns.

The declaration contained three counts. In the first and second the same publication was laid different ways. It was as follows: "But what will not ambition and revenge des- "cend to? Who could expect better from such a quarter? "Was not the envenomed simpleton, who professes to be "the editor of that paper, *deprived of a participation of the "chief ordinance of the church to which he belongs, and that "too by reason of his infamous and groundless assertions?* "Were it not for the lenity of some, this *public pest* would "long since have been silenced; but the day is not far dis- "tant, when the deep toned bell, will toll the exit of his "paper." The third count, set out the publication in the paper of the 16th of *September*, which was as follows: "Cer- "tificates of religion. Of late we have had a display of cer- "tificates to prove that *Wm. M'Corkle* has been in full stand- "ing and communion with the church for some years. I "deny the truth of the assertion, and affirm that the certifi- "cates he has produced, do not prove it. And I further "affirm, that *he has been deprived of his full standing, and of "partaking in communion, because of his groundless and in- "famous assertions.* I do not affirm that he has been thus "deprived of partaking in communion, by any regular act of "the regular officers of the church of which he is a member; "but do distinctly and decidedly affirm, that he has absent- "ed himself from the table, and thus prevented the session "from being called to investigate his conduct."

The cause was tried under the plea of Not Guilty, with leave &c. before *Brackenridge* J. at a Nisi Prius in the last month, when the jury found a verdict for the plaintiff, 500 dollars damages; and now upon a motion for a new trial, which was accompanied by a motion in arrest of judgment, the material facts were reported as follows:

For the purpose of proving the papers, the plaintiff called *William T. Donaldson*, who stated that he was a subscriber to the *Democratic Press*, and the defendant was the editor of it. The papers were left daily at *Donaldson's* house by one of the defendant's carriers, and it was his custom to have them filed by a clerk, and preserved. A number of them had been thrown into an upper room, in which lumber was kept. The plaintiff came to *Donaldson's* house after this action was commenced, and being informed that he

1812.

M'CORKLE v. BINNS.

filed his papers, asked permission to search for those he wanted, and went up with *Donaldson* for that purpose. After being there for some time, the plaintiff said to the witness, that it was cold, and there was no occasion for him to take the trouble of staying; that he might go down stairs, and the plaintiff would continue the search. *Donaldson* went down, and sometime after the plaintiff came to him with a file of papers which *Donaldson* believed to be his own; and at the request of the plaintiff wrote his name on the papers of the 9th, 12th and 16th of *September* 1808. The witness did not perceive that the plaintiff had taken up any papers with him. The room was open to *Donaldson's* family; and he had not been in it perhaps for a month before. He knew the defendant to be the editor of the *Democratic Press* by general reputation, and by having given him an advertisement, which he promised to insert in the paper, and which was accordingly inserted, and paid for to the clerk of *Binns* in his presence. The witness subscribed for the paper at the same time.

His Honour, against the consent of the defendant's counsel, permitted this evidence of publication to go to the jury.

Another witness was called by the plaintiff, and proved that he had bought a paper of the 16th of *September* 1808, then produced, at the defendant's office. This paper also went to the jury; and in his charge, the judge told them, that they might compare the types, devices &c. on this, with the two papers found in *Donaldson's* house, for the purpose of ascertaining the authenticity of the latter.

Several reasons were assigned for a new trial, and one in arrest of judgment. Of the former, those that were pressed in the argument were, 1. That one of the jurors declared before the trial, that he had made up his mind against the defendant, and if called on the jury, that he would inform the Court of it. 2. That the Court erred in permitting the newspapers to go to the jury upon insufficient evidence of their publication by the defendant. 3. That the Court also erred in permitting the jury to form a judgment by comparison of newspapers. The motion in arrest of judgment, was that the publications in question were not libellous.

In support of the first reason for a new trial, the defendant's counsel called a witness named *Jonathan Carson*,

who swore that on the evening of the day when the trial was called on, the sheriff's officer, who was summoning *tales* men, came to him and ordered him not to leave the court. *George Summers*, the juror in question, then came up to the witness, who told him he would soon be caught. In two or three minutes *Summers* was summoned. He then observed to the witness, *that it was of no use to take him, he had made up his mind against Binns. Binns has published a libel on religion, and I will give my verdict against any man who publishes a libel on religion, and I will inform the Court so, if I am impannelled on the jury.* The witness said that *John Wagner* was present about the time, and near enough to hear. The next day after the jury were sworn, *Carson* said he mentioned it in *Rubicam's* tavern in the presence of several persons. He also mentioned it to Mr. *Browne*, one of the defendant's counsel, before the verdict was given in. [The defendant knew it after the jury had retired, and before they returned.]

Lambert Smith swore that he was present at *Rubicam's*, while the trial was going on, and heard *Carson* state what he had since sworn in court. *Summers* was as respectable as any man, in his opinion, and *Carson* was also a reputable man.

John Wagner swore that he was in court at the time alluded to, but did not recollect seeing *Carson* there. He saw *Summers* in court, but did not recollect having any conversation with him upon the subject of this suit.

The plaintiff's counsel then called Mr. *Summers;* but he was objected to, on the authority of *The Lessee of Cluggage* v. *Swan* (*a*), he being the party charged with improper conduct. A juror should not be permitted either to impugn or support his verdict.

On the other hand it was said, that though he could not impugn, he might be examined to support the verdict. *Dana* v. *Tucker* (*b*). Any verdict might be avoided, if the rule were otherwise.

Tilghman C. J. The Court see no objection to examining the juror. He is a legal witness. He is in nowise inte-

(*a*) 4 *Binn.* 150. (*b*) 4 *Johns.* 487.

1812.

M'CORKLE v. BINNS.

rested; and to reject him would be perhaps to exclude the truth. Where a matter of fact is brought before the Court, they must try it; and if the case requires it, they must judge of the credibility of witnesses. It is impossible to decide in any other manner.

George Summers then swore, that he was a talesman in this cause. That he had not been in court more than half a minute when he was summoned. Mr. *Mitchell* who was standing by, said, you are caught. *Summers* replied, that he did not believe either *Binns* or *M'Corkle* would have him on the trial, that he supposed it was a political trial, and he did not believe that either had much regard for his politics. *He did not know then that the cause of action was on account of religion, nor did he know it until it was opened by counsel after the jury were sworn. He did not tell* Carson *that he had made up his mind against* Binns, *nor that he would tell the Court so, nor that he would find a verdict against any man who published against religion.*

The plaintiff's counsel then proposed to ask Mr. *Summers*, whether he had not been for the lowest damages of any of the jury: But the Court overruled this question, and would not permit it to be put to other jurors who were attending. The Chief Justice said he thought it unnecessary in this case, and the other judges said that it was wrong on principle, to inquire into the proceedings of the jury, by questions to the jurors themselves.

C. J. Ingersoll for the defendant. 1. The evidence that we have given of the juror's declarations is positive; that of the juror is negative, and proceeds from an interested quarter. The former cannot be false without perjury; the latter may be. The Court will therefore suppose the declarations to have been made; and as they would have been a ground of challenge before the juror was sworn, and are decisive evidence that the juror did not stand indifferent, a new trial should be granted. The precise point in this case was ruled in *Harding's Kentucky Rep.* 167.

2. The papers were not duly proved, when the judge gave them to the jury. Their identity with those which *Donaldson* received from the editor, was in no respect established.

1812.

M'CORKLE v. BINNS.

Until that was done, it was no more, than giving a paper in evidence, without a particle of proof that the defendant had published it, which would have been clearly erroneous.

3. The comparison of newspapers was never before stated as a ground to infer authorship. Types and devices may be imitated so as to escape detection. Even comparison of handwriting will not do; but this is infinitely less.

4. The narr contains no libel. To say or write any thing concerning ecclesiastical affairs is not actionable, unless the party spoken of gets his living by the church, or receives special damage, which is laid in the declaration. Scandals which concern matters merely spiritual, are in *England* cognizable only in the Ecclesiastical Court. 3 *Bl. Com.* 125. The common law does not notice them. Our own law emphatically disregards them, because it permits an unbounded liberty in religious opinions. It neither requires nor protects particular doctrines, and of course cannot take notice of a privation of religious privileges, nor consider it as an injury to character. The whole controversy is ecclesiastical. The secular arm cannot punish nor terminate it.

M'Kean for the plaintiff. 1. The fact of the declarations is clearly disproved. The Court cannot but perceive there is error on one side, and until further proof is brought, the party impeached must be deemed innocent. But if the words were used, the defendant knew it before the verdict, and should immediately have communicated it to the Court. He cannot take the chance of a verdict, and endeavour to defeat it when it is against him.

2. The proof of the papers was sufficient to go to the jury. Every fact was distinctly shewn, except the negative that the defendant or some other person, had not interpolated the papers in question. This was a matter for the jury to decide; and inasmuch as the defendant could have shewn to a demonstration, that he did not print such papers, if that had been the fact, the absence of that proof concluded the matter. Much less than this has been held sufficient evidence of the publication for the jury. *Peake's Ev.* 308. *Baldwin* v. *Elphinston* (*a*), *M'Nally* 642. *ch.* 32., 4 *Bac. Abr.* 458. *Libel. B.* 2. *King* v. *Almons* (*b*).

(*a*) 2 *W. Black.* 1037. (*b*) 5 *Burr.* 2687.

1812.

M'CORKLE v. BINNS.

3. Comparison of handwriting is a ground of judgment, and a species of evidence, when supported by other circumstances. So are types and devices. If the defendant can rebut, let him. Publication was a fact, and the jury had a right to weigh the resemblance, as a circumstance. This was all the Court authorised them to do. 3 *Selw. N. P.* 930. 933.

4. That this is a libel no man can doubt. Any malicious defamatory writing, tending to expose one to ridicule, hatred or contempt, is a libel. 4 *Black. Com.* 150., 3 *Selw. N. P.* 925., 1 *Hawk. ch.* 73. *sec.* 1. 3. 4. 10., 4 *Bac. Abr. Libel.* 450. *O.* 2. *Villers* v. *Monsly* (*a*). It is not possible that any man can be driven from the chief ordinance of his church, for infamous and groundless assertions, or in consequence of those assertions be forced to fly from an investigation, without losing his character; and it is this which is falsely charged against the plaintiff. The offence has nothing ecclesiastical about it. It is true that it consists in charging the loss of standing in the church; but the cause assigned is infamous falsehoods. To publish in writing of a man that he is an infamous liar, is a libel. This is the same thing, with conviction and degradation added.

Browne in reply, said he would leave the motion in arrest of judgment, upon the argument of his colleague.

On the first reason for a new trial, he remarked that if the Court had any doubt, they ought to grant the motion, because the plaintiff would not be injured by that course, and the defendant might suffer by a contrary one. The fact of his knowledge before the verdict was immaterial, because the time for challenging had gone by. A cause of challenge not known, is cause for a new trial. 6 *Bac. Abr.* 661. *Trial L.* 4., 3 *Bac. Abr.* 756. *Jury E.* 5.

On the second, he contended that until the publication was proved, the paper could not be read. The judge must therefore decide the question of publication in the first instance. Here the essential fact, the identity of the papers, was left to the jury; but until that identity was proved, the jury had no right to hear the papers.

On the third point, he argued that the comparison of types

(*a*) 2 *Wils.* 403.

was infinitely too slight a basis for the judgment of a jury to be formed upon it. It would be a rash judgment. Hand-writing has a peculiar character, which none but the author can give to it; types and devices are the fruit of an art, which can reproduce the same character *ad infinitum*. The former is never relied on, but when powerfully corroborated; the latter has no weight whatever.

Tilghman C. J. This is an action for two libels published by the defendant in a newspaper called, "*The Democratic Press*," of which he is the editor and proprietor, on the 9th and 16th of *September* 1808. Motions have been made by the defendant for a new trial and in arrest of judgment. There were five reasons for a new trial filed, but as some of them were abandoned, I shall consider those only which were insisted on. These may be reduced to three heads. 1st, That one of the jurors declared, before he was impannelled, that he had made up his mind against the defendant. 2d, That the judge who tried the cause erred in law, in permitting the newspapers to be read to the jury. 3d, That he erred in suffering the jury to form a judgment by comparing one paper with another.

1. There is no occasion to consider the *law* on the first point, because I do not think the defendant has established the fact. It was sworn indeed by one witness, *Jonathan Carson*, that after *George Summers* had been summoned as a talesman, he heard him say, that "it was of no use to take "him, as he had made up his mind against *Binns;* that *Binns* "had published a libel against religion, and he would give "his verdict against any man who published a libel against "religion, and that he would inform the Court of his opi-"nion, if they went to impannel him on the jury." In corroboration of *Carson's* evidence, it was proved by *Lambert Smith*, that during the trial he heard *Carson* say, substantially, the same thing that he has sworn, at *Rubicam's* tavern, in the presence of ten or a dozen people. On the other hand *Summers* swore that he never said any such thing, and that in fact so far from having made up his mind, he did not know what the cause of action was until after he was impannelled; and he stands corroborated by this circumstance, that he did not say any thing to the Court of his having formed

1812.

M'CORKLE v. BINNS.

an opinion on the subject. I am loth to impute perjury to any man where there is a possibility of mistake. It is possible, that in a crowded court house, *Carson* might have mistaken something which he supposed to have fallen from *Summers*. But I do not conceive it possible that *Summers* can be mistaken as to his having made up his mind against the defendant. It appears that they are both men of good character. All that I can say therefore is, that it is an extraordinary affair, but I do not consider the fact set up by the defendant as sufficiently established. There is another circumstance which would make me incline against a new trial on this point. It does not appear at what precise time, this matter first came to the knowledge of the defendant or his counsel; but it is very certain that it was *before the verdict*. Now if the defendant supposed that he should not have a fair trial, he ought to have laid the matter immediately before the Court, and requested that the jury might be discharged. He ought not to have taken the chance of a verdict in his favour, and kept his motion for a new trial in reserve; because the plaintiff and defendant were then placed on an unequal footing. I mention this for the direction of those, who may happen to be in like circumstances in future.

2. In order to understand the second and third points, it will be necessary to take a view of the evidence, [which the Chief Justice accordingly stated.] If the judge had been satisfied that the papers were not identified, he might have withheld them from the jury; but considering it as a doubtful matter, I cannot say that he was wrong in submitting it to the jury. It was possible that the plaintiff might have inserted a paper of *his own*, in the file which he found upstairs; but enough had been shown to authorise the Court to submit the matter to the jury. It is like the common case of a deed which is not immediately in issue, being offered in evidence. If the Court think it not sufficiently proved, they may refuse to suffer it to be read. But if the evidence in favour of it has any considerable weight, they may and generally do leave it to the jury.

3. Besides the paper of the 16th of *September* found in *Donaldson's* house, there was another of the same date given in evidence, which was proved to have been purchased from the defendant's shop. This being identified beyond all

doubt, the judge told the jury that they might compare the type, devices &c. on this, with the two papers found in *Donaldson's* house. The defendant's counsel say this was wrong, because proof by comparison of *handwriting* is not legal, and *à fortiori* proof by comparison of *types* &c. If comparison of hands were in no case legal evidence, it would operate strongly in favour of the defendant's argument; but I do not take the law to go so far. After evidence has been given in support of a writing, it may be corroborated by comparing the writing in question, with other writing concerning which there is no doubt. The law is so laid down in *Peake* 104, who says, "that the courts of justice have wisely rejected "all evidence from mere comparison of hands, unsupported "by other circumstances." Some of the old books give us a reason for not submitting comparison of hands, that perhaps some of the jury cannot write. But when they *can all write*, that reason has no weight; and I believe it is very rare indeed at this time of day, to find a juryman in this city who cannot write. If the discovery of truth is the object of evidence, it must be confessed, that in doubtful cases the jury, after hearing other testimony, may be much assisted by a comparison of hands. On the same principle I think that a foundation being first laid, the jury may be permitted to compare the types, devices &c. of newspapers. In general such evidence would not be very strong. But cases may occur in which a comparison would be decisive.

The motion in arrest of judgment remains to be considered. It has been contended for the defendant that the matter complained of is not a libel. If it be not, it seems to me, that it is no easy matter to compose a libel. Let us see what it is that the defendant has inserted in his paper. He charges the plaintiff, "with having been deprived of a participation "of the chief ordinance of the church to which he belongs, "and that too, by reason of his *infamous* and *groundless* as-"*sertions*." The distinction between slander by words, and by printing or writing, is so well known, that it is unnecessary to dwell on it. Suffice it to say, that any malicious *printed* slander, which tends to expose a man to ridicule, contempt, hatred or degradation of character, is a libel. But say the counsel for the defendant, no man's character suffers in *Pennsylvania* by an exclusion from the rites of the church

1812.

M'CORKLE v. BINNS.

to which he belongs, because by our constitution the only test for opening the door to honour and office is, "a belief "in one Supreme Being and a future state of rewards and "punishments." But how does that bear upon the question? The plaintiff is not charged merely with a voluntary abstinence from the principal sacrament of his church, or being deprived of that sacrament for any innocent or meritorious action, but with an expulsion from it on account of his *infamous unfounded assertions*. To say of a man in a newspaper, that he is guilty of *infamous falsehoods* is clearly a libel; and is it less so, because the elders of his church have found him guilty, or because in order to evade the judgment of those elders, he has absented himself from the sacrament of the Lord's supper, as is alledged in the paper of the 16th of *September?* All persons who become members of a religious society are subject to the discipline of that society. The law permits it, and very wisely, because it tends to the preservation of religion and morals. It is understood that according to the rules of the church to which the plaintiff belongs, if he had really been guilty of infamous falsehoods for which he refused or neglected to make atonement, he might after proper admonition have been excluded from the sacrament of the Lord's supper. Now is it possible that after such an exclusion for such a cause, any man could keep his standing either in the society to which he belongs, or in the world at large? In my opinion he must sink under the opprobrium. I can have no doubt therefore of the matter charged in the declaration being a libel.

Upon the whole my opinion is against a new trial, and against arresting the judgment.

YEATES J. Five reasons have been alledged for this Court's awarding a new trial; two of them only have been insisted upon by the defendant's counsel during the argument.

The first ground taken, that *George Summers*, one of the jurors, had prejudged the cause in favour of the plaintiff before he came to the book to be sworn, does not appear to me to be founded in fact. He has positively denied it upon his oath, and has further sworn that he was wholly ignorant of the cause of action, until it was opened by the plaintiff's

counsel. Previous thereto, he thought it had been some quarrel between the parties about politics. The testimony of *Jonathan Carson* cannot be reconciled with that of *Summers*, being directly contradictory as to the supposed declarations; but charity would induce me to hope, that *Carson's* memory has been defective. We know from experience, that jurors will sometimes make use of finesse to escape from serving in that capacity; but it is perfectly clear that *Summers* alone could know the real state of his own mind antecedently to his being sworn as a juror. Besides, though the defendant here cannot ascertain with precision the time when the supposed declarations of *Summers* were communicated to him, he admits that it must have been previously to the jury's making up their verdict. To intitle him to the advantage of his exception, he should have disclosed the information he had received promptly to the Court. What the judge would have done under that disclosure,—whether he would have confronted the witness and juror, and determined the fact as to the matter of exception,—or whether he would have thought it more eligible to discharge the jurors from giving any verdict, I will not presume to assert; but in this I am very clear, that it would be highly unequal and unreasonable, that the defendant should have two chances, by affirming the verdict if it passed in his favour, but if unfavourable to him, by obtaining a new trial.

The second reason urged in support of a new trial, is that there was a chasm in the testimony adduced by the plaintiff, to prove the defendant's publication of the *Democratic Press* of the 9th of *September* 1808, it being one of the papers charged in the declaration. It is contended that the identity of that paper shown in evidence to the jury was not established, and therefore the same ought not to have been read to them. I readily admit, that in the trial of every suit the *probata* must correspond with the *allegata*, and that the judge usually decides on the conformity of the evidence offered, to the case before him. Should he be of opinion that the testimony proposed is impertinent to the issue then on trial, or does not establish the fact for which it is adduced, he will at once overrule it. But should it be dubious and equivocal in his judgment, if it tends to prove the fact relied on, he may and frequently does submit it to the jury for

1812.

M'Corkle v. Binns.

their decision, with proper instructions to them as to the law arising on the facts as found by them. This subject came before the Court for their deliberate consideration in the *Lancaster* district, upon an appeal from the Circuit Court of *York* county, between the commissioners of *Berks* county and *Ross*. The doctrine is held as I have already laid it down. The judges in delivering their opinions put several cases by way of illustration. Where a deed is offered in evidence, the Court if they please, may decide whether it is sufficiently proved; but they may if they please leave it to the jury to determine on the sufficiency of the proof, and then it is read with proper instructions. So in the case of a receipt supposed to be signed by the plaintiff or his agent, for the whole or part of the sum demanded, the genuineness of which is questioned, and the matter remains doubtful in the mind of the judge, it is more safe and correct to submit the fact to the decision of the jury, than for the judge to determine it himself. I adhere to the opinion which I then delivered, that such a line of conduct is most congenial to our judicial system. 3 *Binn.* 542. 545. Circumstanced as this case was, I think the judge was not bound to reject the testimony offered to prove the publication, and that he did not err in permitting it to go to the jury with proper instructions for the regulation of their conduct. I cannot bring myself to believe that in no case whatever is the comparison of hands evidence. The uniform practice of this Court is directly otherwise.

It has been said, but not insisted upon, that the damages found are excessive. The case certainly is not of that kind, wherein the damages assessed merit that denomination.

As to the matters urged in arrest of judgment, that the publications charged are not libellous, I have no difficulty whatever. Any publication which tends to bring a man into disrepute, ridicule or contempt, is a libel in a legal sense. The distinction between words written or printed and published, and the same words spoken, is clearly settled. *Litera scripta manet.* Charging another with being "deprived of a "participation in the chief ordinance of the church to which "he belonged, by reason of his infamous groundless asser-"tions,"—calling him "a public pest,"—and "distinctly "and decidedly affirming, that he had absented himself from

"the table of the Lord's supper, and thus prevented the "sessions from being called to investigate his conduct," necessarily tend to disgrace a man in society, and make others to shun him. Such charges create ill blood, and manifestly lead to breaches of the public peace. I am well satisfied that such publications are libels, and that judgment upon the verdict be rendered for the plaintiff.

Brackenridge J. was of the same opinion.

New trial refused, and judgment for plaintiff.

The Commonwealth *against* Sprenger and others.

Philadelphia, Saturday, December 26.

When leave is granted to file an information in the nature of a *quo warranto*, the defendants must be summoned by a *venire*, or *subpœna*; and if they fail to appear, must be brought in by *distringas* or *attachment*.

ON a former day, *Dallas* and *Ingersoll* on behalf of *O'Ellers* and others as relators, obtained a rule to shew cause why an information in the nature of a *quo warranto* should not be filed against the defendants, to enquire by what authority they claimed to exercise the office of Lay Trustees of the Corporation of the *German* Religious Society of *Roman* Catholics of the Holy Trinity Church &c. Upon the return of that rule, the defendants appeared by counsel, and shewed cause; and the names of the same counsel were marked upon the docket opposite to the names of the defendants.

An appearance upon the previous rule to shew cause, does not put them in court as to the information; and therefore upon filing the information, the relators are not entitled to a rule to plead.

The Court being of opinion that sufficient cause had not been shewn, made the rule absolute on the 24th instant; and on this day, the information being filed, they were asked for a rule upon the defendants to plead in six hours, unless they would consent at all events to try by the next general jury in *January*, and then the rule to plead might be returnable on any previous day.

Binney and *Hopkinson*, who had been counsel for the defendants upon the rule to shew cause, declined consenting to try, and denied the authority of the Court to grant the rule, as the defendants were not in court.

1812.

COMMONWEALTH v. SPRENGER et al.

Dallas and *Ingersoll contra*, contended that they were already in court by appearance upon the rule to shew cause; and suggested that unless the rule to plead was granted, the office, which was annual, would expire before judgment could be obtained in the information. The *British* statute 9th *Ann. c.* 20, not being adopted in this state, it was essential to the administration of justice, that the Court should lend their aid to the relators in the manner proposed.

The counsel who argued the rule for the defendants, denied that they had ever appeared to this information, or that they had ever performed any duty as attorneys in the case, for until the information was filed, there could be no appearance by attorney to it. The former proceeding was simply an application for leave to institute the suit, the first step in which was the information. They said it was essential to issue a *venire* or subpœna; and if the defendants would not then appear, to bring them in by *distringas* or attachment; and for this they referred the Court to 2 *Kyd on Corp.* 404. 438, 439., 1 *Sid.* 86., 3 *Bac. Abr.* 646, *Informations*, *D.*

PER CURIAM. There certainly are inconveniences arising from delay in a case of this kind; but we must not permit ourselves to overthrow well established principles of law, to facilitate a particular suit. The defendants are not in court in this suit. The rule to shew cause was intended to obtain leave to institute the action. It is now commenced by the information. The relators must proceed by *venire* to the next term.

Motion denied.

1812.

Philadelphia, Monday, December 28.

STODDART *against* SMITH.

A contract for the purchase of forty-five lots in different parts of a city, is not dissolved by failure of title to a part of them; the vendee can claim only a deduction from the price. But where a part is so essential, that the loss of it renders the rest of little value, as of a mine or valuable fishery appurtenant to very poor land, or the right of water necessary for turning a mill, the failure of title to such a part, dissolves the contract for the whole.

The courts of one state have a right to decide upon the validity of an act of Assembly of another state, in reference to the federal constitution, wherever it is essential to the decision of a cause duly brought before them.

THIS was an action of *debt*, brought in the name of *Benjamin Stoddart* for the use of the Bank of *Columbia*, against *Elizabeth Smith* executrix of *John Smith*, upon a bond dated the 1st of *August* 1804, conditioned for the payment of 5036 dollars 3 cents with lawful interest in one year from the date.

The cause was tried under the plea of *payment*, before *Brackenridge* J. at a *Nisi Prius* in *November*, when a verdict was found for the defendant. It came now before this court upon a motion for a new trial.

His Honour reported the case to be as follows:

The bond in question, together with other bonds and notes, amounting in all to 14,164 dollars, was given as the consideration for the purchase of 45 lots in different parts of the city of *Washington*, which upon payment, the plaintiff contracted to convey to the defendant's testator, with general warranty. Among these were lots No. 17 and 18 in square No. 846, and lots No. 1, 15, and 16, in square No. 734, five lots that were valued by the parties in a schedule from which the purchase money was calculated, at 1910 dollars 95 cents. The whole number of lots was bought by Mr. *Stoddart* from the commissioners of the city of *Washington;* and were part of 6000 lots sold by the said commissioners to *Morris and Greenleaf* on the 24th of *December* 1793, and upon nonpayment of the purchase money, were resold by them agreeably to an act of the Legislature of *Maryland*, hereafter mentioned. It was very clearly in evidence, that the contract with *Morris and Greenleaf* was

An act of the legislature of *Maryland*, which gave authority to the commissioners of the city of *Washington*, to make resales of all lots the purchase money of which remained unpaid for a certain time after it ought to have been paid, does not impair a contract previously made by the commissioners for the sale of those lots, but merely gives a new remedy. It is therefore not unconstitutional for such a cause.

A sells several lots of land for a sum of money, payable by instalments, and covenants to convey with general warranty, on payment of the whole money. He then conveys the lots to *C* and *D* with general warranty, in trust to convey them to the vendee in fee simple as soon as the purchase money and interest should be paid according to contract, and delivers them the obligations for the money. *Held* that this conveyance is no impediment to a suit in *A's* name for the recovery of the money, nor to an apportionment of the purchase money, if title to some of the lots fails.

1812.

STODDART v. SMITH.

signed in the evening of the 24th, after an express had arrived from *Annapolis*, bringing a copy of the *Maryland* act, then understood to have been passed.

The defendant, under a notice that failure of consideration would be given in evidence upon the plea of payment, objected the want of title in the plaintiff, under the following circumstances.

1. That the commissioners, having once sold the lots in question to *Morris and Greenleaf*, had no authority to resell them to the plaintiff; because the act of *Maryland* which authorised the resale, was passed subsequently to the contract on the 24th of *December* 1793, and as it impaired the validity of that contract, was unconstitutional. Evidence was given to shew that the act in question, entitled "a further supplement to the act concerning the territory of *Columbia*, and the city of *Washington*," (and which enabled the commissioners to sell at public vendue any lots sold by them on credit, if the purchaser should fail to pay the purchase money thirty days after it became due) was read in the senate of *Maryland*, the first time on the 29th of *November* 1793, and laid on the table. On the 2d of *December* 1793, it was read the *second* time, and *passed*, and sent to the delegates for concurrence. In the house of delegates, it was read the first time on the day it was brought down, and on the 24*th day of December*, read and *passed*, and sent back to the senate. On the 28th of *December* the engrossed bill was read in the senate, *assented to*, and with the paper bill thereof sent to the house of delegates, where the same was read and *assented to* on the same day. From all which it was inferred that the bill did not become a law until the 28th of *December*, that being, as the counsel alleged, the day of the *final* passage of the bill; and the depositions of several gentlemen of *Maryland* were read to shew, that it was from its *final passage* that a bill became a law, without reference to the seal, and signature of the governor, those being ministerial acts, as the governor had not a negative. But no evidence was given to shew, whether by the *final* passing, was meant the passing when it was read the second time, or when the engrossed bill was assented to.

2. That of the lots referred to, the *five* before mentioned were not sold to the plaintiff at a *first resale*, but had been bid off at a prior resale by persons, for whose default they

were re-resold to the plaintiff; and which re-resale passed no title, the commissioners, according to *O'Neale* v. *Thornton* (*a*), having authority to make only one resale, for the default of *Morris and Greenleaf*. The plaintiff being thus incapacitated to make a good title to the whole 45 lots, the contract, it was said, was dissolved. The superintendant of the city of *Washington*, who succeeded to the commissioners, stated however, in a deposition, that the *five* lots were merely bid off at a prior resale, by persons who never gave notes for the purchase money, nor came forward to get titles for them, nor set up a claim to them; and that such lots had always been considered by the commissioners as unsold.

3. That on the 3d of *October* 1804, the plaintiff had conveyed the premises to *John Mason*, and *John Laird*, in trust to convey to the defendant's testator on his paying the whole amount of the bonds and notes; and that on the 19th of *July* 1806, the first deed being void for want of recording, another conveyance was made to the same persons, upon the same trust, and duly recorded. This it was said disabled the plaintiff from conveying, and of consequence from recovering the consideration money from the defendant.

His Honour further reported to the Court, that his charge had been in favour of the plaintiff, and that he was not satisfied with the verdict.

Duponceau in support of the motion, argued, that all the points of law which had been raised, were in the plaintiff's favour, and the verdict most clearly against law and evidence.

1. The authority of the commissioners to resell under the act of *Maryland*, which was denied on the ground of unconstitutionality. To this there are several answers. In the first place, this Court will not enquire into that question. Paying the respect which is due to an independent state, we must hold the law to be constitutional until the courts of *Maryland*, or the judicial power of the *United States*, shall have said other-

(*a*) 6 *Cranch* 53. In the report of this case, the reader, who is curious to learn the manner in which the titles of lots in the city of *Washington* are deduced from the original proprietors of the soil to the purchasers at resales by the commissioners, will find it stated at large. The titles of Mr. *Stoddart* and of *O'Neale* were similar.

1812.

STODDART v. SMITH.

wise; and the defendant, if disposed to litigate that question, might, and ought to, have called us to the courts of the country where the lands lie. But further the law is constitutional, in reference to this particular case, and in a general sense also.—As to this case, because the contract by *Morris and Greenleaf* with the commissioners, was made with a view to the law, after it was understood to have passed, and after it had legally passed. The executive of *Maryland* has no *veto*. His office, in signing and affixing the state seal, is ministerial. When a bill has passed both houses, it becomes a law; and that takes place, not when the engrossed bill is compared with the paper, and assented to as a true copy, but when the clerks enter on the journals that the bill has passed.—This law is constitutional in a general sense, supposing it not to have passed until after the contract. It is not *ex post facto*. That phrase in the federal constitution is intended to describe such laws only as relate to crimes, pains, and penalties. *Calder* v. *Bull* (*a*). It does not impair the validity of contracts. The obligations of commissioners and vendees remained the same as before; of the one to convey upon payment, of the other to pay at the appointed time. It merely added another remedy. It amounted to a decree of chancery for the sale, without the delay of chancery proceedings, which would have been fatal to the great object of building a city for the accommodation of government. It no more impairs the validity of contracts, than insolvent laws, bankrupt laws, our own arbitration law, the act for the abolition of survivorship in joint-tenancy, or the laws of the *United States* giving a peculiar remedy against persons accountable for public money, and on bonds for duties. The remedy is no part of the contract. Every legislature must add, alter, or take away remedies, to suit the public convenience.—Being neither *ex post facto*, nor impairing the validity of contracts, this law does not transgress the limitation of state powers appointed by the federal constitution. The case of *O'Neale* v. *Thornton* (*b*) throughout admits its validity.

2. The commissioners it has been decided cannot make a re-resale. But as to the *five* lots, there was no resale, until

(*a*) 3 *Dall.* 386. (*b*) 6 *Cranch* 53.

the plaintiff bought. There was a mere bid at auction, and no subsequent step. Nothing passed, by the *Maryland* statute of Frauds. Act of 1715. *ch.* 47. *Sugd.* 60. If this amounted to a resale, the commissioners and the act of *Maryland* might have been wholly defeated by a trick. But if the five lots were never in the plaintiff, the residue were, and all that the defendant could claim was a deduction from the price; and of course the jury were wrong in giving nothing. The contract was not so entire, that a failure of part defeats the whole. There was no important connection between the lots. Loss of part did not make the rest comparatively worthless. It is a clear case for apportionment. (*c*)

3. The deed of trust is not in the way. If the title to all the lots is complete, the trustees will convey the whole; and if they refuse, a Court of Chancery will compel them. If title fails as to part, they must convey the residue, on payment of the purchase money, with a proper deduction.

Read and *Dallas* contra, contended that the verdict was right.

1. The plaintiff had no title, because the commissioners resold under a law, which if it was passed after the contract, did not give them any valid authority. Whether that law is constitutional or not, this Court must have the power to decide. The question is not only whether constitutional in reference to the constitution of *Maryland*, but whether it is so in regard to the federal constitution. Now the Judges of this Court, are sworn to support the constitution of *Pennsylvania* and the *United States;* they are bound therefore to decide the question, wherever it is duly brought before them; and it is so here, if the act is in any manner material in the case. But supposing it to violate the constitution of *Maryland*, this Court is competent to say so. The constitution is the paramount law; the statute is a subordinate law. If it is in the power of the Court to say whether the statute has been duly enacted, in any respect, they may go the whole length. Their decision cannot offend the dignity of *Maryland*, because it binds only in the particular case. It is an

(*a*) *Vid.* 2 *Atk.* 371., 6 *Ves. jr.* 678., 1 *Ves. jr.* 221., 9 *Ves. jr.* 368., 7 *Ves. jr.* 270., 10 *Ves. jr.* 505.

1812.

STODDART v. SMITH.

unconstitutional law then, because it violates the third and fourth sections of the *Maryland* bill of rights, which give to the citizens of *Maryland*, the benefit of the common law; and of course an opportunity of being heard before their rights are divested. It is contrary to the federal constitution, because it enables one party to rescind a contract, which upon principles of universal law should bind until both rescind it. All the cases cited by the other side, except the case of bankrupt laws, are clear cases of remedy to enforce contracts. Bankrupt laws flow from a special power. In the present, a remedy is not given to enforce, but to vacate the contract. It is absurd to call it a remedy upon the contract. The legislature destroy the contract in an event, for which the parties themselves did not provide; and they destroy it, when the original purchasers had a manifest interest in the land. *Sugden* 120. 122., *Noy* 88.

That the law was passed after the contract, follows from an act of both houses, no doubt essential, on the 28th of *December*, when the engrossed bill was read and assented to; and in the statute book it is stated to be a law of that date, though not signed by the governor until the 29th.

The only construction which can make it constitutional, is to say that it is not intended to be retrospective, or to have any effect on the present contract. In *O'Neale* v. *Thornton* the law in question was not material to either party.

2. The five lots were undoubtedly resold at a prior auction. The commissioners could have enforced the contract, and so the purchaser. The former have as good authority to re-resell upon nonpayment of notes given for the purchase money, as to re-resell upon a refusal to give the notes. *Stoddart* therefore cannot make title to the whole; and the contract being entire, the whole is dissolved. That it is entire, is evident, because there is but one consideration. Upon the payment of that the whole are to be conveyed, and none before; of course until the defendant pays in full, the plaintiff is not bound to make title to any part, and there is therefore no possibility of apportioning the consideration, without violating the contract.

3. The plaintiff has conveyed to trustees in trust to convey the *whole*, on payment of the *whole* money. Equity cannot create a new trust. It cannot therefore compel the trus-

tees to convey a part on the payment of a part, which must be in the case of apportionment.

TILGHMAN C. J. This is an action of debt on a bond. The defendant pleaded payment and gave notice that she should give in evidence a failure of the consideration for which the bond was passed. It appears that the plaintiff by his agent, the late colonel *Burroughs*, sold to *John Smith* deceased, forty five lots in the city of *Washington*, for the sum of 14,164 dollars payable by instalments. Several negotiable notes were given by *Smith* for the purchase money, as well as several bonds, of which this is one. The contract was made the 1st of *August* 1804. The defendant alleges, that the plaintiff was to give *Smith* a good title for the lots which it is out of his power to do for two reasons. 1st, That he has conveyed the property to other persons. 2d, That he never had a good title.

1. As to the first objection, the fact is that on the 3d of *October* 1804, *Stoddart* conveyed the lots to *John Mason* and *John Laird*, in fee simple, with a general warranty, in trust that they should convey them to *Smith*, his heirs or assigns, in fee simple, as soon as payment should be made of the purchase money and interest according to contract. I see nothing in this which should prevent the plaintiff's recovery. This conveyance in trust was no injury to *Smith*. It was manifestly intended for his benefit, by preventing any of *Stoddart's* creditors from getting a lien on those lots by judgments which they might obtain against him. If the trustees do their duty, the land will be conveyed to the devisees of *Smith*, as soon as the purchase money is paid. And if, (which ought not to be supposed), the trustees should not be disposed to do their duty, a court of equity will compel them.

2. In order to judge of the force of the second objection, we must examine the title which was shewn on the trial. These lots are part of 6000 lots in the city of *Washington*, which were sold by the commissioners of that city to *Robert Morris* and *J. Greenleaf* on the 24th of *December* 1793, for a large sum of money payable by instalments. The contract between the commissioners and *Morris and Greenleaf*, or to speak more properly, the remedy of the commissioners in

1812.

STODDART v. SMITH.

case of default of payment according to the contract, was affected by an act of assembly of the state of *Maryland*, of which it is necessary to take particular notice. It passed the senate and house of delegates on the 24th of *December* 1793, and on the 28th of the same month, the engrossed bill was read and assented to in both houses, and received the signature of the governor according to the constitution of that state. It is said by the plaintiff that the act operated as a law on the 24th of *December*, as soon as it had passed both houses. On the other hand the defendant contends that it had no force as a law until the 28th of *December*, when the engrossed bill was read, and assented to. By this act the commissioners were authorised in case any sum of money should be unpaid for the space of thirty days after it ought to have been paid, to expose the lots so unpaid for, to sale by public auction in the city of *Washington*, after sixty days notice in the newspapers. This power the commissioners exercised with regard to the 45 lots in question, of which *Stoddart* became the purchaser, and produced a regular title from the commissioners. As to five of the lots, it is alleged by the defendant that they were sold to another person by the commissioners after the default of *Morris and Greenleaf*, and that person also making default, they were again exposed to sale when they were purchased by the plaintiff. But this the plaintiff denies. It has been decided by the Supreme Court of the *United States* in the case of *O'Neale* v. *Thornton*, that the commissioners having once exercised their power of resale under the act of assembly of *Maryland*, could not exercise it a second time, so that if in fact there had been a resale before the purchase of the plaintiff, his title to these five lots was not good. But I do not consider this as a matter of any importance with regard to the question of a new trial, because although the defendant was entitled to a deduction for those lots in case the jury were in her favour on that point, yet without other ground it would not justify a verdict for the defendant. It has been contended indeed, that the contract was so entire as to be incapable of division, and that a failure of title to part dissolved the contract in the whole. It strikes me very differently. There are cases where failure of title to part ought to dissolve the whole contract; because that part may be so essential, that

the loss of it would render the residue of little value. Such would be the case of the loss of a mine, or a valuable fishery, attached to a parcel of poor land. Such also might be the case of a loss of a parcel of meadow or woodland, or the right of water necessary for turning a mill. The principle is this, that when the part lost appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, the contract is dissolved in toto. But what is the case under consideration? The loss of five lots not adjoining or particularly connected with the others. There was no evidence of their being any way essential to the use or full enjoyment of the residue, and as the price at which each of the lots was estimated in the contract between the plaintiff and *Smith*, was proved on the trial, there could have been no difficulty in making a proper deduction for their loss. But the great point in the cause turned on the act of assembly of *Maryland*, which was said to be *ex post facto* and in violation of a preceding contract, and therefore unconstitutional and void. The plaintiff's counsel made a previous question whether this Court had a right to take into consideration, the validity of an act of assembly of another state. It appears clearly to me that we have not only the right, but are forced to do it. The contract between the plaintiff and *Smith* being of a transitory nature, an action may be brought any where. It has been brought here, we are to try it, and consequently are to decide all points collaterally introduced, which are essential to the decision of the main question. That question is whether or not the plaintiff had title to the lots sold by him; his title depends on the act of assembly; the act of assembly depends on the constitution of the *United States*, which we are sworn to support. So that it is impossible to get at the merits of the case, without deciding on the act of assembly. Nor can our decision have the least effect on the independence of the state of *Maryland*, or on the validity of the act of assembly within the jurisdiction of *Maryland*. It only affects the cause before us; and if the courts of *Maryland* should differ from us in opinion, they will pay no regard to our judgment, except so far as it affects *this cause*. Let us now consider the objections to this act of assembly. That of its being *ex post facto* was not much insisted on. Those expressions in the consti-

1812.

STODDART v. SMITH.

tution have been construed to extend to the *criminal law only*. The decision of the Supreme Court of the *United States* in *Calder and wife* v. *Bull and wife* (3 *Dall.* 386), is on the very point. But it is said that by this law the obligation of the contract is impaired. If the law took effect before the contract, the objection vanishes. I am sorry that in the commission sent to *Maryland* for the purpose of obtaining the opinion of persons learned in the constitution and laws of that state, the interrogatories were not pointed to this question. But they were only calculated to draw from the witnesses their opinion on the point whether the signature of the governor was essential to the validity of a law. Of this there could be little doubt, as the governor performs no more than a ministerial act in signing the laws and affixing the great seal of the state in presence of both houses. The journals of the legislature of *Maryland* shew their mode of proceeding, which is somewhat singular. The bill is put to its passage after the second reading; no question is taken nor any amendment offered in either house afterwards. What passes subsequently, is only matter of form; the bill is engrossed and read (or rather supposed to be read), and assented to by each house. I have never heard of any decision on this subject, but I cannot help supposing that light may be thrown on it by the testimony of persons who have not yet been examined, persons who assisted in framing the constitution of *Maryland*, and know the construction put upon it, and the practice of the legislature from the beginning. At present I am not satisfied on this point, nor am I satisfied that even if the contract preceded the law, its obligation is impaired by it. In what is its obligation impaired? The purchasers of lots in *Washington* are not compelled to pay more money than they contracted for, nor at a different time, nor is the land to be withheld from them in case they make payment according to contract. Every thing stands precisely as agreed on, but in case of default, a summary remedy is given to the commissioners. These commissioners were appointed by the president of the *United States*, with an adequate compensation for their services to be paid by the public, and totally disinterested in the sale of lots. They appeared to the legislature of *Maryland* to be no improper persons in whom to vest a power of enforcing a contract, to

which, though they were nominal parties, they were substantially indifferent. This summary proceeding was of immense importance. A city was to be built in a short time for the accommodation of the legislature of the union. Suppose a court had been erected by the state of *Maryland* with power to proceed to judgment in a short time? This certainly would have been within their acknowledged power. What they have done is not much different. For it must not be supposed that the purchasers of lots were left at the mercy of the commissioners. I presume that on an affidavit of a purchaser, that he had paid all the money then due, the Court of Chancery would have interfered, and stopped the proceedings of the commissioners till the matter could be enquired into. We have evidence of this law having been acted under for a great many years. Property to a very great amount has been transferred under it; no court has decided against its validity. On the contrary we see that in the case of *O'Neale* v. *Thornton* mentioned before, neither party entertained an idea of its being other than an operating law. I might add that there was evidence tending to shew that the contract was made by Mr. *Greenleaf* on behalf of himself and Mr. *Morris*, *with an eye to this law*, which would at all events preclude them from objecting to it. On a full consideration of this case, I have found no satisfactory ground for the verdict which has been given, nor does it appear to have accorded with the sentiments of the judge before whom the cause was tried. I am therefore of opinion that there should be a new trial.

YEATES J. Equity will not decree the specific execution of an agreement respecting lands, the title whereof is defective: and I fully agree that in this state, where courts of justice exercise certain equitable powers, a man will not be compelled to pay for lands which he has purchased, though even with general warranty, where it plainly appears that he cannot obtain a good right therefor. Why should a payment be enforced, which when made cannot be retained? Why should this circuity of action be permitted, when the insolvency of the seller of the lands, or other untoward circumstances, may prevent the recovering of the money back.

The chief objection which has been urged against the

1812.

STODDART v. SMITH.

plaintiff's recovery in this suit, is bottomed on the supposed unconstitutionality of the *Maryland* act of *November* Sessions 1793, No. 58, respecting the city of *Washington;* under which the plaintiff derives his title through a resale made by the superintendant. It is said that this law was passed on the 28th of *December* 1793, and being four days subsequent to the contract made between the commissioners of the city of *Washington* and *Robert Morris* and *James Greenleaf* for 6000 lots of ground, (whereof the 45 lots sold by the plaintiff constitute a part) impaired the obligation of that contract, and was therefore null and void by the provisions of the constitution of the *United States.*

This objection assumes as a fact that this law took effect from the 28th of *December*, which is at least highly questionable. I profess little knowledge of the received opinions in *Maryland*, respecting the constitution of that state, or when bills which have passed both houses of the legislature, are conceived to have operation as laws. It is admitted on all hands that the governor has no negative on the laws, but that his authentication of them is necessary previous to their enrolment. Were it absolutely necessary to give a decisive opinion, when the law in question took effect, I should be strongly inclined to say, that it existed as a valid law on the 24*th* of *December*. It appears by the journals of the senate and house of delegates, *in their own language*, that the bill *passed* both houses, though it was engrossed on a subsequent day. What strikes my mind with much force, is, that the act was applied for by the advice of *Thomas Johnston*, esq. one of the commissioners, a lawyer of the soundest cast, and that it was received by express from *Annapolis* and acted upon as a law by the commissioners, previous to the execution of their contract with *Morris and Greenleaf.* I adopt the words of the Chief Justice of the *United States* in *O'Neale* v. *Thornton*, 6 *Cranch* 69, that the law must have been agreed upon by the parties to this contract, and was specially adapted to it.

But admit for the purposes of this argument, that its operative force did not commence until the 28*th* of *December*, that it had a retrospective effect on the previous agreement made with *Morris and Greenleaf*, and that they had no knowledge thereof, how are the merits of the present controversy

affected thereby? In what manner does it impair the obligation of the antecedent contract? It does not diminish in the slightest degree the legal or equitable rights of *Morris and Greenleaf* in the lands they had bargained for. It left the responsibility of the commissioners as to them, in the same state as the contract placed them in. The obligation of the contract on either side was wholly unimpaired. Each stood bound to perform their stipulated engagements. What change then did the law profess to introduce? None whatever, but the simple one of *accelerating* the remedy of the commissioners engaged in a momentous public trust, on the non-performance by the vendees, of what they ought to have done. They were empowered to do summarily, what a Court of Chancery would clearly have done upon a disclosure of the facts by bill and answer. In this I cannot see any violation of the constitution. Private rights are preserved, but a remedy for a wrong is to be administered by a new tribunal. The sovereignty of a state would be a mere farce without such an inherent power, as exigences may arise. Insolvent and bankrupt laws, arbitration and limitation acts, are more liable to the exception now taken, than the present instance, and yet I do not know, that the exercising of such legislative powers has ever been questioned. It has been often said that an act of the legislature will not be pronounced to be unconstitutional by the judicial department in a *dubious* case. Where a plain instance occurs, in the necessary discharge of official duties, it is to be hoped, that judges bound by oath, will firmly act according to the honest dictates of their consciences, independently of all consideration of consequences.

It will be remembered that the provisions of the *Maryland* act are adopted and enforced by the law of the union of the 1st of *May* 1802, 6 *U. S. Laws* 126, and I have only to add that I have no difficulty whatever on this part of the plaintiff's case.

Another ground of defence has been taken upon the testimony of *Thomas Munroe*, esq., who has sworn, that five of the lots sold to the defendant's testator, are derived to the plaintiff under a re-resale by him as superintendant, the purchasers at the second sale not having complied with the

1812.

STODDART v. SMITH.

conditions thereof, and that the superintendant had no legal authority to make such third sale, according to the decision of the Court in the case of *O'Neale* v. *Thornton* already cited. It is contended that the contract between the plaintiff and defendant's testator is *entire*, and the consideration of the 45 lots of ground cannot be severed; and therefore if the title to five of the lots cannot be made good, the whole agreement is annulled. If these five lots have been resold by an agreement valid and binding by the laws of *Maryland*, the superintendant had no power to sell them again, because he had then fully executed his authority according to the case cited. But even in that case I think the consideration money might be apportioned, according to the prices stipulated to be paid by *Smith* for each distinct lot, which are particularly set out in the letter from the plaintiff to *Turner*, read in evidence on the part of the defendants. When the possession of particular parts of the land sold may fairly be deemed the inducement to the contract, (as in the case of buildings, valuable meadow or orchards standing and situate on a portion of the land), then the incapacity of the vendor to make a good title to such portion would afford a strong ground to vacate the whole agreement; but this could not apply to separate lots in the ground plat of a city sold at different rates. If a good title therefore could not be transferred to these five lots, the defendant would only be entitled to an allowance for the deficiency, and the trustees would be compelled to transfer the rest of the property, upon being paid the balance of the consideration money after a proper reduction.

In whatever light I view this verdict, I think palpable injustice would be done if it received the sanction of this Court, and therefore I concur in opinion, that a new trial should be awarded.

BRACKENRIDGE J. Might not the commissioners of the city of *Washington* have proceeded to sell, or re-sell, no money being paid, or an inconsiderable sum; and this *toties quoties* as often as default was made? And would not courts of law and equity have sanctioned such a sale? More especially in such a case as this, where a great national object was in view, the raising money by the sale of lots in order

to erect buildings for the residence and accommodation of the general government? The sale was under an understanding with all concerned, that the consideration was to be paid down, or at the expiration of the contemplated credit. Would not the nonpayment make it a *fraud*, and avoid the contract *ab initio*? Reason and common sense and public utility, and the necessity of the case would say so; and I take it the law would say the same. For the law is founded on all these, and where the public interest is concerned, it makes a stronger case. I do not consider the law of *Maryland* as doing more than sanctioning this doctrine, and thus in a summary way expressing the same sense on this subject, which courts of law and equity would have done. I do not consider the law of *Maryland* as impairing a contract, but as pointing at, or authorising if that should be necessary, a remedy for the compelling a compliance with the contract, or ascertaining the evidence whereby it might be considered void. The resale was an act which the commissioners or the trustees had a right to make; the prior sales, or rather biddings down, amounting to no sales, and the purchasers, but persons in legal contemplation fraudulent, as defeating the object of the sale, and this for the great national purpose contemplated by those who brought the lots to market. I suggested to the counsel for the plaintiff on the trial, that the rule of the *Maryland* law might be laid out of the question. But declining this hint, and knowing his comprehension of mind, I yielded to his better judgment, and who had a right to manage his cause in his own way. But it confirmed me in my first idea, when I found that the learned counsel on reflection, and on the present argument, took it up in this point of view. For it appeared to me, and now appears, that the sale was immaterial, as the law authorising an act *to be done*, may be considered as ratifying an act which has been *done*. *Fieri non debet, factum valet.* As to the sale by the commissioners in this case, being a re-resale, I did say on the trial, and I think still there was no evidence of it. But I need not enlarge on this, as it may be seen that in my way of thinking, even a sale with solemnity and clerk's entry &c., could be considered as no sale, where on the non-complying of the terms, which I consider as a precedent

1812.

STODDART v. SMITH.

and implied condition of the sale, a fraud in contemplation of law did exist. And in fact in most of these sales in the town of *Washington*, the purchasers on bidding down were on the speculation of an under sale to others, before the money was paid or became due, with a profit to themselves. On all these grounds, I am of opinion that the verdict be set aside and a new trial granted. But the plaintiff on a new trial having a verdict, and obtaining a judgment, it would seem to me, that there is something which he ought to do, before he can recover, or the money be paid over. *Stoddart* had given or contemplated the giving a bond, to refund in case of eviction by any claim. By his own shewing he is insolvent or embarrassed. Shall not the bank of *Columbia* do this, so far as respects the money which they are to receive? But this I leave to a motion which may be made when the case occurs. I take notice of the language of the Court of the *United States*, as confining *ex post facto* to a *criminal* case. It is an idea purely *American*, and not the worse for that, but it is incorrect. *Ex post facto* law, *ex jure post facto*, translated "*ex post facto* law," embraces *civil contracts* as well as *criminal* acts. The *pœna* and the action, *ex jure post facto*, or arising on an act done or a contract made before the law passed, are both embraced by this term. Our constitutions use the phrase *ex post facto* law, or law impairing contracts. They mean no more than to specify under the idea of impairing contracts, a kind of *ex post facto* law, which was embraced under the general term *ex post facto*.

New trial granted.

1812.

Ex parte OVERINGTON.

Philadelphia, Monday, December 28.

THIS was a petition by *William Overington* to be admitted to the rights of a citizen of the *United States*, upon taking the oaths prescribed by law.

A, a *British* subject, emigrated to the *United States* on the 10th of *October* 1807, at which time he reported himself and an infant son, agreeably to law, and declared his intention to become a citizen of the *United States*. He resided in *Pennsylvania* from the time of his arrival until his death on the 1st of *October* 1809. Subsequent to the present war between the *United States* and *Great Britain*, and after the expiration of five years from his father's arrival, the son petitioned to be admitted to the rights of citizenship upon taking the oaths prescribed by law.

Held, that as the father himself if living could not be admitted to the rights of citizenship during the war with *Great Britain*, neither can his son be; the proviso in the act of Congress of the 14th of *April* 1802, which denies the privileges of citizenship to the subjects of a sovereign with whom the *United States* is at war at the time of the application, extending to the supplemental act of the 26th of *March* 1804, which in the case of an alien who has declared his intention &c., and dies before he is actually naturalized, intitles his widow and children to be naturalized on taking the requisite oaths.

The father of the petitioner, *John Overington*, a native subject of *Great Britain*, arrived in the *United States* on the 10th of *October* 1807. He reported himself and the petitioner, then and still a minor, in conformity to the second section of the act of Congress of the 14th of *April* 1802; and resided in the state of *Pennsylvania*, from the time of his arrival, until the first day of *October* 1809, when he died.

On a former day of this term, the petitioner, conceiving himself intitled to naturalization, under the act of 26th of *March* 1804, which in the case of an alien who complies with the act of 1803, and dies before he is actually naturalized, confers citizenship on his widow and children upon taking the oaths prescribed, declared his own intention to become a citizen, and presented this petition, upon which the Judges now delivered their opinions.

TILGHMAN C. J. after stating the facts, pronounced his opinion as follows:

It is enacted by the act of Congress passed the 14th of *April* 1802, that any alien being a free white person, may be admitted to become a citizen of the *United States* on certain conditions, the first of which is, that he shall have declared on oath, three years at least before his admission, that it was *bona fide* his intention to become a citizen of the *United States*. The second section of this act directs, that all free persons being aliens, who may arrive in the *United States*, shall make a report of themselves in the manner therein directed. But the act contains a proviso that no alien who shall

1812.

Ex parte OVERING-TON.

be a native citizen, denizen or subject of any country, state, or sovereign, with whom the *United States* shall be at war *at the time of his application*, shall be then admitted to be a citizen of the *United States*. By a supplement to this act passed the 26th of *March* 1804, it is enacted, that when any alien who shall have complied with the first condition specified in the first section of the original act, and shall have pursued the directions prescribed in the second section of the said act, may die before he is naturalized, his widow and children shall be considered as citizens of the *United States*, and shall be intitled to all rights and privileges as such, upon taking the oath prescribed by law.

The question to be considered, is whether the proviso in the original act, forbidding the naturalization of an alien, who is a native subject of a sovereign with whom the *United States* are at war, is to be extended to the supplement under which the petitioner applies for naturalization. These acts being made on the same subject, are intimately connected, and must be considered as parts of one system. The non-admission of alien enemies to the rights of citizenship, is a principle equally applicable to persons described in the original act and in the supplement. If the petitioner's father had been now living, he could not have been naturalized, although he had complied with all previous requisites, and nothing was wanting but his taking the oath prescribed by law. Why then should his son be in a better situation? Why was this principle forbidding the naturalization of an alien enemy introduced into the original law? I presume it was because the Congress thought it improper to accept the allegiance of a man for whom they could not claim the rights of an *American* citizen, in case he should fall into the hands of the enemy. If one of our own citizens should, during the present war, take an oath of allegiance to the king of *Great Britain*, our government might prosecute him for treason, if he were taken fighting against us. *Great Britain* and all the powers of *Europe* claim the same right over their subjects. Besides, it might have been thought dangerous to admit into the bosom of the country in the heat of war, persons who, having resided but a few years among us, might still retain a strong attachment to their native land. I do not say that these were the only reasons for introducing the proviso on

1812.

Ex parte OVERINGTON.

which this question arises, but it appears to me that they are some of the strongest that can be assigned, and they apply with as much force to the petitioner as to his father. Nay, they apply with much greater force; because the father could not have been naturalized without a residence of *five years* in the *United States*. Whereas the petitioner, if his construction of the law is right, in case his father had made the necessary report, and made a declaration of his intention to become a citizen, and died on the very day of his arrival in the *United States*, would have been intitled to the right of naturalization, immediately on taking the oaths prescribed by law. It may be said, that the supplement being subsequent to the original law, and being absolute in its terms, is to be construed without reference to the proviso. But to say that it has no reference to the proviso, is begging the question. There may be a reference by implication, and I think there is. The two laws make but one system, which would be marred by striking out of either a prominent feature equally applicable to both. I am therefore of opinion that the petitioner being a native subject of the king of the united kingdom of *Great Britain* and *Ireland*, with whom the *United States* are now at war, cannot *at this time* be admitted to the rights of citizenship.

YEATES J. I have the misfortune of dissenting from the opinion delivered, upon the best consideration I have been able to give to the subject.

The objection to the prayer of the petitioner being granted, is grounded on the proviso expressed in the act of Congress establishing an uniform rule of naturalization, passed the 14th of *April* 1802, "that no alien who shall be "a native citizen, denizen or subject of any country, state "or sovereign, with whom the *United States* shall be at "war at the time of his application, shall be then admitted "to be a citizen of the *United States*." His father *John Overington* was a subject of *Great Britain*, and arrived in the *United States* on the 10th of *April* 1807, in a time of profound peace between the two countries, the petitioner being then and still a minor. He afterwards died on the 1st of *October* 1809. I admit that the father if living, could not now take the oaths precribed by law, by reason of his being

1812.

Ex parte OVERINGTON.

considered an alien enemy; but I do not view the petitioner in the same light under the additional act to the naturalization law, passed on the 26th of *March* 1804. The second section thereof modifies the restriction as to children under certain limitations. It provides, "that when *any* alien who shall "have complied with the first condition specified in the "first section of the said original act, and who shall have "pursued the directions prescribed in the second section of "the said act, may die, before he is actually naturalized, "the widow and the children of such alien shall be consi- "dered as citizens of the *United States*, and shall be in- "titled to all rights and privileges as such, upon taking "the oaths prescribed by law." That the petitioner is within the words of this section cannot I think be controverted. His parent has conformed to the conditions. Why is he not within the spirit of the act? If Congress had intended to incapacitate children under such circumstances from becoming citizens, upon a change of the amicable relation between their native country and the *United States*, would they not have introduced some provision to this effect? I readily agree that we must take into consideration the original act, when we are called upon to give a construction to the latter. But alterations in the last law abrogate the former. I think there is a sound political distinction between a father and his minor children on the breaking out of a war. The father has strong prejudices and prepossessions in favour of his native soil, where he has spent the earlier years of his life; but the *natale solum* has not such influence on the minds of minor children. The bounty of congress may therefore extend to them privileges denied to their father.

I am of opinion, that the prayer of the petitioner should be granted.

BRACKENRIDGE J. concurred in opinion with the Chief Justice.

Petition refused.

1812.

LOCK, qui tam &c., *against* The Estate of LLOYD.

Philadelphia, Monday, December 28.

A traverse to an inquisition of escheat must be tried by a jury, in the county where the inquisition was taken; and cannot be tried by this Court, in a summary manner, nor at *Nisi Prius* in the county of *Philadelphia*, if taken in any other county, nor by a jury summoned from the proper county. *Hence*, as this Court cannot try issues in fact out of the county of *Philadelphia*, and a traverse to an inquisition of escheat can be taken only in this Court, an inquisition taken in any other county, cannot be traversed.

UPON the information of *Thomas Lock*, the Escheator General issued his precept to the sheriff of *Chester* county, to impannel an inquest for the purpose of ascertaining, whether *John Lloyd* deceased, had died without heirs or known kindred, possessed of any estate real or personal in that county, and in whose hands or possession the same was; and the inquest, on the 26th of *February* last, found that he did so die, leaving monies, goods and chattels to the amount of 640 dollars 28 cents, in the hands of *Joseph Hall*.

Hall had previously taken out letters of administration to *Lloyd*, and filed an inventory; and on the 31st of *March* last, he settled his account in the Orphan's Court of *Chester*, which was confirmed on the 4th of *May*, making a balance of only 164 dollars 27 cents in his hands. On the 31st of *August*, an attachment was issued upon the inquisition, on which he paid the balance admitted to be in his hands, and gave bond according to law, to appear at this Court to traverse the inquisition, and to pay the balance, if found against him.

Frazer on a former day presented a petition, and moved for leave to that effect; but the Court, suggesting a difficulty in consequence of their inability to try an issue of fact, in *Chester* county, requested him to argue the point, which he now did accordingly.

He remarked, that he entered upon the argument in consequence of an intimation from the Court, on presenting the petition of the traverser, that the issue upon the traverse must necessarily be tried by a jury; but that he would endeavour to shew, that the Court might proceed without a jury; and if so, that the proceedings might be put into such shape, as would conform to the opinion of the Court. That the Court clearly had jurisdiction of the case, by the fourth and fifth sections of the "act to declare and regulate escheats,"

1812.

LOCK v. LLOYD.

and that the only difficulty arose from abolishing the Courts of *Nisi Prius* and Circuit Courts in all the counties of the state except *Philadelphia*. That as the application therefore was not to extend the jurisdiction of the Court, they would sustain and decide upon it, if they possessed any powers adequate to the case, and particularly, as the traverser would be otherwise wholly without remedy.

To shew that the Court had power, he contended,

1. That the proceedings upon a petition of right, *monstrans de droit*, or traverse, do not necessarily require that the trial should be by jury. On the petition of right, the party suggests an interest in himself which does not appear upon the inquisition, and which controverts the title of the public; and proceedings being had to ascertain the truth of the suggestion, the merits are to be ascertained "upon issue or demurrer *as in other suits*." 3 *Bl. Com.* 256. 260. And the traverse coming in place of the petition of right, for the greater facility of the proceeding, will, as to the mode of trial, be governed by the same rule.

Trial, which is the examination of the matters of fact in issue, may be in various modes, of which that by *record*, that by *witnesses*, and that *by jury* are applicable to the present case; 3 *Bl. Com.* 330; and as the defence suggested by the traverser, arises upon a record of the Orphan's Court of *Chester* county, there will be no difficulty in so framing the issue, as to have a trial by the record. Or if the record of that Court should not be considered conclusive, the account which it contains can be re-examined *by witnesses*, and by the usual vouchers called for by that Court. Either of these modes appears more appropriate than trial by jury to the present case, where neither the attorney general, nor escheator general, nor the informer, although noticed, make any objection, and where the only matter to be ascertained is the balance of an administration account.

2. But the act of assembly, not only does not require the trial to be by jury, but, as is apprehended, expressly directs it to be in *a summary way*. By the fifth section of the "act to declare and regulate escheats," 2 *Smith's Laws* 427, it is directed that "if there be any that claim the estate real or *personal* so as aforesaid found to be escheated, he, she or they shall be heard *without delay* upon a traverse to the office,

monstrans de droit, or petition of right" &c. The remainder of this section is confined to cases relating to real estates, and does not reach the present. The sixth section enacts "that if any person or persons within five years next after the "sale of such goods and chattels as aforesaid, shall make his "or her *claim in manner herein before directed*, and shall es- "tablish his or her right thereto, *as herein after provided*, he "or she shall" &c. referring for the mode of trial and determination to a subsequent part of the act; and there is no subsequent part which directs the mode of determining on claims or traverses, except the seventeenth section, which relating principally to estates forfeited for crimes, enacts "that the Supreme Court shall allow of traverses and claims "(if made under the limitations herein before provided) to "such forfeited property, and decide upon the same" &c.; "and the justices of the Supreme Court or any two of them "shall hear and determine upon all and any claims as last "aforesaid in *a summary manner* as to equity shall appertain" &c. 2 *Smith's Laws* 431, 2. By which it appears, that the sixth and seventeenth sections have a direct reference to each other; the sixth to the seventeenth, for the mode of determining, the seventeenth to the sixth for the form of application to the Court. And by the records of claims and proceedings under the seventeenth section, it will appear that the present application is exactly conformable to them; and that in those cases there was no trial by jury, but that the cases were decided upon the documents exhibited with the petition. *James' claim.* 1 *Dall.* 47.

3. If, however, the Court should think that the facts of this case must be tried by a jury, what prevents their summoning to the bar of this Court a jury from *Chester* county? The act of 1722, constituting the Court, grants jurisdiction and power "as full and ample as the justices of the King's Bench &c. at *Westminster* have." And although it is not contended that such a power has usually, if ever, been exercised by this Court, under the act of assembly, yet as such a power did exist at the time of passing the act, and is still exercised by the Court of King's Bench, as the words of the act are sufficiently broad to embrace the power, and as the remedy of the traverser must wholly fail, without the

1812.

LOCK v. LLOYD.

interposition of the Court, there does not appear to be any sufficient objection against the Court's exercising this power.

4. But finally, the Court have jurisdiction of the case, and are expressly directed to decide on it. And if the act does not direct a trial by jury, nor the form in which the issue is to be joined, nor the place where the *venire* is to be laid, and the Court should be of opinion that they cannot determine the case in any of the modes already pointed out, still they are bound to decide the case. They are bound to give redress, and for that purpose to exercise such authority as is not disputed, to direct the issue to be made up in such form as that a jury may be called from the city and county of *Philadelphia*, which is the object of the specific motion before the Court.

TILGHMAN C. J. In pursuance of a writ issued by the escheator general, at the instance of *Thomas Lock*, an inquest was held in the county of *Chester*, who found that *John Lloyd* deceased, died without heirs, or known kindred, leaving goods and chattels to the amount of 640 dollars 28½ cents in the hands of *Joseph Hall*. The inquisition has been returned to this Court, by virtue of the act "to declare and regulate escheats," passed the 29th of *September* 1787; 2 *Smith's Laws* 425; and *Joseph Hall* appears, and desires to traverse the inquisition.

It is provided by the fifth section of the act, that the inquisition may be traversed, and the cause tried in this Court without delay. But a difficulty arises from a subsequent act of assembly, made the 24th of *February* 1806, 4 *Smith's Laws* 271, by which the authority of this Court to try issues in fact, is confined to the city and county of *Philadelphia*. The counsel for *Hall*, has proposed several expedients for trying the cause here. 1st. He asks the Court to decide without the intervention of a jury, and produces a record from the Orphan's Court of *Chester* county, by which it appears, that on a settlement of the estate of the said *John Lloyd*, by the said *Joseph Hall*, his administrator, a balance of only 164 dollars 27 cents, is found to be in the hands of the administrator. 2d. He supposes that the Court may issue a *venire* to the county of *Chester*, returnable before

themselves in bank. 3d. If neither of these things can be done, he asks a trial by a jury of the county of *Philadelphia*.

However painful it may be to perceive a defect of justice, yet when it is produced by the act of the legislature, this Court has no power to grant relief. It has been produced however merely by inadvertence, and will no doubt be remedied as soon as perceived. When a traverse is tendered to the inquisition, the cause must be tried by a jury. It is matter of *fact* which is in dispute, and there is no precedent of the Court's ever having taken the trial upon themselves. It is urged that it is a trial by *record*, because the balance in the hands of the administrator has been settled by the Orphan's Court of *Chester* county, which settlement is matter of record. But I do not conceive that settlement to be by any means conclusive. It was altogether *ex parte*, and founded on materials furnished by *Joseph Hall* himself. He made out the inventory of the intestate's estate just as he pleased, and the settlement is founded on the inventory. The commonwealth was no party, and the Orphan's Court could know nothing of the estate except what *Hall* told them. If a traverse to the inquisition should be put in, concluding with a prayer that the matter might be tried by the record of the Orphan's Court, it would be bad. But it is said, that supposing it not triable by the record, still the Court should try it by any testimony which may be produced, because the act of assembly directs that it shall be tried in a summary way. But that is a mistake. The words of the act are that the party "shall be heard *without delay*, upon a traverse to the office, *monstrans de droit*, or petition of right." There is another part of the act relating to escheats, by forfeiture upon attaint, (sect. 17,) by which it was intended to authorise this Court to hear and decide upon claims exhibited by creditors of persons attainted; but there it is expressly declared, that the justices of this Court, or any two of them, "may hear and determine upon all and any claims *as last* "*aforesaid*, in a summary manner as to equity shall apper-"tain." The different modes of expression plainly shew the difference of intention.

2. There is no precedent for summoning a jury from another county, to appear before this Court in bank. It is contrary to the provision of the act of 1722, by which this Court

1812.

LOCK v. LLOYD.

was established, (1 *Smith's Laws* 140), the twelfth section of which directs, that issues joined in the Supreme Court, shall be tried *in the county from which the cause was removed.* It is contrary also to the act passed the 24th of *February* 1806, by which it was enacted, that no issue in fact shall be tried by this Court in bank. This point was fully considered at *Pittsburg*, in the case of the *Commonwealth* v. *Smith*, 4 *Binn.* 117, in which we refused to grant a rule to shew cause why an information in the nature of a *quo warranto*, should not be filed against the defendant. The rule was refused, because the Court had no power to try an issue in fact in bank.

3. I need hardly add, that we cannot accede to the third proposition, of trying this matter at *Nisi Prius* in the county of *Philadelphia.* The matter arose in the county of *Chester.* The inquisition was transmitted from the county of *Chester.* It would therefore be contrary to all principle, to have the trial in any other place than the county of *Chester.* I am sorry that *Joseph Hall* should be without remedy, but the inconvenience is only temporary. I am satisfied that the legislature, which is now in session, will, upon a proper representation, pass an act authorising the County Courts of each county, to receive and determine traverses in cases of this nature.

YEATES J. and BRACKENRIDGE J. were of the same opinion.

Motion denied.

b 381
b 367

1813.

WALSH and another *against* NOURSE.

Philadelphia, Tuesday, January 5.

A discharge in the *District* of *Columbia*, under the insolvent law of Congress, does not entitle bail in this state to an *exoneretur*, because, according to the opinions of the Court of last resort in that district, a discharge under the insolvent law of *Pennsylvania* would not be recognised there; the debt being contracted and due to a person out of the jurisdiction of the place where the discharge was obtained.

THIS was a motion to enter an *exoneretur* upon the bail piece.

The debt in this case was contracted in *New York*, where the plaintiffs resided. The defendant an inhabitant of *Georgetown*, was discharged on the 7th of *August* 1811, under the act of Congress of the 3d of *March* 1803, an insolvent law for the *District* of *Columbia*, which merely liberated the person, and prevented its future arrest, but did not discharge the debt.

After this motion was made, allegations of fraud were filed against the insolvent, in the proper court in *Washington*, with a view to vacate the certificate; and while these proceedings were pending, this Court would not entertain the motion; but on the allegations being dismissed in the last month, the motion was now called on.

Chauncey on behalf of the motion, argued that this court had bound itself to the principle of reciprocity, in cases of this nature; and that by reference to various decisions, particularly that in *Smith* v. *Brown* (*a*), it would be found that no other rule on the subject, was known to this state. That being settled, the only question was, to what extent is a discharge under the insolvent law of *Pennsylvania* recognized in the *District* of *Columbia?* And on this point the certificate of Judge *Cranch*, is decisive. A note of three cases is given (*b*). In the first, the debt was contracted in *Georgia*, and

(*a*) 3 *Binn.* 203.

(*b*) The following are the notes of the cases referred to.

Alexandria *county.* November *term*, 1798. WRAY v. REILY. Debt on a judgment of a court in the state of *Georgia* in 1796. The debt was originally contracted in *Georgia*. Plea of a discharge under an insolvent law of *Maryland*, which discharged the debt itself and not merely the person, held good.

Washington *county.* July *term*, 1805. BOYER v. HERTY, special bail of *Roberts. Ca. sa.* to *December* term 1803, returned *non est.* 7th of *January* 1804, insolvent law of *Maryland* passed discharging *Roberts.* 27th of *January* 1804, *scire facias* issued against bail, returnable to *July* term 1804.

1813.

WALSH et al. v. NOURSE.

the discharge took place under a bankrupt law of *Maryland*. In the second the discharge was under an insolvent law of *Maryland*. In the third the debt was contracted in *Maryland*, and the discharge was under the insolvent law of *Pennsylvania*. In all, the Circuit Court of *Columbia* recognised the discharge. The last case is in point to the present.

Montgomery for the plaintiffs, contended that the discharge ought not to be recognised, because the debt was contracted and the plaintiffs resided in the state of *New York;* and neither in that state, nor in *Pennsylvania*, where the suit was brought, nor by the general law, could such a discharge affect such a debt.

In *New York*, the cases of *Smith* v. *Smith* (*a*), and *Vanraugh* v. *Vanarsdaln* (*b*) are express, that a debt contracted in one state, is not discharged by the insolvent law of another.

In *Pennsylvania*, *Millar* v. *Hall* (*c*), which is the leading case, was a discharge under the law of *Maryland*, of a debt contracted there; and the subsequent cases of *Thomson* v.

May 1804, *Roberts* was discharged by the Chancellor of *Maryland*. *July* term 1805, *Herty* moved to have an *exoneretur* entered upon the bail piece. But the Court refused, because the motion was made too late. The surrender of the principal himself, would not then have been received. The Court intimated an opinion, that if the motion had been made in time, *i. e.* while the bail could discharge himself by the surrender of the principal, it would have prevailed.

Washington *county*. July *term* 1804. DAVIS and others *v.* MARSHALL. Debt contracted in *Maryland*. Defendant moved to *Philadelphia*, where his creditors arrested him, and he was discharged under the insolvent law of *Pennsylvania*. The plaintiffs brought suit in the General Court of *Maryland*. On producing this discharge, the General Court of *Maryland* permitted the defendant to appear without bail. The plaintiffs then struck off their action, and brought suit in the *District* of *Columbia*, where this Court also permitted the defendant to appear without bail, upon his producing his discharge under the laws of *Pennsylvania*.

Judge *Cranch*, on communicating these notes, stated that some other cases had occurred, in which the practice of the Court had been in conformity with these; and he did not know any case decided differently; so that he considered it as the uniform practice of that Court, to give the same validity and effect to the insolvent law of any state, as it would have had in the courts of that state.

(*a*) 2 *Johns.* 235. (*b*) 3 *Caines* 154. (*c*) 1 *Dall.* 229.

1813.

WALSH et al. v. NOURSE.

Young (*a*) and *Donaldson* v. *Chambers* (*b*), were ruled upon the authority of that decision. The general law is shewn by a variety of adjudications, all confirming the principle, that to make a discharge valid, either the debt must have been contracted, or the creditor resident, within the jurisdiction where the discharge took place. *Emory* v. *Greenough* (*c*), *Proctor* v. *Moor* (*d*), *Green* v. *Sarmiento* (*e*), *Knox* v. *Greenleaf* (*f*), *Pedder* v. *MacMaster* (*g*), *Smith* v. *Buchanan* (*h*). The law which gives relief to the debtor, must bind the person of the creditor, or have been in the contemplation of the parties at the time of the contract.

Binney on the same side argued, that if this Court would not adopt the argument of his colleague, they must at least consider themselves as bound by the rule of their predecessors, whose decisions had rejected the general rule, and created in its place one of a peculiar kind. The only question was as to the character of that rule. In *Millar* v. *Hall*, and the other cases ruled by it, the discharge was under a bankrupt law, which wiped off the debt, and this Court gave it effect. But in the only case of a discharge under an insolvent law, relieving the person merely, *James* v. *Allen* (*i*), no effect was given to it. The distinction must have been founded on this, that where the person is discharged and the goods left liable, it becomes a question of remedy merely, a *capias* and *ca. sa.* being taken away, and *summons* and *fi. fa.* left; and, the courts of all countries adopting their own remedies without regard to foreign laws, as in *Smith* v. *Spinolla* (*k*), they had deemed an insolvent's discharge to have no effect any where but upon the remedy, and therefore not to be recognized by them. It has been only in relation to an absolute discharge that comity has been shewn. In this case the discharge of the defendant is merely personal, and leaves his future goods liable to execution.

Chauncey in reply, insisted that the case of *Hilliard* v. *Greenleaf* (*l*), was a complete answer to the argument upon

(*a*) 1 *Dall.* 294.
(*b*) 2 *Dall.* 100.
(*c*) 3 *Dall.* 369.
(*d*) 1 *Mass.* 198.
(*e*) *Brown.* 30. *App.*
(*f*) *Wallace* 108.
(*g*) 8 *D. & E.* 609.
(*h*) 1 *East.* 6.
(*i*) 1 *Dall.* 188.
(*k*) 2 *Johns.* 198.
(*l*) *Supra. p.* 336.

1813.

WALSH et al. v. NOURSE.

the general rule. In that case the debt was contracted and the creditor resided in *Pennsylvania*, and the discharge was granted in *Maryland*. As to the distinction between bankrupt and insolvent laws, it had not been any where taken by the Court, although *James* v. *Allen* did not appear to coincide with the other cases. Such a distinction was completely at variance with that principle of reciprocity on which *Smith* v. *Brown*, after much consideration had been ruled; for *Pennsylvania* at the date of those cases, had no bankrupt law. She has none now. And of course, to argue that her courts ought to respect only such discharges as take away the debt, is to argue that she never can respect the bankrupt laws of other states, on the ground that they pay respect to hers; which is the meaning of reciprocity. The discharge, whether absolute or personal, is intitled to respect, because it follows a surrender of all the debtor's property, for the benefit of his creditors. They are the same in their benefit to the creditors, they ought to be the same in their advantages to the debtor. The Circuit Court for *Columbia*, makes no distinction, but gives full effect to our insolvent law.

At the close of the argument, Mr. *Tilghman*, as *amicus curiæ*, stated, that in *Greenleaf* v. *Banks* in the Supreme Court of the *United States*, where the question was whether a discharge in *Maryland*, was a bar to an action for a debt contracted in *Virginia*, Judge *Chase* intimated to the counsel of the plaintiff in error, that all the judges present had expressed an opinion adverse to the discharge; in consequence of which the writ of error was non-prossed.

TILGHMAN C. J. This is a motion for an *exoneretur* on the bail piece. The debt for which the plaintiffs sue, was contracted in *New York* where they reside. The defendant has been discharged from imprisonment at *Washington* in the *District* of *Columbia*, by virtue of an act of congress for the relief of insolvent debtors within the *District* of *Columbia*, passed the 3d of *March* 1803. By this act the person of the debtor is discharged from imprisonment, on making an assignment of all his estate for the benefit of his creditors; but any property which he may afterwards acquire, remains liable to the payment of his debts. It is provided by the 14th section of the act, "that no discharge under it shall have a greater

"effect in any particular state, than if such debtor had been "discharged under the insolvent debtors law, of any other "state."

If this matter is considered *on principle*, it is not easy to discover by what authority any state can by its laws affect a debt contracted in another state, where the creditor is residing. I mean how it can affect the debt so as to prevent the creditor from bringing an action in another state. Every state has power over the persons residing within its territory, and therefore where a debt is discharged by the law of a state in which both plaintiff and defendant reside, another state ought to pay regard to it. Repeated decisions by my predecessors in this court, have placed the law on a footing somewhat different from the principle I have mentioned. Our rule has been to pay the same regard to the insolvent laws of our sister states, which their courts pay to ours. If the matter were to be taken up anew, I should be for adhering to what I consider the true principle. But not without considerable reluctance, I have thought myself bound by former decisions, as I have declared in the case of *Boggs* and *Davidson* v. *Teackle*, a few days ago. We are to consider therefore how the law is held in the *District* of *Columbia*. That district is subject to the laws of the *United States*, and the judges are appointed by the President with the advice of the Senate. A writ of error lies from the inferior courts to the Supreme Court of the *United States;* so that we had better go to the fountain head at once, and inquire what is the opinion of the Supreme Court. I believe the point has never been expressly decided by that court, although it has been several times before them in cases which I shall mention, and it has been several times decided by judges of the Supreme Court sitting in the Circuit Courts. In the case of *Emory* v. *Greenough*, 3 *Dall.* 369, the debt was contracted in *Massachusetts*, the debtor went to *Pennsylvania* where he was discharged, he returned to *Massachusetts*, and in an action brought against him in the Circuit Court there, it was determined that the *Pennsylvania* discharge was of no validity. A writ of error was brought to the Supreme Court of the *United States*, which was then held in this city. It was fully argued. I was present at the argument, and from intimations which fell from the judges, it was generally supposed that

1813.

WALSH et al. v. NOURSE.

the judgment of the Circuit Court would be affirmed. No judgment however was given, the Court being suddenly broken up by a dangerous fever with which the city was infected. The cause went off afterwards for a defect of jurisdiction. In *Banks* v. *Greenleaf* in the Circuit Court of *Virginia*, judgment was given against the defendant, who pleaded his discharge under a law of *Maryland* to an action for a debt contracted in *Virginia*. A writ of error was brought to the Supreme Court, and non-prossed by the plaintiff in error, from an apprehension that the Court would decide against him. In *Green* v. *Sarmiento*, in the Circuit Court for the District of *Pennsylvania*, it was lately decided that a discharge under a bankrupt law of the *Island* of *Teneriffe*, was not available in an action brought against the defendant on a judgment in the state of *New York*. I am inclined to think therefore, that when a point of this kind shall be brought before the Supreme Court, the decision will be unfavourable to the debtor. Under these circumstances, the rule adopted by this Court, which deals out to others the same measure which they deal to us, would prevent us from discharging the defendant if he had been surrendered by his bail. It follows that an *exoneretur* should not be entered on the bail piece. I am therefore of opinion that the motion should not be granted.

YEATES J. The difficulty in my mind during the argument of this case, arose from the certificate of Judge *Cranch*, produced by the counsel who supported the motion for an *exoneretur*. After specifying three different suits in the District Court of *Columbia*, and the decisions of the Court therein, he proceeds to state, "that he considers it as the uniform prac-"tice of that Court to give the same validity and effect to the "insolvent law of any state, as it would have had in the courts "of that state." The principle on which this Court has acted, is to discharge the party on common bail, if the state where the debt is discharged, extends the same courtesy to citizens of *Pennsylvania;* and in *Smith* v. *Brown*, 3 *Binn.* 202, the Chief Justice has gone so far as to say, "that he thinks it fair to "presume unless some reason is shewn to the contrary, that "such courtesy is extended, and such has been the course "hitherto pursued by the Court, when discharges have been "pleaded under the laws of our sister states." The certifi-

cate of Judge *Cranch* would therefore be highly authoritative, unless we had strong evidence to impugn it. But an appeal lies from the District Court of *Columbia* to the Supreme Court of the *United States;* and it is ascertained fully to us, that a different doctrine prevails in that Court, from the cases cited at the bar, and particularly in *Greenleaf* v. *Banks*, mentioned by Mr. *E. Tilghman* as *amicus curiæ*. A diversity of decision on this subject holds in different parts of the union. *New York* and *Massachusetts Bay* do not adopt our principle of reciprocity as the rule of decision. But feeling myself bound by it, as the governing rule of this Court, and conceiving that the settled doctrine in the courts of *dernier resort*, must be our guide on the point of comity, I am of opinion that the motion for the *exoneretur* should be denied.

BRACKENRIDGE J. expressed his concurrence; and added, that, should an opportunity occur, he should have no objection to reconsider the principle which had been adopted by the Court.

Motion denied.

MUSSINA *against* HERTZOG.

Philadelphia, Saturday, January 9.

EXCEPTIONS by the plaintiff to a report of referees.

An agreement by rule of Court to submit all matters in variance to *A*, *B*, and *C*, before whom the parties were to appear without counsel, to *waive all objections arising upon legal grounds*, and to let the referees determine all matters justly, honestly, and equitably, the report of a majority of them to be *final and conclusive*—does not preclude either party from filing exceptions to the report.

There were cross actions on the case between these parties, who had been partners, and brought suit respectively in this form, for matters arising out of unsettled partnership transactions.

The present action was by amicable agreement to *July* term 1812, whereby the parties submitted all matters in variance between them in this action, to *Peter Wiltberger*, *Thomas Mifflin*, and *William Bethell*, who were "to hear the parties and their allegations, and determine the controversies between them, and their award or the award of any two of them to be final and conclusive; this reference to be under the act of 1705, and not subject to the provisions of the late arbitration laws. Report into office, and judgment."

On the 6th of *July* 1812, they entered into an additional agreement. "According to our original agreement and un-

1813.

MUSSINA v. HERTZOG.

"derstanding, we agree that we will appear before the re-"ferees by ourselves, without the personal assistance of at-"torney or counsel. And we further agree to waive all *ob-*"*jections arising upon legal grounds*, and to let the referees "determine all matters, claims and controversies whatever, "that we may have each against the other, *justly*, *honestly* "*and equitably*, and their report, or the report of a majority "of them, to be *final and conclusive* upon us."

The referees having awarded in the plaintiff's favour, exceptions were filed; and a question preliminary to the merits, was the right of the defendant to file them.

J. R. Ingersoll for the plaintiff, contended that by the agreement of the 6th of *July* 1812, the award was not subject to exceptions; it was the same as if the parties had agreed not to file exceptions.

Phillips and *Hopkinson* contra, argued that the terms *final and conclusive* were not a bar, because every rule of court contained them; they meant final and conclusive, subject to the approbation of the Court; and the second agreement, was intended merely to waive objections to the form of action, which was case instead of account render, and in one of the suits, damages were claimed for a cause of action local in its nature, and which arose in *Louisiana*. Had the parties agreed not to file an exception, this Court would have disregarded the agreement. *Kyd on Awards*, 14, 20. *Kill* v. *Hollister* (*a*). If the jurisdiction of this Court is not ousted by an engagement to refer, as these authorities prove, neither can it be by an agreement not to except.

J. R. Ingersoll in reply. Any man may waive a legal advantage. He may release errors, or he may stipulate not to assign them; and surely the Court will hold him to his agreement. Whether an agreement to refer, implies a negative, that he will not sue, has been the only question; but if he covenants not to sue, he is certainly estopped. The only point then is the true meaning of the last agreement; which if any thing can imply a negative, does imply that the report shall not be questioned.

(*a*) 1 *Wils.* 129.

1813.

MUSSINA v. HERTZOG.

TILGHMAN C. J. It is unnecessary to decide whether a party shall be permitted to except, after a plain and clear agreement not to file exceptions. That is not the present case. The first agreement is in the usual form, and neither party is barred by the terms *final and conclusive.* They are common to every rule of reference, and leave the report subject to the Court's opinion, upon exceptions duly filed. The second agreement, was no doubt made to obviate objections to the form of action, and the nature of the demand. These are the legal objections referred to; objections that might be taken before the referees. It goes no further than the former as to the conclusiveness of the award. I am of opinion that the defendant was intitled to file exceptions.

YEATES J. was of the same opinion.

BRACKENRIDGE J. If the defendant had agreed not to file exceptions, he would have been bound. The case is the same as if *A* promise to pay for a horse what *B* says he is worth. *Interest reipublicæ ut sit finis litium.* But it is a question of intention. Did the plaintiff so agree? I see nothing like it. There is enough for the agreement to operate upon, without precluding the defendant from filing exceptions.

The Court then proceeded to an examination of the merits, and

Set aside the award.

5b 389
4sr508

KEARNEY *against* M'CULLOUGH.

Philadelphia, Saturday, January 9.

Motion for rule to shew cause why foreign attachment should not be dissolved, is in time at *December* term, if the attachment was returnable at *July*; that term consisting of but one day.

FOREIGN attachment to *July* term 1811. On the first day of *December* term following, *Hallowell* for the defendant obtained a rule upon the plaintiff to shew his cause of action, and why the attachment should not be dissolved.

Meredith for the plaintiff, being now called upon to shew cause, contended that the motion was too late by the practice of the court. It should have been made at the term to which the writ was returnable. *Serg. on Att.* 138.

1813.

KEARNEY v. M'CULLOUGH

PER CURIAM. The court in *July*, being held for one day only, for the purpose of receiving returns, has not generally been considered as a meeting of business. It is true the motion might then have been made. But we think the defendant cannot be said to have been in default, in not making the motion sooner than the *December* term following.

No cause being shewn,

Attachment dissolved.

PRESTON *against* ENGLERT.

Philadelphia, Saturday, January 9.

IN ERROR.

An award of referees upon which no judgment is rendered, is a cause *remaining untried,* within the act of the 11th of *March* 1809, abolishing the Circuit Courts, and is duly transferred to the Common Pleas of the proper county, there to be determined.

ERROR to *Wayne* county. This action was brought against *Preston*, in the Common Pleas of *Wayne* to *February* 1806. It was removed by *habeas corpus* to the Circuit Court, and there referred. On the 3d of *February* 1808, an award was made in favour of *Englert* for 126 dollars 85 cents and costs, and filed in the office. On the 7th of *October* 1809, the cause was returned to the Common Pleas, who on motion of the plaintiff's counsel, gave judgment on the award, in *December* following.

Ewing for the plaintiff in error, objected to the record, that the cause ought not to have been sent down from the Circuit Court, because it did not remain *untried* on the 4th of *October* 1809, within the seventh section of the act of the 11th of *March* 1809. *Purd. Abr.* 267. It was *determined* by the omission of *Preston* to file exceptions; and it clearly had been *tried.*

C. J. Ingersoll contra, said that the cause had not been tried and determined in the Circuit Court; and that Court having been abolished on the 4th of *October*, it was essential to send it down for determination, or the plaintiff could never have obtained judgment. The reason why there was no judgment in the Circuit Court, was that no such court was held there after the report.

1813.

PRESTON v. ENGLERT.

PER CURIAM. A cause was not completely tried within the spirit of that act, until judgment was pronounced. The intention of the law, was to take all unfinished causes down to the Common Pleas; and this was one.

Judgment affirmed.

END OF DECEMBER TERM, 1812.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District. March Term, 1813.

5b 392
4r 284
6w303
6ws251
10 155
18 255
23 473
24 240
59 286

1813.

Philadelphia, Monday, March 29.

Clemson *against* Davidson and another.

A received a sum of money from *B*, and gave him a receipt, stating it to be received as an advance on a shipment of flour then making on board a certain ship, *to be* consigned to the house of *B* in *Manchester*. The flour was bought by *A*, after this receipt, and delivered by the vendor on board a ship freighted by *A*. *A* having stopt payment about the same time, agreed with the vendor of the flour, who was ignorant of the agreement with *B*, to rescind the contract of sale, and gave him back the bill of parcels, with a request that he would take possession of it. *Held*, that *B*, or his house, had no *lien* upon the flour that could prevent *A* from rescinding the contract with the vendor, and re-delivering the flour to him. To constitute a *lien* upon a corporeal chattel, possession is essential; and although, where a fund is appropriated to an individual, equity considers the appropriation as an assignment, and will protect it, yet this is only where from the nature of the fund, manual possession and transfer are impossible. If the chattel is susceptible of delivery, an appropriation without delivery cannot prevail against a *bona fide* purchaser, or *quasi* purchaser, without notice.

Where a replevin issued for flour on board a ship, and the master and consignee made no question about the freight, but were only desirous to prevent the ship from being implicated in the controversy between the respective claimants, both of whom were willing to send the flour on in the ship, *Held*, that the jury were warranted in finding that the claim to the payment of freight, before the flour should be delivered to the plaintiff, was waived by the master; and that the judge was right in instructing them that the master's pleading property in the adverse claimant, and not in himself, was evidence of the waiver.

Quære, whether a master has any *lien* for freight before the ship breaks ground.

The Court may grant a second new trial, where merely facts are in controversy; but it ought only to be in extraordinary cases.

REPLEVIN. This cause came on for trial a second time, before the Chief Justice at a *Nisi Prius* in *February* last, when the same facts were in evidence, that are stated in the preceding volume, (page 405) with these additions.

When the plaintiff went to receive from *Davidson* his notes for the flour which had been carried down to the *Hi-*

bernia, he gave him a bill of parcels, which *Davidson* returned, saying his notes would be of no service to him, and telling him to go and take possession of the flour. That the plaintiff went to the captain of the *Hibernia*, and to her consignee Mr. *Griffith*, expressed his willingness to send the flour to the owners of the vessel, on consignment, and asked for a bill of lading on those terms; but Mr. *Griffith* directed the captain not to deliver the flour, unless the matter should be put on such ground that the ship should not be implicated. The same answer was given to *Pershouse*, who claimed in opposition to the plaintiff; and it was not until after property was claimed, and bond given in the replevin by *Pershouse*, that he obtained a bill of lading.

The defendant's counsel contended before the jury, 1. That the flour had been duly delivered, and the property transferred to *Davidson*. 2. That he never rescinded the contract of sale, or agreed to re-deliver the flour. 3. That *Pershouse* had a lien upon the flour, in consequence of the previous agreement with *Davidson*. 4. That the plaintiff could not recover, not having tendered the freight.

The Chief Justice left the delivery of the flour, and the rescinding of the contract, to the jury, as facts; instructed them on the third point, that *Pershouse* had no lien which put it out of *Davidson's* power to vacate the contract, if he was disposed so to do; and as to the freight, submitted it to the jury whether a tender of freight had not been waived by both captain and consignee, of which the plea by the former, *of property in Pershouse*, was evidence corroborating the circumstances which occurred before the replevin.

The inclination of the Court's mind upon the points of fact, seemed to be rather in the defendant's favour; but the jury found again for the plaintiff, and the defendants moved for a new trial.

Hallowell and *Tilghman* for the defendants.

1. The verdict is manifestly against the weight of evidence. The contract was to deliver the flour at the wharf or on board the *Hibernia;* and it was so delivered before the notes were demanded. The property was therefore in *Davidson*. If any thing on his part was necessary to rescind the contract, and restore the flour to *Clemson*, it was not re-

1813.

CLEMSON v. DAVIDSON.

scinded, for he peremptorily refused to do any thing that should benefit one creditor more than another. The return of the bill of parcels is an after thought; it was not mentioned on the first trial. It was a useless document, and was neither given nor returned with a view to pass or devest the property; and unless it was returned with this view, it was of no value. Nothing stands in the way of a new trial upon this ground, but two verdicts. No doubt, however, the Court may order any number of new trials, where the jury err plainly against the fact. There is no rule that there may not be a new trial after a new trial in such a case; it depends merely upon the discretion of the Court, who grant or refuse it, as best answers the ends of justice. *Goodwin* v. *Gibbons* (*a*). Here there was no disputed fact. The jury went directly against the evidence, and the obvious inclination of his honour's mind.

2. *Pershouse* had a lien upon the flour, which put it out of *Davidson's* power to return it. The flour was bought for the security of *Pershouse*, and was specifically appropriated to his house, by shipping it on board a vessel that was to transport it to them. He relied upon the specific security, and not on the personal responsibility of *Davidson*. Under these circumstances, equity will protect the appropriation, and if necessary would follow the proceeds into the hands of third persons. *Ex parte Oursell* (*b*), *Ex parte Byas* (*c*), *Bates* v. *Dandy* (*d*), *Inglis* v. *Inglis* (*e*), *Sharpless* v. *Welsh* (*f*), *Yeates* v. *Groves* (*g*), *Row* v. *Dawson* (*h*), *Parke* v. *Eliason* (*i*), *Tooke* v. *Hollingsworth* (*k*). In *Fitzgerald* v. *Caldwell*, in this Court, an appropriation of a fund, by letter merely, was held to prevail against a subsequent attachment creditor.

3. Freight ought to have been tendered. The right to it gave the master a lien or special property, which is fatal to the plaintiff's action; for upon the issue, he must shew such a property as entitled him to possession at the time the replevin was served; and if the master was entitled to retain for any cause, the issue is against him. Nothing was done to

(*a*) 4 *Burr.* 2108. (*d*) 2 *Atk.* 207. (*g*) 1 *Ves. jr.* 280. (*k*) 5 *D. & E.* 215.
(*b*) *Ambl.* 297. (*e*) 2 *Dall.* 49. (*h*) 1 *Ves.* 331.
(*c*) 1 *Atk.* 124. (*f*) 4 *Dall.* 280. (*i*) 5 *East* 550.

waive this right. Mere silence will not answer. It was the duty of the plaintiff to tender the freight, without request; and the subsequent plea by the master, is of no importance, because that was put in after the replevin was returned, and the question is, what were the rights of the parties, when it was served.

Binney and *Dallas* for the plaintiff.

1. The right of the Court to grant a second new trial is not questioned; but it is exercised only in extraordinary cases; cases in which the jury have been flagrantly wrong. It is not a sufficient reason for it, that the Court do not agree with the jury, and would have given a different verdict. *Walker* v. *Smith* (*a*). Upon the last trial there was new evidence. The bill of parcels was given as the symbol of delivery; it was returned as such to the vendor, with a request that he would take possession again. The whole turned on *Davidson's* intention, which was left as a fact to the jury. If he intended to rescind the contract, he did rescind it; for his acts were sufficient, if that was his intention. His refusal to sign an order, was from a desire not to furnish his creditors with a document to convict him of partiality.

2. No right of *Pershouse* was in the plaintiff's way. *Pershouse* had no lien; for possession is essential to lien, and where that is lost, the lien ceases. The very term implies it. *Hammonds* v. *Barclay* (*b*), *Drinkwater* v. *Goodwin* (*c*), *Kinloch* v. *Craig* (*d*), *Sweet* v. *Pym* (*e*). Here the goods were put on board *Davidson's* ship, he, and not *Pershouse*, having engaged the freight; and no bill of lading was signed until after the replevin. It stood up to that time upon a mere promise to consign; and in fact from the course of dealing between the parties, it is obvious that the promise and not the chattel was considered the security. All the defendant's cases are equitable appropriations, where the fund was not susceptible of delivery, and all that the owner could do to vest an interest, was to appropriate by letter or assignment. They furnish no rule for a case in which manual possession might be had. A secret appropriation of a corporeal chattel without delivery, can never stand in the way

(*a*) 4 *Dall.* 390.
(*b*) 2 *East* 235.
(*c*) *Cowp.* 253.
(*d*) 3 *D. & E.* 119.
(*e*) 1 *East* 4.

1813.

CLEMSON v. DAVIDSON.

of a person purchasing *bona fide*, and without notice; and that is our situation. *Walton* and *Fillis* v. *Ross* and *Jenks*, in the Circuit Court, is very like the present. There *Shoemaker* and *Travers* had promised to ship flour to *Walton* and *Fillis*, in payment of a debt. They put flour on board a vessel, and took a bill of lading in the name of *Walton* and *Fillis*, which was kept in their own hands. After this, the vendees having stopt payment, returned the flour to *Ross* and *Jenks*, from whom it was purchased, but not paid for; and Judge *Washington* decided in favour of the latter.

3. Freight was waived. The conduct of the master and consignee before, and the plea of the former after the suit brought, prove it. The objection is now made, not by the master, but by *Pershouse;* and therefore no countenance should be given to it. The jury were rightly instructed upon the facts. But in law no freight was due; first, because the flour was ours, and they refused us a bill of lading for it. If the customary document is refused, the merchant may take his flour without freight; he is not forced to send it on, without any evidence of property. In the next place, freight does not begin to be earned by the marine law, until the vessel has broke ground. Up to that time, there is of course no lien. The owner may take back his goods, being answerable for the damages. *Curling* v. *Long* (*a*), 1 *Molloy* 370. *Lib.* 2. *c.* 4. *s.* 3. 5. 6.

TILGHMAN C. J. In my charge to the jury on the trial of this cause, I submitted two facts to their determination. 1st. Whether the flour was actually delivered by *Clemson* to *Davidson*. 2d. If delivered, whether the contract was afterwards rescinded by consent of both parties. The evidence of a delivery was so strong, that I cannot suppose the jury had any hesitation on that point. As to the rescinding of the contract, it appeared to me that the evidence inclined considerably in favour of the defendants; because *Davidson* refused to give an order for the re-delivery of the flour, and declared that he would do no act, by which any one creditor should obtain a preference. But I cannot say, that the conduct of *Davidson* was altogether consistent, or that there

(*a*) 1 *Bos. and Pul.* 634.

was no evidence which went towards rescinding the contract. When *Clemson* presented the bill of parcels, and demanded *Davidson's* notes, *Davidson* says, that he told *Clemson* the notes would be of no service, returned him the bill of parcels, and told him to go and take possession of the flour. The contract might have been rescinded without a written order for re-delivery, and as this is the second verdict in favour of the plaintiffs on a matter of fact, I do not think it proper to order a third trial. But it is not to be concluded, that the Court have not power to direct a third trial of matters of fact. There is no such rule; the Court undoubtedly possess the power, and cases may occur in which it may be necessary to exercise it. Two verdicts on the same point are entitled to great weight, and unless they are attended with extraordinary circumstances, I have ever thought that they ought not to be disturbed. Where juries persist in violating *the law*, the case is different. We have several times granted a third trial, and there is no reason why we should stop there. Thus much for the facts in this cause.

But there are two points of law on which the counsel for the defendants rely for a new trial. In the first place they say, that if the property was vested in *Davidson* by delivery, *Clegg* and *Pershouse* immediately acquired a right, of which it was not in *Davidson's* power to deprive them. And they contend in the second place, that issue being joined on the *property of the plaintiff*, the defendants were entitled to a verdict, because the captain had a lien on the flour for the amount of the freight.

1. If *Clegg* and *Pershouse* had a right to the flour, it must be either because they had a lien on it for the money advanced to *Davidson*, or because *Davidson* had made them some kind of conveyance, legal or equitable. The fact is that *Pershouse* had paid 16,000 dollars to *Davidson*, for which a receipt was taken, "for advance on shipment of "158 bales of cotton, *shipped* on board the *British* barque "*Esther*, consigned to Messrs. *Clegg* and *Pershouse*, on "also a shipment now making in flour and cotton, on board "the *British* ship *Hibernia*, *to be consigned* also to Messrs. "*Clegg* and *Pershouse*." The flour was not at that time purchased by *Davidson*. The consignment was to be on the account and at the risk of *Davidson*, and *Clegg* and *Pers-*

1813.

CLEMSON v. DAVIDSON.

house were to be reimbursed out of the sales of the cotton and the flour. I see not how *Clegg* and *Pershouse* could have a lien on what was never in their possession. Possession is essential to a lien; and if one who has a lien parts with the possession, his lien in gone. There was no delivery on board the ship to *Clegg* and *Pershouse*, nor was it ever contemplated to make the delivery to them in the first instance. The promise was to *consign* to them. *Pershouse* trusted to the promise, and relied on the faith of *Davidson*. But it is said that the receipt given by *Davidson* vested an equitable interest in *Clegg* and *Pershouse*. At the time the receipt was given, it could vest no interest, because there was no subject in which there could be an interest, the flour not being then purchased; and when purchased, it is difficult to conceive how any *equitable* interest could arise to *Clegg* and *Pershouse*, to the prejudice of a third person who had no notice of their transactions. The defendant's counsel have cited a number of cases which do not come up to the point. They are to this purpose, that any order, writing or act, which makes an *appropriation* of a *fund*, amounts to an equitable assignment of that fund. The reason is plain, the fund being neither assignable at law, nor capable of manual possession, an appropriation of it, is all that the nature of the case admits. A court of equity will therefore protect such appropriation, and consider it as equal to an assignment. But very different is the case of a parcel of flour, which admits of actual delivery. Every man who purchases an interest in property of this kind, ought to take immediate possession; if he does not, he is guilty of negligence, and can have no equity against a third person, who contracts with the actual possessor without notice of a prior right. It is very material in the present case, that *Clemson* knew nothing of the contract between *Davidson* and *Clegg* and *Pershouse*, although he knew that *Davidson* bought the flour for the purpose of shipping; and when the agreement to rescind the contract was made, *Clemson* paid a valuable consideration by relinquishing his demand for the price of the flour. It is true, he knew then that *Davidson* had stopped payment; but he might have recovered part of his debt, though perhaps not the whole. The case of *Walton* and *Fillis* v. *Ross* and *Jenks*, in the Circuit Court of the *United States*, cited for the plaintiff, is very strong in his favour.

As to the lien for the freight, supposing that it once existed, I left it to the jury to decide from the evidence, whether it had not been relinquished. There was no express relinquishment; but it did not appear that the captain, or Mr. *Griffith*, the consignee of the ship, who were both applied to by *Clemson*, for possession, ever demanded freight, or put the delivery of the possession upon that point. Mr. *Griffith* seemed willing that the possession should be according to the right, and made no intimation that it would be withheld from *Clemson*, if *Pershouse* should acknowledge his right. He was anxious that the ship owners should not be involved in the dispute, and to that point his attention was directed. If the parties could not agree, Mr. *Griffith* knew that the dispute must be settled by law. The law was resorted to, and now, not Mr. *Griffith* nor the captain, but *Pershouse*, sets up this right to freight, in order to *prevent* a decision of the merits of the dispute between his house and the plaintiff. Captain *Finley*, the very man who might insist on this lien for freight, is a defendant in this action, and never made any such plea; he pleaded property in *Pershouse*. It is true, that notwithstanding this plea, it is necessary for *Clemson* to shew property in himself. He has shewn a *general* property; and as to this *special* property, now set up for freight, it lay with the ship owners or their agents, to insist on it or give it up. Whether they have given it up, is matter of fact to be inferred from their words and actions; and the plea of *Finley* that the property was in *Pershouse*, is evidence (though not conclusive) that in his opinion, this lien for freight did not exist. It is said that the plea was put in after the action brought, and the question is, what were the rights of the parties at the commencement of the action. That certainly is the question; but what is said or done by a party after the action commenced, may be strong evidence to shew what his rights were *at the commencement*. I am of opinion therefore, that the jury were warranted in saying that the lien for freight was relinquished, if it ever existed. Whether it did exist, the ship having never broken ground, it is unnecessary to decide. Upon the whole, I am against a new trial.

YEATES J. The Court possesses the unquestionable right of awarding a new trial, when a verdict has been rendered

1813.

CLEMSON v. DAVIDSON.

against the weight of evidence, or it is manifest that injustice has been done. In the exercise of this right, they will regulate their conduct by a legal discretion. They will not order a new trial against two concurring verdicts upon a question of fact, unless in an extraordinary case. More, however, may be urged in favour of the last verdict than of the first, new evidence having been laid before the jury by *Nathan Davidson*, which had been wholly omitted on the first trial. It was testified by him, that when the plaintiff called upon him for his promissory notes in payment of the flour, he gave him a bill of parcels, which *Davidson* delivered back to him, saying he might take his flour. If this be a correct statement of the fact, it may be supposed to warrant the inference that the original contract was rescinded, and that an act was done by *Davidson* to vacate it, flowing from his wishes upon that occasion. I would not, however, be understood to say, that I should have concurred in such a verdict, if I had been one of the jurors; because this circumstance of the bill of parcels renders *Davidson* inconsistent with himself in other parts of his story. But the jurors were the proper judges of his credibility, and under all the circumstances of the case, I do not feel myself justified in disturbing the second verdict.

I can see no reason for changing the opinion which I delivered upon the former motion, that *Clegg* and *Pershouse* had no specific lien on the flour shipped, in consequence of the advances made by one of the partners on the spot. I still think that *Davidson* had the legal right of vacating the contract made with *Pershouse*, if he thought proper so to do; though he thereby subjected himself to an action. I am more strongly fortified in my opinion since the present argument. It remains only for me to say, that I think the Chief Justice was correct, when he charged the jury that they might infer from all the facts of the case, that the initiate right to the freight of the flour was waived by the consignee. Mr. *Griffith* testified, that he was totally opposed to implicating the vessel under his care in the controversy, and must have well known that the possession of the flour would entitle the foreign owners to the freight on the performance of the voyage.

Upon the whole, I am of opinion, that the rule to shew cause why a new trial should not be granted, be denied.

BRACKENRIDGE J. It has been made very clear to me, that the ship owner had no lien on the goods put on board, beyond the compensation for the taking on board, the stowage, unshipping and putting on the wharf again, and the demurrage to her sailing which this might occasion, this being before he broke ground. But all this was included in the freight, which the person putting on board offered to pay, provided he would carry for him. He offered to be answerable for it at the end of the voyage, when freight should be earned, which was the same thing. After this, he was a wrongdoer to retain for any other person, and his defence set up to the replevin, fails.

It has been rendered abundantly clear also, that *Pershouse* had no lien. On the former motion for a new trial, it struck me *en masse* from the evidence, that he could have none, but I had not the detail of facts so fully in mind as I now have. I could collect them only from hearing the report of the testimony read, or the comments of the counsel. The exposition of the counsel as to these facts, and as to this point, have been now more full, and the comments and legal discussion more at large. I shall not go into them, but leave it to a report which I shall be happy to see minute, and the reasoning at length. It will be of use to the student and the judge. The matter, therefore, stands as between *Clemson* and *Davidson*. There was a sale, but the substratum to the sale being completed was wanting, the giving notes, that is the paying for the property. The delivery was *quodam modo*. It carried with it, in the nature of the case, the same precedent condition. Without this it was but a carrying the sale into effect to a farther extent, a delivery *sub modo*, a sort of delivery, or, as the *Virginian* says in his expressive phrase, *sort and not sort*. In strictness there was no rescinding or annulling the contract on the part of *Davidson*, but a refusal to carry it farther, and comply with the last requisite to a complete transfer and change of possession. When the bill of parcels was offered to him, which was a circumstance that was not in the former evidence, he disclaimed a retainer or accepting this for the evidence of the transfer and possession. Could he set up a right to retain after this, as he has done, or has been done for him?

1813.

CLEMSON v. DAVIDSON.

I consider the case, 7 *Mass. Rep.* 453, as *alter et idem* with this case; another case with the like facts, save that some particulars were wanting to make it so strong a case for the defendant as this. The consignor put property on board the ship of the consignee. He delivered the invoice, and the bill of lading was signed by the captain, the agent of the consignee. There was shewn in evidence to the jury, an agreement with the consignee, by which the consignor agreed to accept draughts, and advance cargoes on credit. Also a copy of an account current, in which the cargo in question was charged by the consignor to the consignee. This property was attached as that of the consignee, by a third person. It was shipped under the agreement and bill, on board a ship sent as an entire chartered ship, for the purpose of conveying the cargo in question to the consignee. It was contended "that "the delivery to the master of the ship owned wholly by the "consignees, was a delivery to them to all intents and pur- "poses, he being their servant, and duly authorised to "receive that delivery. The property thus vested in them, "and the power and rights of the consignor wholly ceased."

By *Parsons*, Chief Justice: "the agreement cannot bind "the consignor after the insolvency of the consignee. The "credit contemplated, being founded upon the supposed abi- "lity of the consignee at the expiration of the term."

No tariff has been hitherto settled, by which it can be ascertained how many jurors shall go to make a judge, or how many verdicts shall weigh against the opinion of a Court; and grant that the Court may overrule *ad infinitum*, yet ought not this to be confined in discretion to a matter merely of artificial science, I mean questions which are a part of that science of fee simple, or fee tail, contingent remainder or executory devise, springing use or resulting trust, and not when the matter of law is merely a deduction of moral reason. The right and wrong of the case, the common mind may be more competent to decide. What is the law of the case, but the justice of it? My reason is with the verdict, and therefore I shall not interfere.

New trial refused, and judgment for plaintiff.

1813.

SAVAGE and another *against* PLEASANTS.

Philadelphia, Monday, March 29.

THIS was an action upon a policy of insurance, underwritten by the defendant, as President of the *United States Insurance Company*, on the 4th of *September* 1807, upon goods by the ship *Union*, *Jacobs*, at and from *Philadelphia* to *Antwerp*, 15000 dollars at 10 per cent. The policy contained an agreement by the assured not to abandon in less than sixty days after advice of capture or detention, and the usual clause in relation to illicit or prohibited trade.

The cause was tried before the Chief Justice at a *Nisi Prius* in *November* last, when it was agreed that a verdict should be entered for the plaintiffs for 6862 dollars 94 cents, the full amount of their claim, calculated upon the principles of a total loss, subject to the opinion of the Court upon the whole case. If the Court should be of opinion that the plaintiffs were not intitled to recover, then the verdict to be set aside, and judgment to be entered for the defendant. If they should be of opinion that the plaintiffs were intitled to recover, then they were to say whether as for a partial or total loss, and if for the former, upon what principles it was to be calculated.

An insurance was effected on *goods* at and from *Philadelphia* to *Antwerp*, with an agreement by the assured not to abandon in case of capture or detention in less than sixty days after notice thereof, and with the usual clause against illicit or prohibited trade. The ship sailed on the 13th of *September* 1807, was captured by a *British* privateer on the 16th of *October*, and carried into *Plymouth*. *This event was known to the assured on the 1st of December.* On the 20th of *October* the ship's papers were returned, and she proceeeded on her voyage. On the 27th she dropt anchor in *Flushing* roads, when, the captain having reported himself to have been in *England*, a guard was put on board his vessel, and remained there until he was ordered to quit the roads, having been refused permission to proceed to *Antwerp*. On the 16th of *November* or *December*, he sailed from *Flushing* for *Rotterdam*, intending to discharge his cargo there, and on the 17th of *December* was captured by a *British* vessel of war, and carried into the *Downs*. *These events were known to the assured in the beginning of February.* On the 24th of *December* the ship's papers were returned, with permission to proceed to *Rotterdam*. But various accidents detained her until the captain, hearing of the *Dutch* decrees, determined to proceed to *London*, and discharge his cargo, which he did in the latter end of *February* or beginning of *March*. On the 20th of *May* 1808, the assured abandoned on the ground that the voyage was broken up, and the cargo was discharged in *England*.

Held 1. That the prohibition to trade at *Antwerp*, and the arrest at *Flushing*, being consequences of the first capture, they were not within the clause against prohibited trade, and gave the assured a right to abandon, if exercised in due time. 2. That the dropping anchor in the roads of *Flushing* was not a deviation, that fortress commanding the *Scheldt*, and compelling vessels to report there. 3. That sailing to *Rotterdam* for the purpose of discharging, was sailing on a new voyage, which the policy did not protect, and therefore the underwriters were not answerable for any subsequent disasters. 4. That the arrest and detention at *Flushing* and turning away, being known to the assured in *February*, the abandonment in *May* was too late; and therefore the assured were intitled to recover only for the loss arising from the first capture, and carrying into *England*.

1813.

SAVAGE v. PLEASANTS.

The facts reported by the Chief Justice were these: The *Union* sailed upon the voyage insured, with the goods of the plaintiffs on board, on the 13th of *September* 1807; and on the 16th of *October* was captured in the *British* channel by the private armed ship *Resolution*, and carried into *Plymouth*. On the 20th the ship and cargo were restored without costs, the papers returned, and the vessel permitted to prosecute her voyage, no one of the officers or crew having been on shore during the detention. On the 20th she arrived in *Flushing* roads, and there cast anchor. As soon as the master reported himself from *England*, a guard was put on board, and continued until she finally departed. Efforts were made by the consignee at *Antwerp* to procure permission for the ship to come there, but they proved abortive; and on the 16th of *November* or *December*, it did not distinctly appear which from the protests, being ordered to leave the roads, she set sail *upon a destination to Rotterdam for a market*, in consequence of recommendations by the consignee. While in the prosecution of this voyage, she was on the day after her departure from *Flushing*, captured by the *British* brig of war *Royalist*, and carried into the *Downs*. On the 24th of *December* her papers were returned, with permission to proceed to *Rotterdam* on payment of the captor's expenses, which the captain agreed to, to prevent further delay. On the 29th of *December*, while the captain was in *London* for the purpose of obtaining advice and assistance, a gale of wind arose, in which the ship was obliged to cut her cable and proceed to *Margate* roads, where she obtained another, and came to anchor, with assistance from the shore. The salvage was adjusted here at 80*l*. On the 10th of *January* she proceeded to *Westgate* bay, where another gale arose on the 14th, and continued to the 16th, in which she suffered some damage in her hull, and was in danger of shipwreck; but by aid from the shore was again saved, at an expense, for salvage, of 886*l*. She then went to *Ramsgate* for repairs, where on the 12th of *February*, she was considerably injured in her channels and mainwhales, by the ship *Paragon's* running foul of her. During this period, the captain remained in *London*, endeavouring to obtain the necessary advances for salvage and repairs, and for the amount of his freight, without

which he would not proceed; and hearing in the month of *February* of a decree of *Holland*, forbidding the entry of all vessels that had been in *England*, except in case of distress, he determined to bring the ship to *London*, and deposit the cargo with *Bainbridges* and *Brown*, who agreed on that condition to make the advances he required. On the 23d of *February* she accordingly came to *London*, the cargo was landed, and the repairs, salvage, and freight paid.

The intelligence of the *first* capture reached the plaintiffs on or before the 1st of *December* 1807. On that day they wrote to their agents Messrs. *Baring* and brothers, of *London*, requesting their assistance, if the vessel and cargo were not restored, expressing their conviction that the capture would prevent her admission into *Antwerp*, and their hopes, that if that was the case, she might make some other port on the continent.

In the beginning of *February* they knew of the events at *Flushing* and the second capture; and on the 29th of that month they wrote to the same gentlemen in *London*, expressing their regret at her detention in *England*, and saying "if the cargo is *discharged* in *England*, we consider the property as belonging to the underwriters." Messrs. *Baring* and brothers, on the 29th of *March*, wrote to the plaintiffs, informing them that the cargo was discharged, and that when the expenses were settled, they would take their part of it. Shortly after the receipt of this letter, the plaintiffs on the 20th of *May*, abandoned to the underwriters, stating for cause, that "the voyage was broken up, and the cargo dis- "charged in *England*."

No proofs of loss were exhibited to the defendant, until the 18th of *January* 1810; prior to which time, but after the abandonment, namely on the 8th of *December* 1808, the plaintiffs without consulting the defendant, wrote to Messrs. *Barings* to sell their adventure by the *Union*, when an opportunity should offer, stating that they were short insured 14000 dollars, that they were desirous of making the most for all concerned, and that they had no doubt of recovering from the underwriters. On the 31st of *December* 1808, and the 11th of *October* 1809, the adventure, consisting of sugars and indigo, was sold, at a considerable loss. The verdict was made up by taking the proportion which

1813.

SAVAGE v. PLEASANTS.

the sales, deducting general average and freight, bore to the invoice price, and applying that to the sum insured.

The case was argued at last *December* Term.

Binney and *Rawle* for the defendant. The case presents an adventure of goods, which at the time of abandonment were free from any restraint insured against, and in no degree damaged. But they were at *London* and not at *Antwerp*. It is the case of a loss of voyage merely, which gives no right of abandonment, unless exercised in a reasonable and short time after notice. *Anderson* v. *Royal Exchange* (*a*), *Mitchell* v. *Edie* (*b*), *Allwood* v. *Henkell* (*c*), *Duncan* v. *Koch* (*d*). The result of all the disasters which befel the adventure being this, if the plaintiffs can recover a total loss, it must be, because there has been at some period a peril justifying an abandonment, and an abandonment duly made. This has not been the case.

1. The first capture cannot be relied on. *Per se*, it was a cause of abandonment only while it lasted, and it ceased before it was known to the assured. Its *effects*, were such as the policy does not cover, or if it does, recourse to the policy was waived by delay. The only effect was the prohibition to trade at *Antwerp* by the *Berlin* decree. This did not justify abandonment, because it was not a peril acting directly upon the thing insured, but it was the fear and apprehension of a peril. *Hadkinson* v. *Robinson* (*e*), *Parkin* v. *Tunno* (*f*), *Foster* v. *Christie* (*g*), *Brown* v. *Vigne* (*h*), *Richardson* v. *Maine Ins. Co*, (*i*). It was also within the clause against prohibited trade; and as the underwriters are not answerable for this at all, it is immaterial to them from what cause it arises. *Mumford* v. *Phœnix Ins. Co.* (*k*), *Speyer* v. *N. York Ins. Co.* (*l*), *Tucker* v. *Juhel* (*m*), 1 *Marsh.* 346. But be this as it may, the peril of capture and all its effects were known to the assured on the first of *December;* the sixty days expired on the first of *February*, and they did not abandon until the 20th of *May*, which was out of time.

(*a*) 7 *East* 42.
(*b*) 2 *Marsh.* 590.
(*c*) 2 *Marsh.* 593.
(*d*) *Wallace* 33.
(*e*) 3 *Bos. & Pul.* 388.
(*f*) 11 *East* 21.
(*g*) 11 *East* 205.
(*h*) 12 *East* 288.
(*i*) 6 *Mass.* 102.
(*k*) 7 *Johns.* 449.
(*l*) 3 *Johns.* 88.
(*m*) 1 *Johns.* 20.

2. The detention at *Flushing*, and the turning away, will not answer. If *Flushing* is an out port of *Antwerp*, then the vessel arrived, and all that followed was a mere interdiction of trade, which is within the clause in the policy. If *Flushing* is not an out port of *Antwerp*, it was a deviation to cast anchor, for there is no evidence either of a custom, or a particular necessity to stop there. But suppose it otherwise, still the arrest, detention and turning away, are all within the clause against prohibited trade. At all events, they were known in the beginning of *February*, and gave if any an immediate cause of abandonment, which was not exercised until *May*. It is perfectly clear that the assured intended to speculate at the underwriter's expense. If the cargo could reach the continent, they would take the profit; and they intended to abandon, only in the event of its being discharged in *England*. This it was not competent for them to do; but it shews why they did not elect to consider any event up to this time as a total loss.

3. The second capture and its consequences are insufficient. The vessel sailed from *Flushing* for *Rotterdam*, not for advice, nor to wait an opportunity for prosecuting her original voyage, but to obtain a market. This was a clear deviation, which discharged the underwriters; for if the port of destination is shut, the policy does not protect the adventure to another port of discharge. The original voyage was abandoned, and the policy was at an end. *Parkin* v. *Tunno* (*a*), *Blackenhagen* v. *Royal Exchange Ass. Co.* (*b*), *Lee* v. *Gray*. (*c*)

4. The abandonment when made, did not state a sufficient cause. It gave the result, and not the accident or peril, which should have been communicated, that the underwriters might know how far it was their duty to accept. The cargo might be discharged and the voyage broken up by the fault of the captain, as in fact it was from his solicitude to obtain his freight. Stating this, therefore, stated nothing material. *Suydam* v. *Marine Ins. Co.* (*d*), 2 *Marsh.* 601., *King* v. *Delaware Ins. Co.* (*e*).

(*a*) 11 *East* 22.
(*b*) 1 *Campb.* 454.
(*c*) 7 *Mass. Rep.* 349.
(*d*) 1 *Johns.* 191.
(*e*) 6 *Cranch* 78.

1813.

SAVAGE v. PLEASANTS.

5. If duly made, the abandonment was waived by the conduct of the plaintiffs in selling without our assent. Until acceptance an abandonment is revocable. It was therefore in the plaintiffs' power to waive it, and they did by exercising an ownership, incompatible with the abandonment. Had the adventure brought a profit, no doubt they would have retained it. It is true they were part owners, to the extent that they were uninsured; but part owners cannot sell the entire property.

6. There being no total loss, the only question is as to the extent of the partial loss, which we contend is confined to the average at *Plymouth*. The disasters in *England* after the second capture, do not concern us for the reasons before stated. Damage to the goods there was none at any time. Freight paid in *England* which is also claimed, is not chargeable to us; first because it was not due, and secondly because underwriters on goods have nothing to do with the freight. And as to the loss arising upon the sales, that is a loss of market, which, unless it is a cause of abandonment, is nothing.

Dallas and *Ingersoll* for the plaintiffs, contended that there was a good cause of abandonment, duly exercised, and persisted in.

By the capture and carrying into *Plymouth*, the *Berlin* decree was brought into operation, and an insurmountable impediment raised to the termination of the voyage at *Antwerp*. Every thing therefore relative to the clause against prohibited trade, is misapplied, because that prohibition was brought into operation, if at all, by a peril insured against. If the trade became illegal, it became so by the capture; and it can never be permitted to underwriters to take advantage of an illegality induced by an accident for which they are liable. At the moment then when the capture, by means of the *Berlin* decree, cut off this vessel from its port of destination, it broke up the voyage, it rendered seizure or turning away from *Antwerp* morally certain, it justified the assured in making an abandonment. It was not fear or apprehension merely; it was not a contingent evil which might or might not happen; the loss of the voyage by this accident was as certain morally speaking, as

if the vessel had never been restored by the captors; and though the voyage was prosecuted to *Flushing*, that it might not afterwards be objected against our claim to an indemnity, that it was the duty of the master to proceed, yet that further prosecution was as hopeless in the beginning as it proved fruitless in the end. Under such circumstances the owner cannot be required to go on. The legal impediment, is as effectual a restraint as actual force. The interest of the underwriter forbids his encountering the consequences of an attempt to surmount it; and his own duty to the power that created it, commands an acquiescence. In such cases the policy is blank paper, if the assured may not abandon; and contrary to the cases cited, there are decisions both in *England* and the *United States* which justify an abandonment. *Barker* v. *Blakes* (*a*), *Craig* v. *United Insurance Company* (*b*), *Snowden* v. *Phœnix Ins. Co.* (*c*), *Hurtin* v. *The Phœnix Ins. Co.* (*d*), *Symonds* v. *The Union Insurance Company* (*e*).

Under these facts there was a perfect right to abandon. But at the same time there was a right to suspend the exercise of it, until inquiry had been made at or near to the port of destination. At *Flushing* where the ship cast anchor, she was guilty of no deviation, because that fortress commands the *Scheldt*, and all vessels bound to *Antwerp* are forced to pass under its guns. The master reported himself to the commandant, which implies a necessity for casting anchor, and his vessel was immediately put under actual arrest. Here was actual physical force, preventing the further prosecution of the voyage, and finally compelling the vessel, after ineffectual efforts of the consignee to depart. Was it necessary still to proceed to *Antwerp?* This if not impossible, would have been instantly fatal. To what port was she then to go? The captain was intitled to act for the benefit of all concerned, and to proceed to the most advantageous port. To go somewhere for the purpose of discharge was essential; and although the severity of some *English* decisions has denied the right, yet it has not been in cases

(*a*) 9 *East* 283.
(*b*) 6 *Johns.* 226.
(*c*) 3 *Binn.* 457.
(*d*) 2 *Marsh.* 601, *a.*
(*e*) 4 *Dall.* 417.

1813.

SAVAGE v. PLEASANTS.

like this, where a peril insured against has defeated the original voyage.

At the time of the second capture and detention, then, there was a perfect right to abandon, and sixty days after the intelligence was received in the month of *February*, brings it within a short time of the 20th of *May*. But if this is too late for the causes occurring at *Flushing*, the disasters in *England* gave a new right. By this time the *Milan* and *Dutch* decrees made every port of the continent impracticable, and confiscation was the inevitable consequence of arrival there. The vessel was injured, and no one was found willing to lend upon hypothecation on a voyage to the continent. The circumstances bring the case precisely to *Milles* v. *Fletcher* (*a*), and justified discharging the cargo. The knowledge of this event, was immediately followed by abandonment.

There has been then a peril, or rather a variety of perils flowing from or connected with each other, justifying abandonment.

It was duly exercised, because to state that a cargo has been discharged and the voyage broken up, implies that a peril insured against has caused it, or it would not be communicated to the underwriters; and if they wanted further information, it was their business to inquire. *Ralston* v. *Union Ins. Co.* (*b*).

It was persisted in, because the same letter which orders the sale negatives the waiver, by asserting the claim upon the underwriters. As part owners, the plaintiffs had a controul over the property, as to their own share at least; and no injury was done by sale of the whole. It was necessary to sell the whole for expenses due by the whole. Whether a waiver of the abandonment or not, depends on the *quo animo*, which was clearly against the waiver. If however there is not a total loss, there is at least a right to an indemnity, which can only be obtained by paying the general average in *England* upon both captures, and the loss upon the invoice by the sales, which of course includes the freight paid in *London*. Not having received the goods at *Antwerp*, the

(*a*) *Doug.* 219. (*b*) 4 *Binn.* 399.

plaintiffs derived no advantage from the payment of freight; and the payment of it was therefore a loss *pro tanto*.

Cur. adv. vult.

On this day the Judges delivered their opinions.

TILGHMAN C. J. On this case two questions are submitted to the Court:

1. Whether the plaintiffs are intitled to recover for a *total* loss.

2. Whether if not for a *total*, they may not recover for a *partial* loss, and on what principles such loss is to be estimated.

There is no doubt but the voyage has been broken up by events beyond the plaintiffs' controul. But the defendants contend that they are not responsible, because it was not broken up by any peril which they insured against; not by perils of the sea, capture or restraint or arrest of princes, but solely by decrees of the *French* emperor, which under the circumstances of this case prohibited an entry into the port of *Antwerp*. The defendants rely on the principles established by the late *English* decisions, cited in the argument, viz. 3 *Bos.* and *Pull.* 388, *Hadkinson* v. *Robinson;* 11 *East* 21, *Parkin* v. *Tunno;* 11 *East* 205, *Foster* v. *Christie;* 12 *East* 288, *Brown et al.* v. *Vigne*, which appear to have been adopted by the Supreme Court of *Massachusetts*, in *Richardson* v. *The Maine Fire and Insurance Company*, 6 *Mass. Rep.* 102.; *Amory and Co.* v. *Jones*, 6 *Mass. Rep.* 318, and *Lee* v. *Gray*, 7 *Mass. Rep.* 349. On these principles the insured is not at liberty to abandon, where the ship has reached the port of destination, and is refused an entry by the government of the place, or where the voyage is relinquished in consequence of intelligence that the port is blockaded or in the hands of an enemy, or that a hostile embargo has been laid. The decisions alluded to are bottomed on this reason, that the loss is not occasioned by a peril insured against, because a *fear* of capture or detention is very different from the *fact* of capture or detention. To permit the assured to abandon in every instance where capture is apprehended, would place the assurer upon a very uncertain and unjust footing, because there might be an

1813.

SAVAGE v. PLEASANTS.

affected or even a *real* fear, where there was very little actual danger, and it is truly said that the risque of capture is one of the immediate objects of the insurance, and therefore the assurer has a right to insist on the chance of escape, of which he is deprived by the relinquishment of the voyage. On the other hand the assured may be placed in a very hard situation as the law has been held. If he attempts to enter a blockaded port after notice, he forfeits the right of a neutral; if he attempts to trade in a port into which an entry has been prohibited, even after the commencement of the voyage, his property is liable to confiscation; and if being refused an entry, he steers for a different port, the underwriters are discharged, because it is not the same voyage which was insured. Thus without any default of the assured, his property is left uncovered. From the opinion delivered by Chief Justice *Kent* in *Craig* v. *The United Ins. Co.* 6 *Johns.* 226, it appears that the Supreme Court of *New York* have doubts whether the law has not been carried too far in favour of the insurers, in the cases which I have mentioned. It is unnecessary to express an opinion on that subject, as the case before us is distinguishable from all those which have been cited in favour of the defendants. It has never been decided that the assured may not abandon and claim for a total loss, where a voyage is broken up by a peril insured against. On the contrary, in *Barker* v. *Blakes*, 9 *East* 283, on an insurance from *New York* to *Havre de Grace*, where the ship was captured and carried into *England*, and during her detention there, the port of *Havre* was declared by the *British* government to be in a state of blockade, it was held that the assured had a right to abandon, the voyage being broken up in consequence of the capture and detention. Now in the present instance, the capture and carrying into *England* were the causes that the ship would not have been permitted to enter the port of *Antwerp*. For the decree of *Berlin* would have been no impediment to an entry, if there had been neither capture nor going to *England*. But it is said, that although this carrying into *England* might have been cause of abandonment, yet it was waived by the resumption of the voyage. Supposing this answer to be sufficient, yet another peril within the policy, soon afterwards occurred at *Flushing*. As soon as the ship came to an anchor and the master re-

ported that he came last from *England*, a guard was put on board of her, and continued till she left the port. So that the voyage was stopped by the actual force of the governing power at *Flushing*. But it is contended for the defendants, that dropping anchor at *Flushing* was a deviation. I cannot think so; it was necessary to come to an anchor, and make report, because the fort at *Flushing* commands the passage of the *Scheldt*. Again it is said by the defendants, that if the entry into *Antwerp* was unlawful, they are not responsible for it, because the plaintiffs have agreed not to look to them for any loss by seizure for illicit trade. But the trade was no otherwise unlawful than in consequence of an accident, against which the defendants had insured, viz. the capture and carrying into *England*. They must not be permitted therefore to avail themselves of an illegality springing from this source. The voyage then having been stopt by actual force of the government at *Flushing*, the plaintiffs might have abandoned to the defendants and claimed for a total loss. But did they exercise that right in due time? The breaking up of a voyage where the goods remain safe, is not a loss total in its nature. It is in the option of the assured to consider it so or not as he pleases. But he must decide in a reasonable time, and make known his determination to the insurers, otherwise they will be liable for no more than the actual loss. In this case, the plaintiffs had notice of what had happened at *Flushing*, probably about the middle, but certainly before the last of *February*. Now allowing what they contend for, that they had no right to abandon in less than sixty days from the time of notice, still I am of opinion that their abandonment was too long delayed, especially when the motive of the delay is considered. They did not abandon sooner, because they had it in view to proceed to *Rotterdam;* and it was not until this scheme was frustrated by the unlading of the cargo in *England*, that an abandonment was finally resolved on. They have no right after all this to throw the cargo on the defendants. But they have sustained damage, and shall they not be indemnified?

This brings us to the second point of inquiry.

There is no doubt but that the defendants are liable for an average loss on the first capture and detention in *England;* that is not disputed. The objects of dispute are, 1st, an ave-

1818.

SAVAGE v. PLEASANTS.

rage loss in consequence of the second capture, and of storms and accidents on the coast of *England* after leaving *Flushing*. 2d, The loss arising from the difference between the invoice value of the goods, and the proceeds of the sales in *England*. 3d, Freight.

The insurers are not liable for any partial loss not happening in the course of the voyage insured. When the ship was stopped at *Flushing* and afterwards released, if she had proceeded to one of the neighbouring ports with a view of prosecuting her original voyage as soon as the danger should be over, she would have been covered by the policy. But it appears she sailed from *Flushing* with a view of proceeding to *Rotterdam* for a market. This was not the voyage insured, and therefore the insurers are not answerable for losses sustained in the course of it. They are not answerable then for the losses by the second capture, and the storms and accidents on the coast of *England*, nor for the difference between the first cost of the goods and the sales in *England*. Indeed I see no principle upon which that *difference* could be reckoned as a partial loss, as the goods themselves received no damage. As to freight, it was not earned, and therefore the insurers are not chargeable with any loss on that account.

Upon the whole, I am of opinion that the plaintiffs are not intitled to recover for a total loss, but that they are intitled to recover for a partial loss which arose on the first capture and detention in *England*, and for no more.

YEATES J. It seems an insuperable bar to the recovery of the plaintiffs for a total loss in the present instance, that the state of the fact did not justify the abandonment at the time it was made. The sugars and indigo insured, appear by the protest of captain *Jacobs* on the 28th of *April* 1808, to have been safely landed in *London*, and deposited with the rest of the cargo in the hands of *Bainbridges* and *Brown*, as a security for money advanced by them for the necessary repairs of the ship *Union*. They were not then under the restraint or detention of any foreign prince. Besides, the loss of the voyage was no total loss in itself, but a cause of abandonment only, according to the doctrine laid down in *Anderson* v. *Royal Exchange Assurance Company*, 7 *East*

42. The capture of the ship and sending her into *Plymouth* on the 19th of *October* 1807, and the subsequent capture and sending her to the *Downs* on the 17th of *November* following, were at most but the grounds of a technical total loss. Of the first capture the plaintiffs had information previous to their letter to Messrs. *Baring* and Co. of the 1st of *December* 1807; and by another letter addressed to the same gentlemen on the 29th of *February* 1808, it appears that they knew of her second capture and of her having been at *Ramsgate* on the 22d of *December* preceding. The plaintiffs should have made their cession in a reasonable time after knowledge of these captures; and a delay of nearly two and a half months must be considered as fatal to their claim for a total loss. The books are filled with cases upon this point. Among others, the case of *Anderson* v. *Royal Exchange Assurance Company* before cited, *Barker* v. *Blakes*, 9 *East* 294, and *Livermore* v. *Newburyport Insurance Company*, 1 *Mass. Rep.* 264, may be referred to. Moreover if the abandonment was valid to charge the defendants as for a total loss, it was utterly inconsistent therewith, that the plaintiffs should assume a power over the goods insured, by directing their correspondents in *London* to sell them, subsequently to the cession of their interest therein to the underwriters; when in fact they could only exercise a dominion over such proportion of the goods as were short insured.

The important inquiry will then be, whether under all the occurrences which have happened, the defendants are responsible for a partial loss, and to what extent?

It cannot be denied that when the *Union* was pursuing her voyage to *Rotterdam*, she departed from the track of her voyage to *Antwerp*. How far she had proceeded, we are not informed by the captain; but this we know, that the two ports lie in opposite directions.

It has been strenuously contended, that the *British* capture justified the deviation upon the ground of necessity, and that the loss of the voyage insured necessarily flowed therefrom, which was one of the risks contained in the policy. These observations merit our serious consideration.

I take it to be fully established that the master of a ship insured, finding that some change has been effected in the

1813.

SAVAGE v. PLEASANTS.

commercial relations of his port of destination, may proceed to a neighbouring port to obtain information; that he may if he thinks it prudent, continue there until the impediment obstructing his voyage is removed, and that while he lies by for these fair and honest purposes, the property insured is protected by the policy. But if after notice of a blockade, the captain continues his voyage to the blockaded port, the cargo insured becomes contraband of war, and a loss by capture and condemnation on that account is not insured against, although it is competent to the insurers to take that risk on themselves. 6 *Mass. Rep.* 120. Thus in *Blackenhagen* v. *London Assurance Company*, 1 *Camp.* 455, if the captain of a ship learns in the course of his voyage to a foreign port, that an embargo is there laid on all the ships of his nation, it was held that he might wait at some place as near thereto as he safely could, until the embargo should be removed; and the goods insured would be protected by the policy, while the voyage remained legal. But if she sailed back for her port of outfit, and was lost, the voyage insured would be considered as abandoned, and the assurers be discharged. When the master discontinues his voyage, (by which is understood an abandonment of it, with an intention in him no further to pursue it) and sails for his original port, from that time the policy is discharged. 6 *Mass. Rep.* 121. So in *Lee et al.* v. *Gray*, 7 *Mass. Rep.* 352, where a captain heard on his voyage of the *British* orders in council of the 11th of *November* 1807, and that he could not proceed to his destined port in *Holland*, it was resolved that he might depart from the course of his voyage, and proceed to *Plymouth* to procure intelligence and advice, and not with the intention of discontinuing the voyage; and such proceeding would be no deviation. But should he sail from *Plymouth* to *London*, the original voyage would be abandoned, and the insurers be no longer liable. Though the loss of the voyage insured is good cause of abandonment, if it arise from any of the perils insured against, yet the detention of a cargo at a neutral port, in consequence of the danger of entering the destined port, is not such a peril. *Hadkinson* v. *Robinson*, 3 *Boss.* and *Pull.* 388, *Richardson et al.* v. *Maine Insurance Co.* 6 *Mass. Rep.* 119. The restraint of princes which will excuse the master of a vessel for not delivering his cargo at the port of destination, means an *actual* and *operative* re-

straint, and not a merely expected one. *Atkinson* v. *Ritchie*, 10 *East* 530. The risk insured against must be the *direct*, and *immediate* cause of the loss. 3 *Bos.* and *Pull.* 392, before cited. In illustration of this doctrine, Lord *Ellenborough* in *Forster* v. *Christie*, 11 *East* 209, puts this case; "suppose "there had been fair weather to a certain point of the voy- "age, and then bad weather and adverse winds, which had "prevented the vessel from entering her port of destination, "till she had received advice of the embargo, which obliged "her to put back, could that have been declared on as a loss "by the perils of the sea? And yet that might as well be said "to be the *causa remota* of the loss of the voyage, as a de- "tention by a king's ship in the particular case. But that "will not do; the risk insured against must be the *effective* "cause of the loss, in order to charge the underwriters.

I readily admit that these decisions operate with severity on the insured, and seem in some degree to counteract the principle of indemnity, which is the sound basis of all insurances; because a loss has in fact arisen from the capture under the *British* order in council of the 11th of *November* 1807, issued after the commencement of the voyage, which could not be foreseen nor guarded against by human prudence. Without any fault or negligence on the part of the insured, or their agents, the ship was prevented from reaching her port of destination, and left wholly without protection, although an adequate premium had been paid for the ordinary risks of the voyage. But it is of the utmost moment to the interests of commerce, that the determinations of the tribunals of justice in similar cases should be adhered to; and it will be recollected that the losses here did not occur in the course of the voyage insured, and that the assured had given an express warranty against seizure for prohibited or illicit trade. After an actual deviation, the underwriters are no longer liable. My opinion therefore is, that the defendants are not responsible for any losses which accrued after the 16th of *November* 1807, the time at which the ship left the roads of *Flushing;* though they are liable for those which previously accrued.

BRACKENRIDGE J. Notwithstanding the minute report of the Chief Justice in this case, and the lucid exposition

1813.

SAVAGE v. PLEASANTS.

of facts by the counsel on both sides, yet it is not so easy a thing to catch by the ear, as to see by the eye.

Segnius irritant animos demissa per aures,
Quam quæ sunt oculis subjecta fidelibus.

It is for this reason that no report of a judge, or exposition by the counsel, of the facts in the case, can be equal to a special verdict or a case stated. For though the ear hears, yet the hand occupied in noting what always too rapidly occurs, the attention is divided between the hearing and the writing, the combining clerkship with the thinking faculty. I make this apology, because under this disadvantage I am not perfectly sure that with all the pains in my power, I have all the material facts of the case perfectly in my mind; and where this is not the case, the application of the law to the facts must be incorrect.

As I understand the case,—in the *English* channel off *Plymouth*, the vessel and cargo in question were captured; for I call it a capture, where, by compulsion she was forced from the direct course of her voyage. What would have been a *deviation*, when compelled to make, must amount to a capture. *Eo instanti* the insured would have had a right to abandon, had it not been for a clause in the policy precluding an abandonment until sixty days after the perils insured against, had attached. This in the case of capture. The lapse of sixty days must have been provided, with a view to give the chance of recapture or liberation, as the state of the fact under the late decisions might avoid the abandonment; it being understood to be the law now, that the state of the fact, not the date of the intelligence, fixes the right of abandonment. But before it was physically possible to give intelligence of the fact of capture, by a communication to the assured himself, the vessel and cargo were released. She was at liberty to prosecute her voyage. But in the mean time, she had been not only taken out of the direct course, but she had been carried into *British* anchorage, the contaminating touch of which, in the contemplation of the government within whose jurisdiction the port of destination was, disqualified her from an entry at that place. Being now at liberty to prosecute her voyage to the port of destination, the right of abandonment which before had an inception,

may be considered as suspended; but suspended only because though it was possible, nay probable that an entry would be prohibited at the port of destination, yet it was not certain. The being compelled to cast anchor in a *foul port*, was compulsory; and this shewn at the port of destination, might form an exception to the prohibition of an entry. It behoved therefore to go to the port of entry, in order to represent the fact of the duress, and await the pleasure of the government. This experiment was made, and an entry was prohibited. The right of abandonment then attached, unless within an exception in the policy. This is seizure or detention, "for or on account of any illicit or prohibited trade." But the capture or carrying into a *British* port, was the cause that an entry to the port of destination became prohibited; and the capture and carrying were a peril insured against. The decision of the Court in the case of *Forster* v. *Christie*, 11 *East* 205, does not appear to have the substratum of good sense, and is carried beyond that of *Hadkinson* v. *Robinson*, 3 *Bos.* and *Pull.* 338. In this last case it was merely that of the port of destination being embargoed, that was alleged as the cause of the loss of the voyage. In the former there was a restraint and detention of a prince. The vessel was boarded by the crew of a boat, with orders to put them under the protection of the king's ships, and the boat's crew remained on board to enforce obedience to the orders. It was this restraint and delay that occasioned her not arriving until after an embargo had been laid in her port of destination. I find myself supported in not implicitly submitting to the ideas of Lord *Ellenborourgh* in that case, by the language of Chief Justice *Kent*, 6 *Johns.* 253. "I am aware," says he, "that some late cases go a great way towards denying "this right to the assured. But in this case I cannot at "present concur, and when the case arises, I shall chuse to "give it further consideration." But we have the case 8 *Johns.* 217, that notwithstanding the endorsement of papers, it might not be certain that the *French* and *Spanish* decrees would be enforced, as the vessel had not submitted to the making such endorsement. It was compulsory; she ought to have proceeded until the decrees had been actually brought to bear upon her. There was not a moral certainty of being seized on her way to the port of destination, or at

1813.

SAVAGE v. PLEASANTS.

the port. But I am disposed to attribute a greater consequence to the endorsing papers; it alters the character of the vessel, and makes it *sub modo* a different property. The *British* themselves speak of such marking or endorsing on sea letter and register, as giving them a qualified property in the vessel and cargo, and they act upon it accordingly, and seize and capture outright, if an attempt is made to go to another than a *British* port as ordered to proceed. The hailing and warning a vessel at sea are not the same with entering on board and endorsing papers. There is a great difference in the case. The sound of the warning carries no impression with it, it is a monition to the warned; but who shall know that a vessel has been warned? But the writing on the sea letter and register carries with it its own evidence, and will be seen by those who visit afterwards. It is a brand upon the flank or rather back, *endorsed*, if I may play upon a word. It is a charm or spell from which the vessel cannot escape; she is liable to be taken, and is uniformly taken, if she attempts to proceed or to return. She must obey the directions and proceed to a *British* port. Why is it that large premiums in case of neutral insurance are given, ten per cent., as in this case? Sea risk? It must be more. Capture of war? Neutrals can run no risk of this; as to them there is no war. It must be *restraint* and detention of princes, questioning the neutral character of ship or goods, or such arbitrary regulations as they may chuse to assume. What, but orders in council or *Berlin* and *Milan* decrees, is there to increase the premium in such cases? The violation of a prohibition of trade is excepted in this case; and therefore an entry at ports prohibited cannot be attempted, or at least persisted in. The prohibition must be submitted to, and it is the consequence that is insured against. If not this, there is nothing to insure against as an object of increased premium. It is not an insurance that a vessel shall be received in a prohibited port, but an insurance against what is a cause of not being received. The *British* marking is the real cause; and it is admitted by both Chief Justices *Kent* and *Parsons*, that the lawfulness of *Berlin* and *Milan* decrees or orders in council must be laid out of the case. It is the effect, the fact of the restraint, that can alone be taken into view. I would add my eulogy to that

1813.

SAVAGE v. PLEASANTS.

of the counsel in the argument, upon the distinguished legal talents of Chief Justice *Parsons*, were it not *lignum in sylvas*, and totally unnecessary. I premise this that I may take the liberty to say with deference, that I do not think his reasoning, 6 *Mass.* 102, is in every particular without fallacy. I agree with him that information at sea to the master of a neutral vessel, and a warning not to proceed, is not of itself a restraint or detention of the vessel; but he omits noticing the most material circumstance, and which distinguishes it from a bare warning not to proceed, and that is the writing on the sea letter and register. This makes all the difference in the world in the case. He considers the vessel after warning, for he still keeps out of view the endorsing papers, as being restored to the condition in which she was before; that is, free to proceed. Was that the case? If so, how came it that after proceeding not as she was ordered to do, to a *British* port, but discontinuing her intended voyage and proceeding on her course to the port from whence she had set out, she was boarded by a *British* letter of marque, captured as a prize, and ordered to *St. Nevis?* Why was she captured, but, as after having had a mark set upon her, she was endeavouring to escape? The Chief Justice thinks that because the warning was not a capture *eo nomine*, it did not amount to a capture. It would seem to me that the neutral country of the vessel had a right to consider it so, and to demand reparation, when the loss of the voyage is occasioned by such an act. Our case was not that of endorsing papers, but within the same reason, the being carried into an *English* port, which, as to a reception in the port of destination, wrought the same effect. And the vessel here did not rest upon the the moral certainty of not being received, but actually made the experiment. There was no *quia timet* in the case, or apprehension of being excluded. She proceeded to the port of destination, and after all representations as to the compulsory circumstance of her being carried into a *British* port, she was excluded. The casting anchor at *Flushing* was no deviation, but in the direct course to *Antwerp*, the place of destination. It was the casting anchor short of *Antwerp*, and waiting there to make the representations and to obtain advice what to do, for the benefit of those concerned. The sailing in consequence of advice to go to

1813.

SAVAGE v. PLEASANTS.

Rotterdam, was with a view to do the best for those concerned, and comes under the head of labouring and travelling, as by the clause in the policy the assured was bound to do. I resolve the whole into the first capture and being carried into a contaminated port. All that took place after, was a struggle to escape from the effect of it.

The vessel having sailed for *Rotterdam*, was captured a second time and carried to the *Downs*. It is at this point of the case that I have not the facts so fully in my mind as I could wish. But as I understand it, she was again liberated, and so no right of abandonment existed for the second capture. But in the *Downs* she suffered from a storm, and she could go no where for the benefit of those concerned, without being repaired. At *London*, the nearest port, or port where there might be a prospect of getting the means of repairing, endeavours were used to raise funds for the purpose of repairing. The captain found he could not hypothecate; no agent, no consignee here, he could not otherwise than by a sale of some part of the cargo, raise the money necessary to repair. He did sell, and raised the money and had the vessel repaired. So far all seems fair enough. It seemed to be the best that could be done; but here comes the *rub*, if I understand the matter right. The captain claimed freight. Had he a right to freight? It was not earned. The vessel had not arrived at her port of destination, but returned to the port from whence she was at an intermediate point of her voyage, and freight not due. But the captain sells to pay himself, or insisting on freight, a part of the cargo is sold to pay. The captain was the agent of the assured in all this transaction. At least he must be considered so; and in that case, it is the same thing as if the assured had disposed of a part of the cargo and paid the captain. They had not therefore the cargo to abandon, and it would seem that they must be considered as waiving the idea of abandoning and claiming for a total loss. I am not able to get over this difficulty. Here I must stop, I can pursue the matter no further. If the assured must be considered as paying freight in their own wrong, they must take it on themselves, and it is said to be the matter of freight only that makes the difference as to a total or a partial loss. From this conception of the facts as I have them in my mind, it would seem to me that the assured must look to the captain to recover back

freight which ought not to have been paid, and it does not lie with the assurer to look after him, having the loss thrown upon them in the first instance. My idea therefore would be, that he cannot oblige the assurer to take the place of the assured, and call this a technical total loss.

1813.

SAVAGE *v.* PLEASANTS.

Judgment for a partial loss arising from the first capture, and detention in *England*.

The Commonwealth *against* BARKER.

Philadelphia, Monday, March 29.

A minor under the age of eighteen, bound by the managers of the almshouse as an apprentice to a mechanic, who covenanted not to *assign* the indenture without the consent of the managers, may with the consent of his master in writing, and without the consent of the managers, be enlisted as a soldier in the army of the United States.

THIS was a *habeas corpus* to *James N. Barker*, a captain in the *United States*' army, to bring up the body of *John Butcher*, detained in his custody, and to certify the cause of his detainer.

The return to the writ stated, that the defendant had the body of *Butcher* before the Court, and that he detained him by virtue of an enlistment as a soldier in the army of the *United States* on the 17th of *August* 1812, the consent of his master *Philip Le Fevre*, in writing, having been first obtained.

The writ was prosecuted at the instance of *Butcher*, by the managers of the almshouse and house of employment of *Philadelphia*, who on the 12th of *March* 1810, had bound him as an apprentice to *Le Fevre*, for seven years, seven months and three days, to learn the art and mystery of a cordwainer, under a stipulation in the indenture, that it was not to be assigned without the consent of the managers for the time being. At the time of the enlistment, *Butcher* was between fifteen and sixteen years of age.

S. Ewing for the managers of the almshouse, contended that the enlistment was void for three reasons. 1. Because the act of congress of the 11th of *January* 1812, does not permit the enlistment of minors under the age of eighteen. 2. Because if it does, it is under the condition of the *consent* in writing of the parent, guardian or master; and by the terms of this indenture, the master could give no consent. 3. Because

1813.

COMMONWEALTH v. BARKER.

by the common law such a contract by an infant is void; and congress cannot give it validity.

1. The eleventh section prohibits the enlistment of any person under *twenty-one*, without the consent of his parent, guardian or master, in writing; and gives the sum of two dollars to the commissioned officers in the recruiting service, for every able bodied man they may enlist between *eighteen* and forty-five, with a proviso that the regulation as to age shall not extend to musicians, or to soldiers who may re-enlist. That is, they may enlist them as *musicians* and not otherwise, under eighteen, and may re-enlist soldiers above forty-five. Musicians must be enlisted specifically as such, for they have higher pay than the privates. *Butcher* was enlisted as a common soldier.

2. The master had no authority to give consent. His was not the general power of guardian or parent, nor even the ordinary power of master. He could not assign to another mechanic, because it would have been against his covenant. His right to the boy's service was special, and connected with a continuance in the original employment. The moment this right to service was assigned, the indenture ceased, and the apprentice became free. What is consent to an enlistment, but consent to a transfer of service, in other words, to an assignment? Congress call for the consent of him who has a plenary controul over the service of the minor. The master had not. The managers themselves had not. They are to put out to some trade or calling, which no one can suppose includes the trade of war. The commonwealth alone is the guardian of this boy, and has the complete right to dispose of his service.

3. The contract as to the minor, is clearly void at common law. It therefore does not bind in the present case, unless congress have a constitutional right to remove the disabilities of infancy or coverture, and to make children independent of their parents, and wives of their husbands. No such power has been given by the states. They may raise armies from among the adults. They cannot shake a principle of the common law of the states, in relation to the personal disabilities of infants. These are privileges, not defects; and congress cannot take them away.

Dallas, district attorney of the *United States*, answered,

1. That no act of congress contained any limitation of age, under which a minor should not be enlisted. If musicians may be enlisted under eighteen, so may every soldier of the army; for musicians are without exception enlisted as soldiers, that being the generic name of all who are enlisted, and the distribution into musicians, non-commissioned officers and privates, cavalry, infantry, and artillery, being a matter of subsequent arrangement. It follows from the authority to enlist persons under eighteen for musicians, that there is an authority to enlist them as soldiers. The eleventh section speaks of the age, merely with reference to the compensation of the recruiting officer, not with reference to his authority. All that is prescribed on the subject of age by any act of congress, is, that if under twenty-one, there must be the consent of the parent &c. Act *U. S.* 16 *Mar.* 1802. 6 *U. S. Laws* 17., Act 12 *Apr.* 1808. 9 *U. S. Laws* 91.

2. In permitting enlistments under twenty-one, congress have taken care to do no violence to private rights. They suppose every minor to have a parent, guardian, or master, who has an interest in, or is entitled to dispose of, his service; and if no wrong is done to them, there is no wrong. Who was entitled to the service of *Butcher?* Not the managers, for they executed their power by the indenture. The master alone had a full, absolute right, to the service of the boy till twenty-one. His inability to assign is nothing. The *United States* do not claim by assignment or transfer. They claim by the contract of the boy, his master consenting that his private rights shall not stand in the way. Suppose the guardian to consent: does he assign, or transfer? No, his consent is required, to shew that he withdraws any claim that he may have; not that he conveys or transfers it.

3. The right of congress to authorise the enlistment of minors under these circumstances, is plain, from the terms of the constitution, and the practice of all the states. They have power to raise armies, constituent parts of which, under the practice of every military state, are boys. They are wanted particularly in the musical department; and the power to contract for this, implies the whole. In every section of the union, military duty is required from eighteen to forty-five. Every where then the law disregards minority

1813.

COMMONWEALTH v BARKER.

upon the question of military service. And the argument therefore is, that what a minor is bound to do in this respect, by his natural allegiance and the laws of his state, congress cannot authorise him to bind himself to do. The act of congress takes away no right; it merely communicates a capacity, which we are bound to suppose is not injurious to the minor, which we know is essential to the country, and to the exercise of a right granted by the constitution.

TILGHMAN C. J. *John Butcher*, who is now about the age of sixteen years, was bound apprentice by the managers of of the almshouse and house of employment of the city and county of *Philadelphia*, to *Philip Le Fevre*, to learn the art and mystery of a cordwainer. On the 17th of *August* last he was enlisted as a soldier in the army of the *United States*, the consent of his master in writing having been previously obtained. These facts are set forth in the return to the *habeas corpus*, and are not disputed.

By the act of congress of the 11th of *January* 1812, it is provided that no person under the age of twenty-one years shall be enlisted or held in the service of the *United States*, "without the consent in writing of his parent, guardian, or "master first had and obtained, if any he have." The managers of the almshouse derive their authority from an act of assembly of *Pennsylvania*. The indenture contains an engagement on the part of the master, not to assign it without the consent of the managers. I do not consider the master's consent to the boy's going into the army, as an assignment of the indenture. Still it would be unwarrantable unless justified by the act of congress. In the first place then this act is to be considered. There is no affirmative direction as to the age of the persons to be enlisted. But from the proviso which I have mentioned, there can be no doubt of an intention to authorise the enlistment of minors, with the consent of their parents, masters or guardians. If the minor has a parent living, and is not bound to a master, the consent of the parent is necessary; if the parent is dead, and there is a guardian, his consent must be obtained. But whether there be a parent or guardian, if the minor is bound to a master, the consent of the master *alone* is sufficient. Upon the first reading of the beginning of the eleventh section of the act, I had doubts

whether the authority to enlist minors was not limited to those above the age of eighteen years, because a premium of two dollars is given to officers who shall enlist "an effective "able bodied man for the term of five years, (*and between the "ages of eighteen and forty-five years*) provided nevertheless "that this regulation so far as respects the age of the recruit, "shall not extend to musicians, or to those soldiers who may "re-enlist into the service." But upon reflection I am satisfied that this part of the act was not intended to restrict the enlistment of soldiers to persons between the ages of eighteen and forty-five, but was only a regulation of the compensation to be allowed to officers in the recruiting service. It appears that all recruits, whether intended for musicians or otherwise, are enlisted under the general name of *soldiers;* and it does not lie with the recruiting officer, but with his superiors, to designate the service in which the recruit shall be employed; so that if none but *musicians* could be enlisted under the age of eighteen, it would be impossible to say whether the enlistment was binding or not, because the recruiting officer could not tell, whether the recruit would be employed as a musician. Besides, in the latter part of the same section which designates the age, *under which*, the consent of the parent &c. is to be obtained, the expression is general, *no person under the age of twenty-one &c.* But it has been urged, that whatever may have been the intent of the act, congress has no power to authorise the enlisting of a minor, because at common law a minor cannot bind himself, and by the laws of *Pennsylvania*, minors who have no friends to support them, are put under the protection of the managers of the almshouse. But although minors of this description are so far placed under the care of the managers, that they have power to bind them out to useful trades, yet when this duty is performed, the authority of the managers ceases. I do not mean to say that the managers have not a right to see that the covenants of the master are performed, and to interfere in case he undertakes to assign the indenture without their consent. But the legislature of *Pennsylvania* has never made any law prohibiting the *enlistment* of minors with consent of their masters. Should they do so, it would produce a painful conflict with the *United States*. We are now however to decide upon the law as it stands. Congress have

1813.

COMMONWEALTH v. BARKER.

power to raise armies, and of course to pass laws necessary for that purpose. They have said that a minor who has a master, may be enlisted with his own consent and the consent of his master. The parent or guardian having transferred their power to the master, the persons whose rights are principally to be regarded are the minor and the master. Now when their consent is attained, can it be said that there is any thing so monstrously unreasonable in authorising an enlistment, that the law shall be declared to be *of no effect?* I cannot say that it appears so to me. Consider the consequences of such a decision. A very important portion of the strength of the country is under the age of twenty-one years. It may be of vast importance that this force should be employed in the regular army. And why should it not be so employed with the consent of the minors and of those persons, whether parents, guardians or masters, who by the laws of society had acquired previous rights to their service? As an individual I am no friend to war. Under the most prosperous circumstances, it is one of the greatest evils that can befall us. But until the nature of man is changed, there will be war, and it is essential that every nation should be so organized as to be able to exert its strength upon necessary occasions. I can have no doubt therefore but that upon a candid construction of the constitution of the *United States*, congress have power to go as far as they have gone by the present act, that is to say, to authorise the enlistment of a minor, the consent of his master in writing having been previously obtained. I am therefore of opinion that *John Butcher* should be remanded to the custody of captain *Barker*.

YEATES J. By the eighth section of article first of the constitution of the *United States*, "congress have power to declare "war, and to raise and support armies." General laws must be enacted to effect these purposes, which may in some instances break in upon the municipal provisions of individual states. This part of the act of congress of the 11th of *January* 1812, on which the question arises, appears bottomed on the principles of the common law, which considers the relation of master and apprentice as not assignable, and does not seem to me to impair any law of this state.

When the public safety shall be supposed to require the

services of minors in the armies of the *United States*, I can see no impediment to a change of the relation between masters and their apprentices by mutual consent. They may lawfully vacate a contract entered into for their benefit respectively, without prejudicing the rights of others; it conduces to the common weal, and cannot be said to injure any one, or give just cause of complaint. The return to the *habeas corpus* brings the enlistment of *John Butcher* within the words and spirit of the act of congress. The words in the beginning of the eleventh section of the act, that recruiting officers "shall "be entitled to receive for every effective able bodied man, "who shall be duly enlisted for the term of five years, and "mustered, (and between the ages of *eighteen and forty-five* "*years*) the sum of two dollars," only relate to the compensation allowed to such officers, but do not prohibit the enlisting of minors under the age of eighteen, any more than healthy persons exceeding the age of forty-five years; and this more fully appears by the generality of the expressions in the concluding proviso of that section, "persons under "the age of twenty-one years."

The president of the *United States* is authorised to raise a certain number of regiments for the public defence, and fifers and drummers are necessary therein. It is well known that youths under the age of eighteen years, acquire proficiency in these capacities, with much greater facility than persons more advanced in life. Where such youths possess sufficient discretion to make choice of a military life, with the consent of their parents, guardians or masters, if any such they have, who are entitled to their services during their nonage, I see no reason why they should not be bound by their contract of enlistment. They owe duties to their country as well as more adult persons, and we are bound to presume, that such contracts will not be detrimental to them.

I think upon the whole, that *John Butcher* should be remanded to the custody of captain *Barker* his officer.

BRACKENRIDGE J. By the constitution of the *United States* "the congress shall have power to raise and support armies." I think the raising and supporting them an object to be favoured; a military establishment to the extent of the public exigences. That military establishment, which we have had

1813.

COMMONWEALTH v. BARKER.

in these states, I have considered in general as falling miserably short of this. For I never had reliance on what are called the militia, beyond the purpose of a *posse comitatus* to preserve the peace, or occasional aid in repelling an invasion. It must be a man's business to be a soldier, and the camp must be his home, to render himself satisfied with his employment, and his services effective. The habit of subordination, and the discipline of tactics, are also essential. These cannot be possessed in the first instance, or acquired but by an apprenticeship to arms. I call it an apprenticeship, but I have no idea that it was that kind of apprenticeship, or that the profession of arms was that kind of trade or calling, art, mystery, occupation or labour, which was contemplated by any act of the legislature at any time in binding out by indenture or otherwise. An apprenticeship in agriculture, manufacture, or commerce, may be considered the great divisions under which any trade or occupation may be considered as comprised; as respects the poor especially, for it is rare that such will be taken to study physic, divinity or law, or any art which requires a preceding education in something else. I cannot understand it as extending to the profession of arms. To that of a mariner it might extend, for this is a peaceful pursuit, and connected with commerce. Under the act of the 29th of *March* 1803, the managers of the poor are authorised to put out to some trade or calling, poor children, that is the children of such poor persons who are dead without leaving property or kindred to provide for their children, or who if living shall be found unable to maintain them. Shall it be said that this trust can be executed by putting out such to the professsion of arms? The power of these managers is *potestas sub potestate*. The community, the commonwealth, which is the guardian in the first instance, has delegated this trust by a special authority which cannot be exceeded. What they could not do now, could not have been done at the time the indenture in question was made. But the power under the indenture is even more circumscribed than it was in the managers themselves. They could choose the art, mystery &c., and the master to whom the apprentice was put; but no power of this kind is given to the master by assignment, even supposing it could have been given; but it is specially excepted as not within his power. I

have no doubt but that by this act of the master's, the consenting to the enlistment, the indentures are cancelled, so far as respects the right to the services of the apprentice, and on application to the Sessions or the Mayor's Court, as the case may be, the apprentice would be discharged from the obligation of an apprentice to the master, and he would be answerable to the managers in damages. The power of a parent is without limit as to the right of service, and the power of the community which succeeds in this case to that of the parent; but the managers under the law of the community, have no such power given them, and the master can derive no such power from them. Could a guardian appointed by the Court, have such a power? I will not enter into that discussion, because it is not the case of a guardian chosen by the minor, and sanctioned by the Court. But clear I am, that the managers of the poor, or a master by indenture from them, can have no such power. We must suppose the officer enlisting to have looked at the indenture, and to have examined how far the master was solely master. He would have seen, that as he could not assign, he could not transfer service; and he would have applied to the persons binding, to have their consent, as this was a minor under their controul. This was the best that could be done in the case. The act of congress can have no bearing on this, but as directory to recruiting officers, and declaring the services of what persons they may be willing to accept, and the precautions necessary to avoid interfering with contracts and private rights. The act of congress can neither abridge nor enlarge these rights.

A person of age indenturing himself on becoming of age, exists a contracting party, and the contract can be dissolved by himself and that of the master. But it is the guardian who in the case of the minor contracts. The instruction of the minor and his services to the master, are but the subject of the compact. The managers of the poor are the guardians in this case, and the consent of these has not been given, nor could be given to any apprenticeship, but that specified and contemplated under a fair construction of their powers. Would the consent of the minor and that of the master have sufficed, when there was a parent to be consulted? It is the guardian here in place of the parent, whose

1813.

COMMONWEALTH v BARKER.

consent must be obtained. It is the managers of the poor that interpose here, and claim the liberation of the minor. It is what they have a right to do, or rather what they are bound to do, in discharge of the trust by law committed to them. It is of great moment in a republic, where the idea of a standing army has great prejudices against it, that in making it up, no undue advantage should be taken of the unwary, and that in maintaining it, every respect should be paid to pre-existing contracts; and I am well persuaded, that the act of congress never intended the smallest deviation, or ought to be so construed; and did a different construction force itself upon me, I would pay no regard to it. A negro slave might as well be taken away, or an ox or a horse labouring at the team, without the consent of him who has an absolute or a special property in their use. If a contract shall not be impaired, how shall it be dissolved and entirely taken away? I am of opinion therefore, that the enlistment in this case is void, and does not bind.

Petitioner remanded.

Philadelphia, Monday, March 29.

A defendant is not entitled to a stay of execution under the act of the 21st of March 1806, upon the ground of his being a freeholder, unless he has a freehold in the county where the judgment is obtained.

The Commonwealth *against* MEREDITH.

IN this suit, which was brought to *July* Term 1812, the Commonwealth obtained a judgment in this Court on the 3d instant for 4050 dollars, with such stay of execution as the Court might order.

Read for the defendant, now moved for a stay of execution until the return day in *July* next, that being twelve months from the first day of the term, to which the original process was returnable. It was agreed that the defendant was a freeholder in the state, but not in the county of *Philadelphia;* and he argued in support of his motion, from the general terms of the seventh section of the act of the 21st of *March* 1806, 4 *Smith's Laws* 329, which entitles a defendant to such a stay upon a judgment for such an amount, "if the "defendant in the opinion of the Court is possessed of a "freehold estate, worth the amount of such judgment clear "of all incumbrance." A freehold any where in the state exempts a party from arrest, and this law, he said, proceeded upon the same principle.

1813.

COMMONWEALTH v. MEREDITH.

The Attorney General (*Ingersoll*) answered, that the judgment did not bind out of the county, until a *testatum* was delivered; and therefore the freehold in other counties was no security to the commonwealth. The stay was evidently given upon the ground that the freehold secured the judgment, which is true only of a freehold in the county where the judgment is obtained; and of course such a freehold can alone be intended.

PER CURIAM. In order to obtain a stay of execution, the defendant must have a freehold in the county where the judgment is entered. A freehold in another county is of no use, because, not being at liberty to take out a *testatum* execution, the plaintiffs cannot obtain a lien upon it. Although the words of the act are general, it is necessary to give them this limited construction in order to answer the intent of the law, which was that the plaintiff should have an immediate execution unless he has security for his debt. The law is also general, that a freeholder shall not, except under certain circumstances be held to bail; but the want of bail does not interfere with proceedings to enforce payment, as the freehold mentioned in the act of 1806, does.

Motion denied.

5b 433
32 300

CROUSILLAT *against* M'CALL.

IN ERROR.

Philadelphia, Monday, March 29.

In account render, the course of the action is to take issues before the auditors, upon all matters in discharge of the account, alleged by one party, and denied by the other; which issues are certified to the Court by the auditors, and accordingly as they are of law or fact, are decided by court or jury. The auditors then regulate their account by the result, and report it to the Court. Exceptions taken to an account reported by auditors, after the same has been returned, are irregular, and of no effect.

THIS was an action of *account render*, brought by *Crousillat* in the Common Pleas of *Philadelphia* county. After judgment *quod computet*, auditors were appointed, who on the 16th of *October* 1810, reported an *account* between the parties, and also awarded, in conformity therewith, that the sum of 4394 dollars 66 cents, the balance of that account, was due from the plaintiff to the defendant, with interest from the 17th of *April* 1810. On the 1st of *December* the plaintiff filed suggestions for allowance and disallowance, consisting of ex-

1813.

CROUSILLAT v. M'CALL.

ceptions to overcharges on the defendant's side of the account, and short credits on his own. On the 9th of *February* the Common Pleas dismissed the exceptions, and entered judgment for the defendant; on the 19th of *February*, so much of the entry as related to the judgment, was by order of the Court altered, and an entry made that the report of auditors was confirmed; upon which this writ of error was brought.

Phillips and *Ingersoll* for the plaintiff in error, took five exceptions to the proceedings below.

1. That the suggestions had been erroneously dismissed. By the practice in this state those exceptions were filed in due time and order. The report of the auditors, which sets forth that they had heard the parties and witnesses, and examined the vouchers, evidently shews a controversy and dispute before them. It was therefore a case for exceptions; and not an instance can be found in the juridical history of this state, in which there has been a plea or demurrer before auditors, or an objection taken in any other way, than was done below. It is contrary to the genius of our system, from which every species of form that tends to perplex or entangle the suitor, has been immemorially rejected; and there is a particular reason for abolishing useless forms in the action of account render, because it is the only action that we possess to compel an account. In its best shape it is inconvenient, dilatory, and expensive. The leaning of the court should therefore be to render the action practicable and useful; and nothing can contribute more to this end, than to permit every thing to be done *ore tenus* before the auditors, except the mere exhibition of the accounts, in the place of pleading, and to listen to objections taken after the account is returned, as in the case of a common report. Practice is in its favour. It was done in *Holland* v. *Mackie*, and in *Moore* v. *Hunter* (*a*), the only cases in this court where the question has arisen; and as to what is said in the latter case in approbation of the old practice, it is to be regretted that the decison was not published when it was pronounced, as it was supposed, that by confirming *Holland* v. *Mackie*, it justified the proceedings in

(*a*) 3 *Binn.* 475.

this suit. Convenience is also in its favour; and so we submit are the *English* cases, when rightly understood. It is not essential that a plea or demurrer should be put in before the auditors. Lord *Coke* is express, that if the auditors do not allow the party what he ought to have, *he may shew his grief to the justices, and they ought to do him justice.* 1 *Vin.* 168. *Account R.*, 2 *Inst.* 381., 3 *Woodeson* 83, 84. "If either of the "parties think they do him injustice, he may apply to the "court; and if the defendant denies any article or demurs to "any demand, it is to be tried and determined in court." 1 *Bac. Abr.* 38. *Accompt F.*

From these authorities it follows, that the Court may be called upon to interpose their power in correcting the errors of the auditors, which cannot be if pleas, demurrers, and the like, *must* be made before the auditors, and issue joined there.

2. Judgment was entered for the defendant below, for the balance due by the plaintiff. This was clearly erroneous; and the Court have no power at a subsequent day to correct the entry. The defendant cannot take judgment for a balance that is found due to him. His remedy if any, is by *scire facias* on the report. Act of 1705, 1 *Smith's Laws* 50.

3. It does not appear that the defendant was sworn. "He "who is awarded to account, swears that he will account "well and lawfully." 1 *Vin.* 172. *Account U. pl.* 9. The auditors being a subordinate tribunal, the due exercise of their powers ought to appear.

4. The auditors should only have stated an account. *F. N. B.* 270. They have made a report as referees, and the account returned, is neither connected with the report, nor identified as their account.

5. The auditors tried the issues themselves. From their examination of witnesses and vouchers, it clearly appears that there were contradictory statements; and if so, it was *their* duty to form the issues, and certify them to the court.

Binney and *Tilghman* for defendant in error. 1. The first exception does not turn upon practice, but upon the rules of the common law in relation to account render. If it were a question of practice, the Common Pleas, who are judges of their own rules, have settled it against the plaintiff; and let

1813.

CROUSILLAT v. M'CALL.

this Court fashion its own proceedings as it may, it can never reverse a judgment of the Common Pleas, for being against the practice of this Court. The judgment is good, if it conforms either to the practice of the Common Pleas, or to the common law. The only question is whether that judgment is erroneous. The substantial objection to the plaintiff's argument, is that it refers exceptions to the Court, which by the course of the common law are triable by a jury. The course of the action is this: If either plaintiff or defendant takes exceptions in law or fact before the auditors, issues to the whole extent of the controversy are joined, and are returned to the Court for their appropriate mode of trial. In the mean time the auditors are respited, *venires* are issued for the trial of the facts, the Court decide the issues of law, and when the decisions take place, the auditors make up their account, report it, and are discharged. This incontestably appears from these authorities. *Tresham* v. *Ford* (*a*), *Pendarvis* v. *St. Arbin* (*b*), *Bishop* v. *Eagle* (*c*), *Kirk* v. *Lucas* (*d*), *Baynton* v. *Cheek* (*e*), *Sadock* v. *Burton* (*f*), *Burdet* v. *Threele* (*g*), *Andrews* v. *Roberts* (*h*), *Godfrey* v. *Saunders* (*i*). 1 *Com. Dig.* 117. *Accompt. E.* 6., 1 *Selw. N. P.* 7., *Bull. N. P.* 128., 2 *Inst.* 381., 1 *Wentw. Plead. Ind.* 1., *Brownl. Red.* 4. 10., 1 *Brown. Entr.* 115., *Co. Ent.* 46, 47., 1 *Vin.* 171. *pl.* 4. 172. *pl.* 11. 173. *pl.* 13., *Rast. Entr.* 14, *a.* 15, *a.* 16, *a.*, *Bro. Abr.* 11. *Account. pl.* 45., 1 *Mall. Entr.* 53. 74. If the plaintiff's exceptions are tried by the Court, they become the triers of fact, as well as law; if by a jury, and the objections are found valid in part, and bad in part, who makes up the account? The auditors are discharged when they send in their report. It cannot then go back to them; and if not, the Court or the jury must be auditors. But on what is the judgment to be rendered? The common law says on the account of the auditors; but by the plaintiff's argument it would be partly on their account, partly on the finding of the jury upon the issues of fact, and partly upon the decision of the Court on issues of law. This shews the fallacy of the argument, for such a course would be without precedent at the common law. In fact the question may

(*a*) *Cro. Eliz.* 830.
(*b*) *Style* 410.
(*c*) 10 *Mod.* 22.
(*d*) *Style* 480.
(*e*) *Ib.* 353.
(*f*) *Yelv.* 202.
(*g*) 2 *Lev.* 160.
(*h*) 1 *Lutw.* 47.
(*i*) 3 *Wils.* 92.

be considered as settled by *Moore* v. *Hunter* (*a*). What Lord *Coke* remarks about shewing one's grief to the justices, is said to distinguish auditors assigned by the Court, from the case of auditors assigned by the Lord. In the latter, the statute of *Westminster* gives the writ *ex parte talis*, by which the cause is removed to the Barons of the Exchequer; in the former, of which he is speaking, redress must be in the same court where the auditors are assigned, and not before the barons. This is the reason for saying they may shew their grief to the justices. No doubt the justices will do the party right, if the auditors will not permit issue to be joined, or according to the course of the action, if issue is joined. Lord *Coke* says nothing to negative the joining of issue before the auditors.

2. The judgment for the defendant was right, for there must always be judgment for the defendant, at least for costs, where the plaintiff does not recover. But here at an adjourned court, part of the same term, when the court had full power over the minutes, the entry was altered.

3. The oath is not essential. Auditors are *empowered* by 4 *Ann. ch.* 16, to administer it, but not required. Besides it does not appear that the oath was not taken. It is not more essential that the oath should appear to have been taken by the accountant, than by a witness.

4. The auditors have stated and returned an account. The report is *surplusage*.

5. There is not a shadow of evidence on the record that the parties had any controversy whatever before the auditors; and of course it does not appear that they tried an issue.

TILGHMAN C. J. After stating the case and exceptions, delivered his opinion as follows.

1 The first is the principal objection on which the plaintiff relies. The action of account render has not been frequent in our courts, and where it has been used, it has often been conducted *by consent*, in a manner which was convenient to both parties. It has either been agreed that the jury should find a verdict for plaintiff or defendant, as in common actions, or that the auditors should make a report as referees. In the case of *Moore* v. *Hunter*, 3 *Binn.* 475, the Court were led to an investigation of the true mode of

(*a*) 3 *Binn.* 475.

1813.

CROUSILLAT v. M'CALL.

proceeding; and although for particular reasons, exceptions to the report of the auditors were permitted to be filed and acted upon in that case, yet it was expressly mentioned, that in future, it was expected that the proceedings should be conducted, "according to the principles and practice to be "found in the books." The Court did not then decide what those principles were; yet there was a pretty plain intimation of their opinion on that subject. It has now been fully and well argued; and from the cases cited it plainly appears, that if the matters offered by the defendant in discharge of the plaintiff's demands, are disputed by the plaintiff, he may either demur or take issue before the auditors. If there are more points of dispute than one, there may be a demurrer or an issue on each, which are to be certified by the auditors to the Court, and then the matters of law will be decided by the Court, and the issues in fact by a jury, after which the account will be finally settled by the auditors according to the result of the trials. It is said on the part of the plaintiff, that these proceedings are tedious, expensive and inconvenient, and that the Court ought to embrace the present opportunity of modelling this action so as to render it more useful. That the proceedings are tedious and inconvenient is certain, and for that reason, the action has for a long time been very little used in *England*, where the Court of Chancery affords a more complete remedy. But it does not follow from the inconvenience of the thing, that we have a right to make innovations. Where the forms of an action are well ascertained, we have no right to alter them even in our own Court, much less have we a right to compel the Court of Common Pleas to alter them. It does not appear for what reasons the exceptions were dismissed. It is said, and I suppose truly, that it was because the Court of Common Pleas were of opinion that the matters contained in them ought to have been pleaded before the auditors. For any thing that appears on the face of the record, we cannot presume that there was any matter in dispute before the auditors, because they have made no mention of any such matter. With no propriety therefore can we say that the Court below were wrong in rejecting the exceptions. The plaintiff's counsel have urged that if either party has cause of complaint against the auditors, there is no mode of redress but by complaint to the Court. This is very

true; and when there is cause of complaint, the Court are bound to give redress. If either party desires to join an issue, and the auditors refuse permission, the Court will set the matter to rights. So if the auditors conduct themselves with any manner of impropriety to the injury of either party, redress may be had on application to the Court.

2. The second objection is contradicted by the record. The judgment which was first entered, was struck out, and the report confirmed. Whether judgment could have been lawfully entered for the balance reported in favour of the defendant, or whether the defendant may by virtue of our act of assembly, hereafter sue out a *scire facias* against the plaintiff, for the balance so reported, are matters not now in question. All that the Court of Common Pleas did was to confirm the report.

3. The third exception was given up in the course of the argument. Indeed if an oath were even necessary, it does not appear that it was not administered. No complaint of this kind was made in the court below.

4. There is nothing in the fourth exception. The auditors did state an account which they returned along with their report.

5. The fifth exception is not founded in fact. It does not appear that any issue was joined, or even tendered before the auditors.

My opinion on the whole, is, that the judgment should be affirmed.

YEATES J. Gave no opinion, having been unwell during the argument, and unable to attend.

BRACKENRIDGE J. I have always felt a strong disposition to get over the application of a rule of practice, or to change the rule, when it is in the way of the attainment of justice in a particular case. But the application is one thing, and the change of the rule is another. In *Moore* and *Hunter*, the question was the application of the rule. It was not applied there, owing to the case of *Holland* and *Mackie* having led to a misunderstanding of the rule. The like misunderstanding is said to exist in this case; the counsel declaring themselves not to have been apprized of what had been laid down as the rule in *Moore* v. *Hunter*. But there is an essential difference

1813.

CROUSILLAT v. M'CALL.

between dispensing with the application of our own rule in a case originating in this Court, and that of a case brought up by a writ of error, where the judgment has been precisely what we then said it ought to be. It has been rendered abundantly clear, that in an action of account render, the matters in controversy cannot be taken in bulk; but there must be a simplification, and the fact separated from the law by demurrer or joining issue. By the analogy of our *Pennsylvania* practice, this need not be by form at length, but in brief, as *ore tenus* in *England* was originally the case, before special pleadings came in use. This removes one objection at least to the expense of this mode of proceeding, in the action of account render with us. I have been thinking of taking up the question of practice in this action, on the ground of what it ought to be, if it were for the first time to receive a consideration; or rather what it ought to be if in a legislative capacity, we were to say, what in future it ought to be. The alternative of this practice would be, unless original chancery jurisdiction was given, that as in the case of other auditors, the Court should have a superintendance and approve. This would lead to all the uncertainty and vexation, and guessing in the dark, which attends the examination of reports of referees.

But were a Court in the last resort, which has the power to change a rule of practice, disposed to do it, there is an impediment in the way here. It is taking away the trial by jury from the action of account render, so far as respects the issues in fact, which has been questioned to a certain extent, as not being within the power of the legislature itself. The possible injustice done in this particular case, is all that remains to pass upon now, and that does not appear. It can only be said, that it might have appeared, if it could have been examined by the Court below. The presumption is, that no injustice was done, especially by such intelligent auditors as are said to have passed upon the accounts mutually exhibited with vouchers and explanations. No misbehaviour of parties or auditors, such as would affect the verdict of a jury, was alleged or put upon the record of the Court below, but suggestions of mistake, &c. offered only. Even if there had been error, I do not see how it could be relieved in this stage of the proceeding. Better a particular mischief, than a general inconvenience.

Judgment affirmed.

1813.

D'Arcy *against* Lyle.

Philadelphia, Monday, March 29.

THIS was an action of *indebitatus assumpsit*, in which the plaintiff declared for money paid laid out and expended, money lent and advanced, money had and received, and work, labour, and services. It was tried before *Yeates* J. at a *Nisi Prius* in *December* last, when a verdict was found for the plaintiff, damages 3500 dollars; and upon a motion by the defendant for a new trial, his honour reported the facts to be as follows:

Damages incurred by an agent, without his own fault, in the management of the principal's affairs, or in consequence of such management, must be borne by the principal. *Hence*, where *A*, the agent of *B*, recovered certain of *B*'s goods in *Cape Francois*, by the decree of a competent court there, (the same having been attached by *C* for the debt of *D* and *Co.* in whose hands they were, and claimed in court by *A*) and then sold them and remitted the proceeds to *B*; and was afterwards in a suit instituted by *C*, and connected with the first proceeding, compelled by the threats of the president *Christophe*, to confess, contrary to the truth, that at the time of receiving the goods, he promised to pay *C* a sum of money on account of *D* and *Co.*, and to let judgment go against him, *It was held*, that *A* might recover from *B* his principal the amount thus paid, it not exceeding the estimated value of *B*'s goods

On the 4th of *August* 1804, the plaintiff, who was then about to proceed to *Cape Francois* upon commercial business, received from the defendant a power of attorney to demand from *Suckley* and *Co.* at the *Cape*, who had been the defendant's agents, all his goods remaining unsold in their hands, and to settle by compromise or in any manner the plaintiff thought most beneficial, all accounts of the defendant with that house. On the voyage, the plaintiff, in consequence of being chased by a *French* privateer, threw overboard, among other papers, the power of attorney. He stated this fact to *Suckley* and *Co.* upon his arrival, who consented to deliver up the goods, upon his promising to pay a balance which they alleged to be due from the defendant; and this being assented to by the plaintiff, they proceeded to deliver the goods. Before the delivery was complete, one *Thomas Richardson* attached them with other goods of *Suckley* and *Co.*, to secure a debt due by them to the house of *Knipping* and *Steinmetz* of *Charleston*, for whom he was agent. The plaintiff interposed a claim on behalf of the defendant; and on the 26th of *November* 1804, the Chamber of Justice decreed that he should retain possession of the merchandize, on his entering into a recognisance in the sum of 2089 dollars, conditioned to produce within four months an authentic letter of attorney from the defendant, or on default to pay *Richardson* as the agent of the *Charleston* house, the said amount, which was the invoice value of the merchandize. The recognisance was given on

1813.

D'ARCY v. LYLE.

the 30th of *November;* and on the 6th of *December* following, the plaintiff personally appeared in the clerk's office of the Civil Tribunal where it was entered, and caused an act to be made, setting forth, that his recognisance or submission in *November* should be null, as he had received the power of attorney, and notified it to *Richardson.* In *November* 1805, the plaintiff having sold the goods forwarded an account current to the defendant, making the nett balance 2509 dollars 60 cents. On the 1st of *December* 1805, he by letter directed the defendant to pay over to a friend all his funds, after deducting the balance due to himself; and on the 19th of *April* 1806, having had some misunderstanding with the defendant, he wrote his final letter, closing his correspondence, and declining any further concern with him. Up to this time *Dessalines* was emperor, and favoured the plaintiff.

In *March* 1808, the powers of government at the *Cape* being in *Christophe*, who was the friend of *Richardson*, and the plaintiff continuing to reside as a merchant at the *Cape*, *Richardson* instituted a suit against the plaintiff in the Tribunal of Commerce, to recover from him the value of the goods, which by the decision of the Chamber of Justice had been decreed to him as the defendant's agent in 1804. The amount of the claim was 3000 dollars, which by a memorial presented by the plaintiff to the tribunal, (no part of the record of this court being produced) appeared to be founded on an alleged promise of the plaintiff to pay so much for *Suckley;* but in the memorial the plaintiff denied the promise, asserted that this was no other than the transaction about the security to produce a power of attorney, that he was no longer an agent for *Lyle*, and had settled the matter with him, and that *Richardson* was endeavouring to make them change the just and wise decision made more than three years before. On the 14th of *May* the Tribunal of Commerce gave judgment for *D'Arcy*. *Richardson* appealed to the Civil Tribunal of the first district of the province of the North, sitting at the *Cape*. That court on the 1st of *June* confirmed the sentence of the lower court. *Richardson* had previously applied to the president *Christophe*, who interfered in the proceedings, and on the 31st of *May* sent an order for the imprisonment of *D'Arcy's* lawyer, who was tied and sent to the fort. To this another order succeeded, that *D'Arcy* and *Richardson* should fight each other, and that

the issue of the combat should be fatal to one or the other. A friend of *D'Arcy* waited upon *Christophe*, remonstrated against the order, and procured the commander of a *British* vessel of war then in the harbour, to do the same; but the president insisted upon the combat, unless *D'Arcy* would pay to *Richardson* the sum claimed as the value of the goods. *D'Arcy* having determined not to pay the money, the parties met, but neither of them was injured. On the same day another order came from *Christophe*, that *D'Arcy* and *Richardson* should again fight at six o'clock on the following morning, and that he, *Christophe*, would be there himself to see the affair settled. The friends of *D'Arcy*, deeming it dangerous for him to remain longer at the *Cape*, prevailed upon him to attempt his escape; but he was intercepted by the president's order. The same friends then advised him to pay the money, and preserve his own life, that of his lawyer and the judges, all of whom were in danger from the parts they had taken. The plaintiff still refused. About dusk of the same evening *Christophe* sent for *D'Arcy*, and had a conversation with him, the purport of which was not in evidence; but on the next day, after the judgment of the lower court had been confirmed, *D'Arcy* in open court retracted his defence, consented that both judgments should be reversed, that his memorial should be burnt by the public agent, and that he should be condemned to pay *Richardson* the 3000 dollars he claimed, and the costs. He retracted his oath also, that he owed *Richardson* nothing, because, as the record of the court set forth, *Richardson* had since made him remember some facts his memory did not furnish him when he took the oath. The court accordingly reversed the judgments, condemned *D'Arcy* to pay *Richardson* the 3000 dollars, "for so much he had engaged to pay him for "*Suckley* and *Co.*, for merchandize which the latter had de- "livered to him as belonging to Mr. *James Lyle*, whom "the said *D'Arcy* represented, for which the tribunal, do "reserve to Mr. *D'Arcy* his rights, that he may prosecute "the same if he thinks proper against *Lyle* or *Suckley*." On the 22d of *June*, *D'Arcy* paid the 3000 dollars and the costs.

1813.

D'Arcy *v.* Lyle.

Judge *Yeates* charged the jury, that if they were satisfied the plaintiff individually promised to pay *Richardson* the

1813.

D'ARCY v. LYLE.

3000 dollars, he could not recover. But the record shewed, that there was a review of the suit in 1804, respecting the goods of the defendant received from *Suckley* and *Co.*, as the judgment referred the plaintiff to the defendant for compensation. The plaintiff was in no fault; he stood out until the safety of all concerned in the business was endangered. He did not pay voluntarily. The jury must decide whether the loss arose from his private engagement, or from his having received the goods as agent of the defendant. If they were satisfied that the money was extorted from the plaintiff as the defendant's agent, he might recover under the count for money paid to the defendant's use. A loss of money incurred by the agent without fault, ought to be compensated by the principal.

The motion for a new trial was argued at *December* term last.

Tod and *Rawle* for the defendant, argued, that there should be a new trial, because, 1. The defendant was in no manner bound to answer for the loss incurred by the plaintiff. 2. There was no count upon which, if a recovery was just, the plaintiff could recover what the jury had given him. 3. The verdict was excessive.

1. The agency of the plaintiff for the defendant ceased in the year 1805. He remained in *St. Domingo* after that time, for his own business; voluntarily exposing himself to the tyranny and outrages of the black government, and finding an indemnity for this exposure in his own emoluments. The loss which accrued in 1808, was therefore not incurred in the course of the agency, but was the effect of an outrage committed upon his property intentionally detained within the reach of the wrongdoer, to which the defendant was in no respect accessary. Take it first upon the ground of a promise actually made by the plaintiff when he received our goods, to pay *Richardson* 3000 dollars on account of the debt due by *Suckley* and *Co.* It was a promise never communicated to or sanctioned by the defendant, and which most obviously transcended the agent's powers; for the amount to be paid, was greater than the value of the goods, and not a shadow of authority was given to make any contract with *Richardson* on behalf of the *Charleston* house. *Nixon* v.

1813.

D'ARCY v. LYLE.

Hyserott (*a*). But this promise was a fiction. The transaction with *Suckley* and *Richardson* closed with the production of the power of attorney. The suit in 1808 was instituted under the patronage of *Christophe*, not as an appeal from or review of the prior suit, for in none of the proceedings in 1808 is the decree or judgment of 1804 either reversed or questioned, but as a new action, depending for its success upon despotic authority, regardless alike of law and morality. Take the case then upon the ground not of promise, but of an outrage committed under the coercion of despotism, it is a qualified robbery of the plaintiff's own property, for which he can have no recourse to us, without destroying commercial security, and putting every merchant in this country who has ever employed as his agent a resident in *St. Domingo*, at the mercy of the despots who rule that island. The consequences of such a doctrine may be terrible. An agency has closed, or expired. The agent is no longer in the confidence or employ of his former principal. His former principal is dead, and his property is distributed. A suit is commenced against the agent in *Algiers*, in *Turkey*, or at the *Cape*, and under the threat or the asserted threat of death, he is made falsely to acknowledge a promise, upon a matter said to be connected with his former agency, and to confess a judgment to an extent beyond all that his principal was worth. Is it possible to say that such an agent can recover his loss from the principal, without destroying hereafter that relation among men? It is not our property that has been taken; it is not in the course of an agency for us, that his own property has been taken; it is the case of an extorted promise under at most a mere colour of continuing agency, the whole from the foundation a tissue of falsehood and outrage, and the judicial proceedings the mere machinery of robbery. All writers upon the subject of mandatary contracts, agree that in such a case there is no recourse to the principal. The mandant is obliged to replace to the mandatary, all reasonable expenses disbursed *bona fide*, and the damage sustained by him *in the execution* of the mandate. 2 *Ersk. Inst. Bk.* 3. *sec.* 38. *p.* 534. The agent ought to be repaid whatever charges he has been at in the execu-

(*a*) 5 *Johns.* 58.

1813.

D'ARCY v. LYLE.

tion of the commission; and the same holds good of any loss that happens *by reason of the trust*, but not of such a loss as is occasioned *obliquely* by it, as if he had been plundered or shipwrecked. *Puff. lib. 5. cap. 4. sec. 4. p.* 482. When an agent undertakes a hazardous business, as every business in *St. Domingo* is to an *American* merchant, he takes the risks on himself. *Ibid.* If he suffers damage on account of the affair which he has taken in hand, we must judge by the circumstances, on whom the loss must fall. It will depend on the quality of the order to be executed, the danger, the nature of the event which occasioned the loss, *the connexion between the event and the order that was executed*, the relation which the thing lost or the damage sustained, had to the affair which was the occasion of it. 1 *Domat. Bk.* 1. *Tit.* 15. *sec.* 2. *art.* 6. If a person undertake to go for another to a place where his own business obliges him to take money with him, and he is robbed of it, the person who engaged him to make the journey is not liable for the loss. *Ibid. note to art.* 6. The agent may be a sufferer in his own person or property by the business he undertakes, as where one goes a journey and lames his horse, or is hurt himself by a fall on the road; but he cannot recover unless by express stipulation. 1 *Paley's Mor. Ph.* 175, *Bk.* 3. *ch.* 12. He may demand reparation for such losses only as are the *natural* consequence of his agency. *Burl. pt.* 3. *ch.* 12. *sec.* 2. 1 *Hub.* 367. *Non omnia quæ impensurus non fuit, mandator imputabit, veluti quòd spoliatus sit à latronibus, aut naufragio res amiserit, vel languore suo, suorumque adprehensus, quædam erogaverit; nam hæc magis casibus, quàm mandato imputari oportet. Dig. lib.* 17. *Tit.* 1. *sec.* 26. *art.* 6. The distinction is then between those losses which grow naturally out of the agency, and such as are casual, or as *Puffendorf* terms them, *oblique*, not flowing directly from the execution of the mandate. For the latter, which is the character of the plaintiff's loss, the defendant is not liable. There is also a strong equitable reason why in the present case, he should not be; for although he may recover from *Richardson*, we cannot from either *Richardson* or *Suckley*.

2. The only count on which he can recover, is the equitable count for money had and received; but we have never received with interest more than 2000 dollars; the nett pro-

ceeds of the goods, deducting the balance paid to *Suckley* and *Co.*, and the outstanding debts, being but 1627 dollars.

3. Upon the same ground the damages are excessive.

Hare and *Tilghman* contra. The authorities cited for the defendant on the important question in this cause, will not be controverted. They prove by the clearest implication, that a loss growing out of the agency, without the fault of the agent, is to be borne by the principal. The rule is distinctly stated and illustrated by *Heineccius*. The person giving a commission, is obliged to restore useful and necessary charges, and bound to repair all damages that may have been incurred for his sake, or on account of managing his affairs, without the fault of the agent. 1 *Turnb. Heineccius* 269. *lib.* 1. *cap.* 13. *sec.* 349. The same principle runs through a variety of cases, in which the relation of the parties is analogous to that of principal and factor. If a trustee is robbed of the trust-money, he is entitled to an allowance. 2 *Fonbl.* 177. If a partner who is travelling on business of the concern, is wounded or robbed, the common stock must make it good. 1 *Domat.* 159. *lib.* 1. *tit.* 8. *sec.* 4. *art.* 12., 2 *Ersk. Inst.* 528. *Puff.* 279. *bk.* 5. *ch.* 8, *note by Barbeyrac.* Partners are agents for each other; and they derive their indemnity under such circumstances, from their acting at the time as agents for their house. It is the plainest equity, and the merest justice, that the agent should be indemnified; and if ruin must follow, it is better that it should fall upon him who was to reap the profit, without being personally exposed to the injury.

Consider this case then either as a regular judicial proceeding, founded on a real promise, or as an act of force springing from despotic power; in either point of view, the defendant is answerable. If a real promise, the plaintiff had authority to make it, for he was empowered to settle the account with *Suckley* and *Co.* by compromise, or in any other way, and of course to promise, as a means of obtaining undisturbed possession of the goods, to pay their debt to *Richardson's* friends at *Charleston*. Setting aside the idea of a promise, then it is most clear, that the final act of force was applied in a suit growing out of, and connected with, the original proceeding. The jury have negatived all individual liability by the plaintiff to *Richardson*, and therefore we

1813.

D'ARCY v. LYLE.

must take the asserted liability to have been as agent. This is the first step. The next feature in the case, is *Richardson's* intention by the suit to defeat, if not reverse, the judgment in 1804. The records are imperfect. The situation of the country prevents perfect copies from being obtained. But enough appears in the plaintiff's memorial or defence, to shew the connexion, because he says that it was *Richardson's* endeavour to make the judges "change their already wise and just "decision," and "who could suppose that the repose of so "honourable a decision should be disturbed after the lapse of "more than three years." If the money had not been paid over by the plaintiff to the defendant, it would have been impossible for the latter to recover, against this proceeding at *Hayti;* and where is the difference between the inability to recover, and the obligation to refund? Where would be the difference between *Christophe's* seizing the goods in the hands of the plaintiff, and compelling him to pay money on account of those goods after they were sold? If an agent advances money to the principal, and the goods are burnt:—or after the agent has sold and accounted for the goods, a suit is brought against him by third persons claiming the property, and obtaining a judgment:—or while the goods are in his hands, a suit against him for them is decided in his favour, he then sells and remits, and upon appeal the first judgment is reversed, and judgment rendered against the defendant:—what difference is there between any of these cases, and the present, in which the first judgment was in fact reversed, in a proceeding which was intended to have that effect? In one and all the agent is entitled to an indemnity. It is true the act of *Christophe* was an outrage of the grossest kind. But we are not to criticise such acts by the rules of our own code; it is enough that the plaintiff did not yield a voluntary assent to it, that he resisted until resistance was fruitless, and certain death the consequence of continuing it; and that it was a consequence flowing from the agency, and which could not have existed but for the agency. It is said the plaintiff was not agent at the time. This is begging the question. He was agent *quoad hoc*, if the second proceeding grew out of the first; and it is of no importance whether actual agent or not, if the loss was the consequence of the agency. The material fact is, that *Richardson's* claim did not originate in a transaction subsequent to the agency. It is also objected that

the plaintiff continued to reside at the *Cape*, after the agency ceased, and that it was his own property that was exposed. To make this of any consequence, it must have been a *fault* in him to remain there: he was under no obligation to remove. It is said too that this loss was the result of one of the risks attending the agency, which he knew and took upon himself. In no respect does it deserve the name of a casualty. It was a consequence of the agency, produced by the will of those among whom the commission was to be executed. Finally it is objected that we can recover against *Richardson*, and the defendant cannot. This also begs the main question. If we paid as agent, and paid for the defendant, he may recover, and not we. But it is no reason for turning us round, be the law as it may.

2. The action may be supported upon either of the counts. We have recovered no more than the principal, interest and expenses, and this was the least we were entitled to. 2 *Com. on Contr.* 1. 138. 159.

3. For the same reason the damages are not excessive.

Cur. adv. vult.

Tilghman C. J. after stating the facts, and remarking that although the records were very imperfect, he thought it sufficiently appeared that the proceedings in 1808, were connected with those of 1804, either as an appeal from the judgment in 1804, or a revival of the suit in a new form, proceeded as follows:

This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution.

If the confession of judgment by the plaintiff had been *voluntary*, it would have lain on him to show that the 3000 dollars were justly due from the defendant to *Richardson*, or the persons for whom he acted, or that they had a lien on the goods of the defendant to that amount. But the confession of judgment was *beyond all doubt* extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is, whether the transactions between the plaintiff and *Richardson*, were on any *private* account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for

1813.

D'ARCY v. LYLE.

granted that the proceedings at the *Cape* against the plaintiff, were in consequence of his having received possession of the defendant's goods, from *Suckley* and *Co.* I take the law to be as laid down by *Heineccius*, *Turnbull's Heinec. c.* 13. *p.* 269, 270, and by *Erskine* in his *Institutes*, 2 *Ersk. Inst.* 534, that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff, he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible to an unknown amount, for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it to be understood, that I give no opinion on a case where an agent should consent to pay a sum, far exceeding the amount of the property in his hands. That is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at 3000 dollars. The cases cited by the defendant show, that if the agent on a journey on business of his principal, is robbed of *his own money*, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was taken lame, the principal was not answerable. That I think would depend upon the *agreement of the parties*. If *A* undertakes, for a certain sum, to carry a letter for *B*, to a certain place, *A* must find his own horse, and *B* is not answerable for any injury which may befall the horse in the course of the journey. But if *B* is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his own fault, *on account of his agency*, and the jury have indemnified him to an amount,

very little if at all exceeding the property in his hands, with interest and costs. I am of opinion, that the verdict should not be set aside.

Yeates J. Several legal exceptions against the plaintiff's recovery in this suit, were taken by the defendant's counsel in the course of the trial, which have been relinquished upon the argument on the motion for a new trial. It is now contended that the payment made by *D'Arcy* to *Thomas Richardson*, was voluntary, and unconnected with the agency under Mr. *Lyle*, and that were it otherwise, the defendant as principal, is not responsible to the plaintiff for injuries done by a *despot* to him as a special agent, after the determination of his authority.

The cause was put to the jury to decide, whether the conduct of the plaintiff as agent of the defendant was correct, and whether the payment of the 3000 dollars under the sentence of the Court of *Hayti*, was extorted under colour of law from him for acts done by him during his agency. The jurors by their verdict, have established the affirmative of both questions, and I was far from being dissatisfied therewith: I feel no diposition to disturb their decision.

I see no reason whatever for retracting the opinion I had formed on the trial, that where a factor has acted faithfully and prudently within the scope of his authority, he is entitled to protection from his constituent, and compensation for compulsory payments exacted against him under the form of law, for the transactions of his agency. The flagitious conduct of *Christophe*, President of *Hayti*, compelled the litigant parties under his savage power, into a trial by battle, in order to decide their civil rights. He influenced the civil tribunal of the first district of the province of the North, sitting at the *Cape*, "to set aside a former judgment rendered "by the tribunal of commerce, and of their own Court, and "to condemn *D'Arcy*," according to the language of the sentence, "to pay to *Thomas Richardson* 3000 dollars, for so "much he had engaged to him to pay for *Suckley* and *Co.* "*for merchandize, which the latter had delivered to him as* "*belonging to James Lyle*, whom the said *D'Arcy* repre- "sented, for which the tribunal *do reserve to D'Arcy his* "*rights*, that he may prosecute the same, if he thinks proper, "*against the said Lyle* or *Suckley*," &c.

1813.

D'ARCY v. LYLE.

The defendant appointed the plaintiff his attorney, to settle and collect a debt in a barbarous foreign country. The plaintiff has transacted that business with fidelity and care, and remitted the proceeds to his principal. He risked his life in defence of the interests of his constituent, under the imperious mandate of a capricious tyrant, holding the reins of government. He has since been compelled by a mockery of justice, to pay his own monies for acts lawfully done in the faithful discharge of his duties as an agent; and I have no difficulty in saying, that of two innocent persons, the principal and not the agent should sustain the loss.

In *Leate* v. *Turkey Company Merchants*, *Toth.* 105, it was decreed, that if a consul beyond sea hath power, and do levy goods upon a private merchant, the company must bear the loss, *if the factor could not prevent the act of the consul.* The decree is founded in the highest justice, and its reason peculiarly applies to the present case. *D'Arcy* was doomed by the cruel order of an inexorable tyrant, either to pay the 3000 dollars, or in his hated presence to fight his antagonist until one of them should fall.

Upon the whole, I am of opinion that the motion for the new trial be denied.

BRACKENRIDGE J. Whatever conditional stipulation it might have been necessary for *D'Arcy*, the agent of *Lyle*, to have made, provided that stipulation was not so much against the interest of *Lyle*, as to come under the denomination of an unreasonable stipulation, and to constitute a mal-agency respecting the subject of the agency, *Lyle* the principal, must have been bound by it. The giving bond to produce the power of attorney, in order to receive the goods of *Lyle*, out of the hands of *Suckley*, which would seem to have been detained under the claim of *Richardson*, might be deemed prudent; and had the power of attorney not have been produced, owing to no fault of *D'Arcy*, but to accident, or the impossibility of getting it in time, *Lyle* might be considered as bound to pay the bond, as the goods had been disposed of for his benefit. But the power of attorney was received, and the bond satisfied; and we hear no more of this. It is on an entire new ground, that a claim was advanced by *Richardson* against *D'Arcy* as the agent of *Lyle*. It is that of an agreement or stipulation by him, (*D'Arcy*) that in consideration

of having obtained a delivery of the goods of *Lyle*, he would pay the debt due by *Suckley*, and in whose possession the goods of *Lyle* were, a debt due and owing from *Suckley* to him (*Richardson*) as agent for a house in *Charleston*. Had he made such agreement, and it should turn out that this debt was beyond the value of the goods received for the use of *Lyle*, it would be an unfaithful, being an improvident agency; and he would not be considered as entitled to recover from *Lyle*, more than the value of the goods which he had received, and the money arising from the sale of which had come to the hands of *Lyle*. But *D'Arcy* admits that he had made no such agreement, or stipulation whatever, on behalf of *Lyle*, in order to receive his goods, or to have them delivered to him. How then can he claim against *Lyle?*

It is alleged to be on the ground, that *Richardson* had compelled him from a fear of life to acknowledge such agreement. It was on the allegation of *Richardson*, that *Christophe*, the master of the gang, interfered, and compelled *D'Arcy* to acknowledge such agreement. He compelled him to come into a court of his, who had given judgment to the contrary, and confess such agreement; in other words, to retract a denial of such agreement, and give his court colour for reversing the judgment before given. This cannot be distinguished from a compulsion *without colour*, to retract a denial, and confess an agreement. It is the same thing as if *Richardson* and *Christophe*, out of doors, had compelled through a fear of life *D'Arcy*, not only to pay money, but to acknowledge that he had agreed to pay it. A common carrier has carried the money of *B*, to pay *C*. He is met by a gentlemanly footpad, who says that the money is his so carrying to *C*. It is denied by *A*, who is suffered to go on. But on his return, he is again accosted by the same footpad, who alleges that he agreed to pay him that sum or a greater, on condition that he should be suffered to go on and carry to *C*. It is denied, but the master of the gang interposes, and says he shall acknowledge the agreement. The acknowledging the agreement never made, is but the *sub modo* of the robbery. It is but the robbery of the carrier, under a pretence of having carried the money of *B*, which he the footpad alleges, belonged to him, and which he the carrier had agreed on his first journey to be the fact, and now on his return should pay him, and even a greater sum. In this case, it would

1813.

D'ARCY v. LYLE.

appear to be as perfectly a pretence, as that of the wolf in the fable, accusing the lamb of disturbing the stream. Why is it that a carrier must be answerable for goods notwithstanding a robbery? It is the policy of the law, founded on the possibility of a carrier procuring himself to be robbed. Will not the same policy be in the way of an agent recovering for an alleged robbery; robbed more especially not of the goods in his possession, but of other goods, on account of having had these? Settling such a principle, would render it unsafe to have an agent at all. There are two things or circumstances which take this case entirely out of all reason and justice; the remaining in the country after the agency as to the principal had been closed, and it being the act of the agent himself that gave colour to the compulsion. He was put in fear, fear of his life; a fear that would excuse or justify a constant and resolute man; that is clear. But it is his misfortune, and I can consider *Lyle* under no obligation to indemnify him for the loss. His redress, if he shall ever be able to obtain any, must be against the spoiler, or those for whom he may have acted, or who may have obtained the advantage of his wrong. There is a third circumstance in this verdict, which would justify a new trial; the sum given being beyond the value of the goods or money, even with interest, which *D'Arcy* the agent alleges to have been paid, on account of obtaining possession of the property of *Lyle*. But on the two first grounds, I do not think him entitled to recover. I see nothing of an appeal from a proceeding under a claim made or interposed against the goods of *Lyle*. Nor am I able to see any thing like a growing out of the claim; it may be said to be engrafted on it, or adscititious to it, or springing up with it. But the act of *D'Arcy* himself, confessing an agreement, is the only thing that can connect; and this he admits did not exist. His agency for *Lyle*, might be said to be the occasion, but could not be considered the cause of his loss. But it was rather the occasion of the pretence that was set up, and to which *D'Arcy* himself gave sanction, and if he has saved his life by that, he must keep his life as that for which he sustained the loss. It is not more nor less, than if an agent having resisted a claim, set up against his *quondam* principal, and to avoid a challenge, should come into one of our courts, and move to have the judgment in his favour set aside, and to confess a judgment against his

principal, which if allowed, might be to any amount. It is a question with moralists, whether it is lawful for the sake of life or property to depart from truth.

Propter vitam, vivendi perdere causas.

Where a person had a right to expect the truth, it is not *lawful*, however under circumstances it may be *excusable*. But for one to evade a risk by departing from the truth, and to attempt to throw the loss upon another person, is totally inadmissible; it cannot be done. If any argument could be drawn from the circumstance of the master of the gang, *Christophe*, being a principal as to the force, it must be evident that it might be owing to the indiscreet expressions respecting *Christophe*, and his influence upon the administration of justice in his courts, that induced him to interpose. This was the act of *Richardson*. I am therefore of opinion for the defendant.

New trial refused.

Read *against* Bush.

Philadelphia, Monday, March 29.

The rule for affidavits of defence, does not apply to a case in which the defendant is an infant.

This action was brought to *July* Term 1811, upon a promisory note for 568 dollars 60 cents, drawn by the defendant on the 29th of *August* 1810. Bail was entered on the 16th of *August* 1811, a declaration filed on the 16th of *October* following, and on the 4th of *November* 1812, judgment was signed for want of an affidavit of defence, according to Rule 79 of this Court.

Levy for the defendant now moved to open the judgment, on the ground that the defendant was an infant.

The Court heard evidence on behalf of the motion, to shew that the payer of the note, from whom the plaintiff derived by indorsement, knew that the defendant was a minor, and sold him wine, at more than the market price, for the note. There were four other suits against him to *March* Term 1811, in which affidavits were filed, and the appearance of Mr. *Levy* was entered to this suit in *June* 1812. The defendant came of age on the 23d of last month.

On the contrary, evidence was given, that the defendant

1813.

READ v. BUSH.

had traded with the knowledge and consent of his friends, and particularly his guardian, Dr. *Currie;* and that to some of his creditors he had stated himself to be of age, when he contracted debts with them. That he had finally committed acts of great impropriety, and failed.

Levy contended that the affidavit rule, which was founded on an agreement of the attorneys, did not extend to the case of an infant, who could not appear by attorney, but by guardian only; his own appearance in this instance being merely a memorandum for his personal convenience. And that the defendant was entitled to avail himself of his infancy to open the judgment, precisely as if it had been entered against him by warrant of attorney. *Bush* v. *Gower* (*a*), *Stern* v. *Bern* (*b*), *Wilmot* v. *Bye* (*c*), *Conroe* v. *Birdsall* (*d*), *Van Winkle* v. *Ketcham* (*e*), *Stokes* v. *Oliver* (*f*), *Sliver* v. *Shelback* (*g*), 2 *Saund.* 95., *b. notis.*

Milnor contra, contended that the Court had never opened a judgment against an infant, where he had been guilty of misconduct or laches. In this case, the plaintiff had lost a trial by delay; and the defendant's conduct in trading and passing himself off as of age, ought to be a bar to any indulgence by the Court. The rule does apply to the present case, because its terms are general, and there was an appearance by attorney.

Levy replied, that as to delay, it was the plaintiff's fault, as he might have brought on the trial. The guardian knew nothing of the judgment, until there was a *sci. fa.* against him as special bail.

TILGHMAN C. J. This case comes before us, on a motion on the part of the defendant, to open a judgment entered against him for want of an affidavit of defence. The defendant was an infant at the time of entering the judgment. Affidavits of defence had been filed in four other actions brought against him to the term next preceeding the commencement of this suit, so that it was well known that his

(*a*) *Cas. Temp. Hardw.* 220.
(*b*) *Id.* 96.
(*c*) *Id.* 359.
(*d*) 1 *Johns Ca.* 127.
(*e*) 3 *Caines* 323.
(*f*) 5 *Mod.* 209.
(*g*) 1 *Dall.* 165.

1813.

READ v. BUSH.

guardian intended to dispute those contracts which were made during infancy. The rule of court under which the judgment was entered, was founded on an agreement signed by most of the counsel at the bar, to confess judgment at certain periods, unless their clients would swear that they had a just defence. Although the agreement is in terms so general as to comprehend *all actions*, yet it has been construed according to its intent. It does not extend to *torts*, or those actions in which the plaintiff, having no *certain demand*, it is evident, from the nature of the case, that there is cause of dispute. It does not extend to *executors* or *administrators*, because, not being privy to the transactions of the deceased, it would be unreasonable to put them to an oath. So neither do I think it extends to *infants*, who can appear only by guardian; because it ought not to be supposed, that any agreement of attorneys with respect to the confession of judgments in general, was intended to comprehend cases in which the defendant cannot appear by attorney. The insisting on an oath from the defendant or his guardian, is not consistent with that care and protection which have ever been extended to infants by courts of justice. I am therefore of opinion, that the judgment should be opened, because it was not regularly entered.

YEATES J. was unable to attend, in consequence of sickness, and gave no opinion.

BRACKENRIDGE J. concurred with the Chief Justice.

Motion granted.

LYLE *against* BARKER, Sheriff, &c. and others.

Philadelphia, Monday, March 29.

THIS was an action of trespass *vi et armis*, for breaking and entering the close of the plaintiff, and taking away twenty-nine pipes of *Madeira* wine. The defendants pleaded

The pawnee of goods may maintain trespass against a stranger who takes them away, and recover the whole value in damages, although they were pledged for less. He is answerable for the excess to the person who has the general property.

The sheriff is not, by a domestic attachment, invested with the rights of the defendant, in property that has been pledged by him. He is *quoad hoc* a stranger, and liable in damages to the same extent in case of a trespass.

1813.

LYLE v. BARKER.

not guilty, and a special justification under a writ of domestic attachment, at the suit of *Alexander Burton* against *Robert Morris*, junior, which was executed by *Barker* as sheriff, and the other defendants as his assistants.

Upon the trial of the cause, which took place before the Chief Justice at a *Nisi Prius* in *February* last, it was in evidence that *Robert Morris*, junior, in whom the general property of the wine was, was indebted to the plaintiff in the sum of 14,800 dollars, upon eleven promisory notes, drawn in the spring and summer of 1806, at 60 and 90 days. The plaintiff claimed a special property in the wines, under an asserted bailment by *Morris*, as a security for this debt. The sheriff took them out of his possession on the 12th of *August* 1806, in virtue of a domestic attachment against *Morris*, by whose testimony it appeared, that the wine was pledged to the plaintiff by a written agreement, (not produced on the trial) till certain notes of *Morris* should be paid; that these notes were less in amount than the first cost of the wine; and that there were afterwards other notes of *Morris* in the hands of the plaintiff, for which the wines were not pledged.

It was upon this evidence, that the only point now material arose; the defendant's counsel contending that the plaintiff could recover no more in damages, than the amount for which the wines were pledged, which it was his duty to shew precisely; but the Chief Justice in his charge instructed the jury, that if they were satisfied the plaintiff had a special property in the wines, they might give damages to the full value, and interest from the time they were taken away. The jury found a verdict for the plaintiff 8821 dollars 87 cents damages, being the full value of the wines according to the plaintiff's estimate, with interest from the time of the attachment to the day in bank, and including one hundred dollars for the trespass. The defendant moved for a new trial upon the ground of misdirection.

Wallace and *Tilghman* for the defendant, contended, that the direction was wrong. The measure of the plaintiff's damages, was the injury sustained, which could not exceed the amount for which the wines were pledged, and the damage done by breaking his close. Where goods are taken from a bailee in consequence of his own negligence, he is an-

swerable over, and in such case there may be a colour for giving him the full value. But they were taken here by process of law, and he is not chargeable over. His right to damages is therefore only commensurate with his personal loss, which it was incumbent upon him to shew, without putting the burden of proof upon us. What would he have recovered, had the trespass been committed by *Morris?* Certainly no more than the sum secured. The defendants are *Morris.* They represented his general creditors who succeeded to all his rights. The same rule ought to be applied to their case. In a suit by the auditors against the plaintiff, for the excess, it will not appear how the jury formed their verdict, how much they gave for the wine, and how much for the trespass. They cannot therefore fix the surplus value recovered by him, beyond the amount of his security.

Hopkinson and *Ingersoll* for the plaintiff, answered, that the sheriff did not represent the rights of *Morris.* The auditors are his representatives, and alone have the right to redeem the property he has pledged; at the time of this trespass, no auditors were appointed, and the sheriff was a mere stranger. As between the pawnee and a stranger, the former may recover the whole value in trespass, and is chargeable over for the excess. He has no right to settle his account with the pawnor in an action against a stranger. It would be inconvenient, and the pawnor would not be bound by it. The right of the pawnee to recover the whole value, is founded upon his obligation to deliver up the chattel upon lawful demand, and tender of the money due. His rights against a stranger are co-extensive with those of the pawnor. 2 *Black. Com.* 453. There is no difficulty on the part of *Morris* or the creditors, because all they will have to shew is the value of the wine, without regard to the verdict; and the account must be settled upon that basis.

TILGHMAN C. J. delivered the Court's opinion.

This is an action of trespass for breaking the plaintiff's house, and taking away twenty-nine pipes of wine. The wine was pledged to the plaintiff by *Robert Morris*, junior, for a debt, the amount of which was not ascertained. The cause was tried before me, and I gave it in charge to the jury, that if they found for the plaintiff, they might give the *whole value*

1813.

LYLE v. BARKER.

of the wine in damages. The point was very little argued, and no authorities cited; so that my opinion was upon a general recollection of the principle, that he who has a special property in chattels, being answerable to the general owner, unless he takes good care of them, may recover the whole in damages against a wrongdoer who takes them away. Upon subsequent reflection and reference to authorities, I am satisfied that the charge was right. I cannot better express my ideas, than in the language of 13 *Co. Rep.* 69. *Heyden and Smith's case.* "If, after taking the goods, the owner "hath his goods again, yet he shall have a general action of "trespass, and upon the evidence, the damages shall be mi-"tigated. So is the better opinion in 11 *H.* 4. 23, that he "who hath a special property in goods, shall have a general "action of trespass against him who hath the general pro-"perty, and upon the evidence, damages shall be miti-"gated; *but clearly the bailee, or he who hath a special pro-"perty, shall have a general action of trespass against a "stranger, and shall recover all in damages, because that he "is chargeable over.*" This authority is cited in 2 *Black. Com.* 453, where the law is laid down substantially to the same purpose, though not in such express terms. The defendant's counsel endeavoured to shew that *Barker* was in the same situation as *Morris*, who had the general property, because he took the wine, as sheriff of *Philadelphia*, under a domestic attachment, issued at the suit of one of *Morris's* creditors. But I cannot see how this places him in the situation of *Morris*, or of those persons intrusted by law with the care of his effects for the benefit of his creditors. Those persons are the auditors appointed by the Court from which the attachment issues, and were not appointed when this suit was brought, and are in no shape parties to it. It might be extremely inconvenient to enter into a settlement of accounts between *Morris* and *Lyle* in this action. A course far more simple is the one which has been taken; that is to say, the plaintiff having now recovered the full value of the wines, stands, with respect to *Morris*, or those who represent him, precisely in the same situation that he did before the wines were taken away. Upon payment of his demand against *Morris*, he is accountable for the wines or their value. The defendant's motion, therefore, ought not to be granted.

Motion refused.

1813.

JONES *against* BADGER and others.

Philadelphia, Monday, March 29.

IN this case, *Sergeant* for the defendants, obtained a rule to shew cause, why a *fi. fa.* issued by the plaintiff's attorney should not be set aside.

Filing a recognisance, paying costs, and making the proper affidavit, do of themselves constitute an appeal from the award of arbitrators, without filing an order to enter the appeal, or a declaration that the party does appeal.

The action was in case to *December* Term 1811, and was referred to arbitrators at the instance of the plaintiff, on the 26th of *May* 1812. On the 17th of *September* following, a report was filed, awarding to the plaintiff 10,000 dollars with costs. On the 21st of *September*, the defendants made the requisite affidavit that the appeal was not for the purpose of delay, paid the costs, and with sureties entered into a joint and several recognisance of bail before Mr. *Hennessy*, the commissioner, who entered the appeal on the docquet. On the 23d, *Phillips*, the plaintiff's attorney, excepted to the bail. On the 28th additional bail was entered. The attorney excepted to the additional bail; and on the same day the additional bail, and the sureties in the first recognisance, made oath before the commissioner, that each was worth 7000 dollars, clear of debts, &c., and notice was given to *Phillips* that the cognisors would answer on oath to any questions he might put to them. On the 6th of *October*, another recognisance of bail was entered into before the commissioner, by another surety, who made oath in the same manner, that he was worth 20,000 dollars, and like notice was given that he would answer any questions on oath. On the same day the plaintiff's attorney excepted to this bail, but did not propose any questions. On the 16th of *October* the execution was taken out, although the attorney was previously warned of his irregularity.

A recognisance in which the defendant and his sureties join, is good, although the act requires only the sureties to enter into it.

A recognisance of bail, to ground an appeal, is well taken before the commissioner of bail, though the act directs that the surety shall enter into it with the prothonotary.

The rule requiring bail to justify in open Court, either by affidavit taken before the commissioner, or one of the judges, does not apply to bail upon an appeal.

The exceptions taken to the appeal, and in support of the execution, were four. 1. That the defendants never entered an appeal, because they did not declare in writing, and file it of record, that they did appeal. 2. That the recognisance of bail was irregular, as the defendants joined with the sureties; and the act of the 20th of *March* 1810, directs that the appellant shall produce one or more sufficient sureties, *who* shall enter into a recognisance &c. 3. That the commissioner

An affidavit before the commissioner, with an offer to the opposite party to propose any questions as to the circumstances of the bail, is a sufficient justification.

1813.

JONES v. BADGER.

of bail had no authority to take the recognisance, because the same act required that the sureties should enter into a recognisance *with the prothonotary*. 4. That the bail did not justify either according to the common law, or the rule of this Court, which requires it to be done in open court, either by affidavit before the commissioner, or one of the judges.

After argument by *Sergeant* and *Hopkinson* on behalf of the rule, and *Phillips* and *M'Kean* in support of the execution,

TILGHMAN C. J. delivered the opinion of the Court.

1. The first exception is void of foundation. The defendants made oath that the appeal was not entered for the purpose of delay, paid the costs, filed a recognisance in nature of special bail, and had an appeal entered on the docquet of the prothonotary. Yet it is said that no appeal was entered; and why? Because the defendants did not file a separate paper, expressly declaring that they appealed. The law requires no such act, nor is it necessary. The entry on the docquet is in all respects sufficient.

2. The second exception is no better than the first. There was no necessity for the defendants joining in the recognisance, but their joining does no harm; because all the cognisors are bound jointly and severally. All that can be said is, that the defendants have given better security than was required by law.

3. The act of assembly directs that when the defendant appeals, "he shall produce one or more sufficient sureties, "who shall enter into a recognisance *with the prothonotary*, "in the nature of special bail, &c." The plaintiff's counsel contend, that it was the intention of the legislature to throw all possible difficulties in the way of an appeal, and therefore the party appealing should be held to a strict compliance with the letter of the law. But inasmuch as the taking away of the appeal, is the taking away of the trial by jury, the great support of the liberty and property of the people, I never can consent to construe this law, under an idea, that the legislature intended to throw unreasonable obstructions in the way of an appeal. On the contrary, if the law is doubtful, I should incline to a liberal construction in favour of an

appeal. On the point which now occurs, we cannot adhere to the *letter* of the law, because if we do, the prothonotary *himself must be bound* in the recognisance. Let us then seek for the intent, which appears to be plainly this; that the defendants should give sufficient security, in the nature of special bail, to be filed *in the office of the prothonotary*, and that the recognisance should be entered into, before such persons as are legally authorised to take bail in the court where the suit is depending. In the Supreme Court, the persons so authorised are the judges, the prothonotary and commissioners appointed by the Court, by virtue of an act of Assembly vesting them with that power. The recognisances in this case were taken before Mr. *Hennessy*, the commissioner of bail appointed by the Court. They fall therefore within the intent of the law.

1813.

JONES. *v.* BADGER.

4. The last exception is, that when the bail were excepted to, they did not justify according to the rule of this Court. I think it unnecessary to enter into the argument on the rule of court, because I do not conceive that the rule extends to this case. It is a rule made many years ago for the regulation of bail, but not with any view towards cases arising under a law not then in existence, introducing a new and unusual mode of deciding suits at law. This law directs that good and sufficient security in the nature of special bail, shall be entered within twenty days from the filing of the award, and then goes on to prescribe the condition of the recognisance. If sufficient security is entered, the execution is staid; but if not entered, the plaintiff is entitled to an execution. If this Court were now called upon to make a rule for the regulation of the manner of entering security, they would be extremely cautious how they embarrassed the appellant with matters of form, because if that form is not complied with, the appeal is gone. In common cases, if bail is not regularly entered, the defendant remains in jail until good bail is given; when given, he is liberated. So that the consequences of not entering bail in an action at law, and entering security under this act of Assembly, are widely different. The substantial requisite under the act is, that good security be entered in twenty days. This has been done by the defendants, and moreover, they have always appeared anxious to give the plaintiff every reasonable satisfaction both with regard to

1813.

JONES v. BADGER.

the solidity of the bail, and the means of enquiring into their circumstances. I am of opinion, therefore, that the execution was irregularly issued, and that it should be set aside, with costs to the defendants.

Rule absolute.

GRIFFITH *against* The Insurance Company of North America.

Philadelphia, Monday, March 29.

A warranty that a vessel is an *American bottom*, means that she is owned by a citizen of the *United States*, and is furnished with the usual documents required by our laws and treaties with foreign nations, so as to protect her from capture by any of the belligerents; but not that she is *American* built, or is an *American registered* vessel. *Hence* if she is *American* owned, and sails under a *sea letter* merely, the warranty is true.

THIS was an action of covenant upon a policy of insurance dated the 8th of *July* 1797. for 9500 dollars, on a quantity of indigo on board the Brig *Rosina*, at and from *New Orleans* to *Philadelphia*, *New York* or *Baltimore*, at a premium of ten per cent. The policy contained the following warranty. "The insured warrants the above goods to be "*American* property, *and that the vessel is an* American *bot-*"*tom*, proof whereof shall be required in the city of *Philadel-*"*phia* only."

Upon the trial of the cause before the Chief Justice in *February* last, it was admitted that a certain portion of the indigo was on board the *Rosina*, and belonged to the plaintiff and his partner, since deceased, citizens of the *United States;* that the vessel foundered on her voyage to *Philadelphia*, and that there was an abandonment and demand of payment on the 14th of *November* 1797. It was proved at the same time, that the brig at and before her departure and loss, was the property of *William Davy*, a citizen of the *United States*, and sailed under a *sea letter*. Upon these facts, it was agreed that a verdict should be taken for the plaintiff for 5694 dollars 98 cents, subject to the opinion of the Court in bank, whether the warranty of *an American bottom* had been broken.

The question was elaborately argued at this term, by *Gibson* and *Dallas* for the plaintiff, and *Hopkinson* and *Levy* for the defendants; the former contending, that by the laws of the *United States* and their treaties with foreign powers, a *sea letter* vessel, was entitled to the same respect and protection on the high seas, and in reference to the law of nations, as a vessel *American* built and registered; and that the privileges conferred by a register, were purely of a domestic kind,

which did not enter into the contemplation of insurers: that the vessel being entitled by a sea letter to all the privileges of an *American* vessel, must therefore be considered as an *American* bottom, according to the intention of the parties, and the true construction of the warranty.

The defendant's counsel on the other hand argued, that an *American bottom* meant a vessel *American* built and registered, a vessel of the first grade; and that a *sea letter* did not insure to her all the protection and advantages that it was the intention of the warranty to provide, particularly at the time of this insurance.

The argument turned exclusively upon acts of Congress and treaties, which are very fully stated in the Court's opinion.

TILGHMAN C. J. delivered judgment.

This is an action on an insurance upon goods on board the brig *Rosina*, on a voyage from *New Orleans* to *Philadelphia*. The policy is dated the 8th of *July* 1797. The insured warranted the goods to be *American* property, and that the vessel was an *American bottom*. It was proved that the brig was the property of *William Davy* a citizen of the *United States*, that she sailed under a *sea letter*, and was not a registered vessel. The loss was admitted, and it was admitted also, that the goods were *American* property. The only question is then, whether a vessel owned by a citizen of the *United States*, not registered, but sailing under a *sea letter*, is an *American bottom* within the warranty. An *American bottom*, strictly speaking, may be said to be a vessel built within the *United States*. But that cannot be the meaning of the warranty, which was intended for the benefit of the insurers. A ship may be built in *America*, and owned by a foreigner, a subject of one of the belligerent potentates. In that case she would derive no protection from the circumstance of being built in the *United States*. On the other hand, a vessel may be built in foreign parts, and owned by a citizen of the *United States*, under circumstances which would entitle her to every privilege *within* the *United States*, and every protection *without*, which can belong to a vessel built in the *United States*. The warranty must be construed therefore, to mean a vessel owned by citizens of the *United States*, and furnished with the usual documents, required by our law and treaties with foreign nations, so as to protect her from capture

1813.

GRIFFITH v. INS. COMPANY of N. AMERICA.

by any of the belligerents. Something has been said, in the argument of this cause, of a distinction between the terms *American vessel*, and *American bottom*, but I consider them as synonimous. There are two kinds of *American* vessels, registered and unregistered. The former are entitled to greater privileges *within* the *United States* than the latter, they pay less tonnage, and the goods imported in them pay less duties. The counsel for the defendant contended in the first place, that the words of the insured are to be taken most strongly against himself, and therefore a registered vessel, which is entitled to the highest privileges, must be intended. This is pushing the matter too far. Where words are doubtful, they are to be taken most strongly against the speaker. But not so, where they are sufficiently clear. There being two kinds of *American* bottoms, if I engage that a certain vessel is an *American* bottom, *generally*, my engagement is complied with, if she is an *American* bottom of either kind, unless it can be shewn that such construction involves consequences at variance with the object of the agreement. We are then to consider the object of this warranty. It was to insure to the underwriters that protection to which neutrals are entitled. Now if this object is answered without a register, and if the use of a register is principally to obtain privileges of a domestic nature, there is no ground for asserting that the warranty contemplated a *registered* vessel exclusively. But if, as has been argued by the defendants, an unregistered vessel, though owned by citizens of the *United States*, was at the time of this insurance unprotected by the government, and deprived of those documents to which foreign nations look, as proof of neutrality, then indeed there will be strong reason for saying that the warranty required a registered vessel. It is necessary therefore to examine what was the situation of a vessel sailing under a *sea letter*, at the date of this insurance. A good deal will depend on ascertaining with precision the nature of a sea letter, concerning which there has been a considerable difference of opinion, occasioned principally, as it appears to me, by confounding it with a different instrument, called *a certificate of ownership*. It is provided by the 25th article of our treaty with *France*, that the ships and vessels of the people of both nations, shall be furnished with *sea letters or passports*. From this expression it seems that a sea letter and a passport were considered as the

same. I presume that during the revolutionary war, our vessels were furnished with this document according to treaty. During the peace that succeeded, it is probable that it was omitted, as there was no danger of capture. But when war broke out again between *France* and *England*, it became a matter of importance that our vessels should be so documented, as to afford them protection in their navigation. Accordingly we find that the attention of our government was very early turned to this subject. In a circular letter from the secretary of the treasury to the several collectors, of the 13th of *May* 1793, he mentions the necessity of furnishing "all "ships and vessels belonging to *citizens of the United States*, "with *sea letters*, for their more perfect identification and "security." This letter was accompanied with sea letters according to the form prescribed by the government, and not materially different from that which had been used in the revolutionary war. It is under the hand of the President, and seal of the *United States*, countersigned by the secretary of state, and contains the name and burthen of the vessel, with the nature of her cargo, the name of her master and the voyage on which she is bound, with permission to depart and proceed on the voyage. It contains also a declaration that oath has been made by the master, proving the vessel to be the property of citizens of the *United States* only. Underneath the signature of the secretary of state, is a certificate signed by the collector of the port from whence the vessel sails, that oath has been made before him by the master, that the said vessel is owned by citizens of the *United States* only. This certificate is addressed to all foreign kings and potentates, and prays that the said master may be received and treated with kindness and friendship &c. This sea letter being furnished to all vessels, *registered or unregistered*, belonging to citizens of the *United States*, afforded the same protection to both. It was a passport within the meaning of our treaties with *France*, *Spain*, *Holland* &c., nor have we any reason to suppose that its efficacy was called in question by either of them. Lord *Alvanley* appears therefore to have been mistaken, when he said in the case of *Baring &c.* v. *Clagett*, 3 *Bos. & Pull.* 213., that our unregistered vessels were not protected from capture by our treaty with *France*. It is true that by the registering act of the 31st of *December* 1792, it is declared that none other than registered vessels "should be

1813.

GRIFFITH v. INS. COMPANY of N. AMERICA.

"denominated and deemed vessels of the *United States*, entitled to the benefits and privileges appertaining to such vessels." But those benefits and privileges were of a municipal nature, with which foreign powers had no concern. On the 1st of *June* 1796, an act was passed directing the secretary of state, with the approbation of the president, to prepare a form of *passport* for *ships and vessels of the* United States going to foreign countries. And by a supplement to this act, passed the 2d of *March* 1803, every *unregistered* ship or vessel, owned by citizens of the *United States*, and sailing with *a sea letter*, going to any foreign country, is entitled to one of the passports created by the original law. Hence it has been concluded by the counsel for the defendants, that unregistered vessels were unprovided with a passport during the interval between the passing of the acts of *June* 1796 and *March* 1803; that they carried in fact nothing but a *certificate* of *ownership*, which obtained in common parlance the name of *a sea letter*, but did not operate as a passport. But in this I think they are mistaken. During all that period, sea letters (which were passports) were granted to unregistered vessels, and the passports under the act of *June* 1796, were what are commonly called *Mediterranean* passports, rendered necessary by our treaty with the Dey of *Algiers*, on the 5th of *September* 1795, by the fourth article of which, eighteen months were allowed for furnishing the ships of the *United States* with passports. The sea letters which operated as passports among the *European* nations, are printed in the *English*, *French*, *Spanish* and *Dutch* languages. But the *Mediterranean* passports are in the *English* language only, ornamented with an engraving, and indented at the top, so that the *Algerines* might easily distinguish them by the eye, and by an examination of the indented part. Mr. *Dallas's* argument has thrown light upon the subject of *passports and sea letters*. From a careful examination of the acts and papers to which he referred, I am satisfied that his view of the subject was correct. The result of all this is, that when the insurance in question was made, the brig *Rosina* was furnished with all the documents which an *American* unregistered vessel ought to have, and with all the documents necessary to protect her against the *European* belligerents. As to the *Algerines*, we were at peace with them. At any rate it is not to be supposed that danger from that quarter could have

been apprehended in a voyage from *New Orleans* to *Philadelphia*, and therefore it is entitled to no consideration in the construction of the warranty. Upon the whole I am of opinion that the warranty was complied with, and therefore judgment should be entered for the plaintiff.

1813.

GRIFFITH *v.* INS. COMPANY of N. AMERICA.

Judgment for plaintiff.

HOLME *against* KARSPER.

IN ERROR.

Philadelphia, Saturday, April 3.

If the indorser of a promissory note, proves that it was put into circulation by the drawer fraudulently, he may call upon the holder to shew what consideration he gave for it, and how it came into his hands. And the indorser is entitled to give such proof, in order to require such explanation from the holder.

BY a bill of exceptions signed by the Judges of the District Court of the city and county of *Philadelphia*, it appeared that this action was brought upon a promissory note drawn by one *Delabourdine*, on the 12th day of *December* 1809, and payable seventy-five days after date without defalcation, to *Holme*, the defendant below, who was sued as indorser.

Before the trial, the attorney of *Holme* gave notice to the plaintiff, that proof would be required from him, of the consideration he gave for the note, and of the circumstances under which it came to his hands. At the trial, it appeared that the plaintiff possessed the note before it became due, and had it protested for nonpayment. The defendant's counsel, then, to entitle him to use the previous notice, offered to prove that the note was given by the drawer to *Holme*, the payee, for goods sold and delivered; that it was never put into circulation by the payee, his name having been written upon it, merely for the purpose of collection in bank, where it was deposited by him; that in consequence of an arrangement between the drawer and the payee, the note was taken out of bank by the latter, settled for, and sent to the drawer to be cancelled; and that the payee, having neglected to strike his name off the note, sent immediately to have it done, and was told by the drawer, that the note had been destroyed. The Court, however, refused to admit the evidence, or to permit the defendant to call upon the plaintiff agreeably to the notice.

1813.

HOLME v. KARPSER.

Biddle and *Dallas* for the plaintiff in error. It is a proposition universally true, that where a promissory note has been feloniously or fraudulently put into circulation, the holder, upon the proof of such fact, is bound to shew that he obtained it *bona fide*, and for a good consideration. The circumstance that the note was not due when the holder received it, is nothing in this point of view. If due, *bona fides* and consideration would not help him; it would have been his duty to inquire. *Tinson* v. *Francis* (*a*). If not due, then they will help him, if he can shew them; but after the note is impeached, it is for him to shew that his good faith, and the consideration paid, prevent the consequences from extending to him. The clause of defalcation is also unimportant. It prevents a *set off* by the payee against the drawer; or in other words, it applies to notes of hand in this state, the general commercial principle, and makes them negotiable, whereas before they were assignable only. But this does not give immunity to a rogue, a thief, or a finder. It leaves the note as to such a case upon the footing of the general law, by which it is perfectly well settled, that the evidence offered below, was proper. In *Grant* v. *Vaughan* (*b*), the case of a *lost* note, one of the questions left by Lord *Mansfield* to the jury, was whether the plaintiff came to the possession of the note, fairly and *bona fide*. The general result of the authorities is stated by *Peake*, who says, "where a bill has been "stolen from the real owner, or given on a bad considera- "tion, it will be incumbent on the holder to prove that he "received it *bona fide* for a valuable consideration." *Peake's Ev.* 220; and he is supported by *Kyd* 206, by *Duncan* v. *Scott* (*c*), and by *Rees* v. *Marquis of Headfort*, (*d*), in point to the present case.

Phillips for the defendant in error. The note having been passed to the plaintiff below, before it became due, it was *prima facie* a sufficient title to demand payment; and it was incumbent on the indorser to impeach it directly, by shewing fraud or want of consideration on the part of the holder. He was not entitled to call upon the holder for proof of the contrary. In one case the doctrine has been carried further. In

(*a*) 1 *Campb.* 19.
(*b*) 3 *Burr.* 1523.
(*c*) 1 *Campb.* 100.
(*d*) 2 *Campb.* 574.

1813.

HOLME v. KARSPER.

Russel v. *Boon* (*a*), the Supreme Court of *New York* say, that no cases have gone so far, as to admit of the defence that the note was fraudulently obtained and passed, except where the passing was after it became due. "If made payable to order, it is perhaps never necessary for the indorsee to prove that he gave value for it; nor has the maker been permitted to go into its real consideration, unless it be such as to render it void by statute, or unless it has become due before it was transferred." Every indorser is a new maker, and as between him and a subsequent holder, the rule is the same as between drawer and payee.

TILGHMAN C. J. This action was brought by the indorsee against the indorser of a promissory note. The defendant gave notice to the plaintiff, that he should call on him at the trial, to prove what consideration he had given for the note, and under what circumstances he came to the possession of it. On the trial, the defendant offered to prove, that the note had been put into circulation by the drawer, fraudulently and without his knowledge, and it was his intention after laying this foundation, to call on the plaintiff to shew how he came by it, and what he gave for it. The Court rejected the evidence, and a bill of exceptions was taken to their opinion. Honesty and good faith are the basis of the mercantile law. Those, therefore, who act with honesty and good faith, and those only, are worthy of protection. Negotiable paper stands in the place of specie; it is therefore of the utmost importance, that when such paper is fairly put into circulation, the *bona fide* holder should be involved in no difficulty, on account of secret transactions between the original parties. On this principle our act of assembly was made, which forbids defalcation, in case of paper of a certain description. But although the person who acquires paper, *in the usual course of business*, should receive all possible protection, yet there is no principle of justice or sound policy, which requires the same extension of favour to one who comes to the possession of it in an *unfair manner*, or *without* consideration. In the first instance it is presumed that every man acts fairly. It lies on the defendant, therefore, to shew some

(*a*) 2 *Johns.* 50.

1813.

HOLME v. KARSPER.

probable ground of suspicion, before the plaintiff is expected to do any thing more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called on to rebut the suspicions. All that is asked of him, is to shew that he has acted fairly, and paid value. That these are the principles of the mercantile law, has been abundantly shewn by the cases cited by the plaintiff in error. Now to apply these principles to the case before us. The defendant offered to prove that the note indorsed by him, had been put in circulation by the drawer, by *fraud and falsehood.* If he had proved this, enough would have been done, to throw on the plaintiff the proof of the manner in which he came to the possession of the note, and what he paid for it. But from this evidence the defendant was precluded. He was not permitted to make out a case, which would have entitled him to a verdict, unless the plaintiff had come forward and cleared himself of suspicion. I am of opinion, that the District Court erred in rejecting the evidence, and therefore the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. gave no opinion, not having been present at the argument.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment reversed.

EYRE *against* GOLDING.

5b 472
5ws 31
3g 174

Philadelphiæ, Saturday, April 3.

IN ERROR.

The testator bequeathed to his daughter *R*, the interest of 400*l.* to be paid her *annually* during her natural life. *Held*, that the first payment was to be made at the end of the first year from the testator's death.

THIS was an action of debt in the Common Pleas of *Philadelphia* county, to recover the sum of 74 dollars 66 cents, being one year's interest at seven per cent. upon the sum of 400*l.*, the interest of which was bequeathed to the wife of *Golding*, the plaintiff below, by her father *Joseph Kay*.

There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the former case, the legacy, not being payable till the end of a year from the testator's death, carries no interest for that year. But in the latter, the first payment of the annuity, must be made at the end of the first year, or the legatee will not receive the annuity annually during his life.

1813.

EYRE v. GOLDING.

Upon the trial of the cause, the plaintiff proved that *Joseph Kay* died on the 12th of *December*, 1806; that he had before made his last will, dated the 21st of *February*, 1805, in *New Jersey*, which was duly proved there, and in which was contained *inter alia* the following bequest, "*I give and* "*bequeath unto my daughter Rachel, the interest of* 400*l.*, *to* "*be paid her annually during her natural life, and at her de-* "*cease, I give the same* 400*l. equally between all her children;*" that the plaintiff duly filed a refunding bond; that the defendant was executor and had assets; that the plaintiff was the husband of the legatee; and that the rate of interest in *New Jersey* was seven per cent. To this evidence the defendant demurred, and judgment was given upon the demurrer, for the plaintiff. The only question was whether the legatee was entitled to the interest at the end of the first year from the testator's death.

The testator by his will gave to his daughter *Elizabeth* 400*l.*, to her two children *Maria* and *Sarah*, 100*l.* a piece, to his grand-daughter *Ann* 300*l.*, to his son *Charles* 200*l.*, and directed "that the several foregoing legacies given to his "children and grand-children *in their minority*, should be "placed out at interest *at the end of one year from his de-* "*cease*, and be paid to them with the interest thereon arising "as they attained to age, that is to say, the females at "eighteen, and the males at twenty-one."

W. Smith and *Hallowell* for the plaintiff in error. No interest was due for the first year from the testator's death. The general rule is unquestionably so, where no time is appointed for the payment of the legacy. *Toller on Ex.* 245. 252., *Griffith's Just.* 194., 4 *Bac.* 435, *Legacy*, *H.* 3. There are it is true, several exceptions to the rule, but none which embrace this case. As where the legacy is charged on land, or other fund yielding profits or interest. 4 *Bac.* 439. *Legacy*, *H.* 3. Where it is from a father to a child under twenty-one, who has no other maintenance. 4 *Bac.* 436, *Legacy*, *K.* 3. *Beckford* v. *Tobin* (*a*). But here the legatee was married, and it does not appear that she wanted any other maintenance than her husband was able to give her. That it was to be paid annually, is no more than if the in-

(*a*) 1 *Ves.* 310.

1813.

EYRE v. GOLDING.

terest of the sum had been given for life, in which case the law would have given it annually. The time of the first payment is undetermined, and the general rule must settle it. Other bequests in the will have a strong bearing upon the question of intention. The other children and grand children are clearly excluded from interest during the first year, those who are of age, because the general rule excludes them, those under age, because the testator expressly excludes them. He could not have intended to make a distinction as to the interest in favour of *Rachel*, who seems to have been less an object of bounty than the others.

Shoemaker for the defendant in error. The question depends upon the nature of the legacy; and upon the same principle that when the time of payment is fixed, interest runs from that time, *Smell* v. *Dee* (*a*), interest is in this case due for the first year. It is to be paid *annually* during her life, which cannot be unless it is paid the first year. It comes also within the rule of provisions for children, which always bear interest from the death of the testator. *Green* v. *Belchier* (*b*), *Churchill* v. *Lady Speake* (*c*), *Heath* v. *Perry* (*d*). That it was intended as a provision is plain, because not the principal, but the income was given; and according to the opposite argument, the legatee might have lived any time short of two years, without deriving any benefit from the bequest. The other legacies shed no light upon the question. They are legacies of a principal sum, and the interest of such of the legatees as were minors, was to be paid only at eighteen or twenty-one. This argument therefore proves too much. It is carrying the matter too far, to argue that because the testator put *Rachel* upon a worse footing as to the principal, he intended to put her on the same footing as to interest. The fair conclusion is that he intended to put her upon a better.

TILGHMAN C. J. *Joseph Kay*, deceased, by his last will and testament, dated the 1st of *February* 1805, bequeathed to his daughter *Rachel*, (wife of *Golding* the plaintiff below and defendant in error,) "the interest of 400*l*., to be paid "her annually, during her natural life," and at her decease, the said 400*l*. was to be equally divided between all her chil-

(*a*) 2 *Salk*. 415. (*b*) 1 *Atk*. 507. (*c*) 1 *Vern*. 251. (*d*) 3 *Atk*. 102.

1813.

EYRE v. GOLDING.

dren. This action was brought for the recovery of the interest of 400*l.* for one year, immediately succeeding the death of the testator. The executor contends that no interest is due for the first year. Whether it is or not, is the question. In general, where a legacy is given and no time of payment mentioned, it is not payable till the end of a year from the death of the testator, nor does it carry interest. But this rule is liable to exceptions. Where the legacy is to a child not otherwise provided for, interest is allowed from the testator's death. It is contended on the part of the executor, that the exception is confined to *infant children*, or at most to children who live in the father's family and have no support independent of the legacy, and cannot be extended to a married woman, who is maintained by her husband. I do not think it necessary to define the precise extent of the exception in favor of children, because it is applicable only to cases where no time of payment is prescribed by the will, or where the time prescribed is at some distance from the death of the testator. The devise in the present instance is not of a gross sum, but in nature of an annuity. There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid *annually* for life. In the former case, the legacy not being payable till the end of a year from the testator's death, carries no interest for that year. But in the latter, the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death, or the legatee will not receive the annuity *annually during her life*. Suppose she should live eighteen months, and then die; according to the construction of the executor, she would not receive one farthing. How then can she be said to have received the interest of 400*l. annually during her life*. I have never had the least doubt on the construction of this will, judging from its words abstracted from authority. None of the cases cited in the argument, bear directly on the point. But in 2 *Roper on Legacies* 172, I find the law laid down precisely according to the construction which I think right. The distinction is taken between a general legacy, and the bequest of a sum of money to be paid annually; in the latter of which cases it is said, that "the "first payment is to be made at the end of the first year from "the testator's death, because it commences immediately on

1813.

EYRE v. GOLDING.

"the happening of that event." But it has been argued for the executor, that other parts of the will throw light on the bequest to the plaintiff's wife, and the intention of the testator is to be drawn from the whole will. The parts alluded to, are those by which pecuniary legacies are given to the testator's other children and grand children, on which interest is not to commence in less than a year from his death. But it does not appear to me that any inference can be drawn from these legacies. The testator has made a distinction between Mrs. *Golding* and his other children. Probably she or her husband had offended him; because to all the rest he gives a *principal* sum, but to her he only gives the *interest* of 400*l.* for her life, and the principal after her death to her children. But what is of more importance, all the rest are otherwise provided for by the will, and therefore it seems hard to say, that the father could not have intended to give Mrs. *Golding* the small sum of 28*l.* for the first year after his death, because the legacies of the others bear no interest that year. On the contrary, I should think it more reasonable to suppose, that in that trifling point he meant to give her a preference, having made so much less a provision for her upon the whole. Judging then not only from the expressions in the bequest to Mrs. *Golding*, but from the intent of the testator to be collected from the whole will, I am of opinion, that the first payment of the interest on 400*l.* was to be made at the end of a year from the death of the testator. The judgment should therefore be affirmed.

YEATES J. was unwell, and gave no opinion.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed.

477
238
54
141
187

MILES *against* WISTER and others executors of WISTER.

1813.

Philadelphia, Saturday, April 3.

THE case under which this cause was decided, stated in substance that—

The testator bequeathed to the four children of his nephew *J. M.* the sum of 400*l.* to each of them; which sums he directed to be put out on interest at the expiration of two years after his decease, for the benefit of the said legatees respectively, and the principal *and interest* to be paid as they should respectively attain twenty-one; but if any of them should die in his or her minority without issue, the *share* of such child so dying should be equally divided among his or her brothers and sisters.

Held that no *interest* was recoverable by the legatee during minority; but that it must accumulate, and in case of the legatee's death under age, form a part of the *share* to be divided among the survivors.

William Wister, by his last will dated the 15th of *January* 1800, devised and bequeathed *inter alia*, in the words following: "I give unto the four children of my nephew *James* "*Miles* deceased, namely *Catharine*, (the plaintiff) *Samuel*, "*William*, and *James*, the sum of 400*l.* specie to each of "them; which sums I direct to be placed out on interest "at the expiration of two years after my decease, for the be- "nefit of the said legatees respectively, and the principal and "interest to be paid as they respectively attain the ages of "twenty-one years. But if any of the aforesaid children of "my nephew *James Miles* deceased shall die in his or her "minority, without issue, the share of such child so dying "shall be equally divided among his or her brothers and "sisters, and so *toties quoties*." The sums bequeathed were put out on interest by the executors as directed by the testator. The children of *James Miles* are all still in their minority, two of them residing in the city of *Philadelphia*, with their mother, a widow, and two in employments that for the time furnish them with a livelihood; but with a rigid economy, the income of the family, amounting in all to about 700 dollars, has been found inadequate to defray their necessary expenses, with the clothing and education of the children. The question is whether the interest on the said several sums bequeathed is not payable as it accrues, to the said children respectively, or their guardians during their respective minorities; or whether it is the duty of *William Wister's* executors to withhold from the said children all accruing interest, till they respectively attain the age of twenty-one.

M'Kean and *Levy* for the plaintiff. This is the case of a legacy to the children of a nephew, who have no adequate provision or maintenance; and if there was no clause that carried the bequest over upon a contingency, there could not be a doubt. Many cases have gone further, particularly *Harvey* v.

1813.

MILES v. WISTER.

Harvey (*a*), where it is said that if one *not a parent*, gives a legacy payable at twenty-one, and the infant has nothing else to subsist on, the Court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person who paid it, out of the remaining principal. All the cases say that interest is pretty much in the breast of the Court; and whether the legacy is from a parent or collateral relation is certainly of no importance. *Falkner* v. *Watts* (*b*). The legatees in this case evidently requiring aid, and this Court by the exercise of its equity powers, being competent to give it, the only difficulty is the devise over, which we conceive to be immaterial. In *Harvey* v. *Harvey*, it is said that though the legacy be devised over in case of the legatee's dying under twenty-one, yet interest ought to be allowed for maintenance. The distinction is well settled between the interest or produce, and the capital, in reference to this question. In *Tisser* v. *Tisser* (*c*), where one devised his personal estate to his son, and if he died within age, and without issue, then over, it was held that the son should have the produce of the personal estate, and that only the capital should go over. The same in *Nicholls* v. *Osborne* (*d*), upon the ground that the devise was a present one, and went over upon a condition subsequent, which is the case here. So in *Taylor* v. *Johnson* (*e*), and *Chaworth* v. *Haper* (*f*). The *share* that is to go over is not the interest, but the principal; it does not include the interest, any more than a bequest of the personal estate includes the produce, which is in almost every case, nothing but interest.

Hopkinson for the defendants. The allowance of interest by way of maintenance, where it is not given by the will, is granted by equity only in favour of the testator's children, in cases of absolute poverty and necessity, totally unlike the present, and upon the presumption that such was the testator's intention. But it is impossible to find a case in which the will has been violated by the allowance, as it must be here, where the testator has clearly postponed the payment of both principal and interest, in terms, until the legatees come of age, and therefore prohibits its being used as a maintenance. Even grand children do not receive interest by way of mainte-

(*a*) 2 *P. Wms.* 21. (*c*) 1 *P. Wms.* 499. (*e*) 2 *P. Wms.* 504.
(*b*) 1 *Atk.* 408. (*d*) 2 *P. Wms.* 420. (*f*) 2 *Bro. Ch. Rep.* 82.

nance. *Haughton* v. *Harrison* (*a*), *Inkledon* v. *Northcote* (*b*), *Elkton* v. *Elkton* (*c*); though where a legacy is absolutely vested, part of the legacy may under certain circumstances be allowed. The case of *Butler* v. *Butler* (*d*), is the most analogous to this, where the testator gave all the residue of his personal estate to his grandson, at his age of twenty-one, and if he died before that age, then over, and the Lord Chancellor directed that the interest should accumulate until the legatee was twenty-one. It is true the legacy was contingent as to the whole; but it is the same thing in effect here, where the principal and interest are to be paid at twenty-one, and in case of previous death, the *share*, that is both principal and interest, is to go over. If it would be wrong to grant part of the principal in case of a devise over, so it must be to grant the interest, where it is expressly connected with the principal, forms one *share*, and goes over with it. All the plaintiff's cases turn upon legacies where the testator has been silent as to interest; this is one in which he makes an express disposition of interest, excluding the legatees until twenty-one.

TILGHMAN C. J. *William Wister* by his last will and testament bequeathed as follows. [The Chief Justice here read the clause on which this cause depended.] The question is whether the plaintiff is entitled to receive interest on this legacy, during her minority.

Where a legacy is given to a child payable at the age of twenty-one, without mention of interest, the general rule is, that interest shall be allowed from the death of the parent, because it must be supposed, that the parent intended to do his duty, and not leave the child without a maintenance; but this rule does not extend to legacies given to strangers or distant relations, because none but a parent is bound to provide for a child. Courts of equity have gone great lengths to provide a maintenance for infants who are entitled to legacies payable at a future time. It is said in *Harvey* v. *Harvey*, 2 *P. Wms.* 21, 22, that if one *not a parent*, gives a legacy to an infant payable at the age of twenty-one, *and there is no devise over in case of death before twenty-one*, the Court, if the infant has no other means of providing bread, will order part of the legacy to be paid presently, allowing interest on the

(*a*) 2 *Atk.* 329. (*b*) 3 *Atk.* 438. (*c*) 3 *Atk.* 507. (*d*) 3 *Atk.* 58.

1813.

MILES v. WISTER.

sum advanced to be paid out of the remainder of the legacy. This is going a great way, but no harm is done, because interest is allowed on the money advanced, and the infant gets no more in the whole than the principal of the legacy. But if the legacy is *devised over* in case of death before twenty-one, it would be *defeating* the will to order payment of any part before the time appointed by the testator. Whatever might be *William Wister's* reason, it is clear that he had no intention to provide a maintenance for the children of his nephew *during their minority;* because he orders the legacy of each to be put out to interest at the end of two years from his death, and the principal and interest to be paid to each respectively, on their attaining the age of twenty-one years. The interest was to accumulate during the minority of each legatee. But what was to become of it, in case of death before the age of twenty-one? That will depend on the latter part of the devise; if any of them died during minority and without issue, the *shares* of those so dying were to be equally divided among the survivors. What is meant by the *shares?* Is it the principal sum of 400*l.*, or the principal, with the interest, which had accrued at the time of the legatee's death? I have no doubt but that the *whole* was intended to go to the survivors. What else should be done with the interest? If the deceased legatee left issue, both principal and interest would remain in the family; but if no issue, who so proper to take the interest, as the survivors to whom the principal was to go? The word *share* will very properly comprehend the aggregate sum of principal and interest, and I cannot conceive any reason why the testator should intend to separate one from the other in the devise over. That being the case, it would be a manifest violation of the will, to order the payment of the interest to any of the legatees during their minority; it would be paying to one person, what in case of death during minority, was directed by the testator to be paid to another. The withholding the interest may be extremely inconvenient to the legatees, who appear to be pinched for a living, though not entirely destitute of support. But they must remember that their relation from whose bounty these legacies flow, had a right to direct the course of them. His intention is plain, and must not be contradicted. I am of opinion that the plaintiff is not entitled to receive any interest during her minority, and that in case of

her death without issue and before the age of twenty-one, the executors of *William Wister* are to pay to the surviving legatees the principal of the plaintiff's legacy, together with the accumulation of interest.

1813.

MILES v. WISTER.

YEATES J. was unwell, and gave no opinion.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment for defendants.

5b 481
6sr170
2w420
8w128
9w471
5wh445
6wh 41
9ws 58
60 332
95 411

Case of a Turnpike Road by Chad's Ford to the State Line.

Philadelphia, Saturday, April 3.

THIS was a *Certiorari* to the Quarter Sessions of *Delaware* county, to remove all proceedings on the application of *Samuel Davis* and *Owen Rhoades*, to have adjudged the damages occasioned to them by laying out through their land respectively, a turnpike road from *Philadelphia* by *Chad's Ford*, on *Brandywine*, to the line of the state in the direction towards *Baltimore*.

By the record it appeared, that the petition of *Davis* and *Rhoades* was presented to the Quarter Sessions of *Delaware* in *January* 1811, under the act of the 24th of *March* 1808, incorporating this turnpike company, and which by reference embraced the following provision, contained in the 10th section of the Spring House and *Bethlehem* Turnpike Act; "that if the said road shall be laid out upon any land, where- "by the owner thereof shall suffer damage, the person or "persons sustaining such damage, may make application to "the Court of the county in which such damage is sustained; "and thereupon the Court shall appoint *six disinterested per-* "*sons to view and adjudge the amount of the damage so* "*done*, which if approved of by the Court, shall be paid by "the company."

Where several persons are authorised to do a *private* act, they must all join; but where they are authorised to do an act of a public nature, which requires deliberation, though all should be convened, a *majority* may decide. *Hence*, where an act of assembly provided, that if a certain turnpike road should be laid out upon any land, whereby the owner should suffer damage, he might apply to the County Court, who should appoint *six* disinterested persons to view and adjudge the amount of the damage so done, which, if approved by the Court, should be paid by the Turnpike Company, it was *held*, that if the whole number viewed, *five* might *adjudge* the damage.

Upon a *certiorari* to remove proceedings in a road cause, this Court will hear evidence to shew that all the viewers attended the view, if the record does not state the contrary, and no exception to the non-attendance of any of the viewers was taken below.

Unless it appears upon the record, that the damage viewed and adjudged was done out of the county in which the proceedings were had, this Court will presume that it was done within the county, and that the Court below had jurisdiction.

1813.

BALTIMORE TURNPIKE.

At the same term the Court appointed *six* viewers, *five* of whom reported that they had viewed the road, and adjudged the damages of *Davis* at 358 dollars, and of *Rhoades* at 100 dollars.

One exception taken here, was that five only of the six viewers, viewed and adjudged.

Ross, for the petitioners, offered a deposition taken under a conditional rule, to prove that six attended, though five only adjudged.

B. Tilghman and *Frazer* opposed it, upon the ground that the record was unambiguous. This Court, they said, must take the fact to be as it appeared, and to admit the evidence, was to examine into the merits.

PER CURIAM. It does not appear clearly by the record whether six viewed or not. Nor does it appear that any such exception was taken below. It is proper, therefore, to inquire into that fact, because it is consistent with the record, if it should turn out that six viewed, and only five reported. This is not an inquiry into the merits.

The deposition proving that the whole number viewed, the remainder of this exception was alone insisted on, viz. that five had adjudged. Another exception was, that the land of the petitioners did not appear to be within the jurisdiction of the Court; but it was not pressed.

B. Tilghman and *Frazer* on behalf of the exception argued, that as these proceedings originated under a special statute, affecting the property of individuals, the authority must be, and on the face of the record, must appear to have been, strictly pursued; and especially as it was a private authority, in relation to private rights. They instanced in the case of commissions to take testimony, as in *Burton* v. *Soltock* (*a*); of submissions to arbitrators, *Green* v. *Miller* (*b*); of authorities given to justices of the peace, *Chittinston* v. *Penhurst* (*c*), *Dawson* v. *Alberti* (*d*), *The Queen* v. *West* (*e*); and in a case analogous to the present, of commissioners to

(*a*) 1 *Bulstr.* 105. (*c*) 2 *Salk.* 474. (*e*) 6 *Mod.* 180.
(*b*) 6 *Johns.* 39. (*d*) 1 *Binn.* 135.

assess damages by running a turnpike road through private lands. *Gilbert* v. *The Columbia Turnpike Company* (*a*). The law intended that the same number who viewed should adjudge; and as it cannot be contended that any one may be absent from the view, so the whole number must adjudge. It is a sufficiently small number, since it is in derogation of trial by jury, where unanimity is essential.

Ross contra. This is an authority of a public nature, which concerns the whole of that part of the state through which the road passes, and which in its exercise requires judgment and deliberation. In such cases, though all must deliberate, a majority may decide. *Co. Litt.* 181. Nor is there any instance to the contrary, except in the solitary case of a petty jury, the result of a peculiar policy, and not of any general principle. *Dyer* 218. 1 *H. P. C.* 297. To require unanimity, is to defeat the law. It cannot be enforced by keeping the viewers together, as in the case of a jury; it cannot be compelled by *mandamus*, because it is not a ministerial act. The only question is, whether the law is for a private purpose, or for public advantage; if for the latter, there cannot be a doubt. All the opposite cases apply to private authorities, or to special powers granted for private purposes.

TILGHMAN. C. J. The principal error assigned in this case, is, that six persons were appointed by the Court to view the road, and adjudge the damages, and only five of them joined in the report. The act of Assembly directs, that the person sustaining damage by the laying out of the the road, may make application to the Court of the county in which such damage is sustained, and thereupon "the "Court shall appoint six disinterested persons, to view and "adjudge the amount of the damages so done, which, if "approved by the Court, shall be paid by the company."

It may be material to ascertain in the first place, whether all the six persons appointed by the Court, met and viewed the land. The report is made by five of them, and it is contended on the part of the Turnpike Company, that this Court must take for granted, that no more than five met and viewed, because there is no mention of more in the

(*a*) 2 *Johns. Ca.* 107.

1813.

BALTIMORE TURNPIKE.

record. They consider the proceedings brought up under the *certiorari*, precisely in the same point of view as proceedings returned under a writ of error, in which the Court will not look out of the record. But it has not been the practice of this Court to confine themselves so strictly to the record, on removals of the proceedings of the Courts of Quarter Sessions, in cases relating to roads. This appears by the 19th rule of the Court in which it is declared, that they will inquire into "fraud or undue practice in the "viewers or parties, which the party complaining of such "fraud or undue practice, had not neglected to make appear "to the Court below." No exception was taken in the court below to the non-attendance of one of the viewers. If it had, we know that they would have inquired into that matter, because it does not appear by the report, that the whole six did *not attend*. An averment that they all attended, is consistent with the record, and if we should refuse to inquire into it, pernicious consequences might ensue. It has been usual for those who make the report, to say nothing about the attendance of the others. In such cases, if the objection is made in the court below, it may immediately be obviated, by an inquiry which will bring out the truth. But if *this Court* are precluded from inquiry, nothing more is necessary than to remove the proceedings by *certiorari*, when they must be quashed, contrary to the truth and justice of the case. I think it consistent with the spirit of our rule to make this inquiry, and we find by the deposition which has been filed, that all six of the persons appointed, actually met and viewed the road, as was confessed in the court below.

It has been objected, that the Court of Quarter Sessions had no jurisdiction, because it does not appear on the record, that the place where the damage was done, is in the county of *Delaware*. No objection was taken in that court to want of jurisdiction. It does not appear that the place is out of their jurisdiction, and therefore we ought to suppose that it is within it.

The only point of serious difficulty, is, that the act requires six persons to view and adjudge the damages. Six viewed, but five only adjudged. It is conceded, that where several persons are authorised to do a *private* act, they must all join, because unless the contrary is expressed, the intent of the person granting the authority must have been that it

should be the joint act of all. It is conceded too, that when several persons are authorised to do an act of a public nature, which requires deliberation, they all should be *convened*, because the advice and opinions of all may be useful, though all do not unite in opinion. But it is contended, and as it appears to me, with great reason, that although all must attend, a decision may be made by the voice of a majority. It is said by Lord *Coke*, 1 *Inst.* 181 *b*, that a liberal construction shall be given to *powers* concerning the administration of justice, which is *pro bono publico;* he instances the case of a sheriff, who gives a warrant to three persons jointly or severally to arrest another, the warrant may be executed by *two*. So if a *venire facias* is awarded to four coroners to impannel and return a jury, and one die, the survivors may execute and return the same. The reverse of this would have been the law in matters of a private nature. The cases put by Lord *Coke* are by no means so strong as those of a *deliberative* nature. In matters purely ministerial, there is no difficulty in procuring the concurrence of all, because there is nothing concerning which they can differ. But where the judgment is to be exercised, the inconvenience of requiring unanimity may be extreme. I recollect no public body in which unanimity is required, but a petit jury. If trial by jury were to be now instituted, it might be doubtful, whether good reasons could be assigned for insisting on an unanimous verdict in *civil cases*. But we revere it for its high antiquity, and it is certain that in ancient times, the jury were so rigidly restricted from meat and drink, as to prevent the inconvenience which we now sometimes experience from want of unanimity. There is a great difference however, between a jury who are kept together under the eye and authority of the Court, and those persons who are appointed to view a road, and adjudge the damages. If unanimity is required, and one should happen to differ from the rest, what is to be done? If it were a ministerial act, they might all be compelled to join in it by *mandamus*. But a *mandamus* has no control over the *mind*, and therefore would be inapplicable to the case. Is the party sustaining damage then to go without compensation? Or are the Court to appoint other persons; and how often may they appoint them? The act of Assembly makes no provision for such new appointments, not having contemplated a state of things

1813.

BALTIMORE TURNPIKE.

in which it would be necessary. In the organization of courts of justice, where a certain number of judges are authorised to hold a court, it is understood that a majority may decide. So in commissions of Oyer and Terminer, and other matters of a similar nature. The same construction is given to powers vested in corporations. Cases have been cited, to shew that special powers vested in justices of the peace, acting out of court, must be strictly pursued. But these cases are not applicable to the proceedings in the General Quarter Sessions. The principle on which the present case rests, has never, to my knowledge, been decided by this Court. But from analogy to the law laid down by Lord *Coke*, from its great convenience, and the great inconvenience of the contrary doctrine, I feel myself warranted in saying, that according to the true construction of the act of Assembly, it is sufficient if a *majority* of the persons appointed by the Court of Quarter Sessions concur in adjudging the damages. I am therefore of opinion, that the proceedings should be affirmed.

YEATES J. was prevented by sickness from giving any opinion.

BRACKENRIDGE J. concurred with the Chief Justice.

Proceedings confirmed.

5b 486
52 133

The Commonwealth *against* The Philanthropic Society.

Philadelphia, Saturday, April 3.

The articles of a corporation authorised the expulsion of a member for being concerned in scandalous or improper proceedings, which might injure the reputation of the society. *Held* to be good cause of expulsion, that a member claiming relief from the Society, had altered a physician's bill from four dollars to forty, and had presented that bill to the corporation as the ground of his claim.

ON motion of *Delaney*, a rule was granted at a former day upon the defendants, to shew cause why a *mandamus* should not issue to restore *William M. Stewart* to the standing and rights of a member of the Philanthropic Society.

Sergeant on shewing cause, produced the affidavit of the

1813.

COMMONWEALTH v. PHILANTHROPIC SOCIETY.

President of the Society, together with the articles of incorporation, and certain proceedings, by which it appeared, that the Corporation were authorised to expel any member who was concerned in scandalous or improper proceedings, which might injure the reputation of the Society; and that under this article, after a citation to the relator who appeared and confessed, that he had altered a physician's bill from four dollars to forty, and that he had presented it with the doctor's receipt, to the president, as the basis of a claim for relief, he was expelled.

TILGHMAN C. J. The return to this rule sets forth an expulsion of the prosecutor, and the causes of it. By the 13th section of the articles of the Society, certain causes of expulsion are enumerated, which consist of being concerned in scandalous or improper proceedings, which may injure the reputation of the Society; and under this section he was expelled. It appears by the minutes of the expulsion, that he had made a demand upon the Society for relief, agreeably to the rules of the institution, and had presented to them a physician's bill, which he alleged he had paid, amounting to forty dollars; but in fact it was a bill which he had altered by adding a cypher to four, the real bill paid being four dollars. If this was not a forgery, it was very like it. That it was a scandalous and improper proceeding, is most plain. Did it tend to injure the reputation of the Society? No man can doubt it. A society that would not be injured by such a proceeding as this, on the part of one of its members, must be a society without reputation. But it is said the minutes of the expulsion do not say that the proceeding did injure the reputation of the Society. This is immaterial. The tendency of the proceeding is self-evident. I am therefore of opinion, that the rule should be discharged.

YEATES J. having been unwell during the argument, gave no opinion.

BRACKENRIDGE J. of the same opinion.

Rule discharged.

1813.

Philadelphia, Saturday, April 3.

5b 488
82 234

CURREN *against* CONNERY.

IN ERROR.

After a witness has been examined in chief, and turned over to the opposite counsel for cross-examination, it is still in the discretion of the Court, to permit the party who produced the witness to examine him even as to new matter in any stage of the trial.

BY a bill of exceptions in this case, which was an action of assumpsit in the Common Pleas of *Philadelphia* county, it appeared that the promise was proved by one *Rye*, a witness called by the plaintiff *Connery;* after which the plaintiff's counsel said he had finished the examination, and had no more questions to put. *Rye* was then cross-examined by the defendant's counsel, and declared that the assumption was made on a *Sunday*. The counsel for the plaintiff, then proposed to ask the witness, whether he had not heard the defendant promise to pay the debt for which the action was brought, on any day or at any time, other than the *Sunday* he had mentioned. The counsel for the defendant objected to the question, but the Court permitted it to be put, and sealed a bill of exceptions.

The question was submitted without argument.

TILGHMAN C. J. The plaintiff in error supposes that the counsel for the plaintiff below, having finished their examination in chief, had no right to examine as to any *new matter*. The examination of witnesses is to be conducted in such a manner as to discover the truth without taking any unfair advantage. The party who calls the witness examines him first, he is then cross-examined by the adverse party, after which, if necessary, the party who produced him may examine him again. The mouth of the witness is not to be closed, because the counsel omitted to ask a material question at first. It may be necessary, in order to come at the truth of the case, to examine him as to new matter, and after that, there may be a second cross-examination. The Court at their discretion may permit a witness to be examined by either party, over and over again, at any time during the trial. But they will take care to exercise this discretion, so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might perhaps have

been contradicted by the witnesses who have been dismissed, the Court would not suffer him to avail himself of such disingenuous conduct. In the case before us, the Court were right in permitting the question to be put. It became necessary in consequence of what came out on the cross-examination, and it subjected the defendant to no possible inconvenience or injury. I am therefore of opinion, that the judgment should be affirmed.

1813.

CURREN v. CONNERY.

YEATES J. was unable to attend, and gave no opinion.

BRACKENRIDGE J. concurred.

Judgment affirmed.

The Commonwealth *against* LONG keeper of the Gaol.

Philadelphia, Saturday, April 3.

Persons sentenced to imprisonment, and to pay a fine not more than 5*l.*, with costs, are entitled to a discharge from imprisonment, both as to fine and *costs*, after having remained in confinement for the fine, thirty days beyond the term adjudged for their imprisonment. But neither fine nor costs are remitted thereby. If the defendant has property, it is liable.

THIS was a *habeas corpus* to bring up the bodies of several prisoners, who, as it appeared by the return, were confined in the common gaol, under sentence by the Quarter Sessions, to be imprisoned a certain time, to pay a fine, which in each case was under five pounds, and to pay the costs of prosecution. They had all remained in confinement thirty days after the term adjudged for their imprisonment, but had not paid either the fine, *or the costs*.

The question was, whether they were entitled to a discharge under the fourth section of the act of the 27th of *March* 1789, which enacts "that every person who now is, "or hereafter shall be, confined in any gaol within this com- "monwealth, in execution *or otherwise*, for any debt or "debts, sum or sums of money, or *fine* or fines, forfeiture "or forfeitures, none of which do or shall exceed the sum "of five pounds exclusive of costs, and has or shall have "remained so confined for the space of thirty days, shall "be discharged from such confinement, and not be liable to "be again imprisoned for the same; and the sheriff, gaoler, "or keeper of the gaol, in which such person is, or shall be "confined as aforesaid, shall, upon application to him by the "person so confined, discharge him or her out of custody, "if detained for such debt or debts, sum or sums of money,

1813.

COMMONWEALTH v. LONG.

"*fine* or forfeiture only, and *for no other cause.*" 2 *Smith's Laws* 483.

Phillips for the inspectors of the prison, at whose instance the *habeas corpus* was awarded.

The Attorney General (*Ingersoll*) for the commonwealth.

PER CURIAM. The construction of the act is this, that the prisoner is not entitled to a discharge, unless he has remained in confinement for *the fine*, thirty days beyond the time adjudged for imprisonment; and when he has remained such thirty days, he is entitled to a discharge both as respects the fine and *the costs*. But neither fine, nor costs, are remitted. If the criminal has property, his property is liable for both.

Prisoners discharged.

Philadelphia, Saturday, April 10.

TONER *against* TAGGART administrator of TONER.

THIS was an appeal from a *prô forma* decree of the Orphan's Court of *Philadelphia* county.

A deposited in the hands of *B* at different times, for a purpose which he said he had mentioned to *B*, 10,000 dollars, for which he refused to take receipts.

The appellee, who was administrator of *Philip Toner*, filed his account in the register's office; and the auditors to whom it was referred, found a balance in his hands of

same time he had various dealings with *B*, and paid him money, for which receipts were taken. *A*, who had been brought up in *B*'s store, and assisted by him in business, often expressed his gratitude, said that he owed *B* every thing, and that in case of his death, *B* or his family should not lose by it. Being in ill health, he was pressed to make a will; but replied "*B* (or his family) *should be secured whether or not.*" At another time he said he would leave 8000 dollars to one of *B*'s children. At a third time he said that he was worth 20,000 dollars, that half of it was enough for him to trade on, and that he had placed, or meant shortly to place, the remainder in *B*'s hands, for the proofs of his friendship on opening store &c. and would leave what he died possessed of to *B*'s family. After *A*'s death a paper was found in his pocket book with his signature, in these words: "I "acknowledge to be indebted to *B* in the sum of 8000 dollars, value received of him. "*Philadelphia, June* 15, 1805." This date was about the time of his saying that *B* should be secured whether or not.

Held, that under the circumstances of the case, this writing should be considered as evidence of a debt due by *A* to *B*; and that *B*, who took out administration to *A*, might retain the amount as in case of a debt. But that it was not a testament, and if it was, it must be proved in the register's office, before this Court could give it effect.

10,233 dollars 38 cents, of which 2233 dollars 38 cents was passed to the credit of *Toner's* estate, and 8000 dollars credited to the appellee as retained by him, under the circumstances hereafter stated. Upon this report a decree passed in his favour without prejudice, and an appeal was entered on behalf of the next of kin.

The facts were in substance these: *Philip Toner* the intestate, died in *November* 1805, unmarried, and without issue, leaving as his next of kin, four sisters in *Ireland*, and a brother recently arrived in the *United States*, who was with him when he died. He left personal property to the amount of about 20,000 dollars. *Toner* was brought up in the appellee's store, possessed his confidence, was ultimately employed as his clerk, and had the receipt of his cash. In 1800 he entered into business on his own account, in the grocery line, which was that of *Taggart* also; and by his bank books it appeared, that within a few months afterwards, his deposits amounted to ten thousand dollars, although he began without any visible property, and had not until after this taken up even the wages due to him as clerk, amounting to about a thousand dollars. The friendship of *Taggart* was variously manifested to *Toner* in his new business; and they had occasionally together transactions of buying and selling. On the 2d of *January* 1804, *Toner* paid to *Taggart's* clerk a balance of 60 dollars 61 cents, due for merchandize, and took a receipt; and at the same time gave him a check for 4000 dollars, for which he refused to take a receipt, saying that he had a reason for it, and that he meant to put 10,000 dollars into *Taggart's* hands, for a certain purpose, which he had mentioned to *Taggart*. At different times between this and the 21st of *June* 1804, *Toner* paid to *Taggart* 10,000 dollars, always taking receipts for what he paid upon a merchandize account, and refusing them for the component parts of this sum, no part of which was ever withdrawn from *Taggart* during *Toner's* life time. To one witness *Toner* said that he should not have been worth a cent but for *Taggart*, and that he should leave 8000 dollars to one of *Taggart's* children. In 1804 he informed another witness that he was possessed of property to the amount of more than 20,000 dollars; that half of that was sufficient for him to trade on, and that he had placed, or meant shortly to place, the remainder in *Taggart's* hands, for the proofs of

friendship he had received on opening store, and afterwards; that what he should die possessed of, he meant to leave to *Taggart* and his children, of whom the third child should have the greater part; and he requested the witness to make a will for him accordingly, but it was never done. In 1805, *Toner's* health became impaired by the intemperate use of spirituous liquors. In the summer of that year he went to *Cape May*, where in conversation with a respectable clergyman, he said he owed every thing to *Taggart*, and that in case of his death, *Taggart*, or his family, the witness was not sure which, should not lose by it. The clergyman advised him to make a will. He replied that *Taggart*, or his family, *should be secured whether or not*. He returned to the city, and died in the *November* following. After his death, when the appellee was making search among his papers, for a will which it was supposed he had left, the following memorandum in the handwriting of *Toner*, was found in his pocket book. "I acknowledge to be indebted to Mr. "*John Taggart* in the sum of eight thousand dollars, value "received of him. *Philadelphia*, *June* 15, 1805. *Philip* "*Toner*."

J. R. Ingersoll and *Tilghman* for the appellant. It is impossible to doubt that the intestate entertained a purpose of bounty to *Taggart* or his family, or to some one of them, though to which is extremely uncertain: but it is sufficient for the next of kin, that whatever this purpose was, it was inchoate and unexecuted during his life, and has not been completed by any instrument to which the law can give effect as a will.

That it was not effectual during his life, is manifest. He kept the paper privately in his own custody, he did not make it known to any body, and he therefore retained, and intended to retain, a control over it during his life. During his life then it was a matter merely initiate, designed perhaps to be carried into effect by a will, but *per se* nothing; and he probably was prevented from thus carrying it into effect, by the recollections of his family in *Ireland*, and the arrival of his brother the appellant. The case strongly resembles *Disher* v. *Disher* (*a*). There *Disher* by a note un-

(*a*) 1 *P. Wms.* 204.

der his hand, promised to pay his brother 5000*l.*, and kept the note in his own custody; but his brother knew nothing of it until after *Disher's* death, when the note was found among his papers. The lord keeper decreed that it should be looked upon as a matter initiate or intended, and never perfected, and that it was no debt at all. To give it effect, there should have been a delivery, or something equivalent.

It cannot take effect as a will, because it has nothing testamentary in its nature, and was not so intended by *Toner*. By his conversation with the clergyman, he shews that he had no idea of having made a will, at a time subsequent to the date of the instrument. But whether will or not, it cannot be set up as a will in this Court at present. An administration is outstanding, and the administrator is now a party. While this is the case, intestacy must be presumed. This Court cannot take jurisdiction of a will of personal estate, in the first instance; it must be proved before the register. If it is a will, it defeats all the proceedings below, which are founded upon an intestacy.

The testimony of none of the witnesses supports the instrument. To one the language of *Toner* was, that he would leave 8000 dollars to one of *Taggart's* children; to another, that what he should die possessed of he meant to leave to *Taggart's* children, particularly the third eldest; and to a third, that in case of his death, *Taggart* or his family should not lose, and that whether he made a will or not, he or his family should be secured. This last expression is certainly the most to the purpose of the appellee. But it was made after this writing. The language is prospective, it promises some future act, which was never performed.

How is this paper to take effect? Not as evidence of a debt, because of that it is but *prima facie*, and on examination of the accounts, it appears that he was not indebted, but a creditor to a large amount. Not as an appropriation, because in form there is nothing like it, and in substance there can be no appropriation unless there is notice, or something to make the act irrevocable on the part of him who appropriates.

If there was an intention on the part of *Toner* to give 8000 dollars to *Taggart*, consummated by a final act, the money is his. If he ever alluded to the paper as an act completed with that view, it will answer; but there is nothing of

1813.

TONER v. TAGGART.

that kind. The manner in which *Toner* obtained the money, and the motives which led to his conduct, are of no importance; except, that to allege as *Taggart* has done, that *Toner* robbed him of it, cancels all the equity that he might otherwise have.

Hopkinson and *Ingersoll* for the appellee. The conduct and the motives of *Toner* are involved in the greatest mystery. The only satisfactory explanation which any one can give, is, that having erred in the outset of life, he felt an honest disposition at the close of it to remedy the error, without having resolution enough to confess it. The expedients he resorted to were intended to satisfy his conscience, without wounding his pride. That he intended this money for *Taggart*, no one can doubt; the only question is whether his intention has been carried into effect. We contend that it has, in a manner which distinguishes the case from *Disher* v. *Disher*, and all other cases of mere promissory engagements; namely, by the deposit of the money in *Taggart's* hands, and the refusal of receipts, while for all other transactions he uniformly took them, and by the execution of this instrument to prevent his representatives from ever reclaiming the money. Here was intention consummated by two unequivocal acts; and to the last of them, it is clear that *Toner* alluded as an act done, when he said, that whether he made a will or not, *Taggart* should be secured.

Cases of this sort turn upon the intention of the party. In *Disher* v. *Disher*, the note was set aside, not merely because it was a promise never communicated, but because the promisor subsequently married. In *Naldred* v. *Gilham* (*a*), the case of a voluntary settlement, made by an aunt, in favour of her nephew, and kept in her possession, the Court did not go upon the ground that there was a want of delivery, but on the ground of her not intending to be bound by it, which was manifested by her refusing to give a copy to her nephew and his friends, although when she made a second settlement in favour of another person, she gave possession of it. So in *Ward* v. *Lant* (*b*), where a father executed a bond to his daughter, payable immediately, but always kept it by him in his lifetime, and it was found after his death

(*a*) 1 *P. Wms.* 577. (*b*) 2 *Eq. Abr.* 283.

among his papers, it was decreed to be set aside, not upon the ground of non-delivery, but on the ground of intention, the father having executed it only to protect him from paying taxes for his money. But where intention supports the deed, it is enforced even against a subsequent will, though it be purely voluntary, and never out of the party's possession. *Boughton* v. *Boughton* (*a*), *The Lady Hudson's Case*, cited in *Clavering* v. *Clavering* (*b*), *Seton* v. *Seton* (*c*).

The writing in question may take effect in various ways. First, as an acknowledgment of *debt;* and if the party confesses it, who shall deny it, particularly under circumstances like these, where the funds with which *Toner* commenced his business, are involved in such mystery. By *Taggart's* books it is true there is no debt by *Toner;* but *Toner's* whole conduct shews beyond all doubt, that he knew of transactions which did not appear on *Taggart's* books.

It may take effect as an appropriation, because the money was already paid to *Taggart*, and the only doubt is for what purpose, which this writing distinctly points out.

It may also be used as a testament; not in support of an action for recovery of money, because to that probate is essential, but by way of defence. *Toner* intended this instrument to be used after his death; and almost any thing, a letter, a memorandum, if so intended, may be proved as a testament. But if there is any difficulty about the technical character of *Toner's* act, whether debt, appropriation, or testament, there is clear evidence of intention connected with acts, to benefit *Taggart* to the extent of 8000 dollars, and this Court, proceeding upon equity principles like the Orphan's Court, will never compel him to account for that sum.

TILGHMAN C. J. after minutely stating the facts, and the writing found after *Toner's* death, delivered his opinion as follows:

It has been contended by the counsel for the appellant, (the decree having been entered in the Orphan's Court by consent, in order to bring the case before this Court) that this writing was no more than an inchoate act, which was never completed. That *Toner* by keeping it secretly in his

(*a*) 1 *Atk.* 625. (*b*) 2 *Vern.* 476. (*c*) 2 *Bro. Ch. Rep.* 611.

1813.

TONER v. TAGGART.

own hands, shewed his intent that it should have no effect during his life, and that as a will it could not operate, having nothing about it of a testamentary nature. On the other hand, the counsel for the appellee argued, that it might take effect either as a will, or as an appropriation of so much money of *Toner* in the hands of *Taggart*, or as an evidence of a debt due from *Toner* to *Taggart*. It does not appear to be of a testamentary nature, nor if it were, can we establish it as such in this collateral way. Every kind of will must be proved before the register, although in case of dispute it may be brought into this Court by appeal. If effect can be given to this writing, it is our duty to give it, for it certainly was the intention of the intestate to do something considerable for *Taggart* or his family. It is confessed that if *Toner* ever alluded to that paper as an act done in favour of *Taggart*, it would be sufficient for its establishment. Now it is clear to me that he did allude to it, when he told Mr. *Potts* that *Taggart should be secured, whether or not.* This declaration must probably have been made shortly after the date of the writing. It is objected that "*should be secured*" must have reference to a *future* act. But I think nothing of that objection; it is founded on a grammatical criticism, which is easily obviated, by reflecting that *Toner* might not have been an accurate grammarian, or that Mr. *Potts* might not have recollected the precise expressions made use of. The writing is exactly what such a person as *Toner* might have supposed to be a sufficient security, in case of his death without a will. It is material that *Toner* never drew his money out of *Taggart's* hands, persevering to his death, in his purpose of appropriating 8000 dollars to *Taggart's* use. No doubt the paper remained in his power, and if he had made a will, it is probable that he would have cancelled it. But not having made a will, and the writing remaining in existence, it serves to answer the very purpose intended. But it is objected, that so far from being in *Taggart's debt*, *Toner* was his creditor to a great amount at the date of the writing. He certainly was so, as far as we have any certain evidence by books and papers. But there may have been secret transactions unknown to us. It has not been made to appear in what manner *Toner* acquired the considerable sums deposited in bank soon after he opened his store. Conjectures have been made,

1813.

TONER v. TAGGART.

but they are only conjectures. The matter has not been accounted for. It is involved in something of mystery. Why then, when the man has said, that *he was indebted*, and when he undoubtedly intended to throw at least 8000 dollars into the family of *Taggart*, shall we take pains to defeat his intention, because we cannot discover how the debt was contracted. No evidence is so strong as a man's own confession, and I am content to take the fact as *Toner* has stated it. I take no particular notice of the cases cited on the argument, because it is a matter of intention to be inferred from all the circumstances of each case. Enough appears to satisfy me that the intestate kept this paper by him with a view of securing to *Taggart* 8000 dollars, and therefore I am of opinion, that the decree of the Orphan's Court should be affirmed.

YEATES J. was prevented by sickness from giving any opinion.

BRACKENRIDGE J. The placing the amount of 10,000 dollars and upwards in the banks of this city, without any visible funds from whence that could come, induces the suspicion that it must have been detracted *occasionally* from the money of the master, so as not to be missed. The master, *Taggart*, would seem from the testimony to have entrusted him with the handling of his cash. It could not *reasonably* be supposed to have been from private speculation, or from his wages saved for five years. One thousand dollars and upwards for wages is charged in the book of *Toner* to himself, as received after this deposit in the banks. This embezzlement was probably with the original intention of replacing the money as soon as he should be able; and under this idea, without supposing him ultimately to have intended a fraud, he might have reconciled it to his conscience. In pursuance of this intention, and having been fortunate in business, in less than five years, he actually places in the hands of *Taggart*, the master, through the medium of his clerks, and had entry in his books to the amount of 10,000 dollars, for which he would take no receipt, whereas with regard to other credits for monies in those books he took receipts. I would take the 8000 to be the sum originally embezzled, and this, with the addition of one-fourth, according to the law of

1813.

TONER v. TAGGART.

Moses, in the case of *restitution*, to have accounted for the placing the 10,000 dollars; two thousand the one fourth of eight thousand. It would seem to have been a struggle in his mind how to get the restitution accomplished, without avowing the original breach of trust, which he had not resolution to do, and which he may have thought was not necessary to be done, provided the same justice was rendered, and the original replaced with what would, at least, cover the interest. It is evident that he sometimes thought of a devise to *Taggart*, or some of his children, and it is probable that the coming of his brother from *Ireland*, and the *dulcis moriens reminiscitur Argos*, the idea of unkindness in giving so much to a rich man, and neglecting *pro tanto* his poor kindred, was in his way. But for this all might have been set right by a will. But it would seem to relieve from this, to acknowledge himself to have been indebted originally in the sum taken, the 8000 dollars. This was done by the memorandum left behind him, and may be considered as a credit in the way he intended it, as a set off against the claim which his relations might advance to the surplus in the hands of *Taggart* as a trustee for the use of *Toner*. The document would rebut the idea of a trust, so far at least as the sum of eight thousand dollars.

The mind of *Toner* would seem to have occasionally vibrated on the ways and means by which he might conceal his shame, and satisfy his conscience. He had spoken of a devise under the idea of a sense of gratitude for assistance in setting up and carrying on business; this possibly the better to hide the real consideration. He was advised by a witness (*Potts*) to make a will; and he had been speaking of making a will in favour of *Taggart*, under this consideration of gratitude. The expression in the reply of *Toner* is remarkable: "Mr. *Taggart* and his family should be secured whether or not." This was in the summer of 1805; and the securing must have had a reference to the money which he had placed on the books of *Taggart*, taking no voucher, or to that instrument which he had in view to leave, and did leave behind him. Either of these, or both, would seem in his opinion to *secure Taggart*. I need not say whether this paper could be proved as a testamentary paper, but it must come through that medium before it could be acted on as a gift by devise. But as giving it an operation by way of

credit, I can have no difficulty. I could by no means reconcile it to myself to consider it otherwise. I am of opinion therefore that the sum of 8000 dollars be placed to the credit of *Taggart* the administrator in this case.

1813.

TONER v. TAGGART.

Decree confirmed.

WHARF *against* HOWELL and wife.

IN ERROR.

Philadelphia, Saturday, April 10.

THIS was an ejectment in the District Court, for a messuage and lot in the city of *Philadelphia*.

The title to the premises in question, was on the 5th of *April* 1806, in *Mary Bell*, the wife of *Howell*, the plaintiff below, who on that day, in consideration of 200 dollars, executed and delivered to *Ann Dolan*, an absolute deed of the property in fee simple. At the same time *Ann Dolan* executed and delivered to *Mary Bell*, a deed of defeasance, conditioned, that if the said *Mary*, her heirs &c. should within three months from the date, well and truly pay to the said *Ann*, her heirs &c., the sum of 200 dollars without any fraud or further delay, and without any deduction or abatement whatever, the deed first mentioned should be void, and the grantee of the premises should reconvey. On behalf of the plaintiffs it was proved at the trial that the property was at the time of the conveyance worth 800 dollars; and the scrivener who drew the writings testified, that when they were executed, he considered them in nature of a mortgage, and so explained them to the parties. He also stated that within three months afterwards, a tender of the money due was made by *Mary Bell*. The property had been since the transaction rented by *Ann Dolan*, and the rents received by her. On the contrary, the defendant gave evidence to shew that the tender had not been legally made, nor to a

When the question, whether mortgage or not, depends wholly upon writings, it is a question of law for the Court, and should not be left to the jury. Otherwise, if it depends partly on parol evidence.

A, in consideration of 200 dollars, executed and delivered to *B*, an absolute deed in fee simple of a messuage and lot of ground worth 800 dollars. At the same time, *B* executed and delivered to *A* a deed of defeasance, conditioned that if *A* should within three months pay to *B* the sum 200 dollars, without any fraud or further delay, and without any deduction for taxes, the absolute deed should be void, and *B* should reconvey. At the time of executing the deeds, the scrivener considered them in the nature of a mortgage, and so explained them to the parties. *Held*, that although there was no covenant for the payment of the money lent and interest, the writings constituted a mortgage, upon which the lender might recover the money due, by *scire facias* and sale; and that if the rents and profits received by the lender up to the time of trial, were equal to the money lent and interest, the borrower might recover in ejectment, without bringing the amount into court.

1813.

WHARF v. HOWELL.

sufficient amount, and that *Ann Dolan* had been at the charge of some necessary repairs. And on this the case rested.

The presiding Judge gave it in charge to the jury, that under the circumstances they were to judge, whether the transaction was an absolute sale, subject to a right of repurchase within a limited time, or whether it amounted to a mortgage. If it was an absolute sale, then it was essential that the tender should have been made within the limited time, or the right was gone for ever. If it was a mortgage, then it might be redeemed at any time, and the tender was of no further importance than to authorise the commencement of the suit; and if the rents and profits received up to the time of trial, free of all deductions for taxes, repairs and the like, were equal to the money due and interest, the plaintiffs were intitled to recover, although they had not brought the money into court. That if the jury had a doubt, that doubt ought to operate in favour of its being a mortgage, because such a decision would do justice between the parties. In the opinion of his Honour, a Court of Chancery under the circumstances would consider the agreement as a mortgage; and he saw no reason why the District Court should not consider it in the same point of view.

The defendant excepted to the charge, and the jury found for the plaintiffs.

Browne and *M'Kean* for the plaintiff in error. The Court below erred in several particulars. 1. In leaving to the jury the decision of a question of law; for what is a mortgage, and what circumstances shall make a mortgage out of a deed absolute on its face, are questions of law which the Court should have decided. 2. In giving it as their opinion that the writings did amount to a mortgage, whereas they were an absolute sale, with a right of repurchase. The true meaning of the parties ought, no doubt, to be carried into effect. If the conveyance to *Ann Dolan* was meant as a security for money, without a view to a sale, the Court were right; it was and must always remain a mortgage. But there are features in the case which are incompatible with a security, and shew it to have been a sale. It is essential to a security, that there should be a remedy for the recovery of the loan. In the deeds there is no interest reserved, there is no covenant to pay the money, it rested wholly in the pleasure of *Mary Bell* whether

to pay or not. What would have been the remedy of *Dolan*? A *scire facias* would not lie. Our act of 1705 contemplates the case of a covenant or condition in the mortgage deed, and authorises a sale, upon the same ground that Chancery decrees a foreclosure, because the covenant or agreement to repay has been broken. Besides, the deed in *Dolan's* possession was absolute. The defeasance was in the hands of *Bell*. It would therefore have been out of *Dolan's* power to proceed upon the defeasance, and to produce both before the Court as constituting together a mortgage. *Bell* might have baffled the lender forever. This is material upon the question of intention. Inequality of price, is by itself of no moment, *Sugden* 170; but here there was a risk on the part of the lender, which negatives the intention of a mortgage, as much as inequality of price does the intention of a sale. The building was of wood. If burnt, the security was gone, as the lot was subject to a considerable ground rent. This was a strong argument against a mortgage. The justice of the case consisted in allowing a repurchase within a limited time, and not in compelling *Dolan* to wait a year after the three months, before she could institute an action. It is a leading circumstance with a Court of Chancery in decreeing a mortgage, that there is a covenant to pay the money, and in decreeing against it, that there is none. *Howard* v. *Harris* (*a*), *Floyer* v. *Lavington* (*b*), *Tasburgh* v. *Echlin* (*c*). 3. The Court also erred in not requiring the principal to be brought into court. For several reasons it was requisite. It was a surprise upon the defendant to call for an account in an action of ejectment. The rents and profits, should therefore have been left for a distinct action. No interest being reserved, the profits were by the agreement of the parties in lieu of interest, and therefore we ought never to be called to account for them. *Talbott* v. *Braddell* (*d*). The risk was equivalent to the advantage. It was particularly wrong to take into view the rents subsequent to the action, because it exposed the defendant to costs, although at the institution of the suit, the possession was properly withheld.

Sergeant for the defendants in error. 1. Had there been

(*a*) 1 *Vern.* 190.
(*b*) 1 *P. Wms.* 265.
(*c*) 2 *Bro. Par. Ca.* 265.
(*d*) 1 *Vern.* 183. 394.

1813.

WHARF v. HOWELL.

no facts independent of the writings, the Court should have decided the whole; but there was parol testimony as to the explanations of the scrivener, the value of the property, the understanding and agreement of the parties. This gave the jury an authority to decide. But in truth, nothing but the facts were left to them, the Judge giving his opinion upon the law. 2. Whether a mortgage or not, depended upon the writings, and the understanding of the parties. That a mortgage may be composed by two deeds is not denied; and it is remarkable, that the present defeasance contains the same terms, which are inserted in the proviso to a common mortgage. The property was worth four times the money advanced; and it is going too far to say that this is of no moment in a doubtful case. In connection with the evidence of the scrivener, which was left to the jury, and was credited by them, the whole is perfectly plain. It would be monstrous to say that it was a conditional sale, when at the time of executing the deeds, the parties agreed it to be a mortgage. There is no objection of any moment but the want of a covenant to pay; but this is not essential to a mortgage. A mortgage is a conveyance, subject to be defeated by a condition subsequent. The covenant to pay is a matter quite collateral, and is very frequently omitted. It is begging the question to say, that the lender had no remedy. The *scire facias* in no respect depends upon a covenant to pay. It is a proceeding against the land, to enforce a sale, because the condition subsequent is not performed; and as to the inability of the lender to make use of the defeasance, this may be an actual, but it is not a legal inability. She might have called for the production of it, and should have reserved a copy. If this argument had any weight, it would apply in every case where a defeasance was contained in a separate deed; and yet this certainly does not affect the question of mortgage. *Pow. on Mor.* 19. *ch.* 2. —3. The Court were right as to the rents and profits. A mortgagee who enters and receives the profits, is in the nature of a bailiff to the mortgagor. *Pow. on Mor.* 464, 5, 6. *Gould* v. *Tancred* (*a*). In Chancery, if a bill were brought to redeem, the mortgagee would be forced to account; and if he was fully paid, would be forced to deliver up possession, as having had a complete satisfaction. The same thing must

(*a*) 2 *Atk.* 534.

1813.

WHARF v. HOWELL.

be done here, where instead of a bill to redeem, the party is driven to an ejectment; and justice is not done unless the account is brought down to the trial. As to the costs, nothing is said in the charge, nor was the subject mentioned below. They are a just penalty upon the defendant, for not giving up possession at the time of the tender.

TILGHMAN C. J. after stating the case, delivered his opinion.

The exceptions to the Judge's charge are, 1st, that he submitted to the jury a matter which was merely a point of law, viz. whether the writings operated as a mortgage or not. 2d. That in the opinion delivered to the jury, he erred in point of law.

1. If the question whether mortgage or not, depended solely on the writings, it would have been purely a matter of law, and ought not to have been left to the jury. But that is not the case. The intention of the parties is to be discovered not only from the writings, but from extraneous circumstances. The value of the property is an important consideration, and so are the acts and declarations of the parties. Cases of this kind are generally decided in Chancery, and the chancellor receives evidence of matters not appearing on the writings. We have no chancery. The court and jury stand in the place of the chancellor. Evidence is given to the jury, who decide the whole matter under the direction of the Court on points of law. In the present case, parol evidence having been given, the Court could do no otherwise than submit the cause to the jury, giving them their opinion in matters of law.

2. The District Court were of opinion that it was a mortgage. The value of the property (amounting to four times the sum paid) weighs strongly in favour of that opinion. And if *Mitchell* was accurate in saying, that he explained to the parties that the writings would operate as a mortgage, there can be little doubt on the subject. The great objection of the defendant is, that there was no covenant to pay the money, and therefore he supposes there could be no action to recover it; which proves that an actual sale was intended, on condition that the property should revert to the vendors, if the purchase money was repaid in three months. But to

1813.

WHARF v. HOWELL.

say that there was no remedy for recovery of the money, is begging the question, for if it be a mortgage there is a remedy. We have no mode of foreclosing a mortgage. The mortgagee may recover in an ejectment; but the only way in which the *money* can be recovered, is by *sci. fa.* under the act of 1705. This is a proceeding against the *mortgaged premises only*, and not against the person or the general property of the mortgagor. After judgment a *levari facias* issues, by virtue of which the mortgaged premises are sold. Whether the mortgage consists of *one* or *two* writings, can make no difference. The nature of the case, whatever it may be, is stated in the *sci. fa.* But it is said that the deed of defeasance belongs to the mortgagor, and is not in the possession of the mortgagee, and therefore cannot be set forth in the *sci. fa.* This is a false inference. If the mortgagee uses common care, he will have the defeasance recorded, or keep a copy of it. No difficulty on that point was found in *this case.* If the defendant had refused to produce the writing of defeasance after notice, the contents might have been proved by *Mitchell*, who drew it. It was not denied by the counsel for the defendant, that a mortgage may be made by an absolute deed, accompanied with another deed containing a defeasance in case the money is paid by a certain time, as well as if the whole were contained in one deed. And under all the circumstances of this case, it appears to me that the District Court were right in considering both writings taken together as a mortgage.

Another objection is made to the charge of the judge. It is said, that he erred in charging the jury, that the plaintiffs were intitled to recover, in case they should think that the rents and profits received by the defendant up to the time of trial, (over and above the taxes and reasonable expenditures for repairs &c.) amounted to a sum equal to 200 dollars with interest from the date of this deed of conveyance. The defendant contends that the plaintiffs ought to have brought the money into Court. In this I cannot agree with him. For what purpose should the money be brought into Court, if it was already in the hands of the defendant? How would the matter have stood, if the plaintiffs had filed a bill in Chancery? The defendant would have been ordered to account for the rents and profits, and if those rents and profits had equalled the principal and interest of the debt, it

would have been decreed that he should execute a reconveyance. In order to do justice between the parties, it was necessary that the account should be brought down to the *time of trial.* Whether the defendant should be burthened with the costs of suit, would depend on circumstances. If the money was really tendered in three months, or if the rents and profits equalled the amount of principal and interest before the suit brought, the costs ought to fall on the defendant. But neither party turned its attention to, nor prayed the Court's opinion on the matter of costs particularly, and therefore no particular mention is made of them in the charge. Upon the whole, I am of opinion that the plaintiff in error has not supported any of his exceptions, and therefore the judgment of the District Court should be affirmed.

YEATES J. being unwell, gave no opinion.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed.

BINNS *against* HUDSON.

Philadelphia, Saturday, April 10.

The goods of a tenant taken in execution upon the premises, are liable to the payment of rent to the landlord, up to the time they *are taken in execution,* though it be in the middle of a quarter; but not up to the time of *sale.*

If the tenant agrees to pay a certain rent, clear of all deductions for taxes which he covenants to pay, the landlord cannot claim a preference for the taxes due and unpaid, but only for the rent

IN a case which was submitted for the opinion of the Court, it was stated, that the defendant, on the first of *September* 1811, leased of *James L. Fisher*, for five years, a brewery and the appurtenances, at an annual rent of 1200 dollars, payable quarterly, without any deduction on account of rent charges or taxes, which the lessee covenanted to pay himself, together with the taxes upon a lot not included in the lease. On the 25th of *July* 1812, an execution was issued by the plaintiff, which was levied the same day upon sundry goods and chattels on the premises, at which time part of a quarter had expired, and some of the taxes were unpaid. The sale did not take place until a subsequent day; and the money having been brought into Court, the questions to be decided were,

1813.

BINNS v. HUDSON.

1. Whether the rent should be apportioned, and paid to the time the goods were taken in execution, or up to the day of sale.

2. Whether the taxes should be included in the demand for rent.

Randall for the plaintiff.

Wheeler for the landlord.

TILGHMAN C. J. By the act of the 21st of *March* 1772, the goods are liable "for the sum of money which was due "for rent at the time they were taken by virtue of the exe- "cution." Were the construction of the act to be now given for the first time, I should incline to the opinion that the landlord could claim no rent which was not *actually due* at the time of the levy. But it has been determined, that the growing rent may be apportioned, so that the landlord shall have it, down to the time when the goods are taken by the sheriff. Such was the decision of this Court in the case of *West's administrators* v. *Zint*, *March* term 1798. I have seen the manuscript notes of Judges *Yeates* and *Smith*, and the Court said that "*such had been the construction uniformly* "*put on the act.*" I am not for disturbing a long settled construction; but as the Court have certainly been sufficiently liberal to the landlord, we should stop at the line which they have drawn; that is to say, the rent is to be calculated to the time when the goods are *taken*, and not to the time when they are *sold* by the sheriff.

The rent might have been reserved in such a manner as to cover the taxes, but it has not been done so in this lease. The rent reserved is 1200 dollars, payable quarterly, *without any deduction on account of taxes*, and the tenant covenants to pay all taxes, so that the taxes are no part of the rent reserved. Indeed the covenant extends to the payment of taxes on some lands *not included in this lease*. The landlord therefore, cannot be permitted to charge the goods taken in execution, with any part of the sum due for taxes.

BRACKENRIDGE J. concurred.

Money to be taken out accordingly.

1813.

Philadelphia, Wednesday, June 30. *

Boggs and another *against* Bancker.

Bail are intitled to an *exoneretur*, where the principal has been discharged under a bankrupt law, upon paying the costs of the *scire facias* merely, and not those of the original suit.

IN this case, a *non est* was returned against the principal to *March* term 1812, and a *scire facias* against the defendant, who was the special bail, was issued to the *July* term following. Prior to the return day of the *scire facias*, the principal was discharged under the bankrupt law of *Maryland*, and the bail moved for an *exoneretur*, which was granted on the payment of *costs*.

The question was now submitted to the Court, whether the costs of both the original and *scire facias*, were or were not included in this judgment on the motion.

Tod for the plaintiffs, suggested that they were, because the application of the bail being to the equitable jurisdiction of the Court, equity consisted in the bail's paying all the costs.

Binney for the bail, answered, that the costs in the original suit were part of the judgment, and discharged with it by the bankruptcy of the principal. All that the bail should pay, were the costs that had accrued in consequence of his not making the motion, before the *scire facias* was sued out.

By the Court. The bail is to pay only the costs of the *scire facias*. He might as well be called upon to pay the debt, as the costs of the original suit. Both are included in the judgment in that suit, and both discharged by the *exoneretur*.

* The remaining cases in this volume were decided at an adjourned Court beginning the 27th of *June*, and forming part of *March* term.

1813.

The Insurance Company of Pennsylvania *against* Hewes and others executors of Anthony.

Philadelphia, Saturday, June 30.

Under the arbitration law of *March* 1810, executors are entitled to an appeal without entering into a recognisance, paying costs, or making an affidavit.

THIS case had been referred to arbitrators, who awarded in favour of the plaintiffs. *Meredith* on behalf of the defendants, obtained a rule on the prothonotary to shew cause, why an appeal should not be entered without paying costs, filing an affidavit, or giving a recognisance of bail.

Binney and *Rawle*, who were of counsel with the plaintiffs, shewed cause for the prothonotary. They contended that the proviso in the 14th section of the arbitration law, merely exempted executors or administrators from giving the recognisance mentioned in that section, and not from the affidavit and payment of costs, required by the 11th section. The affidavit was reasonably required, because after a hearing before arbitrators, an executor must be competent to swear, that his appeal is not intended for the purpose of delay, but that he believes injustice has been done; and there is no reason for distinguishing this case from others, in regard to costs, as in the case of a verdict against executors, they are bound to pay costs, except where there is the single plea of *plene administravit*, and that is found for them. 2 *Tidd* 894. The law gives an appeal to executors as *in other cases*. In a law passed on the same day, the 20th of *March* 1810, *Purdon's Abr.* 286, executors are entitled to appeal from the judgment of a justice, without giving surety in the nature of special bail. This is the class of other cases referred to.

Meredith and *Levy* contra, argued, that the proviso was general. Executors and administrators shall have appeal *as in other cases;* and in other cases, no costs are paid, nor affidavit made, to ground an appeal. It clearly extends to a preceding section, because the 14th applies only to executors defendants, the 12th applying to executors plaintiffs; and no doubt the proviso embraces all cases of executors. If it applies to any preceding section, it may to all the sections on the subject of appeal. Executors are excepted out of the affi-

davit rule adopted by the Court. They are not conusant of their testator's transactions. After a hearing they may be in equal darkness. They may want further information from a distance. They must guard against a devastavit, of which they would be guilty, if they permitted a judgment to go against them without full investigation. As to costs, if the affidavit is dispensed with, so is the payment of costs, because they are connected in the same section; and the proviso must extend to both if to either. Executors are not liable for costs, personally, unless they plead a false plea.

1813.

INS. COMPANY of PENNS. v. HEWES.

TILGHMAN C. J. This case was submitted to the decision of arbitrators under the act of assembly. An award was made in favour of the plaintiffs and the defendants desire to enter an appeal. The question is on what terms the appeal is to be entered.

By the 11th section of the act of the 20th of *March* 1810, an appeal is granted to either party *under the following rules regulations and restrictions.* These rules are contained in the 11th, 12th, 13th and 14th sections. It is directed in the 11th section, that the appellant shall swear or affirm, "that it is "not for the purpose of delay the appeal is entered, but be- "cause he firmly believes injustice has been done;" and the appeal is not to be allowed until the appellant pay all the costs that may have accrued in the suit. By the 12th section, the appellant if plaintiff is to enter into recognizance with security, the condition of which is, that if the said plaintiff does not recover in the event of the suit, a sum greater than was awarded to him by the arbitrators, he shall pay all future costs and a dollar a day to the defendant, for every day lost by him in attending the appeal. By section 13th, the costs paid by the appellant previous to entering the appeal, are to be recovered of his adversary only in cases, where in the event of the suit, the appellant is entitled to costs by the provisions of this act. By section 14th, if the defendant be the appellant, he is to enter into a recognisance in nature of special bail, with condition that if the plaintiff in the event of the suit, shall obtain judgment for a greater sum than was awarded by the arbitrators, the defendant shall pay all the costs accrued in consequence of the appeal, together with the amount of the sum awarded, with a dollar a day for every

1813.

INS. COMPANY of PENNS. v. HEWES.

day lost by the plaintiff in attending to the appeal, or in default thereof surrender himself to prison &c. In the end of this section is a proviso in the following words, "provided "that where executors or administrators may be the party ap- "pellant as aforesaid, they shall have an appeal, as is by law "allowed in other cases." The plaintiffs contend that this proviso is restricted to the 14th section, and only exempts the defendants from the recognisance in nature of special bail. They insist that the words, "party appellant *as aforesaid*" limit the proviso to the contents of the 14th section. I am of a different opinion. Here is an act of assembly establishing a set of rules, under which appeals are to be entered. They begin in the 11th, and are continued through four sections, forming in the whole one system. But it was evident that this system would be unjust, with regard to executors or administrators, who, whether plaintiffs or defendants, appear in court only as trustees for the rights of others, and who are not so well acquainted with the matter in contest as their testator or intestate. It would be hard to exact from such persons an oath as to the justice or injustice of the case, and very hard indeed to make them pay costs, which in the event of the suit they might never recover again. The consequence of such hardships would be, that executors or administrators might rather acquiesce in an unjust award than enter an appeal; and in such case, on whom would the loss fall? Not on themselves, but on those entitled to the estate of the deceased person; very often widows and infant children. The words of the law are quite sufficient to guard against those inconveniences, and it appears to me that they were intended to do so. "Where executors or administrators may be the party appel- "lant *as aforesaid*, they shall have an appeal as is by law "allowed in other cases;" that is, where executors or administrators whether plaintiffs or defendants, may be the party appellant, they may appeal without the restrictions in the 11th, 12th, 13th and 14th sections, which are unsuitable to the case of executors and administrators. The words *as aforesaid* might have been omitted without injury to the law, and being inserted, they are to be referred not to the 14th section only, but to all the other sections containing regulations, part of the same system. This forms a consistent plan; but to exempt executors *defendants* from inconvenience, and

to leave executors *plaintiffs* subject to it, would be inconsistent, and ought not to be supposed to have been the intent of the legislature. I am therefore of opinion, that the defendants should be permitted to enter their appeal without oath, without payment of costs, and without recognisance in the nature of special bail.

YEATES J. This case has already been fully stated by the Chief Justice, and the different sections of the law have been detailed.

I think the words *as aforesaid*, in the close of the proviso of the 14th section of the act of the 20th of *March* 1810, cannot be confined to that section, but are referrible also to the 11th section. The concluding section of the act repeals former arbitration laws inconsistent therewith; and the legislature must necessarily have meant *other cases of appeals*, as they stood independently of compulsory arbitrations, wherein neither an affidavit, payment of costs, or giving a recognisance were made essential pre-requisites to an appeal.

It would require strong and clear words to shew an intention in the legislature, to subject executors and administrators to the necessity of swearing to facts of which their knowledge must be very imperfect, paying costs out of their own pockets, when perhaps there may be no assets in their hands, and making themselves personally responsible for the debts of their testator or intestate, or forego the benefit of an appeal, in instances where they have strong reason to conclude, that injustice has been done by the award of arbitrators. Either *all* these acts are necessary to be done by the defendants in the present instance, or the Court will impose *none* of them. I think it the fair construction of the law, that it requires neither of them to be performed, and am therefore of opinion, that the appeal should be received by the prothonotary.

BRACKENRIDGE J. concurred with the Chief Justice.

Rule absolute.

1813.

Philadelphia, Thursday, July 1.

The Commonwealth *against* Holloway Keeper of the Gaol.

If a person is committed to prison by a justice of the peace or a judge of a state court, for an offence against the *United States*, this Court may issue a *habeas corpus*, and discharge him altogether, or admit him to bail; unless he is chargeable with an offence punishable with death, in which case they cannot admit him to bail.

THIS was a *habeas corpus* to the keeper of the common prison of *Philadelphia*, to bring up the body of *Jesse Appleton*, who by the return to the writ, was detained under a warrant of commitment by an alderman of the city, upon a charge of misprision of treason against the *United States*.

Before calling the witnesses, upon whose testimony the prisoner had been committed,

Dallas, district attorney, suggested a preliminary question, as to the jurisdiction of the Court. He contended, that as the commitment had been made for an offence against the *United States*, and by a magistrate acting under a power delegated by congress, it was not competent to this Court to interfere. *First*, upon general principles. The judicial power of the *United States* extends to all cases in law or equity, arising under the constitution, the laws of the *United States*, and treaties; *Art.* 3*d*, *sect.* 2. And by the act to establish the Judicial Courts of the *United States*, the Circuit Courts have exclusive cognisance of all crimes and offences cognisable under the authority of the *United States*, except where that act, or the laws of the union otherwise provide. 1 *U. S. Laws* 55. Treason and misprision of treason are exclusively cognisable by the Circuit Court. The incompetency of this Court to try, implies an incompetency to discharge, or in any way to interfere after the character of the commitment is ascertained. If they have authority to bail or discharge, they have by necessary implication an authority to disturb the criminal jurisdiction of the Federal Courts, and to defeat both the act of congress and the constitution. This question is ably discussed by Chief Justice *Kent* in *Ferguson's* case (*a*). *Secondly*, under the *habeas corpus* act of *Pennsylvania*. This act specially excepts from the benefit of the writ, cases of commitment for treason, the species whereof is plainly set

(*a*) 9 *Johns.* 239.

forth in the warrant of commitment; and the fourth section negatives the right to interfere in the case of persons charged with treason &c., who by the confederation ought to be delivered to the executive power of another state, or who are charged with a breach of the law of nations. From this it is manifest that the legislature intended to provide for the case of an interfering jurisdiction. *Thirdly*, from the judiciary law of the *United States*. The 33d section of this act empowers any justice of the peace or magistrate of any of the states, to arrest and imprison or bail, for any crime or offence against the *United States*, except where the punishment may be death; but if imprisoned, bail cannot be taken by the Supreme or Superior Court of the state, if there is a judge of the *United States* in the district to take the same; and if the offence be punishable with death, the state Court cannot bail at all. 1 *U. S. Laws* 72. This section evidently impugns the authority of the Court to proceed in the investigation of the present case.

Ingersoll for the prisoner. In every point of view it is not only the right but the duty of this Court to proceed. Their authority to grant relief by *habeas corpus* exists at common law, and the present use of it is opposed neither by principle, nor by legislative provision. The authority to try is in no manner connected with the authority to relieve from illegal restraint by *habeas corpus*. This Court have no original jurisdiction in any criminal case. The Common Pleas have none original or otherwise. Time out of mind both Courts have issued the writ of *habeas corpus*, and discharged or admitted to bail in criminal cases. It is the same in *England*. The Common Pleas, though without any criminal jurisdiction, are entitled to use, and do use, the writ, as fully and effectually as the King's Bench; and it is used by the latter Court, in cases where they have no jurisdiction to try. The objection that the offence is within another jurisdiction, begs the question in two particulars; first, by supposing that there has been an offence; and secondly, that that offence is cognisable by another tribunal. These are matters which must be investigated, and if so the authority to investigate must exist. The argument on the other side is, that a mere commitment for an offence against the *United States* is a bar to the Court; and that however flagrant the conduct of the committing magis-

1813.

COMMONWEALTH v. HOLLOWAY.

trate, though he should consider a murder in the streets of this city as within the federal jurisdiction, and commit accordingly, this Court must acquiesce. So far at least they are bound to go,—to see that the offence is within another jurisdiction, and of course to see that an offence has been committed. The power to go thus far, implies the whole. The *habeas corpus* act is not in our way. This writ is at common law, and not under the act of 1785. Nor is it of any importance that the judiciary law does not give this Court the power to interfere; it should be shewn that the law takes it away, for the Court otherwise possess it. But the true construction of that law is, that where the offence is not punishable with death, and the commitment has not been made by a federal judge, this Court may bail.

TILGHMAN C. J. delivered the Court's opinion.

It is necessary to inquire whether the prisoner is chargeable with an offence against the *United States* punishable with death; because if he is, we have no power to admit him to bail. There is a difference between a commitment by a judge of the *United States*, and by a justice or judge of a state. It is enacted by the 33d section of the act of congress to establish the judicial Courts of the *United States*, that for any offence against the *United States*, the offender may by any justice or judge of the *United States*, or by any justice of the peace or other magistrate of any of the *United States*, where he may be found, agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed, as the case may be, for trial before such Court of the *United States* as has cognisance of the offence; and that upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be *death*, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a justice of the Supreme Court, or a judge of a District Court. And if a person committed by a justice of the Supreme or a judge of a District Court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the *United States* in the district to take the same, it may be taken by any judge of the Supreme or Superior Court of law of such state.

Thus we see, that when a judge of the *United States* has acted by committing the offender, no judge of a state has au-

thority to interpose except in case of necessity, *viz.* where there is no judge of the *United States* in that district. But suppose the commitment to have been by a state justice or judge, as is the case in the present instance. There the law does not prohibit the bailing by a state judge. On the contrary, I apprehend that such power is included in the general authority to imprison or admit to bail, in the beginning of the section. And there is great reason for such authority, because a state justice may be called on to issue process against an offender, at the distance of several hundred miles from the residence of the district judge of the *United States;* the offender may be committed for want of bail and afterwards find bail; or there may have been a hasty commitment by an inferior magistrate, which requires consideration. In such cases it would be an intolerable grievance to have no relief from imprisonment but by application to the district judge, and it would be necessary that the prisoner should be either bailed or discharged, as the case might require, by a state judge; and accordingly such power is given.

This appears to us to be the fair and genuine construction of the act of congress. The authority of the *United States* is sufficiently supported, while at the same time every reasonable accommodation is extended to those persons who are charged with offences.

The Court accordingly heard the witnesses; and being of opinion that the alderman had mistaken the nature of the offence, and that it was very doubtful whether any offence had been committed, admitted the prisoner to bail in five hundred dollars, and one surety in the same amount, conditioned to appear at the next Circuit Court of the *United States*, to answer the charge of misprision of treason, and such other charges as should be preferred against him.

Prisoner admitted to bail.

1813.

Philadelphia, Thursday, July 1.

The Commonwealth *against* Holloway Keeper of the Gaol.

A justice of the peace of the city or county of *Philadelphia*, may commit any *vagrant* to gaol, to be kept at hard labour for a term not exceeding one month, he being thereof legally convicted before the justice, on his own view, or by the confession of the offender, or by the oath or affirmation of one or more credible witnesses.

THIS was a *habeas corpus* directed to the defendant, to bring up the body of one *John Boyer*.

By the return it appeared that the prisoner was held in custody, under a warrant of commitment by *Michael Freytag*, a justice of the peace in *Moyamensing*, who had adjudged him to hard labour for one month, on a conviction before him of being an idle disorderly vagrant.

Phillips for the prisoner, contended that there was no authority in the law for this conviction, the act of the 8th of *February* 1766, 1 *St. Laws* 455, which alone gave to the justices of *Moyamensing* the authority to commit vagrants to hard labour, having been repealed by the act of the 29th of *March* 1803, 4 *Smith's Laws* 50.

The *Attorney General* contra.

Tilghman C. J. delivered the Court's opinion.

It appears by the return to the *habeas corpus* in this case, that *Boyer* was committed by Justice *Freytag* of the township of *Moyamensing*, on a conviction before him, for being "an "idle disorderly vagrant;" and it has been contended, that there is no act of assembly in force, by which such a conviction can be supported.

By the act of the 21st of *February* 1767, vagrants are described; and any justice of the peace is authorised to commit them to prison, to be kept at hard labour for any time not exceeding one month, "being thereof legally convicted be- "fore him, on his own view, or by the confession of such "offenders, or by the oath or affirmation of one or more cre- "dible witness or witnesses." But this act does not extend to the city of *Philadelphia*, district of *Southwark*, or the townships of *Moyamensing* and *Passyunk*, or the *Northern Liberties*.

By the act passed the 8th of *February* 1766, entitled "an "act for the better employment, relief and support of the

"poor in the city of *Philadelphia*, the district of *Southwark*, "the townships of *Moyamensing* and *Passyunk*, and the "*Northern Liberties*," any justice of the peace of the city or county of *Philadelphia*, is authorised to apprehend, and upon due examination and proof commit *to the house of employment*, all rogues, vagabonds &c., to be there kept at hard labour, for a term not exceeding three months.

By the 11th section of the act "to reform the penal laws "of this state," passed the 5th of *April* 1790, and made perpetual by the act of the 4th of *April* 1799, it is made lawful for the mayor or any alderman of the city of *Philadelphia*, or any justice of the peace of the county of *Philadelphia*, to commit any vagrant to the *gaol of the said city and county*, to be kept at hard labour for any term not exceeding one month, *being thereof legally convicted before him as by law is directed.*

By an act passed the 29th of *March* 1803, there was a consolidation and amendment of the laws respecting the poor, in the city of *Philadelphia*, district of *Southwark* &c., and all former laws respecting the poor of the said city, district &c. are *repealed.*

Boyer's counsel argues that this last act, having repealed the act of the 8th of *February* 1766, there no longer exists any authority to commit vagrants to prison within the city of *Philadelphia*, district of *Southwark* &c. But we are of opinion that this conviction and commitment are lawful by the act to reform the penal laws, which separated the case of *vagrants* from that of the poor in general. The words "being thereof "legally convicted before him *as by law is directed*," are to be referred to the act of the 21st of *February* 1767, which is still in force, and not to the act of the 8th of *February* 1766, which is repealed; because a *conviction is directed* by the act of the 21st of *February* 1767, but no conviction is mentioned in the act of the 8th of *February* 1766. The result of these different laws, so far as respects vagrants, is that vagrants are now on the same footing in the city of *Philadelphia*, district of *Southwark*, and townships of *Moyamensing* and *Passyunk*, and the *Northern Liberties*, that they are in the other parts of the state. We are therefore of opinion that the prisoner should be remanded.

Prisoner remanded.

1813.

Philadelphia, Tuesday, July 6.

A second rule of arbitration cannot be entered without consent of parties, until the first is discharged by order of the Court.

BARNET *against* HOPE.

PHILLIPS for the defendant, obtained a rule to shew cause, why the proceedings under a rule of arbitration in this case should not be set aside.

The writ was returnable to *July* 1812. On the 30th of *June* 1812, the plaintiff declared his intention to have arbitrators appointed on the 11th of *July*. On that day they were appointed to meet at a certain place and hour on the 20th of *July;* but in consequence of an arrangement between the plaintiff's counsel, and the arbitrators, another time and place were fixed, at which the defendant refused to attend, and no further proceedings were had.

On the 22d of *July* 1812, a second rule of reference was entered by the plaintiff, and served on the defendant; arbitrators were chosen *ex parte* on the 1st of *August*, and on the 8th of *September*, an award was filed in favour of the plaintiff, the defendant not having attended.

Heatley for plaintiff.

PER CURIAM. The Court are of opinion that the proceedings under the second rule were irregular. The plaintiff having acted under the first rule, could not enter a second until the first was discharged by order of the Court. Let the rule be made absolute.

Rule absolute.

Philadelphia, Wednesday, July 7.

This Court cannot discharge an insolvent debtor, who is in confinement under process from the District Court for the city and county.

Ex parte OGLE.

THE petitioner was committed to the debtors' apartment, by execution from the District Court for the city and county of *Philadelphia*, returnable to the next *September* term; and on a previous day of this adjourned court, he presented his petition for the benefit of the insolvent laws. He was now brought up for a hearing.

Phillips and *Shoemaker* for the creditor, objected, that this

Court had no authority to discharge, 1. Because the act of 1729 required that the petition should be presented to the Court from whence the process issued: 2. Because the return day of the execution had not yet arrived. *Henderson* v. *Allen* (*a*).

E. S. Sergeant and *Ewing* for the petitioner, answered, 1. That the expressions of the act of 1729, had always been taken with this qualification, that the Court from which the process issued, had power to discharge; but where it had not, this Court *ex necessitate* had interfered, as in the case of executions from the Alderman's Court formerly, and from justices of the peace. The District Court after solemn argument have decided that they cannot discharge under the insolvent law; and unless this Court interposes, the petitioner must lie in gaol for ever. The act of the 3d of *April* 1794, enlarges the power of the Supreme Court, by authorizing it to discharge all persons who may be imprisoned for debt. 2. The objection that the writ is not returned, is not of the slightest importance. The case cited does not support it, and as far as it goes speaks of the practice merely in the Common Pleas.

TILGHMAN C. J. The great difficulty in this case is the question of jurisdiction. The act of 1729 is express, that application shall be made to the Court from which the process issued; and reason is in its favour, as they have a control over their process, and it is by their order that the insolvent has been imprisoned. The act of 1794 makes no change in this respect. It merely increases the amount from which the respective Courts may grant a discharge; but at the same time directs that it shall be granted in the same manner and upon the same terms, as is directed by former laws, thereby expressly referring to them as a guide. I know of no general power of this Court to discharge all debtors; the power which we have, we take from the acts before mentioned, and from those only. Had not the District Court decided the point, I should have thought the act of 1729 was incorporated with the act by which the Court was created; but be this as it may, we have no authority to assume jurisdiction, because another Court has it not.

PER CURIAM. Petitioner remanded.

(*a*) 1 *Dall.* 149.

1813.

Philadelphia, Saturday, July 10.

The Commonwealth *against* Addicks and wife.

Although this Court are bound to deliver all persons by the writ of *habeas corpus*, from illegal restraint, yet they are not bound to decide who is entitled to the guardianship of children, or to deliver them to the custody of the father, even where he has been divorced from the mother, on account of her adultery; but they may in their discretion do so, if they think proper.

THE Court, upon the application of *Joseph Lee*, granted a *habeas corpus* to the defendants, to bring up two female children, his daughters, in their custody; and they were accordingly brought into Court, under the care of their mother, *Barbara Addicks*, with whom, as was stated in the return, they had lived ever since their birth.

One of the children was ten, the other about seven years old.

J. R. Ingersoll for the father, read to the Court the proceedings in the Common Pleas, upon a libel for divorce by *Lee* against *Barbara*, at present the wife of *Addicks*, by which it appeared, that about the beginning of the present year, she had had a child by *Addicks*, and for some time before, and constantly since, had lived with him. *Lee* was divorced from her *a vinculo*, for this cause, on the 12th of *June* 1813; and since that time, the wife and *Addicks* were married, notwithstanding the act of the 19th of *September* 1785, which prohibits the party who is guilty of adultery, from marrying with the paramour, during the life of the former husband. He contended that the father, as the natural guardian of the children, had a right to their custody, and that the nature of the intercourse between their mother and *Addicks*, rendered it highly improper to permit them to remain under her care.

Hopkinson contra, replied, that it was entirely in the Court's discretion to interfere or not, as there was no illegal restraint of the children; and for the purpose of enabling the Court to exercise a sound discretion upon the subject, he gave to them an outline of the mother's history, her marriage with *Lee*, his conduct to her and his family, and the circumstances under which her acquaintance with *Addicks*, and her subsequent indiscretion had originated. From the whole it appeared, that she was at least as unfortunate, as she was culpable; that for four years prior to the divorce, from the embarrassments of *Lee*, and other causes, he had

made no provision for either his wife or these children, although he had been applied to for this purpose. That during this period, the mother had kept a boarding house, and had educated the children herself, having applied in this manner the accomplishments she had acquired in the course of an excellent education in *Canada*. That the marriage with *Addicks* had taken place without a knowledge of the legal impediment, and that in no respect had her intercourse with him, interfered with the attention that was due to the children, whose sex as well as age, particularly required the care of a mother.

J. R. Ingersoll on the other hand, made a statement to exculpate the husband, and to shew that his pecuniary circumstances, which at one time prevented him from giving aid to his family, now enabled him to educate and maintain the daughters, as he did a son of the same marriage, who had always been under his care.

One fact was not disputed, that the children were well treated and educated by the mother, and had hitherto in no respect suffered under her care.

After holding the case under advisement for a day, the Chief Justice now delivered the Court's opinion.

TILGHMAN C. J. We have considered the law, and are of opinion, that although we are bound to free the person from all illegal restraints, we are not bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person. But we may in our discretion do so, if we think that, under the circumstances of the case, it ought to be done. For this we refer to the cases of *The King* v. *Smith*, 2 *Stra.* 982, and *The King* v. *Delaval*, 3 *Burr.* 1436. The present case is attended with peculiar and unfortunate circumstances. We cannot avoid expressing our disapprobation of the mother's conduct, although so far as regards her treatment of the children, she is in no fault. They appear to have been well taken care of in all respects. It is to *them*, that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother. It is on their ac-

1813.

COMMONWEALTH v ADDICKS.

count, therefore, that exercising the discretion with which the law has invested us, we think it best, at present, not to take them from her. At the same time, we desire it to be distinctly understood, that the father is not to be prevented from seeing them. If he does not choose to go to the house of their mother, she ought to send them to him, when he desires it, taking it for granted that he will not wish to carry them abroad, so much as to interfere with their education.

ANCORA *against* BURNS.

IN ERROR.

Philadelphia, Monday, July 12.

In an action of replevin, if an issue be joined upon rent in arrear, and there is any thing to shew the amount of rent claimed, this, and not the damages laid by the plaintiff in his declaration, will settle the jurisdiction of the Court. But where the jurisdiction depends on the amount in controversy, there is nothing to decide the question, in actions sounding *merely in tort*, but the damages laid in the declaration.

THIS was a writ of error to the Common Pleas of *Philadelphia* county. By the record, it was an action of replevin for goods distrained for rent. The attorney of the plaintiff, *Ancora*, indorsed on the writ the sum of 87 dollars and 50 cents, as being the defendant's claim for rent; and the sheriff, by his return, replevied and delivered the goods to the plaintiff. In the narr the damages were laid at 400 dollars; the defendant avowed for rent in arrear; the plaintiff replied no rent in arrear, and the issue being joined, the cause was ready for trial, when the act of the 30th of *March* 1811 was passed, the second section of which directs, that "all suits depending in the Court of Common Pleas of "the city and county of *Philadelphia*, *where the sum in con-* "*troversy* exceeds one hundred dollars, shall be transferred "to the District Court, there to be heard, tried and deter- "mined; and the original jurisdiction of the Court of Com- "mon Pleas, in all civil actions, where the sum in contro- "versy exceeds one hundred dollars, shall cease and deter- "mine." On the 24th of *June* 1812, the plaintiff entered a suggestion upon the record, that the Court had no jurisdiction. On the 29th of *June*, the issue was tried in the Common Pleas, and the jury found a verdict for the avowant 84 dollars 55 cents damages, and six cents costs.

Delany for the plaintiff in error, argued, that the Court below had no jurisdiction, and therefore the judgment was erroneous. The indorsement on the writ was not to be regarded, it was only information to the sheriff, to guide him

in the amount of the replevin bond. There was then nothing but the damages laid in declaration, by which the jurisdiction could be ascertained, and they were too high. The plaintiff might have recovered the whole amount for the wrongful taking of the goods, and therefore not the verdict of the jury, but the claim of the plaintiff, shewed the sum in controversy. The avowry furnished no rule; it was general. A replevin was in fact an action for a tort, in which the plaintiff recovered, not only the property, but damages for the taking; and in actions for torts, the sum laid in the declaration was the sum in controversy. *Hulsecamp* v. *Teel* (*a*), *Wilson* v. *Daniel* (*b*).

Green for the defendant in error. In replevin both parties are actors. 6 *Bac. Abr.* 52. *Replevin A.*, 2 *Mod.* 199. It depends then upon the issue who is the claimant, and what is the sum in controversy. If the issue is *non cepit*, the plaintiff's narr may be the guide; if *rent in arrear*, then the avowry is in the nature of a declaration, and that is the guide. 3 *Vin.* 372. *Avowry A.* 2. In our practice, the avowry is entered short; but a sum must be presumed to be inserted, which sum, in this case, the plaintiff has indorsed on the writ. But if no sum is presumed, then the only guide is the verdict of the jury, which is below a hundred dollars. The plaintiff's narr and damages are out of the question, because, before the act passed, he took issue on rent in arrear, and rested satisfied with his goods.

TILGHMAN C. J. The plaintiff in this suit, laid his damages in his declaration at 400 dollars; and hence it is contended, that the *sum in controversy* in this suit, exceeded one hundred dollars, and therefore the cause should have been transferred to the District Court. The plaintiff's counsel has cited cases which prove, that in actions sounding *purely in tort*, such as trespass *vi et armis* &c., there is no standard for estimating the *sum in controversy*, but the amount of damages laid in the declaration. Granting it to be so, the rule is not applicable to the present case, where, in the progress of the cause, and before the act of assembly was made, an issue was joined, reducing the matter in con-

(*a*) 2 *Dall.* 358. (*b*) 3 *Dall.* 401.

1813.

ANCORA v. BURNS.

troversy to a certainty. In replevin, the avowant is in nature of a plaintiff; not having claimed the *property*, and resting his cause on the demand for *rent*, the amount of that rent, and not the property of the goods, became the matter in controversy. This amount having been stated by the avowant, and found by the jury to be less than one hundred dollars, I am of opinion, that the jurisdiction of the Court of Common Pleas was not divested, and therefore the judgment should be affirmed.

YEATES J. The sheriff's return and the pleadings in this case furnish certain *indicia*, by which the Court's jurisdiction may be determined.

The plaintiff's attorney, in his *præcipe* for the replevin, marked the claim of the defendant to be for 87 dollars and 50 cents, on account of rent. The sheriff returned, that the had replevied the goods and delivered them to the plaintiff. The plaintiff laid his damage in his declaration at 400 dollars. The defendant avowed the taking for rent in arrear, which, though generally expressed, must be supposed to be for a certain sum, as claimed by him, and the plaintiff replied, there was no rent in arrear. On this point they were at issue, which remained properly to be tried in the Court of Common Pleas, the demand in controversy not exceeding 100 dollars. Both parties are actors in replevin. The plaintiff did not go for the value of his goods, for they had been previously delivered to him by the sheriff. He merely resisted the claim of rent. I think the Court of Common Pleas acted correctly in asserting their jurisdiction, and that the cause ought not to have been transferred to the District Court. The necessary result is, that the judgment of the Court below be affirmed.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed.

CALLENDER and another *against* The Insurance Company of North America.

1813.

Philadelphia, Monday, July 12.

THIS was an action upon a policy of insurance, underwritten by the defendants on the 12th of *May* 1809, upon the brig *Mary* and her freight, at and from *Philadelphia* to *St. Bartholomews*, 4500 dollars on vessel, valued at that sum, and 1500 dollars on freight, valued at that sum.

Ship and freight were insured at and from *Philadelphia* to *St. Barts.* On her voyage the vessel was so much injured by storms, as to be under the necessity of putting into *Jamaica;* and upon being surveyed, it was found that her repairs would cost more than she would be worth when repaired.

The cause was tried before *Yeates* J. at a *Nisi Prius* in *December* last, when the following facts were in evidence.

The *Mary* sailed from *Philadelphia* upon the voyage insured, on the 30th of *April* 1809, with a cargo consisting principally of corn meal and flour, consigned to the master, who was instructed to proceed with it to *St. Barts*, and there to purchase with the proceeds a cargo of such sugar and coffee as might be lawfully imported into the *United States*, or bills, if a cargo could not be obtained. In the prosecution of the voyage, the vessel encountered severe gales of wind which did her great injury, and finally compelled her to bear away for *Kingston* in *Jamaica*, where she arrived on the second of *June*. A survey was immediately held, and the surveyors reported, that the repairs necessary to make her seaworthy, would cost more than she would be worth when repaired. The master directed inquiries to be made for a vessel to carry on the cargo to *St. Barts;* but none could be found, except a small Swede, that was unable to carry more than half the *Mary's* cargo, and the freight demanded for her was so exorbitant, that he was induced to decline chartering her. In consequence of these events, the brig was condemned, and together with the cargo, sold for the benefit of all concerned, sometime before the 19th of *June*, and the proceeds paid to the master. The cargo brought less than the prime cost. The plaintiffs abandoned to the defendants on the 20th of *July* 1809, as soon as they received advice of the loss, and on the same day they also abandoned to the *United States* Insurance Company, who were underwriters on the cargo.

The master, who was consignee of the cargo, made inquiry for another vessel to carry it on to *St. Barts;* but the only one that could be procured, was not large enough to take more than half the cargo, and for her an exorbitant freight was demanded. In consequence of this the vessel was broken up, and together with the cargo sold for the benefit of all concerned. Upon receiving advice of the facts, the owners abandoned to the underwriters on ship and freight, and also to the underwriters on cargo. *Held*, that as the goods were not *voluntarily* accepted by the owners at the intermediate port, no freight *pro rata* was due, and therefore the assured were entitled to recover a total loss on both policies.

1813.

CALLENDER v. INS. COMPANY of N. AMERICA.

The only question made at the trial, was as to the seaworthiness of the vessel; but to meet the point that now came into discussion, the following agreement was entered into by the parties:

"It is agreed, that if a verdict be given for the plaintiffs in this case, it shall be for the whole amount claimed on vessel and freight, with liberty to the defendants to move for a new trial; and if, upon such motion, the Court shall be of opinion that the defendants are entitled to a *pro rata freight*, the amount of such *pro rata* freight shall be tried and determined in a suit brought by the same plaintiffs against *Israel Pleasants*, President of the *United States* Insurance Company; and the said defendants shall be entitled to retain the amount of the freight insured, say 1500 dollars, until the said question shall be determined, and shall be bound to pay such proportion thereof to the plaintiffs, if any, as shall be over and above the amount allowed by the jury for the *pro rata* freight."

The jury having found for the plaintiffs, the defendants' counsel moved for a new trial.

Hopkinson and *Levy* for the defendants. A *pro rata* freight is due, upon principles of equity, and of the marine law.

It is contrary to natural justice, which is the foundation of equity, that labour should be performed without compensation; and it is manifest in this case, that an expenditure of money and labour has been incurred in the transportation of the goods, almost, if not quite, equal to that which the voyage to *St. Bartholomews* could have required. Nothing more than this can be necessary to lay a foundation for a recompense to the carrier. But there is also a service performed, which completes the obligation of the shipper to pay; for it is unquestionably a service to deposit the goods at a port nearer to their destination than they were at the port of departure; though what was the extent of it here, it is unnecessary to say. The inquiry at present, is not who is to pay freight, nor to what amount, but whether any freight was earned; if it was, the defendants are by the agreement entitled to the benefit of it. The contract, it is true, is not performed, except by the delivery at *St. Barts;* and upon the footing of that contract nothing can be claimed. But there are even by the common law, implied exceptions to all posi-

tive contracts, and it is peculiarly the province of equity to sustain them. 1 *Rep.* 92., 1 *Dall.* 212., *Bull.* 109., 1 *Eq. Abr.* 379. *pl.* 7. Where a party is prevented by inevitable accident from completing his contract, where he is guilty neither of fraud nor of negligence, and where in the part performance he labours or expends money for the benefit of the person who employs him, the original contract, particularly a commercial contract, cannot, upon principles of equity, stand in the way of a remuneration *pro tanto*.

The marine law has accordingly proceeded upon this basis; and from the earliest day at which we have any records of it, has asserted the rule, that where, without any fault of the master, the vessel is driven into an intermediate port, and is there forced to break up her voyage, freight *pro rata* is due. By the laws of *Oleron*, if a ship be disabled, and the merchants require their goods, the master "may, *if* "*he pleases*, deliver them, they paying freight for the part of "the voyage that is performed," *Art.* 27. 32. 42, which shews that they cannot have them without paying. By the laws of *Wisbuy*, "if the accident did not happen by any "fault of the master, then the freight *shall* be paid him." *Art.* 37. *Roccus* says, "When goods have been conveyed "a part of the voyage, equity directs that freight be paid "for that part of the voyage on which the goods have been "conveyed, and to that extent payment *must* be made." *Note* 81, *de navibus*, for which he cites *John de Hevia* and *Straccha*. By the Ordinance of 1681, "if the master cannot "find a ship to carry to the place agreed on, the goods pre- "served, he shall *only* be paid his freight in proportion to "what he has performed of the voyage." And by the late *French Code de Commerce*, "if the master has not been able "to hire another vessel, the freight is *only* due in proportion "to the voyage performed." *Art.* 296. This is one and the same principle speaking in all the most celebrated codes of marine law, and applies with great strength to the present case, which is precisely that referred to in the two last mentioned codes.

Great Britain has adopted the rule. In *Lutwyche* v. *Grey*, as stated by Lord *Mansfield* in *Luke* v. *Lyde* (*a*), a *pro rata*

(*a*) 2 *Burr.* 885.

1813.

CALLENDER v. INS. COMPANY of N. AMERICA.

freight was decreed, though the master *declined* carrying the goods from *Toughall* to *Glasgow*, the port of destination. In *Luke* v. *Lyde*, Lord *Mansfield*, who investigated the subject profoundly, sums up all the authorities by saying, "there can be no doubt but that *some* freight was due, for "the goods were not *abandoned* by the freighter," to the master, of whom he was then speaking. "If he abandons "all, he is excused freight," and not otherwise. In *Baillie* v. *Modigliani* (*a*), which was the case of a capture and sale of the goods at an intermediate port, the same judge pronounced the opinion of the whole court, that "as between "the owners of the ship and cargo, in case of total loss, no "freight is due; but as between them no loss is total where "part of the property is saved, and the owner takes it to his "own use. In this case, the value of the goods was restored "in money, which is the same as the goods, and therefore "freight was *certainly* due *pro rata itineris*." In *Mulloy* v. *Backer* (*b*), the reason of the rule is stated by Lord *Ellenborough* to be, if not the service rendered to the owner, the *labour* performed by the master in his service; and in none of the late *English* decisions is *Luke* v. *Lyde*, the leading case in this branch of the law, in the least shaken.

Our sister state, *New York*, has adopted the rule. *Williams* v. *Smith* (*c*), *Robinson* v. *The Marine Insurance Company* (*d*).

Our own state has adopted it in *Germain* v. *Maureau* (*e*), and in *Morgan* v. *Insurance Company of North America* (*f*). In the late case of *Armroyd* v. *The Union Insurance Company* (*g*), the judges did not unite in opinion.

The distinction by which in modern times the rule has been assailed, is that the acceptance of the goods must be voluntary, that the owner must elect to take them. There is nothing of this in the marine law. The contrary is manifest throughout. What is the meaning of the terms? If the owner takes his goods at all, he takes them in one sense voluntarily, he elects to take them. If you mount higher, to the disaster which has happened, then, that being involuntary, all its consequences are so. There cannot then be a voluntary acceptance, if reference is had to the loss; and there cannot be an involuntary acceptance, if reference is had to the taking

(*a*) *Park* 70.
(*b*) 5 *East* 322.
(*c*) 2 *Caines* 21.
(*d*) 2 *Johns.* 323.
(*e*) *Ingersoll's Roccus* 70.
(*f*) 4 *Dall.* 454.
(*g*) 3 *Binn.* 437.

merely. It is in truth a distinction without meaning; and is in no manner connected with, or founded upon the true principle of the right to recover, namely, the labour of the master, and his inability to do more than he has done.

Binney and *Chauncey* for the plaintiffs. The claim to *pro rata* freight, is placed by the defendants upon ground on which it cannot be maintained; it has no defence in the principles either of the common or marine law, and it is in opposition to both. If service performed is at the foundation of the claim, how can it be supported in a case in which the goods brought less at the intermediate port, than their cost, and where the disaster absolutely defeated the adventure, a material object of which was a return cargo, that could not legally be imported from *Jamaica?* Such a principle was not thought of in *Luke* v. *Lyde*, where it was agreed that the freight was greater from *Biddeford* to *Lisbon*, than from *Newfoundland.* If labour performed is the principle, why is it that in the case of capture, or of total loss, though in the very port of destination, no freight is due? The labourer is no doubt worthy of his hire, but he is worthy according to his contract only. Labour *per se* is nothing; it must be connected with something else, to constitute a right of action. The only question then is, what must be connected with the labour performed; and that is, a voluntary acceptance of the goods at the intermediate port, from which the law will imply a new promise to pay, in consideration of the labour.

This question is not to be decided by the common law merely. Where an express contract is entire, that law does not raise a promise by implication in the case of a part performance. Nor is it to be decided by the ordinances of ancient or modern *France.* They are more in the nature of statutes, than declarations of the marine law. It is to be settled only by the marine law, as it has been interpreted and applied by those from whom we derive our laws, and by our own Courts; and the principle to be obtained from this source is, that where a ship and cargo are driven into an intermediate port, and the owner, having an election to send on the goods in the same or another ship, agrees to take them at the intermediate port, with the consent of the master, freight *pro rata* is due.

The rule is obviously a reasonable one. The contract in

1813.

CALLENDER v. INS. COMPANY of N. AMERICA.

its origin is entire, and calls for entire performance. If wholly performed, the whole compensation is earned. If part is performed, and the remainder, though practicable, is dispensed with by both parties, one giving up the right to entire performance, and the other to entire freight, the marine law gives rise to a contract to pay *pro rata*. If the remainder cannot be performed at all, then the disaster which excuses the master from going on, excuses the owner from paying. This is plain justice between the parties. The consequence of the defendant's rule on the other hand is, that however useless or pernicious the landing at an intermediate port may be, though the goods are carried to a market where they are of less value than their cost, and from which they can never be taken away, still the owner must lose his goods entirely, or pay a *pro rata* freight. There is no equity in such a rule as this; it gives the master either the goods or a *pro rata* freight in every case without exception.

The meaning of a voluntary acceptance then is plain; and the necessity of it, according to ancient codes, as well as modern decisions, is equally so. The laws of *Oleron* evidently refer to such a case; for, after saying that if the merchant requires his goods, he must pay freight, they proceed to say, "but if the master can readily repair his ship, he "may do it, or if he pleases he may freight another ship to "perform the voyage." *Art.* 4. The case spoken of, is one in which the ship may be repaired, or another procured, and therefore the acceptance must be voluntary. *Molloy* and *Maline* say, "if the freighter disagrees to the master's carrying "the goods in another ship, the master shall receive his "freight in proportion." *Maline's Lex Mer.* 98., *Molloy*, *lib.* 5. *c.* 4. *s.* 4. The laws of *Wisbuy* speak of the same case. *Art.* 16. No one of these codes gives a *pro rata* freight, when the goods must necessarily remain at the intermediate port.

Lutwyche v. *Grey*, the earliest *English* case, is erroneously stated by Lord *Mansfield*. From a report of it by *Abbot*, *Treat. on Ship.* 196, the *pro rata* was given, because the owners refused to let the master carry on the goods in another ship, and took them away. A voluntary acceptance was evidently the ground of the Court in *Luke* v. *Lyde*. The facts shew it, because the owner sent the fish to *Bilboa*, and of course they could have been sent by the master to *Lisbon*. Lord *Mansfield* relies upon it. He says "the mer-

"chant did not abandon, but took the goods, and did not "require the master to carry them to *Lisbon*, the port of de- "livery." In all subsequent cases, *Luke* v. *Lyde* has been confined to its particular facts. Lord *Mansfield's* reasoning, and his endeavours to import into the law of *England* the *French* ordinance, have never received the sanction of later judges. What is said in *Baillie* v. *Modigliani* is a dictum; the right to *pro rata* freight was not in discussion, but the obligation of the insurer on goods to pay it. In other cases, if the acceptance has not been voluntary, freight has been refused; and *Luke* v. *Lyde* has been defended solely upon that distinction. *Mulloy* v. *Backer* (*a*), *The Hiram* (*b*), *Liddard* v. *Lopez* (*c*). So it has been in *New York; Post* v. *Robertson* (*d*), *Marine Insurance Company* v. *United Insurance Company* (*e*); in the Circuit Court of the *United States*, *Hurtin* v. *Union Insurance Company* (*f*); and in this Court in *Armroyd* v. *Union Insurance Company* (*g*); for although in the last case, the Judges did not unite, Judge *Yeates*, who was in favour of a *pro rata* freight, seems to have considered the claim made by the owners to the profits on the bills purchased with the proceeds of sale, as equivalent to voluntary acceptance, the necessity of which he does not deny.

In this case then, there is no *pro rata* freight, because the goods were not accepted voluntarily, but were necessarily sold at *Kingston*, from which no vessel could be obtained to carry them on; because as soon as the disaster was known to the plaintiffs they abandoned; and because the underwriters on goods never took any step in relation to them, from the loss up to this time. If freight must be paid, the plaintiffs must lose it, although all their interests were insured; for it seems admitted that the underwriters on goods have nothing to do with the freight.

TILGHMAN C. J. If this case were to be considered on principles of natural justice, there seems no reason why any freight should be paid; because it does not appear that any service was performed. The voyage was planned for *St. Barts*, at that time a neutral island, from whence a cargo might have been imported into the *United States;* but that

(*a*) 5 *East* 317.
(*b*) 5 *Rob.* 183.
(*c*) 10 *East* 526.
(*d*) 1 *Johns.* 24.
(*e*) 9 *Johns.* 186.
(*f*) 1 *Condy's Marsh.* 281.
(*g*) 3 *Binn.* 437.

1813.

CALLENDER v. INS. COMPANY of N. AMERICA.

could not be done from *Jamaica*, because the non-intercourse law was in force, which prevented all communication between the *United States* and a *British* island. Neither ought any freight to be paid, if we look to the terms of the contract, because the stipulated voyage was not performed. But it is said, that freight *pro rata* should be paid, because such is the precept of the marine law, which has been adopted as part of the common law. The ancient codes of marine law do not seem to be quite clear on this point. In *Wellwood's Abridgment of all Sea Laws*, published in the year 1636, and said to be collected from all writings and monuments then existing, I find it laid down in *page 75*, as follows: "If the ship in her voyage become unable, without "the master's fault, the master may either mend his ship or "freight another; but in case the merchant agree not thereto, "then the master shall at least obtain his freight so far as he "hath deserved it." For this the author cites the *Laws of Oleron*, and the *Rhodian Laws*, said by Lord *Mansfield* to be the most ancient in the world. Supposing this to be the law, it does not follow that any freight is earned in case the master will neither repair his ship, nor freight another. I know there are not wanting some ancient authorities in support of *pro rata* freight, when the ship becomes unable to perform the voyage without any fault of the master, although he does not offer to freight another vessel; but upon the whole I do not consider the point, so far as it rests upon ancient marine authority, as by any means clearly settled. The more material question, however, is what has been the principle recognised by the *common law*. The case principally relied on in support of freight, is *Luke* v. *Lyde*, 2 *Burr.* 883. There can be no doubt, but that case was rightly decided, because, according to Lord *Mansfield's* statement of it, the merchant did not require the master to carry the goods to *Lisbon*, the port of delivery, but received them and carried them himself to another port. Under such circumstances, by fair implication, a new contract arose to pay freight *pro rata*, and on no other principle is that decision supported. But although the point decided in *Luke* v. *Lyde*, has never been denied by Lord *Mansfield's* successors, yet it has been said by Lord *Ellenborough* in *Liddard* v. *Lopez*, that it has been *pressed beyond its fair bearing*; and where such pressure has been to the extent contended for in the

argument of the case before us,—to an extent which entitles the master to *pro rata* freight, although the merchant requires him to procure another vessel, and complete the voyage, and he refuses to do so,—I think I may venture to assert that the doctrine has never been received with approbation. On the contrary, it seems to have been understood, that *pro rata* freight is not due, unless the consent of the merchant, either by words or actions, has been expressly given, or may be fairly deduced, to accept his goods at an intermediate port; and such consent being given, the original contract is dissolved, and a new one arises. For this principle, I refer to the cases of *Cooke* v. *Jennings*, 7 *T. Rep.* 385., *Liddard* v. *Lopez*, 10 *East* 526., *Hurtin* v. *Union Insurance Company*, in the Circuit Court of the *United States*, *Pennsylvania* District, 1 *Condy's Marsh.* 281. *a.* (*notis*); *The Marine Insurance Company of New York* v. *The United Insurance Company*, decided by the Supreme Court of *New York*, 9 *Johns.* 186., and *Armroyd* v. *The Union Insurance Company*, in this Court, 3 *Binn.* 437. The question then will be, whether there was any consent to receive the goods at *Jamaica*, in this case. I cannot see that there was. The vessel was unladen from necessity; and the master finding that the difficulty and expense of freighting another, were greater than he chose to encounter, the cargo was sold for the benefit of whom it might concern. The owner of the goods abandoned; and as for the underwriters, they knew nothing of what had been done, till long after the business had been concluded. I am of opinion upon the whole, that inasmuch as the original contract was not performed, nor any consent given to substitute a new one in the place of it, the claim of *pro rata* freight cannot be supported.

YEATES J. The general principle as to freight is, that it is demandable where the goods are delivered at the port of destination according to the terms of the bills of lading; for such is the contract between the parties. Indeed where some event has arisen, which has frustrated the voyage after it has begun, and the vessel has become innavigable, and the ship owner offers to transport the goods to the destined port, which the owner of the goods, or his agent, refuses, there full freight also is due. By the maritime law, where the owner of the goods or his agent *voluntarily agrees* to accept

1813.

CALLENDER v. INS. COMPANY of N. AMERICA.

them at an intermediate port, he becomes liable to pay freight *pro rata itineris*, though there be no express stipulation for that purpose. In *Armroyd* v. *Union Insurance Company*, I differed in opinion from the majority of the Court, and thought that such circumstances existed in that case, as were equivalent to a voluntary receipt of the goods. The supercargo accepted the remnant of the cargo at *Antigua*, sold it to a good profit, and invested the amount of sales in bills of exchange, on which a considerable profit arose to the concerned, which were accounted for to the company, allowing a small commission for the negotiation. I apprehended that the case was brought within the principle of former decisions, and according to the expressions of Lord *Mansfield*, in *Baillie* v. *Modigliani*, *Park* 53. *5th ed.* the value of the goods being restored in money, was the same as the goods themselves, and therefore freight was due *pro rata itineris*. Be this as it may, there is no acceptance of the goods in this case at the intermediate port, nor any substitution of money for them, nor any other circumstance upon which, in my idea, the law would imply a promise to pay a rateable freight. I am therefore of opinion, that judgment be rendered on the verdict, without any abatement for such freight.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment for the plaintiffs.

The Commonwealth *against* The County Commissioners.

Philadelphia, Wednesday, July 7.

If county commissioners appoint a treasurer, not with the free exercise of their judgments, but by drawing cuts to decide which of two of them shall give up his nomination to the other, the appointment is illegal, and the commissioners may make another appointment.

IN this case a rule was granted upon the commissioners of *Philadelphia* county, to shew cause why a *mandamus* should not issue, commanding them to grant to *Liberty Browne* a certificate of his appointment to the office of treasurer.

The commissioners severed in their return; two of them, *Jacob Fitler* and *Isaac Johnson*, shewed for cause, that on the day fixed for the appointment of treasurer, all the commissioners attended at their office, and all voted for different persons. After several unsuccessful efforts to produce unanimity, *Robert Taylor*, the third commissioner, proposed to

Johnson to draw cuts, to determine which of their two candidates should be appointed, and with some hesitation *Johnson* acceded. *Taylor* drew the longest paper, and *Browne*, the candidate of *Taylor*, was chosen; *Fitler* at the same time declining any part in the transaction, but adhering to his own candidate. The amount of security to be given by the treasurer was then settled in a conference by all the commissioners, and a notice of the appointment was signed by *Taylor* and *Johnson*, but not delivered, though it was made known to *Browne*. On the next day two of the commissioners being ashamed of what had occurred, and *Johnson* regretting his agency in it, proposed, and proceeded to, a new appointment, when *Fitler* and *Johnson* voted for *Daniel Groves*, and *Taylor*, though he put in no ballot, still declared himself for *Browne*.

The return of *Taylor* differed from the other in two particulars. He alleged, 1, That he never consented to the second election, but protested against it, and 2, That the drawing of lots was not for the purpose of *electing*, but to decide which of the two should *give up his man*.

J. R. Ingersoll for *Liberty Browne*, argued in favour of the first appointment, and against the authority of the commissioners to make a second; and he referred to the act of the 6th of *March* 1812, 5 *Smith's Laws* 310, to shew that *Groves*, who was a member of the state legislature, was ineligible.

Ingersoll contra, contended that the first appointment was illegal and void, that it was highly proper to make another, and that whether *Groves* was capable of taking the office, was immaterial upon this rule.

TILGHMAN C. J. The Court are of opinion that this is an extremely clear case. It is at the same time a very important one, because it materially concerns the purity of elections or appointments; for the name is in this case of no moment. We should be sorry if the public supposed we could have any doubt upon the subject. The law intended that the appointment of county treasurer should be made by the judgment of the commissioners, and it has been made by chance;

1813.

COMMONWEALTH v. COUNTY COMMISSIONERS.

for if the agreement was that chance should decide which of two candidates should be withdrawn, chance was to decide who should be the treasurer. If a jury were to settle their verdict by drawing lots, the Court, if they knew it, would set it aside; and the jury might be punished for their misconduct. We think the same of an appointment by the commissioners; and perhaps they would be liable to indictment for so improper an exercise of their official power. We therefore approve of the commissioners who reflected, and repented, and proceeded to a new appointment. Whether Mr. *Groves* is eligible to the office, it is not material at present to say; but we are very clear in refusing the *mandamus*.

PER CURIAM. Rule discharged.

The Commonwealth *against* The County Commissioners.

Philadelphia, Monday, July 12.

5b 536
1sr 195
1ws 461
7 44

An act of the legislature directing the county commissioners to draw an order for the amount of a schoolmaster's bill, for educating poor children, *if they approve thereof*, invests them with the power of approving or disapproving; and if they *disapprove*, though for bad reasons, this Court cannot compel them by *mandamus* to draw the order.

IN this case a rule was granted upon the commissioners of *Philadelphia* county, to shew cause why a *mandamus* should not issue, commanding them to draw an order on the county treasurer, for 66 dollars 17 cents, the amount of *John Poor's* bill for schooling poor children, according to the act of the 4th of *April* 1809.

The first section of that act, makes it the duty of the assessors to receive from parents, the names of all children between the ages of five and twelve, residing in their township, and whose parents are unable to pay for their schooling; a list of which, after adjustment by the commissioners, is to be transmitted to the assessor, requiring him to inform the parents of the children therein mentioned, that they are at liberty to send them to the most convenient school, free of expense.

The second section directs the assessor to send a list of the names to the teachers of schools within his township &c. "whose *duty* it shall be to teach all such children as may "come to their schools, in the same manner as other children

shall be taught." It requires the teachers to keep a day book, and to enter in it the number of days each child shall be taught, and the amount of stationary furnished for the use of the child, "from which book he shall make out his account against the "county, on oath or affirmation, agreeably to the usual rates "of charging for tuition in such school, subject to the exa- "mination and revision of the trustees of the school where "there are any; but when there are no trustees, to three "reputable subscribers to the school; which account, after "being so examined or revised, he shall present to the "county commissioners, who, *if they approve thereof*, shall "draw their order on the county treasurer for the amount, "which he is hereby authorised and directed to pay out of "any monies in the treasury." 5 *Smith's Laws* 73.

The commissioners shewed for cause, among other things, that the act of assembly did not require them to draw an order, unless they approved of the account, but in this instance, they disapproved of it.

Sergeant and *Condy* for *John Poor*, urged the impropriety of such a construction, since it was the *duty* of the teacher to receive and educate the children. The approving ought to be considered as a ministerial act, as much so as passing any account, or drawing the order; otherwise, though the master was bound to teach, the commissioners might, for any or no reason, refuse to pay.

Ingersoll contra, said the commissioners had a deliberative power; and however inconvenient, the Court could not compel them to exercise their judgment in a particular way.

TILGHMAN C. J. The law has vested the commissioners with the power of approving or disapproving of the account, and we cannot take it away from them. The act is defective in not pointing out some mode of decision, in case of a difference of opinion between the master and the commissioners. I take it for granted, that upon this defect being made known, the legislature will remedy it by a new act. But as in this instance the commissioners have *disapproved* of the account, we cannot order a *mandamus*.

PER CURIAM. Rule discharged.

1813.

Philadelphia, Monday, July 12.

Cranston and others *against* The Philadelphia Insurance Company.

An agent who effects insurance for his principal, and becomes answerable for the premium, has a lien upon the policy, so long as he retains it; but if he delivers it up, his lien is gone; and although the underwriters are intitled to deduct the premium, if unpaid, from the loss, yet if paid by the agent, he has no equity to stand in their place, and to claim payment out of the sum due for the loss.

THIS was a *scire facias* against the defendants, as garnishees of *Nicholas Duff*, in which a case was stated for the opinion of the Court, in substance as follows:

On the 20th of *September* 1802, *Nicholas Duff* as principal, and *George Barnwell*, as surety, entered into a bond at the custom house of *New York*, for duties, amounting to 596 dollars 73 cents, payable in six months, which *Barnwell* paid on the 10th of *May* 1803, with interest, making 601 dollars 68 cents.

Duff, being owner of the brig *Betsy*, chartered her for a voyage from *New York* to cape *François*. The vessel sailed on the 25th of *September* 1803, to bring home a cargo, but returned to *New York* on the 5th of *December* 1803, without earning freight. In the month of *September* 1803, *Duff* agreed to effect insurance on the *Betsey* and her freight upon the above voyage, and to assign the policies to *Barnwell* as a security for the payment of the above debt.

After this agreement, *Duff* directed the plaintiffs to effect insurance on the *Betsy* and her freight in *Philadelphia*. The insurance was accordingly effected in the names of the plaintiffs on the 21st of *October* 1803, and the plaintiffs gave their note for the premium of both policies, amounting to 372 dollars, payable at four months, which note they paid to the defendants on the 25th of *February* 1804. One of the plaintiffs in *November* 1803 forwarded the policies to another in in *New York*, who delivered them to *Duff* about the 7th of *December* 1803. On the 12th of *December* 1803, *Barnwell* sent the policy on freight indorsed in blank by *Duff*, to *W. M'Clure* and *Co.*, with other documents, and directed those gentlemen to demand payment as for a total loss, which was accordingly done on the 13th of *December* 1803.

Duff became insolvent, applied for the benefit of the insolvent laws, and made a general assignment of his property about the 6th of *January* 1804.

The plaintiffs issued a foreign attachment against *Duff*, for the said debt, on the 9th of *January* 1804, which was served the same day on the defendants; and on executing a

writ of inquiry, the verdict found due to them 447 dollars 12 cents, on the 25th of *July* 1807.

The questions submitted, were, 1. Whether there was legal evidence of the debts due from *Duff* to *Barnwell*, and *Jones* and *Clinch*, or either of them, and of a *bona fide* assignment of the policy? (This was wholly a question of fact, depending on documents exhibited, which embraced the case of *Jones* and *Clinch* as well as *Barnwell*, but which are of no importance.) 2. Whether the plaintiffs were intitled in law or equity to be repaid the premium out of the fund in the hands of the defendants?

If the plaintiffs were entitled to recover, the Court were to fix the amount; if not, then judgment to be for the defendants.

Dallas for the plaintiffs, argued in support of their claim on the following grounds. 1. Because the plaintiffs had an equitable lien on the fund in the defendants' hands, which *Duff's* assignment to *Barnwell* could not discharge; their money having produced the fund, and *Barnwell* having no equity to take the fruit, without paying the cost of it. 2. Because the policy provided, that in case of loss, the premium should be deducted, if not previously paid; and the plaintiffs being the sureties of *Duff*, and having paid the note to the defendants, were intitled in equity to the security which the defendants had under the agreement in the policy, according to *Miller* v. *Ord* (*a*). The defendants being intitled to deduct both premiums from the loss on the freight policy, the plaintiffs had an equity to the same extent. 3. Because it appeared from the dates that there was an agreement in *September* 1803, between *Duff* and *Barnwell*, that *Duff* should effect insurance, and assign the policy; and the order being given after, and in pursuance of, that agreement, the plaintiffs must be considered as agents of *Barnwell*, though *Duff's* name was used, *Barnwell* being the party in interest; and therefore they had the same equity against *Barnwell* as they could have had against *Duff*.

Rawle for the defendants, denied the right of the plaintiffs: 1. Because this being a foreign attachment, they could

(*a*) 2 *Binn.* 382.

1813.

CRANSTON v. PHILADELPHIA INS. COMPANY

recover no more than was *Duff's* on the 9th of *January* 1804, prior to which time he had not only assigned to *Barnwell*, but to general assignees; and further at the date of the attachment, nothing was due to them, as they had not then paid the note. 2. Because they had neither lien nor equity. As to lien, they surrendered it, by giving up the policy, and trusting *Duff* personally. As to equity, they could have none against *Barnwell*, who was a *bona fide* assignee without notice, and never in any way pledged himself for the premium, or induced the plaintiffs to trust *Duff*. Nor could they claim to take the place of the defendants as to the premium, because the premium being paid, the defendants were not intitled to deduct any thing. The plaintiffs by their foreign attachment came in as representing *Duff*, and not under any right which they had individually in the money due by the defendants.

TILGHMAN C. J. Two questions are submitted to the Court on the case stated. 1st, Whether there is legal evidence of debts due from *Duff* to *Barnwell*, and *Jones* and *Clinch*, or either of them, and a *bona fide* assignment of the policy. 2d, Whether the plaintiffs are intitled in law or equity, to be repaid the premiums out of the funds in the hands of the defendants?

1. Upon an examination of the depositions and documents exhibited in the cause, I am of opinion that there is legal evidence of debts due from *Duff* to *Barnwell*, and to *Jones* and *Clinch*, and also of a *bona fide* assignment of the policy.

2. It appears that the plaintiffs procured insurances to be effected on the brig *Betsey* and her freight, as the agents of *Duff*, and knew nothing of *Barnwell* in the business. They passed their own note for the premiums of insurance, for which they undoubtedly had a lien on the policies as long as they retained them. But having given them up, they gave up their lien; because, although the insurances were made in their names, yet being for the benefit of *Duff*, it was competent to *Duff* to support actions against the insurers in his own name. Thus stands the case at law, and it is the same in equity, because there can be no equity against the assignees of the policies, who are purchasers for a valuable consideration without notice of any interfering claim. But it is said,

that the defendants have a right to deduct the amount of the premiums before they pay the loss, by the express terms of the policies, and that the plaintiffs who have paid the premium have a right to put themselves in the place of the defendants, and deduct their amount against the assignees of the policy. The plaintiffs are in a hard situation, but I am afraid it is too late to resort to a remedy of this kind; because the premiums being paid, there is nothing to deduct, and the giving up of the policies, the payment of the note for the premiums, and the prosecuting of an attachment, being all the acts of the plaintiffs, they must abide by the consequences. After all, their case is not uncommon; they trusted to their friend *Duff*, and gave up the staff which they held in their own hands. I can see no principle of law or equity by which the fund in the hands of the defendants can be made liable to the plaintiffs' demand, and am therefore of opinion that judgment should be entered for the defendants.

YEATES J. and BRACKENRIDGE J. concurred.

Judgment for defendants.

FISHER and another administrators of FISHER *against* EVANS.

IN ERROR.

Philadelphia, Monday, July 12.

THIS was a writ of error to the District Court of the city and county of *Philadelphia*.

The holder of a bill must use reasonable diligence to ascertain the residence of the drawer, for the purpose of giving him notice of its dishonour. It is not sufficient to look for the drawer at the place where the bill is dated, if his residence is elsewhere. Notice left with the family of a seafaring man, during his absence at sea, is sufficient.

It was an action against the defendant as the drawer of a bill of exchange, dated at *Savannah* the 26th of *April* 1809, and drawn upon *Samuel Church* of *Philadelphia*, in favour of *Christian H. Fisher*, the plaintiffs' intestate, at five days sight, for 342 dollars 85 cents. The bill was presented on the 9th of *May* following, and noted for nonacceptance; and on the 17th of *May* was protested for nonpayment.

It appeared upon the trial, that the drawer, *Evans*, was a sea captain, who was frequently absent from his family, in the prosecution of his business; but that his general residence was in *Philadelphia*, where he had a house in which his wife and family lived before and at the time the bill was dis-

1813.

FISHER v. EVANS.

honoured. The payee lived in *Savannah*. When the bill was protested, it was sent to *Savannah*, at which time the defendant was absent from that place; but no notice was given to the drawer, nor was any inquiry made for his residence, although the payee knew that he did not reside in *Savannah*. The drawee was indebted to the drawer when the bill was dishonoured, and he afterwards failed.

The counsel of the plaintiff requested the Court to charge the jury, that because the bill was dated at *Savannah*, it was not necessary for the holder to look for the drawer elsewhere; and not being there, notice was dispensed with. The Court on the contrary directed the jury, that the holder was bound to use reasonable diligence to find the drawer, and to give him notice. The plaintiff took a bill of exceptions.

Shoemaker for the plaintiff in error. The place where the bill is drawn, must be taken to be the residence of the drawer. He asserts it by the date of his bill. He makes that the place, by the law of which damages are to be regulated, *Slacum* v. *Pomery* (*a*), and where the holder is to resort in case the bill is dishonoured.

J. S. Smith for the defendant in error. The only rule upon the subject is, that the holder must use due diligence to find the drawer or indorser, for the purpose of giving him notice. It is impossible to suppose that the date proves the residence, or circumscribes the inquiries of the holder, particularly in a case where he knows the fact to be otherwise. The holder is not bound to follow the drawer round the world. He may inquire for his residence, and if his diligence is reasonable, and he does not find it, it is sufficient; or if he finds his family, he may leave notice there, though the holder is absent; but he must use reasonable diligence, without regard to the place where the bill is dated. *Muilman* v. *D'Eguino* (*b*), *Heylin* v. *Adamson* (*c*), *Chitty on Bills* 167, (181), *Cromwell* v. *Hynson* (*d*), *Bateman* v. *Joseph* (*e*), *Chapman* v. *Lipscombe* (*f*).

TILGHMAN C. J. I can find no such principle as that for which the plaintiff in error contends, that the place where

(*a*) 6 *Cranch.* 224. (*c*) 2 *Burr.* 669. (*e*) 2 *Campb.* 461.
(*b*) 2 *H. Black.* 569. (*d*) 2 *Esp.* 511. (*f*) 1 *Johns.* 294.

1813.

FISHER v. EVANS.

the bill is drawn must be taken to be the residence of the drawer. The rule was rightly given by the District Court, "that reasonable diligence must be used to give notice to "the person intitled to receive notice." Where a man has a counting house, or a known place of doing business, it is sufficient if notice is given there. In the present instance, the drawer was with his vessel at *Savannah*, when he drew the bill, and the payee must have known that he did not reside there. The proper place to have given notice, would have been at his house in *Philadelphia*, where his wife and family were. For if he himself had been at sea, it would not be necessary to follow him. The case of *Cromwell* v. *Hinson*, 2 *Esp. Rep.* 511, resembles the one before us more than any which has been cited. It was an action against the indorser of a bill drawn upon *London*, dated and indorsed at *Jamaica*. The indorser was a sea captain who kept a house near *London*, where his wife and family resided, but he himself was generally at sea. It was held that notice to his wife in his absence was sufficient. In 1 *Johns.* 294, *Chapman* v. *Lipscombe* &c., the bill was drawn and dated at *New York*, and payable at *New York*. The drawers resided at *Petersburg* in *Virginia;* but that was unknown to the holder, who, on the protest of the bill, having made inquiry for the drawers, and received information that they resided at *Norfolk*, in *Virginia*, put two letters in the post office, one addressed to the drawers at *New York*, and another at *Norfolk*. This was held to be *reasonable diligence;* but it was not insinuated that it would have been reasonable, if without making inquiry as to the actual residence, the letter had been put into the office addressed to the drawers at *New York*. We are satisfied that the law was properly laid down by the President of the District Court, and therefore the judgment should be *affirmed*.

YEATES J. gave no opinion, having been prevented by sickness from sitting during the argument.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed.

1813.

Philadelphia, Monday, July 12.

Ferguson and another *against* The Phœnix Insurance Company.

5b 544
1s 294

THIS was an action of covenant upon a policy for 3200 dollars, dated the 2d of *November* 1807, on goods by the ship *Logan*, *Myrick* master, at and from *New York* to *Amsterdam*, "with liberty, in case of being turned off on account of blockade, to proceed *to a neighbouring port.*" Premium ten per cent., to return two, in case of safe arrival.

Goods were insured on board the ship *Logan* "at and "from *New* "*York* to *Am-* "*sterdam*, with "liberty, in case "of being "turned off on "account "of blockade, "to proceed *to* "*a neighbouring* "*port.*" On the voyage she was boarded by a *British* privateer, and her papers endorsed "warned not to "enter or at- "tempt to enter "an enemy's "port;" in consequence of which she proceeded to *Cowes*, where she arrived the 28th of *December* 1807. She there paid duties, and took a license for *Amsterdam*, to continue in force four months from the 30th of *December* 1807. On the 13th of *February* 1808, when about to depart, she was detained by a *British* ship of war, and libelled in the admiralty. Restitution was obtained on the 23d of *March*, and on the 18th of *April* she sailed with a view of prosecuting her voyage to *Amsterdam*, but was again captured by a *British* cruizer on the 3d of *May*, sent to *Yarmouth Roads*, and a second time libelled. She was restored on the 21st of *June*; but her licence having expired, and intelligence having been received in *England* that the *French* and *Dutch* decrees were rigidly enforced on the continent, the captain proceeded to *London*, and there discharged his cargo.

At the trial of the cause before *Yeates* J. at a *Nisi Prius*, in *January* last, the plaintiffs, having opened their case to the jury entirely from written and printed documents, the defendants demurred; and on this demurrer it came now before the Court.

The material facts were these: The *Logan* sailed from *New York* upon the voyage insured, on the 31st of *October* 1807, having on board *Havanna* sugars belonging to the plaintiffs, to an amount equal to the sum in the policy. On the 25th of *December*, she was boarded off *Scilly* by the *British* private ship of war *Minerva*, and her papers indorsed, "warned not to enter, or attempt to enter, an enemy's port." The captain of the privateer at the same time read to the captain of the *Logan*, the *British* orders in council; in consequence of which the latter proceeded for advice to *England*, and arrived at *Cowes* on the 28th of *December*. Finding from the *English* newspapers, that all neutral ships and cargoes coming from *England*, were liable to confiscation by the *French* decrees, he went to *London;* but learning nothing more than the existence of the decrees, he returned to his ship at *Cowes*, to remain there for information from *Holland*, which was daily expected, as to the operation of those decrees in that country. On the 22d of *January* 1808, he received advice from his owners' correspondents, that there

Held, that *London* was a *neighbouring port*, within the policy, and that the assured had no right to abandon.

was no obstruction to *American* ships entering *Holland;* and having previously paid duties, and taken a license for *Amsterdam*, to continue in force for four months from the 30th of *December* 1807, he determined to proceed on his voyage to *Amsterdam*. But, as he stated in one of his protests, *after waiting at Cowes for a favourable opportunity to proceed with his ship for Amsterdam*, and being about to depart, he was, on the 13th of *February*, seized by an officer and boat's crew from the *British* ship of war *Pelter*, and the ship's papers taken and sent to *Portsmouth*. The ship and cargo were libelled in the admiralty, and the captain attended in *London* until the 23d of *March*, when they were restored. He then proceeded to *Portsmouth*, where the ship had in the mean time been carried, and obtained possession on the 1st of *April*. Bad weather and various accidents detained him until the 18th of *April*, when he weighed anchor, and proceeded to the *Mother Bank* to wait for convoy to the *Downs*. He obtained it on the 23d, and on the next day came to in *Dover Roads*, the wind being ahead. On the 1st of *May* he proceeded for *Amsterdam*, but on the third was boarded by the *Zenobia* sloop of war, and sent, under the charge of a prize master and crew, to *Yarmouth Roads*. The ship and cargo were a second time libelled in the admiralty, and restored on the 21st of *June;* but about this time, information being received that the decrees of the *French* and *Dutch* governments, prohibiting the entry into their ports, of any vessel coming from *England*, were rigorously enforced in *Holland*,—that several vessels had been seized there, and others ordered away, he determined to take his ship to *London*, and land her cargo, which he accordingly did a few days afterwards. On the 19th of *October*, the plaintiffs received a letter from *Gruffle* and brother, their agents in *London*, dated the 8th of *September*, informing of the unlading of the cargo, and on the next day they abandoned.

The case was very ably argued by *Hallowell* and *Rawle* for the defendants, and by *Hare* and *Meredith* contra; but the Court having expressed no opinion upon the point that was particularly pressed by the counsel, it becomes unnecessary to give more than the heads of the argument on both sides.

1813.

FERGUSON v. PHOENIX INS. COMPANY

The *defendant's counsel* objected to a recovery as for a total loss, which was the only point in dispute,

1. In consequence of the delay at *Cowes*, from the 22d of *January* to the 13th of *February*, without any cause being assigned. This, they said, was a deviation which discharged the underwriters. *Park* 295. 310., 1 *Condy's Marsh.* 199, 200.

2. Because, after the expiration of her license, to wit, on the first of *May* 1808, the ship sailed for *Amsterdam*, a blockaded port, contrary to her duty to the belligerent who imposed it, and in violation of the policy, as she had been previously turned off. This was an increase of the risk, which discharged the underwriters.

3. Because, having been turned off from *Amsterdam* in consequence of blockade, the clause in the policy came into effect, by which it was made her duty to go to a neighbouring port; and *London* being selected as a port of discharge, was a neighbouring port, within the policy, where the voyage regularly terminated. If not a neighbouring port, then it was a deviation to go there; and none of the *French* or *Dutch* decrees, or *British* orders, justified the captain in thus deviating and breaking up the voyage. It was the consequence of apprehension merely. On this point were cited, *Richardson* v. *Maine Ins. Co.* (*a*), *Radcliff* v. *The United Insurance Company* (*b*), *Snowden* v. *Phœnix Insurance Company* (*c*), *Savage* v. *Pleasants* (*d*) *Lee* v. *Gray* (*e*), *Hadkinson* v. *Robinson* (*f*), *Lubbock* v. *Rowcroft* (*g*), *Blackenhagen* v. *London Assurance Company* (*h*).

4. Because the abandonment on the 19th of *October* was too late, the unlading of the cargo having taken place about the beginning of *July;* and the plaintiffs were responsible as much for the delay of their agents, in not sooner communicating that fact to them, as they would have been for their own delay in not communicating it immediately to the underwriters. Unless an abandonment is accepted, the agency is at the risk of the assured.

The *plaintiffs' counsel* answered

1. That there was no deviation by delay at *Cowes*, because the master swore that he waited for a *favourable opportunity*

(*a*) 6 *Mass.* 110.
(*b*) 7 *Johns* 38. 45. 9 *Johns.* 277.
(*c*) 3 *Binn.* 466.
(*d*) *Supra p.* 403
(*e*) 7 *Mass.* 349.
(*f*) 3 *Bos. & Pul.* 388.
(*g*) 5 *Esp.* 50.
(*h*) 1 *Campb.* 454.

to proceed, from which the jury might have inferred, and the Court must infer, that he seized the first favourable opportunity, and that unfavourable occurrences operating on the ship, such as the state of the winds or weather, prevented him from proceeding sooner.

2. That the ship sailed from *Cowes* for *Amsterdam* before her license expired, though taken afterwards; and that she was still under the protection of that license, in consequence of her previous detention being caused by the government that gave it. Nothing but this circumstance could have led to a restitution of ship and cargo, by the admiralty.

3. That *London* was not a *neighbouring* port within the policy; that phrase being used in a geographical sense, and with reference to the cargo, which was intended for a market on the continent. That if it was a neighbouring port, it was in the option of the plaintiffs not to use it, that clause being inserted, not to compel them to go there, but to protect them if they chose to go there, instead of breaking up the voyage and abandoning; and that the master, by reason of the *Dutch* decrees, and *British* orders, and the moral certainty of capture and confiscation in case he proceeded, was justified in breaking up the voyage, and landing the cargo in *England*. That this was the direct consequence of a legal and moral restraint, as effectual as if it had been actual, which was insured against by the policy, and entitled the plaintiffs to abandon. *Tenet* v. *Phœnix Insurance Company* (*a*), 1 *Emerigon* 507, 508. 510, 511. 543, 544., 1 *Valin lib.* 3. *tit.* 3. *Art.* 15. *p.* 656, 657., *Pothier*, *Charte Partie* 79., *Schmidt* v. *United Insurance Company* (*b*). *Craig* v. *United Insurance Company* (*c*), *Marine Insurance Company* v. *Tucker* (*d*), *King* v. *Delaware Insurance Company* (*e*), *Barker* v. *Blakes* (*f*), *Snowden* v. *Phœnix Insurance Company* (*g*).

4. That the abandonment was made in due time, being offered as soon as the plaintiffs knew of the loss; and that the negligence of agents abroad, did not affect the assured, because, by abandoning as soon as the loss was known, they transferred the property to the underwriters from the time of the loss, and placed the agency at their risk. Whether the persons having charge of property after a loss, are the agents

(*a*) 7 *Johns.* 363.
(*b*) 1 *Johns.* 249.
(*c*) 6 *Johns.* 226.
(*d*) 3 *Cranch* 396.
(*e*) 6 *Cranch* 71.
(*f*) 9 *East* 283.
(*g*) 3 *Binn.* 469.

1813.

FERGUSON v. PHOENIX INS. COMPANY

of the assured, or the underwriters, depends on the former abandoning or not when the loss is known. If an abandonment is made, they are the agents of the underwriters.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

Serious objections have been made to the captain's conduct in remaining so long at *Cowes*, after he had obtained a license to proceed to *Amsterdam*, and also to the conduct of the plaintiffs' agents in *London*, in suffering so long a time to elapse before information was given of the discharge of the cargo. I shall give no opinion on these objections, nor on the point raised by the plaintiffs' counsel, and very well argued, touching the general right to abandon, in consequence of the situation in which the ship was placed under the *British* orders in council, and the decrees of *France* and *Holland*. It appears to me, that the case may be more properly decided under the special agreement in the policy, by which the ship was permitted to proceed to a neighbouring port, in case of being turned off on account of blockade. This agreement is entitled to a liberal construction, having been intended to remove the embarrassments arising from a blockaded port. *A neighbouring port* is an expression not very definite. I see nothing in it, however, which is confined to a port on the *continent;* and it would surely be unreasonable to give it that construction, if a port in the island of *Great Britain* should be nearer than any port unblockaded on the continent. So with regard to a *blockade*, it is immaterial whether it be *actual* or *on paper*, lawful or unlawful. The decrees of the emperor of *France* blockaded the whole island of *Great Britain*, and the *British* orders in council blockaded all that part of the continent held by *France* or her allies. In such a case what was to be done? It has not been denied, that the port of *London* was nearer to *Amsterdam* than any port on the continent, not blockaded by the *British* orders in council. *London* then, may be fairly said to be a *neighbouring port*, within the meaning of the policy, and had the ship been lost on her way to that port, the underwriters would have been responsible. The captain had a right to go to *London*, and did go there for the purpose of discharging the cargo. Had the ship been lost on the way, the goods would have been covered by the policy. The owners of the

goods, then, shall not be permitted in the first place to avail themselves of the policy, in order to get their property into port, and having arrived there, to consider the voyage as broken up, and throw the cargo on the underwriters.

Upon the whole of this case, it appears to me, that the voyage was completed according to the true intent of the policy. The assured, therefore, had no right to abandon.

YEATES J. was of the same opinion.

BRACKENRIDGE J. I continue to be of the opinion that I have heretofore expressed in other cases, that the indorsing papers, and ordering to proceed to a port in *England*, was a capture *sub modo;* that is according as the effect of it should turn out to be. It was such a restraint, and might occasion such detention, as to change the practicability of attaining a port of destination, and might break up the voyage. It did turn out to be the cause of an entry being prohibited at the port of destination, and of the voyage as to the main object being broken up; for I can have no idea that a port of *England*, was within the meaning of that clause in the policy, "with liberty, in case of being turned off on account of "blockade, to proceed to a neighbouring port." The nature of the cargo shews that it could not be a *British* port that was intended. Sugars, of which the cargo insured consisted, could not be discharged at a port in *England*, but for the purpose of transportation. A market there, or a sale for this purpose, could be no better, if not worse, from the duties to be paid, than at the port of departure. It was evidently a cargo for the continent, and a neighbouring must mean some port in the *vicinity* of *Amsterdam*, and upon the continent. It is apparent for another reason, that on the second of *November* 1807, the time the policy was underwritten, there was no *British* port blockaded, or could be blockaded actually; for no other belligerent power had the means of blockading actually, and the constructive blockade of the *Berlin* decree had been declared by the *French* government not to extend to vessels of the *United States*. And it was not until long after, viz. the 23d of *January* 1808, that even this constructive blockade, or prohibition of an entry, had been declared by the *Dutch* decree of *Lewis*, king of *Holland*. So that I do not consider the port of *London* finally attained, as coming within the meaning of the policy. It was

1813.

FERGUSON v. PHOENIX INS. COMPANY

attained, it is true, and the cargo discharged; but this was compulsory, and the effect of the *British* outrage upon the law of nations, in marking papers, and ordering to proceed to a *British* port in the first instance. All that happened afterwards was a struggle to escape from the effect of this; the complying by proceeding to a *British* port. For without so doing, there was no chance, or at least so little as to render it improbable that the vessel could escape, in which case an absolute capture and condemnation was unavoidable. The *British* cruisers, covering every wave in the channel, and on the coast of *England*, she was as perfectly guarded as if a prize master had been put on board. I do not, therefore, consider the proceeding to *Cowes* as a deviation, but a necessity imposed as an act of prudence on the part of the captain, by reason of the indorsing papers, and warning to proceed to a *British* port. And under the denomination of necessary prudence, I include the paying duties, taking license or convoy. But the delay at *Cowes* is in my way, and may make it a deviation. For the delay of a day might materially vary the effect of the license which had been obtained, the chance of convoy, or a more or less rigorous enforcement of the *French* belligerent decrees. A delay of three weeks did materially vary. The license expired before approaching *Amsterdam*, which occasioned the taking by the *Zenobia*. But suppose a cause of abandonment to have arisen, would not the captain be considered as from thence the agent of the insurers, or the agent of both insurer and insured, so that as to the delay, it will equally affect both, and not the insured only, so as to discharge the cause of abandonment? There is an equivocal language of this kind to be found in tract writers, and the reports of judicial decisions, of the captain or agent entrusted with the ship and cargo, being the agent of both. But it is language or dictum, if any where found, which I cannot comprehend. I consider him or them the agent of the insured only, not after a cause of abandonment has arisen, and until abandonment made, but even after abandonment, and until reasonable time and opportunity be given to the insurers to get actual possession of the property abandoned, and to become his own agent. A want of due diligence, therefore, or a want of due prudence, and unskilful management on the part of the insurers, will defeat the right of abandonment. I have not an opportunity of looking

into authorities on this head, and comparing them, but it is so clear a principle in all cases of agency, that I cannot doubt of it. Now applying this, I am not able to get over the unaccounted for delay of three weeks at *Cowes*, and for that reason, and for that only, am constrained to concur in deciding for the defendants. It is possible the captain, had he been examined as to this, or had he attended to it himself, in the several protests that he made, could have filled up this place, by shewing some necessity for the delay; but he has not done it, though he had it in his own hand, and could easily have raised a storm, or given adverse winds, or wanted convoy, or have invented some accident, but he has not ventured to do this, and I can make no other inference, but that he was amusing himself on shore, and taken up with the pleasures of the place. This, though spoken of by the counsel for the defendant as a minor point, appears to me the major in this case. I think less of the great point made, that the *British* arrest and the *French* interdict did not come under the head of restraint of princes. For I take them together, and between one and the other, certain it is that the voyage was defeated and the object of it broken up; and if not with a view to a possibility of such war risks, why the ten per cent. premium? On the other principal point made, I am also clear, that a neighbouring port must be construed a port in the vicinity of *Amsterdam*, and on the same side of the channel or sea, which the port of *London* was not; and as to abandonment within reasonable time, it is unnecessary to say, as I am constrained to be of opinion that the unaccounted for delay at *Cowes* discharged the cause of abandonment which had arisen, or might afterwards arise.

Judgment for a general average only, to be adjusted by the parties.

1813.

Philadelphia, Monday, July 12.

5b 552
8 31

GORDON *against* CORREY.

A ground land lord does not lose his lien for the rent due, by taking a bond and warrant of attorney for the arrears, and entering up judgment.

ISAAC W. Morris, by deed dated the 26th of *December* 1796, granted a lot of ground to the defendant, subject to a rent charge of 37 dollars 33 cents per annum. The deed contained the usual covenant for payment, and the reservation of a right to distrain, or to enter for non-payment. On the first of *January* 1805, he obtained from *Correy* a bond and warrant of attorney for 205 dollars 31 cents, arrears of ground rent, and entered up judgment on the 11th of *February* 1805.

On the 11th of *January* 1804, *Gordon* entered a judgment against the defendant, upon a bond and warrant dated the 10th of *January* 1804, on which the premises were sold by the sheriff.

The money, it was agreed by a case which stated the above facts, should be considered in court; and the question was, whether *Morris* had lost his right to a preference by taking the bond, and entering up judgment. If he had, the executors of the plaintiff, who was the oldest judgment creditor, were entitled to the money.

The question was argued upon a motion by *Morris* to take the money out of court, the parties to settle the amount, if the Court should think he was entitled, and *Armstrong*, the attorney of *Gordon's* executors, to pay it, he having the balance, after paying other incumbrances, in his hands.

Hallowell in support of the motion. The case is decided by *Bantleon* v. *Smith* (*a*); and it is not of the least importance to *Gordon's* executors, because as he purchased the property at sheriff's sale, if the proceeds of sale do not pay the arrears, the ground must.

Armstrong for the executors of *Gordon*. In *Bantleon* v. *Smith*, the landlord merely brought an action of covenant, which was one of his remedies. Here he voluntarily took a bond, which extinguished the arrears of rent. *Higgins's Case* (*b*). It is material to *Gordon's* executors, because if the

(*a*) 2 *Binn.* 146. (*b*) 6 *Co.* 45.

land pays, it does not pay interest on the judgment, but the simple arrears.

1813.

GORDON v. CORREY.

TILGHMAN C. J. The point on which this case turns, was decided by this Court in *Bantleon* v. *Smith*, 2 *Binn.* 146. Notwithstanding a bond and judgment, a debt still remains due on account of rent, to which the land is subject. The balance, therefore, in the hands of Mr. *Armstrong*, is to be applied, not to the payment of *Isaac W. Morris's* judgment, for that is younger than the plaintiff's judgment, but to the payment of the rent due to *Morris*.

YEATES J. Whether the motion made in behalf of the ground landlord in this case, that he should be allowed to take out of court the money paid in by the sheriff, should prevail or not, depends on the question, whether he has waived his paramount right as the grantor of the lands, by entering up a judgment subsequent to that, wherein the premises were sold by the sheriff.

The case of *Bantleon* v. *Smith*, 2 *Binn.* 146, establishes the doctrine, that where the ground landlord has brought an action of covenant for his rent, and obtained judgment thereon, it does not extinguish his right of rent. I can see no good ground of distinction between the two cases. If there is any difference, it would seem to be in favour of the present claimant, to whom a voluntary confession of judgment, not in an adverse suit, would appear to be intended as an additional security for his demand. At all events, I think the principle already settled must govern our decision here.

It appeared to me singular on the argument, that *Gordon*, (who was admitted to have purchased at the sheriff's sale,) or his personal representatives, should contest the present question. It is certainly more advantageous to them, to apply the monies arising from the sale, in payment of the arrears of the rent charge, than to pay the money over to others, and permit those arrears to remain an incumbrance on the house and lot of ground, which *Gordon* had thus purchased.

I am of opinion, that the motion made for *Isaac W. Morris*, to take the money out of court, should be granted.

BRACKENRIDGE J. concurred.

Motion allowed.

1813.

Philadelphia, Monday, July 12.

The Guardians of the Poor *against* GREENE.

IN ERROR.

5b 554
11s r409
12s r233

A clergyman, who *officiates* as such, is not bound to serve as a guardian of the poor, notwithstanding he so far attends to secular business as to keep a store for the sale of merchandize.

THIS was an action of debt in the Common Pleas of *Philadelphia* county, to recover from the defendant the penalty of sixty dollars, prescribed by the act of the 29th of *March* 1803, for refusing to take the oath of office of a guardian of the poor, for the township of the *Northern Liberties*, or to undertake the duties of that office.

The cause was decided below in favour of the defendant in error, upon a case, in the nature of a special verdict, which stated as follows:

The defendant was duly elected to serve as a guardian of the poor, in the month of *November* 1810, by virtue of the act of assembly of the 29th of *March* 1803; and refused to take the necessary oath for the faithful performance of the said office, within ten days after his election or appointment. He also refused to take upon himself the said office. He was duly ordained a deacon in the Methodist Episcopal church on the 6th of *May* 1787. He was duly appointed an elder of the said church on the 25th of *September* 1788, and from the time of his ordination till this day, has fulfilled all the duties required of him in his different stations, by the rules of the said church. On the day of his election, he acted as a local preacher of said church, and had, among others, the following duties assigned him by the stationed preacher, which he fulfilled. (The case then stated a variety of ecclesiastical duties performed by the defendant, between the 30th of *September* 1810, and the 15th of *January* 1811, in general recurring weekly.) He had a similar routine of duty assigned him after the expiration of the time in the before mentioned list stated, and has regularly had assigned to him since, duties which he has regularly fulfilled. He was a travelling preacher in the said congregation, from *May* 1783 until *June* 1800, about which time he married a lady who kept a dry good store, and obtained permission from the proper authority to locate. *Local* preachers of the Methodist Episcopal church, are not bound to travel abroad: they have no salary allowed them, except when they officiate as *stationed* preachers. They have not the pastoral charge of any particular

congregation, except in case of the sickness or absence of the stationed preacher, when called upon; and are considered as being subject to receive appointments from him, when to officiate and perform divine service. The defendant, by the rules of the said church, is authorised to assist, and usually has assisted, in the ordination of preachers, to perform the rites of baptism, marriage, and burial, and to administer the sacrament, which none but elders can do. Local preachers are obliged to attend class meetings. The bishops of the said church, and the stationed preachers, besides their travelling expenses, have eighty dollars allowed them as salary. The defendant for ten years before his election, kept a dry good store, and part of that time he kept two stores, to which his wife chiefly attended. Local preachers of the said church have heretofore been elected to serve as guardians of the poor, and have not objected to serving, but have taken upon themselves the execution of the said office; but no local preacher that has done this, was an elder.

The question arising from the foregoing facts is, whether the defendant is liable to the penalty prescribed by the 2d and 15th sections of the act of the 29th of *March* 1803.

Ewing for the plaintiffs in error. The act of 1803 provides for the election of *substantial house-keepers*, inhabitants of the city, district or township, and citizens of the state. It requires no other qualification in a guardian of the poor. It exempts none from the obligation of serving, who come within that description. The defendant being therefore within the plain words of the law, and the law containing no express exception in his favour, he is bound to serve, unless he establishes an implied exception in the clearest manner.

An implied exception in his favour, is negatived by an express exception in other laws, such as the militia law, by which ministers of religion of every denomination, are in terms exempted from military duty. *Purdon's Abr.* 368. If the legislature had entertained a similar purpose in relation to guardians of the poor, they would have introduced a similar exception.

Incompatibility of duties may be alleged. There is none between the duties of a guardian of the poor, and those of a clergyman. Though the office is temporal, it is in the highest degree charitable, and affords the largest field for the exercise

1813.

GUARDIANS of the POOR v. GREENE.

and display of the clerical virtues. It brings into notice the greatest number of objects, both for religious counsel, and pecuniary relief. Whatever may be the calls of some clergymen, the argument of incompatibility is peculiarly weak in this case, where the defendant has no cure of souls, is rarely called to officiate, except as the casual substitute of a stationed preacher, and is occupied with the concerns of trade, of all branches of business the most in collision with the duties of a clergyman. His own life is a complete answer to the argument of incompatibility.

The exemption of the clergy from the burden of temporal offices, is in *England* a fruit of the establishment. None at common law enjoy the privilege, but the clergy of the established church; and it has required the interposition of the legislature to relieve the dissenting clergy, who, until late time, sustained in common with the laity all temporal burdens. 1 *W.* & *M.* *c.* 18. *s.* 11, and 31 *Geo.* 3. *c.* 32. This privilege, which is a badge of political distinction, cannot exist here, where every thing like an establishment has been pointedly put down. Our law confers no privileges upon that body of men. Venerable as they are, it has been thought sufficient to remove from them all disabilities. They are capable of sustaining any office, and the converse should be true, that they are exempt from none, except where expressly exempted by law.

The obligation to serve as overseer of the poor, is peculiarly extensive, even in *England.* None but the established clergy, those privileged by statute, and those who are officers of the king, bound to attend his person, his courts, or some department of his government, are exempt. 1 *Botts' Poor Laws* 5, 6. A woman may be appointed if there is none other. 1 *Botts* 7. Courtesy usually passes over the clergy, and excuses them from serving as jurors, and even as guardians. But the question is now as to the right; and that is not supported either by common or statute law.

Allibone and *Tod* for the defendant. The words of the act, are, it is true, general; but this is the strongest argument for implied exceptions. According to the plaintiffs' doctrine, justices of the peace, officers of the state and federal governments, attornies at law, and even the judges of this Court, are liable to serve as guardians of the poor. Such can never have been the intention of the legislature, and such is not the

true construction of the act. On the contrary, the legislature must have intended exceptions, and it is for this Court to say which they are by the principles of the common law, or by our own usage since the first settlement of the state. If a privilege exists at common law, a statute must contain negative words to destroy it. *Jolliffe* v. *Langston* (*a*).

There is then an obvious incompatibility between the duties of a clergyman, and those of any temporal office, which is the foundation of a common law privilege to be exempt. A clergyman, says *Blackstone*, cannot be compelled to serve on a jury, nor can he be chosen to any temporal office, in regard of his own continual attendance on the sacred function. 1 *Black. Com.* 376. Lord *Coke* says, that "the common "law, to the intent that ecclesiastical persons might the better "discharge their duty in celebration of divine service, and "not be entangled with temporal business, hath provided, "that if any of them be chosen to any temporal office, he "may have his writ *de clerico* &c." 1 *Inst.* 96. *a.*, 2 *Inst.* 3, 4. Dr. *Lee* was discharged from the office of *expenditor* for *Rumney Marsh*, in consequence of being archdeacon of *Rochester*, though his predecessors for many years had executed the office. 1 *Mod.* 282., 1 *Ventr.* 105. *S. C.* And other cases are express to the same point. *Vicar of Dartford's case* (*b*), *Chambers's case* (*c*). In an anonymous case in 6 *Mod.* 140, a clergyman was held to be privileged from the office of overseer of the poor, though he appeared to have no cure of souls.

If this privilege was confined to the clergy of the established church, which does not any where distinctly appear, it was not in consequence of any reason growing out of the establishment, but because the law did not recognise the clergy of any other denomination. In this country all denominations are recognised; all therefore should be considered as privileged in the same degree, as the favoured denomination in *England*.

Our own usage has admitted the privilege. Clergymen have never been called to serve as jurors, or in any temporal office against their will; and if any argument is derived from the circumstance that local preachers of the Methodist church have served as overseers, it is answered by the fact that elders have not.

(*a*) 1 *Lord Ray.* 342. (*b*) 2 *Stra.* 1107. (*c*) *Andrews* 353.

1813.

GUARDIANS of the POOR v. GREENE.

The defendant is in the full exercise of his clerical functions, according to the discipline of his church. That he attends to secular business through the agency of his wife, to procure a livelihood which his church does not afford him, is of no moment. Clergymen are frequently engaged in the instruction of youth. When this is voluntary, they can so regulate the duty, as to make it compatible with the higher duties of religion; but they are no longer at liberty to attend to the service of God, if they are bound to discharge a temporal office. This is the true ground of privilege, and one from which no well regulated society can wish to remove this important and venerable body of men.

TILGHMAN C. J. The question in this case is, whether the defendant in error, an ordained deacon, and an elder in the Methodist Episcopal church, is subject to the penalties of the act of the 29th of *March* 1803, for not serving in the office of a guardian of the poor, to which he was elected. There is no doubt but the commonwealth has a right to insist on the service of every member of the community, in any capacity in which it may be thought proper to exact it. But unless the intention is clearly expressed, it is not to be supposed, that services were meant to be exacted contrary to ancient usage, and involving incompatible duties. Every country has its common law. Ours is composed partly of the common law of *England*, and partly of our own usages. When our ancestors emigrated from *England*, they took with them such of the *English* principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the *English* law would be suitable to this country. By degrees, as circumstances demanded, we adopted the *English* usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own, founded in general on the *English* constitution, but not without considerable variations. In nothing was this variation greater than on the subject of religious establishments. The minds of *William Penn* and his followers would have revolted at the idea of an established church. *Liberty to all, but preference to none;* this has been our principle, and this our practice. But although we have had no established church, yet we have not been want-

ing in that respect, nor niggards of those privileges, which seem proper for the clergy of *all religious denominations*. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways, or of the poor, jurors, or others of a similar nature. Not that this exemption is founded on any act of assembly, but on an universal tacit consent. In the nature of things, it seems fit, that those persons who devote their lives to the service of God, and the religious instruction of their brethren, should be freed from the burthen of temporal offices, which would but distract their attention, and may be better filled by others. This sentiment is not peculiar to us. We find it in the *English* common law, though from motives of policy restricted perhaps to the established church. It is said by Lord *Coke*, in 2 *Inst.* 3, 4, to be a principle of the *ancient common law*, that the clergy shall not be implicated in secular business; and that if a man holding lands, by virtue of which he is bound to serve in temporal offices, become an *ecclesiastical person in holy orders*, he ought not to be elected to such office, and if he is, he may have the king's writ for his discharge. And in the *Register of Writs* 187, and *Fitz. N. B.* 175, the form of the writ is to be found. It appears then, that what the *English* have applied to their *established church*, we in conformity to our principles of religious liberty, have granted to the clergy of *all professions*. Nor is the privilege confined to common law offices. It is proved by the cases cited in the argument to which I refer, that the same construction has been held with respect to offices created by statute, in which there is no express exemption of the clergy. The rule of construction is this: unless the clergy are mentioned, it shall not be supposed that it was intended to include them. If we apply this rule to the act of assembly in question, the case will be easily decided. The act directs that a certain number of *substantial householders* shall be elected, but is altogether silent as to any exemptions. We must presume then, that it was not intended to include persons who, from ancient usage, were exempt from this kind of service, or who held other offices incompatible with the duty of a guardian of the poor. Without such presumption, how is it, that judges and attorneys at law are privileged? They have no express privilege by that or any other law, but in

1813.

GUARDIANS of the POOR v. GREENE.

sound construction they are excepted from the general words of the act. It has been contended, however, that granting this to be the true construction of the law, yet Mr. *Greene* is subject to the penalty, because he has forfeited his privilege. It is true, that every man may waive his privilege. We have instances in this state of ordained clergymen holding the offices of register of wills and prothonotary of the Court of Common Pleas, and in *England* they very commonly execute the office of justice of the peace. But how has Mr. *Greene* waived his privilege? He has become what is called in the Methodist church, *a local* or *located minister*, (one that does not travel), and he has kept a shop for mercantile business, which has been principally managed by his wife; but he has constantly *officiated* as a minister of the gospel in this city. His services indeed have not lately been so weighty as formerly, but he is subject to an increase of them at any moment, according to the discipline of his church. I am not for measuring too nicely the length and breadth of clerical duties and employments. While a man is an *acting minister*, it is sufficient to entitle him to the privileges of his order. Too minute a scrutiny on this point, would involve us in unnecessary and unprofitable difficulties. Different societies require from their ministers different degrees of service. In all it has been deemed decent and proper, that the clergy should devote part of their time to the instruction of youth in seminaries of learning, and in *some* they are permitted to pursue any business to which they are inclined, without any restriction. I would leave it to each society to regulate its own clergy; and until the legislature shall think proper to express its will to the contrary, I shall be for extending equal privilege to the mitred bishop and the unadorned *friend*.

My opinion is, that the Court of Common Pleas were right in their construction of the act of assembly, and therefore their judgment should be affirmed.

YEATES J. The words of the second section of the act of the 29th of *March* 1803, though general in their nature, must be restrained by a reasonable construction. Although the guardians of the poor are to be elected out of substantial housekeepers, who are citizens, I should suppose that it was not the intention of the law, that a woman should be elected, while there were other fit persons to fill the office.

1813.

GUARDIANS of the POOR v. GREENE.

At common law, I apprehend no persons in holy orders could be compelled to serve in a temporal office, upon the ground that their time should be devoted to the sacred duties of their station, and their minds abstracted from secular affairs, as far as is possible. An entire abstraction cannot be reasonably expected. Means must be procured for the support of a family; and frequently both here and in *Great Britain*, the cultivation of land and instruction of youth are recurred to for that purpose. In this point of view I regard the defendant's keeping a dry good store by his wife or a clerk. If independently of this circumstance, he would be exempted from service in this office, the pursuing of such an occupation would not abridge that right.

But it has been urged by the plaintiffs in error, that the privilege contended for by the defendant, exists by the common law of *England* only in the cases of clergymen of the established church, and that the privilege as to other ministers of religion is granted by statutes. It is true that by *art.* 9. *sec.* 3., of our constitution, it is declared, "that no preference "shall ever be given by law to any religious establishments "or modes of worship." All religious societies are placed on the same broad equal ground, and the only test of office is the acknowledgment of the being of a God, and a future state of rewards and punishments. But if the exemption of clergymen of the established church in *England* from the burden of temporal offices, is founded on the solid principles of moral fitness, decency and public policy, is it not more correct to assert, that ministers of religion of all denominations amongst us should participate in that privilege, than that it should wholly cease to exist? It is of great importance to the peace and good order of society, that the character of public exhorters of our religious duties, should be held in the highest respect and veneration. Their influence on the conduct of the people at large will be impaired by compelling them to serve as guardians of the poor, constables, and other petty officers.

The uniform opinion which has prevailed as to clergymen in general not being compellable to serve as jurors, fortifies the defendant's pretensions in the present instance. It has subsisted both before and since the *American* revolution. The provisions of the act of the 29th of *March* 1805, as to the selection of jurors, are general in their nature, and contain no exceptions. The sheriff and commissioners are enjoined to

1813.

GUARDIANS of the POOR v. GREENE.

put into the wheel the names of *sober* and *judicious* persons, and a fine not exceeding twenty dollars is imposed on those who shall refuse to serve as jurors. The burthen is intended to fall equally on every citizen fit to discharge that duty. And yet both before and since the passing of that act, public ministers of all denominations returned as jurors, have uniformly been excused by the Court on their application. There is a seeming incompatibility of character, when we unite the *divine* and the *juror*. I may be permitted to say the divine owes superior duties to society. Whence is it that the judges of other Courts would be excused from serving as jurors in this Court, or as guardians or overseers of the poor, supervisors of the highways, or constables? Upon what ground would the professors of the law rest their claim to exemption, when returned to either of these offices? I answer, on the same ground of incompatibility of character, and of their owing higher duties to the community, which public policy requires the faithful discharge of in the first instance. Indeed we ourselves would have no other plea to recur to, when called upon by another Court to fulfil the duties of either of those offices. The faithful pastor, who conscientiously watches over his flock, and teaches them their duties to their Creator and fellow men, will have but little leisure to attend to temporal pursuits.

I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BRACKENRIDGE J. There is no trace of the *privilegium clericale* in the New Testament, in the epistles, in the fathers, in the history of early christianity. It was not until the *Roman* empire became christian, that persecution ceased and privilege began. But from that time it made a very rapid progress. On the clearing away of the mist of the dark ages, we find it settled down with the *jure divino* right of tithes, and endless immunities. The church establishment in *England* has become a part of the common law. But was the common law in this particular or any part of it, carried with us in our emigration and planting a colony in *Pennsylvania?* Not a particle of it. On the contrary, the getting quit of the establishment and ecclesiastical tyranny and immunity, was a great cause of the emigration. All things in this particular were reduced to primitive christianity, and we took a new

state. A teacher of religion of any denomination was unknown to our laws; no clerical exclusion, no immunity. But it has been customary with the people not to impose secular employments on clerical functionaries. I believe the speakers in assemblies amongst the people called Friends, claim no such exception. With other denominations, even where the cure of souls becomes an employment, it is matter of courtesy not to impose; but immunity is not a claim of right. The act of assembly proves this, which exempts in the case of militia service. This is not in affirmance of a common law known to us, it is introductory of a new privilege. The exemption proves a preceding obligation. *Exceptio unius exclusio est alterius.* In our commonwealth there is no exclusion from office to a clergyman, from public trusts; and why an immunity? *Qui sentit commodum, sentire debet et onus.*

Why talk of an incompatibility? There is no constitutional incompatibility, no legal impediment, nothing in the nature of the case. All trades and occupations might as well plead avocations, and set up an incompatibility. In a state where every individual may constitute himself a public teacher of religion, and allege the cure of souls, the plea of incompatibility would work a general inconvenience. If indulged to the full extent, and what is there to limit it, it would work a general inconvenience. But there is no law or usage to justify such a plea. I will venture to say it is the first time that it was ever heard of in a court of justice in *Pennsylvania.* It cannot be allowed, and my judgment is for the plaintiffs.

Judgment affirmed.

1813.

Philadelphia, Monday, July 12.

GRATZ *against* PHILLIPS executor of SIMON.

In actions sounding merely in damages, the rule is that the plaintiff cannot recover more than the damages laid in the declaration; but this rule is not applicable to *account render*, in which the main object of the action is to obtain an account, and judgment for the arrearages, and in which damages are given only *ratione interplacitationis*. A plaintiff in account render may therefore have judgment for the arrearages to a greater amount than the damages laid in the declaration.

THIS was an action of account render, in which the plaintiff in his own right, and also as survivor of *Bernard Gratz*, declared against the defendant as executor of *Joseph Simon*, "that the said *Joseph* in his life time was the "bailiff and receiver of the plaintiff, and had the care and "management of divers lands and tenements of him the said "plaintiff, to make sale thereof for the common profit of the "said plaintiff and *Joseph*, to wit of 1912 acres of land in "the state of *Pennsylvania* &c. and to render a reasonable "account thereof to the said plaintiff when thereunto re-"quired." The declaration then concluded that "the said *Jo-*"*seph*, although often requested, had not rendered any rea-"sonable account thereof, but the same to render wholly had "refused, and the said *Levy Phillips* &c. since his death did "still refuse, to the damage of the said plaintiff *ten thousand* "dollars." Pleas, *ne unques bailiff and receiver*, and fully accounted.

After judgment *quod computet*, the Court appointed auditors, who filed a report awarding to the plaintiff *twelve thousand one hundred and sixty nine dollars and ninety-four cents*, on which final judgment was entered. For this sum and costs execution issued. The defendant paid the 10,000 dollars laid in the declaration; and the plaintiff having proceeded with a *testatum* execution to a levy and condemnation,

Phillips for the defendant, obtained a rule to shew cause why the execution levy and condemnation should not be set aside.

Meredith and *Rawle* shewed cause. They contended that the rule which prevents a plaintiff from recovering more than the damages laid in the declaration, was confined to actions sounding merely in damages, and did not apply to the action of account render. In this action the judgment is for the arrearages, and damages on account of the interpleading; in the same manner as in *debt*, the judgment is for the amount of the debt, and damages for the detention. So that

1813.

GRATZ v. PHILLIPS.

in the present case the plaintiff has no judgment for damages, but solely for the amount found in arrear by the auditors; and in every case of account render, though damages cannot be adjudged beyond the amount laid as damages, yet there may be a judgment for the arrears to any amount.

This is a question purely technical. There is little reason for the rule, even in reference to common cases. There is less in reference to this, where the plaintiff does not know the arrears until the account is rendered. The Court will therefore lean against it, although no case is found directly in point to the distinction suggested. By reference to the books of entries, it appears that the final judgment in account is, that the plaintiff recover the amount found in arrear, "*et damna ratione interplacitationis.*" *Sheph. Abr. Account, Part* 1. *p.* 11. 14. 15., *Sheph. Epit.* 78. *Account., Formula Placit.* 123., 1 *Mod. Entries* 43. 66. No costs or damages are recovered upon the first judgment; but after that, if upon issue the verdict be for the plaintiff, "he shall "recover his goods or money demanded, *with* his costs and "damages." 1 *Hughes Abr.* 21. The latter are given in consequence of the defendant's misconduct in not accounting at once; 1 *Mod. Ent.* 44. 56. 70. 71.; for if he offers to account at the return of the writ, he pays no damages, though found in arrear. 7 *Vin. Damages.* 286. *pl.* 29, 30. It seems by some authors to be doubted whether damages are at all recoverable in account. 7. *Vin.* 284. *pl.* 17. 18. 287. *pl.* 38. 41., *Andrews* 19., *Brook's Abr. pl.* 64., 1 *Vin.* 176. *pl.* 6. But the distinction is between being found in arrear generally, and being so found after resisting the plaintiff's claim by pleading. 2 *Bac. Abr. App.* 20., *Collet* v. *Robston* (*a*), *Harris & Baker's case* (*b*). In *Godfrey* v. *Saunders* (*c*), where judgment was given for the plaintiff upon demurrer, the judgment was rendered for 12,000*l.*, the value of the goods laid in the declaration, and also 278*l.* 7*s.* 9*d.* for his damages, as well by reason of the interpleading, as for his costs; and yet the damages laid in the declaration were but 12,000*l.* and of course the recovery exceeded the damages laid. All these authorities shew unequivocally the difference between arrears and damages; that they are not necessarily connected; that they are recovered under different names; and that the

(*a*) 2 *Leon.* 118. (*b*) 1 *Leon.* 802. (*c*) 3 *Wils.* 94.

1813.

GRATZ v. PHILLIPS.

former are specifically found, and not comprehended under the latter. It follows therefore, that in this case the plaintiff has recovered only his arrears, without damages, and that he is intitled to execution for the whole.

Phillips and *Dallas* in support of the rule. The general principle is too well established to be shaken at this day, that in personal actions the plaintiff cannot recover more than he has counted for. It is therefore incumbent upon the plaintiff to shew a distinction that will help the present case. Among all the entries and cases produced, there is not one, in which such a distinction is taken; for in all of them the declarations contain the value of the goods for which the defendant is in arrear, and damages are laid to the same amount or greater. When this is the case, there is something analogous to *debt*, and the Court may render judgment for the value, and also for damages. But here no sum or value is laid but the damages, and there is no other amount by which either damage or arrears can be regulated. If the defendant had made default after the first judgment, final judgment would have been entered for the sum laid as damages and nothing more; that is, the judgment would be for the plaintiff as he counted. *Williams* v. *White* (*a*), 1 *Com. Dig.* 119. *Accompt. E.* 9. And so if there had been judgment against him upon demurrer to an insufficient plea before auditors. 1 *Bac. Abr. Accompt. G.* This is the most satisfactory test of the plaintiff's rights; for if the defendant had confessed judgment, or in any other way without settling the account before auditors, had given the plaintiff the full benefit of his declaration, the judgment could have been for no more than the amount laid. All the precedents that are in the present form, accordingly lay a sum sufficient to cover the arrears, in the same manner that the plaintiff has done. 1 *Wentw.* 81—87.

The result of all the authorities is, that where a value is laid, the plaintiff recovers the amount and damages, though in no case does it appear that the whole, exclusive of costs which are given by way of increase, has ever exceeded the amount of damages laid; that where no value is laid, the damages are the only measure; and that in the latter case,

(*a*) *Cro. Eliz.* 806.

be it as it may in the former, the rule that applies to all personal actions, must govern.

1813.

GRATZ v. PHILLIPS.

TILGHMAN C. J. In actions sounding merely in damages, the rule is established, that the plaintiff can recover no more than the amount laid in his declaration. If a verdict is found for more, the plaintiff may release the overplus, and take judgment for the amount declared for. If judgment be entered for a greater amount, it is error. In such actions the plaintiff demands nothing but damages, he alleges that the defendant has committed a trespass, or broken his covenant, or refused to perform his promise, by which damage has been suffered to a certain amount; and as it is presumed that the plaintiff is the best judge of the damage sustained, his declaration is taken for conclusive evidence of the *maximum* of that damage. It is a technical rule, which must not now be shaken, although the reason on which it is founded, is certainly in many instances very questionable. But this rule is not applicable to cases not sounding altogether in damages. In an action of debt, the plaintiff declares for the amount of his debt, and besides for damages occasioned by the unjust detention of it. There he recovers the debt, and also damages for the detention, which are quite different things. His debt may be 10,000 dollars, and his damages laid at ten cents; yet he has judgment for 10,000 dollars *debt*, and ten cents damages. In the action of account, he sometimes charges the defendant with the receipt of chattels of a certain value, or money to a certain amount, or as in the present case, with being his bailiff, or receiver of money proceeding from the sale of lands without mentioning the amount; and besides this, he alleges that he has suffered damage by the defendant's not accounting. Now this damage is different from the main object of the action, which is to obtain a settlement of the account, and judgment for the sum found to be in arrear. By keeping this distinction in view, we hold a clue which will lead us to the discovery of the truth. The defendant's error lies in the supposition, that the plaintiff recovers 12,169 dollars 94 cents as *damages*. It is no such thing; he recovers it as the *amount of the arrearages stated by the auditors*, and in truth, he has recovered nothing in nature of damages, except it be the costs of suit. In looking into the

1813.

GRATZ v. PHILLIPS.

books, we find some confusion, as to the plaintiff's right to recover damages at all in this action. It is said that damages *are not* recoverable, in 7 *Vin.* 284. *pl.* 17, 18. *ib.* 287. *pl.* 38. 41., 1 *Vin.* 176. *pl.* 6. In other books it is said that damages *are* recoverable. This apparent contradiction may perhaps have arisen in some measure from the peculiar nature of this action, in which two judgments are rendered, first, a *quod computet*, and secondly, a final judgment for the arrearages. Now the first judgment includes no damages, and if upon the issue of never bailiff or receiver, the jury assess damages, no judgment can be given for them. I take the law to be accurately stated in the second volume of the *Appendix to Bac. Abr. pa.* 20. It is there said, "it seems to be "questionable whether in *all* cases damages are recoverable; "but it is clear that if the defendant *resists* the plaintiff's "claim by pleading, or where an increase is received by a "receiver *ad merchandizandum*, there shall be judgment for "damages." In support of this is cited the case of *Collet* v. *Robston*, 2 *Leon.* 118. This action has been so little used of late years, that not much is to be found but in old books. I have examined the ancient books of entries, and find that when the plaintiff lays in his declaration the value of the chattels, and also damages, he obtains judgment for the value, and also for damages, distinguishing each. There is a complete record of an action of account in 3 *Wilson*, *Godfrey* v. *Saunders*, which throws more light on the subject than any case in modern times. There the plaintiff declared that he had delivered to the defendant a quantity of coral of the value of 12,000*l.* and laid his damage at 12,000*l.* After the judgment *quod computet*, the defendant put in a plea before the auditors, to which the plaintiff demurred, and it was decided in favour of the plaintiff; whereupon judgment was entered for 12,000*l.* the *value* laid in the declaration, and also for 278*l.* 7*s.* 9*d.* for the *damages* sustained by the plaintiff, as well by reason of the *interpleading*, as for his costs and charges expended in the suit. Now unless the distinction which I have marked is attended to, here is a recovery to a greater amount than the *damages* laid in the declaration. But it is all plain, when we reflect that the *value* of the chattels is one thing, and the damages by unreasonably resisting the plaintiff's demand is another. The only difference between that case and the one before us is, that

in the former the value is laid in the declaration, but in the latter the declaration mentions no precise sum of money received by the defendant. But this difference appears to me to be unsubstantial. In both cases, the plaintiff demands an account of the money due to him from the defendant, and damages for not rendering that account according to his duty. The sums due from the defendant being once ascertained, either by an implied confession of what was stated in the declaration, as in the case of *Godfrey* v. *Saunders*, or by the report of auditors, as in the case before us, the resemblance between the two cases becomes complete, and nothing remains but to enter a similar judgment in each, that is to say, for the amount of the value laid or of the arrears found, and also for costs of suit under the name of damages. In this view of the subject, the plaintiff is so far from having recovered damages to a greater amount than the 10,000 dollars laid in the declaration, that he has recovered no damages at all, except the costs of suit. I am therefore of opinion, that the rule obtained by the defendant on the plaintiff to shew cause why the execution should not be set aside, should be discharged.

YEATES J. The technical rule, that no man shall recover more damages than he has declared for, I feel binding upon me, unless it shall appear that in the case before us, the rule is not applicable. The arrears found by the auditors due to the plaintiff, exceed the sum laid in the concluding part of the declaration, 2169 dollars 94 cents. The question then is reduced to this, whether these arrears are to be considered as damages in a legal sense.

Much obscurity prevails in the books, as to this form of action; and the counsel have told us that their researches into the entries, as to the point under inquiry, have been unsuccessful. The proceedings in account render are said to be difficult, dilatory and expensive, and the more adequate remedy is found to be in a court of equity. 1 *Bac. Abr.* (*by Wilson*) 31. In the same book (*pa.* 40) it is laid down, that it seems to be questionable whether in all cases damages are recoverable in account; but it is clear, that if the defendant resists the claim of the plaintiff by pleading, or where an increase is received by a receiver *ad merchandizandum*, there shall be judgment for damages. The authorities are

1813.

GRATZ v. PHILLIPS.

cited to these points. We know, however, that when the account is finished, the second judgment is that the defendant pay to the plaintiff so much as he is found in arrear. *Ib.* 40. The precedents adduced by the plaintiff's counsel also shew this, and that damages are not recoverable, except *ratione interplacitationis*. Upon that ground, no damages in this instance have been found by the auditors, or awarded by the Court.

What weighs greatly with me is, that the action of account render in the result bears a much stronger similitude to debt, than to actions of trespass or case, wherein damages are properly recoverable. This will appear in two striking particulars. If the defendant make default after interlocutory judgment at the day assigned by the auditors, final judgment shall be entered for the sum demanded by the plaintiff. *Cro. El.* 806. The same judgment was entered on full consideration upon an insufficient plea entered before auditors, which was adjudged bad upon demurrer. *Godfrey* v. *Saunders*, 3 *Wils.* 117. I know of no form of action sounding in damages, wherein such final judgment has been given either on default or on a vitious plea, without ascertaining the damages by an inquest, or by the prothonotary of the Court, as has happened in some instances. In actions of debt it is sufficient if the damages are laid at any sum whatever.

Another feature of dissimilitude presents itself between account render and actions brought to recover damages. In the latter it is fully settled that a man can only recover according to his right when he instituted his suit. He cannot recover upon a demand which happens to become due, pending his action for another demand of the same nature. But upon a judgment to account, all articles of account, though incurred since the writ, shall be included, and the whole brought down to the time when the auditors make award of the account. 2 *Burr.* 1086. This shews not only the distinction between the two forms of action, but also the difficulty thrown on the plaintiff in account, when he makes an estimate of damages in his declaration.

On these considerations, I have much satisfaction in finding myself authorised to declare, that the arrearages found by the auditors are not damages in a legal point of view, that the technical rule insisted on by the defendant does not apply to this case, and that his motion be denied.

1813.

GRATZ v. PHILLIPS.

BRACKENRIDGE J. There is reason in the rule that the declaration shall correspond with the writ, the evidence with the declaration, the verdict with the evidence, the judgment with the verdict, and the execution with the judgment. But the day laid in the declaration is holden not to be material. It may be a day even before the cause of action arose. Yet it would seem an absurdity to allege a cause of action to have existed before it did exist. It is not necessary that the place of the contract proved, be the same with that laid. It must be laid to be in the county where the action is brought, and this, though but a fiction, is sustained. There is not a concord in these particulars between the *allegata* and *probata*. Why should the sum laid in the declaration be held to be material? A jury may give less, why not give more, according to the evidence? It is a rule merely technical, and I would have no objection to see it changed. This Court has the power to change it. It is a Court in the dernier resort, and equally competent, by their decision in all rules of practice, with an act of the legislature. The practice of the Court is the law of the Court. I never hear an application of the counsel to enlarge the sum laid, or see them reduced to the necessity of entering a *remittitur* for a part of the damages justly ascertained upon the evidence, and found by the verdict, but I consider the rule in the way of justice. For the party seldom or rather never applies his mind to estimate what damage he may have sustained, but throws a sum into the declaration at random, knowing that it must depend upon the evidence he can produce, what damages he may recover. Out of caution and looking to the rule, if it occurs to him, he is led to allege damages sometimes to a ridiculous amount. It were better that it was considered merely nominal, as it actually is, so far as that the jury never take into view what he has demanded, but what he has proved. The reason therefore does not hold that he is the best judge of his damages, for he does not judge of them at all, or if he does judge, it passes for nothing. And if a man in modesty of mind shall fall below, why shall a court and jury be precluded from considering all his wrong, and doing him justice? He may not really know the extent of his wrong at the time of action brought or declaration filed. It is on this ground therefore, that without changing the rule, but which I could wish to see changed, that I come previously disposed to cir-

1813.

GRATZ v. PHILLIPS.

cumscribe the rule, or restrain it as much as possible. In an action of account render, it is, as has been said by the counsel, an action to compel a settlement. He is supposed not to know what is due, because it is to know what is due that he is pursuing his bailiff or receiver. The judgment is *to account*, and damages for not accounting.

The defect of precedent and obscurity of *dictum*, leaves me at liberty to conceive how the law of this action, as to a sum laid in the declaration, may have been, or ought to be. It could be but a mere guess as to what sum a bailiff or receiver had in his hands, and the sum laid ought to have been considered merely nominal, as it in fact was; or if real, for the vexation of being reduced to the necessity of bringing a suit in order to obtain a settlement. It has no connection with the arrearages of rents, or monies had and received as agent. Instead of pleading never bailiff and receiver, or fully accounted, suppose a defendant to confess judgment, or to let judgment go by *nil dicit*, an appointment of auditors in the nature of a writ of inquiry might still be demanded by the plaintiff to settle the account. The confessing or the not answering, would found a presumption that a greater sum was in the hands of the receiver, than the damages laid for not accounting, and an appointment of auditors ought to be made. But the truth is, I wish to get rid of this rule which is merely technical, altogether, and at this moment I am ready to declare against it. But what can avail my declaring? The *dictum* of a single judge. It may turn out to be something. A small wedge makes way for a greater that splits the block. Those that have the least character to lose in a science, may be the boldest. In medicine some of the best remedies have been introduced by empiricks in the medical science. But there are great names to sanction in the law the rejection of absurd and useless rules. We do not sit here, said *Mansfield*, to take our rules from *Siderfin* and *Keble*. But setting aside the rejecting or changing this rule as to the sum laid, the present case I think distinguishable, being that of an account render where there are two judgments, and the last as to arrearages has no connection with the first. I am therefore against the motion to set aside the levy, execution, &c.

Rule discharged.

JONES and others executors of WISTER *against* MOORE administrator of GRAY.

1813.

Philadelphia, Monday, July 12.

An acknowledgment of a subsisting debt, made within six years before action brought, to the executors of the creditor, will not, where the issue is upon the statute of limitations, support a declaration upon a promise to the testator himself. There should be a special count.

An acknowledgment does not revive the old debt, but is evidence of a new promise, for which the old debt is a consideration.

The administrator of the drawer of a note wrote several letters to the executors of the indorsee, recognising the existence of the demand, but declining to take up the note. He however finally wrote, that he would be in town in a few days, and *would settle the matter in some way.. Held* that this was sufficient evidence of a promise to pay.

THIS was an action upon a promissory note for 2000 dollars, drawn by the defendant's intestate on the 12th of *February* 1799, and payable sixty days after date to *Bond* and *Brooks*, by whom it was indorsed to the testator of the plaintiffs. The declaration contained but one count, which was upon a promise by the intestate to the testator; and the pleas were *non assumpsit* and the statute of limitations.

Upon the trial of the cause before *Brackenridge* J. at a *Nisi Prius* in *January* 1812, the plaintiffs' counsel, after proving the handwriting of *Gray*, (who it was admitted died in *November* 1805) offered the following letters, to take the case out of the statute; and they were read under a reservation of the point, whether, supposing them to amount to an acknowledgment of a subsisting debt, they supported the plaintiffs' count. They were written by the defendant to one of the plaintiffs.

To Mr. *John Wister.*

Dear Sir, *Reading*, 7th *Dec.* 1807.

I will be obliged to you to write me, whether I am at liberty to write to the heirs of *Robert Gray*, to call on me for the assets belonging to his estate, which is in my hands, or whether I must still hold them *until your claim is satisfied.* I am, sir, your humble servant,

William Moore, admr.

To Mr. *John Wister.*

Dear Sir,

I was not at home when your letter arrived, or I would have answered by the *Monday's* mail. As an administrator, I can make no composition but at my own risk. Mr. *Bond* knows well that no part of the money came into Mr. *Gray's* hands; this I have often heard Mr. *Gray* declare, and this Mr. *Gray's* friends know. If Mr. *Bond* has any just claims against Mr. *Gray's* estate, let him bring them forward pro-

1813.

JONES v. MOORE.

perly attested. *With taking up those notes in controversy, I will have nothing to do.* I am, sir, your humble servant,

Reading, 6th *February* 1809. *William Moore.*

To Mr. *John Wister.*

Dear Sir,

I will be obliged to you to inform me the result of the arbitration between you and *Bond.* The heirs keep pressing me for money, and I do not wish to keep it from them a moment longer than I can with safety pay it to them. I am, sir, your humble servant,

Reading, 14th *March* 1810. *William Moore.*

To Mr. *John Wister.*

Dear Sir, *Reading*, 18th *March* 1810.

I received your favour of the 16th, and return you thanks for the statement you have given me of Mr. *Bond's* affairs. Was my own interest only concerned, I might be induced to enter into some compromise with *Bond.* But as administrator, I cannot do it without the consent of the heirs, unless at my own risk. Some of the heirs are in *Ireland*, and some in the back country. It would require from twelve to eighteen months to consult them; and unless I find that I am perfectly safe, I will do nothing without their consent. I think it necessary to inform you, that Mr. *Gray's* property *will not pay above half of your demand.* I am, sir, your humble servant,

William Moore.

To Mr. *John Wister.*

Dear Sir, *Reading*, 26th *July* 1810.

I received your favour informing of the decision of the arbitrators in *Bond's* business. I expect to be in the city in a few days, *and will settle the matter some way.* To shew the principles of *Bond*, his attorney by his order, has ordered me to retain money in my hands for the 1500 dollars, provided they fail in an appeal they mean to enter. I would have answered you sooner but was from home. I am, sir, your humble servant, *William Moore.*

His honour charged the jury, that the letters amounted to an acknowledgment of a subsisting debt due to the plaintiffs, by the intestate, and if they were of the same opinion, they should find for the plaintiffs, which they accordingly did.

The defendant moved for a new trial, and this motion was now argued in connection with the reserved point.

M'Kean for the plaintiffs. 1. The letters supported the count, if they amounted to an acknowledgment of the debt. An acknowledgment *revives* the old debt, and takes the case out of the statute, not because it is a new promise or evidence of a promise, but because it shews that the old debt has never been discharged. Where an acknowledgment is made, the case is not within the equity of the statute; for the statute never intended to prevent the recovery of a debt acknowledged to be due. It is in fact a waiver of the statute. Hence an acknowledgment after action brought, is a bar to the statute, which could not be, if it was merely evidence of a new promise. *Yea* v. *Fouraker* (*a*), *Sluby* v. *Champlin* (*b*). In *Heylin* v. *Hastings* (*c*), the action was by the executor for goods sold by his testator to the defendant, and the plea was *non assumpsit testatori* within six years. Upon proof of an acknowledgment to the executor, the plaintiff had judgment.

2. The letters amount to an acknowledgment. They recognise the existence of the debt, which the administrator declined paying, because as it was an accommodation note to *Bond* and *Brooks*, and a suit was going on by the plaintiffs against them, he wished the money to be obtained from that source; but when that suit proved abortive, he said in his last letter, that he would settle the matter some way. This is much stronger than many of the cases. *Quantock* v. *England* (*d*), *Trueman* v. *Fenton* (*e*).

Binney for the defendant. 1. The act of assembly says that all actions upon the case shall be commenced within six years next after the cause of such action accrued, and not after. The plaintiffs must therefore shew a cause of action within six years; and the only cause of action is a promise. The issue is in fact joined upon the existence of such a promise; and unless an acknowledgment amounts to that, it is nothing. The promise proved, if any, is then a promise by the administrator to the executor; whereas the promise laid is by the intestate to the testator; so that the proof fails on both sides.

(*a*) 2 *Burr.* 1099.
(*b*) 4 *Johns.* 461.
(*c*) *Carth.* 470.
(*d*) 5 *Burr.* 2630
(*e*) *Cowp.* 545.

1813.

JONES v. MOORE.

This point is perfectly settled by authorities. *Green* v. *Crane* (*a*), *Hickman* v. *Walker* (*b*), *Sarell* v. *Wine* (*c*), *Marborough* v. *Widmore* (*d*), *Whitaker* v. *Whitaker* (*e*). The whole learning upon the subject is contained in a note to 2 *Saund.* 63 *g.* by Serjeant *Williams;* and the books of precedents shew the form of the count that is proper for a case in which the acknowledgment is to the executor. 3 *Wentw.* 71., 1 *Chitty* 204., 2 *Chitty* 60, 61. If an acknowledgment operated by revival of the original debt, then it would answer, though accompanied by an express refusal to pay, which is contrary to the opinion of the present Chief Justice, in *Murray* v. *Tilly*, and of Judge *Washington*, in *Reid* v. *Wilkinson.* In *Heylin* v. *Hastings*, as reported in 5 *Mod.* 426., and 1 *Ld. Ray.* 389., this point was not made.

2. If the letters were from the original debtor, there would be strong ground for the plaintiffs' argument, under the decisions that have taken place. But they are from a representative, knowing nothing of the original transaction, and saying nothing from his own knowledge. His remarks shew that he was acquainted with a claim, not that he recognised a *subsisting debt*, which is essential. *Cowan* v. *Magauran* (*f*). Many adjudications on the subject of the statute, go to an extravagant length. The Court should require either a new promise, or evidence from the debtor that he knows the debt is unpaid, from which the law will imply a promise.

TILGHMAN C. J. This action was brought on a promissory note dated the 12th of *February* 1799, given by *Robert Gray* deceased to *Bond* and *Brooks*, payable sixty days after date, and indorsed by *Bond* and *Brooks* to *William Wister* deceased. Issue was joined on the statute of limitations; and on the trial several letters from the defendant *Moore*, were read in evidence, from which the jury, agreeably to the opinion of the judge before whom the cause was tried, inferred a promise to pay the debt. It was reserved as a point for the decision of the Court in bank, whether supposing a promise by the defendant to have been proved, it supported the plaintiffs' declaration, which was founded on a promise to *William Wister* the testator. I will consider first, whether such a pro-

(*a*) 2 *Ld. Ray.* 1101. 6 *Mod.* 309 *S. C.*
(*b*) *Willes* 27.
(*c*) 3 *East* 409.
(*d*) 2 *Stra.* 890.
(*e*) 6 *Johns.* 112.
(*f*) *Wallace* 66.

mise will support the declaration, and secondly, whether the letters warranted the conclusion drawn by the jury.

1. The act of assembly declares, that the action shall be commenced, "within six years next after the cause of such "action, and not after." If six years elapse after the cause of action accrued, there can be no recovery, although the debt is *not extinguished.* It remains due in *conscience*, and is a good consideration for a new promise. It remains in some respects due in *law* too, for if the defendant omits to plead the act of assembly, he is considered as having waived the benefit of it, and the plaintiff may recover against him. The letters of the defendant are said to contain an *acknowledgment* of the debt, which, as the plaintiffs' counsel contends, is sufficient *per se*, to take the case out of the statute, not because it is evidence of a new promise, but because it *revives* the debt. There is some confusion, and perhaps some inconsistency in the cases on this subject; but it appears to me from the reason of the thing, and from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise, or what is pretty much the same thing in substance, as a circumstance from which the law will imply a new promise. To consider this matter on principle. When the defendant pleads *non assumpsit infra sex annos*, and the plaintiff replies *assumpsit infra sex annos*, how can the issue be found for the plaintiff, without proof of a promise express or implied within six years? It is the very point, and the only point in issue. I cannot comprehend the meaning of *reviving* the old debt, in any other manner than by a new promise. But if there was a new promise in the present case, it was to the plaintiffs the executors, and not to their testator as stated in the declaration, and therefore the declaration would not be supported. Let us see next how the authorities stand. The case of *Heylin* v. *Hastings*, is reported in 1 *Ld. Ray.* 389. 421., 12 *Mod.* 223., *Comyns* 54., 1 *Salk.* 29., *Carth.* 471. The report in *Carthew* is not so good as in the other books. It was an action of general *indebitatus assumpsit*, by an executor for goods sold &c. by his testator. Issue was joined on the statute of limitations; and the plaintiff recovered on proof of the debt, and evidence of a promise within six years to *the executors*, to pay the debt if they could prove it. Lord *Holt* consulted all the judges of *England*, and they were all but two of opinion that an *acknowledgment* of the debt was sufficient evidence of a

1813.

JONES v. MOORE.

promise, but did not *of itself* amount to a promise. It was taken for granted that the plaintiff was entitled to recover, but the point does not appear to have been considered, that supposing a promise to have been made, it was a different promise from that laid in the declaration, *viz.* a promise to the executor and not to the testator. In subsequent cases this point has been brought directly into question, and it has been decided, that where the promise is laid to have been made to the *testator*, it cannot be supported by proof of a promise within six years to the *executor*. In *Green* v. *Crane*, 2 *Ray.* 1101, reported by the name of *Dean* v. *Crane*, in 1 *Salk.* 28. and 6 *Mod.* 310., the declaration was on a promise to the testator, issue on *non assumpsit infra sex annos*, and evidence of a promise within six years to the *executor;* held that the evidence did not support the declaration, and this by Lord *Holt* who delivered the opinion of the judges in *Heylin* v. *Hastings*. In the Duke of *Marlborough's exrs.* v. *Widmore*, 2 *Stra.* 890., the declaration was on a promise to the testator, issue being joined on the statute of limitations; the plaintiffs were permitted to amend by laying the promise to the executors, on payment of costs. In *Hickman* v. *Walker*, *Willes' Rep.* 27, the declaration laid a promise to the testator, the defendant pleaded the statute of limitations, and the plaintiff replied, that letters testamentary were committed to him within six years, by which cause of action accrued to him; held to be a *departure*, because it was a different cause of action from that laid in the declaration. In 2 *Saund.* 63 *a.* (*notis*) the cases are all collected and the principle asserted, that where an acknowledgment or promise has been made to the executor, it should be declared on accordingly, and a declaration laying a promise to the testator cannot be maintained. The same principle seems to be adopted by the Supreme Court of *New York*, in *Whitaker* v. *Whitaker*, 6 *Johns.* 112. From those authorities, and from the nature of the issue joined in this case, it appears to me that the evidence such as it was did not support the declaration, because it tended to prove a promise to the *executors* more than six years after the death of the testator.

2. I will now consider the evidence, which consisted of five letters from the defendant to *John Wister*, one of the plaintiffs. In the first the defendant asks the plaintiffs whether he is at liberty to pay over the assets in his hands to the

representatives of *Gray*, or whether he must withhold them, *until the plaintiffs' claim was satisfied.* In the second letter the defendant says, that he can make no composition but at his own risk, and that Mr. *Bond* well knew that no part of the money came to *Gray's* hands. In the third letter, the defendant asks to be informed of the result of the arbitration between the plaintiff and *Bond.* The fourth letter contains nothing material. In the fifth the defendant acknowledges the receipt of a letter from *Wister*, informing him of the decision of the arbitrators between the plaintiffs and *Bond*, and adds, "I expect to be in the city in a few days, and "will settle the matter some way." From the whole of these letters it appears that the defendant knew of the plaintiffs' claim and never denied it, on the contrary, he constantly recognised it as *an existing debt.* The dispute was not with the plaintiffs, but with *Bond* and *Brooks*, the indorsers of *Gray's* note, and who, as *Gray* said, received the money which was the consideration of the note. The last letter is something very like an express promise; "*settling the matter some way*," would lead a person to expect some kind of satisfaction. It is certainly much stronger evidence of a promise, than several of the cases which have been held sufficient to take a case out of the statute of limitations. I agree therefore with Judge *Brackenridge*, that the jury were justified in presuming a promise, but as it was a promise not to the testator but to the executors, it varied from the declaration, and did not support the issue on the part of the plaintiffs. On this ground, I am of opinion that the verdict should have been for the defendant, and therefore there should be a new trial.

YEATES J. The plaintiff declared in this case on a promissory note dated the 12th of *February* 1799, drawn by *Robert Gray* in his life time, payable to *Bond* and *Brooks*, and by them indorsed to *William Wister* in his life time. The promise to pay is stated to have been made by *Gray* to *Wister*, the former of whom died in *November* 1805. The defendant pleaded the act of limitations and the plaintiffs replied thereto. Upon this issue nothing can be more clear in point of fact, than that a promise made by the administrator of the intestate, to one of the executors of the testator, would not shew a promise by the intestate to the testator. And considering the matter in a legal view, letters written by the defendant's

1813.

JONES v. MOORE.

administrator to the plaintiff's executor, could not be received in evidence in the manner the plaintiffs have declared, to prove an acknowledgment of the debt, so as to take it out of the statute of limitations. In such instances it is absolutely necessary, after stating the true nature of the demand according to its circumstances, to insert a count shewing specially the promise to pay by the executor or administrator. This I take to have been abundantly proved by the cases adduced by the defendant's counsel, and particularly by *Hickman et al. exrs.* v. *Walker*, *Willes* 27. On the reserved point therefore, I am clearly of opinion that a new trial should be awarded. The plaintiffs upon application to the Court will be allowed to add the special count to their declaration, and they will then have the full benefit of the evidence.

But the Court are now called upon, to express their sentiments on the legal operation of the letters which were read on the trial, as it may save further litigation between the parties.

I hold the act of limitations to be a most beneficial law, and that it strongly tends to the peace and quiet of social life. The consequences of aiding stale demands, where vouchers may have been lost, and material witnesses have paid the common debt of nature, are obvious to every one. Some hard cases it is true may have occurred under the act, wherein the recovery of fair and honest debts may have been barred by its operation; but on the score of sound policy, it is better to submit to private inconvenience, than introduce a general mischief. My judgment is not yet prepared to go to the extent of some of the cases decided on this subject. We are told in the books that an acknowledgment of a debt is only evidence of a promise to pay it. Where it is accompanied by circumstances or declarations, that the party means to insist on the benefit of the statute, no promise to pay can possibly be implied without violating the truth of the case, and so it has been decided.

There was much truth in the observation of the defendant's counsel, that declarations by executors or administrators respecting demands brought against them, should not be construed so strictly against them, as if made in their individual character, where they must be supposed to be conusant of their duties as well as rights. Inquiries may fairly be made by persons in their representative character, concerning the justice

of claims made against their testator or intestate, which in heir personal capacity well might be supposed to imply a promise to pay them. Under these impressions, I at first doubted, whether the letters could be construed as an acknowledgment of the justice of this debt. My doubts have been removed on more mature reflection.

In Mr. *Moore's* letter of the 7th of *December* 1807, he desires information whether he is at liberty to write to the intestate's heirs to call on him for the assets in his hands; or whether he must hold them, *until this claim is satisfied.* He evidently treats this claim as just, and submits to the executors whether he should retain the assets in his hands to discharge it. No evidence was given on the trial of the ground of the action brought by the executors against *Bond;* but it is most highly probable from the other letters which were written, that it was founded on his indorsement. So it is stated by the plaintiffs' counsel, and if the fact be so it is capable of proof on another trial. The meaning of the first letter then, would plainly be, whether the executors would look to *Bond* and *Brooks* as indorsers, and give up their demand on the estate of the drawer. The letters written by the executors to Mr. *Moore* were not produced on the trial, but they may be shown at a future day, if it should be thought that they can throw light on the true meaning of the administrator. His letter of the 26th of *July* 1810, acknowledges the receipt of Mr. *Wister's* letter informing him of the decision of the arbitrators in *Bond's* business; and he therefore says, he should be in the city in a few days, *and would settle the matter in some way.* This is powerful evidence connected with the former letter in 1807, and unless they can be fully explained, they amount to such an acknowledgment of the debt, as will take the case out of the act of limitations.

BRACKENRIDGE J. I am not about to dissent from the Chief Justice; it was my way of thinking on the trial as to the result of the case. Nevertheless I will add some observations which may perhaps in some particulars be different. It is the language of some judges on the benches of *England,* that if the statute of limitations was for the first time to receive a construction, nothing in the nature of an exception to take a case out of the statute would be admitted. I incline to be of a contrary way of thinking, on the principle that a

1813.

JONES v. MOORE.

statute bearing on a contract *uberrimæ fidei* which is their own language, ought to have a liberal application. Who ever heard of a statute under which there were not equity exceptions? In applying the statute and ascertaining them, we must look at the mischief which the statute was intended to remedy. This was principally the advancing stale claims in the case of honest but improvident debtors, who may have lost the evidence of papers, or testimony of witnesses who could have established a discharge of the debt. The statute goes on this presumption of payment, where a time has elapsed without a demand made; but where that presumption is removed by an *acknowledgment of the debt*, it has been considered a case out of the statute, because out of the reason of it.

That a bare acknowledgment of the debt, without any promise to pay, may well take a case out of the statute, is laid down in the *English* tracts, and sactioned by elementary writers abundantly. I will refer only to 2 *Saund.* 64., *Selwyn's Ni. Pri.* 122. A distinction was formerly taken, says Serjeant *Williams*, in his note, between a *promise to pay* and a bare acknowledgment, but no longer regarded, it being now settled that an acknowledgment of the debt takes it out of the statute. And also *Selwyn* 126, that however it was ruled in *Heylin* v. *Hastings*, yet from the language of more modern decisions it must be inferred, that the mere finding by a jury of an acknowledgment of the debt within six years of action brought will be sufficient. But it is laid down also and sanctioned by Lord *Mansfield*, not to speak of later authorities, that an acknowledgment may be inferred even from equivocal expressions. A letter written in ambiguous terms shall be left to the jury to say, whether it amounts, not *to a promise*, for that is not the language in the books to which I refer, but to *an acknowledgment*. The bare saying that no demand had been made within six years, has been left to the jury as evidence of an acknowledgment, who found accordingly, and a new trial refused. It has been said that the slightest acknowledgment will take a case out of the statute, as when defendant said, "I am ready to account, but nothing is due." But what is more, circumstances will take a case out of the statute, from which may be inferred an acknowledgment. The idea of a *new promise*, which is sometimes introduced in the *English* decisions, does not appear to be on principle correct. The saying your demand is barred by the statute, and

1813.

JONES v. MOORE.

I will not pay, has been held an acknowledgment of the debt, and taken the case out of the statute. How could there be a new promise here? The truth is, it is the old promise that is *continued*, or as some choose to say, *revived*. A new promise would be a *nudum pactum* without a reference to the consideration of the old. Why then not go upon the old promise, and allege it as still continuing, by force of the acknowledgment of a consideration still existing. The replication to the statute, of an acknowledgment of the debt within six years, and demurrer to this, would it prevail? Why then, not the promise laid as made to the deceased? It is laid down by Lord *Mansfield*, 2 *Burr.* 1099, "that an acknowledgment "of the debt even after action commenced, takes the case "out of the statute." In that case the promise laid in the declaration could not be the promise raised by the acknowledgment; which proves that the language of a new promise, or reviving a promise, is incorrect, and it is the original promise that ought to be declared upon, unless in the case of an express promise to pay, and undertaking by a representative, making the debt his own. The idea of a new promise is a fiction introduced by the *astutia* of the courts, to take a case out of the statute, and yet preserve the forms of pleading as before. This is done by reciting the original promise as a consideration of the new, which by a technical fiction is alleged to be made. But it would have answered the same purpose, and superseded the necessity of a fiction, to have *replied specially* to the plea of the statute, that the defendant had acknowledged the debt within six years. I am clear that such a special replication could not but be sustained. In the case before us therefore, I would give leave to withdraw the joinder in issue on the plea of *non assumpsit*, and reply specially according to the truth of the case and in bar of the defendant's plea, that he had acknowledged the debt within six years. This would be my way of proceeding, and what I would ask leave to do in order to get quit of the fiction of a promise, which the common mind cannot comprehend. But if it is preferred to follow the old forms and stick to the fiction, it may be done by asking leave to change the declaration by alleging a new promise in consideration of the old, or adding a second count. According to the law now holden, it will come to the same thing; but I prefer the simplicity of truth where fiction may as well

1813.

JONES v. MOORE.

be avoided. It is more comprehensible by the student of the law, and will mar less the good sense and logic of the science of pleading.

But the giving leave to do one or the other of these must depend upon the evidence of an acknowledgmen. of the debt by the defendant. I am of opinion now as I was at the trial, that there was evidence of an acknowledgment sufficient to take the case out of the statute. This being the case, I have wished to support the pleadings; but the taking issue on the plea of *non assumpsit* seems to be in the way. I am constrained to say there shall be a new trial, with leave to amend; though as the defendant must see that it can answer no other end than to give delay, I would recommend the payment of the demand according to the verdict, unless he chooses to take the sense of another jury on the fact of acknowledgment. I find a dictum upon the point in the charge of the Court, that the special matter may be pleaded. 8 *Mass. Rep.* 129. "The defendant pleads what is *prima facie* a legal bar "to the plaintiff's demand. The plaintiff replies other matter "which shews the defendant to be bound." And 134. "The "sound principle which ought to govern in the construction "of the statute (of limitations) is, that a presumption arises "that the defendant from the lapse of time has lost the evi- "dence which would have availed him in his defence, if sea- "sonably called upon for payment. But when this presump- "tion is rebutted by an acknowledgment of the defendant "within six years, the contract is not within the intent of the "statute." So that I cannot doubt, but that if the defendant were to say, "the debt is so, but I will not pay," he would be liable. This puts an end to all idea of a promise, unless by technical fiction or legal implication, the necessity if not absurdity of which may be avoided by pleading the special matter.

New trial granted.

1813.

LYLE *against* DUCOMB.

Philadelphia, Monday, July 12.

The mortgagee of a lot of ground, has a lien, not only on the ground, but on the buildings erected subsequent to the mortgage, in preference to brickmakers and other material men who claim under the lien law of 1806.

A mortgage given to indemnify the mortgagee against loss in consequence of his drawing notes in favour of the mortgagor, is as valid where the notes are to be drawn in futuro, as where they are already drawn; and if the parties by indorsement on the mortgage agree, that instead of drawing notes for the whole amount, the mortgagee shall indorse part, for which the mortgage shall be a security, the mortgagee will have a lien for the indorsements, not only against the mortgagor, but also against the material men, who subsequently erect buildings on the ground.

THIS cause was argued under a case, which stated as follows:

"*Vincent Ducomb*, the defendant, executed to *James Lyle*, the plaintiff, on the 21st of *February* 1811, a bond and warrant of attorney in the penal sum of 18000 dollars, conditioned for the payment of 9000 dollars on demand; and accompanied the same with a mortgage of the same date, on a house in *Walnut* street near *Second* street, on the back of which was indorsed an agreement, that the said mortgage was to secure *James Lyle* and *Lyle* and *Newman*, from loss, by sundry promissory notes already drawn by *Lyle* and *Newman*, and others *about to be drawn* by *James Lyle*, in favour, and for the use of *Ducomb*, to the amount of 9000 dollars; that *Lyle* should have these notes renewed for twelve months, and *Ducomb* should take them up; but if at any time *Lyle* was under the necessity of paying any of them, he was to be at liberty to proceed immediately on the bond and mortgage, and from the proceeds of sale, to pay all the notes, and the overplus to go to *Ducomb*. By another memorandum indorsed upon the mortgage on the 5th of *September* 1811, it was agreed at the instance of *Ducomb*, and for his convenience, that instead of *Lyle* or *Lyle* and *Newman* being the drawers of all the notes, some of them might be drawn by *Ducomb*, and indorsed by the other parties, and that the mortgage should be a security, not only for the notes drawn, but for the notes endorsed.

"On the 22d of the same month of *February*, the said mortgage was acknowledged, and on the 28th of *February* was recorded. *James Lyle*, and *Lyle* and *Newman*, afterwards lent their notes and indorsements to *Vincent Ducomb*, to the amount of 9000 dollars, relying on the said mortgage as their security, and, in pursuance of the said agreement, continued to renew the same, until *December* 1811, when *Ducomb* became insolvent, and *James Lyle* and *Lyle* and *Newman* took up all the said notes, and after deducting all the money recovered from the rest of the property of the said *Ducomb* sold by the sheriff by execution, and other funds in their hands, there remains a balance of 3378 dollars 49 cents due to them; but none of the said notes were paid

1813.

LYLE v. DUCOMB.

until after the month of *November* 1811, so that in fact no money was paid or advanced by *James Lyle* for or on account of said mortgage, until after *November* aforesaid.

"That when the said mortgage was so given by the said *Vincent Ducomb*, there was a frame house on the lot mortgaged, which *Ducomb* afterwards pulled down, and caused to be erected on the said lot a brick house; but he did not pay the mechanics and workmen for the materials and labour found and furnished for the buildings, which mechanics and workmen now claim a lien on said brick house and lot, in preference to the said mortgage, and the judgment which has been entered on the said bond. The materials were all furnished, and the building was nearly completed, before *December* 1811, and before the payment of any money by *Lyle*, or *Lyle* and *Newman*, on account of the said notes or indorsements.

"If the Court should be of opinion that the proceeds of sale in the sheriff's hands should be paid to *James Lyle*, towards satisfaction of his bond and mortgage, then the said *James Lyle* is intitled to receive the whole sum so in the sheriff's hands.

"But if the Court should be of opinion, that the persons who claim liens, are intitled to a preference out of the proceeds of the building only, in that case the Court to appoint three men to ascertain what proportion of the proceeds of sale shall be considered as the value of the building, and what proportion thereof shall be considered as the value of the lot, and also to ascertain the amount respectively due to each of the lien creditors, who may have filed their claims and proceeded according to law.

"And if the Court shall be of opinion, that the said *James Lyle* is not intitled to any preference, either in the proceeds of the house or lot, then the said *James* to receive only the surplus of the proceeds of sales, after satisfying such of the said lien creditors, as have filed their claims according to law."

The main question depended on the first section of the act of the 17th of *March* 1806, which enacts "that all and "every dwelling house, or other building, hereafter con-"structed and erected within the city and county of *Phila-"delphia*, shall be subject to the payment of the debts con-"tracted for or by reason of any work done or materials "found and provided by any brickmaker, &c. or any other

"person or persons employed in furnishing materials for, "or in the erecting and constructing such house or other "building, *before any other lien, which originated subsequent "to the commencement of the said house or other building;* "but if such house or other building should not sell for a "sum of money sufficient to pay all the demands for work "and materials, then and in such case the same shall be "averaged, and each of the creditors paid a sum propor- "tioned to their several demands." 4 *Smith's Laws* 300.

Tod for the plaintiff.

Delany and *Hopkinson* for the lien creditors.

TILGHMAN C. J. The plaintiff had a mortgage on a lot of ground, the property of the defendant, on which was erected a wooden house. The mortgage was regularly acknowledged and recorded, after which the defendant pulled down the wooden building, and erected a brick one. The different mechanics who furnished the materials, and did the work of the brick building, claim a lien on it in preference to the plaintiff's mortgage, by virtue of the act of the 11th of *March* 1806. By that act it is enacted, that "all buildings "thereafter erected within the city and county of *Philadel-* "*phia*, shall be subject to the payment of the debts contract- "ed for or by reason of any work done or materials found "and provided by any brickmaker, bricklayer &c. &c. *before* "*any other lien which originated subsequent to the commence-* "*ment of the said building.*" At the first reading of this clause, it seems a very plain provision, that the lien of the workmen &c. shall be preferred to mortgages, judgments &c. given by or obtained against the proprietor of the house, after the commencement of the building. But by an argument which appears to me too refined, it is contended that mortgages &c. *prior* to the commencement of the building, may be said according to the intent of this act, to originate subsequent to the commencement of the building, so far as respects their lien on the building; and the argument is simply this, that it is impossible to have a lien on a thing not in existence, and therefore a mortgage cannot be a lien on a building before it is erected. In answer to this, it is to be considered that a mortgage is a legal conveyance of the land itself, and of course the mortgagee has the legal title as long as the mortgage is in force, to the land and every building erected

1813.

LYLE v. DUCOMB.

on the land. It may be asked, and I see not how the question can be answered, at what moment the mortgage began to be a lien on the building, in the sense contended for by the defendant. Was it when the building commenced, or during the time that it was carrying on, or not until it was finished? The idea of separating the building from the ground on which it stands, is altogether novel, and cannot be carried into practice without great difficulty. It is confessed that the land itself remains to the mortgagee, and of course that he may proceed to sell it under the mortgage. But the land cannot be sold without the house. In order to remove this difficulty, it is said that both land and house shall be sold, and the value of each ascertained by arbitrators appointed by the Court. I know not whence the Court derive this power. There is not a word of it in the act of assembly. Thus the obvious meaning of the expressions of the law are rejected, in order to introduce difficulties, which cannot be removed without the assumption of powers, which, to say the least of them, are very doubtful. Besides, this construction may do manifest injustice to the mortgagee, as it does in the case before us. At the time of the mortgage there was a wooden house; this has been pulled down, and the mortgagee has lost the benefit of it. It would be the same if the first building had been of brick instead of wood. In the rapid improvement of this city, we are every day pulling down old brick buildings, and putting up new ones in their place. In such cases then the mortgagee who had the security of a good house and land, is to rest contented with the land alone; and he is to trust to the decision of arbitrators to fix the value even of that; and all these difficulties and inconveniences are to be resorted to, in order to protect persons, who certainly have been unfortunate, but who have no right to complain, because they undertook the building with full notice of the mortgage. It is far better to follow the plain meaning of the words used in the act, which involves us in no difficulties, and protects all persons who make use of due diligence in searching for liens which existed before the commencement of the building. I will add that the legislature, by mentioning *subsequent* liens, must have supposed that there might have been prior liens which were to keep their preference. But if a mortgage bearing date before the commencement of the building was not prior, it is not easily

to be conceived what could be prior. In fact, the defendant's argument proves too much, for, if it proves any thing, it must prove, that it was impossible there should be any lien prior to the commencement of the building. I have said more on this subject than I should have thought necessary, had it not been mentioned by the defendant's counsel, that the construction for which they contend had been sanctioned by the decision of the Courts of Common Pleas, and District Court of this city. We have no report of the cases; perhaps they may have been attended with particular circumstances.

But there is another question in this cause. Supposing the plaintiff's mortgage to have the preference, shall it be preferred to the amount of his whole demand? The mortgage appears by an indorsement on it, to have been intended as a security to the plaintiff, for notes *drawn* or *to be drawn* by the plaintiff and by *Lyle* and *Newman*, in favour of the defendant, and for his use and accommodation, to the amount of 9000 dollars. These notes were to be renewed from time to time by the plaintiff for twelve months, when they were to be taken up by the defendant with his own funds. By another indorsement on the mortgage, subsequent to the commencement of the brick building, it was agreed between plaintiff and defendant, at the request of the defendant and for his convenience, that instead of *Lyle* or *Lyle* and *Newman* being the *drawers* of *all* the notes, some of them might be *drawn* by the defendant and *indorsed* by the plaintiff or by *Lyle* and *Newman*, but the whole amount was still limited to 9000 dollars. It is said that this was a departure from the original agreement, and therefore the mortgage lost its force as to all the *indorsed* notes. I cannot think so. The parties to the mortgage had a right to alter the agreement as they pleased, and so far as *they* were concerned, there cannot be a particle of doubt. With respect to third persons, the mortgage could not be altered to their prejudice; but I do not consider this as an alteration to their prejudice. It is perfectly immaterial to them, whether notes to the amount of 9000 dollars were *drawn* or *indorsed* by *James Lyle* and *Lyle* and *Newman*. The object was to raise 9000 dollars for the defendant on their credit, and this sum would have been raised by *drawing*, if it had not been done by *indorsing*. The drawing or indorsing was but the form; the raising of 9000 dollars, and an indemnity to that amount

1813.

LYLE v. DUCOMB.

by mortgage, the substance. I am of opinion that the parties had a right to vary this form, without impairing the force of the mortgage, either as it regarded themselves or others. It was opened by the defendant's counsel, though not much insisted on, that a mortgage intended as an indemnity against acts *to be performed at a subsequent time*, ought not to have any effect against third persons. This point was very properly abandoned. There cannot be a more fair, *bona fide*, and valuable consideration, than the drawing or indorsing of notes at a future period, for the benefit and at the request of the mortgagor; and nothing is more reasonable than the providing a sufficient indemnity beforehand. On all the points which have been made in this case, my opinion is in favour of the plaintiff.

YEATES J. I have not a particle of doubt as to the mortgage executed by the defendant to the plaintiff on the 21st of *February* 1811, duly acknowledged and entered upon record on the 28th of the same month, that it operated as an incumbrance on the lot of ground, and frame house thereon from the time of its *execution*, according to the true intent and meaning of the parties at that period, although no money was actually paid until after the month of *November* following. It took effect by way of indemnity, and notes were furnished to the mortgagor, upon a reliance on its security. I have known several instances of mortgages given to indemnify sureties, and never heard their legal operation questioned before on this score.

The equity of redemption on the face of the mortgage, rests on the payment of 9000 dollars on demand to *Lyle*. But by an indorsement thereon signed by all the parties, and bearing equal date therewith, it is stated "that the "bond and mortgage recited therein had been given to se- "cure *Lyle* and *Newman* and *James Lyle* against any in- "convenience or damage he or they might sustain, by rea- "son of divers promissory notes already drawn by the said "*Lyle* and *Newman*, and of other notes about to be drawn "by *James Lyle* in favour of *Ducomb*, to the amount of "9000 dollars, all of which notes have been or are about to "be drawn for the use and accommodation of, and lent to "*Ducomb*, and which notes *Lyle* thereby promised to renew "from time to time as they might become due, and so to

"continue to renew the same for the space of twelve ca- "lendar months from that time, besides the days of grace." It was further stipulated, that *Lyle* should not at any time be called upon by *Ducomb*, to furnish cash to take up or pay all or any part of the said notes, but that the same should be paid and taken up by *Ducomb*.

By another indorsement on the mortgage likewise signed by all the parties, bearing date the 5th of *September* 1811, it is recited that "whereas it appeared by the declaration of "*Ducomb*, that in some cases it would be most convenient "for him to have the indorsements of *Lyle* and *Newman* and "of *James Lyle* on notes drawn by *Ducomb*, instead of notes "to be drawn by them or either of them, as was mentioned "in the first agreement, and *Lyle* and *Newman* and *James* "*Lyle* were willing so to accommodate *Ducomb:* It was "agreed, that the bond within recited, and the within mort- "gage, should be held not only to indemnify *James Lyle* "and *Lyle* and *Newman* from such notes of which they "might be drawers as before mentioned, but also in like "manner to indemnify them against any inconvenience or "damage they or either of them might sustain by reason of "any indorsements lent or to be lent as abovementioned; "and that the said *Lyle* and *Newman* and *James Lyle* "might have the same advantages and benefits for the reco- "very of any money they might be compelled to pay as in- "dorsers, as by the first agreement they might be compelled "to pay as drawers of notes; and that generally the above "agreement and every thing therein contained, should ex- "tend to such indorsements as they might give, in as full "and ample manner as if they had been notes drawn by "them or either of them."

I have been minute in my extracts from these two agreements. I shall hereafter more particularly consider the light in which I view their influence upon the questions before the Court.

In opposition to the claim of the mortgagee to take out of Court the money raised by the sheriff, it has been contended that the mortgage having been given subsequent to the 17th of *March* 1806, when a law was enacted conferring a lien on dwelling houses and other buildings thereafter to be

1813.

LYLE v. DUCOMB.

erected within the city and county of *Philadelphia*, in favour of workmen and material men, must be considered as controlled thereby, as to its general legal operation; that the mortgagee relied for his indemnity on the vacant lot and frame house thereon, and that he ought not to receive the superadded value of the property by the new brick building, inasmuch as he would thereby materially affect the interests of other persons, and violate the spirit of the law. It was admitted that the lien of the mortgage, if it operated as an incumbrance under all the circumstances of the case, extended to the ground covered by the new erection; and therefore it had been mutually agreed, that if the Court should be of opinion, that the persons who claimed liens, were intitled to a preference out of the proceeds of the building, persons were to be appointed to ascertain what proportion of the proceeds of sale should be considered as the value of the building, and what proportion thereof should be considered as the value of the lot. Decisions of the District Court, and of the Court of Common Pleas of this county, were referred to during the argument, from whence it was said the principles insisted upon might fairly be inferred, but we were not furnished either with the particulars of the cases, or the grounds of decision. I am compelled to acknowledge that the observations of the counsel made a considerable impression on my mind during the argument, but more mature reflection since has effaced them.

We are now called upon to construe this law upon general principles, and to declare what effect it ought to have. It makes no distinction between the operation of liens prior or posterior to the passing of the act; and yet it is certain, that if the doctrine contended for is applied to incumbrances done or suffered previous to the 17th of *March* 1806, it would impair the obligation of a preceding contract. Erections made on lands which have been mortgaged, operate as a further security to the mortgagee, for *cujus est solum, ejus est usque ad cœlum.* It cannot be asserted with any shadow of reason, that a mortgagee shall be placed at the mercy of a mortgagor; that the latter may prostrate what erections are on the ground, and build up others at his sole will and pleasure, which might diminish the security of the former upon a sheriff's sale, if they are to be paid for out of the proceeds of the sheriff's sale. The mortgagor might thus cover the

1813.

LYLE v. DUCOMB.

whole of a vacant city lot with expensive buildings, and if the mortgagee is eventually compelled to buy it in for his own security, he would be subjected to pay monies out of his own pocket according to the ideal value of those buildings in the estimation of others. Many inconveniences would flow from the principles which have been insisted upon. The law confers on us no power to appoint persons to ascertain the proportional value of the buildings as to the lot, against the will of the mortgagee. It is much better therefore, to adhere to the words of the act of the 17th of *March* 1806, which are susceptible of a plain and obvious meaning. "All "and every dwelling house or other building hereafter con- "structed and erected within the city and county of *Philadel-* "*phia*, shall be subject to the payment of the debts contract- "ed for or by reason of any work done or materials found "and provided by any brickmaker &c., before any other lien, "which originated *subsequent* to the commencement of the "said house or other building." The mortgage here preceded the building, and must prevail against the claims of the artisans and materialists according to its legal operation, and the true intent and meaning of the parties at the time of its execution, as I have mentioned before. The purposes of the mortgage must be first answered, before the other claimants can be let in. This leads me to inquire into the legitimate extent of the mortgage, as far as it affects those claimants, in which I am so unfortunate as to differ in opinion from my brothers. I will give the reasons of my dissent.

I regard the indenture of mortgage, and the indorsement on it bearing equal date therewith, as one act, in the same manner as if they had been incorporated in the same instrument. They show the intention of the parties accurately and precisely defined at the moment. The mortgage was expressly declared to be an indemnity against divers promissory notes drawn by *Lyle* and *Newman*, and of other notes about to be drawn by *James Lyle* in favour of *Ducomb*, to the amount of 9000 dollars. To the amount of the notes thus drawn and taken up by them, the mortgage takes effect from the date of the 21st of *February* 1811, but no further as between the litigant parties. Above six months after, viz. the 5th of *September* 1811, a new agreement was entered into, whereby it was declared, that the indemnity of the mortgage should extend to indorsed notes in order to meet

1813.

LYLE v. DUCOMB.

the wishes of *Ducomb*, and to suit his convenience. If it is possible to doubt what was intended by the first agreement, these doubts would be removed by the inspection of the second indorsement; wherein it is declared that the mortgage should be held, not only to indemnify *James Lyle* and *Lyle* and *Newman* against such notes of which they might be drawers, but also against their indorsements of notes drawn by *Ducomb* himself. Previously thereto, the building of the house commenced, and the liens of the workmen and materialists attached under the law, subject however to the priority of the mortgage, according to its legal effect and the contract of the parties. If the terms were changed by the second contract, as I think clearly they were, for the reasons I have given, was it competent to the parties to make this alteration to the injury of intervening creditors by a statutable lien? This then is the question.

It has been urged on the part of the mortgagee, that the spirit of the contract was an indemnity against notes lent or indorsed for the accommodation of *Ducomb;* and that third persons have no right to object that the notes were indorsed by *James Lyle* or *Lyle* and *Newman*, instead of being drawn by them or either of them. The same substantial benefit was conferred on *Ducomb* in either mode.

True: as between the original parties, the whole transaction is perfectly right and fair. But how far it should affect third persons, now becomes the point of inquiry. That the mortgage was meant as an indemnity, there can be no question; but it must be limited and governed by the agreement of the parties. To warrant a recovery upon it, there must have been a damnification within the precise terms of the contract. If those original terms have been enlarged to the injury of other lien creditors, those creditors have a right to make objections. I will exemplify my system of reasoning by putting a few instances. It would be of no moment to a mortgagor, whether the consideration money of the mortgage was grounded on the delivery to him of *meal* or of *malt*, or of his individual debts due to other persons for such articles advanced and paid by the mortgagee. But if a mortgage is given to indemnify a person against an advancement of money for debts due for *meal*, it will not be construed an indemnity to the mortgagee for monies paid by him for debts due for *malt*. So in the principal case, if *James Lyle* or *Lyle*

and *Newman* had purchased in the notes of *Ducomb*, or had given him bonds instead of notes, I should hold the mortgage could not take effect as an indemnity in such cases to the injury of other lien creditors, so as to squeeze them out. The present is a struggle between two classes of creditors, whom I will suppose to be equally meritorious; their several legal rights should prevail.

Upon the whole matter I am of opinion, that the plaintiff is intitled to a preference as to receiving the proceeds of sales to the amount of the notes drawn by himself or by *Lyle* and *Newman*, and taken up by them in pursuance of the mortgage, but no further.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment that the money be paid to the plaintiff.

Low and another *against* DAVY.

Philadelphia, Monday, July 12.

If the assured, in consequence of the port of destination being blockaded, accepts his goods from the carrier at an intermediate port, paying full freight, and from thence transports them by lighters to their destined port, he cannot recover from the underwriter on goods, either the expenses of transhipping and the freight paid for the lighters, or a premium of insurance paid for the risk in the lighters.

CASE. "On the 17th of *March* 1807, the defendant, as President *pro tem.* of the *United States* Insurance Company, subscribed a policy of insurance, for and on behalf of the plaintiffs, in the sum of 17500 dollars on goods on board the ship *Le Roy*, upon a voyage at and from *New York* to *Bremen*, at a premium of six per cent.; the same being declared on sugars valued at 100 dollars per hogshead, coffee at twenty-seven cents per pound, and *Nicaragua* wood at 120 dollars per ton.

"On the 5th day of *April* 1807, the ship *Le Roy* sailed from *New York* upon the voyage insured, having on board goods, the property of the plaintiffs, amounting in value to the sum insured in the policy, according to the value therein expressed. On her voyage, the ship experienced heavy gales of wind, by which part of her cargo was damaged. On the 11th of *May* 1807, she was brought to, and boarded by the *British* privateer *Busy*, *William Bell*, commander, who seized and sent her into *Plymouth*. The ship was restored to the claimants, her papers being indorsed by the Admiralty Court, forewarning her not to enter the river *Weser*, the

1813.

Low v. Davy.

same being blockaded by the *British* squadron; and thus forewarned, proceeded to *Tonningen*, where the ship arrived. The cargo was landed at *Tonningen*, and there delivered to the agents of the consignees at *Bremen*, who paid the entire freight, by the bills of lading, and the goods were forwarded in lighters for *Bremen*, one of which was captured by the *British* and restored. The plaintiffs did not abandon. In the adjustment of the loss, arising upon the damaged goods, the assured charge to the underwriters the expenses of landing and reshipping, and the freight paid for the transportation of their goods in lighters from *Tonningen* to *Bremen*, and also the premium of insurance paid on one of the said lighters, which was captured by the *British* and afterwards restored.

"Two questions are submitted to the Court.

"1. Are the expenses and freight paid for the transportation of the goods in lighters from *Tonningen* to *Bremen*, or either of them, properly charged to the defendant in the adjustment of the partial loss?

"2. Is the premium of insurance paid on said lighter properly charged in such adjustment?

"If either of said questions is decided in the affirmative, judgment is to be entered for the plaintiffs, and the amount of the partial loss to be ascertained and adjusted by referees to be appointed by the Court, under the Court's decision of these questions.

"If both questions be decided in the negative, judgment to be entered for the defendant."

Chauncey for the plaintiffs. 1. The expenses and extra freight were paid to prevent a total loss; for the charter party being dissolved by the blockade, the master, unless full freight had been paid at *Tonningen*, would have been intitled to bring back the goods to *New York*, and the voyage would thus have been broken up. It is the case of a payment made necessary for the whole concern by the peril of blockade, and is chargeable upon the same principle with expenses incurred to liberate an adventure from restraint. *Park* 174., *Beawes* 150.

2. The insurance was a measure of just precaution, arising out of the peril insured; and was effected for the benefit of whom it might concern, before the insurance in this country

was known. It should therefore be borne by the defendant. *Fontaine* v. *Columbia Ins. Co.* (*a*).

Binney for the defendant. 1. The payment of full freight at *Tonningen* was a voluntary act, and not a consequence of the peril; for the charter being at an end, all that the acceptance of the goods created an obligation to pay, was freight *pro rata*, and then the freight to *Bremen* would have made up the entire freight. If the owner of goods pays more than one full freight for the voyage, it is his own fault; the underwriters on goods have nothing to do with it. It does not appear that the goods would have been brought back, if full freight had not been paid; and if they would have been, the payment was not made to prevent a total loss, because whether total loss or not, depended upon the plaintiff's electing to abandon, and not upon any fact that existed at the time of payment.

2. If the defendant was on the policy to *Bremen*, he cannot be charged with a premium on the same risk; if he was not, the events of that part of the voyage do not concern him. The *New York* case charged the premium to the underwriters, because the captain was forced to allow it to the agents who gave bonds to liberate the cargo, and who chose to insure their own interest. Here the same interest was voluntarily insured a second time.

Tilghman C. J. This is an action on a policy of insurance on goods in the ship *Le Roy*, on a voyage from *New York* to *Bremen*. In the course of the voyage, the ship was taken by a *British* privateer, and sent into *Plymouth* in *England*. The Court of Admiralty ordered restitution to the claimants, but the ship's papers were indorsed with a warning not to enter the river *Weser*, which was then blockaded by a *British* squadron. Being thus warned, the ship proceeded to *Tonningen*, where having arrived in safety, the agents of the consignees in *Bremen* received the cargo and paid the whole freight. They then sent the goods to *Bremen* in lighters, one of which was captured by the *British*, and restored. An insurance was effected from *Tonningen* to *Bremen*.

The question is, whether the defendants are liable for the

(*a*) 9 *Johns.* 29.

1813.

Low v. Davy.

cost of this insurance, or for the expenses of carrying the goods from *Tonningen* to *Bremen*.

I cannot see upon what principle the defendants are answerable for those charges. If the plaintiffs thought proper to pay the whole freight when only part was due, it was their own affair, with which the defendants had nothing to do. Here has been no loss, the goods have arrived in safety at the port of destination. Whether the plaintiffs had or had not a right to abandon, is not now in question, for they did not abandon. The ship earned at most only a *pro rata* freight; and if the owners of the goods after paying the entire freight of their own accord, incurred additional expenses in transporting them to *Bremen*, it is not in the nature of a loss for which they can claim an indemnity from the underwriters. Whether the *Weser* remained under actual blockade at the time the goods were carried round from *Tonningen* to *Bremen*, does not positively appear, although from the capture of one of the lighters, we are led to suppose that it did. The restitution of the goods captured in this lighter, may be accounted for from a fact mentioned in the case of *The Maria*, decided by Sir *William Scott*, 6 *Rob.* 201. It seems that the *British* government, on a remonstrance from *Bremen*, was induced to relax the blockade, so far as to permit the importation into that port in lighters. As for the *insurance* from *Tonningen* to *Bremen*, there is, if possible, less colour for that than the other charges. Because, if the underwriters remained liable for the risque between *Tonningen* and *Bremen*, they gave no authority to the plaintiffs to burthen them with the cost of another insurance, which it was folly to make without necessity. And if they were not liable for that risque, of course they are not liable for the expense of insuring against it. Upon the whole, I am of opinion that the defendants are not liable for any of the charges on the transportation of the goods from *Tonningen* to *Bremen*.

Yeates J. No proposition is more self-evident, than that a greater sum than has been stipulated to be paid for the transportation of goods from one place to another, cannot be legally or morally exacted.

In this case, the sugars, coffee and *Nicaragua* wood of the plaintiffs, were insured in a valued policy upon a voyage at and from *New York* to *Bremen*. The ship was seized and

sent into *Plymouth*. She was there restored, her papers being indorsed, "not to enter the river *Weser*, the same being "blockaded." She proceeded to *Tonningen*, where the articles were landed and delivered to the agents of the consignees at *Bremen*, who paid the *entire* freight according to the tenor of the bills of lading, and forwarded the goods in lighters to *Bremen*.

The plaintiffs have insisted that the payment of this second freight and the expenses thereon, prevented a total loss to the insurers, and justly form an article of charge in the adjustment of a partial loss, the turning the vessel back from the course of her voyage, and the blockade of *Bremen* which lies on the river *Weser*, falling within the restraint of princes. To this it has been correctly answered that these events might have formed a ground of abandonment to the insurers, if the insured or their agents had chosen so to consider them. But they did not abandon; they elected to take their chance of the market at the port of destination, being an inconsiderable distance from it when at *Tonningen*. Here they paid the ship owners their full freight, although the same could not have been demanded on any principle of maritime law, unless the latter had delivered the merchandize at *Bremen*, or had offered to transport it thither, and the same had been refused by the agents. It is fully settled that insurers on goods have nothing to do with the freight, and that they only stipulate an indemnity for loss sustained by any of the perils expressed in the policy. With what propriety then can the voluntary unadvised conduct of the plaintiffs' agents, in paying a second freight from *Tonningen*, and the attendant expenses, be visited on the underwriters? These expenditures were not the legitimate effect of the blockade of *Bremen*, but must be ascribed to sub-agents under their principals, against whose acts there was no stipulated indemnity.

The second point appears to me equally clear in the defendant's favour. If the underwriters here were responsible under the circumstances of this case, for the transportation of the goods from *Tonningen* to *Bremen* in case a loss should arise, recourse should be had to them upon their policy, which must be deemed an adequate indemnity; but if they were not so reponsible under the original contract, the act of the plaintiff's sub-agents could not render them liable. The

1813.

Low v Davy.

defendant has not engaged to pay a premium on a second policy, effected without his knowledge or approbation.

I am clearly of opinion in the negative on both of the questions submitted to our decision.

Brackenridge J. not having been present at the argument, gave no opinion.

Judgment for defendant.

M'Kinley *against* M'Calla.

Philadelphia, Monday, July 12.

IN ERROR.

Upon an appeal from a justice of the peace, a jury may find a sum due to a greater amount than was within the jurisdiction of the justice. It does not follow from such a verdict, that the justice had no jurisdiction.

ERROR to the Common Pleas of *Philadelphia* county.

M'Calla the plaintiff below, brought trover before a justice of the peace, against *M'Kinley*, and obtained judgment on the 30th of *October* 1811, for thirty dollars and costs, the extent of the magistrate's jurisdiction. The defendant appealed to the Common Pleas, where a verdict was found for the plaintiff on the 3d of *February* 1813, for *thirty-two* dollars and six cents costs, upon which judgment was entered.

Delany fo plaintiff in error, contended that the verdict proved the sum in controversy to have been beyond the jurisdiction of the justice, as it is limited in trover by the act of 4th of *April* 1809; and cited *Moore* v. *Wait* (*a*) and *Owen* v. *Shelhamer* (*b*), to shew that this was fatal.

E. S. Sergeant contra, insisted that the inference from the verdict was incorrect. The cause of action was the same, and the jury merely added the interest. Unless they had authority to do this, the plaintiff must have been a sufferer by the appeal.

Tilghman C. J. The act of the 4th of *April* 1809 gives jurisdiction to justices of the peace in actions of trover, to the amount of thirty dollars. The error assigned is, that judgment was entered in the Common Pleas for thirty-two dollars, which exceeds the jurisdiction of a justice of the peace. It is contended, that the verdict of the jury for thirty-two dollars, is conclusive evidence that the cause of action before the justice

(*a*) 1 *Binn.* 219. (*b*) 3 *Binn.* 45.

amounted to thirty-two dollars. But it is not so. The judgment of the justice was for a sum within his jurisdiction, and when the cause came to trial on the appeal, the jury were not obliged to give precisely the same sum that was recovered before the justice. It does not appear that any thing more has been done in this case. The cases cited by the counsel for the plaintiff in error are not applicable. They only go to shew, that the appellant cannot proceed in the Common Pleas on a *different* cause of action from that which was prosecuted before the justice. I am of opinion that the judgment should be affirmed.

1813.

M'KINLEY *v.* M'CALL.

YEATES J. gave no opinion, having been prevented by sickness from being present at the argument.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed.

5b 601
3wh305
5 266
0 361
0 362
3 391

PEMBERTON *against* PARKE and others executors of PEMBERTON.

Philadelphia, Monday, July 12.

CASE stated for the opinion of the Court.

"On the 1st day of *April* 1794, *John Pemberton* made his "will, and thereby *inter alia* bequeathed as follows:—"To "the children and grand-children of my brother *Israel Pem-* "*berton* deceased, (excepting *Mary Fox* and her children, she "and they not needing it,) to be equally divided among *those* "*of them* who may be *then* living, saving that my cousin "*Sarah Rhoades* shall have two shares thereof, two thousand "pounds."

"The word *then*, it is agreed refers to the time of the "death of the testator's widow *Hannah Pemberton*.

"The testator died on or about the 31st of *December* 1794. "The widow died on the 22d day of *June* 1811. At the "time of her death there were living *Mary Pleasants*, who "was a daughter of *Israel Pemberton*, eight children and "thirty-six grand-children of *Mary Pleasants*; three children "of *Joseph Pemberton* who was a son of *Israel Pember-*

The testator bequeathed two thousand pounds "to the children "and grandchildren of his "brother *I. P.* "deceased, except- "ing *M. F.*" (who was a grandchild of *I P.*) "and her "children, she "and they not "needing it, to "be equally di- "vided among "those of them "who may be "*then* living," (*viz.* at the death of the testator's widow) "saving that his "cousin *S. R.* "should have "two shares

"thereof." *Held*, 1. That the great grand-children of *I. P.* took equally with children and grand-children. 2. That all who were alive at the death of the testator's widow, whether born before or after the testator's death, were entitled to take.

1813.

PEMBERTON v. PARKE.

"*ton*, and five grand-children of *Sarah Rhoades*, who was a "daughter of *Israel Pemberton*. *Mary Fox* was a *grand-*"*child* of *Israel Pemberton*. The plaintiff is one of the grand-"children."

"All the parents of the great grand-children, except Mrs. "*Rhoades's* son and daughter, are alive, and were alive at "the making of the will and codicil, and the death of the "testator."

"The questions submitted to the Court are, 1st. Whether "children and grand-children, only, alive at the widow's "death, are to take. 2dly. Whether if great grand-children "are to take, those born after making the will, or those born "after the testator's death, are to come in with the other "great grand-children for a share."

Tilghman for the plaintiff.

1. Great grand-children do not take. The words of a will are to be understood, generally, as they are used in common parlance, unless they have acquired an appropriate legal meaning. In that case they must be taken in the appropriate sense, provided it is not plainly against the testator's general intent. The words *children* and *grand-children* have no appropriate legal meaning; the sense in which the testator used them, must therefore be ascertained by a reference to his will, and the popular signification of the terms. In the present instance, *children* cannot include all the descendants of *Israel Pemberton*, because the testator goes further, and specifies *grand-children*. *Grand-children* cannot include *great grand-children*, because the testator, knowing that his brother had all three descriptions of descendants, confines his bequest to two of them. Expressing the two first excludes the last. He could not have used *grand-children* in a comprehensive sense to include great grand-children, because he did not use *children* so. He evidently used both terms in the popular sense. The amount of the legacy, and the number of legatees are a further proof of it. If great grand-children are excluded, there will be seventeen to share, and the family of *Mary Pleasants* will take nine-eighteenths, *Sarah Rhoades* taking a double share; if they are included, there are fifty-three legatees, and the *Pleasants* family take forty-five parts. The testator must have seen that such a division would reduce the legacy to a trifle, and would place the remotest descendant upon a foot-

ing with the *Pembertons* and *Sarah Rhoades*, except as to her double share, and that would come to little. He therefore guarded against it by mentioning two classes only; and there is no case where the Court has disregarded such a division, and extended it to a third.

2. If great grand-children take, those only can do it, who were alive at the testator's death, and also at the death of his widow. "To the children and grand-children of *Israel* "*Pemberton*," is plainly to persons in being. "To be equally "divided among those of *them* who may be then living," is restrictive, and does not extend to the unborn. The general rule is, that persons referred to in a will, mean persons living at the testator's death. In *Northey* v. *Burbage* (*a*) it "was agreed by the Court, that a devise to all his children "and grand-children, extends only to those who were in esse "at the time when the will was made, for then the will speaks; "and none born after are to be let in, unless there had been "future words in the will." In subsequent cases it is extended to the testator's death, that being the time when the will speaks. In *Ellison* v. *Airey* (*b*) Lord *Hardwicke* says, that "the Court will not construe a will to extend to persons "not in being, unless the testator shews his intention to be "such by words in the will; as it tends to make property un-"certain, and to the inconvenience of making more divisions "than the testator meant." In that case the counsel cite *Web* v. *Web*, which is strong to this point; for that was a devise of the residue of personal estate to the testator's brother and *all* his children, to be divided amongst them share and share alike. The brother had several children; and six months after the testator's death, another child was born. Lord *Talbot* held that this child could not take. In *Horsley* v. *Chaloner* (*c*) the devise was to the younger child of the testator's son, and if more than one, then to such younger children, equally to be divided, and to be paid at their respective ages of twenty-one; and if any died before twenty-one, then to survive to the others. A child born after the testator's death was excluded. In that case as in the present, the payment was to be made at a future day, and among those who should survive. In *Coleman* v. *Seymour* (*d*) the devise was to the wife of *C.* for the use of her younger children as she should ap-

(*a*) *Prec. in Chan.* 470. 1 *P. Wms.* 341. *S. C.* (*b*) 1 *Ves.* 114. (*c*) 2 *Ves.* 83. (*d*) 1 *Ves.* 209.

1813.

PEMBERTON v. PARKE.

point; and the children of her second husband were excluded. To the same principle, are *Heath* v. *Heath* (*a*), *Hodges* v. *Isaac* (*b*), *Gartland* v. *Mayot* (*c*) and *Cook* v. *Cook* (*d*).

Rawle for the defendants.

1. Great grand-children may take under the term *children* or *grand-children*, and it was the particular intention of this testator, that they should take. The term children includes all descendants. In *Wythe* v. *Thurston* (*e*), grand-children and great grand-children were both embraced by it. In *Wyth* v. *Blackman* (*f*) and *Gale* v. *Bennet* (*g*), the same construction is given to it. The term grand-children is a word of still larger import. It takes in every body descended from the testator, and will have that effect, unless the intention appears to the contrary. *Hussey* v. *Dillon* (*h*). The circumstance of naming both classes ought not to limit the extent that either term would have by itself; for the intention to include all, is the more manifest from the use of the two terms which in popular language embrace all a man's descendants. In this case however the intention is made perfectly plain by the exception of *Mary Fox* and her children. The testator knew that *Mary Fox* was a grand-child, and that her children were the great grand-children of *Israel Pemberton*. He excepts both from the benefit of the legacy; that is, he excepts particular great grand-children, which is conclusive to shew, that he considered them as included by the general terms of the legacy. This certainly disarms the argument that is founded upon the specification of two classes only, and which has considerable force. It shews that the testator in the present case meant to comprehend more than the mere terms are supposed to comprehend; and against so plain an intention, the inconvenience of splitting up the legacy into small parts, is nothing.

2. The general rule I admit, that where persons are spoken of in the present time, such only are embraced as are living at the death of the testator, unless an intention to the contrary appears. But the rule does not apply to this case, because the intention is to the contrary; for the legacy does not vest until the death of the testator's widow, and the division is to be made among such as may be living at that time. It is

(*a*) 2 *Atk.* 121.
(*b*) *Ambl.* 348.
(*c*) 2 *Vern.* 105.
(*d*) 2 *Vern.* 545.
(*e*) *Ambl.* 555.
(*f*) 1 *Ves.* 196.
(*g*) *Ambl.* 681.
(*h*) *Ambl.* 603.

the same as if the testator had given the legacy among such of the children, grand-children, and great grand-children of his brother, as should be living at the death of his widow. There is no inconvenience in admitting all up to that time, because until then no one takes in certain, and it is impossible to imagine a cause of preference in the testator's mind, of persons born after his will and before his death, over those born after his death, and before that of his widow. The inconvenience to legatees then in being, by introducing new partners, would be obviated by the probable death of some of the old ones. Where the description is general, there is no other safe rule, but to comprehend all who come under it at the time when the bounty is to be distributed.

Reply. 1. The exception of *Mary Fox* and her children ought not to have the effect contended for. If children and grand-children stood alone, it is admitted the argument would have force; it is reasonable then to endeavour to account for any thing of a contrary tendency, so as not to destroy such argument. This may be done in two ways. First, by the drawer of the will's mistaking *Mary Fox*, whose maiden name was *Pemberton*, a daughter of *Charles Pemberton*, for a daughter of *Israel.* If in *Hussey* v. *Dillon*, the mistake of calling Miss *Hussey* a grand-daughter, when she was a great grand-daughter, did not prevent great grand-children from coming in, which was the general intent there, the mistake of treating a great grand-child as a grand-child, ought not to prevent great grand-children from being excluded, which is the general intent here. Secondly. As *Mary Fox* was a grand-child, it was necessary to mention her to exclude her, and the meaning was that neither she, nor her children under her should take. But what is said as to *Mary Fox* is an exception. Now an exception proves the rule, but does not destroy it. The construction given to this exception, makes it broader than the rule, and is a plain contradiction of the terms of it; it ought so to be interpreted as to make it restrain, and not enlarge the previous terms.

2. It is admitted that a devise in present terms generally includes existing persons; but that here it does not, because it is the same as if it had been to such as should be living at the wife's death. This is substituting an original bequest of a future nature, in the place of a present bequest to a certain

1813.

PEMBERTON v. PARKE.

description of persons, to be lessened as to its objects, by their dying before a certain time; and this original bequest of a future nature, is to increase the number of objects, so that the testator could not know what was given to such of his first objects as might outlive his widow. There is no resemblance between the actual and the substituted case. The devise is in fact the common one of a devise to certain persons, but if some die before a certain or uncertain time, the survivors to have all; this is not a part of the bequest, but a restriction of it.

TILGHMAN C. J. Two questions are submitted to the Court in this case on the will of *John Pemberton*.

1. In the case of *Hussey* v. *Dillon*, Lord *Northington* says, that in common parlance, the word *grand-children* includes *great grand-children* and all other descendants. In this I think he goes too far. In common parlance we understand *grand-children* to mean *children of children*. But it is certain that where it appears by the will, that the testator meant to comprehend great grand-children, the Courts have given it a construction agreeable to the intent. Let us see then whether any thing appears in this will from which the intent of the testator may be inferred. He must have known very well that the children of *Mary Fox* were great grand-children of *Israel Pemberton*, and when he excepts *Mary Fox and her children* from any share of this bequest, he must have supposed that without such exception they would have taken. The inference is very strong, that he intended to let in great grand-children; so strong indeed that I am unable to resist it, although it leads to the inconvenience of cutting up the 2000*l.* into such small portions, as makes them of little value. I am therefore of opinion that the great grand-children come in for a share equally with the children and grand-chidren.

2. The next and more difficult question is, whether this bequest is to be limited to those persons who were in being at the death of the testator. If this will had been put into my hands, and I had been asked for my opinion of the testator's meaning, without argument or reference to authorities, I should have said at once, that he intended the 2000*l.* to be divided among all the children and grand-children of *Israel Pemberton*, who should be living at the death of his widow

Hannah Pemberton, without discrimination; for I perceive nothing which affords any indication of an intent to exclude those who should be born after the death of the testator. He looked forward to the *death of his widow*, as the period at which his bounty was to be distributed. It was very natural therefore to intend, that *all* those who were *then* living, and *only those*, should share the legacy. But it has been very ingeniously and ably argued by the plaintiff's counsel, that according to established rules of construction, no persons shall be included in this bequest, but those who were in existence at the death of the testator. I have carefully examined the cases cited on the argument, and am of opinion that neither the rule, nor the reason of the rule, is applicable to the case before us. Before I consider these cases, I will state what the rule appears to me to be. Where a man devises a sum of money *generally*, to be equally divided among the children of *A*, those only who are in being at the death of the testator shall take; the reason is that it was the intent that the legacies should be vested at that time, and that the legatees should then receive their money. Now if *all* the children are let in, they must *all* wait till *the death of A*, before any one of them receives his legacy, because until the death of *A* it cannot be known how many children he may have. The result might be, that instead of the children taking, many of them might never take: they might die in their father's life time, in consequence of which their share would indeed be transmitted to their representatives, but would be of little benefit to them personally; or if they survived their father, the legacy might come so late as to be of little service. But where the testator declares his intent that the legacies shall not vest till *a future time*, there can be no good reason why all those who were born before that time should not be let in, unless there be something in the will to the contrary. I will now take a view of the cases cited.

In *Northey* v. *Burbage*, *Pre. in Ch.* 470, it was said by the counsel and agreed by the Court, that a devise to "*all his* "*children and grand-children*," extends only to those *in esse* at the time *the will was made*, for *then* the will speaks, and none born *after* are let in, unless "there had been future "words in the will &c." This case goes rather too far. It would have been more accurate to say, that none born after

1813.

PEMBERTON v. PARKE.

the *death of the testator* are let in. But it comes within the distinction I have marked. It is a devise generally to children and grand-children.

Ellison v. *Airey*, 1 *Ves.* 111, was a devise of 300*l.* to *A*, to be paid at her age of twenty-one or marriage, and interest in the mean time for her maintenance and education; "but if "she died before twenty-one or marriage, then to the younger "children of her nephew *B*, equally to be divided to and "among them." Lord *Hardwicke* was of opinion, that it meant *such as should be younger children at the death of A before twenty-one or marriage;* "because it was a contingent "legacy, and there was no reason to confine it to the time of "making the will, or the death of the testator, for neither was "the time upon which the legacy was to vest, and therefore as "the whole was suspended until the death of *A*, there was no "inconvenience to wait till then." This reasoning is strong, and bears directly upon the case under consideration; for *here* the legacy is contingent, and not to vest until the death of *Hannah Pemberton*.

Horsley v. *Chaloner*, 2 *Ves.* 83, was a devise of 200*l.* "to "*the younger children* of *A*, equally to be divided, and to be "paid at their respective ages of twenty-one; and if any dies "before twenty one, then to survive to the others:" held by the master of the rolls, that this devise comprehended those children only who were born *at the death of the testator*, because the extending it to those who should be born after, would defeat the will of the testator, who intended that each child should receive his legacy on attaining the age of twenty one; whereas if *all* were to take, "it would be necessary to "wait till the death of *A*, because it could not be known "sooner, who would be entitled."

Coleman v. *Seymour*, 1 *Ves.* 209, was a devise to testator's daughter *A*, wife of *B*, of 3000*l.* "for the use of her younger "children, to be by her distributed among them, in such "manners, shares, and proportions as she shall think fit, and "if no appointment made by her, then equally to be divided "among her younger children, and to survive, if any of the "children died under age, or unmarried." The question here was, whether the younger children by a *future husband* should take; held that they should not, for sufficient reasons mentioned by lord *Hardwicke*, but not at all depending on the rule of construction set up by the plaintiff's counsel in this

case. On the contrary, so far as concerns that rule, his expressions are as follows: "There have been different determinations of this sort of cases, whether *children* or *younger children* should relate to those born at the *making* of the will, or *after* the will, or *further* in the *life* of the person, in whose power it was committed for life; and *no general rule has been laid down*, but always construed according to the particular words, circumstances and views of the testator. I am delivered from any difficulty which would have arisen, had there been any children by *B*, *subsequent* to the making, for they were all born *then*."

In *Heath* v. *Heath*, 2 *Atk.* 121, *A* devised lands to his wife *B* for life, and after her death to *C* in fee, charged with the payment of 400*l.* within six months after *B's* death, *among all the children of E*, share and share alike. After the testator's death, his widow *B* made her will, and gave all her personal estate, "*among all the children respectively male or female of E.*" Some years after the death of both the testators, *another* child of *E* was born: held that it could not take, and very properly, because six months after the death of *B* at furthest was the time for vesting the legacies under *A's* will, and the legacies given by *B* would vest immediately on her death.

Gartland v. *Mayot*, 2 *Vern.* 105, was a devise of 20*l.* a piece to *all the children of her sister B:* the question was whether a child born after the *making* of the will, and before the *death of the testatrix*, should take; held that it *should*, which is contrary to what was said by the counsel, and agreed by the Court in *Northey* v. *Burbage*, but throws no light on the present question.

Cook v. *Cook*, 2 *Vern.* 545, was a devise of real estate to the *issue of I. S.* The case itself is no way applicable, but was cited for the sake of a *dictum* of the Lord Keeper, that on a devise to *a man and his children* of a *personal* estate, a child born after the death of the testator shall not take, for it vested on the death of the testator, and shall not be divested. This is just in conformity to the principle which I have laid down, and does not help the plaintiff, unless it can be shewn, that the devise in *John Pemberton's* will, was in general to the children and grand-children of *Israel Pemberton*. But that is not the case; for although in the beginning of the sentence, it is said *to the children and grand-children* of my brother

1813.

PEMBERTON v. PARKE.

Israel Pemberton, yet it goes on to say, to be equally divided among those of them who may be then living, (that is at the death of my wife.) To get at the testator's meaning, the whole of the sentence must be read; and taking the whole we find, that instead of an immediate devise to any of them, it is but a contingent devise to such as shall be living at the death of the testator's wife.

I am therefore of opinion that all the children, grand-children, and great grand-children of *Israel Pemberton*, who were living at the time of the death of *Hannah Pemberton*, are to come in for a share of the legacy of two thousand pounds.

YEATES J. Grand-children are words of equivocal import, and may or may not include great grand-children, according to the sense in which they may have been used by a testator, collected from the whole of his will. Here the bequests to the children and grand-children of a brother, would *prima facie* evince an intention in the testator to exclude great grand-children; because as he must be presumed to know that his brother had great-grand-children living at the time of making the will, his enumeration of the second class of descendants, would naturally imply that his bounty did not extend beyond that second class. But that argument necessarily loses it weight upon the indication of a contrary intention in the will itself. The testator has excluded from the benefit of this bequest *Mary Fox* and her children. Now it is stated that *Mary Fox* was a grand-child of *Israel Pemberton*, the brother of the testator, and consequently her children stood, as to *Israel*, in the relation of great grand-children. The testator therefore has given his own exposition of the terms he has made use of; and by expressly excepting the children of a grand-daughter, has conveyed his meaning distinctly, that without such exception, such great grand-children of his brother would take; and of course that other great grand-children were not excluded, but all the rest of the great grand-children were to participate in this 2000*l*. If the drawer of the will has committed a mistake, we have no materials in our hands by which we can rectify it. The expressions in the will must be supposed to be those of the testator himself.

It is agreed by the counsel, that the words "who may be

"then living," in the concluding part of the sentence, refers to the time of the death of the testator's widow, which afterwards happened on the 26th of *June* 1811. This introduces the question, whether grand-children or great grand-children of *Israel Pemberton*, born after the death of the testator, and in full life when his widow died, shall take any share of this legacy?

In *Ellison* v. *Airey*, 1 *Ves.* 114, cited by the plaintiff's counsel, Lord *Hardwicke* says, no certain rule can be laid down in cases of this kind. They must be various, as a very few words will vary the evidence of the testator's intention, and consequently the meaning of the will. The Court generally takes it that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being, unless the testator shews his intention to be such by words in the will. When there is a devise to children, if it was to be suspended till the death of the father, it might be little beneficial to any of them. But there are middle cases depending on the penning of a bequest, and he thought that before him to be of that kind. It was a contingent legacy, and there was no reason to confine it to the time of making the will or the death of the testatrix, for *neither* was the time upon which the legacy was to vest.

It is impossible to reconcile all the different decisions on this branch of the law; it would seem however that this general rule may be collected from the cases. Where the devise or gift to the children is general, and not limited to a particular period, it is then confined to the death of the testator. *Northey* v. *Burbage*, *Pre. Ch.* 470., *Heathe* v. *Heathe*, 2 *Atky.* 121., *Horsley* v. *Chaloner*, 2 *Ves.* 83., *Isaac* v. *Isaac*, *Ambl.* 348. But where such devise or gift is to one for life, or where the distribution is postponed to a future time, there children born during the life or before the time of distribution are let in. *Harding* v. *Glynn*, 1 *Atky.* 470., *Graves* v. *Boyle*, *Ib.* 509., *Houghton* v. *Harrison*, 2 *Atk.* 329., *Ellison* v. *Airey*, *already cited*, 1 *Ves.* 111.

The plaintiff's counsel has contended that the devise here to the children and grand-children, was *per verba in presenti*, and not *in futuro*, and that this is all important in ascertaining the testator's intention as to who shall take under it. But the whole will must be taken together, in order to form a judgment of its true meaning. We find therein that the testator

1813.

PEMBERTON v. PARKE.

gave the bulk of his estate to his widow during life or widowhood; and "to the children and grand-children of his brother "*Israel Pemberton*, to be equally divided among those of "them who may be then living, 2000*l.*;" and the word *then* is agreed to refer to the time of the death of the widow. Until the death of the widow the legacy did not vest, but was suspended, and was clearly contingent as to such of the descendants as should survive the widow.

I am therefore of opinion that such of the children, grand-children and great grand-children as were living at the time of the death of the testator's widow, whether born or unborn in the life time of the testator, excepting Mrs. *Mary Fox* and her children, are intitled to share this 2000*l.* according to the true meaning of the will.

BRACKENRIDGE J. concurred.

Judgment for the plaintiff accordingly.

5b 612
4s 201
120 294

Philadelphia, Monday, July 12.

In the Case of a Road in Radnor and Newtown.

If a petitioner for a road, acts as a reviewer, it is fatal to the proceedings.

THIS was a *certiorari* to *Delaware* county, to bring up the proceedings relative to a road laid out in the townships of *Newtown* and *Radnor*.

A variety of exceptions were taken and argued, by *Frazer* in support of the *certiorari*, and *B. Tilghman* for the road; a material one was, that *Maskell Ewing*, who was one of the petitioners for the road, was appointed and acted as a reviewer.

PER CURIAM. Many objections have been made to the proceedings in this case, but we shall confine our opinion to one, namely, that Mr. *Ewing*, one of the petitioners, was appointed a reviewer, and signed the report which was confirmed by the Court. We make no doubt but this appointment was merely accidental. The Court did not happen to have the names of the petitioners before them, when they appointed the reviewers. But it was an irregularity which

cannot be overlooked. We are of opinion that this objection is fatal, and therefore the proceedings must be quashed. 1813. RADNOR ROAD.

Proceedings quashed.

In the matter of KENTON a lunatic.

Philadelphia, Wednesday, July 14.

Before the return of the inquisition taken under a commission of lunacy, the Court may appoint a receiver to the lunatic's estate.

IN this case a commission in the nature of a writ *de lunatico inquirendo* had issued against *George Kenton*, returnable the last *Monday* of this month. The inquest had found the party to be a lunatic; but the inquisition not being yet returnable, *Drinker* laid before the Court *affidavits* proving that the estate was suffering, and that there was no person to take care of it but the wife, who was addicted to intoxication; and on the authority of *Lady Marr's case* (*a*), and *Heli's case* (*b*), he moved the Court to appoint a receiver.

The Court accordingly appointed a receiver until further order, security to be given by the receiver and one good surety in 1000 dollars; and they ordered the bond to be made to the lunatic.

5b 613
74 248

COOPER *against* RANKIN administrator of RANKIN.

IN ERROR.

Philadelphia, Saturday, July 17.

It *seems* that an attorney who is not authorised by writing under seal, cannot execute a deed of release under seal, in the name of his principal; but if he does execute such a deed, though it cannot be given in evidence against the principal under the issue of *non est factum*, yet it may be under the issue of *non assumpsit* as amounting to an agreement not to sue.

THIS was an action in the District Court of *Philadelphia*, upon a promissory note drawn by *Cooper* the defendant below, in favour of *Rankin* the intestate, for 466 dollars 67 cents, and payable in four months from the 13th of *November* 1804. The pleas were *non assumpsit*, payment, and a release, to which last plea the plaintiff replied *non est factum*.

Upon the trial of the cause, the defendant proved, that *Rankin*, in the beginning of the year 1805, sailed upon a voy-

(*a*) *Ambl.* 82. (*b*) 3 *Atk.* 634.

1818.

COOPER v. RANKIN.

age to the *Isle of France*, as the supercargo of *Lewis Crousillat*, and left *Crousillat* to settle and adjust all his concerns, during his absence; that he returned from that voyage in the summer or fall of 1806, sailed in two or three months for *Batavia*, and died abroad.

He then offered in evidence, after proving *Crousillat's* handwriting, an instrument dated the 27th of *May* 1805, signed and sealed "*L. Crousillat*, attorney to *Alexander Rankin*," but without any subscribing witnesses, and purporting, in consideration of an assignment of the same date by *Cooper* of all his property in trust for his creditors, to release and quit claim to him, his heirs &c. all actions, suits, debts, sums of money, and demands in law or equity, which the parties had against him from the beginning of the world to the day of the date.

This evidence was overruled by the Court, who sealed a bill of exceptions.

Sergeant and *Hallowell* for the plaintiff in error. The Court below were of opinion that an authority under seal was necessary to execute the release under seal, and that there was no proof of a delivery of the release by the attorney. As to the first objection, it applies only to the particular issue of *non est factum;* the release was evidence under the issue of *non assumpsit*, to prove an agreement not to sue. As to the second, there was no subscribing witness to the release. None was necessary. And where there is none, proof of the handwriting of the obligor is strong evidence of sealing and delivery, and should have gone to the jury. *Clark* v. *Sanderson* (*a*), *Peak Ev.* 100.

Phillips for the defendant in error. Delivery is essential to a deed, and there was no proof of it whatever. *Bull. N. P.* 254. If delivered, the attorney had no authority to execute it; for an attorney cannot execute a deed for his principal, without an authority by deed. 3 *Bac. Abr.* 408., 1 *Bac. Abr.* 183. *Authority.*, *Co. Litt.* 48. *b.*, 2 *Roll. Abr.* 8., 1 *Salk.* 96., *Brownl.* 94., *Yarborough* v. *Beard* (*b*), 1 *Bac. Abr.* 287. *Attorney.*, *Co. Litt.* 52., 8 *Co.* 58., *Hob.* 9., *Roll. Rep.* 3. The only question below, was, whether the release was evidence under the issue of *non est factum.*

(*a*) 3 *Binn.* 192. (*b*) *Taylor's N. C. Rep.* 25.

1813.

COOPER v. RANKIN.

TILGHMAN C. J. If we were only to consider now, the question which the District Court is said to have decided, that is to say, whether an agent or attorney not authorised by deed, can execute a deed in the name of his principal, I am inclined to think I should agree with that Court, because I do not see how the stream can rise higher than its source. I refrain however from giving a positive opinion on that point, as it is unnecessary. The writing was good evidence on a plea of *non assumpsit*, because, granting it not to be a deed, it might operate as an agreement in writing not to prosecute an action on the note, and this agreement was founded on good consideration, on a conveyance executed by *Cooper*, of all his estate, for the benefit of his creditors. From the circumstance of there being no subscribing witness, I think it probable that the writing never was sealed and delivered; but after proof of the hand writing, it ought to have gone to the jury in the character I have mentioned. I am therefore of opinion that the judgment should be reversed, and a *venire facias de novo* awarded.

YEATES J. gave no opinion, having been sick during the argument.

BRACKENRIDGE J. The use of the seal was originally the distinguishing the person; for every individual was supposed to have his peculiar seal. The act of impressing with a seal, importing greater deliberation, might also be considered as adding to the evidence of its being the act of the party. It was a symbol of solemnity, which gave a greater effect to the instrument. This may be considered as a second use of the seal. There could be no other use in impressing with the *tooth;* for when the teeth were gone, there was nothing with which to compare the impression. Yet this species of sealing would seem to have been in use; for in an old deed by *William* the Conqueror to a certain *Rowdon*, an ancestor of the present earl of *Moira*, and which is in old *English* verse, we have the attestation of sealing in these words:

> "*In token that this thing is sooth,*
> "*I bite the white wax with my tooth.*"
> *European Magazine for* 1811.

1813.

COOPER v. RANKIN.

But both these uses have in a great degree come to nothing. For as to the first, no person is distinguished by a seal, or supposed to be so distinguished. And as to evidence of deliberation, it amounts to nothing, since the circumflex of a pen has come to be considered as equipollent to wax, or to a wafer impressed with a seal. Not even a circumflex or circle is thought necessary, but some curve of the parabola, or something like it, in a flourish or scrape of the pen. It was a bold advance in thus reducing the symbol to a shadow, and I am not able to trace when or where it began. But it would be going a step beyond, to dispense with it altogether, and to say that even the name shall not remain. For though it is a maxim that when the reason of a thing ceases, the law with regard to it ceases also, yet this image of technical distinction is so interwoven with our rules of law, that I am not able to say that the judiciary power can restrain or abridge. The legislative authority has referred to it in acts of assembly, and made it a part of the building. The assignment of an instrument under seal, that of a bond, must be by seal. The limitation of time in the case of a note of hand merely, is different from that of a sealed obligation. Awards must be under seal; certificates of justices of the peace, though they have no seal, &c. &c. &c. The word seal has crept into the acts of the legislature in many cases without meaning or use. It was introduced as a term of course, or supposed to have some magic in it, which baffled the examination. Might it not be advisable by an act of the legislature to reduce the necessity of sealing to *corporate bodies*, who have seals, or are supposed to have them. It is the *hand writing* of an individual that must be proved, and not his seal; and why then continue the necessity of adding something that bears the name? The mischief is, that individuals do not always know where to use seals, or where they may do more harm than good; as for instance in the case before us, where the attorney thought he was making sure doubly sure, by adding a seal. And the fact is, that his authority not being given him by seal, he had no right to put the seal of the principal. There was no necessity for a seal, for it was but a chattel interest that was to be acted on, and had no relation to real estate. But the attorney has put the seal of his principal, and his authority, upon the evidence, appears to have been by parol. The defendant by

his counsel in his pleading might have demurred to the replication of *non est factum* to the plea of release, and shewn that in this case of a chattel interest, there being no relation to real property, it was not necessary that the release should be by deed. The seal in that case would not come into view, and might be rejected as surplusage. But this was not done, but issue taken on the plea.

But as the record comes to us, *non assumpsit* is pleaded, and issue joined upon this plea. Under the plea of *non assumpsit* a release may be given in evidence. 1 *Selwyn's Nisi Prius* 106. This I presume, being laid down generally, may be with or without seal. Surplusage does not vitiate; and the putting the seal was unnecessary to release a right of a chattel interest, though on the issue of *non est factum* it might be necessary to show a seal in order to support the plea. In *assumpsit* the defendant is allowed to give in evidence any thing that will discharge the debt. *Bull. Ni. Pri.* (*old ed.*) 129. If any plea that goes to the whole of the plaintiff's cause of action, be found for the defendant, it will suffice to bar a recovery. This is a principle for which I need not cite authorities. I incline therefore to reverse the judgment.

Judgment reversed.

5b 617
41 436

SIMMONS *against* The Commonwealth.

Philadelphia, Saturday, July 17.

A person who steals goods in another state, and brings them with him into this state, cannot be indicted here for the felony. He is to be treated as a fugitive from justice.

THE plaintiff in error was indicted at a Mayor's Court for the city of *Philadelphia* in *March* 1812, for feloniously stealing and carrying away twenty-five silver spoons and other articles, the property of *E. I. Dupont;* and upon the trial the jury found a special verdict which stated, "that the defendant "did feloniously steal, take, and carry away all the goods and "chattels mentioned in the indictment (except six shirts of "the value of seven dollars) *within the state of Delaware,* "*and that he brought the same into the city of Philadelphia,* "and within the jurisdiction of this Court; but whether &c."

Upon this verdict, the Court being of opinion that the defendant was guilty in manner and form as he stood indicted,

1813.

SIMMONS v. COMMONWEALTH.

adjudged him to restore the property stolen, or pay the value to the owner, and to undergo a servitude at hard labour for the space of three years; and upon this judgment a writ of error was brought in this Court.

The question was argued by

Phillips for the defendant in error, and the Attorney General (*Ingersoll*) for the Commonwealth.

TILGHMAN C. J. This is an indictment for larceny. The property was originally stolen in the state of *Delaware*, and afterwards brought by the thief into this city. The jury found a special verdict; and the question submitted to the Court is, whether under such circumstances, an indictment can be supported in the Mayor's Court. The point has never been expressly decided; but it is understood, that a practice has prevailed *sub silentio*, under which there have been convictions in several of the courts of the state. This practice was founded on the general principle, that possession in the thief amounts to a larceny in every county into which he carries the goods, because the *legal possession* still remains in the true owner, and therefore every moment's continuance of the felony, amounts to a *new caption* and *asportation*. There is considerable subtlety in this principle. It was probably adopted for the convenience of trying the felon in the county where he was taken with the goods in his possession. For it is scarcely reconcileable to plain common sense to say, that the continuance of the possession amounts to a *new* taking. It is in fact but one and the same felony, and so it is considered in law; for if the thief, after carrying the goods from the county in which they were stolen, to another county, and after being indicted and convicted in the latter, should be again indicted in the former, he may plead the conviction in bar, which could not be done if they were *different* felonies. I consider the principle which I have mentioned as bordering upon a fiction, and although it is so well established as not now to be called in question, yet there is no reason why we should give it greater extent than it has received in the *English* common law from whence we took it. Now it was never extended by that law to cases where the *original* taking was without the kingdom. This is expressly stated by Lord *Coke* in 3 *Inst.* 113, and 13 *Co.* 53, in proof of which he cites *Butler's case*

in the 28th year of *Elizabeth*. It was the opinion of the Judges at that time, that no offence was punishable at common law, which was committed without the jurisdiction of the common law, that is out of the kingdom. This ancient doctrine has been adhered to in modern times, as appears in 2 *East's Cr. Law* 772, where the case of *The King* v. *Anderson* is cited, in which it was determined by *all the Judges* in the year 1763, that no indictment lay in *England* for goods stolen in *Scotland* and brought into *England*. This was found inconvenient, and therefore, so far as respected goods stolen in *Scotland*, a remedy was provided by *stat.* 13 *Geo.* 3. *ch.* 31. But I have never heard it suggested that the *English* courts assumed a criminal jurisdiction in case of goods stolen beyond sea, and brought into *England*. It may be said to be inconvenient not to exercise jurisdiction in cases of goods stolen in one of the *United States*, and brought into another, and it appears to me that it will be inconvenient. But the legislature may at their pleasure apply the remedy, as the *British* parliament did. I feel myself treading on tender ground, when *criminal* jurisdiction is in question; and I confess that I had rather see a hundred culprits escape, than extend such jurisdiction a hair's breadth beyond its constitutional limits. The constitution of the *United States* provides for the case of an offender flying from the state in which the offence is committed. Wherever he is found, he may be secured and sent to that state for trial, on demand of the executive thereof. If we should punish him, he may be punished *again* in the state to which he may be sent; for certainly the courts of that state are not bound to pay any regard to our proceedings. A conviction *here* is no bar to an indictment *there*. The different states are altogether as independent of each other in point of jurisdiction, as any two nations; and if murder committed in one state, should be prosecuted in another to which the murderer had fled, without the authority of an act of assembly, we should at once be shocked at the proceeding. In the Supreme Court of *New York*, it has been decided that larcenies committed out of the state, cannot be prosecuted within it, although the goods are brought there. 2 *Johns.* 477, 479. In the state of *Massachusetts* the contrary opinion has been held. 1 *Mass. Rep.* 116., 2 *Mass. Rep.* 14. It appears however that the Judges of *Massachusetts* relied very much on a decision in their own courts, by which they conceived themselves bound,

1813.

SIMMONS v. COMMONWEALTH.

and the case of *the King* v. *Anderson*, cited in 2 *East* from a manuscript report, does not seem to have been known, because it is mentioned by Judge *Sedgwick*, that the only case relied upon as directly in point, was *Butler's case*, 3 *Inst.* 113. If the point had ever been decided in this Court upon solemn argument, I should have been for letting it rest. But that not being the case, we must take it up as *res integra*, and I am of opinion that the Mayor's Court had no jurisdiction, and therefore the judgment should be reversed.

YEATES J. I was not present at the argument on the special verdict found upon this indictment, having been on that day confined to my chamber by indisposition; but I have been furnished with the notes of the cases cited, and of the arguments of counsel on both sides. The jury have found the prisoner guilty of larceny, in stealing twenty-five silver spoons of the value of 100 dollars, of the goods and chattels of Mr. *Du Pont de Nemours*, at *Wilmington* in the state of *Delaware*, and that he brought the stolen goods into the city of *Philadelphia*. The Mayor's Court have decided that the facts thus found constitute a larceny here, in legal contemplation, and have sentenced the prisoner to an imprisonment at hard labour for three years &c. The question is, whether the offence charged against the prisoner is supported by these facts, so as to justify a conviction in this city.

Larceny is defined in the old books to be *fraudulenta obtrectatio rei alienæ, invito domino*. There must be a felonious taking and carrying away, in order to constitute the crime. Offences are *local* in their nature, and must at common law be tried in the county where they were committed.

There can be no doubt under the *English* authorities, that where a person steals goods in the county of *B*, and afterwards carries them into the county of *C*, he may be indicted in the county of *C* for the felony in the county of *B*. The reason given is, that the possession still continuing in the true owner, every moment's continuance of the trespass is as much a wrong to him, and may come under the technical word *cepit*, as much as the first taking. 1 *Hawk. c.* 33. *s.* 9., 2 *Hawk. c.* 25. *s.* 38., 1 *H. H. P. C.* 507, 8. 536., 2 *H. H. P. C.* 163. But to this rule there is an exception, that where goods have been piratically taken on the high seas, and afterwards have been brought into some county in *England*, this

is no felony punishable at common law, because the original taking was not an offence whereof the common law had cognisance. 13 *Co.* 53, *Butler's Case*, 3 *Inst.* 113.

It is objected by the counsel of the plaintiff in error, that *Delaware*, where the offence was first perpetrated, being a sovereign independent state, forms likewise an exception to the rule; and that although a conviction and judgment in one county, may be pleaded in bar to an indictment for the same offence in another county in the same state, yet the same would not hold where the sovereignties were completely independent on each other. The case of *Rex* v. *Anderson and others* (in 1763,) 2 *East's Pl. Cro.* 772, was contended to be similar in principle to the present. Where the original taking was in *Scotland*, it was adjudged that the felon could not be indicted in the county of *Cumberland*, where he was taken with the stolen goods. To remedy this defect in the law, the provisions in the fourth and fifth sections of the *stat.* of 13 *Geo.* 3. *c.* 31, were enacted. Reliance also has been placed on two decisions in the Supreme Court of *New York* in *November* 1807; *The People* v. *Gardner*, 2 *Johns.* 477; where a person stole a horse in the state of *Vermont*, and fled into the state of *New York*, where he was apprehended with the horse in his possession: it was determined that the prisoner could not be tried in *New York* for the felony. The Court held, that where the original taking was out of the jurisdiction of the state, the offence did not continue and accompany the possession of the thing stolen, as it does in the case where a thing is stolen in one county, and the thief was found with the property in another county. The prisoner could be considered only as a *fugitive* from justice from the state of *Vermont*. On the authority of this case one *Schenck*, who was indicted in the city of *New York* for stealing a gun, and the jury found a special verdict that the gun was stolen in the state of *New Jersey*, and brought by the prisoner into *New York* where it was found in his possession, the Court said that the prisoner was entitled to his discharge; but they ordered him to be detained in prison three weeks, and notice thereof to be given to the executive of *New Jersey*, and if the prisoner should not be demanded within that time, that he should be discharged. *Ibid.* 479.

The attorney general has insisted, that no solid distinction can be made between this case, and that wherein goods have

1813.

SIMMONS v. COMMONWEALTH.

been stolen in one county and carried into another county. In either instance the possession of the goods though stolen and carried away, in legal contemplation remained in the real owner. It would be highly inexpedient that such offences should go unpunished; and it is absurd to suppose that a criminal in one state, passing its boundaries with the stolen articles in his hands, should escape with impunity. The invariable practice has been to try offences of this nature in this state, and the reason operates much more strongly since the adoption of the constitution of the *United States*. We are now become a federative republic. Two cases in the Supreme Judicial Court of *Massachusetts* have settled the law in that commonwealth in the manner it is now contended for on the part of the prosecution. *Respub.* v. *Thomas Cullens*, 1 *Mass. Term Rep.* 116, and *Respub.* v. *Thomas Andrews*, in *March* term 1806. The last was for receiving knowingly, goods stolen in *New Hampshire*, which were brought into *Massachusetts*, was fully argued by able counsel, and received the unanimous decision of all the judges, who delivered their opinions *seriatim*. The doubts respecting the law, anterior to the *British* statute of 13 *Geo.* 3. *c.* 31, as expressed in its preamble, were adverted to and remarked upon; and the Court thought that upon principle, independently of the cases decided in *Massachusetts*, the common law doctrine respecting counties might well be extended by analogy to the case of states, united as these are under one general government. The questions in the *New York* cases, cited for the plaintiff in error, appear to have been submitted to the Court and decided without argument.

I have bestowed on this subject every attention in my power, and will at once say, that the chief difficulty which I had to combat, was the effacing of impressions formed in my mind from the practice alluded to by the attorney general in his argument. But I cannot agree with him, that the principle which he has contended for, is fortified by the present constitution of the *United States*. The provisions of that instrument exclude the idea of the jurisdiction insisted on, and supersede the necessity of exercising it, least criminals in other states should escape with impunity. We find in the second section of the fourth article of the federal compact between the several states, that a person charged in any state "with "treason, felony or other crime, who shall flee from justice

"and be found in another state, shall on demand of the exe- "cutive authority of the state from which he fled, be deliver- "ed up, to be removed to the state having jurisdiction of the "crime." When the law is settled and ascertained, political expedience can have no influence on our judgments. We are bound to pronounce the law as we find it written. In criminal cases in particular, the party charged should suffer no other or greater punishment than the law imperiously enjoins. I cannot possibly suppose, that where it is said in some of the books, that the asportation of stolen goods into a different county, satisfies the word *cepit*, by amounting to a new taking, any thing more is meant than it being a continuance of the first unlawful act, it is punishable in either county; not that new and distinct offences arise in every county into which the goods are carried. Were it otherwise, the original unlawful act might be punished as often as the number of counties into which the criminal removed the goods; which would be a plain violation of the great principle of natural law and political justice, that a man should not be punished twice for the same offence. Upon this ground it was held, where a piracy had been committed at sea, and the goods piratically taken brought into *England*, the offence was not punishable in a court of common law; if so prosecuted, the admiralty, having jurisdiction of the original offence on the high seas, might also proceed against the parties charged, who would thus be subjected to a double penalty for the same crime. 13 *Co.* 53., 3 *Inst.* 113.

The distinction between the principal case and stolen goods carried from one county into another in the *same* state or kingdom, appears to me sufficiently obvious. In the latter instance, general laws pervade the whole government, and prescribe penalties on distinct offences. There *autre fois* convict in one county, may be pleaded in bar to another prosecution for the same offence in another county. But not so as between distinct and independent states, governed by different laws. Our laws have no influence in the sister state of *Delaware*, and so *vice versa*. A conviction here of an offence against the peace and dignity of this commonwealth, cannot be pleaded in bar to an indictment in *Delaware* for the same offence laid against the peace and dignity of that state. Besides, the penal codes of the several states greatly vary. We

1813.

SIMMONS v. COMMONWEALTH.

must presume that the punishments annexed to crimes in *Delaware*, are properly calculated to promote the peace and good order of society in that state. If the penalty prescribed to a larceny is more severe than that in *Pennsylvania* for the like offence, then it is clear, that the defendant does not receive an adequate punishment upon his conviction here of the crime committed in *Delaware;* but if on the other hand, the punishment here is the most severe, it is also clear that upon such conviction, he would be subjected here to a greater penalty than the laws of the country where the offence was perpetrated, in such case inflicted. The crime must be viewed retrospectively.

Scotland, for the purposes of the present argument, stood in the same political relation towards *England* in 1763, as *Delaware* now stands toward *Pennsylvania.* They were different kingdoms, governed by distinct laws, but were united under one common head for national defence, and in support of their general interests. The case of *Rex* v. *Anderson et al.* fully established the law, that antecedent to the *stat.* of 13 *Geo.* 3. *c.* 31, where a felony was committed in *Scotland*, and the stolen articles were brought by the felon into an *English* county, he could not be tried in such county. It of course settled the principle contended for by the counsel of the plaintiff in error, respecting goods stolen in one county and carried into another, that it relates merely to the jurisdiction of different courts acting under the same authority, and governed by the same rules. The reasons of the judges are not detailed in the report of the case in 2 *East's Cro. Law* 772, but most probably they are of the nature I have already mentioned. It appears that the case was heard first at *Carlisle* Summer Assises 1763, before *Gould* Justice, and afterwards before all the judges of *England* in *November* following.

The *stat.* of 13 *Geo.* 3. *c.* 31, was referred to in *Respublica* v. *Andrews*, but this case was most probably overlooked. It is impossible to suppose that it was cited, when we advert to the expressions of *Parker* and *Sedgwick* Justices. The latter in 2 *Mass. T. R.* 20, says, "all that can be inferred from the "*stat.* of 13 *Geo.* 3. *c.* 31, is that there were doubts or differ- "ent opinions on the question. If there had been a decision "against the jurisdiction, it would not have been said that "doubts existed, but that the law needed alteration."

The principle upon which the case of *Anderson et al.* was

decided, most strongly influences my mind in this instance. I cannot distinguish between them. If evils or inconveniences result from the doctrine I have laid down, the legislature alone can furnish an adequate remedy. My opinion is, that the judgment of the Mayor's Court be reversed. At the same time I much approve of what was done in *New York* in the case of *Schenck;* that the prisoner should be detained in gaol a reasonable time, and notice thereof be given to the executive of *Delaware*, and if he should not be demanded within that period, that he should then be discharged.

BRACKENRIDGE J. It is laid down simply and correctly, 2 *East's Crown Law* 771, "That the possession of goods stolen by the thief, is a larceny in every county into which he carries the goods, because the *legal* possession still remaining in the true owner, every moment's continuance of the trespass and felony, amounts to a new caption and asportation." On which I observe, that it is not because it is a continuance of the trespass committed in another county, but because it constitutes of itself an original and independent trespass. The question of actual possession originally in the owner, comes in only by way of evidence of property, and puts it upon the accused to shew how he came by the goods. It is the having the goods which I prove mine, and the having them *animo furandi*, a principal badge of which is concealment, that grounds a charge of felony, and subjects to the jurisdiction of the county in which the thief is found to have had the goods. It is on this principle alone of a new and independent trespass, that the jurisdiction of another county into which the goods are carried can be supported. For though evidence is admitted of actual possession in another county, yet it must be of a larceny in the proper county where the prosecution is, that a conviction can take place. But will evidence be admitted of actual possession in a foreign country, in order to support the constructive or legal possession necessary to constitute the trespass and felony in that to which the goods may be carried? I am not able to say why it should not. In that case a foreigner whose property has been taken beyond sea, and finding it in the hands of an *English* thief, might prosecute and convict. I can see no rule of general convenience or public policy why he should not. But we hear nothing in the *English* books of persons convicted for clandestinely taking

1813.

SIMMONS v. COMMONWEALTH.

goods in other countries, and stealing them by carrying them into *England*. It may be that the *English* Courts have not carried out the principle so far as to admit such evidence, had it been offered in any case. But there would seem no good reason why it should not be carried out in our country towards sister states, not that such a case strengthens the principle, but justifies the application. The being under one general government does not strengthen the principle, for that general government has no common law in this case, nor draws to it the common law of a state in this particular; but it is a reason of expediency and common utility, that the principle should be carried out in the application of it in the case of stolen goods brought by the thief from one state into another. Each neighbouring state would otherwise become a receptacle of stolen goods brought into it. Suppose an act of assembly to pass, that, in the case of stolen goods brought into this state from another, the thief might be prosecuted as for a larceny committed here. On what principle would this be, but that he might be considered as committing a larceny in this state, by that deprivation of possession which the true owner had sustained. I speak of the actual possession, and by that touch and handling of the goods, the *contrectatio rei alienæ animo furandi*, as *Bracton* expresses it. The exercising an act of ownerhip over such goods, with evidence of concealment and intention to steal, would make it a larceny within the state as to goods brought into the state, the legal or constructive possession still remaining in the original owner, and the law protecting that right. For "in the case of a personal chattel, the possession in law follows the right of property." 2 *East* 573. The moment that the true owner comes into the state, following the goods stolen, his right of possession attaches within the commonwealth, and the law will protect such property. It will punish the trespasser. It will give him an action of trover and conversion, where it is a trespass and bare keeping from him. Why not support a prosecution for a felony, where the *contrectatio animo furandi* exists? It is no argument against this, that goods obtained by theft at sea, and afterwards carried into some county, are not the subject of the common law jurisdiction, for this is an exception to the general rule. 2 *East* 772. It is because the Admiralty jurisdiction draws it *ad aliud examen*. A distinct tribunal is constituted for such offences. It is the same in this country. But for goods felo-

niously taken and brought from one state into another, there is no such tribunal. Nor can it be necessary that the goods be feloniously taken in the other state; for if they be obtained by a trespass and brought into the state, and there be a concealment here *animo furandi*, the law, if we are correct, would make it a felony and prosecute it as such. I admit that an implication arises from the absence of cases, or the silence of reporters, that in *England* the common law did not protect the legal or constructive possession, where the actual possession had not existed under the protection of that law. And the exception would seem to be recognised by the law as it respected *Scotland* before the union, and even after the union doubts would seem to have been entertained. The same exception prevailed till lately, where the original taking was in *Scotland*. 2 *East's Crown Law* 772. "It was ruled that a felon in such case could not be indicted in *Cumberland*, where he was taken with the goods." But I recur to the principle, and lay aside the exception where there is no good reason for it. It is not what has been done, but what can be done consistent with principle, that I look to.

There is no implication contrary to this from the provision of the constitution of the *United States*, *art.* 4. *sec.* 2. "that a person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Because even in this case the owner of the stolen goods ought still to have *his election* to have the thief back, or to prosecute him here, if having taken the goods with him, and continued the felony, or as I would say, committed the felony *de novo* within our jurisdiction, he has put it in the power of the owner so to do.

On the argument of this case, there has been a reference to the understanding of the law from the usage on this subject. But I do not recollect that instances were produced of a prosecution for goods stolen in a neighbouring state, and brought here. Nevertheless it is so consonant with principle and general convenience, what is more, with the safety of the community in keeping thieves and stolen goods out of the state, that I will not hesitate to sanction the doctrine, that a thief bringing his stolen goods here, may be prosecuted as committing a theft here, and guilty of an offence against the peace

1813.

SIMMONS v. COMMONWEALTH.

and dignity of this commonwealth. If the owner of goods taken in another state, and coming here, could not prosecute for a felony, neither could he maintain trespass, for that supposes a possession. He must allege a finding by the thief, and bring his action after demand made. If the thief is taken back to the state where he took the goods, and it is even made a part of his sentence on conviction, that he shall restore the goods, yet he has not the goods to restore, for they are in the state to which he carried them, and there he must be considered as having a right to detain them, so that they could not be brought forward at the trial to establish the identity and prove the theft. For though the executive of another state would be authorised to demand the thief, he could have no authority by the clause of the constitution to add *a duces tecum* of the goods stolen.

The principal thing that I find in the way of my doctrine from the *English* books, is the reason given, that "where one "stealeth goods in one county and brings them into another, "there he may be indicted of felony in any of the counties, "because the original act was felony, *whereof the common* "*law taketh knowledge.*" 13 *Coke* 53. But this is applying the reason of another case to the present one, *viz.* that "larceny "of goods at sea brought into a county," could not be tried there, because the jurisdiction of the Admiralty Court had attached by the original taking, and the cognisance of any after act could not be taken by the common law. But in no other case except that of larceny, can there be a question about the jurisdiction of a county, where the offence was committed, though under the same common law, and the punishment the same. "All crimes are local, and must be "tried *where* committed." In the case of robbery, there can be no relation to the act begun, to give that county jurisdiction. The locality must be where the crime was consummated. This overthrows all notion of the reason being because the offence was under the same common law. I refer to *Holt* Chief Justice, 11 *Mod.* 12. One county is as distinct from another, as one country from another, in respect of the right of jurisdiction. Personal actions follow the person, and there is a fiction of the contract being in the county where the person is; but trespass *quare clausum fregit* must be in the county where the trespass was committed. And there is no fiction in a criminal case so as to give jurisdiction. Upon

what principle then but that of considering the having goods in one county and exercising, so to speak, the stealth over them, can give that county jurisdiction? By the ancient law, "all offences were said to be done against the peace of the "county; *contra pacem vice comitis.*" 1 *Black.* 117. And though *Alfred*, to keep within the bounds of the universal or common law, gave the control to the king's own courts, in consequence of which offences were laid to be *contra pacem domini regis*, yet it still remained a principle, "that the trial of all "causes civil and criminal must be in the very district where "the cause of complaint arose." 4 *Black.* 411. Fiction in civil cases, as has been said, has dispensed with this as to actions purely personal, but in criminal *never*.

I therefore recur to the position which I think I have established, that it is not the carrying into another county the goods stolen, but the being considered as stealing in the new county the goods carried, that gives jurisdiction. What difference does it make where it is a new *county* into which they are carried? Supposing it not to have been within the policy of the Courts of *England* to extend this principle to goods taken in another country, say *Scotland*, *Ireland* or even *France*, and the larceny continued under the jurisdiction of the common law, yet it would be a matter of great inconvenience to restrict the cognisance in such manner between one of these states and another separated by no sea, but a narrow river, or ideal boundary, so easily passed or repassed in the asportation from one to another. And I say that no act of the legislature would do more than in affirmance of a principle, and as in the *Scotch* case "to remove doubts." For the common law of *Scotland* is not the common law of *England*, nor the mode of trial or punishment of crimes the same. The being therefore under the same common law, could have made no part of the reason of one county attaching the jurisdiction of a larceny, because a larceny of the same goods had been first committed in another county. An act of assembly is out of the question. For it could not provide that an act should be stealing where it was not, which would be the case, unless carrying stolen goods into the state was stealing within the state. As to an act providing that the bringing stolen goods into the state should be punishable, it would be a novel kind of misdemeanor, and of which we hear nothing in the intercourse of *England*, with *Ireland*, or with other

1813.

SIMMONS v. COMMONWEALTH.

countries. It would involve all the necessity of establishing the prior stealing, which would draw with it what was stealing in other countries. In that case the common or statute law of that country must come into view. No law of this state however framed could be made to reach in the shape of a prosecution for a felony, the bringing goods into the state. It would be made a misdemeanor only. I say no law could make it felony but in affirmance of the principle which I have laid down, that the *concealing* stolen goods within the commonwealth is a *stealing*, and against its peace and dignity. I incline therefore to support the prosecution.

Judgment reversed.

The Court at the same time directed the prothonotary to communicate the case of the prisoner to the executive of *Delaware;* and made an order for his discharge in three weeks, unless in the mean time a demand should be made agreeably to the constitution of the *United States*.

END OF MARCH TERM, 1813.

INDEX

OF THE

PRINCIPAL MATTERS.

AMENDMENT.

APPEAL.

See ARBITRATION, 1. 3. 4.

APPEARANCE.

The decree of an Orphan's Court, ordering the real estate of an intestate, at the valuation, to his oldest son, is not *void*, as against a minor child, merely because the minor did not appear by *guardian*. No act of assembly requires such appearance, and, the proceedings not being in the nature of an adversary suit at common law, notice to the minor, or to those having the care of his interests is sufficient. *Elliot* v. *Elliot*, 1

APPOINTMENT.

If county commissioners appoint a treasurer, not with the free exercise of their judgments, but by drawing cuts to decide which of two of them shall give up his nomination to the other, the appointment is illegal, and the commissioners may make another appointment. *Commonwealth* v. *County Commissioners*, 534

ARBITRATION.

FINE.

See ERROR, 3.
INDICTMENT.

FISHERY.

In a petition for the partition of an estate, it is not essential to state the fisheries that may belong to it. It is enough if the inquest take them into view in their valuation. *Elliot* v. *Elliot*, 1

FRAUD.

See CREDITORS.
DEED, 1.

FRAUDS, ACT OF

Where a parol sale of lands has been made, money paid, and possession delivered, the contract is good between the parties; but to make it good against a *bona fide* purchaser, there must be clear evidence of notice to him, either actual or *legal*. *Legal* notice exists only where there is a violent presumption of *actual* notice. Undisturbed possession by the equitable owner, has generally been considered as legal notice; but it must be a clear unequivocal possession. *Hence*, where *A* bought by parol from *B*, a corner of *B's* tract, paid for it, was put into possession and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to certainty, and on *B's* own part there was a forge, dwelling house, grist and saw mill, and buildings for the workmen, which with *A's* buildings, might strike the eye as one establishment, the possession of *A* was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against *B*. The equity of a second purchaser will prevail over such a title as *A's*, under these circumstances, particularly if *A* gave no actual notice of his title, when he probably knew of the judgment, execution and sale. *Lessee of Billington* v. *Welsh*, 129

FREEHOLD.

See EXECUTION 4.

FREIGHT.

See INSURANCE 3.
LIEN.

FUGITIVE FROM JUSTICE.

See LARCENY.

GENERAL WARRANTY.

A sells several lots of land for a sum of money, payable by instalments, and covenants to convey with general warranty, on payment of the whole money. He then conveys the lots to *C* and *D* with general warranty, in trust to convey them to the vendee in fee simple, as soon as the purchase money and interest should be paid according to contract, and delivers them the obligations for the money. *Held* that this conveyance is no impediment to a suit in *A's* name for the recovery of the money, nor to an apportionment of the purchase money, if title to some of the lots fails. *Stoddart* v. *Smith*, 355

GRAND-CHILDREN.

See LEGACY, 6.

INDICTMENT.

INFANT.

INFORMATION.

JURISDICTION.

INSOLVENT DEBTOR.

INSURANCE.

INTEREST.

See LEGACY, 6. 4. 5.

INTESTATE LAW.

See ADMINISTRATOR, 2.

ISLANDS.

LIBEL.

LIEN.

LIMITATIONS, ACT OF

MORTGAGEE.

NATURALIZATION.

NEW TRIAL.

NONSUIT.

NOTICE.

ORPHAN'S COURT.

OBLIGATION.

ORDER OF REMOVAL.

SERVANT.

SHERIFF.

SLANDER.

SOLDIER.

SUPERVISORS.

SURVEY.

TENANT IN COMMON.

WILL.

WITNESS.

MOSES THOMAS,

(NO. 52, CHESNUT-STREET, PHILADELPHIA,)

Has lately Published,

VOL. IV. OF BINNEY'S REPORTS,

AND HAS FOR SALE, COMPLETE SETS OF THE SAME;

Also,

AN EXTENSIVE AND VALUABLE COLLECTION OF

LAW AND MISCELLANEOUS BOOKS,

AMONG WHICH ARE,

JOHNSON'S REPORTS, 9 vols. (and Part I. and II. of vol. 10.)

☞ For the convenience of Gentlemen of the Bar, M. T. has made arrangements for furnishing them with this work in Numbers, which will be taken back on the completion of a Volume, and a bound copy furnished at the regular price of SIX DOLLARS. He published the Fifth and will publish the future Volumes of BINNEY on the same terms.

GRAYDON'S DIGEST OF LAWS OF THE UNITED STATES, 2 vols.

DAY'S (Connecticut) REPORTS, 4 vols. (4th just published.)

HENNING AND MUNFORD'S (Virginia) REPORTS, 4 vols.

MUNFORD'S Continuation of Do. 1 vol.

HARRIS AND M'HENRY'S (Maryland) REPORTS, 2 vols.

BAY'S (South Carolina) REPORTS, 2 vols.

TYNG'S (Massachusetts) REPORTS, 8 vols.

CRANCH'S REPORTS (Supreme Court of the United States.) Second edition revised and corrected, 6 vols.

DALLAS'S (Pennsylvania) REPORTS, 4 vols.

CAINES' NEW-YORK TERM REPORTS, vol. I, *second edition*, with corrections and additions.

TYLER'S (Vermont) REPORTS, 2 vols.

☞ Any of the above may be had in complete sets or separate Volumes.

AN ABRIDGMENT OF LORD COKE'S REPORTS, in one vol. 8vo. 5 dollars.

SMITH'S Edition of the LAWS OF PENNSYLVANIA, 5 vols. 8vo. 20 dollars.

PURDON'S ABRIDGMENT of Do. 1 vol. 6 dols.

DIGEST OF AMERICAN REPORTS, by George Griffin and John Anthon, Esqrs. vol. I. 6 dolls.

LAWS OF THE UNITED STATES, 11 vols. 2 dolls. each.

MARSHALL ON INSURANCE, improved by Condy, 2 vols. 12 dolls.

COOPER'S EQUITY PLEADING, (*new edition*) 1 vol. 5 dolls.

CHITTY ON PLEADING. *Second American edition, with corrections and additions.* By Thomas Day, Esq. of Connecticut, 2 vols. 12 dolls.

JUSTINIAN'S INSTITUTES: with Notes by Judge Cooper of Pennsylvania, 1 vol. 6 dolls.

BACON'S ABRIDGMENT. New edition. 7 vols. 60 dolls.

HALL'S LAW JOURNAL, 3 vols. 8vo. 15 dolls.

No. I, II and III, *New Series.*

COKE ON LYTTELTON—TUCKER'S BLACKSTONE.

CRUISE'S DIGEST—FONBLANQUE'S EQUITY.

EAST'S, and DURNFORD and EAST'S REPORTS.

JACOB'S LAW DICTIONARY.

FITZHERBERT'S NATURA BREVIUM.

VERNON'S CHANCERY REPORTS.

TIDD'S PRACTICE, &c. &c. &c.

☞ M. T. will make a liberal discount to Gentlemen of the Bar, *who purchase their Books generally from him*—he is supplied with all the *New Publications* at early date.

He has lately Published,

THE BRIDAL OF TRIERMAIN, or the Vale of St. John. A Lover's Tale. In three cantos.—Price 75 cts.

LORD BYRON'S POETICAL WORKS: Comprising Poems Original and Translated; English Bards and Scotch Reviewers; Childe Harold's Pilgrimage, &c.

INTERCEPTED LETTERS; OR THE TWOPENNY POST BAG. With Notes, by an American Gentleman.—Price 50 cts.

CHATEAUBRIAND'S TRAVELS IN GREECE, &c.—2 dolls. 75 cts.

THE EPISCOPAL PRAYER BOOK: with engravings. Price (in different bindings) from 3 to 6 dolls. and a plain edition at a lower price.

LORD LYTTELTON'S LETTERS, &c. &c.

HE ALSO CONTINUES THE PUBLICATION OF

The Select Reviews,

UNDER THE TITLE OF

THE ANALECTIC MAGAZINE;

EDITED BY WASHINGTON IRVING, ESQ.

Embellished with the Portraits of

HULL, JONES, DECATUR, LAWRENCE AND BAINBRIDGE.

ACCOMPANIED WITH

BIOGRAPHICAL SKETCHES.

☞ SUBSCRIPTION FIVE DOLLARS PER ANNUM.