REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

DANIEL CALL.

RICHMOND:

Printed by *THOMAS NICOLSON.*

M,DCCC,I.

DISTRICT of VIRGINIA to wit:

BE it remembered that on the 7th day of JULY in the 26th Year of the Independence of the United States of AMERICA, *DANIEL CALL* 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 argued and adjudged in the Court of Appeals of Virginia." In conformity to the act of the Congreſs of the United States, 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."

WILLIAM MARSHALL,
Clerk of Virginia Diſtrict

A Copy,

Teſte,

WILLIAM MARSHALL, Clerk.

To the Honorable GEORGE WYTHE, *Esq.*
Judge of the High Court of Chancery.

SIR,

IN thus publicly addressing you, I am not influenced by views of private interest, but an unaffected desire of manifesting my esteem for a benefactor; to whom I owe the little knowledge I possess; and whose kindness has always been remembered with gratitude.

It occurred to me, that whilst your ingenious labours were employed in administering justice, with honour, integrity and ability, in that Court where you so eminently preside, it could not be indifferent to you, that your fellow citizens at large, should be informed of the true exposition of those laws which are to regulate their conduct through life; and therefore that you would pardon me for prefixing, without your knowledge, this small tribute of respect to a work, which is intended to convey to the public a faithful report of the opinions and decisions of the highest tribunal in the state, upon some important points of Law and Equity. Under these impressions I have acted; and I trust the motive will be a sufficient excuse.

Permit me to add a sincere prayer, that you may long live to serve your Country, with those useful virtues and talents, which adorn the Bench and cast a lustre over your private life.

I am Sir,

Your most Obt. Servant.

DANIEL CALL.

The AUTHOR, acknowledges with the higheſt gratitude and reſpect the very great aſſiſtance, with which he has been honored in the following work, by the Judges of that Court, whoſe deciſions are reported.

RICHMOND, October 1801.

TABLE OF ERRATA.

Page 19, Line 12, leave out the words, *that Rice inſiſted.*
22, 23, ſtrike out *a* and for *and that without* read *and without,*
44, 12, for *execution* read *exchange.*
54, 10, for *found on* read *founded on.*
66, 3, for *mention* read *mentioned.*
68, 41, for *agreement,* read *argument.*
70, 40, for *very* read *every.*
81, 38, for *and ſtill* read *and he ſtill.*
92, 3, for *colloquum* read *colloquium.*
95, 4, for *though it did* read *though did*
109, 23, for *beſides only* read *beſides as only.*
128, 36, for *which was proved* read *atteſted by three witneſſes but proved only by one.*
131, 13, for *will was* read *will of Chriſtopher was.*
143, 28, after *government* take out (;) and put it after *ſatisfaction.*
145, 14, for *permitted* read *permitting.*
161, 1, in marginal note for *diſcuſſion* read *deciſion* and in line 11, of marginal note for *had title* read *had no title.*
167, 18 for *Reave's hiſt. com. law.* read *Reeves hiſt. Eng. law.*
170, 38, for *do not* read *does not.*
186, 21, for *intereſt and a veſted remainder* read *intereſt are defeated; and a contingent remainder,*
215, ſix lines from the bottom for *except* read *accept*
222, 12, for *This* read *His,* and line 25, for *muſt be* read *muſt the defendant*
234, 4, for *et æquo,* read *ex æquo.*
238, 21, for *delay* read *loſs.*
255, laſt line, for *ſuſtainable* read *ſuſtainable.*
276, 31, for *our county courts,* read *our county courts.*
285, 40, for *time* read *line.*
302, 35, for *White* read *Hite.*
303, 31, for *claimed* read *claim.*
310, two lines from the bottom for *defendant* read *appellant.*
328, 14, for *are all,* read *is all.*
346, 3, for *this* read *that before mentioned except*
383, 3, marginal note, after *money* read *for debts due,* and line 4, for 71 read 74.
390, laſt line, read *none* before *in.*
403, 2, for *the claim* read *a clauſe.*
424, 21, for *mortgagor* read *mortgagee.*
432, 17, for *its* read *the jury.*
444, 31, for *To this judgment Webb* read *to the judgment againſt himſelf Webb.*
477, 6, for *the conſtitution* read *conſtruction.*
499, 9, for *payable* read *negotiable,* and in line 11, for *negotiable at,* read *payable to;* and line 14, for 21 read 22; and line 21, for *negotiable at* read *payable to the.*
511, 29, ſtrike out *law or.*
526, in the 5th line from the bottom for *their* read *theſe.*
535, 10, after *off* read *if,* and in line 34, ſtrike out *it ſhou.*
558, 12, for *their* read *theſe,* and line 13, for *contray* read *contrary*
565, 20, for *divided* read *decided.*
571, 14, after *plaintiff* read *and.*

CASES
ARGUED AND DETERMINED
IN THE
COURT of APPEALS
IN
THE SPRING TERM OF THE YEAR 1797.

JOSEPH CUTCHIN
against
WILLIAM WILKINSON.

WILLIS WILKINSON died inteſtate, leaving a widow and three children on the 22d day of April 1793, and adminiſtration of his eſtate was granted to Mrs. Wilkinſon his widow, who was the mother of the ſaid children. The children all died inteſtate, under age and without iſſue," in the lifetime of their mother, that is to ſay, two of them before, and the other upon the 10th day of May 1793. Mrs. Wilkinſon died on the 1ſt day of November 1793, leaving a will, whereof ſhe appointed executors, who accepted the office. Upon the death of Mrs. Wilkinſon, application for adminiſtration of the unadminiſtered eſtate of Willis Wilkinſon was made to the County Court, by Joſeph Cutchin who was her brother, and by William Wilkinſon brother of the ſaid Willis Wilkinſon. The County Court committed the adminiſtration to Cutchin; and Wilkinſon appealed to the Diſtrict Court. Where the Judgment of the County Court was reverſed, and the adminiſtration committed to Wilkinſon, upon which Cutchin appealed to this Court.

WICKHAM for the appellant. The appellee clearly had no title to the adminiſtration. When Willis Wilkinſon died his perſonal eſtate veſted in his then repreſentatives, 1 *Show.* 26; and theſe were

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were his wife and children. Upon whose decease their representatives became entitled to the estate; and consequently to the administration. For it is a rule that the person having title to the estate, ought to have the administration; because he is most interested and will take most care of it. This doctrine always governed the courts in England. *Richardson's Wills*, 406. 2. *Eq. cas. ab.* 423, *pl.* 5. *Ibid.* 425, *pl.* 15; and has always been considered as the law of this country.

But independent of this, by "the act of Assembly passed in the year 1748, *Chap.* 3. *Sec.* 14. administration is first to be granted to the husband or wife, and then to the child or children or their legal representatives; which expressly includes the present case. But the act of 1785, puts it beyond all doubt. For it declares that it shall be granted to the person entitled to distribution. Which is decisive against the appellee; who has no title to the estate, or any distributive share thereof. Consequently as well upon the authority of adjudged cases as upon the plain directions of the statutes, the judgment of the District Court was clearly wrong and ought to be reversed.

Ronold *contra*. Mr. Wickham assumes, as the ground of his argument, that the estate vested absolutely in the widow and children on the death of Willis Wilkinson; and therefore he infers that the representatives of the widow who survived the children, are entitled to the administration. This argument would be just, if the principle were correct; but the principle is not correct; and therefore the argument fails. The estate vests in the administrators of the first intestate for the payment of his debts, in the first place; and the distributees whose claim is only to the surplus after the debts are paid, are not entitled until they are satisfied.

The question then is to whom administration of the unadministered estate, thus subject to payment of debts, ought to be committed in the present case? The English authorities in all cases of administration prefer the next of kin of the person to whom the

the eſtate belonged, and not of thoſe entitled to the ſurplus. Cutchin *vs* Wilkinſon.

The next of kin to the firſt decedent has never been rejected in caſes like the preſent; and our act of Aſſembly ſo far from ſupporting a contrary doctrine, in fact ſays nothing about an adminiſtration *de bonis non.*

MARSHALL in reply. It is unneceſſary to repeat the general principle, that the diſtributee is entitled to the adminiſtration, both upon the authority of adjudged caſes and the expreſs directions of the act of Aſſembly; becauſe that point ſeems to reſt on a baſis much too ſolid to be ſhaken. Mr. Ronald has however taken a diſtinction between an original adminiſtration and an adminiſtration *de bonis non.* The firſt he appears to admit to be within the act of Aſſembly, but the laſt not; and therefore he would make the grant of the latter depend upon a different rule, from that of the former. But this diſtinction cannot be maintained; for it goes the length of eſtabliſhing one law for the adminiſtration of part, and another for the adminiſtration of the whole; Which would be abſurd. No caſe is produced to ſhew that the next of kin ever was prefered; whilſt thoſe cited by Mr. Wickham expreſsly decide that he has no title.

But it is ſaid that the eſtate was liable for the debts of Willis Wilkinſon, and that the diſtributee has no title until the debts are paid. This however does not alter the caſe. For under that view of the ſubject, the rights of the creditors is the only important conſideration; and the property would be juſt as liable to their claims in the hands of the diſtributee, as in thoſe of the next of kin; therefore that circumſtance cannot affect the cauſe. In the caſe in *Shower* it was ſaid if the perſon entitled to diſtribution die, his repreſentative ſhall have the adminiſtration. Yet there alſo the eſtate would be liable to the debts of the firſt decedent. That caſe therefore decides the queſtion now before the court; and may be conſidered as an expreſs authority

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rity in our favor upon this as well as the other points in the cauſe.

RONOLD. Then mentioned the caſe of *Palmer* vs. *Alcock* 3, *Mod.* 58, as proving what he contended for.

WICKHAM. That caſe does not affect the preſent. For it does not appear upon what point it was decided. In *Comberb.* 14, no notice is taken of the point made by Mr. Ronold, the juriſdiction and veſting only being ſpoken of; and although it is ſaid no intereſt veſted, yet it is to be obſerved that in the ſame book page 112, it is ſaid that the judges were of different opinions upon that point, and that the cauſe was decided on another. Which is confirmed by 2, *Show.* 486; who ſays expreſsly that three of the judges determined it upon the ground of their having no juriſdiction; and that only one judge held no intereſt veſted. Which latter opinion the Reporter makes a quære of; and ſays that the intereſt was clearly veſted by the act of diſtribution; and that it had been ſo held in the Chancery and Exchequer all along.

'*Per. Cur.*' The precedents cited and the arguments urged by the appellants counſel are deciſive. They prove that the perſon entitled to the eſtate is entitled to the adminiſtration alſo; and conſequently that the appellee has no title. The only queſtion which could have ariſen would have been between Cutchin and the executors of the widow; but as the executors do not appear to have made any oppoſition, and as the appellee had no right, the Diſtrict Court certainly erred in reverſing the judgment of the County Court. Therefore the judgment of the Diſtrict Court muſt be reverſed and that of the County Court affirmed.

WILLIAM

WILLIAM FAIRCLAIM Leſſee of JAMES GUTHRIE,
against
RICHARD GUTHRIE and ELIZABETH GUTHRIE.

THIS was an action of ejectment in the Diſtrict Court of King and Queen for one meſſuage and ſixty acres of land; and upon a ſpecial verdict found, the caſe appeared to be as follows; John Guthrie the elder being ſeized in fee of the meſſuage and ſixty acres of land in the declaration mentioned, and having three ſons, to wit: James, Richard and John (of whom James was the eldeſt and heir at law of his father) died in the latter end of the year 1761, having firſt made and duly publiſhed his laſt will and teſtament in writing, bearing date the 17th day of October 1761, whereby he deviſed as follows:

"My will and deſire is that finneral charge "and all my lawful debts be fully paid,—Item, I "give and bequeath to my ſon John or his ears one "ſhilling ſterling, my will is that my ſon Richard "ſhould have his choyes of my 2 whences Geany or "Dice and if he chuſes upon Jeany and ſhe ſhould "bring ever ſo many children ſhe ſhall nurce "them till they are fourteen months old an then "ſhall return them to James Guthrie or his ears, "but if he chuſes upon Dice he ſhall leave her and "her ears and one feather bed and furniture, and "my houſhold goods to be equally divided between "James Guthrie and Richard Guthrie and to divid "it themſelves. *My will is that James Guthrie* "*ſhould* HAVE *my land houſe and orchard and im-* "*portances belonging thereto and if ever James* "*Guthrie ſhould* SELL *the land I leave him Richard* "*Guthrie ſhall* HAVE *half the purchaſe, My will* "*is if any land ſhould fall to James Guthrie by* "*earſhip that Richard Guthrie ſhall* HAVE *it or* "*elſe have* THIS THAT I NOW LIVE UN my will is "that Richard Guthrie ſhall have tenn head of cattle

"and

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" and tenn head of hogs and half my sheap and the " remainder of my stock my will is that James " Guthrie shall have them, my will is that all Jea- " neys children that is now living (viz.) I give un- " to James Guthrie and his ears forever, Harry, " DaTenny, Frank and Samson, my will is it " Richard Guthrie makes choyes of Jeany he shall " *have* no other part of estate, my will is that " Richard Guthrie should have Dice and London " and her increase and to his ears forever, my " will is that Jeany and all her increase shall be " James Guthries and his ears forever moreover " my will is that if Jeany brings ten live children " that she shall be at her one liberty from him or " his eares only living with James Guthrie or his " ears her lifetime:"

The lands described in the above will, by the words '*This that I now live un*' are the same messuage and sixty acres of land for which the suit is brought; and at the time of making the said will, the testator had a brother named William, to whom the said testator was heir apparent. After the death of the said John Guthrie the testator, James his eldest son and heir at law as above mentioned, entered upon the said lands and messuage described by the said words '*This that I now live un*;' and died seized thereof in the Month of January 1776 without having made a will; and leaving the lessor of the plaintiff his eldest son and heir at law. The testators said brother William died in the lifetime of the testators said son James, and from him the said James as his nephew and heir at law took certain lands and tenements by descent; which he likewise entered into and died seized thereof. After the death of the said James, the lessor of the plaintiff as eldest son and heir at law to his father entered into the said first mentioned messuage and sixty acres of land for which the present suit is brought as well as into those which descended from William, and was thereof seized until the said Richard Guthrie the son of the testator John Guthrie, evicted him of the said messuage and sixty

acres

acres of land, by virtue of a judgment of the General Court in an action of ejectment grounded on the said will of John Guthrie. In consequence of which said judgment the said Richard entered into the said messuage and sixty acres of land and died seized thereof, having first made his last will in writing whereby he devised the said messuage and sixty acres of land to the defendant Elizabeth for life remainder to the other defendant in fee. After the death of the said Richard the testator, the defendant Elizabeth entered into the said sixty acres of land and messuage by virtue of the devise to her as aforesaid, and continued possessed thereof at the time of finding the special verdict in this action. The district court gave judgment for the plaintiff; from which judgment the defendants appealed to this court.

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MARSHALL for the appellant. The first question is what estate James took under the will of John Guthrie? I contend he took a fee.

WARDEN for the appellees. I shall insist also that he took a fee.

MARSHALL. It is not necessary then to proceed to prove the point. Supposing therefore that James took a fee, the case is no more than this, the lands in question are devised over to Richard if James takes other lands by descent; and it is found by the verdict that he did take other lands. Richard recovered, and the defendants claim under the devise over to him, insisting that the contingency on which it was to take effect has happened. It will be said that James had his election, for it cannot be contended that he is entitled to both tracts. Now by the law of elections he who is to perform the first act, must make election; but if the time is suffered to pass away the election is gone. *Co. Litt.* 145 (*a*) *in notes.* As soon therefore as the other lands descended on James he had his election; and although he has not made it in express words, yet his having entered on the descended lands either amounts to an election to take them, or else he has past the time and Richard may now elect.

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But this is in nature of a limitation over to Richard. The reaſon of the difference between a limitation and a condition proves that this was a limitation to Richard unleſs defeated by the election of James. For otherwiſe what remedy could Richard have? He could never force an election any way but by bringing an ejectment. Richard could not claim the lands which came by deſcent, he could only claim thoſe under the limitation over. The principle of the rule that words of condition ſhall be conſtrued into words of limitation, when the deviſe is to the heir at law, applies here.

WARDEN. An illiterate man like the teſtator cannot be ſuppoſed to have underſtood the abſtruſe doctrine of elections. The queſtion is not whether Richard had a right to take, but how long he was entitled to hold. He took only an eſtate for life. The teſtator having died before his brother had no right to diſpoſe of what his ſon would take as heir to his brother. John Guthrie the teſtator never was heir to his brother, but James was and took as heir.

There are no words of inheritance in the deviſe to Richard; and the heir ſhall not be diſinherited without expreſs words. *Cro. Car.* 447, 449. He alſo cited 2, *Wils.* 80.

In this caſe there are no words nor any apparent intent to diſinherit the heir. In ſeveral inſtances the teſtator uſes words of inheritance when he deviſes ſlaves and other things; which ſhews he knew how to limit an inheritance when he was minded to do ſo. 3, *Wils.* 414, *Cowp.* 235, 657. *Dougls.* 759.

There are not only no words of inheritance in the deviſe to Richard; but the will further ſays in another part that if Richard ſhould make choice of the ſlave Jeaney, he ſhould have no other part of the teſtators eſtate. Now as he was to take upon his not making choice of Jeaney, the verdict ſhould have found in ſo many words, that he did not make choice of her.

MARSHALL.

MARSHALL. It is agreed that James took a fee; and if ſo I contend that the deviſe over paſſes the ſame eſtate to Richard.

WARDEN. I did not mean to admit that James took a fee under the will, but that as heir at law he had a fee by his better title.

MARSHALL. As this point is now receded from, I muſt proceed to prove that James took a fee. The caſes cited on the other ſide merely prove that where there are not words of limitation nor any manifeſt intent to give a fee, only an eſtate for life paſſes. The queſtion then is if there be ſuch an intent in the preſent caſe? The whole complexion of the will proves it. The teſtator was evidently very ignorant and illiterate and wholly unacquainted with technical terms. When this appears upon the face of the will as in the preſent caſe, the court will ſtrive to favor the intent. The deviſe to James was unneceſſary according to Mr. Warden's conſtruction, becauſe he was heir at law and would have taken as ſuch; it could therefore only have been introduced for the purpoſe of providing for Richard. He alſo contemplated a power in James to ſell, and although James would have had ſuch power without, yet the teſtator certainly thought it neceſſary to give it. All which proves his extreme ignorance of technical language and legal doctrines. The teſtator meant to provide only for two ſons (as he gives but a ſhilling to John,) and contemplating the inheritance of James from his uncle, he made ſuch a diſpoſition of the ſmall tract in his own poſſeſſion as might provide for both of thoſe two ſons in caſe the contingency happened. That is to ſay, if one fee ſimple eſtate deſcended upon one ſon, the other ſhould go to the other ſon. If any land deſcended to James by heirſhip that Richard ſhould have an equivalent eſtate in the other. As therefore the deſcended eſtate was a fee, ſo alſo is that deviſed to Richard. When he ſpeaks of the deſcended eſtate which was clearly a fee, he uſed no words of inheritance to deſcribe it. The teſtator certainly contemplated the right of election

in

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in James, and yet there could be no doubt which he would take if one was in fee and the other for life only. Almoſt all caſes of wills ſtand upon their own bottom. They all depend upon the teſtators intent; and therefore differ: becauſe there are different evidences of intent.

A man cannot hold under a will and in contradiction to it too. A deviſe of Blackacre to A. and of Whiteacre (which is entailed on A) to B. A cannot hold both; but if he takes poſſeſſion of Blackacre, B. ſhall have Whiteacre. Which is exactly our caſe. From this I draw an argument as to the amount of the eſtate given. If James had given up the deſcended eſtate; he would have given up a fee. But as he retained it, he muſt give up his whole eſtate in the other.

As to the objection concerning the election with regard to the ſlave Jeaney, it is only neceſſary to remark that we are in poſſeſſion, and if that choice was to defeat our right, the plaintiff ſhould have had it found; becauſe he ſhould prove a title to recover.

If James had ſold the land after Richards death, the family of Richard would have been entitled to half the money, which is an additional argument to prove a fee was intended.

ROANE Judge. The firſt queſtion important to be conſidered is what eſtate James the heir at law took under the will? This will was made antecedent to the act of Aſſembly which conſiders a fee as paſſing unleſs reſtrained by words of limitation; and muſt therefore ſtand upon the acknowledged rules of law which then prevailed. At that time the rule was that even in laſt wills, if words of inheritance were wanting, an eſtate for life only would paſs, unleſs from a view of the whole will the intention of the teſtator obviouſly appeared to be that a greater intereſt ſhould paſs. I ſhall then examine this will at large without confining myſelf to the particular clauſe under conſideration, for by this means only can we come at an intention which the

teſtator

teſtator knew ſo little how to expreſs. But let me premiſe in the firſt place that no inference is to be drawn from the want of technical words, unfavorable to an enlarged conſtruction of the deviſe now under conſideration; for it is apparent from the face of the will that the teſtator was wholly illiterate and incapable of expreſſing himſelf properly. Whenever he uſes a technical word, he uſes it improperly and unneceſſarily. In ſome of the bequeſts of the perſonal eſtate, he uſes the word heirs; the meaning or legal import of which he certainly knew not: for he uſes the ſame word as ſynonymous with *children* in the clauſe where he gives a negro woman named Dice and *her heirs* to Richard. Guthrie vs Guthrie.

Neither can any inference againſt an enlarged conſtruction be drawn from a tenderneſs for the rights of the heir at law, who it was ſaid is not to be diſinherited without expreſs words; becauſe the deviſee in this caſe was the heir at law of the teſtator. The word HAVE in the deviſe to James is the ſame as that uſed in the clauſe which diſpoſed of the cattle. In the latter it not only paſſed the abſolute intereſt according to the principles of law, but the teſtator certainly intended that it ſhould have this operation, when applied to perſonal property; which from its nature was every day undergoing ſome change, and the value of which depended on the unlimited uſe in it. It is fair then to give to the ſame expreſſion in the deviſe of the land the ſame meaning. It is the appropriate meaning of the teſtator who certainly did not know that a difference of expreſſion was neceſſary when applied to real and perſonal eſtate. The proviſion for Richard in caſe James ſhould ſell, does not directly give a power to ſell (for if it did no doubt could exiſt, that a fee paſſed,) but it explains ſtill further the meaning which the teſtator affixed to the term HAVE, by ſhewing that he contemplated an exiſting right in James to ſell, in conſequence of the intereſt which the will gave him. For he certainly ſuppoſed that all the intereſt which James could claim was under the will, or elſe he would not have made the

deviſe

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deviſe; and as he could not ſell unleſs he had a fee, it is clear that the intention was to give a fee.

If then James took a fee, the next queſtion is if the limitation over to Richard is good? It certainly is ſo by way of executary deviſe, as the contingency on which it is to depend muſt happen within the time preſcribed by the rules of law reſpecting limitations of this kind.

The only remaining queſtion then is, what eſtate Richard took in the lands limited to him upon the event which has happened of other lands coming to James by deſcent? I think he alſo takes a fee. The ſame terms are uſed: He is to have the land; and according to the rule which I have before mentioned, that the ſame word uſed in different parts of the will ſhall have the ſame meaning, unleſs there be circumſtances ſhewing an intention to vary it, Richard will take a fee if by force of the ſame expreſſion a fee paſſed to James. If the tract was too ſmall to divide between two ſons he could never have intended a diviſion as to the intereſt in it. I am therefore for reverſing the judgment.

FLEMING Judge. The principal queſtion is, whether Richard took an eſtate in fee or for life in the lands for which the preſent ſuit is brought? To decide this we muſt ſearch for the intention of the teſtator, that we may ſee whether it be ſtrong enough to over rule the principle of common law, which requires words of inheritance to paſs a fee. To diſcover this intention it may not be amiſs to conſider the ſituation and the circumſtances of the teſtator. He had two ſons, for whom he wiſhed to provide, and a third for whom he intended nothing. His whole eſtate conſiſted of about ſixty acres of land, a few ſlaves, ſome ſtock and a tract of land in expectancy. To divide the ſixty acres of land would afford but little benefit to either ſon; he therefore prefers the eldeſt, but was determined to provide for his ſecond ſon alſo, ſo ſoon as the eſtate, which he expected ſhould come to his family. Theſe intentions were to be expreſſed by a

very

very illiterate man, who from the face of the will it is evident knew not the neceſſity of uſing technical terms, or in what manner to apply them. But in moſt caſes of this ſort unleſs contradictory expreſſions are uſed, there will be ſome circumſtance which will lead to the mind of the teſtator. Such is the preſent caſe. Guthrie *vs* Guthrie.

The teſtator does not give a power to ſell in expreſs terms; but he ſays that James ſhall have his lands, and immediately declares in ſubſtance that he ſuppoſed he had given him ſuch an eſtate as he might ſell. The effect of this clauſe is equally powerful to my mind, in demonſtra tingthe intention of the teſtator, as if he had given a power to ſell. For whether in the act of giving he annexed a power which could only appertain to a fee, or firſt gives the land and then declares that ſuch a power is acknowledged to exiſt, the intention is the ſame. If then James took a fee, which I am clear he did, the ſame eſtate paſſed over to Richard. For it was obviouſly the intention of the teſtator that James ſhould have one eſtate and Richard the other, with this difference only that James ſhould have an election.

The objection to the limitation over as being too remote is unfounded. For as Richard was *in esse* at the time the will was made, a perpetuity could not take place. Upon the whole, I have no doubt about the intention of the teſtator, and that a fee paſſed in the land in queſtion to Richard. Of courſe I think the judgment ought to be reverſed.

LYONS Judge. If we conſult common ſenſe and the reaſon of mankind, we ſhall be ſatisfied that where a man gives an eſtate in lands, without limitation or reſtraint, he means to give his whole intereſt in the ſame manner as if it had been a deviſe of money and perſonalties. But the principle having been once admitted, that words of limitation were neceſſary in order to carry a fee, there was, for a long time, no Judge found bold enough to emancipate himſelf from the influence of the

principle,

Guthrie *vs* Guthrie.

principle, though all of them have endeavoured to undermine it. They have therefore laid hold on any words to avoid the rule of law, and effectuate the intention of the teſtator. Thus the word *eſtate*; charging the lands with a ſum in groſs, or giving a power to ſell, have all been held to give a fee; and it has finally been eſtabliſhed by a long courſe of deciſions that the manifeſt general intent of the teſtator ſhall prevail, if by any poſſibility it can be carried into effect without violating the rules of law.

To apply theſe principles to the caſe under conſideration.

What did the teſtator mean when he ſaid that James ſhould *have* the land? It will be ſaid perhaps that this expreſſion taken by itſelf is too doubtful to paſs a fee; but then the teſtator has explained what he meant by it. For he conſiders that his ſon James might poſſibly ſell the eſtate; but if he had ſuch a power the teſtator muſt neceſſarily have ſuppoſed that he derived it under the will; and of courſe conceived that he had before given ſuch an intereſt as would authoriſe the ſale. When therefore he ſays that James ſhall *have* his land, his meaning was that James ſhould have the whole intereſt.

Having fixed an appropriate meaning therefore to the word *have* it is fair to give it the ſame interpretation in the limitation over to Richard. Becauſe it is manifeſt that his intention was, that whatever eſtate James took, ſhould go over to Richard in the event of a deſcent to James. Beſides if James ſold the land Richard was to have half the purchaſe money, not for life, but abſolutely; for there is no reſtriction, he is to have half the purchaſe, which is a plain diſpoſition of the whole intereſt. So that in that event the teſtator clearly meant the whole intereſt; and therefore the fair inference is, that he intended the ſame thing in caſe no ſale took place. If there be a deviſe to A. unleſs his father purchaſe other lands of the ſame value for him, and then to another; here A. has a

fee,

fee, becauſe purchaſe imports an abſolute purchaſe *Hob.* 65. So if there be a deviſe to A. for life, and then to a ſon, except A. purchaſe land of the ſame value for the ſon, and then that A. ſhall ſell; here, if A. does not purchaſe, the ſon takes a fee for the reaſon juſt mentioned, 2 *Cro.* 599. *Hob.* 65. Theſe two caſes are in principle the ſame with that at bar, and appear to me to decide the cauſe. For the firſt expreſſly proves a fee in James and the latter a like eſtate in Richard. Guthrie *vs* Guthrie.

An objection was made to the remoteneſs of the limitation to Richard; but as the eſtate was to deſcend to James himſelf, that is, in his lifetime, it was to take place within a life in being, and conſequently is within the allowed limits for the veſting of executory deviſes.

I concur with the reſt of the judges therefore that the judgment of the Diſtrict Court ſhould be reverſed.

C. CASE

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
THE FALL TERM OF THE YEAR 1797.

PETER BAIRD
against
EDWARD RICE.

RICE filed a bill in Chancery in the borough court of Norfolk ſtating that he was ſecurity for one William Black in a bond to Baird. That Baird obtained a judgment thereon againſt the obligors in the borough court and iſſued an execution; upon which property belonging to Black was taken and duly advertized by the ſheriff; that Baird attended upon the day of ſale; and having received a payment of part of the judgment, directed the ſheriff to reſtore the property to Black; who afterwards abſconded with all his effects. That Baird had ſince iſſued execution againſt Rice for the balance of the judgment; and therefore the bill prayed an injunction. The anſwer ſtated that upon the day of ſale, a bond of indemnity was demanded by the ſheriff in conſequence of the ſale having been forbid under ſome incumbrance, which neither Rice nor Baird would give. That Black offered to pay 150l. if his property was releaſed; which propoſition Mathews urged Rice and Baird both to accede to. That Rice declared he was perfectly ſatisfied with whatever ſhould be recommended by Mathews: and thereupon Baird accepted the £150. That ſo far from Rices appearing to conſider himſelf exonerated

exonerated from the debt, he afterwards ſolicited the loan of £ 220 of Baird and one Weſtmore, which they conſented to lend provided he would give them good ſecurity for that ſum as well as for whatever he might be previouſly indebted in to Weſtmore, and for the balance which he ſtill owed Baird on the judgment. That Rice agreed thereto and offered them a deed of truſt on his Hackwood eſtate; but this negociation afterwards breaking off, Baird iſſued the execution which is ſought to be injoined. Baird vs Rice.

It appeared by the evidence that Rice inſiſted that a deed of truſt had been given on the property to ſecure a debt due to Marvault, and to indemnify Rice againſt his ſuretyſhip aforeſaid; which was proved in the Diſtrict Court of Suffolk by two witneſſes and ordered to be recorded. That the ſale was forbid in reſpect of Marvaults intereſt, but Rice inſiſted on its taking place and offered to releaſe his intereſt in the property: that the ſheriff demanded an indemnity which neither Baird or Rice offered to give. That Baird upon receiving payment of the above mentioned £ 150, and Blacks promiſing to have the property ſold within four months under the ſaid deed of truſt, directed the ſheriff to reſtore the property to Black; which he accordingly did. That an attorney was ſent for to draw the mortgage on the Hackwood eſtate, but the treaty broke off and none was executed. That at this time Baird offered to advance a ſum of money to Rice if he would ſecure the debt due from Black. That Baird ſtated an account againſt Rice, in which he charged the balance of Blacks judgment; and that the ſame was ſhewn to Rice, during the period of negociation for the mortgage. Upon the final hearing of the cauſe the Borough Court diſſolved the injunction and diſmiſſed the bill with coſts. From which decree Rice appealed to the Court of Chancery, where the decree of the Borough Court was reverſed, and the injunction made perpetual. From which decree Baird appealed to this Court.

CALL for the appellant. The queſtion is, whether

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ther the ſeveral acts of Baird upon the day of ſale, exonerated Rice from his ſuretyſhip? He could only be releaſed by expreſs agreement; the mere circumſtance of Bairds having given time was not ſufficient. *Dingwall* vs. *Dunster*, *Dougl.* 235. Where the delay was greater and the circumſtances ſtronger than in the preſent caſe: but it was decided that nothing, but an expreſs declaration by the holder of the bill would diſcharge the acceptor. The principle of which caſe is the ſame with that before the court; for the acceptor there was in fact only a ſecurity.

Beſides there are circumſtances in the preſent caſe to juſtify the delay; for an incumbrance was ſuggeſted, and the ſheriff demanded an indemnity which Baird was not bound to give. Becauſe he was not obliged to run any riſque, or encounter the conſequences of an act, which might bring him into difficulties; but it was the proper buſineſs of the ſecurity to ſee that the debt was paid. 2. *Vez.* 103, 372. If Rice wiſhed diligence and activity to be uſed he ought to have paid the money and taken an aſſignment of the judgment; after which he might have proceeded to ſell or not as he thought proper. All this he could readily have done, as he was upon the ſpot and knew of the difficulties. If he failed to do ſo then, it was his own fault; and the *laches* was upon his ſide and not on ours. But he had the property incumbered for the very purpoſe of ſecuring this debt; and therefore might have proceeded to ſell under the deed of truſt, as he was oppoſed by no creditor. His inſiſting on the ſale was unimportant; for it was forbid by others, and the ſheriff demanded an indemnity which as before obſerved, Baird was under no obligation to give.

If Rice is entitled to releif at all, it muſt be on the ground that his ſituation was altered. But it clearly was not; as he was preſent at the ſale, knew what was going on, was poſſeſſed of a deed of truſt for the property, and had it as amply in his power to ſecure himſelf afterwards as before. He cannot

cannot therefore with any propriety inſiſt that the conduct of Baird lulled him into ſecurity; for he was fully apprized that the debt was not paid, and that there was no poſitive agreement for his exoneration. Baird vs Rice.

WICKHAM *contra.* This was a joint judgment and execution, upon which the ſheriff took property which was afterwards releaſed by order of Baird, who thereby exonerated Rice. For if the ſheriff had returned the truth of the caſe, no new execution could have iſſued at common law; and although by the ſtatute a party may have ſeveral executions, yet a ſatisfaction of the firſt diſcharges the judgment; and the taking of a ſecond is at the peril of the plaintiff. Indeed if the proper return had been made Baird could not even under the ſtatute have taken a ſecond execution; becauſe the firſt would have appeared upon record to be diſcharged. Now the omiſſion of the officer to make the return will not alter the nature of the caſe, eſpecially in equity which always conſiders that as actually done, which ought to be done. For it was the ſheriffs duty to have made the return, the law obliged him to do ſo, and his failure ought not to prejudice any party. Therefore Rice was entitled to the ſame benefit from the tranſaction as if the return had been actually made; and conſequently no ſecond execution ought to have iſſued. The rule being that if the firſt execution be from whatever cauſe diſcharged, that the judgment is ſatisfied and no other execution can iſſue on it.

But it is ſaid the agreement was that if the money was not paid within four months another execution ſhould iſſue. Which is not correct; for the agreement was that the property ſhould be ſold under the deed of truſt. If the fact though were that it was agreed a ſecond execution ſhould iſſue after the four Months yet that would not alter the equity of Rice; becauſe it was an agreement without his conſent. On the contrary he inſiſted

on

Baird vs Rice

on the ſale; and the property taken was clearly ſufficient to have paid the debt.

The deed of truſt was no objection. For if it be a mortgage, which it is moſt like in its terms, then having been only proved by two witneſſes it was by the very words of the ſtatute expreſsly void againſt creditors. If however it be taken as another kind of conveyance, then the poſſeſſion of the property remaining with the grantor it was equally void.

The buſineſs of the loan proves clearly that in the apprehenſion of Baird himſelf, Rice was diſcharged. It was a bait on the hook, by which he hoped to allure him into the ſuretyſhip again.

The authorities cited on the other ſide dont apply. That in *Dougl.* was merely a reſort to the ſecurity after an ineffectual application to the principle. That in *Vez.* is indeed ſtronger; but there was no new agreement in that caſe, as there was in the preſent. For the plaintiff relied upon his firſt ſecurity and made no alteration in it. But here Baird made an entirely new contract; which tended to lull Rice into a repoſe, and that without the aid of a court of Equity, would have turned to his prejudice. The decree of the Court of Chancery therefore is right, and ought to be affirmed.

ROANE Judge. The property taken in execution in this caſe being forbidden to be ſold, under an idea of a prior lien, the ſheriff was nevertheleſs bound to proceed finally in the buſineſs and to make his return upon the execution. Upon the refuſal of the appellant to give an indemnity, he might on application to the Court, have had further time given him to make his return and in the mean time have put it upon the parties concerned to litigate their right to the property in queſtion by filing a bill for that purpoſe. This is ſaid to be within the power of the ſheriff in ſuch caſes in 1, *Burr.* 34. *Cowper et at.* vs *Chitty & Blackſton*; and perhaps other cautionary ſteps are within his power. During all theſe meaſures the plaintiff is not bound to do any thing; he may remian

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a ſilent and inactive ſpectator: and is to be ſuppoſed totally unconcerned in the tranſaction. Baird vs Rice.

But if he ſhall voluntarily intrude himſelf therein, he may releaſe the obligation of the ſheriff to proceed, he may looſe his lien upon the property and may diſcharge third perſons otherwiſe liable, in the event of the property ſeized being inſufficient.

The teſtimony in this cauſe is, that the plaintiff inſtead of leaving the ſheriff to encounter the difficulties in the legal manner made a compromiſe, and authorized the ſheriff to releaſe the property; Rice the now appellee ſtrenuously inſiſting, all the while, that the ſheriff ſhould proceed to act in the legal manner: and as an inducement thereto offering to give up his claim to the property in queſtion under the deed of truſt.

This conduct I conceive as far as it reſpected the ſum to be paid in future, amounted to a new contract; a ſimple contract indeed inſtead of a judgment; and one whereby Black alone became liable inſtead of Black and Rice: and the conſideration of this new aſſumpſit on the part of Black, was the releaſement of his property then in the hands of the ſheriff.

However improvident this contract might be, in theſe reſpects, no perſon can ſay that Baird had not a right to make it; nor that the conſideration on which it was founded was not a good one to ſuſtain an action againſt Black: but the effect is that the old conſtract was thereby at an end, and with it Rices' liability to pay the debt.

There is no teſtimony as at the time of the tranſaction that Rice did not conſider himſelf diſcharged; and if at a future time the belief of his being liable is inferred from his conſenting or at leaſt not objecting that the balance of Blacks debt ſhould be comprized in the mortgage on the Hackwood eſtate, that inference is confronted on one hand by the circumſtrnce of his forbidding a ſale of the property comprized in his truſt deed at a time prior, but never

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ver posterior to the compromise, although it appears from the record that many executions attached on that property as well after as before that period; and on the other hand this circumstance may be merely considered as a tacit consent to become again liable for that debt, in consideration of advantages expected from the loan of the money by Baird and Westmore. Which however were never compleated; and possibly he might have thought it of little consequence, having some prospect for aught appears to the contrary, of being finally relieved by the court. But on the contrary some opinion may be formed of Bairds own idea of Rices' being discharged, from his strenuously insisting on a security for that balance, and as soon as he probably got it by assignment of the bonds, seeming to reject the plan of the mortgage by directing M'Kenny not to advance the money.

These inferences are however too loose, and too nearly balanced for us to form any decided opinion from them, as to the ideas of the parties subsequent to the compromise.

The case rests therefore upon the transactions at that time, and these in my opinion amount to a discharge of the appellee from his liability. Of course the Chancellors decree, making the injunction perpetual must be affirmed.

CARRINGTON Judge. An execution once levied and returned satisfied discharges the judgment forever; and the law is the same, if what is equivalent thereto, be done. In the present case the officer had taken the property, which he restored by the order of Baird, but expressly against the consent of Rice. The sheriff ought then to have returned the execution with a statement of the facts; and if he had done so, no new execution could have issued. But his omission did not affect the justice of the case, or alter the rights of the parties; which must be considered in the same manner as if the return had been made.

I

Baird vs Rice.

I admit that Baird was not bound to indemnify the ſheriff, and if the caſe reſted upon that point, he would have been ſafe; but his conſenting that the payment ſhould be delayed, and releaſing the property, changed the complexion of the caſe altogether; and diſcharged Rice from his covenant.

It is true the anſwer ſtates that Rice was conſenting to the releaſe of the property; but it is not proved: and this part of the anſwer is not reſponſive to the bill. Conſequently it is not evidence. I think therefore that the decree of the Court of Chancery is right; and ought to be affirmed.

PENDLETON Preſident. The execution levied on conſiderable property, reſtored to Black by order of the creditor on payment of part of the money, and a further day given for the ballance was a total diſcharge of the judgment as to Rice at law, if the ſheriff had done his duty in returning the execution with the truth of the caſe. But he having neglected this, Rice is driven into a Court of Equity for relief; where things are conſidered as performed, which ought to have been done. He muſt indeed appear with a fair aſpect, and not have done any act contributing to the omiſſion; or forborn to do what he might, to prevent it.

It is ſaid in the anſwer that the tranſaction was with his privity and conſent, and this, if proved, would have bound him, and operated no change in his original engagement. But this is not proved; on the contrary it is diſproved as far as a negative can be, by teſtimony of facts inconſiſtent with the ſuppoſition. He preſſed the ſale, and waived his claim under the deed of truſt, which repels the idea that he was conſenting to the poſtponement.

But it is ſaid he might have given ſecurity to the ſheriff and proceeded to ſell under the execution. I fancy this was rather a haſty and ſudden aſſertion of the counſel; for I could refer it to that gentleman himſelf on cool reflection, whether the ſheriff could at the inſtance of Rice or any other proceed

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to sell under the execution when he was ordered to forbear and restore the property by the creditor.

As to a sale under the deed; that was to be made by Leatry when required by Rice and Marvault; the subject dont appear to have been contemplated by them at this time and if Rice conceived himself discharged from the engagement, he had no right to proceed under the deed, nor was he obliged to involve himself anew.

In the list of executions filed amongst the testimony in the cause there appears a series of them at the suit of Knight against Black from December 1738, to September 1792. On some of the intermediate ones, property contained in the trust deed was taken; and the sale forbid, at one time by Leatry and at another by Rice: But it does not appear that either of them forbid the sale on the last execution in September 1792, (four months after Bairds sale) levied on two slaves; neither does it appear that the slaves were in fact sold; but the creditors receipt is indorsed for the debt, amounting to £143, 4, 1½. From hence two inferences seem natural; first that Rice considered himself as discharged and so did not appear to stop this sale, as he had done on the former occasions. Secondly that £143, was then raised on the seisure of two slaves; which makes it probable that Baird might have got his money if he had pursued his execution and not made the compact.

But it is said that the transaction in February 1793 shews Rice at that time considered, and acknowledged himself liable for this debt. I forbear to review the evidence of that negotiation because I think myself warranted by reason and precedent, in deciding, that propositions on either side, made by parties on a treaty for compromising their differences, if that treaty be not effectual, are not to operate as evidence in a future contest in court.

I come now to the conduct of Mr. Baird: The cases from *Dougl.* and *Vez.* were cited to prove that a creditor to preserve his remedy against a security,

curity, is not obliged to give him notice that the principal has not paid, nor to uſe legal diligence againſt him ſhort of the time preſcribed by the act of limitations, nor to ſue tho' deſired by the ſecurity.

Upon which I obſerve, that the caſe in *Vez.* was going a long way for a Court of Equity; and perhaps our act of Aſſembly, which obliges the principal to ſue if required by the ſecurity, is better. But if full force be allowed the doctrine, it will not profit Baird in the preſent caſe. If indeed he had forborn to act, refuſed to give the ſecurity and left the ſheriff to the duty of his office, no *laches* could have been imputed to him; and Rice's exoneration muſt have depended on the final event of that execution. But Baird acted he received part of his money, gave Black a further day for the ballance, and directed the property to be reſtored.

I conclude as I began that the ſheriff ought to have returned that the property ſeized had been reſtored by order of the plaintiff which would have been a diſcharge of Rice at law, and this court conſidering it as done, will give it the legal effect.

affirm the decree.

SMITH

SMITH Ex'r. of WILLIAMS,

againſt

ROBERT WALKER.

THE appellee Robert Walker was ſecurity for Edward Walker ſince deceaſed in a bond to Jones Williams for payment of £372. This bond bore date on the 3d day of December 1774. In October 1774 Edward Walker bought a tract of land from Williams for the ſum of £141; but did not pay the purchaſe money; and on the 15th day of May 1778, he gave his penal bill for the ſame in theſe words,

"For value received this 15th day of May 1778 "I promiſe to pay or cauſe to be paid unto Jones "Williams the juſt and full ſum of one hundred "and forty one pounds current money of Virginia "on demand with lawful intereſt, I bind myſelf "my heirs executors and adminiſtrators in penal "ſum of two hundred and eighty two pounds like "money as witneſs my hand and ſeal,

EDWARD WALKER, (SEAL.)

Robert Walker is executor of Edward Walker, who made ſome ſmall payments in his lifetime, and ſince his death Robert Walker has paid ſeveral conſiderable ſums, but it is not ſtated in the record whether thoſe payments were made out of his own money or out of the aſſets of his teſtator, neither is it ſtated in the record that he gave any particular directions with regard to the application of them at the time of the payments. But Williams and his agents credited ſome on one bond, and ſome on the other, in the form of receipts. About the year 1784 Walker and Williams called on colonel Fiſher to take a liſt of the payments, which he did, and credited the bonds againſt it, reducing that in 1778 by the ſcale, but it did not appear that this reduction by the ſcale was with William's conſent. Nor is it ſtated in the depoſition that the parties profeſſed themſelves ſatisfied with the account as ſtated, tho' it is ſaid that the liſt of payments was taken from Williams

Williams himself. In the margin of the list, opposite to one of the payments are the words "not on the bond." Williams afterwards dying, Smith as his administrator, brought an action upon the bond to which Robert Walker was security; who pleaded payment, and on the trial of the issue gave Fisher's deposition aforesaid in evidence. To rebut which, the plaintiff produced the other bond, and offered to prove by a witness, that it was given for the purchase of the land aforesaid, and that Edward Walker at the time of executing of it promised to pay interest thereon from October 1774, and thereby to prove that it was for a specie debt. The District Court of Petersburg rejected the evidence and the plaintiff excepted to that opinion. The bill of exceptions stated that the testimony contained in it was all the evidence in the cause "except what proved the bond on which the suit was brought, paid and except the deposition of Daniel Fisher above stated." The jury found a verdict for the defendant and the Court gave judgment accordingly. From which judgment the plaintiff appealed to this Court.

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CALL for the appellant. It is evident that if the second bond be taken as a specie debt, that the bond on which the suit is brought was not paid; because as the obligor had given no directions about it, the obligee had a right to apply the payments.

But it is not important to be considered at this time whether any part of the money was really due, or how much, but the plain abstract question is, whether the plaintiff had a right to the testimony which he offered. For if he had a right to the evidence, and was not permitted to use it, the court below did wrong in rejecting it, and therefore the judgment is erroneous and ought to be reversed.

The question with regard to the plaintiff's right to make use of the evidence involves two others.

First, whether obligees in general have a right to this kind of evidence, where the bond was given during the period for scaling paper money?

Secondly,

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Secondly, whether the plaintiff in this particular action, had not ſuch a right?

I. There is a difference between the contract itſelf and evidence of the contract. For the contract may be of one date, and the evidence of the contract may be of another date. The contract may be in the year 1774, and the evidence of that contract may be dated in 1778. This is the caſe in all actions of *Indebitatus aſſumpſit*, where the contract which is the original purchaſe of the articles, is always laid to be anterior to the promiſe which is but an evidence of the contract.

There is another difference under the act of Aſſembly, between contracts prior to the firſt day of January 1777, and thoſe entered into between that day and the firſt day of January 1782. This is a difference which the Legiſlature ſeem anxiouſly to have maintained, and therefore is to be ſtrictly regarded. Upon this diſtinction contracts between 1777 and 1782, are liable to be ſcaled, whilſt thoſe anterior to that period are not ſubject to the ſcale.

To apply theſe obſervations:

According to the firſt of the foregoing differences, the contract here was in 1774; for that was the time of the purchaſe, and not in 1778 when the bond bears date.

Becauſe the bond is not the contract, but only the evidence of the contract. For the original purchaſe was the contract, and the bond is only a proof of it.

Of courſe according to the ſecond of thoſe differences above mentioned, this bond of 1778 was not liable to be ſcaled; becauſe it was a contract entered into prior to the year 1777.

Suppoſe the bond in ſo many words had ſaid with intereſt from the year 1774, then according to the univerſal practice the evidence would have been allowed. This is frequently done in the Diſ-

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trict Courts and I have been informed it has been so decided here. * Smith, vs. Walker.

Now these words are only an evidence of its being a specie debt, and do not necessarily prove it to be so. For there might have been a contract for paper money expressed in those very terms. A man might in 1778 have contracted to have paid an hundred pounds with interest from 1774 in paper money, and the contract would have been good.

But if collateral evidence would be admissible in that case, in order to prove the real contract, it would seem to be as reasonable in any other, provided it did not contradict the bond. Therefore as there is nothing in the evidence here which is contradictory to the bond, I conclude that the evidence was proper in the present case.

Again the bond evidently involves the first contract. For if a suit were brought upon the first contract for the purchase money agreed to be given for the land, the defendant might plead that a bond had been entered into for it; and the plaintiff could not reply that the bond would be less, by reason of the scale, than the original purchase money.

Let the bond then be the date; and still it is a specie debt. Because it includes a specie contract and extinguishes the original promise.

But if it be true that the bond destroys the first contract, surely the converse of the proposition must be equally true. If the obligor may say that it swallows up the specie contract, the obligee must have an equal right to insist upon it as an evidence of that specie contract which the other side will have it to contain. It must prove the same fact for the plaintiff as it does for the defendant. If it establishes on the part of the defendant that the original specie contract is extinguished by the specialty, it must at the same time

* Pleasants *vs.* Bibb. 1 *Wash.* not published at the time when this case was argued.

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time eſtabliſh on the part of the plaintiff likewiſe that it was given for a ſpecie debt. Its being introduced on this or that ſide of the queſtion can make no difference as to the exiſtence of the fact. It is impoſſible to deſtroy the reciprocity. Becauſe the moment it is ſaid that no action can be maintained for the original contract itſelf on account of the higher ſecurity being taken for it, that moment it follows that the higher ſecurity itſelf is but a converſion of the firſt contract into another form; and therefore that the plaintiff may inſiſt on the effect of it although its ſhape be changed. For it operates as a merger; and the firſt contract is infuſed into the ſecond; which is but the repreſentative of the firſt and contains all its eſſence and qualities.

Therefore upon general principles whether the bond be taken as a mere evidence and ſecurity for the contract, or whether it be taken as the contract itſelf, it was ſtill a bond for a ſpecie debt and not ſubject to the ſcale of depreciation.

But to conſider the caſe more cloſely upon the act of Aſſembly itſelf.

If the bond be the date of the contract ſtill by the very words of the act of Aſſembly the evidence is admiſſible.

The preamble ſtates that paper money had become an improper ſtandard to adjuſt and ſettle debts and contracts, and that the people will ſuffer for want of a rule for liquidating and adjuſting them, ſo as to do juſtice as well to the debtors as the creditors. Which of itſelf implies an intention in the Legiſlature that the conſideration of the contract ſhould be enquired into. For an aſcertained debt would need no liquidation or adjuſtment; and therefore that expreſſion neceſſarily ſhews the intention that an inveſtigation was to be had as well for the benefit of the creditor, as of the debtor.

But this is further manifeſted by the enacting clauſe which directs that all debts and contracts entered

entered into or made in the *current money* of this ſtate or of the United States, ſhall be *liquidated ſettled and adjuſted* by the ſcale, except contracts for gold and ſilver coin, tobacco, or any other ſpecific property. Which undeniably proves that paper money contracts only were to be ſcaled; and that when the contract was not for paper money expreſsly that it ſhould not be reduced by the ſcale.

This then indiſpenſably impels to the enquiry whether the contract was for paper money or ſpecie; becauſe its being ſcaled or not depends upon its being the one or the other. Evidence therefore muſt be received to explain it; for it can be aſcertained in no other manner.

But to this the rule of law, that parol evidence ſhall not be received in oppoſition to the deed, may perhaps be objected; and it may be ſaid that the bond bearing date within the period of the ſcale, and being for *current money* ſhews that it was for paper money.

This however would not be correct. For currency is an equivocal word and comprehends two diſtinct ſpecies of money either of which ſatisfies the term. A tender in either would have been legal. Or a payment either in ſpecie or paper money before the paſſing of the law would have diſcharged the bond. Therefore current money was as applicable to gold and ſilver coin as to paper money.

But if the expreſſion includes two characters of different qualities and properties it is clear that parol evidence may be received to explain them. For it is then in principle no more than the common caſe of a legacy to the teſtators ſon A; he having two of that name, in which caſe parol evidence is admiſſible in order to ſhew which of the two was meant. Which is agreeable to a known rule upon the ſubject. For wherever evidence creates an ambiguity, there evidence may be uſed to explain the ambiguity. Therefore when it appears that the expreſſion comprehends two characters, to

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either of which it is equally applicable an ambiguity arises, which ambiguity must be explained by shewing which of the two was intended.

Besides the known distinction is between evidence which contradicts and that which explains the deed; the first is not admissible, but the other is. Now here the evidence was not contradictory to, but was entirely consistent with the expression, and therefore admissible upon the distinction.

I do not mean to say, that parol evidence may always be received to explain words. For where the question is upon the meaning of the words *qua* words as the phrase is, there it cannot be received; but where the question is with regard to quantity and the object of the words, there parol evidence may be received. Now quantity and object constitute the whole enquiry in these cases; and therefore according to the rule the evidence may be received.

All these observations are assisted by the words 'liquidated, settled, and adjusted' in the enacting part of the second section; the force of which in the preamble has been already mentioned; and the repetition of them in this part of the act shews that the Legislature intended every thing to be thrown open to enquiry again: because those words relate to unsettled affairs and not to ascertained quantities freed from computation or circumstances.

But this which is so clear upon principle and the plain interpretation of the act is rendered more manifest still by the last clause of it: Which gives full jurisdiction and discretion to the court to make the enquiry.

For the expression that 'where other circumstances arise which, in the opinion of the court before 'whom the cause is brought to issue, would render 'a determination agreeable to the above table unjust; in either case it shall and may be lawful for 'the court to award such judgment as to them shall 'appear just and equitable,' necessarily leads to the reception of parol evidence. Because before you

you can determine on the circumſtances you muſt know them; and in order to know them, you muſt receive evidence to prove and aſcertain them; which inevitably lets in the parol proof; for the facts cannot be learned without, and therefore it becomes unavoidable.

It may be likened to a caſe where the writing does not through fraud or miſtake recite the contract truely. In which caſe *prima facie* the writing expreſſes the contract rightly, and is not liable to be encountered by parol evidence; but becauſe the law had ſaid that fraud or miſtake ſhould be ſufficient ground to impeach the deed, parol evidence became neceſſary to eſtabliſh it; and therefore has been conſtantly received.

So here when the law ſays that circumſtances ſhall controul the deed, it in effect ſays that parol evidence with regard to thoſe circumſtances ſhall be received; becauſe it is impoſſible to come at the circumſtances without the proof.

The judgment is to be, according to the very right and juſtice of the caſe, upon hearing all the circumſtances. Therefore, when the defendant *insists upon leſsening* the plaintiffs debt below the natural import of the words, he muſt ſhew a reaſon for it. He will not have done enough by ſaying that the bond bears date during the exiſtence of paper money; for that we have already ſeen does not neceſſarily prove that it was for a paper money contract. He muſt therefore ſatisfy the Court that it was ſo. But if the defendant goes into evidence of that fact, then it is clearly competent to the plaintiff to encounter that evidence with teſtimony ſhewing the contrary; and that it was for a ſpecie debt.

I ſay when the defendant *insists* to have it leſſened, which is correct; for the act does not ſay that the debt ſhall *ipso facto* ſtand reduced to a certain ſum; but only that it ſhall be liquidated, adjuſted and ſettled according to a certain ſtandard. Which words *liquidated, adjusted and settled*, ſuppoſe

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poſe ſome further act, and ſeem to render an application for the adjuſtment indiſpenſable: although in practice it is of courſe to do it, where no oppoſition is made, from a preſumption that the other ſide would oppoſe it if it were otherwiſe.

Of courſe then it is but the common caſe of rebutting an equity. The whole tenor of the act leads to this. For the act aſcertains nothing of itſelf with regard to any particular demand, but merely eſtabliſhes a ſcale, which may or may not be reſorted to according to circumſtances and the direction of the Court.

I know it has ſometimes been ſaid that the act was made for the benefit of the debtor only, and not of the creditor.

But this would be contrary to juſtice. To ſay that one ſide ſhould be more favored than the other is a poſition too monſtrous to be maintained; eſpecially on a law which profeſſes to do juſtice to both parties without leaning to either, throughout every ſection of it.

But the words "other circumſtances &c." are plainly more applicable to the creditor than the debtor; becauſe the latter was expreſsly provided for by the two preceding members of that ſentence.

It is not important however to inſiſt upon ſuch a circumſtance. The true conſtruction is, that the proviſion was intended for both. The words are the moſt unlimited in their meaning that can be; for the Court under all the circumſtances are to give "ſuch judgment as to them ſhall appear juſt and equitable".

II. This caſe though is ſtronger than the generality of caſes.

For the agreement was to pay intereſt from 1774; which was binding, and an action would have lain upon the promiſe, or a court of Equity would have enforced a ſpecific performance of it. The plaintiff therefore had a right to inſiſt upon the agreement,

agreement, at leaſt as to ſo much debt as the additional intereſt would have created.

Again the bond is payable on demand "with intereſt" without ſtating the time of its commencement. Now as the word intereſt was unneceſſary for the bond carried it of courſe, it ſhews that ſomething was meant by the inſertion of it. And as no commencement is mentioned, it is fair to infer that the indefinite expreſſion was to be applied to the firſt contract, which was now for the firſt time reduced to writing.

The payments are indorſed in the form of receipts, to which if the obligor or his executor was preſent, it amounted to a written agreement that the bond was payable in ſpecie; and the over payments ſhew the ſame thing.

Again the witneſs might have proved a fraud or miſtake in making the bond as that it was to have been inſerted that the intereſt was to be paid from 1774, but that it was omitted through fraud or miſtake, which would clearly have entitled the plaintiff to the benefit of the ſpecie contract. The opinion of the court therefore which prevented this enquiry was wrong, and an injury to the plaintiff.

From all which I infer that the plaintiff had a right to the evidence, and then the quantum of the demand was not a queſtion, for the court deprived him of a right which he had a clear title to demand, and that was error.

But if it were material to go into the evidence it would be manifeſt, that if this were a ſpecie debt, then the payments which the plaintiff had a right to apply as he had received no directions as to the application did not amount to both debts.

WICKHAM *contra*. I have conſidered the caſe under a different point of view from that which Mr. Call has taken of it, and therefore ſhall not purſue his train of argument. The defendant was ſecurity to one of theſe bonds and not to the other; he has made

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made payments more than sufficient to discharge Mr. Tom's own bond; but a stratagem has been used in order to apply them to the other, and render his own unsatisfied. The question of the scale dont apply to the case: but if it did, although I am not prepared to speak upon the act, I should doubt Mr. Call's construction. I have heard that some of the courts have refused an enquiry into the circumstances, and that they were of opinion that the law was made for the benefit of the debtor and not of the creditor. If the defendant on the present occasion be a gainer, on other occasions he may have been a loser. So that in attempting to do justice to his creditor in this instance, he may in general be injured. Which proves that it is better to stick to the letter of the law and the scale established by it; as that mode will be more equal, in its operation.

On common law principles the enquiry contended for is not allowable; for the rule there is that parol evidence shall not be received to contradict a deed. This bond is "For value received this 15th "day of May 1778 I promise to pay &c. one hun-"dred and forty one pounds current money of "Virginia &c." which imports that the value was then received, and therefore evidence to shew that the contract was in 1774 would be in express contradiction of the words of the bond, which the rule supposes cannot be done.

It is said however that parol evidence may be received, because the words *current money* are equivocal; but it means paper as well as specie; and as the former is perfectly consistent with the other parts of the bond, the case is to be governed by the general directions of the act.

A distinction was attempted however between an evidence of a contract and the contract itself. But that cannot apply in the case of a written agreement; for at law the bond is the contract. The declaration always states the bond and not the contract. A declaration which should state the contract

contract would be erroneous. However I repeat it again that the particular terms of this bond obviate all difficulties, and prevent all enquiry into the circumſtances.

As to the laſt clauſe of the act: the court notwithſtanding that clauſe are bound by the ordinary rules of evidence. The judgment muſt always be *secundum probata et allegata*; but this ſort of evidence would be extraneous to the iſſue, and therefore no ground of deciſion.

Be the conſtruction of the act though how it will, the deciſion of the court in this caſe was clearly right. The defendant was only a ſecurity, paid moſt of the money, and knew not that the other was a ſpecie debt. The preſumption is that when he was making payments they were upon account of his own bond firſt. Equity it not uſually ſet up againſt a ſecurity; but here the Equity was againſt the plaintiff. If he recovers the defendant muſt pay the money out of his own pocket; but if the judgment be affirmed, the plaintiff may ſue the other bond, and if there be aſſets and he has a right to prove the ſpecie debt he may recover againſt Edward's eſtate, which is the proper fund to pay it.

It was ſaid that if the indorſements were made in preſence of the defendant, he would be bound; but nothing of that kind appears; and the court will not preſume it.

The over payment ariſes from the falſe manner of calculating the intereſt; and as to the agreement for intereſt from 1774, the defendant knew nothing of it.

PENDLETON Preſident. Whether parol evidence of a fact not contained in a bond can be admitted at law in a ſuit on that bond is a queſtion not to be ſtirred at this time of day, notwithſtanding the ingenious diſtinction of the Counſel between a contract and the evidence of a contract; I mean as a general queſtion.

Whether

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Whether it may be done in paper money bonds under the laſt ſection of the ſcaling act, is a queſtion as difficult as it is important; and was it neceſſary to decide it, the Court would have referred it to a fuller Court, eſpecially as we know there is a diverſity of ſentiment among the judges on the queſtion.

But we unite in opinion that it is not only unneceſſary, but improper, to enter into the diſcuſſion in this ſuit.

The bond in ſuit is a ſpecie bond, on which Robert Walker is ſued in his own right; and the other bond is given by Edward Walker his teſtator only; the payments are all in ſpecie, except £97:9:3 paid in 1776 and 1777; which cant be applied to the ſecond bond, being prior to its date, but are to ſtand at their nominal amount by the expreſs words of the ſcaling act.

The queſtion is whether the ſecond bond be ſpecie or paper?

A queſtion which was collaterally brought on, for the ſake of applying to that, the payments which the defendant claimed, as diſcharging his bond. But if it was proved by evidence *which dont appear*, that the debt ſued for was paid, the evidence offered was immaterial? and the Court were right not to ſuffer the jury to be embarraſſed or inveigled by it.

That we are to take this to have been ſo proved upon the bill of exceptions, we have no doubt. After ſtating John William's evidence, and the uſe intended to be made of it, it goes on "and this being "all the evidence in the ſame, except what proved "the bond on which this ſuit was brought to be "paid and except Fiſher's depoſition the counſel "excepted &c." I mentioned this paſſage to the counſel; he ſaid it was an inaccuracy which had ſtruck him, and did not attempt an explanation of it; although he muſt have been ſenſible, that they were too important to have been inſerted *currente calamo*, without

without a meaning. They could not apply to Williams' proof since to that they are stated as an exception; nor to Fishers deposition, because that is specially excepted; they therefore can only mean what they import, namely, that other satisfactory proof was made that this debt was paid. Smith *vs* Walker.

On that ground the Court affirm the judgment of the District Court.

If Mr. Smith chuses to commence a suit on the second bond, the question on the scaling act will be brought on; and if he is let into the proof, it is obvious that many other circumstances will be proper subjects of enquiry, besides those mentioned by this witness, in order to an equitable decision. I cannot avoid saying however that this creditor seems to have less reason to complain of injury from paper money, than any which has appeared before the Court.

As to a bar by the endorsement on the second bond, Fishers deposition recorded, states the whole payments; and on a suit on this bond, it will be a proper enquiry whether by *those* both debts are paid.

Judgment affirmed.

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IN this case the sheriff who took the forthcoming bond included his commissions on the debt. The plaintiff released the commissions prior to the judgment. The original execution issued, and the sheriff took the bond for the sum of £. 1342 : 16 sterling and £. 4 : 5 : 10 currency, conditioned for payment of £ 670 : 8 sterling and £ 2 : 2 : 11 currency; Indorsing that his commissions were included in the bond; and that the rate of exchange was from forty to forty two. The District Court gave judgment for the penalty to be discharged by the amount due after deducting the sum released by the plaintiff. The record states that the rate

If a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess the bond will support a judgment.

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of exchange upon the judgment on the forthcoming bond was settled at 40 per. cent. by the certificate of James Brown and the agreement of the parties.

A sterling judgment may be reduced into currency at the time of entering judgment on the forthcoming bond.

The defendant appealed.

WICKHAM for the appellant. The first question is if the commissions were rightly included; and whether the release of them cured the error? In the revised code page 228 there is a list of the sheriffs fees, which for taking a forthcoming bond is only sixty three cents; and for proceeding to sale of the effects a commission is allowed. These two clauses taken together, prove beyond all doubt that the sheriff has no right to commissions for taking the bond; because he made no sale. The compensation though was afterwards thought too little, and therefore in December 1794, a law was made to allow them; which shews the sense of the Legislature upon the former laws. The release after the day of sale passed cannot alter the case, because in its commencement it was not pursuant to the statute, and therefore will not support a motion, however it might have maintained an action. Especially as the release was not in the interval between the date of the bond and the day of sale.

But upon another ground the judgment is erroneous. The execution should have stated the difference of exchange, and the bond should have pursued it for the information of the Court. The act of Assembly requires that the Court rendering a judgment should fix the rate of exchange; and there are precedents in this Court where judgments have been reversed for omitting it. Therefore as it does not appear to have been done in the present case, there is error in the record which ought to be corrected. The rate of exchange is indeed settled in the judgment on the forthcoming bond, but it ought to have been settled in the first judgment and the omission was fatal. The consent here dont go to cure that error, but is merely collateral and relates to the ascertainment of the difference in the money, without including any consent on the part

of

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of the defendant that any judgment ſhould be rendered gainſt him upon the bond. Strip the caſe then of this ſuppoſed conſent, and there is nothing which can ſupport the judgment.

ROANE Judge. The act of 1793, page 309, *Rev. Code.* concerning forthcoming bonds is ſilent as to the penalty in which thoſe bonds are to be taken. Indeed it is the univerſal practice to take them in double the ſum contained in the execution; but as the law is ſilent as to this it will not vitiate a bond voluntarily given, having through *miſtake or miſapprehenſion of the law*, a greater or leſſer ſum in the penalty.

The condition of the bond in the preſent caſe, is conformable to the law; as it is to have the property ready at the time and place of ſale. But the ſame act requires that the bond ſhall recite the ſervice of the execution and the amount of the money or tobacco due thereon; and it is alledged that the preſent bond does not truly ſtate the amount due; but more, *i, e,* by the amount of the ſheriffs commiſſions.

Theſe commiſſions ought not by the then law to have been inſerted in the bond: 1ſt, Becauſe they are no part of the amount of the money or tobacco due thereon, but are only a collateral recompence to the ſheriff; and 2d, becauſe by the ſame act the bond is to be diſcharged by payment of the money or tobacco mentioned in the execution, which ſhews that the bond ſhould be given for nothing more than what is mentioned in the execution.

By the proviſions of this act the defendant may diſcharge the conditions of his bond either by delivery of the property, or, as I have before ſaid, by paying the money or tobacco mentioned in the execution; and not that recited in the bond. Therefore in a motion on ſuch a bond, if the defendant can ſhew the Court that the ſum due by the execution is leſs than that recited in the bond, the Court in rendering judgment will have reference to the execution itſelf; ſo that in either caſe the obligor cannot be injured.

But

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But in the preſent inſtance, the plaintiff has entered a *remittitur* for the exceſs ſtated in the bond, *i. e.* the ſheriffs commiſſions; and the defendant has conſequently ſuſtained no injury whatever by the judgment, which is in fact given only, for what is due by the execution. There can be no reaſon then for not ſuſtaining the judgment, which is for the ſum really due, as neither the penalty or condition of the bond are contrary to law; although there be a departure from the uſual rule of penalties and a miſtake in the recital of what is really due.

With reſpect to the ſettlement of the execution on this judgment, I have no doubt it was proper to be ſettled at that time; and the agreement of the parties extends to the rate as eſtabliſhed by the certificate of James Brown. I think therefore that the judgment ought to be affirmed.

CARRINGTON Judge. The principal queſtion is if the ſheriffs commiſſions being included has rendered the bond void? This was a queſtion ariſing under the laws before the act of 1794 when the caſe was provided for. If we reflect upon the practice of ſheriffs in appointing very ignorant or very young men as deputies, it is not to be wondered at that miſtakes of this kind frequently occur. But as they are miſtakes ariſing merely in the execution of the judgment, they ought not to vitiate, but ſhould be corrected according to the truth of the caſe. It is the duty of the court to ſee that their proceſs is rightly executed; and to correct miſtakes if any have happened in the execution of it. For otherwiſe a fraudulent ſheriff might connive with the debtor and by taking the bond for a little more or a little leſs, deſtroy its effect on purpoſe. I do not think that the miſtake ought to avoid the bond in the preſent caſe; and as the commiſſions were releaſed and execution awarded for no more than was actually due, there does not appear to me to be any exception to the judgment on that ground.

As to the rate of exchange it was ſettled by agreement, and the firſt omiſſion cured; which puts

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an end to that objection. I have always thought that this Court ſhould not ſeek for reaſons to reverſe judgments upon mere points of practice; but ſhould make a point of ſuſtaining them where juſtice has been attained, if it can be done without any violation of the rules of law. Scott vs Hornſby.

LYONS Judge. I think a mere miſrecital like the preſent is not error; but may be corrected by the execution. This was a matter depending upon calculation. It is indeed the ſheriffs buſineſs to ſee that the calculation is right; but if he omits it, and any miſtake intervenes, it is under the controul of the court who may correct it. This is a ſummary proceeding under a law which ſuſpends the immediate harſh effects of an execution for the benefit of the debtor; and the conſtruction ſhould be as beneficial for the creditor, as the debtor. So that if no error ſhould be admitted to prejudice the latter, a mere miſtake in calculation ought not to injure the former; as certainty can be had by reference to the execution. I think therefore there is no error upon that ground.

As to the other point, the ſterling money was properly ſettled at the time of the judgment: becauſe the rate of exchange was liable to fluctuation and therefore ſhould be aſcertained at the time when the plaintiff is to get his money.

PENDLETON Preſident. The firſt error aſſigned is, that the ſheriffs commiſſions were improperly made part of the aggregate ſum for which the bond was given. The record indeed ſtates that it was ſo: but that the plaintiff indorſed a releaſe of that ſum on the bond, and judgment is entered for the ballance: So that juſtice is done in that reſpect.

But the Counſel inſiſted that the inſertion made the whole bond void. In which I differ from him. If the exceſs had been inſerted in conſequence of an uſurious contract, or for money won at gaming, it would have vitiated the whole bond under the acts of Aſſembly on thoſe ſubjects. Or if it had been

Scott
vs.
Hornsby.

been for a claim evil in itself, it might have furnished some colour for the objection. But the Legislature have removed even that colour; they having by their law of 1794, allowed the commissions; and if it was not unjust in principle *then*, it was not so, before. If it was an error, which I dont decide, it was inserted by mistake; and all that is to be done in reason and by precedents, is to rectify the mistake, and the bond is good for the ballance.

The second objection is, to the entry of the judgment relative to the exchange. Which it is said should have been settled according to the rate of exchange allowed in the first judgment, and that it should have been entered for the current money. In both points I think the Counsel mistaken, what the first rate of exchange was, dont appear; the bond being properly taken for sterling money, if it varied, the course of exchange at the time of the second judgment was the proper rule: it being the intention of the law to enable the sterling creditor to place his current money when paid in Britain, without loss in the difference of exchange. The entry of the judgment for sterling money, which may be discharged in current money at 40 per cent exchange, strictly pursues the law and uniform practice, leaving the defendant the alternative of paying in either money. Whether this be right in principle, since it gives the debtor an advantage from the fall of exchange without subjecting him to a loss by a rise, is not our business to enquire; the law has placed him in this situation, and the court cannot change it.

affirm the judgment

HENRY

HENRY BELL and CARY HARRISON
against
RICHARD MARR.

If the forthcoming bond include an excess, and the plaintiff after judgment, but during the same term, release the excess the defect is thereby cured; and the judgment rendered valid.

THIS was a supersedeas to a judgment of the District Court of Prince Edward upon a forthcoming bond, which exceeded the amount of the execution by £23:6:7½. Judgment was rendered upon the 5th day of April 1796, for the amount of the forthcoming bond, without any deduction; and upon the 8th day of the same month, Marr offered to give credit for the excess, which the Court allowed, and made the following entry.

"Richard Marr by his attorney this day entered a credit of twenty three pounds six shillings and seven pence half penny on the forthcoming bond of the said Marr's against Henry Bell and Cary Harrison, which credit bears date August the 27th 1794. and on which said bond a judgment was entered the fifth day of this month, being the amount of an error made by the sheriff in taking the said bond, on the motion of said Marr by his attorney the said sum of twenty three pounds six shillings and seven pence halfpenny is entered as a credit for so much against said judgment, agreeable to the date last mentioned."

PENDLETON President. Delivered the resolution of the Court to the following effect.

That there was no difference between this case and that of *Scott* vs *Hornsby*, decided the other day; except that the release here was after the judgment, but in that case it was before. That the Court however thought there was no distinction between the principles of the two cases; and consequently that the judgment, in this as well as in that case was right; and ought to be affirmed.

WORSHAM

WORSHAM
against
EGLESTON.

If before the act of 1794, the sheriff in taking a forthcoming bond included his commissions on the debt, it was erroneous, but in such case the bond is not void; and judgment shall be entered for the sum due without the commissions

EGLESTON issued a writ of fieri facias against Worsham in the year 1794 which amounted to 6940 lbs. of tobacco and £2:16:6; property was taken thereon, and a forthcoming bond given by Worsham on the 19th of August 1794; which he forfeited. The condition of the bond recited the amount of the execution to be 7342 lbs of tobacco and £2:16:6 *including interest costs and sheriffs commssions.* The District Court gave judgment for the amount of the condition and from that judgment Worsham appealed to this court.

Per Cur: The judgment in which the sheriffs commissions are included is clearly wrong. It must therefore be reversed, and judgment entered for the sum due, without the commissions.

The judgment was as follows;

"The court is of opinion that the said judgment "is erroneous in this that the same is entered for "the amount of the debt recited in the forthcom- "ing bond in the proceedings mentioned, in which "bond it is stated that the sheriffs commissions are "included, which by law he was not entitled to, "and which ought to have been deducted from the "amount aforesaid, before the entering of the "judgment of the District Court. Therefore it it "considered by the court that the said judgment "be reversed &c. And this court proceeding to "give such judgment as the said District Court "ought to have given. It is further considered "that the appellee recover against the appellant "14,684 lbs. of tobacco, the penalty of the said "bond and his costs in the said District Court; "But to be discharged by the payment of 6,940 lbs. "of tobacco; and £2:16:6 specie the amount of "the said debt, after deducting the commissions "aforesaid, with interest thereon to be computed "after

" after the rate of five per centum per annum from " the 19th day of Auguſt 1794 'till payment; and " the coſts."

WILKINSON

againſt

M'LOCHLIN & Co.

UPON the 6th day of Auguſt 1794, Duncan M'Lochlin & Company iſſued a writ of *fieri facias* againſt the eſtate of Wilkinſon, who gave a forthcoming bond, which he forfeited. The execution only amounted to £ 187 : 13 : 7; but the condition of the bond recited that it amounted to £ 195 : 12 : 6 " including intereſt, ſheriffs commiſſions, and all legal coſts." The bond acknowledged the obligors to be held and firmly bound to Duncan M'Lochlin and company, in the ſum of £ 391 : 5 : 6 to be paid to the ſaid *Duncan M' Lochlin his certain attorney his heirs executors adminiſtrators or aſſigns;*

If in a forthcoming bond the "teneri" be right tho' the "ſolvendum" be wrong it will not vitiate; but the bond is good.

The condition recites *whereas Duncan M'Lochlin hath ſued out of the County Court of Cumberland a writ of fieri facias &c.*

The County Court gave judgment for the amount of the condition of the bond. The Diſtrict Court affirmed the judgment and from the judgment of affirmance Wilkinſon appealed to this Court.

WASHINGTON, for the Appellee. Upon the ground that the bond is taken for too much, the obligation will not be held void; but the Court will enter judgment for as much as is really due if the party will releaſe.

And as to the exception that the execution is at the ſuit of M'Lochlin and Company, and the condition of the bond is for payment to M'Lochlin only; *Scott* vs *Hornsby* the other day went the

Wilkinson vs. M'Lochlin

full length of deciding that point: in which case the Court determined that the bond might be corrected by the execution. For although the condition mentions M'Lochlin only, yet that is an evident miſtake; becauſe the penalty mentions the right name, and therefore we need not go out of the record to aſcertain it. If we reaſon by analogy to the ſtatute of Jeoffails, which being in *pari materia* is therefore applicable, it will be clear; for the proviſions of that ſtatute are that if the ſum or name be right in any part, it ſhall not vitiate. Though in motions upon bonds of this kind the Court may hold to ſome ſtrictneſs, yet the bond being for the benefit of the defendant he ought not to be allowed to object.

DUVAL for the appellant. The bond is in the nature of a *scire facias*; in which ſuch a variance would have been fatal. The including of the ſheriffs commiſſions was palpable error.

Per Cur: The error as to the ſheriffs commiſſions might have been corrected; but the *solvendum* is to Lochlin only, and ſo does not purſue the execution,

WASHINGTON. That will not prejudice; becauſe the *teneri* is right, and the *solvendum* is repugnant and therefore void. It is the *teneri* which creates the obligation and the ſubſequent matter will not vitiate. 2 *Ld. Raym.* 1043. *Robert* vs *Harnage*. 3 *Bac: abr:* 696. 1 *Sid.* 295, 3. *Dyer.* 350. Upon theſe authorities the bond is clearly good.

ROANE Judge. Thoſe authorities are ſatisfactory. The act requires the bond ſhould be made payable to the creditor; and the legal effect of this bond is, that the obligor is bound to the creditor for payment of the money.

The reſt of the judges concurred.

Per. Cur. Correct the miſtake as to the commiſſions, and enter ſuch judgment for the appellee as the Diſtrict Court ought to have entered, that is for

for the sum due by the execution without the sheriffs commissions. *

DREW
against
ANDERSON.

THOMAS Anderson sheriff of Buckingham, gave notice to Drew his deputy and his securities, that he should move the District Court of Prince Edward for judgment against them for £59 16:9 with interest thereon after the rate of 15 per cent. per annum, from the 1st of September 1794, till payment and costs, which Drew the deputy had received by *virtue of an execution* issued from the District Court of Prince Edward in favour of Lyle & M'Credie against Benjamin Hopkins, as would *appear by the return made on the said execution by Drew*; and which he failed to account for according to law.

The execution is in favour of James Lyle & George M'Credie against Benjamin Hopkins, for £53:16:2 damages and 80lbs. of tobacco and nine dollars and eleven cents costs. Which is endorsed "Executed on a negro man by the name of Savery, and satisfied."

There is a copy of a judgment of the District Court of Prince Edward, on a motion, in favour of Lyle & M'Credie against Thomas Anderson sheriff of Buckingham county, for the sum of £59:16:9 with 15 per cent. interest thereon, from the 1st of September 1794, till payment; "that being the 'amount of an execution issued from the clerks office 'of this court the 23d day of April 1794, on a judg-'ment recovered by the plaintiffs against Benjamin 'Hopkins; and which said execution is returned sa-'tisfied by Cary Drew deputy sheriff for said defen-'dant, and payment thereof demanded and refus-'ed to be made." The

If there be a judgment for too much money ag'nst the sheriff on acc't of monies received by his deputy on an execution, he cant recover the amount of that judgment against his deputy; for he shall not by submitting to an erroneous judgment saddle the deputy with it.

If a notice, which is the act of the parties and not of Counsel, be general, it is to be favourably expounded and applied to the truth of the case as far as it will bear; but if descends to particulars, it must be correct as to them.

* The four preceding cases being all, in one respect, upon the same subject, are printed together, in order that the reader might have the whole doctrine before him at one view.

Drew vs. Anderſon.

The Diſtrict Court in the preſent motion gave judgment in favour of Anderſon againſt Drew and his ſecurities for £59:16:9 with intereſt thereon at 15 per centum per annum from the firſt day of September 1794, till payment and the coſts. Drew obtained a writ of ſuperſedeas to this judgment.

WARDEN for the plaintiff. The plaintiff could only receive £56:18:9 on the execution, which was merely returned ſatisfied; And yet by the judgment he has to pay £59:16:9 which is manifeſtly unjuſt. Beſides the return and the notice do not correſpond.

RANDOLPH *contra*. The court will not require more certainty in a notice than in an action on the caſe; in which the notice here would clearly be ſufficient, as the plaintiff was well enough informed of the nature of the demand to know how to defend himſelf. For Anderſon gives notice to the defendant, that he will move for judgment for the amount due on a certain execution, which he ſubſtantially deſcribes, ſo that it could not be miſunderſtood; and if there be ſome little miſtake in the calculation it ought not to vitiate, as the defendant was fully apprized of the nature of the demand and the execution on which it was claimed. If therefore the court thinks that the judgment as entered is erroneous, it will not diſmiſs the plaintiff out of Court altogether, but will proceed to give ſuch judgment as the Diſtrict Court ought to have given; by correcting the calculation and adjudging to the plaintiff the ſum actually due him.

ROANE Judge. The judgment of April 1795 by Lyſle and M'Credie againſt Anderſon, founded on the execution contained in the record, was erroneous, being for more money than the deputy ſheriff had actually received upon that execution.

By the act of 1792 *Rev: Cod:* 130 §. 25. the ſheriff of a county ſhall have the ſame remedy and judgment againſt his deputy or ſecurities failing to pay money received on an execution, as the credi-

tor

Drew vs. Anderson.

for may have againſt the ſheriff. That is, the ſheriff may recover from his deputy the amount of the money which his deputy had received on the execution.

The document on which the motion by the ſheriff againſt his deputy muſt be founded, is the execution itſelf, which on the return will ſhew how much money had been actually received thereupon. And a judgment erroneouſly given againſt the ſheriff at the ſuit of a creditor for more than the deputy has received, is not the proper document whereon he is to proceed againſt his deputy; for if he will himſelf ſubmit to an erroneous judgment, he ſhall not be permitted in conſequence thereof to charge his deputy for more than it is legal to charge him with, and the heavy penalty ariſing on it.

The execution itſelf then being neceſſary to be produced, the queſtion is, whether when the notice in this caſe ſpecifies a receipt by the deputy ſheriff of £59:16:9 by virtue of an execution of Lyle & M'Credie againſt B. Hopkins, the Diſtrict Court could give a judgment upon an execution which with all the coſts amounted only to £56:19:1½? I am clear that they could not.

But it is ſuppoſed that the return of *ſatisfied* can only be conſtrued to extend to that ſum.

I am ſtrongly inclined to view notices with indulgence, ſeeing that they are the acts not of lawyers, but of the parties: If however they deſcend to particulars as to dates and ſums, the documents referred to, muſt when produced correſpond with the notices, or no judgment can be given.

This is like the caſe of a material variance of the bond produced from that ſtated in the declaration; in which caſe the Court are not at liberty to give judgment for the ſum mentioned in the bond exhibited, if it be a leſſer ſum, but muſt give judgment for the defendant on account of the variance. The judgment therefore muſt be reverſed.

FLEMING

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FLEMING Judge. If the terms of a notice are general the Court will construe it favourably and apply it according to the truth of the case as far as it will bear; but when the notice goes into special circumstances it is taken more strictly, and must be more correct as to the circumstances stated. The notice here refers to such an execution as did not exist. The first judgment included the sheriffs commissions and was clearly for too much. The present judgment found on it, therefore must be reversed.

CARRINGTON Judge. The first judgment against the sheriff including his own commissions was certainly wrong, and the mistake cannot be rectified by the court. The notice goes to particulars; and the distinction is where the notice is general, in which case mistakes may be corrected, and where the notice descends to particulars, in which case no correction can be made. I concur that the judgment ought to be reversed.

judgment reversed.

GRYMES
against
PENDLETON.

No appeal lies from an interlocutory decree of the H. C. of Chancery.

THE question was whether there can be an appeal from an interlocutory decree of the High Court of Chancery, before the final decree is pronounced, although the interlocutary decree may have decided the title or settled the principles of the cause?

ROANE Judge. My opinion is that there can be no appeal from an inferior court until a final decree. Before that period, the appellate court has no jurisdiction. The words of the law are so explicit that argument cannot render them clearer.

FLEMING Judge. I do not see any difference between this case and that of *Young* vs. *Skipwith*. I think there cannot be any appeal, before the final

final decree of the High Court of Chancery. Till then this court has no jurisdiction of the cause. Grymes vs. Pendleton.

CARRINGTON Judge. I am clear that no appeal lies until a final decree. Although this may be inconvenient, the court cannot alter the law.

Per. Cur. Remand the cause to the Court of Chancery to be further proceeded in.

M'CALL
against
PEACHY

No appeal lies from an interlocutory decree of the High Court of Chancery although the parties consent thereto.

THE question was whether this Court had jurisdiction of a cause from the High Court of Chancery upon an appeal from an interlocutory decree pronounced there, and appealed from by consent of parties?

WARDEN. I think that in general consent does not give jurisdiction, although perhaps it may be otherwise in this case. Because here all the principles of decision are established by the interlocutory order; and what remains to be done is merely formal, as the Court which allows the appeal must necessarily see. So that the Court below will not allow an appeal for the sake of delay, until there is a final decree; but in a case of difficulty where the question of law and equity is definitively decided, it may reasonably be granted, especially as it will be in the discretion of the Court to allow it or not. The practice under these restrictions will rather tend to expedite, than delay justice.

WASHINGTON. That consent takes away error is generally admitted; but it is said that it will not give jurisdiction. The reason of the difference is not easy to be discerned; for it would seem proper that consent should be as obligatory in one case, as in the other. Perhaps this may be the distinction; where the Court has not original jurisdiction

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jurisdiction of the subject matter of the cause, there consent cannot give it; but where the Court has eventual jurisdiction of the subject, there consent may speed the submission of the cause to their determination. These ideas seem warranted by the usual course of proceedings; for wherever the defendant omits to plead to the jurisdiction of a Court not having cognizance of the cause, it is not competent to him to except afterwards. In a case of eventual jurisdiction it is not a matter *coram non judice*, but it is a subject the cognizance of which emphatically belongs to the Appellate Court. The act prohibiting appeals before a final decree, was made to prevent delay and costs, and was intended for the plaintiffs benefit: He may waive it if he will though, and if he does, there is no injury done.

RANDOLPH. I admit that the practice is convenient, and wish it could be supported; but I fear that the interposition of the Legislature is requisite. That consent takes away error, is one rule; but that it cannot give jurisdiction is another. Both rules are equally settled; and one of as much force as the other. Consent only applies to personal rights, which the litigant parties may waive if they please. Mr. Washington stated the case of a court which had no jurisdiction. But that is the very case with this Court; because it has no jurisdiction until a final decree in the court below. It is said, that the matter of one jurisdiction may be decided by another, if not pleaded; but that is, because the jurisdiction is presumed, where the contrary does not appear. It was said that the reason of the law was to prevent delay. That indeed is one reason: but another is, that the Court of Chancery may change the interlocutory decree, and make a total alteration in the principles established by it. The practice would multiply appeals to infinity, and it will not be in the power of either Court to prevent it.

There may be some inconveniencies from this opinion, as in the case of a decree to foreclose a mortgage; but that is in some measure obviated by

by this reflection; that there is no power which can force the mortgagor out of poſſeſſion, but the Court of Chancery: whoſe authority to compel performance of the decree, will be ſuſpended by the appeal. M'Call vs. Peachy.

WICKHAM. I felt an inclination to perſuade myſelf that the court had juriſdiction in theſe caſes: but am conſtrained to acknowledge that in general my opinion is otherwiſe. It is the act of Aſſembly only which gives this court juriſdiction; and the words are ſo expreſs that I do not ſee how they are to be gotten over. Mr. Waſhington's idea is ingenious, but I believe not tenable. For if conſent can give juriſdiction why may not the party appeal directly from a County Court to this court, without going through any of the intermediate courts; ſince this court under that idea, would as well have juriſdiction of the ſubject matter of ſuch a ſuit, as if it had been through the intermediate courts? But it is evident that ſuch a conſtruction would, in the long run, bring every thing here; and deſtroy the intermediate courts altogether. I therefore think that generally ſpeaking the decree muſt be final before any appeal can be allowed.

But I think alſo that this doctrine admits of ſome qualification; as where the matter of the ſuit is finally decreed ſo as to change the right, and the judgment only remains to be carried into execution. As, for inſtance, where there is a decree for ſlaves and an account of the profits directed; here the decree is final as to the title and changes the right, and the taking of the account of the profits is only an execution of the decree. True it is that there may be a double appeal ſometimes in ſuch caſes, but that inconvenience is ſmall, when compared to that, which would follow from the contrary practice. Which would oftentimes render the appeal but a mockery, as the plaintiff can proceed to inforce that part of the decree which changes the property, by attachment from the Court of Chancery, and may thus get poſſeſſi-

M'Call vs. Peachy.

on of the property, and waſte or remove it, before the appeal can be determined. It appears by the Engliſh books that in that Country the appeal is taken up when any thing final is decreed. Under theſe reſtrictions therefore I think that there may be an appeal before the cauſe is entirely out of the Court of Chancery.

ROANE Judge. By the Court of Appeals law of 1792, *Rev. Code.* page 67. this court is to have juriſdiction not only in caſes provided for by the conſtitution and in ſuits originating there, or adjourned thither by virtue of any ſtatute &c. but alſo in ſuch as are now pending therein or which may be brought before them by appeal, writs of error, ſuperſedeas to reverſe decrees of the High Court of Chancery, or judgments of the General Court, or Diſtrict Court, after thoſe deciſions ſhall be final there, if the matter in controverſy be of the value of one hundred dollars &c.

It is to be obſerved alſo that, that expreſſion *after those &c.* is to be found in and was taken from the original act of 1779, conſtituting the Court of Appeals.

It is likewiſe obſervable, that in the act conſtituting the Court of Admiralty of 1779, there is a proviſion that a party thinking himſelf aggrieved may appeal from a final ſentence of that court, in ſome caſes to a court to be conſtituted by Congreſs, and in others to the Court of Appeals.

I mention this to ſhew that the Legiſlature have not only reſtricted appeals to final decrees in Chancery, and to final judgments of common law juriſdiction, but have alſo, in the caſe of ſentences of the Admiralty, adopted the ſame principle.

The 14 *ſect.* of the act of 1792, conſtituting the Court of Appeals further provides, that appeals writs of error and ſuperſedeas may be granted, heard and determined by the Court of Appeals, to and from any final decree or judgment of the High Court of Chancery, General Court and Diſtrict

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trict Courts, in the ſame manner and on the ſame principles as they are granted heard and determined in the High Court of Chancery and Diſtrict Courts, to and from any final decree, or judgment of the County Court.

And I may here once for all remark, that on an attentive inſpection of the various acts on this ſubject, they all ſeem to reſtrict appeals, to caſes, where final decrees, ſentences and judgments have been given.

The arguments of inconvenience ariſing from reſtricting appeals, to caſes of final judgment, are improperly addreſſed to a court, when the words of a whole ſeries of acts are expreſs and unequivocal; and by being kept up in that ſeries through a long courſe of time, they appear in the mind of the Legiſlature not to have been available. It is conſequently rendered unneceſſary for me, from the poſitive terms of the law to form or expreſs any opinion, whether greater inconvenience would enſue from allowing appeals from interlocutory decrees, than thoſe which are apprehended, from a contrary conſtruction. For example, in a writ of partition, the firſt judgment is, that the ſheriff take a jury and make partition between the parties. Now though in executing this power he abſolutely changes the poſſeſſion of the land, no writ of error at common law, nor appeal by our act of Aſſembly, will lie until a final judgment is rendered upon the return of the ſheriff, of his having executed the writ.

There is no diſtinction in law more clearly underſtood, than that between interlocutory and final judgments; and this diſtinction runs through decrees in Equity as well as others. If therefore we depart from the plain ſignification of the act of Aſſembly in caſes of decrees, we may with as much propriety in caſe of judgments (which was never yet pretended,) as the ſame words in the act are equally applicable to both; and perhaps ſome inſtances might be noted, ſhewing the ſame

reaſons

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reasons of convenience to apply in the one case as in the other.

So far upon the subject of general jurisdiction:

But then it is said, that consent of parties can give this court jurisdiction, although otherwise we have none. It was properly observed at the bar, that from the law alone, this court has derived its power; and that in cases not proper for the cognizance of the court under the law, they can have no authority whatsoever: And it would be a strange construction indeed, that when the Legislature has constituted this court to revise the solemn and final decisions of courts of high authority in this country, it should be in the power of parties to anticipate their admission here, by appealing from orders or opinions of the inferior courts, which are still within the controul of those courts, until final judgment; and which consequently if not hastily appealed from they might themselves correct.

But it is said, that this restriction to final decrees was intended for the benefit of the parties and here they have waived it. I answer, that this restriction is not for the benefit of the parties merely, but that it is a principle running through the whole judiciary system, and cannot be departed from, without introducing an infinity of appeals and litigation. Consequently that a departure from them, would *quoad hoc*, change the nature of the jurisdiction of an appellate court, which properly should be confined to the correction of the final and deliberate judgments of the courts below, into a jurisdiction merely for correcting and consummating their inchoate and interlocutory judgments.

The parties therefore, under a pretence of waiving a benefit introduced for themselves, must not be permitted to destroy the very principle on which our judiciary system is founded; and thereby to produce a general evil to the community.

The

The case in *Vezey* * is conclusive, that a Court of Equity even after argument, cannot proceed if it appears that there is a defect of jurisdiction; and this principle applies to the case now before us. I therefore think that the cause ought to be sent back to the High Court of Chancery to receive a final decision there.

FLEMING Judge. No consent can give jurisdiction against the plain words of the act of Assembly; which are too clear to admit of a doubt. The practice would be dangerous; and I think there is less inconvenience in that established by law, than there would be in the other. At any rate if there be an inconvenience the Legislature must correct it, and not the Court.

CARRINGTON Judge. The question is if consent can give this Court jurisdiction, before a final decree in the Court of Chancery? By examining all the laws upon the subject it will be found that this Court which is bound by the law creating it, is confined to the case of final decrees; and consent cannot alter the law. The power of this Court is extensive, and from its judgments no appeal lies: It should therefore be extremely cautious not to assume to itself a jurisdiction which the law has not conferred. If consent would give jurisdiction, then cases below the conizance of this Court might be brought here; causes may be hurried hither, before they have been properly investigated in the Courts below, and numberless other inconveniences may follow, which it is better to prevent. Besides the Chancellor in his final decree may correct the error in the interlocutory decree, if there be any; and so the grievance complained of may be redressed in that Court, without the delay and expence of an appeal to this. However be that as it may, the law is express that this Court has no jurisdiction until a final decree is pronounced below; and therefore I think we cannot exercise it even by the consent of the parties. Consequently the cause must go back to the Court of Chancery in order to receive a final decree there.

* 1 Vez. 446.

LYONS

M'Call vs. Peachy.

LYONS Judge. That this Court has no original jurisdiction, until the final decree, has already been determined: and the question now is whether consent can give it? If consent can give jurisdiction, then consent may take it away; which will scarcely be contended for. The general rule is clear, that consent cannot give jurisdiction to a Court which has it not. How then can this Court exercise it here, when we are by the express language of the law confined to appeals from final decrees? As to the cases put from local jurisdictions they prove nothing; because there it depends on fiction, and the party's neglect to plead; so that the defect of jurisdiction does not appear, upon the record. But here the very question arises from, and is contained in the record itself: So that the Court cannot avoid seeing the defect. I think consent cannot give jurisdiction, or else the parties may erect Courts for themselves, which the law will not allow. I am therefore of opinion that we have no jurisdiction; and that the appeal was premature; Consequently the cause must be sent back to the Court of Chancery, to be there proceeded in to a final decree, before any appeal can be allowed to this Court.

GIBSON

against

FRISTOE and OTHERS.

A. being indebted by bond to B. in £445:11:2 sterling on the 17th day of December 1787 assigns him C's bond for 780l. cury, at the agreed

GIBSON brought an action of debt against Fristoe, R. Ralls and C. Ralls upon a bond bearing date the 11th day of October 1788, and given for payment of £149:12:1 specie, payable on or before the first day of March 1789, with lawful interest on the same, from the 17th day of December 1787. The defendants first put in the plea of payment; which was afterwards withdrawn by consent, and thereupon the de-

fendant

fendant after taking oyer of the bond filed the following plea,

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The ſaid defendants ſay that they ought not to be charged with the ſaid debt by virtue of the ſaid writing obligatory, becauſe they ſay, that on the 17th day of December in the year of our Lord 1787, at the pariſh of——— in the county of Prince William, the ſaid defendant John Friſtoe was indebted to the ſaid plaintiff by bond in the ſum of four hundred and forty five pounds eleven ſhillings and two pence ſterling, with intereſt thereon from the firſt day of January 1786, and on the ſaid day and year aforeſaid at the pariſh and county aforeſaid, it was corruptly agreed between the ſaid plaintiff and the ſaid defendant John Friſtoe, that the ſaid plaintiff ſhould forbear and give day for the payment thereof, until the firſt day of March 1789; and that the ſaid defendant John Friſtoe for the forbearance and giving day for payment thereof, for the time aforeſaid and in lieu of the aforeſaid bond, ſhould give and aſſign to the ſaid John Gibſon, a bond given by Ann Brent, George Brent and Daniel Carrol Brent to the ſaid John Friſtoe for ſix hundred pounds current money; and alſo ſundry bonds given by the ſaid Ann Brent and George Brent amounting in the whole with intereſt then due to the further ſum of one hundred and eighty ſeven pounds nineteen ſhillings and ten pence half penny; and that the ſaid defendant ſhould give his bond to the ſaid John Gibſon for the further ſum of one hundred and forty nine pounds twelve ſhillings and one penny ſpecie, payable on or before the ſaid firſt day of March 1789: And afterwards to wit, on the ſaid 17th day of December in the year of our Lord 1787, at the pariſh and county aforeſaid, the ſaid defendant John Friſtoe did aſſign and make over the ſaid ſeveral bonds above mentioned unto the ſaid John Gibſon and the ſaid writing obligatory in the declaration mentioned, was then and there ſealed, and as the deed of the ſaid defendant then and there delivered by the ſaid defendant unto the ſaid plaintiff, for the forbearance and giving day for the payment of

value of £382 : 8 : 8 ſterling; and gives a new bond with two ſecurities for the balance of £166 17 : 2 ſterl. payable in March following, this is uſury.

In ſuch caſe it is ſufficient if the verdict finds facts amounting to uſury, tho' they do not find the corrupt agreement in technical words.

Gibſon vs Friſtoe.

of the money due from the ſaid John Friſtoe to the ſaid plaintiff, on the bond firſt above mentioned, until the ſaid firſt day of March 1789; and in lieu of the ſaid firſt mentioned bond, in performance and fulfilling and according to the form and effect of the ſaid corrupt agreement: Which ſaid ſeveral bonds ſo aſſigned by the ſaid John Friſtoe to the ſaid plaintiff, together with the ſaid writing obligatory ſealed and delivered by the ſaid defendant to the ſaid plaintiff, do exceed the ſum which was due and owing from the ſaid John Friſtoe, unto the ſaid plaintiff on the ſaid firſt mentioned bond, with intereſt at the rate of five pounds for every hundred pounds per annum, until the ſaid firſt day of March 1789. Whereby the ſaid writing obligatory in the ſaid declaration above mentioned, by force of the act of Aſſembly in that caſe made and provided, is become void in law; and this they are ready to verify; whereof they pray judgment if they ought to be charged with the ſaid debt and if the ſaid plaintiff his action thereof againſt them ought to have or maintain &c.

The replication was as follows; "And the ſaid plaintiff ſays that he by any thing by the ſaid defendant above in pleading alledged ought not to be precluded from his action aforeſaid thereof againſt the ſaid defendant, becauſe he ſaith that the ſaid defendants, the writing obligatory aforeſaid in the declaration aforeſaid mentioned, to the ſaid plaintiff did make, ſeal, and as their deed deliver, for a true and juſt debt to the ſaid plaintiff from the ſaid defendant John Friſtoe, without that, that it was corruptly agreed between the ſaid plaintiff and the ſaid defendant John Friſtoe in manner and form as the ſaid defendants have above in pleading alledged, and this he is ready to verify: Wherefore he prays judgment and the debt aforeſaid together with his damages by reaſon of the detention of that debt to be adjudged him &c.

Nothing further was done towards an iſſue; and the jury found the following ſpecial verdict,

"We

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"We of the Jury find that the defendant John "Fristoe was indebted by bond to the plaintiff on "the 1st day of January 1786, in the sum of "£445:11:2 sterling, payable in bills of Ex- "change or in current money at the current ex- "change, when paid, with interest from that date. "That the defendant on the 17th day of December "1787, by agreement between the plaintiff and "defendant, did make over and assign to the plain- "tiff sundry bonds amounting to £780, current "money, at the value of £382:8:2 sterling, and "the balance due to the plaintiff, being £106-17-2 "sterling, which at the rate of 40 per cent ex- "change amounted to £149:12:1 currency, the "said defendant in pursuance of the settlement, "signed by the plaintiff and referring thereto, in "these words to wit: *Mr. John Fristoe, &c.* gave "his bond on the 11th of October 1788, with "Rawleigh Ralls and Charles Ralls his securities "for that sum, payable on the 1st day of March, "1789, and bearing interest from the 17th of De- "cember 1787: which last mentioned bond is the "bond in the declaration mentioned. That the a- "mount of bonds assigned by the defendant to the "plaintiff and the bond given by the defendant to the "plaintiff as before mentioned, exceeded the origi- "nal debt and interest thereon due from the defen- "dant to the plaintiff, £244:12:7 currency. "That the defendant about the time of assigning "the bonds intended to remove to Kentucky; and "that the plaintiff afterwards declared that the "defendant should not have gone to Kentucky, "without having settled the debt. That the "bonds so assigned have been fully paid up and sa- "tisfied to the plaintiff, together with the in- "terest due to the times of payment. That the "obligors in the bonds so assigned, were at the "time of the said assignments, deemed of sufficient "estate and property to satisfy and discharge the "same. That at the time of the writ being serv- "ed upon the defendant for the before mentioned "bond of £149:12:1 currency, the said defen- "dant acknowledged the debt to be a just one. If

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"upon the whole matter the law be for the plain-
"tiff, We find for the plaintiff the debt in the de-
"claration mention and one penny damages, If for
"the defendant, then we find for the defendant."

The exhibit referred to in the verdict is in theſe words,

Mr. John Friſtoe to John Gibſon. Sterling.

To your bond payble the 1ſt of January 1786 for goods ſold you	£445 : 11 : 2
To intereſt from 1ſt January 1786 to the 17th December 1787.	£ 43 : 14 : 2
	£489 : 5 : 4

1787 Cr.

Dec. 17. By bonds of George Brent, Ann Brent & Dan. C. Brent aſſigned to me valued per agreement.	382 : 8 : 2
	106 : 17 : 2
Exchange at 140 per cent to make cur.	42 : 14 : 11
	£. 149 : 12 : 1

The ſum of one hundred and forty nine pounds twelve ſhillings and one penny ſpecie is due by a bond granted the 11th day of October ſeventeen hundred and eighty eight, by John Friſtoe, Rawley Ralls and Charles Ralls, payable on or before the firſt day of March ſeventeen hundred and eighty nine, with intereſt from the ſeventeenth day of December ſeventeen hundred and eighty ſeven.

JOHN GIBSON

There is amongſt the papers filed in the cauſe, the bond on which the ſuit is brought: and a liſt of ſeven bonds given by the Brents amounting in the whole to £780: ſix of them for £30 each, the firſt of which was payable in March, 1785; the ſecond in March 1786; the third in March 1787; the fourth in March 1788; the fifth in March 1789; the ſixth in March 1790; the ſeventh bond was for £600 and was likewiſe payable in March 1790.

At

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At the foot of this liſt is the following aſſignment; Dumfries ſeventeenth day of December ſeventeen hundred and eighty ſeven. This day I have aſſigned unto John Gibſon, the above ſeven bonds amounting to ſeven hundred and eighty pounds current money, for the ſum of three hundred and eighty two pounds eight ſhillings and two pence ſterling in part of a bond due by me to him, as witneſs my hand and ſeal the day and date above mentioned. The above ſeven bonds are all due, and no part of which is received by me, or any of Mr. John Ralls ſenr. executors, or any perſon for them.

JOHN FRISTOE, (SEAL.)

The Diſtrict Court gave judgment for the defendants; and Gibſon appealed to this Court.

WASHINGTON for the appellants. The queſtion is whether the facts ſtated in the ſpecial verdict amount to uſury? In order to conſtitute uſury there muſt be a lending on one ſide and a borrowing on the other. There muſt be a corrupt agreement on one ſide to take and on the other to give greater intereſt than the law allows. If the defendant had any relief it was in a Court of Equity; where the unconſcionable gain if any might have been corrected. That however is no queſtion at preſent; but the queſtion is merely, whether the unreaſonable profit, if it be ſo, was uſury or not? In all theſe caſes the firſt enquiry is if there be a loan? I admit, that if a real loan is endeavoured to be covered under any diſguiſe whatever, it is ſtill uſury. Here was no direct loan; and the queſtion is, if there was any indirect lending. If one goes to borrow and the parties communicate about a loan, which at length terminates in a ſale of property, at a price greatly beyond its value, it is uſury; becauſe it is merely a ſcheme indirectly to avoid the ſtatute. But here was no borrowing nor any communication about a loan; it was a fair ſale of property which the one party might make and the other purchaſe. The caſe is no more than this, Friſtoe ſays

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fays to the plaintiff I have not money to pay you, but if you will accept of property upon ſuch terms as we can agree upon, I will diſcharge the debt immediately; Gibſon conſents, and got a bargain: Now although a Court of Chancery might relieve if there were any undue advantage taken, yet the law cannot; becauſe there was neither a loan or a borrowing; without which there cannot be uſury. 3 *Wils*, 261. *Cowp.* 112. Which laſt caſe not only eſtabliſhes the general principle but goes further, for there more than five per cent. was taken, and juſtified merely upon the cuſtom. *Cro. Eliz.* 27. 2 *Black. Rep.* 859. 3 *Wills.* 390. All theſe caſes prove the definition of uſury to be a corrupt agreement for greater intereſt than the law allows; and that there muſt be a borrowing and a lending. So that if one meant a loan and the other not, there would be no uſury: for both minds muſt concur in the corrupt intention. Uſury is odious, and not to be preſumed; for it occaſions not only a loſs but a penalty. Therefore it muſt be expreſſly proved.

The queſtion then is if the facts in this caſe amount to uſury. It is the caſe of a debtor not able to pay his debt in money, but offering to diſcharge it in property and the creditor accepts the offer. I ſaid offering property, for bonds are property; they do not in any manner differ from other property but are every day bought and ſold at market. So that if the plaintiff had not been a creditor the purchaſe would have been clearly legal; and his being a creditor does not make any difference at law. If Friſtoe had given ſtock at a valuation, though the value of that is more eaſily aſcertained, it would not have been uſury. And where is the difference. One is as much the ſubject of loan and purchaſe, as the other. Nothing like a loan is found in this caſe whatever might have been the opinion of the jury; and I repeat it again that without a loan there can be no uſury. At the former agreement it was ſuppoſed that the liability of the aſſignor might affect the caſe; but I

cannot

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cannot see how. For suppose instead of bonds Fristoe had paid the debt with lands, and the title had afterwards been evicted, he would have been liable on his warranty, and yet that would not have turned the transaction into usury. But the principle of that case is precisely like the other. The contrary argument goes the length of establishing, that if a debtor, not having money, is willing to discharge his debt in property, that the creditor dare not take it but at the full value; for if he takes it at less, his conduct is corrupt and he will be condemned for usury. So that instead of the debtors being able to facilitate his struggles he will be obliged to submit to a suit and execution. For his creditor cannot without danger or loss relieve his difficulties. Therefore taking it as a question at law, there can be no doubt that it was not usury.

But even in Equity the transaction could not be impeached. For there was no future responsibility on Fristoe, because the obligors were able at the time of the assignment, and it is found that they have since actually paid the money. In additon to which, it appears that the transaction was in 1787; that the largest of the assigned bonds was not due until 1790; and that twelve or thirteen shillings in the pound was given for it: Which was a fair market price and more.

RANDOLPH *contra*. There was a surplus for which we were entitled to a credit; as the jury have said there was an excess. If Fristoe had given the plaintiff the bonds to collect and pay the debt, he would have been clearly liable for the excess; and if there be an assignment without more being said, the assignor would be entitled to the excess, as so much money received to his use. For the court will not intend that the assignor would relinquish such an interest, without compensation or an express agreement to the contrary. But if there be an excess coming to us; we had a right to insist upon it as a discount. So that if the court should be against us on the point of usury, a deduction

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deduction to the amount of the excess should be made from the judgment.

But the transaction was clearly usurious. The act of Assembly annuls every contract where more than lawful interest is reserved, whether the same be directly or indirectly or by any shift, and this was plainly but a shift to elude the statue. Usury is a mixt question both of law and fact; and it is for the court to draw the conclusion from the facts found in the verdict; *i, e,* whether the facts stated amount to usury or not. *Cro. Jac:* 508 *Reberts* vs *Tremaine.* Which case expressly proves, that it is not necessary for the verdict to find, in so many words, that the agreement was corrupt; but that the court may infer it from the facts. In our case the facts found amount to usury; and therefore, no communication of a loan or other technical language, was necessary to be stated. It is said that usury is odious and not to be presumed. But this is only where the words are equivocal; for then a favourable interpretation will be made. So if there be a mistake, or if the contingency be doubtful. But if the facts stated amount to compleat usury and are not equivocal, then the transaction will be considered as usurious.

The authorities cited by Mr. Washington only prove that a loan is necessary. Which I admit. But those same books prove that it is a loan whenever the money is to be certainly returned without any hazard. Here the plaintiff was certain of his money at all events; and therefore the case falls within the principle of those cases. In 6 *Mod.* 303, *Villars* vs *Cary* it is held that if there be a just debt due and a bond be given for it with unlawful interest it is usury; and the same principle may be collected from 12. *Mod.* 385. This doctrine is our case expressly; for here the defendant was indebted and gave a new bond. The case in *Cowp.* cited by Mr. Washington shews that a shift will not do; and that very case of usury should stand upon its own ground. Fristoe got time for payment of the £106: 17: 2 sterling. Now suppose

pose A. owes B. a sum of money and pays it to him; who thereupon relends it to A. with more than lawful interest, this is usury. Suppose then instead of his own bond the party gives one in which he was security by assignment, he is not indeed liable in the first instance, but he is ultimately liable, and so is within the same principle. Gibson, vs Friston.

This practice is calculated to afford a cloak for usury, which may be secretly carried on to a great extent under pretence of discounts; and therefore the court will view it with a jealous eye. It is said that it is like the case of a payment in lands with warranty, and that such a payment would not be usury. But this is the difference, that the warranty in that case, only obliges for the title, whereas the assignor of a bond warrants not only that the bond is due but that the obligor is able to pay; and therefore is ultimately liable for the money, if the obligor fails. Such a transaction as this was expressly held to be usury in the case of *Massa* vs *Dauling*. 2, *Stra.* 1243; which was the case of an assignment of a note, and therefore is in principle precisely like the case before the court.

The decision that this is usury will not affect the general question whether one may not fairly purchase bonds at a discount; for this rests on particular grounds, here payment was called for, threats used that the defendant should not remove till he had paid the debt, and an advantage attempted to be taken of Friston; which finally ends in bonds being given for more than the debt. This was forcing the party to give more than lawful interest. As to Friston's acknowledgment that the debt was just, it does not alter the case; for it is only evidence of a fact, and other facts prove it was not for a just consideration.

WASHINGTON in reply. If the plea in bar is overruled, then the defendant has admitted that he has no payments to offer, and is consequently estopped to insist upon them afterwards. Payments

cannot

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cannot be given in evidence on the plea of usury; becauſe they are not in iſſue. If the defendant meant to rely upon it, he ſhould have pleaded doubly and inſerted a plea of payment. But if the plea of payment had been put in, the pretended diſcount could not have been inſiſted on. For it is not the caſe, which Mr. Randolph ſuppoſes, of bonds put into the hands of the aſſignee to collect; but the whole contents are ſold at a certain agreed value. The agreement is expreſs and does not admit of any preſumption. The deciſion contended for, will affect all caſes of the ſale of bonds; and will make every purchaſer liable for the ſurplus.

It is admitted that to conſtitute uſury there muſt be a loan? but here was none; there was no reſervation of more than legal intereſt; but it was a fair purchaſe of property. In which Inadequacy of price will not conſtitute uſury. The caſe in *Strange* is ſo; and it was left to the jury in that caſe whether it was a loan or a ſale. According to the doctrine contended for, if a bill of exchange were paid at leſs than the current exchange, it would be uſury. In ſhort the practice will deſtroy all accommodation between debtor and creditor; and put an end to payment in facilities altogether, however convenient to the parties. Suppoſe Friſtoe had paid the whole debt in bonds at this value, then according to the doctrine Gibſon was guilty of uſury and an information would lie for it. There is a caſe in *Bunb.* 101, which goes the whole length of deciding this; and proves very clearly that the preſent tranſaction was not uſurious.

RANDOLPH. That caſe turned on the capacity to make advantage; for the judge ſays there is a great difference between loſs and gain. But when the party who takes up, cant make gain, it is uſury, or elſe the quotation from *Grotius* would be idle. The plaintiff therefore in order to to have avoided the ſtatute ſhould have ſhewn that Friſtoe was to derive profit from the tranſaction; but the fact is that he ſuſtained poſitive loſs. I was miſunderſtood upon the ſubject of the rate of bonds. If the ſeller, does not make himſelf anſwerable for the money

ney it is not uſury; but if he does, it is. In a transfer of ſtock there is no future reſponſibility, and therefore no uſury. ſo if the owner of a bill of exchange delivers it over, without endorſement. But here the aſſignor, according to the deciſion of this Court, is expreſsly liable; and therefore it is uſury. Bonds in England do not paſs by aſſignment and thefore no argument can be drawn from them. Promiſſory notes there are more like bonds here; but no caſe is produced to ſhew that ſuch a tranſaction in the caſe of a note would not be uſury there. Indeed the caſes are the other way. Gibson *vs.* Fristoc.

WASHINGTON. The caſe in *Lutwyche* proves that you may even buy guineas at leſs than value; and why not bonds? It is not material on which ſide the profit was; for in uſury both are corrupt.

ROANE Judge, At the firſt hearing of this cauſe I was ſtrongly inclined to think the bond in queſtion was uſurious, even upon an *ex parte* argument, but now upon a full diſcuſſion and mature conſideration, I am confirmed in that opinion. But before I come particularly to the circumſtances of the preſent caſe, as ariſing from the ſpecial verdict, I will lay down ſome principles which appear to be clearly warranted by law.

I. If the corrupt agreement be not expreſſed in the verdict but it is apparent to the court, that the matter is uſury, there it is not neceſſary, for the jury to ſhew that it was corruptly made. *Roberts vs Tremaine*, *Cro. Jac.* 508; for in the language of the caſe, *res ipsa loquitur*.

II. That where the intention of the contract is, to get more than legal intereſt upon the ſum lent, it is uſury; unleſs the ſum itſelf be put in riſque. *Cowp.* 797.

III. But that a ſlight contingency will not take a contract out of the ſtatute, where the ſubſtance of the contract is a borrowing and a lending. *Cowp.* 776.

IV. I hold it alſo to be a clear principle that a corrupt forbearance of money *then due*, is as much

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much within the ſtatute as an original loan; and that within the meaning of the ſtatute, it is a loan.

To teſt the preſent caſe, by the foregoing principles.

On the 17th day of December 1787, the defendant being indebted to the plaintiff by bond, on demand, in £442:11:2 ſterling, with intereſt from the firſt of January 1786; by agreement aſſigned to the plaintiff, certain bonds amounting to £780 currency, at the value of £382:8:2 ſterling, and his own bond for £149:12:1 currency, on account of the ſaid debt. Which bonds, the jury find, exceeded the original debt and intereſt, by the ſum of £244:12:7 currency; on the giving and aſſigning theſe bond reſpectively, the plaintiff lent, or which is the ſame thing, forbore to demand the money originally due him; as to the ſum, for which, the bond in December was given, until the firſt of March 1789, and as to much the greater part of the money due by the bonds aſſigned, until periods of time poſterior to that of the tranſaction. The bonds ſo aſſigned and the bond in December are all of them bonds with ſureties; whereas the bond, in lieu of which they were given, was a ſingle bond; and as the jury find that the obligors in the bonds aſſigned were at the time of the aſſignment deemed of ſufficient eſtate and property to diſcharge the ſame, I may ſafely affirm that the riſque of loſing the preſent money, as reſpects the ability of the obligors, was not increaſed, but rather leſſened by the tranſaction, now in queſtion. It is alſo found that the defendant about the time of this tranſaction intended to remove to Kentucky. Whence we may reaſonably infer that he was under a peculiar ſituation, which placed him much within the power of his creditor.

Under the above principles is this tranſaction uſurious or not?

The money due, as above ſtated was by this tranſaction forborne to be demanded; and in conſideration

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ſideration thereof, one obligation was given and others aſſigned, the amount of which exceeded greatly the principal and intereſt really due: It is true, the jury have not found the forbearance, in ſo many words; but they have found the agreement and the bond, in which the forbearance is contained, and that is the ſame thing. The money due by theſe obligors could every ſhilling of it, have been recovered, ſuppoſing the queſtion of uſury out of the caſe, unleſs there had been an inſolvency of the obligors; and in the caſe at bar, that is far leſs probable, than in the original bond. For there are ſureties to the bond on which the ſuit is brought, whereas that was a ſingle bond and the obligors, in the bonds aſſigned, are found to have been of ſufficient ability. What then, upon the face of this tranſaction, could have induced the defendant, to have acceded to the terms of this unrighteous accomodation, but the diſtreſs and dureſs under which he laboured?

If it be ſaid that on the contingency of all the obligors in the original bond being inſolvent, then Friſtoe could only be made reſponſible for the ſum allowed as the value of the aſſigned bonds, upon the principle on which this court went in the caſe of *Mackie* vs *Davies*, 2, *Wash.* which ſum with the bond in diſcuſſion is not more than was originally due. I anſwer, that the event of their being inſolvent, under all the circumſtances of this caſe, are too ſlight and remote a contingency to take the caſe out of the ſtatute, according to the ſpirit of the deciſions, upon the ſubject.

But we are to conſider the caſe, upon the bond only, for if the agreement of the creditor is to get an illegal profit on money lent, every bond given in purſuance thereof is void.

In deciding this caſe, I go entirely upon the circumſtances of the tranſaction in queſtion forming the terms, on which money was to be lent or forborne; and therefore it is entirely different, from a caſe of the ſale of a bond, unconnected

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with a loan. For in my mind every circumstance here has considerable weight; especially the ability of the obligors, the additional sureties; and the defendants being about to remove to Kentucky. The decision of this case therefore, will not affect other cases, where such circumstances are wanting.

I said, that the jury have found what is tantamount to finding a forbearance expresly; that is to say, they have found an agreement which shews a forbearance; and bonds given in pursuance thereof payable in future, for a debt due by a bond on demand: And this being the case, I may say in the imphatical terms of Lord Mansfield that it is impossible to wink so hard, as not to see, that a borrowing and loan of money was intended.

But these bonds it is said were sold for their real value; I answer, that in case of the solvency of the obligors, (of which there was no reason to doubt from the verdict,) the plaintiff, in as much as bonds form a certain measure of value, was sure of getting a sum exceeding that due, with interest by the sum of £244:12:7 currency, and the present sum not put in risque.

But indeed putting bonds merely on the footing of chattles; I suppose that if, on an usurious agreement for money, a horse were set off at £25 whereby to enhance the balance of the money borrowed, beyond what in justice it ought to be; and a bond given for the balance in pursuance of such agreement expressed, or which is the same thing manifestly inferred from the circumstances of the transaction itself, that such bond would not be permitted to stand; but would be deemed usurious and void. For where the intention is to get an illegal profit upon money lent or forbone, the wit of man, as said by Ld. Mansfield, cannot devise a shift to evade the statute.

On every principle therefore this transaction is usurious and the judgment of the District Court is right.

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CARRINGTON Judge. The caſe carries ſeveral marks of hardſhip, along with it, all tending to ſhew, that the defendant was driven into an agreement to give more, than the law has eſtabliſhed, for a little longer indulgence from his creditor. For none but a man preſſed by the urgency of his affairs, would have conſented to ſuch an improvident bargain, and unuſual ſacrifice as was made in the preſent caſe. Into whatever ſhape thrown, it was ſtrictly ſpeaking, an engagement on the part of the plaintiff to receive, and of the defendant to allow greater gain, than that preſcribed by the ſtatute. In other words it was a contract of forbearance, in conſideration of more than the legal profit; both principal and profit being ſo well ſecured, that there was not the ſlighteſt danger of either being loſt. There cannot be a doubt but this was uſury; and therefore I am for affirming the judgment.

LYONS Judge. The bond is good in form, but it is objected to; as being given for an uſurious conſideration, becauſe the aſſigned bonds and this together were for more than the original debt. In all findings by juries, nothing is to be preſumed; for facts and not evidence of facts, muſt be found, which was well illuſtrated at the bar, by the caſe of an action of trover and converſion; in which if the verdict omits to find the converſion, it will not be preſumed. In the preſent caſe the verdict does not find that the aſſigned bonds were transferred at more than the current value, and if any preſumption were to be admitted at all, it ſhould rather be in favor of the plaintiff; who ought to be ſuppoſed to have acted rightly, until the contrary is ſhewn; eſpecially as the defendant acknowledged afterwards, that the debt was juſt, and it is a rule that fraud or corruption ought not to be preſumed, neither does the verdict ſtate any offer of further time for the balance on payment of the bonds; and therefore all argument upon that ground fails. So that upon the verdict it is really no more, than the ordinary caſe of a ſale of

bonds,

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bonds which is not unlawful, according to the decision of this Court in the case of *Hunters executors* vs *Hylton*, where the bonds were as well secured, as those in the present instance. If then it would not have been wrong in other persons, to have purchased them on those terms, why should it be in the plaintiff, when there was no communication for a loan or forbearance? I confess I can see no reason for it; and therefore cannot say that the agreement was illegal.

The intended removal to Kentucky, even if it had been imparted by the defendant to the plaintiff, would not have altered the case; but if it would, still the jury have not found that the defendant told the plaintiff of his intention to go thither, or that there was any conversation between them concerning it; and therefore no inference can be drawn from thence. The verdict does not state, that the defendant considered himself in the plaintiffs power, or that he was driven into an usurious engagement, by the terrors of his situation, ought I then, as a judge sitting here to decide upon the facts presented to me in the verdict, to presume what the jury with all the evidence before them have not thought proper to infer? Especially when the transaction bears another construction, namely, that the defendant being about to leave the state meant to do justice before he went.

The plaintiffs conduct appears to have been fair throughout, not only during the transaction itself, but even after the suit brought; for the plea of payment was withdrawn by consent, which was fair and candid, and if presumptions were to be indulged, it would afford no slight evidence of his confidence in the purity of the original negotiation. But I repeat it again, that presumptions ought not to be admitted at all.

The jury might have found, if the evidence would have supported them in it, that the defendant was forced into the settlement, that there was an intention on the part of the plaintiff to

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make illegal gain, and that the bond was given in conſideration of *forbearance;* but they having omitted to find theſe facts, I with leſs information of the tranſaction than they poſſeſſed, am not at liberty to infer them. The defendant ſurely cannot expect me to be ſatisfied with leſs evidence, than would convince the jury.

It was ſaid though, that the jury were not bound to find in words that the agreement was corrupt or uſurious. Be it ſo; but then they muſt find ſomething equivalent to it. In the preſent caſe they have not found any circumſtance conſtituting a corrupt or illegal bargain; and yet I am called on to pronounce the tranſaction uſurious, when not a ſingle ingredient conſtituting uſury is contained in the verdict. For the jury have not found, either that the defendant aſked, or that the plaintiff offered a forbearance; they have not ſtated any corrupt motive, or deſign to make illegal profit from the diſtreſſed ſituation of the defendant; they have not ſaid that the bonds were ſettled at leſs than the market value, or that the defendant was driven into the agreement by the exigency of his affairs, or the extortion of the plaintiff. But without ſomething of this kind, ſurely there can be no uſury. Although goods ſold for more than the value, or property ſettled at leſs, may be uſury according to the circumſtances, yet thoſe circumſtances muſt be found. In the caſe of the goods, a prior communication for a loan, or ſomething amounting to it muſt be ſtated; and in the caſe of the property, the actual value ſhould be found, with the forbearance and other circumſtances tending to ſhew, that it was ſettled at leſs, with an uſurious intention. Bonds actually due do not ſell for the nominal amount; and much leſs thoſe upon time. They fluctuate in value like corn, wheat, or any other article. So that the purchaſe of them for leſs, than they expreſs upon the face, may be perfectly innocent. I cannot therefore in the preſent caſe decide, that a tranſaction, unaccompanied with any unfair practice,

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is void; merely becauſe the defendant has voluntarily made an improvident bargain, which has eventually proved beneficial to the plaintiff, whoſe conduct has not been impeached.

That the bonds were warranted to be due dont alter the caſe; for all ſales are warranted; and perhaps the plaintiff could not have recovered of the defendant more than the value paid, in caſe there had been an inſolvency.

Upon the whole the leaſt that could have been required, would be, that the verdict ſhould have ſtated that the aſſigned bonds were rated below the market value; and that in conſideration thereof, the bond on which the ſuit is brought was given for forbearance of the balance; the moſt therefore that could be done for the defendant, would be to award a new trial in order to have the defects ſupplied. But I am for reverſing the judgment.

PENDLETON Preſident. I do not conſider the verdict in the preſent caſe as uncertain, or objectionable as finding evidence inſtead of facts. The jury refer to the evidence indeed, but that is ſurpluſage, ſince they find the facts, which are proved by that evidence, Uſury is a queſtion of law, and the jury find in a clear and ſenſible manner, all the facts neceſſary to decide it.

Mr. RANDOLPH's firſt point may be thrown out of the queſtion, ſince if there was no uſury, the bargain was to ſtand; and the bonds aſſigned at the value agreed on of £ 382: 8: 2 ſterling, leaves no exceſs to be ſet off againſt the bond on which the ſuit was brought. The ſuppoſed threat of the plaintiff not appearing to have been uſed at the agreement, if it was of any conſequence, may alſo be laid aſide, or balanced by the other finding that the defendant acknowledged the debt to be juſt, when the writ was ſerved; which is equally unimportant, ſince he could no more ſanctify the corrupt agreement, if it was one, by that acknow-

ledgment,

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ledgment, than he could by his original aſſent in making it.

I proceed therefore to the principal point.

The legal principles on which queſtions of uſury are to be decided appears to me to be well ſet-ſettled.

An agreement by which a man ſecures to himſelf directly or indirectly, a higher premium than legal intereſt for the loan of money, or the forbearance of a debt due (for in reaſon and precedent they ſtand on the ſame ground,) is uſury. But if the principal or any conſiderable part, be put in riſque it is not uſury; becauſe the exceſs in the premium, is a conſideration for that riſque. So if it be a mere ſale of property (and bonds are as much property in this reſpect as any thing elſe,) although at an under value, it is not uſury; becauſe price is a thing unfixed and depends upon the convenience of the parties contracting.

But if the bargain proceeds from, and is connected with a treaty for the loan or forbearance of money, it is uſury; becauſe the vendor is ſuppoſed to have ſubmitted to a diſadvantageous price, under the influence of that neceſſity which the ſtatute meant to protect him againſt.

How do theſe principles apply to the preſent caſe on the ſpecial verdict?

The jury find that, on the bonds aſſigned, and the bond in ſuit, the plaintiff received £244:8:7 more than the principal and intereſt due, on the bond, they were meant to diſcharge; & that no part of the principle was put in riſque under the agreement, ſince they find that the obligors were deemed ſolvent at the time, and proved ſo in event. The plaintiffs ſecurity was bettered too by the liability of the debtors in the bonds aſſigned and the ſureties to his new bond, inſtead of the defendant, being alone anſwerable on the old bond; and ſtill remained liable for the whole; So that there was no riſque.

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Then was this a mere independent sale of the bonds, or connected with a proceeding, from a treaty for payment of part of a debt due, and forbearance of the residue? It is apparently the latter; and therefore it differs from the case of *Hylton* vs *Hunters exrs.* which was a mere bargain for sale of bonds; and there was no prior treaty for borrowing or forbearance.

For what brought the parties together in the present case? It was not to treat of the sale and purchase of bonds, but of the debt existing between them. The bonds are offered as payment, and the plaintiff in his acceptance of them, imposes on the defendant terms which secures to himself a profit beyond legal interest: and on these terms, as they make but a partial payment, he will give a further day for the balance, provided the defendant will, to his own obligation, add other security for it. These terms are accepted, and the bond in suit given in consequence.

Under this view of the case, nothing can be more apparent to me than that this agreement was entered into by the defendant, in order to procure forbearance of part of a debt due and to avoid a suit for the whole, and that it was not an independent sale. Which if it had been, I should have adjudged it the proper business of a Court of Equity to enquire into its fairness or iniquity, and that it was not usury.

I concur in affirming the judgment; and am authorised by the absent judge, to say that he also concurred.

CHICHESTER

CHICHESTER
against
VASS.

THE declaration in this case was as follows: "Alexander Vass complains of Richard Chi- "chester in custody &c. for this to wit, that "whereas on the 12th day of April in the year "1789 at the parish of Friero in the county afore- "said, the said Richard Chichester the defendant "well knowing the affections and love of the said "Alexander Vass were fixed on a certain Millisent "Chichester, daughter of him the defendant, and "well knowing that the affections and love of his "said daughter were fixed upon the said plaintiff, "so that they the said plaintiff and the said Mili- "sent were desirous of entering into the holy state "of lawful matrimony, and the said defendant well "knowing that before that time, to wit: the tenth "day of April in the year aforesaid, at the parish "and county aforesaid, the plaintiff had solicited "his approbation and consent concerning the said "intermarriage, and well knowing that the pecu- "niary circumstances of the plaintiff and his said "daughter Millisent would render it necessary for "their comfort, and well being to be assisted by "him the said defendant, at that time and yet "a wealthy man, by some portion or part of his "wealth, if the said intended marriage should be "carried into effect, he the said defendant on the "said 12th day of April in the year 1789 at the "parish and county aforesaid did consent that the "said intermarriage might take place and further- "ing and promoting the same, did promise to the "plaintiff in order that the plaintiff might be in- "duced to intermarry with his said daughter Mi- "lisent, that he the said defendant would do "equal justice to all his daughters as it should be "convenient to him, thereby meaning that the "estate and provision and advancement to be made "and distributed by him among them should be "equal.

Nothing will be presumed after verdict, but what must have been necessarily proved from the matter stated in the declaration, & therefore the total want of an averment of a fact which constitutes the gist of the action will not be cured after verdict by our act of Jeoffails.

If A promise B that if he & A's daughter marry, that he will do her equal justice with the rest of his daughters, A has his life-time to perform it in.

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" equal, ſo that one ſhould not be better advanced " or provided for from time to time than another; " and the ſaid Alexander Vaſs in fact ſaith, that " relying upon the conſent and promiſe aforeſaid " of the ſaid defendant and in conſideration there- " of, he the plaintiff afterwards viz. on the 15th " day of October in the year aforeſaid at the pa- " riſh and county aforeſaid did lawfully intermar- " ry with the ſaid Miliſent, whereof the ſaid de- " fendant on the day and year laſt mentioned at " the pariſh and county aforeſaid had notice. And " whereas afterwards to wit: on the ſaid 12th day " of April in the year aforeſaid at the pariſh and " county aforeſaid, it was mutually agreed be- " tween the ſaid Alexander Vaſs and Richard " Chicheſter, that he the ſaid Alexander Vaſs " ſhould marry Miliſent the daughter of him the " ſaid Richard Chicheſter, the defendant and that " he the ſaid Richard Chicheſter would do equal " juſtice to all his daughters as faſt as his conve- " nience would permit him, in conſideration that " the ſaid Alexander Vaſs performed the agree- " ment aforeſaid in all things on his part to be " performed, he the ſaid defendant then and there " undertook and faithfully promiſed to do and per- " form the agreement aforeſaid in all things on " his part to be performed, and the ſaid plaintiff " in fact ſaith that he did perform all things in " the ſaid agreement on his part to be performed, " whereof the ſaid defendant afterwards viz. on " the 15th day of October in the year aforeſaid at " the pariſh and county aforeſaid had notice. Ne- " verthelefs the ſaid defendant not regarding his " ſeveral promiſes and undertakings aforeſaid, but " contriving to defraud and injure the plaintiff in " theſe particulars, hath not kept or performed " either of his undertakings and promiſes afore- " ſaid, but hath altogether broken them and each " of them, and though often requeſted to wit: on " the —— day of —— in the year —— at the pariſh " and county aforeſaid to perform them and each " of them, hath refuſed and ſtill doth refuſe to " perform them and each of them, wherefore the " plaintiff

" plaintiff says he is damaged to the value of Chichester,
" £2000, and therefore brings suit &c." vs.
Vass.

The defendant plead non assumpsit, and the plaintiff took issue. The jury found a verdict for the plaintiff for £500 damages.

There was a bill of exceptions to the courts opinion which set out a letter form the defendant to the plaintiff dated the 12th of April 1789, which acknowledges the receipt of one from the plaintiff and consents to the marriage. Adding after some observations upon competency and contented minds " my circumstances are such, that " my daughters cannot expect large fortunes, but " I shall endeavour to do them equal justice as " fast as its in my power with convenience."

The bill of exceptions also set out another letter from the defendant to Col. Gordon, dated the 24th of Frebuary 1790; in which after stating his own and the plaintiff Doctor Vass's opinion that the neighbourhood of Lancaster courthouse would be a good situation for a physician he asks Col. Gordon's opinion about it, and if a small tract of two or three hundred acres of tolerable land with a house could be bought there on reasonable terms, as he does not know how it would suit the Doctor to build, and that it appeared to him that a plantation with a house ready for *their* immediate possession would answer best, he adds " my engage-
" ments (previous to this plan) for a tract of land
" adjoining me and late advancement to Mr. Hath-
" ways for their lands for my daughter Lee ren-
" ders it out of my power to make immediate pay-
" ment, for the lands above mentioned to be
" bought. I expect about fifty pounds could be
" paid in May next, which would probably be as
" soon as a title could be made and the balance at
" two annual payments after. If it would be any
" material advantage in the purchase perhaps the
" whole balance may be advanced in May or June
" 1791."

There

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There was a N. B. not to confirm the contract before the defendants approbation was had; and another, that if a plantation of 400 acres ſhould offer it might make no odds, provided the terms were ſuitable.

The bill of exceptions prayed a nonſuit, or that the court would direct the jury that the evidence did not ſupport the declaration, or elſe to declare their opinion to the jury whether the promiſe contained in the letters was not void for the uncertainty of it; but the court gave it as their opinion that is was not void for the uncertainty, but might be rendered ſufficiently certain by averment, and refuſed to nonſuit the plaintiff.

The reaſons in arreſt of judgment aſſigned by the defendant as ſtated in the record, were 1ſt. Becauſe the promiſe laid in the declaration is uncertain. 2d. Becauſe the declaration is inſufficient and informal.

The following papers were inſerted in the Record but not made part thereof by any order of the Court or in any other judicial manner.

1. A letter dated the 2d of Frebruary 1788, from the defendant to Mr. Hooe the father of a gentleman who had married another of his daughters. Which letter ſtated that the defendant had agreed to give this daughter Hooe £500 Virginia currency, as ſoon as he could raiſe it with convenience out of his eſtate? and at his death that he would make her proportion equal to that of his other daughters.

2. A letter from the plaintiff to the defendant dated the 10th of 1789; in which he aſks his conſent to marry his daughter.

3. A letter dated the 5th of January 1790 from the defendant to the plaintiff, in which he ſays there is nothing in his power to do without diſtreſſing himſelf which he will not do to aſſiſt the plaintiff in ſettling himſelf to his ſatisfaction. That if a plantation in the upper part of the country would be more agreeable to the plaintiff than a ſettlement

ment in town, perhaps he could get off a contract with one Stewart for a tract of land in Shenandoah; that at the time he contracted with Stewart he did not know that any of his own family would like that part of the world for a ſettlement, and that this was his reaſon for attempting to ſell it. That if the plaintiff liked Colcheſter or Dumfries better, the defendant would endeavour to procure a lot, or would do any thing in his power in any place which the plaintiff might think moſt agreeable.

4. A certificate from the clerk of Fairfax county of a leaſe from the defendant to Hancock Lee, who married another of the defendants daughters for 1241 acres of land, being recorded.

5. The depoſition of a Mrs. Johnſton concerning ſome converſations between her huſband and the plaintiff relative to the plaintiffs addreſſing Milliſſent Chicheſter; and alſo ſome declarations of Mrs. Chicheſter in the preſence of the plaintiff prior to his paying his addreſſes to the young lady, that ſhe approved of ſettling daughters fortunes on themſelves and would perſuade Mr. Chicheſter to do ſo.

The Diſtrict Court of Dumfries gave judgment for the plaintiff according to the verdict aforeſaid; and from that judgment Chicheſter appealed to this Court.

WASHINGTON for the appellant. Made three points:

1. That the plaintiff in the action could not recover on ſuch a contract as was ſtated by him. For where a man promiſes to pay a ſum of money when it is convenient for him to do it, if there be no prior duty the promiſe is too uncertain to maintain an action. Becauſe if I promiſe to pay money in ſuch a caſe when it is convenient, I reſerve to myſelf the right of judging at what time it will be convenient, or whether it will be ſo at all. But if ſuch a right be reſerved then the promiſe is too uncertain to ground an action on, for the payee

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cannot make it certain without taking away the reſervation or right of judging from the payer or perſon making the promiſe. Becauſe the plaintiff muſt make his declaration certain by averment, which he muſt prove; and that takes away the power of judging from the other ſide, and veſts it in the jury contrary to the principle. In this caſe Chicheſter ſaid in effect, I cant do any thing in certain, but what I do for the reſt of my daughters I will do for this, when convenient; I will not be coerced however, but will reſerve to myſelf the power of judging of that convenience. All that he promiſed was if he gave any thing to the others he would do the like for this daughter? but if he gave nothing to the reſt, this one had no right to complain. If a man owing a debt promiſes to pay it in convenient time, there the promiſe relates to the time and not the payment, and conſequently the jury may judge of the time. But when the promiſe goes to the payment it is otherwiſe. In the one caſe the convenience relates to the time, in the other to the payment. If I owe a debt and promiſe to pay when convenient, I ſhall not be allowed to judge of the convenience in this caſe. So if I have work done, or take up goods; but in thoſe caſes, the law creates the aſſumpſit on the doing of the work or taking up the goods, independent of the particular promiſe. The rule which ſays, that is certain which can be rendered ſo, means when the promiſe can be refered to ſome ſtandard in the agreement itſelf. As if I promiſe to pay when I receive ſuch a debt, there the reception forms a ſtandard which aſcertains the period when the promiſe is to be performed. So if in this caſe Chicheſter had promiſed to pay ſo much whenever he gave either of his other daughters any thing, then the gift to either would be a ſtandard from whence the obligation to pay would be deduced. In ſhort whenever the parties agree upon a ſtandard it is obligatory: but otherwiſe where there is no ſtandard and all is indefinite and incapable of being reduced to certainty without violating the rights of the one or the other party.

If

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2. If the promiſe ſtated was effectual, yet the declaration has not ſtated it with preciſion, but wants a ſufficient averment to render the promiſe certain, and to ſhew the plaintiffs title. It is a rule in pleading that a plaintiff muſt always ſtate a title to recover or elſe he can have no judgment, 4 *Bac: abr:* 13. In this caſe three things were neceſſary, 1. a promiſe, 2. proof that Chicheſter had given portions to his other daughters, 3, that it was convenient for him to advance to this daughter. All of which were neceſſary to be proved in order to entitle the plaintiff to a judgment. For it was neceſſary to ſtate them, and wherever the plaintiff ſtates a ſpecial agreement he muſt prove it. The plaintiff then does not ſhew a title; he ſtates the aſſumpſit and marriage but he does not ſtate the other parts of the agreement. Which were in the nature of a condition precedent. If I promiſe to pay a man a ſum of money when he does a certain thing, to entitle him to an action he muſt ſhew that he has performed it; for the performance is his title to recover. This caſe is the ſame in principle; becauſe Chicheſter was not bound to give any thing to the plaintiff until he had given ſomething to the others: and therefore ſuch gift to the others ſhould have been alledged.

3. Whether the verdict cures this want of averment? The diſtinction is between a declaration which ſtates a defective title and a declaration which ſtates a good title defectively. A verdict will cure the laſt, but not the firſt; and the reaſon is, that in the caſe of a defective ſtatement of title, the court after verdict preſumes every thing neceſſary to perfect the title to have been incidentally proved upon the trial; but in the caſe of a defective title, however proved, it is a defective title ſtill, and does not involve a right. The diſtinction applies to this caſe, for the title ſtated, is a defective title; becauſe the performance was to be on the happening of a certain event, and that happening was as neceſſary a part of his title as the promiſe itſelf. But here the plaintiff has not ſhewn that the event

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has happened; therefore it does not appear that his title has accrued: So that the title ſued upon is plainly defective. If I promiſe to pay a ſum of money on the termination of a certain diſpute, or a man's going to a certain place, the plaintiff muſt ſhew that the event has happened before he can maintain an action. In this caſe then, the merely ſtating a promiſe, without ſhewing the other matters neceſſary to conſtitute the plaintiffs right to recover, is no defect of ſetting forth the title, but a defect of title itſelf. A general demurrer to this declaration might have been ſuſtained; and if ſo clearly a verdict will not cure. As to things to be intended after verdict, the rule is, that nothing is to be preſumed but what is ſtated or eſſentially grows out of the pleadings. If the plaintiff had attempted to ſet out a good title with the happening of the events, and had ſet them out defectively, then it would have been preſumed that the whole matter was incidentally proved upon the trial; but here was no attempt to ſet out a good title and to ſtate the neceſſary facts, therefore the preſumption cannot take place; becauſe evidence of thoſe facts would have been improper upon the trial of the cauſe. 1 *Term. rep.* 144. Spears *vs.* Parker. *Salk.* 662. Theſe caſes are an excellent illuſtration of what I contend for. In the firſt, it appears that the Court, after verdict, cannot intend one of the conſtituent parts of the plaintiffs title to have been proved, if not alledged in the pleadings; whereas in the other, the mere defective ſtatement was cured by the verdict. So here if the plaintiff had attempted to ſtate a title and had failed, it would have been cured: but he has not attempted it, he has not ſtated that Chicheſter had given any thing to the reſt of his daughters, for if he had, all formal parts would have been preſumed to have been proved. *Cro. Car.* 186 is exactly like this caſe, and ſhews that the verdict has not helped the defect. *Latch.* 223. 4 *Bac. ab.* 24, are to the ſame effect; and prove that an uncertain averment will not do: which is ſtronger than our caſe; becauſe here is no averment at all. In ſhort all the caſes ſhew that where the promiſe is entire and the whole

whole neceſſary to conſtitute the title, the whole muſt be ſtated, or the verdict will not aid.

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But beſides this, the bill of exception ſtates the whole evidence; in which caſe there can be no preſumption: for it is impoſſible to preſume againſt the record.

WARDEN *contra.* Chicheſter promiſed to make the portion of this daughter equal to that of the others when it was convenient, which ought to be underſtood in a reaſonable time: And his own interpretation of it was ſo. For in 1791 he writes to Col. Gordon on the ſubject of a purchaſe for the plaintiff; which ſhews he thought he was *then* bound to provide for her. He was therefore liable to an action upon the promiſe, at the time the ſuit was brought. But admit that he had a right to judge of the time of convenience, yet ſtill it was a matter of fact and might have been proved. It is ſaid that there is a want of averment; but the declaration has ſtated a promiſe, and then aſſigns a general breach; which covers every thing in ſuch a manner as to let in the neceſſary evidence. Therefore all material facts will be preſumed, to have been proved after verdict, eſpecially as the declaration ſtates that Vaſs had done every thing on his part to be performed. As to the diſtinctions which have been taken on promiſes to pay in convenient time, they will not avail the appellants; becauſe marriage is not merely a good, but a valuable conſideration alſo; and therefore when entered into it related back to the firſt communication, and was a precedent duly in the ſenſe which Mr. Waſhington contended for. It was not a mere naked agreement therefore, but an undertaking upon ſufficient conſideration. It is admitted that if the period is certain when the promiſe will begin to operate, that it will ſuſtain an action; but convenience in this caſe was a fact capable of being aſcertained, and therefore when actually ſhewn, was a ſufficient foundation to ſupport the action, according to the principle of that admiſſion.

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The 4. *Bac:* only proves that the plaintiff ſhould ſhew a title; and here the declaration ſhews a *colloquum*, a conſequent promiſe, and an actual marriage, all which conſtitute a title, when the other events happened; and the jury having found for the plaintiff and aſſeſſed damages, have rendered every thing certain; and ſhewn not only that the events had happened in fact, but that Chicheſter had broken his promiſe. This conſtituted a ſufficient ground of action; and proves that there is no error on the ſecond point made by the appellants counſel.

The promiſe marriage and other things are ſet forth in ſuch a manner as to afford an opportunity of proving the title. So that if the defendent had demurred it would have come to this, that Chicheſter had made a promiſe upon a ſufficient conſideration, and that he had afterwards refuſed to perform and had broken it altogether; which unqueſtionably would have been a good cauſe of action. But I repeat it again that the breach went to all parts of the promiſe, and completely let in the evidence with regard to the title. This is expreſsly warranted by our ſtatute of Jeofails which goes much further than the Engliſh ſtatute. The words are that "no judgment after a verdict "ſhall be ſtayed or reverſed for omitting the aver- "ment of any matter, without proving which, the "jury ought not to have given ſuch a verdict." If then the declaration firſt ſtates a good promiſe and alledges a performance by the plaintiff and a breach by the defendant, the reſt was but a mere averment in the ſenſe of the act, and therefore the omiſſion is not fatal. For the other matters were ſuch as without proving them, the jury ought not to have given ſuch a verdict; ſince it is impoſſible to conceive, that without they had been proved, the jury would have found for the plaintiff: Which expreſsly reduces it to the caſe of an averment within the meaning of the act of Aſſembly. If this reaſoning wanted any illuſtration or ſupport, it is abundantly confirmed by *Rushton* vs

Aspenall

Aspenall, 2, *Dougl.* 679, and *Scroggs* vs *Griffin*, *Cro. Eliz.* 205. I conclude therefore that there is no error upon the third ground taken by the appellants counsel. Chichester, vs. Vais.

WICKHAM in reply. The promise stated is too uncertain to support an action. When the law says that a promise is void for uncertainty, it means that the person to whom it is made cannot recover upon the merits of the case. If a man should promise to the person who had done a piece of work for him that he would pay him for it so much money as he could afford, a suit founded on the special promise could not be maintained; although it might, on the implied promise which the law would raise. But marriage is not a consideration on which the law would raise a promise; and therefore it differs from the other case. Because the express promise must be pursued; and failing in proof of that the plaintiff cannot resort to an implied promise. For the law raises none such: and consequently the want of certainty therein is fatal. The promise in this case, was a mere declaration on the part of the father, and not binding on him. If a father were to say he would do as much as he could for a son, it would be uncertain and void; for he promised nothing specifically. The letter to Gordon was only a reference to the others which were written before the marriage, or else evidence of a parol promise which would be void under the statute of frauds.

ROANE Judge. The bill of exceptions speaks of another letter.

WICKHAM. But no such is in the record.

WARDEN. The clerk has made a memorandum that it was read.

WICKHAM. It must still be argued as if no such letter existed because it is not made part of the record. The promise was to do equal justice; and what was equal justice? Suppose one of his daughters was more needy than the others, then equal justice.

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juſtice would conſiſt in beſtowing a larger portion on her, becauſe the others could do with leſs. But it is not only uncertain as to the ſum, it is indefinite as to the kind of proviſion alſo; the promiſe is not to give lands, ſlaves, or money ſpecifically; and if it had, it might have been given to the daughter and her children in excluſion of the huſband. The time too is uncertain; it is as faſt as convenient; but fathers generally provide for their daughters by will, which is conſidered as the moſt convenient period by them; yet it cannot be referred to that more than to any other period and therefore is altogether uncertain as to time. The letters were written evidence; on which the party had a right to aſk the opinion of the court, and therefore the deciſion ſhould be on the papers themſelves, which do not diſcloſe a ſufficient cauſe of action.

There ought to have been an averment of gifts to the other daughters and convenience to Chicheſter, whithout which the plaintiff could not recover. For they conſtituted the very git of the action. Suppoſe the declaration had ſtated a proviſion for one daughter and that it was convenient for the father to beſtow the ſame on this daughter, if the defendant choſe to plead the act of limitations he muſt not ſay generally that he did not aſſume within five years but that the action accrued more than five years paſt; which proves that the happening of thoſe events is the git of the action and not the promiſe; and therefore thoſe events ſhould have been ſtated to have actually happened. The breach though is relied upon by the counſel for the appellee. Which is no more than the common breach in every declaration of indebitatus aſſumpſit, and if ſufficient to ſupport the preſent declaration the plaintiff will be entitled to judgment in every caſe which can be conceived, although he ſhall have left out the whole git of his cauſe. If there be an action on a covenant for doing divers things, ſome poſitively and others on the happening of certain events, and there is a general breach

breach laid of non performance of the covenants it would be bad for the want of certainty. But it is said that the verdict cures the defect and the act of Jeofails was relied upon. That statute though it did not change the law in this respect, and there was a case in this court upon that subject. If Mr. Warden is correct then the plaintiff could never fail upon a general verdict; for the statute clearly cures form and according to him title too; and therefore there could be no failure after verdict.

The case in 2. *Dougl.* 679, proves that this act only affirms the common law; for the rule laid down there is precisely like the act of Assembly. And in that case the Court determined that the defect was not cured. The statute indeed aids the omission of the averment of a fact which must necessarily have been proved in order to have entitled the plaintiff to a verdict; but what fact was necessarily proven in this case is not apparent. The promise here was only an inducement to the fact, which was the happening of the event, and therefore the fact itself is entirely omitted. In *trover* the finding is only inducement and the conversion the *git*; but if the conversion be entirely omitted then most clearly the plaintiff cannot have judgment though the verdict be for him. In every case the *git* of the action must be laid, or else the party might recover without a declaration altogether; for if he can leave out the *git* he certainly may the formal parts, that is the Court may dispense with a declaration altogether. The reason for requiring a precise statement, is to give the defendant an opportunity of defending himself; but in this case the defendant could not tell how to defend himself: for no particular fact is stated which he might come prepared to contend against. So that he was liable to surprize and unexpected charges at the trial. Another reason why the law requires precision is, that there may be a final bar to the claim; but this case would not afford such a bar, and a new suit would still lie: for he could not prove by the record a prior recovery for the

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ſame advancement which was ſet up in this caſe. The caſes cited by Mr. Waſhington are perfectly appoſite, and indeed ſtronger than this. For in ſome of them the ſubſequent circumſtances were attempted to be ſtated, but, becauſe defectively done, it did not prevail. 4. *Bac.* 24 was ſo; and thus Mr. Wardens doctrine leads to this, that it will be better to omit them altogether than to ſtate ſome. In 4 *Burr.* 2455, there is a more modern caſe than ſome of thoſe cited by *Mr.* Waſhington; but to the ſame effect. Which proves that the doctrine has been uniform upon the ſubject. All the caſes therefore where verdicts have been held to cure the defect in ſtatement, have been where there was a certain definite fact, neceſſarily to be inferred, from thoſe ſet forth; and which conſequently muſt have been inevitably proved upon the trial of the cauſe. If the doctrine contended for upon the other ſide ſhould prevail then the defendant will not only be liable to ſurprize, or to be twice ſued for the ſame thing, but defective declarations will be drawn, on purpoſe in order to deceive the defendant, and let in multifarious and uncertain evidence upon the trial of the cauſe.

RANDOLPH on the ſame ſide. The act of Aſſembly only meant to adopt the Britiſh ſtatute upon the ſubject of amendment and Jeofails, and a contrary conſtruction leads to abſurdity. The promiſe here was not in conſequence of any communication from Vaſs on the ſubject of fortune; and therefore was not bottomed on the marriage, which was no inducement to it. Although in moſt inſtances the term convenient is convertible with the term reaſonable, it would in this be perfect nonſenſe. How can the Court and jury decide upon the convenience of any man? If he has thouſands in poſſeſſion he may owe tens of thouſands. It would therefore require an inventory of his eſtate to be exhibited. Chicheſter does not bind himſelf to do any thing poſitively; but merely that he will "endeavour" to do it. At all events he had his whole lifetime to perform the promiſe. The bill of

exceptions

exceptions ſtates that the Court were requeſted to inſtruct the jury that the evidence did not ſupport the declaration. Which the Court ſhould have done as it was written evidence, *Macbeth* vs *Haldirman*. 1. *Term Rep.* Chicheſter, vs. Vaſs.

WARDEN. The caſe in *Burr.* does not apply; the goods there were not ſpecified: but in our caſe the whole promiſe is firſt ſtated in all its parts and then a general breach of that promiſe is alledged. Of courſe the events muſt have been proved or the promiſe could not have been broken. When therefore the verdict finds that the promiſe was broken, it eſſentially finds that the events had happened; becauſe the promiſe could not be broken unleſs the events had happened. It is a caſe therefore expreſsly within the words of the act of Aſſembly. If the defendant thought the evidence did not ſupport the declaration he ſhould have demurred; the only queſtion on the bill of exceptions is whether the evidence was properly admitted? and it clearly was, becauſe not inconſiſtent with the declaration.

ROANE Judge. At the former argument of this cauſe as well as now I felt a ſtrong diſpoſition to get over the objection of a want of a ſufficient averment in the declaration; but am now ſatisfied that we cannot do ſo, and that great inconveniences would reſult from ſupporting ſuch a declaration as the preſent.

Under our act of Jeofails, according to the principles of conſtruction adopted by the courts of law in England, a verdict will cure ambiguities, but it will not cure a declaration where the *git* of the action is omitted; for no proof at the trial can make good a declaration, which contains no ground of action upon the face of it. This is the diſtinction laid down in the caſe of *Rushton* vs *Aspenal*, *Dougl.* and upon this diſtinction this court went in the caſe of *Winston* vs *Francisco*.*

If ſuch an omiſſion as that could be tolerated, the very end and deſign of pleadings would be fruſ-

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* 2d v. Waſhington's Reports.

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ſtrated; and a writ of error could never be ſupported in any caſe after verdict.

The promiſe ſtated in the declaration of itſelf gave to the plaintiff no cauſe of action; it was only a foundation whereon a cauſe of action was to ariſe on ſome future event, viz. in the event of the defendants making advancements to his other daughters, which he did not equally make to the plaintiff. Till that event happened the cauſe of action could not be ſaid to accrue; the promiſe itſelf was merely inchoate. So that non aſſumpſit within five years would not have been proper, but *actio non accrevit.* 2, *Salk.* 442, *Johnson* vs *Gould.* This is ſuppoſed to be deciſive that the right of the plaintiff was not complete at the time of the promiſe.

The happening of that event then was an eſſential link in conſtituting the plaintiffs right; it was the conſummation of it; and the queſtion is whether a direct averment of this, the very git of the action, was not neceſſary?

In *Rushton* vs *Aspenall* upon a general verdict the judgment was reverſed in an action againſt the indorſer of a bill of exchange, becauſe the declaration did not alledge a demand on the acceptor and his refuſal; and becauſe it did not ſtate that notice of that refuſal had been given to the indorſer. But theſe circumſtances although forming a part of the plaintiffs title, are certainly not a more eſſential part of it, than the circumſtances ſuppoſed neceſſary, to be ſet out in the declaration before the court.

But then it is ſaid 1ſt that the general breach ſtated in this declaration amounts to a ſufficient averment, that the defendant had not done equal juſtice to the wife of the plaintiff; 2d that at leaſt it is good under our act, for without proof of that fact the jury could not have found the preſent verdict.

As to the firſt, I anſwer that a breach only refers to the title ſtated in the declaration; and that

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as it is not the province of the assignment of breaches to set out the right, but to allege a violation of it, such an assignment though general, cannot better the case stated in the declaration. Chichester, vs. Vass.

As to the second, although without such evidence, the jury could not have found such a verdict, yet that will not mend the matter, when as before stated, the declaration does not in itself contain a sufficient cause of action.

But if the general breach should be deemed equivalent to a general averment, I am inclined to think that such general averment is insufficient.

It is the very end and principal use of pleadings that the charge and defence of the plaintiff and defendant respectively should be set out and particularized, so as that the opposite party may know the very ground of discussion between them and be prepared accordingly; and that thereby, the very point in dispute being apparent on the record, all future litigation, for the same cause, may be prevented.

Those reasons have deservedly great weight; and this court was under the influence of them in deciding the case of *Overton* vs *Hudson* * in April 1796; in which it was determined that a general *indebitatus assumpsit* would not lie against a sheriff for money illegally received by his deputy; but that where he is to be charged for the act of his deputy, the act should be set out in the declaration.

In the present case to shew in a very strong light the necessity of a particular averment, the plaintiff might have recovered on account of a supposed advancement to another daughter, when if the defendant could have known from the declaration that that advancement was to be relied on as the ground of action, he might have been prepared with testimony to have shewn it to have been a *bona fide* sale for a valuable consideration.

For these reasons I think the declaration insufficient. There

* 2d v. Washington's Reports.

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There are ſeveral other points in the cauſe, which have been very ably argued both on the preſent and former occaſion; but it is unneceſſary for me to go into them as the declaration is in itſelf inſufficient; and upon that I think the judgment of the Diſtrict Court ought to be reverſed.

CARRINGTON Judge. I am of the ſame opinion. The declaration contains two counts, but they are in effect the ſame. In both it charges a general breach, without avering that he had given any thing to his other daughters, or that it was convenient to make an advancement to this one. But it was evidently important at leaſt, to have averred a prior gift to the other daughters and that it was convenient to make an advancement, to the plaintiffs wife; becauſe they were part of the very *git* of the action, as the letter only contained a promiſe of equal juſtice with his other daughters, when it ſhould be convenient to him. So that not only form but ſubſtantial juſtice required that it ſhould be inveſtigated, whether there had been prior gifts to the other daughters, and whether it was convenient to make an immediate advancement to this. But if they were not ſtated in the declaration, then it was not made neceſſary to inveſtigate them; and therefore eſſential points in the cauſe were never put in iſſue. So that there is no room for the preſumption that all matters requiſite to ſupport the action were proved upon the trial; for the declaration did not make it neceſſary to prove the prior gifts, or the convenience of a preſent advancement; although upon no conſtruction, could the plaintiff poſſibly, be entitled without. I am not inclined to be over rigorous in things of this kind; but ſome degree of certainty is neceſſary; and the act of Aſſembly could never have been intended to cure ſuch radical defects as exiſt in the preſent caſe. Otherwiſe all would be uncertain, the defendant would be conſtantly liable to ſurprize, and the very end of pleading would be fruſtrated.

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It is the buſineſs of the plaintiff to conſider what facts will ſupport his action before he brings it; and then to ſet them forth in ſuch a manner as that the Court may ſee, a cauſe of action has accrued. But this has not been done in the preſent inſtance; and therefore I think the judgment muſt be reverſed.

LYONS Judge. At common law he who would recover againſt another was obliged to ſhew the cauſe of action explicitly in his declaration; in order that the defendant might know how to defend the ſuit, and plead the judgment in bar to another action for the ſame thing. Regularly there muſt be an affirmative and a negative to make an iſſue; and a party is not bound to prove what he does not aver, as it is not included in the iſſue. The plaintiff therefore muſt aver all material facts, in order that the jury may inquire into them. 1 *Salk.* 112. A condition precedent muſt be averred, in order that the court may decide whether the cauſe of action has accrued. The promiſe here was to give as much to this, as to the reſt of his daughters, when convenient to him. To entitle the plaintiff therefore to an action for the breach of this promiſe, he ſhould, at leaſt, have ſtated that the defendant had given ſomething to the reſt of his daughters, and that it was convenient for him to make an advancement to the plaintiff; for thoſe were eſſential grounds of the action, and in the nature of conditions precedent. They therefore ought to have been averred; and the want of it was ſuch a defect as the verdict will not cure, according to the caſes which have been cited. Eſpecially thoſe from *Dougl.* & 1 *Term Rep.* which clearly ſhew, that nothing is to be preſumed but what muſt have been neceſſarily proved upon the averments contained in the declaration. But as there is no averment of the facts neceſſary to ſupport the action in the preſent caſe, there was no neceſſity for proving them upon the trial, and therefore no preſumption that ſuch proof was offered, can be made.

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Chicheſter, ex dem. Vaus.

It was inſiſted though that our own act of Jeofails cured the defect; and perhaps; at firſt ſight, there does appear ſome colour for the aſſertion. But ſuch a conſtruction would introduce innumerable inconveniences. It would deſtroy all certainty, tend to ſurprize the defendant and put it out of his power to plead the firſt judgment in bar to a ſubſequent action.

This proves the danger of introducing poſitive rules of practice into a ſtatute. Which generally ſpeaking is not ſuſceptible of the ſame modifications and exceptions according to the exigency of the caſe, as the common law admits of. But there are rules for conſtruing ſtatutes; and one is that the beſt conſtruction of a ſtatute, is to conſtrue it as near to the reaſon of the common law as may be, and by the courſe which that obſerves in caſes of its own. But we have already ſeen that the reaſon and policy of the common law required an explicit ſtatement of the plaintiffs caſe in his declaration, in order that there might be a complete inveſtigation of the merits of the queſtion, and that the defendant might not be taken by ſurprize. Conſtruing this act therefore according to the ſpirit of that doctrine, it will follow that a verdict will in no caſe cure an omiſſion to ſtate a principal ground of the action or an eſſential part of the plaintiffs title. Becauſe in ſuch a caſe there would be no occaſion for the plaintiff to prove what he had not averred, and the defendant could not foreſee a charge which was not contained in the declaration. Both which were required by the common law; and then conſtruing the ſtatute as near to that as may be, it reſults that it is ſtill neceſſary for the plaintiff in his declaration to aver the eſſential grounds of his action, or the verdict will not aid the defect.

It is ſaid that it need not be averred that it was convenient; for it was to be done in a reaſonable time. In caſes of forfeiture the party is generally to be allowed his lifetime to perform the condition; and in agreements the intention of the parties

ties is principally to be attended to. This promise left it to the fathers own will and pleasure when he would make provision; for he says he will do it, when it is convenient to him: that is whenever his affairs would permit, without subjecting himself to distress and difficulty. But of that he was to be the judge. This was clearly the intention of the writer throughout the whole letter; and as he was to be the giver, he might dispose of it upon what terms he pleased. He may be taken to have said I will do her equal justice in the end; that is as soon as I think my affairs will admit of it; for it is not to be supposed that he meant to be sued on each gift, but the time of doing it was to be left to himself; and he did not mean that Vass should have it in his power to bring an action against him the moment it was understood that he had made an advancement to any other of his daughters. However I decide nothing with regard to the merits, but shall be perfectly open to an argument on them, if the case should ever occur again, at present I think the declaration clearly bad; and therefore that the judgmen should be reversed. Chichester, vs Vass.

PENDLETON President. I doubt whether the plaintiff can maintain the action alone without joining his wife, since tho' the promise was made to him, it would seem to import a donation to the daughter, which in its nature would admit of performance by a grant of lands to herself, and fixing the inheritance in her. If it were considered though merely as a promise of a personalty, that right would vest as a joint interest in husband and wife until reduced into possession, and go to the survivor if either died before that happened. On that ground therefore I am rather inclined to think the wife ought to have been joined, but do not decide upon it, as unnecessary at present.

I think the letter of April 12th 1789, from the defendant to the plaintiff, proves the promise as laid in the declaration, and that the District Court were right in giving that direction to the jury; but if I had doubted, I would have presumed that the letter

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letter miſſing afforded additional weight of evidence. I think however that the court erred in the opinion, that the declaration was ſufficient to maintain the action.

The promiſe as laid, does not, upon the marriage, give a right to the action, but other things are to happen to entitle the plaintiff, which may be conſidered as the *gist* of the action, and ought to have been averred; as that the defendant had given to another daughter ſuch a ſum; for on that his right of action accrued upon the promiſe to do equal juſtice to his daughters: He ſhould alſo have alledged, at leaſt, that it was convenient to the defendent to pay, if he was not, in the promiſe, made the judge of that convenience. Neither of which is averred.

But it is ſaid that this is ſupplied by the breach; and if that had ſtated that the defendant; altho' he had given ſuch a ſum to another daughter, and been required to give a like ſum to the plaintiff, had refuſed ſo to do, I would, eſpecially after verdict, have conſidered it as a ſufficient averment tho' not put in the uſual place or form.

But the breach has not a word about it. and only ſays in general that the defendant had broken his promiſe, without ſhewing how, ſo as to be defective in itſelf, inſtead of curing the omiſſion in the want of an averment.

I concur in thinking this defect not cured by the verdict under the act of Aſſembly, preſuming proof to have been given of facts imperfectly laid in the declaration, but not ſuch as are not laid at all.

I am not fond of theſe exceptions, but every declaration ought to be drawn ſo as to anſwer two eſſential purpoſes, 1ſt, to convey ſufficient notice to the defendant upon what points he is to defend himſelf; 2d, to enable the defendant, if caſt, to plead that recovery in bar to another action, for the ſame thing. Neither of which are anſwered by the preſent declaration. The innuendo what the

promiſe

promise meant, namely, that when he gave a cow or a bed to one daughter he was to have it valued and give immediately as much to each of the others, does not accord with my idea of the promise, he did not mean to subject himself to so much trouble and to so many suits.

Chichester vs Vass.

The time was fixed for his doing them equal justice.

It was left to his convenience, of which he was the judge; and he had all his lifetime to perform it in. When making his will he might review his whole donations, and provide for any inequality among the daughters, including a recompence to those who had not been advanced equal to others, in point of time as well as value, for this event the plaintiff should have waited and not brought his action too soon.

The Judgment of the District Court must therefore be reversed.

SYME
against
BUTLER Ex'r. of AYLETT.

IN an action on the case brought by Syme against Ayletts executors in the District Court of King and Queen, the declaration contained several counts, 1, for flour, bacon and barrels sold and delivered; 2. a *quantum valebat* for the same, 3. for money laid out and expended. Plea the general issue with leave. The principal question in the cause was whether Aylett who was *deputy commissary general of purchases* for the United States was personally liable for a contract with Syme, for some flour purchased during the late war. The original agreement between them is in the following words.

A public officer contracting on the part of government is not personally liable.

If a point of law arise in the cause the party should demur, move the court to instruct jury, or present notes for a special verdict.

Proposals

Syme vs. Butler.

Propoſals made by Col. Syme to William Aylett. D. C. G. P. December 25th, 1778.

You may have all the flour I manufacture this ſeaſon at my Rocky Mills, at five pounds certain, and as much more as I ſell one hundred barrels common flour for, to one perſon for ready caſh, delivered on demand under one contract and manufactured at my New Caſtle Mills, deducting four ſhillings and ſix pence per hundred for the waggonage from Rocky Mills to navigation, allowing me the ſame price for barrels as other millers get on Pamunky river. The flour to be taken from the mill door, in ſuch manner as to prevent more than about one hundred and fifty barrels at one time in the mills. Paying me five thouſand pounds directly, and fifteen thouſand pounds the 1ſt day of March next, and the balance after that date as it is wanted.

I agree to the above conditions except in taking away the flour, which I promiſe to exert myſelf by my aſſiſtants in effecting even to the laſt barrel. Col. Syme's people aſſiſting in loading, this is my ultimatum.

WILLIAM AYLETT, D. C. G. P.

I accede to the within with this amendment to the exception, that when the quantity of flour on hand, after one month from this date ſhall exceed the within ſtipulated quantity of 150 barrels, that I am to be allowed to employ waggons upon the beſt terms I can to tranſport it ſo as to keep my mill clear and in order for buſineſs.

J. SYME.

I agree to the above.

WILLIAM AYLETT, D. C. G. P.

Upon the trial of the cauſe the plaintiff filed a bill of exceptions to the courts opinion, which ſtated "that at the trial of this cauſe, the evi- "dence hereunto annexed, to no part of which "any objection judged valid by the court was "made, was offered, and by the court ordered to "go to the jury, a motion was made to the court "to

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" to direct a verdict to be found for the defen-
" dants, whereupon the presiding Judge did direct
" the jury that upon the whole of the letters it did
" appear that the testator did not by the agree-
" ment given in evidence, nor by his own conduct
" appearing by the said letters, or any other tes-
" timony in the cause, make himself personally li-
" able and did direct the jury to find for the de-
" fendant, but the other Judge having been of opi-
" nion that the question whether the defendants
" testator made himself personally liable ought to
" be left to the jury, it was ordered by the court,
" that the jury should upon the said evidence con-
" sider, whether the testator did upon the said
" testimony make himself personally liable and to
" find for the plaintiff, if he did, but for the
" defendants if he did not, whereupon the
" Counsel for the plaintiff under all the circum-
" stances objected to the opinion of the court."

There is nothing in the record which describes any particular papers as being annexed to the bill of exceptions; but it is said " the papers filed in this cause are in the words and figures following, that is to say." After which follow a variety of documents consisting of the written agreement aforesaid, of letters, invoices of flour, accounts, orders for flour and money, depositions of witnesses &c. From which documents it appears that after the agreement aforesaid was made, a variety of letters (in which the public service is often spoken of by Aylett,) passed between the parties; to most of which Aylett added the same letters D. C. G. P. to his signature, but to some he did not. The receipts and orders for the flour are generally given by some public officer refering in some terms or other to the troops, or the public In the correspondence, there was frequent reference to the expected receipt of public monies by Aylett, with which he intended to discharge the debt. And in one he says, he is ready to pay, but must have proper vouchers. This letter is signed William Aylett D. C. G. P. The depositions

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tions related cheifly, to the merchantable quality, the price and delivery of the flour; and to the payments made.

The Jury found a general verdict for the defendant, and the Court gave judgment accordingly. To which judgment the plaintiff obtained a writ of superſedeas from this Court.

WARDEN for the plaintiff. The firſt queſtion is if Aylett having made propoſals for the flour and ſigned his name with the addition of D. C. G. P. bound himſelf perſonally or only bound the United States? Thoſe letters may ſignify any thing elſe, as well as the commiſſion which he bore; and therefore do not neceſſarily oblige the government, inſtead of himſelf. The tenor of the agreement is not ſo, and the additional letters dont prove it. The firſt letter is to Aylett perſonally, and ſo is the ſtyle, and the initial letters contained no magic to bind the United States inſtead of the writer. The agreement does not ſay that the plaintiff ſhould be paid at the public treaſury, but that Aylett will pay ſome down, and the reſt at ſtipulated ſeaſons. Some he did pay; and he ſays in one letter there is a run upon *his* treaſury. The account is ſtated againſt Aylett; and there is no expreſs agreement that the government ſhall be bound. It was therefore a contract with Aylett; and he was to reſort to government in his own right.

The next queſtion is as to the opinion of the Court. Although the opinion of the preſiding judge only was poſitively delivered againſt the plaintiff, yet the jury probably paid more regard to it than to that of the junior judge, inasmuch as that was no charge, but only by way of opinion that the jury might conſider it as they pleaſed. Whereas the charge of the preſiding Judge was poſitive and therefore more calculated to influence them. If it had been left on the arguments of counſel the jury would have decided for themſelves; but that differs materially from this caſe, where the junior judge did not gainſay what the preſiding

Judge

Judge had said, and consequently the impression from his charge was not removed.

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WASHINGTON *contra.* The single question is whether the Courts decision was right or wrong? It is said that the presiding judge decided against the plaintiff; but this is not correct. For the judges did not concur in the charge; but the junior judge was of opinion that the jury should decide for themselves upon all the circumstances of the case, and so the Court afterwards directed. But suppose it were otherwise and that the judges had not concurred at last, but had finally differed, then no opinion at all was given, and therefore no reason to impeach the judgment for misdirection.

But upon the merits the law was clearly for the defendant *Macbeath* vs *Haldimand*, 1. *Term Rep.* 172. which proves expressly, that Aylett was not personally liable, as he contracted on behalf of the public. Therefore if the question was whether the charge by the presiding judge was right it would be clear. It is true that a public agent may by special agreement or concealing his character make himself personally liable. But it is otherwise when he avows his character, as Aylett did in this case. For the addition of the initial letters to his name was a clear avowal of the capacity in which he acted: and the whole question was whether he meant to make himself personally liable or not, The jury to whom the question was properly left, understood it, that he was not to be liable in his own right, but that it was a contract on the part of the government merely and they had a right to decide. Besides only the written evidence is stated it dont appear that there was not other evidence to prove that he acted in his official capacity. Of course there is no ground for disturbing the judgment even on the evidence and the merits of the case. But if the Court is of opinion that the charge was right it is no matter what evidence is in the record.

WICKHAM

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WICKHAM in reply. According to the bill of exceptions the Court were called on to give an opinion; and one judge gave a positive charge, but the other said that was not the opinion of the Court; and that according to his own notion, the matter ought to be left to the jury. Such a direction was accordingly given; and no particular opinion of the Court delivered on the testimony. Which according to Mr. Washingtons own case, there ought to have been; because it was written evidence and therefore the Court ought to have decided on it.

Two questions occur, 1. whether the party had a right to the Courts opinion? 2. Whether a proper opinion was given? The presiding judge did right in giving his opinion decidedly on the law of the case, and the junior judge was wrong in declining it: because he was bound to declare his opinion. It was wrong therefore to leave the case to the jury. The law says that the jury shall not decide upon a question of law; and therefore if the question involves both fact and law the judge should determine the question of law. For the party has a right to the opinion of the Court upon the law; and the Court should not refuse, and leave the matter of law, at large, to the jury. If the Court is divided in opinion there may be some difficulty, but in that case they should direct a special verdict which is the only way of getting out of it.

But if this point be against us, still I contend, that the merits are with us. It cannot be denied but an officer in Aylets situation might make himself personally liable, and that he would be so if the terms were personal. From the whole tenor of this evidence Aylett seems to have intended to become personally liable. It does not appear that he had any authority to contract for the United States; but he contracted with the United States, and Syme with him. He appears to be in arrear to the United States, and in one of his letters says he must close his accounts before he resigns his office. Which shews he considered the engagement

ment with Syme as perſonal, and that he wanted a voucher to ſettle with the public. In another letter after a ſuit was brought he ſays if it were not for delay, he would prefer that mode of ſettlement to any other, and propoſes a reference, which proves the ſame idea, of his perſonal reſponſibility. as to the caſe from 1 *Term. Rep.* the Governor there probably repreſented the perſon of the King, and then the contract was expreſsly with government. Beſides the account there, was made up againſt government; but here it was againſt Aylett.

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WASHINGTON. Mr. Wickham ſtates it as if the plaintiff had moved the court to inſtruct the jury, and they had refuſed. But it was not the plaintiff but the defendant who moved; and the defendant does not complain. If the plaintiff had inſiſted on the courts opinion and been refuſed perhaps there might have been ſomething in the exception. But as it is, there is none.

WICKHAM. It would have required a counſel of more than ordinary aſſurance after what had paſſed to have made ſuch a motion; becauſe the court had already decided. There is a general count for money had and received; and Aylett appears to have received large ſums which were to pay for this flour, and therefore were received to the plaintiffs uſe.

WASHINGTON. That argument was proper for the jury, and was probably urged.

FLEMING Judge. With regard to the queſtion whether this was a public or a private contract I have no doubt. The whole of Ayletts conduct ſhews, that he acted in his public and not in his private capacity. The very nature and ſtyle of the contract proves it; and it muſt have been known to the plaintiff that he was negotiating as a public agent. I think therefore that Aylett was not perſonally liable. For it is fully within the influence of the principle in *Macbeath* vs *Haldimand*, 1 *Term. Rep.* That caſe is concluſive, and the deciſions

refered

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refered to in it, go the whole length of determining this. Particularly that of *Lutterloh* vs *Halsey*; where an action was brought againſt Halsey, who was a commiſſary for the ſupply of forage for the army, by Lutterloh who had been employed by him in that ſervice, and it was held that the action would not lie. Which is very nearly the caſe before the court, and therefore may be conſidered as putting an end to the queſtion as to the original contract.

Nor is there any thing in the ſubſequent correſpondence which tends, as far as I can diſcover, to increaſe the perſonal reſponſibility of Aylett. At any rate it was a queſtion proper for the conſideration of the jury. For I am clearly of opinion that it ought to have been left to them to conſider of the mixt teſtimony which was offered; and therefore that the court were right in the direction which they gave, according to the opinion of Judge Butler in *Macbeath* vs *Haldimand*: And as they have decided the fact in favour of the defendant, I ſee no reaſon for diſturbing a verdict which I think right upon the merits.

My opinion therefore, is that the judgment ſhould be affirmed.

CARRINGTON Judge. The queſtion made by the bill of exceptions is to the conduct of the court relative to the inſtruction given to the jury. One exception taken by the appellants counſel was, that the ſenior Judge decided poſitively for the defendant. But it appears, that the other Judge differing from him, they finally concured in leaving it to the jury. So that the firſt opinion of the ſenior Judge whether right or wrong was unimportant, as the final declaration of both Judges and not the ſingle opinion of either was to be the rule. There is conſequently no cauſe of complaint upon that ground.

But it was ſaid that the plaintiff had a right to the courts opinion on the evidence, and therefore that it ought to have been given. I think though that

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that in the *present case* the jury had a right to decide upon the evidence; and consequently that the direction was right. If the jury mistook the law the plaintiff should have moved for a new trial; or if he fearedit, before the verdict was rendered, he might have prepared notes for a special verdict, or demured to the evidence. By either of which means he could have got the courts opinion if he had desired it. But instead of this he chose to risque his cause with the jury altogether, and therefore must submit to the verdict, as he has shewn no error in the proceeding of the court, which ought to avoid it.

Thus far with respect to the conduct of the court:

But upon the merits of the case I am of opinion that the verdict was right. For the facts disclosed in the record clearly prove, that Aylett contracted in his public and not in his private capacity. His answer to the original proposal is designated by his public character; and it is not probable that he would, upon his own account merely, have made so many large contracts as it appears he did. Neither is it presumeable that any person, would have prefered him to the public in such a transaction, or that he would have taken a risque upon himself, which might have involved him in ruin. The principle established in *Macbeath* vs. *Haldimand*, 1 *Term. Rep.* 172. is, that an officer appointed by government and treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. Which is precisely the situation of Aylett, according to the facts contained in the record; and therefore that case may be considered as an express authority in favor of the defendant upon the merits of the cause. So that the jury appear to me to have decided rightly upon the evidence. But we are determining on the bill of exceptions, which discloses no error in the conduct of the Court; and therefore I am for affirming the judgment.

PENDLETON President. The record is apparently voluminous, but it is short as to the proceedings

Syme, vs. Butler.

ceedings in Court, the length being occasioned by the insertion of the evidence. Whether this be the whole evidence produced at the trial, dont appear; but it seems from the bill of exceptions, as if the question agitated in the Court turned upon the contract and the conduct of Mr. Aylett, as appearing from that testimony: And if it was proper for this Court to decide upon the justice of the verdict, they might have thought themselves at liberty to do so, upon the evidence stated.

But it is not the verdict of the jury, but the opinion of the Court that we are to examine into upon the bill of exceptions.

That opinion we must take from the final direction of the Court and not from an opinion delivered by one judge and retracted by him, on discovering that his associate differed from him. The opinion of the Court was to leave the whole matter to the jury, with this direction that if they thought Aylett had by his contract, or subsequent conduct made himself personally liable, they were to find for the plaintiff, if not for the defendant.

In Buller's *nisi prius* 316, it is laid down from Sir *Thomas Raymond*, 105. and I do not find it controverted, that if the judge allow matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exceptions will lie; and accordingly in the case of *Macbeath* vs. *Haldimand* the motion for a new trial is founded upon the Judge not having left the evidence to the jury, as well as on his having given a misdirection on a point of law.

It was said this was a misdirection, as it was a question of law which should not have been left to the jury, since it is the right of every party to have a point of law decided by the court: And it is true that such is the right of parties.

Let it be observed however that we are not in the state of the Court of Kings Bench on motions for new trials on misdirection of the Judge at the nisi prius trials, which are subordinate to and are de-

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cided upon the same principles, as if in the Court itself. They take the history of the trial from one of their body, who presided over it, giving his statement full credence. But we are an appellate Court, hearing the appeal from an inferior Court of distinct jurisdiction, and can judge only from what appears on the record.

From that source it should appear, that the appellant asserted his claim to have the point of law tried by the Court at the time of the trial; and it should be shewn on the record that the question was upon a point of law. Which may be done several ways. By moving for the direction of the Court immediately, or to reserve the point of law on the case stated on the record, or to move the Court to direct the jury to find a special verdict upon notes offered, shewing a question of law, or by demurring to the evidence bring the whole question of law and fact before the Court.

None of these steps appear to have been taken by the plaintiff. On the contrary, for any thing which appears, he seems to have been willing to submit the whole matter to the jury. He does not move for any thing; but the defendant having moved for a direction to the jury to find for him, the plaintiff opposes it, and successfully too: for the Court leave it to the jury, after which he does not demur to the evidence, but excepts, and that not to the opinion of the Court, but to that of one Judge given and retracted.

In that view it is an exception without a precedent.

If we view the evidence with regard to the points on which the Court properly left it to the jury, namely 1, whether Aylett bound himself personally by the contract; It will appear that the contract was with Aylett in his character of public agent, so as to bind government and not himself personally and this is proved not by the parade of letters called cabalistic only, but by Col. Symes

original,

Syme, *vs* Butler.

original propoſals to deal with him as a public agent. So that upon that point, the verdict was right both in law and fact. 2. As to the ſubſequent conduct of Mr. Aylett to charge himſelf; that was ſurely a fact proper for the jury: and if it was proper to decide on it, I can only ſay that there is a defect in the evidence to enable me to do ſo, which I preſume might have been ſupplied on the trial.

The diſpute was about price, a proper ſubject for the jury; and it is to be lamented that the parties had not ſettled it when no loſs to either would have happened, But like many others they got angry and went to law, and muſt abide the conſequence.

It is ſaid it appears Aylett was indebted to the United States; and that upon the third count for money had and received to the plaintiffs uſe, Syme may recover. But the counſel appears to have miſtaken the count, which is for money *laid out and expended* by the plaintiff for the uſe of the defendant, and not for money had and received as he ſuppoſed. But it dont appear that Aylett is indebted. Harriſon ſays he was indebted upwards of eight millions of dollars by the treaſury books. And Tate ſays that by Aylett's books there appears a ſmall balance either way, but he cannot recollect which.

So that the fact is undetermined until that account be ſettled.

Affirm the Judgment.

MAXWELL

MAXWELL
against
LIGHT.

IN replevin by Maxwell for taking his goods and chattles, Light avowed the taking for rent arrear due by indenture on a demiſe for ten years. The plaintiff replied 1. that the avowant did not demiſe, and iſſue thereon. 2. Entry by the defendant into parcel and expulſion of the plaintiff, 3. No rent arrear. 4. That defendant did not build certain walls on the premiſes. 5. That defendant did not permit the plaintiff to clear and cultivate twenty acres of land in addition to the cleared lands. 6. That defendant entered and expelled the plaintiff from another parcel of the demiſed premiſes.

Rejoinder to the 2d plea, that he entered by conſent of the plaintiff and iſſue. Demurrer to 4th and 5th pleas. Rejoinder to the 6th plea, that the defendant did not enter and expel the plaintiff, and iſſue thereon. After which follows this entry "and the ſaid Peter Light by his attorney demurs generally to the firſt and third plea aforeſaid of the ſaid James Maxwell above pleaded. Which demurrer the ſaid James Maxwell by his attorney joins."

Upon the trial of the iſſues the plaintiff filed a bill of exceptions to the courts opinion, which ſtated that the avowant offered a copy of an indenture of leaſe in evidence, the only probat of which was in theſe words "at a court continued and held for Berkeley county the 10th day of May 1791. This indenture was proved by the oath of Moſes Hunter a witneſs thereto and ordered to be recorded."

Teſte, MOSES HUNTER.

To which the plaintiff objected becauſe it was only a copy, and not ſo proved and authenticated as to make it legal evidence. That the avowant then proved that the plaintiff had acknowledged that a deed

If a deed be proved by one witneſs, a copy merely, with th' courts certificate of ſuch probate, will not be evidence in an action founded on the deed; although the court has admitted it to record: and altho' the leſſee is proved to have been in poſſeſſion of the original, but the copy muſt be proved to be a true copy.

The Court may hear evidence after verdict, in caſe of a replevin, in order to ſhew that the landlord diſtrained for more rent than was due, and to confine the judgment to the rent only.

Maxwell, vs Light.

deed which he ſaid was the original leaſe was in the poſſeſſion of the plaintiff ſince the date of the ſaid certificate, who did not produce it though called on to do ſo at the trial of the cauſe. That the plaintiff proved that Moſes Hunter one of the ſubſcribing witneſſes to the ſaid deed is alive and within the juriſdiction of the court. That the court permitted the deed to go in evidence without any proof from the ſubſcribing witneſſes that the original had been executed, or that the ſaid copy was a true copy of the original. Another bill of exceptions ſtated that the court directed the jury that the ſaid copy of the deed was ſufficient to prove the demiſe. A third bill of exceptions to the ſame effect as the laſt.

Verdict for the avowant in theſe words "we of the jury find for the avowant and alſo find two hundred and twenty five pounds Pennſylvania currency of the value of one hundred and eighty pounds current money of Virginia, to be rent in arrear and due from the plaintiff to the avowant."

After the verdict the plaintiff filed a fourth bill of exceptions which ſtated that the landlord moved the court for judgment for double the rent found by the jury to be in arrear, to which the plaintiff objected, and offered to prove to the court that the avowant had diſtrained for more rent than the jury had found due and arrear. Which evidence the court refuſed to hear after the verdict received and the jury diſcharged, becauſe *ex parte*, irregular and without notice.

The court overruled the demurrers and gave judgment for double the rent found by the jury to be in arrear, and the coſts. From which judgment Maxwell appealed to this court.

WASHINGTON for the appellant. The copy of the deed ought not to have been permitted to go in evidence to the jury. There are two ways of proving deeds, one by witneſſes, and the other by atteſted copies from the records, where they have been proved as the law directs. The laſt is as

good

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good evidence as the original itſelf would be; but if the deed be not proved and recorded as the law directs, then a copy is not good evidence. In the preſent caſe the deed was proved by one witneſs only; and although it is recorded, yet that gives no degree of evidence to it; becauſe it was not done as the law directs. It is therefore no more than the clerks certificate which is not evidence in any caſe; for it is not on oath, and is of no more weight than the certificate of any other perſon. Therefore the copy was not evidence, without proof that it was a true copy of the original, unleſs Maxwell's acknowledgment that he had poſſeſſion of the original, altered the caſe. But it did not; for to have that effect, it ſhould have been proved that it was in his poſſeſſion at the time of the trial, and not that it had been in his poſſeſſion, at ſome time before. Becauſe he had once had it in poſſeſſion, it did not follow that he was always to have it. Beſides notice ſhould have been given him to produce it, or he was not bound to carry it to court, or to bring it forward when called for by the other party, *Gilb: law Evid:* 95, 97. 4. *Burr.* 2487. There is a difference between proving the contents of a deed, and proving a copy of a deed. In the laſt caſe the witneſs muſt ſwear that it is a copy. *Gilb: law Evid:* 96. So that although it ſhould be admitted in any caſe that a copy is evidence, ſtill the party who would offer it muſt prove, that what he produces is a copy of the original.

The court erred in another inſtance. For it appears by the bill of exceptions that they affirmed to the jury that the evidence offered was ſufficient to maintain the iſſue. Whereas they ſhould merely have decided on the competuency, and left the ſufficiency to the jury; and the deciſions of this court have been ſo.

The court were clearly wrong alſo in refuſing to hear the evidence, after the verdict, in order to prove that the diſtreſs was for more rent in arrear than the jury by their verdict had found to be due.

WILLIAMS

Maxwell, *vs.* Light.

WILLIAMS *contra.* Three witneſſes are not neceſſary in order to record a deed; for one is enough to admit it to record, though three are requiſite in order to give it effect againſt creditors. The words of the act of aſſembly warrant this diſtinction, as it does not prohibit probat by one; but only ſpeaks of its being void againſt creditors and purchaſers unleſs proved by three, leaving the grantee to prove it as he pleaſes, between him and the grantor. The County Court when the deed was recorded had a right to receive the oath of the witneſs; and therefore the certificate of that probat was ſufficient proof of the execution of the deed. But the deed has been recorded, and that record is effectual till reverſed, ſo that this court will not examine into it. The copy therefore was good evidence, eſpecially as Maxwell who excepted, is proved to have acknowledged his having had poſſeſſion, and does not ſtate any ſubſequent diſpoſeſſion.

It was Maxwell who called for the opinion of the court, and therefore he ſhould not be allowed to except to it.

As to the other point, the quantum due, was involved in the iſſues; and the jury having decided it, no new evidence was admiſſible after the verdict, as to a point which was proper for their inveſtigation.

WASHINGTON. The copy was inadmiſſible. None but the copy of a deed recorded as the law allows could be admitted. For if not recorded as the law directs it is the ſame as if it was not recorded at all. In England none but deeds of bargain and ſale are enrolled, and a copy of the enrollment is evidence. But ſuppoſe a feoffment were enrolled would that be evidence? It was ſaid that as it had been recorded it was effectual, till reverſed. But there is no mode of reverſing it, no appeal or ſuperſedeas lies, this argument therefore objects the want of that which cannot be. It is ſaid that Maxwell required the opinion of the

Court

Court. But that did not authorize them to give an improper direction to the jury.

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PENDLETON Preſident. Upon the third point, the queſtion is whether the court or the jury are to aſſeſs the double value? For if the court, then the evidence was proper, but if the jury then it was not.

WASHINGTON. It is the province of the court to aſſeſs it; becauſe they are to render the judgment, and therefore ought to hear the teſtimony on which it is to be founded. The object of the law was to puniſh tenants who replevied when the rent was juſtly due; but the landlord may diſtrain for more than is due, and if he does, then he is not entitled to double value.

WILLIAMS. The practice would introduce inconvenience and would tend to ſurprize the plaintiff.

PENDLETON Preſident. If the landlord did diſtrain for too much, was he entitled to the double value?

The Court having taken a few days to conſider the caſe;

PENDLETON Preſident now delivered their reſolution; that the judgment was erroneous on account of the Courts permitting the copy of the deed to be given in evidence without any other proof than the clerks certificate of its being proved by one witneſs. Becauſe although the copy would have been ſufficient if the appellant refuſed to produce the original when called on, yet it ought to have been proved to have been a copy by other evidence. For its being proved by one witneſs did not authorize the recording of it under the act of Aſſembly. That therefore the judgment was to be reverſed, and the cauſe remitted to the Diſtrict Court for a new trial to be had.

The judgment was as follows; "The Court is "of opinion that there is error in the ſaid judg- "ment in this, that the ſaid Diſtrict Court permit-

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"ted the copy of the leaſe from the appellee to "the appellant to be given in evidence on the tri- "al without other proof of the execution of the "original, or of its being a true copy thereof than "the certificate of Moſes Hunter annexed to the "copy; ſince although the proof of the execution "ought to have been diſpenſed with, on the ap- "pellant's refuſing to produce the original in his "poſſeſſion, it was incumbent on him to have "proved the truth of the copy by better proof than "the certificate of the clerk from the records; as "the recording of the original on proof by one "witneſs is not warranted by law. Therefore it "is conſidered by the court that the ſaid judgment "be reverſed and annulled, and that the appel- "lant recover againſt the appellee his coſts by him "expended in the proſecution of his appeal afore- "ſaid here, and it is ordered that the jurors verdict "be ſet a ſide, and that the cauſe be remanded to "the ſaid Diſtrict Court for a new trial to be had "therein, in which if the appellant ſhall refuſe to "produce the original leaſe the copy ſhall be ad- "mitted as evidence upon the appellee's proving, "either that it is a true copy, or that the probate "in Berkely County Court was made at the in- "ſtance of the appellant. And it is further or- "dered that upon the trial and after the verdict "if the jury ſhall find for the *avowant* and aſcer- "tain the rent due, the tenant ſhall be allowed to "give in evidence to the court, that more rent "was diſtrained for, than ſhall be ſo found due, in "order to avoid the entry of the judgment for "double the value of the rent, and confine the "ſame to the rent only."

M'WILLIAMS

M'WILLIAMS
againſt
SMITH.

In a ſuit againſt the indorſer of a bond the hand writing of the indorſers prior to his own need not be proved upon the trial of the cauſe.

If the party gets the opinion of the court upon a point of law in one ſhape, he ſhall not be permitted to object that it was not given him in another.

LECKIE gave a bond for payment of money to Saunders; who aſſigned it to Greenhill; who aſſigned it to Duval; who aſſigned it to M'Williams; who aſſigned it to Smith. Who brought ſuit upon it againſt the executors of the obligor; who plead *fully adminiſtered*, and had a verdict and judgment in their favour upon that plea. Whereupon Smith brought ſuit againſt M'Williams, and counted 1. ſpecially upon the aſſignment and ſuit, 2. for money had and received to the plaintiffs uſe. Plea *non aſſumpſit*, and iſſue. The plaintiff gave a copy of the record in the foregoing ſuit in evidence, and proved the aſſignment from M'Williams, but did not prove the other three aſſignments. The defendant excepted to the evidence 1. Becauſe although judgment had been obtained on the bond in another court, yet the plaintiff had it in his poſſeſſion. 2. Becauſe the three firſt aſſignments were not proved. Theſe exceptions were overruled. The defendant then moved the court to inſtruct the jury that the defendant was not liable on his aſſignment, but the court inſtructed the jury that he was. After which the defendant deſired the court to direct the jury to find a ſpecial verdict "ſtating the whole cir-"cumſtances and facts which they ſhould find in "evidence and leaving the law to the court;" which the court refuſed to do, and an exception to the refuſal was taken. Verdict and judgment for the plaintiff. From which judgment the defendant appealed to this Court.

WARDEN for the appellant. Said 1. that Smith had been guilty of *laches* and that whether *laches* or not was a queſtion for the court to decide and not the jury. 2, *Wils.* 353. 2. That the record was not exemplified under ſeal according to the deciſion of this Court upon a former occaſion. 3. That

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That the Court ought to have directed the jury to find a ſpecial verdict as there was matter of law involved in the caſe.

WASHINGTON *contra.* There was no application to the Court to inſtruct the jury whether Smith had been guilty of *laches* or not; they were merely aſked their opinion whether an aſſignor was liable, and they gave it that he was; which is agreeable to the deciſion of this Court. Although a party may have a right to the opinion of the Court, he ſhould aſk for it according to the deciſions of this Court, but here he did not upon the point of *laches* and therefore has no ground for exception. If however the defendant had aſked it and the Court had refuſed, the refuſal would have been right. In this country even upon bills of exchange the Courts do not inſtruct the jury as to *laches*, but leave it to themſelves to decide. But there was no negligence in this caſe.

There was no occaſion that the record ſhould be exemplified under ſeal; the caſe of *Burks* exr's vs *Triggs*, * in this Court was upon the plea of *nul tiel record;* in which caſe the exemplification was proper, but here it was not in iſſue.

As to the motion for a ſpecial verdict; this point, whether a court refuſing to direct it, is guilty of error, is not for diſcuſſion at preſent. It ſeems admitted that the party has a right to the Courts opinion on the law; but what refuſal is error has not been fully ſettled. The Court has ſaid that the party may procure it by various modes. 1. By moving the Court to inſtruct the jury what the law of the caſe is. 2. By demurring to the evidence. 3. By preparing notes for a ſpecial verdict which the Court may judge of. But if the party makes choice of one, he cannot complain that he did not have the other alſo; for one is as adequate for his purpoſe as the other.

ROANE Judge. At the trial of this cauſe it appears from the bill of exceptions that two objections

* Waſhingtons'. Rep. 2 vol.

tions were taken to the writing obligatory with the assignments mentioned in the declaration being evidence proper to be submitted to the jury. 1ſt. Becauſe, inaſmuch, as it ought according to law as was alledged, to have been in the office of the Court of Caroline, having been as appears from the record in this caſe the foundation of an action in that Court, it is to be inferred that this was not the note mentioned in the declaration; and 2d That it ſhould not have been given in evidence without proving the hand writing of the aſſignors in all the intermediate aſſignments.

As to the firſt we have only to ſay, that the note itſelf was proper to be given in evidence. How the party obtained it, was not an enquiry for the Court. As an action is given to the aſſignee in default of recovery againſt the obligor, he muſt have the uſe of the note ſome-how, even if the action is brought in a different court; and we ought rather to intend that it was obtained properly than illegally.

As to the ſecond it was decided in *Mackie* vs. *Davies* * that this action was founded principally on the privity which exiſts between the aſſignor and aſſignee, and therefore the *mesne* indorſements were unneceſſary to be proved.

Another exception was taken in the argument to the obligation as proper evidence. viz. on account of a variance of the aſſignments ſet out in the declaration being ſtated to be for value received, whereas theſe laſt words are wanting in the aſſignment themſelves. To which I anſwer the expreſſion in the declaration for value received is only an averment of the plaintiff and not intended as an averment of what is contained in the aſſignments themſelves. But if this was not the caſe, this note with its aſſignments was certainly proper evidence on the general count for money had and received.

It alſo might have been objected, that there is a variance, in the aſſignments given in evidence, from

* Washington's Reports 2 vol.

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from thoſe ſtated in the declaration, as to the day in which the aſſignment was made to the plaintiff. But the laſt anſwer given to the preceding objection would equally apply to this, if it ſhould be deemed ſuch a variance, as renders it improper upon the ſpecial count: As to which it is unneceſſary for me to give any opinion.

The objection made in the exceptions to the opinion of the Court reſpecting the liability of the aſſignor is juſtly abandoned ſince the deciſion of this Court in the caſe of *Mackie* vs *Davies*.

But after having moved for and obtained the opinion of the Court on that point, and having made an exception to that opinion which would reſerve to him the benefit of reviewing it before an appellate Court, the defendant without ſtating any other point of law ariſing in the caſe, moved the Court to inſtruct the jury to find a ſpecial verdict. It does not appear that there was any other point of law in the cauſe which could be proper for the conſideration of the jury. I ſay for the conſideration of the jury, becauſe all the objections before ſtated againſt the admiſſibility or competency of the evidence were ſolely proper for the conſideration of the Court.

As much inclined as I am to think that Courts ſhould obſerve the maxim, that Courts ſhall anſwer to queſtions of law, I ſee no reaſon to extend the doctrine ſo far as that when a party has choſen to appeal to the opinion of the Court in one particular form, he ſhould upon the ſame ground only, take another chance for the opinion of the ſame Court in another form, as it will unavoidably produce delay. If indeed the defendant had ſhewn in the bill of exceptions, that there were other points in the cauſe, which were proper for the deciſion of the Court and not decided on by them, the objection would probably have been conſiderably more ſubſtantial. I am for affirming the judgment.

CARRINGTON Judge, concurred.

LYONS

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LYONS Judge. The points of law were decided by the Court under the motion to inſtruct the jury upon the law. It was too late to inſiſt upon a ſpecial verdict after having the points of law decided in another manner. The plaintiff purſued the executors of the obligor, but could obtain no ſatisfaction; and his own aſſignor was conſequently liable. I think therefore that the judgment muſt be affirmed.

PENDLETON Preſident. Concurred.

Judgment Affirmed,

DAVIES
againſt
MILLER.

What words paſs a fee in a will.

The word *eſtate* may be tranſpoſed from different parts of the will and coupled with the deviſe ſo as to give a fee.

Tho' the opinion of the Court below appear to be confined on one point, yet if it appears upon the whole record that the judgment is ſubſtantially right it muſt be affirmed

IN a writ of right brought by Davies the demandant againſt Miller and others tenants, the caſe on a bill of exceptions to the courts opinion appeared to be as follows.

John Miller being ſeized of the lands in fee made his laſt will and teſtament in writing, dated the 21ſt of February 1742, and admitted to record the next Month; which ſo far as concerns the preſent caſe was as follows.

" I John Miller being weak &c. do make my will " and diſpoſe of my *eſtate* in manner following." Then after directing that his body ſhould be buried at the diſcretion of his executors he proceeds thus.

" *Secundo*, I give to John Berry during the life " of my daughter Mary Berry wife to the ſaid " John one hundred acres of land, containing the " plantation where I now dwell all on this ſide of " the creek and bounded &c, and after the death " of my above mentioned daughter Mary 'tis my " deſire the ſaid land ſhould return to my ſon Chriſtopher

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Quere. Whether the act of 1792, enables the teſtator to deviſe lands of which he was not in poſſeſſion?

"Chriſtopher Miller or his heirs. I give all my "other lands to my ſon Chriſtopher above named "containing one hundred and fifty acres includ- "ing the plantation on which he now lives." Then follow ſeveral bequeſts of perſonal property and a ſlave; and then the laſt clauſe in theſe words.

"I leave all the corn and tobacco now upon the "plantation to John Berry to pay my perſonal "debts, this is my will and the way I deſire my "*eſtate* to be diſpoſed of, revoking any other "will or teſtament made by me formerly."

The bill of exceptions further ſtated, that the ſaid John Miller the teſtator left Chriſtopher Miller his ſon in the will mentioned. And alſo as the demandant alledged and offered to prove another Chriſtopher Miller his grandſon and heir at law. That this laſt named Chriſtopher was the eldeſt ſon of the teſtators eldeſt ſon, who died in the lifetime of the teſtator. That after the teſtators death the ſaid Chriſtopher his ſon entered on the lands in queſtion claiming them by virtue of the following clauſe of the will. "I give all my "other lands to my ſon Chriſtopher named above "containing one hundred and fifty acres including "the plantation on which he now lives." The ſaid Chriſtopher the alledged grandſon being then living. That after the death of Chriſtopher the ſon, the tenants entered as his ſons and deviſees. That on the 16th of March 1792, Chriſtopher the grandſon claiming as heir at law of the teſtator John Miller brought his writ of right for the ſame, which afterwards abated by the death of the ſaid Chriſtopher who died without having recovered poſſeſſion of the land; but made his will on the 2d of June 1792, which was proved on the 23d of September 1793, and thereby deviſed the lands to the demandants. Whereupon the tenants without going into evidence on their part moved the court that it appeared from the demandants own ſhewing that the ſaid Chriſtopher the teſtator was not either at the time of making and publiſhing his ſaid will

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will or at the time of his death ſeized or poſſeſſed of the ſaid lands and therefore that the ſaid deviſe was void. That the court was of this opinion and inſtructed the jury accordingly. The jury found for the tenants. The court gave judgment agreeable to the verdict. And the demandant appealed therefrom to this court.

WICKHAM for the appellants. The queſtion is if a man out of poſſeſſion of lands can deviſe them? Great doubts have ariſen with reſpect to ſuch a deviſe under the ſtatute of wills in England. But I believe if it were neceſſary that I could maintain the deviſe under that ſtatute, in which the words are any perſon having lands may deviſe them. But be that as it may, the act of 1792 expreſsly includes the caſe and removes all doubt upon the ſubject; and ſo I have been informed it has been decided in this Court.

WARDEN *contra*. There is another queſtion in the cauſe; whether the deviſe by John Miller did not carry a fee in theſe lands to his ſon Chriſtopher the deviſee? In this deviſe there are no words expreſsly deſcribing a ſmaller eſtate, and therefore the words in the latter part of the will, in which the teſtator ſays "this is my will and this is the way I wiſh to have my eſtate diſpoſed of" will carry the fee. For the word eſtate carries the whole intereſt and means all the right of the teſtator. This conſtruction is ſupported by the introductory words where the teſtator ſays *I dispose of my estate as follows*; thereby plainly ſhewing that he meant to diſpoſe of his whole eſtate and to die inteſtate as to no part thereof. Words of inheritance are not neceſſary to create an eſtate in fee ſimple in a will. *Guthrie* vs *Guthrie* in this Court at the laſt term.*

Then upon the point made by Mr. Wickham the law of 1792 was made to govern rights accruing after and not thoſe which were acquired before the paſſage thereof. The words are that every

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* Ante, 7

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ry perſon ſhall have power to deviſe all the eſtate, right, title and intereſt in poſſeſſion, reverſion or remainder, which he hath or at the time of his death ſhall have of, in, or to lands &c. But the teſtator in this caſe had no eſtate title or intereſt either in poſſeſſion, reverſion or remainder; for he was not in poſſeſſion, and the claim he ſet up was neither in reverſion or remainder; and conſequently he came within neither of the proviſons of the ſtatute.

Again the will of Chriſtopher was only proved by one witneſs which was not ſufficient; and the tenants had been in poſſeſſion fifty years.

If enough appears upon the record to ſhew that the tenants have the better right, the Court will decide for them without ſending the cauſe back to the Diſtrict Court to go through the mere form of another trial.

WICKHAM in reply. It is ſaid that Chriſtopher the ſon took a fee by the deviſe to him in John Millers will; which I do not admit. By the firſt clauſe he had clearly only an eſtate for life by the ſettled law of the land. There muſt be a ſufficient expreſſion to alter this rule; and the words in the latter clauſe do not contain ſuch an expreſſion. The words there are according to the common ſtile in wills. To have had the effect contended for, the word *all* ſhould have been inſerted. Beſides there is a clauſe which expreſſes another idea; for it is to the deviſee and his heirs, and yet in the next clauſe to the ſame deviſee he does not uſe words of perpetuity or inheritance: which ſhews that when he intended a fee he knew how to create it.

It was ſaid that the act of 1792 relates to eſtates acquired afterwards and not to thoſe which the teſtator had before; but there is no reaſon for the diſtinction: The words are ſufficient to enable him to deviſe his intereſt of every kind; and the deciſion of this Court was ſo.

Although the will was proved only by one witneſs in the Court where probat was obtained yet it does not appear, but that there might have been other evidence

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evidence, at the trial. But the Court will consider only what point was made and decided by the inferior Court; and if the deciſion on that was wrong they will reverſe the judgment and award a new trial. Mr. Warden ſays that the Court will decide upon the whole record; and if our conduct was improper prior to the deciſion he would be right; but no ſuch thing appears and therefore I think the Court is confined to the point in deciſion. For what was ſtated prior thereto was only explanation and inducements leading to the point which was decided.

WARDEN. There is no evidence that the will was proved as the law requires, and it cannot be preſumed. The word *eſtate* means the whole intereſt, and ſo the teſtator intended it.

PENDLETON Preſident. This is an appeal from the Diſtrict Court of King and Queen, wherein a writ of right the *miſe* was joined on the mere right; and a jury were ſworn and charged to decide it.

The demandant filed a bill of exceptions ſtating the title of both parties to be derived from John Miller who died ſeized in 1742. The demandants claiming under Chriſtopher his grandſon and heir at law, the tenants under Chriſtopher his ſon, to whom the teſtator deviſed it by his will.

By the ſtrict wording of the opinion it would ſeem as if it was founded on the ſtatute, requiring as the Court appear to have ſuppoſed, ſeizin and poſſeſſion of the lands to enable a teſtator to diſpoſe of them, which Chriſtoper the grandſon had not and therefore according to the opinion, could not deviſe them though he ſhould have had title. But if it appears, by the demandants own ſhewing, that Chriſtopher the grandſon had neither ſeizen poſſeſſion or title, ſo that they could derive none from him, the opinion and verdict were ſubſtantially right, and the court will affirm the judgment.

Whether the heir had a title depends on the will of his anceſtor deviſing the lands to his ſon Chriſtopher

Davis, vs Miller.

Chriſtopher without limitation, but declaring in the preamble he intended to diſpoſe of his eſtate and towards the concluſion that he had diſpoſed of his *estate* according to his will.

If this paſſed a fee to the ſon, his title was in the tenants and the heir had no title. If on the contrary, it only paſſed an eſtate for life, the reverſion deſcended to the heir, who had a right to the poſſeſſion on the death of Chriſtopher his ſon.

That the word *estate* coupled with the deviſe will comprehend the intereſt, as well as deſcribe the thing and paſs a fee has long been ſettled. That it may be tranſpoſed from the preamble or other parts of the will and annexed to the deviſe, to fulfil the intention of the teſtator, which all agree is to give a fee by theſe unlimited deviſe, is warranted by precedents in England and in this Court.

The teſtator here has doubly fortified his deviſe, by the word *estate* in the preamble and concluſion of his will. Which the court do not heſitate to ſay paſſed a fee to Chriſtopher the ſon; and that the heir had not, and conſequently the demandants have no title.

Affirm the judgment.

M'CALL,

M'CALL
against
TURNER.

THIS was an appeal from the Diſtrict Court of King and Queen, upon the following caſe. On the 18th day of January 1774, Reuben Wright, Reuben Turner, Benjamin C. Spiller and William Aylett entered into a bond of the uſual form, to Robert M'Kendliſh in the penalty of £55 with condition to be void on payment of £27:10 on or before the firſt day of October thence next following "with intereſt from the date;" which bond M'Kendliſh aſſigned to the plaintiff by an indorſement in theſe words "pay the within to Archibald M'Call," ſigned Robert M'Kendliſh. Upon which bond M'Call brought ſuit in the Diſtrict Court of King and Queen in July 1793, againſt Wright, Turner and Spiller; Aylett being then dead. The writ was executed by the ſheriff of King William county on Turner only, and Spiller and Wright were returned "no inhabitants." The plaintiff filed a declaration on the above bond in the common form of declarations upon aſſigned bonds, after which follows an entry in theſe words "abated as to the defendants Reuben "Wright and Benjamin C. Spiller, by the return "and a conditional order againſt the defendant "Reuben Turner and James Turner bail for his "appearance." The conditional order was confirmed at the next rules; and at the ſucceeding Court Reuben Turner gave ſpecial bail, plead payment and the plaintiff took iſſue. In April 1795 the cauſe ſtood for trial, and the jury being charged upon the iſſue, the plaintiff filed a bill of exceptions to the courts opinion, which ſtated that the defendant "moved the Court to be permitted to "give evidence to the jury that the plaintiff was "abſent in foreign parts beyond ſeas, and not "within the ſtate of Virginia for the ſpace of eight "years, to wit, from the 19th day of April 1775, "to

A writ cannot iſſue from one Diſtrict Court into another diſtrict altho' againſt joint defendants.

Evidence may be given to the jury on the plea of payment to a bond, that the plaintiff was abſent in foreign parts beyond ſeas in order to extinguiſh the intereſt.

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"to the 19th day of April 1783, and that during "that period, he had not any known agent or at- "torney within the commonwealth who would re- "ceive payment of the debt and give a legal diſ- "charge for the ſame, on which the ſuit is found- "ed, with a view of extinguiſhing the intereſt "during that period, to which the counſel for the "plaintiff objected, but the Court permitted the "defendant to offer ſuch evidence if he ſhould "think fit to do ſo. And the defendant being per- "mitted to give evidence to the jury, to the pur- "poſe aforeſaid, it was proved that the plaintiff "was out of Virginia in parts beyond ſea from "ſome time in the year 1775 to ſome time in the "year 1783, which was permitted to go to the "jury." The jury found a verdict for the plain- tiff, that the defendant had not paid the debt in the declaration mentioned, but that the ſame ought however to be diſcharged by the payment of £27: 10 with intereſt thereon from the date of the bond until the 19th day of April 1775, and from the 19th day of April 1783, until paid, and aſſeſſ- ed damages to a penny; the Court gave judgment for the plaintiff for the penalty of the bond to be diſcharged according to the directions of the ver- dict and the coſts of ſuit. From which judgment the plaintiff appealed to this court.

WARDEN for the plaintiff. It is not neceſſa- ry to ſay much upon this queſtion; for the record ſhews manifeſt error in admitting improper evi- dence to go to the jury. The plea was pay- ment, and nothing but what went to prove that could be admitted; for nothing elſe was within the iſſue. Now the notice is not to prove a pay- ment, but only that the plaintiff was abſent during a certain period; and it does not even appear that there was no agent here to receive payment. All the jury upon this iſſue could do was to find that the debt was paid or not; and if travelling out of the iſſue they of their own accord ſhould di- miniſh the debt, the court would grant a new trial. The law is that judgment ſhall be for the penalty,

to

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to be discharged by the principal debt with interest and costs; and so it is constantly done in cases of judgment by default, which proves the law of the case. It does not appear that there was any other evidence, though the bill of exceptions does not state that this was all. Upon the whole I conclude that the evidence was inadmissible; and consequencly that the judgment is erroneous and ought to be reversed.

WICKHAM *contra.* This was a suit upon a joint bond, which could neither be sued or prosecuted severally. Therefore the plaintiff should have pursued all the obligors and should not have abated the suit as to the non-residents; for he thereby discontinued as to the defendant who was arrested. It may be said that this should have been pleaded in abatement; but that was not necessary because it appears upon the record, and Turner could not have pleaded it, because the declaration was joint. The act of Assembly had provided the means of bringing all the parties before the Court; and therefore it ought to have been done. At least the plaintiff should have followed up his process.

Then as to the point made by Mr. Warden. My own impression from the act of Assembly originally was that the jury were merely to find if any, and what payments had been made, and the Court were to ascertain the rest; but on my first coming to the bar I found the practice to be settled the other way, and that the jury were to find the sum by which the penalty should be discharged which I suppose was done upon a proper consideration of the law. I had occasion once to submit this question to the Federal Court, and contended that the jury should find the payments specially; but the Court enquired into the practice of the General Court, and being informed that it was to find generally, they submitted the cause to the jury. Therefore I conclude that the practic is now settled that the jury may enquire into the amount; and of course must be regulated by evidence and the circumstances. The

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The circumſtances do not appear in this caſe; but if under any circumſtances there might be a deduction of intereſt, the Court will ſuppoſe thoſe circumſtances appeared, as every thing tranſacted in a Court of juſtice is preſumed to be rightly done until the contrary is ſhewn. The queſtion therefore is whether under any circumſtances a deduction of intereſt can be made by the jury? The act of Aſſembly does not ſtate from what period the intereſt ſhall commence. I ſuppoſe the act was founded on the practice in the Courts of Chancery of relieving the obligor on payment of principal, intereſt and coſts. In which Court circumſtances would clearly be taken into conſideration and a deduction made accordingly. As to the caſe now under conſideration all the circumſtances are not ſtated, but there are ſeveral mentioned which afford an equity. The plaintiff was abſent during all the time mentioned in the notice and there was no known agent to whom payment could be made. Now if in this time he attached himſelf to the other party and became an alien enemy, ſo that the defendant was prohibited from having any intercourſe with or paying him the money in that caſe a reduction of intereſt would be highly reaſonable. For it would be againſt conſcience that the creditor ſhould demand intereſt when his own abſence was the cauſe why the debt was not paid. I do not ſay that this was the caſe; but although no proof of theſe circumſtances is ſtated yet as the contrary does not appear, the Court will intend that they or ſome ſuch were proved, for the reaſon before given, namely whatever is tranſacted in a Court of Juſtice ſhall be preſumed to be rightly done until the contrary is ſhewn.

WARDEN. As to the queſtion concerning the abatement, there is no difficulty in it. The ſheriff is bound to return the truth of the caſe, for otherwiſe the proceſs might be infinite. In the County Courts it has been conſtantly done both before and ſince the revolution. When this ſuit was commenced the Diſtrict Court did not poſſeſs the

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the right to iſſue meſne proceſs out of the limits of the diſtrict. There is a manifeſt diſtinction in this reſpect between the act of 1788 under which this ſuit was brought and the act of 1792 ſpoken of by Mr. Wickham. The plaintiff therefore proceeding under the act of 1788, was obliged to ſubmit to the abatement; for he could not follow up the proceſs as to the non reſident defendants.

Then as to the point of evidence. Any thing elſe might as well have been proved under the plea of payment as the abſence of the party. If the defendant had pleaded the fact ſpecially it would have been demurrable to; which proves that ſuch evidence before the jury cannot be admitted; for whatever goes in deſtruction of the plaintiffs right may be pleaded. Even a tender in this caſe would not have availed; becauſe the day of payment had arrived, before the plaintiffs departure from the ſtate. A caſe in the Federal Court was mentioned, which I do not recollect; but I remember that in the caſe of *Jones's* ex'rs vs *Hylton*, Chief Juſtice Jay, was of opinion that the jury could not deduct intereſt. For he ſaid that it was the act of the Court to aſcertain the amount ſtill due after the payments were deducted, which was all that the jury could enquire into. It has been ſaid that no particular intereſt was fixed by law; becauſe the act of Aſſembly does not ſay that any intereſt ſhall be recovered, but only that not more than 5 per cent. ſhall be taken. If though the law has ſaid that the obligee ſhall not take more than 5 per cent. it certainly implies that he may take that, and the uniform practice of the country has been to give judgment for it, which proves the univerſal opinion of the law. By the treaty of peace we agreed to the payment; and there is no exception in it of caſes where the party was abſent. It is time for us to lay aſide a conduct which has ſubjected us to the obloquy, of all good men both in Europe and America, and muſt be diſagreeable in the ſight of God and Angels. For intereſt is a part of the debt and the

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plea of payment ſignifies the payment of intereſt as well as principal, and conſequently the deduction of intereſt where there is no payment is what a jury cannot do conſiſtent with their oaths, and no Court can with propriety receive their verdict.

WICKHAM. As to the firſt point which I made the diſcuſſion is new. It is admitted that if the ſuit were in the General Court or any other of unlimited juriſdiction, that the plaintiff ought to have continued the proſecution againſt all; which goes the length of deciding the cauſe; for the act of Aſſembly has given juriſdiction *pro hac vice*. The act of 1792 does not admit of a doubt. I do not know that it has ever been decided that the defendant in ſuch a caſe could not plead the jointure in abatement, but upon principle I ſhould think he might; and as the fact is open upon the record, he may take the ſame advantage of it as if it were regularly pleaded. This is not an objection of form merely, but goes to the very eſſence of the plaintiffs right. Who ſhould purſue all jointly and not harraſs one without calling on the others, ſo that he might have their aid in the defence and ſuccour in the payment.

WARDEN. The act forbids iſſuing a writ into any diſtrict but that in which the defendant reſides under pain of having the ſuit diſmiſſed with coſts. The ſubſequent clauſe only relates to the right of arreſting the co-obligor if found in the diſtrict in which the writ is iſſued. This is clear from the next member which gives a right to ſue upon a copy. The plaintiff might have had ſeparate ſuits depending againſt each defendant in his own diſtrict, which by virtue of this clauſe he is enabled to maintain. Although I admit that ſatisfaction of one execution would have diſcharged all.

WICKHAM. The Diſtrict Courts uniformly interpret the law as I underſtand it; and the conſtant practice is to ſend writs into other diſtricts.

FLEMING Judge. There were two points made in this cauſe, one by the plaintiffs counſel

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on the propriety of admitting the evidence in order to extinguish the interest during the absence of the plaintiff from this country; and the other by the defendants counsel on the point whether the plaintiff by failing to continue the process against the non resident parties, had not discontinued his suit altogether?

On the first question, it was said by the plaintiffs counsel that such evidence could not be given on the plea of payment. Which position is correct if the case be considered at common law merely. But the act of Assembly has altered the common law; and by allowing the penalty "to be discharged by payment of the principal and interest due thereon," necessarily turns the quantum into a question to be determined by circumstances; and I think it was the province of the jury to decide that question. The plaintiff by absenting himself from the country, put it out of the debtors power to make payment; and therefore it is unreasonable that he should demand interest during that period. This was a circumstance proper to be left to the jury upon a plea of this kind, in an action of debt upon a bond. It is like collateral evidence to mitigate damages in actions of assault and battery.

As to the other point. The act of Assembly does not give such extensive jurisdiction as the plaintiffs counsel contended for; the clause relative to the copy of the bond proves it. Which would have been unnecessary if the Court had possessed general jurisdiction so as to force the appearance of the non resident defendants from other districts. According to any construction though I think it ought to have been pleaded; and therefore I am of opinion that the judgment of the Court was right upon both grounds and should be affirmed.

CARRINGTON Judge. Every question in this case might have been saved, except that upon the bill of exceptions. If Mr. Wickhams argument were correct a judgment might never be obtained

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tained where there are ſeveral defendants; becauſe it would ſeldom happen that they all could be found in one diſtrict. For the act of Aſſembly does not admit of the enlarged juriſdiction which he contends it does. Although the words of the proviſo page 83* are calculated to give that impreſſion at the firſt view, yet a cloſe attention will lead to another conſtruction. For the next member of the ſentence which allows a copy to be given in evidence would according to the other expoſition have been unneceſſary. But let the interpretation of the act be what it may, the matter ſhould have been pleaded in abatement, without which if it even be admitted that his argument is correct the defendants counſel cannot avail himſelf of it. Upon that ground therefore I think there is no error.

The whole queſtion then reſts upon the other point; and I think the jury had a right to decide what was the amount of the intereſt due. The act of Aſſembly ſeems to me eſſentially to inveſt them with this power. For by the expreſs directions of the act the penalty is, "to be diſcharged by payment of the principal and the intereſt due thereon," with the coſts of ſuit. Who then are to ſay what "intereſt is due thereon?" The jury ſurely; who muſt decide upon the circumſtances of the caſe, and ſay when it ſhall commence, how long it ſhould continue, and when it ſhould be ſuſpended or extinguiſhed. On all general iſſues (and this is one) the whole circumſtances of the caſe ſhould be ſubmitted to the jury, who are to decide accordingly.

As to the juſtice of the caſe, I do not think that its being a Britiſh debt or not makes any difference; the ſame rule would apply in a caſe between two citizens. Now ſuppoſe a caſe between two citizens, in which one is creditor and the other debtor; and that the creditor removes himſelf into parts unknown, ſo that the debtor could not come at him in order to make payment, would it be juſt that full intereſt ſhould be given? And

* *Rev. Code.* ought

ought not the jury to enquire into the circumſtances and reduce the intereſt accordingly; Again ſuppoſe there be a bargain and ſale of property and that the ſeller keeps the property a long time, would it be right that he ſhould recover intereſt upon the purchaſe money during the time of his unjuſt detention of the property? Surely not; no jury but what would deduct it; and I think the law would warrant them in doing ſo. In this caſe the plaintiff abſented himſelf, went into a country with which we had no intercourſe, and did not return till 1783; ſo that his debtor could not make payment to himſelf, or by remittance. If under theſe circumſtances he were to have full intereſt, he would be better off than our own citizens, who ſtaid at home and ſuſtained the injuries of the war. Upon the whole matter the trial appears to have been fair; the plaintiff had notice of the evidence; the verdict I think was juſt, and does not in my opinion endanger the honor of the country. Therefore I am for affirming the judgment.

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PENDLETON Preſident. It is ſaid by the appellees counſel that this being a joint bond, one obligor could not be proceeded againſt alone, that the abatement againſt the others on the return of the ſheriff of King William that they were no inhabitants was an error, and the plaintiff ought to have proceeded againſt them according to the directions of the Diſtrict Court law. What that ſhould be, was a matter of doubt at the hearing, either from a partial reading of the clauſe, or inattention in me. I thought a *teſtatum capias* might iſſue from King and Queen to any county in the ſtate, returnable and to be proceeded on there; and that the plaintiff ſhould have ſo proceeded: I find I was miſtaken though, and Mr. Warden right, that a diſtinct ſuit was to be commenced in the diſtrict where the others were to be found, in which a copy of the bond was to be evidence, or the Court might order the Clerk of King and Queen to attend with the original.

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But this proceeding ſeems intended for the benefit of the defendant, who might waive it and proceed againſt the defendant only who had been arreſted, if he was ſatisfied of his ability. Mr. Wickham in anſwer to the objection that he ought to have pleaded this in abatement, endeavored to obviate it by obſerving, that he was prevented from pleading it, becauſe the declaration ſtood againſt all. But the abatement was before the plea, and had the ſame effect as to him, as if their names had been ſtricken out of the declaration; he had a right to waive it; and might chuſe to do ſo, to ſave expence and delay, relying on a total indemnity from the principal if ſolvent, or if he was inſolvent, a contribution from the co-ſecurities. I concur in opinion that by pleading in bar, he legally waived the objection.

As to the queſtion, on the merits, relative to intereſt.

We are told that the juries through the ſtate are branded with infamy by all impartial obſervers, as having in their verdicts ſtriking off intereſt during the war, violated the principles of juſtice, of law, of treaty, of the Federal conſtitution and finally of religion. A heavy charge indeed againſt a State; for ſuch it muſt be, ſince the jurors diſperſedly collected at the various Courts, uniformly purſue the opinion, which evidently proves the general ſentiment.

Who theſe impartial obſervers are I know not but will avow myſelf to be impartial (unleſs I may be ſuppoſed to poſſeſs a national bias, and from that it is equally probable that the gentleman or his obſervers are not free) and will endeavor as far as my opinion will go to redeem my country from this grievous charge, with equal ſincerity tho' with leſs acrimony than the gentleman made it.

1. Upon the *juſtice* of the caſe. A claim of the principal debt is founded on the modern practice of war in Europe, ſecuring individual property from confiſcations in conſequence of national

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wars. I who am an utter enemy to all war, if it can be avoided, cannot but approve of this, and every other practice tending to soften its rigors. Our Legislature in the preamble to their sequestration act, acknowledge the principle, and manifest a wish to adopt it, but waited to discover whether our enemy would observe those rules in a war, different from one between independant nations. Did Britain meet us upon that liberal ground? The recollection is painful. I wish it could be forgotten, and it is with an ill grace citizens of that country make it necessary to review it. Their treatment of our unhappy soldiers who became their captives; their wanton destruction of our towns, houses and other private property; their plunder of plate and specie; but above all, as most materially effecting this state, their tempting our slaves by a delusive promise of manumission, to take arms against us; slaves which they had introduced and received our money for, and in which property alone our citizens probably lost more value than the amount of all the debts they owed the British merchant: These I say were so many infractions on their part of the modern practice of war, which would in reason and justice deprive them of the beneficial parts of that practice, as against American debtors, and throw the creditors upon their own government; for satisfaction which by its conduct deprived them of their ordinary recourse against their debtors. So that I am free to declare my opinion that, independant of the treaty, they were not entitled in justice to recover one shilling of their *principal* debts from the debtors.

I would not be understood, by what I have said, to find fault with the treaty of 1783 in this respect; much less to hint that it ought not to have been performed. As a citizen I have ever thought and expressed myself otherwise. Because a treaty disadvantageous in one article and beneficial in all others, was as much as we could expect, and at any rate preferable to a continuance of the war. When I say it ought to have been performed, let

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me be underſtood to mean upon condition, that Britain had complied with the treaty on her part, having no idea that in compacts, national or private, containing mutual covenants, a party who has broken his covenants, can complain in a Court of juſtice, of a breach on the part af the other.

However this is now out of the queſtion, and I have no difficulty in deciding as a Judge that we muſt regard that treaty as a law, controuling our confiscation acts, and that the debts are to be paid: The only queſtion therefore is, whether intereſt during the war, conſtitutes a *bona fide* part of the debt? And I do not heſitate to declare my opinion in the negative, whatever ſtigma may be attached to that opinion.

Our ſituation at that period, attacked by a powerful nation, to whoſe government we had been ſubjected; called to the exertion of every power, perſonal and pecuniary in defence of life, liberty and property; and without commerce (which had been theretofore monopoliſed by that nation) to enable our citizens to pay their debts, takes the caſe out of every principle on which intereſt is demandable.

The objection applies to all creditors, but a *fortiori* againſt thoſe of the nation, who unjuſtly brought us into that ſituation.

I ſhould ſuppoſe that under the modern practice of war, all the creditors of the enemy nation could expect, would be to be placed on the ſame ground with the citizen creditors; ſubject to all inconveniences which imperious neceſſity impoſed on the latter, in conſequence of the war. Strike out the intereſt in queſtion, they are placed in a preferable ſtate, they received their principal, and all proceeding and ſubſequent intereſt in *ſpecie*, the others received theirs in depreciated paper.

But ſuppoſe the plaintiff a citizen going beyond ſea, with his bond and leaving no agent to receive the money, ſince the debtor could not by paying the

the debt, if the war had permitted his attention to it, have ſaved the intereſt that alone ought to exempt him from it.

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On the merits therefore I am of opinion that no intereſt is due, and that none of the moral obligations ſtated are violated by the opinion. Whether religion has been tranſgreſſed will reſt with another and more unerring tribunal!

2. Having ſhewn on what ground my opinion is formed that juſtice is attained in the deciſion appealed from. It only remains to conſider the objections to the mode of proceeding upon the bill of exceptions.

It is to the opinion of the Court, permitted the defendant to give evidence "that the plaintiff was "abſent beyond ſea, from April 19th 1775, to "the 19th of April 1783, and had no known attor-"ney here to whom the money could have been "paid, with a view to extinguiſh the intereſt dur-"ing that period," on previous notice, that ſuch evidence would be offered, that the objection is taken; and it is ſaid the admiſſion of ſuch evidence is improper on the plea of payment, for that even payment of principal and intereſt after the bond was forfeited, if pleaded, might be demurred to.

If the counſel meant, that this was the caſe at the common law he was correct; but it does not apply at preſent. At common law if the money was not all paid at the day, although only a ſhilling remained due, the bond was forfeited and the penalty was thenceforth conſidered as the debt. This rigid law drove the debtor into a Court of Equity, whoſe maxims permitted it to relieve againſt penalties and forfeitures in all caſes where juſt compenſation could be made, of which in this inſtance principal and intereſt was adopted as a juſt meaſure; what had been paid was allowed, and, on payment of the balance, an injunction ſtood to the judgment for the penalty.

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This circuitous proceeding was a public evil, and the Legiſlature wiſely provided a remedy by the act to prevent frivolous and vexatious ſuits, long ſince introduced and continued in our code, tranſferring to the juries, the equitable juriſdiction. Upon the trial, not only payments but diſcounts are to be allowed, and the jury are to ſay what is due of principal aud intereſt, on payment of which the judgment for the penalty is to be diſcharged. Now if inſtead of payment of intereſt proof is made to their ſatisfaction that in right and juſtice the intereſt ought not to be paid, what ſhall reſtrain the jury from finding that intereſt not to be due, or the Court from permitting the evidence to that effect to be given? I know of nothing in law or reaſon to interdict either. If we recur to the principles of equity on the occaſion, from whence the juriſdiction is drawn by Courts of law, perſuaded I am that no Chancellor in relieving againſt penalties, would impoſe upon a debtor the payment of intereſt which on proofs before him appeared not to be due in conſcience. The notice in this caſe was fair, though from the hiſtory of the buſineſs in general it does not ſeem to have been required, but it has been diſcuſſed as a thing of courſe.

We are told that the Federal Chief Juſtice in an elaborate charge to the jury in *Jones* vs *Hylton*, declared his opinion in favor of intereſt. I have no doubt but he gave that opinion with the like ſincerity, as I have delivered mine to the contrary, and mankind if they think it worth while, will judge between us.

So far as it concerns the preſent caſe, it ſeems, after telling the jury the intereſt was a queſtion of law, in which I have alſo the misfortune to differ from him, thinking it proper for the jury to decide what intereſt as well as principal is due, he finally ſaid the jury might decide both law and fact if they choſe it. This power it ſeems the juries exercifed; and their verdicts being uniform againſt the intereſt in the Federal as well as other Courts; the

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creditors and their counſel have acquieſced, and ſtruck off the intereſt as a thing of courſe.

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This happy train of the buſineſs ſhall not be interrupted by my opinion. For I cordially agree with my brethren in affirming the judgment.

Judgment Affirmed.

BRANCH *againſt* BURNLEY.

THIS was an appeal from a decree of the High Court of Chancery, upon the following caſe. Burnley and Breckenridge employed Mr. Briggs an attorney at law to bring ſuit for them againſt Ozborne the teſtator of Branch in the County Court of Cheſterfield. He obtained judgment for them in the year 1772, and in the year 1774 a replevy bond was given. In 1778 Ozborne paid the money to Briggs; and after the war in the year 1787 the plaintiffs moved for judgment on the replevy bond in the County Court of Cheſterfield againſt Branch the executor, which was refuſed. Whereupon the plaintiffs at law filed a bill of exceptions ſtating the foregoing matters and the payment to Briggs. And thereupon appealed to the General Court, from whence after the law eſtabliſhing Diſtrict Courts the cauſe was transferred to the Diſtrict Court of Richmond, where the judgment of the County Court was reverſed. The defendant then applied to the Court of Chancery for an injunction which merely ſtated the caſe as above ſet forth except that the bill mentioned that the complainant ſuppoſed that Briggs had received authority to collect it. The Chancellor awarded the injunction on the uſual terms of releaſing errors at law. Which the complainant did. The reſpondents in equity demurred to the juriſdiction; and by anſwer denied that Briggs was authorized

An att'y may receive the money recovered from the defendant, and his receipt will diſcharge th' judgment.

This has become a cuſtom.

Equity may relieve tho' the complainant might have had redreſs at common law.

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rized to receive the money. Briggs being examined ſaid that he was not particularly inſtructed or impowered to receive the debts by Burnley and Breckenridge; but that what he did was with the ſole view of getting his clients debts as expeditiouſly as poſſible. That the common practice of himſelf and of other County Court attornies at that time (as he believed) was to receive the debts in any ſtage. Two other witneſſes were examined as to the cuſtom of attornies in receiving the monies for which they brought ſuit. And a fourth witneſs ſaid that part of the money paid aroſe from collections of debts due before the war. The Chancellor diſmiſſed the bill for want of equity. And the complainants appealed to this Court.

PENDLETON Preſident. The Court has little doubt upon the merits; for they think the payment to the attorney was good. But the complainant ſeems to have miſtaken his remedy, for the whole matter was ſtated on the record, ſo that he might have had relief by appeal or ſuperſedeas. The queſtion then is whether the releaſe of errors which was impoſed upon him by the Chancellor but which prevented him from reſorting to a writ of ſuperſedeas afterwards has altered the caſe? On this point we wiſh to hear counſel.

WICKHAM for the appellee. The queſtion is if a party having a remedy at law by way of appeal can go into equity without the leave of the other party? The Court of Chancery can proceed either becauſe they have original juriſdiction or by the concurrent act of the parties ſince the act of 1787. But here was no original juriſdiction and the parties have not conſented, for there is a demurrer to the juriſdiction and therefore the caſe is not aided by the act of 1787. Burnley had a right to a common law trial; it was the proper juriſdiction; and therefore the Court of Chancery ſhould not have interfered. Nothing but the act of the Court then can alter the caſe. But the Court cannot by its own act give juriſdiction where it had none. Or elſe the Court of Chancery might obtain univerſal juriſdiction The

The authority of an attorney at law to receive the money expires at the end of the year and day unleſs he receive new directions.

RANDOLPH *contra.* The uſage of the country is in favor of Branch; but independant of that, the replevy bond might have been executed by motion and it was the attorney's buſineſs to proceed. At all events the act of Aſſembly which regulates the computation of time reduces the period within the year and day.

The functions of Briggs created a truſt which gave the Court of Chancery juriſdiction and would have ſuſtained a bill of interpleader. Beſides that Court having compelled the plaintiff to give the releaſe of errors, ought not to refuſe to entertain juriſdiction of the cauſe afterwards. The miſtake of the Court ought not to prejudice the right.

WICKHAM. There was no truſt in this caſe; and if a bill of interpleader lay yet none is filed. The Chancellor on diſmiſſing the bill might have enjoined the reſpondent from ſetting up the releaſe. And although the time may have expired yet that perhaps would be no objection under the circumſtances of the caſe.

ROANE Judge. The queſtions I ſhall conſider in this cauſe are. 1ſt, Whether the caſe exhibited by the appellant in his bill is in itſelf proper for the juriſdiction and relief of a Court of Equity? And if not then 2. Whether it can become ſo from the circumſtance of the opinion of this Court that the Diſtrict Court erred in point of law, to the injury of the appellant, in their judgment in 1791; and that he is now barred from correcting that judgment on the common law ſide of this Court by reaſon of his releaſing errors on obtaining the injunction and by the lapſe of the time limited by law for obtaining appeals, writs of error and ſuperſedeas?

Upon the firſt queſtion I hold it to be a clearly eſtabliſhed principle that a judgment of a Court of Common Law, though erroneous, given on a le-

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gal queſtion ſhall never be corrected or diſturbed in equity upon grounds which were proper for the conſideration of the common law Courts, and which therefore we muſt ſuppoſe ſuch Court to have decided upon; unleſs the applicant to the Court of Equity can ſhew ſome particular circumſtances to have taken place, operating as an impediment to his availing himſelf of thoſe grounds upon the trial at law.

A contrary conſtruction would erect a co-equal Court exerciſing a different line of juriſdiction into an appellate Court, deſtroy thoſe barriers between the reſpective juriſdictions which have been wiſely and anxiouſly eſtabliſhed and kept up, both in this coutry and in England. Such a conſtruction would admit a party to come into a Court of Equity although remediable by a Court of Law, when he alledges as a ground for coming into equity, and ought truely to alledge it, it is preſumed, at leaſt where there is not a concurrence of juriſdiction, that he is only and properly relievable in equity.

The queſtion decided upon in the preſent inſtance by the judgment of the Diſtrict Court, reverſing that of the County Court, is a queſtion of a nature purely legal. It is as ſimplified by the bill of exceptions, whether the receipt of an attorney at law, not ſpecially authorized to receive payment, by his client, given a conſiderable time after the judgment was obtained, operates as a diſcharge of the debt?

That Court in conſidering this queſtion ought, and we muſt preſume did take into its conſideration the general cuſtom ſpoken of in the appellants bill, if that cuſtom conſtitutes a part of the law of the land, and their deciſion was againſt the validity of the cuſtom as a part of the law of the land. If this judgment was in this reſpect erroneous, it could be corrected by an Appellate Court of Law only. Till then the deciſion ſhould be taken to be right.

But ſuppoſing this cuſtom be merely an unauthorized and illegal cuſtom, the plaintiff in equity

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cannot avail himself of having conformed thereto without alledging and proving the particular assent of the appellee to be bound thereby. This particular assent is not alledged in the present bill; and indeed if in fact it had been given, testimony thereof was proper in the trial at law and should not now be set up in equity unless discovered since that trial, or then could not be urged on account of some particular impediment.

Nor should the allegation of the appellant that he had no notice of the appeal till after the determination be permitted to sustain him in equity. For then every cause of whatever nature would be liable to be carried from a Court of Law into a Court of Equity. But in fact the determination of this appeal was known to the appellant in due time to have enabled him to review the decision, in the ordinary way before an appellate Court of Law.

These are the grounds on which the appellant has brought himself into a Court of Equity. For I suppose little stress will be laid on the circumstance which is alledged, but not proved, of Briggs's threatening to sue out an execution against him. Grounds which were proper for the consideration of a Court of Law, and can confer no jurisdiction on a Court of Equity, without erecting that Court into an Appellate Court of common law jurisdiction.

I come now to the second question viz. whether as the bill of the appellant, in itself has not presented a case which is proper for the cognizance of a Court of Equity, the case will be considered so, from any opinion this Court may entertain that the judgment of the District Court is erroneous in point of law, but yet cannot be corrected by a Court of Law in favor of the appellant, by reason of his release of errors on obtaining his injunction, and the lapse of the term limited by law for obtaining appeals, writs of errror and supersedeas?

Being informed that this Court has decided heretofore the question decided by the District Court

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Court differently from what that Court has done, we cannot reasonably doubt but that that judgment is in point of law erroneous: But this Court, setting as a Court of Equity, ought not by a side wind to undertake to say that such judgment is erroneous or in effect to reverse a common law judgment, although from principles before established in other cases they would probably reverse the judgment, if regularly brought before them, on the common law side of the Court.

Over and above the danger of an appellate Courts giving its sanction to any question or resolution not directly and judicially considered, this doctrine pre-supposes the Court to understand the merits, in point of law, of a judgment which is merely collateral and which it has not judicially considered. And however short and plain the question of error in this particular case may be, we should be cautious of acting upon a principle and establishing a precedent which would impose on this Court in its appellate character as a Court of Equity, the task of reviewing a common law judgment not appealed from and only collaterally brought before it.

If then this Court cannot now with propriety say that the judgment of the District Court is erroneous, we cannot say that the appellant has been injured by barring himself from reviewing that judgment as at common law; for whether he is injured, or not, depends upon the question whether the judgment of the District Court be erroneous or not. A question which this Court ought not to decide for the reasons already assigned.

Far be it from me to impeach the power of a Court of Equity to give relief against a judgment at law. My position however is, that when such relief is granted it is on the ground of some unconscientious conduct on the part of the party inforcing that judgment; or on the ground of some vice in the judgment itself, arising from circumstances other than an erroneous opinion, in point

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of law, of the common law court in that particular caſe. In the preſent caſe this Court cannot ſay that it was unconſcientious and oppreſſive in the appellee to carry into effect a judgment of the Diſtrict Court obtained without any circumſtance of unfairneſs.

But if that judgment might now be properly conſidered as erroneous and originally liable to reverſal, as the appellant might, ſo he has waived his right to a review both expreſsly and impliedly; expreſsly by agreeing to releaſe errors and impliedly by ſuffering that time to elapſe within which he ought to have applied for ſuch review under the terms of the act of Aſſembly.

There is no hardſhip in confining a party to one juriſdiction. It is a general principle of equity that a man ſhall not be permitted to ſue both in law and equity for the ſame thing; this principle has given riſe to the practice of requiring a releaſe of errors at law on obtaining injunctions to judgments. It is bottomed on a principle that a man may waive any particular right or benefit and on the evident juſtice of preventing a party from being vexed and harraſſed in various Courts for the ſame cauſe, but that he ſhall ſtand or fall by the election he has made.

It will readily be obſerved that in deciding this caſe I go by general principles. Poſſibly this particular appellant may be injured by the ſituation into which he has brought himſelf, by an injudicious courſe of proceeding. This however is of his own chuſing and the probable hardſhip of his own creating.

And it is better even in the eye of a Court of Equity that an individual ſhould ſuffer an injury ariſing from his own acts and conduct than that that Court ſhould, with the view of relieving him, uſurp a juriſdiction prohibited by law, and break down the partitions wiſely eſtabliſhed in our judiciary ſyſtem.

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For theſe reaſons I am of opinion that the Chancellor had no juriſdiction in the cauſe; and ought to have given judgment for the appellee on the demurrer.

FLEMING Judge. The firſt queſtion is whether the complainant has ſhewn a caſe proper for the relief of a Court of Equity againſt the judgment of the Diſtrict Court?

And I think he has. It was the cuſtom of the country and is ſo proved by the teſtimony in the cauſe for the attorney to receive the money on behalf of his client from the defendant. It frequently happened that the creditor would refuſe payment himſelf and referred the debtor back to the attorney to ſettle the buſineſs. Indeed ſo far was this principle carried that the merchants would not employ an attorney who refuſed to do ſo.

It is ſaid that the attorney's authority ceaſed after the year and day. But ſuch an anſwer would have aſtoniſhed the client to whom it was made. Briggs's power continued till revoked, and his duty was to move for judgment and award of execution on the bond. The Court has already determined that payment to the attorney was good; and the practice is convenient to both debtor and creditor. So that there is no doubt but that the judgment of the Diſtrict Court was erroneous; and it is equally clear that Oſborne did nothing unjuſt; for the payment was made out of monies ariſing from the collection of ſpecie debts. It would therefore be againſt all conſcience that he ſhould be bound by a judgment manifeſtly erroneous. Which brings me to the next queſtion, whether the Court of Chancery had juriſdiction?

The payment to Briggs was both a legal and an equitable diſcharge, and upon its being made, the bond ſhould have been given up. Now the rule is, that equity conſiders that as done which ought to have been done; and therefore it is the ſame thing there, as if it had actually been given up.

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The bond however remained nine years in the office without being proceeded on; and the County Court afterwards refuſed to give judgment on it, but the Diſtrict Court erroneouſly reverſed this opinion of the County Court and entered judgment for the plaintiff in the motion. Of which the complainant received no information until ſome time afterwards when it was too late to appeal. It would therefore be extremely unreaſonable that he ſhould be precluded from an opportunity of correcting the error.

But then it is ſaid that he ſhould have applied for a writ of ſuperſedeas to the judgment of the Diſtrict Court. It is true he might have done ſo; but I think he was not under any obligation to do it, and that he was at liberty to chuſe either mode of redreſs. 1ſt. Becauſe he was ſurprized by the judgment at law. 2. Becauſe Briggs was a truſtee and equity had juriſdiction of the truſt. 3. Becauſe there was new evidence which did not appear in the judgment at law.

It was ſaid that he who aſks equity ſhould do it. This I admit. But here there was nothing immoral in the payment; and although the appellees may have ſuſtained ſome injury by it, yet many of our own citizens have borne the like. It was one of thoſe conſequences which reſulted from the nature of things at that time; hard enough either way, but which could neither be foreſeen or prevented. Upon the whole I think the decree is erroneous, and ought to be reverſed.

CARRINGTON Judge. I admit that the powers of a Court of Equity ſhould be kept ſeparate and diſtinct from thoſe of a Court of common law; but I am perfectly ſatisfied that under the particular circumſtances of this caſe, the Court of Chancery might very properly have interfered in order to prevent the effects of an erroneous judgment. Conſequently, as I think the complainant was clearly entitled to relief upon the merits of his caſe, without entering into a minute examination

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of the technical reaſons which have been urged on either ſide of the queſtion, I feel no difficulty in declaring that I am of opinion that the decree of the Court of Chancery is erroneous and ſhould be reverſed; and that a perpetual injunction ought to be awarded to the judgment of the Diſtrict Court.

PENDLETON Preſident. I have not for a moment doubted but that the plaintiff was conſcientiouſly entitled to relief againſt a judgment at law, which bound him to pay, over again, a debt which he had *fairly* and *honestly* paid nineteen years paſt. When I ſay *fairly* and *honestly* I do not looſe ſight of Mr. Wickham's objection that the payment was in depreciated paper, by which the creditor ſuſtained a loſs. It does not appear that Oſborne was perſonally concerned in the ſpeculations which produced the depreciation, or in paſſing the law which made the paper a tender. As a citizen he was bound to obey the law, and no moral duty required him to do ſo to his diſadvantage, and to waive the beneficial parts, to the ruin of his family. He did not carry commodities to market to ſell at five times the value, for paper to pay this debt, but he collects debts of equal value with that he owed to pay it, in the ordinary practice of his neighbourhood, and under an idea that there was no difference in value between ſpecie and paper. This I call a fair and honeſt payment.

Having provided the money, what was he next to do? His creditors had left the country and he could not find them to pay; a circumſtance which in *M'Call* vs *Turner* we decided to be a good reaſon for ſtopping the intereſt at law. He applied to the attorney who proſecuted the ſuit, and who whatever might be the extent of his authority, it is agreed might have moved for an execution on the replevy bond, and iſſued it; in which caſe, a payment to the ſheriff would have diſcharged Oſborne; and is it not equitable at leaſt, that a payment made to the attorney (who had the controul over the bond) to avoid that execution ſhould have the ſame effect. The plaintiff thus ſhewing a fair and proper

proper case for relief in equity, what is the objection to its being afforded him? Not that the Court of Equity is not competent to give it, in the proper exercise of its inherent powers, but that his remedy was at law: And this leads us to inquire what was his remedy at law when he applied to the Chancery.

The judgment of the District Court barred him at law, but it is said he might have sued out a supersedeas from this Court at Law, and possibly, indeed probably, have reversed the judgment; as this Court have since decided in other cases that a payment to the attorney, is good at law. But was he bound to take that step at certain expence and doubtful success, before he could apply to Chancery? I see no reason for it; and I believe a precedent cannot be shewn where the Chancery in England refused relief in a proper case, against a judgment in the Court of Kings Bench or common pleas, to which our District Courts assimilate in this respect, because the party had not prosecuted a writ of error in the House of Lords, their *dernier* resort of justice. All the Chancellor will do on the occasion, is to compel the party on his first application, to abandon his pursuit at law and abide by his equitable claim. And this the Chancellor did in this case, by imposing the release of errors.

But it is said the Court of Chancery had not original jurisdiction, and that it could not be given by the act of Branch or assumption of the Court. The two last members of the proposition are true; the first requires consideration.

If by original jurisdiction be meant, to refer to the outset of the business in 1774, it is true that the court of Chancery had nothing to do with the subject until the judgment in 1791, nor had the plaintiff till that period any occasion to apply to that Court, having so far successfully defended himself at law. But if by original be meant a competent jurisdiction commencing to relieve against an unjust

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and oppreſſive judgment obtained by an adherence to the rigid principles of law, the objection is pointed againſt the general juriſdiction of the Court in granting injunctions, and the counſel will do well to conſider in his ſtate of inconveniences, whether it would be of public utility to deprive the Court of that juriſdiction. The reaſoning of Lord Manſfield in favour of new trials, from the many accidents which may prevent the attainment of juſtice in trials at law, apply forcibly for the interference of equity, where that can't be had at law, and have been ſo applied in many inſtances in this Court, as in the caſes of *Ross* & *Pines* and *Cochrane* vs *Street*. But it is ſaid all the equitable circumſtances are involved in the queſtion at law, and in that view it is an appeal to this Court, to correct the erroneous judgment at law, which would be undoubtedly improper. This is important in itſelf and rendered more ſo by the ſanction it has received from the opinion of one of the Judges of this Court.

The proper way to decide the queſtion is to take a comparative view of the caſes as they reſpectively appear in each Court. At law the bill of exceptions ſtates the caſe that the receipt is no acquittance; and for any thing I know, the court of law might have decided that this bond under ſeal, could not have been diſcharged by the receipt without ſeal; it being one of their old rules, that a ſpecialty cannot be diſcharged, but by ſomething of as high a nature. A Court of Equity however, regarding ſubſtance and not form, will give it effect as a diſcharge.

But on the eſſential queſtion of the power of the attorney at law to receive the money. At law it is put on the general power of attornies at law to receive their clients money without a ſpecial authority. Not a word of the cuſtom here, ſo that the queſtion depended on the common law, and on that ground was rightly decided againſt the power. But in equity the cuſtom is ſet forth; and tho' as ſtated in the demurrer it was illegal, yet ſince the practice had impreſſed on the minds of the people,

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an idea of its legality, and under that idea the payment was made, he ought in this Court to have the benefit of it, and ſo it is ſtated in his bill.

In anſwer to this it is ſaid that the cuſtom of merchants is part of the law of the land of which the Court at law were bound to take notice without its being ſtated.

And this requires a view of that ſubject to developе its principles. A cuſtom of this ſort when firſt brought into Court, is a matter of fact, and merchants examined, to prove what it is. When legal deciſions are made upon it, it becomes the law of the land, of which all parties and Courts are to take notice without ſtating it; and in this diſtinction I am warranted by Lord Mansfield, when he ſays "he was wrong in having permitted "merchants to give evidence of a cuſtom on which "there had been ſuch legal deciſions."

Then how does this apply to the preſent caſe? Had there been any ſuch legal deciſion prior to 1791? I have heard of none, and the Court of Law then appears not to have known of any, or to have diſregarded it. This Court have ſince decided in favor of the cuſtom, and I ſuppoſe the law ſettled. But we are to conſider how it ſtood in 1791.

The cuſtom then, was not ſtated to the Court of Law, nor were they bound to take notice of it, but it is before the Court of Equity. Beſides that of the parties being condemned unheard there are *auxiliary* circumſtances in equity, ſuch as the abſence of the creditors; that Oſborne made a fair and honeſt payment; that Brigg's had the controul over the bond and might have levied an execution if the debt had not been paid; and that the creditors upon their return applied to the attorney and not to Oſborne, thereby ſtrongly implying his power to receive the money. None of which though they have ſome weight, appear in the caſe at law. In ſhort the plaintiff makes and proves a new caſe in this Court, clearly ſhewing him entitled to relief,

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lief: Which the court can afford him, and will not deny, or delay juſtice by ſending him ſome where elſe to ſeek it; eſpecially as in his preſent condition he muſt obtain it here or no where.

Mr. Wickham indeed would ſtart this man in a new race for relief: He may apply to the Court of Appeals for a ſuperſedeas to the judgment at law. He does ſo, and the releaſe of errors is in his way; upon which he is to apply to the Chancellor for an injunction not to uſe the releaſe of errors. This the Chancellor might grant or not. But ſuppoſe that done, would or could the Chancellor oblige the Court of Appeals to grant the ſuperſedeas to bring the caſe before them againſt a poſitive law, the time for granting it being elapſed.

This bandying of ſuitors for juſtice from Court to Court, may anſwer ſome purpoſes, which however I am ſure the gentleman had not in view, but will not produce ſpeedy and ſubſtantial juſtice, the legitimate end of all courts, and which requires that the decree in the preſent inſtance ſhould be reverſed and a perpetual injunction awarded.

And I agree with the Judge near me that ſuch be the decree of the Court, with this addition that it ſhall provide for the repayment of the money, if paid under the diſſolution of the former injunction.

Decree Reverſed with coſts both in this Court, in the Court of Chancery, and the Courts of Law; With a direction that if the money has been paid in conſequence of the diſſolution of the injunction, that there ſhould be a decree for re-payment &c.

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THE REV. JOHN BRACKEN
against
WILLIAM AND MARY COLLEGE.

THE plaintiff brought an action on the case against the College in order to recover £553, ſterling, for arrears of ſalary due him as profeſſor of the grammar ſchool. Plea non aſſumpſit, and iſſue. The jury found a ſpecial verdict, ſtating the College charter; the original ſtatutes for arranging the ſchools, of which the grammar ſchool was one, and ſeveral ſubſequent ſtatutes. That the plaintiff was regularly appointed profeſſor of that ſchool, performed his duty and received the ſalary to December 25th 1779. The verdict alſo refers to the proceedings of the viſitors in 1782 and 1784, wherein is recited a ſtatute of the viſitors, as of the 4th of December 1779, whereby the grammar ſchool was diſcontinued.

The diſcuſſion on the motion for the mandamus was upon the merits; & therefore as Bracken had no right to the office, he had title to the ſalary.

Quere. If this College is not on public eſtabliſhment?

In October 1787, the plaintiff applied to the General Court for a writ of mandamus to reſtore him to his profeſſorſhip; which was adjourned to this Court for difficulty and refuſed. Whereupon he brought this action for the arrears of ſalary from the 25th day of December 1779. The Diſtrict Court gave judgment in favor of the College; and from that judgment the plaintiff appealed to this Court.

WICKHAM for the appellant. The queſtion is if Bracken was legally amoved? If ſo, it was by the ſtatute of 1779; but the jury do not find the ſtatute, they only find evidence of it. They merely ſtate the proceedings, which is inſufficient; for the recital of the ſtatute, was not finding the ſtatute itſelf; and therefore the verdict only finds evidence of facts, and not facts themſelves. Conſequently a *venire facias de novo*, at leaſt, ought to be awarded.

The ſtatute was made when the meeting was not publickly and regularly notified, as it ſhould

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have been; and for want of which the ſtatute is void. But if the ſtatute was of no effect for want of notice, then the verdict is in favour of the plaintiff. So that any way the judgment of the Diſtrict Court was erroneous.

RANDOLPH *contra.* The want of notice did not render the ſtatute void. No part of the charter requires it. The viſitors are not bound by the rules of corporations in general. They are not like the profeſſors. But they are a corporation of a particular conſtruction; and their functions are viſitorial.

As to the objection that the ſtatute is not found, it may be anſwered that our finding is at leaſt equal to that on the part of the plaintiff, which ſays that Bracken was appointed; and therefore if it be inſufficient as to us, it is as to him alſo. But it is ſufficient as to both; for finding the recital is equal to finding the ſtatute in *hæc verba*. It is found that he continued to exerciſe his functions till prevented by the proceedings aforeſaid. Which neceſſarily refers to the ſtatute. And the validity of that was ſettled by the deciſion in the motion for the *mandamus*, which it appears was determined on the merits.

WICKHAM. The former deciſion was only that the College might make ſuch a ſtatute; but the queſtion is, if they did ſo? And we contend that it is not properly found that they did. It is ſaid that the viſitors are not bound by the rules of corporations in general; but there is no ground for the diſtinction. At leaſt they are bound by the rules of common ſenſe, which requires that a majority ſhould exerciſe the powers, and there was not a majority here. It is ſaid that if their finding is bad, ſo is ours; but that juſt brings it to the *venire de novo* again. The finding however is different; for the very ſtatute, which appointed the plaintiff, is found.

RANDOLPH. A majority of the whole were preſent at the meeting.

WICKHAM

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WICKHAM. But that was only a majority of a majority; and not a majority of the whole.

PENDLETON Preſident. This is an action on the caſe brought by the plaintiff to recover £ 553 Sterling for arrears of ſalary due to him as profeſſor of the grammar ſchool in the College of William and Mary, on three counts of indebitatus aſſumpſit. The jury find a ſpecial verdict ſtating the College charter; the original ſtatute for arranging the ſchools, of which the grammar ſchool was one, and ſeveral ſubſequent ſtatutes.

They find that the plaintiff was regularly appointed profeſſor of that ſchool, performed his duty and received the ſalary to December 25, 1779. The demand is for the amount of the ſalary from that time; and the defence is, that by the ſtatute of December the 4th 1779, the grammar ſchool was diſcontinued: which put an end to the duty and ſalary of the profeſſor. It is found in the proceedings referred to, that ſuch a ſtatute was really paſſed on that day, but was loſt from the negligence of the clerk to record it; and the proceedings found in 1782 and 1784, were to reſtore its form. It is ſuppoſed its force commenced from the time of paſſing it. It is not found that the profeſſor did any duty afterwards, but that he was ready to have done it; from whence notice is preſumable, as well as from his being a member of the corporate body, and bound to take notice of the ſtatutes.

In October 1787, Mr. Bracken applied to the General Court for a mandamus to reſtore him to the office, which was adjourned into this Court for difficulty. In June 1790, it was heard here, and continued over a term for conſideration and to be reheard.

Nov. 1790. On a rehearing, the mandamus was denied on the merits, which I believe was inſerted for two purpoſes. 1ſt, To ſhew the caſe had been fully entered into, as if the papers had been before

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us on the return of the mandamus. 2d, To meet an objection warmly inſiſted on, that the General Court had no power to intermeddle with the affairs of the College, upon the Engliſh precedents applying to private donations for Colleges; but which ſome of the Judges at leaſt, of whom I was one, thought did not apply to our College, which had a public and not a private foundation: And to avoid a ſuppoſition that the denial was on that ground, was one reaſon for placing it on the merits.

It is remembered that the diſcuſſion was lengthy both in Court and conference. The detail is forgot; but it is well recollected, that the queſtion turned upon the power of the viſitors to change the arrangements of ſchools, made by the orignal ſtatutes and to diſcontinue the grammar ſchool. The charter and ſtatutes were all before us, and among others that of December 1779, which muſt have been allowed its full force, ſince there being no particular order for his *amotion*, the denial muſt have proceeded from the ſtatute diſcontinuing the ſchool and his office with it. But if he had no right to the office, he could have none to the ſalary, the purpoſe of this writ: And therefore judgment was rightly given for the defendant.

Unanimouſly Affirmed.

CARTER
against
TYLER and OTHERS.

IN an ejectment for 1000 acres of land in the county of Prince William, the jury found, that John Champe was in his lifetime seized in fee simple of sundry tracts of land and of the lands in the declaration mentioned, and thereof died seized in fee on the first day of March 1763, having duly made his last will and testament bearing date the tenth day of December 1759, whereby he devised as follows "My will is that my son William "Champe have all my lands in King George county next below Poplar Swamp together with my "old mill &c. to him and his heirs lawfully begotten forever together with twenty slaves or negroes to be part of those now working on the "said land, and all the stock of every kind on the "said lands at the time of my death; and I also give "to my son John Champe junior all the remaining "part of my lands in King George county next "above Poplar Swamp, together with the plantation that I now live on to him and his heirs lawfully begotten forever, together with twenty slaves "and all the stock of every kind that shall be on "the said lands at the time of my death; and all "the rest of my negroes in King George county to "be in possession of my wife during her life and after her death I desire that they may be divided "between my two sons: and if either of my sons "should die without issue, my will is that the "whole go to the survivor, and they both die "without issue lawfully begotten, then my will is "after my wifes death that the lands be sold and "the monies thereon be equally divided between "my daughters then living and their heirs forever. "My will is that all my lands in Prince William "county and slaves be equally divided after my "wifes death, between my sons William Champe "and John Champe under the same limitation as "my

By the act of 1776, for docking intails, all remainders as well contingent as vested are utterly barred, whether the intail be created before or after passing of the act

Nor will the court in order to avoid this effect construe that to be executory devise, which before would have been held to be a contingent remainder.

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"my lands are given in King George County &c." And in another clauſe thereof, "My will is that "all the lands in King George county above Pop- "lar Swamp negroes and ſtock be and remain in "poſſeſſion of my wife, as alſo all the lands in "Prince William County negroes and ſtock be in "her poſſeſſion and diſpoſal during her life for the "ſupport of herſelf and family and then to fall "to my ſons as before mentioned." That the lands in the declaration mentioned are a part of the lands deviſed in the ſaid will in the aforeſaid following words "my will is that all my lands in "Prince William county and ſlaves be equally de- "vided after my wifes death between my ſons "William Champe and John Champe under the "ſame limitation that my lands are given in King "George county." That the teſtator appointed his ſaid wife executrix and his ſaid two ſons William Champe and John Champe executors of his ſaid will. That the ſaid William Champe was the teſtators eldeſt ſon and heir at law; and that after the death of the widow of the teſtator (which happened in the year 1766,) the ſaid William Champe and his brother John by their own conſent and agreement, divided equally between them the lands in the ſaid clauſe of the ſaid will mentioned, whereby the lands in the declaration mentioned were aſſigned to the ſaid William Champe as his part thereof, who entered and was ſeized as the law requires. That the ſaid William Champe ſold and conveyed the lands in the declaration mentioned to Bernard Hooe by deeds of leaſe and releaſe dated the 9th and 10th days of February 1783 who entered and was ſeized as the law requires. That William Champe ſurvived his brother John and died on the 19th of April 1784 without lawful iſſue of his body, leaving his ſiſter Sarah Carter the plaintiff his heir at law, and the only child then alive of the ſaid teſtator, and that the ſaid John Champe the deviſee alſo died without lawful iſſue of his body. Upon this verdict the Diſtrict Court gave judgment for the defendants in the ejectment; and from that judgment the plaintiff appealed to this Court. The

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The queſtion was whether the plaintiffs title was barred by the act of Aſſembly paſſed in the year 1776, declaring that tenants of lands or ſlaves in taille ſhould hold the ſame in fee ſimple? For if not, then as the events had all happened on which the remainder had been limitted to the plaintiff, ſhe would be entitled to the lands in the declaration mentioned.

CALL for the appellant. Contended, 1ſt that the act of 1776 had not deſtroyed the remainder, in eſtates taille created prior to the paſſage of that act.

1. Veſted remainders.

The mere declaration that tenant in taille ſhall ſtand ſeized in fee ſimple, does not operate like a fine and recovery in England. Becauſe there a recompence in value is always ſuppoſed; which the remainder-man may receive in ſatisfaction of the loſs. 4 *Reaves Hiſt. Com. Law.* 339. 2 *Black Com.* 358, 9. For the fine and recovery does not overthrow and deſtroy the remainder itſelf; but only bars and eſtops the remainder-man from recovering on account of the vouching to warranty and recompence in value.

Therefore the act of Aſſembly and the fine and recovery agree in this, that neither deſtroys the remainder; but they diſagree in this, that in the caſe of the fine and recovery the remainder-man is barred and eſtopped, in reſpect of the recompence and voucher, although the events ſhould afterwards happen, from recovering the ſpecific lands entailed; and is driven to purſue the recompence. But as there is no ſuch recompence or voucher in the caſe of the act of Aſſembly, there is conſequently no bar or eſtoppel to prevent it, and therefore the remainder-man becomes entitled to enter upon the happening of the contingency.

Hence it follows that expreſs words are neceſſary in order to deſtroy the remainder; or, elſe it will continue to exiſt and the right of entry will

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attach in the tenant in taille, whenever the event upon which it was limitted ſhall come to paſs.

This which is clear upon principle is corroborated and confirmed by authority. For although the ſtatutes of the 18, *Edw. I*, and 4, *Hen. VII*, have words which at the firſt ſight would ſeem to amount to a diſtruction of the remainder-mans right of entry, yet the Courts in England would not admit, that they could by mere implication be adjudged a ſufficient bar; and therefore the ſtatute of the 32, *Hen. VIII.* was made in order to remove the difficulty, 2 *Black Com.* 354, 5.

This alſo appears to have been the idea of our own Legiſlature. For the act of 1748 has expreſsly declared that by writ of *ad quod damnum* "the "iſſue in taille of the vendor, and all other per"ſons in remainder or reverſion, ſhall be barred, "in the ſame manner as the ſame eſtate might be "barred by fine and recovery, according to the "laws of England." And ſimilar expreſſions are to be found in many private acts of Aſſembly. All of which goes to prove that in the opinion of the Legiſlature expreſs words were neceſſary to defeat and deſtroy the remainder.

But there are no ſuch expreſs words in the act of 1776. In which not a ſentence has even indirectly, much leſs in ſo many words, declared the remainder to be void and ineffectual. For the words *limitations* and *conditions* in the laſt member of the enacting clauſe, only mean that the tenant in taille may have a fee ſimple, notwithſtanding the remainder; and not that the remainder ſhall be deſtroyed and annulled. But take away thoſe two words, and there is not an expreſſion left which can even incidentally, go to affect the remainder.

The ſaving clauſe does not alter the caſe; becauſe it is only an exception out of the enacting clauſe; and conſequently if that does not abridge and defeat the remainder, much leſs can the exception out of the generality of the expreſſion of the enacting clauſe. A ſtatute which recites a

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non exiſting ſtatute does not make the recited ſtatute to exiſt. 5 *Com. Dig.* 260; and much leſs will a bare exception, out of the enacting clauſe, give greater power to that very clauſe, out of which, itſelf is taken.

The fair inference from all this is, that the remainder is not diſtroyed, but continues to exiſt, although it may chance never to take effect, in actual poſſeſſion and occupation of the eſtate.

But if the remainder is not deſtroyed, it may well take effect on failure of iſſue; becauſe the neceſſary conſequence of the non deſtruction of the remainder is, that tenant in taille does not take an unqualified but a mere determinable eſtate in fee ſimple by the act of 1776; that is to ſay, he has a fee ſimple which will continue to endure, ſo long as the iſſue of his body laſts, but no longer. *Seymors case* 10 *Co.* 97. For if the remainder was not deſtroyed, it muſt attach and take effect in poſſeſſion, by virtue of the inſtrument which creates it and the ſtatute *de donis*, whenever the contingency happens; and therefore muſt interrupt and determine the precedent determinable eſtate. Becauſe the ſtatute *de donis* is only repealed as far as the act 1776 operates; and therefore if the latter does not deſtroy the remainder, then, by the neceſſary conſtruction and force of the ſtatute *de donis* the remainder muſt take effect. For take the two ſtatutes together as one ſyſtem of laws and the conſtruction will be, that he who was tenant in taille under the inſtrument ſhall have a fee ſimple; which ſhall endure ſo long as he has iſſue; but when that is ſpent, then by virtue of the ſtatute *de donis* the remainder ſhall attach and take effect in actual poſſeſſion and enjoyment of the eſtate.

So that the act of 1776, may be ſaid only to have altered the *quality* but not to have increaſed the *quantity* of the eſtate of tenant in taille; that is to ſay, that it only alters the deſcent and makes the eſtate go to the heirs *general* inſtead of the heirs *ſpecial*, according to the doctrine in *Seymors* caſe,

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before mentioned; which clearly demonstrates, that the alteration of the estate from fee-taille to fee-simple does not destroy and overthrow the remainder.

This construction is in perfect harmony with the act of Assembly; as it gives a fee simple to the tenant in taille; which is all that the act has provided for.

2d. Contingent remainders.

But if it should even be admitted that vested remainders are all swallowed up and destroyed by the act of 1776, yet contingent remainders are not.

First, because they are not in being, but only have a capacity to exist at a future time; and therefore as they are not expresly destroyed by the act of 1776, they will not lose their effect when it comes into actual existence. *Powell Dev.* 251.—For a statute cannot make that not to exist, which already does not exist; but as to that the statute is vain and ineffectual.

Secondly, because they derive their force and effect from the statute *de donis*; which in this respect is not contradicted by the act of 1776; but has been already shewn to be consistent with it: And therefore *ci pres*, the force of that statute continues.

Thirdly, because these contingent interest and possibilities are not destroyed by any disposition of the preceding estate, unless the connection between them is thereby broken up and interrupted.

For a change of the estate taille into an estate in fee simple does not destroy the connection between the two estates and thereby destroy the remainder, according to the rule, that if the preceding estate is any how displaced or destroyed before the happening of the contingency on which the remainder depends, that the remainder itself is thereby destroyed also. 1st Because the preceding tenant's taking a larger estate do not destroy a contingent remainder. *Fearne rem.* 247, 8. 262, 3. 2 Because an alteration, of the *quality* merely, and not of the *quantity*, don't destroy the contingent remainder.

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der, *Fearne Rem.* 259: But this, was not an alteration of the *quantity*, but of the *quality* merely. For the alteration was only as to the deſcent, that is to ſay, from *ſpecial* to *general* heirs, and not as to the duration and continuance of the eſtate. It therefore continued to ſupport the remainder *Fearne Rem.* 247, 8.

For the reaſons why contingent remainders are deſtroyed by defeating the preceding eſtates are two. Firſt that there may be a tenant to the *præcipe*; and ſecondly, that the connection between the different parts of the eſtate may be kept uninterrupted. *Fearne* 234. *Plowd.* 25.

Neither of which reaſons applies to the preſent caſe. 1ſt Becauſe the tenant in taille will be tenant to the *præcipe*. 2. Becauſe the fee, being determinable, does not diſturb the connection. The alteration therefore of the preceding eſtate by the act of Aſſembly, does not interrupt the connection and deſtroy the remainder.

This conſtruction does not deſtroy the effect of the acts of Aſſembly for docking entails. 1ſt Becauſe ſince the making of the acts, the ſame words, which formerly ſignified a *fee-taille*, have by *authority of the law* another meaning impoſed upon them; and are made in legal language to ſignify a fee ſimple. 2. Becauſe ſince the acts the donor will be attempting to create what the law will not ſuffer to exiſt; and therefore the attempt will be void. 3. Becauſe the ſtatute *de donis* is repealed by the general repealing law of 1792; and *baſe fees* at common law are deſtroyed by the acts of 1785 and 1792. So that in future there can be no eſtate taille created.

II. That the alienation and warranty, by William Champe had not altered the caſe, and given his grantee an undefeaſible eſtate.

Becauſe a leaſe and releaſe only conveys what the party granting may lawfully convey. 10 *Co.* 97. *Fearne Rem.* 246, 7. *Co. Litt.* 328. 1. *Burr.*

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93; and therefore the leaſe and releaſe only conveyed the determinable fee; but did not alter or increaſe the *quantity* ſo as to diſplace the eſtate and defeat the remainder. If tenant for life grants the eſtate for his own life it does not defeat the remainder. For it is not like a feoffment or a releaſe to the diſſeiſor; becauſe they convey an indeterminable fee, which being an increaſe of *quantity* and not of *quality* deſtroys the remainder. But in this caſe where only a determinable fee is conveyed, the *quality* only is changed, but not the *quantity* increaſed, and therefore the remainder is not affected.

The warranty makes no difference:

Becauſe that does not increaſe the eſtate to which it is annexed, but only aſſures the granted eſtate of whatever extent or quantity it may be. 10, *Co.* 97. Therefore as the leaſe and releaſe only conveyed the determinable fee, the warranty only went to aſſure that; and of courſe whether *lineal* or *collateral* does not eſtop the heir. For it is not like a feoffment, or a releaſe to a diſſeiſor. Becauſe they convey an indeterminable fee, and therefore the warranty extending to the whole, by neceſſary conſequence eſtops the heir.

III. That if the act be conſtrued as intended to dock preceding entails it would be unconſtitutional and void; becauſe it would be, *ex post facto* in its operation, taking away private rights without any public neceſſity, and without making the injured parties any compenſation for them.

It may perhaps be ſaid, that by the act of 1748 it was declared that entails ſhould not be docked except by act of Aſſembly; and that if each entaile might be ſeverally docked by a ſpecial act of Aſſembly made for that particular purpoſe, the whole might be comprized into one act, and all be docked by a general law; and conſequently the remainder-man who took the eſtate ſubject to this mode of deſtruction, could not complain that the remainder was cut off.

But this is no objection againſt the poſition con-

tended for. 1 Becauſe that argument proceeds upon a preſumption of power, which if it ever exiſted, ceaſed with the revolution; and therefore the ſupport failing the argument falls of courſe. 2 Becauſe that doctrine inſtead of purſuing does in fact oppugn the meaning and intention of the act of 1748. For the act of 1748 was intended to reſtore the full effect of the ſtatute *de donis*, which had been broken and deſtroyed by the fine and recovery; and was not intended to facilitate but actually to hinder and impede the docking of intails. Conſequently the remedy is to be advanced and the miſchief ſuppreſſed according to a known rule of interpretation; which will be inverted by the other conſtruction. For it would be ſtrange, to put ſuch an interpretation upon a law, the profeſſed object of which was to impede and reſtrain the deſtruction of intails, as will aid and facilitate the abolition of them.

It was therefore a fair poſition after the act of 1748, to ſay that no eſtate taille, created during exiſtence of that ſtatute, could be docked. Becauſe the law would not preſume that the Legiſlature would make any law other than thoſe which already exiſted; much leſs one, which went to the open violation of private right. Conſequently the remainder-man had a well grounded confidence amounting to an intereſt, that the Legiſlature would preſerve and not deſtroy his right.

Hence in the private acts for the purpoſe of docking intails, regard was generally had to the rights of the parties; thoſe who were intereſted in the buſineſs were to have notice of the petition; and an equivalent eſtate, in analogy to the recompence in the fine and recovery, was ſettled in the room of that which was docked.

A law therefore which takes away the remainder-mans right without any regard to theſe circumſtances is *ex poſt facto* and conſequently void.

But this inconvenience will be avoided by the conſtruction contended for, by us; which therefore ought to be adopted. PENDLETON.

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PENDLETON Preſident. When Mr. Call yeſterday entered ſo extenſively into the proof that there may be ſuch things as determinable or ſubordinate fees in lands, a byſtander would have ſuppoſed, that the law under conſideration had given ſome ſuch fee to tenants in taille. But the words of the act are "that ſuch tenants in-"taille ſhall be *ipso facto* ſeized, poſſeſſed and in-"titled of, in and to his eſtate or intereſt, in abſo-"lute fee ſimple in like manner as if the deed or "will, act of Aſſembly or other inſtrument, they "hold under, had conveyed the ſame to them in "fee ſimple, any words, limitations or conditions "in the conveyance to the contrary notwithſtand-"ing." Words too ſtrong to admit of criticiſm or conſtruction that his fee was limited, or that all remainders depending on his eſtate taille, were not deſtroyed; and if it needed any aid in conſtruction, that would be abundantly afforded in the ſaving clauſe, which excludes all claiming in reverſion or remainder from the benefit of that ſaving.

That the alienation or warranty of William Champe could not give Hooe a better title than Champe himſelf had, was too clear to require the labour uſed to prove it. On theſe points therefore we do not at preſent deſire to hear the defendants counſel, but if the other counſel for the plaintiff wiſhes to add any obſervations on thoſe which he thinks important, we are ready to hear him. If this is declined, the defendants counſel are deſired to confine themſelves to the queſtion whether the act is void as being unconſtitutional.

WASHINGTON for the appellant. If the act of 1776 does not contain words which expreſsly or neceſſarily defeat the rights of the remainder-man the Court will not willingly adopt a conſtruction which ſhall produce that effect. It is not neceſſary to deny the conſtitutionality of the act of 1776, and yet it is obſervable that the law of 1748 paid great regard to the rights of the remainder-man. For in the caſe of the *ad quod damnum*, notice

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was required, and the private acts of Aſſembly not only gave a real inſtead of a fictitious recompence, but required notice alſo; ſo that the buſineſs was not carried on in haſte, but the whole merits of the queſtion were heard. At the time of the revolution though, it was thought neceſſary to unfetter eſtates; and perhaps it was politically wiſe to do ſo.

I am willing therefore that the act of 1776 ſhould have the fulleſt effect that any reaſonable man would require; that is to ſay, that it ſhall fully remove all the inconveniences contemplated by the ſtatute; but then ſurely I may be allowed to aſk that it may not be carried further. In as much as the law is unjuſt in taking away the rights of the individual. For a remainder is an intereſt which it is as unjuſt to take away without a cauſe, as if it were an eſtate in poſſeſſion. My requeſt therefore is not unreaſonable that the law may not be carried beyond the neceſſary conſtruction of the ſtatute.

It is a rule of conſtruction that a ſtatute ſhall not have an equitable interpretation in order to overthrow an eſtate 4. *Bac. abr.* 650.

The queſtion is, what was the miſchief which the act of 1776 was intended to remedy? The title and preamble ſhew it, and prove that the great object of the Legiſlature was to defeat the right of the iſſue in taille. Becauſe it perpetuated property in the ſame family, tended to deceive fair traders, diſcouraged the holder from taking care of and improving the eſtate, and injured the morals of youth by rendering them independent of and diſobedient to their parents. Theſe were the inconveniences;

And what was the redreſs?

It was by making tenant in taille, tenant in fee ſimple; which altered the courſe of deſcent and broke up the channel *per formam doni*. Thereby defeating the iſſue and aboliſhing the perpetuity.

Now

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Now if we ſatisfy all theſe objects of the law, why ſhall not the plaintiff claim under the limitation to her upon the happening of the events? Since it involves none of the inconveniencies ſtated in the preamble; and does not tend to fruſtrate the effect and operation of the law.

My great ground of argument is, that the act of 1776 does not directly deſtroy remainders or defeat the iſſue or reverſioner; but it does it indirectly only. There are no words which expreſſly defeat either; it is only a conſequence of law that does it, by the application of a legal principle. Thus, as to the iſſue; he claims *per formam doni* under the ſtatute *de donis*; but the law has altered that courſe of deſcent, and therefore he can't claim any longer *per formam doni*. The ſame anſwer applies to a veſted remainder-man or the reverſioner. For the act of 1776, having given the whole intereſt to tenant in taille, there is no remnant left for either of them.

Then as to contingent remainders;

If his title is by deed, then he claims a fee after a fee; which by common law he can not do; and therefore the right is gone, although the contingency happens.

If by will; and the limitation is to A. and his heirs, but if he dies without iſſue then over; here he in the remainder can not claim it as a remainder either, becauſe it is a fee after a fee in this caſe alſo. Neither can he claim it by executory deviſe becauſe it is upon too remote a contingency.

But ſuppoſe the deviſe be to A. and the heirs of his body; and if he die without iſſue living B. that the remainder ſhould be to B. in fee. Here B. might take by way of executory deviſe; for it is within a life in being.

Suppoſe the will here had given a fee with a limitation over on this contingency it would have been good. I contend then that it is equally ſo now.

But

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But I ſhall be told that no ſuch inference can be drawn; for that the will in this caſe does not give a fee, which I admit: But the act of 1776 does; and then why ſhall not the limitation over take effect?

If the act had ſaid that "all remainders ſhould be barred," it might have been a different thing; but it has not ſaid ſo, and the only objection to what I contend for, is the legal conſequence ariſing from the law. Which does not apply where the contingency is to happen within a reaſonable time. For the docking the remainder in ſuch a caſe is not a neceſſary conſequence growing out of the law.

The contingency here is, if the ſons ſhall die without iſſue, then after the death of the mother, to the daughters who ſhall be living. Which event has happened, and it was within a reaſonable time, that is to ſay, within lives in being, ſo that the candles were all lighted up at once. In ſhort it is the caſe of *Pells* vs *Brown*, *Cro. Jac.* For if you convert the fee taille into a fee ſimple it is the limitation of a fee upon a fee by deviſe. The words of the act are, that tenant in taille ſhall ſtand ſeized in fee ſimple, in like manner as if the will had conveyed a fee ſimple to him. Suppoſe then the will had given a fee to William Champe, the contingency on which the limitation over was to take effect would have been within a reaſonable time; and conſequently the limitation would have taken effect. But by the ſtatute he is to be ſeized as if the will had given him a fee ſimple, aud therefore it muſt clearly follow that notwithſtanding the act the limitation over is good.

Take a view of conſequences.

Suppoſe a will to be made after the act of 1776: It muſt be conſtrued in the ſame manner as this; for the act includes future as well as prior wills. Then let one man make a will before and the other after the act: The limitation over in the laſt would be clearly good; becauſe the firſt deviſe would be a fee;

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and then the limitation over would be a fee upon a fee, to take effect within a reasonable time. For the act of Assembly changes the force and meaning of the words, which formerly signified a fee taille, and makes them signify a fee simple. But as I said before, a will after and a will before the act, are both to be construed in the same manner; and therefore if in the case of a will after the act, the limitation over would be good, so will it be likewise in a case before the act.

The present case therefore is no more, than a limitation to one in fee, and if he dies without issue living the testators daughter, then to her in fee; which would be clearly a good limitation.

Suppose such a limitation for payment of debts, or the advancement of children, the court would not decide against it surely, but would rather labor to support it. *Bac. abr. tit. stat.* (I.) § 12, 13.

In the cases of *ad quod damnum* and private acts of Assembly, the Legislature cut off the remainder in express words; and the act of 1776 proceeded upon the idea of most remainders being destroyed, but did not include all. Such as this was either *casus omissus*, or intentionally omitted: and if so, the argument is with us.

Full and absolute fee simple is mere tautology. For fee simple and absolute fee simple mean the same thing; and therefore no argument is to be drawn from thence.

Nor is any inference to be drawn from the last words of the enacting clause, any more than from the usual words in statutes of any law usage or custom to the contrary notwithstanding, which are nugatory, because the statute would be law without them.

The saving clause cannot affect my construction: because an exception never vests any estate; but the contrary. It is taking a smaller from a greater, and does not enlarge the enacting clause. 4 *Bac. abr.* 646. 19 *Vin.* 532.

It

It may perhaps be ſaid that this act reſembles a fine and recovery in England. Which Mr. Pigot ſays barrs intails becauſe of the recompence; and Judge Wills 1, *Wilson.* 73, becauſe it is a common aſſurance. But as there was no recompence here, and as I have ſhewn that the act of Aſſembly does not contain any ſuch deſtructive operation as the recovery does, they cannot be juſtly reſembled to each other in reſpect of their effect upon the remainder.

Taltarums caſe in England was laid hold on, by the Judges, as affording an opportunity of deſtroying eſtates taille; and when the Courts had once begun it, in order to ſupport their favorite doctrine and to render eſtates alienable, they conſtrued all eſtates contingent remainders which could be deſtroyed by fine and recovery; but thoſe which could not, were held to be executory deviſees. For a contingent remainder may be deſtroyed but an executory deviſe cannot. *Fearne* 306. But there is no occaſion for that conſtruction at preſent, as no eſtates taille can be created hereafter. Therefore as it is a rule, that what was a contingent remainder in its origin, may from ſubſequent circumſtances, be turned into an executory deviſe *Fearne* 418. 419; it will follow that, in the principal caſe, what was at firſt, a contingent remainder has by ſubſequent circumſtances, become an executory deviſe: and therefore the alteration in the preceding eſtate does not affect the caſe.

It may perhaps be ſaid that the act of 1776, after deſtroying the remainder, can not give effect to it as an executory deviſe. But I have ſhewn that it does not deſtroy it, either by the words or by conſequence; and therefore that objection can have no weight.

WICKHAM and RANDOLPH for the appellees. It will be neceſſary for us, after what has paſſed, to make but very few obſervations upon the caſe before the Court. The act of 1776 has deſtroyed every ſpecies of remainder; for the language is as effectual, for that purpoſe, as any that could be deviſed;

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deviſed; and any addition would be but mere repetion. The words of the ſtatute are *full and abſolute fee ſimple*; which clearly ſhew the extent of the Legiſlative mind, and include every quality and property of any fee ſimple eſtate; which Judge Blackſtone in his commentaries ſays is the ſtrongeſt and higheſt eſtate.

But the attempt is to turn the fee ſimple into a determinable fee, and the word *abſolute* in the ſtatute is ſaid to be tautologous. Upon which it may be remarked 1ſt, That *fee ſimple* according to Lord Cokes definition 1 *Inſt.* 1, is more applicable to a general unlimited fee, than it is to a conditional fee. 2d. That lawyers uſe the word *abſolute* in contradiſtinction to determinable fee, 2. *Black. Com.* 104. 109. *Pow. Dev.* 237; and therefore no word was ſo proper, for the purpoſe of creating an unqualified fee. The ſaving clauſe too ſtrongly marks the impreſſion of the law makers; and indeed the whole ſcope of the act ſhews a fixed determination in the Legiſlature to unfetter the eſtate: which is utterly inconſiſtent with the notion of a determinable fee. The enacting clauſe ought not to have mentioned reverſions and remainders; for then perhaps there might have ariſen ſome difficulties about the extent of the terms uſed; whereas by the ſimple, plain and unequivocal declaration that the tenant in taille ſhould ſtand ſeized of a pure and abſolute eſtate in fee ſimple, all room for doubt is removed; and the tenant has a perfect and indefeaſible eſtate in fee, freed from all manner of limitations and conditions.

But it is ſaid that the words of the ſtatute do not include contingent intereſts in expreſs terms; and therefore in the preſent inſtance, the remainder will take effect by way of executory deviſe. But if remainders were all deſtroyed, as we have already ſhewn, then it was unneceſſary to have been more particular in the deſcription; becauſe an executory deviſe cannot be limitted on an eſtate taille. And therefore it would have been a work of ſupererogation to have ſaid, that ſuch intereſts ſhould be barred.

Which

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Which, of itſelf, in a great meaſure anſwers the argument, that the Court would avoid conſtruing it a contingent remainder, leſt the ſtatute ſhould deſtroy it. But that argument is of little weight upon other grounds. For the mere circumſtance of its being liable to be deſtroyed, will not prevent the conſtruction that it is an eſtate of a particular kind; but the Court will give it the fair conſtruction without regard to the conſequences. *Fearne Rem.* 306. Particularly when the object would only be to preſerve a ſolitary caſe of no public utility; and which the Legiſlature, if they had conceived any difficulty could have ariſen concerning it, would certainly have provided for. Beſides it is not correct to ſay, that what was a remainder in its origin, can be turned into an executory deviſe, by matter *ex poſt facto*. The caſes cited from *Fearne* do not prove it; for they were all caſes, where the firſt deviſe became void in the teſtators own lifetime; and the remainder-man therefore took by way of executory deviſe. So that in fact the limitation never was a contingent remainder after the will began to operate; and conſequently the caſes are not parallel. The words of the act are more extenſive in their operation, than the judgment in a fine and recovery in England; which clearly would have deſtroyed the plaintiffs intereſt. *Spalding* vs *Spalding*. *Pow. Dev.* 225.

In ſhort the main deſign of the act of Aſſembly was to deſtroy entails and all other conditional eſtates which tended to a perpetuity; and therefore the Court ſhould adopt the conſtruction which will beſt effect that end. Which is by conſidering the remainders and all other contingent intereſts as entirely barred.

PENDLETON Preſident delivered the reſolution of the Court as follows: The ſtatute *de donis* ſecured intailed eſtates to the iſſue and remainder-men by declaring that the will of the donor in that reſpect ſhould be obſerved and that all conveyances made by tenants in tailſe ſhould be

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be *ipso facto* void. The fine and recovery furniſhed means by which the tenant in taille might defeat both if he choſe it, or he might forbear, and leave his eſtate to the operation of the ſtatute. Mr. Pigot and the Judge who contended with him might, and any other gentleman may, amuſe themſelves with inveſtigating the principles, upon which that proceeding was adjudged to barr the iſſue in taille and remainder-men: It is ſufficient to ſay that it was adjudged by the Court to have that effect, at an early period, and ſo became as much a law of that country as the ſtatute itſelf.

Our anceſtors brought hither with them both laws as a rule of property; and the fine and recovery might have been uſed here, if the forms could be preſerved, until the Legiſlature ſhould interpoſe to prohibit them: And this I find they did by an act paſſed in 1710, reſerving to the Aſſembly the ſole power of docking intails.

The exerciſe of this power was by acts paſſed on each particular occaſion. Which may rather be viewed as a change of the lands on which the eſtate taille was to operate; than as defeating that eſtate, and giving a real recompence for it, inſtead of the fictitious one, in the form of the fine and recovery. The old lands were veſted in fee ſimple, and the new placed in the hands of the tenant to paſs to his iſſue, and thoſe claiming in remainder or reverſion, as the others would have paſſed by the inſtrument creating the intail. This ſpirit in the Legiſlature for preſerving intails, is further manifeſted by an act paſſed in 1727, authorizing the annexing ſlaves to lands to paſs with them in taille, in poſſeſſion, remainder or reverſion, making the ſlaves however liable for the debts of the tenant in taille, for the time being. I believe it was in 1734, for I have not the law here, that the Legiſlature, judging as I ſuppoſe, that a ſmall tract of land would not ſupport and perpetuate a family, introduced the writ of *ad quod damnum*, for docking entails. The writ did not defeat the intail, but was a previous enquiry to aſcertain the

the value, and whether it was a ſeperate tract, not adjoining to other intailed lands of the tenants? If the jury found the value under £200 ſterling, and the other tract affirmatively, then a conveyance, particularly deſcribed, is declared to veſt the eſtate in the bargainee in fee ſimple, and the iſſue, and thoſe claiming in remainder and reverſion are declared to be barred. From thence and from the language of the private acts an inference is drawn, that where the Legiſlature intended to barr remainders they did it by expreſs words, which are not in the act of 1776. A review of theſe acts give an impreſſion that in the opinion of the Aſſembly, a different language was proper, where a fee ſimple was veſted by the act, and where it was to veſt in conſequence of a future conveyance, whether well or ill founded is immaterial. Carter, ſa. Tyler.

In the former caſe they barely veſted the fee ſimple without barring the iſſue or remainder-men expreſsly, only excepting them from the operation of the ſaving clauſe; in the other caſe they expreſsly declare them barred But ſince it is admitted that the iſſue and veſted remainders are barred in conſequence of what is declared in the act of 1776, the queſtion is whether that conſequence does not include the limitation under conſideration without the aid of the conſtruction, againſt which this obſervation was applied. Whether it does or not, I ſhall conſider when I come to that act. In the reviſed law of 1748 the prohibition of fines and recoveries, and permiſſion of writs of *ad quod damnum* were continued till the revolution. That event having produced a new order of things, this great ſubject came before the Legiſlature in October 1776, under a view of all its legal circumſtances from the common law and the ſtatute *de donis* down to that period.

The great ſubject of diſcuſſion was whether they ſhould reſtore the fine and recovery, which was objected to on account of its fictitious nature, and the trouble and expence attending it. But the principal objection was that it would permit the

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tenants to continue what was conſidered as a miſchief; and that thoſe who poſſeſſed the large eſtates would have an inclination to continue them in their families. They therefore reſolved to cut the Gordion knot at once, and *ipso facto* to veſt the fee ſimple in thoſe who then had or ſhould in future have an immediate beneficial intereſt; that is to ſay, an eſtate in fee taille in poſſeſſion, or a remainder or reverſion in taille, after eſtates for life or leſſer eſtates, unfettering the eſtates of all future intereſts depending, in creation, upon thoſe eſtates tail.

That this was the deſign of the act is manifeſt from the title and preamble: And the queſtion is, do the words of the enacting clauſe effect their purpoſe, and defeat the plaintiffs remainder?

1ſt, Rules of conſtruction of ſtatutes are given us, but none of them prove that where the words of a ſtatute are plain and obvious, the Court can by conſtruction reſtrain their operation. The rules prove the contrary.

2d. The reviſed law of 1785 and 1792 on this ſubject refered to, which adds to the veſting in fee ſimple theſe words "the eſtate ſhall from that time (that is from 1776) and thenceforth be diſcharged of the conditions annexed thereto by the common law, reſtraining alienations before the donee ſhall have iſſue; ſo that the donees or perſons in whom the conditional fees veſted or ſhall veſt, had and ſhall have the ſame power over the eſtate, as if they were pure and abſolute fees. This it was ſaid proved that the words of diſcharge are neceſſary, which being omitted in the act of 1776, are here ſupplied, and the act ſo far amendatory; and in that view muſt be proſpective only, and not retroſpective according to former judgments of this Court. So at leaſt I underſtood the application of thoſe acts. I am of opinion theſe acts make no alteration but only expreſs in other words, and thoſe not ſo ſtrong, what is in the former law. Conditional fees at common law, are *eſtates taille* under the ſtatute, and theſe the act of 1776 ſays ſhall veſt a full and abſolute eſtate in fee ſimple.

And

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And what are the words of exclusion in the new acts, discharged of the condition annexed by the common law, to the conditional fee? The act of 1776 is "the fee shall vest in the tenant in taille, in the same manner as if it had been conveyed to him in fee simple, notwithstanding any words, *conditions* and limitations to the contrary in the instrument of conveyance." If this be not effectually discharging the estate of those words, *conditions* and *limitations*, I own I am not able to discover the difference.

3. But the gentleman said that estates may yet be limitted to provide for contingences in families, and of this there is no doubt. A parent may guard against an improvident childs wasting his provision by limitting his interest in, or power over it. He may give an estate for life and limit remainders over upon it; but how far he may go in limitting estates for life one after another, so as to affect a perpetuity, we leave to be decided when a case shall come before the Court in which the experiment shall have been made. At present we can safely say that whenever the conveyance gives an estate taille in lands, the act vests in that tenant an estate in fee simple.

But inconveniences are objected.

1st. A man ought to be allowed to provide for perpetuating estates in his family one after another. But this the act prohibits as injurious to society.

2. But he may by these remainders provide for paying his debts, and for younger children. A provision for either by a remainder to take effect after a general failure of issue, which it is truly said may not happen in 1000 years, would be very unsatisfactory.

On the other side we discover important inconvenience in the decision laboured for. The act has been in operation 21 years, and we might suppose, and indeed know that great numbers of te-

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nants in taille have sold their estates to fair purchasers, without a doubt of the interest being absolute, and unfettered of these latent family provisions ingrafted on that estate taille. To subject these purchases to be disturbed in favour of mere volunteers, would be at least a great evil; but in this Court the law is to guide.

Mr. Washington states a difference between a will made the day before, and one made the day after the act of 1776, which we do not comprehend. That act makes no difference between estates created before or after.

These objections being removed we come to the act itself, the words of which are so strong and explicit, that no comment could increase their force.

Wm. Champe was indisputably tenant in taille of these lands at that period which the act changes into a full and absolute fee simple. And what is the general aspect of Mr. Washington's reasoning? The issue, who have the first and most important interest and a vested remainder which may never take effect, and which I call an estate *in the clouds*, is preserved. I believe it may be truly said, that no statute ever proceeded upon such a system. It only remains to consider Mr. Washington's great fort, that this devise may be supported as an executory devise, consistent with William Champe's having a full and absolute fee simple under the act, and if he could have proved this, he would have succeeded. But this is not, and can not be proved.

For what is a fee simple? It includes an entire dominion over the property to *sell*, to *give* or *transmit* to heirs general; and when an instrument has disposed of that to one, nothing remains to be given to others, or to descend.

The words *full and absolute* used by the Legislature; the word *pure* by Lord Coke, *and pure and indefeasible inheritance* used by others, are epithets to distinguish fee simple from *base* and *limitted* fees; unnecessarily indeed, as *fee simple* alone would

have

have the same effect. That an executory devise under proper rules, may be limitted upon a contingent fee is proved; the cases go farther however, and prove that a devise, in itself importing a fee simple, may admit of an executory devise afterwards: But by what operation? by changing the supposed fee simple, into a contingent and limitted fee, from apparent intention. There are no words or spirit in the act, to admit of such an operation in the full and absolute fee simple which it vests in William Champe. So that if this devise which is a contingent remainder and as such barred by the act, could be converted into an executory devise to some purposes, yet it cannot be so changed to avoid the act, nor have that effect. Upon the whole we are clear and unanimous that the defendants under the conveyance from William Champe have a good title; and affirm the judgment.

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TOWLER,

against

BUCHANANS HASTIE & Co.

And e CONTRA.

THIS was an appeal from a decree of the High Court of Chancery, upon the following case. Towler filed a bill in Chencery against Buchanans, Hastie, & Co. merchants in Glasgow; which stated that the lands in question were mortgaged to Buchanans, Hastie, & Co. by Isbel. That Jameson the defendant's factor and Isbel afterwards agreed to convey them to Hammond, on his securing the mortgage money to be paid to the defendants, in four instalments. That afterwards Jameson left the factorship and Lindsey succeeded him. That Hammond mortgaged six slaves to Lindsey for this and another debt, and then sold the lands to Lea, who sold to Towler; and the bill is brought to have Isbels mortgage to the defendants delivered up.

If I give a mortgage on lands to B & co. and then the agent of B & co. and I agree to convey to H on his securing the mortgage money; after which H. gives a deed of trust on sundry slaves for that & other debts to a

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succeeding agent of B. & co. the 1st mortgage is discharged, though B. & co. never conveyed to H.

The answer admits Isbel's mortgage, Jameson and Isbel's agreement with Hammond, and the mortgage to Lindley; but denies that the mortgage money has been paid, and stating that Hammond is now insolvent, insists now upon the lien.

The cross bill states the debt due to Buchanans, Hastie & Co. and another of £95, due Read for his undertaking to Burwell; for which Isbel mortgaged the lands and four slaves. That Jameson and Isbel entered into the aforesaid agreement with Hammond, to convey him the lands when he should secure the payment of £225, the amount of Isbel's mortgage; but denies payment thereof, or that Jameson ever conveyed to Hammond. That Hammond being indebted on his own account to Buchanans, Hastie & Co. to secure that debt, as well perhaps as an additional security for Isbel's debt, gave the mortgage for six negroes, which he has since carried off.

A witness deposed that he heard Towler say that he understood previous to his purchase, that the lands were mortgaged to Buchanans, Hastie & Co. That Towler and he went to inquire of Jameson; to whom Towler shewed the deed for the six slaves, and asked if they were not mortgaged to release the lands, who answered yes; and that the land ought to be cleared.

The purport of the agreement of Jameson and Isbel with Hammond, is only that they would convey on the money being paid or secured. There is in the record the proceedings in an attachment by Burt for Buchanan, Hastie & Co. against Hammond; in which is an account stating Hammond to be debtor to Buchanans, Hastie & Co. in £156: 19: 9 on his own account, and £225, *the agreed price for Isbel's land*, with a credit "by further security taken on slaves by deed of trust."

The Court of Chancery decreed that Towlers bill against Buchanans, Hastie & company should be dismissed; and on the cross bill that the lands should be sold to pay the mortgage money. From which decree Towler appealed to this Court.

Towler, *vs.* Buchanan.

RONALD for the appellant. Inſiſted that the ſecond deed for the ſix ſlaves was an execution of the agreement with Jameſon, and therefore that the mortgage on the lands was diſcharged. That all the circumſtances of the caſe proved this; and conſequently that the decrees were erroneous.

CALL for the appellees. The ſecond deed does not appear to be made with intention to diſcharge the firſt. The anſwer does not admit it, and the circumſtances plainly prove that no ſuch exoneration was intended by the parties. At any rate the laſt does not deſtroy the firſt, unleſs the money was paid. For it was but a mere contract of ſale. Buchanans, Haſtie & Co. had a mortgage for market, which Hammond agreed to buy at a certain price, payable by inſtallments; but he has neglected to do ſo, and conſequently by the known rule of equity, the ſellers have a lien until the purchaſe money is paid, *Cole* vs. *Scott* * in this court. This is the ſtronger ſtill, when the plaintiff claiming with notice under Hammond comes to call for a ſecurity, which itſelf is a lien on the eſtate. 1 *Anſtruther rep.* 111. If the conteſt were with Hammond himſelf, there could be no doubt; and his derivative purchaſer, both with implied and expreſs notice, can be in no better ſituation.

RONALD in reply. The caſes put are all of implied agreements, but here it was expreſs.

Per Cur: The deed of truſt from Hammond to Lindſay, of March the 28th 1774, comprehending a ſecurity for the £225 mentioned in the agreement of October twenty ſeventh 1770 between Libel, Jameſon and Hammond, was a complete performance of the condition mentioned in the ſaid agreement on the part of Hammond; and as ſuch appears to have been accepted by Lindſay as agent for Buchanans Haſtie and company. Therefore although Hammond, whilſt the land remained in his poſſeſſion, might hold it chargeable with any accidental deficiency in the new ſecurity, more eſpecially if that deficiency was occaſioned by his

* *Wash. Rep.* own

Towler, vs. Buchanan.

own fraudulent conduct: Nevertheleſs as Lea was afterwards a fair purchaſer of the land, without other notice than what appeared from the ſeveral papers, which teſtified that the condition was performed and the land exonerated; and this view of the papers confirmed by the proceedings of Buchanans, Haſtie & Co. upon the attachment in Charlotte County Court, He and the appellants under him have ſuperior equity to the appellees; and a right to have the agreement of Jameſon ſpecifically performed by a releaſe of the legal title claimed under Iſbell's deed of truſt. Conſequently the decree of the High Court of Chancery is to be reverſed with coſts; and a decree entered, for a releaſe of all right to the land, under the deed from Iſbell to Jameſon.

COUNTZ *againſt* GEIGER.

If a feme ſole deviſee having a right to lands in lord Fairfax's boundaries, marry, and her huſband by force and menaces gain her conſent, that a patent ſhould iſſue in her own name, her heir at law ſhall have a conveyance.

A feme covert muſt relinquiſh her

THIS was an appeal from a decree of the High Court of Chancery, affirming a decree of the County Court upon the following caſe. The bill ſtated that Geiger the father of the plaintiff, being poſſeſſed of lands, for which he had obtained a warrant from the proprietors office in the Northern Neck, and had improved and cultivated, deviſed them to his wife who was the plaintiffs mother and to whom the plaintiff was heir at law. That Countz afterwards intermarried with the widow, had the land ſurveyed in the teſtators name (who had omitted it during his own life;) and then having forced the mother by ill uſage to conſent that the patent ſhould iſſue in the name of Countz; and to make affidavit thereof, did afterwards obtain ſuch patent in his own name from the proprietors office accordingly; and that the mother has ſince died inteſtate; the bill therefore

prayed

Countz, *vs.* Geiger.

prayed that so much of the lands as were in the defendants possession should be conveyed to him as heir at law, and compensation for that which had been sold by him, with an account of the rents and profits of that in possession. The answer denied the improvements, stated that Geiger the testator had not pursued his right properly; and charged that he had forfeited it by neglect. It avered that he had obtained the patent fairly, admitted the affidavit of his wife, but denied the force and ill usage in order to obtain it. A deposition mentions that the deponent had seen Countz abuse his wife, but does not state the time when. The County Court decreed for the plaintiff, the defendant appealed to the High Court of Chancery, where the decree was affirmed. From which decree of affirmance, Countz appealed to this Court.

equitable as well as legal right separately from her husband. If an answer in chancery be contradicted in several instances it destroys its weight.

Lord Fairfax had a right to establish rules for issuing grants, and applicants were bound to conform to them.

WILLIAMS for the appellant. Geiger died without carrying the survey into effect, and having devised the lands to his wife, she afterwards intermarried with Countz, and consented that the patent should issue in the name of Countz. All this was fair, and the circumstance of the affidavit, which is not proved to have been obtained with force or ill usage, does not affect the case.

But upon another ground Countz has clearly a right to retain the land. For the testator not having pursued his right within proper time, *i, e,* within two years, had forfeited his title, which was revested in Lord Fairfax who might grant it anew, according to the decision of this Court in *Currie* vs *Burns.* *

Taking it though under the idea of a pursuit of Geigers old title, still the plaintiff had no claim. For if Lord Fairfax established rules in his office for the conveyance of the rights of a feme covert, there is no reason why they should not be observed.

Under any point of view then, the decree was wrong and ought to be reversed.

* Washingtons'. Rep. 2 vol.

PENDLETON.

Countz, vs Geiger.

PENDLETON Preſident. After ſtating the caſe, delivered the reſolution of the Court to the following effect. The principles formerly eſtabliſhed in *Currie* vs. *Burn* are well recollected and approved of by the Court. They were that the proprietor had a right to eſtabliſh ſuch rules for granting his lands as he pleaſed, to which thoſe applying for grants were bound to conform. That having publiſhed thoſe rules by ſticking them up in his public office, all applicants were bound to take notice of, and comply with them, without particular notice to each individual. So that if the lands were forfeited, he might grant them to another; and if he did ſo, the grant would be good, provided there was no fraud or deception in the perſon obtaining the ſecond grant. But if before any proceeding towards a ſecond grant, the firſt defaulter applied, and performed or offered to perform what was required he ſaved the forfeiture and had a right to the grant; agreeably to the ſpirit of the act; relative to petitions for lapſed land, which ſaves the forfeiture, if the condition is performed at any time before the petition, tho' not within that preſcribed by law.

Theſe were and are the general governing principles: How they are to apply depends upon the particular circumſtances of each caſe. We do not therefore enquire how they were applied in former inſtances unlike the preſent, but conſider how they ought to operate upon the preſent deciſion.

Excluſive of the wife's affidavit, her conſent is only proved by the anſwer. But that is contradicted, by the evidence in ſeveral important points; and therefore is deprived of that weight, which is allowed to anſwers by the rules of a Court of Equity; And it is not credible, that a wife whoſe huſband had long been in the habit of ill uſing her, even ſo far as to proceed to correction, would voluntarily go to a Juſtice of the Peace, and ſwear that ſhe was deſirous of cranſfering her eſtate to him, to the prejudice of her own ſon.

The proprietor it is apparent, did not mean to exerciſe his power of granting away this woman's lands

lands for the neglect in complying with the rules of his office; on the contrary he meant to preserve her right and was deceived into making the grant by the oath, as an evidence of her consent. Countz, vs. Geiger,

But was that proper evidence?

A feme covert cant' pass her legal title without a deed, accompanied by a privy examination, to evince that she does not do it under her husbands influence. And I presume a Court of Equity would require some equivalent testimony of her freedom of mind, in parting with her equitable title. Which proof is not afforded by the oath. For any thing which appears, she might be dragged before the justice and the oath administered in the husbands presence, under the influence of some signal terror before communicated and kept up. For it does not appear that the oath was administered apart from him, or that any enquiry was privily made of her, as to her freedom of mind in what she was doing.

The novelty of the proceeding gives suspicion of fraud, which is indeed apparent thro' the whole transaction. And the Courts below considering him as a trustee of the legal estate, for the use of the fair and conscientious *owner*, have rightly decreed a conveyance, and made him answerable for the money he received for the other entry. An objection is stated in the petition that he only calls himself heir of the father, but not of the mother, He says however that he is son and heir of the father, and *son* of the mother, to whom the lands would have descended but for the fraudulent deed, which is sufficient; especially as it is not questioned by the answer.

GASKINS,

GASKINS
against
COMMONWEALTH.

No writ of error lies to a judgment of the General Court after five years from the rendition thereof.

Interest is not due upon the damages until after judgment against a public collector.

THESE were writs of superfedeas to four judgments of the General Court, two in the year 1786 and the other two in the year 1788, upon the following cases. Gaskins was sheriff of Northumberland for the year 1785 and did not pay the amount of the taxes due into the treasury within the time prescribed by law. For default of which, motions were made and the judgments aforesaid obtained on behalf of the Commonwealth, for the principal and damages with interest on both, from a date anterior to the rendition of the judgments. The error assigned was "That interest was "directed to be computed on the whole amount of "the taxes due, and the damages from a day pre- "ceding the judgment, whereas it ought only to "have been computed thereon from the date of "the judgments." To these judgments writs of superfedeas were applied for, and obtained more than five years after the rendition of the judgments.

WARDEN for the plaintiff. It is the judgment which fixes the sum that is due, and the whole damage is to be computed at the time of the rendition thereof. The public ought not to have interest and damages too. That the doctrine will be inconvenient and will overturn a great many judgments is no argument against the positive law of the case. The mischief has already begun to be redressed; the General Court has altered its practice and now render rightly their judgments in such cases.

The next question is whether as the judgments were above five years standing at the time of awarding the writs the plaintiff is barred by any statute of limitations from taking advantage of the error? The acts of Assembly upon the subject do not apply to judgments of the General Court. For

they

they all speak of District, County, or other inferior Courts; and do not mention the General Court at all, until the act of 1792 concerning this Court, which being posterior to these judgments could not abridge the right which the plaintiff already had to obtain writs of supersedeas to them. For that would be unconstitutional, and so was the opinion of this Court in the * case upon the act of 1787 for amending the act concerning fraudulent gifts of slaves.

BROOKE Attorney General *contra*. The act of Assembly refers to the practice of the District Courts in granting writs of error and supersedeas to the judgments of inferior Courts. According to which no writ of supersedeas can be issued after five years, either by the act of 1792 or that of 1788. The 15th section of the act of 1792, concerning this Court, expressly enumerates the General Court amongst the others; and subjects it to the practice of the District Courts. Therefore, as these judgments were above five years standing, no writs of supersedeas ought to have issued.

As to the other point, It is right that a man having money in his hands should pay interest on it. By his bond he was to collect and pay into the treasury, and failing to do so, he became debtor, and interest attached. It was urged that the damages were not ascertained till the judgment; but the returns fixed it. The inconveniences of disturbing these judgments will be very great; for all the judgments of the General Court, prior to these writs, are entered so; and some regard is justly due to such long practice.

WARDEN in reply. The act of 1792 upon the subject of writs of error has the word *principles*, which dont' relate to time, but the mode of proceeding. As to the other point, interest was not due till the rendition of the judgment.

PENDLETON President. It can never be necessary to labor that point. It is clear that interest

* *Turner* vs *Turners executors*.

Gaſkins, vs. Commonw'lth

tereſt was not recoverable till the rendition of the judgment.

Upon a ſucceeding day of the term the Court delivered their opinion to the following effect.

ROANE Judge. Theſe caſes will go off in my opinion on this point, whether the writs of ſuperſedeas did not improvidenly and irregularly iſſue, as being beyond the limitation preſcribed by law in ſuch caſes?

The judgments were all of them rendered in the General Court prior to the commencement of the operation of the Diſtrict Court law of 1788; which law has a clauſe to this effect. "That no ſuperſe-"deas or writ of error ſhall be granted to any "judgment in the Diſtrict, County, or other in-"inferior Court, after the expiration of five years "from the date in caſe of judgments hereafter to "be obtained; or after the firſt day of January "1793 in caſe of judgments already obtained," with the uſual ſaving to infants feme coverts &c.

The Diſtrict Court law of 1792 omits the proviſion in the law juſt ſtated reſpecting judgments already obtained, *i, e,* prior to December 1788, not becauſe unconſtitutional to have made it, but becauſe it was wholly unneceſſary to inſert it, inasmuch as the act of 1788 which gave time for a ſuperſedeas in the caſe of judgments already obtained till the firſt of January 1793, was to be in force until that time, the new law having a ſuſpending clauſe till the firſt of January 1793. And there was no reaſon for extending *a time*, which a former Aſſembly thought ſufficient as to thoſe prior judgments, and which even from the date of that law (though many judgments were then of conſiderable ſtanding) was nearly as long as that preſcribed by the ſame law, in caſe of judgments in future.

But it is objected that the limitation of that law, as applied to exiſting judgments, is unconſtitutional. I anſwer that it takes from the party no right, but that of overhauling judgments after a conſiderable

lapſe

lapse of time to the great disturbance and injury of the public; that on the other hand it operates as an invitation to a party speedily to come forward and assert his right if he has any, and is only an acceleration of the course of justice; and that if the objection is valid it would perhaps equally lie, which was never pretended, against the limitation, in case of future judgments, arising on claims prior to the act; as a judgment does not originate but only ascertains a right. But what is equally conclusive with me is, that the power exercised by the Legislature and now in question, is one which even Courts of Law of their own mere authority have often exercised by shutting the door to a stale assertion of right. An instance of this kind is to be found in the *Winchester causes* 4 *Burr:* 1963, in which the Court of Kings Bench determined, that after twenty years unimpeached possession of a franchise, in a corporation, the Court will not oblige the person in possession, to shew by what right he holds it. A decision which was founded on the inconvenience of having rights disturbed after a great lapse of time, and dictated, as to the particular length of time, by an analogy to other cases limitation.

If then the right to review judgments given in District Courts prior to the commencement of the District Court law of 1788, ceased on the first of January 1793, how does the case stand with respect to judgments given in the General Court during the same period? *i. e.* how does the law in this particular affect the cases at bar?

The act constituting the Court of Appeals which passed upon the 26th day of October 1792, and was in force from that time, has a provision to this effect, appeals, writ of error and supersedeas may be granted, heard and determined by the Court of Appeals to or from any final decree or judgment of the High Court of Chancery, General Court, or District Courts, in the same manner and on the same principles as appeals, writs of error and supersedeas are granted, heard and determined by the

High

Grayson, vs. Commonw'lth

High Court of Chancery and Diſtrict Courts, to judgments &c. of the County Courts.

If this act had paſſed on the ſame day or even in the ſame ſeſſion with the Diſtrict Court law of 1788, no perſon could have doubted that it would have embraced, as to General Court judgments, the limitation therein preſcribed for writs of ſuperſedeas in the Diſtrict Courts; 1ſt, Becauſe the words, I think, are ſufficiently comprehenſive, and 2d, Becauſe there is a very ſtrong preſumption that the Legiſlature of a country would mean to extend equally to all Courts a limitation of this kind; and eſpecially could never be ſuppoſed to have intended to exempt alone the judgments of that Court which adminiſters in a peculiar manner the fiſcal juriſdiction of the commonwealth.

We well know that it is ſo deſirable a thing to have an equal meaſure of limitation in different Courts of the ſame country, that Courts of Equity, of their own authority, have adopted the ſtatute of limitations, as a poſitive rule; and apply it, by parity of reaſon, to caſes not within it.

Notwithſtanding however the ſtrong reaſon ſuppoſed to be on the mind of the Legiſlature in this reſpect, it ſo happened that adequate words were not uſed to extend the limitation to judgments of the General Court, until October ſeſſion 1792; when the ſyſtem of our Courts underwent a reviſion, and the Legiſlature enacted the clauſe of the Court of Appeals law above mentioned.

At the time of the enacting and commencement of this laſt act, the law of 1788 was in force and for ſome time after. The former act therefore may well be conſidered as expreſsly refering to the latter and adopting all its proviſions in this reſpect; and even had the latter been then expired, it is a general rule that all acts in *pari materia*, though ſome of them may be out of force, are to be conſulted in forming a concluſion depending upon more than one of them.

I have ſaid that the words of the Court of Appeals

peals law are in themſelves with the reference juſt ſtated ſufficiently comprehenſive to embrace the caſes at bar. They are that "appeals, writs of error and ſuperſedeas may be granted, heard and determined by the Court of Appeals, to and from any final decree or judgment of the High Court of Chancery, General Court and Diſtrict Courts, in the ſame manner and on the ſame principles as appeals, writs of error and ſuperſedeas, are to be granted, heard and determined by the High Court of Chancery and Diſtrict Courts, to and from any final decree or judgment of a County, City or Borough Court." Now if it were aſked on what principle a ſuperſedeas was refuſed, would I ſpeak improper, if I ſaid on the principle of its being barred by length of time? And *vice verſa* might I not ſay that a ſuperſedeas was granted on theſe principles. 1ſt. That the judgment to which it related was erroneous; and 2d, that a *supersedeas* was applied for in due time.

If however in grammatical ſtrictneſs there be a doubt in this particular, yet certainly a liberal conſtruction of the words would extend to this caſe; for clearly the Legiſlature muſt have meant to include all Courts, and emphatically the General Court for the reaſons I have ſtated.

And nor ought it to be loſt ſight of, that if the limitation now in queſtion does nor embrace the caſes at bar, that is to ſay, the caſe of judgments prior to October 1788, there is no Legiſlative limitation whatever of any paſt or future judgments of the General Court, but that Court is in this reſpect entirely preterniitted; and conſequently all that confuſion and inconvenience will follow, which would ariſe from reviewing at very diſtant periods and reverſing perhaps many judgments relative to tranſactions which our government has ſuppoſed, and certainly muſt have wiſhed, to be perfectly cloſed.

For theſe reaſons I think the writs of *supersedeas* ought to be quaſhed.

FLEMING

Grayson, vs. Commonw'lth

FLEMING Judge. By the act of 1792, appeals, writs of error and supersedeas are to be granted, heard and determined by this Court to decrees and judgments of the High Court of Chancery, General Court and District Courts, in the same manner and on the same *principles* as appeals, writs of error and supersedeas are to be granted, heard and determined by the High Court of Chancery and District Courts, to and from any final decree or judgment of a County, City or Borough Court. It is therefore to be seen how they are to be obtained in those Courts. The act of 1788 prescribes as well a mode of obtaining and conducting them, as the principles upon which they are to be granted. The mode relates to the petition, the certificate by counsel, application to a Judge, or the Court, and the giving bond for performance in case of affirmance. The *principles* are the causes of granting them and every other thing not relating to the mere forms of proceeding; as for instance the limitation of time, jurisdiction of the Court, and other things of that kind. And by this law no supersedeas was to be granted to any such judgment after five years from the rendition thereof in the case of future judgments, or after the first day of January 1793, in the case of past judgments. Now apply the first mentioned act to the directions of this, and it is impossible to resist the inference. For this Court is to grant writs of *supersedeas* upon the same principles and under like limitations and restrictions with the District Courts. But those Courts cannot grant them after five years, and therefore necessarily no more can this. The acts when fairly considered do not take away any right, but merely prescribe limits to the time of asserting it, like all other acts of limitation. Which are made for the sake of quieting rights; and putting an end to litigation after a great length of time. The plaintiff has indeed sustained an injury from the error, which the Legislature, on application, will perhaps relieve him against; but the Court cannot.

CARRINGTON Judge concurred.

PENDLETON

PENDLETON Preſident. On Dec. 14 1786, two judgments were entered againſt Mr. Gaſkins as ſheriff of Northumberland: One for the revenue tax, the other for the certificate tax, collected in 1785. Two other judgments are entered againſt the ſame ſheriff for the like taxes in 1787; and in all of them 15 per cent. damages are allowed; and intereſt on them, as well as on the principle, from days preceding thoſe on which the judgments were entered. Gaſkins, vs. Commonw'lth

This was contrary to the revenue act of 1782; ſevere enough in itſelf, ſince by that act the principal and damages were to form an aggregate; on which intereſt was to run from the time of the judgment until paid, ſimilar to judgments on proteſted bills. How this miſtake crept into the judgments of the General Court is not accounted for; but whoever diſcovered it and interpoſed to ſtop its progreſs, did a meritorious act, to prevent future injuſtice. If we were at liberty to decide upon the merits, I am inclined to think we ſhould not have been reſtrained from reverſals, by the arguments of the Auditor and Attorney General, drawn from the bonds and the inconvenience of unravelling ſo many judgments.

The latter was a proper conſideration with the Legiſlature, when they were contemplating the propriety of ſhutting the door againſt the correction of ſtate judgments. They have by their laws interdicted all Appellate Courts, this as well as others, from hearing appeals from judgments which have reſted five years.

The laſt of theſe judgments was in April 1788, the ſuperſedeas in October 1794, (ſix and a half years after,) and by the Diſtrict Court law of 1792 *ſect.* 52, no *supersedeas* or writ of error ſhall be granted to judgments in their own or Superior Courts, after five years from the date.

The counſel objected that this law could not have a retroſpective operation upon prior judgments, as the preſent were; not recollecting that

Gaſkins, vs. Commonw'lth

the Diſtrict Court law of 1788 has the ſame clauſe, providing for prior judgments, which are left open until January 1793. Which was neither unconſtitutional or unreaſonable.

The Court of Appeals law is, that writs of error and ſuperſedeas may be granted, heard and determined in this Court in the ſame manner and on the ſame principles as they are to be granted, heard and determined in the Diſtrict Courts, to judgments of inferior Courts.

The counſel ſaid this only reſpected the mode of proceeding, and did not reach the limitation. But if by law, it could not be granted in a ſimilar caſe in the Diſtrict Court (and that is made the ſtandard of this Court for manner and principles,) it is clear it could not be granted here.

The Court are concerned, at having by granting the writ, drawn the party into expence. However it was done at his requeſt, paſſed in ſilence and was not attended to. We think with Mr. Warden that error, when diſcovered, ſhould be abandoned and not perſiſted in: And according to a precedent in this Court, in October 1783 in *Maze* vs *Hamilton*, quaſh the writ of *supersedeas* as improperly granted, but without coſts.

FLEMING

FLEMING
against
BRADLEY.

Habeas corpus cum causâ must be served on the Court or delivered to the sheriff.

THIS was a motion for a supersedeas to a judgment of the District Court of Richmond, upon the following case. The petitioner was sued by Bradley, in the County Court of Goochland in an action of debt, and was held to bail. At November rules there was a conditional order; at December rules the conditional order was confirmed, "unless the defendant should appear at the "next quarterly sessions to be held for the said "county, and answer the bill aforesaid." On the 23d of March he gave special bail; but did not plead. On the 24th of March the bail surrendered him to the sheriff, who gave a certificate that he had him in custody. On the 25th of March a writ of *habeas corpus cum causâ* issued from the District Court of Richmond (but it does not appear that it was ever presented to the Court, or delivered to the sheriff;) And on the 26th of March being the last day of the term, the Court on the motion of the plaintiff confirmed the conditional judgment. The District Court awarded a *procedendo*. To which order the plaintiff prayed a writ of supersedeas.

DUVAL for the plaintiff. The act of 1792 *Rev. Code p.* 98, only restrained the removal of the suit to cases, where there is an issue or demurrer joined, and does not extend to those where there is no appearance. There is good sense in the distinction too. For it is reasonable that a man who is sued in a Court, and has submitted to the jurisdiction by pleading, or otherwise referring the cause to their decision, should not be allowed to translate the suit into another Court, until a final hearing; but it is otherwise where he has never submitted at all as in the present case.

Per

Fleming, vs. Bradley.

Per Cur: It does not appear that the writ of *habeas corpus* was ever ſhewn to the County Court, or delivered to the ſheriff, without which there could be no removal of the cauſe.

Superſedeas denied.

CASES

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
THE SPRING TERM OF THE YEAR 1798.

BROOKE
against
ROANE and COMPANY.

A forthcoming bond given on a judgment which bore only 5 per cent interest shall carry but 5 per cent. altho the bond was taken after the act allowing 6 per cent.

THIS was an appeal from a judgment, of the District Court of King and Queen, upon a forthcoming bond. The judgment was for £ 206 10: 2 and costs, but to be discharged by payment of £ 103: 5: 1, with interest to be computed after the rate of 6 per cent per annum, from the 18th day of July 1797, till payment, and the costs.

Per Cur.: The judgment is erroneous, in this, that it is "to be discharged by the payment of the "sum due on the forthcoming bond in the proceed-"ings mentioned, with interest thereon at six per "cent instead of five per cent per annum; the "Court considering the said bond not as a new "contract (in which the concurrence of both par-"ties is necessary,) but as a measure legally im-"posed on the creditor in his pursuit of his exe-"cution of the former judgment which bore an in-"terest of six per cent only; and which alone the "sheriff could have raised, if the condition of the "bond had been complied with, and he had pro-"ceeded to sale." The judgment of the District Court must therefore be reversed with costs; and judgment entered for the penalty of the bond, with costs in the District Court; but to be discharged by

Brooke vs. Roane & Co.

by payment of £ 103: 5: 1, with intereſt after the rate of five per cent per annum, from the 18th day of July 1797 till payment, and the coſts.

HUNTER, &c.
against
HALL.

A reaſonable degree of ſtrictneſs neceſſary in entries for lands.

The diſmiſſion of a caveat unleſs it be on the merits is not binding.

THIS was an appeal from the High Court of Chancery. Where Adam Hall brought a bill againſt Hunter and others, ſtating that Terence Popejoy had made an entry with the ſurveyor of Hampſhire county for 400 acres of land lying in the ſaid county, in the following words, "December 17th 1783, Terence Popejoy entered "400 acres of land adjoining the land of Ab. Key"kendall deceaſed, alſo four hundred acres on the "ſouth branch abjoining Lord Fairfax's land at "the mouth of Mill creek." That Popejoy afterwards having got a copy of the ſaid entry, from the ſurveyors books, aſſigned the entry for the ſaid laſt mentioned 400 acres to Martin Brown for value received; and that Brown afterwards for a valuable conſideration aſſigned to the complainant. Who had it ſurveyed and the ſurvey returned to the Regiſters office; but that the defendant Hunter and others had a location and ſurvey of lands made in that quarter (which included a great part of that ſurveyed for the complainant,) and then entered a caveat againſt the complainant's, obtaining a patent, which was afterwards proſecuted in the Wincheſter Diſtrict Court. "That the ſaid "caveat coming on to be heard in April 1791, "the ſame was diſmiſſed by the Court." That after Hunter's ſurvey, the plaintiff being about to enter a caveat againſt iſſuing a patent to him, it was agreed that the whole conteſt ſhould depend on the determination in Hunter's caveat aforeſaid againſt the complainant; but the defendants, notwithſtanding that agreement, had afterwards procured

cured a patent, and thereby obtained a priority at law by fraud. The bill therefore prays for relief againſt the patent, and that the defendants may be decreed to convey to the plaintiff. Hunter, vs. Hall.

The anſwer ſtated that the defendants had entered and ſurveyed the land as vacant; that hearing afterwards of Popejoy's entry, they upon enquiry found that Popejoy had taken a copy of his entry from the ſurveyor in theſe words, "Decem- "ber 17th 1783, then did Terence Popejoy enter "400 acres of land on the ſouth branch adjoining "the lands of the heirs of Abraham Keykendall, "in Hampſhire county within the Northern Neck, "ſigned *Joſeph Nevill ſurveyor.*" That Popejoy went with a deputy ſurveyor to ſurvey the lands, but could find no vacant lands, where he ſuppoſed there had been ſome, and therefore declined proceeding any further under his ſaid entry; which he offered to the ſurveyor for his ſervices, but the offer was rejected. That he ſold the entry to Brown for eighteen pence and half a pint of rum. That from theſe circumſtances, the defendants concluding that Popejoy and his aſſignees could have no title, under the ſaid entry, filed a caveat, which was afterwards diſmiſſed by them on the hearing at the inſtance of the complainant, in order to avoid a deciſion on the merits, becauſe the certificate of the entry made in the Regiſter's office was not atteſted by the Regiſter as the law required, but by one of his clerks. That the defendants never entered into ſuch agreement as that ſtated in the bill.

The Court of Chancery was of opinion that although Popejoy was diſappointed in his firſt attempt to diſcover vacant land, yet that he had not loſt his right, by dereliction or the ſale for a ſmall conſideration, but that the complainant had a title under the entry, "the deſcription of the land in "the entry, (as the terms of that entry are re- "hearſed by the ſurveyor, with whom it was made "in his examination,) being verified of the land "certified to have been ſurveyed by authority of

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"the entry, and that the right of the plaintiff "ought to be in the ſtate in which it would have "been, if the emanation of a grant to him had "not been prevented by the caveat againſt it on "behalf of the defendants, pending which caveat "the obtainment of the grant to the defendants "was an unfair practice." Therefore the Court decreed the relief ſought by the bill. From which decree the defendants appealed to this Court.

ROANE Judge. The appellants in this cauſe having a legal title to the land in queſtion, by virtue of the patent of the 2d November 1789, that title ought not to be diveſted unleſs the Court ſhould be of opinion that under the equitable circumſtances of his caſe, the claim of the appellee is paramount.

This poſition neceſſarily brings into compariſon the claims of the two parties; and unleſs that of the appellee ſhould be deemed preferable, it would be impertinant to enquire whether by any agreement ſtated or proved in the caſe, or by the act of 1779, independent of ſuch agreement, the appellants were prohibited from taking out their patent, during the pendency of the *caveat* in the diſtrict Court of Wincheſter?

In making this compariſon, we are not to infer that the judgment of the Diſtrict Court, diſmiſſing that *caveat*, which is ſtated in the proceedings in this cauſe, aſſerted a right in the appellee to the land in queſtion, or that the caveat was, as it reſpected the merits of the title, groundleſs. For by the act of 1779 a caveat may be diſmiſſed, becauſe not authenticated in a particular manner; or becauſe the ſurvey was not within the time limited by law: or becauſe the breadth of the ſurvey is not equal to one third of its length. But in any of thoſe caſes the title to the land is not decided; for any perſon, even the ſame caveator, may nevertheleſs afterwards by another caveat on the ground of having himſelf a better right, oppoſe a grant. I mention this by way of controverting a poſition,

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in the Chancellors decree, inferring that becauſe the caveat in this caſe was diſmiſſed by the Diſtrict Court, it muſt be preſumed to have been groundleſs: meaning thereby, as I underſtand it, in point of right; and that the right to the land in queſtion was aſſerted by the judgment of that Court, to have been in the appellee: To which right it is the object of the decree to reſtore him.

Taking it therefore as a clear poſition that the rights of the preſent parties, as relative to the lands in controverſy, have never been compared together, nor the one preferred to the other by the judgment of any Court; and that the diſmiſſion of the caveat does not neceſſarily imply the conſequences which the Chancellor has inferred from it, we are now to make that compariſon and ſay whether under the circumſtances of this caſe, the legal title of the appellants muſt yield to the ſuperior claim of the appellee? The act of 1779 preſcribing the mode of locations, by the ſtrict terms of it, preſuppoſes a ſurvey; for without ſuch ſurvey, no perſon can ſtrictly conform to its terms, in making a location. But that act unavoidably requires; and has uniformly received a liberal conſtruction in this reſpect. It is not in my power, nor is it neceſſary in this caſe, to draw a line as to the particular extent of this latitude; but as on the one hand a ſtrict adherence to the terms of the act would produce infinite diſputes and litigation, ſo on the other the ſpirit, as well as letter of the act, requires that we do not wholly diſregard the land marks which it has eſtabliſhed, nor abandon the intereſts of poſterior locators or adventurers. This can only be done by holding locators to a reaſonable degree of ſtrictneſs in their entries.

The entry of Popejoy is for 400 acres of land adjoining the land of Lord Fairfax, at the *mouth of mill creek*. Theſe laſt words are deſcriptive of the particular tract of Lord Fairfax's land, which the land located was to adjoin, but they are not deſcriptive of any particular ſpot in the entry juſt preceding the one in queſtion, and contained

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in the ſame inſtrument; that entry being only to *adjoin the lands of Abraham Keykendall deceased.* But this tract of Lord Fairfax lies on the weſt ſide of the great branch of Patowmac river; and in order to come at the land in queſtion, the appellee, beginning where he himſelf ſuppoſed his entry required him to begin, muſt not only take in the appropriated lands of other perſons, but croſs a river in itſelf conſiderable, and perhaps the largeſt in that country. In order to ſuſtain this entry, as applicable to the land now in diſpute, it ought at leaſt to have been ſhewn that it was uſual in ſurveys in that part of the country, to run acroſs that river. Evidence of a contrary nature though has been given; as may be ſeen in the depoſition of Henry Aſhby. But in truth a location ſtated to be adjoining to a tract of land which only lies on the weſt ſide of that river, or (as is the caſe in the copy of the entry containing the aſſignment to the appellee) ſtated to be on the weſt ſide of the river adjoining a ſurvey of Lord Fairfax, can never be conſtrued to extend to land on the eaſt ſide of the ſaid river. It is not, as to ſuch land, a ſufficient entry under the before mentioned act of Aſſembly. Other adventurers could not reaſonably ſuppoſe it to extend to ſuch land. But if, in truth, the locator intended it to extend to ſuch land (of which however there is abundant evidence to the contrary in the caſe,) it is better that he and thoſe claiming under him ſhould ſuſtain a loſs, ariſing from their own negligence and omiſſion, than that third perſons ſhould, by means of ſuch negligence and omiſſion, ſuffer an injury, which no prudence or foreſight of theirs could have averted.

For theſe reaſons I think the legal title of the appellants ſhould not have been diſturbed; but that the bill of the appellees ought to have been diſmiſſed.

LYONS Judge. The only difficulty is with reſpect to the caveat. If it had been heard and determined on the merits, it would have been binding until reverſed; but it was not, and therefore the

open

case is open on the merits. Neither Popejoy or the surveyor expected to find land on the east side; and the purchaser could not be deceived, as he took the assignment on a copy of the entry; which was complete notice.

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Per Cur. Let the decree of the Court of Chancery be reversed, and the following decree made in its room,

The Court is of opinion that the entry of Terence Popejoy with the surveyor of Hampshire county on the 17th day of December 1783, for four hundred acres of land on the south branch in the proceedings mentioned, under which the appellee claims title, by assignment, to part of the land on the east side of the said branch, included in a patent since granted to the appellant David Hunter, did not express, nor was the same as understood by the surveyor and acknowledged by the said Popejoy, intended to include any land on the east side of the said branch. That the appellee could not have been deceived, as to the situation of the land so entered for at the time of the purchase; as the copy of the entry on which the assignment was made by the said Popejoy, describes the land entered for, as lying on the west of the south branch. That the appellants having afterwards located and surveyed land as vacant on the east side of the branch, and obtained a patent for the same, by which they acquired a legal title thereto, ought not to be deprived of that title by the appellee who hath not shewn a better equitable title; and although the caveat in the proceedings mentioned was dismissed, it does not appear that the same was heard and dismissed on the merits of the case, but rather the contrary, and therefore no barr to the claim of the appellants under their location and patent: which was open for the decision of the Court of Chancery, and ought to have been in their favor, and that the said decree is erroneous. Therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended

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expended in the profecution of their appeal aforefaid here; and this Court proceeding to make fuch decree as the High Court of Chancery fhould have pronounced: It is further decreed and ordered that the appellees bill be difmiffed, and that he pay to the appellants their coffs by them about their defence, in the faid High Court of Chancery expended.

BREWER AND WIFE, *againft* OPIE.

If a cafe agreed be too imperfectly ftated for the Court to proceed to judgment, it will be fet afide, and new proceedings ordered.

Devife of the teftators whole eftate to his fon A and if he die before 21, *or* lawful heir, then over to the children of B and O; the word *or* is to be taken *copulatively*, and both contingencies muft happen before thofe in remainder are entitled.

THIS was an action of ejectment, in which there was the following cafe agreed.

We agree that William Lancafter died after having duly made and executed his laft will and teftament bearing date the 26th day of November 1765 and recorded the twelfth day of May 1766 in the following words. "I William Lancafter of "the county of Northumberland being in perfect "fenfe and memory do make and ordain this to be "my laft will and teftament, that is to fay, I give "and bequeath unto my beloved fon Jofeph Lanca-"fter my whole and fole eftate both real and per-"fonal, *and in case my said son should die before "the age of twenty one years, or lawful heir, then "and in that case I give my said estate to be equal-"ly divided between the children of Joseph Black "well and Lindsay Opie and their heirs forever.* "Item I appoint my friends Mr. Winder Kinner "and John Williams to be guardians to my faid "fon Jofeph Lancafter and my whole and fole ex-"ecutors of this my laft will and teftament."

WILLIAM LANCASTER.

We agree that Jofeph Lancafter mentioned in in the faid will of William Lancafter was feized and poffeffed of the land in the declaration mention-

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ed, and died so seized and possessed on the——day of——1778 without issue, and under the age of twenty one years. We agree that Joseph Blackwell at the time of the death of the aforesaid William Lancaster was married to Hannah Nelms, first cousin of the said William Lancaster, and had one child, a son by the name of Joseph, who died under age and without issue, soon after the said William Lancaster, and before the death of the said Joseph Lancaster.

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As the death of A though will determine both events, the limitation over will be good as an executory devise.

But as those in remainder must take as persons described, it is confined to children of B & O *in esse* at the testator's death; who take *per capite* & not *per stirpes*.

We agree that Lindsay Opie was married to Elizabeth Nelms, a first cousin of the said William Lancaster, at the time of the death of the said William Lancaster, and had three children by the said Elizabeth, at the death of the said William Lancaster, to wit, Sally, Lindsey and William; and four children, after the death of the said William Lancaster, to wit, Thomas, Elizabeth, Susanna and Hiram Lindsey. We agree that Sally was the only surviving child of the said Lindsey Opie and Elizabeth, at the time of the said Joseph Lancasters death and was born previous to the death of the said William Lancaster. We agree that Joseph Blackwell, after the death of his said first wife Hannah Nelms, intermarried with Hannah Rogers; by whom he had issue Nancy, the wife of the lessor of the plaintiff, and [illegible] who died an infant and unmarried, after the death of the said Jos. Lancaster. We agree that the said Nancy the wife of the plaintiff was born prior to the death of Joseph Lancaster, but after the death of the said William Lancaster. We agree the leafe entry and ouster &c. in the usual form.

The District Court gave judgment upon this case agreed for the defendant; and the plaintiff appealed to this Court.

PENDLETON President. If we decide on the case agreed, William Lancaster and his will are out of question; since he is not stated to be seized, and we must enquire who is heir to Joseph the son, who was seized. The statement is imperfect,

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perfect, as to who was his heir; since the time of his death, whether before or since January 1787, is not stated; so as to enable us to determine, whether the old or new law of descents is to govern. Nor does it appear whether all, or any of the four children of Opie, were born before, or after Joseph's death. But it seems pretty evident that the plaintiff Nancy, not stated to have any relation by blood to him, could not have any claim upon his inheritance. Supposing however, what was probably the case, that the testator was seized and that the title depends upon his will, I have no difficulty at present in deciding. That Joseph the son took a contingent fee, to become absolute upon either events happening; that is to say, his coming of age, or having a child born, or leaving one at his death; no matter which. That *or* in this will is to be taken *copulatively*, so as to require the happening of both contingencies to intitle those in remainder. That as the death of Joseph must determine both events, the remainder was good as an executory devise. That as those in remainder must take as persons described, it is confined to children of Blackwell and Opie *in esse* at the testators death, so as to exclude after born children. And that those *in esse* took *per capite* and not *per stirpes*, being all equally within the description, as both events happened. The consequence is, that three fourths of the estate was devised, upon the contingencies happening, to Opie's three children, and one fourth to Blackwell's son. But how this one fourth was to go upon his death, the facts stated do not enable the court to decide. Therefore as the case agreed is too uncertain for a judgment to be given on it, the judgment of the District Court should be reversed, the case agreed set aside, and the cause remanded to the District Court, to be further proceeded in.

The judgment was as follows: The Court is of opinion, that the case agreed in the record mentioned is too uncertain for a judgment to be given thereon, and that the said judgment is erroneous.

Therefore

Therefore it is considered that the same be reversed &c. that the case agreed be set aside, and that the cause be remanded to the said District Court to be further proceeded in.

Brewer, *vs.* Opie.

BARRET & COMPANY, *against* TAZEWELL.

BARRET and COMPANY, as assignees af Emanuel Walker & Co. who were assignees of Theodorick Bland, brought an action of debt in the District Court of Williamsburg, upon a bond given by Tazewell to Bland, for payment of £900 on or before the 25th day of December 1786, under the penalty of £1800. Which bond bore date the 30th day of March 1785, was assigned to Walker & Co. on the 10th of May 1786, and by them to Barret & Co. upon the 20th day of March 1787. There were endorsements as follows:

May 24th, 1795 Received in cash	£276:16:2½
An order on Rev. S. M'Croskey when paid.	276:16:2½
	£553:12:5
Cr.	
By a judgment against Tayloe's executors settled up to the 4th, of May 1792.	£400:10:10

Before any plea pleaded by the defendant, he brought into Court £539:10:5, and tendered it in discharge of the bond; which the plaintiffs refusing to except, the defendant moved for a dismission of the suit at his costs; he having, (as the record stated,) brought into Court the principal sum due, with interest thereon from the 20th day of March 1793; and prayed to be discharged from the interest which accrued on the said bond from

Judgment reversed, because the bill of exceptions stated the facts imperfectly. Quere. If in an action of debt upon a bond, the defendant brings in the principal & a lesser sum than is calculable on the face of the bond with the costs, & the plaintiff refuses to accept it, the court can up on motion decide whether more interest is due, or whether there ought not to be an issue & trial by jury?

the

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the 25th day of December 1786, the time the ſaid bond was payable, till the 20th, day of March 1793. The motion was continued three terms, and finally an order, to that effect, was made by the Court.

The plaintiffs filed a bill of exceptions ſetting forth the bond and endorſements in *hæc verba;* and ſtating further that a motion was made by the defendant to have the ſuit diſmiſſed with coſts againſt him, on his paying into Court the principal and intereſt. That the defendant brought into Court the principal and intereſt, upon the bond, from the 25th, day of December 1786, the time when the bond aforeſaid was payable, 'till the ſaid 20th of March 1793; and to ſupport the motion, that the defendant gave in evidence the proceſs of York County Court ſiting in Chancery, which iſſued on the 19th of May 1786 againſt the defendant and Bland, and was ſerved on the defendant the 24th of the ſame month, in behalf of the executors of Theodorick Bland deceaſed: and an order made by the ſaid Court of York on the 21ſt of May 1787, reſtraining the defendant from diſpoſing of any debts or effects, in his hands, belonging to Bland the original obligee. That the ſaid ſuit was diſmiſſed as to the defendant, on the 20th, day of March 1793. That the defendant had notice of the aſſignment to Walker & Co. before the bond became due, but ſubſequent to the proceſs of York Court being ſerved upon him.

The plaintiffs refuſed to accept the money brought into Court, claiming the intereſt from the 25th of December 1786, 'till March 1793; but the Court was of opinion that the money ought to be received, without ſuch intereſt, and directed a diſmiſſion of the ſuit. At the end of the bill of exceptions, theſe words were added, "and foraſ- "much as the whole caſe could not appear the "parties agreed to the within ſtatement of facts." The plaintiffs appealed to this Court from the judgment of the Diſtrict Court.

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WASHINGTON for the appellants. The firſt queſtion is, whether the claim for full intereſt ought to have been diſallowed? It is unneceſſary to diſcuſs the queſtion, whether in any caſe intereſt ſhall ſtop at law, upon a debt due from the garniſhee, and decreed by a Court of Equity to be paid to an attaching creditor. For be that queſtion how it may, there is no ground for the deciſion made in this caſe; becauſe the bond being aſſigned to Miller on the 10th of May 1786, the debt, from that time, was due to him. The order only reſtrained Tazewell from paying away debts, in his hands, due to Bland; but at this time, that is to ſay, on the 24th of May 1786, this was not a debt due to Bland; and therefore might have been paid without any contempt of the order. The want of notice did not make it leſs a debt due to Walker, although it might perhaps have protected Tazewell, in reſpect of any actual payments made by him to Bland. But if it were otherwiſe, ſtill it ſhould not have ſtopped intereſt longer than the time when Tazewell had notice, which was before the 25th of December 1786. If intereſt could be ſtopped upon any ground, it muſt be upon ſhewing that the defendant had not been in fault. But if he did not chuſe to enquire who owned the bond, he took upon himſelf the riſque of an unneceſſary obedience to the order. As intereſt was not demandable until the 25th day of December 1786, before which he had notice, he cannot ſhelter himſelf, againſt intereſt, under an order not affecting this debt; which had been previouſly aſſigned. But at any rate the defendant ſhould ſhew that he had not contributed to the delay, which he ſays produced a ſuſpenſion of the payment. He was ſerved with the proceſs on the 19th of May 1786, and might have immediately anſwered, ſtating that the money was not due to Bland, and procured a diſmiſſion of the ſuit, as he ultimately did. In juſtice the defendant ought to pay the whole intereſt; for he had the uſe of the money, and we ought not to loſe it, by the act of a third perſon, over whom we had no controul.

But

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But ſuppoſing the claim for full intereſt ought to have been diſallowed, then the queſtion will be whether the Court did right in diſmiſſing the ſuit? The practice of bringing money into Court exiſted long before any ſtatute upon the ſubject; but on a bond it was neceſſary to bring in the penalty. 5, *Bac.* 29. *Salk.* 597. To remedy this the ſtatute of the 4, *Ann. C.* 16, was made; from which our act of Aſſembly is copied almoſt *verbatim*: And the only alteration produced by the ſtatutes is, that of permitting the principal and intereſt, inſtead of the penalty, to be brought in. The practice in England is to ſtrike out of the declaration what is paid into Court: If the plaintiff will accept it, he is entitled to coſts to that time; if not then he proceeds for the balance at the peril of the ſubſequent coſts, ſhould he not recover more. But ſtill he may proceed if he pleaſes. Under our act of Aſſembly, if the defendant pays in the principal and intereſt due, he is to be diſcharged; and judgment is to be rendered for the coſts only. But who is to determine whether all is paid or not? The jury ſurely; for no power is given the Court for that purpoſe, and the trial by jury ought not to be *ouſted* by mere implication, *Watſon* vs *Alexander*, in this Court. * In the preſent caſe many points of inveſtigation were neceſſary, in order to aſcertain what was due. For credits were indorſed, which required explanation, and were open to proof; and therefore the Court could not, in a ſummary way, prevent the trial by jury and diſmiſs the ſuit. For it is laid down by Lord Mansfield that, in ſuch a motion, the law ariſes upon the fact; and if the ſum demanded be certain or capable of being aſcertained by mere computation, without leaving any other ſort of diſcretion to be exerciſed by the jury, the Court may ſtrike ſo much of the plaintiffs demand out of the declaration, and if the plaintiff will not accept it he muſt proceed at his peril. 2, *Bur.* 1120. So that the Court cannot diſcharge the defendant and compel the plaintiff to accept of the principal and intereſt, unleſs it be a caſe of mere

* Washington's Reports 1ſt vol

mere computation. But here as before obſerved a further inveſtigation was neceſſary; and therefore the Court could not interpoſe and diſmiſs the ſuit.

WICKHAM for the appellee. It ought not to be preſumed that there was any other debt due to Bland but this, and therefore the order of York Court neceſſarily related to it. Great frauds may happen under the doctrine contended for upon the other ſide; as antedated aſſignments may be procured, and other ſteps taken to defeat the attaching creditor. It would have been a contempt to York Court for Tazewell to have paid this money to the aſſignee before the deciſion there; eſpecially if it had turned out that the aſſignment was antedated. An attachment, levied before notice, will bind the debt, and the plaintiff in equity will obtain priority. Barret might have come into York Court and interpleaded; for he is preſumed to have had notice. Intereſt is in lieu of damages, and here the penalty was not forfeited until a demand and refuſal after the order was taken of, *M'Call* vs *Turner*, in this Court. * The practice of ſuffering the plaintiff to proceed after the money is brought into Court, is confined to actions on the caſe where the amount is uncertain and facts are to be inquired into. But here the point in controverſy was a matter of law, not proper for the jury to decide, as the claim for intereſt depended on the effect of the proceedings in York Court, which being a point of law, it was proper that the Court ſhould decide it. The caſe of *Watſon* vs *Alexander*, was not like this; for there the jury were to aſſeſs the damages.

ROANE Judge. The act of 1748 *ch.* 5. §. 6, which as well as that of 1792 *ch.* 76. §. 21, is the ſame in ſubſtance with the Engliſh ſtatute of the 4 and 5 *Ann. Cap.* 16, ought to have a liberal conſtruction; and Courts of Law and Equity ſhould exerciſe their own authority to extend the ſpirit and reaſon of it.

* Ante P. 133.

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By that act it was meant, that in case of penalties, by way of security, the final justice of the case should be attained in Courts of Law. That is to say, that Courts of Law should, with respect to the object of that act, stand in the place of Courts of Equity. This construction is adopted by the Court of Kings bench upon the English statute, in the case of *Bonasous* vs *Rybout*, 3, *Bur.* 1373; and I accord entirely with that opinion, in respect to the interpretation of our own act of Assembly.

Previous to the statute there is not a shadow of doubt, but that a Court of Equity would have relieved against a penalty, by decreeing that less than the principal and nominal interest was a satisfaction of the penalty, if from principles operating upon such Court, the whole nominal interest should not be considered as demandable. In such a case the whole of the nominal interest could not in the language of the act of Assembly be considered as due; but only such parts thereof as according to the principles of equity, ought to be paid. This doctrine of applying equity to a Court of Law, by virtue of the act of Assembly, is an answer to Mr. Washington's argument that the principal and interest, being commuted for the penalty, the latter is to remain in force until the principal and whole interest, calculable on the sum mentioned in the bond, shall be paid. But a party coming into Court under the provisions of this act, must by the case which he makes, shew the Court that the whole nominal interest is not justly due, or the Court is not authorised to make him any abatement. In the present case, although admitting the assignment to have been *bona fide*, of which the contrary does not appear; the debt due by the bond in question was not a debt due to Mr. Bland at the time of issuing the process of York Court against the appellee; and although the appellee had notice of the assignment before the bond became due; yet it doth not appear from the case stated in the bill of exceptions, either that he had reason to doubt of the validity of such assignment, or that he took any early measures, if any such were in his opinion necessary,

to

to procure the judgment of a court in order to ascertain who was his true creditor or to exonerate himself from the restraint imposed on him by the process of York Court. Indeed it was justly argued that *laches* on his part in this respect is *prima facie* inferable from the lateness of the period when he was dicharged, as to this debt, by the judgment of that Court. Without therefore undertaking to say whether any circumstances which may in fact exist in favor of the present appellee, shall demand of the Court to adjudge that some part of the nominal interest is not due, I consider that the bill of exceptions has not stated such circumstances as would warrant such an opinion, but that it is, as to those circumstances, a mere naked case.

This view of the subject precludes the necessity of my giving any opinion with regard to the rectitude of the judgment of the District Court; as it respects a dismission of the cause, without the finding of a jury; as to which, whatever my present impressions may be, I have formed no deliberate opinion. But if a dismission upon the merits was illegal, supposing the Court to have had jurisdiction to decide in a summary way; it follows *a fortiori* that the judgment is illegal, when the Court has so decided without the intervention of a jury, if the objection to the jurisdiction is well founded.

It would give me satisfaction and promote the real justice of the case, as it respects the interest in question, if a reversal of the opinion of the Court for the reasons above assigned, should not preclude the appellee from bringing forward in future before the same Court, circumstances if any such exist in his favour, to justify the abatement of the interest: And my impression at present is that it will not. Upon the whole, for the reasons already assigned, I think the judgment of the District Court must be reversed.

CARRINGTON Judge concured, that the judgment should be reversed and the cause sent back for further proceedings.

PENDLETON

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PENDLETON Preſident. The counſel for the plaintiff objects, that as the plaintiff inſiſts more money is due than the defendant admits, and brings into Court, the judgment of diſcharge ought not to be entered; but an iſſue if one be not before joined, ought to be made up and tried by a jury to determine what is really due at the time, agreeable to the practice in pleas of tenders out of Court and the antient principle of equity, when before the ſtatute, that Court was reſorted to for relief againſt the penalty.

This general poſition (modeſtly mentioned indeed from reſpect to a former deciſion of this Court,) "that Courts and juries under this and "a former part of the clauſe are reſtrained "from enquiring whether intereſt in the whole or "in part, be due or not; that the judgment for "the penalty can only be diſcharged by the pay-"ment of the whole intereſt; and therefore that "the diſcharge by the Court cannot be entered "but upon the terms of the defendants bringing in "the full intereſt," he will ſurely on further conſideration acknowledge to be incorrect; for ſuppoſe the whole or part of the intereſt be actually paid, muſt he in either caſe pay it over again to procure his diſcharge?

The word *due* in the act applies to intereſt as well as principal, and authorizes an enquiry what is really due, of one as well as of the other. But how that enquiry is to be made in ſuch a caſe as the preſent, is a queſtion of conſiderable difficulty, not however neceſſary to be decided in this cauſe, for reaſons which will appear hereafter.

Our preſent impreſſions are that the act tho' general and pretty ſtrong, contemplated the payment of the whole claimed by the plaintiff: and did not mean to give a power to the Court in that haſty manner upon motion, to decide a conteſt between the parties about the *quantum* of the demand, but that if not already in iſſue, it ought to be put ſo, and tried by a jury, as a general practice, Though we do not mean to be bound by

This

this opinion, when a proper caſe ſhall bring it before us.

In the preſent caſe the diſpute was about a certain liquidated ſum of intereſt, depending on facts connected with a record of the County Court of York and its legal effects. So that had a jury been impannelled, it would have been the duty of the Court, by direction to the jury, or on a ſpecial verdict, to have decided what were thoſe legal effects. And for this or other reaſons, perhaps to avoid delay, the plaintiff probably choſe to have a deciſion of the Court at once. But the exception does not ſtate that he did ſubmit it to the Court; neither does it ſtate that he applied for an iſſue to be made up and tried by a jury, as he ſhould have done to ſupport the preſent objection. On the contrary the exception ſeems to be to the judgment on the merits; and paſſing over this we come to that queſtion.

Caſes are ſuppoſed which never happened, but might with propriety be put and reaſoned upon by way of illuſtration. Facts too, are ſuppoſed on both ſides, which may be true, though not ſtated; and if ſo, they are important on the queſtion of intereſt: Which cannot be juſtly decided on the ſtatement made in the bill of exceptions. The record of York Court may probably ſupply the defects. And therefore the Court reverſes the judgment, and remands the cauſe to the Diſtrict Court for further proceedings to be had therein, from the payment into Court and the motion for diſcharge.

The entry of the judgment is as follows.

"The Court is of opinion that the facts in the "bill of exceptions are too imperfectly ſtated to "enable the Court to decide the queſtion of inte-"reſt, between the parties, upon juſt principles; "and therefore that there is error in the Diſtrict "Courts having proceeded to judgment upon ſuch "ſtate. Therefore it is conſidered that the ſaid "judgment be reverſed &c, and that the cauſe be "remanded to the ſaid Diſtrict Court for further "proceedings to be had therein, from the pay-"ment of the money into Court, and the motion "of the appellee to be diſcharged."

MAUPIN
againſt
WHITING.

The anſwer of the defendant when reſponſive to the bill is concluſive unleſs diſproved.

If the defence be purely legal, it ſhould be made on the trial at law.

THIS was an appeal from a decree of the High Court of Chancery. The bill ſtated that a replevy bond purporting to be entered into by the plaintiff as ſecurity for John Whiting (and which had been aſſigned to Maupin,) was not the act of the plaintiff. That, about fifteen Months after its date, Maupin informed the plaintiff that he had ſuch a bond. That the plaintiff with aſtoniſhment informed Maupin that he had never executed it, or heard of the execution before. That, about two Months afterwards, he met with the deputy ſheriff, by whom the execution and bond were returned, and was perſuaded by him not to mention the tranſaction; as he ſaid that he would not have ſuch an affair to come before the Court for an hundred pounds; that the plaintiff told him he would not make any ſtir in it, unleſs an execution ſhould come againſt him. The bill therefore prayed an injunction to the bond; and the deputy ſheriff was made a defendant to the ſuit. The anſwer of Maupin ſtated that, not fifteen Months after date, he ſhewed the bond to the plaintiff, who ſaid it was not his hand writing; but from the manner of expreſſing himſelf, he did not ſuppoſe the plaintiff would conteſt it, or deny that the ſubſcription was with his conſent and approbation. That he was the more induced to think ſo, as the plaintiff was the only ſon of the principal obligor, who was wealthy and of a fair character. The anſwer of the deputy ſheriff ſtated, that the commiſſioners having approved of the plaintiff as ſecurity for his father, and the defendant repoſing confidence in the father, intruſted him with the bond to get the ſignature of the plaintiff, who was abſent. That the father afterwards returned the bond to the defendant, with the plaintiffs name ſubſcribed. That the plaintiff afterwards

denying

Maupin, vs. Waring.

denying the ſignature, the defendant ſaid he would ſue the father in order to ſecure himſelf. Whereupon the plaintiff ſaid it might hurt his fathers feelings, and that he ſuppoſed he muſt be his ſecurity. On which he acknowledged the ſignature to be his hand and ſeal. The cauſe was heard upon the bill and anſwers in the Court of Chancery; where the injunction was made perpetual. From which decree Maupin appealed to this Court.

WICKHAM for the appellant. The plaintiff indeed ſtates that he did not ſubſcribe the bond; but Maupin ſays he did not appear to diſpute his liability; and the deputy ſheriff ſays he acknowledged it, which is reſponſive to the allegations of the bill. The deputy ſheriff's teſtimony is admiſſible, becauſe he has no intereſt in queſtions of this kind. It is his duty to take the bonds, and in practice he is generally the only witneſs to them. But the conduct of the plaintiff charges him, becauſe he did not give fair warning. He ſhould have denied it at once; but he did not, and from his own ſhewing he intended to conceal it. This might have been no objection at law, but it certainly is in equity; for it was a fraud upon the defendant. The plaintiff had no pretext for applying to a Court of Equity. He ſhould have pleaded *non eſt factum*, and ſubmitted the legal queſtion to the Court of Law. It is analogous to a caſe in this Court, in which a ſuperſedeas from a Diſtrict Court to an execution in a County Court was quaſhed; becauſe the County Court might have given redreſs.

Per Curiam. The cauſe having been heard in the High Court of Chancery on the bill and anſwers, and thoſe anſwers which are reſponſive to the bill ſtating that although the appellee might not have originally put his name to the bond, yet he afterwards acknowledged the ſignature to be his hand and ſeal, by which he was bound at law; or if he was not ſo bound at law, it was a legal defence of which he ſhould have availed himſelf upon the motion for judgment on the bond, and not have reſorted

Maupin, *vs.* Whiting,

forted for relief, on that ground, to a Court of Equity, where the cafe is to be decided upon its real juftice, and not on the omiffion of ftrict legal ceremonies, the appellee in that view of the cafe had no pretence of equity; efpecially againft Maupin the innocent purchafer of the bond, without notice of the alledged defect. Confequently the decree of the High Court of Chancery is erroneous, in affording the relief fought by the appellee. It muft therefore be reverfed, and the bill difmiffed with coffs.

MINNIS, *againft* POLLARD

A. affigns to B. a debt due from C. and promifes to pay the amount to B. if he does not recover it of C "after perfuing the legal method for obtaining the fame," If B brings fuit in the name of A, obtains judgment and iffues a fi. fa. which is returned *no effects*, it is a fufficient performance, & he is entitled to an action againft A,

IN an action upon the cafe, brought by Pollard againft Minnis, the declaration contained three counts.—1ft For money laid out and expended.—2d For money lent. 3d A fpecial count, which ftated that a certain Thomas Carter was indebted to the defendant in £ 148 military certificates by virtue of an inftrument of writing in the words following, viz. "Mr. John Carter,—Dear brother, "you'll receive by Major Minnis a power of attor- "ney to recover my five years full pay; as I ftand "indebted to him £ 148 military certificates, with "intereft from the year 1784, I requeft you will "difcharge it out of thofe certificates obtained by "you. On my return home, will furnifh you with "on account againft the Major, which you muft "deduct.—I am, Dr. Brother, your's &c.

"*Jan.* 8, 1791. THO's CARTER."

"Received the above mentioned power of attor- "ney, and fhould I receive the certificates from "the Auditor's office, the above order fhall be "complied with. J. CARTER, Jun.

"*Feb.* 3, 1791"

"RICHMOND,

"RICHMOND, June 20, 1791. I do hereby assign "the within contents to Robert Pollard, for value "received, and do by these presents bind myself "my heirs, &c. to pay to the said Pollard, or "to his assigns the certificates within mentioned, "with legal interest thereon, from the first day of "January 1784, if he does not recover the same "from doctor Thomas Carter, after pursuing the "legal method for obtaining the same. Witness "my hand the date above. C. MINNIS."

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for the money.

If A in a letter to B acknowledges that he owes money to C and C assigns this paper to D, no action probably can be maintained on it by D in his own name, against A, but he must bring suit in the name of C.

The declaration then states that the plaintiff has not been able to obtain the certificates from Carter, although he has used due diligence and pursued the legal method to obtain the same. In consideration whereof the defendant became indebted to the plaintiff in £200; and being so indebted promised to pay &c. After which follows a general assignment of breaches of the promises laid in the declaration. Plea *non assumpsit* and issue. Upon the trial of the cause, the defendant filed a bill of exceptions to the Courts opinion; which stated that the plaintiff offered in evidence to the jury a record of a suit in Brunswick County Court, wherein Minnis was plaintiff and Thomas Carter defendant, commenced upon the 9th day of April 1792; and the declaration in which contained three counts. 1st. for military certificates sold and delivered. 2. A *quantum valebat* for military certificates sold and delivered. 3. For money had and received. The plea was *non assumpsit*, and there was a verdict and judgment for the plaintiff for £173:3, and costs. Upon which a writ of fieri facias issued and was returned 'no effects.' There is in the said record a copy of the before mentioned writing from T. Carter to John Carter, and of the indorsements mentioned in the declaration: To which is annexed a certificate of the clerk of the Court, that the same were read on the trial. To the introduction of which evidence the defendant objected, but the objection was overruled by the Court. The defendant likewise demurred to the same evidence; with the addition that there was

verbal

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verbal teſtimony to prove that Thomas Carter was generally reputed inſolvent from January 1761. The jury found a verdict for the plaintiff for £ 188 3:6 damages, if the evidence is ſufficient to ſupport the plaintiffs action; if otherwiſe, for the defendant. The County Court gave judgment for the plaintiff—The Diſtrict Court affirmed that judgment; and from the judgment of affirmance, Minnis appealed to this Court.

WASHINGTON for the appellant. The evidence was inadmiſſible, as it did not ſupport the allegations of the declaration; which avers that ſuit was brought by Pollard: whereas the evidence produced, was the record of a ſuit between Minnis and Carter, and not between Pollard and Carter. So that there was a plain variance between the declaration, and the evidence offered to ſupport it, which is ſufficient to reverſe the judgment.

But upon the demurrer, the judgment is certainly erroneous. It was a ſpecial contract, the condition of which was, that Pollard ſhould purſue the legal method for recovering the demand againſt Carter; and the declaration avers performance. The plaintiff therefore ſhould have proved it. But he has not; for he has not ſhewn that he brought any ſuit: Which was a condition precedent, and without performing it, he could not maintain the action. In *Mackie* vs *Davies* in this Court, * it was held that the aſſignee muſt ſue the obligor, before he can reſort to the aſſignor; upon the implied condition, that he undertook to do ſo. But this caſe is ſtronger; for here nothing was left to implication; but the aſſignee expreſsly undertook to do it, and therefore was bound to perform his promiſe. Senſible of this he has averred it; but his evidence does not ſupport the averment. For the record produced was a ſuit between other parties. It may perhaps be ſaid that Pollard could not have brought a ſuit. But whether he could or not, will make no difference. Becauſe he undertook to do ſo; and he was

* Waſhington's Reports.

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was under a neceſſity of fulfilling that undertaking, before he could ſue the aſſignor. None of the evidence applies to the money counts; and therefore upon thoſe the judgment cannot be ſuſtained.

CALL *contra.* The bill of exceptions does not ſtate that it was all the evidence in the cauſe, and there might have been evidence under the ſpecial counts to ſhew that the ſuit though brought in the name of Minnis, was really for the benefit of Pollard, and that it was commenced by his direction. Which was a thing that lay in averment and might have been proved by matter *de hors* the record.

Pollard could not have brought ſuit in his own name; for the paper being only a private letter between Doctor Carter and his brother, was not a note in writing or obligation to pay to Minnis, although perhaps he might have uſed it collaterally, in ſupport of his original demand. Neither was it negotiable on the ground of its being an order to pay; for it has not any marks of privity and confidence between Minnis and Carter; and at all events it is payable out of a particular fund, and that fund contingent and uncertain. The inference therefore is, that Minnis by aſſigning it, has agreed to lend his name to Pollard to bring ſuit againſt Carter; and conſequently bringing ſuit in the name of Minnis was not only allowable, but all that Pollard could do. Again, the object of a ſuit was only to aſcertain whether the money could be made out of Carter or not; and that object was as well attained by a ſuit in the name of Minnis as of Pollard. Beſides the demurrer admits the inſolvency of Carter at the time of the aſſignment; and therefore it was wholly unimportant whether ſuit was brought or not, as the ſituation of Minnis could not be altered.

But this argument, that Pollard brought no ſuit, proves too much. Becauſe it brings the appellant to this dilemma, that he brought the ſuit himſelf, and therefore has diſpenſed with the obligation,

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ligation, on the part of Pollard, to do it. And having dispensed with it, he can never be received to say that it was not done. But there is a circumstance which clearly proves that the suit was brought for the benefit of Pollard. For the record of Brunswick Court shews that the paper and indorsements were filed and used as exhibits in the trial of that cause; and the defendant by demurring, has admitted that they were the foundation of that action. For the demurrer admits every thing which the jury might have inferred from the circumstances, *Buller nis: pr:* 313. It therefore admits the promise to pay; that Pollard had used the necessary process; and that Carter was insolvent. But the assignment for value received was proper evidence on the money counts; and if Carter was insolvent, then on application to him for the money, and not receiving payment, Pollard had a right to consider the assignment as useless and to resort to Minnis for his original demand *Esp: nis pr: Rep.* 5—6.

WASHINGTON in reply. The doctrine of demurrers is carried too far by the appellees counsel. The demurrer only admits such things as the jury might have inferred from the evidence produced, *Stevens* vs *White* in this Court. * For if all the evidence is stated and yet that evidence does not prove the charge, the presumption is that the party cannot prove it. Or else you must suppose that the jury can presume legal evidence, which would be preposterous. It does not necessarily follow, from the record of Brunswick Court that the suit there was for the benefit of Pollard. At least, he should have shewn upon the trial, that he had it instituted and paid the costs. But having shewn none of these things, and the record being only between Minnis and Carter, the plaintiff has not proved performance of the condition; and therefore cant recover. It was said the whole evidence is not stated; but if that be true, the plaintiff should have refused to join in the demurrer. There was no proof of a *loan* or of *money laid out*; and therefore

* Washingtons Reports.

therefore the plaintiff could not recover on the money counts.

PENDLETON Prefident delivered the refolution of the Court as follows.

On the 20th of June 1791, Minnis, for value received, affigns to Pollard an order of Thomas Carter upon John Carter for fome military certificates? and binds himfelf to pay the certificates; with intereft from the firft of January 1791, if Pollard does not recover them from Thomas Carter, after purfuing the legal method for obtaining the fame.

In April 1792 a fuit is brought in the name of Minnis againft Carter founded on thefe papers, and claiming the value of the certificates. Judgment is obtained and execution iffued in April 1793, which is returned no effects. And in October 1793, Pollard brings this fuit upon the affignment; and adds two general counts. Upon the trial he gives the former record in evidence to fhew he had purfued the legal method for obtaining the money from Carter, with the auxiliary parol proof that Carter was deemed infolvent from January 1791, the commencement of the tranfaction.

It is objected that the fuit againft Carter does not appear to have been for the fame thing. But this objection is made in the very teeth of the record: Which fhews it to be the fame.

Another objection was, that the fuit being in the name of Minnis, it does not appear to have been purfued by Pollard, as his engagement required. But the anfwer is, that it was probably the only legal method which could have been purfued by Pollard: And by whomfoever the fuit was profecuted, the eſſential purpofe was attained by it; namely, that of difcovering whether the money could have been recovered of Carter

The judgment is therefore affirmed.

WOOD

WOOD
against
LUTTREL Ex'r. of CARR.

Qure. If indebitatus assumpsit lies by the indorsee against the indorsor of a bill of exchange?

If the jury submit it to the Court, whether evidence annexed to their verdict supports either count in the declaration, & it appears that the plaintiff has not a right to the money claimed, judgment shall be given against him on the merits, whether the evidence was admissible under that form of declaring or not.

If the endorsee of a bill of exchange neglects to give timely notice of the protest to the endorsor, the latter is discharged.

IN an action upon the case, brought by Wood against the executors of Carr the declaration contained two counts, 1st, Indebitatus assumpsit for £50 sterling of the value of £50 current money, for so much money paid by the plaintiff to the defendants testator, at his special instance and request, 2d, For money had and received to the plaintiffs use. Plea non assumpsit and issue. Verdict for £103:12:3, "subject to the opinion of "the Court, whether the bill of exchange and "protest, and the letters of Carr to Wood, hereto annexed, be legal evidence, admissible to the "jury in support of either count in the declara-"tion." The bill and letters are as follows. The bill is drawn by Leitch in favor of Carr upon a house in Scotland on the 13th of September 1774, for £50 sterling. Carr indorsed the bill to Wood; who endorsed it in Blank; and it was protested at the instance of Keppen (who in the protest is called assignee of the bill) upon the 26th, day of January 1775. On the 12th, of September 1784 Carr's letter to Wood acknowledges the receipt of his letter of the 19th of June last, and his surprize to hear that the bill was protested; for which he thought payment had been received long before; Says that when he gave Wood the bill, Leitch was in good circumstances, and continued so till his death; Refuses to pay, saying that if he had had timely notice, he could have got the money from Leitch, as he had other bills of his drawn some months after the plaintiffs, which were returned protested and paid off by Leitch; That the same would have happened with regard to this bill, if it had been returned in time; That if he can find any of Leitch's estate he will endeavor to have it secured for him: But that he does not think himself liable in law, equity or justice, for

payment

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payment of the bill. Two other letters in 1784 and 1785 are much to the same effect. The District Court were of opinion that the evidence did not support either count in the declaration, and gave judgment for the defendant. From which judgment the plaintiff appealed to this Court.

WICKHAM for the appellant. The question is whether the bill, not being declared upon, could be given in evidence upon either of the counts? And I think it may; for the endorsement is presumptive evidence of money lent by the payee to the drawer. 3. *Term. Rep.* 174. 3. *Bur.* 1516. And *Indebitatus assumpsit* will against those between whom there is a privity; for instance as between the payee and drawer or the endorsee and his own immediate indorsor. *Kyd on bills* 114.

WASHINGTON. The question is if the plaintiff ought to have recovered on the evidence? And I think he ought not. Notice is absolutely necessary to enable the holder to recover; for he is chargeable only in a secondary degree; and to render him liable it should appear that the holder looked to him for the money, *Kyd* 79; unless the plaintiff can prove that the drawer had no effects in the hands of the drawee, *Kyd* 79, 82. But as to the indorsor notice ought always to be given; because he is authorised to endorse, and is sure to sustain a loss if his own endorsor or drawer should fail. *Kyd.* 83. 1 *Term. rep.* 714. And even as to the drawer, though he has no effects, still, if for want of notice he has sustained any injury, it is doubtful if the plaintiff can recover. *Kyd.* 83 2. *Term, rep.* 714. Which argument is *a fortiori*, with respect to the indorsor for the reason already given.

Perhaps it may be contended that, supposing those observations correct, still, if it is conceded that *indebitatus assumpsit* will lie upon a bill against the indorsor, and the only question be, whether the bill and letters are legal evidence to support either of the counts in the declaration, that the law will be for the plaintiff upon the point submitted by the jury.

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That argument however can never be allowed, if the teſtimony referred to by the jury, evidently proves that the plaintiff had no cauſe of action; and *et æquo et bono* ought not to recover. But there is another anſwer: For the bill is endorſed in blank by Wood, and Keppen has it proteſted; which is tantamount to a full endorſement, as it ſhews his election to take it as endorſee. Conſequently Wood, in order to maintain the preſent action, ſhould have had it endorſed back to him by Keppen. But as the caſe ſtands, he has no intereſt in the bill; for it is payable to order and not to bearer; and it might have been found by Wood. So that the argument founded on the endorſements as conſtituting proper evidence on money counts fails.—But taking Wood as indorſee, he will not be entitled to recover on money counts. For there is no caſe which ſays that an *indebitatus aſſumpſit* can be brought againſt the endorſor and the bill be given in evidence. The reaſon of the caſe as againſt the drawer do not apply againſt the endorſor: Becauſe the drawer is liable on account of the conſideration paid; for he is not reſponſible to his own payee, unleſs the bill be drawn for value received. But it often happens that a bill is endorſed merely to give it credit; and therefore the cuſtom, by which alone the endorſor is liable without proof of value paid, ſhould be ſpecially ſet forth; and the plaintiff cannot recover on a general *indebitatus aſſumpſit*. For the git of that action is the conſideration which paſſed.

WICKHAM. The jury have reſerved a ſingle point; and the only queſtion is whether the evidence was admiſſible. For whether the notice was neceſſary or not, is no queſtion in the cauſe; the jury not having found facts but merely ſubmitted a queſtion of law to the Court. Wherever there is privity, a general *indebitatus aſſumpſit* will lie. 4 *Vin.* 259; and the endorſement upon the bill of exchange in the preſent caſe, may be given in evidence to ſhew it was for value received. *Indebitatus aſſumpſit* will lie againſt the drawer, he having received the

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money. 3 *Bac.* 614; and the indorſor is a new drawer. The reaſon why the acceptor is not liable to *indebitatus assumpsit* is, becauſe it is a collateral undertaking; but in the caſe of the drawer there is a privity ſufficient to maintain the action. 2 *Show.* 9—*Kyd.* 114. *Mackey* vs. *Davis*† in this Court: And the letters prove that value was received. In *Alexander* vs *Scott* & *Donoldson* * in this Court it was held that the indorſement has reference to the bill; and the Court ſaid that the endorſor was as if he had been the original drawer. So that the endorſement follows the nature of the original bill; and the want of the words *value received* in the endorſement, was an omiſſion of form only and does not affect the caſe.

ROANE Judge. This is an action of aſſumpſit and the declaration contains two counts; one for money paid by the plaintiff to the defendants teſtator at his ſpecial inſtance and requeſt; and the other for money had and received by the teſtator to the uſe of the plaintiff. The plea is non aſſumpſit, on which the plaintiff took iſſue, and the jury have found a verdict for the plaintiff for £103 12:3 currency, ſubject to the opinion of the Court, upon this queſtion "whether the bill of exchange "and proteſt and the letters of W. Carr hereto "annexed be legal evidence admiſſible to the jury "to ſupport either count in the declaration?" The bill referred to in the verdict was drawn by Andrew Leitch for £50 ſterling on the 13th of September 1774, payable to W. Carr for value in currency here received, at ſixty days ſight on Cunningham Cobbet, merchant in Glaſgow. This bill was indorſed by Carr to the plaintiff, on account of a debt then due by the former to the latter, as appears by the letters. Which debt had been previouſly ſecured by his note as the ſame letters ſhew. On the 26th of January 1775, this bill was proteſted for non payment as having no advice from the drawer. The letters referred to are

† Waſhington's Reports.

* Waſhington's Reports.

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are dated on the 12th and 29th of September 1784; and after proving the conſideration of the indorſement as above, they ſtate that a letter of the plaintiff, dated on the 12th of June then laſt paſt, gave him the firſt information of the non payment of the bill, and that Carr conſidered himſelf not reſponſible for the debt on account of the delay and negligence which had taken place in that reſpect.

Upon this teſtimony which was produced by the plaintiff, it is ſubmitted by the jury whether it be legal and admiſſible evidence to ſupport either count in the declaration?

I lay great ſtreſs upon the word *ſupport* in the verdict; and therefore if the Court ſhould be of opinion that the evidence is legal and admiſſible as far as it goes, but that ſome further teſtimony is wanting to warrant a recovery upon either count in the declaration, judgment cannot be given for the plaintiff upon this verdict.

The particular point now ſubmitted by the jury and which was much diſcuſſed at the bar is, whether this teſtimony will warrant a recovery upon the general counts of *indebitatus aſſumpſit* in the declaration. But if there be ſuch a defect in the caſe ſubmitted, as that a recovery thereon will not be warranted under any count whatſoever, a deciſion, upon the point relative to the form of declaring, becomes unneceſſary.

The evidence referred to ſhews that there was a lapſe of more than nine years between the proteſt and notice to the indorſor. If this had been the uſual and ſpecial action upon a bill of exchange, notice of non payment within a reaſonable time muſt have been ſhewn, or the plaintiff could not have recovered; and ſurely the caſe is not different when another mode of declaring is reſorted to.

It is inſeparably incident to the nature of a bill of exchange, that if the indorſee delays for an unreaſonable

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reasonable time to notify the indorsor of the non payment, he thereby discharges him of his responsibility. But the ground of the action here is that the plaintiff advanced money to the testator of the defendant, which from posterior circumstances became *ex æquo et bono* money received to his use; and to prove this he produces in evidence, amongst other things, the bill indorsed by the testator. But surely when the plaintiff took the bill on account of a praexisting debt, he undertook to perform all that was necessary to be performed by an indorsee, and is liable for all the consequences of his laches. These consequences necessarily grow out of the very nature of the transaction, and cannot be eluded by merely varying the form of declaring. At any rate the complexion of this case is such as to preclude a recovery, under the equitable form of action now in question. Which is brought to recover money, that the plaintiff undertook to receive from another; and in case of non payment, to notify the default to the indorsor within a reasonable period. But instead of this, he has lain by for a very unusual time; and would now throw upon the defendants the loss of a debt, which on timely notice they might most probably have recovered of the drawer of the bill.

I am therefore of opinion that, under the circumstances of this case, the defendant cannot be charged under any form of action, but that he is absolved by the conduct of the plaintiff. Which proposition essentially includes another, namely, that the defendant cannot be charged, on either count of the present declaration.

This view of the subject, upon the defect of evidence in notifying the non payment to the indorsor within a reasonable time, does not decide a question similar to this in other respects, but where such proof is supplied. Should such a case ever occur, I will give that opinion, on it, which shall seem to me to be right; but I shall forbear to say any thing upon it at present. Because I think it unnecessary, and that the judgment of the Dis-

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trict Court ought to be affirmed, upon the other reasons which I have mentioned.

CARRINGTON Judge. It is not necessary to decide as a general question the point relative to the sufficiency of the testimony to support the counts in the declaration. For upon the papers themselves I think the plaintiff was not entitled to recover the money under any form of action. Nine years appear to have elapsed, after the protest was made, before any notice of it was given to Carr; and in the mean time Leitch who was at first in good circumstances dies, his estate is wasted and the money is lost. Under this view of the case, on whom is it most reasonable that the loss should fall? On Carr, who was an innocent man, guilty of no fault; or on the plaintiff whose culpable negligence and unaccountable delay has produced it? It is one of the first principles of justice, that he whose negligence has occasioned a loss ought to bear it. But it was said that the letters of Carr ought not to be admitted as proof of the delay. Those, who make that objection, would do well to remember, that it was the plaintiff who produced them; and therefore he cannot object to the defendants making what use of them, he thinks proper. For they are not to be garbled, but must be taken altogether and not partially. I am therefore extremely clear, that upon the merits of the case the plaintiff was not entitled to recover.

It consequently becomes unnecessary to decide as a general proposition the question submitted by the verdict. But if it had been, I might perhaps have thought (though I give no opinion) that circumstanced as this case is, the evidence without auxiliary testimony, would not have been entirely free from objection, under either count in the declaration. In *Mackie* vs *Davies* and *M'Williams* vs *Smith*, there were special statements setting forth the nature of the demand, besides the common money counts. Which had this, at least, to recommend them, that they gave notice to the defendant, and enabled him to come prepared to

contest

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conteſt the demand; whereas the other practice is calculated to ſurprize and throw him off his guard. However, as before obſerved, I would not be underſtood as deciding that queſtion at preſent, or as meaning to be bound by what I have ſaid with regard to it. Becauſe it is unneceſſary, as I am perfectly ſatisfied that no action can be maintained againſt the defendants, upon theſe papers.

I therefore concur in the opinion that the judgment ſhould be affirmed upon the merits of the caſe. For I ſhall never be inclined to ſupport the idea, that becauſe the ſtrict words of a finding may apparently confine the verdict to a particular enquiry, a plaintiff, who upon the broad grounds of juſtice and law has no title to recover, ſhall be allowed to take his adverſary by ſurprize and overthrow an honeſt defence, by a critical expoſition of the unſkilful words of a jury.

PENDLETON Preſident. The queſtion whether a general *indebitatus aſſumpſit* will lie on a bill of exchange, note or bond aſſigned as between immediate privies, took up much time in conference, ſince the counſel on both ſides argued it at large, and I have an opinion upon it, but it being unneceſſary to decide it in this caſe, the point is reſerved 'till a caſe ſhall ariſe where it becomes neceſſary and there may be a full Court. At the ſame time I cannot forbear to mention that I do not like this new practice of general counts much, as they tend to ſurpriſe the other party without giving him an opportunity of preparing for a full defence. In England the uſual practice is to inſert a ſpecial count, and the general money counts are only reſorted to on account of ſome defect of form in the ſpecial count, which avoids the inconvenience of ſurprize; becauſe the adverſe party has notice from the ſpecial count of the matter with which he is charged: Whereas the general count does not give ſuch notice. This is the ſtronger in a caſe againſt executors who muſt neceſſarily be leſs acquainted with circumſtances than their teſtator was himſelf. In the few inſtances which have occurred

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curred in this Court of ſuits between the aſſignee and aſſignor of bonds or notes, the ſpecial form has been purſued. Such are *Mackie* vs. *Davies*.—*M'Williams* vs. *Smith* and *Minnis* vs. *Pollard*.

But what is the caſe before the Court? Here upon an *indebitatus aſſumpſit* papers are offered in evidence to ſupport the iſſue, which do not ſhew the plaintiff to be entitled in any form of action.

The papers are a bill drawn in September 1774 by Leitch in favor of Carr, and by him endorſed and remitted to Wood; proteſted in January 1775; of which no notice is given to Carr, until September 1784, above nine years afterwards. By this neglect Carr's reſponſibility as indorſee was at an end: And does he revive it by any promiſe to pay or acknowledgment of the debt? On the contrary he poſitively refuſes payment; and for a good reaſon too, that by the delay he had loſt his remedy againſt the drawer; ſolvent at the time of the proteſt, but then become inſolvent.

Wood thus warned lies by till 1792, eight years longer, and ſeventeen years from the date of the proteſt, when Carr being dead, he brought this ſuit againſt his executors, as a chance of recovering, from their ignorance of the tranſaction, an unjuſt demand; and by the general *indebitatus aſſumpſit*, concealing the real caſe, ſo as to better the chance by ſurpriſe. In the language of Lord *Kenyon* in the caſe of *Stedman* vs. *Gooch*.—*Eſpin. rep.* 3. I conſider the documents as mere waſte paper, and think the Diſtrict Court very properly decided, that they were not legal evidence. Of courſe the judgment muſt be affirmed.

Judgment Affirmed.

MILLS

MILLS
againſt
BLACK.

THE appellant had let two terms of this Court elapſe after the appeal was prayed without bringing up the record: and at this term Copland on behalf of the appellee (having proved notice of the motion,) moved to docket the appeal, which the Court ordered to be done. He then aſked to be permitted to open the record, and having ſhewn there was no error prayed an affirmance.

If the appellant let two terms of this Court elapſe, after the appeal has been granted by the D. Court, the appellee may bring up the record and have the appeal diſmiſſed with coſts; but he cannot have the judgment affirmed.

COPLAND and WICKHAM for the appellee. For good cauſe ſhewn, an appeal may be docketed after the ſecond term. *Rev. Code* 89, 69; and it was the duty either of the clerk or of the appellant to ſend up the record. If it be the fault of the clerk why it is not done, then that will be good cauſe for receiving the appeal, at a future day; If it be the appellants own fault, then indeed it will not be a ſufficient reaſon for docketing it at his inſtance; but if the appellee conſents, it may ſtill be docketed. Now let it be, that upon ſuch conſent, the judgment on inſpection ſhould appear to be erroneous, the Court here would certainly reverſe it; and the converſe of the propoſition muſt be equally true. If what we contend for be not allowable, it will tend to incourage delay; becauſe the appellant will pay nothing for it.

PENDLETON Preſident delivered the reſolution of the Court as follows.

This was a judgment on a forthcoming bond in Albemarle County Court in June 1795; the defendant appealed to the Diſtrict Court, where the judgment was affirmed on the 20th of April 1796, and an appeal was prayed to this Court. In April term 1797 the record was not returned, and the

Mills, vs. Black.

appellee was entitled to a diſmiſſion of the appeal with coſts; but no ſtep is taken until the preſent term, when upon notice to the appellant, the record is produced by the appellee; who moves that it may be opened, and if no error, that the judgment may be affirmed with damages and coſts.

" On a view of the act of Aſſembly it appears that the Legiſlature fully contemplated this ſubject. They thought it proper to allow the appellant to the end of the ſecond term of this Court to bring up the record, before any neglect was to be imputed to him; probably from the remote diſtances of the places where ſome of the Diſtrict Courts are held from this City and our office, to which the record is to be returned.

At the ſecond term the appellee had a remedy to get rid of the appeal by bringing up the record and praying an affirmance, and if he did not aſſert it then, the ſubſequent delay is to be imputed to himſelf. The remedy for the appellee after the ſecond term, is a diſmiſſion of the appeal with coſts; which has conſiderable beneficial effects ſince beſides leaving him at liberty to purſue his judgment, it cloſes all future appellate juriſdiction over the cauſe.

Whether the Legiſlature meant that any damages ſhould be had in this caſe, or left them to be recovered on the appeal bond, is not for the Court to ſay on this occaſion. It is ſufficient to decide that at preſent the law does not authoriſe the Court to go further than a diſmiſſion with coſts, which is to be the entry in this cauſe, and others in the ſame ſituation.

The caſe of *Stephens* vs. *White*, which gave riſe to our rule, was an application from the appellant who wiſhed to proſecute the appeal and on notice to the appellee ſhewed an excuſe, ſatisfactory to the Court, for the delay in tranſmiting the record; upon which it was docketed and heard, and he ſubjected himſelf to all the conſequences.

BOOKER'S

BOOKER'S EXECUTORS,
against
M'ROBERTS, &c. EXRS. of COUTTS.

Executors may maintain an action of debt upon a three months replevy bond payable to their testator.

THIS was an action of debt brought in the District Court of Prince Edward upon a three months replevy bond. The declaration was in the common form of a declaration upon a bond for payment of money. Plea conditions performed and issue. The jury found a verdict in these words, "We of the jury find for the plaintiffs the "debt in the declaration mentioned to be discharg-"ed by the payment of £65:11:3 with interest "from the 21st, day of February 1775. If the "Court shall be of opinion that an action of debt "can be maintained by the plaintiffs in this Court "in this cause, it being a three months replevy "bond taken under an execution on a judgment "obtained in the County Court of Hallifax, under "an act of Assembly entitled an act declaring the "law concerning executions and for relief of in-"solvent debtors, passed in the year 1748; but if "the Court shall be of a contrary opinion, we then "find for the defendants."

The District Court gave judgment for the plaintiffs; and the defendants appealed to this Court.

M'CRAW for the appellee. The executors had no remedy by motion under the act of Assembly; and therefore they were obliged to resort to an action upon the bond.

WASHINGTON *contra*. In several instances in this Court it has been decided I admit, that where a forthcoming or replevy bond was void as a *statutary* bond, that the obligee might nevertheless maintain an action at the common law upon the bond. *Hewett* and *Chamberlayne*, *Meriwether* and *Johnston and Bibb* and *Cawthon* were of that kind. But where the bond is good as a statutary bond the party must pursue the remedy by statute. *Cro. Eliz.* 355. It is objected however that the executors.

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executors could not ſuſtain a motion on the bond. But if they have the right to the contents of the bond, they muſt have the remedy to recover them alſo.

PENDLETON Preſident. After ſtating the caſe delivered the reſolution of the Court as follows.

The Court think it immaterial whether the creditor had or had not a remedy by motion under the act of Aſſembly, ſince the act having no negative words, the creditor had his election to purſue the ſtatutary mode, or his common law remedy on the bond.

Judgment Affirmed.

BOGLE, SOMERVILLE, & Co.
againſt
VOWLES.

The circumſtances to be enquired into, under the act for ſcaling paper money, muſt be ſuch as ariſe in the contract ſued on, ſhewing that the parties at that time contracted on the idea of no depreciation at all, or one different from the legal ſcale.

In the caſe of bonds the circumſtances, if admit

THIS was a motion for a writ of ſuperſedeas to a judgment of the Diſtrict Court of Frederickſburg.

The petition ſtated, that William Hewett in his lifetime was indebted to the petitioners for tranſactions on the 22d of June 1776. That this debt was afterwards, to wit: On the 11th day of April 1777, carried into a ſpecialty the penalty of which was 400l. and the condition was for payment of 200l. on the firſt day of Auguſt 1780, with legal intereſt thereon from the 1ſt day of Auguſt 1778. That Hewett died, and his property was put into the hands of the defendant Vowles, as ſheriff of the county of Stafford, for adminiſtration and diviſion by the court of the ſaid county of Stafford; who directed the ſaid bond to be diſcharged according to the ſcale of depreciation upon the 11th day of April 1777, and that the Court refuſed to receive proof of the ſaid debt having originated in the year 1776. That this

Bogle, vs. Vowles.

this opinion of the County Court had been affirmed by the Diſtrict Court of Frederickſburg. To which judgment of affirmance the petitioners prayed a writ of *ſupersedeas*.

The bond was for £ 400 current money of Virginia; and was payable to Meſſ. Bogle, Somerville & company of the City of Glaſgow. The condition was for payment of £200, like money on the firſt day of Auguſt 1780, with intereſt from the firſt day of Auguſt 1778, according to the ſtatement in the petition.

There was a bill of exceptions to the opinion of the County Court, which ſtated, the matter mentioned in the petition, and that the plaintiffs offered to prove that the contract for which the ſaid bond was taken originated on the 22d day of June 1776, but that the Court rejected the teſtimony.

RANDOLPH for the plaintiff, referred the Court to *Pleasants* vs *Bibb*, * and *Hill* vs *Southerland* † in this Court; and ſubmitted the caſe upon the petition.

PENDLETON Preſident delivered the reſolution of the Court to the following effect. The circumſtances to be inquired into, under the laſt clauſe in the act of Aſſembly, in order to overrule the legal ſcale, muſt be ſuch as ariſe in the contract ſued on, ſhewing the parties, at that time contracted on the idea of no *depreciation*, or one different from the legal ſcale.

In the caſe of bonds, the circumſtances if admitted at all, muſt be very ſtrong to induce a departure. *Pleasants* vs. *Bibb* had a ſtrong appearance on the bond itſelf of a prior contract not changed; and this confirmed by other written teſtimony.

But here the bond has a different aſpect. The intereſt is to commence at a future day, and the payment is to be made at another day, ſtill more remote; and whatever might have been the con-

ted at all muſt be very ſtrong to induce a departure.

contract

* Waſhington's Reports 1ſt vol. 8 p.

† Waſhington's Reports 1ſt vol. p. 133.

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tract in 1776, the parties may have contemplated in 1777 an exiſting or probable depreciation, and increaſed the ſum accordingly.

The Courts were right in rejecting the evidence of the contract in 1776 as wholly immaterial; and therefore upon the merits, we deny the motion for a *ſupersedeas*.

M'MURRAY
againſt
O'NEAL.

If the agreement of the parties that the jury may render a privy verdict be ſubſtantially performed it is ſufficient.

If in ejectment the jury find 'for the plaintiff 1 c't damages,' the court may extend the verdict, and make it read, we of the jury find for the plaintiff the lands in the declaration mentioned, & one c't damages'

THE queſtions in this cauſe (which was an action of ejectment) aroſe upon a bill of exceptions to the opinion of the County Court, ſtating that after the jury had retired it was agreed by the counſel that they ſhould deliver a privy verdict to John Peyton deputy clerk of the Court. That the jury delivered a verdict at the office of the ſaid John Peyton, who was not there at the time of the ſaid delivery. That a certain Obed White, one of the clerks in the ſaid office in the preſence of another of the clerks, ſealed up the verdict with other papers relative to the ſaid cauſe, and put them ſo ſealed upon a table ſtanding in the office, and then the deputy ſheriff diſcharged the jury. That Peyton came ſoon after to the office and ſent to have the jury called; but eleven only appeared, and after ſome ſhort time were diſcharged again. That the ſaid papers ſealed up as aforeſaid were produced to the Court by Peyton and amongſt them was found a verdict in theſe words "We the jury find for the plaintiff one cent damage," That the plaintiffs counſel thereupon moved to amend the verdict by adding the words "the lands in the declaration mentioned," alledging that one of the counſel for the defendant agreed, that Peyton ſhould correct any informality that might appear in the ſaid verdict; and the ſaid Peyton informing the

the Court that he ſo underſtood the agreement by the counſel and that he ſhould have made the alteration in the ſaid verdict, the Court accordingly ordered Peyton to make the addition; it being proved by one of the jury that it was their intention to find the land in the declaration mentioned. That the addition was accordingly interlined, ſo as to make the verdict read "We of the jury find for the plaintiff the land in the declaration mentioned and one cent damage," the ſaid jury not being then preſent. M'Murray, v. Oneal.

Upon this verdict the County Court gave judgment for the plaintiff. The Diſtrict Court reverſed that judgment; "becauſe the agreement was not ſtrictly complied with: and becauſe it did not appear that all the jury were preſent at the delivery of the verdict."

From which judgment of the Diſtrict Court, the plaintiff appealed to this Court.

WICKHAM for the appellant. The parties might agree upon the manner how the verdict was to be received. It is like an agreement for the delivery of an award. The only queſtion then is if the agreement has been complied with? The jury went to the office; Peyton was out but the other deputies were in. They delivered their verdict to one of thoſe deputies; and Peyton ſhortly after coming in opens the ſeals in the preſence of eleven of the jurors, and finds the verdict incloſed. Which was ſubſtantially a delivery of the verdict to him. The ſame ſtrictneſs was not neceſſary here, that would have been, had the verdict been delivered in open Court; The agreement does not preſcribe in what form it was to be delivered to Peyton. The only caution requiſite therefore was to prevent the ſubſtitution of a fraudulent verdict. There might have been more doubt as to the amendment if it had been material; but it was not. It is uſual indeed for the jury to ſay that they find for the plaintiff the lands in the declaration mentioned; but the real verdict is that the defendant is

guilty

M'Murray vs. Oneal.

guilty of the treſpaſs and ejectment. The Diſtrict Court therefore erred, and the judgment of the County Court ought to have been affirmed.

PENDLETON Preſident after ſtating the caſe delivered the reſolution of the Court as follows.

In this caſe two objections are made to the proceedings of the County Court, on which the Diſtrict Court reverſed their judgment.

1ſt. That a privy verdict was improperly given in the cauſe.

On this point ſince the conſent of parties will cure error, and an agreement is ſtated that a privy verdict might be given, the only queſtion is whether the agreement has been properly purſued?

The conſent is that the verdict ſhould be given to John Peyton deputy clerk.

The fact ſtated is, that the jury went with the ſheriff to the clerk's office, and Mr. Peyton being abſent delivered the papers to an acting clerk, who ſealed them up and laid them on the table, and then the jury was diſcharged. Peyton coming into the office ſoon after endeavoured to collect the jury together, but all could not be got.

The papers remained ſealed and were by Peyton delivered into Court next morning, where they were opened and the verdict found amongſt them.

There ſeems to have been no perſonal confidence repoſed in Mr. Peyton, but a reference to him in his official character as deputy clerk; and in the tranſaction intended to be at his office, he was to be a mere miniſter, and the duty might as well be performed by another clerk there as himſelf, provided it was fairly done, which appears to have been the caſe.

The Court therefore are of opinion that the agreement if not literally was eſſentially purſued, and overrule that objection.

2d, The

2d. The ſecond objection aſſigned was that the County Court directed the clerk to amend the verdict which was "we find for the plaintiff one cent damage;" and this by the amendment was made to read "we find for the plaintiff the lands in the declaration mentioned and one cent damage." M'Murray, *vs.* Oneal.

An agreement is ſtated that the clerk might amend form; and independant of that it was a general verdict for the plaintiff in a form very commonly uſed, which the clerk in his order book was to reduce into form according to the iſſue. The interpoſition of the Court was unneceſſary; and only directed the clerk to do in ſubſtance what it was his duty to have done without that direction.

On both objections there was error in the Diſtrict Court. Their judgment is therefore reverſed; and that of the County Court affirmed.

BEALE
againſt
DOWNMAN &c.

THIS was an action of debt brought by the ſheriff on a forthcoming bond, payable to the ſheriff inſtead of the creditor; and upon *non eſt factum* pleaded, the jury found for the plaintiff. There was a motion in arreſt of judgment upon the following grounds. 1ſt. That the bond was not taken according to law. 2d. That the remedy was by motion. The Diſtrict Court arreſted the judgment; and the plaintiff appealed to this Court.

If a forthcoming bond be taken payable to the ſheriff he may maintain an action of debt upon it.

PENDLETON Preſident delivered the reſolution of the Court as follows.

The errors aſſigned are in conflict. The firſt, if true, removes the only reaſon in ſupport of the

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second, that having a remedy by motion, he could not bring ſuit on the bond.

Both errors are therefore overruled; the judgment of the Diſtrict Court reverſed; and judgment is to be entered for the plaintiff according to the verdict.

FULGHAM
againſt
LIGHTFOOT.

What defects in a declaration, and the want of what averments will be cured after verdict. The diſtinction is between neceſſary facts being not ſtated at all, and being imperfectly ſtated.

IN caſe the plaintiff in his declaration complained of the defendant "of a plea of treſpaſs "on the caſe, for that whereas the ſaid plaintiff "being an inſpector of lumber at Smithfield, in "the county aforeſaid and pariſh of New Port in "the year of —— by which buſineſs he obtained "an honeſt livelihood at the ſalary of fifty pounds "per annum, which was paid him by the mer-"chants of the aforeſaid town of Smithfield; and "whereas the ſaid plaintiff hath been uſed to in-"ſpect lumber from time to time and to grant "certificates for the ſame, purporting that the "ſaid lumber was good and merchantable, which "ſaid certificates were always ſigned with the "plaintiffs own hand, and whereas this defendant "being a merchant in the town of Smithfield afore-"ſaid; having knowledge of the premiſes, and "with an intent to cheat and defraud the defen-"dant in his calling of a lumber inſpector as afore-"ſaid, did ſometime in January one thouſand ſe-"ven hundred and ninety four, ſend down to "Norfolk the ſloop —— loaded with lumber to "the amount of thirteen or fourteen thouſand "ſtaves, including heading of good merchantable "lumber; which ſloop aforeſaid had on board a "certificate or certificates under the ſignature of "the ſaid plaintiff, *purporting that there was*

"*then*

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" *then on board the said sloop thirteen or four-* " *teen thousand staves, including heading lumber* " *aforesaid, and the said plaintiff avers that all* " *and every certificate and certificates for the* " *aforesaid quantity of lumber on board the sloop* " *aforesaid were forged by the defendant*, and the " said plaintiff further avers that he never had in- " spected any lumber whatsoever belonging to this " defendant since the Month of October 1792; " and the said plaintiff avers that the certificate " or certificates for the lumber aforesaid were dat- " ed in January 1794 as aforesaid, that the forge- " ry of this defendant in the certificates aforesaid " is a great fraud upon the plaintiff, insomuch " that the said plaintiff has been compelled there- " by to leave off his business as an inspector of " lumber, whereby he obtained a salary of fifty " pounds per annum; that this plaintiff brings " here into Court two forged certificates for lum- " ber, which said certificates the said plaintiff be- " lieves were forged by the defendant, and bear " date, the one certificate the fourth of January " 1794, the other certificate the fourteenth of " January 1794; and the said plaintiff positively " avers that the certificates last mentioned are not " the hand writing of the plaintiff; neither were " they ever given for the lumber specified therein " by the plaintiff, and the plaintiff verily believes " that the aforesaid certificates were forged by " the defendant. *By which means he has been ne-* " *cessitated to resign his office or calling as a lum-* " *ber inspector as aforesaid;* and says that he is " damaged one thousand pounds." Plea not guilty and issue. Verdict and judgment for the plaintiff in the County Court for £150 and costs. The District Court affirmed that judgment; and from the judgment of affirmance the defendant appealed to this Court.

WICKHAM for the appellant. There is no positive charge of a forgery. In one part of the declaration the plaintiff says that the defendant forged the certificate or certificates which were on

board

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board the ſloop; but in another he ſays that he brings into Court two certificates which he believes were forged by the defendant. This either qualifies the firſt charge of forgery into a belief only, or elſe there were two ſets of certificates; and then it will not appear, for which of them, damages were given. The ſpecial damage ſhould have been ſtated with preciſion for three reaſons; 1ſt. To prevent ſurprize upon the defendant, and to put it in his power to come prepared to defend himſelf. 2d. To authorize the jury to enquire into it as a matter comprized within the iſſue; and therefore properly falling under their conſideration. 3d. To enable the Court to decide whether the matters ſtated as conſtituting the damage were in themſelves the grounds of an action. But it does not appear how the loſs of office came to paſs; for it is not a clear conſequence of the forgery. It ought therefore to have been ſtated, as it was the git of the action, and for want of it, no preſumption will be admitted that the proper proof was given on the trial. Becauſe the declaration does not contain the averments neceſſary to introduce it. The omiſſion therefore is fatal, and the verdict does not cure the defect. *Chichester* vs *Vass* in this Court. * *Office* means public employment under government; and therefore the plaintiff muſt have been an inſpector of lumber under the law. If ſo the act of Aſſembly. *Rev. Code* 249, preſcribes the remedy; and no other could have been purſued. 11, *Co.* 89, (*b.*)

CALL *contra.* The plaintiff alledges an occupation which was beneficial to him, and that he has loſt it in conſequence of an illegal act of the defendant. Which muſt upon principle be the ground of an action. 1, *Bac. abr.* 55, *cites Poph.* 144. 1, *Com. Dig.* 230. Although the manner of loſing the office is not ſtated, yet the Court will intend that it was proved after verdict. Suppoſe a woman brings an action of ſlander and alledges that ſhe thereby loſt her marriage, without ſhewing

* Ante p. 83.

ing how, this will be good after verdict. Which in principle is the same with the case at bar; for it would be as necessary to set forth the manner of the loss in that case, as it can be in this. The decision, in *Chichester* vs *Vass*, was only that where there was nothing in the declaration, to warrant the introduction of the testimony which constituted the cause of action, that there it would be bad after verdict. But here the declaration covered the evidence, and therefore it will be intended, after verdict, that the cause of action was actually proved. *Office* may be an employment under a private person, as well as under government. *Cowells interp: tit: office;* and consequently the argument drawn from the act of Assembly does not apply; because the declaration states that his salary was paid by the merchants.

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PENDLETON President, After stating the case delivered the resolution of the Court to the following effect.

Whether the damages are excessive or not, we have nothing to direct our judgment; and are bound to presume they were given commensurate to the real injury, and were not the effect of a vindictive temper in the jury.

That a man deprived of a beneficial office, may maintain an action against him who by an unlawful act, deprives him of it, is admitted by Mr. Wickham; but it is properly objected by him, that a declaration stating that abstract proposition, without shewing how it applies to the parties, would be insufficient even after verdict.

The question therefore is, whether this declaration sets forth sufficient matter to entitle the plaintiff to the application of the principle?

The declaration is certainly informal, and a skilful pleader would have put it into a better shape. A proper declaration would have set forth, that the plaintiff was duly appointed inspector of lumber at Smithfield, and intitled to the legal fees

of

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of that office; to be paid him, by all such as exported lumber from the said town. Who were compelled by law to obtain his certificate of such inspection, before the lumber could be exported. By which fees the said plaintiff received from the merchants of Smithfield an income of £50 a year for the better support of himself and family; yet the defendant not ignorant of the premises, but contriving and fraudulently intending to render the employment aforesaid of the said plaintiff unnecessary, and thereby deprive him of his legal fees aforesaid, forged the certificate; whereby the plaintiff was deprived of his fees of office aforesaid to his damage &c. And we are to examine if the essential parts are pursued in the present declaration?

I throw out of the case the latter part of the declaration relative to the two certificates. Which I consider as different from the part first particularly stated, and take the declaration as stopping at the end of the averment as to the first. Thus viewing the other as a separate count, or rather as a *profert in curia* of other papers which he meant to use in evidence.

The declaration states the plaintiff to be an inspector of lumber at Smithfield, by which he obtained an honest livelihood at the salary of £50 per annum, which was paid him by the merchants of that town. That he had been used to inspect lumber from time to time, and to grant certificates purporting that the lumber was good and merchantable; which was always signed with his own hand. That the defendant, a merchant in that town, having knowledge of the premises, and with intent to cheat and defraud the plaintiff in his calling of a lumber inspector, did some time in January 1794, send down to Norfolk a sloop loaded with lumber to the amount of thirteen or fourteen thousand staves, including heading of good merchantable lumber, which sloop had on board a certificate or certificates under the signature of the plaintiff, purporting that there was on board, the

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the lumber before described. It then avers that all and every certificate or certificates for the lumber on board the sloop were forged by the defendant, and further, that he never inspected any lumber for the plaintiff since October 1792. That the certificate or certificates aforesaid were dated in January 1794, and that the forgery of the defendant, in those certificates is, *a great fraud upon the plaintiff*, insomuch that he has been compelled thereby to leave off his business as an inspector of lumber, whereby he obtained a salary of £ 50 a year, to his damage &c.

It is objected that the plaintiff should have stated specially how the act of the defendant operated to produce the loss in his employment; and if, as the counsel insisted it was impossible to draw the conclusion from what is set forth that such was the effect of the defendants act, the objection would have been good; although it is alledged it was done by the defendant with intent to cheat and defraud the plaintiff in his office, with an averment that he was thereby compelled to leave off his office, by which he obtained a salary of £ 50 a year.

The difficulty arises from an idea impressed by the word *salary;* which in common acceptation imports a certain annual stipend payable to an officer for performing his whole duty, and if those for whom he was to act excused him from the duty, no matter how, by forgery or otherwise, if he continued to receive his annual stipend, he could have no reason to complain. But when we recur to the act of Assembly and find no salary annexed to the office, but that the profits were fees to be paid for each inspection and certificate; the term *salary*, explained by what follows, that it was paid by the merchants of Smithfield, must mean an income arising either from the fees to be paid by those merchants when his services were required, or (which the charge might mean) from a commutation of those fees by a gross sum paid annually by the merchants. In either case if he lost the income by the forgery his right of action was equally sustainably.

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Upon the general charge, that he loſt his ſalary or income by the forgery of the defendant made with intent to cheat and defraud him in his office, the defendant could not be ſurprized. He knew the act of Aſſembly gave fees and not a ſalary; and if there was a commutation changing them into a certain ſum which had been paid, notwithſtanding the forgery, the defendant who is ſtated to be one of the body who made it, ought to have been prepared, and I preſume was, to meet the proofs of the plaintiff on the loſs to him by the forgery.

On this view of the declaration and recurring to the act of Aſſembly, which requires the certificate of inſpection to be produced to the captain of a veſſel before lumber can be received on board for exportation, the conſequential damages alledged are ſo far from being impoſſible that they are obvious. The forging of the certificate rendered his employment unneceſſary and ſo deprived him of his fees.

The penalty ſpoken of, as the remedy which ſhould have been purſued, is upon the captain who receives lumber on board, without a certificate of inſpection; from which this certificate would exempt him unleſs he knew it to be forged. Beſides it is given to the informer and not a party grieved: who is left to the common law remedy.

So that I think upon the whole this declaration would be ſufficient after a verdict if we are not reſtrained by the precedent in this court, in the caſe of *Chichester* vs. *Vass*.

I have reviſed my notes in that caſe, and as far as concerns the preſent queſtion, I believe my opinion accorded with that of the other Judges.—My note is this, "The promiſe as laid does not "upon the marriage give the action; but other "things are to happen to entitle the plaintiff, "which may be conſidered as the git of the action, "and ought to have been averred; that is that the "defendant had given to another daughter *ſuch a* "*ſum*; for on that his right of action accrued upon "the

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"the promiſe to do equal juſtice to all his daugh-
"ters. I concur in thinking this defect not cured
"by the verdict under the act of Aſſembly, preſum-
"ing proof to have been given of facts imperfectly
"laid in the declaration, but not ſuch as are not
"laid at all."

That caſe eſtabliſhes the diſtinction between neceſſary facts being *not stated at all*, and being *imperfectly stated*; and the latter appears to be the preſent caſe. The loſs of profit is alledged, but imperfectly, and we preſume under the act, that the defect was ſupplied by proof to the jury. None of the caſes cited appear to deſtroy this diſtinction; and

The Judgment is, therefore, affirmed.

JOHN BAIRD & Company, *againſt* MATTOX.

If defendant is ſued as heir and deviſee, and pleads that "he hath no "aſſets by "deſcent," on which the pla'tiff takes iſſue and a verdict be found for the defendant, a replea der ſhall be awarded; be cauſe the iſſue has only tried the right as to the deſcent, but not as to the deviſe.

JOHN BAIRD & Company, brought an action of debt againſt Mattox as heir and deviſe of his father upon a bond entered into by the father to John Baird and company for payment of money.

The defendant plead *nothing by descent*, and the plaintiffs took iſſue on the plea. The jury found that the defendant had *no assets by descent*, and the County Court gave judgment for the defendant. The plaintiff appealed to the Diſtrict Court where the judgment of the County Court was affirmed; and from that judgment of affirmance John Baird & Co. appealed to this Court.

CALL for the appellants. The defendant was charged in the declaration as *deviſee* as well as *heir*; but the plea ſays nothing as to the deviſe: and therefore the defendant remains undefended as to that. So that, both parties having miſbehaved

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themſelves, there ſhould be a repleader awarded up to the declaration.

PENDLETON Preſident. By calling him both heir and deviſee is he not neceſſarily ſued as heir alone?

CALL. That objection occurred when I was conſidering the caſe, but there is nothing in it; for particular intereſts only might have been deviſed to him; and then he would not be heir.

Cur: adv: vult:

On the next day Pendleton preſident, obſerved, that as it was clear if the deviſe to the defendant was in fee ſimple, that he would take by deſcent and not by the deviſe, the doubt was: whether the Court after verdict would not preſume it ſo, eſpecially as the plaintiff had not demurred to the plea. That, at leaſt it would have been fair for him to have moved the Court below to award a repleader; and that the Court wiſhed to hear the plaintiffs counſel further upon the ſubject on ſome other day of the Court.

At a ſubſequent day:

CALL for the appellants, made two points; 1ſt, That upon the general doctrine of repleaders, a repleader ought to be awarded in this caſe. 2dly, That judgment by default ſhould have been rendered in the Court below againſt the defendant as deviſee.

I. Firſt upon the general doctrine of repleaders.

There are two caſes in which repleaders are conſtantly awarded.

The firſt is, where the iſſue joined is ſo immaterial that it does not ſettle the controverſy and decide the right between the parties, 3. *Black. Com.* 395. 6. *Mod.* 2. 1. *Bur:* 103.

The ſecond which grows out of the other, is where the whole declaration has not been anſwered by the plea. *Heaths Maxim's* 174.

Both

Baird, vs Marrox.

Both theſe are applicable to the caſe under conſideration. For the iſſue here has not decided the right and the plea has only anſwered a part of the declaration. Becauſe although the defendant had nothing by deſcent he might have had an eſtate by deviſe, and therefore the right was not determined; and as the defendant was likewiſe charged as deviſee and the plea ſaid nothing as to that, only part of the declaration was anſwered.

It does not neceſſarily follow that becauſe he was heir at law, he took the deviſed eſtates by deſcent; nor will the Court preſume it. For the deviſe might have been for life, or for years, with remainder to another in fee. In which caſe he would have taken by deviſe and not by deſcent. It cannot be objected to ſuch a ſuppoſition, that the remainderman was not ſued alſo. Becauſe if he were dead no action lay againſt his heir or deviſee jointly with the heir or deviſee of the teſtator; for the ſtatute which gives redreſs againſt the deviſee has not provided for ſuch a caſe as that. Therefore as it is no unfair inference that he might have taken by deviſe, the iſſue joined has not decided the right, nor has the plea covered the declaration; which according to the authorities cited are good cauſes for awarding a repleader.

The inference which I contend for, is illuſtrated and ſanctioned by the deciſions to be found in many of the Engliſh books. Thus in the caſe of *Tryon* vs *Carter* 2 *Stra.* 994, where to a bond conditioned for the payment of money *on or before* the 5th of December, the defendant pleaded payment *on* the 5th of December; to which there was a replication: and a verdict for the plaintiff. But a repleader was awarded, becauſe the iſſue was immaterial; for it finds no breach of the condition, inaſmuch as it might have been paid *before* the 5th, of December; and then the condition of the bond was ſaved. The principle of which deciſion exactly applies to the caſe now under conſideration: for the inference contended for here, is not more ſtrained than the one adopted there;

and

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and of courſe that determination ſhould regulate the judgment in this caſe.

So in 4. *Bac: abr:* 128 *Read* vs *Dawson*, where in an action on a bond againſt the defendant as executor, iſſue was joined whether the defendant had aſſets or not, *on the* 13*th*, *of November?* which was the day, on which he had the firſt notice of the plaintiffs original writ; and it was found for the defendant, that *then* he had not aſſets; but this was held an immaterial iſſue and a repleader awarded: for although he had no aſſets *then*, yet if he had any afterwards, he was liable to the plaintiffs action. Now the reaſoning in that caſe applies with full force to the one before the Court; for it would be difficult to maintain why ſubſequent aſſets ſhould be inferred in that caſe, more than an eſtate by deviſe in this.

The general doctrine and the deciſions are therefore clearly with the appellants, and prove that a repleader ought to be awarded. Becauſe the iſſue joined did not decide the right, and anſwer the whole cauſe of action ſtated in the declaration.

The verdict will not cure the defect in the pleadings; becauſe that only helps miſpriſions and Jeofails (by which I mean the miſtakes of the clerk or the ſlips in form of the pleader,) but does not aid the want of ſufficient matter. It cures the omiſſion of form, but not of eſſential facts. *Euers pleadings* 286. 4. *Bac: abr:* 56. 127, 8.

Therefore an iſſue joined upon a plea or replication, which does not involve the evidence of the right, is not cured by the verdict; for as the book correctly ſtates, if what is material in the cauſe be not put in iſſue, it is not made neceſſary to be proved on the trial; and if it be not neceſſary to be proved on the trial, then the jury could not form any judgment of the fact; and therefore their verdict ought not to be concluſive upon it. This ſeemed to have been the opinion of the Court upon our own act of Aſſembly in the caſe of *Chi-*

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chester vs *Vass* * at the last term. In which it was held that the omission of an essential fact or actual substance was not cured by the verdict.

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Now in this case the evidence with regard to the devise could not have been given by the plaintiff on the issue which was joined; but if offered, the Court must have rejected it. For evidence of an estate by devise would not have maintained a replication that the defendant *had assets by descent*; because the allegation and the proof would have been entirely different, and therefore the testimony could not have been received.

Which is decisive that an essential fact was not put in issue, and consequently that the verdict, according to the cases cited, has not cured the defect.

There may at first sight appear to be some inconsistences in the English cases upon this subject. But two rules which are to be collected from the books, will explain all the differences.

The first is, that if an immaterial issue be found for him who tenders it, he shall not have judgment, because it was his own fault, and the contrary practice would tend to encourage tricks in pleading. Thus in the case of *Tryon* vs *Carter* mentioned before, the bar was good, but the plaintiff tendered an issue which being immaterial did not decide the right, and therefore he was not entitled to judgment.

The second rule is, if the plea be bad and the declaration good, or the plea good and an immaterial issue be tendered thereto by the plaintiff that in either case, a verdict in favor of the good pleader, shall be sustained; and judgment given for him. Because it is what the Court ought to have done at the time of pleading. For if the plea was insufficient, the plaintiff should have had judgment for the want of a plea; because a bad plea was the same as no plea at all. And if an insufficient issue was offered to the bar, the plaintiff, not having avoided it, ought to have been precluded

* Ante p. 83.

Baird, vs. Hatton.

precluded from proceeding any further, unleſs he would ſhew matter of avoidance.

Thus in *Nichols's* caſe 5 *Co.* where before the ſtatute the defendant pleaded payment without acquittance to an action on a ſingle bill, on which plea iſſue was joined and found for the plaintiff, judgment was according to the verdict; becauſe payment without acquittance did not diſcharge the ſingle bill, but the cauſe of action remained ſtill. Of courſe the plea was bad and might have been rejected when offered. A verdict therefore in conformity to the plaintiffs right to judgment, where the defendant had offered nothing to preclude his cauſe of action, inſtead of prejudicing ought rather to have confirmed it. But if in that caſe as is ſaid in 1 *Lev.* 32, the verdict had been for the defendant he would not have had judgment; becauſe he had ſhewn nothing to bar the plaintiffs action.

So if to an action of debt upon a bond the defendant pleads not guilty, on which iſſue is taken, and there be a verdict for the plaintiff, he ſhall have judgment; becauſe although the iſſue was immaterial, yet as the defendant had ſaid nothing in bar of the plaintiffs demand, his plea ought not to have been received at firſt, but judgment entered for the plaintiff for want of a plea; and the verdict in conformity to the right inſtead of defeating, in fact tends to ſtrengthen it.

But if ſince our act of Aſſembly the defendant to an action of debt upon a bond were to plead payment generally, and the plaintiff were to reply that the defendant did not pay the money on a certain day, and an iſſue taken on that replication ſhould be found for the defendant, I think he ſhould have judgment. Becauſe the plea, which is a good one, would anſwer the whole declaration, and the replication inſtead of meeting the plea, would take iſſue upon an immaterial point. So that the barr, remaining unanſwered, would not be avoided; and therefore the plaintiff, not having ſhewn any thing in ſupport of his action, ought

not

not to be allowed to proceed any further in his suit. Baird, vs Mattox.

The whole difference therefore consists in the verdicts being in favor of the good or of the faulty pleader. In the first case judgment shall be according to the verdict; but otherwise in the latter.

No exception to this position is recollected at present; and therefore I believe I may venture to say, that a due attention to the two rules just mentioned, will enable us to reconcile all the cases upon the subject. So that it may be laid down as a maxim, that the verdict will not cure in any case where the issue joined does not decide the right in controversy between the parties; and consequently I infer that upon the general doctrine, as the issue here has not decided the right, a repleader ought to be awarded.

II. But if this point be against me then I contend: Secondly, that judgment by default should have been rendered for the plaintiff against the defendant as *devisee;* because the plea having offered nothing in barr of the devise had so far confessed the cause of action; and therefore although the verdict is for the defendant, upon the plea that was offered, still the plaintiff was entitled to judgment against him as *devisee* for want of a plea. 5 *Com. Dig.* 467.

For if the defendant had appeared at the rules upon the return day of the writ and pleaded this plea, the plaintiffs might have prayed judgment against him as devisee for want of a plea as to the devise. *Weeks* vs *Peach*. *Holt* 561. But here he was in a better situation; for he actually had judgment against the defendant; which could only be set aside according to the opinion of this court in *Downman* vs *Downman*'s executors,* by a sufficient plea going to the decision of the merits of the cause. As therefore the plea only went to his capacity of heir, the office judgment should not have been set aside any further; because no more than the character of heir was covered by the plea.

That

* Washington's Reports, 1 vol.

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That the plaintiff took iſſue is no objection; for the plea, as far as it went, was a good barr; the Court were bound to receive it; and the plaintiff was obliged to accept the iſſue which it tendered. His doing therefore, what the law required, could not operate to his prejudice; and conſequently ſo much of the judgment, as was not embraced within the plea, ſhould have remained.

In ſuch a caſe two pleas are neceſſary; 1. No *aſſets by deſcent*, which was the plea here; 2. That *the defendant took nothing by deviſe*, which has been omitted in the preſent caſe. The wit of man cannot ſuggeſt a plea, which will barr an action like the preſent, without inſerting both theſe facts. For they are ſubſtantive and independent of each other; and are therefore diſtinct matters of defence, which require diſtinct pleas. But, as only one of them was offered, the plaintiff remained unanſwered, as to the other; and conſequently as to that, the judgment ſhould have ſtood. All which is fully proved by the before mentioned caſe of *Weeks* vs *Peach*. In which it is expreſsly ſaid, that where the plea only anſwers part of the demand, that the plaintiff may take his judgment, as to the reſidue, by *nil dicit*.

It is no objection that the plaintiff did not demur. Becauſe *qua* heir, it was a good plea; and therefore upon a demurrer it would have been decided for the defendant, as to that character; but the point would ſtill have remainded as to his character of deviſee. So that the very ſame queſtions would have been open after the deciſion upon the demurrer that now are; and conſequently neither juſtice or fairneſs would have been in any degree promoted by it. Beſides a demurrer in ſuch a caſe would have wrought a diſcontinuance of the whole cauſe *Weeks* vs *Speed*. 1 *Salk*. 94. For this plea did not begin as an anſwer to the whole, when in fact it was only an anſwer to part, and therefore demurrable to, (as if, in treſpaſs upon two cloſes, the defendant pleads not guilty generally to the

whole

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whole treſpaſs and only offers a juſtification as to one cloſe, in which caſe the plea is bad and may be demurred to;) but the plea from the commencement to the end is confined to one charge only, and is aptly and properly pleaded to that. Therefore the plaintiff ought not to have demurred, but was obliged to take iſſue on it; as it was a ſufficient anſwer to one character. But at the ſame time he was entitled to judgment by *nil dicit* againſt the defendant as to the deviſe, according to the caſe of *Weeks* vs *Peach* before mentioned.

That the plaintiffs did not apply for a repleader in the Courts below is no objection.

1. Becauſe the defendant was guilty of the firſt fault in not pleading to the whole declaration, which perhaps was done with deſign, and with a view to this very event, of the difficulty of deciding what would be the conſequence of an iſſue and verdict upon one charge, without any plea to the other. An experiment which he was poſſibly the more ready to try, as if it ſhould be finally decided that there ſhould be judgment againſt him by *nil dicit*, as to his capacity of deviſee, he would run but little riſque. Becauſe a judgment by default againſt a deviſee would not perhaps be entered *de bonis propriis*. For the act of Aſſembly has not directed it in ſo many words; and therefore according to the liberality which diſtinguiſhes Courts of juſtice at preſent, the plaintiff would only be allowed to take an extent. So that it was probably thought that the game was a ſafe one, and might be played without danger to the defendant. In which view of the caſe he would be entitled to but little countenance.

2. Becauſe it is the province of the Appellate Court to correct the errors of inferior Courts, from whatever cauſe proceeding; and this whether the party injured excepts to the opinion of the inferior Court at the time or not. Thus if a plaintiff obtains an irregular judgment againſt the defendant in an inferior Court, the Appellate Court will correct it, notwithſtanding the defen-

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dant took no exception at the time; and yet his failure to except might as well be objected in that case as in this.

3. Because the appeal itself is an exception to the opinion of the Court; whose business it is to look into the pleadings before they render judgment, and see if there be a sufficient foundation for it; and if not to award a repleader. For which reason, namely that it is a judgment of the Court upon the pleadings, neither party pays costs upon awarding it. 6. *Mod.* 2. And perhaps the appeal was on account of their refusing to award it, when applied for.

4. Because the setting aside the office judgment was the act of the Court upon the defendants motion, over which the plaintiffs had no controul; nor had they any agency in it. For their joining issue on the plea, was what they were compellable to do. Because the defendant had a right to offer a good bar to the charge against him as heir; and having tendered a good issue, the plaintiffs were bound to accept it. But then, the Court ought not to have set aside the office judgment, any further than the plea extended to; as the defendant is not entitled to set aside an office judgment, without tendering a sufficient plea, according to the before mentioned opinion of the Court in *Downman* vs *Downman's executors*.

Under every view of the subject then, as it is clear, that the whole case has not been tried, the judgments ought to be reversed and a repleader awarded.

ROANE Judge. This is an action of debt against the defendant as heir and devisee of John Mattox deceased. The plea is that no assets of any kind have come to his hands by descent; and on that plea issue is joined. The verdict finds for the defendant, pursuing the very words of the plea. On this verdict the County Court gave judgment for the defendant, and the District Court affirmed that judgment.

Whatever

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Whatever latitude may be taken in conſtruing the verdict of a jury, I ſuppoſe that this plea muſt be conſidered, as only tendering an iſſue on the point of aſſets or no aſſets by deſcent and omitting to anſwer that part of the declaration which charges him as deviſee.

If lands are deviſed to the heir of the deviſor under other and different limitations, than thoſe attending a deſcent, his title by deviſe is not merged in that by deſcent, and he is chargeable in reſpect of ſuch land as deviſee. 2. *Str.* 1270.

Again if the act of Aſſembly authorizes a joint action againſt the heir and deviſee when different perſons, it follows that it will authorize a joint charge againſt the ſame perſon in different characters; the object of the act being to prevent circuity of action. But that circuity would certainly exiſt, if after having found by one action, that the perſon ſuppoſed to take as heir did not in fact take in that character, the plaintiff ſhould be turned round, to another action, to recover againſt him as deviſee. When therefore the act for this reaſon permits a joinder of the cauſes of action, we cannot diſpenſe with any plea, which would have been neceſſary if there had been two ſeparate and diſtinct actions. But if the preſent plea has only put in iſſue the defendants liability as heir, it may be that he is yet chargeable as deviſee, and the plaintiff conſequently entitled to recover againſt him in the action.

I hold it to be a clear poſition that judgment can never be given for the plaintiff, if it appears from his own declaration, that he has no cauſe of action; and this, whether the defendant has moved in arreſt of judgment or not. I hold it equally clear that a judgment diſcharging a defendant ought never to be given on an iſſue from which, if found for him, it does not neceſſarily follow that he is diſcharged from the alledged cauſe of action. In the former caſe however, as the declaration which is the foundation of the ſuit contains in itſelf no ground of action, a judgment final is given againſt the plaintiff; but in the latter

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ter caſe as the plea only is defective, in omitting ſufficiently to anſwer a good declaration, the Court reſting upon that declaration, will give ſuch judgment as by producing a ſufficient plea will inſure a trial of the merits of the cauſe. I am alſo clearly of opinion that an omiſſion to move for a repleader in ſuch a caſe, and to object to a final judgment for the defendant, founded on an immaterial plea can no more ratify ſuch judgment, than a ſimilar omiſſion will in caſe of a judgment on a vicious declaration.

Juſtice Deniſon in the *King* vs *Pillips*, 1, *Bur.* 304, after obſerving that formerly, when repleaders were more frequent, than they are ſince the practice of granting new trials has prevailed, adds "on granting repleaders the iſſue was conſidered "as void and the verdict too, and conſequently the "judgment was to *replead.*" That is to ſay, the judgment was to replead, becauſe there can be no judgment deciſive of the merits, (which is the end and object of every ſuit,) founded on an iſſue and verdict, which are both void.

The rule in granting repleaders as laid down in *Staples* vs *Heydon* 6, *Mod.* 2, is that repleaders are to be awarded when ſuch an iſſue is joined, as that the Court after trial thereof cannot give judgment becauſe it is impertinant and does not determine the right; and in the before-mentioned caſe, of the *King* vs *Phillips*, Lord Mansfield ſaid that he laid the ſtreſs upon theſe words "and not determining the right." I too will take the liberty to add that I alſo lay ſtreſs upon the words *cannot give judgment*; meaning thereby a judgment determining the right. A Court of law can only give an interlocutory judgment for the purpoſe of bringing about a deciſion on the merits, or a final judgment determining the right; and if it gives a final judgment which does not determine the right, either as it reſpects the matter of the charge or diſcharge, it is error.

The judgment which has been given in this caſe will either barr a future action by the ſame plaintiffs

tiffs againſt the ſame defendant as deviſee for the ſame cauſe or it will not.

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If it will not, it is an admiſſion that the charge againſt him as deviſee has not been decided upon in this action; but if on the other hand it will be a barr, it muſt be becauſe of a judgment on a verdict and iſſue, in which it would have been improper to ſhew (becauſe not put in iſſue) that the defendant has received aſſets by deviſe.

Now it would be highly unreaſonable to deprive the plaintiff in the ſecond inſtance of his remedy againſt the defendant as deviſee, under pretence that the queſtion was tried in a former action, when ſo far from that being the caſe, it could not legally have been tried, owing to the conduct of the defendant, in not tendering an adequate iſſue.

I conſider a repleader as a means given the Court to enable them, by correcting inſufficient pleadings, to decide ultimately the merits of the cauſe; and that ſuch a repleader ought to be awarded, whenever the Court, without ſuch a correction, cannot decide the merits.

But it may be argued perhaps that admitting this to be the end and deſign of repleaders, and that one would have been awarded in this caſe if moved for, yet that the Court was not bound to award it, without a particular application.

I have endeavoured to ſhew already, that a Court ought not to give a final judgment on an iſſue which does not determine the right: But after a verdict was had in the cauſe, the Court was bound to give ſome judgment; and if any other judgment was legal, except a judgment to replead, I am a ſtranger to it.

It muſt here be borne in mind, that Courts muſt always be ſuppoſed conuſant of the pleadings pending before them, and muſt give their judgment upon the foundation of ſuch pleadings only.

Upon the whole I think the judgment of the Diſtrict Court ought to be reverſed and a repleader awarded. FLEMING

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FLEMING Judge. My principal doubt has been whether the Court ought to have awarded a repleader, as it does not appear to have been aſked in the County Court; for I have no difficulty on the principal queſtion. But upon reflection the doubt which I had is removed, as it is the duty of Courts to examine into the proceedings, and to give judgment according to the caſe they unfold. And this Court when reviewing the judgments of inferior Courts conſtantly does ſo; diſregarding omiſſions of the parties and entering the judgment which appears to be right upon the record. Of courſe, if it appears that there ſhould have been a repleader, the County Court ought to have looked into the proceedings, and awarded it.

Indeed I think it queſtionable, whether judgment by *nil dicit* againſt the defendant as deviſee, would not have been proper; as there was no anſwer given to an eſſential charge in the declaration; and conſequently as to that the party remained undefended.

But it is ſaid that, as the defendant took as heir, the plea covered the whole declaration, becauſe he would take the deviſe by his better title of deſcent. To which I anſwer that he was charged as deviſee; and, as the deviſe might have been in ſuch a manner as to have broken the deſcent, he ought to have given an anſwer to that charge alſo. For if he had been ſued as deviſee only, he muſt have anſwered; and I do not perceive, how the joining his character of heir in the preſent ſuit, with a view to charge him as to any other part of the eſtate which he might have taken by deſcent, alters or affects the caſe. I am therefore clearly of opinion that the judgment ſhould be reverſed and a repleader awarded.

CARRINGTON Judge. All pleas ſhould anſwer the whole charge contained in the declaration, in order that the whole matter may be put in iſſue and the right finally decided, between the

parties

parties, without any ſurprize upon either ſide, or leaving any room for future litigation.

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In the preſent caſe the defendant was charged in two capacities; 1ſt. as *heir*; 2d as *deviſee*; and the plea is *no aſſets by deſcent*, which is found for the defendant: and on this, the Courts below thought him entitled to judgment. But I differ from them in opinion.

For a material fact remained untried. Becauſe there may have been a deviſe, not merged in the defendants title as heir. For if leſs than a fee ſimple eſtate was given, he would take by deviſe and not by deſcent; and therefore, unleſs he is liable to be ſued in both capacities, he would enjoy the deviſed eſtate againſt a creditor, notwithſtanding the ſtatute expreſsly declares that he ſhall not. An effect which certainly ought not to be wiſhed for; and it therefore becomes important to examine the ſtatute itſelf and the proviſions it has made.

The act after reciting in the preamble, that it is a grievance, that creditors ſhould looſe their debts by the teſtators deviſing away his lands, declares in the ſecond ſection, that ſuch deviſes ſhall be void againſt creditors in future; and they are enabled by the third ſection to ſue the heirs and deviſees jointly.

Which authorizes the joining of both characters in one action; and therefore the defendant was bound to anſwer both charges. For as the plaintiff was obliged to bring this action, and had no other mode to recover his debt, the defendant ſhould have anſwered and diſcovered the deviſed eſtate, or put it in iſſue in order that the plaintiff might have been enabled to prove it. Or elſe the jury could not enquire into the fact or the Court decide as to the effect of the deviſe. So that the plaintiff was liable to ſurprize and a full deciſion on the ſubject could not be had.

As the caſe at preſent ſtands, if the judgment be affirmed it may poſſibly be a barr to another action

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tion, although the defendant may have had an eſtate by deviſe; which would be highly unjuſt, and therefore ſuch a conſequence ſhould be guarded againſt if poſſible.

But if it would not be a bar, why drive the party to the neceſſity of bringing a new ſuit, when the ordinary method of a repleader will afford him complete redreſs, at the ſame time that it will prevent delay and ſome expence?

That a repleader ſhould be awarded becauſe the right and whole merits of the cauſe have not been decided, is abundantly proved by the authorities which have been cited; and particularly the 4 *Bacon's abridgment* which decides that wherever the iſſue which has been tried was not calculated to involve a complete diſcuſſion of the whole ſubject, a repleader ought to be awarded, becauſe the right has not been decided and the ſubſtantial merits of the caſe determined on. Which is preciſely the ſituation of the caſe before the Court; becauſe the queſtion as to the deviſed eſtate was never put in iſſue; and therefore a complete deciſion of the whole ſubject in controverſy could not be obtained. So that it falls clearly within the doctrine laid down in the book. I am therefore of opinion with the two Judges who have preceded me, that the judgments in this caſe ſhould be reverſed and a repleader awarded.

LYONS Judge. The firſt queſtion in this cauſe is, if the ſame perſon may be ſued as heir and deviſee; and this is anſwered by ſhewing that he may take both ways. 1. *Black. rep.* 265.

The next queſtion is if a deviſee be ſued, whether he ought not to be charged ſpecially and diſtinctly from his capacity of heir? But I do not find it laid down that it is neceſſary to do ſo, but that he muſt be ſued as heir and deviſee jointly is evident. For the act of Aſſembly cannot be complied with by any other mode; and therefore a declaration according to the form uſed here is certainly well enough; inasmuch as it charges him as

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heir and deviſee both. Suppoſe an act of Aſſembly were to ſay that the creditor might ſue the heir and executor together, a ſpecial and ſeparate declaration againſt each would not be neceſſary, the calling him heir and executor without ſhewing how heir or how executor would be ſufficient; and I cannot diſcover a diſtinction between the two caſes. Here he is called heir and deviſee, which are the characters mentioned in the ſtatute; and are ſufficiently preciſe, and clearly underſtood.

The charges therefore being explicit we come next to enquire what the defendant ought to do in ſuch a caſe? He ſhould ſhew what eſtate he has, becauſe it reſts more in his own knowledge, than in that of the creditor; and therefore the law forces him to confeſs, becauſe the plaintiff cannot otherwiſe come at juſtice. If the defendant were ſued in ſeparate actions upon each character, both charges muſt have been anſwered, and why not here? The joining both characters in one action cannot poſſibly make any difference.

The queſtion then is what is the conſequence of the omiſſion in the preſent caſe? It is regularly true that the plaintiff may in ſuch a caſe take judgment for want of a plea, but if he omits, the Court muſt themſelves look into the whole record, and give the proper judgment. *Hob.* 199. If it appear that the ſuit is founded on a joint bond and the judgment is only againſt one, it will be arreſted by a court of error, although no plea in arreſt of judgment was filed in the Court below. So if to an action upon aſſumpſit the defendant pleads non aſſumpſit and the act of limitations, and no notice is taken of the act of limitations; the proceedings will be ſet aſide, the parties made to complete the pleadings, and to try the cauſe over again upon proper iſſues. In *Buller nis: pr:* 176, it appears that a repleader was awarded merely becauſe the iſſue was joined on the ſufficiency of the land, inſtead of the point whether the defendant had aſſets by deſcent or not. Although it is evident *that* iſſue more eſſentially involved the deciſion of the right than the preſent does. As

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As therefore in the preſent caſe nothing has been ſaid in anſwer to the charge of deviſee, that point was not properly brought before the Court and jury for deciſion; and conſequently no judgment completely determining the right could be given. Which according to all the authorities is a ſufficient ground for awarding a repleader.

It is ſaid however that there ſhould have been a motion for a repleader in the Court below; and that for want of it, one cannot be awarded by this Court. But I cannot perceive the propriety of that argument. Becauſe I think it is the duty of this court to correct all irregular or improper judgments of inferior Courts, whether the imperfections be pointed out to the Court below or not. Accordingly whatever defect may be taken advantage of on a general demurrer would I conceive be bad on an appeal. In the preſent caſe no iſſue was made up on an eſſential part of the declaration; and therefore the verdict did not decide any thing concerning it. Of courſe it was void as to that part of the declaration; and no judgment therefore could be given on it, which would be deciſive of the matters in controverſy between the parties. Conſequently if the inferior Court inſtead of ſtopping the buſineſs at the threſhold and obliging the parties to plead anew, have gone on to give a final judgment in the cauſe, they committed an error; and this Court ought to correct it. Accordingly it is the conſtant courſe of the Court to look into the whole record and to give the judgment which the Court below ought to have given.

For although the errors are the errors of the parties, yet the judgment is the act of the Court deciding what is right between them; and therefore it ought to be according to the law of the caſe. For which reaſon we always ſay in our entries, that we have inſpected the record, meaning the whole record, and that we find that there is or is not error in it.

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Upon the whole I think that the defendant ſhould have plead as deviſee; and that as he did not, no iſſue deciſive of the whole cauſe was joined. That therefore a repleader ought to have been awarded; and that this Court ought now to give judgment that the parties ſhould replead, although no motion to that effect was made in the Court below.

PENDLETON Preſident. Two errors are aſſigned by the appellants counſel.

1ſt. That the plea, being defective in anſwering only one charge in the declaration againſt the defendant, to wit, as heir, aud ſaying nothing as to his reſponſibility as deviſee, the Court ſhould not have received it, and ſet aſide the office judgment; but the ſame ought to have ſtood, as by default.

2d. That the iſſue joined and tried, being only as to part of the charge did not put an end to the diſpute, ſince the defendant might not have aſſets by deſcent, and yet have them as deviſee; and therefore that the iſſue was immaterial, and upon the verdict, a repleader ſhould have been awarded inſtead of judgment for the defendant.

I ſhould have to lament that in this caſe, important as a precedent, tho' perhaps in itſelf of no other conſequence than as to the coſts, we heard counſel only on one ſide; but that from the candor of the *exparte* counſel, I believe we have the law on the ſubject fully before the Court.

This is an appeal from a general verdict in which no exception is ſtated, to any opinion given by the Court nor any application to them for an opinion ſuggeſted to be erroneous.

It is truly ſaid that the appellate Court are to inſpect the whole record and give ſuch a judgment as the inferior Court ſhould have given.

If the plea and iſſue tried be immaterial, we in deciding what judgment the County Court ought to have given, come to the queſtion whether it

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was the duty of that Court *ex officio* to take notice of the insufficiency of the plea, when the office judgment was set aside, or that the issue was immaterial when the verdict was given, and award a repleader without being applied to by the party? A question which becomes important as a precedent, considering the mode of proceedings in the County Courts.

In the case of *Staples* vs *Heydon* 1, *Salk.* 579, it is laid down as a general rule "that if the inferior Court grant a repleader when it ought to be denied, or deny it when it ought to be granted, it is error." Which to my mind, from the terms *grant* and *denial*, is conclusive that it is not error in either case, but when it proceeds from an application of the party to the Court to grant it.

It is no objection to say that the appellate Court are to view the whole record and correct errors discovered in the inferior Courts judgments, tho' not pointed out in the Superior Court. For it does not follow, that, in this review, they shall decide it to be error in the inferior Court, in not having done that, which they were not desired to do; altho' if they had been applied to and denied it, it would have been error. The *ex officio* duty of the two Courts, appears to me to be very different.

If application to the Court of common pleas in England, be necessary to constitute an error in these cases, how much stronger does the reason apply to one County Courts proceeding on a different mode? There a full record is made up stating in one view, the whole pleadings and collecting the issue to a point, which is sent in the Country for trial, and the Judge may easily discover whether the issue be material. But in our County Courts where the suit originates, they know nothing of the proceedings till the jury are sworn to try the cause; and then usually the pleadings are not read, but the attornies state the dispute, examine their witnesses, the verdict is taken and the

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conſequent judgment entered, if no objection is made. Are we to ſay then, that the Court upon every verdict are to ſtop their progreſs to other buſineſs, till they read over the declaration and plea to diſcover whether the iſſue tried is material, and force upon the parties a repleader, who may be ſatisfied, and wiſh to be at no further expence and trouble? All the Court have to do in ſuch trials is to ſee that nothing unfair is practiſed, and to decide any queſtion which the parties bring before them.

But it is ſaid that the appeal is equal to an exception. We have ſeen at this and every term, a number of appeals upon other motives than exceptions. Delay indeed could not be imputed to an appellant, who was plaintiff in the Court below, but he might wiſh to ſave his coſts, and enter the appeal in hopes that ſagacious counſel could diſcover ſome error in the proceedings which might effect it: and if theſe appeals from general verdicts receive the countenance of this Court, I fear our docket may be crowded and the ſuitors embarraſſed.

I recollect that ſome years ago, the General Court reverſed a judgment entered by confeſſion becauſe there was no declaration and awarded a non ſuit: which being known, many of ſuch judgments, were hunted up, and brought before the Court, and met the ſame fate. But at length an appeal brought the queſtion before the Court of Appeals then conſiſting of all the Judges, and upon conſideration the judgment of the General Court was reverſed; in which the whole five Judges of that Court concurred, and a ſtop was put to that proceeding.

Theſe are the conſequences which I wiſh to avoid; and have therefore entered ſo fully into the ſubject.

But upon the preſent occaſion, I am clearly of opinion that the iſſue joined and tried is not immaterial: but was proper and decides the queſtion between the parties; as the words *and deviſee* in the declaration

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declaration were mere ſurpluſage and did not require to be anſwered.

By the common law, the heir only was liable to the bond debts of his anceſtor, in reſpect of lands deſcended to him; and if a debtor deviſed his lands from the heir, it defeated the remedy of the creditor; which being unjuſt, the ſtatute againſt fraudulent deviſes was paſſed, declaring ſuch deviſes void as to the creditors, and making the lands liable in the hands of the deviſees, againſt whom ſeparate actions were brought, founded upon the ſtatute.

Our act of Aſſembly proceeds in the ſame manner, to declare that all wills diſpoſing of lands or any rent, profit, term or charge out of the ſame ſhall be deemed and taken (as againſt ſuch creditors, to whom ſuch lands in the hand of the heir would be liable) to be fraudulent, and clearly, abſolutely, and utterly void, fruſtrate and of none effect; and the lands are made liable in the hands of the deviſee, in the ſame manner and ſubject to the ſame conſequences as if they had deſcended to the heir.

Another clauſe is inſerted, namely, that the creditor may bring his action on his bond againſt the heir and deviſee or deviſees jointly. So that if the deviſe be to others than the heir, the declaration againſt the heir may be general, charging him as ſuch, without ſuggeſting aſſets; but as againſt the deviſee, the deviſe muſt be ſuggeſted, in order to charge him under the act of Aſſembly.

Where the ſame perſon is both heir and deviſee the caſe is not within this clauſe; for a ſuit againſt one man *jointly with himſelf* becauſe he poſſeſſes two characters, would be abſurd. In ſuch a caſe, the deviſe being declared void as to the creditor, does not ſtand in the way of the defendants liability as heir but all the creditor has to do, is to charge him in that character; and whether the deviſe to him be in fee or for any limited

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intereſt, is wholly immaterial, ſince whatever it be, it is utterly void, and of no effect.

Therefore all that the creditor had to do in the preſent caſe, was, to charge the defendant as heir; and any words ſuperaded, charging him as deviſee were mere ſurpluſage, and not neceſſary to be anſwered by the defendants plea. Which properly put in iſſue his liability as heir; and the jury having found, that no aſſets of any kind came to the defendants hands by deſcent, the real queſtion between the parties was decided; and no repleader ought to have been awarded, even if it had been applied for in the County Court.

I am therefore of opinion that the judgment of both Courts, were right; but a majority of the Court being of a different opinion, both judgments are to be reverſed, and a repleader awarded.

CHAPMAN

CHAPMAN
against
TURNER.

What shall be called a conditional sale and irredeemable instead of a mortgage. If C gives an instrument of writing to T stating that he had received £30 and had put a slave into th' hands of T. as a security; & that if the money was not paid on or before a certain day, T *was to have the slave for the* £30, this is a conditional sale & not a mortgage.— And on failure to pay the £30 on the appointed day, the sale becomes absolute.

ELIZABETH CHAPMAN Administratrix of Richard Chapman, brought a bill in the High Court of Chancery against John Turner and Jedediah Turner, stating that the said Richard Chapman being distressed, borrowed £30 of John Turner, and as a security pledged and mortgaged a valuable negro woman of a about 18 years of age, and worth £50. That Turner took an instrument by which it would appear that the said slave *was pledged* as a security for the repayment of money. That it was out of Chapman's power to repay the money on the day; whereupon Turner claimed the slave as his property, and sold her and her two children to Jedediah Turner for £60, which was less than their value. That Jedediah Turner at the time of buying knew the slave was *only pledged;* and *had read the mortage or note.* That the plaintiff had tendered the principal and interest, but the defendants refused to restore the property, and therefore the bill prayed a redemption.

The answer of Jedediah Turner admits the purchase, and that prior thereto he had seen the writing from Chapman to the other defendant. But as he had never heard that Chapman wished to redeem, he had concluded that the purchase was absolute; and that his own bargain was not advantageous.

The answer of John Turner, states that Richard Chapman applied to him for a loan of money, but the defendant being a poor man and wishing to vest the little money he had in personal property, refused. That Chapman at length offered to sell him the said slave who was between 20 and 30 years of age for £30, but with leave to repay in in a short time; in which case the slave was to be returned. That thereupon the defendant paid

him

him the said £ 30; and it was stipulated that if the money was not returned without interest, on or before the day for holding the Court in the county of Hanover in the month of July following, that the said Chapman's right of redeeming the said slave should cease, and the slave become the absolute property of the defendant. That Chapman never repaid the money or offered to redeem during his lifetime; and that after Hanover Court aforesaid, he considered the slave as his own property. That the bargain was not advantageous—That the slave had had four children prior to the purchase, three of which she had overlain, and that upon discovering these facts he had offered to annul the contract, but Chapman refused. Chapman, *vs.* Turner.

The writing spoken of in the bill, and answers, was in these words: "I this day received of Mr. "John Turner the sum of thirty pounds, and put "a negro woman named Hannah in his hands as se-"curity, and if *he* the £ 30 is not paid at or before "next July Hanover Court, the said Turner is to "have the said negro for the said £ 30. Witness "my hand this 20th May 1786.

"RICHARD CHAPMAN.

"*Teste*, JAMES PARSONS.

There was an amended bill which stated that Richard Chapman, in his lifetime, on the day of 1786, tendered to John Turner £ 30: 13: 0, which he refused to accept. But the answer of John Turner denies the tender.

The deposition of a witness stated, that he had heard John Turner say he had lent Mr. Chapman £ 30 and had got a bill of sale, or some writing by which Chapman had conveyed a negro woman to him; which was to be obligatory, if the money was not returned by a particular day. That he asked Turner if the money had been tendered? To which he answered, not within the time. That the deponent then asked when it was tendered? To which Turner answered that it was after sunset, or some time in the evening, or towards dark

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on the day that it became due. That the deponent then advised him to return the negro and get his money back, or try to get another bill of sale; for in his opinion, Turner was only raising negroes for other people.

There was no other evidence of the tender; and although the witnesses differed about the value of the slave, when bought of Chapman, yet none of them made her value to exceed the sum actually paid, more than 10 or 15 pounds; and several represented her to have been under a bad character.

There was no other proof of any agreement for redemption.—Neither was it proved that Turner offered to annul the sale; though one witness said he had frequently heard Turner, (who appeared to be uneasy at the slaves habit of overlaying her children,) say that he wished he had his money back.

The Court of Chancery dismissed the bill with costs; From which decree the plaintiff appealed to this Court.

DUVAL for the appellant. Though the bargain be conditional if the lender takes more than lawful interest it is usury. Here was an application for a loan and more than lawful interest was taken. It was therefore but a shift to evade the statute and the security is void. 3, *Atk.* 279, 154. *Dougl.* 736. At any rate it was but a mortgage. The property was only to secure the repayment of the money lent; and the form of the instrument will not alter the nature of the contract. 1, *Eq. cas: abr:* 310. 1, *pl. (A)* 312. *pl.* 11, 13, 313. *pl.* 14. The person to whom a pledge is delivered has no right to dispose of the pledge; and if he does he who delivered it, may on tendering the money recover against the purchaser. 2, *Cro.* 245 3, *Salk.* 268. 3, *Atk.* 49. *Dougl.* 636.

WASHINGTON upon the same side. It is proved that the money was tendered upon the day that it became due, though the witness is not positive whether it was after sun-set or before. If however

ver there was light enough to see the money counted, it was sufficient according to the most rigid law; and much more in equity where such strict terms are not required. Let it be though, that there was no tender until about the time of commencing the suit; yet the right of redemption, admitting that it is to be put on the common footing of a pledge of personal property, would still exist. 1, *Bac: abr:* 238. But this is a case of the first impression with regard to slaves; which in Virginia form great part of the wealth of the people. They were formerly deemed real estates; and could even be entailed, which shews the high value set upon that kind of property by the people & Legislature of this country. A circumstance which should render them more easy of redemption than personal property in general is, according to the opinion of the Chancellor in *Tucker* vs *Wilson*, 1, *Wms.* 261. And although his decree was afterwards reversed by the Lords, yet that was for the sake of trade and convenience. Therefore notwithstanding the reversal, the case stil shews, that they do make a distinction in that country, between the kinds of personal property pledged. It has been truly said that if there be only a security for money, no form of words will barr the equity of redemption. The question must therefore always depend upon the nature of the case; and here the terms of the writing are for repayment; which from its nature is consequently redeemable. *Powell Mortg:* 23 26. *(1st Edit.)* The argument that purchasers might otherwise be deceived does not hold in this case, where the purchase was made with notice of the equitable right. The length of time is no barr, for in the case of *Ross* vs *Norrel** the Court thought that slaves might be redeemed within twenty years; and the valuable nature of the property should preserve its redeemable quality.

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WARDEN *contra.* It was a conditional sale and not a mortgage, and this is proved by the instrument

* Washington's Reports 1st vol.

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ment itſelf. 1, *Ayleffes panduts of civ. law* 144. Beſides it is clear that the parties ſo intended it; for Chapman was unwilling to lend his money at intereſt, becauſe he wiſhed to purchaſe property; and he only advanced it for the accomodation of the other, who was either to have given him his money or enſured him property at the ſtipulated day. So that he was clearly entitled to one or the other of them. The ſlave was not worth more than was agreed to be given for her; and the teſtimony does not ſhew any tender within the time. The anſwer denies it; and in fact the money was not offered until the pay day had paſſed. From the nature of the property the contract cannot be conſidered as a mortgage, but muſt be taken as a pawn and irredeemable. 3, *Salk.* 267. *Cro. Jac:* 244. 1, *Vern.* 214, 232. Chapman, at moſt, had only his own lifetime to redeem it in; and therefore the right, if it ever exiſted, expired with him. There is no covenant for repayment of the money after the day; but the contract merely is, that if it be not paid at the day, the ſlave ſhould belong to Turner, who had no action to recover the money afterwards; and might have been told, you have your bargain, for the ſlave is yours. 1, *Powell mortg. (new edit.)* 148, 151. Which ſhews that in caſes of this kind if the parties deſign to make it irredeemable, their intention ſhall prevail; and that where there is no covenant for repayment the ſale ſhall be abſolute.

WASHINGTON in reply. Wherever there is a forfeiture, for the non performance of a condition or ſtipulation, equity will relieve, if compenſation can be made. And why ſhould there be a difference between a mortgage of real and perſonal property, as the principle applies to both? No reaſon can be aſſigned for it, and therefore an actual diſtinction ſhould either be ſhewn or authorities produced. But although the caſe in point of fact muſt have often happened, it is admitted that no adjudications are found which preciſely apply. *Tucker* vs *Wilson*, proceeded on the idea of the reſemblance between the mortgaged ſubject and

ſtock

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ſtock. Which the Lords conſidered as money, and therefore decided againſt the redemption, on that ſpecial ground; and not upon any general principle that there could be no redemption after non payment at the day. As therefore there is no deciſion againſt it and the principle of compenſation is applicable, it ought to govern and the redemption be decreed. As to the nature of the tranſaction it was clearly a redeemable intereſt. If it is a loan and the conveyance is only by way of ſecurity it is a mortgage. But if the nature of their agreement was ſuch as not to amount to a mortgage, it muſt be clearly proved or the general principle will not be departed from. *Pow. mortg.* 50; but here is nothing upon the face of the inſtrument to diſtinguiſh it from ordinary caſes of mortgage; and therefore the common rule will prevail. If it was only proved by parol evidence that it was a mortgage it would be ſufficient; but here we have no neceſſity to reſort to that, as the inſtrument itſelf expreſſes the redeemable quality of the contract. As to there being no covenant to repay, that indeed, was formerly conſidered as important, but it is not ſo now. For it is ſettled that a mortgagor is liable, as well without as with the covenant. Indeed if it be doubtful upon the inſtrument whether it be a mortgage or a ſale, the want of a covenant is of ſome weight; but if on the face of a deed it be a mortgage, it is otherwiſe.

ROANE Judge. Upon an attentive review of the teſtimony in this cauſe, I muſt be of opinion that the intencion of the parties was that there ſhould be a conditional ſale of the ſlave in queſtion. This intention indeed muſt be clearly proved or neceſſarily implied from the attendant circumſtances or the general rule authorizing a redemption will not be departed from. 1. *Pow. Mortg.* 165.

As the time of diſcrimination between mortgages and theſe defeaſible ſales cannot well be marked out by any general rule, every caſe as to the

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the true nature of the tranſaction and the intention of the parties muſt in ſome meaſure be determined on its own circumſtances.

Here it is to be premiſed that the value of the ſlave in queſtion, even as aſcertained by the general current of teſtimony though there are very different opinions on the ſubject, does not exceed in any exceſſive degree the ſum actually advanced by the appellee John Turner; and eſtimating that value at the higheſt ſum ſtated by the witneſſes, the purchaſe of the ſlave for the ſum advanced could at moſt only be ſaid to conſtitute a good bargain.

This caſe then may ſtand on very different grounds from a caſe where there may be an enormous inequality in value. For although inequality of value is not, of itſelf, a ſufficient cauſe to ſet aſide a ſale, yet it is a circumſtance deſervedly entitled to great weight in diſcovering the intention of the parties, in a doubtful caſe, as to the true nature of the contract.

A diſcovery of the contract being ſought from the appellees, by the bill of the appellants; their anſwer as to this ſubject is clearly entitled to credit; eſpecially when not contradicted by the written agreement (which was probably the act of Chapman only;) and when it is merely explanatory of the tranſaction at and before the time that the contract was completed.

The anſwer of John Turner is expreſs, that having refuſed repeated applications from Richard Chapman to lend him money upon intereſt, Chapman then propoſed to ſell him the ſlave Hannah at £30, redeemable on payment of the money upon a certain day; that accordingly the £30 was paid and the ſlave delivered; and that it was expreſsly ſtipulated if the money was not repaid, without intereſt, the right of redemption ſhould ceaſe and the right of property become abſolute.

If the written agreement referred to in this anſwer had even contradicted the ſtatement of the bargain, it might well be doubted whether being the ſole act of Chapman, and ſuch an act too as an

an unlettered man might well ſuppoſe to correſpond with the bargain, the acceptance of it ſhould bind him as evidencing a variation in the contract. For as on the one hand no act of a ſcrivener can turn that which was intended as a mortgage into an abſolute ſale, ſo as to preclude a redemption, ſo on the other it muſt not be permitted to deſigning men to turn a real though defeaſible ſale into a mortgage, without the free conſent of the other contracting party.

But I think the written agreement in itſelf may on the contrary juſtly be conſidered, as correſponding with the real contract as ſtated by John Turner.

It is an univerſal rule of interpretation, that that conſtruction ſhall be preferred which will reconcile and give effect to the whole inſtrument without rejecting any part.

That part of the agreement which after ſtating a receipt of £ 30 goes on to ſay "and put a negro in his hands as ſecurity" may well be verified and conſidered to have effect by conſtruing the ſale defeaſible till July Hanover Court, during which time the negro would only be a ſecurity and afterwards abſolute: Whereas theſe words of the agreement *and if the money is not paid at or before the next July Hanover Court, the ſaid Turner is to have the ſaid negro for the ſaid* £ 30, cannot have any effect without decreeing the ſale abſolute after that period. In fact the laſt words *for the ſaid* £ 30, not only ſhew that there was a ſale, but that the particular price was ſtipulated and adjuſted between the parties.

If indeed ſuch price had not been fixed expreſsly, or by ſtrong and neceſſary implication, altho' upon failure of redemption at the day the property would have become abſolute at law and thus the terms of the agreement have had effect, yet equity, conſidering it as a forfeiture, would have relieved upon compenſation.

But

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But when the price is fixed it not only inevitably evinces that a ſale was the intention of the parties, but renounces that judiciary interpoſition which is now ſought. Much more then ſhall this conſtruction prevail, where the price agreed on is not unreaſonably, if at all, below the price for which the ſlave would probably have ſold in ready money.

Theſe are ſome of the moſt prominent principles and reaſons which induce me to conclude that the contract was really a defeaſible ſale, which on the non performance of the condition remained abſolute.

I think therefore that the decree ought to be affirmed.

FLEMING Judge. The principal point in this cauſe is, whether the paper was evidence of a conditional ſale only? The caſes cited by the plaintiffs counſel were all upon mortgages where time is allowed; but here the ſale was abſolute tho' liable to be defeated by payment of the money. The firſt part of the agreement looks at firſt ſight like an intention that it ſhould be a mere ſecurity for the repayment of the money; but the latter part explains the meaning and ſhews that the parties intended a conditional ſale. There is no covenant for redemption or payment of the money; and if the ſlave had died in the mean while Turner muſt have borne the loſs. This was clearly the underſtanding of the parties. Turner's anſwer ſtates that he was applied to for a loan of money, but that he refuſed to lend it, as his object was to buy property, and therefore that a conditional ſale took place; which is not contradicted by any evidence. The original bill ſtates that the money was not paid, and does not alledge any tender. The amended bill attempts to correct this but it is only ſupported by the teſtimony of one witneſs, whilſt the anſwer which is reſponſive expreſsly contradicts it, and the general circumſtances of the caſe are in favor of the anſwer. The value of the ſlave is uncertain, but it does not affect the queſtion

queſtion at all as there is no improper conduct ſhewn on the part of Turner. To decree a redemption in ſuch a caſe as this would teem with miſchief and ſet aſide an infinite number of ſales under which property is enjoyed. As to the argument with reſpect to uſury, there is not the leaſt foundation for it; as the ſeller had it in his power to repay the money without any intereſt at all. And even that he was not bound to do. I am therefore of opinion, that the decree ought to be affirmed.

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CARRINGTON Judge. The contract was plainly a conditional ſale and not a mortgage. For no loan was contemplated by the parties, as Turner poſitively refuſed to lend, becauſe he wiſhed to inveſt his money in property. In conſequence of which, a complete ſale took place, and the money was advanced on account of the purchaſe; but at the ſame time a power was given the ſeller to repurchaſe the property by reſtoring the price (which was not very inadequate) at a given time, without intereſt, or any covenant that he ſhould repurchaſe, or pay back the money. This therefore was a right entirely collateral to the ſale; and as it tended to defeat a fair purchaſe, it ought to have been ſtrictly purſued. But there was a failure in the ſeller to do ſo; and the money in fact was not repaid upon the day. The ſale was conſequently diſcharged of the condition altogether, and the right of the purchaſer was no longer liable to be diſturbed.

In this view of the ſubject, the caſe bears no reſemblance to a mortgage, which is always founded on a loan: and as, in that caſe, the ſole object of the ſecurity is merely to compel repayment of the money, the creditor is compenſated by decreeing him his principal and intereſt. But here the object on both ſides was a ſale; and only a collateral right to repurchaſe by a given day was reſerved to the ſeller, who was under no obligation to do ſo, but might exerciſe the right or not as

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he pleaſed. The caſes are therefore eſſentially different; and conſequently the plaintiff had no right to redeem after the time had elapſed. I am therefore of opinion that the decree is right and ought to be affirmed.

LYONS Judge. I had ſome doubts at firſt, whether a mere ſecurity for repayment was not intended, and therefore the contract ſubject to redemption. But upon inſpecting the inſtrument and the other documents in the cauſe, thoſe doubts are removed; and I now think it was a conditional ſale and not a mortgage. That is to ſay, it was a complete ſale ſubject to a right in the ſeller to defeat it, and have the property back on repayment of the money by a given day. Or in other words it was a perfect ſale, with a right in the ſeller to repurchaſe the property on reſtoring the money by a certain time.

It is extremely clear, that no loan was contemplated by the parties. For Turner refuſed to lend the money, becauſe he wiſhed to inveſt it in property; and therefore purchaſed with a view of either having property at the day, or money to go to market with, in order to purchaſe it. For which reaſon he did not demand intereſt or inſiſt on a covenant for repayment. Circumſtances clearly ſhewing that no loan was intended.

It was therefore a mere collateral right to repurchaſe and defeat the ſale by a given day. But as this was not exerted in time, the ſale is now altogether diſcharged of the power, and the ſeller can aſſert no right to the property.

But the doctrine of pledges was inſiſted on by the appellants counſel. It is however generally true, that if goods be pawned without a day of redemption fixed, he who pawned has time during his life to redeem; but his executors cannot. For it is a condition perſonal, and being generally pawned extends only to the life of him who pawned it. *Ratcliff* vs *Davis*, *Yelv.* 178. So that in the ſtricteſt caſe of a general pawn, the right of redemption

redemption would have expired with Chapman himself; and therefore the inference drawn from that doctrine, if the doctrine itself has any application to the case, is altogether inadmissible. Chapman, vs. Turner.

But there is no occasion to resort to any reasoning of that kind, as the cause is capable of being determined upon very different principles. For the sale as before observed was every way complete; and only liable to be defeated by the exercise of a collateral right by a given day. Which was not done; and therefore the seller could derive no benefit from it.

He might indeed have contracted to sell the slave for ready money, and out of the product he might have repaid the price which he had received for the purchase, taken back the slave, and delivered her to the second purchaser, keeping the overplus of the money, if any, to his own use; because as the first purchaser would have got his money according to contract, it was of no consequence to him, how it was raised.

But nothing of all this was done. There was neither any actual repayment or offer to repay on the day. So that the power was never exercised, and therefore no advantage will result to it from the seller, who does not appear to have obtained a very inadequate price at that time, for the slave: which is a circumstance of some weight, and destroys the force of the argument, that imposition may be practised under pretence of sales of this kind. Because whenever such imposition appears, or it is shewn that a borrowing and lending was really contemplated and no sale intended, that alone will turn the transaction into a mortgage.

Upon the whole I think the plaintiff had no title to redeem, and that the Chancellor did right in dismissing the bill. The decree therefore ought to be affirmed.

PENDLETON President. The principle respecting mortgages and pawns in England borrowed from the hypothecations and pignorations of the

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the civil law, are well ſettled as to the right of redemption. Equity allows that redemption on this ground, that ſecurity for the debt being the object, no price for parting with it is contemplated; and as the ſubject pledged is uſually of more value than the debt, it would be unjuſt that the mortgagor ſhould looſe his property, from his misfortune of not being able to pay the money at the day; whilſt on the other hand the creditor receiving his debt and intereſt has what it was his purpoſe to ſecure and no injury is done him. A Court of Equity therefore allows redemption on a general principle adopted by that Court, of relieving againſt all forfeitures where compenſation can be made.

And further if it appears that a mortgage was really intended the Chancellor will not ſuffer the uſual relief to be evaded, by any reſtrictive clauſes inſerted by the act of ſcriveners. Againſt the redemption, the act of limitations does not run (if it does in any caſe in equity) but circumſtances may barr it, manifeſting a waiver of the right, or ſuch a change in the ſtate of things as would render the redemption iniquitous inſtead of being equitable. But as on the one hand the Chancellor will not permit a real mortgage to be made irredeemable by the act of a ſcrivener, ſo neither on the other will he ſuffer *real* conditional or defeaſible ſales to be changed into mortgages by the like acts. The real intention of the parties governs him.

In a defeaſible purchaſe the condition muſt be ſtrictly performed at the day or no relief will be granted; becauſe it does not admit of compenſation for the riſque. If the thing periſh the next day, it muſt be the loſs of the purchaſer, he having no covenant, or even implied promiſe for return of the money in that event; and we are taught by a maxim in Equity that in theſe caſual caſes, eventual loſs or gain muſt accrue to, or fall on him who runs the riſque.

The reaſon for holding vendors to this ſtrictneſs in conditional ſales applies with every degree of

weight

weight to the caſe of ſlaves in this country. They are a periſhable property, and may die the next day: If they ſhould not however, and are males they may be very profitable, or if females they may by their children increaſe the ſtock. Now can it be imagined that any vendor could be ſo warped by intereſt as to ſuppoſe he might lie by until in event the men had earned profits greatly exceeding the principle and intereſt, or the women borne ſeveral children, and then expect to perform the condition when the purchaſer had all the meantime riſqued their lives. If there be ſuch a vendor I am ſure he will receive no countenance from a Court of Equity. Chapman, *vs.* Turner.

Upon theſe general principles let us examine the preſent contract, and ſee whether they apply to it as a mortgage or defeaſible purchaſe? Chapmans intention was to borrow, and for that purpoſe he applied in the beginning of May to John Turner who ſaid he had no money to lend; and that he meant to lay out his money in a purchaſe. In this he perſiſted during ſeveral treaties which they had, until Chapman yielded: and agreed to ſell him Hannah for £ 30. provided that if the money was paid at July Hanover Court without intereſt ſhe ſhould be returned; and in the mean time he was to have her as ſecurity. On theſe terms the bargain was cloſed; and upon the 20th of May Chapman ſent Parſons for the money, with Hannah, and the writing ready ſigned. Which Turner received, and paid the money.

If the writing was really what the counſel have laboured to make it, inſtead of relieving Chapman as a neceſſitious man impoſed on by Turner, I would grant relief to Turner as an illiterate man deceived by Chapman in writing the paper. But there is no deceit; for the writing manifeſts the contract to have been as Turner ſtates it. The word *security*, which gives the aſpect of a mortgage, is explained by what follows, to be a pledge till July Hanover Court; when if the money was not repaid, he was to have the negro for £ 30.

Have

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Have muſt mean property or poſſeſſion. It could not mean the latter; becauſe in that there was no change: and therefore it muſt mean that he was to *have* the property.

This then was a defeaſible purchaſe and not a mortgage; which puts an end to the diſpute.

We are told very truly that uſury and ſpeculations are injurious to ſociety and that John Turner practiſed both. If it be uſury to lend money for ſix weeks without intereſt then he is juſtly chargable on that head. As to his ſpeculations, they are explained by Caſtlin to have been that of ſmall articles of proviſions from his neighbours; and carrying them in his cart to market, at Richmond. A kind of dealing beneficial and not injurious to them.

As to impoſition in bargain, there is no proof of any ſuch thing; and the Court will ſcarcely preſume it from the deſcribed characters of the men. They will not readily conclude that the Miller and Waggoner impoſed upon the magiſtrate.

Decree affirmed with Coſts.

HARRISON

HARRISON & Co.

againſt

TOMKINS Executor of HICKMAN.

No *diſtringas* lies againſt the executors of the old ſheriff to oblige them to ſell property taken by him in his lifetime under a writ of fier' facias.

THE queſtion in this caſe was, whether a writ of *diſtringas* can be iſſued againſt the executors of a deceaſed ſheriff in order to compel them to ſell the property taken by one of his deputies under a writ of *fieri facias?*

CALL for the appellants. I have not found authorities upon either ſide of this queſtion; but upon principle I do not ſee any objection to the practice, which I am informed has been in uſe in the General Court.

If an execution be levied and ſufficient property taken to diſcharge it, the judgment is ſatisfied, and no new execution can iſſue on it. 1, *Salk.* 318 4, *Com. Dig.* 140. *Baird* vs *Rice* * in this Court. As therefore the plaintiff cannot have a new execution, nor the defendant take his property back, the ſheriff neceſſarily becomes a truſtee of the property, firſt to pay and ſatisfy the plaintiffs demand, and then for the defendant as to any ſurplus which may remain after the execution is ſatisfied; and as the law did not allow the change of the property from one hand to another, it was upon the foregoing principles ſettled that the old ſheriff was compellable to ſell. 1ſt. From neceſſity, becauſe otherwiſe the plaintiff could never be ſatisfied; 2d. In order to prevent loſs and litigation by changing the property from one hand to the other, which might produce conteſts about the poſſeſſion of it. Hence the writ of *diſtringas* in order to compel the old ſheriff to proceed to the ſale. *Clerk* vs. *Withers*, 1 *Salk.* 322. But this writ does not give any new authority. It is merely compulſive: and only obliges the party to do that which he was bound to perform before. 4 *Com. Dig.* 124.

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* Ante page 18.

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The writ therefore does not create any new truſt, but only exacts performance of the firſt. So that it is the old truſt which continues; and this of courſe deſcends upon the executors, who are obliged to perform it, according to the conſtant doctrines upon the ſubject of truſts. A qualified property *pro hac vice* in the ſubject is tranſmitted to them by the teſtator, and to this the power of ſale muſt be incident; becauſe otherwiſe the truſt cannot be performed.

But if they have the power to make ſale, then they are bound to do it, and may be compelled thereto, by proceſs adapted to the occaſion.

Upon theſe grounds the law holds them reſponſible and obliges them to anſwer the demand 2 *Bac Abr.* 355. Which caſe is almoſt the ſame with that at bar, except that it does not ſtate in ſo many words that a *diſtringas* may iſſue.

It cannot be objected that the writ may affect their ſituation as executors. 1ſt. Becauſe the creditors have no right to the property which is pledged for a particular purpoſe. 2d. Becauſe the ſame objection would lie to an action of detinue; which certainly may be maintained againſt an executor.

It may perhaps be ſaid that the plaintiffs will not be without remedy; becauſe a Court of Equity may interpoſe and order a ſale of the property. But that argument does not weigh much, 1. Becauſe the Courts of law muſt be competent to enforce their own judgments. Actions at common law were before bills in equity; and the law certainly would never have ſuffered a right to exiſt, without a remedy. Nor can we conceive the Courts of law to have been without authority to enforce their judgments, until Courts of Equity were eſtabliſhed to afford them aſſiſtance. 2. Becauſe that mode is expenſive and calculated to produce delay, without putting the executor in a better ſituation, than he would be under the *diſtringas*. For the Court will not award it, where the executor ſhews

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ſhews he never had the property; or if it ſhould inadvertantly iſſue in any ſuch caſe, upon application to the Court the *diſtringas* would be taken off. Which are ſufficient ſecurities to the executor where he has not the property; and where he has, he may always avoid the inconvenience of the *diſtringas* by complying with the exigences of the writ.

WARDEN *contra*. If the proceſs was common, as is ſaid upon the other ſide, there would have been no occaſion for a ſpecial application to the Court for it; but it would have iſſued of courſe. There never was but one inſtance of it in the General Court, and even in that no entry of the order is made.

None but a ſheriff has a right to execute proceſs either by common or ſtatute law, *Old Virginia laws page* 191, 195, and therefore an executor who is no officer of the Court, nor any how known to them, cannot. So that the executor will be ſubjected to a proceſs, very violent in its operation and affecting his own eſtate, without any default on his part. Which would be the extremeſt injuſtice. That no ſuch authority exiſted in the executor at common law is proved by a ſtatute made in England in the time of George 1ſt, which gives the deputy ſheriff power to proceed to do the duties of the ſheriffs office after the death of the high ſheriff, until a ſucceſſor is appointed. 5, *Stat: abr:* 241. This would have been unneceſſary if the executors could have done it before; and is therefore a deciſive argument againſt what is contended for upon the other ſide.

At common law the new ſheriff muſt take care of priſoners whereof the old ſheriff died in cuſtody; and this without any interference of the executors of the deceaſed ſheriff. *Dalt: Shf:* 17. The principle of which ſtrongly applies to the caſe under conſideration. For if the executors have nothing to do with the priſoners in that caſe, why have they with the goods here? If the cuſtody of the goods belonged to them, the cuſtody of the priſon-

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ers ought likewiſe; and if they are liable for the goods, they ought to be ſo for the priſoners alſo.

An action of debt was the proper remedy; and the paſſage cited from *Bacon* eſtabliſhes no more. *Dalt: Shf:* 515. The property taken by the deputy ſeldom comes to the actual poſſeſſion of the ſheriff; and it would therefore be very harſh to render his executors liable for it, by ſuch a ſummary proceſs. For the ſame reaſon does not apply between the executors and the deputy ſheriff, as between the ſheriff and the deputy. Becauſe the ſheriff has controul over his deputy, but the executors have not. He cited 1, *Rol. ab.* 598. 2, *Danv: ab:* 495.

RANDOLPH on the ſame ſide. After the lengthy diſcuſſion which has already taken place, I ſhall add but a few remarks in addition to what Mr. Warden has ſaid. It is admitted that no expreſs precedent for the proceeding is to be found in any of the books; and the whole argument upon the other ſide is built upon a ſuppoſed analogy betwixt this and the caſes mentioned by the appellants counſel; but upon examination the analogy will be found not to exiſt. The great point of difference betwixt them is, that executors not being officers of the Court have nothing to do with the execution of proceſs and can make no return to it. Whereas in the caſes ſtated on the other ſide, the execution was either completed and only the product required, or they were actions for failure to do his duty and therefore were grounded on his own proper act. In which reſpect they ſtood on the common footing of actions for his tranſactions. But the object here is not to aſcertain any miſconduct in the ſheriff, for none is alledged, but to compel the intromiſſion of the executor, in an affair which he has nothing to do with. And this by a grievous proceſs, which leaves him no election; but forces him to act whether he will or not, before he has had any opportunity of defending his conduct. Nay further if the goods have not even come to his hands, ſo that he has no controul

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over them; ſtill he is liable to be expoſed to the effects of this ſummary proceeding; without any means of mitigating its rigor. So that for the miſconduct of a deputy ſheriff, a man whoſe misfortune it is to be an executor of the innocent ſheriff, may be ſubjected to all the pains of a diſtreſs until perhaps he has paid the debt with his own money. Which would actually be the effect of the proceſs in the very caſe now before the Court. But ſuch a ſyſtem of things cannot be endured; and therefore it will never meet with the approbation of this Court.

If analogy was to give the rule, it would be found much ſtronger in favor of the judgment of the Diſtrict Court than againſt it. For from the ſtrict reſemblance between many of the caſes put by Mr. Warden (where executors could not interfere,) and the caſe now before the Court, the inference would be very fair, that they could not act in this caſe either; and therefore that no proceſs of compulſion ought to iſſue againſt them. It is no objection that otherwiſe there will be no remedy for the creditor; becauſe it would be as hard on the executor as it is on him; and the remedy, if one be neceſſary, muſt be provided by the Legiſlature. But why ſhould this not be the ſubject of a ſuit? If the ſheriff had made the money, it is clear that an action would have lain; and why not, where the property remains in ſpecie? However be that as it may, the executor is not bound to enquire what remedies the creditor may have; but it is ſufficient at preſent to have ſhewn that he is not entitled to that which he has purſued.

CALL in reply. The ſtatute of George I. only relates to things which no-body could do before, as the ſervice of writs, or the commencing of executions; but if I am right the executors could ſell without, and therefore the argument drawn from the ſtatute has no influence on the caſe. As to the violence of the proceſs, that inconvenience is obviated as well by the obſervation made before, that the executor may have it taken off, or comply with the mandate of the writ, as by this additional

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additional reflection that inſtead of the *great diſtress* the *diſtringas* may be by iſſues only, which will not be condemned unleſs it appears that the executor has been in fault. As to the paſſage from *Dalt.* 17, that perhaps turned, 1ſt. upon the new ſheriff and not the executor being keeper of the jail. 2d. Upon the difference between a *ca. ſa.* and a *fi. fa;* becauſe the goods may be loſt by changing them from hand to hand, which is an inconvenience not applicable to the caſe of the priſoners. 3d. Becauſe the writ being once executed and returned there was an end of the proceſs.

The argument, that a ſuit will lie againſt the executor, concludes directly againſt the appellee. Becauſe it ſuppoſes a right to ſell; or elſe the law would not ſubject him to the action. As to the objection that if the money had been made, a ſuit would have been neceſſary, it was not ſtrictly correct. For a *ſcire facias* would have been ſufficient. So that proceſs only is neceſſary, and not an original ſuit. But the uſe of proceſs can only be to aſcertain the right and found the order to pay it over. And if ſo, why not the *rule* and proceſs of *diſtringas* as well as any other? For it is not in fact more ſummary than the *ſcire facias*; which, in reality, is itſelf no more than a ſummons to ſhew cauſe: and therefore if proper notice is given to defend himſelf it cannot be important whether it be by way of *rule* or by a writ of *ſcire facias*.

PENDLETON Preſident. After ſtating the caſe, delivered the reſolution of the Court as follows.

On view and conſideration of the whole caſes on the ſubject we find no inſtance of a *diſtringas* to a new ſheriff, to compel the executors of a former ſheriff to ſell goods taken in execution by him, nor any principle upon which that mode of proceeding can be extended.

It is therefore overruled as oppreſſive to executors, throwing upon them, under a ſevere penal-

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ty, the burthen of performing a duty, which if they had power to perform it at all, was probably not contemplated by them, when they undertook the office. Harriſon, *vs* Tomkins.

What remedy the appellants may be entitled to, is not for the Court to ſay on this occaſion. It is ſufficient for us to decide that they are not entitled to the one applied for.

Judgment of the Diſtrict Court affirmed.

JOLLIFE AND OTHERS

againſt

H I T E, &c

THE bill ſtated that Mary M'Donald having deviſed her real and perſonal eſtate ſhould be ſold by the defendants her executors, they advertiſed the lands for ſale as follows: "By virtue of "the laſt will and teſtament of the late Mrs. Mary "M'Donald will be ſold to the higheſt bidder &c. "that excellent ſeat containing *five hundred and "ſeventy eight acres*, &c. going on to deſcribe its "qualities &c." That on the day of ſale a proclamation was made to the following effect. "That an indefeaſible title would be made to the "purchaſer, for the number of acres ſpecified in "ſaid recited advertiſement with an exception of "Ignatius Perry's claims, about two and one half "acres, for which rather than inſtitute a ſuit, he "is willing to pay to the purchaſer a price in pro-"portion to the ſum the whole tract ſhall ſell for, and "the remainder to be clear of all incumbrances," That prior to the ſale, one of the defendants informed one of the plaintiffs, that the ſociety, of which he was a member, would certainly loſe their meeting-houſe, as the title was in his teſtatrix, and the

If the vendor ſells and the vendee buys a tract of land for ſo many acres *more or leſs*, and it turns out upon a ſurvey that there is leſs than the eſtimated quantity, th' buyer ſhall not be relieved in equity.

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the meeting houſe tract was a part of the tract then offered for ſale. That the plaintiffs purchaſed under an expectation that the tract contained the number of acres mentioned in the advertiſement. That one of the defendants, previous to the plaintiffs entering into bonds for the purchaſe money, told them, that for five pounds he would warrant the ſaid tract of land. That at this time they had no ſuſpicion of a deficiency, or that the meeting houſe tract was not a part of that, which they had purchaſed. That, through miſtake, no deed was made at the time of giving the bonds. That upon intimating this afterwards to the defendant Hite, and informing him of the doubts they began to entertain, ſince the purchaſe, with reſpect to the quantity of land; he anſwered that it was his wiſh to have the land ſurveyed, and that if it proved to be leſs than the advertiſement, he would make a deduction as far as concerned his own proportion, but that he could not as a truſtee for the others, without their conſent. That a ſurvey being afterwards made, the real quantity proved to be only 512 acres one rod and thirty ſix ſquare perches, excluſive of the meeting-houſe tract of ten acres, the title of which was in the Quakers. That they had been obliged to pay £ 6 : 14 : 3 arreages of taxes incurred on the ſaid land before the purchaſe. That a deed had been made by the defendants and delivered to Amos Jollife one of the plaintiffs and the perſon appointed to receive the deed; but that the ſaid Amos had ſignified that the plaintiffs would inſiſt for redreſs on account of the ſaid deficiency. The bill therefore prayed relief and that a ſuitable deduction might be made.

The anſwer of Iſaac White junior admits the deviſe, and advertiſement, but denies the proclamation as ſtated in the bill; and charges that the purport of it was "that notwithſtanding he did not "know or believe there exiſted any defect in the "title of the lands about to be ſet up for public "ſale, nor did he even know of any claim ſet up for "the ſame, except two or three acres claimed by "Mr. Perry, yet he would not agree to give gene-

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"ral warranties, as he acted only as executor." That the plaintiffs gave bonds for the purchase money on the next day after the sale; and that he told one of them on the day of sale before the land was struck off, that no warranty would be made, altho' he might possibly on the day of sale have said that for five pounds he would not be afraid to make a warranty. That it was agreed by the parties, that the said Amos Jollife should have a deed prepared. That the said Amos never signified any disapprobation; but solicited the defendant to have the deed which had been prepared by himself executed: and that the same was afterwards done. That the defendant was at a subsequent time informed by the said Amos that the deed was defective in omitting to describe a part of the lands sold; and therefore he proposed to the defendant to give another. That the defendant fearing some contrivance was meditated, proposed only to give a deed for the part omitted; but at length agreed to give another deed, which was drawn by a gentleman employed by the said Amos, and was afterwards duly executed by the defendants. That before this he was informed by the plaintiffs that they had surveyed the land and found there was a deficiency. That he might have said he would make allowance as to his own proportion, but that he could not as to the other parties. That the defendant never examined the title papers except only to know what quantity the testatrix claimed. That he was ignorant of the nature of the quakers claimed, and therefore denies his telling either of the plaintiffs that they would lose the meeting-house tract. That the said Amos procured an adjournment of the sale when the land was going to be struck off, until the next day that he might consult his friends and run up the land to a higher price; and upon the next day was proclaimed the highest bidder. That he believes the plaintiffs expected the tract to contain the quantity mentioned in the advertisement, for otherwise Amos Jollife would not have inserted in the deed the words *more or less*. That the defendant took a memorandum from the clerk's office of

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the number of acres, and from thence was induced to believe that there was that quantity; and knew not to the contrary, until informed thereof, by the plaintiffs. That he knows nothing of the ſaid arrearages of taxes, but would have diſcharged them without a ſuit.

M'Donalds anſwer, Says he was a ſtranger and therefore left the tranſaction of the buſineſs to the other executor.

Hite the aſſignee of the bond ſought to be relieved againſt, ſtates that he is an innocent aſſignee; and if any deduction is to be made, it ſhould be diſtributively; and ought not to fall on him only.

A witneſs depoſed, that he was preſent at the ſale, when the cryer ſet up the land mentioning the number of acres, he believes. That Iſaac Hite the defendant ſtepped forward and declared he acted as an executor. That he believed there was a good title. That Mr. Perry claimed a ſmall piece of 2 or 3 acres, and that he wiſhed whoever became the purchaſer would permit Perry to have it, on paying in proportion to what the whole tract ſhould ſell for. That he the ſaid Hite would make ſuch a deed as he was bound to make *as executor and no other*. That the deeds called for either 576 or 578 acres, but that he ſold the ſame for *more or less*.

Another witneſs depoſed, that Iſaac Hite, jun. the defendant about nine Months after the ſale ſaid he was willing to make an allowance for the deficiency for his own part in the land, but that he could not make any agreement for the other parties. That the value of the meeting-houſe tract was £400. That the plaintiffs as he underſtood purchaſed with a view to ſecure the meeting-houſe tract, leaſt it ſhould be found to be included in the ſale. That the ſaid Iſaac Hite mentioned at the above time, that he was willing a ſurvey ſhould be made by the county ſurveyor; and that a ſurvey was afterwards made.

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A third witneſs depoſed, that he was preſent at the ſale, and that Iſaac Hite jun. ſaid that the deed mentioned 578 acres, but that it would be ſold *for that quantity be the same more or less*, except a ſmall piece claimed by Mr. Perry which he was to pay for in proportion to what the whole tract ſold at.

A fourth witneſs depoſed that the defendant Iſaac Hite jun. ſometime after the ſale, obſerved on mention being made of the deficiency, that he was willing to make an allowance for his part, but could not make any agreement for the other legatees.

A fifth witneſs depoſed, that on the ſecond day of the ſale, Iſaac Hite jun. publicly proclaimed, that there was a ſmall piece of the ſaid tract of land which Mr. Perry wiſhed to purchaſe; that it would be reſerved upon his paying for the ſame in proportion to what the whole tract ſold for; and that there was a clear title, for the reſt of the ſaid tract, which he would maintain.

A ſixth witneſs depoſed, that when the land was ſet up, Iſaac Hite jun. ſtepped forward and proclaimed that there would be a clear and indiſputable title for the ſaid tract of land, *that is, the quantity mentioned in the said advertisement, except a small piece which was claimed by Mr. Perry*, or *words to that effect.*

A ſeventh witneſs (who ſeems to have been intereſted) depoſed, that when the land was put up by the cryer who mentioned the number of acres, Iſaac Hite jun. ſtepped forward and declared, that Mr. Perry claimed two acres and ſome poles, but agreed to waive the claim, provided he got the land at a price in proportion to what the whole tract ſold for. That he acted as executor; did not know there was any claim to the land; and that he would ſet it up for the number mentioned by the cryer, *be the same more or less.*

The deed of the 21ſt of November 1789, deſcribed three tracts, one of 336 acres, "*be the same*

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more or less;" another for 23¾ acres (without the words *more or less;*) and a third of 198 acres *be the same more or less.* That of the 5th of October 1790, described four tracts; one of 336 acres, *be the same more or less;* another of 23¾ acres, without the words *more or less;* another of 198 acres, *be the same more or less;* and the fourth a tract of 23 acres 91 perch, without the words *more or less.* The deed of the 2d of September 1791 described four tracts; one of 336 acres, *be the same more or less;* another of 23¾ acres, without the words *more or less;* a third of 198 acres, *be the same more or less;* and a fourth of 23 acres and 91 perch, without the words *more or less.*

The Court of Chancery denied relief; and dismissed the bill with costs. From which decree, the plaintiffs appealed to this Court.

WICKHAM for the appellants. Insisted that they were not bound either by the deeds or bonds; but were entitled to a proportionable abatement according to the deficiency. *Quesnel* vs *Woodlief* in this Court. *

WILLIAMS *contra.* The purchase was for 578 acres more or less, and therefore the plaintiffs had no claim to redress. For there does not appear to have been any fraud in the executor, who sold by the deeds. If there had been a surplus, Equity could not have relieved the appellees; and it ought to be reciprocal. 1, *Ch. Cas.* 204. 3, *Bro. Cas: Chy.* 451.

WICKHAM in reply. Relying on the case of *Quesnel* vs *Woodlief*, I have not brought authorities to prove that parties contracting under a mistake may be relieved; but believe that many such may de produced.

Cur: advis: vult.

ROANE Judge. Two general questions present themselves in this case. 1. Whether by the contract which took place between the parties, relative

* November 1796.

tive to the land in queſtion, the appellees bound themſelves to any general warranty as to the land really contained within the tract then ſold? and if not as I am clearly induced to believe from the teſtimony, then 2. Whether under all the circumſtances of the contract, the appellees muſt ſubmit to the loſs ariſing from the deficiency of the land? Which including the ten acres called the meeting-houſe tract, is ſtated by the county ſurveyor to be about ſixty ſix acres; being ſo far ſhort of the quantity of 578 acres called for by the deed; as the ſurvey makes the tract contain, excluſive of the meeting-houſe tract only 512 acres 1 rod 36 perch.

Before I go particularly into the ſecond queſtion I will ſtate ſome principles which appear to me to govern the caſe.

1. In a contract every ſerious and deliberate communication which has taken place between the parties, relative thereto, ſo far as a former one has not been revoked by a latter muſt be conſidered as forming the baſis of the contract, with this exception, that the treaty muſt not at any intermediate time have been at an end.

2. That a communication or repreſentation in a public advertiſement, relative to property offered for public ſale muſt be conſidered as one of theſe communications with reference to any perſon who may become the purchaſer.

3. That a repreſentation of a fact, by one to another contracting party ſhould be fair and true and if the former aſſerts to the latter a fact the truth of which he has it in his power to aſcertain but does not, and it turns out to be untrue, he ſhall be reſponſible himſelf for the conſequences of that event, and the party to whom the repreſentation is made ſhall not be injured thereby. This doctrine is explicitly laid down in the Court of Kings Bench in England in the caſe of *Macdowall* vs *Fraser*, *Dougl.* 247, relative to repreſentations in caſes of inſurance; but the principle of the doctrine, being founded in natural juſtice, muſt equally apply to all contracts.

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4. A misrepresentation may at any time before the conclusion of the bargain, be removed by a just representation of the fact; but it must be clearly and explicitly removed, for if it be equivocal only, the rule concerning misrepresentations which I before mentioned will take place.

5. That in contracts it may be said to be a general rule, that the purchaser takes upon himself usual and ordinary risques, as those arising from the variation of the compass in the present case; but is not, unless it be so stipulated or understood between the parties, insurer against those great defalcations which can only arise from the fraud of some antecedent holder of the land, or the gross mistakes of unqualified surveyors; and whenever these latter risques are involved in the contract, it should clearly appear that such were contemplated by the parties.

In deciding this question, I shall have particular regard to these principles; without perhaps referring particularly to them.

The question in this case as depending on the answer of the defendants solely, is very clear for the appellants; and under that point of view I shall consider it in the first place.

The advertisement stated in the appellants bill, and admitted by the answer of James Hite, contains an unqualified assertion that the tract in question contained 578 acres; and this assertion being a representation by the executor who was fully competent to know the truth of the fact, was a sufficient ground for those who wished to purchase, whereon to rely confidently in making their estimate of the number of acres.

The principal defendant Hite in answer to that part of the bill which charges a declaration to have been made by him at the time of the sale, that he would warrant the number of acres mentioned in the advertisement, although he denies having then made such a declaration, does not go on to say (notwithstanding it would have been much

much in his favor to have ſaid it if true,) that he declared he ſold the land for *more or less;* but the anſwer is ſilent on the ſubject, and by ſtating, the purport of his declaration to have been as it is ſtated in his anſwer, and which I conceive goes only to the title of the land really comprehended, is at leaſt a tacit admiſſion that no further or other declaration was made by him at the time. But if no ſuch declaration was then made, the impreſſion derived from the advertiſement was in full force; and I ſuppoſe in this view of the caſe, that all perſons will agree, the appellants are entitled to relief.

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This reſult however ariſes from a view of the bill and anſwer only.

To come now to the teſtimony:—From which it will appear that the impreſſion alluded to, was kept up by the declarations of Kuner the cryer, who ſtated the number of acres. This evidence fortifying the allegations of the bill is clearly entitled to weight; and I ſuppoſe if the caſe had ſtopped here, the ſame concluſion would clearly reſult, as I have ſuppoſed reſulted from a view of the bill and anſwer only.

But I admit, it is proved by the weight of teſtimony in the cauſe, that after this declaration was made by the cryer, Hite the principal defendant ſaid "that the deeds called for 578 acres; and he ſold the ſame for *more or less.*"

It was well obſerved at the bar, that whether this laſt declaration of Hite was made or not, was a point not put in iſſue by the anſwer; although that defendant was ſubſtantially called on to ſay whether the declaration ſtated in the bill or what other declaration relative to the number of acres, was made by him at the ſale. But although he did not undertake to ſwear to the fact himſelf, he has nevertheleſs examined witneſſes to eſtabliſh it; and it is ſomewhat remarkable, that the teſtimony of a material witneſs, was produced as to this point, by a leading queſtion.

This

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This looks too much like avoiding the great end and object of reſorting to a bill in equity, which is an application to the conſcience of the defendant, and ſeems like bolſtering up a cauſe, with reſpect to a fact not put in iſſue, by reſorting to the conſciences of witneſſes who may be leſs ſcrupulous.

But without undertaking to ſay that the teſtimony as to this declaration ſhould for the reaſons given be thrown out of the caſe, let us conſider the effects of the teſtimony itſelf.

If this alledged declaration of the defendant Hite, had ſtood ſingle, I think it would clearly admit of a queſtion, whether under the reaſon of the 5th principle before laid down, the loſs ariſing from the deficiency in this caſe ought not to be borne by the appellees? It would alſo deſerve to be conſidered in addition thereto, whether as ſmall riſques are generally incident in ſales of land ariſing from variations in inſtruments, the words *more or less* might not have been thrown in for greater caution to avoid any reſponſibility for them? At leaſt it might have been ſo underſtood by the appellants, and thus had a tendency to continue their impreſſion.

But I conſider the declaration as not ſtanding ſingle. I conſider the advertiſement as having juſtly raiſed a confidence as to the number of acres of land, which was kept up and confirmed by the declaration of the cryer under the eye of the principal defendant himſelf; and this declaration equivocal in itſelf was not ſufficient to do away that impreſſion

I think that the contract was conſummated under that impreſſion; and therefore, as to the appellee, he had, by miſtake perhaps, miſled the plaintiff with regard to a fact, the truth of which he might have known to be otherwiſe, but did not take the trouble to be informed about; and, as to the defendant, he has agreed to give a valuable conſideration for that which did not exiſt, but

which

which relying on the veracity of the defendants, he believed to exist.

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The defendant Hite jun. admits that on the deficiency being stated to him he agreed as to himself to make an abatement; but that as an executor he could not agree to do it. This is the part of an honest man; and moreover proves that he did not think the risque of this great deficiency was contemplated in the bargain: Otherwise there could be no obligation on him to make a recompence. This is a strong circumstance to shew the true idea of the contract; and although he could not, as he thought, do that in his fiduciary character, which as an honest man he was willing to do for himself, yet we have power to compel him to do it.

But it is contended that the acceptance of deeds by the appellants, after they knew of the deficiency, is a waiver of the redress now sought.

I answer that the after accepted deed was only to complete an assurance for the land really contained in the tract, there having been one of the tracts of which M'Donalds tract was composed, left out of the former deed; and it never was the intention of the plaintiff to set aside the contract relative to the land purchased. They were therefore justifiable in completing it, especially as their bonds were out for the money. But the injury they complain of is entirely of a collateral nature, as I have before endeavoured to explain; and is wholly independent of the sale of the land, although it grows out of it. Therefore a remedy for the injury, was not to decline taking the deeds, or require others, than those which were made; but to retain money contracted to be paid, under a mistake, and consequently so far without a consideration.

If it be said that the deficiency here is so small as that we ought not to interfere, I answer that the deficiency stated has certainly not arisen from the ordinary variation of instruments: but was such as to produce a conviction in Hite, that it did not arise

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arise from that cause; and therefore I cannot distinguish it from the case of a deficiency of one third or one half. Parties must be permitted to make their own bargains, so as to bind themselves; but to bind others, those bargains must be fair and clearly understood.

With regard to the case of an excess above the quantity sold, it may not follow of course that where there is an abatement for a deficiency, there should be payment for the excess; but as it is not necessary to decide the question, I mean not to give an opinion on it.

As to the retainer of the money in the present case it seems to be a fair mode of proceeding. For the appellants have paid what they suppose to be due, and the balance is subject to the decision of the Court. As to the point, who were or were not the holders of the bonds, they were entirely strangers to it; but if the *set off*, now claimed, is an equitable one, it cannot be lost by the assignment of any bond, against which it ought to apply.

With regard to the survey in the record, if it was made *ex parte*, or there is any just exception to it, in the opinion of the Chancellor, it ought not to conclude the appellees.

The plaintiffs have not shewn any title to the meeting-house paramount to the present purchase, or that the executors when they sold it knew that the title was not in their testator. With respect to this then, the case stands in no other point of view than the rest of the land contained in the tract; and therefore with regard to that point there is no ground for interference.

But as to the other ground of complaint, the cause ought, in my opinion, to be sent to the High Court of Chancery, there to be proceeded in, according to the principles I have just now stated.

The particulars of the decree to be made by this Court should be, if my opinion were to prevail

vail, similar, or nearly so, to those in the case of *Quesnel* vs *Woodlief* in this Court; and as the ground of decision in that case seems not to be well understood, I will take the liberty for myself to say, that the principles and reasons which governed me in that case were substantially the same which I have endeavoured to state as governing in this; and the decision in that, in its principles, appears to be an authority in the present case. I am therefore for reversing the decree.

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FLEMING Judge. There are two points in this cause, 1. What was the contract between the parties? 2. Whether the contract as really understood between them has been broken by the appellees?

With respect to the first: It appears that M'Donald had bought it for 578 acres and that the deeds expressed that quantity; but when the cryer set it up for that number of acres, that Hite declared he was executor only; that M'Donald held it for 578 acres; but that he (Hite) set it up for *more or less*. Which explicitly shews he did not mean to take upon himself the risque of a deficiency; and that the appellants so understood it is manifested by their accepting deeds for the land near twelve months afterwards, when the deficiency was known. A circumstance which proves their acquiescence under the loss at that time, and that they did not then suppose they had any cause of complaint, or that any allowance ought to be made: although they were afterwards advised otherwise. From all which it is evident that both parties understood, the appellants were to take the risque of any deficiency on themselves; and therefore the purchasers have no ground for relief.

This satisfies the second enquiry; and shews clearly that there has not been any violation of the contract on the part of the appellees.

But then the case of *Quesnel* vs *Woodlief*, in this Court, is objected as an authority which de-

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cides the preſent cauſe. That caſe however differed widely from this. For in the firſt place Woodlief ſold his own land, and that was an old family eſtate, the true quality of which was probably known to him; but here Hite was only executor and not ſuppoſed to be conuzant of the exact number of acres. In the next place Queſnel was a foreigner, not acquainted with our language or meaſure; whereas the appellants here are natives and perfectly acquainted with both. Thirdly, that was a private ſale and therefore more liable to impoſition; but this was a public auction, and the terms *more or less* expreſsly declared. Fourthly, in that caſe Woodlief had actually ſold to his brother Peter a part of the eſtate; but nothing of that ſort exiſted here. Laſtly the deficiency there amounted to almoſt one fourth; whereas here it was ſcarcely a tenth.

These circumſtances eſſentially diſtinguiſh the two caſes; and therefore although I think relief was properly granted in that caſe, yet I cannot agree, that it ought to form a precedent for the deciſion in this. The conſequence is, that I am of opinion, the decree of the High Court of Chancery ſhould be affirmed.

CARRINGTON Judge. In this caſe an executor directed by the will of his teſtator to ſell his lands and divide the proceeds amongſt ten legatees, finds deeds for 578 acres, and governing himſelf by them, advertiſes that he will ſell that quantity; and the queſtion is whether, if he afterwards qualifies the advertiſement before the ſale, and declares that he will not ſell for any ſpecific quantity, he ſhall be bound for the quantity ſtated in the advertiſement?

A public advertiſement of this kind ought not to influence the deciſion much; becauſe it is only notice to purchaſers to aſſemble, and they inform themſelves of the particulars at the ſale.

In the preſent caſe the executor gave notice, that thoſe who wiſhed to purchaſe might inſpect the

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the deeds; that they called for 578 acres; but that he only ſold as much as they contained; and that he would neither warrant the title or quantity. All this turned out to be true; and no-body was deceived: For the title papers were according to the repreſentation; and there could be no fraud or deception. So that the real contract was that Hite ſold the quantity that ſhould actually be found to be in the tracts; and the purchaſers took the lands which the deeds ſhould in fact command, let the quantity of them turn out to be *more or less* than 578 acres. A poſition which is confirmed by the ſubſequent acquieſcence of the parties; for three deeds, drawn by Jollife or his counſel, and all for 578 acres *more or less*, were afterwards accepted by the purchaſers. So that upon the terms of the contract there does not appear to be the leaſt ground for relief, according to the general principles of law and equity.

But what would render it peculiarly hard in this caſe is, that ſo much time was ſuffered to elapſe before any complaint was made; and in the mean while Hite had diſtributed the proceeds amongſt the legatees. It would therefore be extremely harſh, by interfering at this late period, and making an abatement, to ſend him in ſearch of contribution againſt the others.

This is not like the caſe of *Quesnel* vs *Woodlief*. There Woodlief, acting for himſelf, ſold an eſtate which had been long held in his family; and the quantity whereof, he might therefore reaſonably be preſumed to know: Whereas Queſnel was a foreigner and did buſineſs by an interpreter. He had, before the deeds, often declared that he was willing to take it at 800 acres; and when they were executed, he enquired into the meaning of the words *more or less*; upon being informed, he aſked whether he would be allowed for deficiency? To which Woodlief anſwered he ſhould, if Queſnel would pay for the exceſs. Here indeed the converſation ſtopt and no reply was made; but as ſoon as the deficiency was known, inſtead of acquieſceing

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quiescing, as was done in the present case, he gave an early notice that he should demand a deduction. All which circumstances vary that case so much from this, that it ought not to be considered as forming a precedent for the judgment which we are now to give.

Upon the whole, people must be satisfied with their contracts as they have made them; and as the purchasers here have had the full benefit of their bargain, according to the terms of it, I cannot see any ground for relief; but think the decree ought to be affirmed.

LYONS Judge. If it be once laid down as a general principle that where a sale of a tract of land is made at auction for 1000 acres, and it afterwards turns out to be only 100, the purchaser shall have no relief, it will put an end to all sales by auction. To say, in such a case, that the injured purchaser shall not have a right to retain the purchase money against the vendor, is in my opinion contrary to all the principles and maxims of a Court of Equity.

Upon general principles it has often been decided that if the purchaser discover a defect before payment of the money he may retain: And that great deficiency would be relieved against, was determined in *Quernel* vs *Woodlief*.

The general rule as laid down by civilians is, that if there be not a full knowledge of all the circumstances it is ground for avoiding the contract, 1. *Vern.* 32. 2. *Vern.* 243; and the reason is, because the buyer proceeds upon the supposition of a quality, which if the thing does not contain the contract should not oblige the party who contracts under a misapprehension. For in this case the party is not conceived to have agreed absolutely, but upon supposal of the presence of a thing or quality, on which, as on a necessary condition, his consent was founded: and therefore the thing or quality not appearing, the consent is understood to be null and ineffectual. *Grotius. lib.* 2. *cap.*

12.

10. § 3, 9.—1. *Bro.* 9.—2. *Bro.* 175 *Puffendorf book* 1. *cap.* 3. *Sect.* 12. Which is equally true, whether the seller knew of the defects or not; for he ought not to reap the advantage of an apparent value, which the thing sold seemed to have, and yet had it not, *Dom. lib.* 1. *Tit.* 2. § 11.

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It was upon these grounds according to my recollection that *Quesnel* vs *Woodlief* was decided. For in that case the Court declared there was no fraud in the defendants, but that both parties had acted under mistake; and therefore they relieved the plaintiff. Consequently if there be any real difference betwixt that case and this, it should be clearly shewn, or else the decision there ought to govern.

But I think there are some differences as to the sixty six acres. 1. Woodlief was owner of the land and lived upon it; but the plaintiff here was only executor and a stranger to it. 2d The executor in this case made an open declaration that he would sell according to the deed by which I suppose he meant the quantity of acres which the land should be found to contain; whereas there was no such declaration in that case. 3. As soon as the purchaser discovered the error in that case, he mentioned it at once and asked for an abatement, (which was right; for an abatement or a rescision of the contract, should be recently demanded; because the vendor may otherwise lose an opportunity of indemnity or a new sale of the estate;) But here a long acquiescence took place: and new deeds were accepted in the mean time. Which afforded a strong presumption that the parties were satisfied; and put it out of the power of the executors to sell the estate again.

Therefore in the present instance, there was, as to the sixty acres, perhaps no grounds for relief upon the circumstances of the case.

But with respect to the ten acres, I think the Court ought to interpose. It appears, that this

parcel

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parcel belonged to the Quakers; that they had built upon it; that the executor ſold it but never mentioned the title of the Quakers or made any reſervation with regard to it: Although the anſwer ſtates that the defendants knew nothing of that title, and there is proof that they were ignorant of it.

Upon theſe grounds I think there ſhould be a deduction on account of the ten acres; as they fall expreſsly within the influence of the principles, which I have mentioned before. To aſcertain the value of which parcel an iſſue ſhould be directed, and the amount of the verdict deducted.

PENDLETON Preſident. The advertiſement upon the 2d of Auguſt 1789, was of the ſeat where M'Donald lived containing 578 acres, and the ſale was to be on the 16th of November.

Upon the 16th of November, the cryer having mentioned 578 acres, the executor proclaimed, that he believed the title was a clear one (except as to two or three acres claimed by Perry, who was willing to pay for that in proportion to the ſale;) but that he ſold as executor and would not warrant. That, as to the quantity, the deeds called for 578 acres, but he ſold it by the deeds, *more or leſs*; and ſo it was purchaſed.

When they met next day to give the bonds, nothing paſt as to the quantity, their claim then was to a general warranty, which the executor refuſed, and they gave it up.

But they perfectly underſtood the terms, that they were to take the land by the deeds *more or leſs*. For three days after in the deed prepared by Jollife himſelf, the tract is not conveyed in the aggregate as is uſual, but each parcel ſeverally; deducing the title to each from the patentee, to Mrs. M'Donald, and reciting her will empowering her executors to ſell. I preſume this unuſual method was purſued, in conſequence of the executors ſelling the land by the deeds.

However

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However at this time the deficiency was not discovered, nor probably presumed to be so great as it was; and therefore if it rested here, I might have had some difficulty at least in deciding that this being a sale by an executor took it out of the general principle. But as the case is, that difficulty is removed by what followed.

This deed was to all the purchasers and was for three tracts only, a second deed was likewise to all the purchasers and was for three tracts only; and a third deed is made to Jollife and Neal for the four tracts, pursuing the same method of conveying the several tracts.

That the deficiency had been then discovered is obvious to me. The survey is dated in that Month October 1790. No day is mentioned; but as this is a resurvey, by the county surveyor in consequence of what Mr. Hite objected to the first, it is very probable that the deficiency was discovered by the first survey, and that the dispute about the deduction was previous to this deed. Ridgeway fixes the time in August or summer 1790.

But I will pass this also as no conclusive acquiescence. Neither of these two deeds are recorded; and eleven months after the last, a third is drawn to Jollife only, pursuing the same mode of conveyance of the separate parcels, containing the words *more or less*, as to the two principal tracts, and omitting them as to the two smaller of about 20 acres each, in the same manner as it was in the deeds referred to: And this deed is recorded.

The ground of the present demand is Cordells survey. D. S. F. E. The two small tracts are surveyed together and contain 44 acres; the full nominal quantity. So that the deficiency is in the two large tracts. The 336 he makes 309; the difference 27; and the 198 he reduces to 158, the difference 40; which added to the 27 makes 67, and this at £ 3:11:1 is £ 238:2:7.

But

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But in the deficiency of the 198 acre tract is included the meeting-houſe; which they ſay, but have not ſhewn, they had a right to. Ten acres at £3:11:1 is £35:10:10. So that the real diſpute is 57 acres, equal to £202:11:9.

It is remarkable that in this ex-parte ſurvey, the Surveyor ſpeaks of lines and corners as *said to be* or *ſuppoſed to be* lines and corners of adjoining landholders; which is too uncertain. So that if the decree is reverſed on the merits, a final decree ought not to be entered; but the cauſe remanded with directions to have a ſurvey made in preſence of both parties, to aſcertain the real deficiency.

But I am of opinion that upon the merits, the decree of diſmiſſion ought to be affirmed.

To ſtate it upon the original ground:

The Court of Chancery will not be bound by the *expreſſions more or leſs* in deeds, but will reſort to the real contract to inquire what was the intention of the parties. Whether to ſell and buy a thing? as in this caſe a tract of land; or a ſpecific quantity? as a certain number of acres.

In the firſt caſe of a ſale in bulk, the Chancery will not interfere unleſs in the caſe of fraud.

An inſtance of fraud is mentioned in 1 *Chy. caſes.* where the ſeller knew there was a deficiency and did not diſcloſe it; and we know that, in that court a ſuppreſſion of truth is equal to a falſe ſuggeſtion.

But neither this or any other fraud is imputed to the vendor in the preſent caſe. The eſtimation was formed from the deeds, for which reſort was had to the clerk's office. This ſhews that the executor did not know of the deficiency; and therefore he is not chargeable with any deception.

On the ground of miſtake, the caſe of *Quesnel* vs. *Woodlief* in this Court, is relied on; which will be noticed hereafter as not applicable.

The

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The case of *Burt* vs. *Barlow*, 3 *Bro. Rep.* 451, seems more to the present purpose. "Catharine "Burt, entitled at the death of the survivor of "herself and three others, to one fourth of a per- "sonal estate, estimated at £2400, in order to "make Barlow, who had married her daughter, "certain of receiving a proportional part of the "£2400, gave her bond for £600 payable to Bar- "low, in three months after the death of the sur- "vivor. The estate estimated at £2400 proved "however to be only £. 1140; so that the fourth "was only £285 instead of £600; and the differ- "ence £325. The executor of Mrs. Burt brought "his bill to be relieved against the bond on pay- "ment of the £285, on the ground of mistake in "the estimate. The answer of Barlow admitted "it was understood at the time that Mrs. Burt's "share would amount to £600, but insisted that "the bond was given to secure the £600 at all "events.

"The bill was dismissed:"

It is stated in the case that she devised the £600 to Barlow but that circumstance is not mentioned either in the argument or the opinion of the Court.

Here was a bond founded on a mistaken estimate and the deficiency much greater than in the present case, being more than half, whereas this is less than a tenth; and yet relief was denied.

This proves that if there was a mistake in the understanding of the parties, yet if they meant to fix it at all events, however that circumstance might turn out, the Chancery would not relieve.

In truth relief on the ground of mistake, as all other questions upon contracts in chancery do, depends upon the circumstances attending each contract.

Here whatever impressions might have been made by the advertisement on the minds of those who attended to purchase, that the tract contained 578 acres, any expectation of a warranty that

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the tract contained that quantity muſt have been removed by the publication at the commencement of the ſale, that the deeds called for that quantity, but the executor ſold the tracts by the deeds for *more or less*. Which I conſider as a ſale in bulk: where a miſtake in the eſtimated quantity has no influence, unleſs there was fraud in the vendor. The fact of this publication is eſtimated by Bell and Angus M'Donald, who are not contradicted by Sword and Helm. They ſpeak of the executors engaging to warrant a clear title, but nothing as to the quantity; and as to what they do ſpeak of, they are evidently miſtaken from all the other proofs.

That the purchaſers underſtood, at the time, that they bought the tract by the deeds, whatever quantity they ſhould convey, is evident from the deed drawn ſo immediately after by Mr. Jollife the active purchaſer; the peculiar form of which, muſt have proceeded from the nature of the contract impreſſed on the mind of the buyer.

So that if it ſtood on its original ground, I ſhould be of opinion there was no foundation for relief.

But if there had been ſuch originally, I conſider what happened afterwards, as a confirmation of the agreement in this reſpect; when its effect upon the preſent queſtion had been diſcuſſed and fully underſtood, as concluſive and ſhutting the door of equity againſt relief.

The ſale was on the 16th of November 1789. On the next day the parties met to exchange bonds, when the warranty was inſiſted on at firſt, but afterwards given up. The bond of the executor was taken to make the uſual conveyance by executors, and four bonds given for the purchaſe money of £ 513:15 each. The deed was prepared by Jollife, bearing date three days after; and in the ſummer of 1790 was executed, but not recorded. A ſurvey had been procured by Jollife and the deficiency diſcovered; and then the diſ-

cuſſion,

cuſſion, on that ſubject, took place at Buſh's tavern. When Hite ſaid he was willing to make a proportional deduction for his own part (and for that purpoſe, I ſuppoſe, ſaid or agreed that the county ſurveyor might ſurvey the land;) but that he could not bind the others concerned in intereſt. Jollife, *vs.* Hite.

This ſecond ſurvey is dated in October, (but no day is mentioned;) and ſtates the deficiency, for which the deduction is now claimed.

It being diſcovered that the firſt deed conveyed only three parcels inſtead of four, a new one is drawn and executed October 5th 1790, for the four, purſuing the former mode of conveying the ſeveral parcels ſeparately and as to the two larger parcels the words *more or less* are uſed. This deed is alſo kept up and not recorded until it was out of date, poſſibly, though it is not ſtated, to give them an opportunity of bringing the other legatees into the terms generouſly offered by Hite. However they had all this time, at leaſt twelve months, to conſider whether they would accept a deed on Hites terms, or bring a ſuit in Equity to be relieved againſt the bonds, as to the deficiency, having had full notice that they could not otherwiſe obtain the deduction.

They did not take that ſtep; but on the 2d of September 1791, took a third deed exactly in the words of the ſecond, except as to the date, and leaving out Neils name and this is recorded in December following.

The executors proceed to diſtribute the eſtate among the ten legatees, aſſigning three of theſe bonds amongſt the others, and Hite, retaining one for his own ſhare; which being for £ 500, overreached the amount of the deduction claimed, and certainly from that remaining in the hands of the executors, they ſhould have retained the money, if they meant to claim it. But inſtead of this, the plaintiffs proceed to off pay the whole of his bond to the executor; and we hear nothing of this claim from

October

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October 1790, until the elder Isaac Hite as assignee of another bond had sued and obtained judgment on it; when, *i, e*, 1793: they file this bill, and if it was to succeed, the consequence might be that Hite, besides loosing his share, would have to pay the other one tenth out of his pocket, by the improper conduct of the plaintiffs. Or, if it was to fall upon the executor, it would be liable to the same objection.

On this point, upon the reasoning in *Cole* vs *Gibbons* 3. *P. Wms.* 290 (and *The Earl of Chesterfield* vs *Janson*, 1. *Atk.* 301.) I think with Lord Talbot, that after all these transactions, evincing in my mind a full confirmation and acquiescence after the deficiency was discovered and the claim perfectly understood, it would be too much for any Court to interfere, and set all aside: and if contracts may be thus confirmed in which there was originally moral turpitude, the argument is much stronger where there is no immoral conduct in the bargain, but a prudent caution in an executor to avoid being involved in future contests.

But the case of *Quesnel* vs *Woodlief* decided in this Court in October 1796 is supposed to be a conclusive precedent in favor of the present plaintiffs.

I premise that I pay the same respect to that decision as if I had been present and united in it: It is the opinion of the Court, and not who gives it, that is to guide us. I have carefully examined that record and am free to declare that I should have united in granting the relief the Court did, upon the circumstances of that case; but from a total dissimilitude of them, in their prominent features, to those of the present cause, the authority dont apply.

1. Quesnel was a foreigner, only about 18 months in the country, a stranger to our customs and language, and in his communications by an interpreter liable to an infinity of mistakes. Whereas here the purchasers were neighbours, who for any thing which appears, knew the tract as well as

as the executor and, from their frequent view, could judge as well as he, what was the probable quantity; but what is more material, they may be presumed to have known our customs and the difference between the purchase of a tract of land as it is, though a nominal quantity be estimated, and the purchase of specific a quantity. Jollife, *vs.* Hite.

2. The original contract, there, is not in proof; but it it is evident to me that it was for a specific quantity, since the purchase money amounts to 800 acres at £ 4 per acre; and that was the sum mentioned by Woodlief, when the conversation passed about the deficiency and surplus, and shews the real contract to have been to purchase by the acre. That conversation was not the contract, but passed at the time of signing the deeds: and strikes me as having no other effect, than the common insertion of those often unmeaning words *more or less*, in a deed. Which however, in a question of the present sort, are only to be corrected, by the terms of the real contract.

Here the executors made proclamation that the deeds called for the quantity, but that he sold it by the deed, *more or less;* It is fully proved and very intelligible, that the sale was to be of the tract, without respect to quantity; and people were to be under the risque of gain or loss, in that respect. Which would no doubt increase or diminish the price, according to the probable deficiency or excess of quantity, in the opinion of the bidder.

That it was well understood by the purchaser, I have shewn, from his having in the deed he drew immediately conformed to such an agreement, by pursuing a very unusual form of conveyance.

This makes an important and conclusive difference in the two cases.

There was no confirmation or acquiescence, equivalent to it, in Quesnel. On the contrary as soon as he discovered the mistake, he sent a written notice to Mr. Ruffin who held three of his bonds, that he should claim a deduction for the great

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great deficiency, and publiſhed an advertiſement to the ſame purpoſe in the Virginia gazette. As ſoon as one bond became due Mr. Harriſon the truſtee advertiſed the ſale of the land to ſatisfy it; upon which Queſnel immediately filed his bill and obtained an injunction to ſtop the ſale. So that he never deſerted his claim, or lay by a moment, for others to be involved in injury or difficulty in conſequence of his neglect. Whereas here the effect of the contract was not only underſtood originally, but when the deficiency was diſcovered and the claim made they were told it would not be allowed. Inſtead of commencing ſuit immediately, they lie by, and after a years conſideration accept the deed in the ſame form as the former, and have it recorded. This I, as the executors appear to have done, conſider as a waiver of the claim; for they proceed to ſettle with the legatees and diſtribute the bonds. Another proof of the waiver is afforded in their having paid off the bond retained by the executor; againſt which it would have been more proper and equal to have claimed the deduction than againſt the aſſignee; although by ſettled rules he may diſcount againſt the aſſignee.

There are many other leſſer circumſtances which diſtinguiſh the caſes from each other, but theſe are ſufficient to ſatisfy me that the precedent does not apply, ſo as to preclude what I conceive to be a juſt decree in the preſent caſe.

But it is ſaid that the principle, on which that cauſe was decided, was that there was a miſtake in both parties, each expecting, the one that he ſold and the other that he purchaſed 800 acres; a miſtake againſt which Chancery ought to relieve; and that the argument applies here, ſince the defendant admits the plaintiffs expected that the tract contained 578 acres.

The principle was properly applied to the former caſe of a contract to ſell a ſpecific quantity. But if it was meant to change or ſet aſide a real

contract

Jolliffe, vs. Hite.

contract for the ſale of a tract of land in groſs, at the riſque of the purchaſer for gain or loſs, by a deficiency or exceſs in the quantity it was ſuppoſed to contain by both parties (which is the preſent caſe.) I do not heſitate to ſay, that it was carried too far; being an interference with fair contracts, which no Court has a right to make. Since there was no miſtake in the contract, whatever there might be in the eſtimate contemplated.

Such contracts are made every day for the purchaſe of tracts of land in groſs. A man wants to ſell his land, and another willing to purchaſe inquires what is the quantity; the vendor anſwers "I hold it for ſo many acres, but I mean to ſell "the tract as it is *more or less* and ſuch is my price." Upon which they bargain. This is perfectly underſtood by planters and farmers even of the loweſt order; and I ſhould have no doubt of its having been ſo by the preſent purchaſer, even if not proved by the form of the deed.

How are all theſe contracts to be departed from and compenſation made to either party (for both ſtand on the ſame ground) if upon a ſurvey the tract ſhall be found to contain even in an important degree, *more or less*, than the quantity talked of (indeed) at the time, but forming no part of the eſſence of the contract? I need not ſtate the conſequence!

But it is ſaid to be immoral for a man to pay, and another to receive money for more land than the one parts with and the other gets.

However it may be wiſhed that mankind ſhould be brought in their contracts to that pure ſyſtem of ethics finely deſcribed by moral writers, yet the deciſion of a Court of Equity on that ſyſtem, where there is no fraud, but the ground of relief is *miſtake* of the parties, would in the preſent ſtate of ſociety produce more evil than good.

To illuſtrate what I mean:

Tully

Jollife, vs. Hite.

Tully in his book of offices determines, that a corn merchant arriving at Rhodes at a time of deep diſtreſs, knowing that a large ſupply is on the way, ought to diſcloſe that fact to the Iſlanders, ſo important to them to be informed of, and not by concealing it get a much higher price for his own cargo; and he gives ſtrong reaſons for his opinion. But is there a ſingle inſtance of a merchant who ever purſued that ſyſtem? or of a Court of Equity ſetting aſide his ſale, becauſe he did not? I believe neither; and that this Court ought not to make a precedent of the ſort, in the preſent ſtate of things.

Uniformity in the deciſions of this Court are all important. We have however progreſſed but little from the commencement of our exiſtence; and if in any inſtance we ſhould recently diſcover a miſtake in a former diciſion, we ſhould ſurely correct it, and not let the error go forth to our citizens, as a governing rule of their conduct.

I have before ſhewn that the former deciſion and what I propoſe in this, will ſtand very well together, from the difference in the contracts. Nor will there be any inconſiſtency even in appearance. For the former entry in our book does not extend the principle to ſuch a contract as the preſent; and a ſtatement, of the grounds of this decree, will diſtinguiſh it clearly from the other caſe.

Upon the whole, as to the merits, I am for affirming the decree.

As to the £6:13:4 the arrears of the land tax, it appears that the appellants have paid it and ought to have it refunded; but it is not clear whether by the appellees or the ſheriff, who may have received it twice, of which Bells teſtimony gives a ſuſpicion. It will be open to a recovery from the proper perſon (if not paid without conteſt;) and ought not to be allowed as a diſcount at preſent.

The decree was as follows:

"That

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"That in all cases of contracts for the sale of "lands by a specific number of acres, the parties "are entitled to compensation for a deficiency or "excess in that quantity, beyond what may be "reasonably imputed to small errors from vari- "ations of instruments or otherwise; the estimate "being supposed to be made from mistake in the "parties; and are not precluded in Equity from "enquiry into what was the real contract, by the "words *more or less* inserted in the deed of con- "veyance. But where the real contract is to sell "a tract of land as it may contain, *more or less*, "fully understood to be so, the purchaser takes the "tract at the risque of gain or loss, by deficiency or "excess in the number of acres contemplated; and "neither can resort to the other, for compensation "on the ground of either event: And this having "been the real contract between the parties in the "present case, there is no error in the said decree. "Therefore &c."

Decree Affirmed.

WOOD

against

BOUGHAN.

ONE question in this cause was whether the District Court erred in directing an issue, on the appeal from the County Court, to try the title of the petitioner to the lands whereon he desired to erect his mill, and reversing the judgment of the County Court in conformity to the finding of the jury?

Quere. If in a petition for a mill the Court can try the title of the parties to the lands, without the intervention of a jury?

If the court direct an issue in such a case to try the title it will

RANDOLPH for the appellant. The law gave no authority to impannel a jury in such cases. For the act directs a jury for special purposes only; which is a proof that they are not to be summoned in ordinary cases. As therefore the title is

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will not be error because it is still open for diſcuſſion on the merits.

not one of thoſe enumerated purpoſes, it is a fair preſumption that it was not the intention of the Legiſlature that there ſhould be a jury with regard to that point. The practice would involve this prepoſterous doctrine, namely, that a jury might be ſummoned to review the judgment of the County Court. Which being a matter of law, it excluſively belonged to the Court to decide it.

WARDEN *contra*. The Diſtrict Court have decided upon what was before them. They thought that the title conſiſted of facts as well as law, and therefore that a jury (who are the proper triers of all matters of fact) ought to decide the queſtion. It is probable that the Counſel agreed to make up the iſſue; and where any doubt about facts occurs, a jury ought to be impanelled according to the ſpirit of the bill of rights. The direction for a jury was conſequently right, in order to aſcertain the title; and after that the Court could judge, upon the other circumſtances, whether the petitioner, his title being eſtabliſhed, ſhould have leave to build a mill?

WASHINGTON on the ſame ſide. Although the Court are not bound to direct an iſſue, yet I do not think that it is error in them to have done it, as it was uſed merely to inform the conſcience of the Court; and the verdict is only to be conſidered as an evidence of the title. But by joining iſſue the parties on both ſides have virtually conſented to the order. It will be ſaid perhaps, that being the order of the Court it could not be reſiſted; but I anſwer that the party ſhould have excepted to the opinion of the Court. It is not neceſſary that the expreſs conſent ſhould appear on record, for the act of the parties may amount to it. An exception is conſtantly taken to the opinion of the Court in all caſes of interlocutory orders; and when omitted, the party is conſidered as waiving the objection. In the caſe of forthcoming bonds, judgment is to be rendered on motion and no jury is neceſſary. Yet in a caſe where *non eſt factum* was pleaded, to a bond of this kind, and iſſue taken

on

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on the plea, to be tried by a jury, it did not occur to the Court that the order for a jury was erroneous. Although the judgment was reverſed upon a ground that rather maintained the propriety of a jury; for it was determined that the Court below erred in rendering judgment againſt the ſecurities until it was decided whether it was the bond of the principal or not. Such an iſſue in the caſe of mills, is like an iſſue directed by a Court of Chancery; and in practice it is not unuſual for the High Court of Chancery to direct an iſſue to aſcertain a fact, on an appeal from a County Court. So in this caſe the Judges of the Diſtrict Court, ſitting to decide on the circumſtances, might direct an iſſue to determine a particular fact concerning which any doubts aroſe.

RANDOLPH in reply. The joining iſſue and neglecting to except, was not any conſent nor operated as a waiver of the objection; becauſe decency directed that he ſhould ſubmit after the Court had ordered it. It was the duty of the Court to decide the queſtion; and they could not depute the authority to others. Their deciſion upon the title would not have been concluſive; but an ejectment would have lain afterwards. Which obviates the argument drawn from the bill of rights; becauſe the party would not have been diveſted of his property, by the deciſion.

PENDLETON Preſident, Delivered the reſolution of the Court as follows:

The firſt queſtion that occurs is, whether the act of Aſſembly authoriſes this Court, upon this ſummary proceeding, to enter into a conteſt about the title of the parties? or whether the words of the act, *owning lands on one or both ſides of the run*, are not ſatisfied by the petitioners being in poſſeſſion as viſible owner? leaving any perſon claiming title to purſue the legal remedy for aſſerting it, ſince it could not be prejudiced by the proceeding.

It is probable that the latter was the intention of the Legiſlature, or they would have provided

ſome

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ſome mode for conducting the trial, and not have left an enquiry, which might prove very important, to be decided by the Court, without the neceſſity of a jury, contrary to the ſpirit of our judiciary ſyſtem; and by which, in a ſuit about an acre in this ſummary method, the title to a large tract might be involved.

The ownerſhip therefore is rather ſuppoſed, and accordingly the ſubſequent enquiries are directed to other objects. Probably if an enquiry into the title be proper, it is a caſe omitted and ought to be ſupplied by the Legiſlature. Our preſent impreſſions are that this mode is improper under the act, without conſent of the parties; but we give no opinion, becauſe in this caſe, as in *Home* vs *Richards*, the inquiry ſeems to have proceeded from conſent of parties; for although no conſent is ſtated, there is no compulſory order to introduce it.

The directing of an iſſue by jury in the Diſtrict Court we do not conſider as error: For although we ſtill approve of the deciſion in *Home* vs *Richards*, that the Court were not obliged to direct ſuch iſſue, yet they might at their diſcretion adopt this ordinary conſtitutional mode for their better information; ſince the caſe upon the merits was left open for their diſcuſſion. This power is juſtly aſſimilated to that of the Chancellor in directing iſſues to ſatisfy his conſcience. In neither is the verdict concluſive.

Upon the merits we have very little doubt; the ſuppoſed conflict between the titles derived to old Boughan from Holt's patent and that of the appellant under Boughan's own patent, ſeems to have no influence ſince Boughan in 1705, when he purchaſed from Holt appears to have been conſcious that his title did not extend beyond the Walnut at H or red A; and therefore, in the ſame year, he purchaſed of Harper, claiming under the other patent, the five acres: the location of which is the diſpute at preſent, and which, upon the whole proceedings, there is little difficulty in deciding. The appellant

appellants location O P Q R, the Surveyor ſtates to be a mere protraction without paper or evidence to ſupport it; and the appellees location red A B C and D appears to agree with the natural deſcriptions as teſtified by the witneſſes.

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Upon the merits therefore the judgment of the Diſtrict Court is affirmed.

CALL, *againſt* RUFFIN.

Action lies againſt the ſecurity to a guardians bond, without any previous ſuit againſt the principal.

But it is otherwiſe in the caſe of an executor's bond; which being only an ultimate ſecurity againſt miſconduct, a devaſtavit muſt firſt be eſtabliſhed; and that can only be done by actual ſuit againſt the executor or adminiſtrator.

If the condition of a guardians bond does not ſtate the appointment

THIS was an action of debt brought for the benefit of Samuel Peniſton, on a guardian's bond; the declaration ſtated that Thomas Morgan was appointed guardian, that the defendant and Thomas Woodlief were his ſecurities; that Morgan was dead inteſtate without leaving any eſtate whatſoever, and aſſigned breaches of the condition of the bond; which was in the following words. "The condition of the above obligation is ſuch "that if the above bound Thomas Morgan, his "heirs, executors and adminiſtrators, ſhall well and "truly pay and deliver or cauſe to be paid and "delivered unto Samuel and Sarah Peniſton, or- "phans of Anthony Collins Peniſton, all ſuch "eſtate or eſtates as ſhall appear to be due to the "ſaid orphans when and as ſoon as they ſhall at- "tain to lawful age, or when thereunto required, "by the juſtices of the County Court of Prince- "George, as alſo keep harmleſs the above named "Juſtices their and every of their heirs, executors "and adminiſtrators, from all trouble or damage "that may ariſe about the ſaid eſtate, then the "above obligation to be void." Plea conditions performed and iſſue.—The jury found a verdict for the plaintiff for £ 910: 17: 6½.

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CALL, vs. RUFFIN.

A motion was made in the District Court to arrest the judgment, for the following reasons. 1, Because the suit is brought against the defendant as security to the said writing obligatory without any suit having been brought against the said Thomas Morgan the principal in the said writing obligatory.—2 Because the writing obligatory stated in the declaration is not sufficient in law to charge the said defendant, the condition thereof not stating that the said Thomas Morgan was appointed guardian to the said Samuel Penistón.

of the guardian it will be sufficient.

One guardians bond may be taken for two orphans.

The penalty of a guardians bond, was reduced by the scale of depreciation, and the security only rendered liable for the reduced sum

The District Court gave judgment for the defendant upon the verdict, with costs. From which judgment the plaintiff appealed to this Court.

WICKHAM for the appellant. The first reason assigned in the record for arresting the judgment is not sustainable. At common law an action lies against all the obligors in a bond; and the special Court of Appeals, in *Claibornes executors* vs. *the Spotsylvania Justices*, * only decided that the creditor could not sue the bond until he had proved his debt and established his privity by an action. So that the decision there turned upon a principle not applicable to the case before the Court.

The second reason assigned by the appellee for arresting the judgment in the present case, was considered by this Court in a former case upon this same bond; and was not thought of any weight.

PENDLETON President. I understood the Special Court, in the case of *Claibornes executors* vs. *the Spotsylvania Justices*, to decide that before a suit could be brought against the security to an administration bond, it was necessary for the plaintiff, in the first place, to convict the executor or administrator, by an actual suit previously brought against him, of having committed a *devastavit*. But that decision is founded upon principles of law, which only apply to the case of executors and administrators; and therefore it has no influence in the present case; which is an action on a guardians

* 1, *Wash: Rep: p.* 31.

guardians and not on an executors or adminiſtrators bond.

Call. *vs* Ruffin.

CARRINGTON Judge. It was decided in *Claibornes executors* vs. *the Spotsylvania Juſtices*, that before a ſuit can be maintained upon an adminiſtration bond, a *devastavit* muſt firſt be eſtabliſhed by a ſuit againſt the executor or adminiſtrator. But the reaſons for that deciſion only apply to the caſe of executors and adminiſtrators; and therefore they do not affect the preſent caſe.

LYONS Judge. The caſe of *Claibornes executors* vs. *the Spotsylvania Juſtices*, was confined to adminiſtration bonds. For an executor or adminiſtrator cannot be charged *de bonis propriis* until a ſuit has been brought againſt him in order to eſtabliſh the demand and aſcertain the diſpoſition of the aſſets; and as the bond is only intended as an ultimate ſecurity againſt a *devastavit*, the *devastavit* ought to be eſtabliſhed, before any action can accrue upon it. But this can only be done by a previous ſuit; which therefore is indiſpenſably neceſſary. It is evident though, that theſe principles only apply to the caſe of executors and adminiſtrators; and that they have no relation to a ſuit upon a guardians bond.

Cur: adv: vult.

PENDLETON Preſident, delivered the reſolution of the Court as follows:

There is no difficulty upon the two reaſons, aſſigned in the Diſtrict Court, for arreſting the judgment. On the judgment, now to be given though, a difficulty has occurred. The bond is dated in November 1779, for £ 50,000 ſubject to the ſcale; which at 36 for one, reduces it to £ 1388: 17: 9; ſufficient to cover the plaintiffs demand. But there are two orphans whoſe intereſt are to be ſecured by this penalty; beyond which, the ſecurity cannot be made liable; and this judgment may exhauſt too much of the fund to admit of juſtice to the other orphan. On conſideration of this ſubject, ſince the claims of the orphans may be different, and the remainder

of

Call, vs. Ruffin.

of the fund amounting to £ 488 : 0 : 3 may not be equal to the claim of the other; we give judgment for the whole penalty to be discharged by the plaintiffs demand. If in consequence thereof, the judgment with what the security has paid or shall be obliged to pay the other, should exceed the penalty of the bond, the security may be relieved in equity; where both claims will be reduced to the aggregate of the penalty and the penalty proportioned between the orphans.

The judgment, after reversing that of the District Court, proceeded thus: "It is considered, that the reasons assigned by the appellee in arrest of judgment be overruled; and that the appellant recover against the appellee £ 1388 : 17 : 9, being the amount of the penalty of the bond in the proceedings mentioned, reduced to specie according to the legal scale of depreciation, and his costs by him in the said district court expended. But this judgment is to be discharged by the payment to the aforesaid Samuel Penisto of £ 910 : 17 : 6½, the damages by the jurors in their verdict assessed and the costs aforesaid in the District Court, and such other damages as may be hereafter assessed upon a *scire facias* being sued out thereon and new breaches assigned."

CASES.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
THE FALL TERM OF THE YEAR 1798.

HORDE
againſt
M'ROBERTS AND WIFE.

Reſiduary clauſe in a will does not carry a remainder after a life eſtate, if there be other eſtate for the reſiduary clauſe to operate on.

THIS was an ejectment brought in the Diſtrict Court of Prince-Edward by M'Roberts and wife againſt Horde, who was a derivative purchaſer under the deviſe to Theodorick in the will of old Robert Munford mentioned in 1. Waſhington's reports 97. A caſe, ſimilar to the one ſtated in that of *Kennon* vs *M'Roberts and Wife*, was made for the opinion of the Court. The caſe had been referred by the Diſtrict Court to the General Court, who certified in favor of M'Roberts and wife, and the Diſtrict Court gave judgment for them agreeable to the certificate. From which judgment Horde appealed to this Court.

PENDLETON Preſident, after ſtating the caſe delivered the reſolution of the Court to the following effect:

This caſe ſtands upon the ſame ground as that of *Kennon* vs *M'Roberts and Wife*. The Court have reviſed and conſidered that deciſion; and unanimouſly approve of it. The judgment of the Diſtrict Court muſt therefore be reverſed, and judgment entered for Horde.

Judgment Reverſed,

DUNN & WIFE
against
BRAY.

Devise of slaves to W. and his heirs for ever. But if he die and leave no issue, then to C. This limitation to C is good & not too remote.

In order to annex slaves to lands, it was necessary that co extensive estates should be given in both.

THIS was an appeal from a decree of the High Court of Chancery, and the material question in the cause was, what interest Winter Bray took in the slaves *Peter* and *Dinah* under the following clauses of the will of Charles Bray deceased? dated on the 24th of February, and admitted to record in the month of March 1772.

"I give and bequeath unto my son William "Bray all that tract of land lying on Piscataway "old mill run (except what I hereafter devise to "my son Charles) which I purchased of John "Griggs executors, to him and the heirs of his "body lawfully begotten forever; also a negro "man named Morie, to him and his heirs forever. "But further, it is my express will, that in case "my son William should die and leave no lawful "issue, that then the land herein before devised "to my said son William, I give to my son Win-"ter Bray, to him and the heirs of his body law-"fully begotten forever."

"I give and bequeath unto my son Winter "Bray, one negro boy named Peter, and one ne-"gro wench named Dinah, and her increase, to "him and his heirs forever. But in case my said "son Winter should die, and leave no issue, then "I give all the said negroes herein before devised "to my said son Winter, to my son Charles and "his heirs forever."

William Bray died before the year 1776.

Winter Bray died intestate, and without leaving any issue after the year 1787.

The Court of Chancery decided that the limitation over to Charles upon the death of Winter without leaving issue was good, and decreed accordingly.

From

From which decree, Dunn and his Wife appealled to this Court. Dunn & wife *vs.* Bray.

WARDEN for the appellants. Contended that the deviſe carried a clear eſtate taille to Winter Bray. That it plainly did ſo with regard to the precedent deviſe of the lands. 1, *Vent.* 230.—1 *Wms.* 605. *Cro: Eliz.* 525. *Cro: Jac:* 290. 22; and as the ſame words were uſed with regard to the ſlaves, he likewiſe intended an intail there too. That the ſlaves were annexed to the lands, and therefore by the act of 1776, Winter Bray became tenant in fee of the lands, and acquired the abſolute property in the ſlaves. That there ſhould have been a decree for an account of the perſonal eſtate; and therefore the decree of the Court of Chancery was wrong upon both grounds.

CALL for the appellees. It was a clear executory deviſe to Charles after the death of Winter, without iſſue living at his death. The caſes cited on the other ſide were all caſes of deviſes of lands, and not of perſonal eſtate; and conſequently they do not apply. The word *leave* ties up the other words and confines them to iſſue in being at the time of the death of Winter, *Atkinson* vs *Hutchinson*, 3, *Wms.* 258. *Forth* vs *Chapman*, 1, *Wms.* 633. As to the idea of the ſlaves being annexed to the lands, there is no ground for it; but admitting there was, it would not have any influence on the queſtion. Becauſe if it were an eſtate taille in its creation, yet by the very terms of the will it was to ceaſe on the event of Winter's dying without *leaving iſſue alive at the time of his death*; beyond which period it was not calculated to endure. Therefore, if they were annexed, they were annexed ſubject to the condition of the entail's ceaſing on the happening of the event. As to the account, it was ſtated that the ſuit was commenced within leſs than nine months from the teſtators death; therefore before the time of diſtribution mentioned in the act of Aſſembly; and of courſe, before any cauſe of ſuit. Conſequently, by analogy to the practice in Courts of law, the

Dunn & wife the bill was properly dismissed by the Chancellor.

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PENDLETON President. Delivered the resolution of the Court as follows.

The record is lengthy, made so by form, but the question is a short one, being what interest Winter Bray took in the slaves under the will of his father Charles Bray?

Before we enter upon the merits we will dispatch two small objections made by the appellees counsel. First, The bill claims partition of a tract of land between the plaintiff and the defendants James and Charles, and an account of the profits: The answer states that they were always ready to make that partition; and the decree of the County Court is that the parties had made it, which was confirmed. The objection now is, that they ought to have decreed the profits till the partition; but the Court overrule the objection, presuming that the profits were given up or compensated for, on the compromise.

A second objection is founded upon a mistake in fact; for the County Court, after dismissing the bill as to the slaves, decreed an account to be taken of the personal estate. Which part of the decree was suspended by an appeal to the High Court of Chancery; where the decree, as to the slaves, being confirmed it was represented that the Chancellor had dismissed the bill instead of remanding it to the County Court to have the other part of the decree carried into execution: whereas the decree being an affirmance has the effect required.

We now come to the merits of the question between the parties, which depends upon the will of Charles Bray, the elder dated February the 24th 1772, wherein he makes this devise. "I give and "bequeath unto my son Winter Bray, one negro "boy named Peter and a negro wench named Di-"nah and her increase to him and his heirs forever; "but in case my said son Winter should die and "leave no issue, *then* I give all the said negroes, "herein before devised to my said son Winter, to my

"my son Charles and to his heirs forever." If Winter took the absolute property in these slaves under that devise, then the appellants are entitled to one third part of them, and the decrees are erroneous: but if his interest was contingent, depending upon the event of his leaving issue at the time of his death, then the remainder over to Charles was a good one and the decrees are right. Dunn & wife vs Bray.

It was argued by the appellants counsel that the slaves were annexed to lands and entailed under the 12 *sect.* of the act of Assembly passed in 1727 respecting slaves; that Winter was seized and possessed of both at the time of passing the act of 1776; which vested in him a fee simple in those devised to him and put an end to Charles's remainder. He was right in his law, if the facts had brought the case within the act of Assembly.

The clause empowers a man by deed or will, wherein lands shall be conveyed in taille, to annex slaves thereto and declare they shall descend together; which shall be effectual to effect that purpose: or, if he devises or conveys lands in taille and in the same instrument disposes of slaves with the like limitations as the land, this shall amount to a declaration of his intention to annex them; and they shall pass together accordingly.

It was admitted that here was no declaration to bring the case under the first branch, but it was said that it came under the second; since although the limitations were not the same in terms, yet they had the same effect; both lands and slaves being devised in taille.

Without wasting time in a scrutiny of this argument, it happens unfortunately for it that no lands are devised to Winter at all, except in remainder upon the death of William without issue; to which remainder, though it took no effect afterwards upon the contingencies happening, there can be no pretence for annexing his own slaves; which he took immediately upon his fathers death. Besides if it were possible to connect them together, he held them

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them under different limitations; That is to say the lands to him and the heirs of his body, without any remainder over; the slaves to him and his heirs, and if he died and left no issue, remainder to Charles: very distinguishable in effect, as well as in terms. This section of the act therefore being out of the question, the case depends upon the third section of the same act; which declares that where slaves are the subject of a sale, gift, or devise, the absolute property shall be transferred in the same manner as a chattel, and that no remainder of a slave shall be limitted otherwise than the remainder of a chattel personal may be limitted by the rules of the common law. By this clause slaves are placed in the predicament of other chattels; and we are to enquire whether by the decisions in England such a devise as the present applied to personals, would vest the absolute property in the first devisee or support the devise over to Charles?

If we were to trace this subject, through the various cases in which it has been discussed, it would be tedious indeed, and we presume unnecessary. Some general principles, changing from time to time in the progress of the discussion, may be necessary to illucidate the ground of our decision. The original common law rule admitted of no division of interest in a chattel. A gift for an hour was a gift for ever, as the expression is; and this founded on the transient mutable nature of the subject. The first case recollected, in which this rule was combatted, is Mathew Mannings case reported by Lord *Coke*; which was a devise to one for life, with a remainder over. The Court had difficulty; but, at length, established the remainder, by transposing the devises: making it a devise of the property to the remainderman with a direction that the first taker should have the use for his life. The same thing was done afterwards, in Lampets case, reported by the same author. Both these cases were devises of terms for years: which were endeavored to be distinguished from mere

personals

perſonals, by the ſtability of the ſubject; and it was not till long afterwards, I believe about the time of the reſtoration, that ſuch remainders were allowed in the caſe of mere perſonals; and were confined at firſt, to inſtances where the *use* only was deviſed to the firſt taker. This diſtinction, however, was ſoon exploded; and a deviſe of a perſonal thing for a limitted time was conſtrued to be of the uſe only, and the remainder ſupported. Dunn & wife *vs.* Bray.

We ſhall ſtate the progreſs no further; and only obſerve deciſions favorable to remainders gradually increaſed till it came to the preſent rule, well known and eſtabliſhed, that a limitation over upon a contingency which muſt at all events happen at the end of a life, or lives in being or a reaſonable number of years, is a good one, and will entitle the remainderman. If it be more remote, it will be void; and the firſt deviſee will take the abſolute property.

It was ſaid, by the appellants counſel, that where the firſt deviſee takes an eſtate taille the remainder over is void; and this is true. Since the remainder being to take effect upon a general failure of iſſue, which may not happen in a long courſe of time, the contingency is too remote, to bring the caſe within the rule before laid down.

The counſel then read ſeveral caſes to prove, that if there be a deviſe of lands to one for life or in fee and, if he die without iſſue, remainder over, this would turn the firſt eſtate for life or in fee into an eſtate taille in the firſt deviſee by implication; in order to favor the teſtators intention of preferring the iſſue, who could not otherwiſe take, to the remainder-man; who was not to ſucceed until the iſſue failed.

But here is introduced the diſtinction between an expreſs intail in the deviſe of a perſonal thing, ſuch as to A, and the *heirs of his body*, &c. and ſuch a deviſe as, in the caſe of lands, would give an eſtate taille by implication: Upon principle the diſtinction ſeems clear; ſince the implication,

made.

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made in the case of lands to favor the intention, would be misapplied, if made use of to destroy that intention, in the case of personals.

In the case of *Atkinson* vs. *Hutcheson*, 3, *P. Wms.* 258, Lord Talbot fully illustrates the distinction between the devise of an express intail and one raised by implication; as well as, the natural meaning of the words, *dying without issue.* That case came near to the present; because the limitation over was upon *any childs dying, without leaving any issue.* The case of *Forth* vs. *Chapman* cited in *this* case, is the very case before the Court; except that there it was devised to the first devisee for life, with remainder over, if he died *leaving no issue*; and here the devise, to Winter, is to him and his *heirs*, and if he *leave no issue*, remainder to Charles; which, it is conceived, makes no difference.

It is remarkable that, in that case, the same devise comprehended lands as well as chattels; and yet the lands were adjudged to be intailed, and the personals not: But, as to them, the remainder was supported, in order to favor the testators intention; thereby clearly establishing the distinction, before laid down.

In *Pinbury* vs. *Elkin*, 1, *P. Wms.* 563, the words *dying without issue*, were less restrained, to the death of the devisee, than in the present case; yet the devise was so confined; and the Chancellor more familiarly illustrates that to be the natural meaning of the words *dying without issue.* He also relies on the word *then*; as aiding the construction; If she die without issue, *then*, that is, at her death, remainder over. The same word is used by the testator here; If he leaves no issue, *then* Charles is to take.

It need only be added that, in the present devise, the remainder over to Charles, (which was clearly intended to take effect upon the death of Winter, without *leaving issue living at the time of his death*; and not upon a general failure of issue)

iſſue) is good as an executory deviſe within the rule; and that the decrees of both Courts are right.

Decree Affirmed.

CABELL, AND OTHERS,

againſt

HARDWICK.

In a ſuit upon an adminiſtration bond, if the declaration does not ſhew that th' plaintiffs ſue as juſtices of th' court, it is a fatal variance and the adminſtration bond cannot be given in evidence.

In ſuch a caſe the pleadings ought to ſtate for whoſe benefit the ſuit is brought.

IN debt upon an adminiſtration bond. The declaration was in the common form of a declaration for payment of money without *styling the plaintiffs Juſtices, &c.* The plaintiffs aſſigned for breaches that the adminiſtrator did not make any inventory of the eſtate, nor adminiſter the ſame according to law, nor pay the legacies, and further that he did not pay "the amount of a decree "in favour of the legatees of the ſaid Pearce Wade "in ſaid Court, and afterwards confirmed in the "High Court of Chancery for the quantity of "of tobacco, and in current money." Plea conditions performed, with a general replication and iſſue. Upon the trial of the cauſe in the Diſtrict Court of New London, the plaintiffs offered in evidence to the jury a bond payable to the plaintiffs as juſtices of Amherſt County Court. Of the uſual form and with the common condition. And inſtead of the uſual atteſtation of the witneſſes, there is written at the foot of the bond a certificate atteſted by the clerk in this form "at a "Court held for Amherſt county at the court-"houſe the ſeventh day of May 1770, this bond "was acknowledged by John Hardwick, &c." (naming the other obligors) to be their act and deed and ordered to be recorded. The Diſtrict Court "rejected the evidence as being different "from that ſtated by the plaintiffs in the declara-"tion aforeſaid."

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Upon comparing the bond and declaration there does not appear to be any other variance between them than this, that the declaration lays the venue in Campbell county, and the clerk's certificate shews that it was acknowledged at Amherst court-house. But neither the writ, declaration or any other part of the proceedings states for whose benefit the suit was brought. The plaintiffs filed a bill of exceptions to the Courts opinion; and there was a verdict and judgment in the District Court for the defendants. From which judgment the plaintiffs appealed to this Court.

MARSHALL for the appellants. Said that the opinion of the District Court was manifestly erroneous; because upon inspection it appeared that the bond and declaration corresponded; and of course there being no variance, that the evidence ought to have been received.

CALL for the appellees. The suit is brought by the plaintiffs in their individual capacities; and not as justices, for the benefit of creditors or legatees. Therefore an administration bond which is taken *in auter droit*, did not maintain the issue; and consequently the evidence was properly rejected.

This distinction is necessary to be kept up, for the safety of the obligors; in order that the judgment, in one action, may be a bar to a future suit for the same thing.

It is also necessary under another point of view, namely that the defendant may know to whom he is to make payment and obtain his discharge. Otherwise, two inconveniences will follow; 1st. that the receipt of the legatees will not be effectual against the judgment; which is in the name of the plaintiffs without any stile or addition shewing for whose benefit the suit was brought: 2d. That the receipt of the plaintiffs, for a judgment in their own names, will be no bar to another suit on the bond, at the relation of the legatees.

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It is not like the case of a suit upon a bond to an executor, in his own name, without his addition of executor. Because there the whole interest, in the bond and money, is in the executor himself; who is competent to give a discharge. Whereas in the present case the magistrates have no right to the private custody of the bond; but it remains in the public office in custody of the law; and they can neither receive the money, and give a discharge against the bond, or refuse their names to a *relator* to bring suit upon it. For which reason, suit may be brought upon it before themselves. All which clearly proves that they have not, in their individual capacities, any authority to institute a suit upon the bond. But that is the form of the action in the present record; which for the reasons already given is clearly wrong.

The difference, in these matters, is between the omission of a *material* and an *immaterial* addition. The first is fatal; but the other not, as in the case of *Bright* vs *Metcalfe*, Cro. *Eliz.* 256. Where in debt upon a bill of £ 5, which had these words *to be paid as I pay my other creditors*, the plaintiff declared generally, that the defendant was indebted to him in £ 5, payable on request: the defendant took *oyer* of the bill, and plead an insufficient matter; to which the plaintiff demurred; and thereupon exception was taken to the declaration on account of the variance between that and the bill, as the plaintiff ought to have declared specially according to the bill; and the whole Court was of this opinion, except *Fenner*; who was of opinion that the words *to be paid as he paid his other creditors* were void; and that the bill was payable on demand; like the case in the 4, *Ed.* 4. where a *solvendum* to a stranger was held void. But the other Judges were of a contrary opinion; and gave judgment for the defendant. In which case if the words "to be paid as I pay my other creditors," had been void and immaterial, according to the notion of Judge *Fenner*, the variance would not have affected the decision; but being material, the omission was held to be fatal.

If

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If judgment here had been rendered for the plaintiffs it would have been in their individual capacities; and the execution would have purſued the judgment. Therefore the plaintiffs might have received the money and given a diſcharge againſt the execution. So that what they could not do *directly* they would have been enabled to have done *indirectly*. For although they could not have releaſed the bond, they might the judgment.

Again it is a rule of law, that if the place of giving the bond is material, it is neceſſary to recite the place truly in the declaration. And by law the bond in ſuch a caſe as this ought to be given in the Court where the adminiſtration is granted or *probat* of the will is made, payable to the *ſitting juſtices* of that Court. A circumſtance which renders locality, in ſuch caſes, material.

In the preſent caſe, though, the bond declared on, is ſtated to have been made at Campbell County; and therefore a bond made at that place ought to have been exhibited: But the bond produced did not correſpond with this recital. 1. Becauſe it is taken to the Amherſt juſtices, which ſuppoſes the probat to be made in that Court, and that the bond was actually given there; ſo that it carries internal evidence along with it, of having been made at another place, than that named in the declaration. 2. Becauſe the memorandum of the execution of it ſhews, that, in point of fact, it was made in Amherſt; and conſequently it does not correſpond with the recital in the declaration. Therefore, according to the before mentioned rule, the variance is fatal. *Robert* vs *Harnage*. 2 *Ld. Raym.* 1043.

But if the evidence and declaration had correſponded, yet as the plaintiffs had not by their pleadings ſhewn any juſt cauſe of action, the Court might at any ſtage of the ſuit arreſt its progreſs. For if the plaintiff ſhews no cauſe of action, the defendant will not be received even to conſeſs a judgment. 4 *Burr.* 2144; and in the caſe of *Da Coſta* vs *Jones*. *Cowp.* 729, inſtances are mentioned of the Courts ſtopping further proceedings in the cauſe.

Now

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Now here no cauſe of action was ſhewn by the plaintiffs. For the record did not ſtate for *whose benefit the ſuit was brought*, nor who were the parties to the decree in the Court of Chancery; nor what was the amount of the decree. Neither did it appear that the executor had committed any *devastavit*, without which, no ſuit will lie on the adminiſtration bond, *Claibornes executors* vs *the Spotsylvania juſtices* 1. *Wash.* 31. *Call* vs *Ruffin* at the laſt term of this Court.* To reverſe the judgment therefore and order a new trial, which can produce no effect, will be doing a vain thing. Becauſe if a verdict ſhould be found for the plaintiff, the judgment muſt be arreſted.

RANDOLPH on the ſame ſide. The declaration ſhould in character have correſponded with the bond. If the plaintiffs had declared on an adminiſtration bond, and upon the trial had produced a bond to them in their individual capacities it could not have been received in evidence. But the rule ought to be reciprocal, and therefore the variance here is fatal. Juſtices of the peace in ſuch caſes may be reſembled to a corporation, and if ſo their addition ought to have appeared. 2 *Ld. Ray.* 1515.

MARSHALL *contra.* Although the pleadings are not in all reſpects ſtrictly correct, yet they were ſufficient to have prevented the rejection of the teſtimony. If the faults ſuggeſted actually exiſted, the trial ſhould have proceeded and the application ſhould have been to arreſt the judgment, for the evidence correſponded with the pleadings, ſuch as they were; and therefore could not be refuſed. The queſtion, in ſuch caſes, being only whether the evidence agrees with the allegations of the party producing it? And not whether the matters ſtated in the declaration are a proper foundation for an action? No caſe has decided that the addition of juſtices &c. for the benefit of the relator was requiſite; and the difference is, where the plaintiff

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* Ante p. 333.

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ſtates a writing to contain what in fact it does not, and where he only omits to ſtate part of what it does contain. The firſt is fatal: but not the other.

As to the other variance it is not material. It is only a laying of the *venue*; and not a deſcription of the bond. Beſides the bond is not dated in Amherſt; for the memorandum, that it was executed in Court, forms no part of the bond. Therefore it might be true that the bond was actually made in Campbell; and conſequently, the argument, attempted to be drawn from that circumſtance, cannot be ſupported.

ROANE Judge. The bond ſtated in the declaration is (as it appears in the declaration itſelf) a mere common bond from one ſet of individuals to another, and it purports a right in the plaintiffs to have and receive the money thereby acknowledged to be due. The word *Successors* in the *Teneri* of the bond, as ſtated in the declaration, muſt either be conſidered as ſuperfluous (in which caſe the character of the bond as before ſuppoſed will not be varied;) or, at moſt, will only import that the bond was given to the obligees in ſome corporate character. But whether for their own uſe, or that of others? Whether to them as juſtices, or in any other corporate character? and what kind of official bond it is? is wholly uncertain.

As adminiſtration bonds are for the uſe of others and are ſpecifically deſignated and provided for by law; it follows that when ſuch a bond is ſued upon and is to be exhibited as evidence, it ought clearly to appear, from the declaration, that the bond declared on is in its character an adminiſtration bond. And it ought not, on the contrary to be inferrable, from the declaration, that it is a mere private bond, (or at moſt an official bond of ſome kind, but what kind uncertain,) which is the ground of the action.

An official bond, when the ground of an action, ought to be laid in the declaration to have been made to the obligee, in his official character. This doctrine is laid down in the caſe of *Symes* vs. *Oakes*

Oakes 2 *Stra.* 893, with reſpect to an action on a ſheriffs bond; and is ſuppoſed to be, independent of authority, a principle almoſt ſelf evident.

I hold it alſo to be a clear general principle of law that the declaration ſhould manifeſt in what right the plaintiff ſues. In 4 *Burr:* 2418. *Canning* vs. *Davis*, an action *qui tam* was brought; and it was inſiſted on for a variance that the writ was *qui tam* and the declaration in his own right, omitting the *qui tam* part. The Court held the variance fatal, becauſe the declaration omitted the right in which he ſued; but ſeemed to think that the converſe would have been otherwiſe: And in 2 *Stra.* 1232. *The Weavers Company* vs *Forest*, the bill of Middleſex was to anſwer *The weavers Company*, but the declaration was *qui tam;* the Court held it right and no variance: it not being uſual to inſert in the bill as it is in the declaration in what right the plaintiff ſues; as in the caſe of executors and adminiſtrators, where the proceſs is only to anſwer A. B. &c.

Theſe two caſes ſeem to ſhew, that however it may be with the proceſs antecedent to the declaration, yet that the declaration itſelf ſhould ſhew in what right it is that the plaintiff ſues; and I hold it, to be a principle equally clear, that a plaintiff ſuing, without ſetting out another right, ſhall be taken to ſue in his own individual character, and for his own benefit.

With reſpect to the caſe mentioned at the bar, of a deciſion here, in which it was held not to be neceſſary for an executor to ſtyle himſelf, I am not acquainted with it; but apprehend, upon examination, it will be found, that in that inſtance it was not neceſſary for him to claim as executor: or that if it was, it appeared from the declaration at large, however irregularly expreſſed, that he ſued in his character of executor.

If then it be neceſſary for the plaintiff to ſtate the right under which he claims in the declaration, and he has only ſtated a bond purporting to be to himſelf

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himself individually and for his own benefit, or at most some vague and indefinite official bond or bonds to a corporation, but of what kind is uncertain, shall a bond which is clearly a legal administration bond, given to justices and importing a right, not in the obligees, but, through them, in others, be given in evidence to support the declaration as above stated? That clearly would be to support an action in an individual right, by producing in evidence an official bond inuring to the use of others; when, by possibility, there may yet be in existence a private bond corresponding with that stated in the declaration. My own opinion, indeed is, that this is by no means probable; but that opinion must not lead me to remove landmarks; which, in other cases, may produce infinite uncertainty and injustice.

The reason why a bond dated in the East Indies will not support a declaration, stating a bond made at London, although according in dates and other circumstances is, that it does not appear to be the same bond, which is declared on; it being the constant practice to compare the declaration with the bond produced 1, *Esp.* 233. But this reason will hold with increased force, when the right imported by the one and the other are different.

Thus the case stands on the declaration, and the comparison is to be made between the bond as described in the declaration, and of which the plaintiff makes a *profert* and that offered in evidence.

The plea of the defendant admits such a bond as that stated; but does not preclude him from objecting to the production of any bond which does not in substance correspond with the plaintiffs statement.

How then does it stand upon the replication? I will not say (but on this I give no opinion) that the replication so far as it tends to explain any proposition contained in the declaration, may not be resorted to as explanatory of the declaration for

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the purpoſe of overruling the objection of variance; but the replication in this caſe is utterly ſilent as to the bond being given to the plaintiffs as juſtices; and indeed if it was not ſo, that would be a material diſtinct member of its deſcription, not contained in the declaration, nor neceſſarily growing out of it.

The replication indeed ſtates a breach of certain ſtipulations which are uſually contained in adminiſtration bonds; but it does not neceſſarily follow, from thence, that the bond ſtated in the declaration was given to the juſtices under the act of Aſſembly; or that it was not a private bond; for ſuch a bond may be given with conditions ſimilar to thoſe required by the act of Aſſembly; and, if broken, may be ſued by the obligee, for his own uſe.

The caſe of *Peter* vs *Cocke*, 1, *Wash.* 257, may be ſuppoſed to have an influence on the caſe. The declaration there ſtated a bond to the plaintiff, and that offered in evidence was made to the plaintiff on account of *Glenn & Peter* merchants of Glaſgow. After a plea, without *over* prayed, an objection was taken on account of the variance; and the Diſtrict Court ſuſtained the objection. But that opinion was overruled here; becauſe it was unneceſſary to ſtate in the declaration the uſe or conſideration for which the bond was given; and if it had been ſtated, it would have been mere ſurpluſage. It was deemed mere ſurpluſage becauſe it was wholly immaterial between the parties, with reſpect to the right of the plaintiff to recover; and only operated ſubſequently as a memorandum. Beſides the defendant, as appears from his plea, was apprized of the indentical bond; and prepared to meet it. For his plea not only admits the bond ſtated, but that the one produced is the ſame. That caſe though, is certainly leſs ſtrong than the one at bar; where, from any thing appearing in the declaration or even in the replication, the bond ſtated imports a right in the plaintiffs to recover the money and receive it to their own uſe; whilſt the one ſhewn in evidence, which

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is not admitted by the plaintiff to be the ſame, uſes their names, it is true, but with an addition which refers to the laws of the country; ſhewing clearly the right of recovery, under it, to be veſted in others; and that the ſame plaintiffs can, by no poſſibility, recover on it for themſelves, even at law, or receive a ſhilling of money ariſing from it.

The reſult of my opinion on this point is, that we cannot get over the objection of the variance, without breaking through thoſe rules, which, for the beſt reaſons, have been eſtabliſhed with reſpect to a ſubſtantial correſpondence between the deed declared on and that ſhewn in evidence.

This precludes the neceſſity of my ſaying any thing to the ſufficiency of the breaches aſſigned, though they at preſent appear to me far too vague and general; or with reſpect to the variance, between the bond declared on and that ſhewn in evidence, relative to the county in which they are reſpectively ſaid to be dated; except, that it is not ſhewn, in the latter, that it was dated in Amherſt; but only certified by the clerk that it was acknowledged there; and therefore I think the principles laid down in *Roberts* vs *Harnage*, 2, *Ld. Ray.* will probably not apply to this caſe.

The plaintiffs when the bond was overruled by the Diſtrict Court, not having offered any other bond which might conform to the declaration, nor ſuffered a non ſuit, nor taken any meaſure to amend their declaration, but ſtaking their defence on being releaſed from the verdict and judgment which was rendered againſt them, upon the chance of reverſing the judgment of the Diſtrict Court, which rejected the bond; and that judgment being in my opinion right, it muſt ſtand in force againſt them. But as my opinion, as well as that of the Diſtrict Court, goes upon the inſufficiency of the declaration, with relation to the bond offered in evidence; and as that bond has never been ſubmitted to a jury nor been the ground of any ver-

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dict one way or other, as far as it appears to us in the preſent cauſe, I do ſuppoſe that that judgment will not bar any party injured from recovering upon the bond in a proper action. At any rate, I do not ſee, how I can, with propriety, avoid affirming the judgment of the Diſtrict Court.

FLEMING Judge. There is a clear variance between the bond ſtated in the declaration and that offered in evidence. It is uſual to aſſign the breaches in the declaration; and when that is not done, they ſhould be ſtated with ſuch preciſion in the replication, as that the bond may be plainly identified; and this with a view to create a barr to any future action for the ſame thing, by the judgment in the firſt. Which has not been attended to in the preſent caſe; ſince it does not appear that the plaintiffs were juſtices, or who were *the legatees*, or what perſons were claimants. In ſhort, there is nothing in the record from whence we can clearly infer, for *whoſe benefit* the ſuit is brought. But the whole is left in a ſtate of uncertainty; and therefore I think the Diſtrict Court did right in rejecting the teſtimony.

My firſt impreſſions were that we might relieve the appellants in ſome meaſure, by awarding a repleader. But on reflection I think we cannot; it is preciſely within the deciſion of *Smith* vs *Walker* 1, *Wash.* 136; in which the Court refuſed to award a repleader, becauſe of the defects in the declaration. That caſe ſeems to me to ſettle this, as to the part of it which I am now conſidering; and therefore I am for affirming the judgment.

CARRINGTON Judge. I concur in opinion with the two judges who have preceded me, that there is a fatal variance between the bond produced, which is an official bond, and the declaration which purports to be founded on a private bond; and therefore that the evidence was properly rejected.

I ſhould however, have been willing to have awarded a repleader and enabled the parties to have brought their cauſe to a hearing upon the merits, if I could have done it, upon any principle of

practice.

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practice. But the whole pleadings are too faulty. The breaches are aſſigned with ſo much uncertainty that they afford no evidence of any right in the plaintiffs to ſue upon the bond produced; and therefore could not be made the proper foundation of a judgment, without totally changing the whole complexion and nature of the ſuit. A latitude which the Court ought not, and I believe never has taken: On the contrary, the caſe of *Smith* vs *Walker*, 1. *Wash.* 136, is a direct authority againſt it; and completely decides the queſtion as to this part of the caſe. To which I may add that the caſe of *Chichester* vs *Vass* in this Court, * was totally reverſed upon ſimilar grounds; that is to ſay, that the plaintiff having failed to ſet out his claim with the preciſion neceſſary to ſhew that he was entitled to recover, the Court would not ſend the parties to another trial upon other pleadings; when it did not appear, from any thing in the record, that the plaintiff had any title to the money, which the evidence produced referred to. So that the principle has been uniformly maintained; and I ſee no reaſon to depart from it in the preſent caſe; where the declaration is founded on a private bond; without ſtating that the ſuit is brought by them as juſtices, or any thing elſe to ſhew that the bond produced is the foundation of the ſuit.

If the Court were to reverſe the judgment it muſt be with coſts; and thus the plaintiffs, who were guilty of the fault, would be allowed to redreſs it at the coſts of their adverſaries; which never could be right. Whereas, if the judgment be affirmed, no inconvenience will follow; becauſe the plaintiffs may commence a new action; to which, this judgment, as it was rendered without the evidence in conſequence of the bad pleading, will not form any barr. That courſe therefore is beſt; eſpecially as it will tend to produce more certainty and prevent a looſe kind of practice, which has been gaining too much ground, throughout the country. I am therefore for affirming the judgment.

PENDLETON

* *Ante*,

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PENDLETON President. I differ with the other judges in some respects; and although the differences are not very great, yet as it regards some points of practice it may not be unimportant to mention my reasons for it.

The declaration pursues the common form, declaring on the bond and claiming the penalty. The condition is not always disclosed in the declaration but is introduced into the subsequent proceedings; which are to discover *for whose benefit the suit is brought*; that being also sometimes omitted in the declaration.

The plaintiff in this case annexes the breaches to his declaration; very imperfectly indeed; but it gives notice to the defendant on what bond he was sued; to wit, that given for his administration of Wades estate, and for what claim the suit was brought; that is, to recover money which the defendant had been decreed to pay to the legatees of Wade.

The defendant does not demand *over* of the bond and condition, so as to introduce the latter; but takes upon himself a knowledge of both, and pleads performance of the condition, on which the plaintiffs take issue, referring I suppose to the breaches before assigned; as their allegations denied by the plea make up the whole issue in the cause. A very blundering proceeding indeed.

The plaintiffs at common law were not obliged to produce the bond at the trial, it being admitted by the plea; and on a verdict that the condition had not been performed, judgment was to be entered for the whole penalty: but our act of Assembly, declaring that such judgments shall be discharged by the payment of the damages and costs, has made it necessary to produce these bonds at the trial; although *over* of them is not demanded.

On this trial a bond, is produced, agreeing with that in the declaration in date and penalty, obligors and obligees: and with a condition corresponding with that disclosed in the breaches

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and plea; where alone the condition of the bond declared on, is to be fought for. This bond was rejected by the Court; becauſe the bond produced is payable to the plaintiffs juſtices of the County Court of Amherſt; which deſcription of the plaintiffs is omitted in the declaration. To this opinion, an exception is taken, and, a verdict and judgment having been given for the defendant, an appeal is entered to this Court.

The opinion of the Court is what is excepted to and appealed from; and we cannot decide its propriety, independent of other errors appearing in the record. Which ought not to affect a deciſion on this queſtion, however proper for conſideration, upon a diſcuſſion of what ought to be done by this Court, in conſequence of a reverſal of this opinion; although that might amount to a deciſion of the plaintiffs ſuit. The effect of ſuch a diſmiſſion being very different from a judgment upon a general verdict for the defendant. But be that as it may, if we think the opinion wrong I conceive it would be very improper to ſanctify it by a general affirmance: and thus eſtabliſh a precedent to be applied to other caſes, in which ſuch errors may not occur.

In ſupport of the opinion of the Diſtrict Court it is now argued that for want of this deſcription, the bond produced does not agree with that in the declaration; the one being payable to the plaintiffs in their public character; and the other to them as individuals in their private capacities. Which makes a material variance; and therefore it was not admiſſible in evidence.

It is poſſible, indeed, that the ſame obligors might, on the ſame day, give two bonds, in the ſame penalty, to the ſame obligees; one in their private and the other in their public character; but the ſuppoſition is very improbable: However, let it be made. In ſuch a caſe, the private bond would ſcarcely be taken, to them, their heirs *and ſucceſſors*, as the bond in the declaration is deſcribed to be; but what is more concluſive with me is, that

ſuch

such private bond would not, nor possibly could have a condition for the faithful administration of Wade's estate, as the condition of the bond declared on, is described to be in the breaches assigned, and is admitted to be by the plea. It strikes me that no man, who views this record throughout can doubt but that the bond produced is the same with that declared on. Which shews that the omission of the description is not material; and should not have prevented the admission of the bond offered in evidence.

Suppose the breaches had been properly assigned and the damages claimed *for the benefit of certain persons legatees of Wade*, and the issue regularly joined; the bond admitted as evidence; and a verdict for the plaintiff, assessing damages. In that case, the clerk would and ought to enter judgment for the plaintiffs, as in the declaration, without naming them justices, for the penalty of the bond; to be discharged by payment of the damages and costs to those legatees; with such future damages, to them or others, as might afterwards be assessed. Would this Court have reversed the judgment, because the plaintiffs were not named justices? or would such a judgment have been subject to the controul of the plaintiffs, and introduce the inconveniences pointed out by Mr. Call? I can only say, that in my opinion neither effect would have been produced.

The authorities cited do not appear to me to apply; but some cases decided in this Court seem pretty strong against the opinion of the District Court. Particularly that of *Peter* vs *Cocke* 1 *Wash* 257: Where the variance appears to have been more important than that contended for in the present case. The bond produced in evidence was payable to the plaintiff for and on account of *Messrs. Glynn & Peter merchants in Glasgow*, the declaration stated the debt as due to himself, without mentioning for whose use: This variance was made an objection to the admission of the bond in evidence, at the trial of the cause; and the objection

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tion was sustained by the Court; the plaintiffs filed an exception however, to the opinion of the Court; and a verdict and judgment being given for the defendant, the plaintiff appealed. Judge *Lyons*, delivered the opinion of this Court that the objection could not be sustained upon any principle; that it was unnecessary to state in the declaration, the use or consideration for which the bond was given; and if it had been stated, that it would have been mere surplusage.

This authority accords with the opinion I formed upon principle; namely, that the opinion of the District Court against the admission of the bond was erroneous; and that the verdict and judgment, given in consequence of it, ought to be reversed. The usual entry in consequence of that reversal, would be to direct a new trial, in which the evidence should be admitted. But, on a view of the whole record, such a trial would be vain to every purpose, but trouble and expence; since the plaintiff could never recover, upon these proceedings. The Court will therefore not pursue that ordinary method; and I was led to consider of the proper mode which might produce a trial upon the real merits.

The plea of conditions performed and the general replication independantly considered made no proper issue between the parties; and if the breaches are to be incorporated into the replication to supply that defect, those breaches are insufficiently stated (for want of expressing *the amount of the decree and for whose benefit the suit is brought*, instead of the general description of legatees of Wade,) and cannot aid the replication. So that here is either no issue at all, or an immaterial one joined between the parties, and a repleader must be the ultimate effect. Which being discovered before trial, may and ought to be awarded now, in order to avoid the expence of a useless trial.

My opinion therefore is, that the judgment ought to be reversed for the erroneous opinion; the verdict and judgment set aside, with all the proceedings

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ings from the declaration; that the plaintiffs being guilty of the firſt fault, ought to pay all coſts in the District Court ſubſequent to the filing of the declaration; which the plaintiffs might have leave to amend, by inſerting after the names of the plaintiffs the words juſtices of the County Court of Amherſt, in order to remove all future doubt; the defendant to plead thereto *de novo*; and further proceedings to be had therein.

In *Smith* vs *Walker*, 1 *Wash.* the Court appear to have inclined to the opinion I have juſt expreſſed; but, there being no good pleading at all in that caſe, they were obliged to award a total reverſal.

Upon the whole I am for reverſing the judgment and entering one according to the principles juſt now mentioned; but there being a majority of the Court in favor of the judgment it muſt be affirmed.

Judgment affirmed.

HOPKINS *againſt* BLANE.

A principal in England, appoints an agent in Virginia to buy grain, and gives him power to draw bills on the principal for payment. The agent buys *tobacco* & gives bills

THIS was an appeal from a decree of the High Court of Chancery. The bill ſtates, that Blane a merchant of London in the year 1789, impowered William Hunter of Alexandria in Virginia, to tranſact buſineſs for him in the mercantile line; and eſpecially by his letter of the 23d of November 1789, he gave him ample power to purchaſe grain and draw on the ſaid Blane at the diſcretion of Hunter. That on the credit of this letter which was ſhewn to the plaintiff, he on the 22d of February 1790, took the bills of Hunter

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on the principal; who refuses payment. The seller of the tobacco cannot recover the money of the principal

drawn on Blane for £400 sterling for value thereof in current money here advanced. That £50 of those bills were paid, and the *residue* protested. That Blane was liable for these bills; and therefore the plaintiff prayed an attachment against his effects in the hands of the garnishees.

The answer of Blane states that the defendant admits he impowered Hunter to transact *some* business for him, as by the letter of the 23d of November 1789 and another of the 20th of the same month, to which that of the 23d refers. That the defendant does not know whether these letters were shewn the plaintiff, but if he saw that of the 23d he ought also to have demanded a sight of that of the 20th; whereby he would have discovered that Hunters authority was limited to a particular conjuncture of commercial inducements not expected to last long. That the defendant does not admit that the plaintiff paid value in current money for the bills; but believes he received them in payment for tobacco sold by the plaintiff to Hunter on the 22d of February 1790; because the plaintiffs account rendered to Hunter shews it to have been so. The answer then refers to copies of two letters from the plaintiff to Hunter, and states that the defendant does not know what Hunter did with the tobacco. That the bill for £50 was paid; but that was owing to the defendants having accepted it, on its first presentation without knowing on what account it was drawn, or that Hunter had exceeded his authority.

The letter of the 20th of November, mentions that a great scarcity of grain prevailed in France as well as Britain, and other parts of Europe; and that supplies must come from America. In consequence of which Blane had chartered several small vessels of about 140 to 180 tons; which would be dispatched, early in the next month, to the address of Hunter, M'Cauly, Patten and Dalrymple and another Mr Hunter of Alexandria; Who were to act together, and adopt such measures as would procure the most immediate dispatch.

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The firſt object being to diſpatch them before other veſſels of a larger ſize, ſo as to get ſooner to market; and the next, to make two trips before the 1ſt of July, that being the expiration of the time limited for the *bounty* to continue. And that he wiſhed proviſion to be made, for the diſpatch of one ſuch veſſel immediately: ſo that there might no detention ariſe.

The letter of the 23d of November, refers to that of the 20th, and adds the reaſons which induced him to enter into the buſineſs. Which were as follows; 1. His confidence in the activity of his correſpondents and as it would be impoſſible to guard againſt every contingency, by inſtructions, he gives them full latitude according to circumſtances, to act as may appear moſt conduſive to his intereſt; having always in view the general ſpirit of his intentions. 2 The ſcarcity of grain in Europe, and conſequently in the Weſt Indies, with the French bounty. Supplies for all which, could only come from America. 3d Freight would be high; and the demand for veſſels greater than could be ſupplied. 4 The markets in Europe and the Weſt Indies would be ſo high, as to juſtify the giving high prices, by his correſpondents in America. 5 That if prices ſhould be higher than in the opinion of his correſpondents ought to be given, the veſſels might then be let to freight. 6 That the ſcarcity in Europe and bounty in France, would attract American veſſels thither; and might render the Weſt Indies a greater object. And if ſo, Britiſh veſſels would be the ſafeſt veſſels for the Britiſh Weſt India Iſlands, unleſs thoſe ports ſhould be opened. Of all which his correſpondents were to judge. 7 That the veſſels chartered ſuited any deſtination; and diſpatch was therefore of unſpeakable importance: For which reaſon he would rather give the full extent of the prices here, than that any detention ſhould ariſe. 8 That the giving Blane early funds was important, and would have conſiderable influence on the operations of his correſpondents. A circumſtance which favoured the Falmouth deſtination. For as ſoon as he got Hunter's

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ter's advice of a cargo and bills of lading, he could raise funds on them. 9 That wheat and flour were doubtless the best articles for European markets, but when the difference between them and Indian corn, should be great, as might be the case about the spring, it would probably suit to purchase that. 10 *That in regard to drawing bills, Hunter would of course negotiate them on the best terms that circumstances would admit of, and that it might, perhaps facilitate the operations of Hunter, by making the purchases payable in bills on certain terms.* 11 Gives addresses as to certain houses, in the West Indies; (who were to be instructed to sell on the spot and remit to Blane) and urges the importance of dispatch. 12. Mentions the destruction to shipping in Britain, from a storm the month before, which had increased the demand for vessels amongst the colliers; and although there might be plenty for a while, it could not last long, on account of the great freight that must arise in America for "wheat, flour, corn, lumber, turpentine tobacco "&c:" adding, *and I must beg that it may never be forgot that in whatever way a vessel can be quickest dispatched is what I shall always prefer; as no consideration can possibly compensate to me for detention and want of time.*"

The account spoken of in the answer is an account current between Hopkins and Hunter; which states a balance of accounts, settled on the 31st December 1789, amounting to £47:17:3 due Hopkins. Then a debit of £496:15:9 for 50 hhds tobacco on the 22d of February 1790 and £210 for two bank bills. Then follow charges for interest and protest. This account is credited by some small articles of merchandize on the 22d of February 1790; and Bills on Blane for £490; together with some lottery tickets.

The letters of the plaintiff to Hunter are dated the 4th and 24th of March 1790; That of the 4th states the rate of exchange, and mentions some other subjects not relevant to the present suit. That of the 24th after speaking of some other matters

matters not connected with this buſineſs, adds, "I am under preſſing calls for money, and requeſt "you to forward me, at leaſt the money for the "bank notes and for the former ballance due me. "The bills on London I do not like to part with "at this very low ſtate of exchange; ſay 16 per "cent. Such however are my neceſſities, that "unleſs you ſupply me, and that very ſpeedily, I "muſt be obliged to make a ſacrifice of them." Hopkins, *vs.* Blane.

There is in the record another letter from Hopkins to Hunter, of the 30th of March 1790; which complains that his former letters had not been anſwered, and adds "I have frequently informed "you that the bills on London, which I received "of you, have not yet been diſpoſed of, owing to "the great fall of exchange; and it was never my "wiſh to ſacrifice them, without the moſt preſſing "neceſſity. With this determination I have re-"gularly acquainted you; to which I have receiv-"ed no anſwer. I now ſend the bills by Mr. "Adams, with a requeſt, that you will be pleaſed "to pay him the money for them; or return them "to me, limiting the price, at which, I may diſ-"poſe of them. It is, however proper to obſerve, "that exchange is now down to 16; nor can I ſay "with confidence that there is any proſpect of its "immediate riſe. I have this day drawn on you, "in his favour, for the amount of the bank notes, "and the balance of my former account; which I "left with you."

There is alſo in the record a letter from Hopkins to Hunter, of the 4th of May 1790, which is as follows: "Sir, I incloſe you a ſtatement of "my account; by which, you will perceive a ve-"ry conſiderable balance, in my favour, for mo-"ney lent and tobacco ſold. The ſituation to "which I am reduced, from my funds being in "other hands, is truly a moſt melancholy one; "and without theſe funds can be drawn forth, to "anſwer my own engagements, the conſequences "muſt and will be ruinous to me. When you "view the face of my account, you will readily

"perceive

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"perceive a very conſiderable ſum of money, from "which I have derived no advantage; and which "has too long (and much longer than I expected "or intended) lain in your hands. It is not only "unfriendly (and I conſider it ſo) but is cruel and "unjuſt to keep it longer. You will therefore "ſend it down to me without delay. It is I con-"ceive needleſs to ſay I want it. Every man "wants his money; and the principle of detenti-"on cannot be juſtified, at leaſt, in the preſent "inſtance. Your bills are ſtill on hand. I have "not, nor can I ſell them unleſs at the preſent "low exchange; reſpecting which, I have repeat-"edly written you; but have not been favoured "with a word in reply. The bank notes lent, "ought at all events to be returned; and the pro-"priety of this was ſo clear, that I ſent to you "for the money, by Mr. Adams. What was the "reply? Verbally, *ſell the bills and be damned.* "I have ſo often troubled you with letters ſince I "ſaw you, without an anſwer to any one of them, "that I can hardly expect one on this occaſion; "but once more, I intreat it."

There is the depoſition of a witneſs, which proves that it appears, by Hunter's books, the bills were drawn for the payment of the tobacco purchaſed, by him, of Hopkins; that he lived with Hunter at that time; recollects the diſpoſal of the tobacco and that no part thereof was ſhipped to Blane; but that the ſame was ſhipped to Fanny and Forreſt of Havre de Grace, for an advance made by them here, to Hunter. Which was applied as *Hunter's buſineſs required; whether for the purchaſe of produce, or the payment of his debts.* That Hunter ſhewed Blane's letter in ſome inſtances, when he wanted to ſell bills on Blane; but does not know whether he ſhewed it to the plaintiff; that theſe were the firſt bills, drawn by Hunter on Blane, after the receipt of the letter of the 23d of November 1789.

Another depoſition ſtates, that the witneſs had in the beginning of the year 1790, heard Hunter ſay

ſay, he had a right to draw on Blane; and that he had afterwards heard the plaintiff ſay, he had bills from Hunter on Blane; and that Hunter had ſhewn him Blane's letter.

The High Court of Chancery diſmiſſed the bill with coſts. And Hopkins appealed to this Court.

MARSHALL for the appellant. That Hopkins made advances for the bills, and that he took the bills upon the authority of Blane's letter is clearly collectable from the circumſtances of the caſe. The queſtion therefore is, whether Blane upon that authority is bound to pay the bills?

The mode of negociating the bills was left by Blane to the diſcretion of his agent; and the inſtructions were, to negociate them in the beſt manner in his power. Of courſe, the agent was not limited by his inſtructions; and therefore whether he appropriated them rightly or not, the bill holder could not be affected by it, ſince he had no controul over him; and conſequently was not reſponſible for his conduct.

It does not matter whether the bills were negociated for tobacco or money, becauſe the agent might as well have miſapplied money as tobacco: and yet it was eſſential to his agency, that he ſhould be able to change them into one, or the other. For it might not ſuit the merchant or planter here to take bills for his grain; and therefore the agent would be obliged to give them ſomething which they would take; and this, he had no other means of raiſing, but by the bills. Either therefore he muſt have ſold the bills for money, or if that could not be done for tobacco; which he might change into money, in order to make grain purchaſes with.

The principles of this caſe have been already decided by this Court in *Hooe* vs. *Oxley*, 1 *Wash.* 19. But the caſe at bar is not ſo ſtrong as that; for upon examining the record, in that caſe, it will be found that the authority of Ponſonby was much more limited there, than that of Hunter

was

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was here. In other reſpects the caſes perfectly reſemble each other in principle. For the bills there were drawn for other objects, than the principals intended, as well as here.

The powers given in the letter were ample enough, to authorize Hunter to purchaſe tobacco itſelf and ſhip it to Blane. For it enumerates tobacco amongſt the articles of commerce; and begs that diſpatch may be uſed at all events, in any of the enumerated ways; as nothing could compenſate the injury of delay. By which it may be fairly argued, that the purchaſe of tobacco was authorized.

WICKHAM *contra*. It is clear that Blane never has received value for the bills; and that he did not even know of the plaintiffs contract with Hunter. It is alſo clear that the bills were not drawn upon the credit of Blane's letter; but that the plaintiff truſted Hunter only. Their letters ſhew an explicit reciprocal confidence in each other. Therefore the argument that the plaintiff proceeded upon the authority of Blane's letter, cannot be maintained. There is no proof that he ever ſaw it; and the circumſtances repel ſuch an inference. It was wholly unlikely that Hunter would have ſhewn it, or that he, from his confidence in Hunter, would have required a ſight of it.

If the plaintiff bought the bills of Hunter, they muſt have been paid for, either in the bank notes or tobacco. The letters prove it was not the firſt; becauſe they treat the bank notes, as a loan.

And as to the tobacco; the inference is, that if was tobacco which the plaintiff lodged with Hunter, to ſell for him; and that it was not an original contract of ſale for tobacco, to be paid for in bills; but that the bills were depoſited with the plaintiff, to be ſold for Hunter: Which is manifeſted, by the difference of exchange, at which they were to be ſettled. The plaintiff therefore ſhould not have ſent the bills to London and had them

them proteſted; but ſhould have returned them to Hunter.

Perhaps it will be ſaid that he took them as a pledge; but it never could have been intended that ſuch a power ſhould have been within the limits of Hunter's agency. Such a conſtruction would ruin trade.

Blane's name was never mentioned in the correſpondence; and therefore, the preſumption is, that the plaintiff did not rely upon him.

The agency of Hunter was limited and confined to the purchaſe of grain, during a ſcarcity which prevailed abroad. This was the primary object; diſpatch was ſubordinate to it; although that was important thro' fear that the market might be loſt: But freight was entirely ſecondary; and only to be taken in caſe the other failed. The agent therefore had no authority to meddle with any thing elſe, whilſt grain could be got.

Blane never contemplated the purchaſe of tobacco or any other article but grain: he only went on the idea, that people would put them on board, on freight. For he ſays nothing of the places, to which they were to be ſent. Therefore Hunter muſt be taken to have bought the tobacco on his own account; and not upon that of Blane.

Hooe vs *Oxley*, 1, *Wash.* 19. differs from this caſe. Ponſonby there was in the character of an agent merely and not of merchant. Of courſe when he drew a bill the preſumption was that he drew it in his authorized character of agent; but here Hunter was acknowledgedly a general merchant; and therefore not to be preſumed to have acted as agent, except where the circumſtances evidently ſhew it.

If in the caſe of *Hooe* vs *Oxley*, the bills had been drawn for the purchaſe of grain, the principals of Ponſonby would not have been bound. That caſe would then in fact have reſembled this; but at preſent it does not.

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An exception is made in that caſe which according to legal inferences will apply here. It is there ſaid by the Court, that the general principles which they laid down "excluded the idea of "colluſion between the bill holder and the agent "to abuſe the powers conſided by the principal. "Such a circumſtance would defeat the bill holder "in his attempt to charge the principal." If then the plaintiff did ſee the letter of Blane, he neceſſarily ſaw that his powers were confined, and therefore having entered into a contract with him, out of the limits of his inſtructions, the law will interpret it a colluſion; which will defeat his attempt to charge the principal. However I do not charge the plaintiff with any actual colluſion; I only inſiſt upon the inference which the law would make, had he actually ſeen the letter. For as Blane evidently never intended his bills to be applied to the purchaſe of tobacco; ſuch a contract founded on a view of the letter, would fall within the exception, above mentioned.

RANDOLPH on the ſame ſide. The bills have been indorſed over by Hopkins; and he does not ſhew his right to hold them again. Which we might fairly inſiſt he was bound to do, if it were neceſſary to ſupport our cauſe.

But Hunter could not buy tobacco with the bills; for he was expreſsly limited to the purchaſe of grain. The enumeration of commercial articles did not authorize the purchaſe of tobacco; for it was not one of them. Grain was the great object; and the others were merely ſecondary.

Either the plaintiff ſaw the letter of Blane or he did not. If the laſt; then there is no room to argue, that he relied upon the credit of Blane. But if the former; then, he falls within the exception mentioned in *Hooe* vs *Oxley*.

If the bills were merely pawned as a ſecurity for payment for the tobacco, then the plaintiffs claim cannot be maintained; becauſe a factor cannot pledge the property of his principal as a ſecu-

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rity for his own debt, *Paterson* vs *Tash*, 2, *Stra.* 1178.

The plaintiffs delay in calling on Blane ſhews he did not think him liable; and that he was probably indeavouring to get it of Hunter; whoſe credit he knew was declining.

Upon principle, if the plaintiff ſaw Blane's letter, he took the bills ſubject to the conditions and reſtrictions which is contained. *Dougl.* 297.

MARSHALL in reply. The authority of *Hooe* vs *Oxley*, as applied to this caſe, remains unimpeached. For although Blane did not receive value for his bills in this caſe; no more did Oxley and Hancock for theirs, in that.

Whether the principal receives value or not is unimportant; provided the agent has power to draw. The plaintiff clearly took the bills on the credit of Blane. It is, at firſt ſight, preſumable that the payee ſees the authority, before he takes the bill; to omit it would be ſuch a groſs act of indiſcretion, as few men would be guilty of. The concluſion therefore is, that the plaintiff ſaw the power, and having ſeen it, he was not bound to enquire further, whether the principal actually received value for the bills or not?

But whether the plaintiff ſaw the power or not he was bound by it; becauſe he ought to have ſeen it: and if he did not, it was a folly; which would not avail him. For by contracting under it, he, in judgment of law, undertook to know it, and therefore was bound by its contents. But if he is bound by it, he ſhould, on the other hand, have all the benefits of it.

In *Hooe* vs *Oxley* it was not proved that all the letters were ſhewn to the ſellers; but Ponſonby held them; and therefore it was decided, that Hooe and Harriſon might avail themſelves of them, becauſe they would have been bound by them.

The intimacy between the plaintiff and Hunter forms no objection; it would equally have held in

Hooe

Hopkins, vs Blane.

Hooe vs *Oxley:* But it was conſidered as unimportant.

If the plaintiff had truſted Hunter only, he would have taken his note or bond; but omitting to do ſo, he muſt be held to have relied on Blane. Who, having truſted an improper man, ſhould bear the loſs when the truſt has been abuſed; and not an innocent man; who, through him, confided in Blane.

The plaintiffs letters do not ſhew, that the bills were paid for, in tobacco, more than money. For he was only remonſtrating with Hunter, whether he would ſuffer the bills to be ſacrificed? but this did not deſtroy Blane's obligation, to pay the bills, which were properly iſſued.

The bills were not taken as a pledge; for the plaintiff took them as a payment and had an immediate right to ſell them.

The argument, that Hunter was an agent for a particular purpoſe only, proves nothing. For if he was a particular agent, it was to draw bills within a certain limited time; and he has done it, within that time. He was not circumſcribed by Blane, as to the mode of negotiating the bills; and therefore the payee was not bound to make enquiry, relative thereto.

As to the argument founded on the exception to the general principles laid down by the Court, with regard to agency, in *Hooe* vs *Oxley;* the anſwer is, that there is nothing to bring the caſe within it. That exception means a fraudulent combination between the bill holder and the agent, to defraud the principal; as for inſtance to get payment of an old debt, or for ſome other corrupt purpoſe; but it was not intended to apply to the caſe of a fair bargain, for an article as current as money; and capable of being turned into it, at any moment. Such a tranſaction inſtead of being colluſive, was actually putting funds into the hands of the agent, to enable him to exerciſe his functions.

But

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But all the principles contended for, on the other ſide, were overuled in that caſe of *Hooe* vs *Oxley;* which is ſtronger than this, for another reaſon, beſide that, which I mentioned before; namely, that here there was an expreſs authority given the agent; which the Court thought could only be implied there.

In that caſe Ponſonby had no right to ſubſtitute himſelf for the planters; yet, the Court held the principals bound, by the ſubſtitution.

That Hunter was a merchant makes no difference; or if any it is againſt Blane. Becauſe if Ponſonby was not a general merchant, it was more manifeſt that he acted as agent; and therefore the bill holder was the more bound to exact a ſtricter conformity to his agency, and to take care that he did not exceed his powers in the tranſaction.

The plaintiff's not ſending the bills immediately does not alter the caſe; becauſe no loſs is proved to have been ſuſtained in conſequence of it; and, being amongſt the firſt that were drawn, they could have created neither caution nor ſuſpicion in Blane. Who would have concluded that they were drawn for the purpoſes of the agency. Beſides it was held in this Court, in the caſe of *Stott* vs *Alexander* 1 *Wash.* 331, that eighteen months was a reaſonable time, for negociating bills of exchange drawn here.

Both agent and principle were liable, if the plaintiff choſe to conſider them ſo; and he might purſue them one after the other, if he thought proper.

In ſhort, upon principle, as well as upon the authority of *Hooe* vs *Oxley* (which in all its parts comes compleatly up to the preſent caſe,) I contend that the decree is erroneous, and ought to be reverſed.

PENDLETON Preſident. On this occaſion we are referred to the caſe of *Hooe & Harrison* vs *Oxley & Hancock*, 1 Waſh. 19, as a caſe where the

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the principles are eſtabliſhed which direct the preſent decision. We have reviſed that caſe and approve, as well of the general principles laid down, as of the application of them to that caſe, and if thoſe principles apply equally to the preſent caſe, the ſame decree will be made; which makes it neceſſary to compare the circumſtances of the two caſes.

Both powers are of the ſecond claſs mentioned in that caſe; *limited as to the object*, or the buſineſs to be done, and the agent *left at large* as to the *mode* of tranſacting it. In that caſe the buſineſs of Ponſonby was to procure conſignments of tobacco to Oxley & Co. ſhipped on board their veſſels; to facilitate which, he was empowered to make advances to the ſhippers; and for that purpoſe to draw bills of exchange on Oxley & Co; which they promiſed ſhould be duly honored. In this reſpect that caſe is miſtated in the outſet, that he was authorized to purchaſe tobacco; but the miſtake is corrected in the opinion of the Court. The bills in that caſe were drawn for the tobacco purchaſed to load the lady Johnſon, and ſhipped on board her by Ponſonby himſelf, conſigned to Oxley, & Co. when other conſignments were not to be procured for her loading: ſo that the principal purpoſes were anſwered; namely, that of loading their veſſel; and intitling them to commiſſions for the ſale of the tobacco. The only difference was, that in caſe the tobacco did not produce the amount of the advance, he would become their debtor for the difference, inſtead of many correſpondents: and they left the opportunity of *engaging* ſuch correſpondents in future. Which being of an inferior nature to the other, it was doubted whether Ponſonby was not within the ſtrict limits of his agency, ſo as to entitle him, to his damages againſt Oxley for having proteſted his bills, if the caſe had come on as between them; eſpecially, as by their letter of November the 30th 1784, with full information before them of what he had done, they ſeemed to confirm it but forbid its being repeated.

In

Hopkins, vs. Blaney.

In this caſe, if the cauſe had come on between Hunter and Blane, it would not admit of a moments doubt. The bills were drawn for the purchaſe of tobacco, not authorized by the power, nor applied to the uſe of Blane, either as a remittance, or for the diſpatch of his veſſels: it is conſigned to merchants at Havre de Grace, not named in the power, and the proceeds advanced to Mr. Hunter here, and applied in the purchaſe of produce and payment of his debts. The produce not ſtated, to be that of grain ſent to Blane, was to bring it, by a circuitous operation, within the power.

We then compare the caſe of the bill holders. Ponſonby had been from May 1783, in the exerciſe of his power of loading Oxley's veſſels and in the habit of drawing bills for advances to the ſhippers; and his power communicated in a circular letter written to engage correſpondents. However, in the infancy, his power to draw was not ſo *notorious*, and an endorſer was in ſome inſtances required. Mr. Smith endorſed one of his bills; of which Smith informs Oxley by letter in September 1783, taking notice, that Ponſonby had applied to him to endorſe his bills on them, to get money to advance to the ſhippers; and that he had endorſed one. In anſwer to this letter they thank Smith for his aſſiſtance to Ponſonby, whoſe bills on them they ſay *will meet due honour*. A general expreſſion, not confined to that particular bill, but to Ponſonby's bills generally, which continued to be frequently drawn and as conſtantly paid; untill thoſe in diſpute were drawn, circumſtanced as before ſtated, in fall 1784, and were proteſted.

In the preſent caſe the bills were drawn in the commencenent of the agency: when the agents power to draw had gained no acceſſion from his habit of drawing and Blane's of paying; and therefore muſt depend on the power itſelf and the circumſtances under which Mr. Hopkins received the bills; that is to ſay, whether he took them upon the credit of Hunter himſelf, or was induced to take them

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them on the credit of Blane, from a well founded opinion that he was bound to pay them? It was laid down by the appellants counsel, that bills of exchange are purchased upon the credit of the person upon whom they are drawn; but this as a general position is not correct: they are generally taken on the credit of the *drawer*, which if doubted, is fortified by an indorser, the payee not being bound until his acceptance; and then the drawer is not discharged till actual payment, unless by delay, the holder gives credit to the acceptor, and so looses the other resort.

We suppose the counsel only meant, the case of a bill drawn by an agent on his principal, pursuant to his power given to draw, and to such bills the observation applies. That these bills were not within the letter or spirit of the power has been stated; and whether Mr. Hopkins was induced to take them, on a supposition that they were drawn to procure money to fulfil the purposes of the agency, by circuitous operation, depends upon the circumstances attending the negotiation.

That Hunter shewed these letters to some persons to whom he wished to sell bills, as a proof of his power to draw is proved, but this would seem to be after these bills were drawn; which Scott proves to have been the first drawn by Hunter, after the receipt of the letters. That they were shewn to Mr. Hopkins at the time, is not otherways proved than by his own declaration to Watson; when made does not appear, nor is it material, since, whatever credit may be privately due to the assertions of that gentleman, they are not here to be taken for proof. It might be that Hunter found it unnecessary to shew those letters; since his bills might pass to Mr. Hopkins, upon his *own credit as a merchant*, with whom Mr. Hopkins had had former dealings, and been in intimacy. The accounts between them, with Mr. Hopkins's subsequent letters, make a strong impression that this was really the case, and the bills taken upon *Hunters credit*. The powers, from Blane, being only

only now reſorted to, when Hunters inſolvency would otherwiſe occaſion a loſs of the money.

Whether the bills were at firſt taken abſolutely, or on truſt, to be ſold for Hunter and whether the exchange was fixed or left to depend upon what they would ſell for, ſeems quite immaterial to Blane, and therefore need not be conſidered. One circumſtance drawn from the correſpondence though ſeems of weight. If Mr Hopkins took theſe bills upon the credit of Blane, it was certainly his duty, upon the general principle of negociation, to have preſented them to Blane or given him early notice of them, to enable him to regulate his conduct as to the agency of Hunter; for want of which he might have paid other bills which he would have refuſed, if he had known himſelf bound to pay theſe bills: or finding his agent abuſing his confidence, he might have put an end to his powers at an earlier period. But theſe bills received the 22d of February remained in Mr. Hopkins's hands, for reaſons diſcloſed in the correſpondence with Hunter, at leaſt till *May the 4th* the date of Mr. Hopkins's laſt letter, and probably longer; ſince by the note at the foot of the bill they do not appear to be preſented till the 31ſt of Auguſt; and that is the firſt notice which Blane had, of their being drawn. There ſeems to be the ſame reaſon for diligence in the application to Mr. Blane, if he was chargeable in this caſe, as there is for the like diligence to charge the *drawer*, when he is to be made liable, for want of acceptance and payment. The form of the bill too, directs the money to be charged to the *account of Hunter*, inſtead of directing it to be placed to account of grain purchaſed for your uſe by me as your agent; a circumſtance which ought in theſe caſes to be obſerved; in order to ſhew on whoſe credit the bills were drawn and to avoid diſputes of the preſent nature. But as this is not always attended to, and was not obſerved in *Oxley's* caſe, it would not alone have weight; yet it has ſome, when added to the other circumſtances. The accounts ſhew that

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the plaintiff & Hunter had dealings together *as ordinary merchants*; an account of which was settled in *December* 1789. The balance begins the account, in which are added ſundry articles of debit and credit, undoubtedly of a *private nature*; and with theſe are intermixed a debit for the tobacco and the credit for the bills, differing in amount; and although that difference is only £ 6: 15: 9, it is yet a circumſtance to ſhew that theſe articles were not a *ſeparate* independent dealing.

The correſpondence confirms the idea of the bills having been taken from Hunter in his *private capacity* and not in his agency; ſince not a word or hint is given of Blane's having any concern in them in any of the letters.

When we return to the accounts, there are two which agree, the 1ſt annexed to Blane's anſwer, the other I ſuppoſe introduced by Mr. Hopkins, making a balance of £ 248: 4: 9 due to him. There is a third account with the ſame articles and making the ſame ballance; which being made an article of debit, this article is added "to bills of exchange on Thomas Blane returned proteſted with coſts £ 560: 6: 9, making £ 808: 11: 6;" and this account, ſo far, has the name of Mr. Hopkins October 9 1790, the ſame date of the other two. Then follow ſeveral credits, amounting to £ 375 11: 7½, which would leave a balance of £ 432: 19 10½ only due from Hunter, ſhewing £ 127: 6: 10½ to have been paid him in part of the bills; and this would evince further, that Mr. Hopkins, after the proteſt, conſidered Hunter as his debtor. But at the foot is a certificate of Mr. Scotts that "the above is a true ſtatement of John Hopkins's account as it ſtands on the books of the late William Hunter;" which creates a doubt, whether the debit of the proteſted bills as well as the latter credits were not taken from Hunter's books, ſo as to do away the influence of Mr. Hopkins' having made it a debit in his account; and that circumſtance is diſregarded.

But

Hopkins, *vs.* Blane.

But another circumstance has considerable weight; namely, that although these bills were protested on the 2d of November 1790, Mr. Hopkins does not appear to have made any application to Mr. Blane until May 1793; when he commenced this suit. Which evinces that during that time he relied on Mr. Hunter; thus depriving Mr. Blane of an opportunity of pursuing a remedy against Hunter, as he might have done, if a demand had been made at an earlier period, by Mr. Hopkins. Upon the whole circumstances then we are of opinion, that Mr. Hopkins took these bills upon the credit of Mr. Hunter (*unconnected* with his agency for Blane;) and not upon the credit of Blane in consequence of that agency. Therefore upon general principles, as well as in conformity to the decision in Oxley's case, we are, unanimously, for affirming the Chancellors decree, dismissing the bill.

MITCHELL,

against

KELLY.

KELLY brought *Indebitatus assumpsit* against Mitchell in the District Court of Northumberland; plea *non assumpsit* and issue. Afterwards on the 6th day of April 1795, the parties by rule of Court referred the cause to the determination of Bellfield and Brewer, or their umpire, and agreed that the award shall be made the judgment of the Court. The order was that the referees might proceed *ex parte* if either side failed to attend after notice. In April 1796, the arbitrators returned their award, bearing date the 25th day of March 1796; wherein, after stating that due notice had been given and that they had had the parties before them, and considered the exhibits and evidences produced, they awarded a balance due

Question, Whether the act of Assembly relating to awards applies to orders of reference made in causes during the progress of suits?

Not Necessary that the award should lie in court two terms before judg-

to

Mitchell, vs. Kelly.

to Kelly, from Mitchell of £ 203:7:7, agreeable to an account thereto annexed. Which award was made the judgment of the Court on the 4th day of April 1796. From this judgment Mitchell appealed to this Court.

ment if the party offers exceptions; for that is a waiver.

The defendant filed a bill of exceptions to the Courts opinion, ſtating that he had moved to reject the award for reaſons ſtated in his affidavit (which is annexed to the accounts furniſhed the defendant by the ſaid Brewer one of the arbitrators;) but that the Court overruled the motion.

The affidavit, referred to, ſtates that the defendant had received no notice, from the plaintiff, to attend the arbitrators ſince the firſt of September then laſt paſt; and that the account, thereto annexed, in the hand writing of the ſaid Brewer was, by him, delivered to the defendant, ſome time in the ſaid month of September.

This affidavit bears date the 2d day of April 1796.

WICKHAM for the appellant. The award muſt lie a term for the party to except; for otherwiſe he would have no effectual opportunity of ſhewing cauſe againſt it; becauſe the judgment would be final and an execution might iſſue on it before the time, for making his exception, had expired. But this would be plainly contrary to the act of Aſſembly. *Rev. Cod.* 54. The appellant offered a good exception to the award, and whether true or falſe was not important, for he ought to have been allowed time to ſupport it. Another notice ſhould have been given to the appellant after the copy of the account was furniſhed him. Therefore although there was no corruption in the arbitrators, yet the word miſbehaviour will embrace it. Becauſe not having given further time, when they were bound to do ſo, they did miſbehave.

WARDEN for the appellee. The act of Aſſembly does not apply to the caſe; for that was only intended for references before the commencement of a ſuit, and not for thoſe which were made in the

Mitchell vs. Kelly.

the progress of a cause, without the forms and solemnities mentioned in the act. But if it did, still there is no ground to impeach the judgment. For the account was delivered to Mitchell by one of the arbitrators in order that he might state his objections; which he never did: and therefore the inference is, that he had none. The exception made in Court was not sustained by any evidence; and, if it had, the matter of it was not sufficient to delay the judgment: Especially as no specific exception to the account was made either to the referees or the Court.

PENDLETON President. Delivered the resolution of the Court as follows.

This is an appeal from a judgment of the District Court entered, upon an award made pursuant to a submission by order of Court, in a suit depending; and at issue. The judgment was moved for at the term the award was returned; and opposed by the defendant for want of due notice; which being overruled, he filed his exception.

The Counsel here has added another objection, that the judgment was entered too soon, in the term when the award was returned; since the act of Assembly of 1789, relating to awards, allows the parties till the end of the next term, to make their objections.

Without deciding, whether the act extends to the present case of a submission made in a suit depending? we are of opinion that admitting it does, the privilege of time might and was waived, by the defendant, in this case; he having brought forward his objections at an earlier period.

As to the notice the affidavit is equivocal; he says, that Kelly gave him no notice after the first of September; thereby implying, that he had given him notice before, and admitting that he might afterwards have had notice from the arbitrators. Which is the rather presumable, since he admits, that he received in that month Kelly's account

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count from one of them; no doubt for some purpose; probably, for an opportunity to make objections to it; and these the arbitrators waited for, until the month of March following. In which time he may have made them; and they may have been considered; by the arbitrators. Who report, that upon due notice they had heard the parties; had considered their exhibits and evidence; and had made the award between them. He does not say, that he has any objection to the account or to the justice of the award; but is quibbling in terms about the notice.

Judgment Affirmed.

PRYOR

against

ADAMS.

The court of Chancery has jurisdiction in all cases where a discovery is wanting.

Mode of proceeding on the part of the defendant where a merely colorable suggestion is made in order to give the C't. of Chancery jurisdiction.

The Court of Chancery should judge on the proofs before it and not send the cause to the jury.

THIS was an appeal from a decree of the High Court of Chancery. The bill states, that the defendant was indebted to the plaintiff as surviving partner of Adams and Parke in £66:7 10 specie, with interest from the year 1774; when the bond was given amounting to £16:14. That in the year 1780 the defendant insisted to discharge the said bond, and applied to Street the plaintiffs agent to receive payment thereof in paper money. Who refused, unless the defendant would agree to pay the depreciation. That the defendant undertook to do so, and in February 1780, paid through the hands of Brand £83:1 in paper money, worth only when reduced by the scale £1:17 specie. That neither the plaintiff or his agent would have received the same if the defendant had not promised to make good the depreciation, whenever a general scale should thereafter fix the same. That the defendant now refuses to pay, "pretending, that as the plaintiff was so credulous to give up the bond on his promise to pay the depreciation

that

that he could not compel him to fulfil his said engagement or prove the same but by the oath of the defendant." The bill therefore in the usual form prays that the defendant may answer the premises; Interrogates him relative to the facts; Asks a decree for the ballance of the money after deducting the payment aforesaid reduced by the scale: And concludes with a prayer for general relief.

Pryor, vs. Adams.

Payments in paper money before 1781 good.

Plea to the juridiction of the Court of Chancery how tried.

The defendant demurred to the jurisdiction of the Court; because the plaintiffs suit was brought upon an assumpsit, which, if made was cognizable at common law. And by way of answer, he refers to Street's certificate to shew the payment of the money: Denies the promise to make up the depreciation; or that he made any other promise than the following, "That if the depreciation was "generally made up, so that the defendant could "recover it from his debtors he would make it up "to the said Street."

The deposition of Hopkins states that he was called on in February 1780, by Street, to take notice, that if the said John Street would receive a sum of money due on bond to Adams and Parke from Pryor, that he Pryor agreed to make good the depreciation, if any depreciation should ever be demanded; and that Pryor agreed thereto in the presence of the deponent.

Brand says he paid off and took up the bond, which he cant find; and that Street told him Pryor was to pay the depreciation if customary.

Street (whose deposition was rejected in the High Court of Chancery because he was interested) says, that the defendant told him, if he would receive the money of Brand and any depreciation was paid by any one, that he the defendant would pay it likewise. That he received it upon those terms and no other. That Hopkins was called on as a witness to the agreement. That as well as he remembers upon a conversation betwixt him and the defendant, some time afterwards relative to an enquiry made by the defendant of him the deponent

Pryor, vs Adams.

deponent, in whoſe hands the bond was? and on being told it had been given up to Brand (with whom the defendant ſeemed diſpleaſed) under the agreement aforeſaid, the defendant anſwered whoever had the bond had a right to the depreciation, and that he would rather the deponent ſhould have it than Brand who had denied his having the bond. That the deponent aſked the defendant if Brand did not claim the depreciation if he would pay it? and that he anſwered he had rather the deponent ſhould have it than Brand. That Brand afterwards told the deponent that he would give up his right to the depreciation to Parkes eſtate.

The ſecond depoſition of Hopkins ſtates that Street called on him to take notice that Pryor agreed to pay the depreciation on the bond, and that Pryor anſwered very well, and turned off.

In May 1792, the Court of Chancery diſmiſſed the bill with coſts upon a hearing; but at the ſame term ſet aſide that decree, and directed an iſſue to be tried before the Diſtrict Court of Richmond to determine, "whether the defendant at the time the money paid in diſcharge of the bond in the bill mentioned, was received or after agreed to allow the depreciation?"

The jury found that the defendant did agree to allow it.

The Court of Chancery upon the verdict being certified decreed the defendant to pay to the plaintiff £ 66: 7, with intereſt from the 3d day of January 1780, and the coſts. From which decree Pryor appealed to this Court.

Street's certificate is, that Brand paid him £ 66 7, with £ 16: 14 intereſt thereon. And in a ſhort time afterwards took in the bond.

There is a receipt in the record from Brand to Pryor for £ 3: 2, (the amount of the money reduced by the ſcale) which Brand had paid Street on account of the bond.

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MARSHALL for the appellant. The decree is erroneous upon two grounds; 1ſt. that the Court of Chancery had no juriſdiction, there being a competent remedy at common law. 2d. That the Chancellor ought to have directed a new trial, upon the certificate of the Judge, that the weight of evidence was againſt the verdict.

As to the firſt; the matter ſtated in the bill was but a plain aſſumpſit; and therefore properly triable at law. For there is no ground for the juriſdiction of the Court of Chancery unleſs the ſuggeſtion that the plaintiff could not aſcertain the amount of the bond gave it; but this ſuggeſtion will be no foundation for the juriſdiction in this caſe; becauſe it appears by the teſtimony that the plaintiff could have proved it. Therefore the ſuggeſtion was only colourable: and for the ſake of tranſlating the juriſdiction.

Although there is no plea in form to the juriſdiction, yet there is a demurrer, which as to this matter will ſerve as a plea.

As to the ſecond point. The Judge who tried the cauſe having certified that the weight of evidence was againſt the verdict, it ought to have induced the Chancellor to ſet aſide the verdict. In England new trials are repeated until the Judge who tries is ſatisfied; perhaps here though in analogy to the proceedings at law, there ſhould not be more than two new trials; but in a caſe circumſtanced like this, there ſhould be at leaſt that number.

DUVAL for the appellee. We could not prove the amount of the bond except by the teſtimony of a witneſs whoſe depoſition is objected to by the appellant. * The defence was an unrighteous one; and therefore a Court of Law would not have ſet aſide a verdict againſt it. Conſequently by analogy to their practice, the Court of Chancery did right in not awarding another trial.

RANDOLPH on the ſame ſide. The bill aſks the ſetting up a higher ſecurity for a debt, and the

* *Street's* vide *ante page* 383.

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demurrer confeſſes it. Which gives the plaintiff a clear title to his demand.

The juriſdiction of the Court of Chancery is threefold. 1. It is aſſiſtant to the Courts of law. 2. It is concurrent with them. 3. It is excluſive of them. As to the firſt, the juriſdiction is maintainable on that ground; becauſe the bond was of higher dignity than the aſſumpſit; and therefore the demand was a proper foundation for application to a Court of Equity. As to the ſecond, although the plaintiff might have had redreſs at law, that will not prevent his application to the Court of Chancery. There was a promiſe which ſhould be carried into execution, upon the circumſtances of the caſe. As to the third. The diſcovery could only be compelled in the Court of Chancery; for a Court of common Law was incompetent thereto: And of courſe the plaintiff was entitled to come into equity for relief.

With regard to the Judges certificate; In England the Court of Chancery repeats new trials only in two caſes, 1. when a freehold is concerned, 2. when the verdict is againſt the Chancellors own opinion. Neither of which is the caſe here. In *Southall* vs *M'Keand* 1 *Wash.* 337, it was held by the Court, that the Chancellor ought to have decided, upon the teſtimony before him, without the intervention of the jury.

MARSHALL in reply. It was ſaid that the Court of Chancery in this caſe was aſſiſtant to the law, But how was it aſſiſtant? Did the plaintiff aſk that a higher ſecurity might be decreed him? On the contrary he only aſks that a debt which he ſays is founded on a promiſe may be decreed him. But if he had aſked the bond to have been delivered up, what uſe would he have made of it? He could not have entertained a ſuit upon a cancelled bond, he muſt ſtill have ſued upon his aſſumpſit; and therefore he in fact, only aſks the ſame redreſs in Equity, which he might have had at law. But then, it is ſaid, that the Court of Chancery has

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jurisdiction in all cases of fraud and seduction. Be it so; but still none appears here. It is only the common case of a breach of promise, for which an action of assumpsit at Common Law would have lain. But still it is urged, that a discovery was wanting. I have already answered this argument. For it appears that the plaintiff could have proved it; and therefore, upon his own ground, it was not necessary to resort to a Court of Equity.

As to the other point; *Southall* vs *M'Keand* has no influence upon the case. Because there it appeared, that the whole evidence, which was before the jury, was before the Court of Chancery. A circumstance that does not appear in this case.

ROANE Judge. The bill of the appellee, now before us, although it contains no specific prayer for a discovery of the bond in question; yet upon the whole, by a liberal construction, it may amongst other things be considered, as a *bill of discovery*.

Admitting with the demurrer in this case, that the question concerning the depreciation is one purely of a legal nature, yet as in a trial at law, the appellee would have had occasion to produce the bond itself, or at least to have had evidence of its amount and date from the confession of the appellant; and as he should not be compelled to trust to the chance of being able to establish the amount by other testimony, the present bill is on that ground clearly sustainable.

The demurrer stating according to the form of such proceedings in other cases "that the said bill contains no matter of equity" is taken to refer to the bill only; and when the demurrer is overuled, the jurisdiction of the Court is sustained, at least, until the hearing; and if at the hearing, the evidence should support those allegations in the bill which confer a jurisdiction, the Court being in possession of the cause will make an end of it; and not turn over the parties to another form so as to produce circuity and expence. But if after the demurrer is overuled, which has impliedly admitted the truth

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truth of the allegations in the bill, the evidence of the anſwer and other teſtimony ſhould contradict the allegations in the bill on the point conferring juriſdiction on the Court, it would then be material to inquire, whether the Court ſhould conſider their juriſdiction as ſuſtained on that point; by the implied admiſſion in the demurrer in oppoſition to ſuch poſitive teſtimony; and go on to conclude the cauſe? This is an important queſtion; and one, reſpecting which I ſhould require further time to deliberate, but that it is not neceſſary to be decided in this cauſe; ſince it is in teſtimony that the bond is or was in the hands of the appellant or his agent; and the appellant has given teſtimony reſpecting the amount of that bond in his anſwer. Which the appellee had in equity a right to require.

The evidence then as to the point of diſcovery of the bond or its amount, ſupports the allegations of the bill inſtead of falſifying it; and the only remaining queſtion is what ſhall be done in a cauſe which as ſtated and proved at the trial is depoſited with a Court of Equity on one of the ordinary grounds of its juriſdiction? And this will lead us to the teſtimony.

The anſwer of the defendant *Pryor* poſitively denies the agreement to make up the depreciation, as charged in the bill, in a manner which ſubſtantially correſponds with the account, given by Brand, of the acknowledgment of J. Street relative thereto. This acknowledgment then may be thrown out of the ſcale, which oppoſes the defendants anſwer; and then the compariſon of the latter will be made with the teſtimony of Mr. Hopkins. His firſt depoſition, for his ſecond does not appear to have been relied on in the argument, if it were as clear and poſitive on one hand as the anſwer is on the other, muſt be repelled by the rules of Equity. But the terms of the depoſition "if depreciation ſhould ever be demanded" (which exclude the idea of a demand by the obligee; who had before and would again demand ſuch depreci-

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ation; and therefore would not be put upon an hypothesis) are supposed to refer to a general legislative requisition, which hath never yet taken place with respect to payments actually made in paper; and therefore by the best construction of this testimony the appellant, by the terms of it, is clearly not responsible.

But it is also in testimony that application was not made for payment by Street and Brand; and though the particular times are not mentioned, it is supposed they were not long before the actual payment of the bond; and this tends to overule an idea, that there was any very great aversion, in Street, to receive paper money. The same inferrence may be drawn from the circumstance of this money being as valuable as specie to Adams.

For these reasons I agree with the Chancellor in his first decree that "the allegations of the bill "which are denied by the answer not being prov-"ed by the evidence," the bill ought to have been dismissed; and I think he ought to have adhered to that opinion, conformably to the rule of evidence established in equity. It appears to me therefore that the issues were improperly awarded; and that all the subsequent proceedings were consequently erroneous.

FLEMING Judge. Two questions have been made in this cause. The first is whether the Court of Chancery had jurisdiction of the case? and secondly, whether there was such an assumpsit proved, as should oblige the defendant to pay the money claimed by the bill?

As to the first question; This was plainly a bill of discovery; and although the plaintiff might have had redress at common law, if he could have clearly proved the facts, yet this might have been attended with difficulty and hazard; and ultimately perhaps he might not have been able to have produced effectual testimony by any other mode, than a bill in Chancery in order to compel a discovery; especially as the bond was out of his pos-

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ſeſſion and the tranſaction of pretty long ſtanding. Therefore upon the ground of juriſdiction I ſee no reaſon to diſturb the decree.

But upon the merits I think the weight of evidence was clearly with the defendant; and that the aſſumpſit was not ſufficiently proved to entitle the plaintiff to a decree.

The anſwer denies the aſſumpſit; and ſays that the defendant told Street, that "If the depreciation was *generally made up*, ſo that he could recover it of his debtors, he would make it up." Which was reaſonable in itſelf, as he would then be placed on the ſame footing with others; and could recover the ſame meaſure from his debtors, which he was obliged to pay to his creditors.

This allegation of the anſwer is confirmed by the teſtimony of Brand; who ſays, Street told him, that the defendant had agreed to pay the depreciation, *if cuſtomary* (and not that he would pay it at all events, whether others did or not:) Thereby ſtill alluding to what ſhould be eſtabliſhed as a common rule throughout the ſtate.

So that here is a poſitive anſwer corroborated by the depoſition of a witneſs; and theſe are oppoſed by the teſtimony of Hopkins only; whoſe recollection does not appear to have been perfect as there is ſome variation in his two depoſitions which both refer to Armſteads ſale. For in the firſt he ſays that the defendant agreed to make good the depreciation, *if any depreciation ſhould ever be demanded.* And in the ſecond he ſays that Street called on him to take notice that Pryor agreed to pay the depreciation on a bond the ſaid Street had to collect for Adams and Parke, when Pryor anſwered *very well* and turned off. Of courſe the poſitive anſwer, corroborated by the depoſition, muſt prevail; according to the known rule in Chancery proceedings, that in order to defeat an anſwer when reſponſive to the bill, it muſt be contradicted by two witneſſes, or by one witneſs and ſtrong circumſtances. Of which there are in the preſent caſe. The

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The result is, that I am of opinion that the first decree of the Court of Chancery was right; and that the subsequent issues were improperly directed, as I think there was no occasion for a jury at all. Of course the final decree founded on the issues is erroneous; especially as the judges who tried the cause have certified that the verdict was against the weight of evidence.

I concur in opinion therefore, with the judge who preceded me, that the decree appealed from should be reversed; that all the proceedings subsequent to the first decree should be set aside; and the first decree affirmed.

CARRINGTON Judge. Concurred.

PENDLETON President. On the first point as to the jurisdiction, I am well satisfied that the demurrer is to be considered as a plea to the jurisdiction; so as to take the case out of the act which precludes appellate Courts from proceeding to a reversal for want of jurisdiction, if it be not pleaded in the inferior Court; And I am also of opinion that we are to consider the question of jurisdiction now, as if the cause was heard upon the bill and demurrer, independent of any subsequent proceedings.

It was objected that a man may in his bill alledge any fact to give jurisdiction, and bring every case into the Chancery; and it was asked how a defendant is to avail himself of the objection to the jurisdiction, in case the fact alledged to give it be not true? The mode is obvious; he may by plea deny the fact, and on that, ground his objection. The fact thus put in issue is to be tried; If found for the defendant, his objection operates; If found for the plaintiff, the question occurs whether the fact alledged be a sufficient ground of Equity to sustain the jurisdiction?

A demurrer admits the facts to be true; and comes to the other question at once: which we are to consider upon the suggestions of the bill.

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The plaintiff charges a promise to pay; which, if proved, would entitle him to a remedy at law. But he says, that having in consequence of the promise given up the bond, he is unable to fix the quantum of his demand, without a discovery from the defendant; which he calls upon him to make. In this view it is a bill of discovery; which is admitted to be proper in equity: And the consequence is also admitted and established; namely, that on this discovery, the Court will finish the cause; and not send the parties to another Court for trial.

On the point of jurisdiction therefore I have no difficulty in overuling the demurrer and come to the question upon the merits.

The Court approve of the principle laid down in *Southall*, vs. *M'Keand*, that we are to consider whether the Chancellor exercised his discretionary power properly, either in not being satisfied to decide upon the merits, without directing an issue? or in being satisfied with the verdict as certified?

We therefore consider the case, 1st Upon the merits. The complainant charges a positive promise to pay the depreciation, in consideration of the plaintiffs receiving his paper. This is denied by the answer, which is contradicted but by one witness, Mr. Hopkins; and that too, in a second deposition; after he had, in the first, proved a conditional promise, much of the same nature with that admitted in the answer; and spoken of by the other witnesses. Is this a circumstance to aid his testimony against the answer? It strikes me as giving additional weight to the scale of the answer, that he should vary in so material a point.

We then come to what was the real promise.— The answer admits he promised to pay depreciation, *if it was generally made up, so that he could recover it of his debtors.*

Brand proves the account of the promise given him by Street, was to pay depreciation *if it was customary*; and Hopkins, in his first deposition, says,

ſays, it was to pay if demanded. Which muſt be underſtood, if demanded and paid generally; and not a demand by that particular creditor; ſince it could not be doubted that he would make the demand, if that alone could entitle him.

If the promiſe be underſtood literally, and to depend upon depreciation being generally or cuſtomarily paid, then there is no proof of a ſingle inſtance of depreciation being made up by a debtor. On the contrary we have three, where it was not made up; that is to ſay, one of Quarles for Pryors debts; and the others of Mr. Adams (one as creditor, the other as debtor:) who would probably never have complained of it, if our act of Aſſembly had not been overruled by a law of ſuperior authority. Upon the ſtrict letter of the promiſe therefore it is againſt the plaintiff.

And what is the ſpirit of the promiſe? Nothing more than to ſubject this caſe to the general regulations which ſhould be eſtabliſhed, either by general conſent, or by the Legiſlature. In this ſenſe, Pryor ſwears he made it, and gives a ſound reaſon for doing ſo; namely, that as a creditor he would receive a benefit to compenſate for his loſs, if it may be called one, as a debtor.

And what rule is given by the act of 1781?

The appellees counſel ſay that the ſcale in that act fixes the rule, either in the enacting part or in the proviſo, authorizing Courts to vary the ſcale upon circumſtances.

Both theſe are confined to debts and contracts commencing after the firſt day of January 1777, and they do not reach the preſent debt created in 1774. The rule as to ſuch debts being, that if not paid, they are to be recovered in ſpecie; but if paid before 1781, the payment is to ſtand, as a diſcharge.

I am therefore of opinion, that the merits were clearly againſt the plaintiff; that there was no oc-

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caſion to have directed an iſſue in the cauſe; but that the firſt decree of May the 17th 1792, diſmiſſing the bill with coſts, was a proper one; and ought to be affirmed; and that all the ſubſequent proceedings ſhould be reverſed.

Which renders it unneceſſary to conſider the queſtions diſcuſſed on thoſe proceedings.

On the next day Pendleton Preſident, obſerved, he was apprehenſive that when ſpeaking of the juriſdiction yeſterday, he ſaid that the defendant "may by plea deny the fact and on that ground "his objection. The fact thus put in iſſue, is to "be tried; and if found for the defendant his ob-"jection operates; if found for the plaintiff, the "queſtion occurs whether the fact alledged be a "ſufficient ground of equity," it might be inferred that he thought it ought to be tried by a jury. But that however was not his meaning; for he meant only, that it ſhould be tried, according to the uſual courſe of chancery cauſes.

PROUDFIT

againſt

MURRAY.

The act of 1748 relative to bills of exchange, did not ceaſe untill Nov. 93, notwithſtanding the act of 92, upon that ſubject. Which did not repeal the act of 48, becauſe all th' ſuſpended

THIS was an action of debt upon a bill of exchange drawn in Virginia, upon the ſecond day of February in the year 1793; whereby the drawer requeſted the drawee, to pay to the *payee* or his order three hundred pounds ſterling, *for value in current money there received*, and to place the ſame to account with or without advice. The declaration ſtated the tenor of the bill as above; and that the ſame had been proteſted for non acceptance and non payment. After which it proceeds thus, "of all which premiſes the ſaid defen-"dant on the day of 179 and at the

county

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"county aforesaid had notice." Plea *nil debet* and issue. Upon the trial of the cause the defendant filed a bill of exceptions to the Courts opinion; which stated, "that a question was made to "the Court, by the Counsel for the defendant, "whether this action, which is founded on a bill "of exchange bearing date the 2d day of Februa- "ry 1793, could be maintained under the act of "the general Assembly in the year 1748, entitu- "led &c? and that the Court gave it as their opi- "nion that it might be so maintained." Verdict and judgment for the plaintiff for the £300 sterling, with interest after the rate of 10 per cent per annum, to the time of the judgment; and five per centum per annum afterwards till payment. From which judgment Proudfit appealed to this Court.

WARDEN for the appellant. Took three exceptions.

1st. That the suit is brought upon the act of Assembly passed in the year 1748, and claims ten per cent damages; whereas, at the time of drawing this bill, the act of 1748 was repealed; and, of course, no action could be founded on it.

For, by the act of the 12th of November 1792, there is an express repeal of all former laws upon the subject (which included the act of 1748;) and the suspending act afterwards made on the 28th of December 1792, did not revive it. Because by the act of 1789, it is enacted, "that whensoever "one law which shall have repealed another, "shall be itself repealed, the former law shall not "be revived, without express words to that ef- "fect." Therefore the act of 1748, having been repealed for a time by that of November 1792, was not revived, by the suspension of the latter.

2d. That it is not shewn, in the declaration, that the bill was *presented protested* to the drawer; and therefore that the plaintiff was entitled to 10 per cent for eighteen months only. Because the declaration only states, that the defendant had

acts of that session, related to the first day thereof, as well as the general suspending law, and so, there was no time, during the session, in which the suspended acts operated

If the declaration state that the bill was for current money here received, without naming the *sum* of *current money*, the pltf. can only recover *current money*.

Quere, Whether the bill should be presented protested to entitle the pltf. to ten per cent?

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had notice; and not that it was presented protested to him, as the act of Assembly requires. Of course the plaintiff was not entitled to demand the 10 per cent damages, for a longer time than eighteen months.

3. That the bill of exchange does not state the *sum* in current money that was paid for it; for the declaration only states that it was *for value in current money* there received; whereas by the act of Assembly the *true sum* ought to be stated in the bill, or the Court can only give judgment for *current money*. Therefore the real sum not having been shewn; and the judgment, being entered for sterling instead of current money, is erroneous in that respect likewise.

RANDOLPH for the appellee. As to the objection that the bill should have been stated to have been presented protested to the drawer; the answer is, that this exception does not appear to have been taken at the trial; and as there is a general verdict for the plaintiff, the presumption is that it was proved to the satisfaction of the jury. Besides it is cured by the statute of Jeofails; which aids a title defectively set forth; and this at most, was only a defective setting out of a title, and not a defective title.

Then as to the point relative to the repeal of the act of 1748; that act was clearly revived by the act of the 28th of December 1792, which suspends that of the 12th of November. The Legislature never could have intended, a total repeal of all statutary provisions, relative to bills of exchange, during the period of suspension mentioned in the act of December. The whole current of legislation, at that time, shews the contrary.

The case does not fall within the provisions of the act of 1789; for the word used in the act of December is *suspended* and not *repealed*. These words differ in meaning. Repeal means a total annihilation; but suspend merely interrupts.

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If there had been a special law of revivor, it would have been revived, and the same in effect is done by the law of December. It is a rule that laws *in pari materia* shall be construed together; and therefore these two acts shall be united in construction; and then a future operation will be given to the act of the 12th of November. Consequently the declaration was rightly founded on the act of 1748; which was clearly resuscitated, by that of December.

With respect to the point relative to the judgment being for sterling money; the exception, if it be one, should have been made at the trial. For, if a fixed sum of current money was actually paid for it, that might have been proved, and would have protected it as a sterling bill. So, if it was a bill drawn for property, that also might have been proved; and would likewise have sustained the bill. The defendant therefore should have taken the exception at the trial, in order that the plaintiff might have made these proofs; but having failed to object then, it is now too late, after verdict; when proof is to be presumed. Consequently upon all the grounds taken by the defendants counsel, the judgment is right.

MARSHALL in reply. The act of 1748, was not in force, when the bill was drawn; but it had been completely repealed, by the act of the 12th of November; and was not revived, by the suspending act, in December 1792.

The rule of the common law with respect to the revival of repealed statutes, by the subsequent repeal of the repealing statute, was done away by the act of 1789; and the foundation of the rule at Common Law utterly abolished.

The notion at Common Law is not that the first statute is destroyed; but merely that a temporary barr is interposed for a while, so as to prevent its operation; whereas by our act of Assembly that principle is subverted altogether, and the idea of a barr entirely done away. So that the total extinc-

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tion of the first law is contemplated by the act of 1789. The subsequent repealing statute therefore cannot call it into existance again, without an express provision for that purpose. For it is not like the English rule, which only destroys the action and not the life of the statute; thus leaving a capacity in the statute to exist again, whenever a subsequent removal of the barr shall call it into operation. But here the very life and being of the statute is annihilated; and it cannot be called into existance again, without the express direction of the Legislature declaring, that it shall be revived.

The appellees counsel contends though, that the act of the 12th of November was not in force when the bill was drawn. Be it so; but still it had previously destroyed that of 1748. For nothing more was necessary, for its total destruction, than the passing of the act of November; which wrought its absolute annihilation; insomuch that it could not again be called into operation, but by express words, to that effect, in a subsequent law; and there are none such in the suspending law.

It is said that it cannot be supposed that the Legislature intended to restore the common law; but the Legislature only speak by their acts: and by them this effect has been produced. Which is not greatly inconvenient, because the holder will still have his principal and charges of protest, with common interest. He only does not gain unusual interest; which is no great cause of complaint. Although the Legislature may not, in fact, have meant what results from their acts; and may not have followed my course of reasoning on the subject; yet that will not authorize the Court to oblige the defendant to pay money, which the law does not render him liable for. If this were a penal law merely, the Court would certainly not decide it against the appellant; but in fact, it is a penal case, so far as relates to the extraordinary interest; for that is a penalty, in the strictest sense of the word.

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The difference attempted between a repealing and a ſuſpending law, will not affect the interpretation, which I have been contending for. If it was actually repealed, it was gone; and there could be no revivor, without expreſs words. For the repealing law annihilated it, and prevented a revivor by implication: of which all ideas are utterly exploded, by the act of 1789. Now no reaſon can be aſſigned, why a repealing law ſhall not revive, and yet, if there is a ſuſpending law that it ſhall. There never was a deciſion that a ſuſpending law revives a repleaded ſtatute. Such a poſition is not to be found in the books, and there is no act of Aſſembly which ſays, that if a repealing law is afterwards ſuſpended the repealed ſtatute ſhall be revived. But if there is no ſuch deciſion or act of Aſſembly, it follows, that, if the repeal of a repealing law will not revive the repealed law, no more will a ſuſpenſe of the repealing law have that effect.

Upon intention, it may be obſerved, that if the Legiſlature had meant, that a law ſtruck out of exiſtence ſhould be called into life again, they would certainly have ſaid ſo; eſpecially as the exiſtence of the act of 1789 was known to them.

As to the point relative to the neceſſity of ſtating, that the bill was preſented proteſted, it has been frequently debated but never decided. The caſe of *Scott* vs. *Call* went off upon another point, and no determination is recollected, which can form a precedent. But it ſeems to me indiſpenſably neceſſary that the declaration ſhould ſtate it; becauſe it is part of the plaintiffs title, as it is on that the 10 per cent. accrues. The plaintiff therefore ought to ſet it forth as the foundation of his demand, or the Court cannot give him 10 per cent, for more than eighteen months. In the preſent caſe however the declaration merely ſays, that the defendant had notice; which will only render him liable for common law and not for ſtatutary conſequences: Becauſe notice alone does not ſatisfy the law; the bill muſt be preſented proteſted, or elſe the

penalty

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penalty will not attach. For the penalty is cumulative, and therefore the ſtatute creating it, muſt be purſued, or elſe the penalty does not accrue. But by the act of Aſſembly no other bills, but ſuch as have been preſented proteſted, are entitled to draw 10 per cent interest. The preſenting the bill proteſted is made a condition precedent; which muſt be performed, or the title does not veſt. To exempt the drawer from the penalty, there is no act required upon his part; he is exempted of courſe, unleſs the payee ſhews his title to demand it.

Every thing therefore lies upon the part of the payee or holder of the bill. The law, which requires that the bill ſhould be ſhewn proteſted, was made in order to prevent frauds, with reſpect to notice, where in fact the bill had not been proteſted or negotiated.

It was ſaid that the jury have decided this; but that is not ſo; For they have only decided upon the allegations in the declaration. But, as it was not charged that the bill was preſented proteſted, it was not neceſſary to prove that fact upon the trial. Notice only is charged, and therefore that only was neceſſary to be proved. The jury can never be ſaid to have found what is not made neceſſary to be proved.

It is ſaid that it is only a defective ſetting out of the plaintiffs title. But this is not correct. For the declaration ſets out a good title for one judgment though not for the other; and preſenting the bill proteſted was of the very eſſence of the plaintiffs title. With reſpect to the 10 per cent, the title is not even attempted to be ſhewn by this declaration.

As to the point, reſpecting the judgment being entered for ſterling inſtead of current money; The bill is ſtated to have been for value in current money without naming the *ſum* in current money; which the act expreſsly requires to be done, in order to entitle the payee of the bill to ſterling. The declaration ſays it was for current money without expreſſing the *ſum*; and the proof muſt have

have corresponded with this allegation; for the plaintiff could not contradict his own pleadings. The jury therefore can only be taken to have found the debt in the declaration according to the terms used, in it, by the plaintiff himself; and suppose whatever extraneous circumstances you will, it comes to that at last; because the jury merely find that the declaration is true. Of course the judgment should have been for current money.

It is asked, why the defendant did not object at the trial? The answer is, that he could not; for, if the bill corresponded with the declaration, it was admissible evidence; and there was nothing to except to, until the rendition of the judgment; when the question would first occur.

It is not necessary to argue the point, whether the plaintiff would have been estopped from shewing the true sum in evidence? But if it were, I should contend he could not. For as a verdict cannot contradict the pleadings, no more can the evidence, on which the verdict is founded. At any rate, if he intended to make such proof, he ought to have given the defendant notice of it in his declaration by proper averments, so as to have enabled him to disprove the fact.

PENDLETON President. After stating the case, delivered the resolution of the Court as follows:

Dropping the objections of the blanks as wholly unimportant, the Court has considered the three which appeared to be worthy of notice.

1st. An act passed November 12th 1792, relative to protested bills, repealing all former acts on the subject; and to commence from the passing.

The 28th of December 1792, an act passed declaring the operation of this and many others, alike circumstanced, to be suspended until October 1793.

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During this ſuſpenſion, to wit, in February 1793, this bill was drawn; and would, within the ſaving of the new act of November 1792, be conſidered as commencing in October 1793.

But it is relied on, that the act of November was in force from its paſſage till December 28th; and therefore, that under the act of 1789, the law of 1748, was effectually repealed, dead and gone for a month and ſixteen days; and could only be revived by an expreſs declaration of the Legiſlature. Becauſe ſince the act of 1789, the repeal of a repealing law, does not revive the repealed law, without a direction to that effect.

It was truly ſaid by Mr. Marſhall that the rule in England was the reverſe; a repealed law was revived, by the repeal of that which had ſtopped its force. A rule certainly inconvenient; ſince old acts, long ſince forgotten, might be revived upon the community; affecting their perſons and property upon a legal fiction, without notice that ſuch was the caſe. Which inconvenience was properly removed by the act of 1789.

But as the inconvenience could not happen in the caſe of the repeal of an act paſſed the ſame ſeſſion, (not gone forth among the citizens, but known only to the Legiſlature,) I was ſtruck with an impreſſion that to ſuch laws the Legiſlature never meant their rule ſhould extend; and doubted, whether this being a repealing law, never repealed but ſuſpended only for a time and yet in force, came within the letter or ſpirit of the act of 1789? However we were releived from all difficulty by recurring to the act itſelf, where the doubt is ſtated and ſolved.

For by the 3, ſect. it is enacted "that as often "as a queſtion ſhall ariſe whether a law paſſed "during any ſeſſion, changes or repeals a former "law paſſed during the ſame ſeſſion, the ſame con- "ſtruction ſhall be made as would have been made "if the act concerning election of members to the "General Aſſembly had never been made."

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The act referred to, passed in October 1785, contains the claim "that all acts shall commence "from their passage, unless in the act itself, ano-"ther day is appointed for its commencement." Which law being declared to have no operation on the question, what was the rule of construction before? Why, that all laws were considered as passed on the first day of the session. According to this rule then, the original act and that for its suspension commenced together; which puts an end to this hair-splitting discussion; and to the objection on this point in the cause.

2d. The second objection is founded on a supposition, that bare notice of a protest is not sufficient, but that the bill must be presented protested, to entitle the holder to damages, for more than eighteen months, from the date of the bill; which not appearing in this case to have been done, the judgment is wrong for so much damages as exceeds the eighteen months. The question about the presentation is all important, as it would interfere with the common practice of the country, to rest it upon notice only; and if it had been necessary, in this case, to decide it, we should have required a fuller Court.

But we suppose it unnecessary. The appellants counsel admits that the notice charged in the declaration is sufficient to entitle the plaintiff to his action; and it follows, that the question of the presentation was to be brought forth, at the trial, in order to settle the quantum of the recovery. Therefore since the jury have found the whole damage, without any statement of the evidence or exception as to this point from the appellant, we are to presume they had evidence of the presentation if it was necessary. On this point then, we think there was no error. Besides there were but fourteen months, from the date of the bill to the commencement of the suit, which puts an end to the objection.

3d.

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3d. Nor have we a moments doubt upon the third objection, but that there was error in the judgment of the Court upon the verdict; which ſhould have been entered for the amount in current money, and not in ſterling.

When the act of 1748 paſſed, the execution, on all ſterling judgments, was to be levied in current money at 25 per cent. for difference of exchange; which was found to be inconvenient, from the fluctuating ſtate of exchange; and therefore by the act of 1755, the Courts were empowered to ſettle the rate of exchange at the time of giving the judgment; and in order to enable them to diſtinguiſh between bills bought at a low exchange knowing that they would be proteſted, (then too frequent in practice) from ſuch as were drawn in the ordinary courſe of buſineſs at the current exchange, the law required, that in all bills drawn for current money debts or for current money paid for them, the ſum of money paid or allowed ſhould be expreſſed in the bill; or in default thereof, the ſum of money, expreſſed in ſuch bill, ſhould be taken as current money and judgment entered accordingly.

In this bill it is expreſſed that it was drawn for current money received; and the ſum of that current money not mentioned. It is therefore clearly within the law; which is imperative, that the judgment ſhall be entered for *current money*.

On this point then, the Court is of opinion there is error. The judgment muſt therefore be reverſed; and one entered for the £410: 10 (if the calculation be right) *current money*; with one penny damages and the coſts; and five per centum per annum from the judgment till payment.

BLINCOE

BLINCOE,

againſt

BERKELEY.

IN Replevin the defendant avowed as bailiff of William Lane ſenr. for £ 108 : 13 : 2 rent due on the firſt day of January 1793, and that he entered and took the goods and chattels as a diſtreſs for the ſame; and concludes thus, "wherefore he "prays judgment and a return of the ſaid goods "and chattels to be adjudged to him together "with his coſts and damages according to the form "of the ſtatute in that caſe made and provided." Replication 1. that the plaintiff had nothing in the premiſes, 2. no rent arrear; and iſſue. 3. no demiſe in manner and form as in the avowry ſet forth. Rejoinder to the firſt plea ſets forth the title of Lane. Iſſue; and a prayer for a return of the goods and chattels together with coſts and damages according to the form of the act of Aſſembly in that caſe made and provided. Rejoinder to the third plea, that the demiſe in the cognizance was made in manner and form as in the avowry is ſet forth. Iſſue thereon; and a prayer for a return of the goods and chattels with coſts and damages according to the form of the act of Aſſembly.

Afterwards the rejoinders to the firſt and third pleas were withdrawn, by conſent, and a general demurrer put in by the defendant.

At a ſubſequent Court leave is given to withdraw the demurrer to the plaintiffs firſt plea. At another Court he had leave to withdraw the demurrer to the third plea alſo. Whereupon to the plaintiffs firſt plea, the defendants rejoins an eſtate in William Lane ſufficient to ſupport the avowry and juſtify the taking. Iſſue; and a prayer for return of the goods and chattels with his damages and coſts according to the form of the act of Aſſembly. Rejoinder to the third plea that the demiſe was made

It is error to permit the depoſition of a witneſs reſident in Maryland, which had been taken under a commiſſion iſſued without notice of the intended application for it.

In ſuch a caſe the appearance of the adverſe party at the taking of the depoſition is no waiver of the objection.

Quere. If the defendant prays a *retorno habendo* in replevin, he can claim a judgment for double rent?

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made in the manner and form in the avowry set forth. Issue; and a prayer for return of the goods and chattels with damages and costs according to the act of Assembly.

The jury found a verdict in these words "We of the jury find for the defendant in the three several issues joined in this cause. We also find arrears of rent amounting to £108:13:4."

The opinion of the Court was taken whether judgment should be rendered for the verdict, or should be reduced by the scale of depreciation? but the Court having divided in opinion, they decided that the motion fell; and that judgment might be entered for the defendant, that he should recover his costs. Whereupon the defendant prayed a return of the goods and chattels which was awarded.

Upon the trial of the cause, the plaintiff filed a bill of exceptions to the Courts opinion, which stated that the defendant offered the deposition of a witness taken in Maryland, the order for taking which was made by one Hardage Lane no party to the suit. That the plaintiff had no notice of the application to the Court for the commission, to take the deposition. That the witness aforesaid was a party to the contract on which the rent is claimed; that the commission issued blank, and there is no evidence that those who executed it were justices of the peace in Maryland. That therefore the plaintiff objected to the deposition's going in evidence to the jury: but that he was overruled by the Court, and the deposition permitted to go to the jury.

The plaintiff appealed from this judgment to the District Court; where the judgment of the County Court was affirmed. From which judgment of affirmance the plaintiff appealed to this Court.

WICKHAM for the appellant. The bill of exceptions shews, that a deposition taken in Maryland, under a commission issued in blank and granted

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ed by the Court without notice to the adverſe party, was permitted to be read at the trial of the cauſe, although objected to by the appellant: Whereas the act of Aſſembly expreſsly requires that notice ſhall be given. The words of the act are that "the party applying for a commiſſion in "ſuch caſes, ſhall give the adverſe party, his at- "torney or agent ten days previous notice of the "day of his intended application to the Court, "without which no commiſſion ſhall iſſue." *Rev. Cod.* 290. § XIII. Which words are ſo ſtrong that no reaſoning can make the objection clearer than merely adverting to the act of Aſſembly itſelf does.

Whether the depoſition was material or not, is of no importance in the preſent enquiry. For the weight of the teſtimony was a queſtion for the jury and not for the Court to decide. It was held by the Court in *Keele and Roberts* vs *Herberts exrs.* 1 Waſh. 203, that the Diſtrict Court did wrong, in directing the jury, that the evidence was ſufficient to maintain the iſſue; that being a queſtion which belonged excluſively to the jury, and ought to have been left with them, without any ſuch declaration, or direction; unleſs the Court (by a demurrer to the evidence having been filed) had been compelled to decide upon it. So thoſe caſes in this Court, where it has been determined that the plaintiff could not be non ſuited by the Court without his own conſent, have all been determined upon the ſame principle; namely that it was the province of the jury to decide upon the fact and the weight of the teſtimony; and that the Court could only determine whether the evidence ſuch as it was, ſhould be ſubmitted to their conſideration. It follows therefore that it was not important whether the depoſition was material or not; Becauſe the Court ought not to have ſuffered it to be read, unleſs the forms, required by the law, had been obſerved in obtaining it.

Beſides King being aſſignor of the reverſion was liable to the aſſignee, if the rent was not recovered;

and

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and therefore was intereſted in the event of the ſuit. Which rendered him an incompetent witneſs; and conſequently upon that ground, his depoſition ought to have been rejected.

But the judgment is erroneous for another reaſon: The Court ought to have directed the verdict to be reduced by the ſcale of depreciation. For it is one of thoſe caſes which was contemplated by the act of Aſſembly; as the leaſe bears date in 1777, during the exiſtence of paper money; and therefore is ſubject to the ſcale.

The Court having been divided on the queſtion, they ſhould have continued the cauſe: for the ſame rule did not apply as upon a diviſion on a queſtion relative to the introduction of evidence; becauſe the judgment is the act of the whole, or of a majority of the Court, and therefore the concurrence of the whole, or of a majority, is requiſite to the rendition of it.

RANDOLPH for the appellee. As to the objection concerning the intereſt of the witneſs, there is no foundation for it. Becauſe although he was intereſted at the time of the application for a commiſſion, yet his intereſt might have ceaſed before the trial. But here is an expreſs agreement againſt any warranty, which deſtroys all idea of intereſt; and therefore his competency could not be impeached.

The objection, that no notice was given of the intended application for a commiſſion, will not prevail. For the juſtices have certified that they took the depoſition in Blincoe's preſence; and it does not appear that he took any exception. This tended to deceive his adverſary; and ſhould be conſidered as a waiver of prior irregularities, if any.

But for another reaſon this objection will not prevail. The teſtimony was unimportant and irrelevant. On *nil debet* the defendant cannot give in evidence, that the plaintiff had nothing in the

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tenements demiſed. *Bull. n. pr.* 170. So that his teſtimony being immaterial, the admiſſion of it was of no conſequence; and therefore it will not vitiate the judgment.

Again the witneſs might ſpeak as to any points not growing out of the deed; and the 3, *Term. rep.* 308 ſhews, that where the verdict cannot be given in evidence for or againſt him, the witneſs is competent.

The queſtion was only whether the depoſition was admiſſible or not; and the Court had a right to decide upon that. Which anſwers the objection, as to the right of the jury to decide upon the weight of the teſtimony.

With reſpect to the point relative to the ſcale of depreciation, as the verdict was found in 1795, it muſt be intended that the jury meant ſpecie. For the right, to reduce the debt by the ſcale, is common to the Court and jury; and the Court has decided it alternatively. Beſides it appears by the teſtimony that the leaſe related to a contract in 1775; and therefore was anterior to 1777. Which takes it out of the ſcale.

The Court were divided on the motion to reduce the verdict, and not upon the motion, to have the judgmen tentered up. Of courſe, when the motion fell, it was right to enter the judgment. But it ſhould have been for double rent.

WICKHAM in reply. The ten days notice were abſolutely neceſſary; and the Court could not diſpenſe with them. Nor did the preſence of the appellant at the taking of the depoſition alter the caſe. For the commiſſion being in blank and the authority given by the Court, when there had been no previous notice to the adverſe party of the intended application, utterly void, the attendance of the party, at the performance of a void act, could not prejudice him.

The witneſs was intereſted; becauſe the warranty extended to the rent, which paſſed by the

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grant of the reverſion. The caſe from *Bull.* was debt upon an indenture; where *nil debet* only goes to the debt, and not to the execution of the inſtrument. But here it was otherwiſe: *for one of the iſſues is that there was no demiſe.*

It is inſiſted, that the depoſition was not material; and yet the appellees counſel relies upon it, to ſhew that it was a ſpecie contract. Which certainly proves that it was important.

But I ſtill rely upon the argument, that the Court could not decide upon the weight of the evidence. The party offers evidence at his peril; and the Court only decides upon the legality of introducing it. Here it was the buſineſs of the Court to determine on the competency of the witneſs; and it belonged to the jury to determine on his credibility, and the force of his evidence.

As to the point concerning the ſcale of depreciation; the act requires the clerk to apply the ſcale of courſe, unleſs ſome proper objection is ſhewn. The verdict of the jury ſhould be underſtood to relate to the ſum ſtated in the avowry; which refers to the leaſe in 1777. Of courſe it was liable to the ſcale. *Watſon* vs. *Alexander*, 1, *Waſh.* 340.

The defendant was not entitled to a judgment for double rent; becauſe he prayed the judgment at Common Law for a return of the goods, and therefore cannot except to it. He might poſſibly have had his reaſons for the courſe he took, in order to prevent the operation of mortgages or prior executions.

RANDOLPH. We may now inſiſt upon a judgment for double rent; for it does not appear that we did not do ſo, in the Court below; the goods are only a ſecurity for their value; and therefore we may diſtrain again for the balance.

WICKHAM. It is ſtated in the record that the defendant prayed a return of the goods; which is a judgment at Common Law, and not upon the ſtatute.

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ſtatute. Now, if a man takes the former he cannot have the latter; and *e converso*. If the defendants prays for no particular judgment, there the Court will render judgment for the double rent; but where he prays a ſpecific reſtitution, he thereby inſiſts upon the judgment at Common Law; and waives that upon the act of Aſſembly. He may as Mr. Randolph ſays diſtrain again; but that ſurely, can never give him a title, to both judgments at once.

ROANE Judge. This is an action of replevin; and, the defendant having made conuſance as bailiff of W. Lane ſenr. the parties were at iſſue on the three pleas, mentioned in the proceedings.

At the trial the defendant offered in evidence, as appears by the bill of exceptions, the depoſition of T. King; and although it was alledged, amongſt other things, that it was taken by an ordinary commiſſion, not granted on notice to the adverſe party (notwithſtanding the examination was to be in Maryland;) and not directed to commiſſioners, ſelected purſuant to the act of Aſſembly, yet the depoſition was permitted to go in evidence to the jury; and the queſtion is whether this deciſion upon this point was legal or not?

The weight of the teſtimony is a foreign enquiry, on the queſtion. A ſuitor may with leave of the Court ſubmit teſtimony to the jury, which the Court may think ſuperfluous or of no weight; the addreſs relative to the influence of teſtimony, being to the jury and not to the Court; and the only province of the latter, in caſes of this kind, is to prevent illegal teſtimony being exhibited to the jury.

If a Court can admit, as teſtimony, a depoſition taken in another ſtate, in a manner unauthorized by law, I ſee nothing to prevent them from admitting a witneſs to teſtify without being ſworn, or a depoſition made within the ſtate, not ſworn to; and taken before private perſons; the power of the Court in each inſtance is the ſame.

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In none of these cases will it cure the defect, of legal requisites and solemnities, that the Court shall be of opinion, that the weight of the testimony was as nothing; for the jury might have been of a different opinion; and that impression might have produced the verdict. So that an after opinion of the Court, upon a point not generally before them on the question of the admission of a deposition or witness (I mean the contents of the one, or the information to be given by the other,) is to cure an opinion of that Court clearly illegal, without such reference; and to justify the introduction to the jury of testimony not authenticated, in the manner required by law. In other words the doctrine is, that, when the Court shall be of opinion that the testimony has no weight, the solemnities required by law may be dispensed with; and *e converso*, they shall be adhered to! Although it is clear that the jury are the exclusive judges of the weight of testimony as operating on their minds; and that a Court, on a question to admit a deposition or a witness, never reads the one or examines the other, with a view to decide upon its influence.

This doctrine is explicitly avowed by the Court in *Ross* vs *Gill*, 1 *Wash.* 90; where it is laid down, that "if the Court admit improper testimony an exception may be taken to their opinion; but if the question depends upon the weight of testimony the jury and not the Court are exclusively and uncontroulably the Judges." That is, as applied to this case, as the Court below admitted improper testimony, it cannot be cured by any opinion the Court may entertain (as they are not the proper Judges) with respect to the weight of the testimony given in the cause. This determination is supposed to be completely decisive of this point.

I suppose the Counsel for the appellee was scarcely serious in arguing, that the appearance of the appellant, before the justices in Maryland, cured the defect in awarding the commission. The attendance was produced by fear, that his objections

ons to the legality of the teſtimony might not avail him. In which caſe, it would be material for him to ſee, that the depoſition was as little adverſe to him, as poſſible. But it is not ſhewn that he croſs examined the witneſs or was there otherwiſe than caſually.

In this view of the caſe it is impoſſible to ſuſtain a verdict, which may have been founded on this illegal teſtimony; and as this teſtimony is clearly relative to the ſubject in diſpute, it is impoſſible for this Court to ſay, if they had power to judge, that it had no influence with the jury. Beſides if we break through the principles and rules that have been wiſely eſtabliſhed, in reſpect of the preſent queſtion, in this inſtance, it is not eaſy to ſay how far the precedent may carry us.

Upon the whole the verdict and judgment of the County Court ſhould have been ſet aſide by the Diſtrict Court, in conſequence of the admiſſion of this teſtimony; which we muſt now do. On the next trial the plaintiff in replevin may be better prepared to diſcuſs and give evidence relative to the point, whether the ſum found due ſhould be ſcaled or not; and the defendant may rectify his judgment (if right) in reſpect of double damages. But I have not conſidered either of theſe queſtions, ſo as to be able to decide them, or any others made by the counſel, except that which is above ſtated as the ground of my opinion.

Therefore I am for reverſing the judgment of the Diſtrict Court; (becauſe of the admiſſion of the depoſition of T. King, in the proceedings mentioned;) and awarding a new trial of the iſſues.

FLEMING Judge. Concurred.

CARRINGTON Judge. It was certainly improper to permit the depoſition to be read. The act of Aſſembly is expreſs, that the adverſe party ſhall have notice of the application for the commiſſion, in order that he may attend and name commiſſioners or make his objections. But this

direction

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direction of the law not having been purſued, in the preſent inſtance, the depoſition was clearly not admiſſible. On that ground therefore I concur that the judgment ought to be reverſed; but I give no opinion as to the other parts of the caſe.

Judgment Reverſed.

GRAVES,

againſt

M'CAUL.

Leave given Vendor to purſue lands in the hands of a purchaſer, with notice, from the vendee, for balance of the purchaſe money.

M'CAUL filed a bill in Chancery in the County Court of Henrico, againſt Francis Graves, ſetting forth that he had ſold a tract of land and ſome cattle &c; to Stockdell for £450 to be paid in bonds, which were to be aſſigned by Graves. That Graves immediately aſſigned bonds to the amount of £ 162: 11. That a written agreement was drawn, bearing date the 5th of January, between Graves, Stockdell and the plaintiff, wherein the two former covenanted to pay the plaintiff bonds aſſigned by Graves; but there being no witneſſes preſent, it was agreed that the plaintiff and Stockdell ſhould ſign, and Graves ſhould witneſs it at that time; and that when the parties met again a new writing ſhould be drawn and executed by them all. That the agreement ſo executed by the plaintiff and Stockdell, and witneſſed by Graves, was left in the poſſeſſion of the latter. That the plaintiff had in conſequence of that agreement ſoon afterwards conveyed the lands to Graves, at the requeſt of Stockdell. That Graves has refuſed to aſſign bonds, or to give up the ſaid written agreement to the plaintiff; and that Stockdell is inſolvent. Therefore the bill prays that Graves may be decreed to pay to the plaintiff the balance due with intereſt.

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The anſwer of Graves admits he atteſted the agreement as a witneſs, and kept poſſeſſion of it at the requeſt of the plaintiff and Stockdell; but ſtates that the contract was made by them whilſt he was aſleep; and that he was called up out of his ſleep to atteſt it. That Stockdell applied to him for the loan of ſome bonds; which requeſt he complied with; and that Stockdell aſked M'Caul if they would do for the preſent? who anſwered yes, if Graves will endorſe them. That he did indorſe them to the amount of £ 163:9:6; for which a receipt is indorſed on the agreement. Denies he ever contracted with the plaintiff for the land, or that he ever agreed to aſſign any other bonds, than thoſe before mentioned to have been aſſigned by him. Denies that he agreed to execute another agreement; but admits the plaintiff has conveyed the lands to him; he having purchaſed it of Stockdell, to whom he paid a valuable conſideration for it.

The agreement after reciting the ſale to Stockdell for the ſum of £ 450, goes on to ſay, "to be "paid in bonds, which is to be indorſed to the "ſaid M'Coul, by the ſaid Stockdell and Francis "Graves."

The depoſition fully prove Graves's reſponſibility; and the County Court decreed, that he ſhould pay to the plaintiff the balance due, with intereſt.

From this decree Graves petitioned for and obtained an appeal to the High Court of Chancery by order of the ſaid Court; where the decree of the County Court was afterwards affirmed, with this addition, that M'Caul on receiving his money ſhould aſſign his claim againſt Stockdell by an irrevocable power of attorney to Graves. From this decree of affirmance Graves appealed to this Court.

COPLAND. The defendant having atteſted the paper, it is evidence of his knowledge of its contents, eſpecially as he has not denied it in his anſwer.

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fwer. But it is further proved by the indorſement, which ſpeaks of the within bonds, 1 *Wms.* 393. 1 *Vern.* 136. The reaſoning in which cases applies more forcible to that at bar; where the knowledge is not denied by the defendant.

RANDOLPH on the ſame ſide. The contract of January was with the knowledge of Graves. Who confeſſes the diſcourſe; and admits he was informed of the bargain. But in addition to this, the caſes cited by Mr. Copland expreſsly apply; and prove the preſumption. The writings were left with him: and he deſired the deed to be made.

The Court will direct the Court of Chancery to give leave to M'Caul to reſort thither to charge the land in reſpect of the lien, ſhould the decree not be ſatisfied out of the perſonal eſtate.

PENDLETON Preſident after ſtating the caſe delivered the opinion of the Court.

The queſtions are 1ſt. Whether Graves was originally liable for this demand, eiher as principal or ſecurity, for it matters not which? If he was, then, whether he was diſcharged by M'Caul's acceptance of Stockddell's bond and the ſubſequent proceedings on it?

We have not a moments doubt, but that Graves was ſecurity for Stockdell's aſſigning good bonds; which Graves was to unite in the indorſement of and conſequently to become anſwerable for their ſucceſs in payment. His idle ſtory of having been waked from ſleep to witneſs the agreement, without knowing its contents, if it deſerved other notice, than the juſt ridicule beſtowed on it by the Chancellor, is fully refuted by his having by the loan and indorſement of the bonds, paid in part, ſo far joined in the execution of the agreement; and by his ſubſequent acknowledgment, as proved by the witneſſes.

His ſecond objection is, that he carried a meſſage from M'Caul to Stockdell, to ſend his bond for payment of the ballance; that he carried

that

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that bond on the 19th of January to M'Caul with a letter from Stockdell to convey the land to the defendant who had then purchaſed it; the bond was accepted by M'Caul, and the property conveyed by which it is inſiſted that Graves was exonerated, if he was originally liable. And the dignity of the anſwer is relied on to eſtabliſh, as well the fact, as the conſequence.

As to the fact "that the bond of Stockdell was given and accepted and the property conveyed to Graves;" it is not in controverſy, but that the effect, whether it operated as a diſcharge of Graves? is to be drawn from the *nature of the tranſaction*, and from the *underſtanding of the parties at the time.*

As to the 1ſt, The agreement was, that Stockdell ſhould pay good bonds indorſed by Graves, by the 1ſt of March; Stockdell's bond was to pay good bonds by the 1ſt of March; which bonds *he* would make *himſelf* liable for, as indorſer. This requiring the indorſement of Stockdell, only, differs in terms from the agreement and would give the appearance of diſcharging Graves from his reſponſibility; but that appearance is changed when coupled with the letter accompanying the bond referring to the *agreement*; which was to be delivered to M'Caul when it was performed *on his part*, by a conveyance and delivering poſſeſſion of the property. To no purpoſe, was it to be delivered to him, if it was fulfilled alſo on the part of Stockdell; ſince it would be then of no conſequence to either. The purpoſe of delivery could only be to enable M'Caul to reſort to Graves finally, if Stokdell ſhould fail in performing his bond.

And how did the parties underſtand it?

As ſoon as Stockdell failed in delivering the bonds, we find M'Caul applying to Graves for the agreement at ſeveral times, without effect; and at laſt is induced to drop that purſuit, upon th *erepeated acknowledgment* of Graves that he was ultimately

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mately anſwerable: in confidence of which, like a humane creditor willing to eaſe the ſecurity, he commenced his ſuit againſt Stockdell to endeavor to get the money. But this proving fruitleſs, and he not yet furniſhed with the agreement, he commenced this ſuit to have it brought forth and to obtain the benefit of it. All indicating that he never conſidered Graves as diſcharged.

And how did Graves underſtand it?

The teſtimony of Stokes M'Call and Miller are full and plain, that he never conſidered himſelf as diſcharged, even as late as July following; ſix months after Stockdell's bond had been given: and there being two poſitive witneſſes, corroborated by the written papers, the anſwer of Graves looſes the dignity contended for.

Upon the whole, we have no doubt, but that Graves was orignally ſecurity for this demand; and that his reſponſibility has never been extinguiſhed, by any of the ſubſequent proceedings. It is then objected that the decree ſhould have been for the aſſignment of bonds, and not for the money: But it would be very unjuſt to compel M'Caul to take bonds now (which he ſhould have had ten years paſt) and put him to the delay of new ſuits on them. Stockdell in whoſe place Graves is, by not delivering the bonds in time, loſt the alternative, and muſt now pay the money. It was truly ſaid, that a Court of Equity would not charge a ſecurity further than he is bound at law; but if a ſecurity bound at law, cannot be charged there, for want of the inſtrument, of which the creditor is deprived by accident or fraud, a Court of Equity will reſtore the paper to its legal force. An inſtance is put of a loſt bond; but the preſent caſe is much ſtronger, the agreement being in the hands of the ſecurity and with held by him.

The part of the decree directing the aſſignment of M'Caul's judgment to Graves by an irrevocable power of attorney was juſt and proper.

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The decree is affirmed with costs; both debt and costs to be paid out of the estate of Graves in the hands of the administrators, if sufficient; without prejudice to any suit, which the appellee may think proper to commence against the heirs of Graves, to subject the land conveyed in their hands to the satisfaction of his demand if necessary.

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HARRISON,

against

HARRISON and OTHERS.

HENRY Harrison eldest son and heir at law of Henry Harrison deceased, filed his bill in the High Court of Chancery, setting forth, that his father on the 4th of July 1763, became bound in a bond as security for his brother Robert of Charles City county, for payment of £708:0:6 to John Syme. That a suit being afterwards instituted against them thereon in the General Court, Benjamin Harrison became bail for Robert. Who to secure the said Henry, (as well as, the said Benjamin) on account thereof, executed to him, on the 4th of November 1766, a mortgage duly recorded, in Charles City county for 35 slaves (naming them) and some household furniture and horses; which was to be void on said Robert's paying the debt and costs, and saving harmless the said Benjamin and Henry from their undertakings aforesaid. That on the 29th of October 1770, Syme obtained judgment against the said Henry (Robert being then dead) for the sum of £607:18:9 with interest from the 27th of January 1764. Which the said Henry deceased afterwards paid. That after the making of the said mortgage a variety of executions issued against Robert, which came to the

The executors of the mortgagee of slaves and not the heir should bring the bill to foreclose. And if no executors or administrators it should be suggested and the children of the mortgagee should be made parties.

The act of limitations runs in equity in favour of an adverse possession.

hands

Harriſon, vs. Harriſon.

hands of George Minge ſheriff of Charles City county, who took the ſlaves in the mortgage mentioned, and, having been indemnified by the creditors, proceeded to ſell them, although he had notice of the mortgage; and the ſale was forbid. That John Minge became the purchaſer under the ſheriffs ſale of fifteen of the ſaid ſlaves (naming them) which with their increaſe are now in the poſſeſſion of Collier and Braxton Harriſon the defendants, under the deed or will of the ſaid John Minge. That the defendants father died inteſtate leaving the plaintiff and his two ſiſters infants. That after the death of his father the plaintiff has underſtood, that a ſuit was brought by the plaintiffs next friend to recover the ſlaves, which abated or went off the docket by ſome means unknown to the plaintiff; neither does he know in what Court the ſame was brought. That the defendants refuſe to deliver the ſlaves in their poſſeſſion; and therefore the bill prays a decree for ſo many as will ſatisfy the mortgage; and for general relief in the premiſes.

The anſwers ſtate that the defendants know nothing of their own knowledge of the matters in the bill mentioned. That the mortgage and judgment appear to be different debts; and that the defendants do not know whether Henry Harriſon paid off the debt to Syme. That Robert was not dead when the judgment was obtained. That the defendants have heard of various executions againſt him, and that the ſlaves named in the mortgage were ſold under them. That the defendants do not know whether Henry forbid the ſale; but they have heard he did not. That John Minge purchaſed under a fair ſale made by the ſheriff to ſatisfy the executions. That after the death of the ſaid John Minge, David Minge his eldeſt ſon, being their near relation, executed a deed to Acril Cocke and William Edloe for their benefit. That they have heard that the ſaid Henry Harriſon deceaſed was fully indemnified and ſatisfied. That the defendants know nothing of their own knowledge

ledge of the suit mentioned in the bill; but they have heard that such a suit was brought and dismissed many years ago. That John Minge was a fair purchaser of the slaves; that they have been in quiet possession, of them, as their own property, for more than five years; and therefore they claim the benefit of the act of limitations.

The deposition of Furnea Southall states, that he acted as deputy sheriff of Charles City county, in the year 1767; that sundry executions came to his hands against Robert Harrison; which he refused to levy on account of his estate being made over by deed of trust to John Minge, for the use and benefit of Collier Harrison eldest son of Robert Harrison. That afterwards other executions came to his hands against the said Robert; and being indemnified against the said deed of trust as well as against the mortgage to Henry and Benjamin Harrison, he sold the property. That John Minge at the sale proclaimed that it might be sold notwithstanding the deed of trust to himself, and became purchaser of part thereof. That afterwards suit was brought against the deponent, for selling the mortgaged estate, in the name of Benjamin Harrison; who denied his having instituted it, and said that the mortgage was nothing more than a fraud. That upon the trial of the suit the jury found a verdict in favour of the deponent. That another suit was afterwards brought against him on the same account, by the administrator of Henry Harrison, but at what time he does not remember. That, in February 1767, Henry Harrison was present at the sale of some of Robert's slaves, and did not forbid it.

There are in the record a copy of the mortgage deed to Henry and Benjamin Harrison; which is duly recorded. A deed from David Minge to Acril Cocke and William Eldoe in trust for the defendants; which is dated the 3d of April 1775, and recorded the 5th of the same month. A bill of sale from Robert to Benjamin Harrison for sundry slaves, dated the 4th of October 1764, and record-

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ed the 4th of September 1765. A deed from Robert Harrison to John Minge, dated the 20th of June 1764; whereby in consideration of 5/, he conveys to him 28 slaves with all his furniture for the use of Collier Harrison son of the said Robert, but if he died before 21, then to Robert's wife and her children by him. Which deed was recorded the 5th of September 1764. A copy of the record in the suit of Benjamin Harrison *vs* Southall the deputy sheriff. A copy of the bond from Robert and Henry Harrison to Syme; and a copy of the judgment of Syme *vs* Henry Harrison only, for £ 637: 18: 9, with interest from the 25th of January 1794. A copy of the bond on which is indorsed a credit for £ 90 in January 1764; which leaves the above balance of £ 637: 18: 9.

The Court of Chancery decreed a fore closure of the mortgage; but to be suspended until it should be ascertained whether the judgment against Henry Harrison in favour of Syme, was paid by Henry Harrison. From this decree the defendants appealed.

WICKHAM for the appellant. It does not appear that Syme's judgment has been satisfied. But clearly Henry was not a creditor at the time of the mortgage; and therefore did not stand on higher ground than the creditors, under whose executions Minge purchased. So that here are two parties, before the Court, having at least equal equity; but the defendants have the advantage of the first deed, which conveyed the legal estate, to interpose betwixt themselves and the representatives of Henry Harrison; and therefore, in a case of equal equity, the Court will allow this advantage to prevail. The position laid down by the Court of Chancery, that the first deed being voluntary was void, cannot be maintained; for it did convey the legal estate, and the appellants may avail themselves of that conveyance, and oppose it against the mortgage; which only conveyed an equitable interest. Minge was a fair purchaser, without notice; and therefore cannot be ousted of his

his property, in favour of a mortgagee, who had not advanced any thing on account of the mortgage. The recording of the mortgage does not alter the caſe; becauſe the act of Aſſembly does not ſay, that a recorded deed ſhall be good againſt every body; but the act is negative, that a deed not recorded within eight months ſhall not be good againſt purchaſers and creditors.

If however this point be againſt us, ſtill the plaintiffs below had no title to relief, becauſe their claim was barred by the ſtatute of limitations. For Henry might have brought detinue for the ſlaves immediately after the ſale to Minge; but did not. So that upwards of five years elapſed, between the ſale and the bringing of the ſuit. Therefore as the act began to run immediately after the ſale, the plaintiffs were clearly barred by the lapſe of time.

Its being a mortgage will not make any difference; becauſe the diſtinction is where the claim is merely equitable, and where it is partly equitable and partly legal. In the firſt caſe it is not barred by the ſtatute; but in the other it is. Therefore as the preſent caſe is of a mixt nature, it is barred by the length of time which elapſed, before the bringing of the ſuit.

Beſides there are ſtrong marks of contrivance throughout the tranſactions betwixt Henry and his friends; and Benjamin one of the mortgagees expreſsly acknowledged that the whole was a fraud. Which deſtroys the effect of the mortgage.

CALL *contra.* The point relative to the payment of the money by Henry is by the directions of the decree to be aſcertained; which obviates the objection made, with regard thereto, by the appellants counſel; and therefore the ſole queſtion now is, whether the direction was right?

Henry was clearly a purchaſer; for every mortgagee upon valuable conſideration is; and therefore the firſt deed was void as to him, by the expreſs

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preſs words of the ſtatute of Elizabeth. Nor does it make any difference whether the mortgage was given for money before due or then actually advanced, or for money which he was bound to advance in future. For the conſideration in both caſes was equally good. So that the ſecond deed tranſferred the legal eſtate beyond all queſtion; for the firſt deed being rendered void, it is, as if it had never exiſted at all; and therefore the argument of the tranſfer of poſſeſſion, in conſequence of that deed, is incorrect.

Minge was a purchaſer with notice; for the mortgage was recorded in the County Court where he lived at the time of the purchaſe. Which was conſtructive notice, according to the deciſion of the Court in *Claiborne* vs *Hill* 1, *Wash.* 177. Of courſe his purchaſe was immoral; and he cannot be called a *fair purchaser*, according to the notion affixed to that term by the law.

The act of limitations was no barr. For if ſo a mortgagor out of poſſeſſion would be conſtantly ſubject to be barred, unleſs he brought a bill to foreclоſe, or an action of detinue within five years: becauſe, according to the modern form of mortgaging, the property always remains with the mortgagor. Bnt this never has been the law; and a contrary doctrine was expreſsly laid down by the Court in *Norvell* vs *Ross*, 1. *Wash.* 14. Which fixed the rule of limitation to be, ſuch a period as created a preſumption of payment. To make the act run againſt an equitable claim, the poſſeſſion muſt be adverſe; and accompanied with a refuſal to deliver up the property. Without this adverſe conduct, it is not important whether the poſſeſſion abide with the mortgagor or another; eſpecially if he be a purchaſer with notice as in the preſent caſe. Becauſe the perſon in poſſeſſion is a truſtee in both caſes for the mortgagee; and cannot put of his fiduciary character, without notice to the *cestui que trust*. There is no ſuch diſtinction, as that inſiſted on by the appellants counſel, between a claim purely equitable, and one

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mixt with law and equity. On the contrary the caſe of mortgages proves the rule to be expreſsly otherwiſe. For they are always caſes conſiſting partly of a legal and partly of an equitable claim; and yet are allowed to be forecloſed, long after the period mentioned by the ſtatute.

The declarations of Benjamin Harriſon have no influence on the caſe. Becauſe he could not by his mere declarations prejudice the rights of other people.

MARSHALL for the appellee. Henry was a creditor in equity before the voluntary deed; becauſe he was bound for Robert's debt; and although he could not have ſued at law, yet in equity he was a creditor. For he was as much bound for the money, as if Robert had not been bound at all. But at any rate he was a ſubſequent purchaſer, and that alone removes the voluntary deed. For it has been decided, in England, that a mortgagee is within the proviſions of the ſtatute of Elizabeth.

But the voluntary deed is not referred to, or any how mentioned in the pleadings. Therefore, according to the uniform tenor of Chancery practice, it cannot be proved or argued from, on the hearing of the cauſe; becauſe the oppoſite party had no opportunity of avoiding it by other teſtimony. Upon this principle it has been conſtantly held, as well at law as in equity, that the *probata* and *allegata* muſt agree; and that a party cannot enter into proof of what he has not alledged.

The mortgage was recorded at the time of the purchaſe; and therefore Minge was a pnrchaſer with notice. Beſides Southall proves, that he refuſed to ſell, until the indemnity was given. So that Minge had more than conſtructive, for he had actual notice. Of courſe, he took it ſubject to all the equity, belonging to it, in the hands of the mortgagee.

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It is no objection that Henry did not forbid the ſale; becauſe he had not then paid the money; and did not certainly know whether he ſhould be called on for it.

The declaration of Benjamin did not affect Henry; but there are circumſtances which account for that declaration. For there is in the record a bill of ſale to Benjamin only; which carried marks of fraud upon the face of it, and to that the declaration applied.

The act of limitations is no barr. The principles laid down by the Court in *Ross* vs *Norvell* 1. *Wash.* 14, apply. For there is no more reaſon to interpoſe the barr in the caſe of a bill to foreclose brought againſt a mortgagor in poſſeſſion, or one claiming under him, than in the caſe of a bill to redeem againſt a mortgagee in poſſeſſion. Indeed there there is leſs reaſon for the barr, in the former caſe; becauſe it is not uſual for the mortgagee, to take the property in poſſeſſion; and therefore his poſſeſſion forms a preſumption of *ouster*. Which does not take place with regard to the mortgagor; as the cuſtom is, for the property to remain in his cuſtody.

But if the barr will not apply in favor of the mortgagor, no more will it in favor of the repreſentatives of Minge in the preſent caſe. Becauſe he was a purchaſer with notice; and conſequently he became a truſtee himſelf, in the ſame manner as the mortgagor was.

RANDOLPH in reply. The form of the ſuit is wrong; for neither the proper plaintiffs or defendants are before the Court.

The plaintiff on record is the ſon and heir of Henry, whereas his executors or adminiſtrators ſhould have brought the ſuit; becauſe they were entituled to the money. *Pow. Mort.* 479. It was equally neceſſary that the executors or adminiſtrators of Robert ſhould have been made parties; becauſe it might be in their power to ſhew that the money had been paid.

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The facts of the caſe are not well aſcertained. It is not ſhewn when the executions were delivered to the ſheriff. Perhaps they were delivered before the mortgage; and if ſo they were entitled to preference. Neither does it appear whether the money was ever paid by Henry.

The objection that the voluntary deed was not referred to in the pleadings, is not of any weight. For it does not appear that the defendant knew it untill the depoſition was taken; after which it could not be neceſſary to amend the anſwer, in order to ſtate it, as the plaintiff knew as much of it as the defendant; and therefore was not taken by ſurprize, but might have produced countervailing teſtimony if he had any.

Henry ought to have forbid the ſale: and it is no excuſe to ſay, that in conſequence of the indemnity, the ſale would have gone on. For ſtill he ought to have forbid it for the benefit of the purchaſer.

But the act of limitations is a clear barr. For Henry knew of the purchaſe; and yet never brought a ſuit, nor his repreſentatives after him for three and twenty years. This forms a ſtrong preſumption of payment; a preſumption which even in a Court of Law would require to be rebutted; and much more when the application is to a Court of Equity to aſſiſt a ſtale demand. But upon the rules of the ſtatute the plaintiff cannot recover. For the mortgage here is in the form of an abſolute conveyance, with a mere proviſo to be void on a condition; So that the property immediately veſted in the mortgagee. A circumſtance which perhaps did not exiſt in the caſe of *Hill* vs *Claiborne*; for the deed in that caſe might have contained a ſtipulation that the property ſhould remain with the mortgagor. In which caſe he would be a mere truſtee; and therefore could not avail himſelf of the act. If this idea is well founded then Henry's ſuffering Robert to retain poſſeſſion defeated his own intereſt againſt creditors and purchaſers. *Chapman* vs *Tanner* 1 *Vern.* 267. The rule is incontrovertible that where the poſſeſſion is adverſary, the act of limitations runs in favour of diſſeiſors; and here was a clear

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clear adverſary poſſeſſion which ouſted Henry, and, according to the principles juſt mentioned, made the act of limitations attach. The caſe of *Ross* vs *Norvell* was that of a mortgagee in poſſeſſion: which was a continuing truſt; and therefore Roſs could not avail himſelf of the benefit of the ſtatute.

Cur: adv: vult.

PENDLETON Preſident- Delivered the reſolution of the Court to the following effect.

"There is no doubt, but the cauſe was improperly heard for the want of the neceſſary parties. The executors or adminiſtrators of Henry and not the heir ought to have brought the ſuit; and if none ſuch, it ought to have been ſuggeſted in the bill and all the other children ſhould have been made parties. The repreſentatives of Robert Harriſon ought alſo to have been before the Court, as they might have had it in their power to have ſhewn payment or ſatisfaction. So that there is clear error upon theſe grounds; and therefore the decree muſt be reverſed and the cauſe remanded to the Court of Chancery for proper parties to be made.

It would be improper to decide upon the merits at this time; and therefore we avoid it, as circumſtances and facts hereafter to be proved may change our opinion. At the ſame time though, We have no difficulty in declaring our preſent impreſſion to be, that if no change is produced by teſtimony hereafter taken, that the act of limitations will be a barr to the plaintiffs claim. It is true that the ſtatute does not run in favor of truſtees; as between truſtee and *cestui que trust*, mortgagor and mortgagee, ſo long as the confidence may fairly be preſumed to continue. But then it runs both in equity and at law in favor of diſſeiſors and tortfeaſors. In this caſe both mortgagor and mortgagee, were out of poſſeſſion; and there was poſſeſſion and a title, in another, adverſe to that, of them both. There is no po-

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ſitive direction in the ſtatute that the Court of Chancery ſhall be bound by the periods preſcribed in the law; but that Court adopts them by analogy to the rules of law; and there is a ſtrong reaſon why the rule ſhould apply here; as Henry was preſent at the ſale and did not forbid it: thereby miſleading the purchaſer into a belief, that he might buy with ſafety.

Theſe are our preſent impreſſions; but we deſire it may be underſtood, that what is now ſaid will not bind the parties hereafter; and preclude them from further inveſtigation. Nor do we conſider ourſelves as bound by it, in caſe the cauſe ſhould ever come before the Court again.

SHAW,

againſt

CLEMENTS.

Special verdict may be found in a writ of right.

Jury may aſſeſs damages in a writ of right.

Proceedings in a writ of right may be had at rules, tho not in ejectment.

IN a writ of right brought by Abraham Clements heir at law of Abraham Clements deceaſed, who was heir at law of Ezekiel Clements deceaſed, againſt Robert Shaw, William Moore and James Parker, the pleadings were had at the rules, and the jury found a ſpecial verdict ſtating, that Benjamin Borden being ſeized of the lands in the count mentioned, by virtue of a patent dated the 24th of March 1740, ſold but never conveyed it to Ezekiel Clements. That the ſaid Borden by his laſt will dated in April 1742, directed his executors to convey all the lands which he had ſold in his lifetime. Of which will he appointed three executors. That two of the ſaid executors in purſuance of the ſaid will executed a conveyance to Clements for the ſaid lands in June 1746. That between the years 1743 and

1747,

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1747, Clements was seized of the lands; and died in 1778, leaving the said Abraham Clements father of the demandant his eldest son and heir at law. That the said Abraham Clements the father died in 1785, leaving the demandant his heir at law. That M'Clenchan obtained a judgment in the General Court in the year 1753, against Abraham Clements for 400 acres of land, founded on a petition which stated that the said lands were forfeited for non payment of *quitrents*; and in consequence thereof obtained a patent for the same on the 16th of September 1765. That M'Clenchan after obtaining the said patent entered on the lands and was thereof seized; and, being so seized, sold and conveyed them to the defendant Shaw. The verdict then finds a survey made during the progress of the cause; and that it contains the lands mentioned in the count. After which it states that Benjamin Borden one of the executors of Benjamin the elder, who executed the deed to Clements, was heir at law and eldest son to his testator; and if upon the whole matter the law be for the plaintiff, then the jury find for the plaintiff the lands in the declaration mentioned and one penny damages; but if the law be for the defendant, then they find for the defendant.

The District Court gave judgment for the demandant; and the defendants appealed to this Court.

WARDEN for the appellant. Amongst other exceptions relied upon the following.

1st. That in a writ of right the verdict of the jury has found damages for the demandant and the court has given judgment for them, although there is no damages in such a case either in the writ or count.

2. That the proceedings prior to the verdict and judgment, were all had at the rules.

3. That the jury had found a special verdict which could not be done in a writ of right.

MARSHALL

MARSHALL for the appellee. As to the damages the objection might have been well founded at Common Law, but the act of Assembly expresly gives them, and directs that they may be found.

As to the special verdict, the general position is that a special verdict may be found in all actions real, personal and mixed. 5, *Com. Dig.* 514. 9, *Co.* 13, 14. Indeed it is fitter that a special verdict should be found in a writ of right than in any other action; because the judgment is final and against it there is no redress. In 1, *H. Black.* 1, a verdict in a writ of right was found subject to the opinion of the Court (which in effect is a special verdict;) and no exception was taken upon that ground. From whence I infer that it was considered as clear that a special verdict might be found.

With respect to the proceedings being had at rules, it is immaterial as the mise was joined; but the act of Assembly directing proceedings at rules makes no distinction between actions.

WARDEN in reply. There should be a writ of enquiry of damages after the title is decided, or else the jury are not charged with the damages. It was decided in this Court that proceedings in ejectment could not be had at rules; and the same reasons will hold with regard to a writ of right. This was the practice in the General Court, and still is the practice of the District Courts.

Cur: adv: vult.

ROANE Judge. The first question which occurs in the present case is whether a special verdict can be found in a writ of right?

This action is by the English Law committed to a grand assise; which is an extraordinary kind of jury composed of sixteen, selected with particular care and established by *H.* 2, in lieu of the trial by battle. They are sworn to try the mere right upon

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upon the *mise* being joined; which, according to *Sir Edward Coke*, 1, *Inst.* 294. *(b.)* is a term appropriated to a writ of right, and anſwers to what in other actions is called an iſſue. But the *mise* is not technically denominated an iſſue; for, in the ſame paſſage, it is held that if in a writ of right a collateral point is to be tried, it is then called an iſſue.

It is alſo held in *Finch's* law 412, that no attaint lyeth for him that loſeth in a writ of right, becauſe it paſſeth by the grand aſſiſe which is more than twelve; and in 3, *Bac.* 279, the ſame doctrine is held, where the aſſiſe is taken on the mere right.

From theſe ſeveral circumſtances; namely, 1ſt. from its being an extraordinary jury ſubſtituted in room of a trial by battle; 2. from its being charged to try the mere right, between the parties; and 3. from their not being liable to an attaint when trying the aſſiſe (which liability to the pains of an attaint is in the caſe aſſigned as a reaſon for permitting juries to find a ſpecial verdict;) from theſe grounds I ſay or ſome of them, it has been held in England as appears from the caſe in *Moore*, decided on argument in the *C. Bench* in the 1, *Jac.* 1, and recognized by other authorities, that a ſpecial verdict cannot be found on the trial of the *mise* in a writ of right.

In oppoſition to this poſition great ſtreſs has been laid upon the deciſion in *Downmans* caſe 9. *Co.* 12. "that on all iſſues joined, a ſpecial verdict may be found." But the following anſwers may be given to that deciſion as applying to this caſe.

1ſt. A *mise* is not legally ſpeaking an iſſue, as appears from *Co. Litt.* 294. *(b.)* above ſtated. 2. In the ſame caſe it is held that on a collateral iſſue joined in an aſſiſe, a ſpecial verdict may be found; which ſeems to exclude one where the *mise* is joined; and 3. The objection in *Downmans* caſe was, that a ſpecial verdict could only be found

found on the general iſſue; but not on a ſpecial iſſue, on a collateral point; and this deciſion, having reference to the objection, is that on all iſſues a ſpecial verdict may be found; 4. the caſe in *Moore* was decided a few years after the caſe of *Downman*; and as it does not purport to overrule it, it ought to be conſidered, as conſiſtent with it. Shaw, *vs.* Clements.

A caſe was alſo mentioned from 1, *H. Black.* 2, of a ſpecial finding in a writ of right, which is ſuppoſed to be equivalent to a ſpecial verdict; but, if that caſe is more accurately examined, it will be found that it was an iſſue taken on a traverſe to a collateral point.

Thus it appears that the law of England is, that on the *miſe* being joined in a writ of right, a ſpecial verdict cannot be found; but that, where an iſſue is joined on a collateral point, a ſpecial verdict may be found.

Our act of Aſſembly in 1748, enacts that, on a plea in abatement being overruled, the defendant ſhall put himſelf upon the grand aſſiſe; and the miſe ſhall be joined upon the mere right and tried by ſixteen jurors. The act, appearing to conform to the Engliſh mode of proceeding on the ſubject, is ſuppoſed not to have altered the practice of the Engliſh law, relative to the point now in queſtion.

We come next to the act of 1786; which purporting to reform the mode of proceeding in writs of right, has dropped the idea of a grand aſſiſe and refers the deciſion to twelve men qualified as jurors are in other caſes. This diminution of the jury probably would not alone juſtify us in ſupporting a ſpecial verdict. For in 5, *Co.* 85. it is held "that though by the ſtatute of *Rutland* 12, *Ed.* 1. "a trial of a writ of right in Wales is to be by "twelve common men, yet that judgment final is "to be given (though the plaintiff had previouſly "ſuffered a nonſuit) as before the ſtatute; for al-

G. 3. "though

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"though the manner and dignity of the trial is altered, yet the judgment in the action remains as before."

But the act of Assembly further provides that at "the trial any matter may be given in evidence "which might have been specially pleaded." That is to say, it supersedes the necessity of pleading a *collateral* matter, by permitting it to be given in evidence at the trial: And, as if such collateral matter had been pleaded and issue joined thereon a special verdict might have been found on the principles of the English cases, it follows, that, when the matter of such collateral issue is submitted to the jury in another form, the right to exercise the same power results, as a necessary consequence.

On this ground then, I can, without infringing any of the English decisions, support a right in the jury to find the same kind of verdict in this as in other cases. Which in reason, as was well argued, seems preeminently adapted to cases of this kind; which, in general, are intricate and difficult.

As to the objection on the ground of damages having been assessed by the jury who tried the *mise* and judgment rendered for them; the answer is that the act of Assembly provides that damages may be assessed by the recognitors of assise, for with holding the possession.

With regard to the exception that all the proceedings were had at rules and not in Court, I answer that neither the words nor reason of the act require this case to be excepted from the general provision that proceedings in causes shall be matured at the rules; and no argument can be drawn by analogy to ejectments; for there the assent of the Court is necessary to introduce the real defendant on the customary terms of admission.

FLEMING Judge. With respect to the question relative to the damages, it is sufficient to observe that our act of Assembly in 1786, has changed

ed the Common Law, and expreſsly directs that the demandant if he recover his ſeizen, may alſo recover damages to be aſſeſſed by the recognitors of aſſiſe.

There is as little weight in the exception that the proceedings prior to the trial of the cauſe were had at rules and not in Court. For the act of Aſſembly which directs the proceedings there is in general terms; and makes no exception as to writs of right.

But there is more difficulty on the point relative to the ſpecial verdict.

On examining the Engliſh books on the ſubject this diſtinction ſeems to prevail there. When the *miſe* is joined on the mere right, or in other words when the ſingle point is, whether the demandant has greater right to recover than the tenant to hold? is to be tried, there a ſpecial verdict or a verdict at large cannot be found; but where any collateral matter is pleaded and an iſſue taken on it, there the facts may be ſpecially found and the law left to the deciſion of the Court.

Great ſolemnity is obſerved in theſe trials in that country; ſixteen recognitors conſiſting of four knights and twelve others elected by them, conſtitute the grand aſſiſe; which was ſubſtituted in the room of the ancient trial by battle. But our act of Aſſembly to reform and ſimplify the mode of trial in this action and to ſtrip it of all its uſeleſs requiſites, has directed that twelve good and lawful men qualified as jurors are required to be, ſhall be elected, tried and charged, as the manner is, to make recognition of the aſſiſe; that at the trial any matter may be given in evidence, which might have been ſpecially pleaded; that upon the verdict, or in the caſe of a demurrer, the like judgment ſhall be given and execution awarded, as in caſe of a writ of right; that the party, for whom judgment is given, ſhall recover his coſts of ſuit; and that the demandant, if he recover his ſeizen, may alſo recover his damages, to be aſſeſſed by the recog

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nitors of aſſiſe, for the tenents with holding poſſeſſion of the tenement demanded. Which brings the caſe within the rules laid down in the Engliſh books. For the nature of the trial and the variety of matter conſiſting both of law and fact, which may now be offered to the jury, call for the interpoſition of the Court. Becauſe as *Lord Coke*, in his reaſoning upon *Downmans* caſe, very properly obſerves, the wiſdom of the law is to refer to perſons, things in which they have knowledge and are expert; and therefore the law will not compel jurors, who have not knowledge in the law, to take upon them the knowledge of points in law; but leaves them to the conſideration of the Judges.

If we take the caſe upon the reaſon of the thing, it appears more neceſſary that there ſhould be a ſpecial verdict in writs of right than in other actions; becauſe the title is often, nay almoſt always, perplexed and difficult; depending upon legal inferences and abſtruſe queſtions, involving many of the niceties of law; which jurors muſt be very incompetent to decide upon.

Therefore upon the whole I think a ſpecial verdict may be found in this country in writs of right; and conſequently that the judgment of the Diſtrict Court is proper and ought to be affirmed.

CARRINGTON Judge. All the objections made in this cauſe are unimportant, except that with reſpect to the ſpecial verdict; and as to that, it ſeems to me, upon principle, that there is more reaſon for a ſpecial verdict, where the *miſe* is joined upon the mere right and all the points of fact and law are laid before the jury, than in ordinary caſes: Becauſe very nice queſtions of law, reſpecting the effect of conveyances, ſeizens and deſcents, will frequently be involved in the iſſue. Which the jury muſt neceſſarily be very incompetent to decide; and which ought therefore to be reſerved for the opinion of the Court. This has been thought neceſſary, in ordinary caſes, where leſs difficulty

ficulty occurs; and the argument is certainly *a fortiori* in cases of intricacy depending upon some of the most abstruse learning in the law. It is therefore wonderful to me, how a contrary doctrine ever should have been thought of.

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The English books however do afford some contrariety upon the subject; and perhaps they leave the question in some degree of uncertainty. But our act of Assembly in 1786, which directs that twelve men qualified as jurors are required to be, shall be elected, tried and charged to make recognition of the assise; and, at the trial, that any matter may be given in evidence which might have been specially pleaded, has made so great a change with respect to the jurors and the matters to be submitted to them, as puts the point beyond all doubt. For they are to be charged as in other cases; and the special matters are to be given in evidence. Which necessarily puts all questions of law, however difficult, in issue; and consequently, upon the principles before mentioned, the reasons for a special verdict in this case, are as strong as in any other; and perhaps stronger. I am therefore for affirming the judgment.

PENDLETON President. The exceptions made by the tenants to the demandants recovery are

1. That damages are not recoverable at Common Law, and though permitted by the act of 1786, they are not recoverable in this action but in a subsequent one brought for the purpose.

This objection is overruled by the words of the act that the damages are to be assessed by the recognitors of assise.

2. That proceedings should have been in Court not at the rules, as in actions of ejectment. In an ejectment however no process issues, nor are there a succession of pleadings; but a fictitious defence is made and the real defendant comes into Court and is admitted on the terms of pleading to issue. The cause is then ready for trial; and it

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would be idle to send it to the rule docket, for no other purpose but to be replaced on the Court docket. The law is therefore silent as to proceedings at rules in ejectment. But in all actions, without exception, the process in the General Court then, and District Court now were to be returnable to the next Court; and the day of appearance to be the day after that Court, in the clerks office. Where all pleadings are to be had until an issue is made up. which puts an end to the objection.

3. That the Count describes the lands differently, from that contained in the patents and deeds. This variance we know will happen in all old patents, from mistake or inaccuracy of surveyors and chain carriers; and from the variation of the compass. Our juryes generally and wisely establish reputed boundaries disregarding mistaken descriptions; and accordingly, this jury have established the bounds described in the count.

4. That the title is defective; the conveyance under Borden's will, being by two only, of three executors. There is I am satisfied an old act of Parliament * authorising those executors who act to convey, where part have renounced; but as the jury have not found that renunciation, it does not apply; and therefore I have not sought for it. Besides the answer given to the objection is satisfactory, that until the power is executed, the lands descend to the heir; who is found to be one of the executors conveying: and although he conveys, as executor and not as heir, yet his conveyance would operate as an estoppel against him, if he was to claim it as heir.

5. That it is also defective, since although Abraham the father is found to be heir to Ezekiel, who died seized, it is not stated that Ezekiel died intestate; and he might have devised it. It was truly said to be the usual practice to state the intestacy; but that does not prove the necessity for doing so in order to support the heirs title. The heir is the natural and legal successor to the ancestor; and

* 21, *Hen.* 8.

and he who claims, in oppoſition to him, muſt ſhew that the ſucceſſion was interrupted by a deviſe.

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6. That the lands are not found to be all in the poſſeſſion of the tenants; and this appears to be true, from a view of the ſurvey made part of the verdict; which ſhews that a ſmall parcel of land will be taken from Wilſon who is no party. But the judgment is that the demandant ſhall hold the land *acquit of the title of the tenants.* Wilſon will not be bound by it; but will be at liberty to aſſert his title in oppoſition to the demandant, if it be ſuperior.

This ſtring of objections being overruled I had ſome doubt at firſt upon the title of the tenants, under M'Clenchans lapſed patent: but the jury not having found it to be for the ſame land (on the contrary the judgment on the petition recites a patent to Borden of a different date, though probably by miſtake,) and above all that proceeding being againſt Abraham, who is not found to have had any title until the death of his father Ezekiel in 1778, my doubts are removed; And the demandants title ſtands free of all objections. But a 7th Objection is made to the form of the proceedings; namely, "That the jury when the miſe is joined in a writ of right, muſt decide and cant find a ſpecial verdict."

The caſes refered to, with ſome which occured to the Court, have been conſidered with that attention which was due to the importance of the ſubject; as fixing a rule in a caſe, where the deciſion was ſo intereſting to the community. It is laid down in very general terms in *Downmans* caſe, that in an aſſiſe of novel diſſeiſen, and on iſſue joined in *all other actions, real, perſonal and mixed,* the jury may give a ſpecial verdict at Common Law; of which the ſtatute of *W.* 2. *C.* 30. was only an affirmance; and this doctrine was delivered by the Court, in oppoſition to the arguments of the counſel, that at Common Law there could be

no

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no ſpecial verdict in any caſe; and that the ſtatute only permitted it in aſſiſe of novel diſſeiſen, when by the pleadings a collateral point is put in iſſue.

The reaſons, given by the Court for this opinion, are very forceable; the jury are judges of *fact*, the Court of *law*; and tho' the jury may take upon them to decide the law, at the peril of an attaint formerly (and what further perils then and now muſt be left to a higher tribunal,) yet it would be very unreaſonable to force them into that predicament; and not permit them to diſcharge their legal duty of deciding the facts, and leaving the law to the Court.

This reaſoning does not apply in a leſs degree, but a *fortiori* to writs of right, as was well obſerved by the Counſel. They uſually ſtir up ancient conveyances of difficult interpretation; and likely to produce intricacy and legal perplexity in the diſcuſſion, more proper for the Court to decide; and that in a mode which will give them time for conſideration.

But though the Court lay down the rule to extend to all actions, yet, in the caſe, there is afterwards ſtated a liſt of caſes, in which a ſpecial verdict may be found. Among which is a *præcipe quod reddat*, (the preſent ſuit) if an iſſue be joined on a collateral point; and hence it is ſuppoſed that it cannot be where the *miſe is joined upon the mere right*. But this ſeems to be the reporters own concluſion from the Courts opinion; which does not warrant the reſtraint; and therefore the inference, from it, falls to the ground.

In *Andrews* vs *Comwell*, *Moore* 762, the Court among other general rules lay down this, "that the jury cannot find a ſpecial verdict where the miſe is joined upon the mere right." No reaſon is given for it there, but ſubſequent authors have given ſeveral, ſuch as they are. 1ſt. That *Lord Coke* in his commentary upon *Litt.* 294, ſays, the

attaint

attaint of jurors was for a falſe verdict on an iſſue joined: but as the joining the miſe is not an iſſue, the attaint does not lie; and therefore that there is no reaſon for allowing a ſpecial verdict. Shaw, vs. Clements.

He however defines both the joining the miſe and the iſſue; and proves to me that they are eſſentially the ſame; and differ only in his terms. But ſuppoſe an attaint would not lie, is the avoiding that peril to the Jury the only reaſon for a ſpecial verdict? And is the right of the parties to have their cauſe tried in the legal courſe of no conſideration? I can only ſay, ſuch reaſoning is a feather in my judgment, weighed againſt that in *Downmans* caſe. In page 295, he ſays, it is the duty of the Judges to inſtruct the jury in points of law; and in another place he ſays, it is their general duty to hear, conſider, conſult and determine. This a ſpecial verdict affords an opportunity of doing; which the inſtruction does not: And that ſeems to be the only difference between them in principle, giving a decided preference to the ſpecial verdict.

In page 226 he repeats the general rules in *Downmans* caſe; but adds as a condition that the jury may find a ſpecial verdict, *if the Court will receive it.* A ſtrange proceeding, and overruled in 3, *Salk.* 373. and 3, *Bacon* 284; which ſhew that the Court cannot refuſe it, if *pertinent.*

The beſt reaſon, given for *Moore's* rule, is founded on the ſolemnity of the trial; ſix knights are ſummoned, who meet and elect twenty four knights and others. Who are alſo ſummoned; and out of them ſixteen are choſen; that is to ſay, four knights and twelve privates. The trial is at bar; where the four Judges are together, to aſſiſt in giving inſtructions on any point of law, with libraries at hand, to recur to if they doubt; and on this ground, it is probable the practice in England yet is, not to find a ſpecial verdict; ſince we do not find an inſtance of one.

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Yet even there as a queſtion of law, ſince it is admitted that the Court may give their opinion on the law of the caſe, it would ſeem ſtrange that a ſpecial verdict ſhould be excluded; which muſt be allowed to be the moſt eligable mode of bringing the queſtion before the Court; eſpecially in ſubordinate juriſdictions.

But however it be there, we have a maxim "that the law does not apply, where the reaſon ceaſes;" more eſpecially in points of practice; which, after all, this ſeems to be.

In this country theſe ſuits are to be tried either in the County Courts, where there is generally more integrity than law knowledge, or in the Diſtrict Court; where there is often but one Judge; and at any rate no library at hand to aſſiſt in removing doubts. Inſtead of ſixteen jurors, in whoſe election a regard is had no doubt to their abilities, our Jury's conſiſt of twelve; called out at the inſtant from the byeſtanders; and no other qualification preſcribed, than their being freeholders.

The act of October 1786 on which the preſent, ſuit is brought is "an act for reforming the *method* "*of proceeding* in writs of right."

The reforms are, 1. That in joining the *miſe*, the parties are to put themſelves upon the *aſſiſe*; and not the *grand* aſſiſe as in England. 2, a jury of twelve men (qualified as jurors are required to be) are to be ſworn and charged to make recognition of the aſſiſe: inſtead of the ſixteen according to the Engliſh practice. 3. On the verdict (without excluding thoſe that are ſpecial) or in caſe of a demurrer, ſuch judgment ſhall be entered and execution awarded as in a writ of right; and if the plaintiff recover the jury may aſſeſs damages: which is not to be done in England. 4. That the parties may give in evidence any matter which they could have pleaded. Which would ſeem to remove Lord Cokes refined diſtinc-

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tion, between joining the miſe and joining an iſſue on a collateral point, if it had been found.

Shaw, qui. Clements.

Since therefore the avowed purpoſe of the act is to reform the mode of proceeding in theſe ſuits; and the Legiſlature have reduced the grand aſſiſe to a common jury, and ſpeak of their verdict in general; without reſtraining it to any particular kind, there is nothing to diſtinguiſh it in this reſpect from a verdict in any other ſuit. The caſe in the 5. *Coke*. 85. is only the reducing of the jury to 12 in Wales; but did not alter the nature of the judgment. Our act ſays the ſame; and that caſe is ſilent, as to the verdict.

Upon the whole of the law then I think the finding of a ſpecial verdict is juſtifiable. Upon principle it admits of no doubt; and therefore I am for affirming the judgment.

GRAVES, *againſt* WEBB.

GRAVES obtained a judgment (upon a motion) in the Huſtings Court of Richmond againſt Webb for £ 7950: 17: 6 ſpecie, being the penalty of the bond upon which a judgment had been obtained by William Reynolds againſt Graves as ſecurity to Webb; but to be diſcharged by the payment of £ 1771: 12: 1, in military audited certificates, bearing an intereſt of ſix per centum per annum, to be computed from the firſt day of January 1789 (the balance found due in military certificates) till payment; and the coſts of the motion.

If the notice be ſufficient to apprize the defendant of the grounds of the motion it is enough.

The ſecurity entitled to judgment againſt the

Upon

Graves, *vs.* Webb.

principal for the same specific thing which he has been adjudged to pay himself.

Judgment cannot be entered for certificates in a suit at common law.

Upon the trial of the cause, the defendant filed a bill of exceptions to the Courts opinion; which stated, that the motion was founded on a notice to this effect, that the plaintiff would move for judgment against the defendant, "for the sum of "three thousand nine hundred and seventy five "pounds eight shillings and nine pence in military "certificates, with interest due thereon, from the "first day of January 1786, till payment; which "sum the plaintiff, as security for the defendant, "paid William Reynolds; as would appear by an "execution issued from the said Court of Hustings "with William Reynolds's receipt for payment "thereon." And that after sundry discounts offered by the defendant that the plaintiffs claim was reduced to £ 1771:12:1 military certificates. That thereupon the plaintiff moved that the judgment should be entered for £ 7950:17:6 specie, to be discharged by the payment of the said sum of £ 1771:12:1 in military certificates. Which the defendant objected to, because the notice was for military certificates. But that the Court overruled the objection.

There is a copy of the judgment against Graves in the record; which is for £ 7950:17:6 specie; but to be discharged by the damages found by the jury, being £ 3975:8:9 in military certificates, with interest thereon, to be computed after the rate of six per centum per annum, from the first day of January 1786, till payment, and one penny and the costs.

To this judgment Webb obtained a supersedeas from the District Court of Richmond, where the same was reversed with costs; and the Court proceeding to give such judgment as the Hustings Court ought to have given, entered judgment that Graves should recover of Webb "£ 1771:12:1 "in military audited certificates, bearing an in- "terest of six per centum per annum, from the "first day of January 1789, the balance found by "the said Court of Hustings to be due; and the

"costs."

"costs." From this judgment of the District Court, Graves appealed to this Court.

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DUVAL for the appellant. No injustice was done by the judgment of the County Court; for although there was some informality in the manner of entering it up, yet it was substantially right upon the merits. It was for the true sum due; and therefore justice should not be defeated by a technical objection to form. The act giving motions of this kind is a remedeal law; and therefore all subtilty of interpretation tending to overthrow the object of it should be discountenanced. The case falls within the spirit of the act of Jeofails; and should be considered as helped by the equity of that statute.

MARSHALL *contra*. The notice was that the plaintiff would move for judgment for certificates; but the judgment actually rendered is for specie, to be discharged by certificates. Which is a fatal variance. It would be so in an action at Common Law, and therefore much more in a summary remedy like this. If certificates were out of circulation altogether, how would this judgment be discharged? It must be, by payment of the specie sum; which is more than was due; and therefore in that respect, the judgment would be unjust. But an invincible objection is, that the judgment is rendered for interest accruing after the judgment against Graves was satisfied. Which I believe has been decided in this Court to be erroneous; but if not it is nevertheless clear that the law does not allow the party to recover interest by this summary mode. If he chuses to have interest, he must bring his action at the Common Law.

PENDLETON President. If the Court should be of opinion that the judgment of the County Court was not sustainable, the question then will be whether we can proceed to give any judgment for the plaintiff? For as certificates are not a medium of exchange, but a specific thing, the Court are doubtful whether any judgment could be ren-

dered

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dered for them, ſhould they think the judgment of the County Court was erroneous; and therefore we wiſh to hear the Counſel upon this point.

MARSHALL. I always thought the Court could not render any judgment for the plaintiff.

Cur: adv: vult.

October 24th. The cauſe was this day argued again by Duval and Randolph for the appellant, and Marſhall for the appellee.

For the appellant. It was contended that judgment might be entered for certificates. For debt lay at Common Law for ſpecific things. 2, *Bac: abr:* 21. *ſhep. ab.* 13. §. 5. and therefore in this caſe where the plaintiff had paid certificates, the Court might render judgment for them by that name. That although the judgment was not expreſsly ſo in form, yet it was in ſubſtance; becauſe the penalty was to be diſcharged by the certificates. That no injuſtice was done the appellee, by the judgment having been entered for the penalty; becauſe the penalty might be diſcharged by the true ſum due. That in point of juſtice it was right that the judgment ſhould be for certificates; becauſe being an article liable to fluctuate in value, a money judgment might not have been equal to the replacing of them. That the notice was ſufficient; becauſe it contained the two eſſential points. 1ſt. Sufficient certainty to enable the defendant to prepare for his defence. 2. Preciſion enough, for the judgment rendered in conformity to it, to form a barr to a future action for the ſame thing. That the act of Aſſembly which gives the remedy by motion is a remedial law; and therefore ſhould be expounded liberally and ſo as to advance the remedy. That in ſuch a caſe the Court exerciſes an equitable juriſdiction; and that intereſt was due in conſcience as well as law. Of courſe, that the Court did right in allowing it.

For the appellee. It was inſiſted that in an action of debt for ſpecific things it was abſolutely

neceſſary

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neceſſary to lay the value of them. That all the caſes cited by the appellants were ſo; and that no caſe had decided the contrary. That the value here was not aſcertained; and therefore there was no ſtandard, by which the certificates could be diſcharged. That in actions of debt for foreign money the conſtant practice was to lay the value, in order that there might be a meaſure by which the ſpecific article might be diſcharged. That this was more neceſſary in the caſe of certificates than in the caſe of foreign money; becauſe the latter might always be procured at home or abroad; but certificates by the very laws which created them, were ſubject to expire; and thus it might happen, that the ſpecific article could not be got to diſcharge the judgment. That the judgment did not purſue the notice. That if it was a declaration, the variance would be fatal; and certainly it would not be pretended, that a notice, which was an innovation upon the common law, might be leſs definite than a declaration; or that the judgment might vary from the notice, in a greater degree, than it could from the declaration, in a ſuit at common law. That the notice ſhould ſtate the claim, with as much preciſion as a declaration; and the judgment ſhould as ſtrictly purſue the one as the other. That the act of Aſſembly did not permit the entering of Judgment for the penalty; which ſhould be for the amount paid preciſely, and that no exceſs was allowable. *Rev. Codc.* 292. That this expreſsly confined it to the ſum paid; and therefore that a departure could not be ſuſtained. That the judicial part of the judgment was for the penalty, and the reſidue was collateral and a mere rule of Court, *Ragsdale* vs *Batte* in this Court.* Which was a complete anſwer to the argument that in ſubſtance the judgment was for the certificates; for that caſe proves that the judgment is really for the penalty; and therefore if it were true that judgment could be rendered for the certificates, yet that circumſtance would not help the

appellants

2. *Wash:*

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appellants caſe. That for the ſame reaſon, that judgment could not be rendered for the penalty, intereſt was not rightly allowed; becauſe it was an exceſs beyond the ſum paid; whereas the act expreſsly confined the judgment to that amount.

ROANE Judge. The original bond, referred to in theſe proceedings, was a bond from Webb and Graves to Reynolds, conditioned to be defeazanced, by the delivery on a certain day of a ſpecific ſum in military audited certificates.

If the ſubject of the defeaſance had been a ſum certain in money, then judgment would have been given for that ſum, it being a medium of univerſal circulation and a juſt ſtandard of value. This likewiſe would have been the caſe with regard to tobacco; for this commodity being in general circulation and a permanent ſtaple of the country, the Legiſlature has by an expreſs proviſion given it ſome of the qualities of money; as for inſtance that tobacco contracts ſhall be diſcharged in kind.

But, with reſpect to military audited certificates the Legiſlature has made no ſuch proviſion; and ſuch an effect will by no means reſult from their general nature and quality.

Theſe certificates were not in the hands of the people generally; but only of thoſe who had compoſed the revolutionary army and a few ſpeculators; the holders, in both of which diſcriptions of men, calculated more on the future than the preſent value thereof; they were merely of a temporary exiſtence; and are only to be conſidered as a document or bond, from the public, for the payment of a certain ſum.

On theſe accounts and becauſe of the very great fluctuation in the value of ſuch certificates, they are a very improper medium for eſtimating damage; By ſuch a medium, although a man might have performed a contract by a purchaſe with £ 50, in money at a given day, it has happened that, within a very few months afterwards, quadruple that ſum would not have indemnified him.

Thus

Thus by departing from a ſtable medium and adopting one liable to be affected a thouſand ways; and eſpecially by the monopoly and artifice of the ſpeculators, the greateſt injuſtice would enſue. Nay more, it might happen and in fact it has happened, that this medium ſhould be called out of circulation; and thus an impoſſibility be created of performing the contract in ſpecie. Graves, qui. W...

For theſe reaſons it has never been the policy of the law that a breach of a contract, like the preſent, ſhould be remedied, in any other way than by a juſt eſtimation of damages in money. The preſent contract was juſt the ſame as if it had been to deliver any other kind of commodity; with this difference however, that with reſpect to moſt articles a ſpecific payment would be leſs unjuſt; becauſe they are more permanent in their value than the kind of certificates now in queſtion.

The preſent caſe then, is that of a mere collateral bond (according to the general acceptance of this country;) and the undertaking of the ſecurity goes to the damages ſuſtained in caſe of non performance, to be eſtimated in money, and a Court of Law has no power to award a delivery of the certificates themſelves.

The queſtion then is, whether as the principal here has not and could not by the policy of the law have bound himſelf to produce the certificates themſelves by a general obligation like the preſent; and as the ſurety has not undertaken further or otherwiſe than the principal himſelf had undertaken, the appellant ſhall, in conſequence of a judgment which ought not to have been rendered (to which the principal was no party and which the ſecurity might have reverſed,) be put in a better ſituation and be enabled to recover the certificates themſelves?

Let me premiſe that I do not meddle with that judgment; it muſt, for any thing I ſay, remain in

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full force: But I am compelled to take a view of the ſubject as connected with the preſent queſtion, and collaterally to ſay, that it was not warranted by the agreement in queſtion, under the laws of the country.

If my premiſes are correct, it might with as much truth be argued, that a judgment againſt a ſecurity for tobacco, on a bond conditioned for the payment of money, if a Court could be found to render ſuch a judgment, would juſtify that ſurety in recovering tobacco from the principal.

Such then would be the conſequence of awarding payment againſt the principal, by having regard only to what he has actually paid to the creditor; and keeping out of ſight his original engagement. Yet I ſuppoſe in that caſe that a payment by the ſurety, of what was not contracted to be paid in the original document, would not be a payment by him as ſecurity; and that a third perſon by his act, nay more that a Court of Juſtice by a judgment to which the principal was no party, could not bind him to pay that which he had never contracted to pay. And this is *a fortiori* where the payment is to be in a medium not recognized, as a juſt medium of circulation, by the laws of the country.

This however might be removed by requiring in the judgment againſt the ſecurity, which is to warrant a recovery againſt the principal, a conformity to the original engagement; and this would impoſe no hardſhip on the ſecurity.

This reaſoning is of a general nature; but it is ſuppoſed it will loſe none of its force, when applied to a recovery in the ſecond inſtance, by a ſummary proceeding on a motion.

Let us next ſee whether we are imperiouſly driven into ſuch a conſtruction by the act of 1786 for relieving ſecurities? It muſt indeed be a poſitive and imperious ſtatute, which would induce me to ſuſtain ſuch a judgment, in oppoſition to ſuch principles. That

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That act, reciting as a grievance the delays incurred by ſureties in getting reimburſement from the principals, provides in future a more expeditious mode of recovery; and this it is ſuppoſed was the only object of that law, as it is the only one which is ſtated or which occurs as neceſſary to be attained.

If this then be the caſe will a Court of law acting in lieu of a jury, give a judgment which it is ſuppoſed would never have been authoriſed by the verdict of a jury? Will ſuch a Court, exerciſing the equitable functions of a jury, give a ruinous judgment for that which was never in the contemplation of any of the parties; merely becauſe, by an *ex parte* deciſion (poſſibly had by colluſion) it was ſuppoſed to be the ſubject for which judgment ought to be given; when in fact it appears to be ſuch a judgment, as, with reference to the contract and law, no Court ought to have rendered? I believe no jury could be be found to render ſuch a verdict.

I ſuppoſe it will readily be admitted, that that conſtruction of a ſtatute ſhall be preferred, which will not tend to bind a perſon by a judgment to which he was no party; which will not tend to ſaddle him with that he never contracted to pay; and which will not put it in the power of a third perſon to charge him, collaterally and by a ſide wind, further and otherwiſe than his original creditor could charge him directly, in conſequence of his real undertaking. Although it is not neceſſary for me to enquire, whether a Legiſlature has power to contravene theſe principles, yet it is enough for my purpoſe to ſay, that, if they be equivocal, the conſtruction, which accords with them, ſhall prevail.

In the body of the act of 1786 there is nothing to drive us from theſe principles; I have already ſaid that the intention of the act was only to expedite the recovery.

The

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The firſt clauſe of the act is, that where judgment hath been entered up againſt any perſon as ſecurity and the amount of ſuch judgment hath been paid by him, it ſhall be lawful for ſuch ſecurity to obtain judgment by motion, for the full amount of what he ſhall have paid &c. This clauſe being general, would be taken to refer to the undertaking of the plaintiff in the motion, as well as to the judgment; but this conſtruction is further fortified, by the terms *judgment againſt him as ſecurity;* and it is clear that a judgment againſt a man, not warranted in his character of ſecurity, does not come within the meaning of the clauſe. The general expreſſion *or other thing;* in the next clauſe is referrable to the condition of the bond, and not to the judgment, ſo as to authorize a judgment for ſuch other thing. As for inſtance in the preſent caſe the condition of this bond is to pay certificates; and the meaning of the clauſe is, that a ſecurity to a bond of this kind may recover from his principal; but the general law, as to the particular ſubject of the recovery, is entirely unaffected by this act. This opinion is enforced by the latter part of the ſame clauſe, where it is provided, that in caſe of a payment by one obligor, he may recover and ſue out execution againſt the other obligors for their reſpective proportions of the ſaid debt; dropping the terms, *or other thing*, before uſed.

Thus then the true conſtruction of the act does not aſſail the principles I have before endeavored to lay down; to ſay the leaſt, it is ſilent on the ſubject; and thoſe principles, deemed in themſelves to be impregnable, muſt controul the preſent caſe.

The reſult is, that the preſent appellant (not having in the former action aſcertained *in money* and paid the damages ſuſtained by the failure to deliver the certificates; and for which alone he was bound as ſecurity: but having ſuffered and paid a judgment for certificates, with reſpect to

which

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which in themſelves after the day of delivery the appellee was not chargeable) has not made ſuch a caſe as to enable him under the act of 1786 to recover the ſaid certificates or even the penalty of the bond. The former, for the reaſons already given; The latter, becauſe, among other reaſons the penalty has not been paid or diſcharged by the appellant.

What remedy the appellant may have in the premiſes is not neceſſary for me to enquire; but for the reaſons now given the judgment of the Court of Huſtings was erroneous, in not overruling the motion for the judgment; and that of the Diſtrict Court was alſo erroneous, in not correcting that of the Court of Huſtings, according to the idea I have juſt ſtated; but inſtead thereof giving a judgment for the certificates.

FLEMING Judge. It is objected that the original judgment in the Court of Huſtings againſt Graves as ſecurity for Webb was erroneous, as the damages, for breach of the condition of the bond were aſſeſſed in certificates and not in money; and conſequently that all the proceedings ſubſequent thereto are likewiſe erroneous.

But whether the original judgment was erroneous or not, appears to me to be wholly immaterial in the preſent ſtage of the buſineſs, as it was acquieced in by both Graves and Webb.

Graves as Webb's ſecurity paid the amount of the judgment for £ 3975:8:9 in military certificates, carrying an intereſt of ſix per cent per annum; and it appeared, on the trial of Graves's motion in the Court of Huſtings, that Webb had reimburſed him upwards of £ 2200, having reduced the balance to £ 1771:12:1. Therefore, had the Court given judgment for that ſum, I ſhould thought it right; as it would then have been for the real balance due to Graves; and agreeable to the notice given to Webb.

The

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The act of Assembly, to empower securities to recover damages in a summary way passed in the year 1786 and re-enacted in 1792, makes use of very extensive language; for it declares, that it shall be lawful for the security or securities to obtain judgment by motion against the principal obligor or obligors, his, her, or their heirs, &c. for the full amount of *what* shall have been paid by the security or securities &c; (which would seem to include whatever was recovered against the security.) And in the next section of the act, which gives a remedy to one security against the others, in order to compel them to bear an equal proportion of the debt recovered, the words are, "where "there shall be two or more securities jointly "bound &c. in any bond, bill, note or other obli- "gation for the payment *of money or other thing*." By which the Legislature probably had in contemplation military and other certificates; as there were at that time and long since, vast quantities of them in circulation; and in which great numbers of people were daily speculating. At all events, the words are large enough to include a remedy, in kind, for whatever was recovered against the security; and therefore I think the Court should adhere to that construction.

But I am of opinion that neither the above recited act of Assembly, nor the notice given to Webb, authorized a judgment on motion for the penalty of the bond; which differs from the first judgment as well in the sum, as in the subject; it being for specie, instead of certificates.

It is objected to the judgment of the District Court that interest is given on the certificates. But the judgment, as I understand it, is, in fact, for audited certificates; carrying, on the face of them, an interest of six per cent.

Upon the whole I think the judgment of the District Court is right; and that it ought to be affirmed.

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CARRINGTON Judge. I conſider the reverſal by the Diſtrict Court to be right in ſubſtance, but not for the reaſon already given. The notice was intended merely to inform the defendant on what judgment the plaintiff meant to proceed; and if it was ſuch, that the plaintiff could not miſtake the object of the motion, it was ſufficient; eſpecially, in ſuch a caſe as this, where it does not appear that Reynolds had two judgments againſt Graves, on account of the defendant. Who therefore could not have been miſtaken, in the object of the notice; and conſequently I think there was no cauſe to reverſe the judgment, upon that ground.

But for another reaſon the judgment of the Huſtings Court, was in my opinion wrong and ought to have been reverſed; namely, that it is given for the penalty of the original bond; which was merged in the firſt judgment and could not be acted on again. Therefore the plaintiff in the motion ſhould only have recovered the full amount paid by him as ſecurity; for that was the true ſum due; and judgment ought not to have been entered for any other. Upon that ground then, I think the Diſtrict Court did right in reverſing the judgment.

It remains to be conſidered whether the final judgment of the Diſtrict Court can be ſupported?

The judgment is for £ 1771:12:1 *in audited certificates;* and in an action, I own I ſhould have had difficulties; as I am diſpoſed to think, that the value, in that caſe, ought to be ſettled in money by a jury; and found in damages. But the act of 1786, is a remedial law, made for the immediate relief and benefit of ſecurities: to reſtore to them, in a ſpeedy manner, the ſubject they had loſt by their engagements. It enacts that they ſhall by motion recover the full amount of what *ſhall have been paid;* and in another clauſe, giving remedy to one joint ſecurity againſt another, it declares that the ſecurity, who has paid, ſhall recover againſt the other his proportion of *money or other thing paid.* Which terms neceſſarily comprehend, what-

ever

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ever the judgment against him shall have been rendered for. The words *the full amount paid*, and *money or other thing paid* must include every species of property for which the judgment was given; and they cannot be satisfied without. So that, comparing the remedy with the spirit and intention of the law, I think the judgment of the District Court right; and that it ought to be affirmed.

If this should bind hard on Webb, on account of the scarcity of certificates, he will always have a Court of Equity open to him, where he may be relieved; as formerly was done in cases of judgments for the penalty of bonds.

PENDLETON President. I agree with the first Judge, who gave his opinion, as to the entering judgment for certificates instead of money in the first suit; because certificates are not to be considered as a circulating medium for which judgment ought, in ordinary cases, to be rendered. The first judgment therefore might certainly have been reversed, if the attempt had been made.

But this not having been done, the question is whether the Court can enquire into that point upon the present record; And I think we cannot; for it remains unreversed and in full force. Therefore for any thing which the Court can now say, to the contrary, it must be considered as right in point of law.

Neither is there any room to impeach it on the ground of collusion; because the suit was adversary and the trial by jury: whereas the collusion contemplated by the act of Assembly was that of a judgment by confession.

The question then is whether Graves having paid certificates specifically, a judgment can be entered for him, under the act of Assembly, for the same specific thing?

The

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The claufe, giving the remedy againſt the principal, is for the amount paid, without ſaying whether the payment ſhall be in money, tobacco or other thing recovered; and on this a doubt might ariſe, whether it muſt not be confined to money or tobacco the only mediums, for which the laws had theretofore authorized the Courts to enter judgment. But the next claufe, giving the like remedy for contribution, to a ſecurity againſt his aſſociates, permits it to be done, upon a judgment *for money or other thing*; and ſince I cannot ſuggeſt a reaſon for any diſtinction between the two caſes, I will add this particular deſcription to the general words of the firſt claufe; and will read it thus, "for the full amount of the *money or thing* paid "by the ſecurity." Which will juſtify the judgment of the Diſtrict Court.

It is not unlikely, that the Legiſlature, reflecting on the great quantity of theſe papers, which were then in circulation and the ſubject of daily contracts might have looked forward to inſtances where the ſecurity had actually paid the certificates; and purpoſely provided for the caſe.

The caſe of a tobacco judgment on a money bond does not apply; becauſe that would be a departure from the contract; but the judgment in the preſent caſe has purſued the bond, and is conſiſtent with the contract. So that the defendant is not compelled to pay a different article from that which he originally contracted for.

The judgment of the Diſtrict Court is to be affirmed.

JONES
against
JONES.

Inclusive patent to three creates a jointenancy.

A father & three sons obtain ſeparate patents for 400 acres of land each adjoining to one another; and the father obtains a patent for another tract of 400 acres; afterwards the three take one *inclusive* patent for the whole tracts and another tract of 1162 acres. This deſtroys the ſeparate eſtates in the firſt three tracts; and creates a jointenancy in the whole 2762 acres comprized in the patent.

IN a writ of right (brought by John Jones againſt William Jones) the jury found a ſpecial verdict which ſtated, that Thomas Jones in his lifetime obtained a patent for 400 acres of land on the 10th of June 1740. That John Jones the demandant obtained a patent dated the 10th of June 1740, for a tract of land adjoining the ſaid 400 acres, and containing 400 acres alſo. That William Jones the defendant, on the 10th of June 1740, obtained a patent for a tract of land adjoining the laſt mentioned tract; and likewiſe containing 400 acres. That the ſaid Thomas on the 12th of January 1746 obtained a patent for 400 acres. That the ſaid Thomas was father to the ſaid John and William. That on the 10th day of September 1755 an inclusive patent was obtained by the ſaid Thomas, John and William, for a tract of land containing 2762 acres; which included as well all the tracts for which patents were obtained by the ſaid Thomas, John and William, ſeverally as aforeſaid, as 1162 acres never before granted. That the ſaid Thomas, John and William ſold part of the ſaid 1162 acres to Hog and Glover. That the ſaid Thomas died between the years 1766 and 1770; and that the ſaid John Jones is his eldeſt ſon and heir at law. That the ſaid William is in poſſeſſion of the ſaid 400 acres patented to his father on the 12th of January 1746; *which is the land in controverſy.* That John Jones the demandant is in poſſeſſion of the 400 acres patented to his father on the 10th of June 1740; and of the tract for which he himſelf obtained a patent, as aforeſaid, on the ſame day and year laſt mentioned. That, beſides the tract of land in conteſt, the ſaid William Jones is in poſſeſſion of the tract for which he obtained a pa-

tent

tent the 10th of June 1740, as aforesaid: and if upon the whole matter the law be for the demandant, then the jury find for him; but if the law be for the tenant, then they find for him.

The District Court gave judgment for the demandant; and from that judgment the tenant appealed to this Court.

MARSHLL for the appellant. The question is whether the first patents were surrendered by the acceptance of the last? For if so the parties were jointenants and the judgment of the District Court is consequently wrong. The case is not within the act of Assembly; and therefore it is to be considered independant of it. But according to the general doctrines of the law, the accepting of a subsequent patent is a surrender of the first; because the party, by accepting, admits the right to grant; and therefore is estopped from saying at a future time, that the public had no estate in the premisses; but that a prior right existed in himself.

RANDOLPH on the same side. This is the case of a special verdict in a writ of right, and as to that point must depend on the opinion of the Court in the case now under consideration. *

But upon the other points I contend that the judgment is erroneous. Under the Royal Government all lands were held *mediately* or *immediately* of the crown, which became entitled upon an escheat or forfeiture; and therefore the king was capable of taking a surrender. Tenant in feesimple indeed cannot surrender to a tenant in feesimple *Shep. touch.* 299; but a Lord having remedy by *cessavit* may accept a surrender *Shep. touch.* 303, 304. Surrenders are either express or in law; and the present case is of the last kind. *Shep. touch.* 300. 305. 4. *Burr:* 2211. The act of 1748 for regulating conveyances does not affect the case; for it was a maxim of the law in those days that the king was not bound by a statute unless he was expresly named in it; and he is not named in that act.

* Shaw *vs.* Clements, *(ante) which had been argued but not decided.*

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CALL *contra*. The cauſe is clearly in favour of the appellee whether it be conſidered upon the intention of the parties; the act of Aſſembly; or the principles of the common law, relative to ſurrenders.

I. Upon intention.

The object of the parties was plainly, not to alter the old eſtates and expoſe them to the hazard of ſurvivorſhip, to the injury of their families; but merely to annex the new lands to the old, in order to avoid the trouble and charge of new improvements and the forfeitures to which they would have been liable, had they taken up the new land independantly of, and without reference to the old.

That this was their intention, is evident from the following reflections; namely, that it is not credible, that the eldeſt ſon would have conſented, not only to have put his own tract in hazard, but to have deſtroyed his hopes by deſcent, for the mere chance of getting the eſtate of his younger brother. That would have been to have ſtaked two chances againſt one. A game much too bold, for any man in his ſenſes to have played. Nor is it probable, that the younger ſon would have ſurrendered his own lands (which perhaps were the only inheritance he might have to leave his family,) upon the mere chance of out living his father and brother: And the father could have had very little temptation to ſacrifice the freehold, from which his declining years were to be ſupported, and to put it out of his power to provide for the reſt of his family, upon the mere expectation of out living his ſons; whoſe chances of ſurvivorſhip, according to the courſe of nature, were much better than his own.

Therefore, if the intention of the parties only be conſidered, it is manifeſt that they did not mean to diſturb their prior titles; which they deſired ſhould continue as they were, without dan-

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ger or hazard; and that they merely designed to avoid the inconveniences refulting from a feparate patent for the 1164 acres; which they wifhed to take up in one body, in order to get rid of the expences of obtaining feparate patents.

II. Upon the act of Aflembly.

The act does not contemplate fuch cafes under any other point of view, than that juft mentioned; becaufe the *inclufive* patent is but a fubftitution of the old *double* patent; which was clearly underftood in the fenfe contended for by us.

For the act of 1677 recites, that "divers perfons to fave the trouble and charge of feating "new taken up dividends of land, do cuftomarily "add new tracts of land to former patented divi-"dends;" and therefore it merely gives the Secretary, an additional fee of fo many times eighty pounds of tobacco, as there are feveral tracts in the patent, without altering the courfe of proceeding or difturbing the eftates.

This plainly proves that the former practice was expreffly founded on the motive of avoiding the *trouble* and *charge* of *new feating* the added lands; and that the feveral tracts in the opinion of both Legiflature and people were ftill confidered as feparate and diftinct.

Therefore, as the *inclufive* patent only came in the room of the *double* patent, it is fair to extend the fame idea to that alfo.

But then it will perhaps be faid, that the act of 1748 declares, that all the tracts fhall be accounted as one entire tract; and therefore that it muft be taken as a joint eftate. That part of the act though, inftead of favoring militates againft the conftruction contended for by the appellants.

1. Becaufe fuch a declaration would have been unneceffary if a furrender of the firft patent could be implied; for it would have inevitably followed,

from

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from the ſurrender, that the whole would have been conſidered as one tract, without any Legiſlative declaration to that effect; and therefore the declaration proves that the Legiſlature did not ſuppoſe, that a ſurrender would be implied.

2. Becauſe there is a difference between the tract and the eſtate in the tract. For a man may hold ſeveral parcels as one tract, and yet his title to them may be founded on different rights. So here, the parties would hold the whole as one entire tract; but their rights would be founded on different patents.

3. Becauſe the act afterwards declares, that any improvements, thereafter made, ſhall extend to the whole tract. Which would have been uſeleſs, if a ſurrender could be implied; for the improvements would, in that caſe, have extended to the whole neceſſarily. The inſertion of it therefore, proves that the Legiſlature thought that the tract was not to be conſidered as entire to every purpoſe.

4. Becauſe the act alſo ſays, that the future improvements ſhall extend towards ſaving of the whole tract, in proportion to the improvements. Which would have been likewiſe unneceſſary unleſs the tracts were conſidered as ſeparate; as the improvements would neceſſarily have ſaved the whole. Beſides the expreſſion ſuppoſes that ſome part would have been ſaved by the improvements; which could not have been, without ſaving the whole, unleſs the tracts were conſidered as ſeparate.

Of courſe they were to be conſidered as one entire tract *ſub modo* only; that is to ſay, ſo as to let the improvements extend to ſave the whole; but the titles were to remain as before: And this for a good reaſon; becauſe entries after the firſt patents, but prior to the *inclusive*, might otherwiſe have gained a preference.

Therefore

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Therefore the true construction of the act accords with the views of the parties; which were to retain their old estates, and only to become jointenants of the 1162 acres.

III. Upon Common Law principles;

Upon these it is clear, that no surrender was wrought, by the inclusive patent.

A surrender must be of a greater estate into a lesser; for the lesser must be capable of merging in the greater. *Shep. touch.* 299. *Perk.* 584. 2. *Black. Com.* 326.

But here was no greater estate in which the lesser might merge. For the king had only a *possibility* and no estate; and an estate in fee cannot merge in a possibility. *Shep. touch.* 303.

To this rule there are but two exceptions;

1. The case of a copyhold, which depending on the *custom* no argument can be drawn from it; besides there, the tenant is merely tenant at will; and the legal estate is in the Lord; who, having the greater and worthier title, is consequently capable of taking a surrender.

2. The case of the *Cessavit* mentioned by Mr. Randolph and stated in *Shep. touchstone* and Perkins. But the reason of that case does not hold here. For it supposes a forfeiture to have actually incurred; so that the Lord has the estate revested in him by the tenant's neglect; but having only a right of entry he uses the *cessavit* to enforce it. Therefore he has the whole estate in him and the surrender only operates, as a release of the tenants right. Consequently, before that case can be brought to bear on this, it will be necessary to shew that an actual forfeiture had incurred, prior to the issuing of the new patent, so that the government had a right of action for the recovery. But the patent supposes the contrary; and that the patentees rights were effectual and unimpaired.

Therefore,

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Therefore, as neither of these exceptions contravene the general doctrine, it remains in full force; and consequently there could not be a surrender even by deed in such a case; but if the deed operated at all, it would be by way of grant and not of surrender.

But it is a rule, that whatever cannot pass without deed cannot be surrendered without deed. *Perk.* 581. Now here the grant was by deed; and by law must have been so. Therefore it could not be surrendered without a deed.

The mere destruction of the patent would not have divested the estate, 2. *H. Black.* 263; and therefore, if the patents had actually been delivered up and cancelled, that would not have revested the estate in the king without a deed. Much less is it so revested, when the patents have been retained and not delivered up.

Of course a surrender by implication cannot be inferred; especially as, from the nature of things, that only takes place where there may be a surrender *in deed*. Which, as before observed, can only be, in those cases, where there may be a merger.

The new patent refers to the old, and shews the intent to have been, that there should be no surrender. Consequently, none is to be implied, 1. *Leon.* 303. Besides a patent must be actually cancelled or it will retain its force. 5. *Com. Dig.* 280. 283; and therefore as it is not pretended that the original patents have ever been cancelled they remain in full force. The consequence of which is that the several estates in the first tracts are not destroyed and the whole turned into a jointenancy, as the other side would have it; but each proprietor remained sole tenant of his former tract, and was only jointenant with the others in the 1162 acres.

But the act of 1748 *chap.* 1. §. 1. is conclusive. For by that, the lands could not be transferred without a deed. This law as much applied to the

case

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caſe of a grant from an individual to the king, as to grants from individual to individual, notwithſtanding the maxim contended for on the other ſide; becauſe the incapacity was in the *subject* himſelf, to grant without the ſolemnities required by the law; and therefore the rule *that the king* was not bound, unleſs named in the ſtatute, does not apply to the caſe. For the objection is to the act of the *subject*, and not to that of the king.

But if there was no ſurrender, either expreſs or implied, then the firſt grants remained as they were; and conſequently the demandant, as heir at law to his father, is entitled to the lands in controverſy.

WICKHAM on the ſame ſide. All deeds are to be conſtrued according to the intent of the parties. The incluſive patent was merely intended as a confirmation of the old. For it has the operative word *confirm;* and there is an expreſs reference to the old patents. The laſt patent does not mention the ſurrender of the firſt, but on the contrary they are ſpoken of as ſubſiſting. It appears from *Viners abridgment*, that the better opinion is that the king cannot accept a ſurrender; and 1. *Inſt.* 1 ſhews that the higheſt eſtate is a fee ſimple. Therefore in the preſent inſtance there was no higher eſtate in the king to ſurrender to. *Shepherd*, in the paſſages alluded to, was ſpeaking of ſurrenders properly ſo called; that is to ſay, of a leſſer to a greater eſtate. The ſum expreſſed, as the conſideration of the grant, ſhews that the new land only was intended to be conveyed; and that the old was to ſtand under the former patents; becauſe the ſum is exactly what ought to have been paid for 1162 acres; and the 4. *Bur.* 2211, ſhews it is to be a ſurrender or not, as the parties intended. As to the caſe of a *ceſſavit*, inſiſted on by Mr. Randolph, it does not apply. For here is no forfeiture proved; and the Court will not preſume it. On the contrary the terms of the incluſive patent ſhew there was none.

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RANDOLPH in reply. The circumſtances in the caſe, relative to the *ceſſavit*, exiſted here; for there might have been a forfeiture; and the patentees under the incluſive patent are eſtopped from recurring to the old patents *Lit.* § 667. Regranting the old tracts of land ſhews the intention of the parties to conſolidate the eſtates; or elſe the words of conveyance will have no operation. For eraſe all the words relative to the former patents, and the laſt would be a ſubſtantive grant of the whole lands. Although an individual could not grant lands to an individual without deed, yet the king might accept a ſurrender; for *he* was not bound by the act, as he is not named in it *Str.* 515.

PENDLETON Preſident delivered the reſolulution of the Court as follows.

The caſe now diſcharged of the queſtion whether the jury could find a ſpecial verdict in a writ of right,* though lengthy in argument appears to the Court to be a ſhort and plain one.

Three patents on the 10th of June 1740 were obtained by Thomas Jones the father and his two ſons John the demandant and William the tenant, for 400 acres, ſo adjoining as to admit of being formed into one convenient tract. They were granted upon the uſual condition of paying two ſhillings ſterling a hundred annual quitrent, and cultivating it according to law within three years; on failure of which, or the quitrents being in arrear for three years, the grants were to be void.

In January 1746, Thomas the father obtained another patent for 400 acres adjoining thereto; which is the land in diſpute; and which was granted upon the like conditions.

In September 1755, theſe three patentees poſſeſſed of the 1600 acres of land; that is to ſay, the father of 800 and each ſon of 400, ſue out what is called an incluſive patent for 2762 acres, by certain bounds comprehending the 1600 acres, (the patents

* *Shaw vs Clements*, ante.

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patents for which are recited) and 1162 acres of new land; and this patent it is agreed conveyed an eſtate to the three grantees as joint tenants of the whole lands; inſtead of the ſeparate intereſt, which each had before in his individual tract. This patent was upon the like condition reſpecting the whole, ſo as to become void if the quitrents were in arrear for three years, or if it was not cultivated within three years from the date of the patent, excepting for ſo much as had been improved under the former patents.

The three join in conveyances of part of the new land to Glover and Hog; of no other conſequence than that, as to the new land at leaſt, they underſtood their intereſt to be that of jointenants.

Between 1766 and 1770, Thomas the father died inteſtate; poſſeſſed of his two patents for 800 acres and John and William of their tracts of 400 acres each; and John is found to be his heir at law. Who took poſſeſſion of his fathers 400 acres, granted in 1740, and ſuffered his brother William to poſſeſs the fathers other tract patented in 1746. Of the new lands nothing is ſaid, as to the poſſeſſion. Of the other tracts the poſſeſſion continued till the commencement of this ſuit, when John the heir claims the 400 acres from his brother William, inſiſting that his father was ſeized of the whole 800 acres under his old patents of a ſeparate intereſt in fee, which deſcended to him.

William inſiſts that by the incluſive patent the whole 2762 acres were conveyed as one entire tract to the three grantees as jointenants, and upon the death of the father ſurvived to the two ſons; that the 800 acres originally the fathers as well as the new land was to be divided and was ſo in fact by the allotment of one tract to the demandant, and the other being the land in diſpute, to himſelf.

So that the queſtion between the parties is, whether as to the old lands the original ſeparate title of each to his grant remained notwithſtanding the incluſive

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inclusive patent? Or whether that title is merged by the acceptance of the inclusive patent, and changed into a jointenancy in the whole land?

Much learning was displayed from the old books concerning the necessary circumstances to make a surrender efficacious; which after all probably proves that that transaction like all other compacts, depends upon the concurring will of the parties; the one to make, and the other to accept the surrender. And in the case of the crown, admitting that the king cannot accept a surrender in cases where, as under our laws, an estate in lands cannot pass but by deed, yet neither that rule nor any of the English doctrines apply to the case of these patents; which depend upon our act of Assembly.

By that act the patentee is the only *actor* and Judge whether he will entitle himself to the inclusive grant; he is not required to make either a surrender or conveyance to the crown; nor had the king any agency in the transaction except that his officers were imperatively to authenticate the new grant, when he should have entitled himself to it by the preliminary steps required. These steps have been taken; the new grant is obtained having an effect favourable to the interest of the defendant: and laying aside the objection, with respect to the surrender, we are to consider those arising out of the act of Assembly.

The first is, that the act is confined to one person and cannot be extended to three; especially as the new land, though adjoining to one of the old tracts, does not in any part adjoin to the whole. In answer to which we cannot discover a reason, why in the case of one person authorized to take such inclusive patent, three persons whose lands adjoin, concurring in will, may not unite their interest and take in common such an inclusive patent; and as to the other part of the objection, if it had any weight, it does not apply in this instance; since the new lands surround the four old tracts, so as

that

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that some part of them adjoin the lands of each of the old tracts.

But then the intention of the parties is truly said to be regarded on these occasions; and it was argued to have been impossible that they could intend to relinquish their separate and individual interest in the old lands; and make them a common stock with the new.

But why impossible or even improbable? what did they loose or gain by this effect of the new patent? The only loss suggested was that of their priority, in case the bounds should interfere with grants posterior to the old, but prior to the new grant. Which admits of two answers. First, they might be so well satisfied with the bounds as to think that circumstance of no consequence; especially as the new lands nearly surrounded the old; and secondly, it has been adjudged, as far as I can recollect, and I believe by this Court, that in cases of interfering bounds upon inclusive patents, lapse patents, and patents for surplus lands, the priority shall refer to the date of the old patent, always recited in the new.

And what does the patentee gain by the new patent?

1st. A release of the forfeiture (if incurred under the former grants, either by the non-payment of quitrents, or for want of cultivation;) being allowed three years to improve the old lands as well as the new; besides extending old improvements to save the new lands; the effect of the exception.

And when we view the relative situation of the three parties, there is nothing absurd or extraordinary in their having made this junction of their interests. Here was a father and two sons. The father in the course of nature would probably die first; and the interest devolve upon the two sons equally. Which the law of descents supposes would be his wish; and the situation of the lands

will

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will conform to his having contemplated such effect of the new patent.

His old patent of 1740, is on one side, his son John next to him, William next, and his patent of 1746 adjoining William, on the other side. Upon his death he seems to have supposed that John would take the tract adjoining him, and William the other; and this was the division which took place on his death; when his sons probably knew his intention and a pious regard to that was more operative upon John, than his interest. Although at a remote period, the latter obtained the victory and produced the suit.

Another circumstance arising from a view of the survey, is, that the new lands were so situated as to make a division of them nearly equal between the sons; as they join the parts of the old, to be divided, as before mentioned.

Upon the whole we are unanimously of opinion that the inclusive patent fixes the title of the grantees to be that of jointenants, subject to all the legal effects of such an interest; and that the partition seems to have been made, in fact, upon that ground. We are therefore for reversing the judgment; and entering a judgment for the tenant.

Judgment Reversed.

PRESTON

PRESTON.

against

The AUDITOR *of Public Accounts.*

If to an execution ag't a former sheriff, the new sheriff ret'rns that he has taken lands, which were claimed by another pers'n, that he had summoned 2 juries on the title who had disagreed, & therefore rendered no verdict. That he had proceeded no further, not having any direction from the agent, &. that he could find no other property; this is not sufficient to prove the sheriff's inability so as to ground a judgment against the old sheriff's security.

An ex'n of the same c't used as evidence upon the trial of the cause,

THIS was a supersedeas to a judgment of the General Court rendered the 11th of June 1796, in favor of the Auditor, against Robert Preston one of the securities of Robert Craig, late sheriff of Washington County.

The judgment is as follows, "on the motion of the Auditor of public accounts on behalf of the Commonwealth against Robert Preston one of the securities of Robert Craig, late sheriff of Washington County. This day came the Attorney General, and it appearing by the affidavit of John Wade, that the defendant hath had legal notice of this motion, he was solemnly called, but came not; and it appearing, that the lands and tenements, goods and chattels of the said Robert Craig are insufficient to satisfy the balance due, from him, of the taxes collected in the said county for the year 1788; therefore it is considered that the Commonwealth recover of the defendant 1961 dollars 25 cents the balance of the said taxes, with interest after the rate of five per cent on 1907 dollars 64 cents part thereof, from the 12th day of December 1795 till payment."

The petition for the supersedeas stated, that judgment was obtained against Craig, and that a writ of *fieri facias* issued thereon, upon the 1st of July 1794 against the lands and tenements, goods and chattels of the said Robert Craig. That the sheriff made return upon the said writ as follows. "By "authority of this writ, I took in execution a tract "of land, whereon Robert Craig within named "lives, containing one hundred and ninety three "acres. The same was claimed by Daniel Carson. I summoned two juries to ascertain the "title, both of which divided and could not agree.

"I

Preſton, vs. The Auditor.

"I proceeded no farther, having no direction "from the agent. No other property found." That judgment was afterwards rendered againſt Preſton as above. That no other execution, than that before mentioned, ever iſſued againſt Craig; and that the General Court gave judgment againſt Preſton upon the principle, that the lands and tenements goods and chattels of Craig were inſufficient.

will be regarded by this court as part of the record without a *certiorari*.

There is annexed to the petition a copy of the execution and return againſt Craig, with a certificate of the Clerk of the General Court that no other execution than that, ever iſſued againſt Craig.

RANDOLPH for the plaintiff. No motion can be made againſt the ſecurity, until the inſufficiency of the ſheriffs eſtate is eſtabliſhed, *Act of Aſſembly 1787, incorporated into the act of 1792, Revise Code.* 144, §. 16. The teſtimony in this caſe was incompetent to prove the inſufficiency of the ſheriff. On the contrary the ſheriffs return ſhews, that the 193 acres of land have not been ſold. Although this is only proved by the tranſcript and certificate annexed to the petition for the ſuperſedeas, that evidence is admiſſible: and to aſcertain the truth of it, the Court will grant a *certiorari* to the General Court, to certify whether that certificate contains the truth.

BROOKE Attorney General *contra*. The Court below will be preſumed to have done right until the contrary is ſhewn; eſpecially as the defendant had an opportunity of ſtating any exception, to the Courts opinion, that he thought proper. It does not appear that the whole teſtimony before the General Court is before this Court; on the contrary it appears by the record that it is not: for the Court ſay, it appeared to them, that the ſheriff had no property; and there might have been parol evidence of that fact, as the defendant has ſhewn nothing to the contrary. But, if there had been a defect of proof, it was the buſineſs of the

defendant

defendant to have ſhewn it; for it was more competent to him to prove the affirmative, than it was to the public officer to prove the negative.

But ſuppoſing the whole evidence to have been, what the counſel for Preſton would have it, yet that would not be ſufficient; for the return is that the juries did not agree as to the right of property; and the Court were not bound to order a further expoſition of the property to ſale; becauſe they were not to keep up a litigated queſtion, when there was no proof offered of right of property in the principal. If ſuch right did exiſt the defendant ſhould have ſhewn it; and as he has not, the preſumption is, that the principal had no right.

But all this teſtimony which is attempted to be introduced into the record is inadmiſſible; and ought not to be received.

RANDOLPH in reply. The General Court could not receive parol evidence; the return of the ſheriff was concluſive, and no other teſtimony was admiſſible. But that return does not ſhew, that the principal had no property; and conſequently the judgment is erroneous.

Cur: adv: vult.

PENDLETON Preſident. The appellant was right in his poſition, that under the act of 1786, the Court are reſtrained from giving judgment againſt the ſecurity, until it is aſcertained, that the lands and chattles of the ſheriff are inſufficient. He is alſo right, in the aſſertion, that the return of the execution does not aſcertain the fact of inſufficiency; ſince upon a *venditioni exponas* the difficulty as to Carſon's title might have been removed; the ſheriff indemnified by the agent of the Commonwealth, or by the ſecurities: or bidders might have purchaſed Craig's title, ſatisfied of the weakneſs of Carſon's.

We are of opinion that this execution was admiſſible evidence: and as ſuch we regard it, in this ſum-

Preſton, vs. The Auditor.

mary proceeding, as a record of the Court appealed from, without the form of a *certiorari*. But we cannot agree with Mr. Randolph in his poſition, that this was the only evidence which could be legally admitted; and our rules forbid us to ſay it is the only evidence, which was in fact given.

The act does not confine the proof to the return of the execution or any other kind; but leaves the fact to be eſtabliſhed, by ſatisfactory evidence; of which the Court are to judge. In this caſe might it not be ſhewn to the Court, that Carſon's title was clear and indiſputable, ſo as to render a further purſuit againſt Craig fruitleſs? This will ſcarcely be denied; and as it might have been, we are to preſume it was proved, or ſomething equally ſatisfactory.

It was the appellants fault that he did not appear, and have the whole evidence ſtated ſo as to enable this Court to judge of its ſufficiency.

It was truly ſaid, that every Court ought to ſtate, on record, legal grounds for their judgment; eſpecially ſubordinate Courts, liable to have their judgments reviſed in another. And this is done in the preſent inſtance.

For the notice, compared with the act of Aſſembly ſhews the caſe to have been brought properly before them, and that their judgment was founded upon its having appeared, that the lands and chattels of Craig were inſufficient to ſatisfy the balance of taxes collected by him for the year 1788, and not paid into the Treaſury; ſo as to bring it within the act, which ſubjects the ſecurities to ſuch judgment, in that event.

How this was made to appear, we are no more at liberty to inquire, than we ſhould be, on an appeal from a general verdict, to examine upon what teſtimony it was founded.

Judgment affirmed.

The

The AUDITOR *of Public Accounts,*

againſt

GRAHAM,

THIS was a ſuperſedeas to a judgment of the General Court entered on the 20th day of June 1793, and is in theſe words, "on the moti- "on of the Auditor of public accounts, on behalf "of the Commonwealth, againſt Robert Graham, "for a judgment for a fine for failing to return to "the Auditors office, an account of the amount of "fees charged by him as clerk of the Court of "Prince William county, for ſervices performed "in the year 1788, and of the ſums received for "thoſe fees. This day came as well the Attor- "ney General as the defendant by his attorney, "who being fully heard, it is ordered that the "ſaid motion be overruled; the Court being of "opinion, that the act of limitations, pleaded by "the defendant, is a barr to a recovery on the ſaid "motion."

Motions are included in the terms *ſuits* and *actions* in the act of 1789, for limitation of ſuits upon penal ſtatutes.

The motion, as the petition for the ſuperſedeas ſtated, was to recover the penalty of £ 500, for failing to render an account of the fees of his office, under the 2d ſection of the 26th chapter of the acts of 1786; and the motion was overruled under the 9th ſection of the 30th chapter of the acts of 1789.

BROOKE Attorney General. There are two queſtions in the cauſe; 1ſt. whether the word motion is included within the act of 1789, *chap.* 30. §. 9? Which only ſpeaks of ſuits and actions; and ſays nothing as to motions. 2d. Suppoſing it to be included, then, whether the Court below ought not, to have put the inquiry into ſome other courſe? inſtead of overruling the motion and diſmiſſing the cauſe, at once.

MARSHALL for the appellee. The caſe ariſes under the act of 1786, *chap.* 26. §. 2; and the demand

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mand is, for a penalty created by an act of Assembly. It, therefore, falls expresly within the meaning of the act of 1789. For a motion is both a suit and an action It is comprehended in each of these terms. The only difference is, that in one the ordinary Common Law process issues from the clerk's office; and in the other the process goes from the mover himself, through the channel of a notice. But both are equally the prosecution of a claim; and the pursuit of a demand.

ROANE Judge. The terms *actions* and *suits*, in that clause of the act of 1789, under which the present motion was probably overruled by the General Court, are terms generical and comprehensive.

They would in giving as well as taking away a remedy, comprehend a motion, which is a particular species of action, but for some supervenient reason, making such a construction inadmissible.

With respect to giving a remedy, a motion would not be considered as comprehended in the term *actions*, for the following reasons. 1st. Because, upon the principles of the Common Law, a man shall not be ousted of his trial by jury by mere implication; but there must be express Legislative words, for the purpose. And this construction is more proper still, as that mode of trial is consecrated by our bill of rights, relative to controversies respecting property. For we ought not, where another reasonable construction can be adopted, to resort to one which makes the Legislature infringe the spirit of the constitution. 2. Because, in other respects a Court of Law would not extend, by implication, a mode of recovery, which is summary and inferior to the other actions known to the Common Law, with respect to the wise provision therein contained, relative to the amplitude and certainty of the pleadings.

These, then, are the reasons, if not the only reasons, why, in giving a remedy, the term *actions* does not comprehend a motion; but these reasons

ſons are wholly inapplicable, in the caſe before us, of a prohibition of ſuits on penal ſtatutes, after the expiration of a given time.

But it is ſaid that the inſertion in the clauſe of the terms *indictments* and *informations* operates an excluſion of motions; under that rule of the conſtitution, that the inſertion of one thing implies the excluſion of another. The former terms were put in, becauſe, being a proſecution of a criminal nature, it might well be doubted, whether they were included under the general acceptation of the term *actions?* But, with reſpect to motions, they cannot be implied to be excluded under this rule; becauſe, as before ſtated, I conſider them a ſpecific ſuit, and comprehended, *ex vi termini*, in the general term actions.

Thus far, I have conſidered this queſtion, upon the clauſe of the act of 1789; as that act is ſuppoſed to be reſerved, relative to the preſent queſtion, under the proviſo of the act of 1792; which (although it has a clauſe ſimilar to that of 1789) after repealing all acts coming within its purview, provides, "that nothing in the act contained ſhall "be conſtrued to repeal any act heretofore made, "for ſo much thereof, as may relate to any offence "committed or done, or claim which may have "accrued, before the commencement of the acti- "on."

But the penalty now in queſtion was incurred on the firſt of October; which was anterior to the act of 1789, by the ſpace of two months: And it may well be queſtioned whether that act, although it has no ſaving clauſe ſimilar to that juſt quoted, has any operation upon the preſent caſe? or rather, whether it does not upon the legal conſtruction thereof, leave it to be decided by the laws which were in force, at the time the penalty accrued? This is an important queſtion; but it is not neceſſary to be now decided. For if this caſe is to be governed by the act of 1789, then the clauſe of limitation, contained in it, expreſsly authorizes the

judgment

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judgment of the General Court; and if not, then all ſuch acts or ſtatutes, as do apply to it, are reſerved by the proviſo. In that view of the preſent ſubject the ſtatute of the 31. *Eliz. ch.* 5, limitting proſecutions on penal ſtatutes, where they are inſtituted on behalf of the king and informer, to one year, and where for the benefit of the king alone to two years, is ſuppoſed to apply; as no act of our Legiſlature is, at preſent, recollected on this ſubject. So that under this limitation alſo, the preſent proſecution was barred; and therefore *qua cunque via data*, the motion, in queſtion, was rightly overruled, by the General Court.

FLEMING Judge. The act, creating the penalty, paſſed in 1766; and the forfeiture was incurred in 1789. After which, the act, for limiting the commencement of ſuits and actions upon penal ſtatutes, was paſſed. Which was repealed by the act of 1792; but with an expreſs ſaving of all offences which had been committed or done, or claims which had accrued prior thereto. So that the act of 1789, is ſtill in force, with regard to caſes prior to that of 1792. Now I am clearly of opinion, that motions are included in the act of 1789; the object of which was, to prevent proſecutions, after a great length of time; and therefore a reaſonable conſtruction ſhould be made upon it. The conſequence, of all which, is, that I think the judgment right; and that it ought to be affirmed.

PENDLETON Preſident, Concurred.

Judgment **Affirmed.**

GLASSCOCK.

GLASSCOCK,

against

SMITHER *and* HUNT.

THIS was an appeal from a judgment of the District Court, declaring that a writing, purporting to be the laſt will of George Glaſſcock deceaſed, was not in fact his laſt will: becauſe "there was produced at the ſame time, another "writing purporting to be the laſt will and teſta-"ment of the ſaid deceaſed; which appeared to "have been legally executed."

Will of perſonal eſtate revoked by a ſubſequent will not written or ſubſcribed by the teſtator; but which was prepar'd by his directions, corrected by him, and which he afterwards declared was his laſt will.

The writing ſought to be proved, as the laſt will of the deceaſed, was offered for probat in the Diſtrict Court on the 6th of September 1796; and contains ſeveral pecuniary legacies with a deviſe of all the reſidue of his eſtate to his ſon George. It concludes thus "This my laſt will and teſtament "being made this 19th day of October 1793, I "ſubſcribe and thereby acknowledge. So help me "God." But the teſtator, in fact, never did ſign, or ſubſcribe the ſame.

The depoſition of one witneſs proves, that the deponent was frequently called on by the decedent to make his will, that at length he made it from notes taken for that purpoſe; that the decedant had it altered, in ſeveral inſtances (naming them;) that he had it read over a ſecond time with the alterations and ſaid he was ſatisfied; that it was his will and, that he had wiſhed it made for a long time before; that the writing, produced for probat, is the ſame will ſo altered and approved of; and that he did not aſk the teſtator to ſign it.

PENDLETON Preſident, after ſtating the caſe delivered the reſolution of the Court. That the will was good as to the perſonal eſtate; it being ſufficiently proved to paſs chattels. That it was a revocation of the former will, as to the perſonalty;

Glaſscock, vs Smither and Hunt.

alty; and ought to have been admitted to record. Conſequently that the Diſtrict Court erred in rejecting it; and that their judgment was to be reverſed.

The judgment was as follows, "The Court is of "opinion that the writing aforeſaid ought to be "eſtabliſhed as the laſt will of the ſaid George "Glaſſcock deceaſed, notwithſtanding the exiſt-"ence of a will legally executed of a prior date, "ſo far as it may concern the deviſe of chattels, "and that the opinion of the ſaid Diſtrict Court "is erroneous. Therefore, it is conſidered that "the ſame be reverſed and annulled and that the "appellant recover againſt the appellees his coſts "by him expended in the proſecution of his appeal "aforeſaid here. And it is ordered that the cauſe "be remanded to the ſaid Diſtrict, for that Court "to admit the will to be recorded; unleſs the par-"ties ſhall deſire to proceed in the conteſt, upon "other grounds, which may be conſiſtent with "the opinion of this Court."

STUART,

STUART
against
MADISON.

ROBERT STUART executor of Thomas Stuart brought an action on the case against the executors of John Madison in the County Court of Botetourt. The declaration contained two counts 1. for money had and received by the defendants testator to the use of the plaintiffs testator 2. For money "paid into the office of the "said John Madison (who was then Clerk of the "Court of Augusta) by a certain Joseph Love a "debtor of the plaintiffs testator who had been "sued for the same; which money was misapplied "by said John or his agents." Plea non assumpsit and issue. The jury found a special verdict which stated, "that in the year 1775 John Madi-"son senr. was Clerk of Augusta Court and that "John Madison jr. was his deputy. That on or "about that time, Thomas Stuart had two suits "depending in the said Court, against Samuel Sa-"muel and Joseph Love, for debt. That in or "about the month of August 1775, one of the de-"fendants came into the clerk's office and paid to "John Madison jun. the deputy of the said John "Madison, sen. the then amount of the said debt, "with interest and costs being £24:11:8, and "that the said suits were afterwards discon-"tinued in 1779. The verdict then proceeded "thus: "We find that on the 27th day of March "1781, a letter from John Madison, junr. to Tho-"mas Stuart, in these words, *Sir, I intended to "call on you; I shall be in, the last week in May "or the first week in June, when I shall be able "to pay you the money I received of yours, of Sa-"muel Love, with the depreciation of it since that "time with interest. I am Sir, your hubl. servt.* "*John Madison, jun.* If the law upon the whole

The clerk of a Court is not liable for money paid to his deputy, (without the intervention of the Court) by a defendant who is sued.

In such a case if the money had been paid to the clerk himself, he would have been personally liable; but his securities would not.

Stuart
vs.
Madiſon.

"matter is with the plaintiff, we aſſeſs his dama-
"ges to thirty nine pounds twelve ſhillings and
"eight pence. If for the defendant, we find for
"the defendant." The County Court gave judgment for the plaintiff, for the verdict and coſts. The Diſtrict Court of Botetourt reverſed that judgment, and from the judgment of reverſal, Stuart appealed to this Court.

PENDLETON Preſident. After ſtating the caſe delivered the reſolution of the Court as follows.

That a clerk and every other officer is anſwerable for all official acts of his deputy, cannot be doubted, and if the clerk had been authorized to receive this money at his office, the receipt of his deputy would have bound him.

But ſince no law permits a debtor ſued, to pay his debt to the clerk without the intervention of the Court; If the payment had been to the clerk himſelf, though he would have been perſonally anſwerable, he would not have been liable officially, ſo as to charge the ſecurities for his office.

It was a perſonal truſt to receive and pay it over; and he alone was anſwerable for the breach.

The judgment of the Diſtrict Court is therefore right, and muſt be affirmed.

Judgment Affirmed.

CASES

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
THE SPRING TERM OF THE YEAR 1799.

CRAIG,
against
CRAIG.

THIS was a *supersedeas* to a judgment of the District Court where an action of debt was brought, in Oct. 1792, by the assignee of a bond with a collateral condition, and the declaration assigned the breaches. The defendant craved oyer of the bond and condition; and plead conditions performed. The plaintiff took issue, and obtained a verdict and judgment. There was a bill of exceptions, which stated the bond and endorsement, with the defendants objection to the admissibility of the evidence. The petition for the *supersedeas* assigned two errors, 1. That the bond was not assignable; 2. That no material issue was joined.

Bond with a collateral condition was not assignable before the act of 1795 chap XIV. §. 2; and therefore the assignee, of such a bond, could not maintain an action on it.

WICKHAM for the plaintiff in the *supersedeas*. I shall not trouble the Court with any observations upon the last error; because I deem the first sufficient to reverse the judgment. The present act of Assembly * allows bonds of this nature to be assigned; and permits the assignee to sue in his own name. But this bond was made anterior to that act; and therefore is not affected by it. So that it stands upon the old act altogether; which merely relates to bonds, for payment of money.

* *Act* 1795. PENDLETON

Craig, *vs.* Craig.

PENDLETON Prefident. Then you fuppofe the words, *payment of money* in the act, to relate to the condition of the bond.

Wickham, yes.

Per cur: The judgment muft be reverfed, becaufe "the bond on which the fuit is brought, not "being for the payment of money or tobacco, but "with a condition for performance of covenants, "was not by law aflignable at the time the fuit "was commenced; which was therefore not main-"tainable by the aflignee."

Judgment reverfed with coffs; and judgment entered for the defendant.

BEVERLEY,

against

FOGG.

* If the demandant in a writ of right omits to fet forth the boundaries in his count, it will be error after verdict.

Quere. If there be feveral claufes in a will, and fome of them devifing lands are written in the teftators own hand,

FOGG brought a writ of right in the Diftrict Court of King and Queen, againft Robert Beverley, and counted for 200 acres of land, with the appurtenances in the county of Eflex, bounded by without defcribing the boundaries. Beverley appeared and filed the plea prefcribed by the act of Aflembly, without fetting forth the boundaries; and the mife was joined in the manner fet forth in the act of Aflembly. Verdict, "that the faid John Fogg hath more right to have the tenement aforefaid, which he demandeth againft the faid Robert Beverley, by his writ aforefaid, than the faid Robert Beverley to hold it as he now holdeth it." Judgment, "that the faid "John Fogg recover againft the aforefaid Robert "Beverley, his feifin of and in the tenement afore-"faid, with the appurtenances as of right, name-"ly, one tenement containing two hundred acres

"of

Beverley, *vs.* Fogg.

"of land, with the appurtenances, in the county "of Eſſex, and bounded by and alſo his coſts in "this behalf expended." Upon the trial of the cauſe, the tenant filed a bill of exceptions, which ſtated that he offered a witneſs to prove that certain clauſes in the laſt will of Nathaniel Fogg deceaſed, through whom the demandant claims as heir of the ſaid Nathaniel, were written in the hand writing of the ſaid Nathaniel Fogg, which was recorded in Eſſex County Court, tho' only proved by the oath of one witneſs, and no certificate thereon written, that the ſame witneſs had given teſtimony, that the ſame clauſes were written in the hand writing of the ſaid Nathaniel Fogg, which clauſes were in theſe words to wit: "My "meaning is, that my daughter Anna have one "hundred and twenty five ackers out of the lands "which I bought of James Holloway, on Neoſſin "Swamp, this alteration made with my own hand "Nathaniel Fogg." "The alteration two the "meaning is, that my daughter Anna have one "hundred and twenty five ackers out of the land "I bought of James Holloway on Neoſſin Swamp, "this alterations on the other ſide I made with "my one hand this 10th day of December, 1752. "Nathaniel Fogg." That the Court refuſed the witneſs, and would not permit the ſaid will to go in evidence. Beverley appealed from the judgment to this Court.

though the others are not, whether the deviſe of the lands will be good without two witneſſes.

WARDEN for the appellant, took three exceptions, 1. That the boundaries of the land were not ſet forth in the count, as the act of Aſſembly requires. 2. That the judgment does not ſtate the quantity of eſtate adjudged to the demandant. 3. That the Court improperly refuſed to permit the will to be given in evidence. For as that part of the will, which diſpoſes of the lands, was all written in the teſtators own hand, it was ſufficient; although the other parts of the will were not. Becauſe the word deviſe, in the act of 1748, refers to lands only; and has no relation to a diſpoſition of chattels.

MARSHALL

Beverley, *vs.* Fogg.

MARSHALL *contra.* The act requires that the whole will should be written by the testator, or attested by the necessary number of witnesses. The word devise is not to be restricted to the sense contended for. Such a construction would not satisfy the terms of the act; which require, that it should be attested by two witnesses, or wholly written by the testator. As to the boundaries not being described in the count, it is too late for the defendant to make an objection upon that ground now. For having gone to issue on the count, he has taken on himself the knowledge of the lands demanded.

Cur: ad: vult:

LYONS Judge. Delivered the resolution of the Court, that there was no weight in the objection that the quantity of the estate was not mentioned in the judgment; for that is not necessary under the act of Assembly. But that the judgment of the District Court was to be reversed, because the demandant had omitted to set forth the boundaries of the land in his count.

The judgment was as follows, " The Court is " of opinion that the said judgment is erroneous " in this, that the boundaries of the land demand- " ed in the count are not inserted therein as re- " required by law, nor found by the verdict of the " jury. Therefore it is considered that the same " be reversed &c. and this Court proceeding to " give such judgment as the said District Court " ought to have given, It is further considered " that the defendant take nothing by his count; " and that the plaintiff go thereof without day and " recover against the defendant his costs by him " about his defence in the said District Court ex- " pended."

ROWE.

ROWE,

against

SMITH.

Depoſitions taken in a cauſe relative to the ſame ſubject but not between the ſame parties cannot be read in evidence, in a ſubſequent ſuit.

JOHN SMITH brought a writ of right in the Diſtrict Court of King and Queen, againſt Rachel Rowe deviſee and widow of Richard Rowe deceaſed and John Rowe, ſon and deviſee of the ſaid Richard Rowe deceaſed, for one tenement and ſixty three acres of land, in the county of King and Queen. The common plea was put in for the tenants, and iſſue joined in the uſual manner.

On the trial of the cauſe, the tenants filed a bill of exceptions to the Courts opinion, which ſtated, "that the demandant offered in evidence the depoſitions of Benjamin Scott and Anthony Ferryman, two witneſſes now deceaſed taken in an action of treſpaſs formerly in this Court depending between Rachel Rowe plaintiff and Juſtice Beadles defendant, and prayed that the ſame might be admitted to be read in evidence in this cauſe to which the tenants objected, alledging that the ſaid parties were not parties to this ſuit with thoſe who were parties to that cauſe; but that the Court overruled the objection; becauſe it appeared that the ſaid action of treſpaſs was brought by Rachel Rowe, who is the ſame Rachel Rowe now one of the tenants in this ſuit, for a treſpaſs, ſuppoſed to be committed on the premiſes now in diſpute, by Juſtice Beadles, who claimed the lands under the preſent demandant; who had before that time covenanted with the ſaid Beadles to convey to him the lands in diſpute, being then in poſſeſſion of part of the premiſes; and the depoſitions related to the ſame title of the ſaid lands, as well in the action of treſpaſs as in the preſent ſuit, and they were taken in the ſaid action of treſpaſs after due notice of the time and place of taking the ſame; and

"that

Rowe, *vs.* Smith.

"that it likewiſe appeared that, at the time of "bringing the ſaid action of treſpaſs, the ſaid "Rachel Rowe was tenant for life and John Rowe "the other tenant in the preſent ſuit was rever- "ſioner in fee of the ſame." Verdict and judgment for the demandant. From which judgment the tenants appealed to this Court.

WARDEN for the appellant. The depoſitions were not taken in a ſuit between the ſame parties; and therefore there was no opportunity of croſs examining. Beſides the ſubject in controverſy was not the ſame in both Courts.

MARSHALL *contra.* The ſubject of controver- ſy was preciſely the ſame, in both ſuits; for in both, the title to this land was in queſtion.

As to the objection that the parties were not the ſame in both Courts, there is no weight in it. Becauſe the rule is that verdicts (and therefore I infer depoſitions) may be given in evidence be- tween privies; as aſſignees, deſcendants or pur- chaſers. So that I conceive, whenever the title is the ſame and comes from the ſame ſource, the depoſition in one ſuit may be read in another. In this caſe the plaintiff in the firſt ſuit was a purcha- ſer under the plaintiff in this.

Cur: ad: vult.

LYONS Judge, delivered the reſolution of the Court, that the depoſitions were not admiſſible, and therefore that the judgment ought to be re- verſed. That if there be a recovery by verdict againſt tenant for life, this is no evidence againſt a reverſioner. *Bull. n. pr:* 232. *cites Yelv;* and by parity of reaſoning the depoſitions in the pre- ſent caſe ought not to have been read in evidence.

The judgment was as follows: "The Court "is of opinion that the ſaid judgment is errone- "ous in this, that the ſaid Court permitted the "depoſitions of Benjamin Scott and Anthony Per- "ryman taken in an action brought by the appel- "lant Rachel againſt one Juſtice Beadles, for a treſpaſs

Rowe, vs. Smith.

" treſpaſs ſuppoſed to have been committed by the " ſaid Beadles on the premiſes now in diſpute as " ſtated in the bill of exceptions, filed in this ſuit " to be read in evidence on the trial againſt the " appellant John, who was not a party in the ac- " tion of treſpaſs aforeſaid and does not claim or " hold the ſaid premiſes from or under the ſaid " Rachel Rowe or Juſtice Beadles and who not " having had the liberty of croſs examining the " ſaid witneſſes ſhould not be injured or bound by " what he was not allowed to conteſt. Therefore " it is conſidered that the ſaid judgment be reverſ- " ed and annulled, and that the appellants recover " againſt the appellee their coſts by them expend- " ed in the proſecution of their appeal aforeſaid " here, and it is ordered that the jurors ver- " dict be ſet aſide, and a new trial be had in the " cauſe, and that on ſuch trial the ſaid Diſtrict " Court do not permit the depoſitions aforeſaid to " be read in evidence."

Judgment Reverſed.

RITCHIE, & Co.

againſt

LYNE.

Depoſitions taken in a ſuit with the factor, may be read in a ſuit with the principal for the ſame cauſe.

RITCHIE & Co. brought indebitatus aſſumpſit, in the year 1768, againſt Lyne, for goods, wares and merchandizes, ſold and delivered and for money and tobacco paid and advanced. Verdict and judgment for the defendant. The plaintiff filed a bill of exceptions to the Courts opinion. Which ſtated, " that the defendant offered in evidence, the depoſitions of John Taylor and Gabriel Mitchell; to the reading of which, the counſel for the plaintiffs objected; becauſe they appeared to have been taken in a ſuit between the ſaid William Lyne as plaintiff and Andrew Craw-

Ritchie, vs. Lyne.

ford defendant, lately depending in this Court, which abated by the death of the ſaid Crawford. A copy of the declaration in which ſuit was thereunto annexed. That the Court overruled the objection; it appearing, that the ſaid Crawford was the ſame perſon mentioned in the plaintiffs declaration as their factor; that *he* had received due notice of the taking of the depoſitions; and that it did not appear that the plaintiffs had any other repreſentative, than the ſaid Crawford, in Virginia. That John Ryburn, who was afterwards the factor or agent for the ſaid plaintiffs in Virginia as well as the ſaid Crawford, received due notice of the taking the ſaid Mitchells depoſition. That the ſuit brought, by the ſaid Lyne, againſt the ſaid Crawford, was a croſs action founded upon the ſame dealings, which gave riſe to this cauſe; in which the ſaid Lyne claimed a balance as due to himſelf, which balance the preſent plaintiffs would have been anſwerable for, in the opinion of the Court, had the ſaid Crawford lived and a recovery thereof taken place. That the evidence, in the ſaid depoſitions contained, related to the ſaid Lyne's dealings with the ſaid Andrew Crawford as factor for the ſaid plaintiffs; And upon thoſe dealings this action is founded." The declaration, referred to, in the bill of exceptions, counted on a contract betwixt the ſaid William Lyne and the ſaid Andrew Crawford, without mentioning or referring to the ſaid Ritchie, & Co. Verdict and judgment for the defendant; and from that judgment Ritchie, & Co. appealed to this Court.

WARDEN for the appellant. The depoſitions were inadmiſſible; becauſe they were not taken in a ſuit between the ſame parties, *Rowe* vs. *Smith* in this Court during the preſent term. *

MARSHALL *contra.* The caſes are not alike; becauſe Crawford repreſented his principal completely. For ſuch was the mode of doing buſineſs at that time that the factor unavoidably and from the nature

* Ante

nature of the connection ſtood in the place of his principal. So that his contracts bound the principal, as he had the entire controul over the buſineſs; and might be ſaid to be the ſame perſon with him. Now here was a ſuit with the factor, on behalf of his principal, touching the ſame ſubject with the preſent action, and the objection is that the Court did wrong in hearing teſtimony to thoſe points; which never can be conſidered as a juſt ground of exception, or it deſtroys the relation which ſubſiſted between them. It muſt therefore be conſidered as a cauſe between the ſame parties, and conſequently the Diſtrict Court did right in receiving the teſtimony. There is no caſe which comes completely up to the preſent; the neareſt in principle is that of a verdict in favour of a termor againſt a ſtranger; in which caſe the verdict may be uſed in a ſuit with the reverſioner; for the reverſioner would have been diſpoſſeſſed by the verdict if it had gone againſt the termor, and the ſtranger can have no prejudice; becauſe he had liberty to croſs examine the witneſſes. The caſe here is the ſame in principle, becauſe Ritchie and company would have had the benefit of the verdict, had it paſſed in favour of Crawford.

Ritchie, *vs.* Lyne.

WARDEN in reply. If it had appeared, in the proceedings of the ſuit with Crawford, that the ſuit was with him as factor, there might have been ſome ground for Mr. Marſhall's argument. But no ſuch thing does appear; and as it might have related to his own private affairs, the depoſitions in that cauſe were improperly admitted in this.

Cur: ad: vult.

LYONS Judge, delivered the reſolution of the Court, that the judgment of the Diſtrict Court ought to be affirmed. That they were in fact croſs ſuits between the ſame parties in intereſt: That it appeared the factor who repreſented his principals had notice of the time and place of taking the depoſitions; and therefore might have croſs examined the witneſſes if he had choſen to do ſo.

Judgment Affirmed.

ECKHOLS,

ECKHOLS, *againſt* GRAHAM.

Names of ſlaves taken under execution ſhould be endorſed.

If plaintiff ſues a ſecond execution before the property taken under the firſt is diſpoſed of, he waives the firſt and deſtroys the lien on the property taken under the firſt.

GRAHAM and Trigg brought trover againſt Eckhols in the Diſtrict Court of New London, for three ſlaves to wit, a woman named Hannah, a child named Judy, and a child named Hannah. Plea not guilty and iſſue. The jury found a ſpecial verdict, which was adjudged inſufficient by the Court and quaſhed. Upon the next trial, the plaintiff filed a bill of exceptions to the Courts opinion, which ſtated that the defendant offered in evidence to the jury, a copy of an execution without producing a copy of the judgment on which it iſſued; that the plaintiff objected to it; but the objection was overruled and the evidence permitted to go to the jury.

The jury found a ſpecial verdict which ſtated, "that on the 10th of Auguſt 1788, an execution iſ-"ſued in behalf of Toliver Craig againſt Richard "and Thomas Bandy, on which ſeven negroes were "taken (the names not indorſed) and a forth-"coming bond executed by John Hook and Abſo-"lam Jordan, in Auguſt 1788, in theſe words: "*Hailsford, Franklin county, Auguſt 21ſt 1788, "we John Hook and Abſolam Jordan, are held "and firmly bound unto Hugh Innis, Eſqr. ſheriff "of Franklin County, in the ſum of four hundred "and fifty pounds, current money of Virginia, to "deliver unto the ſaid ſheriff the following proper-"ty, viz. ſeven negroes, two horſes, two beds and "two blankets, alſo a dutch oven, the ſame to be "delivered on the 11th of next month, being taken "in execution to ſatisfy Toliver Craig, and to ſa-"tisfy public taxes againſt Richard Bandy. Wit-"neſs our hands and ſeals this day above written, "John Hook, Abſolam Jordan.* That at Sep-"tember Court 1788, an injunction was granted

"to

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" to Bandy to ſtay proceedings on the execution " on his giving ſecurity by the next Court. That " he failed to give ſuch ſecurity; and thereupon it " was decreed that the plaintiffs ſhould have the " benefit of the judgment. That the ſheriff de- " manded the ſlaves which were not delivered. " That on the 25th of September 1788, Abſolam " Jordan, Daniel Huddleſton and Richard Bandy " executed a bill of ſale to the plaintiffs, for a ne- " groe wench named Hannah and her child named " Jude; ſetting forth the bill of ſale *in hæc verba*. " That Hannah is the mother of the other negroes. " That the child Hannah has been born, ſince the " date of the bill of ſale; and is in poſſeſſion of " the plaintiffs. That a ſecond writ of *fieri faci-* " *as* iſſued on the 2d of December 1788; on which " there was made £ 101:12:6. That another " execution iſſued on the 16th of Auguſt 1790; on " which there was made £ 51:1:2, nett money " deducting fees &c. That the plaintiff Trigg " was allowed 20/ for keeping the ſaid ſlaves " whilſt under execution. That Eckhols the de- " puty ſheriff of Bedford, who levied the execuţi- " on paid to John Craig £ 52:10, in October " 1790. That the plaintiff Trigg forbid the ſei- " zure and ſale of the negroes in the declaration " mentioned, ſeized by James Eckhols deputy ſhe- " riff of Bedford to ſatisfy the execution of T. " Craig, aſſignee of Hawkins againſt the Bandys. " That the ſaid ſlaves continued in the poſſeſſion " of one of the plaintiffs, from the 25th of Septem- " ber 1788, to the ſeizure and ſale of them. That " John Phelps purchaſed the ſlaves in the declara- " tion mentioned, for the ſaid William Trigg, at " £ 54:15; and that the property was, and has " been ſince the commencement of the ſuit in his " poſſeſſion. That Daniel Huddleſton and Abſo- " lam Jordan were not poſſeſſed of any negroe or " negroes about the time of theirs and Richard Ban- " dy's bill of ſale to Graham and Trigg, for the " negroes Hannah &c. before mentioned. That " Hannah mentioned as aforeſaid was the proper- " ty of the ſaid Bandy, when T. Craig aſſignee of

" Hawkins

Eckhols, vs Graham.

"Hawkins firſt iſſued his execution. That when "Toliver Craig's execution iſſued, the ſaid Bandy "had ſeven ſlaves."

The Diſtrict Court gave judgment for the plaintiffs, and the defendant appealed to this Court.

RANDOLPH for the appellant, contended that the forthcoming bond was informal and void; that the *lien* created by the ſervice of the execution continued: and conſequently that the ſale, by Bandy to the plaintiff, was nugatory and of no force.

MARSHALL *contra.* There is nothing to ſhew that the execution was levied on theſe ſlaves; for the jury have not found the fact, and the Court cannot preſume it. Upon that ground alone therefore the defendants title fails. But if that fact were found, ſtill the names of the ſlaves were not indorſed upon the execution according to the directions of the act of Aſſembly; and conſequently the defendant can derive no aid, from the ſervice of the execution. However, the return that a bond was taken and the reſtoration of the property to Bandy, by the ſheriff, are deciſive; becauſe the ſlaves were thereby clearly diſcharged from the execution. So that Bandy had power to ſell them; and therefore the plaintiff who is a fair purchaſer has title to recover them.

LYONS Judge. Delivered the reſolution of the Court, that the names of the ſlaves ought to have been endorſed, in order to prevent purchaſers from being deceived. That it would make no difference whether the bond taken was good or not. For if good, then the property was clearly releaſed; and if not, then ſome proceedings, with reſpect to it, ſhould have been had. But be that as it might, the Court were clearly of opinion, that by taking the ſecond execution, he waived the firſt; and diſcharged the lien if any ſubſiſted. Which anſwered the difficulty, whether there ſhould not be a *venire facias de novo*, in order to aſcertain

the

the identity of the ſlaves? Becauſe it could be to no purpoſe to aſcertain that the ſlaves were taken on the execution; ſince if it was ſo, the Court were clear that the plaintiff, by taking the ſecond execution, had waived all benefit under the firſt; and deſtroyed the lien if he had any.

Eckhols, *vs.* Graham.

Judgment affirmed.

NOEL, *against* SALE.

NOEL petioned the County Court of Eſſex for leave to build a mill. Writ of *ad quod damnum* granted; and inquiſition taken. After which the record proceeds thus, "On the motion of the "ſaid Sale the ſaid inquiſition, for reaſons appearing "to the Court is quaſhed; and it is further conſi- "dered by the Court that the ſaid John Sale reco- "ver of the ſaid Taylor Noel, his coſts about his "defence, in this behalf expended: From which "determination of the Court the ſaid Taylor No- "el prays an appeal to the next Diſtrict Court to "be held at King and Queen Courthouſe; the "ſame is granted, the ſaid Taylor having given "bond and ſecurity according to law."

If an Inquiſition be improperly quaſhed the plaintiff ſhould pray a new writ or except to the courts opinion.

The deputy ſheriff may take an inquiſition.

The Diſtrict Court affirmed the judgment of the County Court; and, to the judgment of the Diſtrict Court, Noel obtained a writ of *ſupersedeas* from this Court.

MARSHALL for the appellant. The proceedings were all regular, and yet the inquiſition is quaſhed by the Court; which is unqueſtionable erroneous. Therefore the judgment of the Diſtrict Court ought to be reverſed.

PENDLETON

Noel, *vs.* Sale.

PENDLDTON Preſident. May there not have been a cauſe *de hors* the record?

MARSHALL. If ſo, it ought to have been ſtated.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court, that the judgment of the Diſtrict Court ſhould be affirmed. That Noel ſhould either have moved for a ſecond inquiſition, or filed a bill of exceptions to the Courts opinion, in order that it might have appeared upon what ground the Court proceeded.

ROANE Judge. I ſuſpect that the Courts below proceeded upon the ground, that the inquiſition was taken by the deputy ſheriff; but that has been decided to be good by this Court. However, as there might have been matter *de hors*, as miſconduct in the ſheriff, jurors, or party, and nothing is ſtated in the record to exclude that idea, we muſt preſume that ſomething of that kind appeared to the Court.

Per: Cur: Affirm the judgment.

LEE,

LEE,

against

LOVE, & Co.

The assignee of a note of hand must sue the maker before he can resort to the assignor.

THIS was an action on the case brought, by Lee against Love, & Co, in the District Court of Dumfries; in which the plaintiff declared that William Skinker, on the 19th of October in the year 1793, made his note in writing called a promissory note to Love, & Co. and thereby promised to pay to Love, & Co, or order, on the 19th of April in the year 1794, at the counting-house of Josiah Watson in Alexandria, 1030 dollars negotiable at the bank of Alexandria, for value received. That Love & Co. assigned this note to the plaintiff, before the day for payment thereof; of which Skinker had notice. That the said note was not paid according to its tenor and effect; but the payment thereof had been wholly neglected and refused; of which Love and co. had notice. Whereby, and by reason of the act of Assembly, in such cases made, Love & co. became liable to pay the said 1030 dollars to the plaintiff; and being so liable &c. assumed &c. There was a 2d count for money had and received, by the defendants, to the use of the plaintiff; and the 3d count for money paid, laid out and advanced. Plea non assumpsit and issue. The jury found a special verdict, setting forth the note in these words: "Prince "William county October 19, 1793. On the 19th "day of April in the year 1794, at the counting-"house of Josiah Watson in Alexandria, I promise "to pay John Love & co. or order, one thousand "and thirty dollars, negotiable at the bank of Alex-"andria, for value received.

"Wm. SKINKER

"*Teste*,

"HENRY JORDON."

Lee, vs Love, & Co.

They also find the assignment in these words: "pay to Charles Lee the contents.

"JOHN LOVE, & Co."

And then follow these words: "If said indorse-"ment is legal evidence, of the defendants having "received money for the use of the plaintiff in the "suit, we find that the defendant had and received "for the use of the plaintiff 1030 dollars." They then find the protest of the said note for non-payment, upon the 23d of April 1794. They also find a letter from John Love, one of the defendants, to the plaintiff stating that he is sorry he has determined to sue him, instead of Skinker. That if the plaintiff would sue Skinker, the said John Love would give security, that if the money could not be made on the execution, that he the said John Love would pay it. That by suing Skinker in Fauquier, where he had large property, the pliantiff might immediately get judgment; and that he John Love would see to the business. That if this was refused, he should procrastinate the suit as long as he could. That a compliance on the part of the plaintiff would prevent trouble to the said John Love in recovering the money of Skinker afterwards. That he did not consider himself bound to make extraordinary sacrifices for discharging this debt under the circumstances of the case; and therefore, if sued, should consult his own convenience in the payment, which he might be able to put off longer than Skinker. That if the plaintiff brought a suit against Skinker, that he John Love gave him his honour he would endeavour to have judgment got as soon as possible against Skinker; which he should consider as necessary for his own safety. The jury further find, that no suit was ever brought by the plaintiff against Skinker; and conclude, that if the law be for the plaintiff, then they find for the plaintiff, and if for the defendant, then they find for the defendant.

The

Lee, vs. Love, & Co.

The District Court gave judgment for the defendant; and the plaintiff appealed to this Court.

MARSHALL for the appellant. Contended that the indorsement supported the count for money had and received. That the assignor was not bound to sue the maker before he resorted to the indorsor; for there was an implied contract, in such cases, that the assignor would pay the money, if the maker did not. And finally that, as this bill was payable at the bank of Alexandria, it stood upon the same footing with notes negotiable at the bank; and therefore that the indorsor was liable, without a suit against the maker, *Act.* 1791. *Chap.* 77. *sect.* 21.

WICKHAM *contra.* Contended that it had been settled by this Court in *Mackey* vs *Davies* 2 *Wash.* that the maker must be first sued, and due diligence used; though circumstances might excuse, as absence from the country, or insolvency of the maker. That there was no analogy betwixt this case and that of a note negotiable at bank: because that was a contract betwixt the bank and debtor, but this was an engagement between the indorsor and indorsee merely.

Cur: Adv: Vult:

LYONS Judge, delivered the resolution of the Court, that the judgment should be affirmed, as they considered the case, as having been already, decided.

Judgment affirmed.

WILSON,

WILSON
against
RUCKER.

If a military certificate be loſt and afterwards ſold to a *bona fide* purchaſer without notice, ſtill the original owner may maintain trover for it againſt the innocent vendee.

The court of chancery, may on granting a new trial in the ſame Court order the verdict to be certified into the Court of Chancery, and proceed to make a final decree in the cauſe.

RUCKER brought trover againſt Wilſon, for a military certificate iſſued to the plaintiff for the balance of his pay and ſubſiſtence to the 6th day of February 1781, as a captain of the ſtate infantry. The cauſe was tried before the Diſtrict Court of Dumfries; when the plaintiff obtained a verdict and judgment. Wilſon afterwards obtained an injunction to that judgment from the High Court of Chancery, on the ground of the jury having found a general verdict without argument, when the counſel on both ſides (becauſe the queſtion was new, difficult and of extenſive importance) had agreed to certain facts, to be found ſpecially, by the jury; and therefore did not argue the cauſe. The parties conſented in the High Court of Chancery that there ſhould be a new trial of the iſſue in the Diſtrict Court; which was ordered accordingly by the High Court of Chancery; and that the verdict thereupon ſhould be certified into the High Court of Chancery.

Upon the ſecond trial in May 1794 the jury found a verdict which ſtated, "that the plaintiff "Rucker was poſſeſſed of the certificate in the de- "claration mentioned, and loſt the ſame out of "his poſſeſſion. That James Dickenſon afterwards "to wit, on the 4th day of Auguſt 1785, having "the ſaid certificate in his poſſeſſion, ſold the ſame "in the preſence of ſundry perſons, *bona fide*, for "the ſum of ſeventy five pounds ſpecie to the de- "fendant; who had not any knowledge, at that "time, of the plaintiff or of the ſaid Dickenſon; "or that the plaintiff had either loſt, or diſpoſed "of the ſaid certificate otherwiſe. That the de- "fendant paid to the ſaid Dickenſon the ſaid ſum "of £75 on the ſaid 4th day of Auguſt 1785,

"(which

" (which was then the reasonable value thereof) " and at the same time received the said certificate " and converted it to his own use. That it was " and has been, since the issuing of such certificates " in 1781, the general *custom* of the country for " property in such certificates to be transferred " from one man to another, without any assign- " ment in writing, but by the mere delivery there- " of, though in some instances such certificates " have been assigned by writing. That it is the " *custom* of the Auditor of public accounts, to " grant to the holder of the military certificates, " warrants for the interest, on the public Treasu- " ry, whether they be assigned by writing or not. " That on the 21 day of November 1785, the said " Auditor issued a duplicate of the aforesaid certi- " ficate to the plaintiff; which was presented to " the Auditor, within less than a month after the " said loss was alledged to have happened, and the " said duplicate was afterwards delivered to the Au- " ditor and cancelled. If on the whole matter the " law should be for the plaintiff the jury find for " him £224:5:0 damages, but if for the defen- " dant then they find for the defendant."

The District Court at their subsequent term in October 1794, gave judgment for the plaintiff. From which Wilson appealed to this Court.

Prior to which, to wit, in September 1794, the verdict being certified by the Clerk of the District Court (although there was no order of that Court for it) into the High Court of Chancery, the Chancellor delivered his opinion " that although a military certificate be transferrable by simple delivery; and therefore the holder of it is presumed to be owner, deriving the right by mediate or immediate translation from the officer or soldier to whom it was originally granted, yet that presumption may be outweighed by evidence of the contrary; and that in this case the presumption of the plaintiffs right derived in that manner is outweighed by the facts stated in the verdict, namely that the plaintiff in the action at Common Law,

who

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who is defendant in this Court, was poſſeſſed of the certificate in the declaration mentioned as of his proper goods and chattels, and loſt the ſame out of his poſſeſſion, ſo that the tranſlation to the preſent plaintiff by the other party or his aſſignee, if any was, muſt have been after the loſs. Which is incredible; not only becauſe the preſent defendant is found by the verdict to have procured from the Auditor for public accounts a duplicate of the loſt certificate, but becauſe no man it is ſuppoſed would buy a loſt certificate: And the Court is alſo of opinion, that payment of value for the certificate by the preſent plaintiff doth not alter the queſtion, which is only whether one can transfer a right which he hath not to another? Nor is this caſe like the caſe of loſt money found and paid away by a ſtranger, where the identity of the money cannot be proved; for where the identity can be proved, no reaſon for diſtinguiſhing the caſes is diſcerned. Neither is this caſe like the caſe of an indorſed bill of exchange payable to one or his order, or the caſe of an order payable to bearer, by the terms of which thoſe who poſſeſſed the draught are empowered to receive the money; and therefore the Court doth adjudge, order and decree that, upon the plaintiffs delivering the military certificate aforeſaid and paying the intereſt, which he hath received thereupon, with the coſts expended by the defendant, both in the action at common law and in this Court to the defendant, the injunction awarded to ſtay execution of the judgment rendered by the Diſtrict Court of Dumfries to the defendant againſt the plaintiff be perpetual; but if the plaintiff within————after he ſhall have been ſerved with this decree, ſhall not deliver the ſaid certificate, and pay the ſaid intereſt and coſts to the defendant, the Court doth adjudge, order and decree that the ſaid injunction be diſſolved; that the ſaid plaintiff pay unto the defendant over the damages and coſts recovered by the ſaid judgment fifty two pounds five ſhillings and the intereſt upon the ſaid certificate which hath become due ſince the 12th day of May 1790

and

and ſhall become due hereafter until the time of payment, and alſo the coſts expended by the defendant in this ſuit."

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From this decree Wilſon likewiſe appealed to this Court.

And both cauſes came on to be argued together at this term.

CALL for the appellant. The right to circulating papers, as bank notes, bills payable to bearer, certificates, or any others of a like kind, is clearly loſt by a ſale to a purchaſer, without notice. For they are transferable by mere delivery; and a ſale to a purchaſer, without notice, barrs the right of the original proprietor, by the courſe of trade, and for the ſake of public convenience. 1, *Salk.* 126, 283. Which caſes are alone deciſive of the principle. But the doctrine receives additional weight, from the expreſs finding of the jury here, that a *cuſtom* exiſts of transferring them without aſſignment. For the *cuſtom* fixes a rule of deciſion *Branch* vs. *Burnly and Brackenridge in this Court.* * It is like the caſe of tobacco notes; which though payable to the owner or order, yet paſs by delivery without aſſignment. But, if it was allowable for the proprietor to aſſert his right at any diſtance of time, the miſchief would be intolerable; and would put a total end to the circulation of thoſe papers. The practice of the Auditor, (found by the verdict) of paying the intereſt to the holder, proves the general impreſſion, that poſſeſſion is a proof of the right of property in the certificate; unleſs ſome impropriety, in the poſſeſſor himſelf, be proved.

MARSHALL *contra.* The rule is that where the property has a earmark and can be identified, the right of the proprietor is not loſt by a ſale to a purchaſer without notice. Which diſtinguiſhes caſes of that kind from money, bank notes, and other ſpecific articles in the nature of money. The policy of England, which is a commercial country, has

* Ante

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has given the same currency to the two last, as to money; and therefore the same rules apply to them. But that argument does not hold with regard to military certificates; because no such policy ever obtained here. It is therefore like the ordinary case of a sale of personal property, by a person who has no authority; which was never held to bind the right. The custom found makes no sort of difference. For in the first place, it is stated to be both ways; and in the next, the verdict does not state it to be a custom, that a sale binds the right; but only that the paper is transferable by delivery, without assignment. It only shews the mode of transfer; and not any barr to the right. Suppose a man were to lose his bond, a sale of it to a purchaser, without notice, would not barr the right of the owner.

WICKHAM in reply. Bills and other negotiable papers which pass by delivery merely, become the property of a purchaser without notice; and they do not stand upon the common footing of other personal property which has not the same negotiable nature. Now the present case stands precisely upon the same footing. It is like the case of the tobacco notes already mentioned which are always considered as the absolute property of the purchaser; and rightly. For otherwise a total stop would be put to their circulation. The consequences of the doctrine contended for on the other side would be very alarming. They have been in constant circulation; and the sheriffs and public officers were bound to receive them. But what a door to mischief would be opened if they were liable to be regained by the first proprietor?

CALL. It is not a correct position, to say, that whenever there is a earmark, the first proprietor may recover the property. For bank notes have a earmark; and yet that consequence does not follow. It was equally the policy of this country to give currency and circulation to these papers, as it is in England to give it to those mentioned by Mr. Marshall, or to bank bills at present.

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Becauſe the ſtate had not money to pay the officers and ſoldiers; and therefore the public wiſh was to give them ſomething which they could go to market with, and which might ſerve them as a ſubſtitute for money. So that, in this reſpect, the caſes exactly reſemble each other. If the appellees doctrine prevail the miſchief is incalculable. For it will enable proprietors or their repreſentatives to perpetrate all manner of frauds; and to recover againſt never ſo many transfers, when the evidences of the ſales by themſelves, may be loſt, through lapſe of time.

Cur: adv: vult.

ROANE Judge. The principle queſtion in theſe cauſes is whether the property of the certificate in queſtion paſſed to the preſent appellant, by the *bona fide* ſale, found by the verdict to have been made by a vendor, having himſelf no title?

It is certainly a general rule that the title to perſonal goods will not paſs, without the aſſent of the owner; but this rule has admitted of certain exceptions, for the benefit of commerce, and on the principle of permitting a particular injury, rather than a general inconvenience.

In the caſe of *Miller* vs *Race*, 1, *Burs.* 452, it was decided that trover would not lie for a bank bill under circumſtances like the preſent; and by examining the reaſoning on which the deciſion in that caſe was founded, we ſhall be enabled to decide this.

Lord Mansfield in delivering the opinion of the Court in that caſe, ſaid, no doubt an action will lie upon the general courſe of buſineſs and from the conſequences to trade; which would be much incommoded by a contrary deciſion. That the fallacy, of the argument for the defendant, depended on comparing bank notes, to what they do not reſemble; namely, to goods, ſecurities, or documents of debts. Whereas, bank notes were neither the one nor the other; but were univerſally

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treated as money by the general conſent of mankind; which gives them the credit and currency of money, to all intents and purpoſes. That they were conſidered, as money itſelf; ſince receipts are given for them as for money, and they paſs, by will, as caſh; that it was neceſſary for the purpoſes of commerce that their currency ſhould be eſtabliſhed and ſecured; and that the true reaſon, why they and money are not recoverable, is, that they have paſſed into currency.

Theſe principles appear to exclude military certificates; which are not conſidered as money, nor do they paſs as ſuch. They are leſs valuable than money, and are conſidered as mere documents of debt, as the act, providing for the iſſuing of duplicates, proves.

There are in England ſome caſh notes and bills of exchange, which ſtand on the ſame ground in this reſpect with bank notes; for inſtance notes payable to bearer; which in *Grant* vs *Vaughan*, Lord Mansfield ſaid it would be abſurd to indorſe; and which in *Cunningh.* 133. and 2, *Freem.* 258, are ſaid, to be, like ſo much money to whomſoever the note is given. This is alſo the caſe with reſpect to bills of exchange having a blank indorſement. Which are ſaid, not to be different from notes payable to bearer; and that both go by delivery; and that poſſeſſion proves property in both caſes, *Peacock* vs *Rhodes*, *Dougl.* 614. Theſe two deſcriptions of paper therefore have this quality, not only from their generally paſſing as caſh amongſt merchants, but alſo, from the circumſtance of the bearer being by the very terms of the note, or indorſement entitled to the money.

But I can find no inſtance where an ordinary bill of exchange or note payable to A, has been held to be the property of B, without any transfer by A; however much the circulation of ſuch bill and note is favoured in England.

But

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But the claim of the appellant to the property in queſtion is leſs ſtrong, than even in the caſe of a bill of exchange payable to an individual. For military certificates are not made negotiable by any ſtatute; and have never, in fact, circulated generally, amongſt the people; at leaſt ſince the expiration of the act calling them in by taxes. And if that act might be ſuppoſed to have given them the quality of a currency, during its exiſtance, that quality has ceaſed ſince its repeal; and therefore, in this reſpect, theſe certificates now (if they were ever analogous to money) ſtand on a common ground, with the former paper money.

If then theſe certificates fail in their analogy to bank bills, notes payable to bearer, &c. If they are not conſidered as money, but as mere evidences of debt; if the free circulation of them is not eſſential to commerce, why ſhould we vary their fate, from that of chattels and documents in general? Why place them on the high ground, upon which money, or papers (which are univerſally conſidered as money) are, in this reſpect, entitled to ſtand?

Such is my opinion upon the principal queſtion, growing out of the ſpecial verdict, whereon the decree in the ſuit in Chancery is grounded.

It now remains to ſay, whether the judgment of the Diſtrict Court on that verdict, or the decree of the High of Chancery thereupon, ſhall be affirmed?

The bill in Equity on which that decree was founded was an original bill, ſtating reaſons why the firſt verdict and judgment at law ſhould not be concluſive, but be enjoined; and praying that another trial of the iſſue might be had in ſome Court of Law, and for general relief. It made a caſe proper, as is ſuppoſed (on the authority of deciſions here,) for the interpoſition of a Court of Equity; which would juſtify the Court of Chancery in directing another trial of the iſſue in ſome Court of Law, which when certified to that Court, would

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would be the foundation of a final decree; and accordingly, that Court did direct another trial of the issue to be had in the same District Court, and that the verdict thereupon should be certified to the High Court of Chancery.

Now as a Court of Equity ought not to interfere in granting new trials in such cases, unless a case is made, by the bill, rendering its interference proper, so when such circumstances do exist, and the Court of Equity has got possession of the cause, it may proceed finally therein; with power nevertheless to require the aid of courts of common law and juries in deciding those matters of law and fact, which may occur in the progress of the cause. This was the object of the Court of Chancery, in directing an issue to be tried and certified in the present case; and that Court did right in decreeing thereon when certified; and the decree rendered was, for the reasons already given upon the principal question, right in substance; and ought, I think, to be affirmed.

But the District court, not satisfied with trying and certifying the issue under the order of the Court of Chancery, proceeded also to render judgment on the verdict found on the trial of the issue, one month after the present decree was actually made thereupon, in the Court of Chancery; and the question now is, whether the last mentioned judgment should be affirmed or reversed?

Whatever may be the power of a Court of Equity in granting a new trial after a verdict and judgment at law, as to leaving the cause to be finally decided upon by the court of law and letting in a second judgment to be given thereupon by such court (the first judgment not being reversed or avoided by a superior court of law, but only enjoined by the Court of Equity,) I hold it to be a clear principle, that if the Court of Equity directs the verdict to be certified in order to further proceedings, it may go on to make a final decree therein (the case being proper in other respects;) and that a

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court of law acting on such verdict thereafter, acts without authority.

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I have said that the decree of the Chancellor was in substance right; but I think he erred in decreeing an additonal sum of £ 52:5 to be paid in the event of the non-delivery of the certificate. That sum being the excess of the damages found by the second verdict, above that found by the first and was added by the jury by some rule (as the increased value of the certificate, or the like,) which is not disclosed to the Court. But there was no objection to the damages found by the first jury on the part of Rucker; he was satisfied therewith, although an objection came from Wilson that they were excessive. That estimation of the value, therefore, was proper; and should be adhered to, with interest up to the present time, in case the certificate is not delivered; especially as this is a hard case on the appellant, being the innocent purchaser of the certificate for full value and without notice of its being lost. With this variation I think the decree of the Court of Chancery right and ought to be affirmed.

FLEMING Judge. Concurred, that for the reasons already given the property of the certificate was not changed, by the sale to Wilson; and that, as it was an issue out of Chancery and the verdict ordered to be certified into that Court, the District Court ought not to have proceeded to judgment on the verdict; but that the Chancellor did right in proceeding to make a final decree, upon it. Which ought to be affirmed, except as to the alternative right of delivering the certificate, instead of paying the money, and except as to the £ 52:5; improperly added to the amount of the first judgment.

CARRINGTON Judge. As to the main question concerning the property of the certificate, and the liability of Wilson to pay for it, I have no doubt; and consider the case in that respect to

have

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have been rightly decided both by the Diſtrict Court and the High Court of Chancery.

But here appears to have been two Courts going on at the ſame time upon the ſame ſubject, and the records unfold the ſingular caſe of a decree in Chancery and a judgment at law for the very ſame thing; and both liable to be inforced. Which cannot be right; and therefore this Court muſt decide to which of thoſe judgments Wilſon muſt ſubmit.

The bill alledges unfairneſs in the trial, and therefore prays that a new trial may be had in ſome Court of Law; and concludes with aſking for general relief.

Now when the new trial was awarded the purpoſes of the bill were anſwered; and there, the interpoſition of the Court of Chancery ſhould have ceaſed; unleſs, further equitable circumſtances ſhould have required its aid.

But inſtead of this, that Court goes on to direct the verdict to be certified into Chancery, before the determination of the point of law was had. Which I think was improper; and that the Chancellor ought to have left the further deciſion of the caſe to the Court of Law. Accordingly the Diſtrict Court did proceed to a final judgment, upon the verdict, in favour of the plaintiff at law. From which I think they were not reſtrained; eſpecially as there was no injunction againſt the plaintiff at law proceeding to judgment. The Diſtrict Court therefore appear to me to have proceeded regularly, and the Chancellor otherwiſe.

But admitting the Court of Chancery to have acted rightly in proceeding further in the cauſe, ſtill I think the Judge of that Court erred in ſeveral reſpects.

For the judgment at law is for an adequate ſum in damages, for the injury ſuſtained; but the decree in Chancery gives Wilſon the alternative of either returning

returning the certificate or paying the value; whereas Rucker has no alternative, but is obliged to take which ever of them, Wilson may think proper to give him. So that the advantage lies on the side of Wilson altogether. Who will restore the certificate, if sunk in value, and, if it rises, will pay the damages. But this destroys all reciprocity and may operate very unequally with regard to Rucker; who may thus be loser by depreciation, but cannot gain, should the certificate rise in value. Wilson, vs. Rucker.

The novelty of the case, produces some difficulty; but upon the whole, I think the best decision will be to affirm the judgment at law, and reverse the decree of the Chancery, after the award of the new trial.

LYONS Judge. The property of the certificate was certainly not changed by the sale; and therefore the opinion of both Courts was right upon that point. But as to the other question; I am very clear that the Court of Chancery did right in proceeding to a final decree upon the verdict; and that the District Court ought not to have rendered judgment on it, but should have directed it to be certified into the Court of Chancery.

For the Court of Chancery having once obtained jurisdiction of the cause might proceed to make a final end of it; and for that purpose might call for the assistance of a jury on any point of law or fact necessary to be ascertained; and was authorized to direct that their verdict should be certified.

Nor is it material, whether the Chancellor ordered the fact to be enquired into, upon an entire new issue made up in his Court, or that a new trial of the former cause should be had. Because in either case it is a trial had by his order; and the verdict is subject to his controul. For the order, in such a case, is not intended to restore the cause to the Court of Law; but merely to ascertain facts which are important to be known to the Chancellor, before he proceeds

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proceeds to a final decree. The Chancellor therefore was correct in directing the verdict to be certified; and consequently the District Court ought not to have proceeded to judgment.

This which is so clear upon principle receives additional weight from the following circumstance. The decree of the Court of Chancery does not set aside the first judgment; and whether that Court will grant a perpetual injunction or not, depends upon the event of the new trial. But until the verdict is certified, that event cannot be known; and therefore without the certificate, the cause would remain forever upon that docket.

But if it was necessary to return the verdict there, in order to finish the cause, it is certainly more proper that an end should be put to it, in that Court altogether, than that the two Courts should be proceeding upon the same cause at once; and perhaps giving contrary judgments upon it.

Besides it often happens that the merits of the cause in equity, will essentially depend upon the result of the trial; and therefore the verdict must go into the Court of Chancery in order to enable that Court to proceed to judgment upon the equity of the case. Is it not better then, that the verdict should always be returned there, than that the two Courts should be scrambling for the jurisdiction? The Court of Chancery perhaps insisting that it is necessary in order to complete its decree, that the other Court, should certify the verdict, and the Court of Law contending that there is no point of equity which should draw it back again to the Court of Chancery. A contest which certainly ought to be avoided; and which can never take place, if the practice be adhered to, of certifying the verdict into the Court of Chancery; which, having general cognizance over the whole case, can decree what is proper between the parties upon all the points in the cause.

I am therefore of opinion that the District Court erred in proceeding to judgment on the verdict instead

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inſtead of ordering it to be certified, into the Court of Chancery; and conſequently that their judgment ſhould be reverſed, and an order for ſuch a certificate made. But upon the other record I think the decree ſhould be affirmed with the variations, which a majority of the Court have directed to be inſerted in the decree which is now to be entered.

PENDLETON Preſident. The Court is of opinion, that the property of the certificate was not changed by the loſs of it, but remained in the appellee, and did not veſt in the appellant, by his purchaſe from the finder; although fairly made, for a valuable conſideration paid, and without knowing it had been loſt and found; Since there was no aſſignment endorſed thereon, by the appellee. That although it is ſtated to have been the cuſtom, for theſe certificates to paſs from hand to hand and for the intereſt to be drawn at the treaſury by the holder without an endorſement from the original payee, yet ſuch a practice was at the riſk of the receivers reſpecting the property, and could not amount to ſuch a cuſtom, as would change the law; which has eſtabliſhed, that a ſale of perſonal property, ſtolen or loſt, does not change the right of the proprietor. A rule which is never departed from, but when it is to yield to ſome great national convenience; as in England to ſales in open market, and to bank notes and other papers there payable to bearer or to order; which daily circulate as money, to none of which does the preſent paper aſſimilate. It contains no promiſe to pay to any perſon or by any perſon; but it is a mere certificate from a public officer, that Rucker as a captain of the ſtate infantry, is entitled to receive the money at a future day; with intereſt from a prior day, agreeable to an act of Aſſembly referred to. In ſhort, it is, as it was truly ſtated by Mr. Marſhall to be, a mere document or evidence of a debt due, and not a circulating medium. If it be ſaid that it was intended to give the officers a credit, the ſame may be obſerved of bonds and other transfer

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securities; but yet the property, in those papers, will not pass by delivery without assignment; and therefore, that cannot be the criterion by which the distinction is to be fixed.

Bank notes are payable on demand to A. B *or bearer;* so as to be the same, as if payable to the bearer. Which a mere delivery makes the holder to be.

Bills of exchange and promissory notes are payable to A. B. or *order*, but I doubt whether they are negotiable until they are endorsed by A. B; either by signing his name in blank, or assigning it to C D or order; which is the same thing. Since the holder may erase that and let it stand in blank. But as the payee may by a special indorsement, "to pay to C D only, or for the use of the indorser;" restrain the negotiability and circulation, it would seem that his indorsement being necessary to give it circulation, a loss before that is made, would not change the property. However be that as it may, the present certificate not being payable to bearer or order, the property could not be changed but by assignment, under our acts of Assembly respecting bonds and promissory notes: The rule concerning which papers, that the property is not changed by loss without assignment, applies of course to this paper.

And in this opinion the Court are unanimous; and the right on the merits has been properly decided in both the Courts below.

But a difficulty arises on the forms of proceeding; which it appears to me is occasioned by our having heard the cases together, and not distinguishing, but blending together our different jurisdictions. I have therefore considered the cases distinctly as if one had come before the Court without the other.

I. At common law an action of trover is brought to recover the value of a paper lost (a question which was proper for a Court of Law;) and on not guilty pleaded a general verdict is found and

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a judgment entered for the plaintiff. No motion is ſtated to have been made for a new trial; and the cauſe was ſo far out of that Court who could not act further in it, without the intervention of a Superior Court at law, or a Court of Chancery; whoſe juriſdiction, to grant new trials for good cauſe in ſuch a ſituation, is not diſputed; but has been often affirmed.

So far there is no error in the Diſtrict Court; as no motion was made to it for a new trial.

But then, comes an order of Chancery by conſent of parties that the verdict ſhould be ſet aſide and a new *trial of the iſſue* had between the parties in *the ſame Diſtrict Court; and that the verdict thereupon ſhould be certified to the Court of Chancery*. Under this order the Diſtrict Court were reſtored to their original juriſdiction over the cauſe; and were to proceed to a new trial and judgment at law, in the ſame manner as if the new trial had been granted by themſelves in due time.

The queſtion therefore is, whether they were or were not obliged to certify the verdict to the Chancery? A new trial is had; a ſpecial verdict (not complained of) is found, ſettling the *damages and ſubmitting to the Court of Law*, in the legal manner whether it ſhall be for plaintiff or defendant? The Court proceed to give ſuch judgment upon it as this Court would have given; and from that the appeal comes. Will this Court ſitting in their law character ſay there is error in this judgment and reverſe it? Yes ſay gentlemen, there was error; becauſe the Court had no power to give judgment, but were to certify the verdict into the Chancery. A Court of Law to certify a ſpecial verdict to the Chancellor, for him to decide the law upon it! This ſeems novel; and not only breaking the line of juriſdictions, but inverting their order by a tranſfer of one to the other.

The verdict was to depend on the opinion of the Court, upon the law; and was not complete until that was given.

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On this point therefore, I am clearly of opinion 1st That the Chancellor had no power to reſtrain the Court from proceeding to judgment, however he might afterwards have relieved againſt it upon ſatisfactory and equitable grounds. 2d That, if he had ſuch power, he did not exerciſe it by the order to certify the verdict, as that was not inconſiſtent with their giving judgment upon it, which he could not reſtrain.

Therefore my opinion at law is, that there is no error, and that the judgment ought to be affirmed, although a majority of the Judges are for reverſing it.

II. Then take up the Chancery record, and conſider it as in that Court.

The bill ſtates not a word, upon the merits, tending to make it proper for the juriſdiction of a Court of Chancery. It was an action of trover and converſion for a military certificate; and good reaſons are ſtated for granting a new trial, which is the prayer of the bill; an injunction was granted and the defendant, without anſwering goes into Chancery and conſents to a new trial; which was ordered, according to the prayer of the bill. So that the only ground of application to a Court of Equity being thus effected, what had the Court of Chancery further to do with the cauſe but to regulate the coſts? The verdict however was ordered to be certified into the Chancery; altho' that Court, not having original juriſdiction, could not enter judgment for plaintiff or defendant upon it. I am perſuaded that worthy Judge, from his multitude of buſineſs, took up the idea of iſſues directed out of that Court, in caſes commenced there, and in which he has original juriſdiction; and did not attend to the difference.

When, in ſuch caſes of original juriſdiction on the merits, the Chancellor doubts of a fact, he directs a proper iſſue to be made up, and ſends it to any Court of Law he pleaſes to be tried by a jury. In ſuch a caſe the Court of Law has nothing to do with

with the cauſe, but to ſuperintend the fairneſs of the trial; and the verdict is certified, and becomes part of the evidence, on which the Chancellor founds his decree. Wilſon, vs. Rucker.

In the preſent caſe there was no particular iſſue to be tried; but a *new trial* of the whole merits, upon the record in that Court, where the record at law remained and who were to finiſh the ſuit at law, and no further juriſdiction remained in Chancery; unleſs upon a new ground of equity, ariſing out of the ſubſequent proceedings. There was therefore, error in returning the cauſe and directing the certificate of the verdict to be made; and of courſe in all the ſubſequent proceedings by the Chancellor. For he ſhould have decreed as to the coſts and put an end to the ſuit.

But ſuppoſing, he meant, by directing the verdict to be certified, to keep the caſe open for application on any new matter of equity ariſing on the new trial, and that this was right, what ſhould he have done upon the return of the certificate?

A ſpecial verdict is ſtated to have been found and no complaint of a miſtate of facts, or unfairneſs in the trial. If ſuch a ſpecial verdict had been certified, on an iſſue properly directed out of Chancery, it would have been proper for that Court to have ſent it to the General Court for their opinion upon the law. By theſe proviſions, the power of the Chancellor to interfere, in ſome law caſes, is rendered beneficial to ſociety, without violating the great law principal, "the trial of facts by a jury and of law by judges."

But in this caſe, the Chancellor ſhould have ſaid, "I had no other juriſdiction in this cauſe, than to inquire into the fairneſs of the firſt trial, which was admitted to have been unfair; but as another trial has ſince been had, to the fairneſs of which no exception is taken, my juriſdiction is now at an end; and the bill ought to be diſmiſſed and the coſts regulated. Which ſhould in my opi-

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nion be the decree of this Court. But a majority of the Court differ from me in this point alſo.

Ross vs *Pynes* and *Fouſhee* vs *Lee*, are mentioned as inſtances where, on new trials directed by the chancery, the verdicts were to be certified.

In both, the new trials were in different courts from thoſe in which the common law judgments were obtained; thoſe courts had no records before them; and could only take and certify the verdicts.

Theſe were to be certified to the Chancellor, to enable him to decide the injunctions, and not to decree upon the merits. Accordingly in *Ross* vs. *Pynes*, upon the ſecond verdict the injunction was diſſolved, and in the other caſe it was made perpetual; becauſe the ſecond verdict was againſt the firſt.

As the ſecond verdict in the preſent caſe, accorded with the firſt, the injunction ſhould have been diſſolved, and the court at law left to proceed to judgment, on the ſpecial verdict. But a majority of the court are of opinion that the following decree and judgment ought to be entered.

In the CHANCERY cauſe.

"The court is of opinion, that the ſaid high court of chancery ought not to have permitted the appellant to be diſcharged from the damages recovered, by the judgment in the proceedings mentioned, by his delivering up the certificate and paying the intereſt received, ſince that option gave, to him, an unreaſonable advantage; and in the other alternative, the modification of relief is improper; and that the ſaid decree is erroneous. Therefore it is decreed and ordered, that the ſame be reverſed and annulled; and that the appellee pay to the appellant, as the party prevailing againſt the decree for relief in the caſe of his not accepting the alternative improperly allowed him, his coſts: And this court proceeding to make ſuch decree, as the ſaid high court of chancery ſhould have pronounced, it further decreed and ordered, that

that the appellant pay to the appellee one hundred and seventy two pounds current money, together with interest at five per centum per annum, from the nineteenth day of May 1790, till payment, and the costs in chancery and in the district court at law; and that all further proceedings, in the said suit at law in the district court, be perpetually injoined." Wilson, Rucker.

In the APPEAL from the DISTRICT COURT.

"The Court is of opinion, that the said judgment is erroneous in this, that the said District Court proceeded to give judgment on the verdict, when it should have been certified to the High Court of Chancery: Therefore it is considered, that the same be reversed and annulled; and that the appellant recover against the appellee his costs, by him expended in the prosecution of his appeal aforesaid here: And this court proceeding to make such order, as the said district court ought to have made, it is ordered that the said verdict be certified accordingly to the said high court of chancery."

LYONS Judge. If this certificate had been payable in taxes, at the time it was lost, I should have thought differently. Otherwise sheriffs and public officers might have been ruined, and infinite mischief, would have insued.

PENDLETON President. That observation would be correct if the owner had put his name upon the back; because that would have given circulation to it. But, without such indorsement a man would not lose his property, by a sale of the certificate by one, who had no right.

GALLIGTON.

GARLINGTON, against CLUTTON.

Consent that the suit shall not abate by the death of parties is obligatory, & operates like a release of errors.

Therefore **a plea stating the death of the defendant before verdict tho' informally replied to, will not impede the judgment.** *Quere.*

Whether a **writ of error in fact will lie from a district court to a judgm't of a county court?** *Vid. 2 Wash.* 163.

CLUTTON brought indebitatus assumpsit against William Garlington, in the county court of Northumberland, for merchandize sold and delivered and for services done and performed for the defendant, by the plaintiff, in the capacity of an overseer. Plea non assumpsit and issue. On the trial of the cause, the plaintiff filed a bill of exceptions to the courts opinion in admitting improper evidence to the jury. Verdict and judgment for the plaintiff. The defendant appealed to the district court of Northumberland. Where at the April term 1790, "by consent of the parties "by their attornies, it was ordered that the suit "should not abate by the death of either party; "and, for reasons appearing to the court, the "cause was continued until the next term." At the subsequent term of the district court, the judgment of the county court was reversed; and the cause sent back to the county court, for a new trial to be had therein. In November 1792, there was a second verdict and judgment of the county court for the plaintiff, for the sum of £ 33: 11: 8. To this latter judgment Garlington obtained a writ of error from the district court of Northumberland; and in September 1796, assigned errors in the following words: "William Garlington appellant "against Jesse Clutton appellee, on a writ of er- "ror, and the said William Garlington, by John "Monroe his attorney, comes and says there is "error in the rendition of the judgment in the re- "cord aforesaid contained, in this, to wit, that "the said Jesse Clutton before the verdict afore- "said given, to wit, on the fifteenth day of De- "cember in the year 1790, at the county of Nor- "thumberland aforesaid, died; and so the judg- "ment thereon is erroneous. And he prays, that the

"the judgment aforesaid, for this error and others "in the record and proceedings aforesaid being, "may be reversed, annulled and held entirely "void; and that the said William may be restor- "ed to all things which he hath lost by reason of "the judgment aforesaid." Immediately after which, the record proceeded thus. "To which "the plaintiff's demurs and joinder, which demur- "rer is in the words following, Garlington *vs* "Clutton in error, the defendant by his counsel "says, that the judgment of the court ought not "to be reversed, by reason of any thing in the "plaintiffs bill of errors assigned; because he says, "it was agreed, by the parties before the death of "the said Clutton, that the suit should not abate "by the death of either party, as appears by the "record in this cause; and this he is ready to ve- "rify. Wherefore he prays judgment, &c. Garlington, *vs.* Clutton.

"Whereupon the matters of law, arising on the "said demurrer, being argued, it seems to the "court here, that the law is for the defendant. "Therefore it is considered by the Court that the "judgment be affirmed, &c." in the usual form.

From this last judgment of the district court, Garlington appealed to this court.

MARSHALL for the appellant. There is a plea which states that the defendant died before the verdict was rendered; and although there is a pleading thereto, on the part of the plaintiff, which speaks of a demurrer, yet it obviously is not a demurrer; but a mere replication setting forth new matter, which has not been put in issue, and therefore the judgment was premature. But if it were put in issue, it may be questionable, whether such an agreement would preserve the suit and prevent its abating? And at all events the agreement expired with the appeal. However, if the pleading on the part of the plaintiff was a demurrer, then it has admitted the truth of our plea; and of course there was clear error in fact.

S. 3. CALL

Garlington, vs Clatton.

CALL *contra*. Error in fact cannot be corrected in a ſuperior court; but it muſt be done by the ordinary proceſs of a writ of error *coram vobis*. Therefore, the matter of the plea was offered in ſuch an irregular mode, that no regard was due to it. Conſequently the plea itſelf being inſufficient; was properly overruled, upon the demurrer. For ſo the pleading on the part of the plaintiff muſt be taken; becauſe the record ſtates that the plaintiff demurred and that the defendant joined. Which was a good iſſue in law; and the reſidue of the allegations, on the part of the plaintiff, was mere ſurpluſage. The probability is, that the demurrer and joinder were entered in ſhort *memoranda*, without being extended; and that it was left to the clerk to do it in his order book, afterwards; according to a very frequent practice in county courts. But the agreement, being matter of record, was triable by the court only, without the intervention of a jury. For records are always to be tried by the court, upon inſpection; and not by the jury. The opinion of the court then in this caſe, as no exception is ſtated, is as concluſive as the verdict of a jury.

But under another point of view the judgment is clearly ſuſtainable. Such an agreement, as that ſtated in the record, appears ſometimes in the Engliſh books; and is frequently practiſed in this country. It is uſual even in actions of tort. Now the only way of giving effect to the agreement, is by refuſing to let the party object the death. For if he be permitted to alledge it, or if proceſs is required to revive it, either of them defeats the agreement. Becauſe you cannot obtain the proceſs without ſuggeſting the death; and that *ipſo facto* abates the ſuit. If you ſhew the death of either party in an action of tort, the law ſays it ſhall abate the ſuit; and that the cauſe of action expires with the party. But it is abſurd to ſay that it is neceſſary, in order to ſuſtain the ſuit, to plead thoſe matters to iſſue, which, if plead to iſſue, would abate it. Therefore, the only way, to

get

get over the difficulty, is for the court not to receive the party to alledge the death. Of courſe the whole matter which was offered being frivolous and ſuch as the court was not bound to receive, they were at liberty to proceed to judgment, without any regard thereto; although the pleadings appeared inaccurate

MARSHALL in reply. A writ of error in fact will lie from a Diſtrict Court to the judgment of a County Court. For the act of Aſſembly gives them power to award writs of error generally, without diſtinguiſhing between thoſe in fact and thoſe in law. If an agreement, that the ſuit ſhall not abate be effectual, it ought ſtill to be put in iſſue in order that it may receive a trial in the uſual way; but there is no iſſue either in law or fact joined in the preſent caſe. For nothing is referred to the judgment, either of the Court or of the Country; without one of which there can be no iſſue; and therefore the Court ought not to have proceeded to judgment, until the iſſue had been completed.

LYONS Judge. How would you try the matter of fact in a writ of error from a ſuperior Court? Is it not neceſſary that there ſhould be a jury to aſcertain the fact? and if ſo can the appellate Court try it?

MARSHALL. That objection would apply to applications of that kind to this Court, but not to a Diſtrict Court; who have power to make uſe of a jury.

CALL. When the Diſtrict Court exerciſes appellate juriſdiction it reſembles this Court throughout; and therefore, if this Court cannot grant a writ of error in fact, no more can a Diſtrict Court.

LYONS Judge, Delivered the reſolution of the Court, that the judgment was to be affirmed. That where, the parties agree, that the ſuit ſhall not abate by the death of the plaintiff or defendant, the whole Court were of opinion that the agreement is binding on them; and being entered

of

Garlington, vs. Clutton.

of record, operates like a releaſe of errors. That therefore, that point might, hereafter, be conſidered as ſettled. That its being called a demurrer, inſtead of a plea, was immaterial and not to be regarded, as the fact itſelf was ſhown; which was all that was neceſſary.

Judgment Affirmed.

TALIAFERRO

againſt

MINOR.

Private act of Aſſembly for ſale of lands part of which belonged to infants, and the ſale being for ready money, the payment was poſtponed with conſent of the truſtees appointed by the act to make ſale of the lands, during which the paper money depreciated, but payment was afterwards actually made in paper money and a convey ance made by the truſ-

THIS was an appeal from a decree of the high court of chancery. The bill ſtated that John Thornton died ſeized of lands which deſcended on his daughters Mary, (the wife of Woodford) Betty (the wife of Taliaferro) his grandſon Thornton Waſhington and his granddaughter Mildred the wife of Minor. That, in May 1778, an act of Aſſembly paſſed veſting the lands in truſtees; and authorizing them to ſell the ſame and inveſt the money in other lands for the benefit of the parties entitled; thoſe deſigned for Thornton and Mildred, who were both then Minors and the latter unmarried, were to be purchaſed with the approbation of their parents or guardians. That, in January 1779, the whole of the ſaid lands were ſold for £ 41583:5:4 (then equal in value to £ 5197 18:2 ſpecie) and Taliaferro and Woodford became the purchaſers; but paid no money on the day of ſale. That, had the lands been ſold on credit, they would have produced more; and therefore no indulgence in the payment ſhould have been given the purchaſers. That the money however was not received until greatly depreciated, to wit, £ 10639:6:1 in June 1780, and £ 5441:3 in December 1781. Which ruined the ſhares of Thornton

ton and Mildred; whilst Woodford and Taliaferro received the whole benefit of the estate. That the trust remained unexecuted, and the trustees (when called on for settlement and payment of the money, no land being purchased) offered to pay certificates for paper money funded; and that Taliaferro and Woodford refused to pay according to the real value. The bill therefore prayed an account of the trust; that Taliaferro and Woodford might pay the actual value, or the sale be annuled; and that the plaintiffs might have general relief.

Taliaferro, *vs.* Minor.

tees to the purchasers, who were the adult coparceners; the sale and conveyance are good; and the purchasers shall not be affected by the depreciation.

The answer of James Taylor one of the trustees stated, that the trustees sold the land; but as there had been no survey the amount could not be ascertained, until that was made; and therefore the payment was postponed. That the father of Mildred was solicited to purchase one of the tracts of land for her, but refused, as lands of double the value beyond the mountains could be purchased. That Thornton Washington also desired, that none might be bought for him; which they suppose was done on the advice of his father and guardian. That on the day appointed for making deeds and paying the money, Taliaferro and Woodford brought a great many slaves which they had previously advertised for sale, for the purpose of raising the money; when it was discovered that most of the people, who came to buy, had brought emissions of money, which had lately been called in by Congress; and therefore the trustees objected to receive such: But, doubting whether they were justifiable in doing so, a consultation was held amongst all the parties (the fathers of the plaintiffs Thornton and Mildred being present) and it was agreed to postone the payment; which was to be forthcoming, when demanded, and to carry interest. That the fathers of the infants never pointed out any purchase (except one by Mildred's father, which as the quality was not known to that trustee, who lived at a great distance from the land, he proposed to abide by the opinion of her grandfather who lived near it; but no further steps

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steps were taken in it;) though they had promised to do so. That the father of Mildred was absent in Kentucky for 12 months, during which no purchase could have been made for her.) That the trustees could not procure purchases, although they endeavoured, to do it, as people were averse to sell for paper money. That Taliaferro and Woodford threatening to tender the money, it was received; which being insufficient to make purchases, part was deposited in the loan office, under the act for funding paper money, and the other part paid to Mildred's grandfather one of the trustees, in order to be invested in land warrants, but the investiture was not made. That the trustees received no benefit from the loss; which was owing to the situation of the times, and not to any fault in the trustees. That in making the deeds, land equal to one forth of the purchase money was conveyed to both Mrs. Woodson and Mrs. Taliaferro; and the residue was conveyed to Taliaferro and Woodson in their own rights respectively.

The other trustees refer to this answer, and say the lands were considered at the time of sale as having been sold at a very great price.

Taliaferro's answer states, That he bought at a high price; that Mildreds father was urged to buy and refused, saying that better lands could be procured beyond the Blue Ridge. That the purchasers met at Frederickſburg, on the day appointed by the trustees for making payment, each carrying £ 4000 cash: and slaves to sell for ready money, to make up the balance. That the sale was disappointed, by the trustees telling them they might retain the money; which would be as well in their hands as those of the trustees, until purchasers could be procured, that besides this the purchasers had some apprehensions about the emissions of money. That their propositions were disliked by the purchasers, who objected at first; but on Mildreds father, as well as the plaintiff Thornton's father saying it was their desire that it should be retained, the purchasers paying interest,

eſt, it was agreed to on thoſe terms. That the purchaſers afterwards ſold their ſlaves and paid the money. And in other reſpects it agreees with Taylors anſwer. Taliaferro, vs. Minor.

The heirs of Woodford anſwer as far as they know; and to the ſame effect with Taliaferro.

There are ſome depoſitions as to the value of the lands; and whether they ſold for ſufficient prices. The current of which prove that they ſold for about their value. Though one or two perſons declined bidding becauſe they underſtood that it was a ſale for caſh. The crier and another witneſs, ſaid it was proclaimed at the ſale, that there would be a ſurvey, to aſcertain the amount of the money to be paid for the lands; which were ſold by the acre.

The father of the plaintiff Mildred ſays, that the tract of land ſpoken of in the anſwer of James Taylor was offered, if the money could be raiſed in ten days; but as he knew the purchaſers had it not by them, and muſt ſell ſlaves to raiſe it, and that Woodford was from home, he declined all thoughts thereof. That he afterwards mentioned the land warrants as the only probable means of preventing further loſs. That he once offered to take his daughters proportion if paid immediately, but the ſame was not done. Another witneſs proves that Taliaferro offered to ſell one of the tracts he had purchaſed, to Mildreds father, ſaying it would ſuit his daughter; but that the father refuſed.

In other reſpects the teſtimony agrees pretty much with the anſwers.

The High Court of Chancery decreed, that Taliaferro and the heirs of Woodford ſhould convey to the complainants their *purparties* of the ſaid lands, to be held in the ſame manner as if the act of Aſſembly had not been made;" and ſhould account for the profits. From which decree, the defendants appealed to this Court.

The

Taliaferro, vs. Minor.

The petition to the Houſe of Delegates for the private act of Aſſembly was preferred by Woodford, Taliaferro, Lewis (the father of Mildred) and Waſhington the father of the plaintiff Thornton.

Wickham for the appellant. There was no neceſſity for a ſurvey previous to the ſale; and it was almoſt impracticable to have made it before, conſiſtent with the idea of a ſale at a reaſonable period. Which, in practice, is always at the beginning of a year; and that time is moſt convenient to ſellers and purchaſers. Becauſe the firſt loſes nothing on a growing crop, and the latter has an opportunity of preparing for a crop. The purchaſers had no advantage from the manner of the ſale, which in fact was a ready money ſale; becauſe the truſtees might have demanded the money at any time, on completing the ſurvey and tendering a conveyance. So that it was as much a ready money ſale as any ſale of lands is; becauſe it rarely, perhaps never, happens that the conveyance is made and the money received on the day of ſale; but a few days always elapſe before the buſineſs is completed. It was impoſſible to foreſee the ſubſequent depreciation; for, becauſe it had depreciated, it did not follow, in the opinions of men, that it would continue to depreciate. If that idea had prevailed, it would have ſunk altogether and gone entirely out of circulation. If the money had been paid, it would have depreciated in the hands of the truſtees as much as it did in the hands of the purchaſers; with this difference, that in the latter caſe there was intereſt accruing on it, whereas in the former there would have been none. There was no obligation to poſtpone the ſale; until there were probable grounds that other lands might be bought for the infants; becauſe every body knows that in this country lands may always be bought for money. Beſides it was impoſſible for them to know, what purchaſes to look out for, until the amount of the ſales ſhould be known. It is a ſtrange poſition to ſay, that the purchaſers

purchaſers were bound to look out for purchaſes; for they were not the proper perſons, and indeed had nothing to do with it. The purchaſers have complied ſubſtantially with the terms of the ſale; and therefore ſhould have the benefit of their contract. It is not true, that the truſtees were bound to refuſe a conveyance. For the queſtion is not, what a court of equity would do now, but what a court of equity would have done then. Now there can be no queſtion but a court of equity at that time would have compelled a conveyance on payment of the money; and it would have been ſtrange if they had refuſed; becauſe the law made it penal to refuſe the money, and had declared it a legal tender. Beſides, the contract being for paper money, it was impoſſible to refuſe a ſpecific performance, when paper money was tendered according to the contract. The truſtees therefore were not only juſtifiable in receiving the money and making a conveyance, but abſolutely compellable thereto; and, if they had refuſed and any accident had happened to the debt, they muſt have borne the loſs themſelves. If this tranſaction be unravelled, none of that day can ſtand; for it was not a tranſaction with infants, but with the truſtees, who were of full age. There was no breach of truſt in the truſtees, and therefore they are not liable in any ſhape. If it be ſaid, that the whole purchaſe money was not paid, it will make no difference; becauſe the purchaſers were entitled to the other half themſelves; and conſequently were not bound to pay it, in order that they might receive it back again. So that the whole tranſaction was complete, notwithſtanding only half the money was actually paid.

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MARSHALL *contra*. The truſtees were bound to purſue the power; and, if they departed from it, it was a breach of truſt which cannot be juſtified. The Legiſlature muſt have meant that they ſhould ſell for ready money, as the then currency had already depreciated greatly, and was daily depreciating ſtill more. Of courſe the truſtees,

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by allowing the credit, departed from the power; and therefore their act was not obligatory. At leaſt it will not avail purchaſers with notice, eſpecially, where the intereſts of infant children are to be deſtroyed by it. The truſtees ought to have ſurveyed before they ſold, which would have avoided the difficulty; becauſe they might, then, have received the money, on the day of ſale. It is ſingular too, that to ſome bidders it ſhould have appeared a ſale for ready money, and to others that it ſhould have been known to be otherwiſe. This was not putting bidders on an equal footing; and muſt conſequently have injured the ſales.

This being a power created by the Legiſlature and not by the decedent, ought to have been the more rigidly obſerved as it was not a confidence repoſed, by the owners, in the truſtees. Although the truſtees had an indefinite latitude as to the ſale itſelf, they had not as to the manner; but were bound to a providential regard, for the intereſt of the infants. Now it is evident that a purchaſe, for the infants, could not be made upon as good terms, when the money was ſtanding out, as if it had been in hand: and accordingly Lewis could not make a contract, becauſe he was uncertain whether the money could be received in time. There was no probability of the truſtees ſuſtaining an injury, by not receiving the money; and they ought not to have gone on to complete the ſale and make conveyances to the purchaſers. The latter therefore cannot derive any benefit from it; becauſe, having purchaſed with notice, they became truſtees themſelves. But one argument againſt the purchaſers is particularly ſtrong, that is to ſay, that the whole purchaſe money was not actually paid, nor any expreſs appropriation of that which was retained by the purchaſers; for the deeds appear to have been made to the purchaſers and not to their wives. Of courſe the matter remains *in fieri* and the contract has not been completed; but is ſtill open as to that part. Therefore with regard

gard to this part of the cauſe, there can be no doubt, but that the complainants were entitled to relief. Taliaferro, vs. Minor.

RANDOLPH in reply. If this tranſaction is unravelled, all paper money caſes muſt be broken up and opened again. The appellants had the legal title and therefore did not come into Court to aſk a favour, ſo as to put it in the power of the Chancellor to impoſe terms. It was in fact a ſale for ready money; but, if it had not been, that would have made no difference. For the act of Aſſembly had not preſcribed it; and a ſale upon credit, may be as fair as a ſale for ready money. The act ſuppoſes a conveyance, before the payment of the purchaſe money. But the money was in fact offered before the deeds; which in equity was equal to actual payment. It is no objection that the money had depreciated; for the Court has allowed of payments in paper money by executors to themſelves, for debts due to the eſtates of their teſtators. In ſhort it was one of thoſe tranſactions which ſprang out of the times; and which cannot be diſturbed, without laying open more wounds than it heals.

LYONS Judge delivered the reſolution of the Court to the following effect. It was objected that the truſtees ſold upon credit, and not for ready money. But this at beſt is doubtful; and we think, under the circumſtances of the caſe, ought not to have been inſiſted on. For they acted with the general approbation of the parties concerned; had no intereſt in the tranſaction themſelves; and appear to have only wiſhed to give ſatisfaction to thoſe who had.

No queſtion could have ariſen in the caſe, if parties having an intereſt in the ſubject, had not become purchaſers. But if the ſale was fair and the purchaſe honeſt, why ſhould that circumſtance affect the caſe? Eſpecially, as their bidding, by creating a competition, muſt have enhanced the ſale, and encreaſed the price.

The

Taliaferro, *vs.* Minor.

The purchasers were not to blame that the money was not received sooner; they were ready to have made payment, but it was postponed by consent, on their agreeing to pay interest.

The sale was made, when paper money was current; and it was current also, when the money was paid. So that what they had agreed to give, they actually paid; and thus strictly performed their contract.

The purchasers in this case asked no favour, so as to give the Court of Equity power of imposing terms, as was done in the case of *White* vs *Atkinson* 1 *Wash;* for in that case, there was no payment of the purchase money. But, if the money had been actually paid, there can be no doubt, but that a conveyance would have been decreed.

The doctrine that the purchasers in the present case were bound to see to the application of the purchase money, cannot be maintained; and upon the whole the Court is of opinion, that the decree of the High Court of Chancery is erroneous and ought to be reversed.

HACKET,

HACKET

against

ALCOCK.

Relief against a bond, given to secure a title to lands although the consideration was not expressed in the bond.

THIS was an appeal from a decree of the High Court of chaecery affirming a decree of the County Court of Caroline. The bill states, that Hacket the plaintiff, being entitled to a tract of land, after the death of his relation Martin Hacket and for which he had a deed, agreed with Alcock to give him a title thereto; provided he would clear him of the legion, in which he had enlisted. That in pursuance of the agreement he assigned Alcock his deed. Who pretending not to be satisfied with it, required the plaintiff to give his bond for a further title, in case it should be necessary. That Alcock drew a bill penal for 19400 pounds of tobacco and £5:3, without inserting any condition for a conveyance. Which the plaintiff, who is ignorant of such things, executed; having first called upon witnesses to attend to the meaning of the parties. That Alcock afterwards brought suit on this penal bill, although the plaintiff had offered to make a further conveyance; but afterwards agreed to dismiss it, and said he would have a deed drawn. Notwithstanding which, that he fraudulently continued the suit; and obtained judgment against the plaintiff, for the full amount of the said bill penal, To which judgment the bill prayed an injunction; which was granted.

The answer states, that the plaintiff often asked the defendant to clear him of the legion, for the land; but that he had refused to do so. At length however, the defendant having a female slave for sale, the plaintiff offered him the land and thirty dollars, for her. Which the defendant agreed to. That afterwards on the same day, the plaintiff informed him he had procured a man to take his place in the legion; for which he was to give him 3000 pounds

of

Hacket vs. Alcock.

of tobacco in hand; and requested the defendant to lend it to him. That the defendant told him it was not in his power. That the plaintiff soon afterwards returned and said that Johnston had two hogsheads, which he could get if the defendant would pass his word to see it paid. That the defendant did so and lent him a third. That the defendant procured a deed to be wrote, in September 1782, for conveying the land (reserving the said Martin Hackets life therein;) which the plaintiff refused to sign. Whereupon the defendant demanded security, for the property he had given for the land; which the plaintiff agreed to and gave the bill penal, estimating the slave at 16000 pounds of tobacco and including the three hogsheads above mentioned and £5:3. That the defendant then told him, if, by the time the bond fell due, he would pay him the tobacco lent, and make him a good title to the land (the old mans life therein only excepted,) the bond should be void; but otherwise that it should be obligatory. That sometime after the bond became due, the plaintiff informed him he was willing to execute a deed for the land; when the defendant told him, if he would go to the office and get a sufficient evidence of his right to the same, he would settle it. That the defendant was shortly afterwards informed, that the plaintiff had searched the records and found that Martin Hacket the elder had a prior right. On which information, the defendant brought suit on the bond. That afterwards, the plaintiff produced a certificate, from the clerk of Albemarle; that the deed to the plaintiff was recorded. Which satisfied the defendant; that the plaintiffs title was good, if there was no older one; and therefore, he told the plaintiff to get copies of all the deeds, and in the mean time that he would endeavor to suspend the suit. That he accordingly directed the sheriff not to return the writ till further orders (meaning thereby to give the plaintiff a reasonable time to procure documents of his title;) but the sheriff returned the

writ

writ and the judgment was obtained. That the plaintiff never produced any other evidences of his title; which is queſtioned and doubtful.

A witneſs depoſed, that he ſaw Alcock refuſe to ſign a deed, which he believes is the one produced. A ſecond witneſs depoſed, to the ſame effect; and further that in the year 1782, the defendant preſented a deed to the plaintiff to ſign, which he refuſed; and thereupon a bond was written; which the plaintiff was to pay off he did not make the defendant a title. A third witneſs depoſed, that, in 1782; the defendant aſked him to go and witneſs a bond, from the plaintiff, for a title to the land. That after it was executed, the defendant told the plaintiff, he might have his choice, either to pay the amount of the bond or make him a title. That the plaintiff ſaid he would not ſign the bond, for any other purpoſe, than to ſecure the title. Which the plaintiff ſaid was all he intended by the bond. Another witneſs depoſed, that perſons were called on to take notice, that ſuch was the object of the bond. Another witneſs, ſays he informed the defendant, that he the ſaid deponent claimed the land. Which he ſtill does.

Other witneſſes proved that the bond was given for the title; and one related the circumſtances relative to the original contract, concerning the land and the woman ſlave; the tobacco, &c.

The deed, ſpoken of by the firſt witneſs, reciting that the land had been conveyed to Martin Hacket the elder, for life, and afterwards to the plaintiff; and that the plaintiff had agreed to ſell and confirm the lands to the defendant, it then proceeds to convey them to the defendant, immediately; without poſtponing the poſſeſſion, until after the death of Martin Hacket the elder. Of whom, the operative parts of the deed take no notice.

The County Court diſſolved the injunction and diſmiſſed the bill with coſts; the High Court of Chancery

Hacket vs. Alcock,

Chancery affirmed that decree; and from the decree of affirmance Hacket appealed to this Court.

MARSHALL for the appellant. It is clearly proved, that the bond was only given, as a security for conveying a title to the lands. The appellee was therefore bound to accept the conveyance and give up the bond. His inſiſting to compel payment of the penalty, becauſe the conſideration of the bond is not inſerted in the condition, is a fraud; againſt which a Court of Equity ought to relieve. It is like the caſe of an abſolute conveyance being taken by the creditor, when nothing more, than a mortgage, was intended. The caſe is the ſtronger, becauſe the appellee actually promiſed to accept the deed after he had brought his ſuit; and thereby prevented the appellant, from defending himſelf at law. The conveyance was only to have been of the remainder; whereas the deed which was tendered, by the appellee, was for an immediate conveyance; and was therefore properly rejected by the appellant.

WARDEN for the appellee. Inſiſted that the appellant not having performed the condition, the appellee became entitled to the money.

Cur: adv: vult.

PENDLETON Preſident, delivered the reſolution of the Court to the following effect.

That the bond was given to ſecure a title to the land, and was to be void upon making a conveyance, is proved by three witneſſes preſent and not contradicted. They ſpeak of the whole tobacco as on the ſame footing; with the contract for the land which probably proceeded from inattention of the parties at the time.

It is ſtated in the anſwer and ſupported by Livingſton, that the ſlave valued at 16000lbs. of tobacco was given for the land, and that 3400 were lent and to be repaid. The Court therefore are of opinion, that the 3400 are an independant demand, unconnected with the land.

Ar

Hacket, *vs.* Allcock.

As to the deed tendered, there was a diverſity of opinion, whether it was a proper one; ſince although it recited the eſtate for life of Martin the elder, it conveyed the land immediately (and not in remainder at his death) with a general warranty againſt all perſons; not excepting the tenant for life.

But this was thought unneceſſary to be decided; as a majority of the judges are of opinion that without holding parties to ſtrict time, a Court of equity will always relieve againſt a penalty, where compenſation can be made, placing the party in as good a condition, as if the land had been conveyed; as is proved, by many caſes in this Court, as well as in the Courts of that country, from whence we draw our principles of juriſprudence. That this is a caſe, which admits of compenſation; and that the intereſt of the 16000 lbs. of tobacco in lieu of rents or profits, will be a proper compenſation.

Therefore the decree is to be reverſed with coſts, and the injunction diſſolved, as to 3,400 lbs. of tobacco with intereſt; and upon the appellants executing a deed for the land, with warranty, and acknowledging or procuring to be recorded, at the expence of the appellee, and paying to him 800 pounds of tobacco per annum, from the death of Martin Hacket the elder till payment, with the coſts in law and equity within ſix months from the time of entering the final decree in the Court of Chancery, the injunction is to be made perpetual; but if the appellant ſhould fail to do ſo within that time the whole injunction is to be diſſolved.

SHELTON

SHELTON *and others Securities for Tompkins late Deputy Sheriff, &c.*

against

WARD.

The high sheriff may give oral testimony in a motion ag'st his deputy, that the recovery ag'st himself was grounded on the misconduct of the deputy.

A motion in such a case will lie ag'st the deputy sheriff under the act of 1793.

THIS was a motion made by Ward, in April 1798, in the District Court of New London, "for a judgment, for the amount of a judgment "obtained by John Wilson and George Adams "against the said William Ward, in September "1797, for a trespass offered the said John Wil- "son and George Adams, by the said Daniel "Tompkins acting as deputy sheriff under the "plaintiff." The motion was continued until September Court 1798, when it was determined. Upon the trial of the cause, the defendant filed a bill of exceptions to the Courts opinion, which stated, "that the plaintiff introduced a bond, ex- "ecuted by Daniel Tompkins senior deceased, and "the present defendants his securities, condition- "ed for the said Daniel Tompkins's performance "of his duty as deputy sheriff of the plaintiff; also "a record of a judgment obtained against him by "John Wilson and George Adams in the District "Court of New London. Also a witness who "swore he had been examined on the trial betwixt "the parties aforesaid, and that the judgment was "obtained against the present plaintiff on account "of the default of Daniel Tompkins the then de- "puty of the plaintiff. That the defendants ex- "cepted to this evidence, alledging, that it ought "to appear of record, the judgment aforesaid "against the plaintiff was obtained for his said de- "puty's default; and that the same did not appear "by the declaration or any other process subscrib- "ed by the said deputy, and that proof thereof "could not be supplied by oral testimony." The Court overruled the exceptions and gave judgment for the plaintiffs. From which judgment the defendants appealed to this Court.

Shelton, vs Ward,

The declaration in the ſuit of Adams and Wilſon was againſt Ward, "late ſheriff of the county, &c." and charged that the defendant "under co-"lour of his office did ſeize and take into his poſ-"ſeſſion and ſeized and cauſed to be ſeized and "taken into his poſſeſſion the plaintiffs ſlaves to "wit, Will, &c; and did unlawfully ſell and diſ-"poſe thereof ſo that they have wholly loſt the "ſame."

PENDLETON Preſident. Delivered the reſolution of the Court to the following effect.

The ſingle queſtion, upon the bill of exceptions, is, whether the high ſheriff could be permitted upon the motion to give oral teſtimony that the recovery in the record was for the treſpaſs of his under ſheriff acting as his deputy? Or whether it can be proved by the record only ſhewing it to be his tranſaction?

Formerly returns were made in the name of the high ſheriff; and of courſe in that caſe evidence that it was the act of the under ſheriff muſt be oral. The law directs the under ſheriff to ſign his own name as well as that of the principal. Now ſuppoſe he omits his own name, muſt he not be charged by oral teſtimony? Here was no return as to Ward. The ſlaves were unlawfully ſeized and ſold; and therefore there was no proceſs to be returned. The notice gave the defendants an opportunity of conteſting the deputy's being concerned; and upon the whole the Court has no doubt with regard to the propriety of admitting the evidence. A difficulty occured at firſt, whether the high ſheriff could recover on motion, or was put to his action in ſuch a caſe as this? But we find the motion juſtified by an act of 1793.

Judgment affirmed.

ROSE,

ROSE

against

SHORE.

If the debtor be able to pay his own prison fees the jailer cannot demand them of the creditor.

THIS was an action for money had and received to the plaintiffs use, brought by Shore against Rose, in the District Court of Richmond. Plea non assumpsit; and issue. Upon the trial of the cause the jury found a special verdict, which stated, "That the plaintiff sued out a writ of *capias ad satisfaciendum* against William Claiborne, who was taken thereon, and upon the 8th of March 1790, committed to the District jail, of which the defendant is the keeper. That, on the 13th of the same month, Claiborne gave bond for the prison rules according to law; and thereupon was let out of prison. That he took a house within the prison rules; but the same was not in the possession of the jailer and did not form any part of the prison. That, on the 22d of March 1790, the plaintiff executed a bond with William Fenwick his security to the defendant; the condition of which was, that whereas, Claiborne was confined in the public jail in the city of Richmond, having removed his body there, by a writ of *habeas corpus*, from the county of Chesterfield, where he was taken on a *ca: sa:* issued from the court of Prince George county on a judgment obtained there, by the said Shore; therefore if Shore and Fenwick should pay the said Rose all the legal prison fees and charges for the maintenance of the said Claiborne, whilst he remained confined, the bond was to be void. That the defendant, from time to time, demanded and received of the plaintiff 1 s. 3 d. *per diem*, as prison fees for maintaining the said Claiborne, from the 13th of March 1790 to the 29th of June 1791; which he paid over to Claiborne. That Claiborne was, during all that time, possessed of sufficient property and able to maintain himself in prison, without the aid

of

of the ſaid fees; and that he was not maintained by the defendant.

Roſe, vs. Shore.

The Diſtrict Court gave judgment for the plaintiff; and Roſe appealed to this Court.

DUVAL for the appellant. It does not appear that the jailer knew the debtor was able to maintain himſelf; and at firſt ſight the creditor was bound to pay the fees. *Rev. Cod. pag.* 316. §. 44 45, 46. The verdict finds that the jailer paid the fees over to the priſoner; and they were as neceſſary for his ſubſiſtence in the bounds, as if he had been confined in cloſe jail. Beſides Shore was not compelled, by any act of the jailer, to pay the money; but it was voluntary in him; and the jailer being an innocent man ſhould not ſuffer.

WICKHAM for the appellee. The verdict finds the priſoner was not maintained by the jailer; and all the acts of Aſſembly, from the fee bill in the old edition of the laws down to the act of October 1789, ſhew that the jailer is only entitled to fees for actual maintenance of a debtor, unable to maintain himſelf. If the debtor actually lived on the maintenance afforded him by the jailer, it would be an inference, that he was unable to maintain himſelf; but it is certainly otherwiſe, where he gives ſecurity for the bounds and takes a houſe; becauſe that affords a ſtrong preſumption that he is able to maintain himſelf; and the verdict finds, that he had ſufficient property, for that purpoſe. That the money was paid over makes no difference; for ſtill the jailer had received it without authority; and the law did not require him to pay it over. That Shore gave a bond is not material; becauſe he did not know the debtors ſituation, as well as the jailer did; and, if the fees were illegally demanded, the bond was void.

MARSHALL in reply. It is not true that the jailer cannot demand fees, unleſs he actually maintains the debtor. For a man may do by another, what he may do himſelf; and if he might employ another to procure the debtors maintenance he

Roſe, *vs* Shore.

he may employ the debtor himſelf. It can never be material whether the jailer pays the fees to the debtor, or buys proviſions with them himſelf. But it is ſaid that the debtor ſhould be in actual jail. This however is not preſcribed by the act; and, in the notion of law, the priſoner is as much in cuſtody, when he has given ſecurity for the priſon bounds, as if he was in actual jail. And there is the ſame reaſon for maintenance in the one caſe as in the other. The jailer has no means of knowing the debtors ability; and therefore he and the plaintiff ſtand upon the ſame footing, in that reſpect. So that in order to charge the jailer, the verdict ſhould, at leaſt, have found that he knew the debtor was able to maintain himſelf. The jailer innocently received and paid the fees over to the debtor; and gets nothing by the tranſaction. Conſequently the plaintiff cannot recover againſt him in an action on the caſe for money had and received to the plaintiffs uſe; which is an equitable action, and cannot be ſuſtained unleſs, *ex æquo et bono*, the defendant ought not to retain the money.

RANDOLPH on the ſame ſide. The jailer cannot tell what are the circumſtances of the debtor, ſo well as the creditor can; becauſe the latter has had a previous connection with him, whereas the jailer has not. When the fees were demanded Shore ſhould have anſwered that the debtor was able to pay them himſelf; but, inſtead of this, he pays thoſe in arrear and gives bond for the reſidue. Which ſerved to ſtrengthen the jailers deluſion; and was an acknowledgment of the debtors inability to maintain himſelf. This was not ignorance of the law in the jailer, but ignorance of fact; and that will excuſe him. Beſides the public officer ſhould be protected in a caſe of this kind; where the ſufferings of an individual were concerned. If a ſuit for extortion had been brought, it would not have lain; although the jailer had no right to the fees. Becauſe the money was received under miſtake, and therefore innocently.

WICKHAM.

WICKHAM. Although an action for extortion would not lie, yet this will. Indeed, it is rather an argument, in favour of the action, that a suit for extortion could not be maintained. Rose, *vs.* Shore.

Cur: ad: vult.

ROANE Judge. The question in this cause turns upon the legality of the demand and receipt of the fees, which are found by the special verdict to have been paid by the appellee to the appellant.

It is certainly a general principle, running through our code of laws, that an imprisoned debtor shall himself bear the charges of his maintenance.

This principle however admits of exceptions. For instance, by the District Court law of 1788, *ch.* 67. *sect.* 98, it is provided, that the maintenance of an insolvent debtor imprisoned by process of the District Court, shall be borne by the public. It is also enacted, as a general exception from the principle, that the fees of an insolvent debtor shall be paid by the creditor. But, in either case, it is incumbent on a party claiming an exemption from the general principle, to be able to sustain it by a fair construction of the laws.

As it appears, by the bond found by the verdict, that the prisoner Claiborne was imprisoned by the District Court of Richmond, on the return of a *habeas corpus* directed to the jailer of Chesterfield, perhaps this case might more properly fall within the first exception above stated; and then the charges would in no event be payable by the creditor. But I will consider it upon the ground, on which, it was placed by the counsel.

In this view, the exception is set up under the act of 1772 ch. 13, sect. 1, *(since re-enacted)* declaring, that where any person shall be committed to prison, and shall not be able to satisfy and pay his ordinary prison fees, the sheriff or jailer may demand

Roſe, vs. Shore.

demand and receive of the party or parties, at whoſe ſuit ſuch inſolvent perſon ſhall be impriſoned, all ſuch fees as ſhall become due, until ſuch creditor ſhall agree to releaſe ſuch priſoner. It is clear that the word *insolvent* here, is not to be taken in the ſenſe of *insolvency*, by having taken the oath preſcribed by law; becauſe after that, the priſoner cannot be detained, at all. But it is equally clear that this clauſe extends only to ſuch priſoners as are unable to pay their ordinary priſon fees. And the clauſe in the act of 1789, providing for the caſe of a priſoner detained on ſeveral executions, is only intended to meet that particular caſe; and not to change or enlarge the exception before ſtated.

If then the proviſion only extends to charge a creditor, where his debtor is not able to pay the fees, ought a jury to juſtify a jailer in demanding them, where the priſoner is proved to them to be able to pay the fees himſelf? Or ought a Court to exonerate the jailer, on a ſpecial verdict finding that the priſoner was able to pay the fees?

The arguments of the appellants counſel ſhewing the hardſhip impoſed on the jailer by the conſtruction adopted by the Diſtrict Court in this inſtance, would be properly addreſſed, if any where to the Legiſlature. But there may alſo be hardſhip on the other ſide; and it is clear, that if the diſcretion now aſſerted on behalf of the jailer be ſuſtained, it may operate as a repeal of the act, ſo far as it reſpects the inability of the debtor; and throw upon a creditor, in any caſe, a burthen which is only impoſed on him, by law, in the event of his debtors being unable to ſupport himſelf in priſon.

But what is the hardſhip now complained of? It is only impoſing on a public officer, who is paid for his duties, a peril of which there are a thouſand analogous inſtances in the law; and it is ſurely better to hold him to a ſtrict reſponſibility in this inſtance, than to adopt a conſtruction which breaks down a barrier eſtabliſhed by law, and en-

ables

ables him to impoſe a charge, at his diſcretion, upon a third perſon, whoſe intereſt in this particular, the law has deſigned to protect. Rose, vs. Shore.

The money in queſtion, therefore having been illegally demanded and received by the appellant, from the appellee, was ſo much money received to the uſe of the plaintiff; and conſequently the judgment of the Diſtrict Court ought to be affirmed.

FLEMING AND CARRINGTON JUDGES, Both concurred that the judgment ought to be affirmed.

LYONS Judge. It is indeed a hard caſe upon the jailer; but ſtill the law muſt prevail. If the jailer had brought an action againſt the appellee for the fees, in order to recover, he muſt have averred and proved that the debtor was unable to pay them; and the principle is the ſame whether he be plaintiff or defendant. The inſolvency of the debtor is abſolutely neceſſary to be ſhewn in either caſe. The Court is therefore unanimouſly of opinion that the judgment of the Diſtrict Court ſhould be affirmed.

Judgment Affirmed.

TERREL,

TERREL,

againſt

DICK.

After a cauſe has been once fully decided by a Court of Common Law, Equity will not grant relief.

THE bill ſtated that Alexander M'Cauly, George Brackenridge, Harden Burnley and George Pottie were merchants under the firm of Alexander M'Cauly, & co. and that they all lived in the counties of Hanover and Louiſa. That on the 13th of Auguſt 1778, Pottie at the requeſt and ſolicitation of Richard Terrel and Frederick Harris lent them £ 500 of the then current money of Virginia belonging to the company. That Terrel and Harris expreſſly undertook and bound themſelves to pay the ſame with intereſt to the firm. That the company brought ſuit in the County Court of Louiſa, on the writing obligatory, and at the trial the defendants (having great influence in the ſaid county) "prevailed upon the jury who tried the "cauſe, under the pretence that it was a *Britiſh* "*debt* to find a verdict for the defendants without "pretending that any part thereof had been paid" to the plaintiffs. "*By which means* (the bill ſtated) *the plaintiffs were moſt unjuſtly deprived of* "*their money.*" That M'Cauly, Brackenridge and Burnly conſidered themſelves as citizens of this ſtate. That Pottie never was a Britiſh ſubject; but always was a citizen of this Commonwealth. Therefore the bill prayed relief, and that the defendants might be decreed to pay the money lent and intereſt, together with the coſts at Common Law. The defendants plead the judgment, at law in barr to the ſuit; and demurred to the juriſdiction of the Court.

The Court of Chancery overruled the demurrer; and ſaved the benefit of the plea to the defendants at the hearing; directing that it ſhould ſtand partly for an anſwer; and ordered the defendants to anſwer the allegations of the bill.

There

Tertle, vs. Dick.

There was an anſwer accordingly put in; which ſtated that, on the 13th of Auguſt 1778, the defendant borrowed £ 500 paper money of the plaintiffs through their factor, to be repaid in 12 months. That at the end of the ſaid 12 months the factor of the plaintiffs agreed to receive it within a day or two; and on the ſucceeding day, that the defendant offered the money and intereſt to the factor, who refuſed to receive it. That in conſequence of this the defendant not knowing to whom elſe to pay it, was referred by the factor to Pottie, who had the bond. Whereupon the defendant offered the money and intereſt to him alſo; but he likewiſe refuſed to receive it. That the money was not lent as a favor to the defendant; but for the benefit of the firm. That M'Cauley, Brackenridge & Burnley, were here before the revolution, but after the commencement of hoſtilities withdrew and lived under the Britiſh government; and therefore the defendant does not know how they became citizens; nor does he believe they were. He admits however that M'Cauley lived here, when the ſuit in the County Court was commenced; and, denying the influence charged in the bill, ſtates that upon a fair trial there was a verdict for the defendants, on a plea that it was a Britiſh debt, upon which a judgment was accordingly rendered. To this anſwer there was a general replication; but no teſtimony or exhibit appears in the cauſe.

The Court of Chancery decreed that the defendants ſhould pay to the plaintiffs £ 100, the value of the £ 500 by the ſcale, with intereſt from the 13th of Auguſt 1778. From which decree the defendants appealed to this Court.

CALL for the appellants. There having been a full trial at law, without any ſurprize or any new fact ſuggeſted, it was a complete barr to the preſent ſuit. The influence ſtated in the bill is denied and no evidence in ſupport of it is offered. The plaintiffs ſhould have moved for a new trial or ſuffered a nonſuit; but failing to do ſo, they muſt now be taken to have ſubmitted to the judgment

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ment; and cannot be received to impeach it here, *Tarpleys admr.* vs *Dobyns*, 1. *Wash.* 185.

WICKHAM for the appellee. Although the Engliſh books may appear to countenance the argument of the appellants counſel, yet a different rule has certainly obtained here; and properly too; when the difference between the ſyſtems of juriſprudence in the two countries is conſidered. In England the trial is always had under the direction of able judges who can explain the law fully to the jury; but here it is for the moſt part before County Courts, who are not acquainted with the law, and therefore the judgment is frequently contrary to plain principles of law. All the points made by the appellants counſel, with all the learning on them, were fully conſidered and digeſted in this Court, in the caſe of *Floyd* vs *Barret*. In which, the Court decided, that the Court of Chancery might relieve, notwithſtanding the whole merits had been diſcuſſed and decided on in the Court of Common Law. *Branch* vs *Burnley* * was alſo a caſe of the ſame kind; for in that the whole matters ſtated in the Chancery were ſpread upon the record at law, and yet the Court gave relief, although the plaintiff in Equity might have had redreſs by an appeal. Indeed the precedents of that kind in this Court are very numerous *Picket* vs *Morris* † and *Ambler* vs *Wild*, ‡ with ſeveral others confirm the general doctrine. It is not denied that the debt is ſtill juſtly due; and the anſwer has confeſſed the allegations of the bill, after which it is too late to except to the juriſdiction, as has been often decided. There can be no magic in the words new trial, and of courſe there was no neceſſity for purſuing that mode. At the time of the judgment, in the County Court, it had not been ſettled, that *Britiſh debts* were recoverable.

CALL in reply. In all the caſes cited there were new circumſtances; and none of them were like the preſent, in which there is no ſuggeſtion of any additional fact. As to the admiſſion in the anſwer

* *Ante.* † 1 *Wash.* ‡ 2 *Wash.*

anſwer, it is doubtful whether any caſe has carried the doctrine ſo far, as the appellees counſel contended for, even in the caſe of a voluntary admiſſion. But if it has, the argument will not hold in this caſe; becauſe the plea and demurrer have been diſregarded, by the Court of Chancery, and the defendants compelled to anſwer.

ROANE Judge. This was a bill praying to be relieved againſt a verdict and judgment for the appellant, and to have a new trial granted, or that he ſhould be decreed to pay the money due upon the bond, on which the ſuit at law was founded, in due proportions.

The caſe made by the record of Louiſa Court (which I underſtand to be introduced into the cauſe by conſent) is that of an action of debt upon a bond and a verdict and judgment for the defendant upon an iſſue joined upon the plea of *Britiſh debt.* After the verdict a motion was made for a new trial; but it was overruled in conſequence of an equal diviſion of the Court. The additional caſe made by the bill in Chancery is, that the verdict was obtained by the undue influence of the appellee. But this is denied by the anſwer; and is not proved by the appellant. So that it may be thrown entirely out of the caſe; which may be conſidered to be as naked, as I have ſtated it.

On a demurrer to the juriſdiction of the Court of Chancery, and a plea of the above judgment in bar, the Court overruled the demurrer, and, at the hearing, decreed the preſent appellant to pay the money.

If the juriſdiction of the Court of Chancery was ſuſtainable, it muſt be on the ground either of the judgment of the County Court being erroneous in point of law, or of ſome extrenſic circumſtance affecting the fairneſs of the trial, or at leaſt ſome circumſtance varying the caſe from that which was decided upon by the Court of Law.

Terrel, *vs.* Dick.

As to the first, I consider that there is no question more completely and exclusively proper for the decision of a Court of Law, than the one whether British debts were recoverable or not, under the laws of the Commonwealth? and if an erroneous judgment has been given by a subordinate court upon the subject it could properly be corrected by an appellate Court of Law, and by that only. In order to save time, I beg leave to refer, in support of this opinion, to the observations I used upon this point in the case of *Branch* vs *Burnly*; and to remark, that upon mature reflection since, I have not seen cause, to change my opinion upon the subject. Nor do I believe that there is a single decision of this Court, or of the Courts in England, which will justify the interference of a Court of Equity, in a case purely of a legal nature, merely, on the ground that the judgment of the Court of Law was erroneous. In *Branch* vs. *Burnley* I understood the doctrine to have been admitted by the Court; but the jurisdiction there was sustained on the ground, as a majority of the Court supposed, of the case presented to the Chancery being, as relative to that before the Court of Law, a new case; on account of circumstances, exhibited in the suit in equity, which made no part of the case at law. In *Picket* vs *Morris* I understood the jurisdiction was sustained on the ground of improper conduct in the Court of Law; and of one of the parties diverting the other from persevering in an application for a new trial, (the proper channel for obtaining redress) by giving him time to apply for an injunction; and then unconscientiously opposing him on the ground of jurisdiction. At least these were the grounds on which my opinion was founded. In *Ambler* vs *Wyld*, I understand the relief to have been given on the ground of the trial not being fair and equal, and of some of the evidences having been rejected, without reason 2. *Wash.* 41.

Therefore, without adverting to other cases, I believe I am warranted in saying, that no deci-

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sion has taken place, of the interference of a Court of Equity, in a question purely legal and where the case was precisely the same as that decided on by the Court of Law, on the ground that the decision of the Court of Law was erroneous.

2dly. Are there any extrinsic circumstances in the case such as existed in the cases just mentioned, tending to impeach the fairness of the verdict and judgment as to the manner of obtaining them? None such are pretended.

And as I cannot, sitting as a Chancellor in the present case (although my opinion may be that the County Court erred in point of law in giving the judgment in question,) undertake so to decide for want of jurisdiction in the cause, so neither can I say that in point of fact the jury were mistaken; especially as their opinion has been corroborated by that of a moiety of the Court refusing a new trial. Nor can we say, that any act of unfairness existed in conducting the trial. We cannot make the appellees case better, than he himself has made it.

Upon the whole I do not see any ground for the interference of a Court of Equity. Otherwise I do not discover that we can disclaim cognizance of any case whatever, which the party may chuse to bring before the Chancellor, after it has been determined in a Court of Law.

I am therefore for reversing the decree, because the demurrer ought to have been allowed.

FLEMING Judge. Declined giving any opinion.

CARRINGTON Judge. If there had been any circumstances to vary the case in equity from what it was at law, I should have been willing to have afforded the plaintiff an opportunity of having his case reconsidered, as was done in the cases of *Ambler* vs *Wyld*, *Pickett* vs *Morris* and *Branch* vs *Burnley*. But there are none. For no new fact or other matter appears to give the Court of

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Chancery juriſdiction; and to be the foundation for relief in equity. Since the influence is denied, and that was the only one alledged. It is then, preciſely the ſame caſe now (without any addition) that it was in the County Court. And therefore whether the judgment was right or wrong it muſt prevail.

The conſequence is, that the application to a Court of Equity, cannot be maintained; and therefore I think the decree muſt be reverſed and the bill diſmiſſed.

PENDLETON Preſident. The prayer of the bill is, that the verdict and judgment ſhould be ſet aſide and a new trial awarded; or that there ſhould be a decree for principle and intereſt.

The Chancellor has choſen the latter alternative, in which I differ in opinion; ſince the matter being originally triable at law by a jury, it ſeems to me improper to change the mode of trial by a final decree; and that to award a new trial, is as far as Courts of Equity have gone on theſe occaſions.

The ground upon which a Court of Equity interpoſes is this.

New trials at law can only be granted by the Court who ſit on the trial; ſince none others can judge of the reaſons on which they are founded; and becauſe, when judgment is entered that Court have no more power over the cauſe, and a ſuperior Court cannot award a new trial unleſs the reaſons appear in the record. At all times difficult; and utterly impoſſible, where they ariſe from ſomething diſcovered afterwards.

An unjuſt judgment muſt therefore ſtand againſt the parties, or a Court of Equity muſt interpoſe its aid, and ſupply the defect conſequent upon legal forms. In this ſituation, no one can doubt which alternative ought to prevail.

The

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The nature of our County Courts, furniſhes additional reaſons in ſupport of this Chancery juriſdiction; which has accordingly been ſuſtained, by the opinion of this Court, in ſeveral inſtances; where ſufficient reaſons have appeared for awarding the new trial.

Thoſe reaſons are many:

Accident or ſupprize by which a party is deprived of a fair trial, tampering with a jury or witneſſes, or other unfair practices. The finding exceſſive damages, or againſt evidence, and many others. The precedents for which are numerous. Thus for inſtance, in *Ross* vs. *Pynes*, a witneſs was ſick and abſent; but this circumſtance was not known at the time of the trial: In *Ambler* vs. *Wyld* the court at law refuſed to admit evidence, which appeared in equity to be material: In *Cochrane* vs. *Street*, the verdict was given upon a miſtake in the jury: and in *Lee* vs. *Foushee*, the verdict was given late in the evening and a motion for a new trial made next morning; which could not be heard, becauſe the members of the Court were changed; and therefore equity awarded a new trial.

In the preſent caſe none of the reaſons appear. The plaintiffs ſuggeſt none other, than the influence of the defendants and a general prejudice againſt *Britiſh* merchants. The defendant ſays he was not conſcious of that influence, and that the trial was fair.

A motion was made for a new trial and the court divided in opinion. No reaſons appear in the record, nor in the proof. It only can be preſumed therefore that the motion was founded on what was within the knowledge of the Court to decide, that is, that the verdict was againſt evidence.

This was matter of opinion; and although at law the conſequence was unavoidable, that the negative muſt prevail, yet ſince in fact it was equal, whether it was or was not againſt evidence, it is worthy of conſideration, whether the conſequent

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convenience or inconvenience ought not in equity to turn the ſcale?

On one ſide is a creditor who may be barred by the miſtake of the jury and part of the Court. On the other, the trial is to be at the coſts of the plaintiff. If juſtice is with the defendant, he will no doubt prevail on the ſecond trial; and this trouble will be the only inconvenience. On this ground I ſuppoſe it is, that liberality in granting new trials, is practiſed in both Courts of law and Equity. There is another circumſtance which, perhaps may deſerve weight. It appears to me that the iſſue tried was an immaterial one; that a repleader ſhould have been entered inſtead of a final judgment; and that on an appeal it would have been reverſed.

But whilſt he has been proſecuting this ſuit, his time has elapſed, and the door for that remedy ſhut by the act of Aſſembly. The queſtion therefore is, whether the Court will relieve him on account of his miſtake in that reſpect? I have given the caſe the ſtrongeſt view in which my mind could place it, from a wiſh to ſupport the Chancery juriſdiction and to avoid the poſſible riſque of a creditors loſing a juſt debt, from a miſtake in legal proceedings.

But the reſult of mature conſideration is, an opinion that we cannot ſuſtain the juriſdiction in this caſe without fixing a dangerous precedent, wholly deſtructive of all diſtinction in the Common Law and Chancery juriſdiction. And that whatever injury, may ariſe to the party, it has proceeded from his own neglect. 1ſt. In taking iſſue upon and not demurring to the immaterial plea. 2. In not applying to a Superior Court of law to correct the error, in entering judgment for the defendant, inſtead of awarding a repleader. 3. In not ſtating on the record at law, or proving to the Court of Equity, any reaſons on which his application for a new trial in either Court was founded.

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I therefore concur with the two Judges in opinion that the decree ſhould be reverſed and the bill diſmiſſed with coſts.

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JONES,

againſt

THE COMMONWEALTH.

If in an indictment for an aſſault againſt four, one dies, and the jury aſſes the fine jointly againſt the other three is error.

FOUR perſons were *jointly* indicted for an aſſault upon a magiſtrate in the execution of his office. The defendants appeared and traverſed the indictment. Before the trial one of them died; and as to him the proſecution abated. A jury were afterwards ſworn to try the iſſue as to the other three; and they brought in a *joint* verdict againſt the whole and aſſeſſed a *joint* fine of £ 106, againſt them. For which the Diſtrict Court rendered a *joint* judgment; and to that judgment the defendants obtained a writ of ſuperſedeas from this Court.

The ſingle queſtion made in the cauſe was whether in a joint indictment againſt ſeveral for an aſſault and battery, the jury can aſſeſs and the Court give judgment for a joint fine? Or in other words whether the jury ought not to have aſſeſſed and the Court rendered judgment for ſeparate fines againſt each of them?

WICKHAM for the plaintiff. If a joint fine be aſſeſſed againſt ſeveral defendants it is error; for each is only liable for his own act. 11, *Co.* 42. 2, *Hawk. Book* 2, *ch.* 48. §. 10. *page* 633.

BROOKE Attorney General *contra.* Although that may be the rule in England, yet it will not hold here; where the jury aſſeſs the damages on

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a joint proceſs. So that it reſembles an action, in which joint damages may be clearly found.

WICKHAM in reply. The authorities will not warrant the diſtinction. For the damages operate as a penalty; and therefore the caſe is precifely within the Engliſh rule.

Cur: adv: vult.

ROANE Judge. The only queſtion in this caſe is, whether a judgment for a fine aſſeſſed by the jury jointly againſt ſeveral defendants in an indictment for an aſſault be ſuſtainable? In 2, *Hawk. c.* 48. §. 17, it is laid down that where there are ſeveral defendants a joint award of one fine againſt all is erroneous, as it ought to be ſeveral againſt each defendant; for otherwiſe he who hath paid his proportionable part might be continued in priſon until all the others had paid theirs. Which would be, in fact, to puniſh him for the offence of another.

To ſupport this opinion, he cites *Godfrey's* caſe 11, *Co.* 43. In which it was unanimouſly reſolved that a fine aſſeſſed upon jurors jointly for refuſing to preſent &c. was not lawfully impoſed, but ought to have been aſſeſſed ſeverally; and eſpecially, in the caſe where, what produced the fine was ſeveral. Now here the propoſition is laid down as a general one; and it is *a fortiori* in this particular caſe; becauſe the offence was, in itſelf, ſeveral. The general tenor of that caſe (which is a long one) ſeems to eſtabliſh the doctrine; and is bottomed upon an article of *magna charta*, that fines be impoſed *ſecundum quantitatem delicti ſalvo contenemento.*

In this country, I conſider the conſtruction as fortified not only by the principles of natural juſtice, which forbid that one man ſhould be puniſhed for the fault of another; but alſo, by the clauſe of the bill of rights prohibiting exceſſive fines and

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the act of 1786 founded on the ſpirit of it and providing, that the fine ſhould be according to the degree of the fault and the eſtate of the offender. But it is moſt unreaſonable, and directly in the teeth of the act, that one man ſhould ſuffer the puniſhment impoſed by the jury upon all who may chance to be with him; and who were all in the contemplation of the jury, who aſſeſſed the fine.

This is ſo unjuſt and contrary to the ſpirit of the conſtitution, that even if it were eſtabliſhed by adjudged caſes to be the law, nay even if an act of Aſſembly ſhould paſs authorizing it, in expreſs terms, I ſhould moſt probably be of opinion that the one ſhould be exploded and the other declared unconſtitutional and not law.

I think therefore, that the judgment of the Diſtrict Court eſtabliſhing the joint fine was erroneous and ought to be reverſed.

CARRINGTON Judge. Four perſons were indicted jointly for an aſſault upon a magiſtrate in the execution of his office. One of the defendants died before the trial and the proſecution was abated as to him. Upon the trial of the cauſe the jury found a verdict againſt the other three, and aſſeſſed a joint fine againſt them. Upon this ſtatement the ſingle point to be decided is, whether it was right to aſſeſs the fine jointly, or whether it ought not to have been ſo aſſeſſed that each offender ſhould pay for his own offence only, and not for that of other people?

By the bill of rights it is declared "that exceſſive bail ought not to be required, nor exceſſive fines impoſed, nor cruel and unuſual puniſhments inflicted; and by the act of Aſſembly *Rev. Cod.* 112." It is ſaid, that in every information or indictment the fine or amercement ought to be according to the degree of the fault and the eſtate of the defendant. From which it is clear that the makers of

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the conſtitution, as well as the Legiſlature contemplated, that no addition, under any pretext whatever was to be impoſed, upon the offender, beyond the real meaſure of his own offence. But it is manifeſt, that if the judgment be ſo rendered that he may in event, by the death, inſolvency or eſcape of the other defendants be made to endure a longer confinement or to pay a greater ſum than his own proportion of the fine, that both the bill of rights and the act of Aſſembly are contravened by the deciſion. Of courſe, a joint fine which neceſſarily involves their conſequences muſt be illegal, as contray to the ſpirit and meaning of them both.

This doctrine however is not new; but is coeval with the common law. For in 2 *Haw.* 633 *Sect* 18, it is laid down "that where there are ſeveral defendants a joint award againſt them all is erroneous; for it ought to be ſerved againſt each defendant; for otherwiſe one who hath paid his proportionate part might be continued in priſon till all the others have alſo paid theirs, which would be in effect to puniſh him for the offence of another." This accords expreſsly with the obſervations I have made upon the bill of rights and the act of Aſſembly; and proves that ſeparate fines ought to be impoſed in every caſe of this kind, in order to avoid the inconveniences already enumerated.

If the caſe be conſidered upon principles, the injuſtice of a contrary doctrine will be rendered more obvious. Where ſeveral perſons are concerned in a treſpaſs, the probability is, that ſome one of them is either from wealth, ſituation or talents, a man of more influence than the reſt; and therefore that he does, by theſe adventitious circumſtances, prevail upon the others to unite with him in it. Now in ſuch a caſe as that, would it not be the higheſt injuſtice to oblige one of the others of leſs capacity, poorer circumſtances and therefore liable to all the influence of his companion, to undergo as ſevere puniſhment as him who was more guilty?

guilty? and perhaps in event a greater? It ſtrikes me that nothing could be more unreaſonable; and therefore I ſhall be very loth to yield my aſſent to ſuch a poſition.

To make this the ſtronger, perhaps in the very caſe now before the Court, the perſon who is dead might, from his wealth, his weight of character and influence in his neighbourhood, have been the principal mover in all this buſineſs, and that the reſt may have been poor and indigent, and led on by the influence of his example. In ſuch a caſe would it not be contrary to every principle of propriety, that the three indigent men ſhould pay not only for their own tranſgreſſion, but for that of their more wealthy and culpable companion? Every perſon who hears me muſt anſwer in the affirmative; and declare that one man ought not to ſuffer for the fault of another.

Therefore whether I conſider the caſe upon principle, the doctrines of the common law, or the ſpirit of the bill of rights and the act of Aſſembly, I am equally clear in my opinion, that the Diſtrict Court ſhould have required the jury to diſcriminate; and having failed to do ſo, that their judgment is erroneous and muſt be reverſed.

PENDLETON Preſident. I differ from the reſt of the Court; and think neither the authorities or principles mentioned exactly apply. With reſpect to the firſt. The 12, *Co.* 42, was the caſe of a cuſtom for the jury at a Court leet to preſent themſelves to pay to the Lord of the manor 10*s* for chief ſilver and certainty of leet. That a jury ſworn at a Court leet, contemptuouſly refuſed to preſent, and to pay the 10*s* each, upon which the ſteward impoſed a fine upon them jointly of £ 6; and on a diſtreſs for the fine, a writ of replevin was brought and the defendant avowed the diſtreſs for the fine. To which there was a demurrer; and judgment was unanimouſly given for the plaintiff, becauſe the fine was joint and not ſeveral.

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The obſervation as to that caſe was, that the refuſal of one was not that of another; ſince ſome might have been willing though others were not, and that the defaulters only ſhould be fined.

The general principle is, "that no man ſhall be "puniſhed for anothers fault, to which he is not "*party*, *privy*, *conſenting* or *aſſenting*:" On the authority of that caſe it is ſaid in 2, *Hawk.* 633 "that a joint fine againſt ſeveral defendants is er- "roneous; becauſe one defendant having paid his "*proportionable* part might be detained in priſon "for the part of the others; which would be in effect "to puniſh him for the fault of another." This reaſoning was juſt as to the caſe referred to, where the jury were to pay 10/ each; but not correct as to the preſent caſe; for how ſhall the court apportion the guilt or puniſhment of four men who have jointly committed a breach of the peace; and who are involved equally in the guilt and puniſhment.

It is true that the jury may diſtinguiſh between them; and the act giving them power to aſſeſs the fine, gives them, at the ſame time, a direction to regard the degree of offence and the ability to pay. Therefore where there are ſeveral defendants, who differ in the degree of offence or ability to pay, the jury may ſever them; but if they are equal in guilt and ability to pay, they may involve them in a common puniſhment, as is the caſe in civil ſuits. If the jury do wrong in this reſpect, a motion may be made by the defendants for a new trial; which is the proper remedy: and as it was not applied for in the preſent caſe, I preſume the jury acted rightly.

My opinion therefore is, that the judgment ought to be affirmed; but as a majority of the court differ from me, it muſt be reverſed.

BOGLE,

BOGLE SOMERVILLE & Co.

against

SULLIVANT.

THIS was an action of debt brought in the District Court by Bogle & co. against Sullivant, upon a bond. The defendant plead *non est factum;* and the plaintiffs took issue. Upon the trial of the cause the plaintiffs filed a bill of exceptions to the Courts opinion; which stated, "that the plaintiffs offered in evidence to the jury proof of the hand writing of the subscribing witnesses to the bond; and that the said witnesses were dead. That the plaintiff moved the Court to instruct the jury, that the said testimony was sufficient proof of the execution and delivery of the bond; but that the Court were of opinion and did instruct the jury that the said testimony was not conclusive evidence to maintain the issue on the part of the plaintiffs; *but left it to the jury to determine the weight of such evidence.*" Verdict and judgment for the defendant.

The jury have a right to decide on the weight of the testimony, and the court only decides whether it is admissible.

And now Bogle, Somerville & co. petitioned this Court for a writ of supersedeas to that judgment.

RANDOLPH for the petitioner. The Court ought to have instructed the jury, according to the application; which went only to request their opinion upon the sufficiency of such testimony in law. Besides, as no other evidence appears to have been given, they ought to have told the jury that it was the best testimony which the nature of the case would admit of, if it was believed by them.

Curs. Adv. Vult.

PENDLETON President. Delivered the resolution of the Court to the following effect.

The Court sees no difference between this and other cases, where the evidence is admitted, and the weight which it ought to have, is left to the jury, who have a right to decide it. We therefore discover no error in the judgment; and consequently deny the motion for a writ of supersedeas.

SMITH

SMITH, *againſt* DYER,

What ſhall be a reſignation of his office by a clerk of a Court.

THIS was an appeal from an order of the District Court, awarding a peremptory writ of mandamus to the County Court of Pendleton to reſtore Dyer into the office of clerk of the Court of that County.

The caſe was, that on the firſt day of May 1797, Gawin Hamilton, clerk of the Court, wrote a letter to the Court of Pendleton county, in theſe words, "Your worſhips will pleaſe to take notice, I do "intend to leave my reſignation of my clerks office "in this county. I therefore notify you, to pre- "pare to chuſe you a clerk in my room at the next "Court, as I ſhall continue in office no longer af- "ter that day." Signed "Gawin Hamilton" and directed to "the juſtices of Pendleton county." At June Court 1797, the Court made this entry on their records, "the Court are of opinion from a letter received from Gawin Hamilton in open Court at laſt term (and from his verbal declaration to them at that time, that he would not continue in office, as clerk of this county, longer than this term, that he the ſaid Hamilton hath thereby reſigned his ſaid office as clerk aforeſaid; they therefore proceed to chuſe another clerk for the ſaid county, and order that the clerk that may be ſo appointed take upon himſelf and execute the duties of clerk of the ſaid county immediately after the expiration of this term. And that the ſaid Hamilton be notified to appear at the next Court, to be held for this county at the Courthouſe, to deliver up the records of ſaid county to the perſon who may be choſen clerk, as aforeſaid." The Court at the time of making the ſaid entry conſiſted of ten members; four of whom the record ſtates objected thereto, becauſe the ſaid letter and verbal declaration did not warrant the appointment of

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of a clerk at that time; as Hamilton was not present and had not written any further to the Court. The record then ſtates that Dyer was immediately appointed clerk; he having ſix votes; and the four who objected as above having refuſed to vote.

At July Court 1797 the ſame ten members were in Court; a new commiſſion of the peace was produced and three new juſtices qualified under it, againſt the opinion of the above mentioned ſix; becauſe the recommendation was made at the laſt Court, and the copy of the order was not atteſted and ſent to the Governor by Dyer; and becauſe too "the three new magiſtrates aforeſaid were qualified by the deputy clerk of Gawin Hamilton." Then follows an entry in theſe words "Gawin "Hamiltom clerk of this county came into Court "and reſigned his office as clerk of this county, "whereupon Abraham Smith having ſeven votes "was duly elected clerk of this county." The above named ſix members objected to this appointment, as they conceived Dyer to have been legally appointed and he had qualified and given bond at the laſt Court.

The Diſtrict Court firſt granted a rule upon the clerk and juſtices to ſhew cauſe why Dyer ſhould not be reinſtated in the office.

Several depoſitions were taken in the Diſtrict Court, which ſtated that Hamilton came into the County Court at the May term and held a paper in his hand which the Court conſidered as his reſignation. That he gave the paper to the Court, and told them it was his reſignation. That one of the juſtices objected to the form of it, but Hamilton ſaid no advantage was intended; but that he meant it as his reſignation. That if the Court ſuppoſed he had any deſign he would give up the office then, but that he wiſhed to keep it until the next Court, that the young man might get the papers in order. That the Court might proceed to appoint another clerk at the next Court, for he would

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would be their clerk no longer. And that Hamilton gave the Court no further information until the ſucceeding July term.

The firſt writ of mandamus to reſtore or ſhew cauſe not being returned by the juſtices, a ſecond iſſued, with a direction in the order, that it ſhould be delivered to the "juſtices, or ſuch of them as ſhall be fitting, in open Court, &c."

To this latter writ, ſix of the juſtices who ſtated themſelves to be then ſitting and compoſing part of the Court on the 6th of June 1798 returned "that Dyer was never duly elected and ſworn, "but that the office from May to July was filled "by Hamilton. Who then reſigned, and Smith "was duly elected, ſworn and admitted, &c." But ſeven other juſtices being the reſidue of the Court then ſitting returned "that Hamilton reſigned at May Court, and Dyer was elected, qualified and admitted in June 1797 and acted as clerk till July 1797; when in conſequence of an appointment of Smith as above mentioned (reciting the circumſtances as already related) he got the poſſeſſion and acts as clerk, &c."

Upon this return the Diſtrict Court awarded a peremptory mandamus to reſtore Dyer; and from that order Smith appealed to this Court.

CALL, RANDOLPH and NICHOLAS for the plaintiff, contended, that Dyer was not duly elected; becauſe, at the time of his election, Hamilton the preceding clerk had not reſigned. For the letter was not an actual reſignation, but a mere declaration of an intention to reſign; which he might or might not carry into effect, as he thought proper. Therefore as he had done no further act of reſignation, when Dyers election took place, the office was not then vacant and conſequently the election was void. That the County Court could not grant an office to take effect in occupation at a future day, as the king of England can; becauſe the conſtitution requires an actual vacancy, and as

there

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there was no vacancy here at the time, the election conferred no right. That it appeared by the record that the Court did not conſider Hamiltons reſiguation as perfected at the time of the election; for Dyer is elected to occupy the office, after the expiration of that term of the Court; and at a ſubſequent term, it is ſtated, that Hamilton came in and reſigned. That the return to the *mandamus* was not concluſive; for it is ſo only againſt the party praying it; and therefore the ſtatute of Anne only gives a traverſe to him who prays it.

That where there was ſo nice a diviſion of the ſitting members of the Court as there was in this caſe, when the return was made, and where too the members preſent at the elections were equally divided and the magiſtrate who made the majority was not preſent at either, whilſt one of thoſe who was preſent at both elections and had divided in favor of Smith was abſent when the return was made, a peremptory *mandamus* ought not to have gone, until a feigned iſſue had been offered and rejected as was done in 3. *Burr*; For it was but a decent reſpect due to the minority in a doubtful queſtion of this kind, and where accident alone perhaps had produced the return. Becauſe if there had been a full Court, or if the abſent juſtice before ſpoken of had been preſent inſtead of the other who was not at the elections, a very different return would poſſibly have been made. That it did not appear that the *mandamus* was ſerved upon all the juſtices of the Court, and yet all had an equal intereſt in the buſineſs. For which reaſon the order of the Diſtrict Court directing that the *mandamus* ſhould be ſerved upon the members in Court only, was clearly wrong; becauſe it was ſubjecting the deciſion to chance and accident. For if there ſhould have happened to have been a mere *quorum* in court, and that *quorum* had conſiſted of the members who voted for either of the candidates the return would be according to their own opinions; which it is not to be preſumed they would have

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have changed after the decisions which they had made upon record relative to the elections. Of course the only proper mode would have been, to have directed that all the justices should be served; and consequently that the District Court had erred in the manner which they had prescribed.

WICKHAM & MARSHALL for the appellee, contended, that there was an actual vacancy of the office at the time of Dyers election; because the resignation of Hamilton had been accepted by the Court, and was now complete by efflux of time.—*Salk.* 433. That no set form of words was necessary to constitute a resignation, but that any thing tantamount was sufficient. Therefore as Hamilton in this case had shewn a clear intention to divest himself of the office it was enough. But at all events the return to the mandamus was conclusive, 3 *Blac Com.* 111.—6 *Co.* 99. For there was no ground for the supposed distinction between the person applying for the mandamus and any other person. That a feigned issue was not necessary, in a case where the right was clear. That it did not appear that all the justices were not served with the writ. But it was not necessary that it should be served upon all; for service on the sitting members of the Court was sufficient; because they were to do the act.

The court affirmed the judgment of the District Court.

HAMMITT,

HAMMITT,

against

BULLETTS Executors.

THE declaration in this case was as follows, "Thomas Harrison and Thomas Bullett acting executors of the last will and testament of "Cuthbert Bullett deceased, complain of John "Hammitt that he render unto them the sum of "one hundred and twenty pounds specie which "from them he unjustly detains, for that the said "defendant on the 15th of October in the year of "our Lord 1788, at the county aforesaid by his "certain writing obligatory here to the Court shewn "sealed with his seal and dated the day and year "aforesaid, agreed in consideration of a lot of land "in the town of Newport known and distinguished "by number thirteen, together with the improvements on the same, to pay the said Cuthbert "£ 125 specie on or before the first day of April "then next ensuing the date of the said obligation, "with interest thereon from the first day of January then next ensuing the date of the said obligation. Nevertheless the said defendant though "often requested, did not pay to the said Cuthbert "in his lifetime the aforesaid sum of money, or "any part thereof, but the same to pay refused "and still refuses to pay the same to the plaintiffs, to the damage of the plaintiffs £ 200, and "therefore they bring suit &c." Plea conditions performed; and the plaintiff took issue. The suit was then referred; and afterwards at a subsequent Court the record proceeds thus "October 1795, "order referrence set aside and continued." On the trial of the issue the defendant filed a bill of exceptions to the Courts opinion, which stated that the plaintiffs offered in evidence to the jury an agreement in these words "Ageement between "Mr. John Hammett and Cuthbert Bullett. Cuthbert Bullett sells Mr. Hammett lot number thirteen, in the town of Newport, with the improvements,"

Quere If a specialty be for payment of money with interest how plaintiff should declare?

Defendant shall not be received to object to errors in pleadings which are for his benefit.

Plea of conditions performed to an action of debt for money equivalent to plea of payment.

Hammet, vs. Bulletts Exr

"provements, for one hundred and twenty five "pounds ſpecie, payable with intereſt, from the "firſt day of January, on the firſt day of next April, "and rents him both his ferries during the ſaid "Bulletts life, at fifteen pounds ſpecie, per an- "num, for the firſt four years, and after during "the remaider of the term, at the annual rent of "twenty five pounds per annum, the ſaid Bullett "is to have and retain the rent for the preſent "year. Witneſs their hand and ſeals this 15th "day of October, 1788.

JOHN HAMMET. (SEAL.)
CUTHBERT BULLETT. (SEAL.)

Teſte.
WILLIAM DAVIS.
BURWELL BULLETT.

That the defendant objected to the ſame going in evidence to the jury as being variant from the writing declared on; but that the objection was overruled by the Court, who permitted the ſaid writing to go in evidence to the jury.

Verdict that the defendant hath not performed the conditions in the declaration mentioned, as the plaintiffs by replying have alledged and aſſeſſed the damages to £61:5:9. Judgment for the plaintiff for £125 ſpecie, the debt in the declaration mentioned, together with the damages aforeſaid and coſts.

BOTTS for the petitioner. The plaintiff ſhould have demanded intereſt in his declaration upon the £125, as it appears by the record that it was due; and for want of it, there is a variance between the evidence and the declaration. The breach laid is, that the defendant had not paid the aforeſaid ſum of money; without diſtinguiſhing, whether it was the £125 only, or that ſum with intereſt; and therefore the declaration in that reſpect is uncertain. The iſſue is taken on a plea of conditions performed, and the verdict is that the plaintiff had not performed the conditions in the plaintiffs declaration mentioned; which is ſenſeleſs and immaterial, as there was nothing like a condition ſtated in the declaration; but a charge founded on a poſitive

ſtipulation

Hammett, vs. Bullitt's Ex.

ſtipulation, and therefore the iſſue being immaterial the judgment is erroneous. The order of reference appears to have been ſet aſide, upon the motion of the plaintiff merely, and without any conſent thereto obtained from the defendant; although no reaſon for this extraordinary interference appears on the record. This was an aſſumption of power which did not belong to the Court, who ought to have ſuffered the order of reference to ſtand until it was acted on; unleſs the parties had conſented to reſcind it, or ſome other proper cauſe had been ſhewn for their interpoſition. But there is a further variance between the writing produced and that declared on. For the declaration is, that the defendant would pay on *or before* the 1ſt day of April, whereas the agreement produced was that the money was payable *with interest from the first day of January on the first day of next April.* Beſides the writing contains other ſtipulations, of which no notice is taken in the declaration; and therefore it does not neceſſarily appear to be the ſame, on which the ſuit is brought. The judgment varies from the verdict; for the latter finds damages only: Whereas, the judgment is for the £125 and the damages alſo.

PENDLETON Preſident. Delivered the reſolution of the Court to the following effect.

The plaintiffs counſel ſeems to have thought that as there was no penalty to cover the intereſt it could not be recovered under the act of Aſſembly, although the intereſt was promiſed; but could only be given in damages; and ſo declares for the debt and lays his damages for non payment. Whether he was miſtaken or not is doubtful; though the practice is to claim and recover the intereſt with the principal. Yet ſince the defendant is not injured, but benefited by the alteration, he has no right to complain of it as an error, if it be one.

Conditions performed to a ſpecialty for payment of money, amounts to the general iſſue of payment.

Superſedeas denied.

WOODSON *against* PAYNE.

Truſtee of a certificate for a particular purpoſe, cannot apply it in diſcharge of other demands due himſelf.

THIS was an appeal from a decree of the High Court of Chancery. The bill ſtates, that Thomas Payne in November 1784 requeſted the plaintiff to take charge of a final ſettlement or commutation certificate amounting to £628, *and to keep the ſame for him as a friend;* and furniſh him with certificates or money for his purpoſes. That ſuch certificates were then of little value. That, in the ſame month and year, the plaintiff paid £290 in certificates, of the like kind, for Payne; and on the 19th of January, the further ſum of £224 in certificates; leaving a balance of £114, in certificates, in favour of Payne. On which the plaintiff drew indents. That, in March, May and July 1786, the plaintiff paid for the defendant at his requeſt £22:3:9½ ſpecie; which was equal to £139:19s. in certificates: leaving a balance of £29:19 certificates in favor of the plaintiff. That the defendant admitted theſe debits; but ſued the plaintiff for a ſuppoſed balance; and the jury through miſtake found a verdict for £215 ſpecie. That the miſtake aroſe from the plaintiff being unable to prove upon the trial, that the £22:3:9½ ſpecie was equal to £139:19s. certificates. That the plaintiff moved for a new trial; which the County Court refuſed, and gave judgment for the verdict. The bill therefore prayed an injunction which was awarded.

The anſwer admits the depoſit, for ſafe keeping of the certificate for £628; having an intereſt due thereon, from the 22d of March 1783. That it was delivered, in order, to be appropriated as the defendant ſhould direct. That the defendant afterwards appropriated £150, for the purchaſe of a horſe from the plaintiff, for one Ligon. That he

Woodson, vs. Payne.

he also drew for £50 in favour of Pollock, and £80 in favour of Duke; making in all £280. That on the 19th of January 1785 the plaintiff paid Wade Woodson £170; and John Shelton £54; all together making £504; and leaving a balance in favour of the defendant of £134, exclusive of interest. That the charges in the bill relative to the specie account, were chiefly for goods and merchandize; for which the plaintiff was to take pay, out of the interest of the certificate. That the defendant on the trial at law, admitted all the plaintiffs *offsets;* but contested their application; and the jury after a fair trial found for the plaintiff; that the sum allowed by the jury was not quite as much, as the defendant was entitled to.

Ligon proves the payment to himself. Pickett proves that the price of final settlement certificates in 1784 and 1785 was 2/6; and in 1786, from 2/9 to 3/6; with the interest due thereon given up. Crouch proves, that the plaintiff had credit with him in 1786 for £10 or 12l. of indents at par.

The High Court of Chancery dismissed the bill with costs; and Woodson appealed to this Court.

Duval & Randolph for the appellants. The intention was, that the certificate should indemnify all advances and accruing claims against Payne; who ought not to be received to say, that the certificate was to lie, for the advantage of a rise in value, whilst his creditor was kept out of his money; and left to rely, only, upon the general credit of the debtor. 2 *Eq. ca. abr.* 740. The long acquiescence of Payne argues a consciousness upon his part, that he thought this the fund out of which the advances and claims were to be paid; and that he has only come forward now, in consequence of the rise in value. The price, at which they are credited by Woodson, is just, and conformable to the opinion of the Court in the case of *Graves* vs. *Groves*, 1. *Wash.* 1. At any rate the Court will allow them to be restoed in specie, or settled at the true current price of the time according to that case.

Woodſon, vs. Payne.

M'CRAW for the appellees. The certificate was depoſited for ſafe keeping; and only the intereſt was to be applied by Woodſon. Of courſe he could not appropriate the certificate itſelf, for advances or future claims. If the certificate had ſunk in value, it would have been Paynes and not Woodſons loſs. It is fairly to be inferred, that Woodſon now holds the certificate; and has never actually parted with it at any price. Of courſe he was liable to reſtore it to us upon equitable terms. The caſe in 2 *Eq. ca. abr.* turned upon the impoſition; but here was none in Payne. Who, though ready to do juſtice, has been kept out of his property by Woodſon; and therefore the latter is juſtly liable, for the riſe in value.

ROANE Judge. If the agreement, ſtated in the anſwer of the appellee, was rightly interpreted by the jury who found the verdict in queſtion, and there was no fraud uſed, or any improper conduct in the jury, which is not pretended, their verdict and the judgment upon it ought not to be diſturbed.

The ſubſtance of the agreement, as diſcloſed in the anſwer of the appellee and not diſproved by any teſtimony, was, "that the appellant ſhould in November 1784, take into his cuſtody and ſafe keeping a final ſettlement certificate for £628, having intereſt due thereon from the 22d of March 1783, to be thereafter appropriated agreeable to the directions of the appellee." Every appropriation therefore made by order of the appellee (which includes all the advances in certificates ſtated by the appellant, and admitted in the report of the commiſſioner) was in purſuance of the agreement; and made the appellant a proprietor of the like ſum in the certificate then in his cuſtody. But with reſpect to his ulterior account, ſtated in ſpecie, he was not only not warranted by the agreement to ſet off the balance of the certificate at the then current price as a payment thereof, but it is expreſſly ſtated in the anſwer, and not diſproved, that the chief of the charges were for goods, wares and merchandizes; and that before he took one of thoſe articles the appellant

Woodfon vs. Payne.

appellant gave him to underſtand that he would receive payment therefor out *of the intereſt* on the certificate. The appropriation then, of this balance of the appellees certificate, without his conſent and in violation of the agreement thus ſtated, was rightly eſtimated by the jury; and the principles, upon which their verdict was founded, are not improper.

With reſpect to the £ 10 difference in the price of the horſe, as reſulting from the anſwer of the appellee in oppoſition to Ligons teſtimony, the anſwer in this reſpect ought not to avail him. For admitting that anſwer in this inſtance to be poſitive; the depoſition of Ligon is equally ſo; and is ſupported by the following circumſtances. 1ſt. That this charge was not objected to, before the commiſſioner; although the appellee was perſonally preſent. 2d. That he ſays in another part of his anſwer, "that he admitted at the trial at law all the offetts which the appellant contended for; and now contends for;" among which is comprehended the £ 10 now in queſtion.

As then, it does not appear, from the preſent caſe, that the jury interpreted this agreement otherwiſe than is right, as it is not ſhewn that their calculations under this principle were erroneous, there is no ground to impeach the verdict. There is no ground to ſay, from the caſe before us, that they did not take into conſideration, in aſſeſſing the damages, the circumſtances, that a part of this certificate, if funded, would have conſtituted what is called deferred ſtock.

If indeed it now appeared to us, that this was not the caſe; if this could be deduced with any certainty, from any teſtimony in the record, going to the value of theſe certificates about *the time of the demand*, or from other circumſtances, it might be material to give relief in this reſpect. So if the appellant had ſhewn that the price of certificates by which the jury went in aſſeſſing the damages, was not the price at the time of the demand (which for want

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want of other teſtimony, we muſt fix to be that of bringing the ſuit, which time likewiſe is not mentioned in the proceedings) but a higher price at ſome anterior period, this circumſtance alſo might be a ſubſtantial ground of relief. But we cannot make the appellants caſe better than he himſelf has made it; and we muſt not upon ſurmiſe and conjecture overturn the verdict of a jury.

Therefore I think the decree muſt be affirmed.

CARRINGTON Judge. The judgment at law was probably unjuſt; but I cannot interfere, without teſtimony; and the appellant has furniſhed none. I am therefore conſtrained to concur in affirming the decree, upon the principles mentioned by Judge ROANE: although I fear injuſtice is done by it.

PENDLETON Preſident. The certificate for £628 was delivered by Payne to Woodſon, as bank ſtock to be drawn for as Payne wanted it; and Woodſon paid for Payne at different times £514. In conſequence of which he became entitled to ſo much in the ſtock and intereſt; and Payne to the balance of £114. Woodſon drew £66: 12, in ſpecie, for the whole certificate; and was accountable to Payne for his proportion as £514, is to £114: Amounting to £12: 1: 9. Woodſon, before and ſoon after, paid for Payne, in ſpecie £22: 3: 9; leaving a balance, due to Woodſon in ſpecie, to be changed into certificates at 3/6 of £10: 2 equal to £57: 10. Which left due to Payne in certificates the ſum of £56: 9: 11; worth then, ſomething leſs than £10: And the verdict is for £202: 16: 7 ſpecie, on account of the aforeſaid balance of 114l. certificates.

It is therefore very probable, that the verdict is unjuſt, but the appellant has not made out a caſe for the interference of a Court of Equity; and therefore the decree muſt be affirmed. The plaintiff ought to have ſhewn the period when the certificate ought to be turned into money, in conſequence of the converſion.

The decree was affirmed without prejudice;

MACON

against

CRUMP.

CRUMP brought an action of covenant againſt Macon in the County Court of New-Kent; and declared, that the defendant by his certain writing ſealed with his ſeal and to the Court now here ſhewn &c. covenanted and agreed with the plaintiff, to refer all accounts and agreements exiſting between the parties in their own rights and the ſaid Crump as executor of William Clopton, as well in ſuit as otherwiſe, to the conſideration and determination of William Clayton, William Hopkins and Edward Williamſon, or any two of them. That the referees made their award and thereby on the diſpute between the parties, relative to the contract for building a dwelling houſe the ſum of 64l. 5/10 and coſts of ſuit were awarded to the plaintiff; and in the diſpute between the defendant and the ſaid plaintiff, as executor of Clopton, 33l. with intereſt from the month of September 1783, and the coſts of ſuit were awarded to the plaintiff. The declaration then avers performance of all things on the part of the plaintiff, and aſſigns for breaches of the covenant, on the part of the defendant, that the defendant had not performed the award, and had refuſed to pay the ſaid ſeveral ſums of money and coſts; and ſtill refuſed to the plaintiffs damage £1000. The defendant prayed *oyer* of the declaration, covenant and award; and demurred ſpecially, 1. Becauſe the award was not mutual, in that it makes no allowance to the defendant, for his charges againſt the plaintiff; and that no releaſe is awarded. 2. Becauſe the award directed the defendant to pay the coſts of the ſuit; and did not direct the ſuit to be diſmiſſed. 3. Becauſe the award directs the defendant to pay a ſum of money to

Quere. If there be no profert of the deed, & the defendant takes over he can take advantage of a variance by demurrer?

If one of two ex'rs refer a matter in his own right and one in right of his teſtator, and the referees award thereon a ſum of money to him ſelf, and another to him and his co-ex'r, the award is good.

In ſuch a caſe he may ſue upon the covenant in his own name; and there will be no variance.

An award that defendant ſhall pay the coſts of a ſuit good without aſcertaining them.

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to the plaintiff and one Parkeſon jointly; whereas Parkeſon was no party to the ſubmiſſion. 4. Becauſe the defendant was awarded to pay 33 l. immediately; although by the award, the ſame did not appear to be due, until a future day. 5. Becauſe the defendant is awarded to pay to the plaintiff and Parkeſon the coſts of ſuit; which is uncertain as it is not ſaid what ſuit.

The award is in theſe words "Whereas Bene-
"dict Crump and William H. Macon having, by
"their arbitration bond, entered into the fifteenth
"day of May 1793, referred to our determination
"certain matters, relative to the building a dwel-
"linghouſe and other work to be built and done by the
"Crump for the ſaid Macon; and having heard
"the parties and duly conſidered the ſame, are
"of opinion, that the ſaid William H. Macon
"ought to pay unto the ſaid Benedict Crump, for
"the balance due for the ſaid work, the ſum of
"ſixty four pounds five ſhillings and ten pence;
"and that the ſaid Macon pay the coſts of the ſuit,
"brought by the ſaid Crump againſt the ſaid Ma-
"con and now depending in the County Court of
"New-Kent. Given under our hands this 11th
"day of July 1793.

WILLIAM CLAYTON,
WILLIAM HOPKINS.
EDWARD WILLIAMSON.

"1782 Col. WILLIAM H. MACON Dr
"To BENEDICT CRUMP AND JOSEPH
"PARKESON *executors of* WILLIAM CLOP-
"TON.

"MARCH To one negro man Sam, purchaſed
"of the executorts, payable September
"1783. £33:0:0.
"To intereſt on thirty three
"pounds from September
"1783 till paid. £———

"We

Macon, *vs.* Crump.

"We the subscribers think this account just; "and that William H. Macon ought to pay to the "said executors the sum of 33 l. with interest, "from September 1783 till paid, and the costs of "suit. Given under our hands this eleventh day "of July 1793.

WILLIAM CLAYTON.
WILLIAM HOPKINS.
EDWARD WILLIAMSON.

The plaintiff joined in demurrer. The County Court overruled the demurrer and gave judgment for the plaintiff. The defendant appealed to the District Court of Williamsburg; where the judgment of the County Court was affirmed. To which judgment of the District Court, Macon obtained a writ of *supersedeas* from this Court.

WICKHAM for the plaintiff in *supersedeas*. The plaintiff ought to have averred a profert of the award; because it was the git of his action. For it is an invariable rule, that wherever the defendant relies upon a writing as the foundation of his suit he must state a profert; and although the act of Jeofails says the want of a *profert* shall not be cause of error, after verdict, still that does not take away the defendants right to *oyer*, in a case where it is originally demandable. Nor could the plaintiff refuse it, by his having omitted to aver a profert, Indeed the plaintiff by giving *oyer* has admitted the defendants right to it. For there is a distinction betwixt *averring* and *making* a profert. The latter is the act of bringing the writing into Court: and if it appears upon the *oyer*, the writing when incorporated into the record, did not authorise the declaration, it becomes a proper cause of demurrer. For if the variance appears, it may be taken advantage of, in that or any other way; because it appears, that the plaintiff has not pursued his claim, according to the terms of it.

The question then is, whether there is a variance betwixt the award and declaration? and if so whether (as it appears on the record) it was necessary

Macon, vs. Crupp.

to plead it in abatement, or we might not take advantage of it by way of demurrer? Now I hold, that it is never neceſſary to plead what appears of record; for the end of all pleading is only to inform the Court of the nature of the caſe; but this cannot be neceſſary, where it is already apparent. Such an act would be uſeleſs and improper. Thus if there be a variance betwixt the writ and declaration, the defendant may crave *oyer* and demur, as well as plead it in abatement, 2. *Wils.* 394 *Salk.* 659. 21. *Vin. ab:* 538. All which caſes ſerve to explain the general doctrine upon theſe ſubjects, and there muſt be the ſame reaſon, for allowing a demurrer on account of a variance between the declaration and the inſtrument declared on, as for a variation between the writ and declaration. But there is a manifeſt variance in this caſe between the award and declaration. For the award is that the money ſhould be paid to the plaintiff and another; whereas the declaration is upon an award in favor of the plaintiff only. Beſides it is a rule that an award muſt not extend to a perſon who is no party to the ſubmiſſion, *Kyd. aw.* 103. But here Parkeſon was not a party to the ſubmiſſion; and therefore according to the authority, he is not bound by it.

But further ſtill, the declaration ſhould have ſet forth the amount of the coſts. For although the award may be made good, without expreſſing it, yet in declaring upon the award, the amount ſhould be averred; in order that the other ſide may have an opportunity of traverſing it. *Kyd aw.* 138. 2. *Vent.* 242. It is like a *quantum meruit* for work and labor done and performed; in which, it is abſolutely neceſſary to ſtate the value of the labour. So if there be a ſuit between two men, and the defendant agrees to pay the plaintiff the coſts upon condition that he will diſmiſs the ſuit; in an action for the coſts upon this agreement, the plaintiff muſt aver the amount. In ſhort the caſe falls within the principle of *Chichester* vs *Vass* in this Court.* In which all eſſential averments were holden to be abſolutely neceſſary, notwithſtanding the act of Jeofails.

MARSHALL

* *Ante.*

Macon, vs. Crump.

MARSHALL *contra*. There are two queſtions in the caſe; 1. Whether admitting, that a material variance and the other defects ſpoken of by the appellants counſel do exiſt, advantage could be taken of them upon the demurrer? 2. If ſo, whether there be any material variance or actual defect in the proceedings?

As to the firſt; The declaration ſtates the ſubſtance of an award which according to the terms of the declaration would be good, and there is no profert. So that if there be any variance it does not appear by the plaintiffs pleading. Now the rule is that the demurrer admits the allegation of the pleading demurred to; and therefore as the declaration ſets out a good award, the plaintiff ſhould have judgment. The difference is very material where there is a profert and where there is not. In the firſt caſe *oyer* makes the inſtrument declared on part of the declaration; but it is otherwiſe where there is no profert. The caſe therefore ſtands upon the declaration and demurrer. Under which view it is clearly in favor of the plaintiff; and if the defendant thought the variance material he ſhould have excepted to the award, upon the trial of the iſſue. The authorities cited upon the other ſide only prove at moſt, that where there is a profert, advantage may be taken of a variance upon a demurrer. But if my poſition is right they do not affect the deciſion; becauſe there was no profert in this caſe. The ſtatute of Jeofails is very material. Becauſe that act prohibits any advantage to be taken of the want of form in the caſe of a ſpecial demurrer, except thoſe defects which are ſpecially aſſigned as cauſes of demurrer; and under the ſpirit of that act, as the variance ſpoken of is not ſpecially aſſigned, I contend the defendant cannot now inſiſt upon it.

But the award is good and would have been ſufficient under the plea of no award. 1. *Bac. ab.* 152. For the plaintiff was a co-executor, and the receipt of either would have been good. The paſſage cited from *Kyd.* 103 is not important: becauſe at moſt it would only prove the award to be void as to Parkeſon. But an award may be good in part and

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and bad in part: And therefore although it may not be good as to Parkeſon, it is ſo as to the plaintiff; which ſtrengthens the argument on the declaration.

The coſts were reducible to certainty; and the plaintiff under the terms of his declaration might proceed to prove their amount; and without doing ſo he could not have obtained a verdict: Which brings it preciſely within the ſtatute of Jeofails. Beſides the demurrer does not ſtate, the want of this averment as a cauſe for demurring; but, as it is clearly a formal defect, it was neceſſary to have aſſigned it, or the defendant could not take advantage of it at all. So that under that view of the caſe too the defects are cured.

Awards are more liberally expounded now than formerly, and the Court will not labor to ſet them aſide.

WICKHAM in reply. The difference is, between ſubſtance and form. In the latter caſe you can take no exception which is not ſpecially aſſigned as cauſe of demurrer; but in the other caſe you may; for the Court will not give judgment for the plaintiff againſt right, merely becauſe the defendant has aſſigned a wrong cauſe of demurrer. Hence it is a rule, that whatever would be bad upon a general demurrer, you may take advantage of, though not aſſigned as one of the cauſes of the ſpecial demurrer. The failure to ſtate the amount of the coſts therefore was a ſubſtantial defect; and of courſe the error may be inſiſted on, though not ſpecially aſſigned as cauſe of demurrer. Although awards are conſtrued liberally, that does not prove that a bad declaration may be ſupported.

Cur: adv: vult.

ROANE Judge. This is an action of covenant founded on an agreement under a penalty, conditioned to abide by an award, and upon an award made in purſuance thereof. The declaration ſtates a *profert* of the agreement, but does not ſtate a

profert.

profert of the award; which is equally neceſſary, with the deed, to make out the cauſe of action. Macon, *vs.* Crump.

Oyer was prayed and granted both of the agreement and the award; which being ſet out the defendant demurred to the declaration; *because the declaration and award, and the matter therein contained* are not ſufficient in law to maintain the plaintiffs action, and aſſigned the cauſes of demurrer according to the directions of the ſtatute. Upon a *joinder* to the demurrer the judgment of the County Court was in favor of the plaintiff; and on an appeal taken to the Diſtrict Court that judgment was affirmed.

It is admitted that if there is a profert made of the deed, and upon *Oyer* the deed is ſet out, it is competent to the adverſe party to ſhew a variance between the deed produced and that ſtated in the declaration. But it is contended that this rule does not extend to caſes where no *profert* is made, although in fact *Oyer* has been granted. I think however that this rule is not ſo reſtricted. I conſider that this competency of exception for a variance equally exiſts in caſes where no *profert* is made; but where in fact *Oyer* has been granted. This doctrine ſeems admitted in the caſe of *Jeffery* vs. *White*, *Doug.* 459, which was treſpaſs for taking cattle. Plea that they were taken *damage feasant;* Replication ſtating a right of common; Rejoinder ſtating part of a private act of parliament for incloſing the common and an allotment by the commiſſioners of the *locus in quo* to the defendant, and traverſing the right of common. *Oyer* was prayed of this act, and granted; the whole caſe ſet out and then a demurrer to the rejoinder, and the cauſe aſſigned was that it was not ſhewn, by the rejoinder, that the allotment was made according to the directions of the act as ſet forth. On a joinder to this demurrer the Court gave judgment for the plaintiff, although it was argued for the defendant, that a party is not entitled to *Oyer* of acts of parliament; and that it could not be granted becauſe it was not

in

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in the power of the Court: And for a similar reason, the party who relies on them cannot make a profert, because he has them not to produce. That therefore the Court ought to consider the *Oyer* and recital of the act as a mere nullity and that upon what appeared in the defendants rejoinder the allotment was regular. In this case then, the act of Parliament being set out upon *Oyer*, (although *Oyer* might not have been properly demandable) was held to destroy the defence set up in the rejoinder; which, but for the act thus set out, would have been sustainable. It is true a silent judgment only appears to have been given in the case, by the Court; but it is founded upon and I think fully supported by the case of *Smith* vs. *Ycomans*, 1 *Saund.* 316, which it is unnecessary to state.

These cases also shew (as well as those cited) that a demurrer is a proper mode to take advantage of a variance, between the case stated in the declaration and the deed which may be set out upon *Oyer*.

The first variance which occurs in the present case is this, the declaration states that in the dispute between Meacon and Crump, executor of Clopton, the *sum of £ 33 with interest*, from September 1783, and the costs of suit, were awarded to the plaintiff; and the award exhibited upon *Oyer* is of the said sum and costs to Crump and Parkeson, executors of Clopton. The answer to this objection is, that the declaration need not be according to the letter of the award, but according to the operation of the law thereupon. Thus in *Roberts* vs. *Harnage*, 6 *Mod.* 228. The declaration was on a bond for payment to him, his attorney or assigns; and the bond set out upon *Oyer*, was *to his attorney or assigns*, omitting the word *him*; and an exception, for this variance, was taken by demurrer and overruled upon the principle before mentioned; a payment to a man's attorney being a payment to himself. So in the present case an award to pay to Crump and Parkeson as executors, is in legal operation an award to pay to the executors of Clopton;

for

for certainly a payment to both executors is a payment to each executor; and therefore the declaration is sufficient.

I will next consider the award in this particular, with reference to the submission and independently of the declaration. The submission is in this respect of a matter between Meacon and Crump, as executor of Clopton, the award is to pay Crump and Parkeson executors of Clopton. In general an award to pay to a stranger to a submission is void; but this is understood to hold only when such payment can be of no benefit to the other party; for an award to pay the creditor of a party in discharge of a debt due by him to that creditor is good. So is an award to pay to a party's solicitor, if it appear to be for his benefit. This doctrine which appears to me to be sound, and which I therefore adopt, is to be found in *Kyd on awards* 104. It applies forcibly to the above mentioned objection; and is founded upon the same principles which I have just resorted to, to justify the declaration with reference to the award.

It is also laid down in *Kyd* 106, that if the parties, comprehended in the award, were in the contemplation of the submission, though not directly parties to it, yet the award is good; and there can in this instance exist no doubt, but that all the executors of Clopton were in contemplation, when an account was to be adjusted in which the interest of his estate was involved.

An objection is made to the award as being uncertain as to the suit, the costs whereof are awarded to the plaintiff. This objection does not apply to that part of the award which respects Macons private debt, as the suit is partly specified; and that part which respects Cloptons debt, I think on a liberal interpretation may be taken to mean a suit then depending respecting that matter; and if it be said that there is an utter uncertainty as to the Court in which it may be depending I answer that this objection was overruled in the case

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case of *Fox* vs *Smith* 2. *Wills.* 268. The costs of suit too have been ascertained and established by law. I think an award of such costs should be considered in the same light as if it had expressly ascertained and specified the amount thereof in the body of it. As to their amount then, there is no uncertainty, and consequently no need of an averment to render it certain, as in the case put in the argument of an award of so much money as had been expended in a suit.

It is also stated as an objection to the judgment in this case, that it is in the plaintiffs own right, for a sum compounded of two sums, whereof one is due to him in the character of executor. The answer is that the action is on a covenant made to the plaintiff in his own right; on breach of which an action accrued to him; and his character of executor is no otherwise involved in the action than that he submitted a matter in which he was concerned as executor. The defendant might have saved his covenant by paying a sum of money to him (amongst other things) in that character.

These are the most material objections which have been made in the present case; none of which are I think sustainable to arrest the judgment of the District Court affirming that of the County Court.

FLEMING Judge. As to the error assigned, that the award was not mutual, I shall only observe that awards are more liberally expounded now than formerly; and there cannot be a doubt but the present award and the judgment rendered on it, will be a bar to any future claim in respect of any thing embraced in the award; for the parties were present, and their respective claims were all considered. After which neither would be allowed to insist upon any of the matters which had been awarded on. To prevent which is the only object of the mutuality spoken of in the old books.

As

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As to the exeception, that awards ought not to extend to any perſon not a party to them according to the doctrine in 5 *Co.* 77, I ſhall remark, that there is a difference between an award of an act to be done by a ſtranger, and one to be done to a ſtranger, *Kyd* 105. For in the firſt caſe there is no compulſion on the ſtranger, but in the latter the party to the award derives a benefit by the act to be performed; and therefore there is the ſame reaſon for ſupporting the award as if it was to be performed to the party himſelf. This reaſoning applies to the preſent caſe expreſſly; for here Parkeſon might have given a diſcharge, as it was for the benefit of the eſtate.

With reſpect to the objection about the coſts, there appears to be no ground for it; as that part of the award neceſſarily referred to the coſts of that particular ſuit; which were aſcertained by law and only required a calculation by the clerk.

I do not think that the variance inſiſted on was material; but that the declaration has ſubſtantially purſued the reference and award. For the action is founded on a covenant made to the plaintiff in his own right, and upon the breach he became entitled to an action; all which is ſuggeſted in the declaration with perfect preciſion; and that is all which is requiſite. Therefore I ſee no reaſon for diſturbing the judgment; but think it ought to be affirmed.

CARRINGTON Judge concurred that the judgment ought to be affirmed.

LYONS Judge. The Judges have already ſtated the general doctrines on the ſubject now before the Court; and I concur with them in opinion concerning moſt of them But perhaps there may be a difference where a *profert* is made by the plaintiff, and then *Oyer* is taken by the defendant ſo as to incorporate the deed into the declaration; and where *Oyer* only is taken without any *profert* made by the plaintiff. For in the firſt caſe a demurrer would clearly be ſuſtained; but poſſibly the latter may ad-

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mit of ſome doubt. The uſual method, and probably the ſafeſt is to plead the variance; for then the very fact is put in iſſue; the plaintiff muſt ſee to the correſpondence between his evidence and his pleadings; and proceeds to trial at his peril, if there ſhould be any difference between them. So that if this method be purſued the caſe is clear of difficulty; whereas the other as before obſerved may admit of ſome doubt. But it is not neceſſary to go into the conſideration of that point now; becauſe I think the others are againſt the appellant.

It is a rule that awards may be good in part and bad in part; and therefore whatever is good in the award now before the Court ought to be ſupported.

As far as it reſpects Crump in his own right it is clearly within the terms of the ſubmiſſion; and therefore no diſpute ariſes about its ſufficiency ſo far. But I think it as clear that what reſpects the executors is likewiſe within the ſubmiſſion; and therefore is equally as good. For payment to the plaintiff would have been a bar to any future demand by Parkeſon. Becauſe a releaſe by one executor is good; and therefore his receipt againſt the award would have been a diſcharge of the old demand: Which as the repreſentative of his teſtator he might ſubmit to arbitration. It was then a matter of controverſy between him and the debtor; and therefore properly enough adjuſted under the ſubmiſſion.

There is no weight in the objection, that the award contains matter to be performed to a perſon who was a ſtranger to the ſubmiſſion.

For Parkeſon had an intereſt and was no ſtranger. Becauſe this part of the award related to their right as executors; and had no other effect than to aſcertain the amount, leaving the mode of diſcharge and the power of releaſing as they were before. So that each of the executors might ſtill have received the money and granted a diſcharge; and the money when received would have been for the joint bene-

fit

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ſit of both. Of courſe Parkeſon had ſuch an intereſt as made it proper to extend the order for payment to him, and therefore he cannot be conſidered as a ſtranger.

That part of the award which relates to coſts is ſubject to as little exception. For it is certain to a common intent; as it muſt relate to the coſts of the ſuit then pending; and certainty to a common intent is ſufficient 1. *Burr.* 274. Beſides it is a rule that, that is certain which can be rendered ſo. Which applies to the preſent caſe. For when the arbitrators uſe the word coſts, they mean the legal coſts; which only require to be enumerated by the officer of the Court; for the *items* themſelves are certain and to be collected from the record.

I have no difficulty therefore in pronouncing that the award is good.

Then as to the point concerning the variance; upon which it is ſufficient to obſerve, that in Covenant the plaintiff need not ſet forth more of the writing declared on, than is neceſſary to ſhew his own title; which is ſufficiently done in the preſent caſe: And from what has been already ſaid it is clear that there is no ſubſtantial difference between the covenant ſet forth and that produced. For I have ſhewn that Crump had a right to receive the money; and conſequently he muſt be entitled to ſue in his own name for recovery of it; as the covenant was perſonally with himſelf. So that in fact the *allegata* and *probata* may be fairly ſaid to agree together.

The ſame doctrine applies to the caſe of awards. Conſequently it was not neceſſary for the plaintiff in the preſent caſe to have ſtated more of that either than was eſſential to ſhew his title to recover. This he has done; and the award agrees with the recital. So that there is no cauſe for objection upon that ground.

Thus

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Thus then it appears that every objection with regard to the variance is removed; as well as thoſe with regard to the ſufficiency of the award; and conſequently that the caſe ſtands clear of exception. I agree therefore wi h the reſt of the Court that the judgment ſhould be affirmed.

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4 If

4 If in a forthcoming bond, the *Teneri* be right, though the *Solvendum* be wrong, it will not vitiate; but the bond is good. *Williamson* vs *M'Locklin.* 49

5 If a forthcoming bond be taken payable to the sheriff, he may maintain an action of debt upon it. *Beale* vs *Downman.* 249

GUARDIAN & WARD.

1 Action lies againſt the ſecurity to a guardians bond, without any previous ſuit againſt the principal. *Call* vs *Ruffin* 333

2 If the condition of the bond do not ſtate the appointment of the guardian, it is nevertheleſs ſufficient. 333

3 One guardians bond may be taken for two orphans. 333

HABEAS CORPUS.

1 Muſt be ſerved on the court or delivered to the ſheriff. *Fleming* vs *Bradley.* 203

HEIR.

1 The ſame perſon may be charged as heir and deviſee in one action. *Baird* vs *Martox* 272

2 To *oust* the heir, an actual deviſe muſt be found. 439

JEOFAILS.

1 *Vide* amendment.

INTAILS.

1 By the act of 1776 for docking intails, all remainders as well contingent as veſted, are utterly barred; whether the intail be created beforeor after paſſing of the act. *Carter* vs *Tyler.* 165

2 Nor will the court, in order to avoid this effect, conſtrue that to be an executory deviſe, which before would have been held to be a contingent remainder. *Carter* vs *Tyler.* 165

3 The act of 1776, for docking intails, is not unconſtitutional. *Carter* vs *Tyler* 165

INTEREST.

1 Evidence may be given to the jury, on the plea of payment to a bond, that the plaintiff was abſent, in foreign parts beyond ſeas, in order to extinguiſh the intereſt. *M'Call* vs *Turner.* 133

2 A forthcoming bond taken for a debt originating before the late act allowing *six per cent.* only bears an intereſt of *five per cent.* *Brock* vs. *Rowe.* 205

3 *Qu.* If in an action of debt upon a bond, the defendant brings in the principal and a leſſer ſum, than is calculable on the face of the bond, with the coſts; and the plaintiff refuſes to accept it, the court can on motion decide, whether more intereſt is due? or whether there ought not to be an iſſue and a trial by jury? *Barret* vs *Tazewell.* 115

JUDGMENTS.

1 Judgment cannot be entered for certificates in an action at

at common law. *Graves* vs *Webb*. 443
Vide Evidence. No. 5

JURISDICTION.

1 No appeal lies from an interlocutory decree of the high court of chancery. *Grymes* vs *Pendleton*. 54

2 Not even if the parties conſent to the appeal. *M'Caul* vs *Peachey*. 55

Vide Equity. No. 2

LANDS.

1 A reaſonable degree of ſtrictneſs is neceſſary in entries for land. *Hunter* vs *Hall*. 206

2 Diſmiſſion of a caveat, unleſs it be on the merits, is not binding. 206

3 Juries generally and wiſely eſtabliſh reputed boundaries, diſregarding miſtaken deſcriptions. *Shaw* vs *Clements*. 438

4 *Inclusive patent* to three, creates a jointenancy. *Jones* vs *Jones*. 458

5 A father and three ſons obtain ſeparate patents for 400 acres of land, each adjoining to the other; and the father obtains a patent for another 400 acres; afterwards the three take one *inclusive patent* for all the tracts and another tract of 1162 acres; this deſtroys the ſeparate eſtates in the firſt three tracts; and creates a jointenancy in the whole 2762 acres comprized in the patent 458

6 Surrenders depend on the concurring will of the parties. 458

7 It has been decided that in caſes of interfering bounds upon incluſive patents, lapſed patents and patents for ſurplus lands, priority ſhall refer to the date of the old patent. 469

Vide Northern Neck.

LIEN.

1 If I give a mortgage on lands to B & co. and then the agent of B & co. and I agree to convey to H, on his ſecuring the mortgage money; after which H gives a deed of truſt on ſundry ſlaves, for that and other debts to a ſucceeding agent of B & co. The firſt mortgage is diſcharged, as againſt the purchaſer, though B & co. never conveyed to H. *Fowler* vs *Buchanan*. 188

2 But in ſuch a caſe if the the lands had remained in the hands of H, they would have continued liable. 189

3 Leave given the vendor to purſue lands in the hands of a purcaſer, with notice from the vendee for balance of the purchaſe money. *Graves* vs. *M'Caul*. 414

LIMITATION of Suits.

1 Runs in equity as well as at law in favour of an adverſe poſſeſſion. *Harriſon* vs *Harriſon* 419

2 Motions are included in the terms *ſuits* and *actions* in the act of 1789 for limitations of ſuits, upon penal ſtatutes. *The Auditor* vs *Graham* 475

3 And no motion lies, after the period preſcribed by that act

act, against the clerk of a court for a fine for failing to return an account of fees charged by him. 475

MANDAMUS.

How to be served. *Smith* vs *Dyer*. 562

MILLS.

1 *Quere* If in a petition for a mill, the, Court can try the title of the parties to the land, without the intervention of a jury? *Wood* vs *Bougban*. 329

2 If the Court direct an issue in such case, in order to try the title, it will not be error; because it is still open for discussion, on the merits. 330

3 If an inquisiti n be improperly quashed, the plaintiff should pray a new writ or except to the Courts opinion. *Noel* vs *Sale*. 495

4 The deputy sheriff may take an inquisition. 495

MILITARY CERTIFICATES.

1 *Vid.* CERTIFICATES.

2 If a military certificate be lost; and afterwards sold to a *bona fide* purchaser, without notice, still the original owner may maintain Trover for it, against the innocent vendee. *Wilson* vs *Eucker*. 500

Vide TRUSTEE.

MORTGAGES.

1 What shall be considered a conditional sale and not a mortgage. *Chapman* vs *Turner*. 280

2 If C. gives an instrument of writing to T, stating that he had received £30 and had put a slave into the hands of T. as a *security*; and that if the money was not repaid on or before a certain day, T, *was to have the slave for* £30, this is a conditional sale, and not a mortgage. *Chapman* vs *Turner*. 280

3 And on failure to pay the £30, on the appointed day, the sale becomes absolute. *Chapman* vs *Turner*. 280

4 The act of a scrivener shall not turn a mortgage into a sale and prevent a redemption. *Chapman* vs *Turner*. 280

NORTHERN NECK.

1 Lord Fairfax had a right to establish rules for issuing grants, and applicants were bound to conform to them. *Countz* vs *Geiger*. 190

Vid LANDS.

NOTICE.

1 If a notice, which is the act of the party and not of counsel, be general, it is to be favorably expounded, and applied to the truth of the case as far as it will bear; but, if it descends to particulars it must be correct with regard to them. *Drew* vs *Anderson*. 51

2 If the notice be sufficient to apprize the defendant, of the ground of the motion, it is sufficient. *Graves* vs *Webb*. 443

cannot

PAPER MONEY.

1 Although parol evidence cannot regularly be admitted to ſhew a fact not contained in the bond, yet there is a diverſity of ſentiment, amongſt the judges, whether it may be done in paper money bonds under the ſcaling act; *Smith* vs *Walker*. 28

2 The circumſtances to be enquired into, under the act for ſcaling paper, muſt be ſuch as ariſe in the contract ſued on, ſhewing that the parties at that time, contracted on the idea of no depreciation at all, or one different from the legal ſcale. *Bogle* vs *Vowles*. 244

3 In the caſe of bonds the circumſtances, if admitted at all, muſt be very ſtrong to induce a departure. *Bogle* vs *Vowles*. 244

4 Penalty of a guardians bond taken in paper money, reduced by the ſcale. *Call* vs *Ruffin*. 334

5 Payments in paper money for debt due before 1774, good. *Pryor* vs *Adams*. 382.

6 A Private act of Aſſembly, for ſale of lands (part of which belonged to infants) and the ſale being for ready money, the payment was poſtponed, with conſent of the truſtees appointed by the act to make ſale of the lands, during which the paper money depreciated, but payment was afterwards actually made in paper money, and a conveyance made by the truſtees to the puchaſers, who were adult co-parceners; the ſale and conveyance are good, and the purchaſers ſhall not be effected by the depreciation. *Taliaferro* vs *Minor*. 524

PARTIES TO SUITS.

1 The executors of a mortgagee of ſlaves, and not the heir ſhould bring the bill to foreclose. *Harrison* vs *Harrison*. 419

2 And if there be no executors or adminiſtrators it ſhould be ſuggeſted; and the children of the mortgagee ſhould be made parties. 419

PAWNS.

1 If goods be pawned, without a day of redemption fixed, he who pawns has time during his own life to redeem; but his executors cannot. 290

PLEADINGS.

1 Whether the plaintiff may not take judgment by *nil dicit* as to that part of his demand which remains unanſwered by the plea. *Baird* vs *Mattox* 270

2 Defendant ſhall not be received to object to errors, in pleadings, which are for his benefit. *Hammit* vs *Bullit*. 567

3 Plea of conditions performed to an action of debt for money is equivalent to the plea of payment. 567

Vide variance.

POINTS OF LAW.

1 If a point of law ariſe in the

the cause the party should demur, move the court to instruct the jury, or present notes for a special verdict. *Syme* vs *Aylett.* 105

2 If the evidence be partly written and partly oral, it is right to leave it to the jury. 112

3 The final direction of the court, and not the opinion of one judge, is to be considered as the opinion of the court to the jury 112

4 If a party gets the opinion of the court upon a point of law in one shape, he shall not be permitted to object, that it was not given him in another. *M'Williams* vs *Smith.* 123

5 Though the opinion of the court below appears to be confined to one point, yet if it appears, upon the whole record, that the judgment is substantially right, it must be affirmed. *Davies* vs *Miller* 127

6 The jury have a right to decide on the weight of the testimony; and the court only decides whether it is admissible? *Eagle* vs *Indiana.* 561

PRISONERS.

1 If the debtor be able to pay his own prison fees, the jailer cannot demand them of the creditor. *Rose* vs *Shore.* 540

2 And in such a case, if the creditor has paid the fees to the jailor, he may recover them back in an action for *money laid and received* although he had given a bond for payment of them. 540

PROCESS.

A writ cannot issue from one district court into another district; although it be against joint defendants. *M'Call* vs *Turner.* 133

PUBLIC DEBTORS.

Interest is not due upon the damages, until after judgment against a public collector. *Gaskins* vs *Commonwealth* 194

REPLEADER.

1 If the defendant is sued as *heir* and *devisee*, and pleads *that he has no assets by descent*, on which the plaintiff takes issue, and a verdict be found for the defendant, a repleader shall be awarded; because the issue has only tried the right to the descent, and not to the devise. *Baird* vs *Mattox.* 257

2 A repleader is to be awarded in every case where the right has not been decided 268

3 And this although no motion is made in the court below. *Baird* vs *Mattox.* 257

4 No repleader will be awarded where the pleadings do not shew a cause of action in the plaintiff. *Cabell* vs *Hardwicke.* 345

REPLEVIN writ of

1 The court may hear evidence after verdict, in case of a replevin, in order to shew that the landlord distrained for more rent than was due, and to confine the judgment to the rent

rent only. *Maxwell* vs *Light*. 117

2 *Quere*. If the defendant prays a *retorno habendo* in replevin, he can claim a judgment for double rent. *Blincoe* vs *Berkeley*. 404

REPLEVY BOND.

1 Executors may maintain an action of debt, upon a three months replevy bond, payable to their teſtator. *Booker* vs *M'Roberts*. 243

RIGHT WRIT OF.

1 A Special verdict may be found in a writ of right. *Shaw* vs *Clements*. 429

2 The Jury may aſſeſs damages in a writ of right. *Shaw* vs *Clements*. 429

3 Proceedings, in a writ of right may be had at rules. *Shaw* vs *Clements*. 429

4 If the demandant, in a writ of right, neglects to ſet forth the boundaries in his count, it will be error after verdict. *Beverley* vs *Fogg*. 484

SHERIFF.

1 If there be a judgment, for too much money, againſt the ſheriff, on account of moneys received by his deputy on an execution, he can not recover the amount of that judgment againſt his deputy; for he ſhall not by ſubmitting to an erroneous judgment, ſaddle the deputy with it. *Drew* vs *Anderſon*. 51

2 If to an execution againſt a former ſheriff, the new ſheriff returns that he has taken lands, which were claimed by another perſon; that he has ſummoned two juries on the title, who diſagreed and therefore rendered no verdict; that not having any directions from the agent he *had* proceeded no farther; and that he could find no other property; This is not ſufficient to prove the *inability* of the ſheriff, ſo as to ground a judgment againſt his ſecurity. *Preſton* vs *The Auditor*. 471

3 The high ſheriff againſt whom judgment has been obtained, on account of the miſconduct of his deputy, may maintain a motion againſt his deputy, under *the* act of 1793. *Shelton* vs *Ward*. 538

Vide EVIDENCE. No. 5

SLAVES.

1 In order to annex ſlaves to lands, it was neceſſary that co-extenſive eſtates ſhould be given in both. *Dunn* vs *Bray*. 338

2 Names of ſlaves taken under execution ſhould be endorſed on the writ. *Echols* vs *Graham*. 492

STATUTES.

Are to be conſtrued, as near the reaſon of the common law as may be. 102

STERLING DEBT.

A ſterling judgment may be reduced into currency at the

the time of entering judgment on the forthcoming bond.
Scot vs *Hornsby*. 42

SURETY.

Vide EXECUTION.

If the plaintiff has judgment againſt a principal and ſecurity, on which a *fi: fa:* iſſues and property is taken, if the plaintiff releaſe the property and gives a further day to the principal, againſt the conſent of the ſurety, the ſurety is diſcharged. *Baird* vs *Rice*. 18

2 The ſecurity is entitled to judgment againſt the principal for the ſame ſpecific thing, which he has been adjudged to pay himſelf. *Graves* vs *Webb*. 443

TRUSTEES.

Truſtee of a certificate, for a particular purpoſe, cannot apply it in diſcharge of other demands due himſelf.
Woodson vs *Payne*. 570

USURY.

1 A being indebted by bond to B. in £ 445 : 11 : 2d ſterling, on the 17th day of December 1787 aſſigns him C's. bonds for £ 780 currency at the agreed value of £ 382 : 8 2d ſterling and gives a new bond with too ſecurities for the balance of £ 106 : 17 : 2 ſterling, payable in March following; this is uſury.
Gibson vs *Fristoe*. 62

2 In ſuch a caſe it is ſufficient if the verdict finds facts amounting to uſury; altho' the jury do not find the corrupt agreement in technical words. *Gibson* vs *Fristoe*. 62

VARIANCE.

1 Where the declaration was for £ 125 on or before the firſt day of April then next enſuing the date of the obligation with intereſt from the 1ſt day of January then next enſuing the date of the obligation; and the obligation was for payment of £ 125 with intereſt from the 1ſt of January on the firſt of April next, this was held no variance.
Hammett vs *Bullitts Exrs.* 548

2 *Quere*. If there be no profert of the deed and the defendant takes over, he can take advantage of a variance by demurrer, or ſhould plead the variance? *Mason* vs *Crump*. 575

3 If one of two executors refer a matter in his own right, and one in right of his teſtator: and the referees thereon, award a ſum of money to himſelf, and another to him and his co-executor, the award is good; and he may ſue upon the covenant in his own name, and there will be no variance. 575

VERDICT.

1 If the agreement of the parties

parties, that the jury may render a privy verdict, be substantially performed, it is sufficient. *M'Murray* vs *Cneal.* 246

2 If, in ejectment, the jury find for the plaintiff one cent damages the court may extend the verdict and make it read, *We of the jury find for the plaintiff the lands in the declaration mentioned and one cent damages.* 246

2 If the counsel on both sides agree to certain facts to be found specially, and the jury notwithstanding find a general verdict, it is a good cause to move for a new trial; and if omitted, in the court of law, it will be a proper ground for an injunction. *Wilson* vs. *Rucker.* 500

WILLS.

1 A will of personal estate revoked by a subsequent will, not written or subscribed by the testator, but which was proved by one witness only to have been prepared by the testators directions, corrected by his order, and which he afterwards declared to be his last will. *Glasscock* vs *Smither* 479

2 *Quere* if there be several clauses in a will, and some of them devising lands are written in the testators own hand, although the others are not, the devise of the land will be good without two witnesses? *Beverley* vs *Fogg.* 484

WORDS.

The same words used in different parts of the will, have the same meaning. 13

WILLIAM & MARY COLLEGE.

1 The decision on the motion for the *mandamus*, was upon the merits; and therefore as Bracken had no right to the office, he had *no* title to the salary. *Bracken* vs *William & Mary College.* 161

Quere, If this College is not upon public establishment. 161