REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

DANIEL CALL.

VOLUME SECOND.

RICHMOND:
Printed by *THOMAS NICOLSON.*
M,DCCC,II.

District of Virginia to wit:

BE it remembered, that on the twenty fourth day of May, in the twenty ſixth 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*, by *DANIEL CALL*, In conformity to the act of the Congreſs of the UNITED STATES, entitled, *An act, for 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 the Diſtrict of VIRGINIA.

To the Honorable Edmund Pendleton *Esquire,*

PRESIDENT *of the Court of Appeals.*

SIR,

The gratitude of a young Author for a Friend and Benefactor, who had directed his early studies, naturally led me, to address the former volume of this work, to the Gentleman, whose name is prefixed thereto. The share you have had in the decisions contained in both, independant of the high marks of confidence and approbation, which you have received from your Country, during the course of a well spent Life, obviously points you out, as the person, to whom, above all others, I ought to inscribe the present publication. In which fidelity has been my chief object; and, through the politeness of the Judges, I hope, I have been able to attain it. That you may long continue to occupy the great Station, which you hath hitherto filled, with such distinguished reputation to yourself, and benefit to the Commonwealth, is the sincere wish of Sir,

Your most ob't Servt.

Daniel Call.

RICHMOND,
AUGUST 28th, 1802.

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Page	17,	Line	8, for *debts* read *debits*.
	33,		20, for *enſure* read *enure*.
	37,		15, for *as is* read *is as*.
	80,		22, for *ſon* read *ſon's iſſue*.
	105,		ſeven lines from the bottom, for *to the ſurplus: to one fourth of which, the defendant was entitled,* read *to the ſurplus of which, the defendant was entitled one fourth*.
	110,		four lines from bottom in note for *drawee* read *drawer*.
	113,		16, leave out *currency*.
	119,		7, for *intereſt be* read *intereſt to be*.
	135,		27, for *deviſes* read *deviſees*.
	139,		18, for *the defendants* read *the creditor defendants*.
	147,		16, for *land* read *laid*.
	148,		4, for *ower* read *owner*.
	168,		ſix lines from the bottom for *deviſe* read *deviſee*.
	276,		3, of the caſe of Mayo *vs* Clark inſtead of *for altering* read *concerning*.
	381,		9, for *impreſes* read *impoſes*.
	455,		7, for 1. *Roll*, read 2. *Roll*. and line 28 for *creditor* read *creditors*.
	468,		ſix lines from the bottom for *paſſages* read *paſſage*.
	484,		19. for *it all* read *it at all*; and line 33 for *they* read *the ſlaves*.
	487,		five lines from the bottom after *mentioned* read *in*.
	544,		two lines from the bottom for *on account* read *by reaſon*.
	545,		16, for *ſlept* read *ſlept*.
	582,		10, for *conſtructing* read *conſtruing*.

CASES
ARGUED AND DETERMINED
IN THE
COURT of APPEALS
IN
OCTOBER TERM OF THE YEAR 1799.

FOX *& al. against* COSBY.

COSBY and Gregory as surviving partners of James Mills & Co. brought suit in the District Court, against John Fox the heir at law of John Fox deceased, and Ann Fox, William Fox, Thomas Booth Fox and Henry Fox his devisees, upon a bond given by the said John Fox deceased, wherein he bound himself and his heirs for payment of the sum of £444:4:9½. The writ was executed on John Fox, Ann Fox, William Fox, and Thomas B. Fox, and, upon their failing to appear, the conditional order was confirmed against them, in the clerk's office. At the next court the following entry was made "on the motion of the defendants by their attorney, who "pleaded *payment made by their ancestor and testator*; to which the plaintiff replied generally, "It is ordered that the judgment obtained in the "office against them be set aside." At the next court, John Fox, on the plaintiffs motion, was appointed guardian to the defendant Henry Fox; and, as to him, the plea of payment was withdrawn, and the cause sent back to the rules for further proceedings to be had therein, with leave to the other defendants *to plead a new plea setting forth or denying assets.* A rule to plead, was afterwards given, in the clerk's office, to the defendants; who failing to comply therewith, the plaintiff at a subsequent rule day, took judgment by

If defendant obtains leave to amend his plea, he may elect to make the amendment or not as he pleases; and if he fails to do so, the former plea is not withdrawn but the issue on it should be tried.

Quer. What proceeding should be used in order to compel an infant defendant to appear and plead?

It is error to take judgment against an infant defendant by default, when he has not been arrested, or appeared by his guardian, notwithstanding

Fox, *vs.* Cosby.

by *nil dicit;* which not being set aside, at the succeeding term, stood confirmed.

The defendants afterwards petitioned this court for a writ of supersedeas; and for cause assigned, "that the judgment was entered finally against "all the defendants, although the plea of pay- "ment had only been withdrawn as to one of "them; whereas no judgment could legally have "been entered until the plea of payment had been "tried, and a verdict found thereon."*

one has been appointed, by the court, to defend him in the suit.

WICKHAM for the plaintiff. Made two points, 1. That an order was taken at the rules against an infant defendant; which he submitted could not be done. 2. That the judgment at the rules was against all the defendants; which he insisted was wrong, as three of the defendants had plead payment, and the plea not being withdrawn, ought to have been tried, as to those defendants. For the leave to plead a new plea, if not exercised, was no waiver of the first plea.

CALL *contra*. It is the constant course in all the courts to take orders at the rules against infant defendants as well as against adults; and no distinction in point of practice is ever made between them. The leave taken, by the other defendants, to plead a new plea was a waiver of their former plea. But if this be not so, the judgment is certainly right as to the infant defendant. Because the judgment, at rules, is in that case to be considered, as only applicable to him. For the addition of the letter *S*, to the word defendant, is only a misprision of the clerk; (as the setting aside the office judgment could not apply to the infant defendant, for none had been given against him; and therefore the entry could only relate to those against whom the office judgment had been rendered,) which being apparent upon the record, the court will not regard it; but will consider the case in the same manner, as if the letter *S* had not been added; and then it will be a judgment against the infant defendant only; and

the

the cauſe will remain, upon the iſſue docket, as to the other defendants; and as to them may be tried hereafter, if it is found neceſſary.

WICKHAM in reply. The order at rules is certainly againſt all the defendants, which for the reaſons before given was clearly wrong. If the contrary were true, and the cauſe as to the defendants who plead payment was ſtill on the iſſue docket, it might be made to appear by writ of *certiorari*, that the reverſe is unqueſtionably the caſe; and the whole cauſe has been decided on by the order, at rules, notwithſtanding there was a good plea for ſome of the defendants.

Curia advult.

PENDLETON Preſident delivered the reſolution of the court to the following effect.

There is clearly error as to the four defendants who are adults. Their plea of payment is not waived. The leave to plead additional matter preſcribed in the order, left it optional in them to make uſe of it or not as they thought proper; and therefore they could not be in default, for not availing themſelves of the privilege: But on their failing to file a further plea, the iſſue, on the former, ſhould have been tried in court.

The caſe of the infant defendant has ſome difficulty; but ſince it does not appear, that he was arreſted, or ever appeared to the action (for if the plea for the defendants generally, comprehends him, which is doubtful, that appearance, being by attorney, was certainly error and rectified afterwards,) a guardian was appointed by the court on the motion of the plaintiffs; but it is not ſhewn that he acted, or ever had notice of the appointment. The appearance of the infant by him, at the rules, is not ſtated, but a general rule to plead given againſt all; and at the next rules, the judgment by default is entered. Inſtead of which, the clerk ſhould have certified, that upon the rule to plead no plea had been filed

for

Fox, vs. Cox.

for the adults, nor any appearance entered for the infant, by his guardian. Upon which the court would have proceeded to try the iſſue as to the former, and have taken ſteps to compel the guardian to defend the infant, if they had power to do ſo, or have aſſigned another guardian for the purpoſe. The judgment therefore is to be reverſed, and the cauſe remanded to the Diſtrict Court for further proceedings to be had therein.

The judgment was as follows,

"The court is of opinion that there is error "in the ſaid judgment as to John, Ann, Wil- "liam and Thomas Booth Fox defendants in the "original ſuit, in this, that their plea of payment not "having been waived, although they had leave to "plead at the rules further matter preſcribed by "the court, the permiſſion was optional in them, "and they could not be in default for not availing "themſelves of it, but on their failing to file a further "plea, the cauſe ſhould have been tried in court up- "on the former iſſue joined. And that there is al- "ſo error in the ſaid judgment as to Henry Fox "the other defendant in the ſaid ſuit, who being "an infant is not ſtated in the record to have "appeared by his guardian to defend the ſuit, "nor does it appear that the guardian appointed "by the Court, on the motion of the defendants "ever acted under, or even had notice of ſuch "appointment, and therefore inſtead of the judg- "ment by default entered at the rules againſt the "infant, a motion ſhould have been made to the "court for proceeding againſt that guardian, or "the appointment of another for the defence. "Therefore it is conſidered that the ſaid judg- "ment be reverſed and annulled and that the "plaintiffs recover againſt the defendants their "coſts by them expended in the proſecution of "their writ aforeſaid here. And it is ordered that "the cauſe be remanded to the ſaid Diſtrict Court "for further proceedings to be had therein."

FLEMINGS.

FLEMINGS, *against* WILLIS.

Parol evidence admitted to explain the meaning of the parties, in marriage articles, when a conveyance is called for.

LEWIS WILLIS and Anne his wife and John Taliaferro brought a bill, in the High Court of Chancery, ſtating, that on the 17th, of April 1762, the plaintiff Anne, daughter of Charles Carter, being about to intermarry with John Champe jr, ſon of John Champe, it was agreed between the fathers, that the ſaid Charles Carter ſhould pay the ſaid John Champe, jr. £ 1000; and that the ſaid John Champe, the father, ſhould give to his ſaid ſon John Champe jr. (amongſt other things) in fee ſimple, *all the lands which he held in the county of King George above Poplar Swamp, and which he had purchased of Jeremiah Bronaugh.* That notwithſtanding this agreement by indenture, of the ſame date, it was ſtipulated among other things, that in caſe the marriage took effect, the ſaid John Champe and his heirs ſhould convey to his ſaid ſon John Champe jr. and his heirs, *all that part of the ſaid John Champe's tract of land, whereon he then lived, lying above the eaſtern branch of the old mill run called Lambs creek, and the land bought of Bronaugh thereto adjoining.* That there is a material variance, between the original agreement and the ſaid indenture, in this, "that the ſaid John Champe held "diſtinct tracts of land bought of Jeremiah Bro- "naugh and lying above Poplar Swamp, in the "county of King George aforeſaid, and all of "them except one called the farm containing by "eſtimation acres of land adjoining to "the ſaid tract on which the ſaid John Champe "lived on the day of the date of the ſaid Inden- "ture; and by the aforeſaid deſcription of Bro- "naugh's land thereon, the ſaid farm although diſ- "tant from the manor tract, only a quarter of a "mile and ſeparated only by a ſmall ſlip of land of

"William

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"William Bronaugh, is omitted." That John Champe the father died, leaving William Champe his eldeſt ſon and heir at law, without having executed a deed agreeable to the original agreement or even according to the ſaid Indenture, but after having deviſed an eſtate tail only *in all the lands above Poplar Swamp*. That the ſaid John Champe jr. alſo departed this life in 1774, and by his laſt will deviſed the whole of his eſtate real and perſonal to the plaintiff Anne for life, with a remainder in tail male in the Farm aforeſaid to John Taliaferro.

That the plaintiffs applied to the ſaid William Champe, after the death of the ſaid John Champe, for a deed; which he always refuſed, and died in 1784; having by his laſt will deviſed the omitted tract called the *Farm* as aforeſaid to Caroline, Jane, Lucy and Mary Fleming; to whom the plaintiffs have likewiſe applied to execute a deed *according to the true intent and meaning of the ſaid Charles Carter and John Champe, and the will of the ſaid John Champe junior;* but that they alſo have refuſed, alledging that the ſaid Indenture cancelled all contracts preceding it: Whereas the plaintiffs charge, "that before the ſigning of "the Indenture aforeſaid, the ſaid Charles Carter objected to the expreſſion *thereto adjoining*, "as excluding the Farm aforeſaid, and that he "aſked the ſaid John Champe what he meant by "Bronaugh's lands, who replied, *all the land in "King George county above Poplar Swamp*, and "that the ſaid Charles Carter immediately and "openly deſired a certain John Robinſon who "was preſent at ſigning, to take notice of what "then paſſed." The bill therefore prays a conveyance, according to the original agreement, and the will of the ſaid John Champe jr. that is to ſay, for, not only the tracts of Bronaugh in the ſaid Indenture mentioned, but for the *Farm* tract alſo.

There

Flemings, vs. Wills.

There is a second bill, which agrees in substance with the first, but states further, that the said John Champe the father bought of Bronaugh three tracts of land, one of which actually adjoined to the tract on which the said John Champe lived, and the other two were only separated therefrom by a small slip of land, not more than four hundred yards wide. That the whole of the said three tracts only contained 439 acres, and were always considered as appendages belonging to and a part of the manor plantation of the said John Champe the elder, and were never spoken of as distinct estates from the same. That an attorney was directed to draw the articles, agreeable to the original agreement, which being drawn and ready to be executed, on the day of the marriage, the said Charles Carter objected as is mentioned in the first bill to the words *thereunto adjoining*; and received the answer in the said first bill stated. Of which the company were desired to take notice. That after the death of the said John Champe the elder, the said John Champe jr. took possession of the whole of the land bought of Bronaugh, which he quietly held until his death; comprising a period of 17 years. That the said William Champe never was possessed of the said lands bought of Bronaugh; and that his claim was only founded on the *mistake*, in the letter of the marriage articles. That therefore either the explanation of the articles given in the bill should be admitted, or should be considered as a new and additional marriage agreement, which had been in part carried into execution, by the long possession of the said John Champe jr.

The answer admits the purchase of the three tracts from Bronaugh; that one of them (to wit, that which is first mentioned in Bronaugh's deed) joins the tract, on which the said John Champe resided, called Lamb's creek; but that the other two tracts which adjoin each other are separated from the first mentioned tract and from the nearest part of the old Lamb's creek tract, more than

three

Flemings vs. Willis.

three quarters of a mile, and full three miles from the manſion houſe where the ſaid John Champe dwelt. That he ſettled a quarter and negroes thereon ſoon after the purchaſe and before the marriage articles. That from the time of ſettling the quarter it was diſtinguiſhed from the manor plantation by the name of *the Farm*. That the defendants do not admit any *miſtake or ambiguity* in the marriage articles; but the words *thereunto adjoining* diſtinguiſh the tract firſt mentioned, in Bronaugh's deed as aforeſaid, from the other two called *the Farm*. That great inconveniences would reſult, from receiving parol evidence to explain a deed and extend its operation, contrary to what the plain words would warrant. That the defendants admit, that John Champe jr. took poſſeſſion of the farm tract, which he held for ſometime; but how long they do not know; perhaps until his death; they preſume however that this was owing to William Champe's being ignorant of his rights. That the defendants admit the deviſe by the ſaid William Champe to themſelves. To this anſwer the plaintiffs replied generally.

The depoſition of Chadwell ſtates, that he was in the employ of John Champe the elder; that the land on which the manſion houſe ſtood and that bought of Bronaugh on the South ſide of the run were conſidered as the ſame plantation, overlooked by an overſeer, who reſided at the manor plantation; that the two tracts were only ſeparated by a creek and run; and that the run touches the farm plantation; that *the farm* is not more than three quarters of a mile from the Lamb's creek tract. That William Champe never claimed *the farm* tract till a little before his death. The depoſition of Bruce is to the ſame effect.

Jones ſtates, that he drew the articles. That the inſtructions were furniſhed by John Champe and (to the beſt of the deponents recollection) in his own hand writing. That the ſaid Charles Carter called at his houſe for the articles

and

and when the deponent read them over he objected "to the deſcription of Bronaugh's land, as "adjoining to the Lamb's creek tract; ſaying he "apprehended the tract of land called *the farm*, "which was intended to be ſettled on Mr. Champe "by his father, was not adjoining thereto, and "would not be comprehended by the deſcription." To which the deponent replied, that the deed was drawn agreeable to Col. Champe's memorandum, and if any doubt exiſted reſpecting the *farm tract* of land it ſhould be mentioned to, and explained by Col. Champe. Jordan, ſtates that all the lands on both ſides Lamb's creek were conſidered as one plantation, worked by the ſame hands, and overlooked by the ſame overſeer. The depoſition of Robinſon, ſtates, that he was called on to witneſs the marriage articles; that Charles Carter "objected to ſome words; which "he ſaid did not fully mention the lands promiſ-"ed. That the ſaid John Champe the elder an-"ſwered, that there was no occaſion for an al-"teration; for his meaning was to give his ſon "his manor plantation and all his lands above "Poplar ſwamp, and alſo the lands he bought of "Jeremiah Bronaugh, mentioned in the marriage "ſettlement; and alſo all the negroes that ſhould "be on the farm plantation at the time of his "death." That John Champe jr. took poſſeſſion after the death of his father and mother. That he never heard that William Champe ever claimed the diſputed lands; and that the farm plantation is about the half of a mile from Lamb's creek.

Chadwell's ſecond depoſition is ſubſtantially the ſame as the firſt, but adds that *the farm* is not more than 600 yards from Lamb's creek tract. That the land ſold by William Champe to his brother John, called *Grant's* land, lies near the middle of the *farm* land. That the *farm* land does not, in any part, join the land reſerved by Col. John Champe for his ſon William; but lies moſt convenient to the Lamb's creek tract given

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to John Champe. That without the farm plantation and slaves John's part would not be equal to William's. That it was never called *the farm* till Champe bought it of Bronaugh.

The deed from Bronaugh to Champe is for three tracts of land in King George, to wit: one of 153 acres bounded by Rappahannock river, Lamb's creek, and the main road. One other of 151 acres bounded by the lands of Col. William Thornton dec'd and John Grant; and the third of 135 acres known by the name of the Hill's tract bounded by the lands of William Rowley, John Grant and Daniel Grant.

The marriage articles are for "all that part of "his the said John Champe's tract of land, where- "on he now lives, lying above the eastern branch "of the old mill run, called Lamb's creek tract, "and the land bought of Bronaugh *thereunto ad-* "*joining*; together with all the negroes now on "the said land and their future increase, &c."

The deed from William Champe to his brother John Champe is for 93¾ acres, bounded by the lands of Daniel Grant's orphans, and side line of the said John Champe; thence to three saplins, joining the lands of said John Champe; thence to a small oak, joining still to the said Champe's land; thence, joining the land of Daniel Grant's orphans, to the beginning.

MARSHALL for the Appellants. Two questions occur in this cause; 1. Whether parol evidence is admissible at all? 2. Whether, if admissible, the evidence produced is sufficient to maintain the relief sought by the bill?

1. The cases on the first point are numerous. In some it is laid down as a clear principle that parol evidence can in no case be received to contradict a deed; and that it can only be received to rebut an equity. In others, again it is admitted, that where there has been fraud, or a clear mistake, or a secret trust, there parol evidence may also be

received

received to shew it. But in all it has been received with great caution; and none of them has gone so far as the present. *Cheney's* case in 5. *Co.* 68, and *Altham's* case 8, *Co.* 155, are the oldest cases upon the subject, and fully prove the rule. But amongst the modern cases 1. *Wils.* 34. is express. For there was no attempt in that case to contradict the deed, and yet parol evidence was rejected. The case of *Weres* vs *Ansel* in 3. *Wils.* 275 is precisely apposite and needs no comment. That of *Brown* vs *Selwyn Cas. Temp. Talb.* 240, is very much to my purpose. For although that was the case of a will, the circumstances were much stronger than in our case; and yet the parol evidence was not permitted. The general doctrine is confirmed in 1. *Bro.* 84; and upon a full review of all the cases I conclude, the rule to be fixed, that parol evidence shall not be received to contradict or vary the terms of a deed; unless it be in some of the instances which I have before mentioned. For example, in the case of a latent mortgage not inserted in the deed; but that case turns upon the fraud: So in the case of a secret trust, because that affects the conscience of the trustee; or lastly, in cases of oppression imposition or mistake; which are circumstances necessarily to be shewn by parol evidence, or the relief could not be afforded. But no case can be produced, which goes the length of deciding, that property not conveyed by the terms of the deed, can be comprehended therein by the aid of parol evidence, unless some of the ingredients, just mentioned, united in the cause.

2. But if the testimony were admissible, that offered is nevertheless not competent to establish the claim of the plaintiffs. That of Jones is only that he drew the articles according to Champe's instructions; which so far from supporting, the bill goes to defeat it; because it affords a presumption that the articles correspond with the views of the parties. The testimony of Robertson leaves the matter doubtful, and according to one way

of

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of considering his words, the declarations of Champe are consistent with the deed. The reference to the articles seems rather to confine his meaning to the lands therein expressed. At most his testimony is uncertain; and therefore can never be a proper foundation for overturning a fixed rule of law. For if evidence, liable to conjectures and doubt, be introduced into questions, relative to the construction of written instruments, then all the dangers of parol evidence, which the law has so anxiously endeavored to guard against, will be encreased.

RANDOLPH *contra*. The case of *Ross* vs *Norvell* 1, *Wash*, 14, goes the full length, of deciding the principle, we contend for, in this. It proves clearly that the circumstances of each case are to determine, whether parol evidence shall be received or not? The addition to the contract actually made by the evidence there, was as great as that which is desired here. The 3. *Atk*. 388, shews, that either fraud or mistake are proper grounds, for the introduction of this kind of testimony. All the cases, upon the subject, are brought together by Powell, in his book of devises; and from them it appears, that the courts, in England, are relaxing from the former strictness of the rule, in order to attain the justice of the case. The case in *Wils*. is repugnant to that in *Vern*. cited by the court in *Ross* vs *Norvell*; and the effect of the other cases cited by Mr. Marshall, is fully considered by the court in that case, which may now be considered as having established the rule.

Advert therefore to the circumstances. The counsels draft was objected to by Carter, at the time when the articles were about to be signed: and Champe, instead of denying that they were wrong, rather admits it, saying he meant to give the whole tract; and therefore that it was unnecessary to alter them. Consequently, if he did not mean to include the whole, his expression was a fraud; because it was calculated to delude those

to whom it was addreſſed. Beſides the evidence is, that all theſe lands were conſidered as forming one entire tract; and therefore the expreſſion was calculated to embrace them. But what ſtrengthens this opinion is, that William ſuffered John to enjoy them unmoleſted; although, as heir at law, he might have entered into and occupied them himſelf, had he not been conſcious, that they were included in the articles. Robertſon's depoſition is not liable to the interpretation contended for; but expreſſly proves the objection of Carter, and the acknowledgment of Champe as already mentioned. Fleming's vs. Willis.

MARSHALL in reply. I admitted the principle in *Poss* vs *Norvell*; which only eſtabliſhes the caſe of a latent mortgage; and the circumſtances there were extremely flagrant. But that caſe proves nothing, in the preſent controverſy; becauſe here it is ſaid that other property, than has actually paſſed, was meant to be conveyed by theſe articles; and parol evidence is offered in ſupport of it. But the caſes which I cited, prove that it cannot be done. That in *Wils*, was an attempt to prove that other property was included in the grant; but the attempt did not ſucceed. It is ſaid that the circumſtances here are important; becauſe the lands were all conveyed to old Champe, by one conveyance: and therefore that they were meant to be comprehended by the articles. But, although they were all included in one conveyance, ſtill they were different tracts; for they were at a conſiderable diſtance aſunder. It was aſked, if the parties did not mean to include them all in the articles, why did William ſuffer John to occupy them? and I, in my turn, aſk, why if they did conſider them as included did William undertake to deviſe them? Theſe circumſtances prove nothing. At moſt they only ſhew that at one time he miſapprehended the articles, and at another, that he had informed himſelf, upon them. I repeat again, that if parol evidence is admitted at all, it ſhould be clear, diſtinct and pointed; but here the teſtimony offered is equivocal and uncertain,

Flemings vs. Willis.

tain. It may be reconciled with the articles. For if old Champe meant to include the whole why did he particularize them by the words, *the lands purchased of Bronaugh in the settlement?* It would have been enough if he said, the lands bought of Bronaugh; and it was not neceſſary to have added the other words. That addition ſeems to tie up the meaning; and confines it to the articles expreſsly.

Cur: adv: vult:

PENDLETON Preſident delivered the reſolution of the court as follows.

This is a bill for a ſpecific execution of a marriage agreement, in which we are permitted by reaſon and authority (notwithſtanding the agreement was reduced to writing,) to hear parol proof, of what was the real intention of the parties; the governing principle of the decree.

Col. Champe had acquired a large tract of land where he lived; and Poplar ſwamp running through it, he had fixed upon that, as a proper line of diviſion, between his two ſons William and John. By his will, in 1759, he deviſed to William all his lands, in King George, *below*, and to John all *above* Poplar ſwamp; clearly giving, to the latter, the farm plantation in diſpute.

It is obvious that he did not mean to change this land proviſion for John, when he was about to marry in 1762; by taking, from him this ſmall farm of 286 acres, convenient to John, but ſeparated from William's land, by John's whole tract. There was another difficulty occured. If I do not miſtake the poſition of the land, purchaſed of Bronaugh which (according to the depoſitions of Chadwell and Bruce and the deed of Bronaugh) adjoined, it lay below Poplar ſwamp; and under the will would have paſſed to William: To ſecure this to John, was the true reaſon, why Bronaugh's name was mentioned at all; and although Champe, in his inſtructions, or the draftsman,

man, in purſuing them, might embarraſs the literal ſenſe, the intention was, that John ſhould have all the land above Poplar ſwamp, comprehending the farm; and ſhould alſo have the tract below, purchaſed of Bronaugh: Which makes Robinſon's depoſition perfectly intelligible. It was thus, Champe explained it to Carter, who ſo underſtood it, and was ſatisfied. The ſame opinion was entertained by Mrs. Champe; who having a right, for life, to John's land, and not to William's, poſſeſſed the farm until her death, in 1767. How did William underſtand it? He ſuffered his mother to hold it as John's; he afterwards permitted John himſelf to poſſeſs it till his death, in 1774; and then let his deviſees hold it till 1783; when he brought ſuit. But a more direct proof, of his opinion, appears from his deed to his brother, in 1774, for 93$\frac{3}{4}$ acres of land; which the father had purchaſed of John Grant, after the marriage agreement; and which deſcended to William as heir: In the bounds, of which, he calls the farm John's land. Can it be imagined, that if he had conſidered the farm (a ſmall tract of 286 acres detached from his other land) as belonging to him, that he would not have preſerved theſe adjoining 93 acres to increaſe it?

It is urged however that he might be ignorant of his title. But is it reaſonable to ſuppoſe, that he did not underſtand his rights as well in 1763 as in 1783? He was probably the eldeſt ſon, at his brother's wedding; where he heard the converſation between the two fathers, and it is moſt likely he had heard his father, at other times, ſpeaking on the ſame ſubject.

Upon the whole, the decree is a very juſt one; and is to be affirmed.

OZWALD,

OZWALD, DENISTON, & Co.

against

DICKINSON'S Ex'rs.

Where goods are sold by a factor in Virginia for merchants in Britain, it is necessary to state the name of the factor in the declaration.

So if some of the partners reside in Gr. Britain and some in Maryland in America.

And a suit of this kind will be dismissed after issue joined upon the merits, if the fact appear on the trial of the cause.

And it will not prevent the dismission, that there are money counts in the declaration.

THIS was *indebitatus assumpsit* brought, by Ozwald, Deniston and Company, against Dickinson's executors in the county court. The declaration contained four counts 1. For goods, wares and merchandizes sold and delivered to the testator. 2. A *quantum valebat* for the same. 3. For money paid and advanced for the use of the testator. 4. For money had and received by the testator to the use of the plaintiffs. Plea non assumpsit; and issue. Upon the trial of the cause the court, on the motion of the defendants attorney, ordered the jury to be discharged from giving a verdict, and the suit to be dismissed, at the costs of the plaintiffs. To which opinion of the court the plaintiffs filed a bill of exceptions, stating, that "on the trial of the cause, it was given "in evidence, that the goods, wares and merchandizes mentioned in the declaration were "sold and delivered to the defendants testator, "by John Murray factor for the plaintiffs; and "that at the time of said sale or delivery, the "house of Ozwald, Deniston & Co. consisted of "George and Alexander Ozwald, Deniston who "resided in Great Britain, and Robert Dick who "resided in the state of Maryland; and at the "time of bringing the suit all the surviving part-"ners of the said house resided in Great Britain. "That thereupon the defendants counsel moved "the court to dismiss the suit, because it was not "stated in the declaration that the goods, wares "and merchandizes were sold and delivered to "the defendants testator, by John Murray as fac-"tor for the plaintiffs; and that the court ac-"cordingly ordered the suit to be dismissed, and "the jury to be discharged."

There

Ozwald, & co. vs. Dickenson's.

There is an account which the clerk of the County Court has copied into the record and certifies was filed in the cause; but which was not made part of the record, by any act in the County Court; in this account the plaintiffs charge the testator, with various articles of merchandize, and several sums in cash, (the whole account, of *debts* for cash and merchandizes amounting to £ 245: 11,) and give credit for sundry hogsheads of tobacco and a few small sums in cash; the whole amount of credits, for cash and tobacco, being £ 121: 10: 3; thus leaving a balance due the plaintiffs of £ 124: 0: 9.

The plaintiffs appealed from the judgment of the County Court, to the District Court; where the judgment was affirmed, and from the judgment of affirmance, the plaintiffs appealed to this court.

CALL for the appellant. The District Court in affirming the judgment of the County Court erred in two respects. 1. Because the act of Assembly only relates to cases, where all the partners lived in great Britain and Ireland; but here the bill of exceptions states that one resided in the state of Maryland: and this being a mere positive law, relating only to matter of form will be construed strictly. 2. Because there were two money counts in the declaration, and the exhibits copied into the record shew that there was a demand for cash advances: Therefore at most, the court ought only to have directed the jury to disregard the counts for merchandize, and to confine themselves to those for money only. Instead of which, they have dismissed the whole suit; which they had no authority to do; as the plaintiffs had a right clearly, to proceed upon the money counts.

WICKHAM *and* BOTTS *contra*. The act of 1755 *chap.* 2. *Sect.* 7, is express, that the name of the factor shall be inserted, under pain of having the suit dismissed with costs; and of course the plaintiffs, by omitting to insert it in the pre-

Ozwald & co. vs. Dickenſon's.

ſent caſe, ſubjected themſelves to the inconvenience of a diſmiſſion, That the objection was not taken till the trial of the iſſue makes no difference; becauſe the defendant could not tell for what the ſuit was brought, until it was made known upon the trial of the cauſe? and therefore it is within the reaſon of the caſe of *Corrie's* exrs. vs *Campbell* 1. *Wash.* 153. That one of the partners lived in Maryland will not alter the caſe; becauſe he might have been a ſecret partner only, and in point of fact it does not appear that he was known to the defendant, until the trial of the cauſe. So that if this conſtruction ſhould prevail, the law which was beneficial to the citizens might be totally evaded. What we contend for has been decided in the Federal Court, upon a ſerious argument, in a caſe where a verdict was found ſubject to the opinion of the Court upon this very point. The objection that there are counts for money, as well as merchandize, has no weight in it. Becauſe by reference to the exhibits it appears that there were payments in tobacco and other things equal to the money advances; and therefore, ſetting thoſe againſt each other, the remainder will be goods and merchandizes only; and ſo, the caſe will be a ſuit for goods actually ſold and delivered here, by the factor of the plaintiffs; which brings it preciſely within the words of the act of Aſſembly. Beſides the whole ſcope of the record ſhews evidently, that to have been the true nature of the ſuit; and that the money counts were not intended to be relied upon. The declaration does not recite the names of all the partners; and therefore the evidence, which went to ſhew that the debt was due to others, as well as thoſe actually named in the declaration, was irrelevant and improper.

CALL and WARDEN in reply. Either the exception ſhould have been taken by motion, before plea pleaded, or it ſhould have been pleaded in abatement. For it was too late to inſiſt upon it, after iſſue had been joined upon the merits, and the

cauſe

cause was actually under trial. It is no excuse to say, that the defendant could not foresee what would be the charges against her, and therefore could not be prepared to make the objection, until she was informed thereof upon the trial; because she might have refused to plead until the plaintiffs furnished her with a sight of the account; in which case the court would have staid proceedings until it was done, or else she might have admitted that these articles were sold to her testator, and averring that they were sold by a factor, have denied that the plaintiffs sold any other goods to the decedent. By both which methods, the objection, might have been made, at an earlier stage of the cause; and consequently ought to have been urged before: Especially as the exception is but a mere dilatory, tending to delay justice; and therefore not to be favored. At any rate, the plaintiffs had a right to go to trial upon the money counts. This was a right which the county court could not take from them; although they had not produced a tittle of evidence to support these counts. For still, they had a right to submit their case to the jury; who could only find a verdict against them, in case they had no evidence. Therefore the County Court, by arresting the proceedings and dismissing the suit, exercised a power which did not belong to them. But, in point of fact, it appears that there was testimony upon those counts; and the notion, contended for on the other side, that as there had been payments, which if opposed to the cash advances, would counterbalance them and leave only the goods, ought not to influence the case in the slightest degree. For why garble the account for the sake of operating injustice and delay? and, if it was to be garbled at all, why not oppose the payments to the goods, as well as to the cash? For there is surely as much reason for the one as the other. No such attempts however should be made; but the account should stand as it was; and then there was a clear demand for cash advanced; which applied to the

money

Ozwald & co. vs. Dickinson's.

money counts: And therefore the plaintiffs ought to have been heard upon them. The act does not in terms, provide for a case like this, where some of the partners lived in Great Britain, and some in America: Therefore, as it is a law, whose operation tends to prevent the speedy attainment of justice, upon a mere matter of form, it ought not to be taken by equity; so as to affect cases not within the express letter of the statute.

Cur: adv: vult:

PENDLETON President delivered the resolution of the court as follows.

Much unnecessary time was employed in the argument of this plain case.

1. The time and mode of making the objection are excepted to; and it was said that the defendant should either have pleaded in abatement, or demurred, or moved for the dismission at an earlier period.

Whereas it is obvious that the Legislature did not intend there should be any pleading on the occasion, but that when the case appeared, a dismission should take place.

A plaintiff could scarcely be supposed to state a case in his declaration which would subject his suit to a dismission on view of it. But on the trial he must prove the real case, which then, and not before, appearing to be within the act, it was the proper and only time to move for the dismission.

2. It was said the account was of mixed articles consisting of cash and goods; that the declaration has two counts for goods, and two, for money lent, and for money received to the use of the plaintiffs; and therefore that the court should not have dismissed the suit entirely, but suffered the plaintiffs to give evidence as to the cash articles, which are not within the act of Assembly.

In answer to which, it was said by the counsel for

for the appellee, and perhaps correctly, that if the declaration was for goods sold by a factor here, for a resident in Great Britain, and the factor was not named, the dismission must take place, although there were ever so many other demands in the declaration.

But suppose a partial dismission admissible, and the goods be taken from the declaration and account, then the plaintiffs will be found indebted £47:11:9; for so much the credits exceed the other articles. However the plaintiffs themselves consider their demand to be for goods, and so they state it in their bill of exceptions.

3. A third objection was that all the partners do not reside in Britain, but Dick, one of them, in a sister state in America. The name of this partner does not appear in the ostensible firm of the company; but he is what is called a latent or secret partner, unknown to be one perhaps by every person, but the company themselves, and therefore not usually to be regarded in questions of this sort, between the company and others.

Again a factor dealing for a resident in Maryland is equally within the mischief intended to be remedied, by considering it as a dealing with the factor himself. Among others, one important effect is to take the case out of the saving, in the act of limitations, in favour of persons out of the country; which extended to the partner in Maryland as well as to those in Britain.

And since the exceptions state, that at the time of commencing the suit all the surviving partners resided in Great Britain, it is strictly within the letter of the act, which describes the residence of the person or persons in whose names the suit is brought.

The judgment is unanimously and without difficulty affirmed.

EPPES

EPPES
against
DEMOVILLE.

The heir may maintain an action of debt on a bond to his ancestor conditioned for quiet enjoyment of lands, where the breach has happened since the death of the ancestor.

ROYAL as executor of Peter Eppes deceased brought suit against Demoville as administrator of Temple Eppes deceased, upon a bond given by the said Temple Eppes to the said Peter Eppes deceased, conditioned for the quiet holding and enjoying a plantation devised to the said Peter Eppes deceased, by his father Lewellen Eppes. The defendant plead payment by his decedent; and fully administered, except as to £86:15:10¼. The plaintiff took issue; and at a subsequent court by consent of the parties, the declaration was withdrawn, and a declaration upon the same bond was filed in the name of Peter Eppes son and heir at law and devisee of Peter Eppes deceased: Which assigned for breach of the condition, a recovery and eviction, by Demoville and his wife, who was grand daughter and heir of the said Temple Eppes deceased. Whereupon without any other pleadings a jury were charged, who found a verdict for the plaintiff, which was set aside on the defendants motion and a new trial awarded. At a future term another jury were charged, without any further pleadings, who returned a verdict for the plaintiff "for the debt in the declaration mentioned "to be discharged by the payment of six hundred "and seventy nine pounds and one penny damages "the value of the assets in the hands of the de-"fendant." The defendant moved to arrest the judgment, and for cause assigned, that the action of the plaintiff "is founded on a bond given to "his ancestor, whereas by law no such action is "maintainable by the heir on a penalty. The "penalty of the bond being a sum in gross which "after the death of the original obligee could on-"ly be sued for by his personal representative." The District Court gave judgment for the defendant;

dant; from which judgment the plaintiff appealed to this court.

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MARSHALL for the appellant. It is clear that an action of covenant would have lain for the heir on account of the eviction, which happened in his own time and not in that of his anceſtor. But there is no real difference between an action of debt and an action of covenant in a caſe like this. For whatever form the inſtrument may wear, it is ſtill a covenant; and an action of debt founded on it, is ſubſtantially an action of covenant: Becauſe by the act of Aſſembly the plaintiff cannot, by bringing an action of debt, have his penalty; he can only have the damages aſſeſſed by the jury; which puts him in that reſpect in the ſame ſituation, as if he had brought an action of covenant; But to put him completely ſo, inſtead of being confined to one breach only, as formerly, he is at liberty to aſſign as many as he thinks proper, and he is to have a *ſcire facias* for new cauſes of action as they ariſe. In all which reſpects it exactly reſembles covenant. So that, in fact, it is ſubſtantially an action to recover, not a ſtipulated certain ſum, but uncertain damages for the violation of the contract, in proportion to the loſs ſuſtained: Which is the eſſence of an action of covenant. It is therefore an action of debt in name, but of covenant in effect. It is an action which in form, affects to aſſert the penalty, but which in ſubſtance can only enforce damages commenſurate to the injury. The difference therefore between the two actions, in caſes of this kind, is imaginary, and not real.

The bond, in this caſe, was a covenant which ran with the land, for the benefit of the heir; and there is nothing perſonal in it: But the owner of the land is entitled to all advantages ariſing from it. The damages are, in lieu of the land; which belonged to the heir, and were never perſonal aſſets: but the condition being broken in the time of the heir, and not in the life time of his

father,

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father, the heir was the only perſon entitled to redreſs, and the executor had no cauſe of action. For the covenant being knit to the eſtate, according to the expreſſion of legal writers, deſcended on the heir; and he alone could take advantage of it, 3. *Bac. ab.* 20. 2. *Lev.* 92. 1. *Ventr.* 175.

The analogy between the caſe of a *Nomine Pœnæ* put in *Bacon (ub: sup:)* and the caſe at bar is particularly ſtrong. For that is a penalty as well as this; that is a ſum certain, and ſo is this; that is a ſecurity for payment of a deſcendible rent, this of a deſcendible title; that goes to the heir as incident to the inheritance, and this upon the ſame principle muſt go to the heir alſo, as being equally annexed to the inheritance. But it would be idle to ſay, that he ſhould have the right and not the remedy to aſſert it.

Upon principle therefore nothing is more clear, than that the action is ſuſtainable; and if there be no precedent of an action of debt brought by an heir in ſuch a caſe, it is believed that no deciſion to the contrary can be produced. In which caſe the principle ſurely ought to prevail.

WICKHAM *contra.* The heir cannot bring debt on a bond to the anceſtor, although the condition may reſpect lands. For it is a *choſe* in action, and veſts in the executor, as the obligation is for a ſum in groſs, and the condition is for the benefit of the obligor. It is therefore *debitum in præsenti*, *Litt. Sect.* 512; and a releaſe of a perſonal action would diſcharge it, *Co. Litt.* 292 *(b.)* The mere right to the damages, if it be admitted that they belong to the heir, will not alter the rule, and give him an action of debt upon the bond. For there can be no doubt that the executors is entitled to the money due on a mortgage, and yet he cannot bring ejectment for the lands; but the heir muſt do it: Which clearly proves that the legal diſtinctions are preſerved.

If

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If a bond be given to A, with condition to enfeoff B, and the condition is broken, B, cannot ſue upon the bond although the condition is for his benefit. So if there be a bond to A, for payment of a ſum of money to B, the latter cannot ſue upon the bond at law, but would be driven into a Court of Equity; and yet he may releaſe the debt. *Bro. Oblig. pl.* 72. It was upon this idea, that the caſe of *Peter* vs. *Cocke*, 1. *Wash.* 257 proceeded. The argument, that it was a covenant running with the land proves nothing. For if that circumſtance enabled the heir to ſue upon the bond, then an aſſignee of the bond might likewiſe. But that the latter could not maintain an action on it before the act of 1795, was ſettled by the caſe of *Craig* vs *Craig*, * in this court at the laſt term. The doctrine, contended for, would create confuſion and embarraſsment. For ſuppoſe one breach in the lifetime of the anceſtor, and another in the time of the heir; if the latter can ſue, the former will loſe his action: Becauſe the judgment is to ſtand as a ſecurity, for future breaches; and the executor could not ſue a *scire facias* upon a judgment in favour of the heir. Beſides, it is an argument of ſome weight, that no action of debt was ever brought by an heir on a bond to his anceſtor. Perhaps it may be queſtionable, whether an action of covenant would lie, for an heir, upon a bond to his anceſtor? and probably, the only caſe, where the heir could maintain ſuch an action, is where the breach ariſes out of a covenant contained in the conveyance for the land. However, be that as it may, this is not covenant but debt; and the latter cannot be maintained by the heir. For the form of actions is not to be departed from. This was ſettled in *Byrd* vs *Cocke*, 1. *Wash.* 232; and the act of Aſſembly does not confound actions of covenant and debt together. The caſes from 3. *Bac.* *and*

* 1. Call's rep. 483.

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and 2. *Lev.* prove indeed, that the heir may have the benefit of covenants real, which run with the land; but they decide nothing in the preſent caſe. The caſe of a *nomine pœnæ* is anomalous; but at any rate it will not diſprove the doctrine which we contend for: Eſpecially, as the book does not diſtinguiſh whether the heir may bring debt or covenant.

The declaration does not ſtate that the eviction was by one entering as heir to Temple Eppes; and therefore is not certain enough.

There is no iſſue in the cauſe. For the firſt declaration was withdrawn, and no new plea entered to the ſecond. Which conſequently was never plead to at all; and therefore, the parties never were at iſſue on it. For the pleas to the firſt declaration do not apply to it.

RANDOLPH in reply. The equity of the caſe is clearly on our ſide, and therefore the law muſt be very pointed, to make us loſe the benefit of our judgment, on a mere technical exception. There is no ground for the objection, that the eviction is not ſufficiently ſtated in the declaration, as the averment is exactly, what, Mr. Wickham ſays, it ought to be. For the declaration ſtates the whole matter ſpecially, and that the heir of Temple Eppes ſued the plaintiff, and turned him out of poſſeſſion.

Although debt cannot be brought by the heir on money bonds payable to the anceſtor, it is otherwiſe, as to bonds which concern lands; and in this caſe the heir is named expreſsly, for the bond is payable to the anceſtor, his heirs, &c; which was proper, as it was for his benefit; and he is now the only perſon to whom compenſation for the loſs is due. If there be a bond for payment of rent, and there is a breach in the teſtators lifetime, the executor ſhall bring the ſuit; becauſe the rent, incurred in the anceſtors lifetime, was part of his perſonal eſtate. But where

the

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the breach does not happen until after the anceſtors death the heir ſhall have the action; becauſe the rent was iſſuing out of, and concerned the lands. Although the condition is, generally ſpeaking, for the benefit of the obligor, and the penalty, for the benefit of the obligee, as has been ſaid, yet that will not make any difference, in this caſe; becauſe, in all caſes of this kind, the connection, between the penalty and the condition, is ſo great, that it is impoſſible to ſeparate them. So that the condition is as much for the benefit of the obligee as the penalty is; and ſubſtantially the obligor only covenants for the terms in the condition. It was ſaid, that the penalty goes to the executors, and not to the heir; but no caſe to that effect is produced. It was alſo ſaid that the forms of actions were not to be departed from, and that *Byrd* vs *Cocke* had in effect decided, that the difference, contended for, between debt and covenant ought to be obſerved. But the caſes are not alike; for debt and caſe do not ſubſtantially unite together, in the ſame manner as covenant and debt upon bonds of this kind. The caſe of ejectment upon a mortgage does not apply; becauſe the eſtate is abſolute on non-payment of the money, and it is the Court of Equity and not the law which gives the money to the executor. For the law does not recognize the executor's right at all. But here the bond is not for payment of money, nor was it intended to ſwell the perſonal eſtate at all, but it was merely given for the benefit of the heir. Who may always ſue where he is the perſon actually intereſted. The reaſon why, the *cestui que use* cannot ſue upon the bond to the truſtee, is for want of privity. It is not true, that an aſſignee of the land would not be entitled to ſue on this bond; for if he and the executor were contending about the bond, the aſſignee would be preferred; but, if he has a right to the bond he would alſo have a right to the action, to enforce the contents of it. It is exactly like the

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case of a covenant for quiet enjoyment; in which case either the heir or assignee may sue. The case of the *nomine pœnæ* for rent is exactly like this in principle. For that is a penalty, and so is this: Therefore the same rule will apply to both cases.

It is not correct to say, that there was no issue in the cause. For as the first pleas were not withdrawn they stood as pleas to the new declaration. But at any rate that objection would not go to destroy the action altogether: it could at most only produce a repleader.

Curia advult.

ROANE Judge. This is an action of debt on a penalty conditioned for the performance of covenants, that is to say, a covenant for quiet enjoyment of a tract of land; it is brought by the heir of the original obligee; and the grounds, on which he sets up his right, are 1. That the bond is payable to Peter Eppes, his heirs, executors and administrators. 2. That the eviction is alleged to have been since the descent of the land to the heir.

It is certainly a general principle, that an executor is the proper party to recover debts due to the testator; and I have not been able to find a single instance of an action of debt being brought by the heir.

It is admitted that an heir may bring an action of covenant, upon a covenant running with the land, for a breach in his own time; and the executor may also bring the same action for a breach committed in the lifetime of the testator: And it is alleged by the counsel for the appellant that under our act of Assembly this action is substantially an action of covenant.

If this position were true, it would perhaps materially vary the opinion I have formed upon the subject.

Covenants,

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Covenants, the performance whereof is secured by a penalty, are susceptible of a two fold remedy 1. An action of debt for the penalty, after the recovery of which the plaintiff cannot resort to the covenant; because the penalty is a satisfaction for the whole. 2. An action of covenant, in which the plaintiff, waiving the penalty, proceeds on the covenants, and may recover more or less than the penalty *toties quoties*, *Lowe* vs *Peers*, 4. *Burr.* 2225. The party therefore has his election; and, in the present case, the plaintiff has elected to bring an action of debt for the penalty.

A judgment in this action of debt will be in favor of the plaintiff for the whole penalty, altho' he cannot (without a *scire facias* assigning new breaches) sue out execution for more, of that penalty, than is recovered, as a compensation for the breaches rightly assigned. One action is all that can be brought upon the penalty, proceeding by way of action of debt; but proceeding by action of covenant, and waiving the penalty, ever so many actions may be brought, and separate judgments will be given, in each, for the damages respectively sustained. I am therefore warranted in saying, that the position, that this action is substantially an action of covenant, is incorrect.

This opinion is further confirmed by considering the end and object of making our act relative to the assignment of breaches.

At common law, before that act, in such an action as the present the plaintiff could only assign a single breach; but, for that breach, he could recover judgment and sue execution, for the whole penalty; which often exceeded the real damage; and therefore the defendant was driven into equity for relief. It was to prevent that resort to a Court of Equity, and attain the same purpose in a court of common law, that the act of Assembly was made. But it never was intended, nor does

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it operate, to convert the action of debt into an action of covenant.

If then this be not, even in substance, an action of covenant, but entirely an action of debt, it is not enough to support it, for the plaintiff to shew, that the heir may take the benefit of a covenant, appertaining to his inheritance, but he must proceed in that action which the law gives him: And the cases cited on this part of the subject all have reference clearly to an action of covenant.

If this action is sustainable, it vests a right in the present plaintiff to the whole penalty (subject to his future assignment of breaches;) after which no resort can be had to the covenant itself. The consequence of which is that the executor is excluded from his for a breach committed in the testators lifetime; whereas, by confining the heir to sue his action of covenant, the executor may also sue his action of covenant, and each of them respectively recover the damages to which they are entitled.

If it be said, on the other hand, that this action of debt upon the penalty, if sued by the executor, would, on his obtaining a judgment, equally exclude the heir from injuries done in his time, I answer that the executor is the proper representative of the testator as to bringing actions of debt; that he can have no judgment without a breach; that, if he gets a judgment at all, it must be for the whole penalty; and that this is a consequence growing out of the nature of the security the testator has taken. Nevertheless, it may be that the executor would, in that case, be a trustee in Equity, for the damages sustained by the heir. But the only question now before us, is whether the heir has a legal right to sue an action of debt upon this penalty?

I beg it may be understood however, that I have formed no opinion (as being unnecessary in the case before us,) whether the present covenant is,

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or is not, such an one as the heir may sue upon, by action of covenant for an eviction in his time.

There is no ground, whatever, for the position, that the heir has a right to sue in consequence of the word *heirs* being inserted in the *Teneri* of the bond, nor has a single authority been cited to support it.

I am therefore of opinion that the judgment of the District Court ought to be affirmed.

FLEMING JUDGE. The single question is whether the heir could bring an action of debt upon this bond? Every decedent leaves two representatives; the executor, who represents his personal rights; and the heir, who represents his real rights. It is the duty of the executor to collect together the personal estate; of which he is a trustee for payment of debts and legacies; and therefore is entitled to sue all actions which relate to the personalty; because he alone is entitled to the possession of the personal assets, for the purposes just mentioned. But the heir is entitled to the realty; and therefore every action, respecting that property, belongs to him. Now the bond in question, related to the lands altogether, and therefore constituted no part of the personal estate of the testator; as no breach had happened, or forfeiture incurred during his lifetime, so as to entitle the executor to a recompence for the damages which the testator had sustained: Consequently, the property in the bond belonged to the heir, as appertaining to the inheritance, which it was intended to secure. For conditions and covenants real, or such as are annexed to estates, descend to the heir, and he alone can take advantage of them. 3. *Bac. ab.* 20. *cites* 1. *And.* 55. If the bond had been conditioned for building a house upon the land, and the forfeiture had happened after the death of the testator, it would surely be more consistent with reason and justice that the heir, who was to be benefited by

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the building, ſhould have the remedy whatever it was, in his own power, than that it ſhould belong to the executor; who, having no intereſt in the matter, would not be concerned, whether the houſe was built or not. The caſe of the *nomine pœnæ* mentioned in *Co. Litt.* 162, is expreſsly applicable; and ſhews that the intereſt, in conditions and covenants of this kind, veſts in the heir. All the foregoing principles more ſtrongly apply in a caſe like the preſent, where the land has been loſt altogether; and the money recovered is to be in lieu of it. In ſuch a caſe it would be ſtrange if the law were to eſtabliſh the uſeleſs circuity, of a ſuit firſt by the executor againſt the obligor, and then of a ſuit by the heir againſt the executor. It is certainly better to ſay, at once, that he who has the right, has the remedy to aſſert it. There is a paſſage in *Wentworth's office* of executors which may be thought to militate againſt this doctrine. But the author appears to me to have had no fixed opinion concerning it. For in one place he ſays, the money when recovered by the executor is aſſets, and in another that he is truſtee for the heir. Both of which cannot be true. But they ſerve to ſhew however, the oſcillation of his own mind upon the ſubject; and therefore but little weight is attached to his obſervations with reſpect to the point. It is ſaid that there is no caſe produced of ſuch an action having ever been brought by an heir; but that argument will perhaps apply both ways; for neither has any authority been produced, of its having ever been decided, that the action muſt be brought by the executor: Which leaves it equally as uncertain, whether an action, by the executor, could be maintained; and that very uncertainty is of itſelf, a reaſon, with me, for not ſending the plaintiff back to explore the difficulty. Upon the whole, I am for reverſing the judgment of the Diſtrict Court, and entering judgment for the plaintiff.

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CARRINGTON Judge. I concur with the Judge, who laſt delivered his opinion; which if not ſupported by ſtrict law, is, at leaſt, agreeable to the ſoundeſt principles of juſtice and good ſenſe.

But the law is certainly with the opinion. In 7. *Bac.* 421, it is ſaid, that rents in lieu of profits, charters and writings relating to lands go to the heir; and in the paſſage cited from 3. *Bac.* 20, conditions and covenants real, ſuch as are annexed to real eſtates, go to the heir alſo. So that the title to the ſecurity ſeems to be clearly veſted in the heir: And it is admitted that an action of covenant would have lain for him. But I cannot diſcover any reaſonable diſtinction between debt and covenant in ſuch a caſe. For in both the object is to recover compenſation for a ſpecific injury done to the inheritance, or in other words to the heir; and why the recovery ſhould in one action enſure to the heir, and in the other to the executor, is very difficult to conceive.

The bond in the preſent caſe, upon the very face of it, imports that it could not form any part of the perſonal aſſets. For it reſpected the title to the inheritance only, to which it was an appendage. The heir therefore had a right to it as one of the muniments of his title; and, as the breach happened in his own time, he had a right to ſue upon it; and might bring debt or covenant at his election. For if the covenant binds the obligor and his repreſentatives to the heir, the contents of it muſt belong to the heir likewiſe; and the ſum being certain an action of debt to recover it was properly brought.

Indeed the conduct of the defendant admits the propriety of the action. For, inſtead of excepting to the form of the action, he has plead over, and ſtated aſſets to a certain amount. On which plea an iſſue was taken; and on the trial a verdict paſſed for the plaintiff. After which it would be too much to allow an exception to the action,

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without clear principles, or the moſt deciſive authorities require it. But, as there are neither in the preſent caſe, I think the judgment of the Diſtrict Court ſhould be reverſed; and that judgment ſhould be entered for the plaintiff.

LYONS Judge. This is a ſuit at Common Law, and muſt be decided according to the rules and principles of the Common Law.

By the Common Law all charters and writings relating to the freehold and inheritance, that is to ſay, deeds and covenants conveying lands, which can be transferred as I underſtand it, follow the intereſt of the land and belong to the heir to protect his title. But leaſes, mortgages, judgments and bonds for payment of money, belong to the executor and are aſſets.

Leaſes, made by the anceſtor, reſerving rent to the heir and executor, go to the heir; the rent being incident to the reverſion: But mortgages, bonds payable to the anceſtor and heir for money, or in a penal ſum go to the executor; for the executor ſhall take advantage of covenants in groſs. 1. *Ventr.* 175.

A bond for conveying of land or for further aſſurances, conveys no eſtate at Common Law, nor can any eſtate be recovered by ſuit upon it. Such a bond will not enable the heir to recover or defend at law; it is not aſſignable at Common Law, and cannot be transferred to a purchaſer: It is therefore uſeleſs to the heir in that reſpect. Money and not land is to be recovered on it; and the whole penalty is forfeited by a ſingle breach. It is true that either party may have recourſe to a Court of Equity; the obligee for a ſpecific performance of the condition, and the obligor to be relieved againſt the penalty, on making compenſation. But at law the action muſt be for the penalty only, and as that is money and a groſs ſum, the ſuit muſt be brought by the executor as legal repreſentative of the perſonal eſtate.

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In *Wentworth's office of executor's*, it is said, "If A. be bound to B. by bond, ſtatute or recognizance for aſſurance of land, B. dieth, and the land deſcend to the heir; or be it that B. ſold the land to C, and aſſigned to him the bond &c. yet muſt the ſuit &c. be in the name of the executor of B. and neither of the heir or aſſignee; and that which is recovered will be aſſets in law to charge the executor as I take it; yet in equity it pertains to the heir or aſſignee. *quere*, If the executor meddle not, but only ſuffer his name to be uſed," *Wentworth off. Ex.* 74. In another place, he has a paſſage to this effect, "Many have bonds, ſtatutes, or recognizances for warranty or enjoying of land, or freeing &c. from incumbrances in general, or particular. Now he which hath theſe, ſelling the land, may by letter of attorney lawfully aſſign them to the party who buyeth land or leaſe: but this notwithſtanding, the intereſt remains in him who ſelleth, and by his outlawry they may be forfeited, or by himſelf releaſed, any bond to the contrary notwithſtanding; and if he die, the intereſt in law will be in and go to his executors, and in their names only ſuit or execution may be had or maintained. But if the vendor beſides aſſignment makes as to the obligation &c. only the vendee executor, by this the intereſt after the death of the party will be in him actually &c. ſince none but he can releaſe or diſcharge, nor any other name need to be uſed to ſue or take benefit thereof." *Ibid.* 12.

Theſe paſſages prove, that bonds for conveyances, and aſſurances do not, like covenants in conveyances, run with the land, and become the property of the heir; but belong to the executor, and if ſo, the naming of the heir is mere ſurpluſage, and gives him no right of action.

This doctrine is attended with no inconvenience to the heir, whether the breach be before or after the anceſtors death: If before; the execu-

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tor will recover damages for that breach, and a *scire facias* for future breaches may be brought in his name upon the judgment, until the whole penalty is exhausted; which like the Governor, Justices and other public officers he would not, perhaps, be allowed to release. If after; the heir must, indeed, make use of the executors name in bringing the suit, but the recovery will be for his own benefit. So that his interest is sufficiently protected.

It was said that the *nomine pœnæ* in a lease may be sued for, and recovered by the heir in his own name; which the appellees counsel insists is analogous to the present case. But that is not so.

For the *nomine pœnæ* like the rent, it is incident to the reversion, and descends to the heir at Common Law. It waits on the rent, and cannot be released until the rent is behind: Non payment makes it a duty. *Yelv.* 215. 4. *Bac* 285.

The argument, that the act of Assembly by declaring that the penalty shall be discharged by payment of the damages found, does in effect destroy the distinction between debt and covenant, has no weight with me. For that act does not alter the nature of the action, but the same judgment for the penalty is still preserved by the act, and a collateral relief only given, in order to prevent the necessity of applying to a Court of Equity. So that the act, instead of confounding the distinction between them, does in express terms support it.

There must have been many bonds for conveyances and assuring of titles in England, yet there is no precedent of any suit or declaration, by an heir, upon such a bond; and if no such precedent can be shewn, then, according to *Littletons* rule, it is a good argument, that an action lies not, because one was never brought.

I am therefore of opinion that there is no error; and that the judgment ought to be affirmed.

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PENDLETON Preſident. The bond is to Peter Eppes, his heirs or executors, to operate in ſucceſſion, and not to any two at the ſame time; to Peter during his life, in which no breach was made, and at his death it became payable to one of his two legal repreſentatives, and not to both. So that the objection that the obligee was liable, at the ſame time, to be ſued by two different perſons, does not ſeem to have any force. The paper and the remedy can belong only to one; and the queſtion is, to which? The heir is as much the legal repreſentative of the teſtator as to the real eſtate, as the executor as is to the perſonal; and, with the land, the heir takes all deeds, and writings relating to them, whether for conveying the title or protecting his quiet enjoyment; with none of which could the executor intermeddle, as it is laid down by *Bacon* in his 6 ond volume 421 (from *Roll's abr.* 919. and *Wentw.* 63,) where he is profeſſedly treating of the diſtinct rights of the heir and executor.

The ſame author in his 3d. *vol*, 20. treating of the rights of the heir to take advantage of the conditions or covenants made to the anceſtor, lays down this general principle, "conditions "and covenants real, or ſuch as are annexed to "eſtates, ſhall go to the heir and he alone ſhall "take advantage of them." In a note he makes this obvious diſtinction that in caſe of a breach in the teſtators lifetime it ſhall go to the executor; the land being gone and the ſubſtitute money.

But we are embarraſſed by the term penalty; which is money; was a debt from the date of the bond; and therefore, at law, muſt go to the executor.

This, if it could be true, would wholly derange the principles laid down by Bacon: And how is it proved? I conſider it to be the ſame as timber on the land; if ſevered in the teſtators life time

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time it will go to the executor; if growing it will belong to the heir. It is laid down in *Co. Litt.* 292, that if a man be bound by deed to pay another a ſum of money at a future day, a releaſe of all actions before the day ſhall be a bar; becauſe the debt was a thing in action, and although he could not ſue, becauſe it was *debitum inpræſenti, ſolvendum in futuro*, yet ſince the right of action was in him, a releaſe of all actions was a diſcharge of the debt.

Penalties in their nature follow the ſubject they are intended to inforce: And the caſe put of a *nomine pœnæ* 3d *Bacon* 20. applies directly in terms; ſince he ſtates the caſe of a penalty to inforce the payment of rent; which (that is the penalty) he ſays ought in reaſon to go to him who has a right to the rent. So, in the preſent caſe, the penalty is to go to him who loſt the land intended to be protected by it. But it is ſaid that there is no inſtance of a ſuit by the heir for a penalty. I have not ſearched for the precedent; but believe it would be, at leaſt, as difficult to produce one, of an executors ſuing for the penalty of a bond, which had a condition for quiet enjoyment of land annexed to it, and the condition not broken at the teſtators death.

In this caſe the heir has ſuſtained the loſs to be recompenſed; he is named as obligee in the bond; has rightfully the poſſeſſion of it; and I can find no principle of the moſt rigid law to prevent his recovery in the mode he has purſued.

A majority of the Court therefore is of opinion that the errors aſſigned to arreſt the judgment are inſufficient for the purpoſe; and conſequently that the judgment of the Diſtrict Court is erroneous: It is therefore to be reverſed, and judgment entered for the plaintiff.

COOKE

COOKE
against
SIMMS.

In an action on the case upon a note of hand, there must be an express assumpsit laid in the declaration; and merely reciting the note of hand in *hæc verba* is not sufficient.

IN an action on the case, brought by Simms in the Hustings Court of Alexandria against Cooke; the declaration contained four counts. The first charged, "That the defendant made his "certain writing subscribed with his hand in the "words and figures following, to wit, *Alexan-* "*dria January 12th, 1792, Whereas Jesse Simms* "*of Alexandria has this day given me his obliga-* "*tion promising to assign, transfer and deliver* "*to me or my order on the fifteenth day of June* "*next ensuing the sum of five thousand dollars of* "*the funded debt of the United States of America* "*bearing an annual interest of six per centum,* "*commonly called six per cent stock, I do hereby* "*promise on receiving of the said sum of five thou-* "*sand dollars of the funded debt of the United* "*States of America, bearing an annual interest of* "*six per centum, agreeably to his said obligation,* "*to pay the said Jesse Simms or his order the* "*sum of six thousand spanish milled dollars or the* "*value thereof in gold, as witness my hand.*

"*STEPHEN COOKE,*

Witness, James Gillies.

"And in fact the plaintiff saith that he offered "to perform all things on his part necessary to be "done and performed." The second count was for money laid out and expended, by the plaintiff, for the use of the defendant. The third for money had and received by the defendant to the use of the plaintiff. The fourth count charged, that the defendant in consideration that the plaintiff "had given unto him an obligation of him the

"plaintiff,

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"plaintiff, promiſing to aſſign, transfer and deli-
"ver to the ſaid defendant or his order on the
"fifteenth day of June in the ſame year the ſum
"of five thouſand dollars of the funded debt of
"the United States of America, bearing an annu-
"al intereſt of ſix per centum commonly called ſix
"per cent ſtock, undertook and faithfully promiſ-
"ed, on receiving the ſaid ſum of five thouſand
"dollars of the funded debt of the United States
"of America bearing an annual intereſt of ſix per
"centum agreeably to the obligation aforeſaid, to
"pay to the ſaid plaintiff or his order the ſum of
"ſix thouſand ſpaniſh milled dollars or the value
"thereof in gold; and the plaintiff in fact ſaith,
"that he on the ſaid fifteenth day of June in the
"year aforeſaid, at the town aforeſaid, offered to
"the ſaid defendant the ſaid ſum of five thouſand
"dollars of the funded debt of the United States
"of America, bearing an annual intereſt of ſix
"per centum per annum, agreeable to the obli-
"gation aforeſaid, and offered that the ſame
"ſhould be aſſigned and transferred to him or his
"order, and required him to perform his pro-
"miſe aforeſaid, and the ſaid defendant then and
"there refuſed to receive the ſaid ſum of five
"thouſand dollars ſix per cent ſtock aforeſaid, and
"refuſed that the ſame ſhould be transferred to
"him." The declaration then concludes with aſſigning a general breach in the following words, "Nevertheleſs the ſaid defendant though often "afterwards, required to perform his ſaid ſeveral "promiſes aforeſaid and ſtill doth refuſe to per-"form them and each of them, to his damage "three hundred pounds, and therefore he brings "ſuit, and ſo forth.

The defendant prayed oyer of the writing, and then plead *non aſſumpſit* to the firſt, ſecond, and third counts; on which the plaintiff took iſſue. And as to the firſt count, the defendant further plead, "that the plaintiff did not aſſign, transfer "and deliver to him or his order the ſum of five "thouſand dollars of the funded debt of the United "States,

"States of America, bearing an annual intereſt "of ſix per centum per annum, commonly called "ſix per cent ſtock agreeably to his ſaid obligation." And as to the fourth count the defendant demurred, 1. Becauſe the plaintiff did not alledge that he offered to aſſign and transfer the ſaid 5000 dollars of the funded debt at the *Treaſury of the United States*, or at the *Office of the Commissioner of Loans*. 2. Becauſe the tender ſet forth in the declaration was informal and inſufficient. 3. Becauſe it is not avered that the plaintiff had a right to aſſign and transfer the ſaid 5000 dollars of the funded debt.

The plaintiff as to the ſecond plea to the firſt count ſays, that he on the 15th of June 1792, at the *town aforeſaid* offered to the defendant, "the "ſaid ſum of five thouſand dollars of the funded "debt of the United States of America bearing "an annual intereſt of ſix per centum, agreeable "to the obligation aforeſaid, and offered that "the ſame ſhould be aſſigned and transferred to "him or his order, and then and there re-"quired the defendant to perform his promiſe "aforeſaid; and the defendant then and there re-"fuſed to receive the ſaid ſum of five thouſand "dollars ſix per cent ſtock aforeſaid, and refuſed, "that the ſame ſhould be transferred to him." Then follows an entry in theſe words, by "con-"ſent of the parties, the declaration is amended "to the fourth count, * and the demurrer filed "withdrawn."

The defendant demurred to the plaintiffs replication aforeſaid to the ſecond plea to the firſt count. 1. Becauſe it appeared by the plaintiffs own ſhewing, that the offer to transfer was made at the town of Alexandria, and not at the *Treaſury of the United States*, or at *the office of the Commissioner of Loans*. 2. Becauſe it appears by the

* It does not appear in the record, that any thing further was ever done, as to the amendment.

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the plaintiffs own ſhewing, that he hath not performed what he ought to have done in order to entitle him to his action againſt the defendant. 3. That it is not averred, that the plaintiff had a right to tranſfer the ſaid 5000 dollars of the funded debt. The plaintiff joined in the demurrer. The Huſtings Court decided in favor of the plaintiff, upon the demurrer; and awarded a writ of enquiry of damages. The jury found £ 159 damages; and the Huſtings Court gave judgment for the ſame.

The defendant appealed to the Diſtrict Court; where the judgment of the Huſtings Court was affirmed; and from the judgment of affirmance the defendant appealed to this Court.

The caſe was argued at a former term, by Marſhall for the appellant and Lee for the appellee. When the judgment of the Diſtrict Court was reverſed; but that judgment was ſet aſide during the ſame term, and the cauſe continued for another argument.

MARSHALL for the appellant. The declaration does not ſhew a ſufficient cauſe of action. It does not ſhew, with ſufficient certainty, that the defendant accepted the plaintiffs obligation; without which there was no conſideration. But, if it did, ſtill the plaintiff has not entitled himſelf to what he claims. For the mere offer to tranſfer was not enough. 1. *Ld. Raym.* 440. 686. 12 *Mod.* 520. Therefore the plaintiff, having omitted to ſhew a performance on his part, has not ſtated a ſufficient ground of action againſt the defendant. But the declaration muſt ſhew a ſufficient cauſe of action, or the plaintiff cannot recover. 4. *Bac: abr:* 6.

Nothing then can ſuſtain the declaration unleſs the replication has aided it; which has been ſuppoſed, inaſmuch as it is ſaid that the declaration and replication may be incorporated together, ſo as to make one plea. But this cannot be done

becauſe

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becauſe it would be a departue. For it is a diſtinct matter which is ſet forth in the replication, from that which is contained in the declaration; and this according to all the authorities is a departure. It is a variation from the title, which the plaintiff had once inſiſted on; and therefore is expreſsly within the definition and principles laid down in 3. *Black. Com.* 310, and 4. *Bac. abr.* 122. The inſtances there put illuſtrate and confirm it. Thus in the caſe of the aſſize, where the tenant pleads a deſcent from his father and gives colour, the demandant entitles himſelf by a feoffment from the tenant himſelf, the tenant cannot ſay that the feoffment was on condition and ſhew the condition broken; for it would be a departure, as containing matter new and ſubſequent to that of his bar: Which is a caſe in point, and proves that the ſubſequent matter contained in the replication, was a departure in the preſent caſe. This doctrine is ſupported by 2. *Wils.* 98; and, in ſhort, there is not a ſingle authority which does not go to ſhew the ſame thing; and to prove inconteſtibly, that the new matter, introduced into the replication here, was a departure from the declaration.

So that if it were even true, that a declaration and replication can be incorporated, it would not aſſiſt in the preſent caſe. But there is no caſe which goes to prove that ſuch incorporation can be made. For that would be to allow every bad and inſufficient declaration to be amended by the replication; and in ſhort every bad prior plea to be amended by the ſubſequent. So that the ſeries would be infinite; and the *endless altercation*, ſpoken of by the books, and which the doctrine of departure was eſtabliſhed to prevent, would be introduced.

But there is another fatal objection in this caſe; namely, that no *aſſumpſit* is laid in the declaration. For the mere recital of the note was not ſufficient. The *aſſumpſit*, which the law raiſed,

ought

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ought to have been averred: Becauſe the promiſe is the very git of the action, and therefore ſhould be ſtated. 1. *Lev.* 164. 2. *Id. Raym.* 1516. 2. *Wash.* 187. Which laſt caſe is an expreſs authority in the very point; and the ſame doctrine was afterwards held in the caſe of *Chichester* vs *Vass* * in this court. If the Engliſh books of practice be conſulted, no form will be found which omits an averment of the implied promiſe. So that as well upon the authority of adjudged caſes, as upon the forms in uſe, it is clear that the failure to ſtate the aſſumpſit is an incurable error.

But the judgment is erroneous upon another ground. There were two pleas to the firſt count; the firſt a general plea of *non aſſumpſit*, and the ſecond a ſpecial plea. Upon the former the parties were at iſſue; and notwithſtanding this, the court, on overruling the demurrer, have proceeded to enquire of the damages, without trying, or otherwiſe diſpoſing of the iſſue upon a good and ſufficient bar. Which is manifeſt error; becauſe the defendant had a right to inſiſt on having his plea tried.

CALL *contra.* The declaration and replication may be incorporated together and taken as one plea. For all the pleadings of the party is but one expoſition of his caſe. The replication operated like an amendment to the declaration, and might ſupply the omiſſions and deficiences in that. *Yelv.* 18.

The replication is not a departure from the declaration: Becauſe it is every way conſiſtent with it; and may be ſaid to grow out of it. For the declaration charges a general offer of performance on the part of the plaintiff; and the replication only extends the allegation and ſhews how he offered to perform. It is therefore within

* 1. Call's rep. 83.

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in the reaſon of all the caſes upon pleadings; which admit that the replication may explain the generality of the count. 5. *Com. Dig.* 438. Beſides the plea here rendered the replication neceſſary, becauſe it denied the transfer; which denial was true; and therefore the plaintiff was obliged to confeſs and avoid, or the bar would have precluded him. It is therefore within the reaſon of the doctrine of new aſſignments: Which were never held to be a departure merely becauſe they ſtated a new fact.

It is not true that becauſe additional matter is added it is therefore neceſſarily a departure. On the contrary even ſurpluſage, although containing additional matter, is not. 3. *Term. Rep.* 376. Which ſhews that every thing conſiſtent with the declaration may be united to it, and the reſt rejected. The caſe in 2. *Wils.* 8, explains the nature of departures, and was a ſtronger caſe than this; becauſe there the defendant might have taken iſſue on the replication; but here it was abſolutely neceſſary to anſwer the defendants bar; and a neceſſary anſwer to the oppoſite plea is never conſidered as a departure. 5. *Com. Dig.* 438.

The replication contains a ſufficient cauſe of action: Becauſe the offer to transfer was enough, when the defendant refuſed to accept. For the caſe is very different from that in *Ld. Raym.* 441; becauſe here the offer was to the defendant himſelf, which the court in that caſe allowed would have been ſufficient.

There is a ſufficient *aſſumpſit* laid; becauſe the note itſelf contains an expreſs promiſe; and it is immaterial how the promiſe is ſtated, provided it be laid at all. For the only object, in ſtating it, is to ſhew that there was an agreement to pay. But no particular ſet of words is required. It is wholly immaterial what expreſſions are uſed, if the agreement be actually ſhewn. But you cannot render the agreement more certain by any other

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other form, than by a recital of the very words of it; which, as the end of all pleading is only to inform the adversary with what he is charged, is the leaſt exceptionable mode, and moſt certainly effects the deſired object. The caſe of *Buckler* vs *Angel*, 1. *Lev.* 164, does not oppugn theſe obſervations; becauſe in that caſe there was no expreſs promiſe ſtated; and for want of it, the declaration was nonſenſe. The ſame obſervation applies to 2. *Ld. Raym.* 1516; and perhaps, in both caſes, the omiſſion, at this day, would be conſidered as a mere *vitium clerici*, not affecting the judgment. There is probably ſome omiſſion in the ſtatement of the caſe of *Winston* vs *Francisco*. 2. *Wash.* 187; but at any rate, there was no recital of an expreſs promiſe in that caſe, as there is in this; nor did the replication there repeat the promiſe as it does here. For if it had the recital would have been ſufficient, *Euers plead.* 45. As to the caſe of *Chichester* vs *Vass*, the failure to lay an aſſumpſit was not the ground of deciſion there; but the omiſſion to aver what ſum the other daughters received. In ſhort, after ſtating the expreſs promiſe, it never can be neceſſary to repeat the aſſumpſit which the law raiſes. For what purpoſe ſhould this be done? No uſe can reſult from it; and it would only tend to create a redundancy of words, and to fill the record with needleſs repetition.

As to the laſt point, relative to the enquiry of damages without trying the iſſue; it does not appear that the defendant aſked for a trial; and his omiſſion to do ſo, muſt be conſidered as a waiver of the plea of *non aſſumpſit*.

MARSHALL in reply. The caſe in *Yelv.* 18. does not apply, becauſe the replication there would have purſued the declaration; but here the foundation of the action is the refuſal in the defendant to take the ſtock; and that is no where ſtated before in the declaration. For the declaration merely is, that the plaintiff offered to per-

form

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form all the things on his part to be performed, and fays nothing of the refufal. Which is not drawn forth in the replication by any thing contained in the plea of the defendant; which in fact was but a mere denial of the declaration. None of the cafes cited by the appellees counfel come up to this, which was a clear departure. For it introduced new matter, without any neceffity for it from the adverfary pleadings. The form of declaring in England is, to ftate the promife which the law raifes, although the promife in the contract be previoufly ftated. 1. *Rich. prac: K. B.* 119. And the cafes cited before, particularly that of *Winston* vs *Francisco*, 2 *Wash.* completely prove that it muft be fo laid. There was no neceffity for the defendants afking for a trial of the iffue; becaufe the plea ftood upon the record and the court ought to have taken notice of it.

CALL. In the form in 1. *Rich. prac:* it was neceffary to lay the fecond promife, as the plaintiff counted on the ftatute; for, if he had counted at Common Law, he muft have fhewn the conſideration of the note. Therefore the fecond promife laid in that declaration was the *assumpsit* which the ftatute raifed; and without which he could not have recovered. But here was not the fame neceffity; becaufe there is a good conſideration expreſſed in the note itſelf.

Cur: adv: vult:

PENDLETON Preſident, delivered the reſolution of the Court.

The objection to the delaration for want of laying a promife directly, if ſtirred by the counſel on the former argument does not appear in our notes. We know it was not conſidered by the court; but the caſe was decided upon other points which are unneceſſary to be conſidered if this be againſt the plaintiff.

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The declaration is, that the defendant *made the note*, which it recites in *Hæc Verba*, without alledging any other promiſe than that contained in the note itſelf; and the queſtion is, whether, independent of the act of parliament in England and of our act of Aſſembly (neither of which apply,) an action on the caſe will lie on a promiſſory note ſingly, without adding a promiſe?

The caſes produced, and two others coming more directly to the point *Clerk* vs. *Martin*. 2d *Ld. Raym.* 757, and *Burton* vs. *Souter* in the ſame book 774, prove that it will not: but that the declaration muſt lay an indebitatus aſſumpſit according to the form in the attorney's practice in the K. B. and give the note in evidence.

Although it is difficult to juſtify the rationality of this opinion, yet ſince it is the law, and as ſuch has been recogniſed by this Court in former caſes, it ought not to be ſtirred again. For my own part I can yield to it, without reluctance, as a point of little conſequence in this country, where an action of debt is uſually brought.

This count in the declaration then is bad; and judgment is to be entered for the defendant upon the demurrer. But what is to be the conſequence? Is a final judgment to be entered for the defendant, as if this was the only count, when there are three others, on which there has been no deciſion by court or jury? Or ſhall our entry be, that the plaintiff take nothing by this count, but the defendant as to that, go without day, and recover his coſts occaſioned thereby; and that the cauſe be remanded for further proceedings on the other three counts, ſo as to enable the plaintiff to recover, if he can ſupport his action upon either of them?

Our preſent impreſſions are that the latter is the proper mode.

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The following judgment was afterwards entered. "The court is of opinion that the judgment of "the said District Court is erroneous. Therefore it "is considered that the same be reversed and annul- "led &c. and this court proceeding to give such "judgment as the said District Court ought to have "given, is of opinion that the judgment of the said "Court of Hustings is erroneous, in this, that the "law is for the appellant on the demurrer joined "to the replication of the appellee, to the appel- "lants plea put in to the first count in the appellees "declaration, which as to that count is insufficient "to maintain the appellees action. Therefore it "is further considered that the said judgment be "also reversed and that the appellee take nothing "by the said first count, &c. And the cause is "remanded to the said District Court for further "proceedings to be had therein as to the other "counts contained in the declaration."

HUNT
against
WILKINSON.

WILKINSON brought debt, in the County Court of York, against Hunt, as administratrix of Charles Hunt deceased, and at the June rules obtained an office judgment. At the succeeding Quarterly Court, on the motion of the defendant the office judgment was set aside, and she was permitted to plead. After which the record proceeds thus, "Whereupon by her said "attorney, she comes and defends the force and "injury &c. and saith, That since the institution "of this suit, and during the pendency thereof, "and since the last continuance thereof, to wit, "on

Plea *puis dar rein continuance* may be pleaded after office judgment, and before the end of the next quarterly term.

Administratrix, *with the will annexed*, must be sued in that character; and if

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sued as administratrix only without the addition of the words, *with the will annexed*, she may plead in abatement.

"on the twentieth day of July in the year of our "Lord one thousand seven hundred and ninety "five, the will of Charles Hunt deceased, du- "ly authenticated and proved, according to the "form prescribed in England, one of the coun- "tries out of the limits of the Commonwealth of "Virginia, was committed to record by this "worshipful Court of York County, and by the "said Court administration with the said will an- "nexed was to this defendant, in due form of "law, committed; whereby she became bound to "surrender her letters of administration, granted "to her by the Court of Hustings for the city of "Williamsburg before the appearance of the said "will; in which case she ought to be sued as ad- "ministratrix with the will annexed of Charles "Hunt deceased, and not as administratrix, as in "the plaintiffs writ and declaration is alledged; "and which is according to the letters of admi- "nistration committed to her by the said Court "of Hustings; and this she is ready to verify: "Wherefore she prays judgment of the said writ "and declaration, and that the same may be "quashed.

The plaintiff objected that the plea ought not to be received; but was overruled by the Court, and thereupon he filed a bill of exceptions to the Courts opinion, and then demurred to the plea. The defendant joined in demurrer, and the County Court gave judgment for the defendant, "that "the plaintiff should take nothing by his bill, but "for his false clamour be in mercy &c. and that "the defendant should go thereof without day and "recover her costs."

The District Court were of opinion, that the judgment of the County Court was erroneous, 1. because that court permitted the defendant to set aside the office judgment, obtained by the plaintiff against the defendant, by filing a plea in abatement of the writ; which delayed the plaintiff's action, and, as a plea *puis darrein continu-*

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ance, was inadmiſſible; the defendant not having previouſly filed any plea, and the ſuit not having been continued. 2. Becauſe the office judgment could not be ſet aſide, under the act of Aſſembly eſtabliſhing Diſtrict Courts, without filing ſuch an iſſuable plea, as would bring the merits of the caſe before the court. They therefore reverſed the judgment, ſet aſide the plea and all proceedings ſubſequent to the office judgment, and remitted the cauſe to the County Court, for other proceedings to be had therein; with directions, not to permit the defendant to ſet aſide the office judgment, unleſs ſhe filed ſuch a plea, as would not delay the plaintiff in the proſecution of his ſuit, and would bring the cauſe before the court upon its merits.

From which judgment the plaintiff appealed to this court.

WICKHAM for the appellant. 1. If the plea was a good one the County Court did right in receiving it. For a plea in abatement may be filed *puis darrain* continuance; and the act of Aſſembly, relative to ſetting aſide office judgments, does not take away the right. Like all other rules it has its exceptions, and its operation is to be regulated by circumſtances. As if the parties or either of them die; or their functions ceaſe, as in this caſe; or, in ſhort, if any thing happen, which may render the plea eſſential to juſtice.

2. The plea was good. For the Court of Huſtings had no authority to grant the adminiſtration at the time, as a will afterwards appeared; becauſe the probat relates back to the death of the teſtator and avoids the prior adminiſtration, ſo that a judgment obtained by the adminiſtrator is utterly void; although ſuch adminiſtrator, for any thing rightly done by him, may recoup in damages. 2. *Bac. ab.* 411. *cites Gravsbrook* and *Fox*, *Plowd.* 277. 279. If a ſuit is brought againſt the firſt adminiſtrator, and afterwards a ſecond adminiſtration is granted pending the ſuit, the

writ

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writ will abate. 11. *Ven. abr.* 14: And the rule ought to be reciprocal. If an executor is sued as administrator he may plead in abatement; because the will may change the disposition of the assets: And the same argument holds here. But another reason why the suit should abate is, that it may affect the securities to the first administration, and render them liable, for the conduct of the defendant under the second.

CALL *contra*. 1. The second administration, by the County Court of York, did not controul or rescind the first by the Court of Hustings. For one concurrent court cannot repeal the acts of another, *Wooldridge* vs *Wooldridge* in this court. Therefore the application should either have been to the Hustings, the District, or the General Court.

This, which is true upon principle, is more consistent with public convenience, and avoids infinite difficulties. For otherwise, if there be a contest about an administration in one court, and it is there granted to the proper person, the party failing may apply to another court without notice and obtain it; by which means, according to the doctrine contended for, he will repeal the first. So if a wife or distributee refuse in one court, and administration is thereupon granted to a creditor, they may afterwards apply to another and obtain it, to the repeal of the first letters; or at least, there will be the absurdity of two administrators of the same estate, deriving their authority from different courts, and each claiming the exclusive right to administer. Which inconvenience cannot happen, if the application is confined to the same or a Superior Court; because either may grant a *supersedeas* to the first letters.

2. But if the application to York court was regular, yet the second administration did not abate the writ. Because a writ shall never abate, unless the matter, set forth in the plea, proves that the condition of the party would be changed. But

here

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here it would not; for she could make the same defence to this suit, that she could to a new action. Therefore the law will not turn the plaintiff round, for the mere addition of the words, *with the will annexed*. Besides it is a rule, that a suit shall not abate, by subsequent matter, without the plaintiffs fault: as if a *feme sole* marries; the defendant is knighted; or an executor *de son tort* becomes administrator during the progress of the suit, *Williamson* vs *Norwich*. *Styles* 337. The second administration therefore did not abate the writ in the present case, where there was no fault on the part of the plaintiff; whose suit was rightly begun.

It is a rule, that every plea in abatement must give the plaintiff a better writ. But this does not: for, if a suit (brought against the defendant to day) should call her administratrix only, without the addition of *cum testamento annexo*, it would be good. So that the only effect of the plea would be to take this suit off the docket, and put the plaintiff to bring another in the very same form, without any reason for it.

By analogy to other cases, the point is clearly in favor of the plaintiff; because the law frequently allows defective process to be made good, by subsequent events: As in the case of *Humphries* vs *Humphries*, 3. *Wms.* where a suit was brought by one as administrator, who at the time of suing out the writ was not administrator, but afterwards qualified as such; and this was held to sustain the writ. So in the case of a suit by a feme sole who marries, which by law abates the suit, yet if the husband dies before the return day of the writ, its capacities are restored, and the suit sustainable, *Brook abr.* 108. *pl.* 134. Therefore, if the appellants counsel was right in his position, that the first administration was void, yet the subsequent grant of administration by York Court sustains the writ.

Again

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Again the Court never turns a party round for the ſake of form; but, if no inconvenience will reſult from it, they will do juſtice, in the firſt inſtance, without regard to technical miſtakes. Now in the preſent caſe, if the ſuit were abated, it might inſtantly be revived by a writ of *Journeys accounts;* and the defendant would be obliged to plead fully adminiſtered upon the day of the firſt writ purchaſed, and not upon the day of purchaſing the writ of *Journeys accounts.* 1. *Bro. abr:* 16 *pl.* 14. Of courſe the Court will not abate the writ, merely for the ſake of putting the plaintiff to the formality of ſueing his writ of *Journeys accounts.*

With reſpect to the argument drawn from the caſe of *Graysbrook* vs *Fox*, if it proves any thing, it will conclude againſt the defendant. Becauſe, according to that caſe, the *probat* eſtabliſhes the right of the executor againſt every body; and therefore, as the plea does not ſtate the renunciation of the executor, the ſecond letters are as void as the firſt. Conſequently the attempt of the defendant, to avoid one void act by another, will not prevail.

WICKHAM in reply. The County Court of York might properly grant adminiſtration; and no expreſs revocation of the prior adminiſtration was neceſſary. Which ſhews, the fallacy of the argument on the other ſide, becauſe that proceeds upon the idea of an expreſs revocation being requiſite. The matter ſet forth in the plea did change the condition of the defendant; and therefore was proper to be plead in abatement of the writ. The ſubſequent act, which abated the writ, was not the act of the defendant; but it was a conſequence of law drawn from the *probat* of the will. It is not correct to ſay, that a writ againſt the defendant, as adminiſtratrix merely, without adding the words, with the will annexed, would be good. For that addition is abſolutely neceſſary. It was not requiſite to ſtate the renunciation of the executors; for that is preſumed

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sumed, in favor of the judgment of a Court, until the contrary is shewn.

ROANE Judge, Was of opinion, that the judgment of the District Court ought to be affirmed.

FLEMING Judge. There are two questions in this case. 1. Whether such a plea as this will abate a suit at all? And if so, 2, whether it could be pleaded after an office judgment?

With regard to the first question, it seems to me to stand precisely on the same ground, as if the administration, with the will annexed, had been granted to some other person; and in that case, I think it clear that it would have abated the suit. Because in her first character of general administratrix she was bound to administer and make distribution according to the directions of the statute; but when the will was annexed to the second administration it was necessary to conform to that, as far as the nature of things would admit of. In addition to which, the securities to the first administration would continue liable for the result of this suit, although the functions of the defendant, as general administratrix, had actually ceased. Which never could be right. I think, therefore, that there was such a change produced by the second administration, as ought to have abated a suit brought against the defendant under her first character. For as to the objection that the second administration was granted by a concurrent court, there is no weight in it. Because the *probat* of the will *ipso facto* repealed it; and the act of Assembly directs, that if, after administration has been granted, any will shall be produced, and proved by the executors, or the wife or other distributee, who shall not have before refused, shall apply for the administration, the same shall be granted, in like manner as if the former had not been obtained.

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So that the second administration with the will annexed was a complete supersedeas to the first, by the necessary construction of the act of Assembly. Under every view of the case therefore I think the matter was sufficient to abate the suit.

But as it happened after the office judgment and before the end of the succeeding Quarterly Court, it could only be pleaded in the form of a plea *puis darrein continuance*. For, as it did not exist at the time of the office judgment, it could not then be pleaded; and of course, unless it could be pleaded in this form, it could not be taken advantage of any how; although we have seen that such matter would abate the suit.

Upon the whole I think the judgment of the County Court was right; and consequently that the judgment of the District Court was erroneous, and ought to be reversed, and that of the County Court affirmed.

CARRINGTON Judge. It has been rightly stated that there are two questions in this case.

1. Whether a plea in abatement could be received after an office judgment and before the last day of the succeeding Quarterly Court, so as to abate the suit and put the plaintiff to a new action?

2. Whether the plea, tendered in York court, was such a plea as ought to have been received to abate the suit at that stage of the proceedings?

As to the first;

I am clearly of opinion that a suit is abateable at that stage of the proceedings; because the suit was pending until the last day of the succeeding quarterly term. At which time there must be a plaintiff and defendant in existence; that is to say, the original plaintiff and defendant in their primary characters must still exist, or the judgment cannot be confirmed, and execution had.

Suppose

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Suppoſe a feme ſole brings a ſuit, and afterwards marries between the judgment at the rules and the end of the ſucceeding term, a plea to that effect would abate the ſuit; becauſe there would then be no ſuch perſon in exiſtence as that named in the writ. So if either party dies, this fact may be plead in abatement, for the ſame reaſon.

Nothing therefore can be clearer in my judgment, than that a plea of matter of abatement happening between the day of the office judgment, and the laſt day of the ſucceeding quarterly term, may be plead.

Which brings me to the ſecond queſtion;

In this caſe at the time of the office judgment, Mrs. Hunt was defendant in her character of general adminiſtratrix; but, before the end of the next term, that character had ceaſed, and all her powers in that capacity were done away and deſtroyed by the production and proof of the will. So that ſhe was no longer general adminiſtratrix, but was then acting in a character correſpondent to that of executrix, charged with the execution of the will, inſtead of the ſtatutary adminiſtration: And the will might have contained a very different proviſion for the payment of debts, than that directed by law in the caſe of an inteſtacy.

Beſides, upon all judgments an execution neceſſarily follows, or the judgment would be of no uſe to the plaintiff. Now, in the preſent caſe, if a judgment were rendered, how would the execution iſſue? Not againſt the eſtate in the hands of the general adminiſtratrix to be adminiſtered, becauſe there would be no ſuch character in exiſtence, converſant in the adminiſtration. In ſuch a caſe the officer would not and could not have obeyed the precept. Neither could it have iſſued againſt the eſtate, in her hands to be adminiſtered, as adminiſtratrix with the will annexed. Becauſe the execution muſt have purſued the writ,

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and the clerk neither would, or could have varied it from the terms of the record. The judgment therefore would have been wholly uſeleſs.

Under every point of view then, I think the proceedings of York court were correct, and that thoſe of the Diſtrict Court were erroneous. Of courſe I am of opinion that the latter ſhould be reverſed, and the former affirmed.

LYONS Judge. Concurred that the matter of the plea might be pleaded after the office judgment and before the end of the next term; and added that if an executor were confined to the ſtrict words of the act he might be ruined.

PENDLETON Preſident. The firſt queſtion is, whether under the act of Aſſembly, which annexes a condition that the defendant ſhall plead to iſſue immediately, an office judgment can be ſet aſide upon a plea in abatement?

On this point, I am of opinion, that a plea in abatement may literally anſwer the deſcription, as well as a plea in bar; and that the intention of the law was to leave a diſcretionary power, in the court, to ſtop all dilatory and frivolous pleas calculated for delay; but to admit all fair ones either in bar or abatement: and ſuch have been the ſentiments of this court on former occaſions. In *Downman* vs *Downman's ex'rs* 1. *Waſh.* the plea was of a former tender, of money generally, and not *of paper whilst it was lawful money*, as it ſhould have been; but as the plea was not to be received without the money, and the defendant offered in ſupport of the plea paper not then lawful money, it was the ſame as if he had offered leather or pebbles. On that account the court refuſed to receive the plea; which this court affirmed. In the caſe of *Kilwick* vs *Maidman*, 1. *Burr.* 59, the legal day of pleading was paſt, and no plea could be received, but by favour of the Judge; who had a right to impoſe his own terms,

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and to judge, afterwards, whether his intention had been complied with.

But in the caſe now under conſideration, the defendant at the proper time claimed a legal right, and was not aſking a favour; the caſes are therefore perfectly diſtinguiſhable.

Every argument for receiving pleas in abatement in general, where they are fair, applies a *fortiori* to ſuch as are of facts happening ſince the laſt continuance; as they could not have been pleaded at any prior day.

This plea was therefore properly admitted, by the County Court of York; and we come upon the demurrer to conſider the ſecond queſtion; which is, whether the matter pleaded abated the ſuit?

II. If the adminiſtration with the will annexed had been granted to a third perſon, there could have been no doubt; ſince, her authority being at an end, all pending ſuits, againſt her as adminiſtratrix, muſt have ceaſed with it; but the difficulty ariſes from the ſecond adminiſtration having been granted to herſelf; as ſhe is to be ſtill ſued, although in a different character.

Does this make any eſſential difference? It was ſaid, by the counſel, that ſhe might ſtill be declared againſt as general adminiſtratrix, without adding the words, *with the will annexed;* and if he could have maintained that poſition, he probably would have ſucceeded; *ſince* a ſuit ought not to abate, when the ſame declaration may be filed in a new ſuit, unleſs the cauſe of action aroſe after the ſuit was brought. No authority is produced; and upon principle, ſhe ought to be declared againſt in her true character.

The grant of adminiſtration being founded on a ſuppoſition of inteſtacy, when a will appears the adminiſtration is void *ab initio*. Upon legal grounds, how far *meſne* acts are to be confirmed need

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need not now be considered, as not concerned in the present dispute: which is only how the creditors shall proceed against this administratrix? Every reflection on the law and reason of the case produces a conviction on my mind, that she ought to be sued in her new and real character.

She is a substitute for the executor; takes the same oath to perform the will; and gives the same bond with new security. By which the first sureties were discharged: But who might be still involved, if creditors might proceed upon that administration.

The result is, that the District Court erred; Their judgment therefore is to be reversed, and that of the County Court affirmed.

On a subsequent day of the same term, Randolph for the appellee solicited another argument of the cause; whereupon the judgment was set aside, and the cause continued until this term:

Wickham for the appellant. Said he relied upon the arguments he had used, and the authorities he had cited at the former hearing, and hoped that they would be sufficient to reverse the judgment of the District Court.

Randolph for the appellee. It is perfectly clear that the second administration produced no alteration in the condition of the defendant; because an administrator with the will annexed may make the same defences and do every thing which a mere administrator may do. The addition of the words *with the will annexed* are therefore immaterial, and surplusage. Accordingly amongst all the books of entries no precedent is found, where the defendant is called administrator *with the will annexed;* neither *Rastall* or *Lilly* has such a form; although there are some, where the plaintiff is called so. Which perhaps is necessary in order that he may shew his letters testamentary. There is a strong case in 11. *Vin.* 334. *pl.* 41, to shew that calling the defendant administrator

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niſtrator only is ſufficient to cover the letters teſtamentary; and although, in *Moor.* 618, it was doubted, whether if the real adminiſtrator return during the pendency of a ſuit with the adminiſtrator *durante abſentia*, the ſuit ſhall abate, yet it was afterwards decided that it ſhould not. *Doctr: placitandi, (new edition)* 502. Which ſerves to ſhew the privity between the firſt and ſecond adminiſtration: A point more fully illuſtrated in 3. *Hulst. od.* 112; in which Doddridge Juſtice relied, very much, upon the diſtinction, between the caſe, where the adminiſtration comes to the ſame perſon, and where it comes to a different perſon. The 5. *Vin. ab.* 107. *pl.* 4, and the ſame book 119. are alſo ſtrong, upon the general doctrine. The principle of the decision in *Salk.* 296, deſerves to be conſidered; and 6. *Co.* 19. has reaſoning very applicable to this caſe, and ſtrongly marking the privity betwixt the firſt and ſecond adminiſtration. The ſituation of the ſecurities to the firſt adminiſtration is not affected; eſpecially with regard to creditors. Becauſe the teſtator cannot vary the rights of creditors by his will. So that every fair tranſaction for the benefit of creditors done under the firſt adminiſtration will be juſtified and maintained by the law: As therefore it is manifeſt that no injury can reſult to any perſon, the judgment of the Diſtrict Court ought to be affirmed.

WICKHAM in reply. The words *with the will annexed* were not conceived by the court at the laſt term to be immaterial and ſurpluſage. It was ſaid then, by Mr. Call, that the defendant pleading in abatement muſt give the plaintiff a better writ; and that could not be done here, becauſe a ſuit againſt her as adminiſtratrix would be good now. But the rule of law is not that the defendant ſhould give the plaintiff a better form of a writ, but merely that he ſhould give the plaintiff a better writ. Which the defendant did here; becauſe a new writ againſt her after the ſecond adminiſtration, when ſhe became inveſted with the authority

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thority of the will, was a better writ. It is clear law, and was fully proved by the authorities cited at the former argument, that the ſubſequent probat of a will rendered the prior adminiſtration *void ab initio*. Which expreſsly applies and ſhews that the functions of the adminiſtratrix under the firſt letters were totally ſuperſeded; and of courſe that no ſuit could proceed againſt her. As to the argument, that there is no alteration of ſituation with reſpect to the creditors, becauſe the teſtator cannot by his will vary their rights, the very ſame doctrine would apply to the caſe of every adminiſtration revoked by a ſubſequent qualification of an executor; and yet it never was contended but that the executor in that caſe might plead in abatement. And the rule is right too; becauſe there may be ſpecial proviſions under the will even with reſpect to creditors which the executor or adminiſtrator with the will annexed may be bound to obſerve. It is not enough for the appellees counſel to ſay he has not found a form of a declaration againſt an adminiſtrator *with the will annexed*; But he ſhould ſhew, where it ever was decided, that it was unneceſſary to add thoſe words. As to 11. *Vin.* 334. *pl.* 41, it does not appear, when the exception was taken; and perhaps it was after verdict. If *Moor* 618 had been decided it would have had no influence; becauſe it was the caſe of a rightful adminiſtration; and therefore not void *ab initio* as in this caſe. *Doctr: plac.* 502 admits of the ſame anſwer; and perhaps the law of that caſe may be doubted. What is ſaid in 3 *Bulſtrod.* 112, was mere converſation between the judges; the caſe was never determined; but was ultimately compromiſed. Beſides, in that caſe, the ſheriff had levied the money, and therefore owed it to the plaintiff. The caſe in 11. *Vin.* 107. *pl.* 4, was that of a rightful adminiſtration and therefore the ſecond adminiſtration was only a continuance of the firſt: The ſame book 119, only proves that acts already performed by a rightful adminiſtrator remain good;

and

and the whole difference is between an adminiſtration rightfully or wrongfully granted. *Salk.* 296 only decides that the plea ſhould have been in abatement inſtead of bar; and 6. *Co*, 19, was a caſe of a rightful adminiſtration; So that the ſubſequent adminiſtration, did not render it void *ab initio*, as the probat did here.

This doctrine is not attended with any inconvenience to adminiſtrators before probat; becauſe they may *recoup* in damages; and thus are in no danger of ſuffering.

RANDOLPH. The firſt adminiſtration was lawful by the act of Aſſembly, and therefore all arguments, drawn from its being a wrongful adminiſtration, are irrelevant.

WICKHAM. The act of aſſembly makes no difference; it does not alter the common law and legalize meſne acts. *Cowp.* 371. has a caſe againſt an adminiſtrator with the will annexed; which ſhews the practice there is to add thoſe words.

ROANE Judge. There are two queſtions in this caſe 1. Whether, this action, againſt the appellee as adminiſtratrix, is abateable by pleading, at any time, her ſubſequent qualification as adminiſtratrix *with the will annexed?* 2. Whether a plea of this kind is admiſſible on ſetting aſide an office judgment?

The firſt queſtion is difficult, and I am not prepared to decide it: Indeed it is not neceſſary to be now decided; ſince I am clearly of opinion that the plea in queſtion, be the other point as it may, was not a ſufficient plea, at the time, and for the purpoſe for which it was offered.

The act eſtabliſhing County Courts (*Rev. Cod. page* 95. §. 29) directs that where any final judgment ſhall be entered up in the office, againſt any defendant or defendants or their ſecurities, or againſt any defendant or defendants and ſheriff

or

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or other officer by default, execution may iſſue thereon, after the next ſucceeding Quarterly Court, unleſs the ſame ſhall be ſet aſide, during ſuch Court, in like manner as office judgments in the Diſtrict Courts may be ſet aſide.

And by the Diſtrict Court law (*Rev. Cod. page* 85. §. 29) every judgment entered in the office againſt a defendant and bail, or againſt a defendant and ſheriff, ſhall be ſet aſide, if the defendant at the ſucceeding court ſhall be allowed to appear without bail, put in good bail, being ruled ſo to do, or ſurrender himſelf in cuſtody, and ſhall plead to iſſue immediately &c. Upon the conſtruction of theſe two clauſes, the deciſion of this queſtion will depend.

By the firſt clauſe it is provided, that an execution may iſſue upon an office judgment, after the ſucceeding Quarterly Court, unleſs ſet aſide during ſuch Court. This proves that the office judgment is, in itſelf, a compleat judgment, and that no ſubſequent act is neceſſary to perfect it; although the Court has power to revoke it, during the enſuing term, upon the terms preſcribed by the act. One of which is that the defendant *ſhall plead to iſſue immediately*.

Keeping out of view, for the preſent, that the matter of abatement, now ſet up, happened after the office judgment, in the preſent caſe, and arguing as if it had happened before, would it have been pleadable in abatement, on ſetting aſide the office judgment? This queſtion will be ſolved, by conſidering the nature and effect of the plea. Its effect would be, not to try the right to the money claimed, by the plaintiff, in this action; not to put in iſſue the matter alledged in the declaration; finally not to make an end of the cauſe; but to delay the plaintiff, and, if found for the defendant, to turn the plaintiff round to bring another action againſt the ſame defendant, in another character.

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Upon principle, this would ſeem to be unreaſonable, after the defendant has lain by, and ſuffered the plaintiff to obtain a judgment in the office. It is the ſpirit of this principle which induces the Engliſh Courts to refuſe to ſet aſide a regular judgment, unleſs the defendant is to plead to the merits, and the plaintiff is not to loſe a term, 2. *Stra.* 1242. It was the ſame principle which induced our legiſlature to enact, in the act conſtituting the High Court of Chancery, (*Rev. Cod. page* 72. §. 29.) that "after anſwer filed, and no plea in abatement to the juriſdiction of the Court, no exception for want of juriſdiction ſhall ever after be made" &c.

But without citing particular inſtances, I may ſay in general, that the whole ſyſtem of pleading is founded upon a ſimilar principle; and as it were, upon a gradation in the dignity of defence; ſo that, by a reſort to a defence of a higher nature, an inferior one is impliedly waived. I need not ſpeak more particularly, upon this point, to the gentlemen of the bar. May not then, the proviſion of the act, upon ſetting aſide office judgments, have been formed upon the ſpirit of the ſyſtem of pleading; and by analogy to the reaſonable principle above ſtated?

Thus much upon general reaſoning; but to come to the clauſe in queſtion. The terms are, that the defendant *ſhall plead to iſſue immediately.* Now the term *immediately*, of itſelf, ſeems ſtrongly to imply, that the plea is not to be a dilatory one.

It is not now neceſſary to decide the preciſe extent of the terms *pleading to iſſue.* But they ſeem clearly to exclude a plea, which, ſo far from putting the plaintiffs allegations in iſſue, ſhews a reaſon why he ought not to be anſwered.

It is held in *Kilwick* vs *Maidman* 1 *Burr.* 59, that when time is given to plead by a judges order (after the proper term for pleading has expired)

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on the uſual terms of pleading iſſueably, that a plea of tender was iſſueable within the meaning of ſuch order, but not a plea in abatement (notwithſtanding in ſtrictneſs it is iſſueable;) becauſe it tended to delay the plaintiff. And, in 2. *Burr.* 782 *Foſter* vs *Snow*, *pleading issueably* is held to mean ſuch a plea, as the plaintiff may go to trial on: but in 1. *Burr.* 605, the defendant is confined to plead the general iſſue.

Reſorting to theſe caſes therefore, as a ſtandard, a plea in abatement is excluded in the preſent caſe; and yet it is evident the terms of our act are ſtronger, in favour of ſuch excluſion, than thoſe of the judges order, in the caſes juſt mentioned. That I am warranted, in reſorting to this ſtandard, is evident from the caſe of *Downman* vs *Downman's ex'rs*, 1. *Wash.* 26; where, upon the conſtruction of this act, the court reſorted to ſimilar caſes in order to prove, that a plea of tender was an iſſueable plea. It would ſeem too, that this conſtruction, in the Engliſh books, would hold *a fortiori* in the preſent caſe, where judgment has been regularly obtained in the office.

I have ſo far conſidered this plea, as if the matter of the plea had ariſen before the office judgment was confirmed: But, in fact, it aroſe afterwards; and the queſtion is, whether that circumſtance will alter the caſe? It certainly cannot, unleſs we make the time when the fact happened, and not the nature and effect of the plea, to be the criterion of its competency. In ſupport of which, there is not, even a plauſible reaſon growing out of the act of Aſſembly. Nor does the defence derive any aid from the general doctrine of pleas *puis darrein continuance*.

For that doctrine relates to a ſtage of the cauſe prior to a judgment. Nay it is held that although ſuch plea may be pleaded, after the jury have gone from the bar, yet it may not after they have given a verdict. *Bull. nis: pr:* 310. And

again

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again if a releaſe be given, after the verdict and before the day in bank, the defendant cannot plead it (although in bar of the action;) becauſe there is a verdict already given in the cauſe, and upon another plea; and therefore the cauſe is determined. So that the defendant is put to his *audita querela* to prevent execution of the judgment 4. *Bac.* 143. Theſe caſes, giving to an office judgment the effect of a verdict only, ſeem analogous to that before us. The difficulty is, that the act of Aſſembly has authorized ſetting aſide office judgments without aſſigning any reaſons; but it can only be, on the terms preſcribed by the act.

What I have here ſaid does not appear to me to conflict with the deciſion of this court in the caſe of *Downman* vs *Downman's ex'rs*, 1. *Wash.* or any other which has come to my knowledge. Otherwiſe, the reſpect I hold for the authority of this court, and the better judgment of my brethren, would induce me readily to acquieſce. I do not hold myſelf concluded by the deciſion in *Downman* vs *Downman's ex'rs;* becauſe the conſtruction of the act, in that caſe, was not relative to a plea in abatement, but to a plea of tender; becauſe too, no deciſion was given, even upon the plea of tender, but the cauſe was decided upon another point; and therefore I do not conſider it a binding authority in the preſent caſe.

Thus conſidering that deciſion, I have not eſtimated the doctrine there laid down; but hold myſelf free for the reaſons above given, to deliver my ſentiments on this queſtion: And my concluſion is that the judgment of the Diſtrict Court ought to be affirmed.

FLEMING Judge. I have heard nothing which induces me to change my former opinion; and therefore, I am ſtill for reverſing the judgment of the Diſtrict Court, and affirming that of the County Court.

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CARRINGTON Judge. Having given my opinion fully, upon this caſe, at the former hearing, I ſhall at preſent take up little more of the time of the court, than merely to declare, that I have heard no argument to induce me to alter that opinion.

The defendant had a day in court at the time of her plea, and it was proper then to receive it. Suppoſe either party had died, between the day of entering judgment, in the clerks office, and the next term of the court, this certainly would have abated the ſuit, and might have been taken advantage of by plea in abatement. Or, if omitted, and *a ſcire facias to revive* were brought, the defendant might have ſhewn cauſe againſt its being revived. In the preſent caſe, if the adminiſtratrix had been plaintiff in her firſt character, the defendant might have abated her ſuit; and, if ſhe had obtained a judgment, ſhe could not have taken out execution, after the eſtabliſhment of the will. But if the ſuit would abate had ſhe been plaintiff, it ought when ſhe is defendant. This, being the caſe of an adminiſtration revoked by the ſubſequent probat of a will, is different from the caſe in 11. *Vin.* 119, cited for the appellee. An adminiſtrator covenants by his bond to ſurrender his letters of adminiſtration upon the appearance and eſtabliſhment of a will. But, when his authority is ſurrendered up and gone, he is no longer adminiſtrator, and ſuits, for, or againſt him, can have no further operation. I am therefore of opinion, as I was before, that the judgment of the Diſtrict Court ſhould be reverſed; and that of the County Court affirmed.

LYONS Judge. The Engliſh authorities, upon the queſtions made in this cauſe, are not eaſily reconciled with each other: And therefore I had, at firſt ſight, ſome doubts upon the ſubject.

They ſeem however to agree, that where there is an actual citation of the executor, all lawful

acts

acts done by the adminiſtrator bind, 2. *Wentw. off. ex.* 140. And if ſo, our act of Aſſembly has removed the difficulty, by fixing a time for the executor to bring in the will; which is equal to an actual citation, as he is bound to know the law. He may afterwards bring in the will and prove it, but all lawful acts, done before by the adminiſtrator, bind as much here under our law, as in England after citation. The character of the defendant in this caſe may therefore be conſidered as changed, without any inconvenience reſulting from it. Whereas a contrary doctrine might involve the firſt ſecurities and create miſchief.

But if her character be entirely changed, and the eſtate by operation of law transferred to her in her new character, it ſeems to me that it muſt neceſſarily abate the ſuit; as a change of character, without any fault in the defendant, conſtantly has that effect. Thus all ſuits ceaſe, when adminiſtration during minority ceaſes; and ſo do the actions againſt ſuch adminiſtrator according to the rule in *Pigots* caſe, *Brownhead* vs *Spencer* 2. *Brownl.* 247. 2. *Wentw.* 138. If the adminiſtration is repealed, the adminiſtrator cannot take out execution, becauſe his title is taken away. *Yelv.* 82. 2. *Wentw.* 137. An executor cannot found an action on what he did as adminiſtrator, although he be the ſame perſon and might have releaſed; for he ought not to have an action in this manner, *Cro. Jac.* 394. 5. *Co.* 9. 33. Theſe caſes are in principle the ſame with that at bar, and therefore appear to me to decide the queſtion.

It was objected that the plea ſhould have been ſooner filed. But to this I anſwer that the defendant had no day in Court, as the fact had happened ſince the laſt continuance as it were; and therefore was pleadable at that time. For whenever the cauſe of abatement happens after the laſt continuance of the ſuit it may be plead in that manner; becauſe the defendant has no day, in Court, to plead it in any other form: And the reaſon is the ſame, where the fact happens after the

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the judgment in the clerks office; for the defendant ſhould have an opportunity of ſhewing the change in his ſituation; but as this cannot be done, where it takes place after the judgment in the office, he ſhould be allowed to do it afterwards; that is to ſay, before the end of the next term.

Upon the whole I think the judgment of the Diſtrict Court ſhould be reverſed and that of the County Court affirmed.

PENDLETON Preſident. I believe I ſaid, upon the former argument, that all meſne acts of the adminiſtrator betwixt the date of his letters and the probat of the will were void. But I am now ſatisfied that I was miſtaken in the poſition; and that our act of Aſſembly affirms all legal acts done by him during that period. In other reſpects I am ſatisfied with my former opinion; and concur, with the three laſt judges, that the judgment of the Diſtrict Court ſhould be reverſed and that of the County Court affirmed.

Judgment of the Diſtrict Court reverſed and that of the County Court affirmed.

ALLEN

against

MINOR.

If an infant becomes ſecurity in a 12 months replevy bond, a court of equity will grant a perpetual injunction even againſt an aſ-

ALLEN brought a bill in the High Court of Chancery to be relieved againſt a twelve months replevy bond, and ſtated that upon the 29th of October 1788, he became ſecurity for Joſeph Watſon and Daniel Hawes in a twelve months bond to Payne who was aſſignee of Durracott adminiſtrator of Coles. That at the time of entering into the ſaid bond the plaintiff was an

infant

infant under the age of twenty one years, to wit, only 18 or 19 years of age; and therefore that the ſaid bond was void as to him. That Payne had aſſigned the bond to Minor; who had ſued execution on it.

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ſignee without notice.

For the infant in ſuch caſe having no day in the court of law, the application to the court of equity is regular.

The anſwer of Minor ſtates, that he as attorney for Payne obtained the judgment on which the ſaid twelve months bond was given; that the right to the ſame ſoon after devolved on Middleton and Craughton, and Payne having removed out of the ſtate, the defendant as his attorney aſſigned the bond to a third perſon; who re-aſſigned to him, in order to enable the defendant to make the neceſſary affidavit for obtaining the execution. That he knows nothing of the plaintiff; and therefore cannot ſay whether he be of full age or not.

The infancy of the plaintiff at the time of giving the bond was proved. The Court of Chancery diſmiſſed the bill with coſts; and the plaintiff appealed to this court.

DUVAL for the appellant. The plaintiff was an infant at the time of executing the bond, and therefore was not bound by it unleſs ſome fraud had appeared; and there is no proof of any. It will be no excuſe that the ſheriff did not know his age, becauſe it was his duty to have enquired and informed himſelf. At all events his ignorance will not be allowed to prejudice the infant. The appellant came rightly into the Court of Equity for relief; for the twelve months having elapſed, the plaintiff could have ſued execution on his own affidavit, without application to the Court, and therefore a bill in equity was his only relief.

Appellees counſel. Although an infant is not generally bound by his acts under age, yet he is in all caſes of fraud and deception; for his age ſhould be conſidered as a ſhield for his defence, and not as a ſword for deſtruction: Therefore, although he may, by this plea, protect himſelf from injury, yet

he

Allen *vs.* Minor.

he cannot uſe it for the purpoſes of injuſtice towards ot hers. His obtruding himſelf in the preſent caſe, upon the public officer, as a perſon of competency to contract, in order to hinder juſtice and procure a reſtitution of the property to the prejudice of others, was a fraud and deception which renders him liable on the bond; eſpecially to innocent aſſignees and others unacquainted with his age; and who therefore are in no fault.

Cur: adv: vult:

PENDLETON Preſident. Delivered the reſolution of the Court.

That as the plaintiff had no day in the Court of Law, his application to a Court of Equity was perfectly regular; and the juriſdiction being admitted, there could be no queſtion upon the merits: Which clearly entitled the plaintiff to relief. That therefore the decree was to be reverſed, and a perpetual injunction awarded.

SELDEN

againſt

KING.

What ſhall be conſtrued an eſtate tail, and not an executory deviſe.

Teſtator deviſes, that if his wife be with child and the ſaid child *lives* and prove a male child and lives to 21 years of age, a houſe ſhall

IN Ejectment the jury find, "That Joſeph "Achilly, being ſeized in his demeſne as of fee "of

be built on his land, and that he ſhall have the privilege of part of the paſture and woodland and ſhall enjoy the ſame peaceably; and after the deceaſe of his mother, then he gives him and the heirs of his body all his lands, houſes and appurtenances, both real and perſonal, forever; but if the child proves a female and lives till 21 or marriage, ſhe ſhall have one half his perſonal eſtate, and all his lands to her and the heirs of her body forever: But if the ſaid child ſhould *die*, then he gives to his wife and her heirs forever, all his lands, ſlaves, ſtocks of cattle, &c; and appoints her and her father executors of his will. The child proved to be a daughter. On her birth ſhe had a veſted remainder in tail, with remainder in fee to the teſtators wife.

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" of the premiſes in the declaration mentioned,
" did, on the 11th day of March $\frac{1699}{1700}$, duly make
" and publiſh his laſt will and teſtament, wherein
" he deviſed in manner and form following to wit,
" And as for what worldly goods, my God hath
" been pleaſed to bleſs me withall, and after my
" juſt debts and funeral charges and expences are
" fully ſatisfied contented and paid, I give and diſ-
" poſe of the ſame as followeth: I give
" and bequeath unto my dear and loving wife
" Mary Achilly and her heirs forever, in man-
" ner as followeth, that is to ſay, if my ſaid wife be
" with child and the ſaid *lives* and prove a male
" child and lives to the age of twenty one years
" my will and deſire is that there be built out of
" my eſtate a good forty foot dwelling houſe of
" brick upon the land near a mulberry tree ſtand-
" ing between my now dwelling houſe and the river
" ſide and that he ſhall have a free privilege of
" part of the paſture as alſo privilege of the wood
" land ground for fencing and fire wood and he to
" enjoy the ſame peaceably and after the deceaſe
" of his mother then I give and bequeath unto him
" and the heirs of his body lawfully begotten for-
" ever all my lands houſes and appurtenances
" both real and perſonal; and it is my further will
" and deſire that the child wherewith my wife
" goes withall proves to be a female and ſhall live
" till ſhe attains of lawful age or married that
" then ſhe ſhall have the one half of my perſonal
" eſtate and after the deceaſe of her mother ſhe
" ſhall enjoy all my lands houſes, tenements and
" appurtenances to her and to the heirs of her bo-
" dy lawfully begotten forever. Item it is my
" further will and pleaſure that if the child ſhould
" *die* wherewith my wife now goes withall then
" I give and bequeath unto my ſaid dear and lov-
" ing wife Mary Achilly and her heirs forever,
" all my lands houſes negroes ſtocks of cattle, hor-
" ſes, ſheep, goods and chattles moveable and
" immoveable, alſo all my debts that is due owing

" and

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"and belonging to me in this county or in any "other part or place whatsoever. Item it is my "further will and desire that none of my negroes "be removed off or carried away from the plan- "tation whereon I now live but that they shall "live and be together, and lastly it is my will "and desire that my dear and loving wife with "her father be my whole and sole executors of "of this my last will and testament.

"That the premises in the declaration mention- "ed are the lands devised by the said will.

"That the said Joseph Achilly died seized as "aforesaid, before the 12th day of April 1700, "without revoking or altering the said will.

"That, at the time of his death, his wife Ma- "ry Achilly was pregnant, and soon after was de- "livered of a daughter who was named Achilly "Achilly; that the said Joseph Achilly had no "other issue; and that she was his heir at law.

"That Mary, the wife of the said Joseph, en- "tered upon, and was possessed of the premises "in the declaration mentioned, under the said "will; that being so possessed of the estate thereby "devised to her, she intermarried with a certain "John King, by whom she had issue a son named "John grandfather of the defendant: who is heir "at law to the said Mary Achilly, and to the said "John King her son. That Achilly Achilly the "daughter intermarried with a certain Bartholo- "mew Selden; who was possessed, in her right, "under the will, of the premises in the declara- "tion mentioned.

"That being so possessed, the said Bartholomew "and Achilly his wife by deeds of lease and re- "lease indented, conveyed the said lands to Joseph "Selden; which said lease bears date on the "twenty second, and the said deed of release on "the twenty third day of May 1722.

"That

"That the said deeds of leafe and releafe are in "theſe words. "This Indenture &c. (ſetting "them forth.")

That the relinquiſhment of the ſaid Achilly the wife, to the ſaid *deed of releaſe* is in theſe words. "At a court held for Nanſemond county May the "23d 1722, Bartholomew Selden and Achilly "his wife came into court and acknowledged the "above deed of releaſe for lands &c. unto Joſeph "Selden, which on his motion is addmitted to "record; alſo the ſaid Achilly being firſt private-"ly examined, came into court and relinquiſhed "all her right, title and intereſt of in and to the "ſaid lands which is alſo admitted to record.

"That the ſaid Joſeph Selden on the twenty "third and on the twenty fourth days of July "1722, reconveyed the premiſes in the declara-"tion mentioned to Bartholomew Selden afore-"ſaid by deeds of leaſe and releaſe, indented in "theſe words. This Indenture, &c. (ſetting them "forth.

"That the ſaid Achilly Selden died about the "year 1722; having never had iſſue. That ſhort-"ly afterwards, the ſaid Bartholomew Selden in-"termarried with a certain Sarah Hilliard.

"That the ſaid Bartholomew Selden, being "poſſeſſed of the premiſes in the declaration men-"tioned under the conveyance laſt aforeſaid, did "on the fourth day of January $\frac{1726}{1727}$ duly execute "and publiſh his laſt will and teſtament in writ-"ing, wherein he deviſed as follows. As touch-"ing all my temporal eſtate, and the diſpoſition "of it, I give and diſpoſe thereof as followeth. "Imprimis. I will that my debts and funeral "charges ſhall be paid and diſcharged. Item. I "give unto my beloved wife *the land I now live "on*, and my land that is at Hampton during her "life; but, if ſhe proves with child, as I expect "ſhe is, my will is, that the child, lawfully be-"gotten of my body, to inherit the land after her

"deceaſe

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"deceaſe, to him or her heirs forever. Item it "is my will that if my wife ſhould not prove with "child, I give all my fore-mentioned land, after "her deceaſe, to my brother John Selden to him "and his heirs forever. Item. I give to my be-"loved wife two negroes called Buckroe Tony, "and old Tony, likewiſe two children called "Betty and Nanny. All the reſt and reſidue of "my perſonal eſtate, goods and chattels whatſo-"ever, I give and bequeath to my loving wife, "making her my full and whole executrix of this "my laſt will and teſtament.

"That the premiſes in the declaration menti-"oned are deſcribed in the ſaid will by theſe "words, *the land I now live on.*

"That the ſaid Bartholomew departed this life, "ſo as aforeſaid poſſeſſed of the premiſes afore-"ſaid, a few days after the execution of his ſaid "will; that he had no lawful iſſue, and that his "ſaid wife Sarah, who is named in the will, ſur-"vived him, and lived until the twelfth day of "June *in the year of our Lord* 1778: That ſhe "was poſſeſſed of the land in the declaration men-"tioned, *and parted with her right to one James "Kirby, who was poſſeſſed of the ſame;* and "John King ſon of Mary, ſueing a forcible de-"tainer, an agreement was made between them "in theſe words. 'Indented articles of agreement "made this 27th day of January 1727, between "James Kirby and John King both of the upper "pariſh of Nanſemond county, witneſſeth that "the parties above mentioned, for a final deter-"mination of all differences and law ſuits now "depending between them, have agreed, in man-"ner and form following, that is to ſay, to with-"draw a juror, on the forceable inqueſt now de-"pending; and the ſaid Kirby quits claim, and "now, by the delivery of the key of the Manſion "houſe door, delivers in name of poſſeſſion of the "ſaid houſe and lands, that were Bartholomew "Selden's at the time of his death, quiet and

"peaceable

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"peaceable poſſeſſion to the ſaid King; and the "ſaid King is to pay unto the ſaid Kirby ten "pounds current money, on demand, and to "finiſh for the ſaid Kirby the tobacco houſe, now "raiſed by the firſt of May next; Kirby to find "nails and the ſaid Kirby's to have the uſe of the "hall and parlour chamber, until the ſaid firſt of "May; and the ſaid Kirby's to have the fifth "hogſhead of cyder made on the ſaid land, dur-"ing his life, the ſaid Kirby beating the ſame "with his ſervants; and the ſaid Kirby's to have "common of paſture, in the ſaid lands, for thirty "head of cattle and horſes, during his life; and "both parties are to keep the paſture fence in "repair, in proportion to the number of hands "each ſhall yearly employ on the ſame; and the "ſaid Kirby's to have liberty to tend and incloſe "as much land, contiguous to the ſaid tobacco "houſe, as he can work with four hands, and no "more, paying yearly and every year when law-"fully demanded one car of corn rent. In wit-"neſs whereof the parties above named have "hereunto ſet their hands and fixed their ſeals "the day and year above written and agree this "concord ſhall be recorded at equal coſts of the "parties."

his
JAMES ⋈ KIRBY, (L. S.)
mark

JOHN KING. (L. S.)

(Witnesses.)

Daniel Eelbank,
James Everard,
Andrew Meade,
David Oſheal.

"That John King, ſon of the ſaid Mary Achil-"ly, entered upon the premiſes, in the declara-"tion mentioned, in the month of January 1727, "under the ſaid agreement and as at heir at law "to the ſaid Mary Achilly, and died poſſeſſed

"thereof,

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"thereof, and that, from him, the poſſeſſion "thereof hath come to the defendant, who now "holds them, as his heir, and as the heir of the "ſaid Mary Achilly.

"That the ſaid John King, the ſon of Mary "and thoſe that held under him, always claimed, "and that the defendant claims title in fee ſimple "to the premiſes as heir to the ſaid Mary Achil-"ly and John King. That the ſaid Kirby died "about ſixty years before the bringing the ſuit.

"That John Selden, mentioned in the will of "Bartholomew, ſurvived him; and made his laſt "will and teſtament, in writing, bearing date "the 27th of December 1754; wherein he deviſ-"ed in manner and form following, to wit: 'I "give unto my ſon Joſeph Selden my plantation "and tract of land, lying and being in the coun-"ty of Nanſemond and late in the poſſeſſion of "Bartholomew Selden, to him my ſaid ſon and "his heirs forever; he paying and diſcharging "my bond to Major Robert Armiſtead for one "hundred and fourteen pounds."

"That the ſaid John Selden died ſoon after, "and that he was not poſſeſſed of the premiſes in "the declaration mentioned, either at the time "of making his ſaid will, or at his death.

"That his ſaid ſon Joſeph Selden ſurvived him, "and paid off the bond to Armiſtead in the will "mentioned.

"That Joſeph Selden, laſt mentioned, not be-"ing poſſeſſed of the ſaid land, did on the 23d "day of December 1774, ſeal and execute a deed "of bargain and ſale, whereby in conſideration "of the ſum of ſix hundred pounds current mo-"ney of Virginia, he granted *bargained* and *ſold* "unto John Selden and his heirs, all that tract "or parcel of land ſituate, lying and being in the "county of Nanſemond and now in the poſſeſſion "and occupation of Doctor John King and is the "ſaid lands mentioned in the will of Joſeph

"Achilly,

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"Achilly, bearing date the eleventh day of "March $\frac{1699}{1700}$ and therein deviſed to the child "the wife of the ſaid Joſeph was then big with- "al, which ſaid child proved a female called "Achilly Achilly, and intermarried with Bartho- "lomew Selden, who thereupon being in poſſeſſi- "on of the ſaid lands together with his wife "Achilly by their deeds of leaſe and releaſe bear- "ing dates the 22d and 23d days of May in the "year of our Lord one thouſand ſeven hundred "and twenty two, did convey all their eſtate "right, title, intereſt, claim and demand of in "an to the ſaid lands to Joſeph Selden of the pa- "riſh and county of Elizabeth city gentleman and "to his heirs and aſſigns forever, who afterwards "reconveyed the ſame to the ſaid Bartholomew "and his heirs forever, by deeds of leaſe and re- "leaſe bearing dates the 23d and 24th days of "July 1722, who thereupon being ſeized and "poſſeſſed deviſed the ſame by his laſt will and "teſtament bearing date the fourth day of Janua- "ry $\frac{1726}{1727}$ to his brother John Selden and his heirs "forever, having previouſly given therein to his "wife the ſame for life, whereby the ſaid John "Selden being entitled to the ſaid tract or parcel "of land afterwards to wit, the 27th of Decem- "ber 1754, by his laſt will and teſtament did "amongſt other things deviſe to Joſeph Selden "party to theſe preſents as follows the ſaid tract "or parcel of land: Item, I give unto my ſon "Joſeph Selden my plantation and tract of land "lying and being in the county of Nanſemond "and late in poſſeſſion of Bartholomew Selden to "him my ſaid ſon and to his heirs forever, he "paying and diſcharging my bond to Major Ro- "bert Armiſtead for one hundred and fourteen "pounds.

"That the ſaid John Selden died in March "1775 inteſtate; and that the leſſor of the plain- "tiff is his heir at law.

"They

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vs.
King.

"They find the leaſe entry and ouſter in the "declaration mentioned; and if upon the whole "matter, the law be for the plaintiff, then they "find for the plaintiff; and if for the defendant, "then they find for the defendant."

The Diſtrict Court gave judgment for the defendant; and the plaintiff appealed to this Court.

CALL for the appellant. Made three points:

I. This was not a remainder in the mother, after the previous eſtate tail to the daughter.

A contrary conſtruction would not have conſiſted with the general intention of the teſtator, but would have entirely diſappointed it in ſeveral events which might be named. Thus if the wife had had twins they would have been diſinherited. For there is no proviſion for ſuch a caſe; and therefore, the previous eſtates being all removed, the wife would have taken immediately. So if a ſon had been born, had married and died under age leaving iſſue, that iſſue would not have taken, but the wife; as in that caſe, there is no proviſion for the ſon.

Beſides, if the child had proved a ſon, the wife would not have had a fee, in the event of his attaining 21, and then dying without iſſue; for the remainder is only limitted on the eſtate of the daughter, and not on that of the ſon.

Again the wife, according to that conſtruction, was not entitled to the perſonal eſtate; for it was a limitation after failure of iſſue in the daughter; who conſequently took the whole intereſt, which on the marriage veſted in the huſband. But if the child had proved a ſon ſhe would not have been entitled thereto, becauſe no proviſion is made for her as to the perſonal eſtate in that caſe.

Laſtly, it is wholly improbable, that the teſtator would have given his wife, after her death, a remote intereſt of this kind, in preference to his

child,

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child, whom he had all along preferred, in diſpoſing of the immediate intereſt.

II. That it was an executory deviſe to the wife, to take effect on the child's being born dead, which event not having happened, the reverſion in fee deſcended on the daughter, as heir at law to the teſtator.

The word *die*, in the concluding part of the deviſe, is to be ſet in oppoſition to the firſt word *lives*, in the beginning of it. For the word *lives*, is twice repeated in the beginning, and ſhould be taken in two different ſenſes, or elſe ſome of the words muſt be rejected; contrary to the known rule of conſtruction, that effect is to be given to every word, if poſſible. Therefore in the beginning, the firſt word *lives*, is to be taken in the ſenſe of *born alive*; and the ſecond, in the ſenſe of *continuing to live till* twenty one, in the caſe of a ſon, or till 21 or marriage in the caſe of a daughter; and it is to the firſt of theſe ſenſes, that is to ſay *born alive*, that the word *die*, in the concluſion of the deviſe, is to be ſet in oppoſition.

The teſtator therefore had three contingencies in view, at the time of making his will; that is to ſay. 1. The birth of a living child. 2. Its arriving to the age of maturity. 3. The death of that child before its birth.

With the two firſt of theſe contingencies in mind, he conſidered how he ſhould diſpoſe of the eſtate, firſt, in caſe the child ſhould be born alive, and prove to be a ſon; ſecondly, in caſe it ſhould be born alive, and prove to be a daughter: In both caſes predicating the diſpoſition upon its being born alive. His reaſoning was thus; if my child ſhould be born alive, and ſhould prove to be a ſon, then I give my eſtate this way; but if it ſhould be born alive, and ſhould prove to be a daughter, then I give it that way; making the limitation

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limitation in both inſtances to depend on the firſt word *lives*, in the commencement of the deviſe.

But, having provided for all the caſes ſhould the child be born alive, he next determines, what ſhould be done with his eſtate, in caſe the child ſhould die before its birth. In this caſe, having no dearer object to provide for, he gives the whole eſtate to his wife. So that, according to this conſtruction, all the leading contingencies which he had in view are provided for; and the intereſt of his family preſerved, with a prudent regard to events.

This mode of conſidering the ſubject is the moſt obvious, and reſults neceſſarily from the intention of the teſtator; who in the laſt limitation was not contemplating the failure of the iſſue of his daughter, but of himſelf; and was providing for the latter event only. But the interpretation receives additional force, from the manner of the expreſſion. For the words uſed are unapt, and not ſo obvious as many others, for diſpoſing of the remainder; So that they appear to have been anxiouſly uſed in order to diſtinguiſh it from a limitation, on the daughters eſtate.

Conſequently, in the events which have happened, the wife took nothing in the lands, after her daughters death without iſſue; becauſe ſhe was only to take the fee in caſe the child died before its birth; and therefore her only intereſt was an eſtate for life by implication, although, as before mentioned, if the child had died under 21, and before marriage ſhe would have taken the fee, upon the rule in executory deviſes, that where the prior eſtates are removed, the deviſee takes preſently; Becauſe the events, on which the remainder was limitted would, in that caſe, never have commenced.

This conſtruction is preferable to the other; becauſe it avoids the inconveniences which have been enumerated. For if a child was born, and

lived

lived to the prescribed period, it was provided for; and a comfortable disposition made for the mother also: If a son had been born, had married, had issue, and died under 21, he would have taken; So in the case of twins: And, if no child at all had been born, the wife would have taken the whole. Selden vs King.

In short by this construction the testator is not made to violate nature, and act inconsistently with himself, in giving away the remainder from the issue of his blood, for whom in every other instance he shews a preference in order to bestow it upon strangers. For to strangers it must probably have gone; as the daughter was not to take until the mothers death; and therefore it was most likely that the ultimate limitation would be enjoyed by the mothers representatives, and not by the mother herself.

III. That if the last construction be rejected, then the word *die* in the conclusion of the devise is to be contrasted with the words *shall live till she attains of lawful age or married*, in the clause immediately preceding; and then it will be a contingent remainder to the wife, if the daughter should die unmarried before 21; which contingency never having happened, the remainder never vested; and therefore descended on the heir at law.

WICKHAM *contra*. Contended that it was a devise to the wife for life by implication, remainder to the daughter in tail, remainder to the wife in fee. The word *die* is to be understood as *a dying without issue*, which words the court will supply, in order to effectuate the general intention of the testator. This is the interpretation which a plain man would put upon the case; and the meaning put upon the words by the appellants counsel is artificial altogether. That the court may supply the words *without issue* is proved by many of the English cases *Spalding* vs *Spalding Cro. Car.* 185, 1. *Will.* 427. 234. 2. *Vez.* 194. 8. *Mod.* 59. But supply those words, and then it

is

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is but the common case of a plain vested remainder after the death of tenant in tail without issue. As to the inconveniences mentioned, from supposed cases which might have happened, they never were contemplated by the testator, and therefore cannot be argued from. But the consequences which are contended for, would not have followed from those cases. Thus in the case of the twins it would have been considered as a *casus omissus*, and therefore the will would have been rejected in favor of them. So in the case of a son being born, marrying and dying under the age of 21 leaving issue; for the issue would have taken on the same ground. But in fact the son would have taken an immediate estate on his birth; for the contingency of his arriving to the age of 21 only applies to the privileges which he was then to have out of the estate, 1. *Burr.* 228. *Jones* vs *Westcomb. Prec. ch.* 316.

The argument drawn from the personal estate has no influence: for at most it only proves the testator to have attempted to create a perpetuity. But a difference of construction may be applied to the words as relative to the real and personal estate. *Forth* vs *Chapman*, 1. *Will.* 663.

The construction contended for, on the other side would go to establish, that there might be an executory devise after an estate tail; contrary to a known rule of law. Besides the idea of leaving the fee to descend upon the heir at law, is repugnant to the intention of the testator: who, in the preamble to his will, professes a design to devise his whole estate.

But if the construction of the will were against us, still the plaintiff could not recover; because the lease and release did not convey the estate; for the wife was not examined as to the lease. Those conveyances however, operate merely on the possession; but here was none; and there is no privity between the releasor and releasee.

the

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The length of time is a bar; for the defendants and thoſe under whom they claim have been in poſſeſſion 70 years. Sarah Hillards life eſtate make no difference; for ſhe parted with it, before the year 1727. The defendants anceſtor, if he had no title under the will, was a diſſeiſſor; and the diſſeiſen of tenant for life is the diſieiſin of him in remainder, *Co. Lit.* 250 *(b.)* 9. *Rep.* 105. Beſides the accord here was a forfeiture of Kirbys eſtate; and from that time, the remainder man might have entered, *Co. Litt.* 252. *(a.)*

Again there was a dying ſeized which tolled the entry; and ſeveral of the conveyances, under which the plaintiff makes his title, were by perſons out of poſſeſſion; who therefore were unable to convey: Particularly by bargain and ſale; which always ſuppoſes poſſeſſion, 2. *Black. com.* 332.

CALL in reply. The child could not have taken before 21; for the contingency is expreſs and runs through the whole deviſe; and therefore no eſtate in the child, upon that limitation, could come into exiſtence until the event had happened. The caſe from 1. *Bur.* 228, was a caſe upon the known doctrine of an exception out of the general deviſe, *Fearn.* 438; and therefore will not apply to the caſe under conſideration. For the deviſe in the preſent inſtance was not an exception, but an expreſs condition; and therefore neceſſary to be performed, before the eſtates could ariſe, *Fearn.* 438-9. The argument that there can be no executory deviſe after an eſtate tail proves nothing. Becauſe although that is true where the attempt is to create an executory deviſe, upon the preceding limitation in tail, yet we do not contend for this here; but that it ariſes upon an event independent of the eſtate tail, having no connection with it, and which may happen before it. In ſhort it is a mere alternative deviſe altogether. If a child was born and lived till 21 in the caſe of a ſon, or of 21 or marriage in caſe of a

daughter

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daughter, then the eſtate tail was to ariſe; which is one alternative: But if no child was born, then in that event, which is the other alternative, the executory deviſe to the mother was to take place. It is admitted that the remarks relative to the perſonal eſtate are correct, but then it ſaid that ought not to prevent her taking the real eſtate. This however only proves what I contended for, that the conſtruction goes to diſappoint the will of the teſtator.

The leaſe and releaſe was a ſufficient conveyance. For the recital of the leaſe in the releaſe made both of them the wifes deed. Beſides the tenant was rightly in under the huſband, and therefore the releaſe operated to enlarge the eſtate: Or if the huſband had no authority, then it was a diſcontinuance, and the releaſe paſt the right.

The reverſion was well conveyed by Joſeph Selden to John; for the bargain and ſale paſſed it. 1. *Bac. abr.* 275. 2. *Black. Com.* 290. *Plowd.* 154; and that another was in poſſeſſion will make no difference, unleſs it had been adverſe to the remainderman himſelf. The paſſages from *Coke* prove nothing to the contrary, as they only ſhew, that the remainderman may conſider himſelf as diſſeiſed, if he will; but they do not oblige him to enter. The opinions, there ſtated, were introduced merely for the ſake of the aſſize of *novel desseisin*; and therefore it was expreſsly held, in *Taylor* vs *Hord*, *Cowp.* 689. 703, that the remainderman might elect to conſider himſelf diſſeiſed or not. Beſides there could be no diſſeiſen here, as the verdict ſtates, that Sarah Hilliard parted with her right to Kirby, and that he parted with his to King; ſo that King was lawfully in poſſeſſion and therefore could be no diſſeiſor.

That a deſcent was caſt makes no difference; for that doctrine only applies againſt one having a right of entry; which the remainderman here had not. Therefore the remainder, in the preſent

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ſent caſe, was well conveyed; and the right is not barred by the ſtatute of limitations.

Cur: adv: vult.

ROANE Judge. This caſe depends upon the conſtruction of the will of Joſeph Achilly dated on the 11th of March $\frac{1699}{1700}$. And, before I go into this conſtruction, I will mention two or three principles, which I hold to be inconteſtable, and, under the influence of which, I think that conſtruction ought to be made.

1. Then it is a rule, that in conſtruing a will the intention of the teſtator ſhould be collected from the whole inſtrument taken together; every expreſſion ſhould have its due weight; and, as is ſome where ſaid, every ſtring ſhould give its proper ſound.

2. It is alſo a rule, that the conſtruction ought to be made as at the time of the death of the teſtator; and ought not to be differed in conſequence of a contingency, therein contemplated (but the event of which was unknown to the teſtator at the time,) having afterwards happened the one way or the other. This principle will take into the conſideration of the preſent caſe the deviſe to the ſon (although none was in fact born,) and the conſequences reſulting therefrom; which muſt be ſuppoſed to have been in the contemplation of the teſtator.

3. That where the teſtator does not uſe proper technical words to expreſs his meaning, the court may ſupply them, *in order to effectuate the manifeſt intention of the teſtator; and for ſuch purpoſe only.*

Under the influence of theſe principles a difficulty ariſes, as to the words which are to be ſupplied after the words, *if the child ſhould die*, in the ultimate deviſe to the wife; it being evident that ſome muſt be ſupplied, as a dying ſimply is not a contingent event, but naturally certain.

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The words, "*without issue;*" and "*under the age of twenty one;*" or in the event of there being a daugther "*before marriage,*" have all been assumed; and the question is, which of them shall be adopted?

In the devise to the son, if the words, *live to the age of twenty one years*, be considered as only extending to the time, when the privilege, as to the house and part of the land, is to commence (notwithstanding the mother may be alive,) but not as a condition precedent to the vesting of his interest in the land on the death of the mother, the words in the same clause "*and after the decease of his mother then*" will have their full effect; whereas by a contrary construction those words will have no effect, in case of the son being under age at the time of the death of the mother, For, notwithstanding her death, he could not have succeeded under that construction; because not of the age of twenty one years.

But it would be improper to construe a provision in his favour, predicated upon the event of his mother being alive at the time of his coming of age, to narrow a right given by the same clause to succeed to the whole land, upon the death of his mother.

The intention of the testator relative to both his son and daughter (for the material words in both the devises are substantially alike as far as concerns the present question) is to give a provision by way of support, when they respectively arrive to lawful age, or the daughter marries; but he never could have meant, nor can we so expound the will, without rejecting some of his words as above, that their interest in the lands, after the death of the mother, should be postponed to the same period; and, in the event of their not attaining to lawful age, be lost. This, in the case of the son, would be to pretermit his children, if he died under age leaving any, in

favour

favour of the heirs of the teſtators wife (perhaps by another huſband;) which it is preſumed the teſtator cannot be ſuppoſed to have intended: Eſpecially as the wife, on my conſtruction, has a preſent intereſt for life in the whole land, and a remainder in fee expectant upon the extinction of the teſtators lineal deſcendants. Selden vs. King.

Beſides I hold it to be a circumſtance of ſome weight, in aſcertaining the teſtators intention, that my conſtruction of it conforms to a very uſual mode of ſettlement, limiting an eſtate for life, remainder in tail, remainder in fee.

With reſpect to the operation of conditional words, by way of condition, precedent or otherwiſe, it is not neceſſary to go into that doctrine; as, in this caſe, the intention of the teſtator reſtricts the conditional words to the privileges contemplated, and does not extend them to affect the right to the land, on the death of the mother: But if ſo, then upon the birth of the daughter, ſhe had a veſted remainder in tail, remainder in fee to the wife; and upon the death of the daughter, without iſſue, the wife, and the defendant claiming under her, became entitled to the land in queſtion. Therefore I think the judgment ought to be affirmed.

CARRINGTON Judge. In the conſtruction of wills, the teſtators intention ſhould be the rule of deciſion. By that ſtandard, courts ſhould be governed, and the intention ſhould be purſued, as far as the rules of law will permit.

To effect this object, the words of the will are in general to be attended to; but it is ſometimes neceſſary, in order to fulfil the manifeſt general intention of the teſtator, to ſupply ſuch words, as, from the general complexion of the will, compared with the ſituation of the teſtator, and of the legatees and objects of his bounty, are abſolutely neceſſary to effectuate the purpoſes and diſpoſitions intended by him.

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In doing this, too great latitude of conſtruction on one hand, and too ſcrupulous a regard to the ſtrict limits of legal rules on the other, are equally to be avoided, and a juſt medium obſerved.

In the preſent caſe, the teſtator, a century ago, being poſſeſſed of an eſtate both real and perſonal, and probably without relations, but having a wife ſuppoſed to be pregnant, made his will; and thereby, after reciting that he means to diſpoſe of all his temporal eſtate, manifeſts an intention to make proviſion for his wife, during life in the firſt place; next to preſerve his eſtate to the heirs of his own body; and, failing thoſe, to give the whole to his wife; who, next to his own iſſue, was the favourite object of his bounty.

Let us conſider the mode by which he intended to effect this:

Firſt then, I am of opinion that the ſon, if one had been born, would have been entitled to a veſted remainder in tail at his birth, to take effect, in poſſeſſion, upon the death of his mother. But he would, in the mean time, on his coming to the age of twenty one, have had a right to the uſe of part of the lands, during the lifetime of his mother. Any other conſtruction would have diſinherited the iſſue of the ſon; which never could have been intended, by the teſtator.

In like manner I think the daughter, by the ſame rule of conſtruction, likewiſe took a veſted eſtate tail at her birth to take effect, in poſſeſſion on the death of her mother. But, as ſhe married and died without iſſue, a doubt ariſes as to the meaning of the teſtator by the words, *if the child die &c*, in the ſubſequent clauſe of the will.

The queſtion is whether he meant a dying generally? or before his age of twenty one, if a ſon, or marriage, if a daughter? or, as Mr. Call ſuppoſed, before the birth of the child? or laſtly without heirs of the body?

He

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He could not have meant the first, because he knew death was certain: nor the second, because the sons issue would have been disinherited, as before observed, if he had died before twenty one; nor the third, because the general tenor of his will shews he contemplated the childs being born alive: Therefore he must have meant the last.

According to which idea, the true construction is, that the testator by the latter words, *if the child should die*, refered to the preceding devise to the daughter in tail, and meant to add the words, *without heirs of her body*, but inadvertently omitted them. Therefore, in order to fulfill his intention, and carry the dispositions, he was making, into effect, it is necessary to supply those words: And then, upon the death of the daughter without issue, the remainder in fee took effect in possession in the wife.

Being of this opinion, it is unnecessary to trace the title of the plaintiff any further; or that of the defendant at all. For the defendant being in possession must remain so, until a better title is shewn. But I will add, that the defendant and his ancestors having been so long in possession, I should be extremely unwilling to disturb it, unless compeled thereto by positive law.

I am for affirming the judgment of the District Court.

LYONS Judge concurred that the Judgment should be affirmed.

PENDLETON President. We are all agreed, that death being certain and not contingent the testator must be supposed to have meant some other event added to the death, which was really contingent, and which the Court in construction must supply; but we differ about the extent of that supplement. I think he meant, the contingency of the sons dying under twenty one without leaving issue, or a daughters dying under that age, not having been married. My worthy brethren add a

further

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further contingency; namely that of a general failure of iſſue of the children, which does not appear to me to have been contemplated by him.

I would obſerve, that, in ſupplying words on ſuch occaſions, we are not at liberty to form gueſſes or conjectures of what we would have intended in ſuch a caſe, but to ſupply the omitted words, as neceſſary from the complexion of the whole will, as is ſaid by Ld. Mansfield in *Watson* vs *Sheppard Dougl.* 28. On this view, I have formed my opinion.

As there was no ſon, but a daughter only, I diſregard the clauſe for that event, as a ſuppoſed caſe which never happened; altho' there is no material difference, except that the deviſe to the ſon is upon condition, that he attain the age of twenty one, and that to the daughter, of her attaining that age, or being married.

The caſe of a ſon was mentioned, for the ſake of obſerving, that if the limitation to the wife was upon the ſon's attaining 21, and he had died under age leaving iſſue, they would be diſinherited, contrary no doubt to his apparent intention. I anſwer, that if that caſe had happened, from the plain intention to provide for the iſſue, I would have interpoſed the words in the limitation to the wife, *if my ſon die under 21 without leaving iſſue;* confining it to the event at that period, and not extending it to a general failure of iſſue.

But however neceſſary this might be in the caſe of the ſon, it could not be ſo in the caſe of a daughter, who could not have iſſue before her marriage; which was a performance of the condition.

That the daughters attaining full age, or her marriage was a condition precedent to the veſting of any eſtate in her, appears to me evident; ſince although the caſes ſhew, that the words *when* and *as* may be applied to the time of poſſeſſion, and not to the veſting, I believe it never was, nor can be doubted, but that the word *if* muſt make ſuch condition.

Upon

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Upon the will in the caſe before us, the condition applies to the whole; as well the remainder in tail after the death of the wife, as the moiety of the perſonal eſtate ſhe was to have on marriage or coming of age, being coupled together by the word *and*. Thus making both to depend on the ſame condition, though to come into poſſeſſion at different periods. So that the daughter on her coming of age, took a veſted intereſt in half the perſonal eſtate in poſſeſſion, and a veſted remainder in tail in the real eſtate after the death of the wife. So far the reverſion in fee is undiſpoſed of; and, if the will had ſtopped there, would unqueſtionably have deſcended to the daughter. We come then to the enquiry whether that reverſion is diſpoſed of to the wife in the next clauſe. That a man may deviſe to A for life, remainder to B. in tail, remainder to A in fee, is not queſtioned; but the true queſtion is, whether this teſtator deſigned to make ſuch a diſpoſition?

That he intended his wife ſhould have his whole eſtate, in caſe a child ſhould be born, and die under age and unmarried, is apparent; for this might be beneficial to her whom he preferred to any other, having no collateral relations of his own: But that he looked forward to the remote poſſibility of a failure of iſſue, at any time after, is what I cannot diſcover a hint of, in this will; and therefore, although he might have made ſuch a limitation, and if he had done ſo, the court could not have controuled it, the caſe is quite altered, when we are to ſupply words, ſuppoſed, from apparent intention, to have been omitted.

I can eaſily conceive that although he meant to provide for the caſe of his children dying in their infancy, when they could not make any diſpoſition of their eſtates, yet when they came of age and had families of their own, they ſhould take the eſtate in tail with the remainder in fee, ſubject to all the legal conſequences of ſuch an intereſt; that is to ſay, they could not alien in

prejudice

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prejudice of their iſſue, unleſs by a legal mode the eſtate tail was defeated, but might do ſo if their iſſue failed.

As death is naturally oppoſed to life, there was great force in Mr. Call's obſervation, that the teſtator uſed the word *die* in oppoſition to *living*; that is, if the child die before the time I have required it ſhould live to be entitled to my eſtate, then I give it to my wife.

My interpretation will make the two clauſes conſiſtent, but the other will produce inconſiſtency. For the half of the perſonal eſtate is given to the daughter abſolutely, not to her and the heirs of her body; but the limitation over to the wife comprehends the whole perſonal eſtate with the lands, and if he meant the limitation to be on a general failure of iſſue, it would have contradicted the deviſe of the perſonal eſtate. If he had expreſsly ſo limitted it, then it would have either been good as to the land, and void as to the perſonals, or good as to both by applying them to each in different meanings. But let it ſtill be remembered, that we are ſupplying words for him, and ſhould not make him contradict himſelf.

A queſtion was aſked, could the teſtator mean if his daughter died the day after marriage that his wife ſhould not have the eſtate? I anſwer, he has fixed her marriage for veſting the eſtate in her, without hinting a difference in her intereſt, whether ſhe lived a day or an hundred years. But I think I am warranted by the will, in ſaying, that if the teſtator had been aſked, whether if his child had iſſue and that iſſue failed a thouſand years after, the eſtate ſhould go to the heirs of his wife, (the conſequence of the limitation on a general failure of iſſue,) or to thoſe claiming under his child or iſſue? He would have anſwered, that he cared nothing about it.

Upon the whole, the only ſupplement, which I think myſelf at liberty to make, will leave the clauſe

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clause to read thus "Item, it is my further will "and pleasure, that if the child, wherewith my "wife now goes withal, die (if a male before he "attains the age of twenty one or have issue, or "if a female before she shall attain that age or be "married,) then I give and bequeath to my said "dear and loving wife Mary Achilly and her heirs, "*all* my lands, houses, negroes, stocks, goods and "chattels and debts due." Making it an executory devise of the fee to the wife, upon the contingency of the sons dying without issue under age, or a daughter dying under age unmarried, which I conscientiously believe was his intention.

However as the other Judges are of a contrary opinion, the judgment must be affirmed.

Judgment affirmed.

LAWRASON

against

DAVENPORT.

Adm'r. selling a large certificate to pay a small debt, not liable for what the certificate would have sold for if kept but for the market price at his own residence, at the time of the sale

DAVENPORT and others brought a suit in the High Court of Chancery against Lawrason administrator of Brown. The bill among other things stated, that Brown, who was but little indebted, died possessed of some personal property, and entitled to compensation for his services as an officer during the war; which was, after his death, paid to the defendant Lawrason in certificates and warrants for the interest thereof, to the amount of £ 1260 for certificates, and £ 581 1:4 in warrants; besides some military certificates issued to Brown himself. That Brown died intestate without children, leaving the wife of

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Davenport and the other plaintiffs, Daniel, Charity and Robert Daugherty, his next of kin and legal repreſentatives. That Brown was a native of Ireland as well as the plaintiffs who are ignorant of matters in Virginia; which was known to Brown, who has diſpoſed of the effects, certificates and warrants aforeſaid without ſufficient cauſe, and, except the pittance paid to the plaintiff Robert Daugherty, the whole remains in his hands. That when he ſold the £ 1260 in certificates, and the £ 581 : 1 : 4 in warrants, during the month of Auguſt 1791, there was no debt due from the eſtate, which rendered it proper, as public credit was then riſing. Therefore the bill prays for ſatisfaction, with an account of the adminiſtration, and for general relief.

The anſwer admits Brown's death, and that adminiſtration *de bonis non* has been granted to the plaintiff. States that the certificates for £ 1260 commutation, and the £ 581 : 1 : 4 intereſt thereon never came to the hands of the defendant, nor did he know that as adminiſtrator he was entitled to the ſame, until after the ſaid Robert Daugherty and a certain John Wiſe (who the defendant is informed is attorney in fact for the plaintiffs) had entered into an agreement concerning the commutation aforeſaid; and until Wiſe, under pretence that he knew of a debt due the eſtate in Richmond which he thought he could receive, procured a power of attorney from the defendant. That the defendant continued ſtill ignorant of it until after Wiſe had contracted for a ſale of the certificates with Finlay. When the power of attorney proving inſufficient and Wiſe and Finlay diſagreeing, Finlay informed the defendant of his title to the commutation certificate; but the defendant knows not the amount. That Finlay propoſed to give Robert Daugherty as much for the certificates, as he was to give Wiſe for them; and the defendant believing Wiſe knew the value of the certificates, as he had underſtood he had dealt conſiderably in certificates,

agreed

agreed to the propoſal, and gave a power of attorney; that the price received for them was £650, and the defendant believes that to have been as much as could have been gotten for them at the time. That the defendant had not ſufficient effects in his hands to diſcharge a note given by Brown amounting with intereſt to £29: 14 5. That the defendant thought himſelf more juſtifiable in giving the power as Robert Daugherty who was the only relation of Brown in America, and who claimed the whole, was deſirous that the certificates ſhould be diſpoſed of. That the defendant knows of no debts due to the eſtate, except ſome partnerſhip accounts, which are not likely to produce any thing.

Three witneſſes ſpeak as to the relationſhip of the plaintiffs to the inteſtate. A fourth proves that he was concerned a moity in the purchaſe of the certificates which he believes were worth about eleven ſhillings in the pound: Does not know when or for what price he ſold them; that only four certificates iſſued for the £. 1260, they being all that were aſked for; although it was probable that, if requeſted, more might have been obtained, as the Auditor was uſually accommodating in dividing certificates into convenient ſums.

A fifth witneſs proves what would have been the value of the certificates in September 1796, had they been funded by the defendant.

The Court of Chancery at the September term of 1796, being of opinion, that the diſpoſition by the defendant of the military certificates and intereſt warrants, to which his inteſtate had been entitled, was not juſtifiable, the articles ſold not being comprized, as that Court ſuppoſed, in the terms of the act of the general aſſembly, directing executors and adminiſtrators to ſell ſuch goods as are liable to periſh, to be conſumed, or to be the worſe for keeping, and the ſale not being neceſſary for payment of debts, nor having been

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made by public auction, decreed the defendant to pay to the plaintiffs 1887 dollars 55 cents; which would have been the then present value of the certificates and warrants aforesaid if they had been funded, with interest on 4320 dollars 46 cents from the 1st day of the preceding July; after deducting therefrom the £. 29 : 14 : 5 with interest from the first of December 1791.

From which decree the defendant appealed to this Court.

CALL for the appellant. Made three points. 1. Whether the plaintiffs had proved themselves entitled to the estate of the decedent? 2. Whether the payment to Wise the attorney of Daugherty, who was the only known relation of the decedent was not a discharge for so much? 3. Whether the administrator could be rendered liable for more than the certificate actually sold for? Upon the first he denied that the evidence was sufficient. Upon the second he insisted that the payment was good. Because the law would presume that there were no other relations, than those in this country, if the contrary was not shewn; and therefore payment by the administrator to the only known relation here, and who was proved in a Court of Justice to be the decedents heir at law, would be a sufficient exoneration; unless it could be proved that he knew there were other relations. For he was not bound to seek throughout all nations and countries for the kinsfolk of the deceased. Therefore as no knowledge of any other relation was proved at the time of the payment to Wise, that was a sufficient defence. Upon the third, he contended that he could not be made liable according to the case of *Graves* vs *Groves*, 1. *Wash.* and *Woodson* vs *Payne* in this court. *

MARSHALL *contra*. The point relative to the title of the plaintiffs rests upon the proofs in the cause, which are conceived to be sufficient.

As

* 1. Call's rep. 570.

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As to the second point made by Mr. Call, the law does not presume that there are no other relations, except what are in this country. There might be some pretext for such a presumption perhaps in the case of a native; but there can be none in case of a foreigner. The administrator in this case had a reasonable ground to believe there were other relations; and therefore he ought to have inquired and informed himself. He ought either to have demanded security, or waited for a decree of a Court of Justice, before he proceeded to make any distribution. The payment therefore was premature and unjustifiable.

But if he be liable at all, it must be to the full value of the certificate; that is to say, the plaintiffs are entitled to the certificate itself or the value at the time of pronouncing the decree. The case of *Graves* vs *Groves* proves nothing to the contrary. For that was the case of a contract and decided on circumstances. At most, it only proves that the debtor could only be charged with the value of the certificates, which he had promised to deliver, upon the day on which they ought to have been delivered. But here the administrator was a trustee of the article, which he ought to deliver in specie or pay its value at the time of the decree. As to the case of *Woodson* vs *Payne*, I am not acquainted with it, and therefore am unable to make any remarks upon it. Upon the whole the administrator should not have sold more of the certificate than was necessary for payment of the £20: especially as it is proved he might have divided it; and therefore, having done otherwise, he is clearly liable for the full value at the time of the decree.

CALL in reply. If *Graves* vs *Groves* be laid aside altogether, yet that of *Woodson* vs *Payne* will completely decide this case. For the holder of the certificate there was a trustee as much as the administrator here. There the trustee having a right to apply a part disposed of the

whole

Lawrason, *vs.* Davenport.

whole; which was the caſe here; becauſe the adminiſtrator had a right to ſell for payment of the £ 29. If therefore the truſtee in that caſe was not liable for more than the value at the time of ſale, no more is the adminiſtrator here. Beſides, if the adminiſtrator had actually known that the Auditor would have divided the certificate, there was no obligation on him to aſk it. But there is no proof of any ſuch knowledge; and it is far from being certain that the Auditor would have done ſo. For it does not follow, that becauſe he would have accommodated Mr. Pollard, an acquaintance, in that way, that he would have extended the ſame kindneſs to every body, who aſked it. For that might be attended with infinite trouble.

Cur: adv: vult:

PENDLETON Preſident after ſtating the caſe delivered the reſolution of the Court.

There is no queſtion upon the liability of the adadminiſtrator to pay the plaintiffs their due ſhares, though he paid the whole to Robert without notice; ſince that payment was at his peril and he might have ſecured himſelf, and perhaps did, by taking ſecurity for Robert to indemnify him.

The only queſtion is, for what ſum he ſhall be liable? whether for what the certificates were really ſold for? or for the current market price of ſuch at the time? or what they would be now worth, if they had been preſerved, had been ſubſcribed into the continental loan office, and had remained in that ſtate?

The opinion of the court, with the reaſons on which it is founded, will appear in the decree formed, and therefore are not anticipated.

"The Court is of opinion, that the appellant "was liable to pay the appellees their diſtributive "ſhares of the inteſtates eſtate, notwithſtanding "his having paid the whole to Robert Daugh-"erty without notice of there being other rela-

"tions

"tions, since such payment was at his peril, and "he either did take, or might have required a "bond from Robert with security for his indem- "nity. That the appellant is not liable for what "the certificates, if preserved, would in event "have produced now, by operations which he was "not obliged, if he had power, to pursue, and "which, if he had pursued, might in a contrary "event of things, have reduced them to no- "thing: He had not only power to sell the cer- "tificates as an article which might grow worse, "of which he, acting fairly, was the judge, but "was compelled to do so, to raise as well the debt "of twenty nine pounds fourteen shillings and "five pence, as the distributive share of Robert "Daugherty, a more considerable sum; but the "administrator ought to be accountable for the "value of the certificates at the time, according "to the then market price at Alexandria where "the intestate died, and where the administrator "lived; as to which the answer is, that the "administrator was induced to assent to the "sale made by Robert Daugherty to Finley, "from his opinion of the judgment of Wise, "a considerable dealer in certificates, and who, "when those in question were supposed to be "his property, had agreed to sell them to "Finlay for the same price which the latter was "to give Daugherty; and adds that he still be- "lieves that they were sold for as much as could "have been got for them at that time and place, "tendering a fair issue for enquiry, whether the "market price at that time and place exceeded "the sales; to this the appellees have made no "proof, the price at Richmond being foreign and "unimportant, and the answer, being responsive "to the bill, is uncontradicted; for which reason, "and since the whole transaction appears to have "been fair, without any view to benefit the ad- "ministrator or purchaser, and had the approba- "tion, or rather was the contract of Robert

"Daugherty

Lawrafon, vs Davenport.

"Daugherty the only relation then known to the "adminiſtrator, without deciding whether the "adminiſtrator ſhould have told the certificates at "auction upon due notice, or have enquired fur-"ther of the current price than of Wine.

"The Court is of opinion, under all the circum-"ſtances of this caſe, that the real ſale ought to "ſtand as the market value, and the appellant to "account accordingly; and that the decree afore-"ſaid is erroneous. Therefore it is decreed and "ordered that the ſame be reverſed and annulled, "and that the appellees pay to the appellant his "coſts by him expended in the proſecution of his "appeal aforeſaid here, and the cauſe is remand-"ed to the ſaid High Court of Chancery for an "account to be taken and a decree according to "the principles of this decree."

JONES

againſt

WILLIAMS

Exrs. who appear to have made no advantage by it, will not be denied juſtice for having fail ed to make up an account of their adminiſtration, tho' ſtrictly ſpeaking it is perhaps their duty.

THIS was an appeal from a decree of the High Court of Chancery in a cauſe removed thither from the County Court of Nottoway, by writ of *certiorari*. The bill ſtates that William Watſon made his will and appointed ſeveral executors; but that Edward Jones was the acting executor. Who dying, Richard Jones became the acting executor. That Watſon left four daughters to whom he deviſed a tract of 2650 acres of land. That Thomas Williams the defendant intermarried with Elizabeth one of the ſaid

Commiſſions diſallowed an executor where a legacy is given him.

Quitrents allowed againſt the repreſentatives of a ſurviving jointenant under the circumſtances.

said daughters, and received the whole of his wifes proportion of the said Watson's estate, except of the cash supposed to be in the hands of the said Richard Jones, which was unsettled. That in the year 1764 the said Richard Jones paid the defendant £77 : 15, through the hands of Neil Buchanan. That afterwards the defendant requested £100, but was told he had no title to it, whereupon he proposed that it should be lent him, and that he would refund it, if on settlement it should appear that he had no title. That the loan took place accordingly, and a bond for the money was given in conformity thereto, which with other papers has been lost. That the said Richard Jones is since dead, and the plaintiffs are his executors. That since his death, an order of Amelia County Court was made by consent of the legatees of the said William Watson and the plaintiffs for settling the accounts of the administration. That the commissioners made a report, whereby it appears that Watson's estate is indebted to the estate of the said Richard Jones. That according to that report, the defendant will be found to owe £30 : 4 : 4 exclusive of the £100; which he refuses to pay. Therefore the bill prays a decree for payment and general relief.

The answer admits that the defendant has received all his proportion of Watsons estate except the unsettled account; denies the charges of the bill relative to the £77 : 15; and says that the defendant has a fair copy of all his dealings with Neil Buchanan, and there is no credit therein for the same; admits that the defendant received the £100, for which he gave a receipt, as for part of his wifes portion; but denies that he gave any bond to refund; although he told the said Richard Jones, if he had received more than his proportion, that he would refund; states that he had often requested the said Richard Jones to come to a settlement, as he believed there was a balance due him: That the said Richard Jones lent Erskine, who married one of the daughters of Watson about

£200,

Jones, vs Williams.

£200, which he afterwards told the defendant he was afraid would be loſt, and aſked him what he had beſt do, with reſpect thereto; That the defendant told Jones there would be ſome ſmall eſtate of Erſkine's after paying a mortgage to Speirs & Co. but Jones ſaid he was unwilling to diſtreſs Mrs. Erſkine; admits the order of Amelia Court, but ſays that the defendant was not preſent at the ſettlement, and calls on the plaintiff to ſupport his allegations by legal evidence.

The evidence as to the £77:15 was chiefly circumſtantial, and there was a variety of evidence as to the other parts of the caſe. The commiſſioner debited the defendant with a proportion of the quitrents, and diſallowed the £77:15.

The defendant objected to the quitrents, but the Court of Chancery allowed them; and approved of the commiſſioners diſallowance of the £77:15.

The plaintiff appealed from the decree of the Court of Chancery to this court.

PENDLETON Preſident, delivered the reſolution of the court.

This is truly ſtated to be a ſtale tranſaction, commencing in 1752; It was the adminiſtration of a ſmall eſtate which was deviſed in 1765, and yet no account is ſettled by the executors till after all their deaths in 1786, when a partial one is made up by the executors of the ſurvivor.

This had a bad aſpect reſpecting the executors; but ſince no fraud or miſconduct is imputed to them in the management of the eſtate, nor any apparent advantage, which they could, or did derive to themſelves from the omiſſion, but on the contrary a probable diſadvantage, in having articles diſallowed for defect in the proof, which they might have juſtified at an earlier period, we inclined to attribute it to inattention in them,

and

and confidence on the part of the legatees in their integrity, rather than to any impure motives, and therefore think it would be too severe to deny them justice on account of that omission of a duty; for such perhaps it is, although the law only directs them to render accounts when desired.

When the children came of age, they might make private adjustments of the accounts with the executors, to their satisfaction, without reducing them to form. This appears to have been the case as to Edward Jones the principal acting executor, from 1752 to 1758, who never made up any account with the court, yet, till before the Auditor's in 1796, we hear of no complaint on that head; on the contrary, the defendant acknowledges that he received all his wifes part of the estate, except any money which might appear to be in the hands of Richard Jones.

With these impressions, the court proceeded to examine the justice of the case, and think the decree right as to the two articles discussed in court, disallowing the £77:15, as not sufficiently proved, though probably just and allowing the items for the quitrents.

Mr. Wickham was right in his position that joint obligations survive as well as joint rights, but it does not apply; since here was no existing obligation, when the survivorship took place.

The testator provided a fund in the hands of his executors to pay these quitrents, which they yearly applied accordingly, and are allowed those payments as a set off against that fund; to the surplus; to one fourth of which, the defendant was entitled.

We then considered the claim of the executors for commissions and interest on his balance.

The commissions are disallowed, becaufe a reward is devised to the executors by the will.

But

Jones, *vs* Williams.

But intereſt is allowed, becauſe it is natural juſtice that he who has the uſe of another's money ſhould pay intereſt for it.

It was objected that the executor had the uſe of the money previous to 1774 without accounting for intereſt; a juſt objection, if true. We examined the account from 1759, when Richard's adminiſtration commenced, to 1762, when Williams married; the balance then in Richard's hands was £125:14:10; he paid £83:15:3, and from that time the eſtate was in his debt to 1774. It is true the diſallowance of articles now turns that balance againſt him, ſo as to reduce the £100 advanced in 1774 to £53:13:4, on that balance as an agreed loan, the plaintiff ought to have intereſt. There is therefore error in not allowing that intereſt. And the decree muſt be reverſed with coſts. And a decree entered for £53, and intereſt from July 29th 1774, and the other reſervations in the decree.

COUPLAND

against

ANDERSON.

If there be a reference by rule of court in a ſuit depending to 4 arbitrators, or any three, and afterwards 2 others are added; if two of the firſt named arbitrators & one of the laſt make an award it is ſufficient and a majority of the whole is not required

THIS was a writ of *ſupersedeas* to a judgment of the Diſtrict Court of Prince Edward. The petition ſtated, that Anderſon inſtituted one ſuit againſt the petitioner, and the petitioner two againſt Anderſon in the County Court. That all three

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In ſuch a caſe if the rule mentions that the money awarded is to be paid to the ſheriff for the benefit of the plaintiff's creditors; the ſubſequent proceedings muſt be in that ſtile alſo.

If the plaintiff be bail for the defendant at the time of reference in a depending ſuit, the failure of the arbitrators to award concerning that undertaking will not vitiate the award.

The court may give coſts, tho' the award does not mention them.

three were by rule of court referred to four arbitrators, or any three of them; and that the money awarded to the said Anderson, if any, was to be paid to the sheriff, for the benefit of his creditors. That, at a subsequent court, two other referees were added to the former. That an award was afterwards made by three of the referees, that is to say, two of those first appointed, and one of those who were last appointed; whereby it was awarded that the petitioner was justly indebted to the said Anderson in the sum of £205: 19 8, exclusive of a claim that the said Anderson had against the petitioner as common bail to Gadberry. That the County Court gave judgment for Anderson, according to this award, with costs. That the petitioner appealed to the District Court, where the judgment was affirmed. That an execution issued, on the district court judgment: and the petitioner gave a forthcoming bond, which he forfeited; and judgment has been entered on it against him. That these proceedings were erroneous. 1. Because the award was not legally made, or in pursuance of the authority given the said arbitrators; it being made up by only two of the first named arbitrators and one of those last named. 2. Because the award was not final; as it appeared there was a matter in controversy between the parties, which was not settled by the said arbitrators. 3. Because the court in rendering judgment gave costs, although none were awarded by the arbitrators. 4. Because the execution and all subsequent proceedings were in the name of George Anderson, without mentioning the sheriff, to whom the money was to be paid for the benefit of the creditors, according to the order of reference.

The award after reciting the suits &c. proceeds thus "We are of opinion, and do award accordingly, that the said Coupland is justly indebted "to the said Anderson in the sum of two hundred "and five pounds, nineteen shillings and eight "pence; which will more fully appear by referring

Coupland, v. Anderson.

"ring to the above ſtatement of their accounts, "excluſive of a claim that Anderſon has againſt "Coupland, as common bail for William Gad- "berry, now pending in the Diſtrict Court of "Prince Edward. Given under our hands, &c."

The entry of the judgment of the County Court upon the award is as follows. "In conſideration "whereof it is the opinion of the court, that the "plaintiff recover againſt the defendant the afore- "ſaid ſum of two hundred and five pounds nine- "teen ſhillings and eight pence, *and his coſts* by "him in this behalf expended; to be paid to the "ſheriff, for the benefit of George Anderſon's "creditors, ſo far as juſt claims againſt the plain- "tiff may appear: To which opinion of the court "the defendant by his attorney objected, becauſe "the ſubmiſſion of the three ſuits aforeſaid are "made in one award and blended together, when "they ought to have appeared diſtinct and ſepa- "rate; and becauſe the ſuit brought againſt the "defendant, in the name of George Anderſon is "improper, he having become an inſolvent debtor "before the commencement of the action."

The execution is, that the ſheriff ſhould make of Coupland's goods and chattles £ 205: 19: 8. "Which George Anderſon recovered againſt him."

The forthcoming bond is payable to George Anderſon; and the judgment, on it, is rendered in favour of George Anderſon, without mentioning his creditors.

WICKHAM for the plaintiff. Objected 1. That by the firſt order of reference four referees were appointed; and then it was agreed that any three might make an award. But as two others were afterwards added, this altered that agreement; and therefore from that time three were not enough. For it is apparent that it was the intention of the parties that a majority ſhould decide.

2. The

Campbell, ex dem. Anderson.

2. The submission was of all matters in dispute between the parties; but the referees have not included the claim concerning the responsibility as bail.

3. The referees did not award costs, and yet the court has given them.

4. The execution and subsequent proceedings are in the name of George Anderson only.

RANDOLPH *contra*. Awards are construed more liberally than formerly. The addition of the other two did not alter the first consent that three might decide. That consent is not taken away by express words, and there is nothing which implies it. On the contrary the last order refers to the first; and the agreement there extends to both. For the last order is but a component part of the first.

As to the case of the bail, it never was contemplated by the parties that the submission should extend to that. For that claim was too contingent and uncertain, whether any liability would ever attach or not. *Kyd. av.* 91, has an excellent general rule on subjects of this kind; and proves the impropriety of extending submissions beyond the intention of the parties. The defendant has shewn his own idea on this point; for, when the award was presented into Court no exception was taken upon that ground.

As to the costs, if wrongly given, no supersedeas or appeal will be sustained on that ground merely. But the court had power to give them. For originally the arbitrators could not; and their authority to award them was at last founded on the permission for that purpose given by the rule of Court, *Kyd* 100. But the court always had a right to grant costs; and plaintiffs were entitled to them at common law.

That the execution and subsequent proceedings were in the name of George Anderson without

mentioning

Coupland, *vs.* Anderson.

mentioning the sheriff to whom the money was to be paid, is no objection. For the words of the judgment are that they shall be paid to the sheriff, which controuls the subsequent proceedings.

Per: Cur:

"The Court is of opinion that the said judgment is erroneous in this, that it was omitted to be entered therein, that the money was to be paid to the sheriff for the benefit of the creditors of the defendant, so far as just claims against him might appear. 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 recover against the plaintiff four hundred and fifty seven pounds five shillings and eight pence, the penalty of the forthcoming bond in the proceedings mentioned, and his costs in the said District Court expended, to be paid to the sheriff for the benefit of the creditors of the defendant, so far as just claims against him may appear; But to be discharged by the payment of £ 228: 12: 10 with interest thereon to be computed after the rate of five per centum per annum from the 16th day of April 1796 till payment and the costs."

PRICE, &c. vs. CAMPBELL.

In order to constitute usury, both parties must be consenting to the unlawful interest: that is to say, the lender to ask, and the borrower to give. Therefore if a bill of exchange is

THIS was an appeal from a decree from the High Court of Chancery, where Campbell as assignee of his father Robert Campbell, brought a bill stating, that the said Robert Campbell purchased divers bills of exchange drawn by Carter Braxton on sundry persons in Britain, payable to the said Robert

drawn upon an obscure man in Scotland, altho' the payee may expect it will be protested, yet if there was no agreement between him and the drawee, that it should be protested, the transaction is not usurious.

There must be proof of a lending and borrowing to constitute usury.

Robert Campbell, to wit, one for £ 200 ſterling drawn on One drawn on Edward Harford for £ 200 ſterling; another on Robert Young for £ 1811 : 3 : 11 ſterling; another on Robert Cary and Company for £ 400 ſterling, amounting in the whole to £ 2611 : 3 : 11 ſterling, and as great part of Campbell's fortune, who was about to return to Great Britain, depended upon payment of the bills, and that drawn on Young was for ſo large a ſum that a failure would have been ruinous, it was ſtipulated that the amount of it in caſe of proteſt ſhould be ultimately ſecured in Virginia. That in purſuance of that ſtipulation, a deed was given by Braxton to the ſaid Robert Campbell, for a tract of land called Broadneck and another called Foſters with ſundry ſlaves, with proviſo that if the bill for £ 1811 : 3 : 11 ſhould be proteſted, and Braxton ſhould afterwards pay the amount, with intereſt, that the deed ſhould be void. That the bill on Cary &co. for £ 400, and that on Young for £ 1811 : 3 : 11 were proteſted for non payment; of which Braxton had notice. That he made ſome payments towards the ſame, reducing the balance to £ 1960 0 : 3 ſterling as appears by an account made up, by two perſons for that purpoſe choſen, who have ſubſcribed their names to their award or report thereon. That the ſaid Robert Campbell afterwards being diſſatisfied with the ſecurity and requiring other, Aylett and Brooke entered into an obligation in writing, as ſecurities for whatever ſum Braxton might then owe Campbell; That this obligation was by ſome accident deſtroyed, and that Aylett and Brooke, being informed thereof, afterwards gave a writing acknowledging the former, and obliging themſelves anew. That for reaſons unknown to the plaintiff, Robert Page afterwards placed himſelf in Ayletts ſtead, by an indorſement on the ſaid laſt named writing. That, the ſecurities afterwards growing uneaſy, Braxton, for diſcharging the debt and indemnifying the ſecurities, gave a deed to Drury Ragſ-

Price *vs* Campbell.

dale

Price vs. Campbell.

dale and George Braxton for a tract of land in Halifax, two lots at West Point, and sixty slaves, In trust to sell the same if necessary, for satisfying that and other debts and indemnifying the securities aforesaid. That Braxton for further securing Page, and for securing White, who was his security in a debt due Govan, gave another deed to Page and White for 76 negroes and other property in trust to sell them, if necessary, for their indemnity. The bill therefore prays relief against Price executor of Brooke, George Braxton, Drury Ragsdale, Carter Braxton, the administrator of White, and the other creditors stated in the first of the above mentioned deeds of indemnity; and that the lands slaves and property in the said trust deeds contained, might (except the lands released by Robert Campbell) be sold for satisfaction of the plaintiffs claim.

The answer of Braxton states, that Robert Campbell then of Virginia was possessed of two bonds the one for £1335 sterling, the other for £1200, liable to a deduction of £61. That the first he was not likely to receive for a long time, and the second was not to be paid till the estate of the obligor could raise it. That the defendant negotiated for these bonds, and purchased them, without recourse on Campbell. That this purchase was the only consideration for the bills. That Robert Campbell demanded interest at the rate of 10 per cent upon the loan of the two debts, and took the bills of exchange to legalize the transaction, if he could. That Young the *drawee* of the bill for £1811:3:11, was a friend and relation of Campbell's in Scotland; a Clergyman, not engaged in commercial business, and unknown to the defendant, who had never heard of him before; that the defendant does not recollect when he received notice of the protests. That Campbell not content with the mortgage, made the defendant give the personal security mentioned in the bill: Upon which he engaged to relinquish the mortgaged premises. After which the defendant sold the mortgaged

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gaged lands and moſt of the ſlaves. That Campbell in July 1777 wrote a letter in which he declares the defendant is to pay 6 per cent intereſt, from the expiration of the deed to that time; but notwithſtanding this, he afterwards ſtated his account at 10 per cent. That the ſettled account ſtated in the bill was not intended to be concluſive, but was done merely to aſcertain the payments made by the defendant. Inſiſts that the contract is uſurious; and claims the benefit of the act of limitations.

The anſwer of Price. Inſiſts on the uſury; and claims the benefit of the act of limitations: Prays, that if his teſtator ſhould be conſidered as liable, the mortgaged property may be firſt applied.

The commiſſioner reported £ 2498 : 1 : 2½ currency, ſterling to be due in March 1784; of which £ 1547 : 17 : 6 to carry 10 per cent intereſt until paid.

The ſuit abated as to Page, and was revived againſt his adminiſtrators. Who inſiſt on the uſury and act of limitations, and ſuggeſt the uncertainty of aſſets.

The anſwer of George Braxton, ſays he never was in poſſeſſion of the truſt property.

The depoſition of a witneſs ſays, that he heard Robert Campbell ſay he had lent Braxton a large ſum of money, but does not know whether it was in bonds or money; thinks as well as he can recollect, that he has heard the ſaid Robert Campbell ſay the debt due him from Braxton was in bills of exchange, but does not know it was for the ſake of obtaining 10 per cent intereſt; altho' that was a mode, much practiſed in thoſe days, of obtaining ten per cent intereſt. That he knows Broadneck and ſome ſlaves were mortgaged to Campbell; and believes it was on account of the ſaid loan. Has underſtood that Campbell releaſed part of the mortgaged premiſes, and took perſon-

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al ſecurity. Being interrogated, ſays that he is not poſitive, whether the debt was contracted by loan or otherwiſe.

A ſecond witneſs ſays, that he underſtood Campbell had let Braxton have the bonds, and that bills of exchange were given; but knows not the terms as to either. That he underſtood a plantation was mortgaged to ſecure the debt. That Campbell ſoon after went to Scotland.

Two other depoſitions ſpeak of taking ſlaves in execution; and the ſales being forbid by White and Page.

There are among the papers the ſeveral exhibits ſpoken of in the bill and anſwer, to wit, the mortgage, the two deeds of indemnity, the ſecond obligation of Aylett and Brooke, with Page's indorſement. Campbell's ſettled account, ſpoken of in the bill, charged Braxton with the two bonds, and credited the bills of exchange; but debited him anew with the bills and credited the payments, leaving the alledged balance of £ 1960 0: 3. In this ſettlement the amount of the bonds at the time of the tranſaction is made to be £ 255: 2: 11. And the amount of the bills of exchange is made to be £ 2611: 3: 11; which makes a difference of £ 60: 1. And this the referrees credit as a balance due to Braxton at the time of giving the bills; and the commiſſioner in his report charges it thus, "To balance overpaid at this date £ 60: 1. "There are ſeveral letters in the record between Braxton and Campbell, on the ſubject of payment; and particularly that ſpoken of in Braxton's anſwer. Which appears to have been written after November 1778 inſtead of July 1777 as Braxton's anſwer ſuppoſes. Wherein after ſome remarks on the ſubject of a tender by Aylett, Campbell adds "to put an end to the moſt troubleſome affair ever man was concerned with, I now inform you that if you will bring the money to New Caſtle or to Hanover town the day of Mr. Jones's ſale, will receive it, you paying

ing the ſix per cent from the expiration of the deed, the above is a juſt and true ſtate of the affair between you and your humble ſervant."

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There is another letter nearly, in the ſame words, not directed to any perſon or dated; to which there is a poſtſcript in theſe words "Inſtead of bringing or ſending the money you ſent Mr. Clark for my anſwer, which was, that as you had not complied in bringing or ſending the money to the time, but deſired I might call or ſend ſome perſon in my ſtead for it, I was now of another opinion, for that as I intended home firſt opportunity, in that caſe this currency could be of no uſe to me, but would take it in different payments, two, three or four years hence—intereſt, to which no anſwer."

In a letter from Campbell to Braxton dated in July, 67, which was prior to the aſſignment of the bonds, in July 1768, Campbell ſays, "Being "obliged to ſeparate my bonds, thought my-"ſelf under an obligation in conſequence of "what had paſſed between us on that ſubject, to "reſerve one until your return; and ſhall want to "know by the bearer if I am to diſpoſe of it or "not."

In another of the 6th, of Auguſt 67 he ſays, "I ſuppoſe you know by this time that it is Ma-"jor Gaines' bond, I have ſtill by me."

In another of the 29th, October 67, he ſays, "I ſhall ſend down, by Mr. Sample, Major Gaines's "bond, and if you can get the late ſpeaker's ad-"miniſtrators in the humor to diſcount I am wil-"ling to tranſfer the ſame, though am well ſatis-"fied that money cannot be better ſecured."

In another of the 17th, of February 68, addreſſed to Carter Braxton Eſq, Williamſburg he ſays, "I received yours laſt night, which ſhall fully an-"ſwer in a few days, probably call on you to have "the affairs finiſhed one way or other, I do not

"want

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"want any advance so much as the money, and "that in good bills, or could have disposed of the "bonds without asking consent of any person be- "fore this time.

"Should you hear of my purchasing Boss's land "which I hope will go no further, until that af- "fair is over and the old informer cast up, it shall "in no ways affect your bargain, as to the gen- "tleman not making himself liable to me on your "account, I knew that some time ago, but there "are many I should prefer to him on sundry ac- "counts, the exchange falling will certainly be "an advantage to you, and whether my notions "may be chimerically founded or not, time only can "tell, though I think and wish should we agree "that you may come off with paying 2½ per cent "instead of I have had no account from "your quarter for a long time, nor can I tell "whether London is in being or not. I am Sir, "your humble servant

ROBERT CAMPELL.

February 7, 68,

"You may depend on the affair transpiring "from.

R. C."

The Court of Chancery decreed payment of £2498 1:2 currency with interest at the rate of 10 per cent to the time of pronouncing the decree, and five per cent interest on both from the time of the decree until payment, and in default thereof, that the mortgaged slaves should be sold for satisfaction, and if they should prove insufficient, that that the administrator of Brooke and the executors of Page should out of the estates of their decedents pay the balance. And dismissed the bill without costs, as to the other defendants. From which decree Braxton and the other defendants against whom the decree for payment was made, appealed to this Court.

WARDEN and MARSHALL for the appellants, contended, 1. That

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1. That the contract was uſurious. For the real ſubſtance of the agreement was a loan, and the bills were but a mere device to take the caſe out of the ſtatute. Every circumſtance ſhews that it was clearly underſtood betwixt the parties that the bills would come back proteſted. That on Young was not drawn on a merchant of character, trading to America, and therefore likely to have funds in his hands to anſwer it; but upon an obſcure clergyman, not even inhabiting in a trading town, but reſiding in the interior of Scotland; and not ſhewn to have had any connection whatever with Braxton. The bills were given for bonds at par. The mortgage is for the payment of the money by inſtallments, which would not have been the caſe if it had been a purchaſe inſtead of a loan: Neither would it have been the caſe in a ſecurity for a bill expected to be paid; but it was very likely to be done in the caſe of a bill which it was ſuppoſed would not be paid.

2. That Campbell's claim was barred by the ſtatute of limitations: For Braxton's letters were not written within five years; and Page's engagement was not under ſeal.

3. That the debt at moſt ought only to carry ſimple intereſt. For the bill was merged in the mortgage; and if a ſuit was brought at law, upon the covenants, a jury would only give five per cent. The ſecurities were bound for a ſum certain, and not as Indorſers of the bills; on which no action can be maintained againſt them.

RANDOLPH & WICKHAM *contra.*—Contended that the contract was not uſurious. That there was nothing which ſhewed Campbell's knowledge that the bills would be proteſted when he took them; and although privately there might have been ſuch an expectation in the parties, theſe circumſtances will not affect the caſe, unleſs it was part of the agreement that there were no funds in the drawees hands, and that the bills ſhould be proteſted. That the perſon on whom they were

were

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were drawn afforded no knowledge of any ſuch agreement; becauſe Braxton might have money in his hands to anſwer the demand, by remitting in time, or by various other means. So that it was contingent whether they would be proteſted or not, and Braxton had it in his power to avoid the ten per cent; which took it out of the ſtatute. That it did not appear that he affected to aſſert that the contract was for a lending and uſurious, until long after the tranſaction. That the mortgage was taken merely in the room of an Indorſor, which was the cuſtomary mode; and therefore no unfavorable inference could be drawn from that circumſtance. That the act of limitations did not apply, as the deed of truſt protected the claim. That the deed being a collateral ſecurity for the money due on the bills, it was the bills themſelves which were to aſcertain the amount due to the creditor; and as they bore ten per cent. intereſt, that rate of intereſt was to be paid out of the truſt property.

Cur: adv: vult:

ROANE Judge. This caſe viewed in its proper light, is really a very ſhort one, and as I think a very plain one. It has but two real queſtions in it. 1. Whether the contract was uſurious? 2. Whether the claim is barred by the ſtatute of limitations?

In order to ſimplify the caſe, I may throw out of it ſome points which are too plain for diſcuſſion. As firſt whether the mortgage extinguiſhed the bill of exchange? 2. whether the ſecurities Brooke and Aylett became bound, by their agreement, to pay 10 per cent intereſt, in the event of the bills being or having been proteſted? As to the firſt, it is clear that the mortgage recognized the bill of exchange, as an exiſting one; and ſo far from extinguiſhing it, creates an additional ſecurity for its payment. The bill of exchange therefore, and not the mortgage, is the contract which

determines

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determines the rate of intereſt to be paid, and is the contract really ſued upon. As to the ſecond, the general agreement of the parties will extend as well to the nature as to the amount of the debt due from Braxton to Campbell; and the nature of the debt due by bill of exchange, determines the rate of intereſt be paid by them on proteſt to be 10 per cent per annum.

The queſtion of uſury is rather more difficult; but I think nevertheleſs ſufficiently clear. I admit that, on queſtions of this kind we are at liberty to infer uſury from the circumſtances of the tranſaction itſelf. Otherwiſe it would be generally impoſſible to detect it. But in making this inference, we are confined to the enquiry, whether there is a corrupt contract or agreemen for uſurious intereſt? Now ſuch a contract or agreement preſuppoſes the conſent of both borrower and lender to this effect; and without it there is no uſurious contract; whatever may be the hopes, wiſhes, or expectations of either party. Thinking this principle to be almoſt ſelf evident, I ſhall proceed to examine the preſent queſtion by it.

The contract, by which Braxton transferred a right to money in Scotland to Campbell, for a valuable conſideration, as evidenced by the bill of exchange, was a lawful contract; and it had the concurrence of both parties thereto. It is no objection, to the legality of ſuch contract, that the drawee is a ſtranger to the drawer; that the latter has no funds in the hands of the former; or that the drawee is in a line of life other than commercial. This contract is for the payment of money in another country (not in this;) and for the injury ariſing from a diſappointment, the law has allowed an intereſt of 10 per cent per annum; and ſo far operates as an exception to the general act of uſury.

This contract is to be conſidered as the real contract between the parties, unleſs it be ſubſe-

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quently changed, or it has been previouſly agreed that the bill is not to be paid, but to be protested, and the money paid here. In the laſt caſe the bill would be conſidered as a ſhift to evade the ſtatute of uſury, and conceal the real agreement of the parties.

However ſtrong the anſwer of Braxton is to ſhew an uſurious tendency and diſpoſition in Doctor Campbell, as evidenced by the unuſual circumſtance of his procuring Braxton to draw on a ſtranger, a clergyman, and a perſon having no funds of the drawer; Yet he does not ſtate any conſent on his part to waive his right to conſider this as a legal bill and to procure it to be honored. He does not ſtate any agreement on his part, ſubſequent to the drawing of the bill, that it ſhould not be paid; or any previous agreement that the money was really to be paid here, and conſequently, that the bill is a mere ſhift to evade the ſtatute.

The queſtion then is reduced to this ſhort point. There is a complete agreement of both parties evidenced by the bill of exchange, that the money ſhould be paid in Scotland. There is a hope, an expectation, and even a contrivance in the party, and probably an expectation in both, that the money ſhould not be paid in that country, but in this; but there is no agreement, carrying this expectation into effect, barring the right of Braxton to conſider the contract as a real bill of exchange and to procure a payment in Scotland, and converting the contract into an uſurious one.

With reſpect to the plea of the act of limitations, there is no doubt, that laying out of the caſe the previous acknowledgments, but the deed of Braxton to Page and White is an acknowledgment which will prevent its operation. That deed refers to the debt to Campbell as an exiſting one; and when it ſpeaks of £ 2000, it is only as being the amount of it as ſuppoſed by Campbell,s repreſentatives: and the licenſe of Page and

White

White of the 14th of April 1793 to the ſheriff to ſell ſome of the negroes, recognizes and refers to that mortgage. I think therefore the decree ought to be affirmed.

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But Mr. Randolph aſks to correct it. 1. In decreeing that the ſlaves ſold to Adams by Page's conſent ſhould be accounted for. And 2, that liberty ſhould be reſerved to the appellee to proceed againſt the diſtributees of Brooke's property.

As to the firſt, I anſwer that ſuch of Brooke's ſlaves mortgaged to Page and White, as were comprehended in the deed of mortgage from Brook to Campbell, are now liable to Campbell, by the decree into whoſe hands ſoever they may have come, and that Campbell has no lien upon the ſlaves not ſo comprehended, but the lien as to them was only in favour of Page and White, who have releaſed it.

And as to the ſecond, that the diſtributees of Brook having given or being liable to give bond to the executor to refund, are completely entitled to their diſtributory ſhares exempt from any claim, except ſuch as is ſupported by a ſpecific lien on ſuch property, which in this caſe is not I believe pretended.

FLEMING Judge. The counſel for the appellant made three points in this caſe. 1. They contended that the contract was uſurious, and therefore void. 2. That the act of limitations applied in favour of the ſecurities. 3. That the nature of the debt was altered, by ſecurity being given; from which time the contract was changed, and carried only 5 per cent intereſt.

As to the firſt, I obſerve, that in order to conſtitute uſury, there muſt be a borrowing and a lending, with an intent to exact exorbitant intereſt beyond what is allowed by law, or a forbearance in conſideration of ſuch intereſt being paid. But there appears no concluſive evidence that ſuch

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was the caſe in the contract now under conſideration. There are indeed ſeveral ſuſpicious circumſtances reſpecting the bill drawn on Young; but it is unneceſſary to repeat them, as they are not ſufficient, in my mind, to bring the caſe within the ſtatute of uſury.

As to the point of the act of limitations, I think the undertaking of the ſecurities in December 1775 under ſeal, excludes them from the benefit of that act; and that Page's undertaking to ſtand in the place of Aylett and to perform every engagement of his (although not under ſeal) bound him to abide by every conſequence, which was to follow from Aylett's ſuretyſhip. In addition to this, Page afterwards accepted a deed of truſt from Braxton as an indemnity: Which, with the other circumſtances juſt mentioned, certainly removes all pretence for the plea.

With reſpect to the third point, that the taking of the mortgage for ſecurity of the debt, changed the nature of the contract, and made the debt bear five per cent intereſt only, it is ſufficient to obſerve, that the conſideration of the mortgage expreſsly is, to ſecure the repayment of the money *paid by the mortgagee* for a ſet of bills of exchange therein deſcribed, if they ſhould be proteſted; which in that caſe would by law carry an intereſt of 10 per cent per annum. So that Campbell's accepting the mortgage did not change the nature of the debt, but was conſidered merely as an auxiliary ſecurity for the payment.

Mr. Randolph thought there was error in the decree in not allowing the appellee to proceed againſt the legatees of Mr. Brooke for the ſlaves in their poſſeſſion, and to purſue the mortgaged ſlaves purchaſed by Adams. But, beſides the anſwer already given to theſe objections, it is ſufficient to obſerve that thoſe parties are not before the court, and conſequently, we can make no deciſion affecting them. I am therefore for affirming the decree altogether.

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CARRINGTON Judge. Three exceptions have been taken to the decree of the Court of Chancery in this cauſe. 1. That the contract was uſurious and void. 2. That the plaintiffs claim was barred by the ſtatute of limitations. 3. That the 10 per cent ceaſed on taking the mortgage, and that only five per cent could be demanded after that period.

As to the firſt, it is ſaid that the contract is uſurious, and therefore void. But to conſtitute *uſury* there muſt be a loan or forbearance; and there are no features of either diſcoverable in this cauſe. Braxton, in his anſwer, calls the tranſaction a ſale and purchaſe of two bonds for which the bills in queſtion were drawn; and although he afterwards ſpeaks of them as a loan, yet from the nature of the thing in queſtion (namely bonds) they could not have been intended to be returned: Becauſe in that caſe they would have been of no uſe to the borrower; who contracted for them for the purpoſe of negotiating them in payment of his debts to others; and they were certainly drawn as a conſideration for the purchaſe. As to the ſhift which has been alledged, it is poſſible that the intention of Campbell was to make greater profit than five per cent, but ſuch intention is not proved. Braxton indeed ſtates it in his anſwer; but the anſwer is not reſponſive to the bill, and is unſupported by teſtimony. Beſides altho' Braxton ſtates that to have been Campbell's intention, he does not ſay that he himſelf conſented to it, which was neceſſary to form the contract between them. In ſhort I diſcover no trace in the tranſaction ſo concluſive as to juſtify me in criminating Campbell and depriving his repreſentatives of their debt. For there is nothing in the caſe out of the uſual courſe of that kind of buſineſs, which was thus, the debtor drew bills of exchange payable to his creditor, but in caſe of the poſſibility of non acceptance an indorſor was generally required. In the preſent caſe however, in lieu of an indorſor, Braxton conveyed an eſtate

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as a ſecurity for the large bill on Young. In this view it was a fair tranſaction, and not juſtly liable to any objection. But added to this, Braxton's defence is materially weakened by his lying quiet ſo long, and making conſiderable payments, without any complaint.

Upon the whole, I conſider the caſe as not coming within the ſtatute of uſury; and that the ſecurity taken was intended to ſtrengthen and not to injure the plaintiffs legal rights under the bills of exchange.

The ſecond exception was that the claim is barred by the act of limitations. But there is no ground for the objection; becauſe the claim has been preſerved, from the operation of that act, by various tranſactions down to the year 1792, when the ſuit was brought.

The third exception, taken by the appellants counſel, has been already anticipated; and I ſhall only add that I think there is no weight in it.

As to the corrections aſked for by the appellees counſel, it is ſufficient to obſerve that Brooke's repreſentatives are not before the court, and therefore we can make no decree againſt them.

Upon the whole, I concur in opinion with the other Judges, that the decree was pronounced on juſt principles and ought to be affirmed.

EPPES

EPPES & AL. ex'rs of WAYLES

against

RANDOLPH.

THIS was an appeal from a decree of the High Court of Chancery, in a ſuit wherein the executors of Wayles were plaintiffs againſt David Meade Randolph, Richard Randolph, Ryland Randolph and Brett Randolph ſons and deviſees of Richard Randolph, deceaſed; the bill ſtated, that in December 1772 the ſaid Richard Randolph, deceaſed, being indebted to Bevins in £740 ſterling, executed his bond binding himſelf, his heirs &c. for payment of the ſame; that Wayles was ſecurity to this bond. That Bevins going out of this ſtate left the bond with Wayles, who died in poſſeſſion of it; no part thereof having been paid; that Bevins brought ſuit and obtained a decree, in Chancery in the Federal Court, againſt Skipwith and his wife executrix of Wayles for the ſaid £740 with intereſt; that the plaintiffs have paid off great part of the ſaid decree, and are going on to diſcharge the reſidue. That the ſaid Richard Randolph, deceaſed, by his will, after ſeveral deviſes, gave the reſidue of his eſtate, to his four ſons above mentioned, whom he made executors: That he died largely indebted, and the executors alledge a want of aſſets to pay his creditors: That on the 11th of October 1780, the ſaid Richard Randolph, deceaſed, being indebted on the bond aforeſaid and otherwiſe to an amount equal to the whole of his eſtate, executed a deed for a tract of land in Bermuda Hundred, Cheſterfield county, with the ſtocks thereon, and 19 ſlaves to his ſon David M. Randolph, *for and in conſideration of his natural love and affection for his ſaid ſon, and for his advancement in life;* that the ſaid Richard Randolph, deceaſed, being indebted as aforeſaid, did

Deed reacknowledged within 8 months, from its date, and recorded within 4 months from the reacknowledgment is good from the date of the reacknowledgment, although there are more than 8 months between the time when the deed was firſt executed and the day of recording it.—Although the deed does not mention, that it was made in conſideration of a marriage contract, the party may aver and prove it.

Judgments do not bind lands after 12 months from the date unleſs execution be taken out within that time, or an entry of elegit be made on the record.

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on the 20th day of September 1785 executed a deed for his eſtate called *Curles* to his ſon Richard Randolph, after the death of the ſaid Richard Randolph, deceaſed, and Anne his wife, "The "conſideration, expreſſed in the ſaid deed, being "a marriage ſhortly to be had and ſolemnized, "between the ſaid Richard the ſon and Miſs Ma-"ria Beverly the daughter of Robert Beverly;" but that the ſaid Maria was not a party to the ſaid deed. That the ſaid deed was not recorded until the third day of July 1786: That the ſaid Richard Randolph, deceaſed, was at the time of making his will and at his death ſeized in fee ſimple of two tracts of land in the counties of Cumberland and Prince Edward; one called Sandy Ford, the other Clover Foreſt, alſo of a mill and acres of land in Prince Edward, and of two other tracts of 130 acres each in Cheſterfield county, one of which was called Elams. That he deviſed Sandy Ford to his ſon Brett, and Clover Foreſt, with one of the 130 acre tracts in Cheſterfield, to his ſon Ryland; that he deviſed the mill and 50 acres of land adjoining it to his ſons Brett and Ryland, and Elams to his ſon David M. Randolph. That the ſaid Richard the ſon is heir at law to his father the ſaid Richard Randolph deceaſed. That the ſaid deeds were made, by the ſaid Richard Randolph, deceaſed, when he well knew that his eſtate, in poſſeſſion, was inſufficient to pay his debts, and that the ſaid deeds were made with a view to defraud his creditors: That they are void as to creditors not only for that reaſon, but becauſe the conveyance to David M. Randolph was not made on conſideration good in law againſt creditors, and that to Richard was not recorded in due time according to the act of Aſſembly. That, if there be no perſonal aſſets, the plaintiffs are entitled to ſatisfaction out of all the ſaid lands, or any other real eſtate of the ſaid Richard Randolph, deceaſed, as they have a right to ſtand in the place of Bevins, and of any other creditors by ſpecialty,

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who have been paid their debts, out of the assets in the hands of the executors; and that Richard the son has mortgaged Curles to Singleton and Heath: The bill therefore prays a discovery of the personal estate; and, if that should prove insufficient, that the plaintiffs may have satisfaction as well out of the said lands mentioned in the deeds, as out of those devised by the will; and for general relief.

The answer of David Meade Randolph as acting executor says, that he knows nothing of his own knowledge relative to the bond: That the testator died greatly indebted by judgments, bills of exchange, bonds, notes and simple contracts to a greater amount than the assets which have come to his hands: That the assets will not be sufficient to pay the debts of higher dignity: He also demurs to that part of the bill which prays, that the plaintiffs may be put in the place of the bond creditors, because the plaintiffs by their own shewing are not bond, but simple contract creditors. In his own right he pleads that he took no lands or slaves by the devise, except the tract of 130 acres in the county of Chesterfield called Elams; which he did not take to his own use, but has sold it, and applied the money to the use of the testators estate: That, in the year 1780, the defendant, having made proposals of marriage to Mary the daughter of Thomas Mann Randolph, the latter wrote a letter to the said Richard Randolph the defendants father, consenting to the marriage, provided the said Richard would give the defendant a decent and competent fortune, and put him in possession of it; that this letter was delivered open to this defendant, to be presented to his father the said Richard Randolph the elder; which the defendant did: That it has been since lost, but the contents can be proved: That, in consequence of the said letter and the intended marriage, the said Richard Randolph the elder, upon the 8th of August 1780, wrote a letter to the defendant, to be shewn to

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the ſaid Thomas M. Randolph, in which he promiſed, in conſideration of the marriage taking place, to give the defendant a fee ſimple eſtate in all his Bermuda Hundred lands, and a tract of 1000 acres ſituate upon *Dry creek* in the county of Cumberland, with the ſlaves and ſtocks thereon, and two negro carpenters. That the marriage afterwards took effect; but a little before the celebration thereof, to wit, on the 11th of October 1780, in conſideration of the ſaid intended marriage, the ſaid Richard Randolph the elder conveyed to the defendant the Burmuda Hundred lands in Cheſterfield with 19 ſlaves thereon; and as he had not the legal eſtate in him, he gave the defendant a letter of attorney to ſue for and obtain a conveyance from the Royall's of whom the ſaid Richard the elder had purchaſed it; by virtue of which letter of attorney the defendant obtained a decree for a conveyance againſt the heir of the Royall's; and a deed hath been accordingly executed to him. That the ſaid Richard, in compliance with his letter aforeſaid, conveyed to the defendant the Cumberland eſtate alſo. That, owing to a miſtake in the attorney who drew the deed, the marriage is not expreſſed as the conſideration; although it was the real conſideration.

Richard Randolph in his own right pleads, that he took no lands or ſlaves by deviſe; and demurs to that part of the bill which prays that the plaintiffs may ſtand in the room of the bond creditors, as, by their own ſhewing, they are not bond creditors: By way of anſwer, he ſays that he knows nothing of Bevins bond of his own knowledge; and ſtates the want of aſſets to pay debts of ſuperior dignity.

The anſwer of Brett Randolph ſtates, that he knows nothing of Bevins' debt mentioned in the bill; admits his father's will, but ſays that he never qualified as executor: It likewiſe admits the deviſe to him of Sandy Ford lands and a moie-

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ty of the mill. Of which he has ſold acres including a moiety of the mill, for the ſum of £ : That the teſtator was indebted by bond to Pleaſants in £ who has brought ſuit and obtained judgment thereon againſt him and the ſaid Ryland as deviſees as aforeſaid; of which judgment the defendant is bound in law to ſatisfy a moiety: That the teſtator was likewiſe indebted by bond, to Benjamin Harriſon jr. and company in £ ; who have alſo obtained judgment againſt him and the ſaid Ryland as deviſees; and have ſued out execution againſt the whole of the reſidue of the deviſed lands unſold by the ſaid Brett; that the ſaid reſidue was naked and unimproved at the time of the teſtators death; but has been improved by the ſaid Brett, which has increaſed its value; That, after the execution aforeſaid iſſued, the defendant let the ſaid Benjamin Harriſon have the ſaid reſidue, at a fair valuation, in diſcharge of part of the ſum due by the ſaid execution: That he was alſo obliged to purchaſe of Jackſon (who had the fee ſimple therein) 371 acres of the Sandy Ford tract at £ ; which ſhould be allowed, or the ſaid 371 acres ſhould not be conſidered as any part of the deviſe; That theſe ſums, to wit, for Pleaſants judgment, that for the improvements, and that for the purchaſe of Jackſon's lands, are of greater amount than the alienations made by the defendant.

The anſwer of Ryland Randolph is to the ſame effect with Bretts reſpecting the plaintiffs debt, the executorſhip, the deviſes to the defendant, the judgment of Pleaſants, that of Harriſon & Co. and the iſſuing of the execution by the latter; that the defendant ſold the Cheſterfield tract for £ 371: 16, and 74 acres of Clover Foreſt for £ 76: 15; That Harriſon & Co. have taken the mill and all the lands unſold by the defendant in execution, which were not ſufficient to pay the intereſt of the defendants proportion of that judgment, whereby Harriſon & Co. obtained a perpetual

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tual title thereto; That the defendant, after the teſtators death, was obliged to pay an arrearage of taxes due on the teſtators ſeveral tracts of land in Cumberland; That the defendant had bought Brett's moiety of the mills, which was alſo included in the extent on the execution. Which together with the defendants moiety of Pleaſants judgment exceeds the amount of his alienations.

The deed from Richard Randolph the father to Richard Randolph the ſon was dated on the twentieth day of September 1785; was re-acknowledged on the 21ſt of March 1786; and was recorded on the 3d of July 1786. The conſideration is expreſſed to be, "for the purpoſe of advancing him "the ſaid Richard Randolph the younger, and "for and in conſideration of a marriage intended "ſhortly to be had and ſolemnized between him "and Miſs Maria Beverley the eldeſt daughter of "Robert Beverley of Blandfield, and alſo, for "and in conſideration of the ſum of five pounds "to the ſaid Richard Randolph, by the ſaid Rich- "ard Randolph the younger, in hand paid."

The deed from Richard Randolph the elder to his ſon David Meade Randolph for the Bermuda Hundred lands is dated on the 11th of October 1780; and the conſideration is expreſſed to be, "the natural love and affection which he beareth "to his ſon the ſaid David Meade Rondolph and "for his better advancement in life." And that for the Dry Creek land in Cumberland, expreſſes to be made, "for and in conſideration of the na- "tural love and affection which the ſaid Richard "Randolph beareth unto his ſon the ſaid David "M. Randolph and for his advancement in life."

There is a letter from Richard Randolph the elder to his ſon David Meade Randolph in the following words.

"Dear Davy,

"Ever ſince you informed me, you had a "proſpect of forming a connection to very agree- "able

"able to your friends here, I have exerted my-
"self, to little purpose, to procure you a seat to
"carry a wife to, as it never was consonant to my
"notion of things, any man should think of mar-
"rying until he had a home (let it be ever so in-
"different) to present those with, that ought to
"be most dear to him: Which, I flatter myself,
"is the sole motive that induced you to engage
"in a business so serious; because you may be
"assured without such honorable intentions, there
"is little happiness to be expected from such a
"measure; and having not the least doubt of your
"plans being on the most noble principles, I shall
"think it a duty incumbent on me to enable you
"to carry them, without delay into execution:
"Which I shall do chearfully, as I wish to live
"now, altogether for the sake of my children,
"having lost my relish for almost every thing else.

"When I furnished your Uncle with twelve
"thousand pound for the reversion of Turkey Is-
"land, it was with a view of securing it for you;
"but as your present situation may make it in-
"convenient to you to wait for dead mens shoes,
"instead thereof I am very willing, in conse-
"quence of your marriage taking place with Col.
"T. M. Randolph's daughter Polly, to give you
"a fee simple estate; in all the lands I have in
"Bermuda Hundred, one thousand acres in Cum-
"berland county, called and known by the name
"of Dry Creek, together with all the slaves and
"stocks thereon of every kind whatsoever, with
"two negro carpenters, mulatto Peter and Min-
"go; so that, should this proposal be agreeable
"to all concerned, I shall hold myself in readi-
"ness to ratify it any moment, and am with love
"to the good family, your loving father.

RICHARD RANDOLPH."

Curles, Aug. 8, 1780.

Curry a witness to the re-acknowledgment of the deed, states; That both Richard Randolph

the

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the father and Richard Randolph the ſon re-acknowledged the deed from the former to the latter, when he atteſted it as a witneſs.

There are ſeveral depoſitions, proving the amount of the value and improvements put by Brett on Sandy Ford; the ſales made by him; and the valuation at which the reſidue was taken by Harriſon.

The depoſition of Richard Randolph the ſon ſtates, that in the year 1780, he heard his father read a letter from Thomas M. Randolph, which was ſaid to be *a joint letter*, and requiring a ſettlement of property to a certain amount, previous to their conſenting to the marriage of their daughter Molly to David M. Randolph; in conſequence of which the ſaid Richard Randolph the elder agreed to make proviſon and actually gave *Preſque Iſle** and *Dry Creek* to the ſaid David M. Randolph.

Harry Randolph's depoſition ſtates, that the marriage of David M. Randolph was poſtponed, only on account of Col. Richard Randolph not having given his ſon David Meade Randolph certain property in fee ſimple in lands, &c; and which the deponent underſtood was to be partly in or about Bermuda Hundred. That the deponent remembers ſeeing a letter, ſigned by Colonel Thomas Mann Randolph, demanding a ſettlement prior to the ſaid marriage; and this deponent underſtood that ſuch a ſettlement was made.

Pending the ſuit, Hanbury as ſurviving partner of Capel and Ozgood Hanbury, and Main as executor of Hyndman ſurviving partner of James Buchanan & Co. were admitted plaintiffs, and filed their bill charging that the ſaid Capel and Ozgood Hanbury had obtained three judgments of £ 1039: 0: 8 ſterling each, againſt the ſaid Richard

* This is the name of the Bermuda Hundred lands.

and Randolph the elder, in the County Court of York, on the fixteenth of July 1770: That the ſaid Richard the elder was indebted to the ſurviving partners of the ſaid James Buchanan & Co. by bond, in a balance of £ 2355: 11: 3, on the 5th of July 1775; For which ſums the plaintiffs reſpectively aſk relief, having regard to the dignity of their debts.

The following agreement was entered into:

"It is agreed in this cauſe that the judgment creditors are not to be conſidered as ſubject to the diſadvantage attendant on their being plaintiffs in equity, with the admiſſion of their having no legal title: nor are the defendants to be underſtood as admitting that they have a legal title; but it is agreed that the claim and defence are to be firſt conſidered as they would ſtand at law, and if the defendants have a defence at law they are to receive the benefit of it. If, on the contrary, it is the opinion of the court that the plaintiffs ought to ſucceed at law, then it is agreed that the caſe ſhall be ſo conſidered, and the defence of the defendants, as well legal as equitable, ſhall be eſtimated as it would be, if they were now praying to be relieved againſt thoſe judgments. Any iſſue which the court may deem neceſſary may be directed notwithſtanding this agreement. It is further underſtood that nothing in this agreement ſhall bar the court, if the right be determined in favour of the complainants, from extending the remedy according to the principles of equity."

Pleaſants as executor of Robert Pleaſants alſo filed a bill for the amount of a judgment of £ 40, obtained againſt Richard Randolph the elder, in his lifetime, in the County Court of Henrico.

There is alſo a claim on behalf of Byrd's truſtees upon a judgment of Henrico Court againſt

the

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the ſaid Richard Randolph deceaſed, on the 6th day of July 1784; on which a writ of *fieri facias* iſſued, and was ſatisfied, except as to £ 394: 15 9, which was enjoined by the ſaid Richard the elder, but the judgment was revived, by *scire facias*, againſt his executors in the year 1788, as to the enjoined ſum.

To theſe bills the defendant Richard Randolph and David Meade Randolph by anſwer deny any knowledge of Hanbury's judgments until after the death of Richard Randolph; that they are reſpectively purchaſers for valuable conſideration; and therefore they ſeverally pray that their reſpective purchaſes may be ſaved to them, in the ſame manner as if ſpecially pleaded; that, at the time of rendering thoſe judgments, the ſaid Richard Randolph the elder lived in Henrico County; that they believe the ſaid judgments have been in the whole or in great part paid; and rely upon the preſumption ariſing from length of time.

The defendant Richard Randolph, by way of amendment to his anſwer ſays, that on the 21ſt of March 1786 the ſaid Richard Randolph the elder lay ill of the ſickneſs of which he died on the 5th, of June 1786; That the portion of £ 1200 ſterling promiſed by Robert Beverley in conſideration of the marriage, between his daughter and the reſpondent, has been paid; that the executors of Wayles knew of the deed to the defendant, ſhortly after it was executed; that the deed was executed in conſideration of the marriage contract; and that the defendant has mortgaged to Singleton and Heath.

The anſwer of Heath ſtates, that the mortgage was made to him by the defendant Richard Randolph, who had a conveyance from, and was heir at law to the ſaid Richard Randolph deceaſed; and that he is a purchaſer without notice.

The anſwer of Singleton's executors ſtates that the defendant Richard Randolph being ſeized

either

either by descent or purchase mortgaged to their testator.

The executor of Hanbury replies, that he was a British subject; that the debts claimed are within the treaty of peace; that the defendant David Meade Randolph had notice of the judgments on or before the 1st of June 1791; that the plaintiff and the said Capel & Ozgood Hanbury have always resided in parts beyond sea, and out of the limits of Virginia.

Amongst the exhibits are copies of Hanbury's judgments; the bond of Richard Randolph the elder to Hyndman as surviving partner of James Buchanan & Co. and that to Bevins; the exhibits spoken of in the answers of Brett and Ryland Randolph; and the will of Richard Randolph the elder.

The Court of Chancery directed one of the commissioners to take an account of the lands, tenements and hereditaments, whereof the said Richard Randolph the elder was seized on the 16th of July 1770, and which descended to his heir at law, and also which were settled upon, or devised to any of his sons: and also to take an account of such parts thereof as had been conveyed, or otherwise disposed of by the said heir and devises respectively, with the considerations paid, or secured to be paid for the same; and also an account of the permanent improvements, upon any of the said lands, tenements and hereditaments, made by the said devisees.

Upon the coming in of the report, the Court of Chancery delivered its opinion, that the deeds from Richard Randolph the father to David M. Randolph the son, said to be one "for his advancement in life," and the other "for his better advancement in life," might be avered to have been in consideration of the marriage, being congruous with the consideration mentioned in the deeds. That the judgments of Hanbury, and of

Byrd's

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Byrd's truſtees, if revived againſt the heir of Richard Randolph the father, would not by relation defeat or impair lawful meſne acts, ſuch as thoſe deeds, and the judgments and proceedings againſt Brett and Ryland: That the deed to the defendant Richard Randolph the ſon, if it had been cancelled and re-executed in March 1786, and had been altered in another part, would have been an act of that day, in the ſame manner as if another conveyance had been then executed; and, having been proved within eight months from that time, would have been good againſt the creditors of the father; although the marriage of the ſon and Maria Beverley, in conſideration of which the conveyance was executed, had preceded; becauſe marriage is a conſideration continuing. But the ſaid deed being only acknowledged before the witneſſes who proved it, which could mean nothing more than an acknowledgment that the deed had been ſealed and delivered on the day of its date, and the ſaid deed being ſtated to have been made in conſideration of a marriage to be had and ſolemnized, whereas the marriage had been actually ſolemnized before, could not be conſidered as an act of the day when it was ſo acknowledged, and conſequently not having been proved within eight months from the ſealing and delivery thereof, was void againſt creditors, by the words of the act of Aſſembly. That therefore, if the judgments of Hanbury had been revived againſt Richard the father, or his heir and deviſees, writs of *elegit* or *levari facias* might, by the act of 1772, have been lawfully directed to the ſheriff of any county, and, in that caſe, muſt have been firſt ſatisfied: But, not having been revived, they were not entitled to a priority againſt creditors of equal dignity. That, if Wayles' executors had taken an aſſignment to their truſtee of Bevins's bond, they would, in his name, have been entitled to the ſame relief that Bevins himſelf would; and that a Court of Equity would have enjoined the heir of Richard Randolph

deceaſed

deceaſed from pleading payment by the ſureties executors: That they ought to have the ſame remedy as if ſuch aſſignment had been made; and that they had an equal right, with the judgment creditors, as the heirs were ſpecially bound by the bond. Therefore that court diſmiſſed the bill as to David Meade Randolph; and, declaring the lands, conveyed to the defendant Richard Randolph the ſon, liable to the creditors, deducting the improvements made thereon, by him, ordered a ſale by commiſſioners. And pronounced the lands deviſed to Brett and Ryland, and which had been extended and ſold for payment of the teſtators debts, to be exonerated from the lien, to which they would otherwiſe have been ſubject. From this decree Richard Randolph appealed to this court.

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On the day of pronouncing the decree, the following agreement was entered into, "The plaintiffs counſel agree that a ſuit, which is contemplated to be brought on behalf of Robert Beverly and Maria Randolph his daughter, in order to obtain a ſpecific performance of the marriage contract in this ſuit alledged to have been made, for ſettling Curles eſtate on the marriage of the defendant Richard Randolph and the ſaid Maria, ſhall not be prejudiced by the decree in this cauſe having been entered before ſuch ſuit is inſtituted; but that the plaintiffs, in ſuch ſuit, ſhall have the ſame benefit therefrom, as if the ſuit had been inſtituted prior to the pronouncing of the decree in this cauſe, provided that the ſaid ſuit ſhall not be unneceſſarily retarded, by the complainants in the ſaid ſuit."

The bill by Robert Beverley and his daughter was againſt the plaintiffs in the other ſuit, and againſt Richard Randolph the ſon, and the executors of Richard Randolph deceaſed. It ſtated, that, in 1785, Richard Randolph, the ſon, applied to the ſaid Robert Beverley for permiſſion to addreſs his daughter, the plaintiff Maria, in the

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way of marriage: That the ſaid Robert informed him he ſhould give his daughter a portion of £ 1200 ſterling, in addition to a legacy of £ 500 ſterling, upon which a conſiderable intereſt had accumulated; and therefore ſhould expect that the ſaid Richard Randolph the father would make a comfortable proviſion for his ſaid daughter, and when this was properly done he ſhould have no objection to the propoſed marriage: That, in a ſhort time after, the ſaid Richard the ſon returned with the following letter from his ſaid father. "Sir, the connection my ſon Richard is about to "form, with your amiable daughter Maria, is "perfectly agreeable to all his friends upon James "river; and you may be aſſured, on ſo deſirable "an event taking place, I ſhall prepare for mak-"ing the beſt proviſion, my ſituation will admit "of, for their accommodation. The place where "I now live, known by the name of Curles, in "Henrico county, is what I intend for him, at "the death of his mother and myſelf, with forty "ſlaves; that is to ſay, eight men, ſix women, "ſix plough boys and twenty children; together "with the uſe of Turkey Iſland plantation, dur-"ing the lives of Richard and Anne Randolph, "when it is to revert to my eſtate again; and am "with a tender of our compliments to the family, "your moſt obedient ſervant. Richard Randolph. "Curles July 20th, 1785." That the ſaid Robert Beverley, thereupon, aſſented to the marriage, which accordingly took effect; and the plaintiff Robert hath paid the portion and legacy aforeſaid: That the ſaid Richard Randolph the father, intending to execute his promiſe aforeſaid, made a deed to Richard the ſon for the Curles eſtate, upon the 20th day of September 1785, which was before the marriage. That the ſaid Richard the father being ill of the ſickneſs of which he died, and finding that he would be unable to go to court to acknowledge the deed re-acknowledged it before three other witneſſes, on the 21ſt of March 1786, and the ſame was recorded in July following.

ing.

ing. That the deed varies from the articles, as to the intereſt which ought to have been granted. That the defendants have ſet up claims againſt the eſtate, alledging that the deed was not recorded in time. That the re-acknowledgment, if not equal to a re-execution of the deed, was agreeable to the conſtruction of the act of 1748: That the original articles may now be enforced; and that compenſation ſhould be made for the loſs of the intereſt in Turkey Iſland; the ſales of which are in the hands of the defendant David M. Randolph as executor of the ſaid Richard the elder. Therefore the bill prays that the deed may be eſtabliſhed as far as it conſiſts with the articles; that compenſation may be made for Turkey Iſland; and that the plaintiffs may have general relief.

The anſwer of the defendants admits the letter of the ſaid Richard Randolph the father to the plaintiff Robert Beverley, previous to the marriage, but relies upon their rights as explained in the former proceedings and decree.

There was a narrative ſigned by the ſaid Robert Beverley, which was admitted to be read in the cauſe, and is as follows. "When Mr. Richard Randolph jr. applied to me in 1785, for permiſſion to addreſs my daughter Maria, I obſerved to him, that as I ſhould give my daughter twelve hundred pounds ſterling, and Mr. Mills had left her five hundred more, upon which had accumulated a conſiderable intereſt, I ſhould expect that his father ſhould make a comfortable proviſion for him and that when this was properly done, I ſhould have no objection to the marriage. In a ſhort time after this was done he returned with the following letter. (Here follows the letter recited in the bill addreſſed to Mr. R. Beverley.)

Deeming the proviſion above ſpecified adequate to the fortune I ſhould give my daughter, and ſuppoſing that Col. Richard Randolph had a right to make the propoſal, I told Mr. Richard Randolph junior

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junior the marriage might take palce, but that without ſuch a proviſion I ſhould not have conſented to it.

ROBERT BEVERLEY."

Blandfield March 4. 1797.

The Court of Chancery, for the reaſons explained in the proceedings in the former cauſe diſmiſſed the bill with coſts. From which decree the plaintiffs appealed to this Court.

Both cauſes came on to be heard together in this court.

CALL for the appellants. There are four queſtions to be conſidered on the part of the appellants in theſe cauſes; 1. Whether the judgments bind the lands, in the hands of the alienees? 2. Whether the re-acknowledgment of the deed, from Richard Randolph the father to Richard Randolph the ſon, was effectual to convey the eſtate out of the grantor, from the date of the re-acknowledgment, ſo as to defeat the rights of creditors? 3. Whether if the re-acknowledgment be inſufficient, the original agreement, on account of the fraudulent execution of it, may not now be enforced according to the firſt intention of the parties? 4. Whether if the deed, from Richard the father to Richard the ſon, be void, the mortgagees, as deriving title under the heir at law, will not be preferred to the other creditors?

I. The judgments do not bind the lands in the hands of the alienees; becauſe no executions were ſued within a year from the rendition thereof; and therefore the lien, if there ever was one, expired.

For the reaſon why judgments bind lands at all, is not that the ſtatute ſays they ſhall be bound in ſo many words; but it is merely a conſequence which the court draws from the ſtatute, by holding purchaſers to conſtructive notice of the judgment. So that the lien is created not by the ſtatute,

tute, but by the knowledge which the court presumes the purchaser to have had of the judgment.

But there is also a rule of law, that, after twelve months and a day have expired, the judgment shall be presumed to be satisfied, 3. *Black. Com.* 421. So that after twelve months and a day have elapsed, without any execution, the plaintiff is driven to the necessity of removing the presumption, before he can make his judgment effectual.

Thus then it appears, that there are two presumptions against each other, 1. The presumption of notice; 2. The presumption of payment: Of which, the presumption of payment is, at least, as strong as that of notice; and therefore is entitled to the same weight in the present discussion.

But if there be a presumption of payment, as well as a presumption of notice, and the equity of the parties be equal, the purchaser ought to prevail. For he had a right to make the same presumption of payment, which the law did; and therefore was guilty of no fault: Whereas, it was gross negligence, in the creditors, to suffer their judgments to sleep so long, without actually suing executions, or continuing the award of them upon the roll; so as to put purchasers on their guard. For it operated as a fraud upon the purchasers, which shall give them priority. It is like the case of an execution delivered to the sheriff and the property taken, but not sold, at the instance of the plaintiff; which will be postponed to a subsequent judgment and execution at the suit of another creditor. 1. *Vez.* 245.

Thus far upon principle: but a great writer states the very case, now under consideration; and decides against the lien. I mean the Lord Chief Baron Gilbert who in his book upon the law of executions, after having shewn, in the preceding pages, the time in which judgments, in personal actions, were to be executed, at common law, and that

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a judgment gave an authority to the party to sue execution within a year and day; but if he did not do it within that time, that it was presumed to be paid, adds, "This time of limitation of judg- "ment, was not only in personal but real actions; "for though the judgment on a real action settled "the right of the land forever, as in the personal it "did the right of the thing in demand, yet that "judgment could not lie dormant forever, to be "executed at any time; for then dormant judg- "ments would over-reach conveyances between "the parties, and therefore there was but a years "time to execute such judgments, which judg- "ment, over-reached all conveyances, and forced "the party to an *audita querela*; but after the "year, the judgment over-reached nothing; but "he was put to his *scire facias* on that judgment, "and not to his action, for the right of the land "had been already determined, and therefore it "was only to revive the determination touching "the lands, unless something had been done by in- "termediate conveyances *Gilb. law Ex.* 12."

This passage establishes all that I have been contending for; It shows the genius of the law upon subjects of this kind; and proves that the judgments do not over-reach the conveyances in the present case. For it would be difficult to conceive why a judgment should over-reach mesne conveyances in personal, and not in real actions; why, in a real action, where the land itself is demanded it should not disturb the purchaser, and in a personal action, where the land itself is not specifically sued for, it should; why in a real action, where the land itself is actually recovered, the conveyance should not be postponed, and in a personal action where money only is recovered and payment may be made various ways, that it should; finally, why in a real action, where the execution can only go against the lands, the purchase should be protected, and in a personal action, where the execution is usually issued against the person and effects in the first instance and the

lands

lands are ſeldom reſorted to, until all other means have failed, the purchaſe ſhould be avoided.

Perhaps it will be ſaid that as the ſtatute has now given a *ſcire facias* in perſonal actions a different rule will reſult; for the judgments might have been revived by writs of *ſcire facias;* and that when revived they would have related back to the day of the firſt rendition. That, however, would not be correct. 1. Becauſe relations, which are legal fictions only, never have that effect: For they are created rather for neceſſity *ut res magis valeat quam pereat;* and therefore, they extend only between the ſame parties, and are never ſtrained to the prejudice of innocent perſons. 2. Becauſe that argument is directly contrary to the doctrine laid down in the paſſage juſt recited. For the author expreſsly ſays that a *ſcire facias* lay at common law; and therefore, in this reſpect, the caſes are alike: But when he ſpeaks of an expired judgment, and ſays it will not over-reach, it is plain, that he muſt mean after it is revived; for until revived, it could not be enforced. So that in fact he puts the caſe of an expired judgment revived by *ſcire facias;* and decides that it will not over-reach. For it would have been nugatory, to have peremptorily ſaid, that the judgment would not over-reach, without mentioning, becauſe not revived, if by a ſubſequent proceſs, it could have been revived, and made to over-reach by relation.

But if, as was argued in 3. *Mod.* 189, the *ſcire facias* be a diſtinct action, and the judgment on it a new judgment, it is concluſive that the judgment on it does not relate back to the firſt, ſo as to avoid meſne purchaſes; becauſe, in that caſe, it would be the ſecond judgment which would bind, and not the firſt; as it is only by conſidering the firſt as the real judgment, and the ſecond merely as an award of execution on the firſt, that the lien can be preſerved. For the ſtatute gives the *elegit* on judgments upon which executions may iſſue;

but

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but if the ſecond be a new judgment, then the execution iſſues upon that; and of courſe the *elegit* could only iſſue upon the judgment in the new action or *ſcire facias*, which would create a new obligation, and would be the point from whence the lien would recommence. Accordingly in the caſe in the 3. *Mod.* where judgment was obtained againſt a feme ſole, who afterwards married, and then a *ſcire facias* was brought againſt huſband and wife, and, upon two *nihils* returned, judgment obtained againſt them; after which the wife died, and a ſecond *ſcire facias* was brought againſt the huſband alone; and it was held that it lay: Which could not have been the caſe, unleſs the judgment upon the firſt *ſcire facias* had been conſidered a new judgment altogether; for if it had related back to the firſt, that was a judgment againſt the wife only before the marriage, and therefore would not have bound the huſband after her death.

This reaſoning is ſtrengthened by the act of Aſſembly concerning executions, which recites that the plaintiff may take execution within a year after the judgment; and therefore impliedly, that he cannot have it afterwards. But, when he can no longer have execution, the lien which ariſes from it muſt expire. For if the lien is created by the Court merely becauſe the plaintiff has a right to ſue execution, it muſt follow, that when he has no longer a right to the execution, there can be no lien. Becauſe the lien, when the right to execution expired, loſt its ſupport; and to uſe the language of lord *Coke* on another occaſion, became a flower fallen from the ſtock, without any thing to nouriſh and keep it alive.

Theſe arguments are the ſtronger in Hanbury's caſe, when it is conſidered that at the time of the conveyances no *ſcire facias* could have iſſued on thoſe judgments, without ſpecial leave of the court, on account of the length of time which had elapſed; becauſe that increaſed the preſumption

of

of payment and more completely justified the purchaser. For where the plaintiff could not make use of the process of the Court *ex debito justitiæ*, it rendered the presumption greater that the right was extinguished.

But there is another objection to those judgments, namely, that at the time of the rendition of them no execution could have been sued upon them into another county. But if the lands are only bound because execution might be sued against them, it follows, necessarily, that where no execution could issue against those lands, they could not be bound. For how absurd would it be to say that lands could be affected by a judgment, upon which no execution, that would reach them, could issue. It is like the case of judgments in the Federal Courts, which do not bind the lands in any other state than that where the judgments are given; because an execution cannot issue into any other state.

Nor does it alter the case, that, by the subsequent act of 1772, an execution against lands might be issued into any other county upon a judgment in a County Court. For the Legislature could not intend that it should relate to expired judgments, which could not be enforced without new process. The words of the act are opposed to that idea. For they give the clerk power to issue execution; which supposes the judgment to be capable of affording an execution, without any new act to be done. But when no execution could issue, it necessarily followed that it was not a case contemplated by the Legislature; And the Court will not extend the construction, in favour of a negligent creditor, to the injury of fair purchasers, who are seeking to avoid loss, in a case where they have honestly laid out their money, upon this specific property; whereas the creditor is seeking to *make gain* out of property which he did not particularly hazard his money on: and the principle

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principle of universal justice in such cases is, that his condition, who seeks to *avoid loss*, is better, than his, who seeks to *make gain*.

But as the judgment only binds in respect of the constructive notice, which is a legal fiction and a creature of the court, The court, by analogy to the record laws, will confine the lien to the same jurisdictions, and limits, as the recording of conveyances is confined to: Which will be no inconvenience to any body, as the creditor will have his lien over reasonable limits: and the purchaser will be exposed to no greater difficulty in enquiring for judgments, than he will for conveyances. Whereas the inconveniences, from a general lien all over the state, will be incalculable, and intolerable. For there are ninety County Courts, six Corporation Courts, and eighteen District Courts; besides the Courts of general jurisdiction. So that the labour of the purchaser would be endless, and he would sooner relinquish the purchase than encounter the difficulties.

But, in addition to this, the opportunities of fraud, which it would afford, would be infinite; for it would put it in the power of the debtor and creditor to deceive all mankind. Thus a man living in Henrico may have a judgment rendered against him over the Allegany; and seven and twenty years afterwards, this dormant judgment may be trumped up, in order to defeat a fair purchaser, who has honestly paid his money without the least suspicion of any incumbrance. An observation which is particularly applicable to the present case. Because here were judgments obtained, in York, 27 years before the commencement of the present suit; and it is now sought to charge them on lands in Prince Edward and Cumberland. Although no purchaser of those lands would ever have had the slightest suspicion that they were bound by a judgment in York.

But for other reasons, the judgments in York do not bind these lands. 1. Because

1. Becauſe at the time of the conveyances no *ſcire facias* from a County Court ran into another county againſt the *terretenants*, who muſt be actually ſummoned in perſon or upon the lands; nor can it even now run into another county, upon ſuch judgments. For the *ſcire facias* into other counties, given by the act of Aſſembly, is only againſt parties to the judgments and their repreſentatives, and not againſt other perſons. So that if the judgments were revived by *ſcire facias* againſt the executors, they would not be effectual againſt the purchaſers.

2. Becauſe the *ſcire facias*, as between the plaintiff and the *terretenant*, is an entire new proceeding altogether; and, being an action concerning the realty, the *venue* muſt be laid in the county where the lands lie, as neceſſarily as in an ejectment or writ of right; and therefore the County Court of York, having no juriſdiction of lands in another county, could not try the iſſue, which the *terretenant* might think proper to make. So that the *terretenant*, if accidentally ſummoned in the County Court of York, might plead to the juriſdiction of the court; or, failing to do ſo, he might ſtate any matter in bar of the plaintiffs right, and then the Court of York, not having juriſdiction of the ſubject matter, muſt deſiſt from further proceedings in the cauſe, in the ſame manner as every court of limited juriſdiction muſt do, whenever it appears that the queſtion is beyond the bounds of their authority.

Therefore, under every point of view, it may be affirmed that the lien was at an end, and that Richard Randolph the elder might lawfully convey.

II. The re-acknowledgment of the deed was effectual to convey the eſtate out of the grantor from the date of the re-acknowledgment, ſo as to defeat creditors.

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This clearly consists with the view of the Legislature; for that was only to enable creditors and purchasers to enquire for the title and to find out the true ower of the estate: Which, is as effectually done by a re-acknowledged deed, if recorded, as by an original deed.

But then a technical reason is urged against it; namely, that the deed being good between the parties, the grantor had nothing to dispose of, at the time of the re-acknowledgment; and therefore the re-acknowledgment is void. That argument however is not sound. For if the mere execution of the deed passed the estate out of the grantor, as against creditors and purchasers, then the giving up the deed again to the grantor destroyed the grantees evidence of his title; and therefore the grantor might regrant either to the same or another person, *Litt. Sect.* 377: Where it is said "If the feoffee granteth the deed to the "feoffor such grant shall be good, and then the "deed and the property thereof belongeth to the "feoffor &c, and when the feoffor hath the deed "in hand, and is pleaded to the court it shall be "rather intended that he cometh to the deed by "lawful means, than by a wrongful mean:" Upon which Lord Coke observes "Hereby it appear-"eth that a man may give or grant his deed to "another; and such a grant by parol is good. *Co. Litt.* 232. *(a.)*" These passages decide the very point; and shew that the grantee may give up his deed to the grantor, and that the latter may avail himself of the benefit of it. Of course it follows, that he may grant to whomsoever he pleases afterwards.

Nor could the grantee resume his title; for, as by statutary conveyances the estate only passes by the deed and not by transmutation of possession, it follows that, when the grantee cannot shew a deed, he can claim nothing in the land. Because to recover at law, he must produce the deed: But this he cannot do, when he has not the possession

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of it; and a Court of Equity would not aſſiſt him againſt his own voluntary ſurrender of the deed: Whereas the ſecond grantee would always have it in his power to ſhew proper title papers; and conſequently his right could not be diſturbed.

It is therefore like the caſe of a deed that is cancelled and afterwards re-delivered (which is admitted to be good;) becauſe it is preciſely the ſame thing, in principle, by whatever means the property in the deed is loſt; for it cannot be material whether it is loſt by this or that mode.

But the re-acknowledgment would paſs an intereſt, if the eſtate, as between the grantor and grantee, was actually transferred. For if it was after the eight months, then it would paſs the right, which had reſulted to the grantor for the benefit of creditors and purchaſers: And if it was before, then it paſſed the poſſibility of ſuch reverter, as it is now clearly held that a poſſibility is aſſignable. 3. *Term Rep.* 88; For, the grantee being in poſſeſſion under the grantor, the re-acknowledgment would operate either as a confirmation or releaſe of the intereſt.

Theſe obſervations have been made upon the ſuppoſition that the whole intereſt paſſed out of the grantor upon the firſt delivery of the deed. But in truth the deed paſſes nothing, as to creditors and purchaſers, until it is recorded. For, as againſt creditors and purchaſers, the act of Aſſembly makes four things neceſſary to be done, in order to perfect the conveyance. 1. Writing; 2. Indenting; 3. Sealing; 4. Recording. For the words are "That no lands &c. ſhall paſs, alter or change from one to another &c. by bargain and ſale, leaſe and releaſe, deed of ſettlement to uſes, of feoffment, or other inſtrument, unleſs the ſame be made by *writing, indented, ſealed and recorded &c.*" So that all four are abſolutely requiſite againſt creditors or purchaſers; and the abſence of either of theſe things, will leave the eſtate, as to them, in the grantor ſtill.

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It is therefore, as to creditors and purchasers, exactly like the case of the statute of enrollments in England, passed in the 27. *H.* 8. *Cap.* 16: From which our act of Assembly appears to have been copied; as the words are nearly the same, except that, that statute, although it says no estate shall pass without inrollment, does not declare, in so many words, that the conveyance shall be good between the parties to the deed, as our act of Assembly does: But, in practice, the courts, there, have put the same construction on it.

Now it has always been held under the statute of enrollments, that, until the enrollment is actually made, the estate abides in the grantor against creditors and purchasers: So here, the deed, until it is actually recorded, has no effect against either creditors or purchasers; but, as to them, the estate remains in the grantor. For the right of the creditors and purchasers is more than an *estoppel;* it is an actual beneficial interest, which the act prevents from passing out of the grantor at all, unless the prescribed regulations are observed. So that the deed before it is recorded only passes part of the interest out of the grantor and not the whole; like the case of a conveyance of an estate tail or any lesser interest out of the fee.

But then perhaps, it will be said that according to this construction a man would lose his estate, against creditors and purchasers, on the next day after his deed was executed, provided it was not previously recorded; although it might actually be recorded within eight months afterwards. This however would not be correct. For when it has been recorded it is good by relation from the day of the date. 2. *Inst.* 674. Because when several things are necessary to be done, in order to perfect any act, when the last is done it relates back to the first; and the whole are good *ab initio.* 1. *Wils.* 212. *Hob.* 22. *Tenr.* 360. Therefore although the deed is not good, as to creditors and

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purchaſers, before it is recorded, yet after it has been recorded it relates back to the delivery, and avoids the rights of all other perſons indiſcriminately; becauſe the grantee, having by law eight months allowed him to record it in, was guilty of no fault in not doing it ſooner; and as he had made the firſt contract, he had the firſt right in conſcience. So that the relation in ſuch a caſe wrought no injuſtice.

But if nothing paſſed againſt creditors and purchaſers by the firſt delivery, then the grantor had an intereſt to paſs by the re-acknowledgment. For he had that portion of the eſtate which remained in him for the benefit of creditors and purchaſers; and this intereſt he might well grant notwithſtanding the deed, *Hinds case*, 4. *Co.* 71: Where, Hawe bargained and ſold lands to Libbe, and before enrollment, levied a fine to him; and it was held that the fee paſſed by the fine. Which proves two things expreſsly, 1. That the eſtate remains in the grantor until the enrollment; 2. That the grantor may paſs that eſtate to his own grantee. So that it is preciſely our caſe, as far as reſpects creditors and purchaſers; and proves that, as to them, the land is conſidered as remaining in the grantor until the deed is recorded; but that when it is recorded, it takes effect from the delivery by relation, and deſtroys the rights of the creditors and purchaſers.

Any other conſtruction produces inconſiſtency in the effects of the act. For if the deed *ipso facto*, by the firſt acknowledgment, paſſed the whole eſtate into the grantee, it would be difficult to conceive how it would reveſt in the grantor, for the benefit of creditors and purchaſers, after the eight months had elapſed. Becauſe the act does not declare that the eſtate ſhall reveſt, but that the deed ſhall be void only. Now the deed might be void, and yet the eſtate, once veſted in the grantee, would remain there, and could not re-

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veſt in the grantor, by the words of the act of Aſſembly, without a new deed.

But then it will be ſaid that admitting this conſtruction to be right, this was not a new deed, but a mere re-acknowledgment of the old one; which according to the Chancellors reaſoning can mean nothing more than an acknowledgment that it was delivered the day of its firſt date. This poſition is never true; becauſe when it is re-acknowledged, the grantor repeats the ceremony, and ſays in the preſence of the witneſſes that he acknowledges it to be his ſeal, and delivers it as his act and deed. So that it is in fact always an act of the day of its re-acknowledgment. But however true the poſition may be in general, it is certainly not ſo in this particular caſe. Becauſe the grantor here has actually cauſed the real date of the re-acknowledgment to be noted by the witneſſes; thereby manifeſting his deſign that it ſhould be conſidered as an act of that day.

Nor is it a circumſtance of ſmall weight that the general cuſtom and practice of the country is conformable to the expoſition which we contend for. Many deeds, ſoon after the act of Aſſembly was firſt made, were re-acknowlegded and recorded in the proper Courts; and the practice has been continued in various inſtances down to the preſent day. So that the proportion of eſtates, held under deeds in that ſituation, is probably very great. Therefore admitting the conſtruction to have been miſtaken at firſt, it is certainly better that it ſhould be adhered to, upon the principle, that *common error makes the law*, than that a third part perhaps of all the titles in the ſtate ſhould be overturned.

It is upon this principle that if a deciſion of a Court is againſt a ſtatute, the deciſion, though wrong, will always after be adhered to. Yet the deciſion no more repeals the act, than the cuſtom of the people; but the court adheres to it as a leſs evil than uncertainty in the law.

Accordingly

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Accordingly instances are not wanting, both in England and in this country, where men acting under a common delusion with respect to the law have been protected. Thus in the case of *Long* vs *The Deane and Chapter of Bristow* 1. *Roll. ab.* 378. Where a lease was made, by the Deane and Chapter, at a time when it was supposed that the statute of *Eliz.* did not bind the King, and afterwards it was held that it did; yet because the law had been mistaken the lease was supported. So in this court in the case of *Currie* vs *Donald* 2. *Wash.* 63, the custom of the country was mentioned as a circumstance of weight: And *Branch* vs *Burnley* * *Nov.* 1799, was expresly decided upon the ground of the custom. The language of one of the Judges in that case, after stating the situation of the law record was, "In "equity the custom is set forth, and though, as "stated in the demurrer it was illegal, yet since "the practice had impressed on the minds of the "people, an idea of its legality, and under that "idea the payment was made, he ought in this "court to have the benefit of it." Now there can be no difference whether the custom is illegal by common law or statute. For the law is equally binding in either case, and therefore, if custom can sanctify a mistake with regard to the one, it may with regard to the other.

There is nothing in the objection that the marriage was already had before the deed was re-acknowledged; because the recital should be considered as surplusage, and then the consideration of the money and blood was sufficient to pass the estate; which could not be avoided, because the marriage contract would prevent the conveyance from being considered as voluntary, in the same manner as if a deed is expressed to be made for the consideration of five shillings, when full value was actually

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* 1. Call's rep. 358.

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actually paid, the eſtate paſſes and the true ſum paid will ſecure it to the grantee.

The reſult is, that the re-acknowledgment was ſufficient; and, as the deed was recorded within eight months afterwards, it is good againſt creditors.

III. But if the deed is void becauſe not recorded within the eight months, then the contract was not well executed; and therefore on account of the fraud may now be enforced.

For the contract was not merged in the deed; becauſe Beverley was no party to it; and did not even know that it had been made until long after the eight months had expired. It was therefore a tranſaction between other perſons without his privity or conſent; and conſequently could not affect his contract, which he had a right to have effectually fulfilled.

The 4 *ſect.* of the act of Aſſembly makes no difference; 1. Becauſe that means the actual ſettlement itſelf and not the mere agreement for it. 2. Becauſe that was intended to operate on the claims of the huſband and wife or their truſtees only, and not upon thoſe of third perſons. 3. Becauſe Beverley was a purchaſer for money actually paid; and therefore it does not ſtand on the common footing of a marriage contract. 4. Becauſe the execution was a fraud upon Beverley. For the father and ſon, who pretended to have the articles executed and did not do it effectually, were guilty of a fraud, in the ſame manner as in the caſe of an underhand agreement to pay back money, contrary to the tenor of the contract. 2, *Powr. Contr.* 164. Others, therefore, will not be allowed to take advantage of the omiſſion to record; for that, on account of the fraud can create no right: But Beverley is left, at liberty, to avoid what has been done, and to aſſert his contract. 2, *Powr. Contr.* 55.

But if the contract remains, then it ſpecifically binds the lands; for the act does not avoid the contract but only the deed. So that if the contract was never merged it remained with all its

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consequences, and formed a lien on the lands even against judgments. 2. *Pow. Contr.* 58.

IV. If the deed be not good, and the marriage contract cannot now be carried into effect, still as the judgments are no lien on the estate, the mortgagees will be preferred.

Because they have the title of the heir at law; and being purchasers they have, at least, an equal equity with the creditors; Therefore having got the legal estate from the heir, they must prevail against the creditors.

Nor does the deed alter the case; because the resulting interest for creditors and purchasers descended on the heir, who might lawfully convey it: For the mortgage, which is a sale *pro tanto*, is good, although the heir will be liable to the creditors for the value of the alienations. This position, evident in itself, is particularly true in the present case; Because it is in his character of heir that Richard Randolph is sued. Which indeed was absolutely necessary; for in any other mode he would not have been liable; nor could a suit in any other form have been maintained against him; because the statute only renders devisees liable; and as he was not a devisee, if the deed be void, and the same as if never made, he must be liable as heir or not at all.

The mortgagees therefore have got the legal estate; and the Court will not take it away, from them, in favour of the other creditors who have no superior equity.

DUVAL on the same side contended that Richard Randolph the son was a *bona fide* purchaser of the estate, and therefore would not be affected by implied notice of the judgments: 1. *Eq. cas. ab.* 354. 2. *Eq. cas. ab.* 682. 1. *Ca. ch.* 37. That the re-acknowledgment of the deed was sufficient; or if not, still it would operate as a covenant to convey; or if the deed was void, that the fee

descended

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descended on the son, who might fence against the creditors with the equity arising out of the contract. Upon which points he cited *Shep. Epit.* 273. 407. *Cro. Eliz.* 217. 2. *Eq. cas. ab.* 663. 1. *Eq. cas. ab.* 358. That the judgments were not a lien after the year and day; for the negligence of the creditors will postpone them. Besides, as to some of the lands the judgments never did affect them; because they were purchased by Richard Randolph the elder, after the rendition of the judgments. In support of these propositions he referred to 2. *Eq. cas. ab.* 684, 362. 3. *Atk.* 273. 357. 2. *Inst.* 470. 2 *Salk.* 598. 2. *Bac. ab.* 343, 362, 364, 596, *Rol.* 470. *Cro. Jac.* 424. 477. 2. *Hugh ab.* 790, 893. 2 *Mo. Ent.* 390. 391.

HAY for the appellees. Made four points. 1. That Wayles' executors were creditors by bond. 2. That the judgments were a lien on the lands. 3. That the deed was void as to creditors. 4. That the deed to David Meade Randolph was not for a valuable consideration. Which observation, he said, also applied to that of Richard Randolph junior, for the Curles estate.

As to the first point:

The effect is the same, as if Bevins himself had sued; for the debt was originally due by bond; and if the money had been paid by a person not security thereto, and he had taken an assignment of it, he would have been a bond creditor. So if the executors of Wayles had had it assigned to a third person for their use; because a Court of Equity would not have permitted the defendants to plead the payment. If bond creditors are satisfied out of the personal estate, the simple contract creditors shall have payment out of the real: Which is more than what is contended for here. Because there the satisfied bond is revived in favor of another person; but here it is only asked that the same bond may be made effectual in favor of the representatives of one who was originally

nally a party to it; and this for the benefit of the ſecurity too, which is a favorable caſe.

As to the ſecond point:

If the judgments gave a lien, when in force, they will when revived. There is no neceſſity for taking out execution, but the plaintiff may continue the entry on the record. 2. *Bac. ab.* 362; and therefore the lien attached notwithſtanding the ſubſequent alienation of the land. The *Stat.* 13. *Ed.* 1. which gave the *ſcire facias* makes no other difference in the common law, than merely to continue the execution, and enable the plaintiff to carry the judgment into effect at a later time than he could have done at common law. So that, upon this ſtatute execution may go at any time, if the notice mentioned in the act is given; and therefore, upon Mr. Call's own ground, the lien continued as the execution might be iſſued. If the plaintiff ſues an *elegit*, although he never executes it, or makes an entry on the roll, the lien will continue and he may defeat a future ſale. Therefore the argument, on the other ſide, goes to prove, that there is a difference between a judgment revived by the law, and one kept alive by the party himſelf; which cannot be true. The *ſcire facias* is but a mere judicial writ; and the entry is, that the plaintiff may have execution of the judgment; upon which no damages are given. So that to every intent it is but a mere reſtitution of the original judgment and its conſequences. Of courſe, if it ever was a lien on the lands, which is admitted, that lien remains unimpaired.

As to the third queſtion:

The deed not having been recorded within the time preſcribed by law is abſolutely void; or elſe the ways of law, like *The ways of Heaven, are dark and intricate, puzzled with mazes, and perplexed with errors.* The re-acknowledgment has not the effect which has been contended for; becauſe

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the act is that the recording of the deed ſhall take place within eight months from the ſealing and delivery; which means the original ſealing and delivery, and the ſubſequent re-acknowlegdment is vain and ineffectual. *Shep. touch.* 69. If the deed had been delivered up to be cancelled, it would have been good; but this was not done in point of fact; and therefore the defendants muſt contend, that it was a ſurrender of the old deed to be cancelled. But that poſition cannot be maintained; for the fact is not ſo; and the re-acknowledgment only amounts to a confeſſion that he delivered it on the day of the original date: Whereas a new deed implies the contrary; for a new deed reſpects time future only, but the old deed comprehends alſo the interval of time between the date of the old deed and the re-acknowledgment. That the re-acknowledgment is vain is clear from *Perkins Sect.* 154, who ſays, "It "is to be known that a deed cannot have effect at "every delivery as a deed; for if the firſt delive-"ry take effect, the ſecond delivery is void. As "in caſe an infant, or a man in priſon, makes a "deed, and deliver the ſame as his deed, &c. and "afterwards the infant when he cometh to his "full age, deliver again the ſame deed as his deed "which he delivered before as his deed, this ſe-"cond delivery is void. But if a married woman "deliver a bond unto me, or other writing as her "deed, this delivery is merely void; and there-"fore if after the death of her huſband ſhe being "ſole, deliver the ſame deed again unto me as "her deed, the ſecond delivery is good and effec-"tual." This doctrine, which is confirmed by Lord Mansfield in *Goodright* vs *Straphan*, *Cowp.* 204, proves, clearly, that a re-acknowledgment, where the firſt delivery has actually had effect, has no operation. But in the preſent caſe the original execution and delivery of the deed had full effect, and therefore the ſubſequent re-acknowledgment was void. It is ſaid, indeed, that no eſtate paſſed until the deed was recorded; but,

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by the expreſs words of the act, the deed is good between the parties: Which completely anſwers the argument. When the deed was re-acknowledged the eſtate was already in the grantee, and therefore the only effect of the doctrine, contended for on the other ſide, would be to give a longer time for recording the deed than the law allows. But if the re-acknowledgment would have been good, between the parties themſelves, as a new deed; yet, the poſitive words of the law had already operated on the old one, ſo as to avoid it in favour of the creditors; and had put it out of the power of the parties to defeat them by any act of theirs.

As to the fourth point;

The queſtion is if this princely proviſion by a father for his ſon ſhall be good againſt creditors? There is no deciſion in this ſtate which ſupports the claim ſet up in favor of the ſon; and the welfare of the country is certainly oppoſed to it. The deed itſelf ſhews him to be a mere volunteer, and if it was for a valuable conſideration he ought to prove it. Even marriage is not ſhewn to be the conſideration. The letter of Thomas Mann Randolph, which ſays that he would conſent, if Richard Randolph the father would give his ſon David Meade Randolph an eſtate and put him into poſſeſſion of it, does not alter the caſe. For if a father conveys an eſtate to his ſon, without any previous treaty it would be clearly void; and then the queſtion is, whether there was a ſufficient communication in the preſent caſe? The letter ſtates that the writer will conſent, if the eſtate is given; but it does not appear that Richard Randolph the father was at all moved thereby. For in his letter to his ſon *David* he takes no notice of it; but appears to have acted from parental tenderneſs only. His language is, that he had long intended to give him the eſtates. So that he, in fact, only gave it at one time inſtead of another. The deed was written under the direction of Rich-

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ard Randolph and only ſtates affection and advancement. Thereby plainly proving, that he did not act under the idea of a contract, but from motives of affection only. Conſequently unleſs it could be ſhewn, than if a father makes a conveyance becauſe his ſon is about to be married, it will be good againſt creditors, the defence in the preſent caſe cannot be ſupported. For it makes no difference that Thomas M. Randolph required it as a condition; ſince it does not appear that the requiſition had any effect, upon the mind of Richard Randolph. Beſides, the letter did not aſk a ſettlement on the wife; but merely on David himſelf; ſo that the intereſt of the wife does not appear to have been contemplated. If it had required a ſettlement on the huſband and wife, and the conveyance had purſued the requiſition it might be argued from; but here was nothing to ſhew that any regard was paid to the wife; and although Thomas M. Randolph might have intended her benefit, he did not ſay ſo; and, Richard Randolph was not bound thereby, if he had. Richard Randolph was largely indebted at the time, and Thomas M. Randolph, who was his ſecurity in one inſtance, knew it. His object therefore, was to put the property out of the reach of the creditors; and conſequently, as to them the tranſaction was void. But, if that was not the motive, ſtill it was voluntary, and therefore of no effect againſt creditors. So that either way the conveyance forms no defence againſt the creditors. Richard Randolph perhaps acquired credit on this very property; and therefore the creditors ought to be ſatisfied out of it; eſpecially as *David* ſhews no ſettlement; but may do as he pleaſes with it under the deed, and may totally deprive the wife and children of it. Therefore, if marriage be a ſufficient conſideration againſt fair creditors at all, yet, as it is not ſhewn to have been the conſideration of the preſent deed, it will not avail the defendants in the caſe before the Court; but this

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property as well as Curles, will be declared ſubject to the demands of the creditors.

WARDEN *contra.* Spoke to the ſame effect with Call, and cited in addition *Com. Dig.* 63-4. *Cro. Jac.* 52.

MARSHALL for the appellants. 1. The executors of Wayles are not ſpecially creditors. For the original debt has been paid to the obligee and no action to recover it, is ſuſtainable at common law; becauſe the bond having been paid off, and not aſſigned, loſt its obligation. It is not true that the executors are in the place of an aſſignee; for the aſſignment preſerves the bond, but the payment deſtroys it.

The principle that the court goes on, in the caſe of marſhalling aſſets, is not correctly ſtated, by the oppoſite counſel; for it is not that the ſpecialty debt, is revived in favor of the ſimple contract creditor, but that the ſpecialty creditor, having two funds, has contrary to equity, taken the perſonal eſtate from the ſimple contract creditor, and thereby let the real eſtate which ought to have contributed, go quit of bearing any proportion of the debts. An act which operates as a fraud; becauſe it relieves the land that was juſtly bound, to the prejudice of a fair creditor, contrary to the rule of equity, which uniformly compels the party, having two funds, to reſort to that, which does not interfere with the claim of him, who has but one. But that is not our caſe; For this is not a queſtion concerning the unjuſt exerciſe of a right againſt two funds: but whether a man, who has paid off anothers debt, without taking an aſſignment of it, ſhall be permitted to the prejudice of third perſons, to revive the debt which had been extinguiſhed by his own act? It is therefore not within the principle of marſhalling aſſets.

Moreover that principle is never applied to affect a purchaſer; becauſe he has as much equity as

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the claimant, and he has the law beſides. But, in this caſe, a Court of Equity is called on to aſſert, to the injury of fair purchaſers, a principle invented for the ſake of affecting juſtice. An attempt contrary to the nature of that court; which always refuſes to act when injuſtice would follow from it. But in the preſent caſe the plaintiffs had at moſt only an equitable claim; and therefore it would be monſtrous to ſet it up, after it had been extinguiſhed, in order to avoid the meſne acts of others.

The queſtion has a great reſemblance, in principle, to the caſe of old incumbrances in the doctrine of mortgages. For, there, an old incumbrance will protect a latter mortgage, if it has not loſt is legal force; but, if it has loſt its legal effect, it will not, *Pow. Mortg.* 215. So in this caſe the bond, if it had not loſt its legal effect, might have availed the plaintiffs; but having been paid off, by one of the obligors, its legal force is gone; and therefore the executors can only be conſidered as ſimple contract creditors.

2. The judgments are not ſpecific liens on the lands.

At common law lands were not bound, and the lien is only in conſequence of the ſtatute; which does not bind them, in expreſs terms, but only by implication. The lien is a mere creature of the Court, reſulting by conſtruction from the election given to the creditor by the ſtatute; and therefore the Court will never extend it beyond the limits of public convenience. No caſe has been produced where lands conveyed after the year and day were held to be bound; nor indeed can ſuch an inference be fairly drawn, when there is no right to take an execution. For the lien is predicated on, and is only co-extenſive with the right to take execution. If the caſe be taken by analogy to real actions it is clear. For in thoſe the lien is gone when the right to take

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execution ceaſes; which is the ſame principle contended for, in the caſe now before the Court.

It is ſaid that the *ſcire facias* revives every thing. But that can only be where the right is continuing; for it cannot retroact upon a meſne act, where the right has ceaſed. The ſtatute which gave the *ſcire facias* does not ſay it ſhall overreach meſne acts; and the lien is gone before the *ſcire facias* becomes neceſſary.

The argument, that the *ſcire facias* is a judicial writ, and that a releaſe of the execution will diſcharge it, proves nothing; for it will alſo be releaſed by a releaſe of all actions; and therefore it may as well be called an action as an execution. Relation is fair between the parties; but it would be iniquitous, that it ſhould have effect, againſt third perſons; and accordingly it never does, unleſs, in favour of one who has a ſuperior equitable or legal right. Suppoſe a legal title extinguiſhed and afterwards revived, would this revival avoid the meſne act againſt a third perſon, who had innocently acquired a title in the mean time? It would be ſhocking that it ſhould; and the law would never countenance ſuch injuſtice. Yet that is the amount of the principle contended for, on the other ſide.

It is ſaid that ſince the ſtatute, if notice is given, execution may go at any time. But this is contrary to all practice; the ſtatute never was ſo underſtood; and the miſchiefs of ſuch a doctrine, to creditors and purchaſers, would be incalculable.

It is not true that there is no difference between the caſe at bar, and one where the plaintiff continues his *elegit* on the roll. For the continuance is a notice to the world, as much as the original judgment, and of itſelf imports that the judgment has not been ſatisfied; whereas, when no further ſteps are taken, it affords a preſumption that the judgment has been ſatisfied. This

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doctrine is applicable to all the judgments; but as to thoſe of *York* Court it is entitled to ſtill greater weight. For, as it is the caſe of a lien by implication merely, it will not be extended, by the court, to all judgments indiſcriminately.

Generally ſpeaking when the law obliges a man to take notice of any act, it affords the means of doing it. But how can that take place, in the caſe of County Court judgments? For the County Courts are ſo numerous that no prudence or induſtry could enable a purchaſer to guard againſt them. No matter how many tranſfers may have taken place; no matter how many years may have elapſed ſince the judgment was rendered; no matter how many precautions may have been taken to guard againſt injury, the judgment would overreach them all, and bind the lands in the hands of the innocent purchaſer. So that the ſhackles on property would be infinite; eſpecially, when it is conſidered that judgments are always docketed in the names of the plaintiffs and not of the defendants: A purchaſer therefore, before he could venture to contract, would be obliged to ſearch through all the judgments of all the courts in the country. A labour which would be endleſs, and the purſuit intolerable.

The true idea therefore is, that the lien ſhould be confined to the ſame courts, which the law requires the recording of deeds to be confined to. So that a man ſhould not be obliged to ſearch further for a judgment than for a deed: Eſpecially as the Legiſlature by the record laws meant to favour and ſecure purchaſers; and therefore the court ought not, by mere conſtruction and implication, to raiſe up an inference, entirely contrary to the ſpirit and intent of thoſe laws; but on the contrary ſhould promote the object of the Legiſlature as much as poſſible. It is not to be believed, that the Legiſlature could intend that the implied lien ſhould extend every where, when the expreſs lien was confined to certain limited juriſdictions.

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Becauſe the danger from implied liens, was much greater than from expreſs liens, and therefore more to be diſcouraged.

But the neceſſity of a *ſcire facias* againſt the *terretenants* is deciſive; for there could be no ſuch proceeding where the lands lay in another county; and therefore as the *terretenant* could not be brought before the court, the lien could not be revived by the *ſcire facias*. In ſuch a caſe there can be no inference of notice; becauſe the lands could not be reached in the hands of the *terretenants*, between whom and the creditor there is no privity; although it may be otherwiſe as to the heir on account of the privity between him and the creditor.

Therefore whether the principles of the common law, the object of the Legiſlature, or the reaſon and convenience of mankind be conſulted, it will be found to be true, that the judgments conſtitute no lien upon the lands in the preſent caſe.

3. There is no queſtion, but that the policy of the record laws may be as well anſwered, by allowing a re-acknowledged deed to prevail, from the time of its re-acknowledgment, as by allowing an entire new deed to have effect from its date. This poſition has been ſtated by us, and has not been anſwered by the counſel for the appellees. Nor indeed can any juſt anſwer be given to it. For, in both caſes, not more than eight months will elapſe between the acknowledgment and the recording of the deed; and that is all which the policy of the law appears to have required.

But, forſaking this point, the counſel for the appellees inſiſts that the act of Aſſembly is expreſs, that it ſhall be recorded within eight months from the execution of the deed, and that a plain man would neceſſarily ſo underſtand it: Therefore he concludes that a ſecond acknowledgment will not ſupply the omiſſion. He admits however, that if

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the deed had been given up to be cancelled and then had been re-acknowledged, it would have operated as a new deed: Which is not very conſiſtent with the other poſition contended for by him, that nothing could paſs by a ſubſequent deed; or with the words of the act of Aſſembly, according to the conſtruction which he puts upon them. For how, in the caſe he ſuppoſes, would the eſtate get back to the grantor, or how could he have any thing for the ſecond delivery to operate on, if the whole was out of him? This very admiſſion neceſſarily proves that the grantor has an intereſt, which he may grant, ſo as to be effectual againſt creditors from the ſecond delivery; or elſe the new deed would have no effect at all; which is contrary to the terms of the admiſſion.

It is ſaid however, that the re-acknowledgment was no delivery. But for what purpoſe was it made then? Certainly the intention was to deliver; and here the evidence is expreſs that it was delivered on the date of the laſt acknowledgment. Beſides there ought to be poſitive evidence of the firſt execution of the deed; and I ſubmit it to the court whether that be proved or not.

But it is argued that if the re-acknowledgment be a ſecond delivery, that ſtill the ſecond delivery was void and *Perkins* and *Cowper* are cited in ſupport of the poſition.

The caſe in *Cowper* was that of a re-delivery by one, who was a feme covert at the time of the original delivery, but ſole at the time of the re-delivery; and, if it proves any thing, it rather ſupports what we contend for; becauſe it was decided there, that the re-delivery amounted to a confirmation, and that circumſtances might amount to a re-delivery. The ſame argument would apply, with equal force, in the preſent caſe, as the firſt delivery has been rendered void, as to creditors and purchaſers, by the ſtatute.

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The paſſage in Perkins is of a caſe where the firſt delivery takes effect; but we inſiſt that the eſtate in the preſent caſe remained in the grantor, as to creditors and purchaſers; and therefore that the ſecond delivery did operate. For our law is like the Engliſh ſtatute of enrolments, and therefore as againſt creditors and purchaſers the eſtate does not paſs out of the grantor until the deed is recorded. But it is ſaid that the 4th ſection makes a difference; becauſe by that the deed is to be good between the parties. The caſes cited though, prove, that to be nothing more than the Engliſh Judges had, by conſtruction implied before; and it was probably inſerted, in our ſtatute, in conformity to their deciſions. The only difference therefore is, that in England the Judges declared it to be good, between the parties, upon principle and conſtruction; but in this country the act of Aſſembly, purſuing the courſe of their deciſion, has declared it ſo in expreſs words. If this reaſoning be correct, then *Hindes case* 4. *Co.* ſhews that there may be a ſecond delivery, which will not only confirm the eſtate between the parties themſelves, but will be effectual as to every other purpoſe. Indeed the contrary doctrine would be intolerable; as, according to that idea, a defective deed could not be made effectual by any conveyance. There is no ſimilitude therefore between the caſe in *Perkins* and that under conderation. For *Perkins* ſuppoſes a caſe, where nothing remained in the grantor; but here we prove an exiſting intereſt which he might part with; and if he could grant it at all; he might as well convey it to his own grantee, as to any other perſon.

It was ſaid that according to this argument a judgment between the date and recording of the deed would be good againſt the grantee; although the deed ſhould be actually recorded within eight months from its original date. But that poſition is not found; for the judgment would by relation, be over-reached by the recording of the deed according

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according to the doctrine in Hindes case, as there would be no injustice in it. For as the first purchaser would have the first right in equity, no injury would be done to those whose rights were subsequent to his. From all this, it follows, that the re-acknowledgment was clearly good; and therefore that the creditors cannot affect the lands.

4. But the mortgagees have clearly the first right; because they had both titles, that is to say, the title under the deed, and that by descent.

For 1. Their case resembles that of the alienee of a devisee, whose right will be good against creditors, although the devisee himself continues liable to them. For the statute of 3. *W. and M.* like our act for recording deeds, expressly declares that the devise shall be void against creditors; but nevertheless the title of the alienee of the devisee is good, and the estate cannot be touched in his hands, *Mathews* vs *Jones*, 2. *Anstr. Rep.* 506. In that case it was expressly argued, that the devise being void as to creditors, nothing passed by it, as against them; and of course that the devisee could convey no estate to their prejudice. But the Court unanimously held, that the devise did pass the estate so as to enable the devisee to alien, and that he would only be personally liable. The same doctrine applies to this case; For the conveyance here will be good except against creditors, and the alienation by the grantee will be good, altho' the grantee will be personally liable to the creditors. For the two statutes are equally strong and the principles precisely the same. Before the record laws in this country, the alienation would have withdrawn the lands from the creditors here, in the same manner as the devise there; and of course, if the alienation of the devise there will prevail, so will the alienation of the grantee here.

But 2. If this doctrine were not true, then the consequence inevitably would be that the title of the mortgagees under the lien must prevail. For if the conveyance is void altogether, then it is the same

ſame thing as if it had never been made, and in that caſe Richard Randolph muſt, as to the creditors, take as heir neceſſarily. But, if he took as heir, then the mortgages by him are certainly good. Becauſe alienations by an heir are good, although he is liable to the creditor for the value. But a mortgage is ſo far an alienation; and therefore neceſſarily good.

5. The conveyance to David Meade Randolph is not liable to exception.

It is in vain to argue, that a conſiderable property has been conveyed, without any valuable conſideration paid for it. Such an argument may be proper to the Legiſlature, but not to the Court: As it is no longer a queſtion, whether a conveyance, in conſideration of marriage, be ſuſtainable or not. For the law is ſettled, that ſuch a conveyance is good.

But it is ſaid, that a voluntary conveyance to a ſon, about to be married, is void. As that however, is not the preſent caſe I will not ſay whether the poſition be correct or not; but there are ſome caſes which might make it very doubtful. As for inſtance in the caſe of the *East India Company* vs *Clavel*, 2. *Euc. abr.* 607. *Prec. ch.* 377. where A, agreed with the Eaſt India Company to go as preſident to Bengal, and entered into a bond of £ 2000 for performance of articles; but before he ſet out he made a ſettlement of his eſtate, and among other things he declared the truſt of a term of 1000 years to be for the raiſing of £ 5000 as a portion for his daughter, who afterwards married I. S. a gentleman of £ 700 per annum, who before the marriage, was adviſed by counſel that the portion was ſufficiently ſecured, and who afterwards on her death, had at her requeſt expended £ 400 on her funeral, *but never made any settlement on her*; and A. having embezzled the goods and ſtock of the company to a conſiderable value, the queſtion was,

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was, whether this ſettlement was voluntary and fraudulent as to them; and it was held to be a prudent and honeſt proviſion, without any colour of fraud; and though in its creation it was voluntary, yet being *the motive and inducement to the marriage*, it made it valuable. This caſe and others which might be mentioned ſeem to refute the poſition advanced on the other ſide; but, deeming it altogether unneceſſary, I ſhall not go into the argument of that point now. Becauſe an expreſs marriage contract has been proved in our caſe. The letter of *Thomas Mann Randolph* and the depoſitions of Richard and Harry Randolph, ſhew that the marriage was ſuſpended until the conveyance was made. The letter of Richard Randolph the father to *David* was clearly intended as an anſwer to that of Thomas Mann Randolph. For, in it he ſays that he had been looking out for an eſtate, ever ſince he heard of his addreſſing the lady; and that, in conſideration of the marriage, he would give the property. The conveyance was the real ground upon which the conſent of the lady's parents was obtained; and without it, the marriage would not have taken place. So that it is much ſtronger than the caſe of the *India Company* vs *Clavel;* becauſe here was an actual treaty for the property, but there was none in that caſe. To which may be added that without the marriage David Meade Randolph could not have compelled a conveyance.

It is objected though, that he alſo ſays, he intended to give him the ſame property before. But can that deſtroy the claim ariſing from the marriage? Surely not; for it is ſaying no more than was neceſſarily implied: becauſe, before he would enter into the agreement, he muſt have been previouſly diſpoſed to give the property. So that the objection does in fact amount to no more than this, that a man who is diſpoſed to make an agreement ought not to make it, becauſe he was previouſly diſpoſed to do ſo.

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It is said however that the letter from Richard Randolph to David M. Randolph does not refer to that of *Thomas Mann Randolph*. But the contrary is expressly proved. Besides, if it removed the objections of Thomas Mann Randolph, it was the same thing.

Another objection raised is, that the conveyance is to David Meade Randolph, and not to his wife. But so was that in the case of the *East India Company* vs *Clavel*; and yet the settlement was held good. Besides the estate contributes to the benefit of the wife and her family; and the husband cannot deprive her of her right of dower in it. So that she in fact is benefited by it. In the common cases of settlements on marriage the remainder is generally limitted to the husband and his heirs; Which, according to the doctrine contended for by the opposite counsel, would be void; but the marriage has always been considered as protecting the whole settlement.

It is urged, that it is mockery to say, that the letter turned him into a purchaser. But in point of law it does; and although he may afterwards defeat the provision, by squandering or alienating it away, that will not alter the case. For there is a confidence that he will keep it; and as the object was the ease and comfort of the daughter and children, that end was thought to be sufficiently attained by the conveyance to the husband.

But a singular objection is raised, namely, that Thomas Mann Randolph must have known of the embarrassment, under which the affairs of Richard Randolph were, at that time. Now, besides that such knowledge is not necessarily to be interred, from any proofs in the cause, it cannot be contended that that circumstance would make any difference in law. For most marriage settlements originate from apprehensions of that kind; and therefore the knowledge instead of operating against the conveyance would rather strengthen it. Because *Thomas Mann Randolph* would not have permitted

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permitted the marriage without it, and the teſtimony expreſsly proves that to have been the conſideration of the conveyance. The words of the ſtatute of *Eliz.* are not oppoſed to this doctrine; in which nothing, relative to ſuch a caſe, is ſaid: Nor indeed does that ſtatute render even mere voluntary conveyances void, unleſs made to deceive and defraud creditors. 1. *Eq. cas. ab.* 149. But that is not important to be inquired into in the preſent caſe; becauſe here was a ſufficient conſideration in law to ſupport the conveyance.

As to the form of the deed, it is to be remembered, that Richard Randolph the father had not got the legal eſtate conveyed to him, as to part of the lands, when the marriage contract was entered into, but David procured it afterwards; and therefore the argument contended for, with reſpect to the form, does not apply, as to that part. But, independent of that, if the deed does not ſecure the eſtate according to the terms of the agreement, then it is contrary to the contract, which the court will conſider as ſtill ſtanding, and controuling the deed.

RANDOLPH on the ſame ſide, before WICKHAM began, ſtated that articles in the form of a deed would be good. 1. *Wms.* 339. *Pow. Contr.* 432. 334. That if the deed was improperly recorded the court might ſtill order it to be done ſo as to have the effect intended; and that the conſideration might be averred in the caſe of David Meade Randolph. Upon theſe points he cited. 1. *Wms.* 339. *Pow. Contr.* 432, 334. 3. *Term rep.* 1. *Ch. cas.* 37.

WICKHAM for the appellees. The judgments bind the lands; for all judgments give a lien; and it is not important whether this be a rule of the common or ſtatute law: Although it may perhaps be affirmed that the lien exiſted before the ſtatute; as there was a *levari facias* againſt the iſſues, which Lord Coke ſays are the land itſelf. However, whether it proceeds from the common

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or the ſtatute law, it is equally clear, that it extends to all the lands; as well thoſe, owned at the time of rendering the judgments, as thoſe acquired afterwards. 10. *Vin. ab.* 563. But it is ſaid that the judgment only binds for a year; and *Gilb. law of exns.* 12. is relied upon. That book though, ſpeaks of the law before the ſtatute which gave the *scire facias;* and in a ſubſequent page it ſtates a different rule. It is ſaid that there is no inſtance of a lien where more than a year has elapſed. But the argument of Mr. Hay is juſt, that the *scire facias* merely revives the judgment itſelf. The precedents, to that effect, are numerous; and the general doctrine is contained in 3. *Co.* 13. *(b.)* And if analogy be attended to, it will be perfectly clear. For inſtance, if the debtor die, ſtill the lands are bound in the hands of the heir, notwithſtanding the neceſſity of a *scire facias.* Of which many caſes may be produced; and although writs of *scire facias*, to ground the *elegit* in the debtors life-time are more rare, this is owing to there being no neceſſity for actually iſſuing the *elegit* in that caſe. 4. *Bac: abr:* 412. But if there be a lien notwithſtanding the neceſſity of a *scire facias* in one caſe, why not in another? Perhaps it will be ſaid that the election ſhould be made within the year. But that is not ſo; for he may do it when he will. Againſt the heir clearly; and therefore againſt the terretenant. Becauſe a *scire facias* may iſſue againſt the heir and *terretenant* jointly; 4. *Bac. ab.* 418. It is ſaid that the *scire facias* is neceſſary, becauſe the judgment is preſumed to be ſatisfied. But that is only *prima facie;* and therefore, when the writ has iſſued, the defendant muſt plead and prove payment. The right to execution exiſts at the time of the *scire facias*, for the very writ ſuppoſes it; and the iſſuing of it is only required, in order to give the defendant an opportunity of proving the payment. It is ſaid that a *scire facias* is releaſed by a releaſe of all actions; but a releaſe of all executions has the ſame effect.

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Which proves that the judgment is the principal, and that the *scire facias* is but auxiliary, and partakes more of the nature of an execution. The caſe cited from *Vez.* is not material; becauſe poſſeſſion is evidence of property; and therefore creditors and purchaſers are liable to be deceived; but lands always depend upon title, and ignorance of the plaintiffs right is no *defence*. That the lands lay in another county will make no difference; for ſtill they are bound; in the ſame manner, as in the caſe of a *fieri facias*; by which the property is bound from delivery of the writ to the officer, although the goods be in another county. The inconvenience of the doctrine has no weight in a Court of Juſtice, however proper it may be to the Legiſlature; for inconvenience never is allowed to do away a poſitive right. *Wilson* vs *Rucker* * in this court the other day, was a ſtrong caſe to that effect. As to the charge of neglect it ought to have no operation on the queſtion. For the judgments were originally entered as a ſecurity for the money, and that payment was urged appears by the letters: Beſides that, the fee bill ſoon after expired, and ſome of the plaintiffs were Britiſh creditors and could not ſue. It is ſaid that there could be no *scire facias* into another county; but there is a difference between iſſuing and ſerving of the writ. For a return of two *nihils* would be ſufficient; and no venue was neceſſary, as was ſuppoſed. Neither is there any difference, in law, between the caſe of one who ſeeks to make gain, and one who ſeeks to avoid loſs. There is no reaſon for confining the lien, according to the reſtrictions of the record laws. For although it may be difficult, for the purchaſer to know, whether there be any judgments againſt the debtor, it is not impoſſible; and therefore the rule of *caveat emptor* applies. For he ſhould buy of one who is able to give a good title, or a ſufficient warranty. The caſe from 1. *Ch. cas.* does not

* 1. Call's Rep: 500.

not apply; becauſe that was a caſe in equity; but the preſent caſe is to be conſidered, as if it was in a court of common law.

Wayles's executors are bond creditors. For at the time of bringing the ſuit the bond was not ſatisfied; and therefore the obligation was then actually ſubſiſting. It is ſaid however, that the principle of marſhalling aſſets depends upon the ſpecialty creditor having two funds, and being, therefore bound in conſcience to go againſt the realty, in order that the ſimple contract creditor might be ſatisfied out of the perſonal eſtate. But ſpecialty creditors may reſort to which fund they pleaſe; and equity puts the ſimple contract claimants in their ſtead, if they go againſt the perſonal eſtate inſtead of the lands. Of courſe, if the deed is void, the executors, as ſpecialty creditors, may charge the lands. For the court can with the ſame propriety put them in the place of Bevins, as the ſimple contract creditors in the place of the bond creditors in the other caſe. If there be a difference it would ſeem to be in favour of the executors in the preſent caſe; becauſe of the privity between the parties.

The deed for the Curles eſtate is clearly void againſt creditors. The words of the law are expreſs and clear; and no abſtract reaſoning is either neceſſary or proper in order to explain it. The policy of the law was to prevent ſecret conveyances; but the conſtruction contended for, on the other ſide, tends to encourage them and to elude the law. The ſecond delivery of the deed was clearly void *Shep. Touch.* 72, 60; and, if there be no proof to the contrary, the inevitable preſumption is, that it was executed upon the day on which it bears date. Here then was a complete delivery, and from that time the whole eſtate was out of the grantor, who had nothing to grant after that; and therefore, according to the authority, the ſecond delivery was merely void. There is a wide difference between a re-aknowledgment,

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ledgment, and a new deed after the firſt is cancelled; for in the latter caſe the eſtate is gone back from the grantee, who no longer hath any thing in the land; but in the other caſe he has the whole eſtate in him ſtill. The caſe is not like the ſtatute of enrollments in England; becauſe there the ſtatute is poſitive; that the eſtate ſhall not paſs until the enrollment. 2. *Bac. abr:* 338. But our act of Aſſembly is expreſsly otherwiſe; and, in effect, declares that the eſtate ſhall inſtantly paſs to the grantee. As to the argument derived from what is called the cuſtom of the country, it is entitled to no weight; for a cuſtom, however general, cannot change a poſitive law: but the truth is, that the cuſtom ſpoken of is more general in the caſe where the eight months have actually expired, than where, as in this caſe, the re-acknowledgment was before the expiration of the eight months.

Beverley's articles will not help the appellants. Such a deciſion would repeal the act of Aſſembly, which expreſsly requires that all ſuch contracts ſhall be recorded; and although the two Randolphs may have practiced a fraud upon him, that will not alter the caſe, or deſtroy the effect of the act.

The claim of the mortgagees is no better than that of the other appellants. To entitle them to any preference they ſhould have been purchaſers without notice; which muſt be plead and cannot be affirmed at the hearing, *Miſf. Plead.* 215. 1. *Atk.* 571. 1. *Bro. Chy.* 353. That Richard Randolph was heir to his father, makes no difference; becauſe the deſcent was broken. The caſe cited from *Anſtruth.* proves nothing in favor of the appellants. For before the ſtatute, the heir was only liable for the lands remaining in his poſſeſſion at the time of the ſuit, but as to thoſe previouſly aliened he was exonerated; and as the ſtatute only put the deviſee on the ſame footing with the heir, it followed, that the lands which were alien-

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ed, before the ſuit brought, did not remain liable in the hands of the alienee.

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As to the caſe of David Meade Randolph, it is on the face of the deed a voluntary contract; and as the evidence is not poſitive we muſt recur to the deed itſelf; eſpecially as the deed and evidence do not agree together. The caſe cited from 2. *Bac.* 607. was different from this; becauſe there the father was not indebted at the time of the ſettlement, as was the caſe in the preſent inſtance. The deed was before the marriage, and yet the wife is not made a party, which increaſes the difficulty of admitting that the marriage was the foundation of the conveyance. For there was nothing to protect the wife's intereſt, and the huſband might have ſold the eſtate before the marriage, ſo that ſhe could not even have been endowed. The caſe in 1. *Eq: cas. ab.* 149 cannot be law, according to Mr. Marſhall's conſtruction; but perhaps it was only a mere abſtract principle advanced by the court. Theſe lands therefore, as well as the others, are liable to the creditors.

RANDOLPH in reply. The deed to Richard Randolph is good. For marriage is a favorite conſideration in law; and when the grantor made the deed he ſuppoſed himſelf in affluence: To which I add that his will ſhews he poſſeſſed a very large eſtate ſtill. It is no objection that an expreſs eſtate is not given to the wife, by the deed; becauſe it is all that Mr. Beverley demanded. Beſides the right of dower, with the comforts reſulting from the affluence of the huſband, were real advantages to the wife; and the deed contains a reſtriction as to alienation, in caſe of no heirs, that looks as if the children were contemplated. In addition to which there was a real monied conſideration. All which puts the motive for the deed beyond all queſtion.

But then it is ſaid, that the deed was not recorded within eight months from its original delivery; and that the re-acknowlegdment only a-

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mounts to a confeſſion, that he had originally delivered it, but does not operate as a new delivery. This however would be, to ſuppoſe that the parties meant a weak and abſurd thing; and therefore no ſuch preſumption will be made; but it will be conſidered as a new delivery altogether.

It is ſaid though tnat there cannot be a double delivery of the ſame deed. But no ſubſtantial reaſon is, or can be offered for the poſition; becauſe there is nothing which prevents the grantee from giving up his deed, and the grantor from re-granting the eſtate to him. The doctrine from *Shepherd* and *Perkins* is not againſt us; becauſe thoſe authors proceed upon the idea of a re-delivery only. But there is a very material diſtinction, according to the opinion of Lord Mansfield in the caſe cited from *Cowp.* 204, between a mere re-delivery and a re-execution of the deed. In the preſent caſe, there was not only a re-delivery, but a re-atteſtation and re-execution alſo. For the time of the re-delivery is expreſsly noted on the deed, by the witneſſes, in order to ſhew when the atteſtation and re-execution took place; ſo as to remove all doubt, that it was intended to operate as a new deed. Put the caſe that the old date in the deed had been eraſed and the new date inſerted in its room, it would clearly have been good. But what was done, was eſſentially the ſame thing. Let us ſuppoſe a caſe which may and does very frequently happen, that all the witneſſes do not atteſt at the ſame time: In that caſe, according to this doctrine about double delivery, the deed would not be well proved. But ſurely the court would not endure ſuch a poſition. Shepherd puts three technical caſes, which he probably took up from miſtake; and one of the year books does not warrant his inference. A circumſtance tending greatly to weaken his authority. Beſides the doctrine was before the ſtatute of enrollments, and no inſtance is produced ſince. If any circumſtance prevents the grantee from having his deed recorded, he may file a bill in

equity

equity and compel the grantor to make a new deed; which will be good againſt ſubſequent purchaſers, and all creditors who had not made their claims effectual, before the inſtitution of the ſuit. But if he may be compelled to re-execute, why may he not do it voluntarily?

The caſe is peculiar to Virginia, and conſequently the cuſtom is very material. For it is a cuſtom known to every body; and in practice every where. Such univerſal uſage ſhould therefore make the law; and in fact the queſtion never was made before, but the practice conſidered, by all ranks of men, as founded in the law of the land. It is therefore like the caſe of the ſcroll inſtead of the ſeal, or that of omitting to indent, or many of the deciſions of our courts upon the law concerning the office of executors and adminiſtrators: None of which have any better foundation perhaps, than the long eſtabliſhed practice of the country; which the caſe, cited from *Rolls abridgment*, proves ſhould give the rule in ſuch caſes. Beſides it is remarkable that this practice was in uſe at the time of paſſing the law; and therefore the preſumption is that the Legiſlature intended to conform to it.

There is no weight in the objection that the re-acknowledgment was before the expiration of the eight months; for it does not open any door to fraud as the oppoſite counſel ſuppoſes: Becauſe that is more preſumable in the caſe of a re-acknowledgment after the eight months have expired; whereas the other ſhews an honeſt intention, by making uſe of a timely precaution. In the preſent caſe, it was particularly ſo; 1. Becauſe it was on the day the grantor made his will, and when he lay ill and feared he could not be got to court. 2. Becauſe it was diſcovered that the witneſſes could not be produced at court, within the eight months. So that there was a neceſſity for it from both cauſes; and conſequently, there is not the leaſt room to ſuſpect a fraud. The cauſe

therefore

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therefore ſtands in the ſame ſituation, as if the old deed had been deſtroyed, and a new one made; in which caſe, as the title on the deſtruction of the old deed would have been in the grantor, he might unqueſtionably have regranted it by the new one to whomſoever he pleaſed.

That the marriage was prior to the re-acknowledgment makes no difference; becauſe the old conſideration, which was the motive to the deed, continued. Indeed, in ſupport of the real juſtice of the caſe, the court would now permit it to be recorded *nunc pro tunc*. 1. *Wms.* 140. 2. *Vern.* 234, 564.

The deed to David Meade Randolph cannot be impeached. For there was an immediate communication between Thomas Mann Randolph, the father of the lady, and Richard Randolph, the father of the huſband; in conſequence of which the letter to David M. Randolph was written. So that the marriage was the poſitive, pointed conſideration of the deed. It is not material that Thomas M. Randolph did not aſk for any ſpecific property; for he required a competent proviſion for the ſon, ſo as to enable him to maintain his daughter in comfort; and that was given.

Nor was the act fraudulent either upon intention, or upon the principles of law. Not upon intention; becauſe at the time the grantor thought himſelf rich; and there is not a ſyllable of teſtimony to ſhew that the two fathers meditated any fraud. On the contrary it is not even ſhewn, that Thomas Mann Randolph knew of the declining circumſtances of Richard Randolph. But ſuppoſe he had, it would not influence the queſtion. For he would ſtill have had a right to have inſiſted on a ſettlement: Indeed prudence would have the more ſtrongly dictated it upon that account; and that, in fact, is very often the reaſon, why ſettlements are demanded. Therefore upon no legal principle can a fraud be inferred; but as the letter, which is expreſsly proved by the witneſſes, demonſtrates,

demonſtrates, moſt clearly, what was the true conſideration of the deed, it will be received in ſupport of it.

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The judgments do not conſtitute a lien upon any of the lands. For at common law judgments did not create a lien; and the *levari facias* does not prove any thing to the contrary; for that writ had other objects. The lien therefore was the mere conſequence of the ſtatute of Weſtminſter which confined the *Elegit* to the Kings Courts; and therefore to courts of general juriſdiction, like our old General Court. So that a County Court judgment is not within the reaſon of the rule. Indeed any other conſtruction would be intolerable: It would introduce inconveniences too great to be borne; and as there is no poſitive law which ſays that there ſhall be a lien created by ſuch judgments, there can be no reaſon for abiding by a rule which was intended to apply to the judgments of Courts of another kind.

But it is ſaid that the act of 1772 giving a general execution produces the ſame conſequences.

This however is not correct in any caſe; and certainly not in this. For no application appears to have been made for executions, and the act clearly ſuppoſes that to be neceſſary. However, be that as it may, the neglect forfeited the right, if the plaintiffs, in the judgments, ever had any. For the judgments were ſuffered to expire, without any excuſe being made for it; and therefore they ought not afterwards to affect the rights of third perſons. *Gilb. l. Ex.* 12. is extremely applicable. For the caſe of a judgment in a real action is ſtronger infinitely, than a judgment for debt; becauſe in the former the land is ſpecifically recovered, and therefore the purchaſer more bound, in conſcience, to enquire concerning it. The negligence in the preſent caſe has been groſs; and therefore ought not to affect innocent purchaſers who had no cauſe to ſuſpect a lien; becauſe it is contrary to natural juſtice that ſuch negligence

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ſhould be encouraged, *Chan. cas.* 36. The caſe cited from *Vez.* contains a very juſt principle; and there can be no difference between real and perſonal property in that reſpect. For in both inſtances the delay was equally prejudicial; and therefore the rule as to one, will hold with regard to the other.

The caſe cited from *Bacons abridgment*, relative to taking an *Elegit*, *nunc pro tunc*, does not apply; becauſe it is a mere fiction of law, which never is allowed to produce an injury to thoſe who have acted fairly, if the others have no ſuperior equity. The *scire facias* is only a ſubſtitute for the action of debt which was the common law proceeding, and as the lands would only have been bound from the laſt judgment in the action of debt, no more would they in a *scire facias*. If all County Court judgments are to bind, the impoſſibility of getting notice, will create a diſability, which will clog all alienation.

Wayles' executors are not bond creditors; but if they were we have at leaſt articles under ſeal for the property; and the court will not allow it to be taken from us, by thoſe having no greater equity.

But at any rate the mortgagees have a clear equity whether the deed be good or not. For the purchaſe was from the heir, whom the plaintiffs ſue in that character. The mortgagees knew nothing of the debts, and therefore are purchaſers without notice. So that as the law allows the heir to alien before action brought; and the mortgagees have fairly ventured their money on the eſtate, they ought not to be poſtponed to dormant claims in favor of negligent creditors. Therefore if the conveyance be conſidered as abſolutely void, then the mortgagees have the title of the heir; and if it be conſidered as paſſing the eſtate, then like an alienation by a deviſee, they will ſtill be entitled, although Richard Randolph will be perſonally liable, for ſo much, to the creditors. Theſe views

views of the ſubject are completely ſupported by the caſe cited from *Anſtruthers reports;* and by 2. *Bac. abr.* 607. *(a))* 1. *Eq. cas. ab.* 105.

Cur: adv: vult.

PENDLETON Preſident. (After ſtating the caſe, and mentioning that the Court were unanimous as to their judgment and the principles on which it was founded.) Delivered the reſolution of the Court as follows:

We lay down this general propoſition, that where a creditor takes no ſpecific ſecurity from his debtor, he truſts him upon the general credit of his property, and a confidence that he will not diminiſh it to his prejudice. He has therefore a claim upon all that property, whilſt it remains in the hands of the debtor; and may purſue it into the poſſeſſion of a mere volunteer; but, not having reſtrained the debtors power of alienation, if he or his volunteer convey to fair purchaſers, they, having the law and equal equity, will be protected againſt the creditors.

We then proceed to conſider whether the ſons Richard and David were ſuch purchaſers for a valuable conſideration?

1. As to Richard.

There can be no objection to his conſideration; It is natural affection, marriage, and money paid. But the objection is, that the deed was not recorded within eight months from the ſealing and delivery thereof; and therefore, by the expreſs words of the act of Aſſembly, is void as to creditors. If the fact be ſo, the operation of the law is poſitive, ſince it comprehends all creditors; although in reaſon, the recording would ſeem to affect only meſne creditors, between the date and recording.

We conſider this deed to have been ſealed and delivered on the 21ſt of March 1786, and that

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the recording, within four months afterwards, complied ſtrictly with the law. The term *re-acknowledgment* ſeems to have produced, in the mind of the Chancellor, miſtaken ideas. He underſtands it as meaning no more, than that Richard the father, on the 21ſt of March, acknowledged that he had, on the 20th, of September before, ſealed and delivered that deed. A miſtake, which information from our clerk would correct. It would be, that when a man comes into Court to acknowledge a deed, the queſtion put to him is not, whether, he delivered the deed at the date? but whether, he then acknowledges the indenture to be his act and deed? So the oath to the witneſſes is, that they ſaw the bargainor ſeal and deliver the paper as his act and deed. Such was the oath adminiſtered to Currie and the other witneſſes to this deed. When did they ſee it ſealed and delivered? Not on the 20th of September 1785; (for then they were not preſent, and other witneſſes atteſted that delivery;) but on the 21ſt of March when they ſubſcribed it, noting, upon the paper, the day of the delivery which they atteſted.

It is admitted, by the Chancellor, that if this deed had been cancelled and a new one made, it would have been good. This the council alſo admit; but purſuing the Chancellor's idea, they have produced a number of caſes, ſome ſtating that, between the date and recording, the eſtate is in the bargainor; others that it is in the bargainee; and others ſtill, that it is in ſuſpenſe.

Leaving it to others to reconcile this claſhing jargon, we conſider what would be the opinion of a plain man on the occaſion? It would be, that the eſtate was in the bargainee whilſt he held the deed, which was the evidence of it; but, when he ſurrendered that deed to the bargainor, his legal title ceaſed, and the other was at liberty to convey to him, or any other: And if to him, might either deſtroy that deed and make a new

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one, or, by a re-execution of the ſame paper, give it force, as a new deed from that period.

The reaſon mentioned for ſuch re-execution, to increaſe the number of witneſſes, applies in this caſe, and repels a ſuſpicion of fraud. The deed was to be recorded in Richmond, where all the courts were held for its admiſſion; the eight months were near expiring, and only three witneſſes to the deed; two of which reſided at a conſiderable diſtance, and might not be had in time, the eight months being nearly run out.

What difference can it poſſibly make, between a new deed and the old one re-executed? Mr. Wickham ſtated two; in both of which the old deed is beſt.

Firſt, he juſtly complained of the practice of renewing deeds from time to time, and keeping them ſecret; by which means, creditors and purchaſers may be deceived, and againſt which Chancery will relieve as a fraud. But this will apply equally with reſpect to both caſes; with this difference, that in caſe of new deeds each time, it might be difficult to prove the renewals; whereas the old deeds re-executed ſhew the progreſs from the firſt date and is more beneficial to the creditors.

The ſame obſervation applies to his other caſe. That of a meſne purchaſer from the bargainee; ſince the renewed deed would ſhew an exiſting title, at the time of his purchaſe.

Upon the whole we are of opinion, that the deed is to be conſidered, to every intent and purpoſe, as a deed of the 21ſt of March 1786 and not before; that it was, therefore recorded, in due time; and that Richard is to be conſidered as a purchaſer for a valuable conſideration.

2. As to David;

Being at liberty to aver and prove the real conſideration, he has ſatisfactorily proved the deeds to

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to have been in conſequence of a marriage agreement between the fathers of himſelf and his lady; and he is to be conſidered as a purchaſer for a valuable conſideration alſo:

It therefore only remains to enquire, whether at the time of their purchaſe, there was ſuch a lien upon the land, by the judgments, as reſtrained the alienation of Richard the elder?

Hanbury's judgments are the great ſubject of controverſy. They were entered in July 1770, when an *elegit* could not iſſue upon them, into any other county than York; and therefore in reaſon and juſtice could only bind the lands in that county: And this is not contradicted by authority ſhewing, that judgments in England, entered in the Courts of General Juriſdiction over the whole nation, bind the lands throughout.

The act of 1772, however, changed the principle, and by permitting the *elegit* to run into other counties, is ſuppoſed at preſent, but not decided, to extend the lien to all the lands in the country; and that Hanbury had a right, in July 1772, (that being the laſt day to which the executions were to be ſtaid,) to ſue out an *elegit*, on thoſe judgments, into any other county.

We are then to enquire, what he was to do, in order to preſerve his lien?

He was either to iſſue his *elegit* within a year, which expired in July 1773, or to enter upon the roll in England, or in the record book here, that he elected to charge the goods and half the lands; which would be equal to iſſuing the *elegit*. If he did neither, he might, on motion, be allowed to enter the election *nunc pro tunc*; but, in the latter caſe, if there had been an intervening purchaſer, the motion would have been denied, upon the principles of relation: Which being a legal fiction, contrived to ſupport juſtice, is never to be admitted to do an injury to a third perſon.

But

But the creditor here has taken no ſteps; he has ſued out no execution; has made no election upon record. The judgments have long ſince expired; and no *ſcire facias* taken out to renew them. If he had done ſo, the *lien* would have been revived; but to operate proſpectively, and not to have a retroſpective effect, ſo as to avoid meſne alienations.

So that we can with great propriety, ſay, in the language of Chief Baron Gilbert, that theſe judgments *over-reached nothing*; and did not prevent the fair purchaſes of the ſons in 1780 and 1786, unleſs the cauſes, aſſigned in the replication, ſhould be a ſufficient excuſe for the delay.

Preſuming that if this conſtructive notice from dormant judgments will bind a purchaſer at all (contrary to what is ſaid in 3. *Bac.* 645 and 646, that expreſs notice is neceſſary,) it ought to be taken ſtrictly and not extended by equity, we proceed to enquire into the facts.

From July 1772 to April 1774, there is no excuſe. This is 21 months, during which the judgments expired and the lien was at an end: if it could be revived by a *ſcire facias* on the judgment which has never been iſſued.

Admitting his excuſes to be good, from April 1774 to 1791, they ceaſed to operate from the latter period. At that time, if he had ſued out his *ſcire facias*, there were lands in the hands of the deviſees, which he might have charged in exoneration of the purchaſes. But by lying bye, until 1797, he ſuffered them to be exhauſted, by other creditors, by bond (for the proceedings againſt them are all ſubſequent to 1791;) and now comes into equity to ſet up his lien againſt purchaſers. This appears, to me, to be contrary to every principle of law and equity.

The other judgment creditors are liable to the ſame objection, of not having kept their liens alive, by the means before ſtated.

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The decree of the Chancellor ought therefore to be reverſed, ſo far as it concerns the conveyance to Richard Randolph the ſon, and he and thoſe claiming under him are to hold the eſtate according to the deed; But the decree is to be affirmed as to the reſidue; with this reſervation, as to the claim of Wayles's executers, that they are to be conſidered as bond creditors, ſtanding in the place of Bevins, ſo far as may affect the diſtribution of aſſets remaining; but not ſo, as to charge the executors with a *devastavit*, on account of payments, or judgments to ſimple contract creditors.

The decree was as follows:

"The court is of opinion, that the deed, from "Richard Randolph the elder to Richard the "younger, was made upon good and valuable con- "ſideration, and was binding upon the creditors "of the father, having been duly recorded within "eight months from the twenty firſt day of March "1786; when the ſaid deed was re-executed by "ſealing and delivery and atteſted by new ſub- "ſcribing witneſſes, and ought to be conſidered, "to every intent and purpoſe, as a new deed of "that date. That, although, the deeds for Da- "vid Meade Randolph expreſſed the conſiderati- "ons to be for natural affection and advancement "in life, he was, nevertheleſs, at liberty to "aver and prove an additional conſideration; and "having eſtabliſhed, by ſatisfactory proof, that "the ſaid deeds were made in conſequence of a "treaty of marriage between the fathers of him "and his lady, he is to be conſidered as a *bona* "*fide* purchaſer of the eſtates. That the ſaid pur- "chaſers are not to be affected by the ſuppoſed "lien upon the lands from the judgments in the "proceedings mentioned, ſuch lien not exiſting "at the time of their reſpective purchaſes, for the "reaſons ſtated in the decree of the ſaid High "Court of Chancery. That the appellees, exe- "cutors of John Wayles, ought to ſtand in the

"place

"place of James Bevins, and be considered as "bond creditors, so far as may affect the distribu- "tion of remaining assets; but not so as to charge "the executors with a *devastavit* on account of "payments or judgments to simple contract credi- "tors; and that there is error in so much of the de- "cree aforesaid as declares the deed to Richard "Randolph the son void as to creditors, and directs "a sale of the lands by commissioners, and the ap- "plication of the money to the benefit of the ap- "pellees, and as to so much as subjects the money for "which the land called Elams * devised by Rich- "ard Randolph the father to his son David Meade "Randolph hath been sold by him, to the pay- "ment of the demand of the appellees, the court "being of opinion, that the money, for which the "said land was sold, is only liable to the demand "of the appellees, if it has not already been ap- "plied to the payment of debts which bound the "devisee. Therefore it is decreed and ordered, "that so much of the said decree as is herein stat- "ed to be erroneous be reversed and annulled, "that the bill be dismissed as to the appellants; "that the residue of the said decree be affirmed, "with the reservation herein before stated, as to "the executors of John Wayles; and that the appel- "lees pay to the appellants the costs expended in "the prosecution of the appeal aforesaid here."

In the suit of *Beverley* vs *Eppes* the decree was as follows.

The

* The decree of the Court of Chancery as to this part of the case was in the following words. "The money for which "the land called *Elams*, which was devised by Richard Ran- "dolph the father to his son David Meade Randolph, hath "been sold by him, is liable to the plaintiffs demands."

And the devise to David Meade Randolph was in the following words, "I give to my son David Meade Randolph "and to his heirs forever, my tract of land called Elams, "in the county of Chesterfield, containing by estimation one "hundred and thirty acres."

Eppes &c. vs. Randolph.

"The court is of opinion that the said decree "is erroneous. Therefore it is decreed and or- "dered that the same be reversed &c. and this "court proceeding to make such decree as the "said High Court of Chancery ought to have pro- "nounced. It is further decreed and ordered "that the deed from Richard Randolph the father "to Richard Randolph the son, mentioned in the "proceedings, be established. And the cause is re- "manded to the said High Court of Chancery, for "the appellants to proceed further therein for the "compensation prayed in their bill, if they shall "think proper."

TALIAFERRO

against

MINOR.

Receipts and payments by an administrator ought not to be reduced to specie by the legal scale of depreciation; but should be stated in paper money.

The act of Assembly declares that all actual payments made in paper money in discharge of debts or contracts should stand at their nominal amount without being scaled; nor are such payments within the proviso empowering the courts to vary the scale upon equitable circumstances.

THIS was an appeal from a decree of the High Court of Chancery, where William Minor and Mildred his wife, and Lawrence Washington executor and Griffin Stith and Frances his wife, executrix of Thornton Washington deceased, brought a bill stating, that John Thornton died intestate in 1777, and that his personal estate devolved on his daughters Mary, the wife of Woodford, Betty the wife of Taliaferro, on Thornton Washington his grandson, and his granddaughter Mildred the plaintiff. That Taliaferro and Woodford took administration on the estate; and that the plaintiffs William and Mildred have intermarried. The bill therefore prays an account and distribution of the personal estate, and for general relief.

The

The anſwer of Taliaferro ſtates, that many of the debts due the decedent were paid in paper money. That all the perſonal eſtate was ſold by the adminiſtrators, amounting, with a crop, to £ 13848 : 4 : 3¼. That £ 4739 : 13 : 4 came to the hands of the defendant; who received alſo ſundry debts of the inteſtate to the amount of £ 400. That, out of the monies received for the ſales of the eſtate and on other accounts, ſeveral debts due from the inteſtate have been paid. That in July 1779 there was paid to John Lewis father of the plaintiff Mildred the ſum of £ 4111 : 9 : 7, and to Thornton Waſhington, by a written order from his father, the ſum of £ 4200 : 18 : 0; which were the amount of their ſhares after the proper deductions were made; and for theſe ſums he took receipts from the ſaid John Lewis and Thornton Waſhington. That the ſaid Thornton Waſhington and the ſaid John Lewis father of the plaintiff Mildred were preſent at the ſales of the perſonal eſtate, and purchaſed ſeveral articles reſpectively. That the defendant has been ſued for a conſiderable debt claimed of the ſaid John Thornton; which ſuit is yet depending. That after Woodford went into the army, the adminiſtration was conducted by the defendant.

The anſwer of Woodford's executrix, ſpeaks of the ſales of the eſtate, and that, after Woodford went into the army, the adminiſtration was conducted by Taliaferro.

The Court of Chancery referred the accounts to a commiſſioner; who credited the eſtate with the money for the ſales of the perſonal eſtate, upon the days when the ſales reſpectively took place; which were on the 19th, of May 1778, the 1ſt, of December 1778, and the 2d, of January 1779. He alſo credited the eſtate, on the 5th, of June 1779, with four loan office certificates paid to John Lewis, for his daughter Mildred the plaintiff, viz. One of 300 dollars, dated 5th of March 1777, with intereſt to the 5th of June aforeſaid;

when

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when it was paid to Lewis, as above mentioned; a ſecond of 1800 dollars, dated 17th of March 1778, with intereſt as above; a third of 2333⅓ dollars, dated 1ſt of March 1778, with intereſt as above; and a fourth of 1500 dollars, dated 6th of November 1778, with intereſt as above. He alſo credited the eſtate, at the ſame time, with £ 1347 : 12 continental certificates for emiſſions of April and May paper money; to which no date being affixed, the date of payment to Lewis was aſſumed. He alſo on the 5th of July 1779, credits the eſtate with a loan office certificate of 4333⅓ dollars dated 5th of December 1777, with intereſt to the ſaid 5th of July; when it was paid to Thornton Waſhington. He likewiſe credits the eſtate with monies collected. After which he debits the eſtate with ſundry diſburſements; but leaving due from John Taliaferro, as adminiſtrator of John Thornton deceaſed, a balance of £ 158 : 9 : 2 to the eſtate of Thornton Waſhington; and of £ 361 : 18 : 7¾ to the eſtate of Woodford the other adminiſtrator.

In this report the commiſſioner, being uncertain whether the monies paid Thornton Waſhington by William Woodford were included in any of the payments made by John Taliaferro, conſidered the ſeparate receipts as ſeparate and diſtinct payments. He added, that as the payments of the 5th of July 1779 were included in one receipt, without ſpecifying the particulars, except the certificate, the purchaſes at the ſales with the certificate and as much paper money as made up the £ 3800 were taken together for Thornton Waſhingtons ſhare, and that as the ſales were all made for ready money, and few debts to pay, two and a half per cent commiſſion, only, were allowed the defendant.

The defendant John Taliaferro excepted to the report, for the following reaſons, amongſt others. 1. That the certificates for the emiſſions of paper money in April and May 1778, being for paper

money

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money received at the ſales of the eſtate and funded ought to be conſidered as part of the ſales; and therefore as the whole amount of the ſales was credited, the ſaid certificates ought not to be made a ſeparate charge again; for by that means the defendant was twice charged with the ſame thing. But if the certificates had been a proper charge the depreciation ought to be calculated from the time the certificates were received by him, and not from the time they were paid to Lewis. 2. That the commiſſioner in charging the diſburſements and payments by the defendant, had made him liable for the depreciation, between the dates of the receipts and thoſe of the payments; whereas if the ſcale was to be applied at all the defendant ought not to be anſwerable for the loſs ariſing from the intervening depreciation: But that according to the act of Aſſembly all payments in paper money ought to ſtand at their nominal amount. 3. That $2\frac{1}{2}$ per cent was not a ſufficient commiſſion for his adminiſtration on the eſtate.

On theſe exceptions the commiſſioner remarked that the certificate for the April and May money could not be included in the ſales already made, becauſe it is credited by the defendant over and above the ſales of the eſtate. So that the only queſtion is whether the value is rightly aſcertained? To which there could be no objection; becauſe the defendant is not made anſwerable for more, on that ground, than he has credit for in the accounts of Minor and Waſhington. In which the *debits* of the certificates, with intereſt in their accounts, correſpond with the credit to the eſtate in the account current; upon which ſtatement of the certificates, he obſerved the defendants exception vaniſhed; becauſe he paid the ſame value that he received. That as to the exception concerning the diſburſements, and payments made by the defendant he thought himſelf warranted under the decretal order of the court to do the parties material and complete juſtice as far as their reſpective caſes would admit; and that the act of Aſſembly did not prevent a fair adjuſtment,

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of the accounts of executors, adminiſtrators, guardians, or other truſtees. That the act directs, "that debts and contracts, are to be reduced to "the true value in ſpecie at the days or times the "ſame were incurred or entered into. A, buys a "horſe of B. for two hundred pounds in January "1778 payable January 1779, but he fails to pay "for him until January 1782, when paper money "ceaſed to be a circulating medium: When the "contract was entered into, the ſcale was four "for one, and therefor A, muſt owe to B, £ 50 "with £ 7: 10 for three years intereſt thereon "making the ſum of £ 57: 10; whereas if the "term *incurred* is applied to the debt at the day "of payment, when the ſcale was eight for one, "he will only have to pay half that ſum. That "the laſt is not the ſenſe, in which the Legiſla"ture uſed the term *incurred*, appears clearly "from the proviſo in the ſecond ſection of "the act; where it is provided, that actual pay"ments made in the then current paper currency "ſhould not be ſcaled. The injuſtice done to the "debtor, by ſcaling the debtor contract at the "time it was incurred or entered into, and not at "the date of payment, is here transferred to the "creditor, with accumulated force. And altho' "the debtor under the terms of the act in the caſe "propounded, would pay double, yet, if he paid "the creditor with intereſt on the laſt day of De"cember 1781, to wit, two hundred and thirty "pounds reduced by the ſcale of one thouſand for "one making four ſhillings and ſeven pence, he "would pay him with about the two hundred and "fiftieth part of his debt. The laſt clauſe of the "act proves, that the Aſſembly foreſaw that groſs "injuſtice would be done by a rigid adherence to "the ſcale, or to the payments made by debtors "and therefore a diſcretionary power was veſted "in the courts. Under this opinion your commiſ"ſioner has, in every inſtance referred to him by "the Court, endeavored to do juſtice to both debt"ors and creditors. In ſome caſes where the "credits to an eſtate aroſe from ſales on credit,

"and

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"and the collections of debts due to the teſtator "or inteſtate, which are not always punctually "paid, he hath reduced the paper money credits "by a medium ſcale, and uſed the ſame rule for "diſburſements. In others where the ſales were "made for ready money and no debts to collect, "and few or no demands to ſatisfy but the claims "of diſtributees, he hath applied the ſcale accord-"ing to the dates. This laſt rule was applied to "the caſe under conſideration, it appearing to "your commiſſioner that the adminiſtrator had no "debts of any conſequence to pay, which could "retard the diſtribution."

"That the whole of the diſburſements were of "ſuch a nature as made them neceſſarily known "to the defendant, and it was therefore his duty "to have paid them directly, as he had money on "hand for that purpoſe."

The Court of Chancery overruled the exceptions, and decreed payment of the £ 158:9:2 to the eſtate of Waſhington, and of the £ 361:18:7$\frac{3}{4}$ to Woodford, with intereſt on each ſum from the 5th day of July 1779.

From which decree Taliaferro appealed to this court.

RANDOLPH for the appellant. *Sallee* vs *Yates* * and *Granberry* vs *Granberry* † contain the general doctrines of the court upon paper money, which ought to influence this caſe; and prove that the appellant ought only to be charged according to the ſcale value, as that was the real value of the ſubject in his hands. For there was no default in him, and he was ready to pay the ſhares of the other diſtributees when demanded.

MARSHALL *contra*. Relied on the reaſoning of the commiſſioner upon the ſubject; and added that

as

* 1. Wash. 226.

† 1. Wash. 246.

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as the money was not retained for payment of debts, that the appellants might have paid it over to the guardians of the infants at an earlier period.

RANDOLPH in reply. It does not appear that the guardians ever demanded it.

Cur: adv: vult:

Per: Cur:

"The court is of opinion that the receipts and "payments of the adminiſtrator to the end of the "year 1779 ought not to have been reduced to "ſpecie, by the legal ſcale of depreciation, but "to have been ſtated in paper, in which the re-"ceipts and payments were. The reaſoning of "the maſter commiſſioner, on the ſubject, tends "to illuſtrate ſome of the evil effects of paper; but "it belonged to the Legiſlature, and not to the "Courts of Juſtice, to fix the mode of winding up "that unhappy affair, ſo as to ſubject individuals, "on the whole, to the leaſt of unavoidable evils. "Which was done by the act of 1781: Amongſt "other regulations, it is declared that all actual "payments, made in paper in diſcharge of debts "or contracts, ſhould ſtand at their nominal "amount and not be ſcaled: Nor is the caſe of "ſuch payments within the proviſo impowering "the courts to vary the ſcale upon equitable cir-"cumſtances. Perhaps the conduct of this admi-"niſtrator is leſs exceptionable, than almoſt any "which hath been brought before a court; ſince, "in the next year after the inteſtates death, he "paid the two complaining diſtributees all, near-"ly all, or probably over, their proportions of "the eſtate to that period. The account ought "to be ſtated in paper to the time of the laſt pay-"ment to them, and the balance, either way, re-"duced by the ſcale of that month, carried to the "account of ſubſequent ſpecie articles, and inte-"reſt allowed againſt the debtor from time to time "thereafter. The court is further of opinion the

"adminiſtrator

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" adminiſtrator ought to be allowed five per cent " commiſſions on the amount of the ſales and debts " received by himſelf (but not on the loan office " certificates or debts collected by Day, who pro- " bably retained a commiſſion;) that allowance " not being too great for ſelling and receiving, " paying and accounting for the money, and riſque- " ing the receipt of counterfeit paper; an in- " ſtance of which appears to have happened to his " loſs. Amongſt the loan certificates is a con- " tinental one for one thouſand three hundred and " forty ſeven pounds twelve ſhillings emiſſions of " April and May money 1778, which the admi- " niſtrator is charged with, becauſe it is part of " four thouſand ſeven hundred and thirty nine " pounds, thirteen ſhillings and four pence credit- " ed in his account for the certificates, beſides a " credit for the amount of the whole ſales: This " he ſtates in his exceptions to have been a miſ- " take as to the certificates in queſtion; which " were taken for paper money received for the " ſales and funded by him; and ſo a double charge. " Which, tho' not proved, is very probable; ſince " the certificates, being after the inteſtates death, " muſt have been for paper found in the houſe or " received by the adminiſtrator for ſales or debts: " Of the former eighty pounds ſix ſhillings and ſix " pence is accounted for, which it is preſumed " was all. It is remarkable that a like miſtake " was made by the adminiſtrator in the caſe of " Armiſtead's certificates which was corrected by " the commiſſioner. This article, therefore, of " one thouſand three hundred and forty ſeven " pounds twelve ſhillings ought to be open for " enquiry and adjuſtment on taking the new ac- " count. The decree in favour of the repreſen- " tatives of William Woodford the co-adminiſtra- " tor ſeems improper, ſince no conteſt, between " them and the appellee, appears in the record, " nor any account of their ſeparate tranſactions, " except in the ſtate of the accounts by the com- " miſſioner; unleſs that was done by conſent

" which

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"which would juſtify it. And that the decree "aforeſaid is erroneous. Therefore it is decreed "and ordered that the ſame be reverſed and an- "nulled; and that the appellees pay to the appel- "lant his coſts by him expended in the proſecu- "tion of his appeal aforeſaid here; and the cauſe "is remanded to the ſaid High Court of Chance- "ry, for that court to have the account, between "the parties, reformed; and a decree entered, "according to the principles of this decree."

ANDERSON

against

ANDERSON.

The power of the court of chancery, over an appeal to this court, ceaſes on the firſt day of the next term, after the decree was pronounced.

And therefore if ſecurity be given in the vacation that court cannot diſallow the appeal becauſe the appellant does not give other ſecurity.

Marriage ſettlement muſt be recorded, within eight months, or it will be void againſt prior creditors.

THIS was an appeal from a decree of the High Court of Chancery, in a ſuit brought by Jane Anderſon by her next friend againſt George Anderſon and others. The bill ſtates that the plaintiff, before her marriage with George Anderſon, was entitled to the remainder in certain ſlaves after the death of her mother Rebecca Tucker. That, in the year 1787, ſhe agreed to marry the ſaid George Anderſon, who was at the time indebted beyond his fortune; but that circumſtance was unknown to the plaintiff. That her friends thinking it adviſable, a marriage contract, to ſecure her property from his creditors, was agreed upon; and the friends of the plaintiff recommended, that Colonel George Nicholas, an eminent practitioner of the law, ſhould draw it: to which the ſaid George Anderſon objected, becauſe he ſaid his brother, who was a lawyer, would draw it without expence. This, the plaintiff and her friends, who confided in the ſaid George, could not refuſe; and, accordingly, he was requeſted to get his brother to draw proper articles, for ſecuring the property. That,

a

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a ſhort time before the marriage, the ſaid George produced a paper, which he ſaid was ſuch an one as would anſwer the intended purpoſe; but the plaintiffs friends were not ſatisfied, and an addition was made: which they (who were ignorant of law, and no counſel could be had) ſuppoſed to be ſufficient. That the marriage afterwards took effect; and the plaintiff has ſince diſcovered, that the debts of the ſaid George, contracted *before marriage*, are more than ſufficient to ſwallow up the whole eſtate. That the marriage contract has been ſuppoſed inſufficient to protect the property *from former creditors* and that the brother of the ſaid George has ſince declared he intended it ſhould be inſufficient, *the creditors being chiefly his relations*. That the creditors have taken the ſlaves in execution; although they did not truſt him on the faith of the ſame. That the intention of the plaintiff and her friends was to ſecure the property to herſelf and children. The bill therefore prays that the ſaid George and his creditors may be made defendants; that the creditors may be enjoined; that the ſlaves may be ſettled agreeable to the marriage contract; and that the plaintiff may have general relief.

The anſwer of George Anderſon admits the plaintiffs right to the remainder in the ſlaves; That the marriage contract was propoſed in order to protect the property from the creditors of the defendant; and that Colonel Nicholas ſhould draw it. That the defendant objected and propoſed his brother ſhould draw it; but that this was not done with any improper motive. That he applied to his brother, and requeſted him to draw the contract according to the agreement with the plaintiff and her friends. That his brother drew a writing, which he delivered to the defendant as ſufficient; but Colonel Coles with whom the plaintiff then lived, after ſhewing it to the plaintiff and her mother, objected to its ſufficiency; and thereupon the addition was made. That he believes his brother was actuated by unworthy motives,

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tives, but this was not known or ſuſpected by the defendant until after the marriage.

The creditors ſay they know nothing of the fraud, if there was any.

The depoſitions prove that the debts exiſted *prior to the marriage*, that a marriage contract was ſtipulated for; and Anderſon's brother ſays he wrote one. That he conſidered it immaterial at the time, in what manner it was drawn, as the ſaid George informed him it was only to ſatisfy the plaintiffs mother, and that it would be deſtroyed afterwards.

The marriage contract is in the words following, "This indenture made the 24th of March "1787, between George Anderſon of the city of "Richmond of the one part, and Jane Tucker of "the county of Albemarle and pariſh of St. Ann "of the other part witneſſeth, that whereas a "marriage is about to be ſolemnized between the "ſaid parties, and for the greater eaſe, ſatisfaction "and aſſurance of the ſaid Jane, the ſaid George "doth hereby agree on his part that in caſe he "ſhould have no iſſue on the body of the ſaid "Jane and in caſe the ſaid Jane ſhould ſurvive "the ſaid George that then and in that caſe the "ſaid George doth agree to relinquiſh and anounce "all claims and demand to all the ſlaves now in "poſſeſſion of the ſaid Jane or all the ſlaves that "are now her property, that may accrue to him "the ſaid George by the union aforeſaid, and by "the laws of the land, and the ſaid George doth "further agree that in caſe he ſhould leave no "iſſue by the ſaid Jane and in caſe ſhe ſhould ſurvive him, that then and in that caſe, the ſaid Jane "may diſpoſe of by will, deed or any other conveyance, whatever all the ſlaves now in her poſſeſſion with their future increaſe or that are now "her property to any perſon or perſons as ſhe "may think fit. In witneſs whereof I have here-

"unto

"unto set my hand and affixed my seal the day and "year above written. Anderson vs Anderson

GEORGE ANDERSON.

Signed sealed and delivered in the presence of

JOHN COLES.

"It is also agreed by the said George Anderson "that none of the slaves above mentioned or that "may accrue to him by the union before named "or their future increase shall be given to any "other than the issue of the said Jane, or shall "they or any of them be sold on any account "whatever, without the consent of the said Jane.

GEORGE ANDERSON."

JOHN COLES.

At Albemarle September Court 1788 it was acknowledged by George Anderson and ordered to be recorded; and at Albemarle May Court 1791, it was proved by John Coles the witness thereto.

The Court of Chancery on the 5th of June 1794 dismissed the bill; and the plaintiff prayed an appeal to this Court, which was allowed on her giving bond within two months. This she failed to do; and afterwards, that is to say on the 26th of August 1794, petitioned the Chancellor out of court to be allowed to give bond and prosecute the appeal, as she had been prevented by accident from giving it before; The Chancellor allowed the petition, and the plaintiff gave bond; but at the September term following the Court of Chancery set aside the allowance of the appeal, unless the plaintiff by the 26th of that month, gave such security as should be approved of by the Court. In March 1797, the plaintiff having failed to give the last mentioned security, the Court of Chancery allowed her to give bond within two months, if the Court of Appeals should be of opinion that

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the Court of Chancery then had power to grant the appeal.

RANDOLPH for the appellant. Made two points. 1. That the appeal was regularly depending in this court. 2. That the fraud would protect the eſtate for the benefit of the plaintiff.

As to the firſt;

After the appeal had once been allowed, the Court of Chancery had no further controul over it; and the ſituation of the appellant will induce the court, who are not confined to any limited time for allowing the ſecurity, to extend the period farther in this, than ordinary caſes.

As to the ſecond:

If George Anderſon only were concerned, there could be no queſtion about it; for it is clear that relief would be given: But his creditors ought not to be in a better ſituation than himſelf, as they can only have the ſame rights which he has. Nor will the failure to record, within the eight months, help their caſe; becauſe it was owing to George Anderſon himſelf, whoſe neglect was a fraud, which ought not to injure the rights of the wife.

WICKHAM *contra*. The act of Aſſembly is expreſs, that the deed not having been recorded within the eight months, is void againſt the creditors. So that it is as if there had been no ſettlement: But if there had been none, then the law would have veſted the property in the wife; and as the deed was not recorded, the preſumption was that it had veſted by the intermarriage. The alledged fraud can make no difference. For if one man gets poſſeſſion of anothers eſtate, and ſells to a third perſon, without notice, it is good: And the caſe, in effect, is the ſame here. It makes no difference whether the debts originated before or after the marriage; for, as the ſettlement was not recorded within the eight months, the act would equally affect them in either caſe.

WARDEN

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WARDEN on the ſame ſide. The ſettlement is extremely defective. For proper truſts and limitations to preſerve the eſtate are not inſerted: And upon that ground alſo the creditors muſt prevail.

MARSHALL on the ſame ſide. If any fraud has been committed, the creditors were not concerned in it; and therefore it cannot be objected againſt them. It is no objection to ſay, that they did not truſt Anderſon upon the credit of this property; for the act includes them, nevertheleſs, as it renders the deed void againſt all creditors. In which reſpect the act makes a difference between creditors and purchaſers. Of courſe, if the creditors have been guilty of no fraud, it follows that the ſettlement cannot operate againſt them; but they have the ſame rights which they would have had, if the ſettlement had not been made.

RANDOLPH in reply. Recording the deed in September 1788 was ſufficient by relation. That is the principle with regard to the enrollment of deeds of bargain and ſale in England. By the act of 1785, for regulating conveyances, property, moving from the covenantor only, is contemplated; and therefore that law does not apply to the preſent caſe, where the property belonged to the wife. For the covenants here are all on the part of the huſband. The word *creditors* in the act is to be underſtood with an exception of the wife's intereſt. It is uſed more ſtrongly in the ſtatute of *Elizabeth*, than in our act; and yet it has always been taken there in a ſenſe according to the rule in the Bankrupt laws, which excepts the rights of the wife, although the terms in thoſe laws are ſtronger than the words of our act. 1. *Atk.* 190. 2. *Atk.* 562. 3. *Atk.* 399. It was the culpable neglect of the huſband, to whom it was confided, that prevented the deed from being recorded within the eight months; and that was a fraud, which will take the caſe out of the operation of the ſtatute. For the court will ſupply the

omiſſion

Anderſon vs. Anderſon.

omiſſion to record. 2. *Vern.* 564. George Anderſon was a truſtee for his wife; whoſe intereſt was prevented, by the contract, from veſting in him; and therefore his creditors can have no right. 2. *Vez.* 665: He could not, by any act of his, bar her equity. 4. *Bro. Ch. cas.* 326. 1. *Wms.* 459. Of courſe, as the creditors attempt to charge the eſtate merely by the operation of law, it is competent to the wife to rebut that operation, by ſhewing the fraud and its effects in preventing the proper ſteps from being taken for her ſecurity.

WICKHAM. As the deed was not recorded the creditors relied, that this was the property of George Anderſon, and gave faith to it accordingly. So that, if he be a truſtee for the wife, ſtill, the deed, not having been recorded, is void againſt the creditors; for whether truſtee or not, it will make no difference in that reſpect, as he has the legal eſtate in him, and the deed is void by the act of Aſſembly. The arguments drawn from the ſtatute of Elizabeth are irrelevant; becauſe here was no intention to defraud. But if there was, and the creditors were not concerned in it, they would not be affected by it. There is no foundation for the diſtinction taken between the property of the wife and that of the huſband; for ſettlements are more frequently made of the porperty of the wife, than of that of the huſband; and the conſtruction contended for on the other ſide would repeal the law. As the deed contained no ſettlement of lands, recording it in Albemarle Court would not have been ſufficient; for that is expreſsly againſt the words of the act of Aſſembly.

RANDOLPH. The deed was executed in Albemarle county; and therefore that was the proper court to record it in.

Curs. adv. vult.

LYONS Judge, after ſtating the caſe, delivered the reſolution of the Court as follows.

The

Anderson
vs.
Anderson.

The first question is, whether the appeal is properly brought up?

We are of opinion, that the power of the Court of Chancery ceased on the 10th of September 1794; when the next term after the making of the decree commenced; and, from that period, that it belonged to this Court only to determine on the sufficiency of the security; as the cause was then here, and the Court of Chancery had no longer any controul over it. For the authority of that Court, according to the true construction of the act of Assembly, expired with the vacation, which followed the decree; and therefore its subsequent proceedings were altogether void. Of course the appeal having been granted in August 1794, and security given according to law, it must stand.

The next question is, whether a Court of Equity can supply the omission and defect in not recording the marriage articles, within eight months, according to the act of Assembly for regulating conveyances?

Chancellors in England have gone great lengths in supplying defects in conveyances, as appears from the case of *Taylor* vs *Wheeler* 2. *Vern.* 564, and other cases cited at the bar; but we do not know what provisions or reservations there might have been in the act of Parliament or custom referred to in those cases, or in the bankrupt laws of that country alluded to in the argument.

The act of Assembly, for regulating conveyances in this state, was made to protect creditors and purchasers against secret trusts and latent titles; and for that purpose only: Since it contains a proviso, that the deed, although not proved within eight months, shall be binding between the parties, as it was at common law; and the proviso is an exception which proves the rule, that is to say, that the deed shall not bind any but the parties themselves.

But

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But when a ſtatue ſays expreſsly, that a conveyance ſhall not bind, can a Court of Equity ſay that it ſhall? Surely that would be to repeal the act; and therefore equity will not interpoſe in ſuch caſes, notwithſtanding accident or unavoidable neceſſity. For the power of a ſtatute is ſo great, that it has been ſaid, that even infants would have been bound by the act of limitations, if there had been no exception with regard to them, contained in the ſtatute itſelf.

It is true that there are no negative words, in the act of Aſſembly, to exclude the juriſdiction of a Court of Equity in the preſent caſe. But a Court of Equity muſt conſult the intention of the Legiſlature as well as Courts of Law; and when the Legiſlature have determined a matter with its circumſtances, a Court of Equity cannot intermeddle, or relieve againſt the expreſs proviſions of the ſtatute.

Fraud, however, is ſtill left open for a Court of Equity to act upon; and if a creditor or purchaſer has been guilty of a fraud, by preventing the deed from being recorded, or otherwiſe, Equity may ſtill relieve; as no perſon ought to take advantage of his own fraud and obtain the benefit of the ſtatute by undue means. For the act was intended only to ſecure fair and honeſt creditors and purchaſers; and not to protect the fraud and circumvention of either of them.

But as the appellees, in this caſe, do not appear to have been parties or privies to any fraud, nor are even charged with it in the bill, they certainly are entitled to the full benefit of the act for ſecuring their juſt debts; and the marriage agreement cannot now be ſet up in equity to defeat them: Eſpecially as no excuſe, for keeping up the marriage articles ſo long, is even alledged; if any could be admitted.

Rebecca Tucker does not ſhew any title to the ſlaves ſhe claims; and, if ſhe has any, ſhe may recover at law.

The

The other queſtions made are not now neceſſary to be determined: and therefore they are reſerved for future diſcuſſion.

The decree of the Court of Chancery is to be affirmed.

CASES

CASES
ARGUED AND DETERMINED
IN THE
COURT of APPEALS
IN
APRIL TERM OF THE YEAR 1800.

GUERRANT
against
TAYLOE.

If there be judgment againſt a ſheriff, for the amount of money levied on an execution with the 15 p. cent intereſt and he appeals The appellee, by waiving the 10 per cts. damages for retarding the execution and taking a ſimple affirmance of the judgment, may ſtill have his 15 per cent damages, according to the judgment of the Court below.

THE appellant was ſheriff of the county of Goochland, and had levied the amount of an execution, which had been put into his hands by the appellee; but had failed to pay over the money. Upon which the appellee moved for and obtained judgment in the Diſtrict Court, for the amount of the money levied with the 15 per cent damages. From which judgment the appellant appealed to this court.

WICKHAM for the appellee. After obſerving that there was no error in the judgment, ſaid that the appellee was entitled to the 15 per cent damages, notwithſtanding the act of Aſſembly which gives 10 per cent damages only in caſe of appeals. That this caſe of the ſheriff was an exception to the general rule; for the ſheriff would otherwiſe be a gainer inſtead of a loſer by the appeal; becauſe by delaying the execution of the judgment he leſſened the intereſt. At any rate the appellee may relinquiſh the damages in this court, and take a ſimple affirmance of the judgment without the 10 per cent damages, and then by the terms

of

of the judgment which is ſtrictly conformable to the directions of the act of Aſſembly, the appellee will be entitled to the 15 per cent damages.

Geurrant vs Tayloe.

ROANE Judge. Are you contented to take a ſimple affirmance without any damages for retarding the execution?

WICKHAM. Yes.

Per: Cur. Affirm the judgment then, without any damages.

SPOTSWOOD

against

PENDLETON.

IN an action on the caſe, brought by Pendleton againſt Spotſwood in the Diſtrict Court, the declaration was as follows, "Benjamin Pendleton "complains of Alexander Spotſwood in cuſtody "&c. of this, to wit, that whereas, firſt day of "October 1790 there was an appeal from a judg- "ment of the County Court of Spotſylvania, de- "pending in the Diſtrict Court holden at Frede- "rickſburg, in which appeal the ſaid Alexander "Spotſwood was appellant, and the ſaid Benja- "min was appellee, when and where it was "agreed by ſaid Alexander Spotſwood that if the "ſaid Benjamin Pendleton would agree to have "the ſaid appeal diſmiſſed, that he the ſaid Alex- "ander would pay him the full amount of the "debt, damages and coſts then due on ſaid ap- "peal, and the ſaid Benjamin avers that he did "agree to have the ſaid appeal diſmiſſed and it "was in conſequence diſmiſſed, and he doth more- "over aver that the amount of the debt, damages "and

If the appellant promiſe the appellee, that in the latter will agree to have the appeal diſmiſſed the appellant will pay him the full amount of the debt, damages and coſts then due upon the appeal, and the appellee conſents thereto and the appeal is diſmiſſed agreed, the appellee may maintain aſſumpſit on this promiſe.

The Court may leave the queſtion of damages in ſuch a caſe to the jury.

Spotswood vs. Pendleton.

" and costs then due upon the appeal was £ 222 " 5 : 7½. Of which the said defendant had notice, " by reason of all which premises the said defend- " ant became liable to pay to the said plaintiff the " said £ 222 : 5 : 7½; and being so liable he after- " wards, to wit, on the day and year last menti- " oned, at the county aforesaid, in consideration " thereof, undertook and faithfully promised that " he would pay the said £ 222 : 5 : 7½ to the said " Benjamin whenever he should be afterwards " thereto required. Nevertheless the said Alex- " ander, altho' often required hath not yet paid " the said £ 222 : 5 : 7½ to the said Benjamin, " but hitherto to pay the same hath refused and " still doth refuse to the damage of the said plain- " tiff of sixty pounds and therefore he brings suit " &c." Plea *non assumpsit;* and issue. Upon the trial of the cause the defendant filed a bill of exceptions which stated that, " The defendant mov- " ed the court to instruct the jury, that the 10 " per cent before the appeal was dismissed was " not due, and was not included in the contract " stated in the declaration. It appearing also, " from the record, that the appeal mentioned in " the declaration was dismissed in the year 1791; " but the court, being divided, did not instruct " the jury, for the following reasons, because it " depended upon the evidence, what the parties " agreed was due, at the time the contract was " made for the dismission, and because the jury " were the judges of the said contract, which was " verbal."

There is a copy of the order for dismissing the appeal, copied by the clerk into the record, which is in these words, " Fredericksburg District Court " April 30th 1791. Alexander Spotswood appel- " lant against Benjamin Pendleton appellee, upon " an appeal. This suit being agreed between the " parties, it is dismissed."

There was a verdict and judgment for the plaintiff; and the defendant appealed to this court.

WICKHAM

Spotswood vs Pendleton.

WICKHAM for the appellant. The judgment is not described with sufficient precision, as it is the foundation and git of the action. But if it was, still the action could not be maintained; because it is *assumpsit* for matter of record. Which will not lie, as the party has a higher remedy: Consequently if it were true that it lay for the damages, it would not for the judgment itself. Besides the Court left the question of damages to the jury improperly: 1. Because the evidence did not correspond with the declaration; which ought to have stated the amount of the damages: 2. Because the amount of the damages was a question of law; and therefore should have been decided by the Court.

RANDOLPH *contra.* The justice of the case has certainly been attained, and therefore every thing is to be presumed in favour of the judgment. The assumpsit was not in consideration of the judgment, but of the dismission; and the judgment was gone by the appeal, having been dismissed agreed. The description is particular enough; because it is sufficient notice to the defendant. The evidence does correspond with the declaration; for it is averred, that the defendant promised to pay the amount of the damages, in consideration that the plaintiff would suffer a dismission of the appeal.

There was nothing improper in leaving the question, concerning the damages, to the jury; because it was a matter of calculation, more than of law.

WICKHAM in reply. It is not true that the former judgment was gone by the dismission; for that only means that the parties relinquished the question concerning the errors, but the judgment remained.

Cur. adv. vult:

LYONS Judge. Delivered the resolution of the Court, that there was no error in the judg-

ment.

Scotswood vs Pendleton.

ment. That the consideration of the assumpsit was sufficient, and well enough laid. That the evidence was proper upon the declaration. And that there was no impropriety in leaving the question concerning the damages to the jury.

Judgment Affirmed.

BROOKE

against

GORDON.

If the declaration does not demand interest, and the defendant waives his plea the Court cannot give judgment for interest.

B. and S. Gordon brought an action of debt in the County Court upon a promissory note, for £70; The declaration demanded the seventy pounds only, without any mention of interest and concluded to the plaintiffs damage thirty dollars. The defendant took over of the note which was in these words, "Messrs. Samuel and Bazil Gordon, Falmouth, Gentlemen, I will ninety days "after date hereof pay to you or order seventy "pounds for value received of Robert B. Vois, "John T. Brooke, December 23d, 1795." The defendant plead payment. Which he waived at a subsequent Court; and thereupon the County Court gave judgment for the plaintiff for £70, with interest from the 23d of December 1795 till payment, and the costs. From which judgment the defendant appealed to the District Court; where the said judgment was reversed with costs; and the District Court proceeding to give such judgment as the County Court ought to have given, entered judgment for the £70 only, and the costs in the County Court.

From which judgment the defendant appealed to this Court.

WILLIAMS

Brooke vs. Gordon.

WILLIAMS for the appellee. The judgment of the District Court is right according to the decision of this Court in the case of *Hubbard* vs *Blow*. *

Per. Cur. Affirm the Judgment of the District Court.

WILSON
against
STEVENSON'S ADMINISTRATORS.

STEVENSON'S administrator gave the following notice on a forthcoming bond, "Dumfries October "9 1797, Gentlemen, Please take notice that on the "fifth day of the next District Court to be held at "Dumfries, or so soon thereafter as counsel can "be heard, a motion will be made for judgment "on a a bond granted by Richard Graham (now "deceased) and Cumberland Wilson to John Ste-"venson administrator of William Stevenson, "dated the seventeenth day of December seven-"teen hundred and ninety five, for the sum of "eleven hundred and two pounds, eleven shillings "and four pence, conditioned for the delivery at "the courthouse of Dumfries on the fifteenth day "of February 1796, of eighteen slaves given up "to George Lane deputy sheriff of Prince Wil-"liam county in lieu of the body of the said Rich-"ard Graham, taken by said George Lane depu-"ty sheriff by virtue of a *capias ad satisfaciendum* "issued from the said District Court on a judg-"ment obtained there at the suit of the said John "Stevenson as administrator of the said William "Stevenson for the non performance of debt and "costs, balance then due, amounting to five hun-"dred and fifty one pounds five shillings and eight "pence

Quere if there be a joint notice given on a forthcoming bond, to both obligors the plaintiff can take judgment against one of them only?

If the forthcoming bond be not forfeited at the time when the injunction issues the penalty is saved; but it is otherwise, if the bond be forfeited before the injunction issues.

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* *April term* 1792.

Wilson vs Stevenson.

"pence. James Smith attorney in fact of John "Stevenson administrator of William Stevenson "deceased. To Mr. Cumberland Wilson and "George Graham administrator or executor of "Richard Graham deceased." This notice was served upon Graham and Wilson both.

After reciting the said notice, and the appearance of Wilson and Graham by their attorney, with a continuance of the cause from day to day for several days during the term, the record proceeds thus,

"John Stevenson administrator of "William Stevenson. Plaintiff.
against
"Cumberland Wilson & George "Graham administrator or executor "of Richard Graham Defendants.

"Upon a "motion for "judgment "on a bond "executed "by Rich- "ard Gra- "ham deceased and Cumberland Wilson to the "plaintiff, for the forthcoming of property given "up by the said Richard Graham in lieu of his bo- "dy taken by virtue of an execution issued from "this Court, at the suit of the said plaintiff.

"This day came the parties by their attorneys "and their arguments having been fully heard and "mature deliberation thereon had, it is consider- "ed by the Court that the plaintiff recover against "the *defendant Cumberland Wilson* eleven hundred "and two pounds eleven shillings and four pence "the debt in the said bond mentioned &c. And "the plaintiff has leave to discontinue his mo- "tion against the other defendant."

The bond is joint and several. On the execution is endorsed "Executed and eighteen slaves given "up in lieu of his body and injoined in the High "Court of Chancery before the day of sale men- "tioned in the within bond for their delivery."

There is a copy of the injunction bond copied into the record.

Wilson

Wilſon appealed, from the judgment of the Diſtrict Court, to this Court.

Wilſon vs. Stevenſon.

WICKHAM for the appellant. The notice is that the plaintiff will move for a joint judgment againſt the ſurviving obligor and the repreſentatives of the decedent, which could not be rendered; but, if it could, the plaintiff has only taken judgment againſt the ſurviving obligor, and diſcontinued againſt the adminiſtrator. Which is erroneous; becauſe the judgment does not purſue the notice. Such a declaration would have been bad; and a notice, which is in the nature of a declaration, ſtands upon the ſame ground. So that what is requiſite in the one, is neceſſary in the other alſo; and it is right it ſhould be ſo, or otherwiſe the defendant does not know how to defend himſelf.

But, upon the merits, the plaintiff was not entitled to judgment; becauſe the injunction, having iſſued prior to the day of ſale, diſcharged the obligors from performing the conditions of the forthcoming bond. For, if the ſheriff had had the property in cuſtody, he muſt have diſcharged it; and the forthcoming bond was but a ſubſtitution for the property. Therefore if the property was liable to be reſtored, the bond ought to have been given up. For the law does not require a vain thing to be done; that is to ſay, that the obligors ſhould deliver the property and take up their bond, in order that the ſheriff might return the property the next moment. It is like the caſe of one who is ſpecial bail for another, and the principal is made a *peer* or enliſts as a ſoldier; in which caſes, the court will order an *exoneretur* to be entered at once, without requiring that the body ſhould be firſt rendered; becauſe it would be diſcharged immediately, if it were. This, which is clear upon principle, receives additional weight from the act of Aſſembly, directing the money made on the execution, to be reſtored to the defendant at law, upon the emanation of the injunction; which

looks

Wilson vs. Stevenson.

looks as if the Legiſlature meant to preſcribe a general principle, applicable to all ſtages of the execution; for there can be no reaſon, why the money ſhould be reſtored, and the property not.

BOTTS and CALL *contra*. The notice is ſufficient. Theſe proceedings are not like thoſe at common law; and therefore do not require the ſame preciſion. It is ſufficient, if the defendant is ſubſtantially informed of the nature of the motion; which is as effectually done by a joint as a ſeveral notice; becauſe he is equally as well informed, as to the merits of the claim, by the one as the other. The caſe does not reſemble that of a joint declaration, upon a ſeveral contract, at common law. For there the plaintiff fails in the proof of the contract, as he declares on one contract, and proves another; ſo that the defendant could not be prepared to meet the teſtimony. But it is ſtill the ſame forthcoming bond, whether the notice be joint or ſeveral; and therefore there is no failure of the evidence or miſtake as to the nature of the claim. Thus then it appears that even if a joint judgment could have been taken, the notice was inſufficient. But the argument is *a fortiori* where a joint judgment could not be taken; becauſe there the notice muſt operate ſeverally or not at all. Therefore the entry of the diſcontinuance, as to the adminiſtrator, cannot prejudice the cauſe; for it was a work of ſupererogation, and no more than the law would have done without. For as the notice operated ſeverally, and diſtinct judgments were to be taken, that part of it which related to Graham's repreſentatives was ſurpluſage merely; and therefore the entry of a diſcontinuance as to that has no effect one way or the other. Beſides when the plaintiff followed up his notice only as to one of the defendants, he neceſſarily waived it as to the other.

The forthcoming bond was a diſcharge of the judgment, 1. *Wash.* 92; and therefore abſolute compliance with the conditions of the bond was

requiſite.

requiſite. It is generally true, that an injunction leaves things as they were; that is to ſay, the plaintiff or ſheriff cannot proceed to a ſale, but ſtill it is the duty of the obligor to perform his condition; becauſe it was inſerted for his benefit; and he cannot ſave his penalty without fulfilling it. But, it is a clear principle of law, that a man cannot excuſe himſelf, from the performance of a condition, by his own act. *Yelv.* 207; and as the injunction is of the obligors own ſeeking, he ought not to be received to object it againſt the compliance with his bond. Which argument, in the preſent caſe, is juſt as applicable to the ſecurity, as to the principal; for the ſame perſon who is ſecurity to the injunction bond, is ſecurity to the forthcoming bond, likewiſe. So that, having enabled the principal to ſue the injunction, he ought no more to be allowed to object that circumſtance, than the principal himſelf.

Cur: adv: vult:

LYONS Judge. Delivered the reſolution of the court to the following effect. That, if the forthcoming bond be not forfeited, at the time, when the injunction iſſues, the penalty is ſaved; becauſe the compliance with the condition would be uſeleſs, as the property muſt be reſtored immediately, that it was delivered to the ſheriff; and therefore the law would diſpenſe with it. But, if the forthcoming bond is forfeited before the injunction iſſues, the injunction does not diſcharge it, but the obligors continue liable ſtill. That as the court were clear upon this point, they left that relative to the notice undecided.

Judgment of the Diſtrict Court reverſed.

COPLAND

BUCK & BRANDER.

against

COPLAND

A empowers C to purchaſe lands for him; M empowers B to ſell lands for him, with directions to give C a refuſal. A informs B that he and C are the ſame perſon, and offers 2/, ſaying if M will not take that price he will give more than any other perſon. B promiſes C and A a refuſal; but afterwards, without informing M of their offers, purchaſes for himſelf; A court of equity will not enforce the benefit of this tranſaction to A, but if the truſt was proved, would ſet aſide the ſale in favor of M; who ought to be made a party to the ſuit.

THE bill ſtates, that Copland being diſpoſed to lay out ſome money, which he had by him, in the fall of 1795, he mentioned it to Hicks and Campbell, and told them, if they would purchaſe ſome military lands for him out of his own money, that he would allow them a commiſſion of 5 per cent. That they afterwards told him, that Benjamin Moſely wiſhed to ſell; and that they had offered him 2/, which he had refuſed; but ſaid that he would authoriſe the defendants to ſell; and that they had ſpoken to the defendant Brander who had promiſed them the refuſal. That in a few days afterwards, the plaintiff enquired of Hicks and Campbell, whether they had heard any more of the matter? That they anſwered they had not, and adviſed the plaintiff to apply to the defendants. That the plaintiff applied to Buck & Brander accordingly, between the 1ſt and 16th of November; Told them that Hicks and Campbell were purchaſing for him, and offered 2/. That the defendants ſaid, they had been authorized by Moſely to ſell, in order to pay a debt due themſelves; but he had deſired them not to take 2/, until he had adviſed with them; That they would write to him mentioning the plaintiffs offer, and in the mean time would enquire of the value. That the plaintiff told them, if Moſely would not take that price to let him have the refuſal, as he would give as much, or more, than any other perſon, for it. That the defendants promiſed

In ſuch a caſe as the tranſactions between A, C and B were not in writing, B, may plead the act, to prevent frauds and perjuries.

promiſed to do ſo; and one of them, afterwards, told the plaintiff that he had written, but no anſwer had come to hand. That the plaintiff again offered 2/; which that defendant ſaid he believed was the price, and, if Moſely would take it the plaintiff ſhould have the lands. That he would let the plaintiff know, when he heard from him. That the plaintiff had, from the commencement, reſolved to give 2/6, if he could not get the lands for leſs. That all this related to two ſurveys only, of 1000 acres each; for the plaintiff did not know that Moſely owned more. That the defendant Brander, afterwards, told the plaintiff, there were upwards of 2600 acres, and that Anderſon the ſurveyor had a claim for his fees, or for a proportion of the lands, and aſked the plaintiffs opinion, which would be beſt. That the plaintiff adviſed him to pay the fees; and offered to advance the money, and take the whole lands, at 2/, deducting the fees. That the plaintiff continued to apply to the defendants to know if they had heard from Moſely; and was always told that they had not; although they had written him ſeveral times. That the plaintiff was bound by his offer, if the lands had fallen in value, and always kept the money ready. That he did not apprehend any unfair dealings in the defendants with whom he was intimate; but relied on their integrity; and never ſuſpected that they wiſhed to buy themſelves. That the defendant Buck, at length, told the plaintiff, that he believed Brander had a letter from Moſely, who conſented to take 2/; but that there was ſome difficulty with reſpect to an overcharge for the ſurveyors fees. That the plaintiff anſwered, that circumſtance ſhould make no difference; for he would look to the ſurveyor himſelf; and deſired Buck to tell Brander ſo. That Buck, at going off ſaid, for the firſt time, that he believed Brander intended to keep the lands. That the plaintiff went to Brander and inſiſted on the contract; but Brander refuſed, ſaying all that he had promiſed to the plaintiff was, that the plain-

Buck, &c. vs Copland

tiff

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tiff ſhould have the refuſal; and that Kinkaid had bargained for the land for Buck and Brander; who had written him to do ſo. That the plaintiff replied, that the defendant had always informed him, that he had written to Moſely which he admitted; but ſaid, it was only a difference in names, and not in ſubſtance. That the plaintiff mentioned what Buck had ſaid; relative to the overcharge for ſurveyors fees; but Brander ſaid Buck was miſtaken; for only the legal fees were paid, That the plaintiff then offered 2/6, the price he firſt intended to go to, if Moſely had refuſed 2/. But the defendants refuſed; upon which the plaintiff tendered the money for the ſaid 2000 acres at 2/. The bill therefore prays a conveyance of the 2000 acres and for general relief.

Buck and Brander the defendants plead the act of General Aſſembly, to prevent frauds and perjuries, to the diſcovery; and by anſwer they ſtate. That they were intereſted in two concerns, one in Mancheſter, and the other in Buckingham. In which laſt Robert Kinkaid was a partner. That both were diſſolved, previous to any of the tranſactions in the bill mentioned. That Brander ſettled the affairs of the Mancheſter buſineſs and Kinkaid thoſe of the Buckingham buſineſs. That Moſely owed the firm of Kinkaid & Co. £ 355 : 19 : 3 (on which judgment had been obtained;) and Kinkaid and Co. were indebted to Buck and Brander. That Moſely told the defendants, he had 2666 acres of land; but expected 666 acres would go to pay the ſurveyor. That he had offered the balance of 2000 acres to Hicks and Campbell, who offered him 2/ per acre; but from their anxiety to purchaſe, he thought they would give more. That he aſked the defendants to apply to Anderſon the ſurveyor, pay him his fees, and endeavor to ſell the lands to the beſt advantage, or retain them to the uſe of Buck and Brander; in either caſe crediting his account with the amount of the ſales; But added, at the

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ſame time that if the defendants ſhould ſell the lands, he hoped they would give Hicks and Campbell the refuſal, as he had promiſed the ſame to them. That at this time, Buck was from home, and Brander wanted to conſult; or the bargain might perhaps, have been then made: But, as it was, Brander only ſaid that he would endeavour to ſell the lands for the beſt price that could be gotten, and would correſpond with Kinkaid concerning them. That Brander converſed with ſeveral, but found none willing to give as much as Hicks and Campbell; although he learnt from Quarles that the lands would riſe in value. That, upon Bucks return, the defendants reſolved to take the lands, and thereupon a correſpondence was opened with Kinkaid, about them. That one part of the contract with Moſely, was that he ſhould have a further ſtay of execution, for the balance of the money. That, between the time that the defendant was entruſted to ſell, and the purchaſe of Moſely, the plaintiff frequently threw himſelf in the way of the defendants, and converſed about the lands. Once at Hicks and Campbells; who followed the defendant Brander and ſaid, if more was offered than they had offered, they would give as much as any man; and aſked the refuſal; which the defendant promiſed. That, from converſation with the plaintiff on the ſubject, the defendant found out, that giving a preference to Hicks and Cambell and to the plaintiff was the ſame thing. Perhaps, at other times, the defendant might have promiſed the refuſal to the plaintiff; Knows that under the impreſſion, that Hicks and Campbell and the plaintiff were all one, the defendant did make the promiſe of a refuſal to him. That the defendant never offered the land to the plaintiff; but, having from the firſt determined to buy himſelf, he wiſhed to avoid the plaintiff; who he feared, might take ſome unfair advantage of him, with Moſely. Poſſibly the defendant might have mentioned Moſely's name to the plaintiff; but ſuppoſes, it was in ſuch a way, as to ſhew the cor-

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respondence was carried on, through the medium of Kinkaid. Admits the tender, after the plaintiff knew that the defendants intended to take the lands themselves. That the defendants did not pay the fees, on the first interview with Anderson: That the plaintiff advised him to pay them; and said that he would advance the money, and take the whole deducting the fees. To which the defendant made no reply. That the plaintiff once said to Buck, that he would give more, than 2/; and that he and Hicks and Campbell were the same thing. That from the first application to the defendant Buck, the plaintiff was told the land was to be sold to pay a debt due to Kinkaid & co. that Buck and Brander were to have the money; and that he did not know that the lands would be for sale, which might have induced a belief, that the defendants intended to take them. That the defendant Buck never made any contract with the plaintiff, or promised him the refusal.

Amongst the exhibits filed in the cause, are, the agreement between Mosely and the defendants for the purchase of the lands. An acknowledgment by Hicks and Campbell, that they were treating for the benefit of the plaintiff. A letter from the defendant Brander to Kinkaid (referred to in the answer,) mentioning that Mosely had authorized the defendants to sell. That, agreeable to his instructions they had offered 2000 acres for sale, giving as he wished a preference to Hicks and Campbell; who seemed steady, as to price, and offered no more than 2/. That he afterwards applied to Pickett, Fenwick, Quarles and Anderson; but none of them would give as much as Hicks and Campbell. That, finding the above price might be got any day, he wished Kinkaid to mention it to Mosely, and ask his concurrence in a sale. That it was probable, if Buck and Brander could spare the money, they might take; and that he supposed a sale, to them, might be as agreeable, as to Mosely. That, if Mosely

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agreed to the ſale, he might credit him for the ſame by Buck and Brander.

Another letter from Kinkaid to Brander. Informing him, that Moſely will let him have the lands; although he had hoped for, and expected ſomething better. A third letter from Brander to Kinkaid. Stating, that he, as well as Moſely, had once hoped to get more from Hicks and Campbell, from their anxiety to purchaſe of Moſely, or at all events to have a preference, from whom he ſhould empower to ſell the land. A promiſe which they ſaid they had obtained, and he believed that they had promiſed Moſely, if any body would give more, that they would come up to it: But he believed, it was only to gain their object; as they were the higheſt bidders in the market by a third. That it was not till after two applications to Hicks and Campbell (who were ſteady in the price of 2ſ,) that he thought of taking the lands on account of Buck and Brander. That if Moſely was diſſatisfied he was at liberty to make the moſt of the lands.

The Court of Chancery was of opinion, that the act of Aſſembly, to prevent frauds and perjuries, was not pleadable by the defendants; but that they were truſtees for Copland; and ordered a conveyance, upon payment of the money, or a tender thereof. From which decree Buck and Brander appealed to this court.

Warden for the appellants. The act of Aſſembly is expreſs, that no ſuit can be maintained on a parol agreement; and at law no action would have lain. Courts of Equity have been extremely cautious not to depart from the principles of the ſtatute which is a beneficial one, and ought to be adhered to. 1. *Wms.* 618, 770. *Pow. Contr.* 281: But our act of Aſſembly is more extenſive in its operations than the act of Parliament in England. For the recital of the preamble, in the Britiſh ſtatute, ſeems to countenance the idea, that particular caſes only were intended to be provided for;

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but our act was manifeſtly intended to include all caſes of parol agreements not particularly excepted by the words of the ſtatute.

Nor will the admiſſion in the anſwer help the plaintiffs caſe; becauſe the act of Aſſembly has been plead and inſiſted on. 1. *Fonbl. Eq.* 165. Beſides the anſwer does not admit any preciſe agreement; nor does the bill charge one, but merely a promiſe of refuſal; and Copland had not agreed on any particular price, nor could have been forced to give the beſt price, in the market.

CALL and WICKHAM *contra.* As the defendants have confeſſed the agreement in their anſwer a performance may be decreed. *Ambl.* 586. 1. *Black.* 600. 3. *Atk.* 3. This rule has no exception, where there is an expreſs confeſſion of the contract. For the diſtinction is, where the ſtatute is plead and the agreement denied, and where the ſtatute is plead and the agreement confeſſed. In the firſt caſe, you cannot reſort to evidence to diſprove the anſwer; but in the other, you may hold the defendant to his confeſſion. Becauſe there is no danger of either fraud or perjury, the two evils which the ſtatute was intended to guard againſt. It is like a declaration at law, which need not ſtate, that the agreement was in writing, but it is ſufficient to prove it on the trial; and, if the defendant confeſſes the action, judgment will be rendered againſt him.

The doctrine in 1. *Fonbl.* 165. does not overthrow this reaſoning. 1. Becauſe that was but the ſolitary *dictum* of a ſingle Judge, in a caſe, where, it appears, the plea was overruled. 2. Becauſe the ground, he put it on, is not the true one; and never was aſſumed in any caſe before. For a man, by omitting to plead a general ſtatute, does not loſe the benefit of it: Which is proved by the caſes at common law, where the defendant does not plead the ſtatute, but takes exception at the trial. The rule on the act of limitations is no anſwer; for that proceeds upon a different ground;

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namely, that there are exceptions in the ſtatute, as infancy, coverture and abſence beyond ſeas; which the plaintiff ought to have an opportunity of ſhewing. So that the difference is, where the plaintiff has a right to be informed of the nature of the defence, and where he has not. But as the ſtatute of frauds contains no exceptions, the defendant is not bound to plead it; becauſe the plaintiff ſtands in no need of the information. Hence the reaſon, given in the *dictum*, is not only unfounded in principle, but is not the ground of any deciſion. 3. Becauſe Lord Thurlow does not adopt that reaſon, in the opinion which he afterwards delivered; which, if it had been conſidered as found, he certainly would have done; becauſe it would have relieved him, from a great deal of nice diſcuſſion.

The caſes therefore may all be reſolved into Lord Thurlow's diſtinction. That the plaintiff ſhall not produce evidence *aliunde* to diſprove the anſwer; but if the anſwer does confeſs the agreement, as the plaintiff has no occaſion to reſort to evidence, the defendant ſhall be held to his confeſſion. 2. *Bro. Cas. Ch.* 567.

Nor is it material that the plea in that caſe was ultimately allowed. For the laſt decree did not decide againſt the ground taken in the firſt, but turned on quite diſtinct principles; namely, 1. The difference between the contract ſtated in the bill, and that confeſſed in the anſwer. 2. The original incompleteneſs of the contract; which was not definitive, but left a *locus pœnitentiæ*. Therefore the court, ſo far from overruling the doctrine, clearly admits that it will prevail; and conſequently ought to be underſtood as having decided upon the circumſtances of that particular caſe. Of courſe, as the defendants have, ſubſtantially, admitted all the allegations of the bill in the preſent caſe, they are bound by their confeſſion; and the more eſpecially, as it is the caſe of

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a truſt. 2. *Atk.* 156. For the rule is, that the ſtatute never ſhall be interpoſed to cover and protect a fraud. 1. *Fonbl.* 171: And as the defendants were the agents of both parties, and had, in effect, undertaken to procure the lands for the plaintiff, they will not be allowed to diſappoint him, and take the purchaſe to themſelves, under a pretence, that, as the agreement was not in writing, it cannot be carried into effect. 2. *Eq. cas. ab.* 50. *pl.* 26. *Mosely rep.* 39.

RANDOLPH in reply. This is probably the firſt caſe on our ſtatute, and the Engliſh deciſions proceed upon falſe principles. The doctrine, in effect, goes ſo far as to ſay, if a man is honeſt and tells the truth he is gone; but if he will be baſe enough to tell a falſehood, and deny the truth he is ſafe. However, even upon the Engliſh caſes, the plaintiff cannot ſucceed. For, the diſtinction is, where only the plea ſtates the ſtatute, and where, the plea and anſwer both ſtate it: *Prec. Ch.* 208. But in this caſe the anſwer expreſsly inſiſts upon the benefit of the ſtatute; and therefore it does not fall within the principles of thoſe deciſions. The caſe of *Whitchurch* vs *Bevis* 2. *Bro. cas. Ch.* 567, was ultimately decided upon the authority of *Whaley* vs *Bagenal* in the Houſe of Lords, 6. *Bro: Parl. cas;* which appears to have exploded the doctrine, that a confeſſion in the anſwer would avoid the plea of the ſtatute.

But, be that as it may, the plaintiff, upon his own ſhewing, was not entitled to recover. For he does not ſtate (and much leſs, does the anſwer confeſs) any poſitive agreement. It was merely a promiſe of the refuſal, and not an undertaking to procure the lands for the plaintiff. Therefore he might decline taking them, when they were offered. Indeed the very promiſe of a refuſal, implies a right to reject the offer. But both parties muſt be bound or neither. *Cook* vs *Oxley*, 3. *Term rep.* 653. Wich is conſiſtent with the doctrine laid down by the court in the latter part of

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the case of *Whitchurch* vs *Bevis*, *Bro: cas. Ch.* There was consequently no contract, which could be the foundation of an action; and therefore the plaintiff was clearly not entitled to relief.

But the decree is erroneous upon another ground; namely, that Mosely was no party to the suit. Because he was essentially interested in the question; and the rule is, that all parties, having any interest in the matter to be decided, ought to be plaintiffs or defendants to the suit. *Harr: Ch: pract:* 38, 41. Therefore, as Buck and Brander have not the legal title, but merely possession of the surveys, a decision between them and Copland, may eventually affect the interest of Mosely; who ought consequently to have an opportunity of defending his own interests.

There is no pretext for saying that Buck and Brander were the agents of Copland. No evidence shews that they undertook to perform any thing for him; and they expressly deny that they were agents.

CALL *contra.* The case of *Whaley* vs *Bagenal* is probably inaccurately stated in the report of *Whitchurch* vs *Bevis;* which is the only account we have been able to procure of it, at this place. But, at any rate, that case affords nothing contrary to the doctrine we contend for. Because it appears, that there was no answer in the cause; and therefore there could have been no decision upon the point of confession, whatever the abridgment of the case may state. For the Lords never give any reasons for their judgment; but content themselves with a silent vote.

The case of *Cook* vs *Oxley*, 3. *Term reb.* is a strange one; and seems contrary to an opinion in the year books. 5. *Vin: ab:* 515. *pl.* 10, 11. But, at any rate, it will not affect the present case, because here was an absolute agreement to take at two shillings; and Copland was positively bound

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for that ſum. Therefore the refuſal only applied to the caſe, of more than two ſhillings being offered by ſome other perſon; and it is to the latter event only, that the caſe of *Cook* vs *Oxley* will bear any application.

There was no neceſſity for making Moſely a party; becauſe no conveyance of the lands from him to the defendants was neceſſary; the aſſignment of the ſurvey and papers was ſufficient. So that the defendants are in poſſeſſion of a title which they can make effectual, without any further act from Moſely: And that will enable us to proceed againſt them.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court as follows.

The Court after mature conſideration, does not diſcover that Mr. Copland is entitled to the relief which he ſought by his bill.

Indeed ſuch a ſuit, in a Court of Equity, appears to be a little extraordinary. For if we underſtand the nature of it, as ſtated in the bill, it is to obtain the transfer of a fraudulent contract, ſuppoſed to have been made by Buck and Brander, as truſtees for Copland, with Moſely; without allowing the latter any ſatisfaction for the injury, or even making him a party to the ſuit; although he was original owner of the land, and the perſon on whom the fraud was firſt and principally committed: Since it is charged, that Buck and Brander concealed from him, the offer by Mr. Copland of two ſhilling per acre, and of more than any other perſon would give for the land. So that according to that ſtatement, Moſeley had a right to ſet aſide the contract with Buck and Brander, and to have the land reſtored to him again: And as Copland had made no contract with him, he could derive no claim from the ſale to the others.

But

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But Mr: Copland inſiſts, *that* he confided in Buck and Brander to make the purchaſe for him; *that*, by promiſing to write to Moſely on his behalf, they thereby became inveſted with a fiduciary character; and were converted into truſtees for him, as well as for Moſely; *that* acting as truſtees for Moſely, they had promiſſed him a refuſal of the land, and therefore ought not to have purchaſed for themſelves without his conſent: *that* ſuch truſts are not within the ſtatute of frauds, but a Court of Equity will enforce an execution of them; and therefore, *that* the plea in the preſent caſe will not avail the defendants, who being in poſſeſſion of the lands and title papers are not entitled to hold them; but ought to convey them to him, and not enjoy the benefit ariſing from their own miſconduct.'

But how is the truſt proved? Buck and Brander deny it. They aver that they had power from Moſely either to ſell the lands or retain them to their own uſe, in part of the debt due to them; and that they only promiſed a refuſal to Copland in caſe they ſhould ſell. They deny that they ever wrote, or engaged to write to Mr. Moſeley, for or on behalf of Copland, or made any other promiſe, than a refuſal, in caſe more than two ſhillings per acre ſhould be offered; finally they deny that they ever had any offer made to them, by Copland or any other perſon, of more than two ſhillings per acre, until after the agreement was made with Mr. Moſely, for the purchaſe on their own account; although they admit that Mr. Copland (who according to his own ſtatement, at laſt only tendered two ſhillings) ſometimes ſtated that he would give more, but did not ſay how much. In all which reſpects the anſwer is not contradicted, or diſproved by any teſtimony in the cauſe; and, as it is reſponſive to the bill, the facts as therein ſtated, muſt be taken to be true. So that the truſt is ſo far from being confeſſed, that it is poſitively denied, and the plaintiff produces

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no evidence to eſtabliſh it. Of courſe the arguments bottomed on the truſt all vaniſh; and the plaintiff had no foundation for relief upon that ground.

But if the truſt was eſtabliſhed, yet Moſely who was ſo much intereſted, and is ſaid to have been injured by the tranſaction, ought to have been made a party. For ſurely a Court of Equity would not decree all the benefit of the fraud, if one was committed, to the plaintiff only; and give him the whole gain ariſing from the miſconduct of his own truſtees. On the contrary we ſuppoſe, that in ſuch a caſe, a Court of Equity would ſet aſide the ſale to Buck and Brander; and (as the promiſe to Mr. Copland was only of a refuſal of the land, ſo that he might perhaps be allowed to take it or not as he pleaſed,) direct a new ſale. By which means Copland would have an opportunity of bidding for it, and by a fair public ſale, juſtice would be done to Moſely, the party moſt injured in the buſineſs; and who was conſcientiouſly entitled to the beſt price that could be gotten for the land.

But as no truſt is proved and no agreement in writing ſhewn, Mr. Copland has no equity; but was completely barred by the plea.

The decree of the Court of Chancery, therefore is to be reverſed, and the bill diſmiſſed with coſts.

MEADE

MEADE
against
TATE.

TATE assignee of William and James Donald and company, brought debt in the County Court against Nicholas Meade, upon a penal bill. The defendant plead payment. And on the trial of the issue the plaintiff filed a bill of exceptions stating, that the defendant introduced the deposition of William Meade, who said, that some time before the above company's agent Robert Montgomerie left the county of Bedford, the deponent paid him a sum of money, he thinks about thirty pounds, perhaps a little more or less, in discharge of a debt due by Nicholas Meade the defendant to the said company, for which they had his the said Nicholas's bond or note, which when applied for, the deponent was informed by the said Montgomerie, that it had been sent off with the books of the company, and in lieu thereof he obtained a receipt in full of the debt aforesaid. Which receipt is either lost or mislaid. That the money so paid was not in discharge of aught that was due from the deponent to the said Nicholas, but was paid by the deponent at the special request of the said Nicholas, who thereby became indebted to the deponent in the sum so paid. That the defendant also introduced a witness who said, that William Meade was heard to say, that Nicholas had paid him the money he had advanced to William and James Donald and company, before the bringing of the suit. That the plaintiff objected to reading of the deposition aforesaid, as illegal evidence; but that he was overruled by the court.

A witness received to prove that he paid a sum of money for the defendant to the agent of the plaintiffs assignors in discharge of the obligation upon which the suit was brought.

Verdict and judgment for the defendant. Whereupon the plaintiff appealed to the District Court.

The District Court was of opinion that the judgment was erroneous, in this, "That the "County

Meade. *vs.* Tate.

"County Court permitted the depoſition of William Meade who was intereſted in the event of "this ſuit to go as evidence to the jury." It therefore reverſed the judgment, with coſts; ſet aſide the proceedings ſubſequent to the iſſue; and ſent the cauſe back to the County Court for further proceedings to be had therein. Meade appealed from the judgment of the Diſtrict Court to this court.

RANDOLPH for the appellant contended that the witneſs was not intereſted, and therefore that the judgment of the Diſtrict Court was erroneous.

Per: Cur: Reverſe the judgment of the Diſtrict Court; and affirm that of the County Court.

HENDERSON, &c.

againſt

HEPBURN, &c.

An action, in the name of the aſſignee of a bond with a collateral condition dated in 1774, is not maintainable.

What a bond with a collateral condition.

HEPBURN and Dundas aſſignees of Maynadeer adminiſtrator, &c. of Murray brought debt againſt Henderſon & others executors of Kirkpatrick, upon a bond with a collateral condition, given by Kirkpatrick, June 9th 1774, to Murray. The condition of the bond was as follows, "Whereas the above bound Thomas Kirkpatrick "hath this day by indentures of leaſe and releaſe, "bearing date the eighth and ninth days of this "inſtant June, bargained and ſold a tract of land, "ſituate in the county of Fairfax aforeſaid, ſup"poſed to contain nine hundred and forty ſix "acres, to the above named James Murray, for "the ſum of one thouſand pounds, Virginia cur"rency: And whereas it is doubted whether ſome "older patents and tracts of land do not interfere

"with

"with the said land so bargained and sold and "take part of it away; and it is proposed, that "the same shall be surveyed and plotted, to as- "certain the true number of acres contained in "the said land, free, clear and exclusive of all "and every other elder patents and surveys, and "that there shall be a proportionable deduction "and abatement, from the said sum of one thou- "sand pounds, for such quantity of the said land "as may appear to be wanting and deficient after "making such survey and plott, occasioned by "any older patents and surveys, or otherwise. "Now the condition of the above obligation is "such, that if the above bound Thomas Kirkpa- "trick shall cause the said land to be accurately "surveyed on or before the fifteenth day of No- "vember next ensuing, at the joint and common "expence and charge of the said Thomas and the "said James Murray, and shall, in case any de- "ficiency shall appear to be in the said quantity "of nine hundred and forty six acres after such "survey, allow an abatement and deduction for "such deficiency from the said sum of one thou- "sand pounds, according to the proportion that "the said sum of one thousand pounds bears and "hath to nine hundred and forty six acres; or in "case that the said sum of one thousand pounds "shall be paid before the said deficiency shall be "ascertained, if the said Thomas shall repay and "refund to the said James Murray, his heirs or "assigns such sum as he or they may and shall be "entitled to for such deficiency according to the "proportion aforesaid. That then and in such "case the above obligation shall be void, other- "wise that it shall be and remain in full force "and virtue."

The plaintiffs assigned for breaches of the con- dition, "That neither the testator of the defend- "ants in his life-time nor the said defendants "since his death have refunded to the said James "Murray or any person claiming under the said "James

Henderſon vs. Hepburn.

"James Murray, or the ſaid plaintiffs for the deficiency of the land mentioned in the condition of the bond, ſo much money as they were entitled to receive for the deficiency aforeſaid, according to the proportions mentioned in the ſaid bond."

The defendant plead *conditions performed;* and the plaintiff took iſſue. The jury found a verdict for the plaintiff for £ 269 : 4 : 6 damages; and the defendant moved to arreſt the judgment for the following reaſons. 1. Becauſe the bond in the declaration mentioned was not aſſignable. 2. Becauſe the plaintiff, in aſſigning breaches, did not ſtate there was any or what deficiency in the land, occaſioned by the interference of older patents or ſurveys; or the ſum to which the plaintiff was entitled on account thereof.

There are amongſt the papers copied into the record, a copy of a ſurvey made in purſuance of an order of the court, whereby the true quantity of the land appears to be 820 acres. The notice of making the ſaid ſurvey is accepted by Wilſon who ſtates himſelf to be attorney for the executors.

The Diſtrict Court gave judgment for the plaintiff; und the defendants appealed to this court.

CALL for the appellant. The bond, being dated in 1774, was not aſſignable, *Craig* vs *Craig* * in this Court; and perhaps the plaintiffs have no title for another reaſon, namely, that the aſſignment is made by the executors when the bond belonged to the heir *Eppes* vs *Demoville* † in this Court. The condition of the bond is in the alternative; that is to ſay, that, if the purchaſe money is paid before the ſurvey, then the obligor will refund; but if not, then that he will rebate in proportion to the deficiency. Now it does not appear, from the manner in which the breaches are aſſigned, whether

* 1. Call's Rep. p. 483.
† Ante 22.

whether there ever was any rebatement or not; and conſequently the aſſignment is in the nature of a negative pregnant; for although no money had been refunded, yet it might have been rebated. Which argument is the ſtronger, when it is recollected, that it is not ſtated, whether the purchaſe money was ever paid or not; and if it never was, then the plaintiffs claim, at moſt, was only for a rebatment, and not for repayment. In which caſe, he would not have ſtated a title to recover. But, at any rate, the omiſſion to ſtate the quantity of land, in which the tract was deficient, is fatal; for that was neceſſary in order to apprize the defendants with what they were charged, ſo that they might come prepared to defend themſelves. *Chichester* vs *Vass* * and *Cabell* vs *Hardwicke* † in this Court: which laſt caſe was a deciſion in the very point.

WICKHAM *contra*. *Craig* vs *Craig* is not applicable to this caſe; becauſe that was the caſe of a bond for the title, and not a bond for payment of money as this is; for the repayment was to bear an exact proportion to the deficiency. Now that is certain which may be rendered certain; and this was capable of being reduced to certainty, by mathematics and arithmetic. Taking it then, as a money bond, and the caſe is clear; becauſe the act of Aſſembly, paſſed in the year 1748 *ch.* 27, is expreſs that bonds for payment of money or tobacco may be aſſigned, *old edition Virginia laws* 249. The caſe of *Eppes* vs *Demoville*, was a bond for title; and therefore no argument can be derived from it in favour of the appellants. Beſides that caſe turned on the form of the action. The defendants cannot except to the aſſignment of breaches, after the plea of conditions performed and iſſue on it, with a verdict in favour of the plaintiff; becauſe the plaintiff

* 1. Call's Rep. p. 83.

† 1. Call's Rep. p. 345.

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tiff must have proved a deficiency upon the trial, or he could not have obtained a verdict. *Cabell* vs *Hardwicke* turned on the omission to state for whose benefit the suit was brought; and therefore is not like this case. In *Call* vs *Ruffin* * the breaches were as imperfectly stated as in this case; but yet the Court thought them sufficient after verdict. The judgment in this case, will be a perpetual bar to all future actions on the same bond. Besides the defendants consented to a survey; and thereby have agreed, that what was dubious before, should be reduced to certainty. This is an action of debt which is less strict than covenant; and therefore there was less necessity to be particular in assigning the breaches.

CALL in reply. Independent of the decision in *Craig* vs *Craig*, it is a general principle of the common law that no paper given for a contingent or uncertain demand is assignable. Thus a bill of exchange or a note for payment of money is not negotiable, if the payment depends upon a contingency. This was clearly a bond with a collateral condition; for first, it was to be ascertained, whether there were any older or interfering titles, and then, what deficiency they produced, before the plaintiff was entitled either to a rebatement or to have any thing refunded to him. Therefore, in order to maintain the action, it was essential to state in the declaration, either that there had been a survey and deficiency ascertained, notwithstanding which the testator and his executors refused to rebate or refund, as the case might be, or else that the testator had failed to have the survey made, within the stipulated period; in which latter case, the damage would have been the loss of the rebatement or refunding, which had not been ascertained for want of the survey. The case of *Cabell* vs *Hardwicke* did not turn, merely upon the omission to insert the name of the person for whose benefit the suit was brought, but the

* 1. Call's Rep. p. 333.

the insufficiency in the assignment of breaches was also one of the grounds, expressly, on which the Court proceeded. The plea of conditions performed, makes no difference; for that was the plea in *Cabell* vs *Hardwicke*, and yet it was not thought sufficient to maintain the declaration. The order for the survey, stated in the record to be made by consent, does not assist the plaintiff; because it forms no part of the pleadings; and it is not asserted, on the record, that the object was to supply the defects in the prior proceedings.

WICKHAM. Bonds are assignable, under the act of Assembly, in some cases where bills of exchange are not; and it never has been admitted in any case, that with respect to negociability there was any great similitude between bonds and bills.

CALL and BOTTS. If that argument be correct, then every manner of bond is assignable; because money or tobacco is recoverable on all bonds.

Cur. adv. vult.

LYONS Judge. Delivered the resolution of the Court, that the bond was clearly a bond with a collateral condition, and therefore not assignable within the act of 1748. Consequently that the judgment of the District Court was to be reversed, and judgment on the verdict arrested.

Judgment Reversed.

N. B. Judge Roane was confined to his room by indisposition, upon the day on which the Court gave judgment; and therefore was not present when the resolution of the Court was given, but he has favored me with a copy of the notes of the argument he intended to have delivered, which were as follows.

"The first and principal question, in this case, is, whether the bond, declared upon, is such a

bond,

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bond, as under the act of Assembly will authorize an assignee thereof to bring suit upon it, in his own name?

The bond is dated on the 4th of June 1774, and assigned the 17th of November 1791. It will therefore be governed by the act of October 1786 *Chap.* 29; and in the new code the clause of the act now in question is, as follows, "Assignments "of bonds, bills and promissory notes and other "writings obligatory for payment of money or to-"bacco shall be valid &c." So that the question is, whether the bond, before us, is a bond for the payment of money within the meaning of this clause? and this question may be elucidated, if not resolved, by considering what bonds are considered as bonds for the payment of money, in other and clearer passages in our laws?

By the act of 1748, re-enacted in 1792 *Rev. Cod.* 118, it is enacted that in actions which shall be brought on a bond or bonds for the payment of money, judgment is to be entered for the principal sum due thereon and interest. The bonds, here intended, are clearly such as if not single bonds are to be defeazanced by the payment of a lesser ascertained sum, called the principal, and which no assessment by a jury is necessary to calculate and render certain; bonds, which when declared on, do not require particular breaches to be assigned; and in which a recovery is had, as of the debt due by the bond, and not as of damages to be ascertained by a jury.

Such is clearly the nature of a bond, for the payment of money, in the clause just referred to; and if, in the clause immediately in question, the same words are found, as descriptive of assignable bonds, the former clause may be resorted to, as a key for the understanding thereof.

But, by the same clause of the act of 1792, in actions on bonds, for performance of covenants, particular breaches must be assigned; and a jury

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are to aſſeſs, and the court to give judgment, for damages, inſtead of any leſſer aſcertained ſum in the condition.

The diſtinguiſhing criterion then, between theſe two deſcriptions of bonds, is plainly marked out by the act of 1792. That criterion exiſted in our laws, before the period in which it was transferred into the new code, from the acts of 1748; and muſt be ſuppoſed to have been in the mind of the Legiſlature, when it enacted the clauſe allowing aſſignments.

By that criterion, whenever a bond appears, with a ſmaller ſpecific ſum, mentioned in the defeazance, or the bond ſhall be ſingle; whenever judgment is to be given for that ſum with intereſt, and not for damages to be aſcertained by a jury; and whenever particular breaches are not neceſſary to be aſſigned, a bond of this deſcription is a bond for the payment of money, within the meaning of the clauſe in queſtion. But if there be no aſcertained principal ſum, for which judgment can be rendered; if the intervention of a jury be neceſſary to aſcertain what is due by way of damages; and if the defendant muſt be notified, by a particular aſſignment of breaches, wherefore the action is brought againſt him, ſuch a bond is not to be conſidered as a bond for the payment of money, under the act in queſtion.

To teſt the bond, before us, by this criterion. It is a bond to be defeazanced, if the obligor ſhall ſurvey the land by a certain time, and refund or abate money, as the caſe may be, if the obligee ſhould be found to be injured by the interference of older ſurveys. It is a bond whereby the obligor covenants, both to ſurvey, by a certain time, and to make good the deficiency, if any. The obligee has his action againſt him for the failure of one or the other; and this obſervation, it is ſuppoſed, is deciſive of its not being a bond, for the payment of money, only. It is a bond nei-

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ther single, nor to be defeazanced by the payment of a lesser certain sum, called the principal; a bond, in which, a particular assignment of breaches is absolutely necessary; and, as to which, no judgment can be given, without the intervention of a jury, ascertaining the damages sustained, by the obligee.

Is this bond, therefore, to be considered, as a bond for payment of money, in the face of those prominent distinctions, which I have just mentioned?

It is said to be such a bond, because money is to be paid, in the event of a deficiency of the land; and that mathematics and arithmetic may render the sum to be paid absolutely certain. But my answer is, that this differs from the commmon case of a general covenant to make good a deficiency, only in this, that here the parties, by previous agreement, have given a rule to the jury in assessing damages if any; but that, except in this particular, the case is the common case of a bond, for the performance of covenants, in every respect. The only difference is, that here an arbitrary assessment of damages is prevented, by the consent of the parties, and the general power of juries, in respect to damages, is in this instance abridged; as it was in the case of *Lowe* vs *Peers* 4. *Burr.* 2229. Where is was agreed by Peers, that if he did not marry Lowe, that he would pay her £ 1000: And it was held that the jury, in ascertaining damages, would be confined to the £ 1000 as the precise sum fixed and ascertained, by the parties.

Mr. Wickham likens the case, to that of a bond conditioned to pay £ 1000, but attended with an agreement, that it shall be liable to be affected, by the real state of the accounts, between the two parties. To which I answer, that there is no similitude between the cases; for such a bond, as that, would fall, strictly, within the description

of

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of bonds, for payment of money, as to the manner of declaring and the nature of the judgment to be given. Although, in consequence of the agreement entered into, it may happen, that nothing may be really due them.

Upon the whole, I am clearly of opinion; that the present is not an assignable bond, within the meaning of the act of Assembly.

This view of the case precludes the necessity of my considering the legality of the assignment of breaches; although my present opinion is, that they are insufficiently assigned.

KNOX

against

GARLAND.

GARLAND brought an action on the case in the District Court against Knox. The declaration contained 3 counts 1. For goods, wares and merchandizes sold and delivered. 2 A *quantum valebat* for goods, wares and merchandizes sold and delivered. 3. For money had and received to the plaintiffs use. Plea *non assumpsit;* and issue. Upon the trial the defendant filed the following demurrer to the evidence. Memorandum, that upon the trial of the issue in this cause, the plaintiff to maintain the issue on his part, produced

If the demurrer to evidence shews that the plaintiff ought not to recover, the court cannot set it aside and award a new trial, but ought to enter judgment for the defendant.

Where the plaintiffs evidence is not doubtful and uncertain but defective only, the defendant may demur.

In such a case, if the Court does set

aside the demurrer and award a new trial, the defendant may appeal.

And if the defendant offers to appeal and the court refuses it, this court will reverse the judgment notwithstanding there was a continuance by consent at a subsequent term, and after that a verdict and judgment for the plaintiff.

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duced four papers purporting to be public securities in these words.

£ 12: 10: 3 specie.

Commissioners office June 15th 1783.

Sir,

Pay to Nathaniel Harrison the sum of twelve pounds ten shillings and three pence specie for beef and corn furnished com. pro. law, in Buckingham as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.
* SAMUEL JONES.

Mr. Treasurer, Forged.

Endorsed Treasury 5th March, 1792.

There is no mention of any such certificate as the within, in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

£ 5: 10. Specie.

Commissioners office June 12, 1783.

Sir,

Pay to John Clopton the sum of five pounds ten shillings specie for beef furnished the Com. pro: law in Augusta, as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.
SAMUEL JONES.

Mr. Treasurer Forged

Endorsed Treasury 5, March 1792.

There is no mention of any such certificate as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit. J. AMBLER.

£ 4: 14. Specie. Commissioners

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vs
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Commissioners office June 9th 1783.

Sir,

Pay to Edward Oldham the sum of four pounds fourteen shillings specie for beef furnished the Com. pro. law, in Berkeley, as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer. Forged

Endorsed Treasury 5 March 1792.

There is no mention of any such certificate as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

£ 140 Specie.

Commissioners office July 17, 1783.

Sir,

Pay to James Knight the sum of one hundred and forty pounds specie for a waggon and four horses furnished the Com. pro. law. in Augusta as per certificate allowed by the court of claims in the said county.

M. CARRINGTON.

SAMUEL JONES.

Mr. Treasurer. Forged.

Endorsed Treasury 5th, of March 1792.

There is no mention of any such certificate, as the within in the returns made to this office by the commissioners, and therefore it is pronounced a counterfeit.

J. AMBLER.

He also offered in evidence to the jury an endorsement on each of the said papers and on the face of each of the said papers the word forged, which were proved to be the hand writing of Jaquelin

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quelin Ambler the treasurer of this Commonwealth, and to have been written in consequence of the said certificates being presented at the treasury office of the Commonwealth after the plaintiff bought them. The plaintiff also proved by John Wilder, that he John Wilder lived in the store of the defendant in the month of April 1790, and bought a paper of one Jesse Woodward which purported to be a public certificate signed by Mayo Carrington and Samuel Jones as commissioners for £ 140 for a waggon and horses, which he afterwards sold on account of the defendant to the plaintiff but put no mark on it by which he can know it to be the same that he sold to said plaintiff; neither does he know if either of those now produced is the same. That he the said Wilder acting for the defendant, also sold to the plaintiff three or four other certificates of the said description, all of which amounted to one hundred and sixty four pounds and some shillings, for which he was paid at the rate of 5/6 in the pound, by the plaintiff. That he does not know whether any of the said certificates so sold as last aforesaid, are either of the said papers now produced. The defendant then proved by said Wilder that before he bought the said certificate of £ 140 of Woodward, he applied to William Haxall to know if the same was counterfeit. That the plaintiff was there at the time. That Haxall gave it as his opinion that the same was not counterfeit. That the plaintiff on the same day, and before he bought the last mentioned certificate told the deponent that he the plaintiff would give 5/6 per pound to the deponent for the same if the deponent bought it. That after the deponent had bought it, which was on the same day aforesaid the plaintiff did apply on that day, once or twice to deponent, to know if he would sell it him for 5/6. That he did afterwards sell it to the plaintiff for the sum of 5/6 in the pound, and received the purchase money accordingly, and this being all the evidence which the plaintiff and defendant offered to the jury,

the

Knox vs. Garland.

the defendant demurs to the ſame as inſufficient in law to maintain the plaintiffs action, and ſays that he is not, neither is he bound by the law of the land to make any further or other anſwer thereto, and this he is ready to verify: Wherefore he prays judgment and his coſts in his behalf expended to be adjudged to him. And the plaintiff doth aver that the ſame evidence is ſufficient in law to maintain his ſaid action and prays judgment and his damages aforeſaid to be adjudged to him together with his coſts about his ſuit in this behalf expended.

The Diſtrict Court overruled the demurrer to the evidence; and ſetting aſide the verdict and proceedings ſubſequent to the iſſue, awarded a new trial. The record then ſtates, that the defendant prayed an appeal; *which the court refuſed to grant, becauſe as yet they have rendered no final judgment in this cauſe.* At a ſubſequent court, the ſuit was continued, *by conſent of parties.* And at a future court, the record proceeds thus, "This day came the parties by their attornies, and thereupon came alſo a jury &c. who being elected &c. ſay that the defendant did aſſume upon himſelf in manner and form as the plaintiff againſt him hath declared, and they do aſſeſs the plaintiffs damages by occaſion of the non performance of that aſſumption to ſixty three pounds ſix ſhillings, beſides his coſts." Therefore it is conſidered by the court that the plaintiff recover againſt the defendant his damages aforeſaid, in form aforeſaid aſſeſſed, and his coſts by him about his ſuit in this behalf expended, and the ſaid defendant in mercy &c.

To this judgment the defendant obtained a writ of *ſupersedeas* from this court.

CALL for the plaintiff in the *ſupersedeas*. Contended;

1. That the Diſtrict Court erred in overruling the demurrer and awarding a new trial, as the demurrer clearly diſcloſed a ſufficient bar to the plaintiffs action.

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For the plaintiff did not ſhew, that the papers were forged. His only evidence, as to that, is, that he applied to the Treaſurer; and he has neither ſummoned the commiſſioners, or taken the common precaution of applying at the Auditors office. He has therefore precipitated his caſe, without the proofs neceſſary to ſupport his action. Beſides Knox was an innocent purchaſer, in the fair courſe of his buſineſs, of the papers in queſtion, and therefore he is not liable to refund the money, which he afterwards ſold them to the defendant for, without any knowledge of their being counterfeit. *Price* vs *Neal*, 3. *Burr:* 1354. The reaſoning of Lord Mansfield, in which caſe, expreſsly applies to that before the court. For whatever neglect there was, in the preſent caſe, was upon the ſide of Garland; as the defendant had actual iucouragement from him, and *bona fide* paid the whole value to Woodward. So that it is a misfortune which has happened, without the defendants fault or neglect, but if there be any fault or negligence, it was on the part of the plaintiff as already obſerved. Conſequently, there is no reaſon for throwing off the loſs from *one innocent* man, upon *another innocent* man.

2. That the demurrer to evidence was a proper mode of bringing the caſe before the court. Whenever the plaintiffs evidence does not maintain his action, the defendant may demur and refer it to the court to decide whether the plaintiff can recover or not. For he is not obliged to riſque the law of his caſe with the jury, but has a right to draw it *ad aliud examen Cocksedge* vs *Fanshaw. Dougl.* 114. *Stephens* vs *White*, 2. *Wash.* 230. The demurrer therefore ought to have been ſuſtained, and judgment entered on it in favour of the defendant in the court below.

3. That the ſubſequent proceedings make no difference, and were no waiver of the defendants right.

For

For the defendant offered to appeal; and as he had a sufficient case upon the record to entitle him to judgment, the refusal of the District Court to allow the appeal ought not to prejudice him; and all the subsequent proceedings, there, ought to be considered as *in invitum*. Of course no inference from thence is to be drawn against him.

M'CRAW *contra*. The justice and law of the case are both in favour of the plaintiff in the court below; for whenever a man has paid money to another upon a consideration, which happens to fail, he is entitled to recover it back in an action for *money had and received*. But the demurrer to evidence was clearly improper. For the defendant, thereby, prevented the jury from inferring, from the evidence, the very facts, which his counsel now insists were not proved. But this he could not do; for he was bound either to have admitted the facts, or suffered the cause to have remained with the jury. *Bull. nis: pri:* 313. Besides the defendant has, by his subsequent conduct, waived the objection. For, at a succeeding term, he consented to a continuance of the cause; and finally went into the second trial, without taking any exception. He ought not, therefore, to be allowed to do it now. If, contrary to what is the fact, the evidence stated in the demurrer was insufficient to have enabled the jury to make the necessary inferences, the presumption is, that every essential proof was supplied upon the second trial.

CALL in reply. There is nothing, which, *ex æquo et bono*, entitles the plaintiff to recover of the defendant; who was an innocent person, acting in the regular course of his business, and guilty of no fault. Whether the defendant was liable or not, was a question of law proper for the consideration of the court, and not of the jury. The demurrer therefore, was, clearly, proper. For the jury could not have made any such inferences from the evidence, as is contended for, on the other side. There was nothing in the testi-

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Knox vs Garland

mony which inevitably led to such conclusions. But the inferences ought to be inevitable, or the jury can, no more, make them, than the court; and, where they are inevitable, the court may, as well, make them, as the jury. This is the spirit of the decisions in *Cocksedge* vs *Fanshaw* and *Stephens* vs *White*. No waiver ought to be presumed. Because the defendant offered to appeal, which operated like a bill of exceptions. The defendant was obliged to submit to the second trial; for the authority of the court, in awarding it, could not be resisted, as they would not allow his appeal, but obliged him to remain where he was. It is no answer to say, that the defendant ought to have made another exception at the second trial. For it would have been nugatory and disrespectful, to the District Court, to have presented the same demurrer again. Besides, the parties would, by that means, have forever run round in a circle; and the cause could never have been ended.

Per Curi. The court is of opinion, that the judgment of the District Court is erroneous, in this. That they overruled the demurrer to evidence, after it had been joined by the parties, and set aside the proceedings, in the cause, subsequent to the issue, without the consent of the parties: Although the evidence on the part of Garland was fully set forth in the demurrer; and there does not appear to be any thing uncertain or doubtful in the evidence, so set forth, to prevent the court, from determining the sufficiency thereof, to maintain the issue joined. Therefore the judgment and proceedings, subsequent to the first verdict, are to be reversed and annulled, with costs: And this court, proceeding to give such judgment as the District Court ought to have given, is of opinion, that the evidence, stated in the demurrer, is not sufficient, in law, to maintain the issue joined on the part of Garland; but Knox is to go thereof, without day, and to recover his costs in that court also.

GRAHAM

GRAHAM
against
WOODSON.

THIS was an appeal from a decree of the High Court of Chancery. Where Joſiah Woodſon and wife and others brought a bill againſt Graham and Philip Woodſon. Stating, that Mathew Woodſon leaſed to Graham ſome coal mines in Goochland for the term of 20 years; in which leaſe there is a proviſo, that if Graham ſhould think fit to ſurrender the leaſe before the expiration of the term he ſhould have liberty to do ſo on paying the ſum of five ſhillings. That this leaſe was made for the ſole object of providing more competently for the leſſors daughters; and was ſubſiſting at the death of Mathew Woodſon; who deviſed the ſame, or, which is the ſame thing, the money's ariſing therefrom to his daughters the plaintiffs. That the defendant P. Woodſon being entitled by deviſe from the ſaid M. Woodſon to the reverſion of the ſaid coal mines, after the expiration of Graham's leaſe, the ſaid Graham, after the death of Mathew Woodſon, purchaſed the ſaid reverſionary intereſt; and thereupon ſurrendered the leaſe, and gave notice thereof to the executrix and deviſees aforeſaid of Mathew Woodſon. That this was done by Graham to obtain the land for leſs than its value. That by this means the rights of the plaintiffs will be defeated, if the ſurrender ſhould be allowed to prevail againſt them; which they inſiſt it ought not, as the plaintiffs are entitled either to the money, or to the unexpired term of years in the land itſelf. The bill therefore prays an account and payment of the rent till the regular expiration of the leaſe by efflux of time; or otherwiſe, that he may deliver poſſeſſion of the lands to the plaintiff during the reſidue of the term for which the leaſe was granted, and for general relief.

A leaſes to B for 20 years; with liberty to B of ſurrendering the leaſe at any time before on payment of 5 ſhillings. A devises the rents during the leaſe to his five daughters and the fee ſimple afterwards to his ſon P who ſells to A who ſurrenders the leaſe; this ſurrender ſhall not diſappoint the daughters legacies; but A will be decreed to pay the rents.

Intereſt allowed upon arrearage of rents, upon circumſtances

Graham vs Woodſon.

The anſwer of Graham, admits the leaſe, and deviſe. Inſiſts upon his right to ſurrender under the expreſs words of the leaſe; and that is was on account of the right to do ſo, that he had agreed to give ſo high a rent. That the leaſe being defeaſible in its nature, thoſe claiming the benefits, were ſubject to the diſadvantages of it. That the uncertainty, of its duration, was frequently ſpoken of in converſations between the defendant and the ſaid M. Woodſon. That after ſearching for coal for ſome time without any competent ſucceſs, the defendant in the life-time of the ſaid M. Woodſon had determined to annul the leaſe, unleſs he ſhould in a ſhort time find a body of coal which promiſed more. That things were in this ſtate when the ſaid M. Woodſon died; and in a ſhort time afterwards the apprehenſions of the leaſe being ruinous to him increaſing, he determined to abandon, when he was informed that the defendant P. Woodſon would ſell, and conceiving that a purchaſe would be the beſt means of recovering his expenditures already made upon the leaſe, he bought the fee ſimple. That this circumſtance induced him to make greater exertions in ſeeking for coal; which after great expence he hath at length found in ſuch a degree as to promiſe ſucceſs. Yet notwithſtanding theſe proſpects he is willing to relinquiſh his intereſt in the coal lands, on receiving his expenditures without intereſt, and a reaſonable hire for the ſlaves which have been employed on them.

The anſwer of Woodſon ſays, Graham during the treaty for the reverſion, frequently told him, he would give up the leaſe to his ſiſters ſo as to prevent the defendant from receiving any benefit from it. That he ſold his right to Graham, without any intention of defrauding the plaintiffs.

The depoſitions prove M. Woodſon's intention of providing for his daughters by the leaſe. That Graham when he bought the fee ſimple, ſecured £ 100 each to the two youngeſt daughters if they

were

were ſatisfied. And one of the witneſſes ſays, that after the purchaſe, Graham, in a converſation, ſaid to the defendant Philip, that if he had thrown up the leaſe, he ſhould have done it in favour of the legatees, and not of Philip, as that ſeemed to be his fathers *will*.

Graham *vs* Woodſon.

The Court of Chancery decreed the defendant Graham to pay the rents with intereſt, and if he ſhould chuſe afterwards to abandon the leaſe, to deliver the poſſeſſion of the lands during the unexpired term thereof to the plaintiffs. From which decree Graham appealed to this court.

CALL and WICKHAM for the appellants. Inſiſted, *that* it was like the caſe of a ſpecific deviſe; the deviſee of which is liable to all the caſualties, which may attend the thing bequeathed. Thus, if there be a deviſe of a debt, and the debtor becomes inſolvent or the teſtator releaſes the debt, the legatee loſes it altogether, and cannot claim ſatisfaction out of the other eſtate of the teſtator. That the leaſe in the preſent caſe was in its creation liable to be ſurrendered, and therefore if the teſtator did not make proviſion for that event he meant that the intereſt of the daughters ſhould depend upon the contingency in the leaſe and determine with it, if the leaſe ſhould be ſurrendered. Conſequently the daughters could no more claim compenſation for the loſs in this caſe, than the legatee of a debt could in the other. That the contingency of the ſurrender was a benefit which belonged to the remainderman; and, if fortune threw it in his way, the daughters could not complain; becauſe they had the deviſe as the teſtator gave it to them. For he bequeathed it ſubject to be deſtroyed at the election of the leſſee, who was at liberty to exerciſe the right, when he pleaſed; and the daughters had no authority to controul him, becauſe the leaſe itſelf expreſsly beſtowed the power on him. *That* it was ſtrange reaſoning to ſay, that the daughters were injured by the leſſee's exerciſing a right which he had over the eſtate, and which right he had ſtipulated for in expreſs

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preſs terms. Conſequently the principles of the decree were wholly erroneous, and the bill ſhould have been diſmiſſed.

But if it were true, that the plaintiffs were entitled to the rents, which they by no means admitted, ſtill the decree for intereſt was clearly wrong; becauſe that is never given on rents unleſs there be a penalty. 2. *Vez. jr.* 163. *Cas. Temp. Talb.* 2.

RANDOLPH *contra.* Contended, *that* the ſurrender was a ſtratagem to defeat the intereſt of the daughters which would not be ſupported in a Court of Equity; becauſe they were not to be ouſted of their rights by a contrivance between the leſſee and remainderman. *That* there was leſs reaſon for it, in this caſe, than in others: becauſe the defendant had in fact bought the eſtate himſelf before the ſurrender; which was a device, afterwards, made uſe of to defeat the legacies of the daughters; although their claim had enabled him to buy the remainder, at an under rate. *That* a deviſe of the rents, and a deviſe of the term itſelf, were ſubſtantially the ſame; and the true expoſition of the will was, that he intended them to have the emoluments of the land, during the term of the leaſe. *That* therefore the change of owners would not affect their intereſt. For whether the poſſeſſion of the land was with the remainderman or the leſſee, their claim was ſtill the ſame. So that if the remainderman had retained the lands, he would after the ſurrender, have been liable for the rents, or elſe he muſt have yielded poſſeſſion to the daughters; and therefore the defendant who had leſs equity muſt do the ſame. *That* the rents being for a liquidated ſum, ought to carry intereſt; for the uncertainty of the amount is the only reaſon why intereſt is not generally allowed.

Cur: adv: vult:

LYONS Judge. Delivered the reſolution of the Court, that there was no error in the decree upon the merits; and as to the intereſt that it was

diſcretionary

discretionary in the Court to allow it or not. But in this case the defendant had no title to have it taken off, as he had endeavoured to defeat the rents altogether, and thereby delayed the payment.

Graham vs. Woodson.

Decree affirmed.

SKIPWITH *against* CLINCH.

THIS was an appeal from a decree of the High Court of Chancery. Where Clinch as executor of Holt together with the children of Holt brought a bill against Skipwith stating, that on the 23d of May 1777 Skipwith leased of Holt an estate for twenty years at £150 *per annum*, with a proviso for payment of the further sum of £50 *per annum* provided there should be peace between G. Britain and America, the said £50 to commence with the peace. That another lease was afterwards executed between the said parties, in every respect like the former, except that the latter is dated on the 31st of August 1778 instead of the 23d of May 1777. That the only reason for executing the second lease was, that the first had not been recorded. That the plaintiffs can prove that *specie* and not *paper money* was contemplated in the said lease. The bill states the plaintiffs rights to the rents under the lease; the deed for which it states to have been lost. And prays that the defendant may be compelled to pay the rents and perform the other covenants in the lease, and for general relief.

A takes a lease of B in May '77 for 21 years. In August 1778 a similar lease of the same estate is executed. The rents are to be settled by the scale of May 1777.

Interest upon the rents refused.

The answer admits the two leases; but states that the second was a new contract, as there had been

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been a misunderstanding between the parties relative to the first. Denies that it was a *specie* contract: and says it would not have been worth above a fourth or third of the nominal rent, had it been payable in specie. States that the taxes, owing to the unjust valuation of the land by the commissioners, are excessively high, with other circumstances and difficulties, which have attended the contract.

The deposition of a witness states, that Skipwith informed him there was a lease of a date prior to that of August 1778, but that the last had been executed at the particular request of Holt; although there was very little variance between them.

Another witness says, he understood from all he could learn from either party, that the rent was to be paid in *specie*, or (what he understood by that expression) *good money*.

Another witness says he witnessed the original lease, which he has lately seen; and at the bottom was a note in the hand writing of Holt as the deponent was informed, in these words, "This lease renewed the 31st of August 1778," but that the deponent, knows nothing of the last mentioned lease.

Another witness says the plaintiff Clinch told him that the defendant had paid Holt the first years rent in *paper money*, as appeared by Holt's books; and that he believed the reason why he did not annually pay it, to have been because Holt would not receive it.

Another witness says he lived with the defendant in 1778 and wrote the last lease, which he attested as a witness.

The two deeds appear to be the same, except as to their dates.

The Court of Chancery was of opinion, that the rents were payable according to the value of money

Skipwith vs Clinch.

money at the date of the firſt leaſe, and that the plaintiffs were entitled to the ſame benefits under the laſt leaſe as if it had been executed on the date of the firſt. That court therefore decreed, the defendant to pay to the plaintiffs, £ 300 of the preſent current money of Virginia, for the arrearages of the rents on the 1ſt of January 1784, (taken for the date of the peace;) and £ 1044 of like money for the arrearages to the 1ſt of January 1797, with liberty to ſue writs of *scire facias* from time to time to recover future arrears, and that upon all trials at law the defendant ſhould admit the deed of the 31ſt of Auguſt 1778 to be of like force, as if executed in May 1777. From which decree Skipwith appealed to this court. And the plaintiff likewiſe petitioned for an appeal, becauſe the court had ſcaled the rents inſtead of decreeing them in ſpecie; and becauſe intereſt was not allowed upon the rents.

RANDOLPH for the appellant. There is no pretext for conſidering this as a ſpecie contract; as there is in fact nothing to ſhew that it was meditated by the parties, and the anſwer denies that it was a ſpecie contract. The true way is to conſider it as a contract of the date of the laſt deed, and ſubject to the ſcale of that period. That is the only legal notion, and the circumſtances lead to a belief that the parties intended it as a new ſubſtantive contract of that date. Conſequently the depreciation is to be ſettled by the ſcale at that time; and none of the caſes in this court are againſt us. *Pleaſants* vs *Bibb*. 1 *Wash*. 8. is rather in our favor; becauſe the principle which it eſtabliſhes is, that you cannot antedate the period of depreciation, unleſs there is ſomething upon the face of the inſtrument to authorize it; but here there is nothing. The ſame doctrine was held by the court in ſtronger and more explicit language in *Bogle Somerville & co.* vs *Vowles;* * and there, evidence of the date of the original contract was actually

* 1. Call's Rep. p. 244.

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tually refuſed. Which was an expreſs determination in the very point contended for by us; becauſe there is nothing particular in our caſe to take it out of the common rule. Finally the principles laid down by the Court in *Watson* vs *Alexander*, * inſtead of militating againſt the poſition we contend for, will on due examination, be found to be conſiſtent with it. Intereſt was properly diſallowed by the Court of Chancery under all the circumſtances of the caſe; for the full value of the rent was agreed to be given, had there been no change in the property; and in event it has proved a very hard bargain.

WICKHAM *contra.* The ſtile of the laſt deed evidently ſhews that the drawer had the firſt before him; and that the latter was intended merely as a renewal of the firſt, the time for recording of which had expired. Conſequently *Pleaſants* vs *Bibb.* 1. *Waſh.* 8, cited by the appellants counſel operates againſt him, and in every point applies in our favor. For the laſt deed is for payment of rent from a day anterior to the date. The caſe of *Bogle Somerville & Co.* vs *Vowles* is very different from this, and cannot affect it; becauſe there was nothing, in that caſe, to form a ground of enquiry into the date: for it was a naked caſe, unattended with circumſtances. As to *Watson* vs *Alexander*, the ſpirit of that determination is clearly in our favor. Beſides all thoſe were caſes at common law where more ſtrictneſs obtains; but this is a caſe originating in the Court of Chancery, and therefore to be governed by the principles of Equity. At the leaſt we are entitled to the value of the money at the date of the firſt deed. But there is ſtrong ground to infer that ſpecie was intended by the parties; for the leaſe was a long one, and probably to laſt beyond the period of the war: and at the cloſe of that the rent was to be increaſed. All which circumſtances lead to a belief that ſpecie was the object of the parties.

Intereſt

* 1. Waſhington's Rep. 340

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Intereſt ought to be allowed upon the rents; becauſe they were liquidated and certain; in which caſe, and eſpecially where there have been long delays, intereſt has been given. 1. *Wms.* 542. 2. *Vez.* 170. 3. *Alk.* 579. 2. *Wms.* 103.

RANDOLPH in reply. *Pleasants* vs *Bibb* was fully conſidered in *Bogle Somerville and company* vs *Vowles;* which makes the authority of the latter more concluſive. That thoſe were caſes at common law does not alter the rule; becauſe the act makes no difference between a Court of Law and a Court of Equity in this reſpect. On the contrary it gives equal power to both Courts to decide according to Equity. The circumſtances of this caſe are particularly hard; and therefore intereſt ought not to be allowed.

Cur. adv. vult:

LYONS Judge, Delivered the reſolution of the Court, that there was no error in the decree in eſtabliſhing the date of the contract; and as to the intereſt that the plaintiffs were not entitled to it. Becauſe if it was certain they might have diſtrained, and therefore ſhould not have lain by and ſuffered the intereſt to accumulate; and if it was uncertain (as they themſelves plainly ſhewed it was, by contending, at one time, that it was ſpecie, and at another, that the leaſe was to be conſidered as of a different date from that admitted by the defendant, and therefore they did not venture to diſtrain) then, according to the very caſes relied on by the plaintiff's counſel, intereſt was not demandable. Nor ought the plaintiffs to have intereſt from the time of the decree; becauſe they had themſelves appealed as well as Skipwith, and therefore contributed to rendering the amount uncertain and undetermined ſtill.

Decree affirmed.

TALIAFERRO

TALIAFERRO

against

ROBB and AL. ex'rs of GILCHRIST.

What an insufficient averment in a declaration.

What a sufficient consideration to support an assumpsit.

A executor of B. writes to C. a creditor of B, that as soon as he is able to dispose of his crops he will pay the claim, or will let him have any property in his possession at a moderate valuation, this will not bind A in his own right without an averment of assets, or a forbearance to sue, or of some other consideration.

THE executors of Robert Gilchrist brought an action on the case in the District Court against Taliaferro, and declared for this to wit, "That whereas John Taliaferro deceased, in his "life-time, to wit, on the 17th day of June 1787, "by his certain writing obligatory sealed with "his seal, did acknowledge himself to be held and "firmly bound unto James Robb in the sum of "three hundred and thirty pounds fourteen shil-"lings and four pence, conditioned to pay the "sum of £ 165:7:2 on or before the first day of "January then next ensuing, which said writing "obligatory was afterwards assigned by the said "James Robb to the said Robert Gilchrist, and "the said John Taliaferro departed this life with-"out discharging the said debt, and the said John "Taliaferro junior sued out administration on his "estate, and so having the administration made a "certain note or letter in writing addressed to the "said Robert Gilchrist, which said letter is in the "words and figures following, "Sir, I received "your letter and am sorry that it is not in my "power to discharge my fathers bond in your pos-"session, nor can I, as the uncertainty of collec-"tion is so great, fix on any final adjustment with "punctuality, I have by me a considerable quan-"tity of Indian corn and the expectation of a "fine crop of wheat, so soon as I shall be able to "dispose of either of these crops you may rely on "the payment of a great part, if not the whole "of your claim, or should any other property in "my possession suit you, I will readily accommo-"date you with it at a moderate valuation, hop-"ing that you will take into consideration the "difficulty of the times, I am Sir your obedient

servant.

"servant. John Taliaferro jr. Hays 16th Janua-
"ry 1790." And the said plaintiffs aver that the
"bond above mentioned and to the court now
"produced was then in the possession of the said
"Robert, and that no other bond of the said John
"Taliaferro's deceased, was at that time in his
"possession; and they moreover aver, that the
"said John Taliaferro was afterwards able to sell
"his crop of Indian corn and wheat, by reason of
"all which premises the said John Taliaferro jr.
"became liable to pay to the said Robert Gil-
"christ all or a great part of the money due on
"said bond, and being so liable, he the said John
"Taliaferro jr. afterwards to wit, on the day
"of 1790 in consideration thereof undertook
"and then and there faithfully promised to pay
"the same to the said Robert Gilchrist whenever
"he should be thereto afterwards required. Yet
"the said John Taliaferro jr. although often re-
"quired hath not yet paid all or any part of said
"bond to the said Robert Gilchrist in his life-time
"or to the said executors or either of them since
"his death, but hitherto to pay the same hath re-
"fused, and still doth refuse to the damage of the
"said plaintiffs £ 240, and therefore they bring
"suit &c."

Plea *non assumpsit* and issue. Verdict for the plaintiff for £ 217: 14: 5. The defendant moved to arrest the judgment for the following reasons, "For that the only evidence given in the said "cause is the letter recited in the plaintiffs de-"claration, and no legal consideration to found "an assumpsit on the part of the defendant either "to the plaintiffs testator, or to the said plaintiff "is stated, as appears in the said declaration." The District Court gave judgment in favour of the plaintiffs; and the defendant appealed to this court.

WICKHAM for the appellant. This is a new attempt to charge an executor, out of his own estate. The letter is in the usual stile of a letter

from

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from an executor to a creditor of the teſtators eſtate; and there is nothing to ſhew, that he meant to bind himſelf perſonally. No part of it contains any actual *assumpsit* in his own right; for as to the propoſitions, concerning the ſale of the corn and the event of the crop, they at moſt only mean, that he would apply as much of his own money as the amount of the aſſets, which probably would not, ſo ſpeedily, have commanded money. But if more was thereby intended, they were offers which do not appear to have been accepted; and therefore are not obligatory. For if an executor offers to pay a debt, it does not oblige him, unleſs there be ſome new conſideration; as forbearance, or aſſets, or ſomething elſe of that kind. But, here, there does not appear to have been any new conſideration, at all: for it is not alledged, in the declaration, that there was a forbearance in conſequence of the offers: or that the defendant had aſſets ſufficient to pay; or any other conſideration to ſupport the promiſe, which was therefore a mere *nudum pactum*. But the averment is wholly inſufficient, both as to the ſum and the proportion of the crop, for which the defendant was liable. For the declaration does not ſtate the ſum certainly, or the amount and proportion of the crop, for which the defendant was liable; but the averment is, only, that the defendant was liable for the whole or a great part; and the *assumpsit*, which is in the words of the averment, is juſt as uncertain; and therefore void.

WARDEN *contra*. The letter contains a clear aſſumpſit; for it is as ſoon as the corn is ſold, or the crop ſhould come in; and when he ſpeaks of difficulties, it is a plain ſolicitation, that Gilchriſt would not diſtreſs him with a ſuit, and is tantamount to a requeſt of forbearance, which was a good conſideration. *Pow. contr.* 354. It was in fact a clear acknowledgment of his obligation to pay. *Cowp.* 289, is a ſtrong authority in our favor; for the letter here amounted to an admiſſion of aſſets; and that according to the caſe in

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in *Cowper*, was a good foundation for an aſſumpſit. The averment, in the declaration, is ſufficient; for it is, in conſideration of all the preceding matters, which had been ſtated, that the defendant is ſaid to have aſſumed. Therefore if any of the uncertainties, inſiſted on by the oppoſite counſel, do in fact exiſt, they may be rejected as ſurpluſage, and the proper foundations of the *aſſumpſit* only relied on.

RANDOLPH on the ſame ſide. There was probably other evidence in the cauſe, and after verdict the Court will intend that every thing neceſſary to ſupport the action was proved. No ſet words are neceſſary to conſtitute an aſſumpſit; but if the whole ſpirit of the agreement amounts to it, that is ſufficient. The object of the letter plainly was, to obtain forbearance; and by aſſuring Gilchriſt that the debt was ultimately ſafe, to obtain it. Therefore, if there was any deſign at bottom it will not avail the defendant, who ſhould be bound by the terms held out in the letter. The uncertainty of the time, when the corn would be ſold, or the crop would be reaped, neceſſarily proves that he was ſoliciting forbearance; becauſe Gilchriſt, in waiting for either, was inevitably to be delayed. But forbearance was itſelf a ſufficient conſideration, and therefore the promiſe was obligatory. The averment is ſufficient. For the offer was accepted by the defendants waiting for, and betaking himſelf to the fund propoſed, which rendered a more explicit averment unneceſſary. But there was no occaſion, for any particular conſideration to be alledged, in the preſent caſe; becauſe the aſſumpſit was in writing; which ſuperceded the neceſſity of avering or proving any particular conſideration. 3 *Burr* 1670. For where there is a written agreement, the defendant ſhould ſhew that there was no conſideration; and it is not neceſſary for the plaintiff to prove there was. If the executor acknowledges he has effects enough to pay, it is ſufficient to ſupport an aſſumpſit, *Cowper* 284; and here the letter was tantamount; for no other

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other inference could be drawn from it. The letter was written with a knowledge of the teſtators eſtate, and that is ſufficient to oblige him; eſpecially as it is in writing, 1. *Vez.* 124. The averment is in the terms of the contract; which is all that was requiſite. For the certainty was to be made out in evidence; and, as before obſerved, it is to be preſumed, that it was done, as the jury could not have found the verdict without.

WICKHAM in reply. The laſt argument would ſupport every declaration, however defective; and is expreſsly repugnant to *Chichester* vs *Vass* * in this court; which eſtabliſhed that the court can only infer what is made abſolutely neceſſary to be proved by the declaration. The letter only amounted to an offer, and not to a promiſe. The forbearance ſhould be ſtated, as general, or for a particular period. *Pow. Contr.* 354: but here neither is averred. The caſe in *Cowper* is of the firſt impreſſion; and carries the doctrine farther, than good ſenſe warrants. Unleſs the contrary is expreſsly ſhewn, an executor is always conſidered, as promiſing in his fiduciary character.

If the plaintiff proceeded on the idea of an admiſſion of aſſets, he ſhould have averred it. The uncertainties which I ſpoke of before, cannot be rejected as ſurpluſage; and the truth is, there was no promiſe made. If the plaintiff had averred forbearance, aſſets, &c. we might have traverſed it; but, as it is, we could not come prepared to controvert his evidence, on thoſe points, which we could not foreſee he would endeavour to eſtabliſh. The plaintiff ſhould have alledged the price the corn ſold for, or the amount of the crop; for the averment, in the words of the letter is not enough; but he ſhould, as he might have done, have alledged it with certainty. That the offer was in writing makes no difference; for the paſſage from *Burr:* is the ſolitary opinion of a ſingle judge;

* 1 Call's Reports p. 83.

judge, and a like position is to found no where else. *Pow. Contr.* 334, shews that if you declare in an action on the case upon a note of hand, and do not alledge a consideration it is *nudum pactum*. The case in 1. *Vez.* instead of being against us, is, in fact, for us; because it is there said that the defendant was liable in his fiduciary character.

Taliaferro vs Robb.

Cur: adv: vult.

LYONS Judge. Delivered the resolution of the court, that, in order to render the defendant liable, it ought to have been averred, in the declaration, that the defendant had assets, or that the plaintiff forbore, or that there was some other consideration. But this having been omitted, that the judgment was erroneous, and to be reversed; and judgment on the verdict arrested, on account of the insufficiency of the declaration.

WARE

against

CARY.

IN ejectment brought by Ware against Cary in the District Court the jury found the following special verdict. "We find that on the 19th day of June 1744 Judith Ware purchased of Thomas Walton 200 acres of land lying on the south side of the Fluvanna river opposite the seven Islands, for forty pounds, by a deed of bargain and sale, indented and recorded in Goochland County Court on the 21st of August 1744, with a memorandum of livery and seizen thereon endorsed which appears in these words, this indenture, &c. (setting it forth.)

Deed in which an estate for life is given the husband, made by husband and wife of the wifes lands to a trustee, will pass the estate although no consideration be expressed therein.—Particularly if the verdict finds that it was for the purpose of settling it in the wifes family.

We

Ware vs. Cary.

We find that the ſaid land then lay in the county of Goochland, but now in the county of Buckingham, within the juridiction of this court, and is the ſame land now in queſtion:

We find, that, after the deed aforeſaid, the ſaid Judith Ware intermarried with Samuel Jordan. We find that the ſaid Samuel Jordan and Judith his wife in order to ſettle in the family of the ſaid Judith the ſaid land, by their indenture of feoffment bearing date the 14th day of March 1781, conveyed the ſaid land to John Nicholas his heirs and aſſigns in truſt, for the purpoſes in the ſaid deed expreſſed, which ſaid deed of feoffment is in theſe words.

This indenture made this fourteenth day of March in the year of our Lord one thouſand ſeven hundred and eighty one between Samuel Jordan of the county of Buckingham gentleman and Judith his wife of the one part and John Nicholas of the other part, whereas the ſaid Samuel Jordan and the ſaid Judith are ſeized in right of the ſaid Judith of and in one certain tract of land conveyed by Thomas Walton to her the ſaid Judith when *ſold* by a certain deed recorded in the County Court of Goochland, containing two hundred acres more or leſs, lying and being on the ſouth ſide of Fluvanna river in Buckingham county formerly Goochland, joining the lands of John Nicholas formerly the land of George Nicholas. This indenture therefore witneſſeth that for ſettling the ſaid land and to ſuch uſes and in ſuch manner as is hereafter in theſe preſents expreſſed and declared and for enabling the ſaid Judith to diſpoſe of and grant the ſaid land and premiſes in ſuch manner and form, and according to the power and authority to her hereafter in theſe preſents reſerved, and for other good cauſes and conſiderations them the ſaid Samuel Jordan and Judith his wife thereunto moving, they the ſaid Samuel Jordan and Judith his wife do give, grant, alien, enfeoff and confirm unto the ſaid John Nicholas his heirs

and

Ware vs Cary.

and assigns the said tract of land and premises with the appurtenances thereunto belonging, *To have and to hold* the said tract of land and premises with the appurtenances unto the said John Nicholas his heirs and assigns forever, to the uses and purposes hereafter in these presents expressed and declared; that is to say, to the use of the said Samuel Jordan and Judith his wife for and during the term of the natural lives of the said Samuel and Judith without impeachment of waste and after the death of the said Samuel Jordan and Judith his wife to the use and behoof of such person as the said Judith by her last will and testament in writing by her to be subscribed with her own hand and sealed with her seal in presence of two or more witnesses, or by any other writing to be by her subscribed and sealed in presence of three or more witnesses, shall nominate declare and appoint, upon this hope, trust and confidence that the said John Nicholas his heirs and assigns after the ending of the estate of the said Samuel Jordan and Judith his wife of and in the said land and premises to them above limited, make such conveyance and dispose of the same to such person in such manner as the said Judith by her last will and testament, or by any other writing as aforesaid shall appoint, and for and in default of such nomination or appointment, then that the said John Nicholas his heirs and assigns shall convey and assure the said land and premises to the right heirs of the said Judith forever. In witness whereof the said Samuel Jordan and Judith his wife have hereunto set their hands and seals the day and year above writen.

SAMUEL JORDAN. [L S.]

JUDITH JORDAN. [L. S.]

In presence of
CHARLES ROSE,
HENRY BELL,
CHARLES MAY,
JOHN NICHOLAS, junr.

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With a certificate of the record of the ſaid deed in the County Court of Buckingham, which is in theſe words:

At a court held for Buckingham county the 9th day of April 1781.

This indenture was proved by the oath of Henry Bell one of the witneſſes thereto, and at another court held for the ſaid county the 8th day of October 1781. This indenture was further proved by the oath of John Nicholas junior another witneſs thereto, and at another court held for the ſaid county the 12th day of Auguſt 1782. This indenture on the motion of John Nicholas was ordered to be recorded.

(Teſte,) ROLFE ELDRIDGE. C. C.

A copy, teſte, ROLFE ELDRIDGE, C. C.

We find that as the ſaid Judith was under coverture a commiſſion not directed to any perſon by name on the 14th of March 1781, was iſſued by the clerk of Buckingham in theſe words. Buckingham ſc.—The Commonwealth of Virginia to gentlemen greeting: Whereas Samuel Jordan and Judith his wife by their certain indenture of feoffment bearing date the 14th day of March 1781, and hereto annexed, have ſold and conveyed unto John Nicholas the fee ſimple eſtate of and in a certain tract or parcel of land, containing two hundred acres of land more or leſs lying and being in the county of Buckingham on the ſouth ſide of Fluvanna river, and whereas the ſaid Judith cannot conveniently travel to the ſaid County Court of Buchingham to make acknowledgment of the ſaid conveyance, you or any two of you are therefore commanded to go to the ſaid Judith and receive her acknowledgment of the ſame, and examine her privily and apart from the ſaid Samuel Jordan her huſband, whether ſhe doth the ſame freely and voluntarily without the perſuaſions or threats of her ſaid huſband, and whether ſhe be willing that the ſame ſhould be record-

ed

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ed in our ſaid County Court, and when you have received her acknowledgment and examined her as aforeſaid that you diſtinctly and plainly certify the ſame to the ſaid County Court under your hands and ſeals ſending then there the ſaid indenture and this writ. Witneſs Rolfe Eldridge clerk of our ſaid court at the courthouſe the 14th day of March in the 5th year of the Commonwealth.

ROLFE ELDRIDGE.

And returned executed by Charles May and Henry Bell who were Juſtices of the peace at that time for the ſaid county of Buckingham, and that a certificate of the execution of the ſaid commiſſion is in theſe words. Buckingham county to wit: By virtue of this commiſſion hereunto annexed, we the ſubſcribers have perſonally applied to the within named Judith Jordan, and have examined her privately and apart from the ſaid Samuel Jordan her huſband, do certify that ſhe declares that ſhe freely and voluntarily acknowledges the conveyances contained in the ſaid indenture, which is hereto annexed, without the threats or purſuaſions of her huſband, and that ſhe is willing and deſirous the ſame ſhould be recorded in the County Court of Buckingham. Given under our hands and ſeals this fourteenth day of March one thouſand ſeven hundred and eighty one, in the 5th year of the Commonwealth.

CHARLES MAY, [L. S.]

HENRY BELL. [L. S.]

Which with the commiſſion appears to have been recorded in the ſaid County Court by a certificate in theſe words.

At a court held for Buckingham county the 12th day of Auguſt 1782. This commiſſion and the certificate of the execution thereof was returned and ordered to be recorded.—Teſte, Rolfe Eldridge, c. c.—A copy, teſte, Rolfe Eldridge, c. c.

We

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We find that Samuel Jordan and Judith his wife by a deed poll dated the day of 1785, did appoint that the ſaid John Nicholas his heirs and aſſigns ſhould convey the ſaid lands to Robert Cary and Judith his wife, and to the heirs of the ſaid Judith in fee ſimple, which deed is in theſe words,

To all to whom theſe preſents ſhall come we Samuel Jordan and Judith Jordan ſend greeting: Know ye that by virtue of the powers received to me the ſaid Judith, by a certain indenture bearing date the fourteenth day of March one thouſand ſeven hundred and eighty one between the ſaid Samuel Jordan and myſelf of the one part and John Nicholas of the other part for conveying two hundred acres of land in the county of Buckingham in truſt for ſuch uſes as I ſhould declare and appoint, as by the ſaid indenture may appear, and for the affection which I bear to my granddaughter Judith Cary wife of Robert Cary, I the ſaid Judith Jordan with the conſent of the ſaid Samuel Jordan do nominate declare and appoint that the uſe of the ſaid two hundred acres of land ſhall be to the ſaid Robert Cary and Judith his wife, and to the heirs of the ſaid Judith Cary for ever, and for that purpoſe, do appoint that the ſaid John Nicholas his heirs and aſſigns do convey the ſaid land and premiſes to the ſaid Robert Cary and Judith his wife in manner aforeſaid, agreeable to the indenture aforeſaid. In witneſs whereof we have hereunto ſet our hands and ſeals the day of one thouſand ſeven hundred and eighty five.

JAMUEL JORDAN. (L. S.)

JUDITH JORDAN. (L. S.)

Sealed and delivered in preſence of

EDWARD WINSTON.—WILLIAM STO CRAWFORD.—CHARLES ROSE.—THOMAS MILLER.—SAMUEL I. CABELL.—WILLIAM HONLEY.

And

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And which was recorded in the said County Court as appears by a certificate in these words.

At a Court held for Buckingham county the 15th, day of March 1785, this indenture was proved by the oaths of Edward Winston and Thomas Miller two of the witnesses thereto, and at another Court held for the said County 11th day of October 1790, this indenture was proved by the oath of William Honley another witness thereto and ordered to be recorded.

(Teste,) ROLFE ELDRIDGE, c. c.

A copy, teste, ROLFE ELDRIDGE c. c.

We find that while the said Judith was under coverture with the said Samuel Jordan she after reciting the said second indenture of feoffment devised the said land to the said Judith Cary and her heirs and directed the said John Nicholas to convey it accordingly by her will: We find that the said Judith Cary was the grandaughter of the said Judith Jordan, and that the said Judith Cary died in the year 1788, survived by only one child a daughter from her body issuing, who died an infant of tender years in the year 1788, and that the defendant Robert Cary is the heir at law of the said infant daughter. We find that the said Judith Jordan died September or October 1785, and that her husband the said Samuel Jordan died in the year 1789. We find that the said Samuel and Judith Jordan from the time of their marriage to the time of their respective deaths were in possession of the said land.

We find that the defendant at this time is in possession of the said land. We find the lease entry and ouster in the declaration mentioned. We find that John Ware the lessor of the plaintiff is the only son and heir at law of the said Judith Jordan and if upon the whole of these facts the law be for the plaintiff, we find for the plaintiff the lands in the declaration mentioned, and assess

the

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the plaintiffs damages to one penny. But if the law be for the defendant then we find for the defendant."

The Diſtrict Court gave judgment in favour of the defendant Cary; and Ware appealed to this Court.

WICKHAM for the appellant. The deed from Judith Jordan and her huſband to Nicholas purports to be a feoffment; and as there is no livery of ſeizen, it paſſed no eſtate. *Co. Lit.* 56, (*b.*) Nor can it be taken as a conveyance upon the ſtatute; becauſe the parties appear to have clearly intended, that it ſhould operate, as a common law conveyance. But it cannot operate as a ſtatutary conveyance, for another reaſon; namely becauſe there is not a ſufficient conſideration, there being neither money or blood expreſſed. For the finding of the jury that the deed was made, for the purpoſe of ſettling it in her family, does not ſupply the want of a conſideration; eſpecially as the plaintiff (who is the ſon) was as near and nearer in blood than the defendants wife, who was only the grandaughter of Mrs. Jordan. But another objection to the deed is, that the wife was not privily examined, as the act of 1748, requires. For the commiſſion iſſued in *blank*, inſtead of being directed to Juſtices; and it does not appear, that it was ſent to the county, in which Mrs. Jordan reſided. But if there was a ſufficient conſideration and the wife had duly relinquiſhed, ſtill the defendants title would have been defective; becauſe, by the deed, ſhe had no power to convey a fee, but merely a life eſtate. For the deed does not give her power to convey the whole intereſt; but it merely gives her power to appoint to ſuch perſons, as ſhe thinks proper, without naming any eſtate in particular; which in contemplation of law, only gave her power to convey an eſtate for life, to the appointee.

CALL *contra*. The finding of the jury, that Mrs. Jordan made the conveyance, in order to ſettle the

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the eſtate in her family, is a ſufficient conſideration. 5. *Bac. abr.* 366. *cites Ld. Bac. Read. on Stat. of uſes* 310; and the defendant might aver and prove the conſideration. *Randolph* vs *Eppes** in this court. But the connection, between huſband and wife, or wife and huſband, is a ſufficient conſideration to raiſe a uſe and ſupport a conveyance; and as it appears, in the deed, that that connection ſubſiſted between the donors in the preſent caſe; and that the huſband, inſtead of a chance to be tenant by the curteſy, which is an eſtate liable to impeachment of waſte, was to have an eſtate for life certain, without any impeachment of waſte, there was clearly a ſufficient conſideration to ſuſtain the deed. Becauſe "a man may covenant to ſtand ſeized to the uſe of A. his wife, "and the conſideration, that ſhe is his wife will "raiſe a good eſtate to her; for this is a good "conſideration in law." 5. *Bac. abr.* 366. 367. 7. *Co.* 40. *Beadles* caſe. *Owen*, 855. *Plow.* 368. And as the reaſon is the ſame the converſe of the propoſition muſt be equally true. Therefore the deed in the preſent caſe operating as a covenant to ſtand ſeized to the uſe of the huſband, that conſideration was ſufficient to raiſe an eſtate in him. Becauſe the eſtate, which he was to take, under the deed was more beneficial than that, which he would have been entitled to without. It is not neceſſary to conſider the conveyance as at common law; becauſe moſt clearly, as there were ſufficient conſiderations, it operated as a covenant to ſtand ſeized to uſes. For the object plainly was that the land ſhould paſs one way or another; and therefore it may be good either way, without adhering to any particular kind of way, or any particular mode or form of conveyance. 2. *Wils.* 75. Which caſe is an expreſs anſwer to the argument that it could not be conſidered as a ſtatutary conveyance, becauſe the parties intended a conveyance at common law.

The

* Ante 125.

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The deed was ſufficient to enable Mrs. Jordan to convey a fee ſimple to her appointee. For the truſtee was to convey in any manner ſhe might think proper, and it was clearly the general intent to enable her to diſpoſe of the abſolute property. Beſides the deed amounted to a conſent, on the part of the huſband, that the wife might make a will, and the verdict finds that ſhe deviſed it in fee.

The relinquiſhment was well taken. Becauſe the commiſſioners are ſtated to have been Juſtices of the peace; and although the verdict finds that the commiſſion iſſued *blank*, it does not ſtate, that it was returned *blank*. But the practice is to iſſue them blank, and the Juſtices who take the relinquiſhment fill them up: Which for aught that appears to the contrary might have been the caſe here. Beſides, unleſs the contrary be expreſsly found, it is too much to ſay, that after the commiſſion has been received and recorded by the court, that it ſhall be ſuppoſed to have been improperly executed. The deed expreſsly ſtates that Mrs. Jordan was an inhabitant of Buckingham; and therefore the verdict does in effect find, that the commiſſion went to the proper county. So that that objection is obviated by the expreſs finding in the verdict; if indeed it be neceſſary that the Feme ſhould be an inhabitant of the county into which the commiſſion goes; which may perhaps admit of ſome doubt, as the words in the act are, where the wife reſides; which expreſſion may be ſatisfied by a temporary reſidence.

RANDOLPH in reply. It was a rule, at that time, that an heir at law ſhould not be diſinherited by implication, unleſs abſolutely neceſſary; and therefore the court will require the obſervance of the general forms preſcribed by the law. Here there was neither money or blood; and without one there was no conſideration to raiſe an uſe. Mrs. Jordan does not appear to have had her own blood in view; becauſe the deed purports to give her

her an unlimitted power of appointing; so that she might have given it to a stranger if she thought proper; and in fact she did so; for the limitation, to the defendant, was a limitation to a stranger, as there was no blood between him and herself. Mrs. Jordan could not convey a fee under the first deed; which only gives a power to convey a life estate; for there are no words of perpetuity; and if the will is relied on, it ought to have been found. The blank commission was void; as the statute expressly requires, that it should be issued to Justices of the peace.

Ware *vs.* Cary.

Cur: adv: vult.

LYONS Judge. Delivered the resolution of the court; that there was no error in the judgment of the District Court; and that it was to be affirmed.

Judgment Affirmed.

JAMES

against

M'CUBBIN.

JAMES brought trespass in the County Court against M'Cubbin, and declared, that the defendant on the 11th of March 1790 swore in as sheriff of Hampshire county being first legally appointed. That afterwards, to wit on the 13th of November 1790, the defendant appointed Jonathan Purcell of the said county one of his deputies. That the said Purcell on the 13th of November took the oath of office as deputy sheriff for the defendants, who thereby became liable for his conduct as deputy sheriff. That the said Purcell afterwards on the 1st of January 1792, in order to injure the plaintiff, at the county aforesaid, sundry

If the sheriffs deputy drive or cause to be driven one mans property on the lands of another in order that he may levy a *distress warrant* on it which he accordingly does an action will lie against the sheriff for it.

James vs M'Cubbin.

dry horſes, the property of the plaintiff of fifty pounds, drove or procured them to be driven upon the land of James Mercer, where Samuel Bonnifield then lived as tenant, in order that he the ſaid Jonathan might levy a *diſtreſs warrant* upon the ſaid property as deputy ſheriff, which he did, and afterwards, to wit, on the day and year laſt mentioned ſold the ſaid horſes, the property of the plaintiff of the value aforeſaid, to the plaintiffs damage £ 100.

The defendant plead *not guilty*; and iſſue. Verdict for £ 30, and the Court gave judgment accordingly. The plaintiff then releaſed 10/ of the damages; and thereupon, the defendant filed a plea in arreſt of judgment, which aſſigned the following reaſons. 1. Becauſe the defendant was not ſued as late high ſheriff. 2. Becauſe the defendant is not legally liable as ſheriff for the conduct of Purcell. The County Court overruled the plea in arreſt of judgment, and *confirmed* their firſt judgment. The defendant offered to appeal to the Diſtrict Court; but the County Court refuſed to permit him to do ſo.

The Diſtrict Court granted a writ of *ſupersedeas* to the judgment; and totally reverſed it.

Whereupon James appealed to this Court.

WILLIAMS for the plaintiff. The firſt point ſtated in the petition for the ſuperſedeas is very clear againſt the defendant; and the ſecond is equally ſo. It is a rule that the ſheriff ſhall anſwer *civilly* for all the acts of his deputy. 6. *Com. Dig.* 416. 2. *Term. Rep.* 156. In this caſe, the deputy acted as deputy, when he drove the property on the land, in order to make diſtreſs; for it was like, taking one mans goods, under an execution againſt another. 3. *Wils.* 309. 317. *Dougl.* 40. The act of 1748 directs, that the ſheriff ſhall advertize, in order that the owner may claim; but here it was omitted and the deputy ſold the property on the ſame day, on which

which he took it. This was expresly contrary to the act of Assembly; which requires that the property shall be sold in the same manner as if it had been taken under a *fieri facias*.

James *vs* M'Cubbin.

Cur: adv: vult:

LYONS Judge delivered the resolution of the Court, that the judgment of the District Court should be reversed, and that of the County Court affirmed.

WALTHALL

against

JOHNSTON.

JOHNSTON brought detinue for a slave by the name of James against Walthall in the District Court. Plea *non detinet;* and issue. Upon the trial of the cause the defendant filed a bill of exceptions stating, that "It was objected by the attorney for the defendant, that a declaration made by Ellender Willis under whom the defendant claims, after the negro in the writing annexed mentioned, had been sent by her to be sold to the defendant, that nothing was due thereon, should not go to the jury as evidence to prove, that nothing was due under the defeazance thereon indorsed; but the court considered it, as admissible, though not conclusive evidence."

Declarations by the mortgagee, under whom the defendant claims *that the mortgage was paid off*, are admissible evidence on the part of the plaintiff.

The writing referred to, is in form a bill of sale, from Bough to the said Ellender Willis for the negro James; but there is an indorsement on it signed by the said Ellender Willis, which states, that Bough shall have the negro at any time on or before the 1st of September 1793, *by paying*

what

Walthall *vs.* Johnſton.

what is and ſhall appear juſtly due to the ſaid Ellender Willis. This indorſement bears the ſame date with the bill of ſale.

Verdict and judgment for the plaintiff; whereupon Walthall appealed to this court.

RANDOLPH for the appellant. Contended that the witneſs was intereſted; and therefore that the judgment of the Diſtrict Court was erroneous.

Per. Cur. There was nothing improper in ſubmitting the evidence to the jury: But it might have been otherwiſe, if it had been gaming, uſury or any other thing of that nature, which was to have been proved.

Judgment Affirmed.

MAYO

againſt

CLARK.

If the Diſtrict Court refuſe to grant a *ſuperſedeas* to a judgment of the County Court, and enter the refuſal on record this court will not grant a *mandamus*, but will award a *ſuperſedeas* to the order of the Diſtrict Court.

MAYO had petitioned the Diſtrict Court of Richmond for a writ of *ſupersedeas* to an order of Powhatan County Court for altering a road; which the Diſtrict Court refuſed; and entered their refuſal on record.

RANDOLPH, moved a few days ago for a rule upon the Judges of the Diſtrict Court to ſhew cauſe why a writ of *mandamus* ſhould not iſſue to compel them to grant the writ of ſuperſedeas? And to day

LYONS Judge, informed him, that the court was of opinion that a *mandamus* was not a proper remedy. That they did not pretend to preſcribe what mode he ſhould purſue; becauſe it was ſufficient

cient for them to say that his present application was improper.

Mayo vs. Clark.

Whereupon, Randolph moved for, and obtained a writ of *supersedeas*.

SKIPWITH

against

MORTON and Company.

MORTON and company brought an action of debt against Skipwith in the District Court, upon a bill of exchange, for £ 100 sterling dated June 15th 1775. The defendant plead *payment*, and the plaintiff took issue. On the next day on the motion of the defendant, he was allowed by the court to withdraw the plea of *payment*; and thereupon he filed the following plea, "James Morton & Co. for the benefit of Alexander Boyd plaintiff against Sir Peyton Skipwith defendant. And the said Skipwith comes and defends the force and injury when &c. and saith that the plaintiffs ought not to have or maintain their said action against him because he saith that he hath paid to the plaintiffs the debt in the declaration mentioned and this he is ready to verify. And the said Skipwith for further plea saith according to the act of Assembly in that case made and provided, saith that the plaintiffs ought not to have or maintain their said action against him, because he saith that in the year of our Lord 177 a certain medium or kind of money called paper money was made, issued and established by act of General Assembly passed and enacted in the said year 177 which said paper money was by the said act of Assembly declared

If to a suit upon a bill of exchange dated in 1775, the defendant pleads that he tendered the interest in *paper money* with out confessing the action as to the principal or saying any thing in bar of it, the plea is bad.

The defendant may give such tender in evidence to extinguish the interest on the plea of payment.

But if he withdraws the plea of payment he relinquishes the evidence.

And therefore if there be a demurrer to the plea of tender final judg-

ment will be rendered for the plaintiff.

Skipwith vs Morton & co.

declared to be a lawful tender in discharge of all debts contracted or due before that time. And that the said tender if refused should operate as an extinguishment of interest. And the said Skipwith in fact saith that on the sixth day of May in the year 1778, the said Skipwith did in pursuance of the said law tender and offer to pay to the plaintiffs the full amount of the debt, in the said declaration mentioned, together with interest after the rate of ten per centum per annum from the date of the bill of exchange mentioned in the declaration, and also the full charges of protest of the said bill in bills of the said medium or currency called paper money which was by law established as aforesaid. And the defendant farther avers that the said plaintiffs on the day and year aforesaid did refuse to receive or accept the said paper money in discharge of the said debt, interest and charges as aforesaid. Whereby by force of the said act of Assembly all right in the said plaintiffs to recover of the said Skipwith any interest on the debt in the declaration mentioned from the day of the said tender is forfeited: All which the said Skipwith is ready to verify, and therefore he prays judgment if the plaintiffs ought to have or maintain their said action thereof against him." The cause was thereupon sent back to the rules for an issue to be made up therein.

And at the rules the plaintiffs, as to the first plea of the said Skipwith in manner and form by him pleaded, replied that the said Skipwith had not paid the debt in the declaration mentioned; and as to the second plea, they demurred; and for causes stated, 1st. That the said second plea does not sufficiently set forth the act of General Assembly in the said plea mentioned, the time of making, nor the purport thereof. 2d. That the said second plea does not sufficiently set forth in what bills or species of paper medium the tender or offer of payment was made. 3d. That the said second plea does not shew that the defendant has always been ready, since the cause of action accrued

crued or ever ſince the time of making the pretended tender aforeſaid, to pay, the debt and intereſt accruing before the time of making the tender and the charges of proteſt in the declaration mentioned, to the plaintiffs. 4th. That the ſaid ſecond plea does not aver and ſhew that the ſaid defendant ſtill is ready to pay to the plaintiffs the debt, intereſt and charges ſo by him pretended to have been tendered and offered. 5th. That the ſaid defendant in his ſaid ſecond plea does not make a profert *in curia* of the ſaid debt, intereſt and charges that is over. 6th. That the ſaid ſecond plea is contradictory, that it ſtates the act of Aſſembly aforeſaid to extinguiſh intereſt from the time of making the tender, and alſo ſtates that the plaintiffs right to recover intereſt, from the ſaid defendant from the time of the pretended tender, is forfeited, yet begins by avering, that the plaintiffs ought not to maintain their action, and concludes by praying, whether the plaintiffs ought to have or maintain their action &c. 7th, and laſtly. That the ſaid ſecond plea of the defendant is uncertain and wants form.

The record then proceeds thus, "And at another day to wit, at a Court held for the Diſtrict "aforeſaid the 29th, day of April 1796 came the "parties by their attornies and the plaintiffs demurrer to the defendants plea of tender was argued and it was conſidered by the Court that "the plea and matters therein contained were not "ſufficient in law to bar the plaintiffs action and "it was farther conſidered by the Court that the "cauſe be continued till the next Court for the "trial of the iſſue on the plea of payment."

"And at another day to wit at a Court held for the "for the Diſtrict aforeſaid September 29, 1796 came "the parties aforeſaid by their attornies aforeſaid "and the attorney for the defendant relinquiſhed the "former plea of the ſaid defendant. Therefore "it is conſidered by the Court that the plaintiffs "ſhould recover againſt the ſaid defendant three

"hundred

Skipwith vs. Merton &co.

"hundred and two pounds ſixteen ſhillings ſterling "being the principal intereſt and charges of pro- "teſt of the bill of exchange in the declaration "mentioned together with intereſt thereon to be "computed after the rate of five per centum per "annum from this day to the time of payment and "their coſts by them about their ſuit in this be- "half expended and the defendant in mercy &c. "But the ſaid ſterling money may be diſcharged "by twenty eight per cent difference of ex- "change."

To this judgment Skipwith obtained an order from a judge of this court for a writ of *supersedeas*. The petition ſtated, that Moreton & co. inſtituted an action of debt againſt the petioner for £ 100 ſterling on a proteſted bill of exchange; that to this action the petitioner filed a plea of a tender of paper money; to which plea a demurrer having been filed, the ſaid plea was overruled; that the petitioner is adviſed, that, let the reaſons aſſigned, in the ſaid plea, be even valid, (which he in no manner admits) they are founded upon the principle of a tender at common law: Whereas the petitioner is adviſed, that under an act of the October ſeſſion, 1787, when paper money was about to expire, he was at liberty to offer in evidence, any circumſtances for the purpoſe of rendering a judgment more equitable in caſes where the non payment was owing, as in this caſe, to the creditor; that this overruling of the ſaid plea did in fact preclude the petitioner from offering that evidence.

RANDOLPH for the plaintiff in the *supersedeas*. Although the plea would be bad, upon mere common law principles, it is nevertheleſs ſufficient under the acts of Aſſembly, paſſed in the years 1777 and 1781. For by the firſt, it is expreſsly declared that a tender and refuſal ſhall operate an extinguiſhment of intereſt; and by the latter the Court in ſuch caſe are to adjuſt the claim according to the principles of equity. The defendant

therefore

therefore ought to have had an opportunity of proving the tender, and extinguiſhment of the intereſt; which he was prevented from doing, by the courts overruling the plea,

CALL *contra.* The plea unqueſtionably was not ſuſtainable upon any principle of common law, *Downman* vs *Downman's executors.* 1. *Wash.* 26. which caſe expreſsly overrules the plea; and it is therefore properly abandoned as a common law plea by the oppoſite counſel.

Neither can it be ſupported upon the acts of Aſſembly. Becauſe it is not an anſwer to the whole demand; ſince it merely offers a bar to the intereſt ſubſequent to the tender, and neither ſays or claims any thing, in bar of the principal debt and intereſt, prior to the tender. For the rules, laid down in *Downman* vs *Downman's exrs.* not having been purſued, the tender itſelf was no bar to the debt, and intereſt prior to the time of making the tender. So that the plea is plainly a partial anſwer only to the demand, and therefore cannot be ſupported. For if a declaration demand £ 100 and the plea is that the defendant has paid £ 50, without ſaying any thing as to the reſidue it is clearly bad. So if in treſpaſs for damage done in two cloſes, the defendant juſtifies the treſpaſs in one, without ſaying any thing as to the other, the plea is inſufficient. The principles of theſe caſes are all fully weighed and conſidered by the Court in the caſe of *Baird* vs *Mattox;* * in which it was determined, that if the defendant be ſued both as *heir* and *deviſee*, and pleads *nothing by deſcent*, without ſaying any thing as to the *deviſe*, that the plea is bad. Which caſe comes up to the preſent in all its parts; and proves beyond all contradiction, that the plea in this caſe was properly overruled.

The

* 1. Call's rep. 257.

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The defendant, therefore, if he only meant to inſiſt on an extinguiſhment of the intereſt from the date of the tender, ought to have pleaded in the manner in which offsetts are frequently plead in England, that is to ſay, he ſhould in his plea have acknowledged the plaintiffs right of action, for the principal debt and intereſt to the day of the tender; and then gone on and ſtated the tender and conſequent extinguiſhment of the future intereſt, under the act of Aſſembly: Which would have been an anſwer to the whole declaration, but having omitted to do ſo, his plea was ill; and therefore rightly overruled by the Court below.

But if the defendant was entitled to any deduction, under the acts of Aſſembly he ought either to have given the circumſtances in evidence, under the plea of payment (which he might do according to the deciſion of this Court in *M'Call* vs *Turner*; *) or elſe he ſhould have offered them to the Court, after the verdict was rendered. Having, however, declined all theſe modes, the fair preſumption is, that he had no circumſtances to offer, or tender to prove. But, if he had, he, as every other defendant, was bound to ſhew his circumſtances, or plead his tender, according to the forms and manner preſcribed by the law. Inſtead of this however he afterwards withdrew his plea of payment, and gave judgment for the amount of the plaintiffs demand; thereby plainly ſhewing, that he had no circumſtances to offer, or tender to prove; at the ſame time, that he ſhut the door againſt all exceptions to the proceedings; becauſe the confeſſion of judgment was equal to a releaſe of errors, under the act of Jeoffails.

RANDOLPH in reply. If the defendant had plead generally to the whole demand, his defence would have been untrue; and therefore the doctrine, contended for, goes to prove, that it is neceſſary for the defendant to plead an untruth, in order to avail himſelf of what is true. Although the

* 1. Call's Reports p. 132.

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the defendant might have given the tender in evidence, under the plea of payment, that did not preclude him from a right to plead it ſpecially, if he choſe to do ſo. No common law rules of pleading apply to the caſe of paper money; which ſtands upon its own bottom; and all the deciſions of the courts proceed on that idea. The withdrawing of the plea of payment did not alter the merits of the caſe, under the other plea; which admitted the reſidue of the demand, by omitting to anſwer it.

CALL *contrà.* The laſt poſition does not ſatisfy the objection to the plea, on account of its offering only a partial anſwer, to the demand ſet forth in the declaration; becauſe it makes the iſſue immaterial, and produces the neceſſity of a repleader; as happened in the caſe of *Baird* vs *Mattox.*

Cur. adv. vult:

LYONS Judge. Delivered the reſolution of the court, that the plea was clearly bad, in point of form; and therefore was very properly overruled by the Diſtrict Court. That the defendant might have given the tender in evidence, under the plea of payment in order to have extinguiſhed the intereſt, ſubſequent to the tender; but having omitted to do ſo, and having withdrawn his plea of payment, he had relinquiſhed the evidence, and could not now be received to make an objection upon the ground of a right which he had voluntarily waived.

ROANE Judge. The laſt clauſe in the act of 1781, appears applicable only to debts contracted during the exiſtence of paper money; and not to ſuch as this which exiſted long before.

Judgment Affirmed.

DUNLOP

DUNLOP

against

THE COMMONWEALTH.

Quere Whether an inquisition finding an escheat for want of heirs, should not say in express words that the deceased *died without heirs?*

An *amicus curiæ* cannot move to quash an inquisition of escheat unless he either has an interest himself or represents somebody who has.

An *amicus curiæ* cannot appeal.

THIS was an inquisition of *escheat, for the want of heirs*, dated 26th July 1796. It finds that Thomas Jackson was in his life-time seized of the premises, and that he died in 17 without will, "Or in any otherwise disposing of "the said land, and that no person hath ever since "claimed the said land either as a lineal or collateral heir to the said Thomas Jackson deceased."

In April 1798 Dunlop as *amicus curiæ* moved the District Court to quash the inquisition which they refused. *The court not having jurisdiction thereof.* Whereupon he filed a bill of exceptions which stated the inquisition, and motion to quash it; because the clerk of the court had issued no certificate to the *escheator* respecting the said inquest; but that the motion was opposed, 1. Because the inquisition had been duly returned into the clerks office and had remained there ever since, without any person having traversed it, or put in or shewn any *monstrans de droit*, or petition of right within six months next after the time of finding the said inquest. 2. Because the court had no jurisdiction of the cause, unless brought before them by a traverse of office, *monstrans de droit*, or petition of right. And that the court being divided, the motion was overruled.

Dunlop appealed from the judgment of the District Court to this Court.

RANDOLPH for the appellant. The inquisition, having omitted to state that the decedent *died without heirs*, is clearly bad; and an *amicus curiæ* might suggest it to the court, in order that it might be quashed and a new one taken, so as to prevent its

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its being ſet aſide at a future day, and purchaſers, under the commonwealth, from being injured. The lapſe of time made no difference; as no certificate had been granted by the clerk, and therefore it was in the nature of a matter ſtill depending before the court, who had a right to controul the granting of the certificate prior to its emanation. Beſides it never could have been the intention of the legiſlature to bar the claim of men who were not informed of their rights. Elſe a man, who happened to be out of the ſtate on the day of taking the inquiſition and who did not return until a few days after ſix months, would be precluded from aſſerting his claim, although he had no opportunity of being informed of it.

NICHOLAS *Attorney General contra.* The inquiſition finds facts tantamount to dying without heirs; for it ſtates that the lands eſcheated and no ſet form of words is neceſſary. But the ſix months having elapſed is deciſive; for the act expreſsly precludes all objections afterwards. Nor is it material that no certificate had iſſued; becauſe that was the omiſſion of the clerk, which ought not to prejudice the commonwealth. However, at any rate, an *amicus curiæ* could not move the exception, as he had no intereſt in the queſtion himſelf, nor made a ſuggeſtion on behalf of any perſon who was before the Court and concerned in intereſt. Much leſs could he appeal; becauſe he ſuſtained no injury, and therefore could not be aggrieved by the Courts not hearkening to his advice, or deciding againſt his opinion.

RANDOLPH in reply. There is nothing tantamount to dying without heirs found (even if that were ſufficient, which it is not;) for the inference drawn by the jury was not warranted by the facts which they had prevouſly ſtated. Any perſon may give an appeal bond; and the court will preſume that the *amicus curiæ* either had an intereſt himſelf or repreſented ſomebody who had.

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LYONS Judge. Delivered the reſolution of the Court, that, the appeal ſhould be diſmiſſed; becauſe it had been improperly granted; and that the *amicus curiæ* could not move to quaſh an inquiſition, when it did not appear that he had any intereſt himſelf, or repreſented any perſon who had.

Appeal Diſmiſſed.

NELSON
againſt
ANDERSON.

M. appeals from a judgment obtained againſt him by A. in the county court; N. joins M. in the appeal bond: Then M. dies and the appeal abates, without being revived. N. is exonerated.

ANDERSON brought actions of debt in the Diſtrict Court againſt Nelſon as ſecurity to Maury upon two appeal bonds dated December 1ſt 1786. The conditions of which, after reciting the judgments appealed from, proceeded thus, "Now if the ſaid Walker Maury ſhall effectually "proſecute the ſaid appeal, perform the judgment "of the General Court, and pay all coſts and da"mages which ſhall be awarded by the ſaid Ge"neral Court, in caſe the judgment aforeſaid ſhall "be affirmed, then the above obligation to be "void otherwiſe to remain in full force and vir"tue." The plaintiff aſſigned for breaches of the conditions, "That Walker Maury named in the "ſaid condition did not effectually proſecute the "appeal mentioned in the ſaid condition accord"ing to the form and effect thereof."

The defendant took *oyer* of the bond and condition; and plead, "That the ſaid Walker Maury "departed this life before the trial of the appeal, "for the effectual proſecution of which, this de"fendant is charged by the plaintiffs declaration "to have bound himſelf, and the failure in the

"ſame,

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" ſame, on the part of the ſaid Walker Maury is " aſſigned as the breach of the condition of the " writing obligatory in the plaintiffs declaration " mentioned, whereby an abatement of the ſaid " appeal was adjudged by the court, before whom " the ſaid appeal was depending on the fifth day " of May 1790, at which time and at all times " ſince, no revival of the ſaid appeal has been " adjudged or effected. Wherefore he ſays that " he ought not to be charged &c. All which he " is ready to verify; wherefore he prays judg- " ment &c." General demurrer thereto by the plaintiff; and joinder.

The ſecond bond, the pleadings, demurrer and joinder are in all reſpects the ſame as the firſt, except that in the plea the words " and the failure " in the ſame, on the part of the ſaid Walker " Maury is aſſigned as the breach of the condition " of the writing obligatory in the plaintiffs decla- " ration mentioned," are omitted.

The Diſtrict Court gave judgment for the plaintiff, and Nelſon appealed to this court.

CALL for the appellant. It is generally true that the act of God excuſes the performance of a condition; and there is the ſame reaſon for it in this as in other caſes; becauſe it was no more practicable for the obligor to have done the act in this than in any other caſe. If a bond be given to appear and defend a ſuit, and the defendant dies before the appearance day the ſecurities are diſcharged; and the reaſon is the ſame here, for the undertaking is perſonal, that he will proſecute the appeal, and not ſuffer a voluntary nonſuit. The appellees ſhould have ſued a *ſcire facias*, to revive the appeal, and, not having done ſo, they waived the benefit of the ſecurity. For in principle it ſtands upon the ſame ground, as an appeal not brought up in two terms; in which caſe the appellee, who might have brought it up and had damages, cannot afterwards pray them; becauſe ſaid the court he has his advantages in not doing

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ſo, as the delay has prevented a *ſupersedeas* of writ of error; and ſimilar motives might have actuated the appellee in this caſe. If the appellee meant to inſiſt on his ſecurity, it was his duty to have ſued out a *scire facias;* becauſe the executor might not have known of the judgment. The caſe reſembles that of bail in error, who are not liable if the principal dies before the deciſion in the court of error. 5. *Vin. ab.* 528. *Roll. rep.* 329. The like principle was aſſerted in this court in *Keel* vs *Herberts ex'rs.* 1. *Wash*, 138. Which expreſsly decides, that the non continuance of the ſuit after the death of one of the parties does not forfeit the bond. For if ſo, the executors might have brought ſuit upon the bond in that caſe. The ſame idea is purſued by the court in 12. *Mod.* 380; where it is ſaid, that nothing but an actual determination of the cauſe by the voluntary act of the party, or the judgment of the court will render the ſecurities liable.

WICKHAM *contra.* The rule that the act of God ſhall excuſe the performance of the condition, only applies in thoſe caſes, where the executors cannot do the act which is ſtipulated for, as in the caſe of the bond for appearance; but whereever the act may be performed by the executor, it is neceſſary that he do it, or the bond is forfeited. Now here the executor might have proſecuted the appeal; and having failed to do ſo, the condition of the bond is broken. The caſe of the appeal, which has not been brought up within two terms, does not apply; becauſe the appellee could have no ſuch advantages here as in that caſe, inaſmuch as the executors, if there was any error, might, notwithſtanding the abatement, have obtained a *supersedeas* or writ of error. Nor was it neceſſary for the appellee to have ſued a *scire facias* in order to have apprized them of the appeal, for the law does not admit them to have been ignorant of it. And if the debtor had died inſolvent ſo that no body would adminiſter on his eſtate, then the appeal could not have been renewed.

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ed. The caſe of *Keel* vs *Herberts ex'rs.* was decided without argument; but, in addition to that, the firſt *ſupersedeas* was not ſerved, and ſo no hindrance to the execution. Two objections appear to have been taken in the caſe in *Roll*, one was decided againſt the ſecurity, and the other merely given up by the court. The caſe in 12. *Mod.* does not apply; becauſe, there, the ſuit died with the party, and could not be revived, in the name of the executors.

CALL in reply. It was expreſsly decided in the caſe in *Roll*, that the death of the principal was a diſcharge of the ſecurity; but the cauſe went off, upon the point of prior delay, which was diſcloſed by the plea.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court, That conditions of this kind, where the act was to be performed perſonally by one of the parties, were for the benefit of the obligors; who ſtood excuſed, when the act of God or of the law prevented the performance. *Laughters* caſe 5. *Co.* That it reſted on the ſame footing as coſts; which are not recoverable, where the party dies and the ſuit abates, unleſs it be revived. That the party here, who was to perform, being dead, it was impoſſible, that the ſtipulated act could be done by him, which therefore excuſed the ſecurity. But as the condition of the bond, alſo, was, that he ſhould pay the debt, in caſe the judgment ſhould be affirmed, if an affirmance had taken place after the death of the principal, the ſecurities would have been liable; and it was in the power of the appellee to have ſued a *ſcire facias* and obtained a judgment of affirmance, if there was no error: whereas, it was not in the power of the ſecurity to have done this; neither could he have compelled the executor to have ſued a *ſcire facias* and revived the appeal. That conſequently, as

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the appellee might have done it, and the ſecurity could not, it was more reaſonable, that the appellee ſhould ſuffer for the neglect, than that the ſecurity ſhould: Eſpecially when it was conſidered, that if he had actually ſued a *ſcire facias*, the judgment might, perhaps, have been reverſed. So that although the ſecurity was not in danger, if the cauſe had been brought to a hearing in the Appellate Court, he might be rendered liable in conſequence of the neglect to obtain the *ſcire facias*. Which never could be right. That the Court was therefore of opinion, that the judgment ſhould be reverſed, and judgment entered for the appellant upon the demurrer.

Judgment Reverſed.

WINSTON

againſt

THE COMMONWEALTH.

One forthcoming bond takes on ſeveral executions.

Two ſeparate bonds may be included in one inſtrument.

WILLIAM OVERTON WINSTON late Sheriff of the county of Hanover, John Winſton, Bickerton Winſton and James Overton ſecurities for the ſaid William O. Winſton; and Cecilia Anderſon adminiſtratrix of William Anderſon deceaſed, who was likewiſe late ſheriff of the county aforeſaid, and Robert Page and Mathew Anderſon, ſecurities for the ſaid Cecilia Anderſon, gave a bond dated the 26th day of October 1792 to Parke Goodall then preſent ſheriff of the ſaid county in the penalty of £ 15,896: 5: 10; "That "is to ſay, the ſaid William Overton Winſton "and his ſecurities aforeſaid in the ſum of ten "thouſand one hundred and fifty eight pounds "fifteen ſhillings and the ſaid Cecilia Anderſon "and her ſecurities in the ſum of five thouſand "ſeven hundred and thirty ſeven pounds, ten "ſhillings

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" ſhillings and ten pence. To the payment where-
" of well and truly according to our obligation
" aforeſaid, for the uſe of the Commonwealth of
" Virginia, We bind ourſelves our heirs execu-
" tors and adminſtrators jointly and ſeverally firm-
" ly by theſe preſents."

The condition was, " That whereas the ſaid
" Parke Goodall as preſent ſheriff of the county
" aforeſaid by virtue of two writs of *fieri facias*
" ſued out from the General Court of this ſtate,
" on the 19th day of June 1792 on behalf of the
" Commonwealth againſt the eſtate of the ſaid
" William O. Winſton, as former ſheriff of the
" ſaid county of Hanover hath ſeized and taken
" into his hands certain property belonging to the
" ſaid William O. Winſton to ſatisfy the com-
" monwealth the ſum of one thouſand three hun-
" dred and thirty pounds fourteen ſhillings and
" ſeven pence halfpenny, for the revenue taxes,
" the intereſt and damages thereon and the coſts
" due from the ſaid William O. Winſton as late
" ſheriff of the county aforeſaid for the year 1787.
" And alſo the ſum of three thouſand ſix hundred
" and forty three pounds three ſhillings and three
" pence for the revenue taxes, the intereſt and
" damages thereon, and the coſts due from the ſaid
" William O. Winſton, as late ſheriff of the coun-
" ty aforeſaid for the year 1788, which property
" conſiſts, (ſetting it forth,) and whereas the ſaid
" Parke Goodall as preſent ſheriff as aforeſaid, by
" virtue of two other writs of *fieri facias* ſued out
" from the court aforeſaid, on the 9th day of July
" 1792, on behalf of the commonwealth aforeſaid
" againſt the eſtate of the ſaid William Anderſon
" as former ſheriff of the ſaid county, hath ſeized
" and taken into his hands certain property of the
" eſtate of the ſaid William Anderſon, to ſatisfy
" the commonwealth, the ſum of two thouſand
" three hundred and ſixty three pounds, thirteen
" ſhillings and ninepence, for the Revenue Taxes
" the intereſt and damages thereon, and the coſts
" due from the ſaid William Anderſon as late ſhe-
" riff

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"riff of the county aforesaid for the year 1789. "And also the sum of four hundred and forty four "pounds nineteen shillings and ten pence for the "revenue taxes, the interest and damages thereon "and the costs due from the said William Anderson "as late sheriff of the county aforesaid for the year "1790, which property consists (setting it forth) and "whereas by an act of the commonwealth afore- "said passed on the day of this present month "October, the said executions are suspended until "the first day of December, which shall be in the "year 1793, provided the aforesaid William O. "Winston and Cecilia Anderson, adminstratrix as "aforesaid, shall give bond with approved security "to the sheriff of the county aforesaid, for the "forthcoming of their property (by him taken in "execution) on the said first day of December, "1793. Now if the said William O. Winston shall "on the said first day of December 1793, deliver "at Hanover courthouse unto the said Parke Good- "all, as sheriff as aforesaid, the property taken of "him as aforesaid, then the above obligation (so "far as relates to him) the said William O. Wins- "ton and his securities shall be void, otherwise to "remain in full force and virtue. And also if the "said Cecilia Anderson &c." in the same manner as in the case of Winston.

Upon this bond the Auditor gave William O. Winston notice that he should move for judgment against him, John Winston, Joseph Winston, Bickerton Winston, and James Overton "on a "bond dated the twenty sixth of October 1792, "conditioned for the forthcoming of certain pro- "perty therein mentioned seized and taken by "Parke Goodall sheriff of Hanover, by virtue of "two *fieri facias's* issued from the General Court "clerk's office against your estate."

Similar notices were given to Joseph Winston, Bickerton Winston, James Overton and John Winston.

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The General Court gave judgment, upon the bond and notices aforesaid, against the defendants, who obtained a writ of *supersedeas* thereto from this Court.

WARDEN and RANDOLPH for the plaintiffs in the *supersedeas*. The notice is insufficient, as it does not state that the executions issued at the suit of the commonwealth, or at whose instance the motion was to be made. Neither does it mention the penalty or the sum in the condition, nor the names of all the obligors, or to whom the bond was payable. One forthcoming bond cannot be taken on two or more executions; and therefore a summary judgment could not regularly be entered on it. The penalty of the bond involves uncertainty, for first the whole £ 15,896: 5 10 is stated, and then the obligors are bound in separate parcels, and lastly the aggregate sum is taken again. The act of Assembly concerning forthcoming bonds says they shall be payable to the creditor. But here the commonwealth was creditor, and yet the bond is payable to Goodall; and although it is afterwards said *to the use of the commonwealth* that will not satisfy the law. The day appointed in the condition of the bond for the sale of the property was *Sunday;* which is not a juridical day; and a performance of the condition would have been illegal.

NICHOLAS Attorney General *contra*. The notice is good; for all that is required is, that the defendants should know on what bond the motion will be made, and any description answering that end is enough. Here the defendants were sufficiently apprized of the bond on which the Auditor intended to move; for, from the various particulars mentioned, it was impossible for them to mistake. As to the objection that one bond was taken on two executions it has no weight in the present case; because the act of Assembly, passed for that purpose only, expressly makes use of the word *bond* and not *bonds;* which seems necessarily

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ceſſarily to require that one bond only ſhould be taken. The Auditor, as taking care of this department of the public affairs, was the proper perſon to give the notice, and not the ſheriff. That the property was to be delivered on a Sunday makes no difference; becauſe that was formerly a legal day, and it is held, in 3. *Burr:* 1601, that a miniſterial act may ſtill be done on that day. But what is deciſive is, that the act of Aſſembly declares it may be done upon that day.

Cur: adv: vult.

ROANE Judge. The bond, on which the motion is founded, is to be conſidered as one of two ſeveral obligations entered into on the part of the two ſeveral ſheriffs and their reſpective ſecurities, although conſolidated in the ſame inſtrument. This conſtruction ariſes not only from its being ſtated in the obligation that Winſton and his ſecurities are bound in the ſum of £ 10,158: 15, and Cecilia Anderſon and her ſecurities in the ſum of £ 5,737: 10: 10, but alſo from the terms therein uſed, that the obligors are bound for the payment "*According to our obligation aforesaid.*" What is mentioned of the amount of the aggregate ſum does not vary the conſtruction, and is only as a memorandum of the amount of both bonds taken together.

Conſidering this inſtrument however as containing either one bond, or two ſeveral bonds, a queſtion ariſes, whether as it is ſubſcribed by all the obligors they are not all liable for the whole amount? And that they are ſo liable derives ſome colour from its being ſtated in the obligation that the obligors are bound jointly and ſeverally; but this conſtruction is done away by that part of the condition which ſtates that on a delivery by each ſett of obligors, the bond is void as to them, which would not be the caſe if each ſet of obligors were bound for the other.

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The words jointly and ſeverally therefore in the obligation are to be taken *reddenda ſingula ſingulis*, to extend to each ſet of obligors and to each ſeveral obligation, and not to all the obligors with reference to both obligations.

If this be a ſeparate bond, though contained in the ſame inſtrument, with another bond, moſt of the objections to the bond and to the notice will fall to the ground.

Indeed the bond ſeems taken agreeably to the act of Aſſembly which has been cited relating thereto, and the notice is ſufficiently particular and deſcriptive to warn the defendant of what he is to anſwer. The Auditor having ſigned the notice, its being dated at the Auditor's office, and ſtating that inſtructions will be given the Attorney General, are circumſtances clearly indicative of its being a *public bond* which was to be moved upon: And when in addition to this, it is recollected that the notice further ſtates, all the obligors except a deceaſed one; as well as, the date of the bond; its being a bond for the forthcoming of property; the particular ſheriff by whom taken; and that the property therein mentioned, was taken in execution by virtue of two writs of *fieri facias* iſſued from the Clerk's office of the General Court, there is a reaſonable degree of certainty, as to the very bond, which was to be moved upon: And I believe that very many judgments have been affirmed in this court, upon notices not more particular. I am therefore for affirming the judgment.

CARRINGTON Judge. As the counſel for the plaintiffs in the ſuperſedeas have inſiſted on their exceptions with great earneſtneſs, I ſhall conſider them in the order in which they were made, and give an anſwer to each of them.

The firſt exception is, that the notice does not ſtate that the motion would be made at the inſtance of the commonwealth, or deſignate the parties

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ties to the bond, but merely that a motion would be made on a bond payable to Parke Goodall.

The date of the bond however is mentioned, and that the condition was for the delivery of property taken by Parke Goodall, ſheriff of Hanover, by virtue of two writs of *fieri facias* iſſued, from the office of the General Court, againſt the eſtate of the defendant Winſton; which was ſufficiently deſcriptive of the bond: And if the defendants had given any other bond of the ſame date, under the like writs, ſo as to render it uncertain which was meant they might have ſhewn it. But, as none ſuch is ſuggeſted, the fair preſumption is, that none ſuch exiſted.

The next objection is, that neither the penalty or the ſum due is mentioned.

The anſwer to the laſt objection is an anſwer to this alſo.

The third objection is, that all the obligors are not mentioned, *nor the perſon, to whom the bond is payable, ſufficiently deſcribed.*

But as the defendants were all obligors and the motion not intended to be made againſt any other; as too the bond was joint and ſeveral; and Parke Goodall the obligee expreſsly named, there was no occaſion to be more particular, as thoſe circumſtances gave the defendants full notice of the bond on which the motion would be made.

The fourth exception is, that one bond was taken on two executions.

This indeed is not common; but it does not follow from thence that the bond is void. No diſadvantage could reſult to Winſton from it, as he was not thereby ſubjected to more than he owed himſelf; for care is taken to prevent that. Beſides it ſeems agreeable to the directions of the act of Aſſembly; which rather points at one bond only.

The

The fifth objection is, that two ſeparate debtors are included in the ſame bond.

This is nearly the ſame idea with that in the laſt exception; and may receive the ſame anſwer. For the condition deſignates the debt of each; and provides for the diſcharge of each. So that neither is in danger of ſuſtaining any damage from the other.

The ſixth error aſſigned is, that the bond ſhould have been made payable to the creditor.

But that was not neceſſary in this caſe; becauſe the act of Aſſembly directed that it ſhould be taken to the ſheriff for the uſe of the commonwealth.

The laſt exception is, that the day on which the property was to be delivered was Sunday.

But this ſurely could be no objection in this caſe; becauſe the act of Aſſembly had expreſsly directed it; and therefore if it be true that it was contrary to law in common caſes, it clearly was not ſo in this. For the ſheriff ſtood juſtified by the act.

Upon the whole the exceptions taken by the plaintiffs counſel ſeem to me untenable; and therefore I am for affirming the judgment.

LYONS Judge. Concurred.

Judgment Affirmed.

WALCOTT & al.
against
SWAN & al.

S agrees to locate certain lands for W, B and N, in the county of R, afterwards he agrees to locate the same lands for M; and having received land warrants from M for that purpose, he accordingly locates the lands. After this, B and N abandon their contract to W who renews the contract with S, who thereupon transfers the entries of M from the county of R to the county of L. This shall not disappoint M but the lands in R will be decreed him, on his releasing S from his covenants, and paying the fees of locating and surveying.

THIS was an appeal from a decree of the High Court of Chancery where Swan and M'Rae brought a bill against Walcott, Smyth and Price, the Register of the Land Office, stating, That on the 21st day of July 1795, the plaintiffs entered into a contract, concerning the location of certain lands; That Smyth, stated to the plaintiff M'Rae a particular tract of country, lying in Russel County as answering the description of the lands agreed to be located, by the plaintiff M'Rae for the plaintiff Swan. That after some conversation, on this subject, the plaintiff M'Rae entered into the annexed contract with the said Smyth. That under the said contract, the plaintiff M'Rae delivered to the said Smyth land warrants amounting to 300,000, acres, for which he took his receipt, dated the 14th of September 1795. That these warrants were located by the said Smyth in Russel county, on the very lands the plaintiff M'Rae believes which had been described by him, and which he had stipulated to locate. That after this, the defendant Walcott applyed to the said Smyth, and gave him a considerable sum of money; in consideration of which he assigned to the said Walcott the warrants aforesaid, and the entries made for the plaintiffs; and took in exchange a location, which was made for the said Walcott in the county of Lee, on lands not answering, as the plaintiff M'Rae believes the description of his contract, and of value considerably inferior to that, which was actually located, for the plaintiffs under their contract. That these lands have been included, in a large survey of 650,000 acres, made for the said Walcott, and returned to the Register; who, if not prevented,

will

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will iſſue a patent therefor to the ſaid Walcott. That the ſaid Smyth had no authority to diſpoſe of the plaintiffs locations, after having made them; and that, if he even poſſeſſed ſuch power, the motives for his conduct were ſuch as would render the act totally void. The bill therefore prays that the Regiſter may be enjoined, from iſſuing the ſaid patent to the ſaid Walcott; and be decreed to iſſue 300,000 acres thereof, to the plaintiff Swan; or that the ſaid Walcott may be decreed to aſſign, that part of his ſaid ſurvey, which was originally entered on the warrants of the plaintiff Swan, to him the ſaid Swan; and that the plaintiffs may have general relief.

Te anſwer of Walcott ſtates, ſometime in or about the month of June 1795, that defendant together with Booth and Nichols all of Connecticut, were in the county of Montgomery in Virginia, where they met with the defendant Smyth. That, after ſome converſation, reſpecting the unappropriated lands in Virginia, the ſaid Smyth propoſed to locate and ſurvey, for them, a tract of country on the waters of the Big Sandy River, between the eaſtern and the main branches of the ſaid river (and which the defendant avers to be the land in queſtion) upon certain terms, which were acceded to by them. In conſequence of which, articles of agreement were entered into, between the ſaid Smyth; of the one part; and the defendant, the ſaid Booth and Nichols on the other: Whereby, the latter parties ſtipulated to return to Connecticut, and to procure the money which might be neceſſary to carry the contract into effect on their part, and to meet the ſaid Smyth in the city of Richmond on the 20th of September following, for the purpoſe of delivering him land warrants, from half a million to a million and a half of acres, and of paying down ſuch ſums as they ſtipulated to advance, towards completing the buſineſs: On the other hand, the ſaid Smyth agreed to locate the ſaid warrants, upon the lands above deſcribed, to meet the defendant and his

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partners before mentioned, at the city of Richmond, on the ſaid 20th day of September; and in the mean time to enter into no negotiations for locating the ſaid lands, with any other perſons. That the ſaid Smyth alſo agreed to warrant the title of the ſaid land againſt all prior claims, except ſuch as might be aſcertained by the ſtate of Kentucky; it being queſtioned, whether the ſaid lands, or ſome part thereof did not lie, within the limits of that ſtate. That in conſequence of this contract, the defendant and the ſaid Booth and Nichols returned to Connecticut, and ſucceeded in raiſing a ſum of money, ſufficient to enable them to comply fully with their agreement to the extent of 1,500,000 acres of land. But to do this, ſo far as concerned the intereſt of the defendant, he was under the neceſſity, of entering into contracts with ſeveral perſons in that ſtate, obliging himſelf to procure for them upon the contingencies expreſſed in his agreement with the ſaid Smyth, ſo much of thoſe lands as amounted to the defendants intereſt in the ſaid contract. That the defendant together with the ſaid Booth and Nichols, returned to Richmond, by the time appointed, prepared to perform their part of the contract, entered into with Smyth; and were much diſappointed, on finding that the ſaid Smyth had left that place a few days prior to the ſaid 20th of September. That in this ſituation of things, the ſaid Booth and Nichols relinquiſhed to the defendant all their intereſt in the ſaid contract: which he accepted, and determined to improve. For which purpoſe, he determined to purchaſe warrants, to the amount of 500,000 acres (although he came prepared to take up 850,000 acres) intending to procure as many warrants, as would cover the laſt mentioned quantity, if ſo much could be found unappropriated. That the defendant went immediately to the houſe of the ſaid Smyth; who informed him, that, having underſtood, before he left Richmond that the defendant and his partners had abandoned the intention of meeting

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him at the time appointed, or of proceeding, farther with the contract, he had ſuppoſed it unneceſſary to continue longer, at that place; and had therfore entered 300,000 acres of the land, mentioned in that contract in the name of the complainant Swan: But he acknoweldged the prior obligation, under which he was, to comply with the contract he had made with the defendant; and affirming, that he had entered into no engagements with the complainant Swan, which obliged him to locate, for the ſaid Swan, the land in queſtion, he for theſe, as well as for other reaſons to be mentioned, entered into a new agreement with the defendant to locate and ſurvey, for the defendant 850,000 acres of the land mentioned in the firſt contract, upon the ſame conditions, and terms, as were therein mentioned; ſo far as they reſpected the warranty of ſaid Smyth, the ſums to be paid by the defendants, and the times of payment; That Smyth alſo ſtipulated, to withdraw the above entry for 300,000 acres, and to locate and ſurvey the ſame for the defendant. That the additional reaſons, ſtated by the ſaid Smyth, for withdrawing the ſaid entry and transferring the ſame to the defendant were ſuch as convinced the defendant that the ſaid Smyth poſſeſſed, not only the power to do ſo, but that it was alſo his duty. That he informed the defendant that he was bound to procure for the ſaid Swan, lands of a particular character, and had alſo agreed to warrant them generally, and without exception. That he knew of a tract of unappropriated land in the county of Lee, which, in his opinion, would better correſpond with the deſcription mentioned in his contract; and above all, that this laſt mentioned tract was not involved in the queſtion, whether the lands on Sandy River are within the territorial limits of Virginia or not? A riſk which he had not taken upon himſelf, in his contract with the defendant and to which he did not wiſh to ſubject himſelf, or the complainant. That the tract of land in Lee coun-

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ty, was more valuable, both as to ſoil and its vicinity to the ſettled parts of the ſtate, than that in Ruſſel county. That in conſequence of this laſt contract, entered into with the defendant the ſaid Smyth did, afterwards, transfer to the defendant the entry made for the complainant Swan, and did locate and ſurvey an equal quantity of better land, for the ſaid Swan, or for the complainants, in the county of Lee. That the ſaid Smyth ſurveyed for the defendant 650,000 acres of land in Ruſſel county, conformably with his contracts, including the above entry of ſaid Swan's; the plat and certificate of which, have been returned to the Regiſters Office, a ſufficent length of time for a grant to iſſue thereon. That the ſaid Smyth has not located any lands for him, in the county of Lee, or elſewhere; and if he had, the defendant was not bound, by his agreement with the ſaid Smyth, nor could he conſiſtently with his contracts in Connecticut, before ſpoken of, have conſented to take lands in Lee county; although they were more valuable, than thoſe in Ruſſell. For the defendant, having expreſsly ſtipulated with thoſe who advanced him money, to procure for them the very lands deſcribed in the ſaid Smyth's contract, could not have ventured to exchange them, for others. That Smyth was not induced by any unfair or improper conduct of the defendant or by any pecuniary conſideration, other than is beforementioned, to transfer the ſaid entry to the defendant. On the contrary he believes, and did then believe, that the ſaid Smyth had, as the neceſſary conſequence of his contract with the complainant, a perfect power to act as he did; that he meant to act fairly towards all the parties; and that he was influenced by no other motives than a regard to the real intereſt of the complainant and himſelf; and a deſire to fulfil, with good faith, his contracts with all parties. That to do this, it was neceſſary to remove the location of the ſaid Swan from lands, which did not, ſo well anſwer the deſcription of the contract,

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and were beſides, entangled in a queſtion of much difficulty, as to the title. On the other hand he had identified this very land to the defendant; who, with a knowledge of the claim of Kentucky had, not withſtanding conſented to take it up; and to take, upon himſelf, the riſk of this claim. That the defendant is adviſed, that, if the ſaid Smyth hath violated any engagements which he hath made with the complainants, he is anſwerable to them; but that all acts performed by him, as their agent, if fair (as in this caſe they certainly were,) are binding upon the complainants in law and equity. That the defendant had a prior equity to that of the complainants to the land, in queſtion; which was known to their agent Smyth; which he was bound, to protect; and which he could not have defeated, if ſuch had been his wiſh.

The anſwer of Smyth ſtates, that ſome time in the Summer of 1795, the defendant fell in company with Walcott, Booth and Nichols, at the ſurveyor's office in Montgomery; who being engaged in acquiring lands, the defendant deſcribed to them a tract of country, lying between the branches of Sandy river, reſpecting which, doubts were entertained, whether it lay in Kentucky or Virginia? And having apprized them of the nature of the queſtion, entered into a contract with them to locate and have ſurveyed the ſaid lands, as lying in Ruſſell county; they taking the riſque of the Kentucky right upon themſelves. That by the contract, the defendant was to meet the ſaid Walcott, Booth and Nichols in Richmond, on the 20th September enſuing, to receive land warrants, and ſo much money, as was neceſſary to carry the contract into effect; but it was verbally agreed by Nichols and the defendant to meet a week earlier, than the time mentioned in the agreement. That the defendant proceeded to Richmond by the time appointed; but received information, from a perſon, whom he ſuppoſed entitled to his confidence, that the ſaid Walcott

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and his partners had abandoned the undertaking on their part; and having remained, at Richmond, until the arrival of the ſtage, by which he expected the ſaid Nichols, and hearing nothing from him, the defendant took, for granted, the information which had been given him, and offered to locate the lands in queſtion for others. That he was introduced to the plaintiff M'Rae, and propoſed to contract, to locate, for him, the particular lands in queſtion; but he declined accepting the offer made him; not chooſing to contract, unleſs for lands warranted within the limits of Virginia, and of a particular deſcription. That the defendant had been miſled to ſuppoſe, and then actually did ſuppoſe, the lands in queſtion to approach, nearer to the deſcription required, than any other unappropriated lands he had heard of in Virginia, and therefore took the opinion of counſel relative to the right of Virginia to thoſe lands; which, founded on the information then given, was more favorable than his own. After which he entered into a contract with the plaintiff M'Rae; but did not therein, ſtipulate to locate the lands in queſtion for Swan. On the contrary, as he ſtipulated to procure lands *within* the limits of Virginia, and *not* mountainous, to have procured the lands on Sandy, would have been a direct violation of that ſtipulation. That, having received 300,000 acres of land warrants, from the ſaid M'Rae, and 100 dollars to bear incidental charges, the defendant left Richmond, about the 16th of September, and went to Ruſſell, and made an entry of 300,000 acres of the land in queſtion; but information then received, while on the frontier, materially changed his opinion of thoſe lands, and cauſed him to repent of his contract, and to deſpair of fulfilling it, unleſs by locating thoſe warrants on ſome other lands. That, on the arrival of the ſaid Walcott, in Wythe, in October following, the defendant, who had become convinced, that ſurveying the lands on Sandy for Swan, would ruin himſelf and M'Rae, renewed

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newed his agreement to locate and ſurvey thoſe lands for Walcott; who took the riſque of the Kentucky right upon himſelf: And in the contract, then entered into, it was ſtipulated, that the defendant ſhould locate Walcott's warrants according to the words of a location, made for Swan, *which ſaid Smyth has determined to remove*, it not having been then contemplated, reciprocally to transfer entries or warrants of one to another, by way of exchange. That the defendant did not *in conſideration of a ſum of money* aſſign to Walcott the warrants of Swan and the entries made thereon; but the reaſon for the reciprocal tranſfers, was, as follows, upon receiving the warrants of Walcott to the amount of 500,000 acres, the defendant ſent the whole of them to the office of the ſurveyor of Ruſſell; where they were lodged; it being meant they ſhould be there finally executed. But only 200,000 acres were entered, adjoining the entry made in Swan's name. The certificate of the ſurveyor that 300,000 acres thereof were unappropriated, was forwarded to Lee, in order to found an entry, to ſecure vacant lands, in that county. That, the defendant cannot now aſcertain at what time, he determined to adopt the mode of reciprocal tranſfers of the entries; nor does he ſuppoſe it material. That it was an unfortunate plan, as now appears, and *by no means neceſſary to effect the object*. That when the defendant ſent Walcott's warrants to Ruſſell, had he then ordered Swan's to have been withdrawn, and founded each perſon's ſurveys on the warrants iſſued to him, the preſent difficulty would have been avoided; and he would have been thus cautious, had he ſuſpected Swan or M'Rae of baſe principles, or ſuppoſed they would have aſcribed ſuch principles to him. That when he went to ſurvey the lands, in December following, he might ſtill have withdrawn the different entries, and removed the warrants of each perſon to the land intended for him: But to this

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plan the following objections occurred; had the entry made in Swan's name in September been withdrawn, that might poſſibly have let in ſome younger claim to the ſame lands, by entry in Kanawa; and, if not, as the lands muſt have been left uncovered by an entry in Ruſſell, until the defendant could have travelled to Lee, withdrawn the entry there made in Walcott's name, and returned, ſome other perſon might have covered the lands, by entry in Ruſſell or Kanawa, within that period. That to prevent theſe conſequences, and ſave himſelf a diſagreeable ride of near 300 miles, *and with no other motive*, the defendant determined to transfer the entry on Swan's warrants to Walcott on the ſurveyor's entry book, in exchange for the entry on Walcott's warrants in Lee of like amount; and endorſed a memorandum thereof on all the warrants. After which, thoſe 300,000 acres (the entry of which was thus transferred) and 350,000 acres entered, adjoining in Walcott's own name, were re-entered in his name, by way of amendatory entry and then ſurveyed. That, had it not been for the confidence the defendant placed in the complainants, a doubt might poſſibly have ſuggeſted itſelf as to the propriety and validity of the mode of proceeding, adopted by him. But, as a confidence exiſted, and as it is not an uncommon practice for perſons entruſted with warrants, not aſſigned to them, ſurveyors, and others to make transfers of entries thereon; and as the defendant was more than a common agent, being a joint proprietor of the lands to be acquired in Swan's name, he had no ſuſpicion, nor does he admit, that he exceeded his powers, particularly as the tranſaction was not to the detriment, but for the advancement of the complainant's intereſt, and tended to the fulfillment of both the defendants contracts. That, in order, that the return of Swan's plats ſhould not be delayed, the defendant advanced the ſurveyor's fees out of his own pocket, without having received them, and being informed, that a diſpute

would

would arise respecting the lands, he wrote to the complainant M'Rae a letter, in which was the following passage; "Whatever may be your determination or its consequences, it is plain you "ought to pay fees on 300,000 acres of land, if "you are entitled to so much of the lands surveyed for Mr. Walcott, he is entitled to the lands "surveyed for Mr. Swan, and the latter ought to "be registered at *your* expence, as the former was "at *his*. I therefore trust you will pay Mr. Price "the Register's fees on 300,000 acres. It may "be so done I presume as to have no effect on the "question, if you make one; which I hope you "will not. I have also a right to the surveyor's "fees, which in *confidence* of being re-imbursed, "I have advanced out of my own pocket" That the complainants have withheld the Register's and Surveyor's fees; although they ask, that 300,000 acres of land, surveyed and registered at the charge of Walcott, may be granted to Swan. That, the transfer was not injurious to the complainants, having regard to the intrinsic value of the different tracts of land surveyed; and the defendant believes, that the land, acquired in Lee county, is, to its quantity, among the most valuable acquisitions made in this state; since the last opening of the Land Office: It being chiefly land susceptible of cultivation, left by settlers of little foresight, and who surveyed small dispersed farms. On the contrary, the tract in the fork of Sandy, is, as the defendant is informed, and believes an assemblage of steep hills; among which, on creeks, are some narrow bottoms covered with prior claims. That to satisfy the complainants of the attention of the defendant to their interests, an affidavit, to this effect, of a surveyor, who had surveyed a large quantity of those prior claims, *entered in the office of Bourbon in Kentucky by the surveyor of Russell, himself*, was transmitted by the defendant to Pollard their agent. That, the complainants have been deaf to the information given by the defendant. Although

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though the lands lie *in Kentucky* as the defendant is convinced; and he gives his reaſons for thinking ſo. That no part of the defendants conduct towards any of the parties has been unfair, or unjuſt: That, in making the transfer called in queſtion, he was actuated by no improper motive; and only ſubſtituted an eaſy mode of effecting an object, in itſelf uncenſurable in place of a troubleſome mode of effecting the ſame object. That the object, thus effected, was beneficial to thoſe who complain, if they mean no unfair advantage of any other perſon; and that therefore and becauſe of the uſage in this reſpect, and of his intereſt in the thing transferred, the ſaid transfer ought to be held valid and the injunction diſſolved. But if the court ſhould be of opinion, to decree the lands to the complainants, the defendant prays, they may be compelled to take them as a compleat ſatisfaction of his contract with them; and that he may be exonerated from any reſponſibility for the title or deſcription of the lands in queſtion; as they are not the lands he has procured for the complainants.

The depoſition of Pollard is as follows,

Sometime in the month of September 1795, Alexander Smyth of Wythe county applied to me and informed me that he knew of a valuable tract of waſte and unappropriated land, which he wiſhed to obtain warrants to locate on, but had not the means of procuring them and therefore would gladly intereſt me in the buſineſs, if I would furniſh warrants, and proceeded to deſcribe the lands and the part of the country in which they lay, in confidence that I would not diſcover it to any other perſon, if I did not become intereſt myſelf, on having my aſſurance that I would not, he informed me that the lands lay within the forks of Sandy river, and were of a ſuperior quality to any that had been taken up for a conſiderable length of time and were of conſequence a great object to any perſon who had the means of adventuring in

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the buſineſs, that the cauſe of their remaining ſo long vacant was owing to an opinion being generally had that they were within the ſtate of Kentucky, but that he had been at conſiderable pains to inveſtigate the various laws which eſtabliſhed and deſcribed the boundary line between Virginia and Kentucky and was fully ſatisfied that the lands were within the former State.

It not being convenient for me to engage in the buſineſs, and knowing that a large quantity of land warrants had been iſſued in the name of James Swan which were in the hands of Alexander M'Rae, unlocated, I informed Mr. Smyth that I would mention the ſubject to a friend of mine who I knew had warrants, and if he diſcovered an inclination to treat I would then introduce him, which Mr. Smyth conſented to. On the ſubject being mentioned to M'Rae he deſired an interview with the other immediately, and after being togetogether ſome ſhort time, Smyth returned and informed me that M'Rae would not contract with him unleſs he would give a general warrantee title to the land, and although he was well ſatisfied in his own mind that the title would be good he had determined to take counſel before he would bind himſelf to give ſuch a one as was required, he accordingly went off and returned in ſome time after, informed me that the gentleman or gentlemen with whom he had adviſed after examining the laws on the ſubject conceived with him that the lands were clearly within the commonwealth of Virginia, and that he had determined to engage with Mr. M'Rae on the terms he had propoſed, June 5th 1797.

Another witneſs ſays that Walcott acknowledged that he gave the other defendant Smyth four cents per acre incluſive of land warrants, ſurveyors and regiſtering fees, for all the land in diſpute, between the above parties and the reſt of the land taken up by the ſaid Walcot in the forks of the Sandy.

There

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There are amongſt the exhibits the agreement between Walcott, Boothe and Nichols; that between M'Rae and Smyth, and that between Walcott and Smyth together with copies of the land warrants indorſements, transfers &c.

The Court of Chancery delivered the following opinion. "That from the agreement of June in the year one thouſand ſeven hundred and ninety five, between the defendant Alexander Walcott David Booth for himſelf and as attorney for ſeveral other people, and Auſtin Nichols of the one part and Alexander Smyth of the other part, the defendant Alexander Wolcot and his aſſociates derived no right to the land in controverſy; becauſe the defendant Alexander Smyth had no ſuch right, but it was in the commonwealth until it ſhould be regularly appropriated. That in the land office treaſury warrants which authorized the ſurveying and laying off land for the plaintiff James Swan, the words "this warrant is executed H. Smyth S. R. C." were a legal entry of the land in controverſy, for the benefit of that plaintiff, and gave to him an equitable title againſt the commonwealth, and every poſterior claimant under it, in that identical land; and that the ſurveyor could not transfer that right, nor could the defendant Alexander Smyth, transfer it except as to his own intereſt in one ſixth part of the ſaid land, without authority from his conſtituents. The agreement between him and the plaintiff Alexander M'Rae of September in the year one thouſand ſeven hundred and ninety five, did not in terms confer that authority, nor is ſuch authority implied in, nor doth it flow from the nature of the agents office, as the defendant's counſel inſiſted: And therefore the Court doth adjudge order and decree, that the defendant Alexander Walcott do aſſign, to the plaintiff James Swan, all that defendants right and title in and to three hundred thouſand acres of land, part of the ſix hundred and fifty thouſand acres of land certified to have been ſurveyed for him, and completed the ſeventeenth

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teenth day of December one thouſand ſeven hundred and ninety five by the ſurveyor of Ruſſell county; and that the defendant William Price, or the Regiſter of the Land Office, for the time being, do make out in due form the letters patent of the Commonwealth, to be preſented to the Governor for ſignature, granting, to the plaintiff James Swan, the ſaid three hundred thouſand acres of land, to be holden by him for the uſe of the perſons entitled thereto, by the articles of agreement, between the plaintiff Alexander M'Rae of the one part, and the defendant Alexander Smyth of the other part, of the fourteenth day of September in the year one thouſand ſeven hundred and ninety five." That Court therefore appointed commiſſioners, "for laying off, with any ſurveyor or ſurveyors whom the plaintiffs ſhall think fit to employ, the ſaid three hundred thouſand acres of land, in the place in which they ought to have been laid off by virtue of the entry, for the plaintiff James Swan, if the defendant Alexander Smyth had not undertaken to transfer the entry to the other defendant; and in ſuch manner as to exclude, in calculating and caſting up the contents of the area of the plat, all prior legal claims:" And decreed, "that the plaintiff James Swan ſhould within two months from that date, releaſe all his right and title in and to the lands entered for him in the county of Lee by the defendant Smyth." From which decree the defendant Walcott prayed an appeal to this Court.

This court made the following decree. "This "day came the parties by their counſel and the "court having maturely conſidered the transcript "of the record and the arguments of the counſel, "is of opinion, that ſo much of the decree afore-"ſaid, as directs the appellant to aſſign to the ap-"pellee James Swan all the appellants right and "title to the lands in the county of Ruſſell, in "the decree mentioned, before the appellees pay "to the appellant the money advanced by him for

"ſurveyors

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" ſurveyor's and regiſter's fees on account of the " ſaid land, is erroneous: *And* that the ſaid de- " cree is alſo erroneous, in not directing the ap- " pellees, on receiving the aſſignment aforeſaid, " to releaſe and diſcharge Alexander Smyth, in " the proceedings named, from all covenants and " agreements on his part, contained in the articles " entered into by him with the appellee Alexan- " der M'Rae on the fourteenth of September " 1795, referred to in the decree, ſo far as the " ſaid articles relate to the quantity, title, ſoil, " or deſcription of the lands covenanted to be lo- " cated and ſurveyed for the appellees, by the " ſaid Alexander Smyth. *But* that there is no er- " ror in the reſidue of the ſaid decree. There- " fore it is decreed and ordered, that ſo much of " the ſaid decree as is herein ſtated to be errone- " ous, be reverſed and annulled. *That* an account " be taken of the money advanced by the appel- " lant and Alexander Smyth, or either of them, " for ſurveyor's and regiſter's fees; and that, on " payment thereof with intereſt, the appellant " aſſign, to the appellee James Swan, all the appel- " lants right and title in and to the three hundred " thouſand acres of land, part of the ſix hundred " and fifty thouſand acres of land, certified to " have been ſurveyed for him and compleated the " ſeventeenth day of December 1795 by the ſur- " veyor of Ruſſell county: *And* that after ſuch " aſſignment ſhall have been duly made, and ap- " proved by the Court of Chancery, that the ap- " pellees releaſe to Alexander Smyth all actions " and ſuits, and fully diſcharge him from all his " covenants contained in the agreement, made be- " tween him and the appellee Alexander M'Rae " on the fourteenth of September 1795, before " mentioned, ſo far as the articles relate to the " quantity, title, ſoil, or deſcription of the lands " covenanted to be located and ſurveyed for the " appellees by the ſaid Alexander Smyth, within " ſuch time as the Court of Chancery ſhall di- " rect: *And* that the ſame time be allowed the ap-

pellee

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"pellee James Swan to releaſe his right and title "to the lands in the county of Lee, according to "the decree of the ſaid Court of Chancery. *That* "the reſidue of the ſaid decree be affirmed; and "that the appellees pay to the appellant his coſts "by him expended in the proſecution of his ap-"peal aforeſaid here."

HIGGENBOTHAM

against

RUCKER.

A man makes a gift of ſlaves to his daughter *and the heirs of her body*, and in caſe ſhe *died without iſſue* that is *children of her body*, the ſaid ſlaves to return to the grantor, this limitation is not too remote, and therefore is good.

If in a declaration for ſeveral ſlaves laying ſeparate values, the jury find a joint value it is error, and as to that a *venire facias de novo* will be awarded under the act of Aſſembly in order to aſcertain the ſeparate values.

HIGGENBOTHAM brought detinue in the County Court againſt Rucker for four ſlaves. Plea non *detinet* and iſſue. The jury found the following ſpecial verdict, "We of the jury find "that in January 1793 the plaintiff was poſſeſſed "of the ſlaves in the declaration mentioned, as "his own proper ſlaves. We alſo find that on "the thirtieth day of January 1793 the defendant "intermarried with the plaintiffs daughter, after "which time the plaintiff gave to his daughter "the wife of the defendant the negroes in the de-"claration mentioned, to her *and the heirs of her* "*body*, and in caſe ſhe died *without iſſue*, that "is *children of her body*, the ſaid negroes *to re-*"*turn to the plaintiff*. We alſo find that in leſs "than twelve months, after the gift and inter-"marriage, the plaintiffs daughter departed this "life *without iſſue*. We alſo find that ſince the "negroes in the declaration mentioned came in-"to the defendants poſſeſſion they have increaſed "one in number. We of the jury find for the "plaintiff the negroes in the declaration mention-"ed, in caſe the law be for the plaintiff, if to be "had, if not one hundred and fifty pounds da-"mages; if the law be for the defendant we find "for

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"for the defendant." The County Court gave judgment in favour of the plaintiff, for the ſlaves and damages.

The defendant thereupon filed a bill of exceptions ſtating, "That upon the courts deciding the "queſtion of law, the defendant, by his attorney, "moved the court to award a *venire facias de no-* "*vo*, becauſe he ſaith that the verdict rendered "by the jury in this caſe is ſo defective that a "judgment ought not to be rendered thereupon "inaſmuch as the jury hath not ſevered the value "of the ſeveral negroes in the declaration and "verdict mentioned, but was overruled by the "court."

The defendant appealed from the judgment of the County Court to the Diſtrict Court; where the judgment of the County Court was reverſed with coſts: And from the judgment of reverſal Higgenbotham appealed to this court.

RANDOLPH for the appellant. The obvious intention of the donor was to give an eſtate determinable on the death of his daughter without any iſſue then alive; which is a reaſonable period of time, and therefore the limitation is not too remote. For the jury expreſsly find that by iſſue he meant children; which confines and ties up the preceding words, heirs of her body, to the time of her own death. But under another point of view the limitation over is good; for the children were purchaſers, and therefore the daughters intereſt was merely an eſtate for life, which expired at her death without iſſue.

The joint aſſeſſment of the value of the ſlaves is not erroneous, *Jenk. Cent.* 112. *Lees cas.* 283 5. *Mod.* 77, or if wrong, yet there being no certainty, whether it applied to the damages for detention or the value, that part of the finding is nugatory; and therefore under the act of Aſſembly the court may award a writ of enquiry to aſſeſs the value.

CALL

CALL *contra*. Submitted the queſtion whether it had not been already ſettled both in England and this country, that the joint aſſeſſment of the value was erroneous,

And as to the merits, it never has been doubted that ſuch a limitation as this was too remote. All the caſes both in England and this country eſtabliſh it beyond all controverſy. *Goodwin* vs *Taylor* 2. *Wash.* 74. Nor has it ever been decided, in any caſe, that if there be a limitation to one and the heirs or iſſue of his body, and if he die without iſſue remainder over, that the remainder is good, unleſs there be ſome circumſtance or expreſſion to tie it up and abridge the generality of the firſt words, 2. *Fonbl. Eq.* 327. Neither will little circumſtances or ſlight expreſſions be ſufficient; but they muſt be ſuch as afford a fair and clear demonſtration. 1. *Bro. ca. Cby.* 190. Children is no more than iſſue, and iſſue than children. Particularly where no child was born at the time of the gift; and therefore the inſertion of that word in the verdict is not material. Beſides this was the caſe of a gift in the life time, and therefore leſs latitude is to be allowed, than in the caſe of a will; which being made *in extremis*, the court makes ſome allowance for the teſtators ſituation. Whereas a diſpoſition in the life time of the donor is taken to be made with more caution; becauſe the grantor might have had counſel if he had choſen it.

RANDOLPH in reply. I admit the rule as laid down by Mr. Call, that there muſt be ſomething to confine the limitation to a reaſonable period of time; but I contend that this is done in the preſent inſtance; for the word *children* does it. Eſpecially as that is a word of purchaſe and particularly in a deed; ſo that the difference inſiſted on is in our favour. The court will the more readily adopt my conſtruction; becauſe the intention of the donor was reaſonable. For if his daughter had iſſue he intended they ſhould have the benefit

of

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of the eſtate; but if not, then, inſtead of its going to ſtrangers, he intended it ſhould return to his own family again. The caſe of *Dunn* vs *Bray* (1. *Call's rep.* 338.) in this court contains reaſoning expreſsly appoſite to what I contend for.

CALL. That caſe was determined on the authority of *Pinbury* vs *Elkin* and other caſes in *P. Wms.* But not one of thoſe caſes reſembles the preſent.

Cur: adv: vult.

ROANE Judge. The firſt queſtion I ſhall conſider in this cauſe is upon the title to the ſlaves mentioned in the declaration.

This queſtion depends upon the limitation over to Higgenbotham as found by the ſpecial verdict. The clauſe on which the queſtion depends is as follows, "That on the 30th of January 1793 the "defendant married the plaintiffs daughter, after "which the plaintiff gave her the negroes in queſ- "tion to her and the heirs of her body, and in "caſe ſhe died without iſſue, that is, children of "her body, the ſaid negroes to return to the plain- "tiff."

It is a clear principle that a limitation of perſonal eſtate after an indefinite failure of iſſue is void, as tending to a perpetuity; but it is alſo a principle that, with reſpect to perſonal eſtate, the courts incline to lay hold of any words which tend to reſtrict the generality of the words "dying without iſſue," to mean "dying without iſſue living at the death."

Thus a limitation to a perſon *in eſſe* for life, after a dying without iſſue is good; becauſe the contingency muſt happen, if at all, in the life time of the remainderman; and the limitation to him for life reſtrains the generality of the words "dying without iſſue." Otherwiſe if the limitation had been to him in fee or in tail; in that caſe there would be no ſuch reſtriction and the limitation

over

over would be void. My opinion upon the particular principle, formed on thorough inveſtigation, was expreſſed in this court in the caſe of *Pleasants* vs *Pleasants;* * and that opinion I now wiſh to be underſtood to refer to and adopt.

There is a circumſtance in this caſe which appears to me to have this reſtrictive operation; that is to ſay, that the negroes are to return back to the plaintiff in the event of the daughters dying without children.

It is here to be obſerved, that the limitation is to the plaintiff himſelf. It is not to his heirs or repreſentatives, and it cannot reaſonably be inferred to have been the donors intention that the negroes ſhould revert to his repreſentatives at a remote diſtance of time. This limitation then is ſimilar to the limitation for life before ſpoken of; and reſtrains the generality of the words "iſſue of her body," to an event within the period of a life in being.

Without reſorting further to the ſtandard of general principles for the deciſion of this point, there is a caſe from 1. *Wms.* 534. *Hughes* vs *Sayer*, which ſeems deciſive of this caſe; where C having two nephews A and B, deviſed his perſonal eſtate to them, and if either die without children then to the ſurvivor. Here dying without children was reſtrained to mean without children then living; becauſe the immediate limitation over was to the ſurviving deviſee, as in the caſe at bar the immediate limitation over was to the ſurviving father; and the caſe of *Nichols* vs *Skinner Prec: Ch.* 528, is upon the ſame principle, and is perhaps ſtill ſtronger, as the word iſſue is there reſtrained on the ſame reaſon with the word *children* in the caſe juſt mentioned from *Peere Williams*.

My opinion then is that the title of the ſlaves in queſtion is in the preſent appellant.

But

* Vid. The next caſe.

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But the verdict of the jury is erroneous, in finding the value of the slaves aggregately, which was certainly meant to be done here under the word "damages." The judgment of the County Court is therefore erroneous as to this point; and in not awarding a *venire facias de novo* to ascertain the separate value of the slaves. Consequently I think that the judgment of the District Court reversing that of the County Court *in toto* ought to be reversed, and a judgment agreeable to the ideas above mentioned entered.

FLEMING AND CARRINGTON Judges. Of the same opinion.

LYONS Judge. The intention clearly was that the slaves should return to the grantor in the event of the daughters dying without leaving any children; which was a reasonable period, and if a Court of Equity had been called upon to execute the agreement the conveyance would have been in that form. The intention was rational, and the limitation confined within proper limits. Therefore there is no question upon the title. But there ought to have been a new writ of enquiry in order to ascertain the values of the slaves. I think therefore that the judgment of the District Court should be reversed; and that of the County Court affirmed as to the title, but reversed also as to the damages; and that a new writ of enquiry should be awarded to ascertain the values of the slaves.

Per Cur: The Court is of opinion, that the judgment of the District Court is erroneous. Therefore, it is to be reversed with costs; and this Court, proceeding to give such judgment as the said District Court ought to have given, is of opinion, that the judgment of the County Court is erroneous, in not awarding a writ of enquiry to ascertain the separate prices or values of the slaves in the declaration mentioned, the jury having found the value of all the slaves in a gross sum. Therefore that judgment is also to reversed;

ed; and the suit is to be remanded to the County Court, for a writ of enquiry to be awarded, to ascertain the separate prices of the slaves; and after the execution of such writ of enquiry, for judgment to be entered, for the appellant, for the slaves, or their respective prices.

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PLEASANTS *against* PLEASANTS.

Ante 317.

THis was an appeal from a decree of the High Court of Chancery in a suit brought by Robert Pleasants son and heir of John Pleasants deceased against Charles Logan, Samuel Pleasants junior Isaac Pleasants and Jane his wife, Thomas Pleasants junior and Margaret his wife, Elizabeth Pleasants, Robert Langley and Elizabeth his wife, Margaret Langley, Elizabeth Langley the younger, and Anne May. The bill states, that the said John Pleasants by his last will devised as follows, "my further desire is, respecting my poor slaves, "all of them as I shall die possessed with shall be "free if they chuse it when they arrive to the age "of thirty years, and the laws of the land will "admit them to be set free without their being "transported out of the country. I say all my "slaves now born or hereafter to be born, whilst "their mothers are in the service of me or my "heirs, to be free at the age of thirty years as "above mentioned, to be adjudged of by my trustees their age." That the said John Pleasants in a subsequent part of his will devised to the plaintiff eight of the said slaves upon the same condition, that he should allow them to be free if the laws of the land would admit of it. That the testator then devised to his grand son Samuel Pleasants

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The doctrine of perpetuities and executory limitations considered.

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one third part of his ſlaves not otherwiſe diſpoſed of, on the ſame conditions on which he deviſed the ſaid eight ſlaves to the plaintiff. That the teſtator deviſed to his daughtors Elizabeth Langley the uſe of all the ſlaves conveyed to him by Robert Langley and alſo the ſlaves ſold by the ſaid Robert Langley to John Hunt or Samuel Gordon during the term of her natural life, and after her death to her children upon the ſame limitations and conditions relative to their freedom, as are mentioned in the other bequeſts. That the ſaid teſtator then deviſed to his ſon Jonathan Pleaſants, when he ſhould attain the age of 21, one third part of all the ſlaves not otherwiſe diſpoſed of by that will including his mothers jointure negroes and thoſe given to her by her father to be reckoned as part of the ſhare or third part of the ſaid Jonathan Pleaſants in the ſhare of the ſaid ſlaves. That the teſtator deviſed to his grand daughter Jane Pleaſants a negro girl named Jenny upon condition, in addition to the general condition firſt mentioned reſpecting the freedom of the ſaid ſlaves, that ſhe the ſaid Jane as one of the children of her deceaſed father John Pleaſants ſhould releaſe all claim to any dividend in a copartnerſhip mentioned in the ſaid will. That he deviſed four ſlaves to his daughter Mary Pleaſants; to his grand daughter a negro woman named Pender and her children; and to Elizabeth Pleaſants wife of Joſeph Pleaſants a mulatto woman named Tabb and her child Syphax. That the ſaid teſtator then deviſed as follows. "Item I give and "bequeath unto my ſon Thomas Pleaſants "the remaining third part of my negroes, before "directed to be equally divided between my grand-"ſon Samuel Pleaſants and ſon Jonathan, with "the ſame proviſo and limitations reſpecting their "freedom as is before mentioned and intended "towards the whole by this will given or deviſ-"ed." That the ſeveral deviſees became poſſeſſed under the will aforeſaid, and the ſaid Jonathan Pleaſants in the year 1777 by his laſt will, made

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the following deviſe "And firſt believing that all "mankind have an undoubted right to freedom "and commiſſerating the ſituation of the negroes "which by law I am inveſted with the property "of, and being willing and deſirous that they "may in a good degree partake of and enjoy that "ineſtimable bleſſing, do order and direct, as the "moſt likely means to fit them for freedom, that "they be inſtructed to read, at leaſt the young "ones as they come of ſuitable age, and that each "individual of them that now are or may hereaf-"ter arrive to the age of thirty years may enjoy "the full benefit of their labour in a manner the "moſt likely to anſwer the intention of relieving "from bondage. And whenever the laws of the "country will admit abſolute freedom to them, it "is my will and deſire that all the ſlaves I am "now poſſeſſed of, together with their increaſe, "ſhall immediately on their coming to the age "of thirty years as aforeſaid become free, or "at leaſt ſuch as will accept thereof, or that my "truſtees hereafter to be named, or a majority or "the ſucceſſors of them may think ſo fitted for "freedom, as that the enjoyment thereof will "conduce to their happineſs, which I deſire they "may enjoy in as full and ample a manner as if "they had never been in bondage, and on theſe "expreſs conditions and no other I do make the "following bequeſts of them." That the teſtator then proceeds to diſpoſe of his ſlaves among the following perſons to wit, Mary Pleaſants, Anne Langley, Elizabeth Langley, Mary Langley, Jane Pleaſants, David Woodſon, Anne Woodſon, Joſeph Pleaſants, Samuel Pleaſants and the plaintiff; again expreſſing in almoſt every particular deviſe the ſame poſſitive condition in favor of their freedom. That the ſaid Anne Langley hath intermarried with May, Margaret Langley with Teaſdale, Anne Woodſon with Pope, and Mary Pleaſants with Logan. That the plaintiff is heir at law and executor of the ſaid John Pleaſants deceaſed,

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deceaſed, as well as executor of the ſaid Jonathan Pleaſants, and in thoſe characters in the year 17 applied to the Legiſlature for the manumiſſion of the ſaid ſlaves; but the Legiſlature were of opinion that it belonged to the judiciary. That the plaintiff hath been much embarraſſed as to the mode of bringing the queſtion before the Courts, as the ſlaves could not ſue at common law, 1. On account of their not being capable of being manumitted, but upon the terms mentioned in the act of Aſſembly. 2. As they claimed their freedom in the nature of a legacy. That the deviſes to the defendants were only on condition that they would emancipate them when they arrived at a certain age and the laws would permit it. Of courſe that they have no title to them, but either the plaintiff is entitled, for a breach of the condition, or as executor, on whom the legal eſtate veſted to perform the will. That there are no debts due from the ſaid John and Jonathan Pleaſants now unſatisfied. That the plaintiff hath applied to the defendants to emancipate the ſaid ſlaves, but they refuſe. Therefore the bill prays that the ſlaves may be delivered up to the plaintiff to be holden in truſt for the purpoſes of the wills of the ſaid John and Jonathan Pleaſants; that the Court would direct the manner of their manumiſſion; and for general relief.

The defendant Mary Logan demurred to the juriſdiction; and by anſwer ſays that her late huſband died indebted to ſeveral perſons.

Iſaac Pleaſants alſo demurred to the juriſdiction; and by anſwer ſays that the increaſe of the ſlaves deviſed to the ſaid Jane are under thirty years of age.

Samuel Pleaſants likewiſe demurred for want of juriſdiction; and by way of anſwer ſtates, that ſome of thoſe in his poſſeſſion are under 30 years of age.

Elizabeth

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Elizabeth Pleaſants, ſays that Tabb and her increaſe were given to the defendant by the ſaid John Pleaſants in his lifetime as by his letter will appear. And that the will of John Pleaſants doth not operate to give freedom to the other ſlaves.

The defendant Teaſdale denies his reſponſibility to the plaintiff, either as heir or executor. By amended anſwer he ſays, that T, Atkinſon has by virtue of a mortgage recovered part of thoſe held by the defendant, and the defendant hath ſince paid him a valuable conſideration for them.

A ſuit was afterwards brought by Ned one of the ſlaves in *forma pauperis* againſt Elizabeth Pleaſants widow of Joſeph Pleaſants, ſetting forth the clauſes of the will of Jonathan Pleaſants, ſtating the act of Aſſembly authorizing the manumiſſion of ſlaves, and that the plaintiff is now upwards of 30 years of age; and hath ſo demeaned himſelf as to ſhew that freedom would be conducive to his happineſs. The bill therefore prays the court to decree the defendant to releaſe him from ſlavery.

The Court of Chancery overruled the demurrers, and declared itſelf of opinion, that, in equity, of the ſlaves, on whoſe behalf the ſuit was inſtituted, they who were thirty years old or older in the year 1782, when the act authorizing manumiſſion was enacted, were, at that time, entitled. They, who, born before the teſtators death, were not 30 years old at the time of the decree, would, when they ſhould attain the ſame age, be entitled to freedom, and that they who had been born ſince the ſtatute was enacted, were at their birth entitled to freedom: That the plaintiff Robert Pleaſants heir and executor as aforeſaid, was the proper party to vindicate that freedom. It therefore referred it to a commiſſioner to aſcertain their ages, and to take an account of their profits ſince their reſpective rights to freedom accrued. From which decree the defendants appealed to this court.

WICKHAM

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WICKHAM for the appellants. If the plaintiffs were entitled to their freedom it was either by the common law, or by statute; and either way they could have asserted it at common law. Consequently their remedy was at common law, and they ought not to have resorted to the Court of Chancery.

It will be said that the legatees are trustees; and therefore that the Court of Equity had jurisdiction upon the ground of a trust. But the history of uses, which were invented to avoid the statutes of mortmain, shews that a Court of Equity only exercises jurisdiction, where the beneficial interest is in one person, and the legal in another. Now it cannot be said that the legatees have the legal estate, and that the beneficial interest, that is the labour of the slaves, is in the slaves themselves. Of course it is not a case which consists with the nature and foundation of trusts.

Perhaps it will be said, that several may join in one suit here; and that, that circumstance will give the jurisdiction. But that will not alter the case; because several may sue at law also. *Coleman* vs *Dick and Pat.* 1. *Wash.* 233. Therefore the Court of Chancery ought not to have sustained its jurisdiction, but the decree is erroneous, upon that ground.

Then as to the right of the plaintiffs to have their freedom. It may be proper to premise, that, although it may be true that liberty is to be favoured, the rights of property are as sacred as those of liberty; and therefore, that this cause should be decided on the same principles of law, that other causes are.

Emancipation of slaves was prohibited by the act of Assembly in 1748. *p.* 262. *edit.* 1769: Which act was in force at the time of making this will; and therefore the condition, annexed to the bequests, is void.

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There is a distinction in law, which is well known, between conditions precedent and subsequent. The first must be performed, before any estate at all vests; but it is otherwise as to the latter, because then the condition must happen to destroy the estate which has already vested. In our case the condition was precedent, and it remains to consider, whether the title, depending on it, could ever take effect?

This condition was contrary to the nature of the estate, for it tended to bar the alienation of the property, and therefore was void. *Shep. touch.* 129. 1. *Co.* 83. 1. *Inst.* 223. During all the period, between the death of the testator and the happening of the contingency, it was wholly uncertain, whether the law would pass, or not; and consequently the condition operated as a bar of alienation, for that time; which the authorities declare will render it void. For it is, in effect, but a devise of the slaves in absolute property, with a condition, that the devisee shall not alien. In *Co. Litt.* 224 it is said, that a privilege, inseparable from the estate, cannot be restrained; and the right of alienation is a privilege inseparable from the right of property.

But the condition is void, upon another ground; namely, that it was illegal and contrary to the act of Assembly; which having forbid emancipation, every attempt to effect it, was repugnant to the act, and therefore void.

If it be said that the act only respected absolute and not conditional emancipations, the answer is, that the latter is comprehended in the former, for every lesser is contained in the greater. So that this was an attempt at emancipation, which was void on account of its repugnancy to the law.

Perhaps it will be said, that the law permitted manumission at the time, when the emancipation took effect in point of operation, although there was no such law at the death of the testator; and

therefore

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therefore that the case is out of the meaning of the act of 1748. But this is not so; for there is no limitation, for the happening of the event; and the question is not, whether subsequent events can make it lawful? but whether the devise was good upon the face of the will? for posterior events could not make it good, if it were not so at its creation; that is, at the death of the testator. This is evinced in the common cases of remainders of personal estate, where the events may actually take place, within the limits allowed by law, but the remainders will, nevertheless, be void, because too remote in their creation. This principle was adhered to, by the Court in the case of *Carter* vs *Tyler;* * in which it was clearly held, that posterior events would not alter the construction from what it ought to have been, at the death of the testator.

Thus then it appears, that during all the period between the death of the testator and the passing of the act of Assembly, the legatees had property, to which there was a repugnant and illegal condition annexed; which was consequently fruitless and void.

By the act of Assembly in 1782 for emancipation of slaves, there is nothing which either manumits the plaintiffs in terms or obliges the legatees to do it; for the act has certain prescribed terms, and the present case is not within any of them: But the plaintiffs must shew, that they are within the requisites of the act; and this they cannot do.

It is a rule that all acts upon the same subject shall be construed as one act; because the whole are only parts of the same system. Therefore this act of Assembly and that of 1748, are to be taken as one law. It will then be correct to say in the language of 1748, that it is generally true, that there shall be no emancipation; but that there may be certain specified emancipations, according to the act

* 1. Call's Reports p. 165.

act of 1782. So that the provisions of the act of 1748 will still be the general principle; and those of the act of 1782 will only operate as exceptions out of that of 1748. Therefore any case which is not strictly within the terms of the act of 1782 will come within the operation of that of 1748. Thus if a man were to attempt to emancipate his slave by parol, this, not being within the terms of the act of 1782, would be void by that of 1748.

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Besides the act of 1782 is prospective, and not retrospective. It was not intended to embrace any prior cases.

Again the act is permissive, and not compulsory. So that the proprietor may do it or not, as he pleases; for there is no obligation upon him; and therefore the legatees may refuse.

But the act of Assembly imposes certain conditions upon the owner who emancipates, such as the maintainance of the young and aged slaves. Now this the proprietor may do or not, as he pleases, and no person can complain if he will not. But the construction made by the Court of Chancery, upon this will, would go to compel the legatees to give this security; for it cannot be dispensed with, if they are emancipated; or else the helpless and aged will be thrown as a burthen upon the public, contrary to the intention and express provisions of the act of Assembly.

The court cannot compel the administrators to emancipate. No person but the proprietor can do it by law, and, for the reasons already given, the court cannot force him to do it.

The decree of the Court of Chancery, does not follow the testators intention. He intended to erect the slaves into a distinct kind of property; that is to say, they were to be slaves till 30, and free men afterwards; but this idea is not pursued by the decree, which has not only changed the law, but the will too. For a mother having chil-

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dren before thirty, thoſe children will be ſubject to the term of ſlavery too. The word *hereafter* takes in all future generations.

As the decree of the Court of Chancery is clearly wrong, how will the court mould another? Muſt it be, that the plaintiffs and their progeny to all generations ſhall, in ſucceſſion, be entitled to freedom at thirty? This would be to allow the teſtator to create a new ſpecies of property, ſubject to rules unknown to the law. But this is what no man can do.

The whole amount therefore is, that the teſtator has wiſhed to do, what the law will not permit him to do; and, conſequently, the attempt is void.

Upon principles of convenience, the conſtruction of the plaintiffs ought not to prevail. For ſuppoſe Logan had contracted debts, between the death of the teſtator and the paſſing of the law, ought the creditors, who had truſted him on a fair preſumption that no law of emancipation would paſs, to loſe their debts?

The will of Jonathan Pleaſants ought to receive the ſame conſtruction.

With reſpect to the account of profits, who are to repay the expences of thoſe that were chargeable? It could ſcarcely have been intended by the teſtator, that this burthen ſhould be borne by the legatees.

But the general idea of the country and the practice in the courts of law are oppoſed to ſuch a demand; and therefore damages are never given, in actions of this kind, by the juries who decide them.

RANDOLPH on the ſame ſide. By the act of 1727 §. 3. ſlaves can only be conveyed as chattles; and as ſuch a limitation of a chattle would be too remote and therefore void, it follows that this is ſo

likewiſe

likewise. The act of 1748, instead of curtailing, rather extended the power of emancipation. For prior to that law a man could not manumit his slave.

WARDEN for the appellee. This was the case of a trust which gave the Court of Chancery jurisdiction. The nature or kind of the trust does not make any difference, in this respect *Saund. trusts.* 14. 18.

This was a trust to perform a certain act, when the trustee should be enabled to do it: Which trust was not inconsistent with law; and the act of 1782, having enabled the legatees to do it, their conscience is affected, and, consequently, they are bound to perform it.

The application to the Court of Chancery, therefore, in order to compel an observance of this equitable obligation, was proper.

The act of 1748 has not the effect, which is contended for, by the other side. It does not *ipso facto* make void the deed of emancipation. On the contrary, the right of the proprietor is extinguished thereby; although, the freedom of the slaves is liable to determine by the officers of Government exercising the powers given by the act of Assembly, and selling the slave. Which not having been done in this case, and the act of '48 being now repealed, it follows that the devise, which, at first, was effectual to pass the testators right, continues to be effectual.

The decree pursues the intention of the testator; which was, that all above thirty should have their freedom.

The plaintiffs have a right to the profits of their labour. The decree, therefore, as to this point, is right; especially, as it only directs the commissioner to enquire which of them are entitled to their freedom, and to profits: This, in effect, is

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is no more, than instituting an enquiry, which of them came up to the cases contemplated by the testator.

The notion of the *perpetuity*, contended for by Mr. Wickham, is without foundation. Because, from a fair construction of the devise, the contingency was confined to a reasonable period.

MARSHALL on the same side. As to the point of jurisdiction, there can be no question, but that the ordinary principles, founded on the general doctrines of trusts apply; and the rather, perhaps, because, being a suit for freedom, the forms of proceeding will not be so strictly adhered to, as in other cases. This was decided in the case of *Coleman* vs *Dick & Pat*, cited by Mr. Wickham. But it was clearly a trust; and therefore upon that ground, the Court of Chancery properly sustained its jurisdiction. Besides the difficulty of deciding the nature of the case, as whether freedom was actually given, so as that there might be a common law remedy? Or, whether it was not rather in the nature of a contract to be enforced in equity upon the happening of the events? Whether the property was in the heir or administrator? and which of them should perform the act? All these circumstances rendered the resort to the Court of Chancery proper.

As to the question upon the right to freedom, The right of the testator clearly passed by the will. That was irrevocable; although the slaves would not have enjoyed their freedom, had the officers of government chosen to exert their powers, and sold them as the act directed. But as the act of 1748 was repealed, without this being done, on the part of the officers of government, if they had the power in this case, the right of the *paupers* to their liberty continues,

The question then is, whether the condition shall be performed?

If

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If not, it must be, either, because it is against law, or because it is an attempt to create a *perpetuity*.

As to the first there is nothing *malum in se*, in it; and therefore, it is not void upon any principle of morality: Neither is it void, upon the ground of the statutary prohibition. Before the act of 1748, every person, who pleased might have emancipated his slave; and that statute does not say, that the testator may not give his slave liberty, when the law shall permit. The old rule of devises to a child in *ventre sa mere* is, in principle, not unlike this case. For, according to that rule, an executory devise to such a child by words *de præsenti* was void; but it was otherwise, where the devise was future. So here an immediate emancipation was liable to be defeated by the statute, but a future one, like this, was not.

The great question therefore is, as to the *perpetuity*. Now a perpetuity is a condition which may run forever, or to an unreasonable time. But this does not For the will relates to several subjects; and therefore may be construed severally.

For instance as to those born, the devise is to be confined to a life in being; and for this purpose it may be taken distributively: So as to make the contingency with regard to them, fall within a life in being, or a reasonable period afterwards. Thus where a mother was born at the death of the testator, the most remote limitation would be a life in being, and thirty years afterwards. Which is a period not denied by any book. For the authorities are all *affirmatively*, that it may depend on a life in being and twenty one years afterwards; and not *negatively*, that it shall not depend on a longer time than a life in being, and twenty one years afterwards. Therefore, as to the mothers born at the testators death, the bequest is good, upon the soundest principles of law.

The mothers born after the testators death may perhaps form a class of different cases; but that very

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very circumstance shews, that the account directed by the Court was proper.

The act of 1782 operated a clear repeal of that of 1748; and therefore the only impediment, which could be supposed to exist, is removed.

If justice requires it, the Court may compel the Administrators to emancipate; and the legatees, by taking the legacy, bound themselves to perform the trust. Of course they may be compelled to a specific performance of it. For if the testator was himself in that situation, he would be decreed to perform; and in principle, there is no difference.

With respect to the argument of inconvenience, from Legans having contracted debts, if that were the case, the plain answer would be, that the creditors having trusted a contingent estate, must be subject to the contingency.

RANDOLPH in reply. Upon the question of jurisdiction; this was a plain legal question, and if the plaintiff had any right they might have asserted it at law. The nature of the subject did not alter the case; nor did the qualities of the parties as combining the rights of the heir and trustee. In a case concerning lands such an argument would not prevail. you cannot in equity join different rights in one suit; and if you do, it is cause of demurrer. The *paupers* might all have united in one suit at law. Besides numbers alone cannot give jurisdiction to the Court of Chancery. If it be said, that, being a legacy, it was properly sued for in equity, the answer is, that the executor has assented, and, consequently, that the remedy at law was sustainable. It follows therefore that the Court of Chancery had not jurisdiction.

The law of 1727 declares, that slaves shall pass as chattles; and it is most clear, that such a limitation of a mere chattle would be void, as tending to a perpetuity.

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It is said that the act of 1748 only prohibits immediate, and not future emancipations; but this is not correct; and, before that act, it was not lawful to emancipate.

That statute was an existing prohibition, at the time of making this will; and, if a chattle had been devised upon such condition, that such a law should pass, the bequest would have been void. For it would have been a condition contrary to law, and therefore void. 2. *Black. Com.* 160.

Executory devises must take effect within a limited time or not at all. Thirty years is too long, and never has been allowed. If it were, you might go on to any extent. The period of a life, or lives, in being, and twenty one years afterwards, is the fixed rule; insomuch that it has now become a canon of property; and to alter it, would be to shake titles, and unsettle property.

In the present case, the devise is not to take effect within that period, and therefore the limitation is too remote. A law was first to pass; and when that should be, was wholly uncertain. The posterior event did not alter the nature of the case in its origin; it must be decided, by the will, at the testators death; at which time it would have been determined to be void, on account of the remoteness of the contingency.

Upon the whole, the devise is contrary to the policy of the law, as tending to create a *perpetuity*, and annexing conditions contrary to the genius and spirit of the acts of Assembly. It is therefore void; and of course the decree is erroneous, upon the general ground.

But, at any rate, the account of profits is contrary to practice, and the equity of this case in particular; because the defence was reasonable, and therefore the defendants justifiable in making it.

Cur: adv: vult.

ROANE

April Term 1799. Pleasants vs Pleasants

ROANE Judge. This is a bill brought, by R. Pleasants the heir and executor of John Pleasants deceased, claiming title on behalf of the negroes, who were the property of the said Pleasants, at the time of his death, and their descendants.

This claim is founded upon the will of the said John Pleasants, dated the 11th of August 1771; and which has this general clause, "My further "desire is respecting my poor slaves all of them "as I shall die possessed with, shall be free, if they "chuse it, *when they arrive to* 30 *years of age*, "*and the laws of the land will admit them to be* "*free*, without their being transported out of the "country, I say all my slaves now born, or here-"after to be born, whilst their mothers are in the "service of me or my heirs, to be free *at the age* "*of* 30 *years*, as above mentioned, to be adjudg-"ed of, by my trustees, their age."

He then gives his son Robert the plaintff eight negroes "On condition he allows them to be free "at the age of 30 years, if the laws of the land "will admit of it." And, then, devises the residue of the slaves to various persons, under conditions similar to that last mentioned, in the devise to his son Robert.

The will of Jonathan Pleasants (who was a legatee under the will of John Pleasants of one third of his negroes on the same condition) dated the 5th of May 1776 has a general clause respecting the freedom of his negroes, as also particular conditions annexed to each bequest, in substance similar to those, before stated, to be contained in the will of John.

As, however, it does not appear, as well as I recollect, that Jonathan Pleasants had any slaves, other than those derived from his father, as aforesaid, and entitled to the benefit of his will, the will of Jonathan may be thrown out of the present case. But, if it were otherwise, I do not think it would make any material alteration in

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any eſtate, or in the deciſion, which I think ought now to be given.

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After a demurrer by ſome of the defendants, for that the bill contained no matter of equity, but that the matter of it was proper for the cognizance of a court of law, and anſwers (which it is not now neceſſary to ſpecify particularly,) the Chancellor, on a hearing, overruled the demurrer, and decreed in favour of the plaintiffs; directing an account, alſo, to be taken of their profits. It is here to be remarked, that the cauſe with reſpect to the anſwers, does not appear, to have been matured and regularly ſet for hearing; but as all parties were willing to try it, upon the general queſtion, which moſt probably did not, at all, depend upon the particular anſwers, and more eſpecially, one which, involving liberty did not admit of delay, and cannot be drawn into precedent, as applicable, on the point, to other caſes, the deciſion given in that caſe, as upon the general queſtion, was not premature; and the deciſion, under the reſtrictions now contemplated as to ſubordinate queſtions, can produce no injury to any of the parties.

In conſidering the general queſtion, growing out of the will of Robert Pleaſants as before ſtated, I will firſt conſider ſlaves as a ſpecies of property recognized and guaranteed by the laws of this country, and to be conſidered, with reſpect to a limitation over (by the act of 1727,) on the ſame footing with other chattles.

I will alſo conſider, in the firſt place, the claim of the appellees to their freedom, only, as that of ordinary remaindermen, claiming property in them, and endeavour to teſte it by the rules of the common law, relative to ordinary caſes of limitations of perſonal chattles. And if their claim will be ſuſtained on this foundation, and by analogy to ordinary remainders of chattles, every argument will hold, with increaſed force, when

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the case is considered in its true point of view, as one, which involves human liberty.

The doctrines of the common law, relative to perpetuities as to estates of inheritance, hold *a fortiori* as to terms for years and personal chattles. If it be contrary to the policy of that law, to render unalienable, for a long space of time, real estates of inheritance, on reasons of public inconvenience and injury to trade and commerce, these reasons apply, with much more force, as to interests of short duration in lands and personal chattles; not only, because the latter are better adapted to the purposes of trade than the former, but also, because of their transitory and perishable nature.

This observation goes to fortify what is so fully established by the books, as to render citation unnecessary; namely, that the policy and reason of the law leans, at least, as strong against perpetuities in personal as in real estates.

The utmost limits allowed by law for the vesting of an executory devise (or as *Fearne* has it, as applicable to personal chattles, *an executory bequest*,) is the term of a life or lives, in being, and twenty one years after. This limitation, then, has become a fixed canon of property, and ought not to be lightly departed from. And the true distinction is, where the event must happen, if at all, within those limits, the executory devise is good; and on the happening of the contingency, the estate will become absolute, in the remainderman.

Thus a limitation to one, *in esse*, in fee or in tail, after a dying without issue, is not good, because the contingency, *the dying without issue*, is too remote. But such a limitation to one, *in esse*, for life is good; because the contingency must happen, if at all, so as to vest the estate, within a life in being, viz. that of the remainderman; that is to say, the limitation in remainder for life restrains the previous disposition, in the

same

same manner, as if it had been expresly limited to the remainderman, on the event of dying without issue, in his life time. Pleasants vs Pleasants

This case seems directly parallel, with the case before us, the happening of the contingency here; *i. e.* the passing a law to authorize emancipation, standing simply, is too remote, as it may not happen, within 1000 years: But when the testator goes on further, and means the benefit of it to persons *in esse* (for they are the objects of his bounty, and unless it happened within their lives, it might as well, as to them not happen, at all,) this restrains the happening of the contingency, as in the case before put; and makes the executory devise good, at least as to all, who are within the legal limits.

Nay, the doctrine is carried so far, as to terms for years and personal estates (for it is otherwise, with regard to estates of inheritance, in favor of the heir,) that Courts are inclined to lay hold of any words, in the will, to restrain the general words, "leaving issue," to mean *leaving issue at his death;* and thus to support the remainder. As, in the case of *Keely* vs *Fowler Fearne rem.* 370, where those words were so restrained, in a case, where the estate was to return back to the executors in the event of dying *without leaving issue* and to be distributed by them, and £ 50 were given them for their personal trouble. Here the words were so restrained, in order to reconcile the limitation to the devisee, with the nature of the trust reposed in the executors, and to be executed by themselves, *in their lives.*

The construction, in this case, must be, as it would have been, at the instant of the testators death, *Doe* vs *Fonnereau Cowp.* 477. And (the event put out of the question, at present, and leaving, for an after consideration, the circumstances of the contingency having actually happened, and its effects upon the case,) as upon the will itself, the

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the estate, limited on the contingency (if I may so express it,) that is to say, the right to freedom, was good, if the contingency happened within the legal limits, in favour of such, as might be *in esse* to enjoy it, and void, if it happened beyond those limits.

This brings us to the consideration, whether the limitation can be sustained, as on the construction of the will itself, as to such as might be *in esse* during such limits; although it may be void, as to such as might be born, in a remote generation?

And I have no doubt but it may.

I have no doubt but that the limitation, as upon the will itself, may be construed *distributively*; so as to be efficacious, as to some of the plaintiffs, although it might be void as to future claimants; that is to say, such as claim beyond the legal limits, in the event of the contingency's happening sooner or later, as the case may be. In the case of *Forth* vs *Chapman* 1. *Wms.* 663, there was a limitation of freehold and leasehold lands in the same manner, to wit, "If the first devisee die, without issue." These last words, *die without issue*, were construed, under the distinction before taken, to be tied up to mean *issue living at the death* as to the leasehold land, and consequently the limitation was held good; but, as to the freehold lands, they were not considered as being so restrained, and they received the same construction, by the Ld. Chancellor as if they had been twice repeated.

To come now to the case, before us, as it really is. The contingency has happened, within the limits. The effect is, that the limitation over has thenceforth become vested, in interest, in all the appellees, then *in esse*; and vested in possession, as to all, then, or as they might become, thirty years of age. As to all the slaves, then, *in esse*, but under thirty years of age, their right to freedom was complete, but they were postponed

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ed as to the time of enjoyment. They were in the case of persons bound to service for a term of years; who have a general right to freedom, but there is an exception, out of it, by contract or otherwise.

What then, after the passing of the act, is the condition of the children born of mothers, so postponed in the enjoyment of their freedom? Are they, at their birth, entitled to freedom? Or are they too, to be postponed, until the age of thirty? The condition of the mothers of such children is, that of free persons, held to service, for a term of years, such children are not the children of slaves. They never were the property of the testator or legatees, and he, or they, can no more restrain their right to freedom, than they can that of other persons born free. The power of the testator, in this respect, has yielded to the great principle of natural law, which, is also a principle of our municipal law, that the children of a free mother are themselves also free. The conditions of the will then, as applicable to such children, if indeed it was intended, or can be construed to apply to them, is void, as being contrary to law; it being an attempt to detain in slavery, persons that are born free. Considering the mothers of such children, by analogy to other persons held to service, it will be found, that a particular law was here necessary; the power of the Legislature, alone, was competent to subject the children of mulatto mothers, held to service till the age of thirty one, to serve till the ages, respectively, of twenty one and eighteen. But this case goes further, and, is an attempt, by an individual to hold to service, till the age of thirty, persons, who, following the condition of their mothers, are born free.

The view of the subject I have now taken, (which will sustain the claim of the plaintiff, by referring to the ordinary doctrine of limitations of personal chattles) will supersede the necessity of a very delicate and important enquiry: Namely,

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ly, whether the doctrine of perpetuities is applicable to cases in which human liberty is challenged?

It is clear, that the restraints, rightly imposed on the alienation of inheritances, to prevent perpetuities are founded principally, if not solely, on considerations of public policy and convenience. That those restraints have gradually been extended to terms for years and chattel interests, and that the utmost tolerable limits in such cases, have not been settled till after much investigation, and a considerable lapse of time. It is also clear, that neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges, who established the doctrine on this subject; which therefore may not apply. But this is an extensive question, and if it were necessary to be now decided (but it is not,) it would be proper to weigh the policy of authorizing or encouraging emancipation (a policy which has certainly received in many instances, and partly by the act of 1782, the countenance of the Legislature, at least from the æra of our independence, and must always be dear to every friend of liberty and the human race,) against those secondary considerations of public policy and convenience; which apppear to have supported and established the doctrine of the law, on the subject of perpetuities, as relative to ordinary kinds of property.

But it is said the act of 1782, authorizing emancipation, is prospective in its operation, and does not take in the present case. In answer to this, I am of opinion, that the acceptance of the negroes, in question on the condition stated in the will, created an inchoate contract to emancipate on the part of the devisee; which, on the passing of the act, became essentially complete. That an emancipation ought, therefore, to have been made; that the devisees were, thereafter, trus-

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tees, for the purpose of making such emancipation; and that the plaintiffs are right, in coming into a Court of Equity, to enforce the fulfillment of that trust. And this is one answer to the objection on the score of jurisdiction.

It is said too, that as the will speaks of an unqualified emancipation, without respect to bond and security, to prevent aged and infirm slaves from being chargeable to the public,) and as the act of 1782 has required that such security should be given, an act authorising emancipation, in the sense contemplated by the will, has not yet passed; and therefore the condition imposed upon the legatees, is not obligatory.

In answer to this, I am of opinion, that the testator cannot reasonably be supposed, to have contemplated an act of emancipation, making no provision to prevent the persons liberated from being chargeable to the public. That therefore the act, as contemplated, has substantially taken place; and, that a Court of Equity may carry the contract into execution, if in no other manner, at least by throwing the burthen of the indemnity, required by the act of 1782, upon the slaves themselves, and making it a *lien*, upon the liberty granted them; and such an arrangement, it is evident would place the holders, in the same, and no worse condition, than if an unqualified act in favor of emancipation had actually passed. The necessity of making such an arrangement, in this case, shews the propriety of applying to a Court of Equity; because no other Court has adequate power. Which is another answer to the want of jurisdiction.

In what manner the arrangement should be made, in this case, so as to comply with the act of 1782, requiring an indemnification against aged and infirm slaves, becoming chargeable to the public, is a subject, upon which, I have had considerable difficulty. But I am fully perswaded, that the powers, of a Court of Equity, which re-

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gards the substance of things more than forms, are competent thereto; and I now beg leave to refer to the *projet* of a decree, which I shall take the liberty of stating, presently, as containing the result of my deliberations, on the subject.

Another ground, upon which, the jurisdiction of the Court of Equity is sustainable, in the present case, is, that it involves the rights of a great number of claimants. So that the joint suit prevents a great deal of litigation and expence; besides involving, in the same common fate, those who stand on one common title. Whereas if separate suits were brought, it might turn out, either upon general or special verdicts, that persons having the same rights, nay even children of the same mother, might one be adjudged to be free, and another a slave. An enormity, which the joint proceeding is wisely calculated to prevent.

With respect to the slaves claimed by Elizabeth Pleasants and by Teasdel, paramount to the will of J. Pleasants, my opinion, in the present case, does not extend to them, so far, as, the title, thereto, is claimed paramount to that will; but such title ought to be considered, as still open, if desired for discussion and decision.

With respect to the debts of the original testator, if any, the original slaves and their discendants are clearly liable. But whether they are liable to the debts of the devisees accepting them, or their right to freedom is lost by a *bona fide* sale, if any such has taken place, are questions which I also consider, as open for the decision of the Chancellor, if required. It would seem to me, however, as at present advised, that if the limitation was good, by the rules of law, the right thereby created would not yield, either, to the claim of creditors or purchasers. But, on this point, I give no decided opinion.

I have now gone through, or touched upon such points in the case, as appeared to me necessary

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to be noticed. There is yet one part of the Chancellor's decree, which I could have wished had not been made. I mean the reference to a commissioner to ascertain the profits of the slaves. We have no precedents, either of the Courts of England, or this country, to guide us. In the former country, indeed, no such case could occur; because slavery is not there tolerated; and, in this country, I believe, no instance can be produced of profits being adjudged to a person held in slavery, on recovering his liberty. Among a thousand cases of palpable violations of freedom, no jury has been found to award, and no court has yet sanctioned a recovery of the profits of labour, during the time of detention. Yet it must be admitted, that juries are often excellent Chancellors. But this is not a palpable violation of freedom. To say the least, it is a very nice question, whether these plaintiffs be entitled to freedom or not? And ought the court, in such a doubtful case, to award that, which the whole equity of the country, flowing through a thousand channels, has not yet awarded, in a single instance? It seems to be a solecism, to award ordinary profits to recompence the privation of liberty; which, if it is to be recompenced, the power of money cannot accomplish.

But what, with me, is decisive on this point, is this, that as, in my opinion, all the children born of the female negroes, in question, since the passage of the act of 1782, are, and were thenceforth entitled to freedom by birth, the burthen of rearing such persons, during their infancy (which must be borne by the legatees,) will form perhaps not an unreasonable offsett against the profits of those, who were capable of gaining profit by their labour.

I have thus endeavoured to make known the grounds upon which my opinion is founded. I entirely concur in the result of the Chancellor's decree, except in the particulars, in which, I

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have already stated my opinion to be different. As it is the policy of the country to authorize and permit emancipation, I rejoice to be an humble organ of the law in decreeing liberty to the numerous appellees now before the court. And this upon grounds, as I suppose, of strict legal right, and not upon such grounds, as, if sanctioned by the decision of this court, might agitate and convulse the Commonwealth to its centre.

The general outlines and substance of the decree, which I think should be made in this case, are as follows.

That whensoever, and as soon as the appellee Robert Pleasants or any other responsible person or persons, shall under the direction of the High Court of Chancery enter into bond with sufficient securities in such Court or Courts under such penalty or penalties, as the said High Court of Chancery shall direct, with condition to indemnify and save the public harmless, with respect to all such of the slaves in question as were *in esse*, at the time of the passage of the act of 1782, authorising emancipation, and shall be deemed to fall within the provisions of that act, relative to old age and infirmity, with an exception however, with respect to such indemnity, as to such of the said slaves as may be under the age of thirty and may be deemed infirm, for the period or periods of time it may respectively require them to accomplish the said age of thirty years, and during which they will remain, at the proper charge of the legatees or holders under the will or wills, in question. Or whensoever, and as soon as the Legislature of this Commonwealth shall, if it ever shall remit the indemnity above supposed, necessary to be given. And when, in addition in either case, it shall appear to the satisfaction of the said High Court of Chancery, either that there are no legal and subsisting debts of the said John Pleasants the testator, or that being so, a sufficient fund has

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been raiſed, by the common labour of the ſaid ſlaves to diſcharge the ſaid debts, which in that event, ſaving the right of the legatees as aforeſaid, the ſaid Robert Pleaſants or any other truſtee to be appointed by the ſaid court are authoriſed to do; and if it ſhall be found that the teſtator Jonathan Pleaſants poſſeſſed, at his death, any ſlave or ſlaves other than thoſe derived under the will of the ſaid John and now in queſtion, then a like proviſion to be extended to them in reſpect of his the ſaid Jonathan's proper debts, if any; it ſhall be the duty of the ſaid High Court of Chancery to emancipate and ſet free the ſaid ſlaves reſpectively; ſubject nevertheleſs to the rights of the legatees and thoſe claiming under them to their labour, until they ſhall ſeverally have attained the age of thirty years, in like manner and to all intents and purpoſes, as if they had been reſpectively emancipated, conformably to the ſaid act. But if ſuch indemnity be given or remitted, as the caſe may be, within a reaſonable time, to be adjudged of by the ſaid Court, it ſhall in that event be lawful, for the ſaid Robert Pleaſants or any other truſtee or truſtees to be appointed by the ſaid Court to poſſeſs the whole of the ſaid ſlaves (ſubject as aforeſaid) in truſt, to raiſe a ſufficient fund to anſwer or procure the ſaid indemnity and ſatisfy the debts, if any, as is aforeſaid; and as ſoon as thoſe purpoſes are accompliſhed, in the opinion of the ſaid Court, it ſhall have power and is hereby directed to manumit the ſaid ſlaves, ſubject, as is aforeſaid, in the manner above directed; adopting and purſuing, in either caſe, ſuch meaſures as are provided by the ſaid act of 1782, as far as may be, for preſerving the evidences of their title to freedom. Provided, that nothing, herein contained, ſhall be conſtrued to extend to any of the ſlaves, in queſtion, born ſince the paſſage of the act of 1782, and who are entitled to freedom, by birth and not by emancipation. Nor to the paramount titles ſet up, by Elizabeth Pleaſants and Daniel Teaſdel,

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to a part of the said slaves. Nor to the question, whether the said slaves are liable to pay the debts of the original legatees, or those who claim under them? Nor, if sold to bona fide purchasers, whether, such sale be valid to bar the right of liberty now asserted? Nor to bar or affect the title or titles of any person or persons whatever, other than the said testator or testators, as the case may be, and those claiming under them respectively. All which questions ought to be considered, as open and undecided, as if the present decision had never been made.

CARRINGTON Judge. I concur with the decree of the Chancellor, so far as it goes to overrule the demurrers of two of the appellants. For it was unquestionably a proper subject for the interposition of a Court of Equity, and strictly within its jurisdiction. I am also of opinion with the Chancellor, that the plaintiff, neither as heir at law, executor, or trustee, could proceed, at law, as for a condition broken: He having parted with his powers, by his own assent and distribution of the slaves amongst the legatees.

But I differ widely from the Chancellor with respect to the exercise of his jurisdiction. Perhaps, I do not understand the principles and reasoning, upon which, he founds his decree; but the result is, clearly, contrary to both law and Equity.

It is contrary to law; because he has not preserved the principles of the only law giving owners power to emancipate. It is contrary to Equity; because it either fixes, on the public, a certain expence, or leaves a number of these people to starve, for want of subsistence.

Until the year 1748, every owner of a slave had a right to emancipate him, upon the principle of having a right to dispose of his own property as he pleased; but the Legislature, conceiving that inconveniences arose therefrom, passed a law to prevent the manumission of slaves, except for

meritorious

meritorious ſervices, to be judged of by the executive. Which law remained unaltered, until the year 1782; when the act paſſed allowing emancipation upon condition that the public is indemnified againſt loſs and expence. This is ſtill the law, and ought to have been attended to by the Chancellor in forming his decree.

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I perceive no difficulty in aſcertaining the meaning and intention of both the teſtators; who diſcover a ſtrong deſire to emancipate their ſlaves immediately on their deaths. But as the then exiſting laws would not permit, they did all they could towards effecting it, by directing, that it ſhould be done, as ſoon as the laws would authorize it; and, in the mean time, making temporary deviſes of them amongſt their children and friends, with a poſitive condition annexed, that the different deviſees ſhould liberate them, as ſoon as by law it ſhould be allowable, on their reſpectively attaining to the age of thirty years. Which period was probably fixed upon, with a view to the labour of the ſlaves affording ſome compenſation, for the trouble and expence of taking care of the aged or infirm, and rearing the children.

The queſtion, then, is, whether theſe deviſes are ſuſtainable? I hold that they are; and not liable to the rule reſpecting chattel intereſts, limited on more remote contingencies, than the law allows. For the ſubjects of the deviſes are different; inaſmuch as in the deviſe of chattels, property only, is concerned; but liberty is deviſed in this caſe. Both ſacred rights indeed; but the rules of limitation not neceſſarily the ſame with regard to them.

In point of fact, the contingency actually happened, within a very ſmall ſpace of time. For, within ſix years, from the date of Jonathan Pleaſants' will, a law was paſſed enabling owners to emancipate their ſlaves.

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But, by this law, the owner, who would manumit his ſlaves, muſt give ſecurity to indemnify the public, againſt the expence of ſupporting ſuch as are aged, infirm, or infants. A proviſion which the decree has not attended to, although it certainly, ought not to be overlooked. But I do not think, that the holders, in the preſent caſe, ſhould be compelled to give it themſelves. On the contrary, I think the emancipation ſhould be upon the condition, that the preſent friend of the appellees, or ſome other perſon or perſons, will procure the ſecurity required by law. Which will be conſiſtent with the conduct of the Legiſlature in two recent inſtances; namely, in the caſe of Mayo's ſlaves, in which the executors were by an order of the Court of Chancery, founded on the law of 1787 for emancipating thoſe ſlaves, directed to reſerve funds enough for the purpoſe. The other caſe was that of Moreman's ſlaves. In which caſe, the act of Aſſembly, for emancipating of them, directs, in ſo many words, that the executor, or ſome other perſon, ſhould be bound to indemnify the public.

Having mentioned my opinion upon the general queſtion concerning emancipation, I ſhall now ſtate what I conceive to be the periods, at which, the appellees will be reſpectively entitled to their freedom, upon the conditions juſt explained. I think they are to be emancipated in the following order. That is to ſay, all thoſe *now* above the age of thirty years immediately; and the increaſe of mothers above the age of thirty, at the term of the birth of the child, are alſo to be emancipated immediately. But thoſe born of mothers, not thirty years of age at the birth of the child, are not to be liberated, until they arrive at the age of thirty; and the ſame rules are to be obſerved, with reſpect to their progeny, born, during the ſervitude of the mothers. Which ſeems to me to ſatisfy the meaning of the teſtators.

The decree for profits is I think new and unprecedented. Beſides the account, when the reductions

reductions for the trouble and expence of taking care of the aged and infirm, and for rearing of the children is made, would probably yield very little. Under every point of view, therefore, I am against the account; and think the decree should be corrected in that respect likewise.

Some other alterations are wanting still. For all the defendants have not been fully heard. Two demurred, and as to them the cause was properly heard. But the cause was not in a proper situation to be heard as to Elizabeth Pleasants; and, in the case of Ned, there was no answer, nor the bill taken for confessed, after the proper previous steps. Therefore, I think, that, as to those parties, the cause should go back to the Court of Chancery, in order, that the proper proceedings may be had therein with respect to them; so that they may have an opportunity of supporting their titles, if they can do so.

Besides no attention has been paid to creditors.

Although it may not be the case, yet it is possible, that John and Jonathan Pleasants owed debts, which are still unpaid. If there be any such creditors their rights should be secured.

The holders of the slaves, may owe debts; and it is expressly said to have been the case of Logan. Perhaps too some of them may have been mortgaged, or sold to innocent purchasers, upon the faith of possession, and apparent ownership in the legatees. Now, although I will not say, at present, whether the debts and contracts of the legatees ought or ought not to affect the slaves, because the case is not before me, yet the door should not be shut to enquiry, and such creditors and purchasers excluded from shewing, if they can, that they have an equitable lien.

Upon the whole, I think the decree should be reversed; and a new one entered, conformable to the opinion, which I have delivered.

PENDLETON

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PENDLETON Preſident. On mature conſideration, I am of opinion, that the ſuit in Chancery cannot be ſuſtained upon the ground of the appellees claim as heir at law to take the ſlaves for the condition broken, it being the practice of that court to relieve againſt forfeitures and not to aid or inforce them. Neither will his claim, as executor, have that effect; becauſe, having long ſince aſſented to the ſeveral legacies and bequeſts of theſe people, he had fully executed his power over the ſubject. At the ſame time, theſe characters furniſh a commendable reaſon for his ſtating the caſe of theſe paupers to the court; and it ought to be heard and decided upon, without a rigid attention to ſtrict legal forms, ſince it can be done, without material injury to the other parties.

And upon a view of the caſe, I am of opinion, that the paupers are not legally emancipated under the wills of the teſtators and the ſeveral acts of Aſſembly; but if they are entitled to relief, at all, it is on the ground of a truſt created by the will's, that their manumiſſion ſhould take place, upon a contingent event, which it is alledged has eſſentially happened, but requires an act to be done by the poſſeſſors, who refuſe to perform it, and a Court of Equity can, alone, inforce the execution of the truſt, or make the neceſſary arrangements therein; and therefore, that there is no error in ſo much of the decree, as overrules the demurrers of the appellants Mary Logan, Iſaac Pleaſants and Samuel Pleaſants jr. for want of juriſdiction.

But, as the cauſe was only ſet for hearing on the demurrers, and not on the anſwers and exhibits, it would ſeem, that, regularly, that court could not, in that ſtate of the proceedings, have proceeded to a hearing and decree upon the merits: Nevertheleſs, upon the principle, before ſtated, of not adhering to ſtrict form, in this pauper caſe, where eſſential juſtice can be done; (ſince

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the answers of these three defendants put their defence upon the wills and acts of Assembly, without alledging any facts to influence their construction, and the counsel, on both sides, have argued the merits, at large,) the court have, in this case, for convenience, without meaning to fix a precedent, considered and determined the general question; leaving, however, the claims of Elizabeth Pleasants and Daniel Teasdale to part of the paupers, under titles paramount to the will of John Pleasants, and the question, how far those in the possession of Mary Logan shall be liable to the debts of her husband, open for discussion in the Court of Chancery, upon proper statements of the facts, and exhibits relative thereto; which they are to be at liberty to introduce in that Court.

Although the testators, at the time of making their respective wills, had not power to manumit, and if they had devised them upon condition that the devisees should emancipate them immediately, the condition, being unlawful, would have been void, and the property vested; yet a condition, that they should become free when the law would permit it, was not of that sort.

To consider this freedom in the light of a limitation of the remainder of a chattel, upon a contingent event, it would seem to assimilate to the case of such remainder, limited over upon a general *dying without issue*, and therefore, void; since the Legislative permission might never be given; might be afforded one hundred years after; or at any earlier period. And the will in the other case, is allowed to be the rule of judgment, unaltered by the event, although the *dying without issue* shall happen in a reasonable time; all being involved in one fate. But I am of opinion, that it would be too rigid to apply that rule, with all its consequences, to the present case; and that a reasonable principle ought to be adopted, to suit its peculiar circumstances; which is, that, if the event happens whilst the slaves remain in the pos-

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session of the family, without change by the intervention of creditors or purchasers, since the contending parties would be those whose interests had been contemplated by the testators, the bequest ought to take place: But that the case of such intervening claims, not being in the view of the testators, it ought to be considered, how far they should, in equity, prevent the devise of the manumission from taking effect. So far therefore, as concerns the family, I should have had no difficulty, in decreeing in favour of the paupers, if the wills had directed a general emancipation, when permitted, and the Legislature had permitted it, without any condition annexed to it.

The difficulty arises from the testators not having directed a general manumission, when permitted by law; but a limitted one, directing all future generations of these people, born whilst their mothers were under thirty, to serve to that age; founded no doubt, upon a consideration of the interest of his family, and that of the slaves.

On this middle state the Legislature have not declared their will; except in a case, which assimilates to this, namely, that of mulattoes, the descendants of a free white woman by a negroe; all of whom, born whilst the mother was under thirty one years of age, were to serve to that age, in all generations, by an act passed at an early period, and continued in force until 1764, when it was repealed; which is not conclusive, as to their will, upon the present subject. On the other hand the Legislature have permitted a voluntary unlimited emancipation, but annexed a condition, that the person liberating shall support and maintain all such, as in the judgment of the Court *are not of sound mind or body* or above 45, or males, under the age of 21, and females, under 18; to be levied upon him, or his estate, by order of the court in case of neglect or refusal. On these terms the testators have not declared their minds, whe-

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ther they would, or would not, have compelled the deviſees to emancipate, ſubject to them.

Under this difficulty; the Court endeavored to model a decree, to affect the purpoſe of the paupers, without eſſentially violating the wills or the laws; and was of opinion, that the limited manumiſſion, according to the modifications in the wills of the teſtators, could, alone, take place and be decreed; and would have found no difficulty in making ſuch a decree, from the ſilence of the Legiſlature, on ſuch a ſtate of ſervitude (ſince it might in future act upon the ſubject, and either continue or diſcontinue it,) but had inſuperable difficulty upon the terms impoſed by the law; which may be important. The perſon empowered to emancipate, had an opportunity of judging, whether he would do the act upon that condition? In the preſent caſe, the deviſees, the legal proprietors, oppoſe the manumiſſion, and the queſtion is, whether they ſhall be compelled, under the wills, to do the act, be ſubject to new hardſhips, not impoſed on them by the wills, and on which no perſon can ſay, what would have been the deciſion, had the teſtators contemplated the ſubject?

On Moremans will an act paſſed in 1787, reciting his will in 1778, by which he deviſed certain ſlaves by name to each of the different legatees to enjoy their labor; the males to 21, the females to 18, and then all to be free; except ſome, deviſed to his wife, which ſhe was to have for life, and then they were to be free; and except another parcel, who were to be immediately free. The act divides them into four claſſes.

1. Thoſe who were between 21 and 45.

2. Thoſe deviſed to the mother then dead; which two claſſes, were to be immediately free, as if born ſo; and their increaſe were alſo to be free.

3. All under 21 and 18 were to be free, when they attained thoſe ages, and the increaſe of thoſe

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to be free at a future period, were to be free with the parents.

4. Those above 45, to be free, when Johnson the executor, or any other should enter into bonds, with approved security to the County Court, with condition that they should not become chargable to the public. This was in spirit pursued by a majority of the Court; and a decree has been formed, to the following effect.

"The court is of opinion, that there is no error in so much of the decree of the said High "Court of Chancery as overruleth the demurrers "of the appellants Mary Pleasants, Isaac Pleasants and Samuel Pleasants junior for want of "jurisdiction in the said court, but that there is "error in some of the principles on which the decree upon the merits is founded and part of the "reasoning, thereupon, is not approved by this "court: Therefore it is decreed and ordered "that so much of the said decree as overruleth the "said demurrers, be affirmed, and that the residue of the said decree be reversed. And this "court, proceeding to make such decree as the "said High Court of Chancery should have pronounced, is of opinion, that altho' the testators, "at the time of making their respective wills, had "not power to manumit, and if they had devised "them upon condition that the devisees should "emancipate them immediately, the condition, "being unlawful, would have been void, and the "property vested; yet the condition that they "should become free when the law would permit "it, was not of that sort. That to apply the rule "respecting the limitation of the remainder of a "chattel upon too remote a contingency, with all "its consequences, to the present case, would be "too rigid, but that a reasonable principle ought "to be adopted to suit its peculiar circumstances "which is this, that if the event happens whilst "the slaves remain in the possession of the family, "without change by the intervention of creditors

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"or purchasers, since the contending parties "would be those whose interest had been contemplated by the testators, the bequest ought to "take place; but that the case of such intervening claims, not being in the view of the testators, it ought to be considered how far they "should in equity prevent the devise of the manumission from taking effect. So far therefore as "concerns the family, the court would have had "no difficulty in decreeing in favour of the paupers, if the wills had directed a general emancipation, when permitted, by law, and the Legislature had permitted it, without any condition annexed: but a difficulty arises from the testators not having directed a general manumission, when allowed by law, but a limited one, "directing that all future generations of these people, born whilst their mothers were under thirty, should serve to that age; founded, no doubt, "upon considerations of the interest of his family, "and that of the slaves; on which middle state "the Legislature have not declared their will; "and on the other hand the Legislature have permitted an unlimited emancipation but annexed a "condition imposing upon the person liberating, "certain terms for the sake of the community, of "which the persons making voluntary manumissions might judge, whether they would do the act "upon these terms, and use their pleasure, and "on these terms the testators have not declared "their minds, whether they would or would not "have compelled the devisees against their inclination, to emancipate subject to them. Under "this difficulty the court endeavoured to model a "decree, to effect the purpose of the paupers, "without essentially violating the wills; and is of "opinion that the limited manumission according "to the modifications in the wills of the testators, "can alone take place and be decreed, and that "the terms for securing the public against the "maintenance of the aged or infirm, cannot be "equitably imposed upon the devisees. It is

"therefore

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"therefore further decreed and ordered that all "the slaves of which the testators were possessed "as their property at the time of their respective "deaths not subjected to the claims of the credi- "tors or purchasers before stated, and who are "now above the age of forty five years and their "increase born after their respective mothers had "attained the age of thirty years (so soon as Ro- "bert Pleasants the executor, the several trustees, "or any other person shall in the courts of the se- "veral counties in which the said slaves respective- "ly reside enter into bonds with approved sure- "ties payable to the Justices then sitting in each "court, and their successors, with condition that "the said slaves shall not become chargeable to "the public, or enter into one such bond for the "whole in the General Court,) and all such as are "now above thirty and under the age of forty five "years immediately shall be emancipated and set "free to all intents and purposes, in like manner "as if they had been born free, and that all who "are now under the age of thirty, and whose mo- "thers had not attained that age at their birth; "and all their future descendants, born whilst "their mothers are in such service, do serve their "several owners until they shall respectively at- "tain the age of thirty years, and then be in like "manner free; and when their freedom shall se- "verally take effect according to this decree, there "shall be delivered to each of them, by their re- "spective masters or mistresses, a certificate writ- "ten or printed, attesting their freedom, in such "form as shall be directed by the said High Court "of Chancery. That no account ought to be tak- "en of profits, it being unusual in such cases, and "less reasonable in this very difficult one. And "the cause is remanded to the said High Court of "Chancery for a state to be taken of the present "condition of the several persons, and their rights "ascertained, according to the principles of this "decree; also for further proceedings to be had, "respecting the claims of Elizabeth Pleasants and

"Daniel

" Daniel Teasdale to part of the slaves, under ti-
" tles paramount to the will of John Pleasants,
" and the claim of the creditors of Charles Logan,
" upon proper statements of the facts and exhibits
" relative thereto; which they are to be at liber-
" ty to introduce in the said court."

BRAXTON

against

ANDREWS.

BRAXTON appealed, from the Court of Chancery, to this court; and then died. As no person would take administration on his estate, it was committed, by the Hustings Court, to the Serjeant of the city, agreeable to the act of Assembly. *Rev. Cod.* 176. *sect.* 61.

If the appellant dies, and no person will administer on his estate, so that the court orders the Serjeant to take possession of it, no *scire facias* to revive the appeal, lies against the Serjeant.

A *scire facias*, was moved for against the Serjeant, to revive the appeal.

The court thought it was a case not provided for, by the act of Assembly. And nothing was taken by the motion.

N. B. The cause lay over for several terms; and, at length, was finally abated.

M'CONNICO

M'CONNICO & al. Exrs. of HOLLOWAY. *against* CURZEN. *

A consignee, who receives no orders to the contrary, may sell on the customary credit of the place.

The executors of a consignee will not be liable for outstanding debts, unless there be gross negligence.

And the appointment of agents to collect is *prima facie* evidence of due diligence, So that the consignor must afterwards prove the negligence.

Where the evidence was defective as to a particular item, no decree as to that item was made

Interest not demandable on an unliquidated account.

Specie during the war, was not an article of currency, but a commodity at market; and items of specie, advanced during that period, should be extended, at the value, at the time of the advance made.

THIS was an appeal from a decree of the High Court of Chancery, where Curzen brought a bill against Holloways exrs. stating, That in 1780 he consigned the sloop *Hero's revenge*, with her cargo, to Holloway at Petersburg in Virginia, to be disposed of by him; which he did, some time in the ensuing year, for £ 205,072: of which £ 7726:2:4, by Holloways own statement appears to be due; and that the plaintiff is entitled to receive the same, in tobacco, at £ 70 per cwt. as will appear by Holloways letter of the 19th of August 1781. That besides the above balance the plaintiff claims an account for 800 weight of coffee part of the said cargo, kept by himself, and to be paid for in tobacco at the same rate. That the coffee was then worth £ 3720 paper currency. That, on the 18th of April 1781, Holloway transmitted to the plaintiff, then resident in Baltimore in Maryland, notes for 143 hhds. of tobacco, amounting, inclusive of warehouse expences, to £ 118.926; 18; pretending that it was received from the purchasers of the consignment. That the whole of this tobacco, was shortly after, destroyed by the British; and the plaintiff believes a considerable part of it, being the tobacco of Holloway and not of the plaintiff, was fraudulently

* The above case was accidentally omitted, in publishing the cases of the October Term 1799. It is therefore inserted now.

ly sent, when Holloway apprehended the British would destroy it. That in 1780, the plaintiff, likewise consigned to Holloway, the schooner Blossom, with her cargo; the nett proceeds of which amounted to £ 3461: 16; of which the plaintiff has received 33171 dollars, continental money, leaving a balance due the plaintiff of £ 23510: 10, payable in tobacco, at £ 70 per cwt. The bill therefore prays an account, and payment of the balance; and for general relief.

The answer admits the said sum of £ 7726: 2: 4 *paper currency*, on 21st August 1781, and that the same was payable in tobacco at £ 70 per cwt. It also admits the coffee to have been on hand, upon the 19th of August 1781; but refers to an account to shew how it was disposed of. Insists that the tobacco notes, remitted were the property of the plaintiff, and not fraudulently sent; but that they were honestly remitted, the plaintiff having then actually sent for 100 hhds; and, at that time, that there was little or no prospect, that the British would go to Petersburg. That the cargoes were sold at the customary credit of the place, as no directions to the contrary were given; and there are sundry outstanding debts, due from the purchasers. That proper steps have been taken to collect the same, but several of the defendants have plead the act of limitations.

The Court of Chancery referred the accounts to a commissioner; who allowed the plaintiff the charge for the coffee and the other debits; but credited Holloway for the 143 hhds. of tobacco sent; and reported a balance of £ 28929: 9: 7, payable in tobacco, at £ 70 per cwt. amounting to 41,328 lbs. tobacco, with interest, on the whole balance, from the 1st of September 1781 until paid. The commissioner refused to make any allowance to the executors, for the outstanding debts, there being, as he alledged no proof of proper steps taken to collect them; and Hollo-

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way when he rendered his accounts had not excepted them.

The plaintiff excepted to the report, for having credited the 143 hhds tobacco.

The defendants alſo excepted to the report. 1. Becauſe the outſtanding debts were not allowed, as the proper ſteps to recover them, had been taken; 2. Becauſe the eſtate could at moſt, only have been liable for actual aſcertained failures; and none ſuch were ſhewn, on the contrary, in one inſtance, that of Baniſter, the whole diſpute was, whether it ſhould be paid in money, or the certificate given for it, by the public? for whoſe uſe the commiſſioner as executor of Banniſter alledged it was bought. 3. Becauſe the commiſſioner had debited the defendants with the coffee. 4 Becauſe the commiſſioner had turned a *debit* of 20 half Johannes, into paper money, at 140 for one; and then recharged it in tobacco at £ 70 per cwt. 5. Becauſe intereſt was allowed from September 1781.

The Court of Chancery diſallowing the plaintiffs exception, eſtabliſhed the credit to the defendant for the 143 hhds tobacco; and declared its opinion, That the outſtanding debts ought to be credited, if the proper ſteps were taken to recover them, and they would now give a power of attorney to the plaintiff to collect them. That the half johannes ought to ſtand in money, and reſerving the queſtion of intereſt, recommitted the report to the commiſſioner.

The commiſſioner in his ſecond report corrected the charge as to the half johannes, ſtating it at £ 48 ſpecie; but in other reſpects he reported the balance, as in his former report. In his remarks he ſtated, *That* the defendants had filed a liſt of the outſtanding debts, with a power of attorney to the plaintiffs to collect them. *That* Holloway died, on the 19th of October 1781; ſoon after which an agent was appointed to manage

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the eſtate; and when he left Peterſburg another agent was appointed; both perſons of known ability; and therefore that the defendants inſiſted, they had done all that was incumbent on them. *That* Baniſter's debt was for a hhd. of rum bought for public uſe, and that the agent would not accept of the certificate. *That* the defendants had produced a memorandum in the hand writing of Stewart, who is now dead, but was a clerk to Holloway, in order to ſhew, that the coffee (with many other articles) was ſent into the country, out of the way of the enemy; and, as their teſtator died ſoon after, that they preſume it was loſt.

Holloway's letter, to Curzen, of Auguſt 19th 1781, ſays, he has about 800 lbs. coffee on hand, of which a bag is kept for the plaintiff according to inſtructions.

Stewart's memorandum referred to in the report is headed as follows.

A liſt of ſundry goods, lodged with ſundry perſons belonging to John Holloway deceaſed 1781.

And in it is an entry in theſe words.

"In the hands of Baker and Blow, ſome ſugar "and coffee, at Wine-Oak, belonging to Richard "Curzen, S. I. R. to be ſent him."

And another in theſe words.

"Five bags coffee, belonging to Richard Cur- "zen, 2 barrels ſalt do. James Wilſon. Sold John "Pride, he ſays.

There are various letters, accounts &c. in the record.

The Court of Chancery decreed the defendants to pay the balance, reported by the commiſſioner, in the laſt report, to be due to the plaintiff, with intereſt from the 1ſt of September 1781, "upon "payment, by the plaintiff, to the defendants of "forty

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"forty eight pounds of current money of Virginia "for the twenty half Johannes aforesaid, with in "tereſt thereupon from the ſame firſt day of Sep. "tember."

The defendants appealed to this Court.

CALL for the appellants. Where a conſignee, who has no orders to the contrary, ſells goods on the cuſtomary credit of the place, he is juſtifiable by the known rule of mercantile law; and therefore he is not liable for failures or accidents not ariſing from his own miſconduct.

In the preſent caſe, the goods were ſold on the cuſtomary credit, and therefore, according to the rule juſt mentioned, Holloway was not liable for future loſſes, not ariſing from his miſconduct; eſpecially as it appears, that the plaintiff actually approved of what he had done.

There is no ground for imputing the ſubſequent loſſes, if any have taken place, to the miſconduct of the conſignee or his executors. Not the firſt; becauſe the ſales were, chiefly, made in 1781, and the debts, from the ſituation of the country, could not be collected during his life time, as he died in October 1781; and therefore, no blame attached on him: Not the ſecond; becauſe, if ſome little time, for the funeral, the qualifying of the executors, their making themſelves acquainted with the teſtators affairs, and for the inclemency of the ſeaſon, is allowed, it will be found, that they could not have been in a ſituation, to have commenced the collection, until the ſpring of 1782; by which time the ſix months act of limitations had barred the claims; and therefore, no blame attaches on the executors, either.

But the fault was in the plaintiff himſelf. For the executors could not, regularly, have proceeded to collect, without authority from him; to whom the debts belonged, and who might have them collected, or not, as he thought proper. He

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did not, give this authority though, or call for the debts. But he ought to have done one, or the other; and therefore, if there has been any improper delay, it is imputable to himſelf.

The executors, however, uſed as much diligence as the nature of things would admit of. They appointed agents to manage the eſtate and collect the debts: Which agents proceeded in the collection, as well as they could; and, if they failed in their attempts, it was the misfortune of the plaintiff, and not the fault of the executors; who did more than their duty required; and therefore, inſtead of meeting with reproach, they have merited the thanks of the plaintiff.

But it is, certainly, a proceeding of the firſt impreſſion, to attempt to ſubject the executors to a loſs of the debts, when the conſignor appears to have taken no proper ſteps, to recover them. The principles of univerſal juſtice demand, that the debtor ſhould have been firſt diſcuſſed; becauſe he might have made ſatisfaction; and then there would have been no ground, even in pretence, for complaint againſt the conſignee or his executors; who could, at moſt, only be liable for culpable negligence. But the plaintiff does not venture to charge them with any: Nor, indeed, could he; for he was, throughout 1781, willing, that the balances ſhould remain in the hands of the debtors.

It is no argument to ſay, that Holloway did not in terms object to bad debts, when he returned the accounts to the plaintiff. For that was unneceſſary; becauſe the law implied it. Beſides, in his letter of the 19th of Auguſt 1781, he ſays, he cannot make the accounts more accurate, owing to the confuſion his books and papers were in, from the ſituation of the country. Which ſhews he was merely making a general eſtimate, for the plaintiff's ſatisfaction, without meaning to deſcend to particulars. In ſuch a ſtate of things, an ex-

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ception was not to be looked for by the one, nor thought of by the other.

The coffee was clearly an improper charge againſt the eſtate; becauſe the memorandum of Stewart ſhews, that part was depoſited with Baker and Blow to be ſent to the plaintiff, who had written for it; and that another part was depoſited with Wilſon in the country, to be put out of the reach of the enemy; and that it was afterwards ſold to Pride, and not kept by Holloway for himſelf, as the bill ſuppoſes. The conduct of Holloway therefore was perfectly correct; and of courſe nothing like miſconduct, with regard to it, can be imputed to him; but this article ſtands involved in the common calamity of the times, which the plaintiff muſt bear, as he has nothing to object, with reſpect to it, in the conduct either of the conſignee or his executors.

Nothing can be more untenable than the attempt to ſubject the eſtate to the payment of Baniſters debt. For it is not pretended to be loſt, but the whole queſtion was, whether a certificate or money ſhould be received. Of courſe there is not the ſlighteſt colour for this charge. Becauſe if Baniſter bought the rum for the public, it is a debt due from the public; and therefore the plaintiff muſt receive payment in the mode, in which other creditors of the public are paid. At all events, it is a matter between the plaintiff and the public, or the executors of Baniſter, and not between the plaintiff and the defendants.

The claim of intereſt on the part of the plaintiff cannot be ſupported. It is contrary to the whole courſe of mercantile proceedings, to demand intereſt upon an unliquidated balance, and a Court of Equity never allows it. On the contrary, intereſt, being entirely in the diſcretion of the Court, is never given, unleſs the defendant, *ex æquo et bono*, ought to pay it; which cannot be affirmed of the defendants, in the preſent caſe; from whom it does not appear, that

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any demand was made, until several years after their testators death. But what renders the claim for it, more exceptionable is, that the plaintiff had, late in 1781, consented, that the debts should remain in the hands of the debtors; of course it would be extremely unjust, to allow him interest upon money, which has never been collected, and which remained in the hands of those, who owed it, with his own consent. This too, from the moment the account of sales was returned, without allowing a reasonable time for the collection; although it is manifest, from the state of the country, as well as from other causes, that, notwithstanding the debtors might have continued able and willing to pay, no industry could have produced satisfaction, until long afterwards.

Whether the mode, adopted by the decree, of setling the half johannes be correct or not, is submitted to the Court. But it appears unconscionable to say, that an advance of that kind should only stand at its nominal amount, when it must have been a favor, and the specie would have commanded a much greater price in exchange for the currency of the day.

Per Cur. The court is of opinion, that the appellee, having consigned his goods to Holloway for sale, without particular instructions not to sell upon credit, the latter was at liberty to use his own discretion on the occasion; in the exercise of which, he appears to have acted fairly and prudently, so as to have met the approbation of his principal: And therefore the outstanding debts were the property, and at the risque of the appellee, and not chargeable to the factor, or his representatives; unless, having undertaken the collection, they were guilty of such gross negligence, as, in equity, ought to charge them: Which cannot be imputed to the factor, who died so soon afterwards; nor to the appellants, who appear, from the facts stated in the Masters second report, to have used proper diligence, in employing agents

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of ability and integrity to make the collection, and to have given probable reasons for its failure: And therefore the appellants are entitled, at present, to a credit for the amount of the outstanding debts. That as to the eight hundred pounds of coffee, the price of which is claimed by the appellee, there appears, at this time, no ground to charge the appellants for that article; since the statement made by Stewart respecting it, to which the answer refers, is unsatisfactory for a decision either way; and therefore that the claim ought not now to be allowed. That the credit for the twenty half joes paid Walch, by order of the appellee in August 1781, ought not to stand, as in the decree, to be repaid now in specie, with interest; but ought to be applied at its relative value, at the time, towards the discharge of the paper debt. Specie, at that period, not being considered, as a circulating medium, but a commodity at market, the value of which was to be settled by contract, or if none such, by the current value at that time, independant of the legal scale; nor, in the present case, has the contract for tobacco, another commodity, any influence on the question. The Master, residing at Petersburg, is presumed to have been well acquainted with the value, and in his first report to have stated the credit accordingly (having departed from the legal scale and the contracts for tobacco;) and therefore that it ought to stand as there stated in paper; and that the other articles of debit and credit ought to stand as stated in the last account. That the demand being for an account unliquidated, in which there were considerable articles in dispute, so that it was uncertain on which side the balance would be, no interest ought to be allowed on the balance. The decree therefore is to be reversed; and the cause remanded to the High Court of Chancery, for that court to have the account between the parties reformed, and a decree entered according to the principles of this opinion, reserving to the appellee liberty to make a future claim, for the outstanding debts,

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or any of them, on proper proof of the receipt thereof by the appellants, or of groſs negligence in them in the collection; and as to the coffee upon proper proof to charge them.

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CASES

CASES ARGUED AND DETERMINED IN THE *COURT of APPEALS* IN OCTOBER TERM OF THE YEAR 1800.

GLASSEL *against* DELIMA.

Ante 213.

On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment againſt one of the defendants.

GLASSEL gave a forthcoming bond, with James Somerville and David Blair ſecurities, to Delima. Upon this forthcoming bond, Delima gave notice to Glaſſel, Blair and the executors of Somerville jointly, that he ſhould move the Diſtrict Court for judgment. He took judgment, however, againſt Glaſſel only. The defendant filed a bill of exceptions, reciting the notice and execution, with the ſheriffs return, in *hæc verba;* and ſtating, that the defendants excepted to the ſame as improper, but that the Diſtrict Court overruled the exception.

Glaſſel appealed to this Court.

WICKHAM for the appellant. The queſtion is, was the notice ſufficient for the Court to give judgment againſt the appellant only? A notice ſhould be at leaſt as particular as a declaration; and upon a joint declaration the plaintiff could not ceaſe to proſecute the ſuit againſt ſome of the defendants, and take judgment againſt the reſt. This is a fault which the ſtatute of Jeoffails

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would not cure, and much leſs will that ſtatute cure the error on a motion; to which the ſtatute does not apply.

Glaſſel vs Delima.

WARDEN for the appellee. Was ſtopped by the Court; who held clearly that the notice was ſufficient to warrant the judgment.

Judgment Affirmed.

STANNARD

against

GRAVES & *al.* ex'rs. of BLAYDES.

After three verdicts the Ct of Chancery, did right in decreeing according to the opinions of the juries.

If the judge who tried the cauſe is diſſatisfied with the verdict it ought to be certified or a bill of exceptions taken; elſe the omiſſion cannot be ſupplied by affidavits, eſpecially of the counſel, for it would be a moſt dangerous precedent.

The diſcretion of the Chancellor is to be exerciſed on ſound principles, of which this Court may judge.

THIS was an appeal from a decree of the High Court of Chancery, where Stannard brought a bill, againſt Graves and others executors of Blaydes, to be relieved touching judgments upon two bonds given by him to Blaydes, for ſome carpenters work done by the latter. After anſwer, replication, and commiſſions to take depoſitions, the cauſe was heard upon the bill, anſwer, exhibits, and the depoſitions, which were very numerous. When the Court of Chancery diſſolved the injunction as to part of one of the bonds, and directed, "iſſues to be made up between the "parties to enquire whether the diſpute between "the plaintiff and the teſtator concerning breach-"es of the articles of agreement entered into by "them, and referred to in the bill was adjuſted at "the time when the plaintiff executed the two "bonds, on which the judgments were obtained; "and, if not, to enquire, whether the teſtator "was guilty of a breach of thoſe articles, and to "aſſeſs damages for ſuch breach; and alſo to en-"quire whether any agreement was made between "the plaintiff and the ſaid teſtator at the time of "executing thoſe bonds, or before, other than "the

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"the firſt, that the latter ſhould perform other "work for the former, and whether, ſuch work "was performed accordingly, and, if not, to aſ- "ſeſs the damages ſuſtained, by the breach of "that agreement." The jury found, "That the "diſpute between the plaintiff and the teſtator of "the defendants concerning breaches of the arti- "cles of agreement, entered into between them "and referred to in the firſt iſſue, was adjuſted at "the time when the plaintiff executed the two "bonds, on which the judgments were obtained. "And that an agreement was made between the "plaintiff and the teſtator of the defendants, be- "fore the time of executing the two bonds men- "tioned that the ſaid teſtator ſhould perform "other work for the plaintiff, and that the ſecond "agreement was adjuſted in the amount of the two "bonds aforeſaid when executed."

Upon the verdicts being certified into the Court of Chancery, that Court, for reaſons appearing, ſet aſide the verdict and ordered a new trial of the ſecond iſſue. And, "ſetting aſide ſo much of "the ſeveral orders as is inconſiſtent with what fol- "loweth," directed a jury to be impanelled be- tween the parties to enquire, "Whether the "teſtator of the defendants, at the time of the ex- "ecution of the bonds, on which were rendered "the judgments ſought to be injoined, did agree to "make good any defects in the building of the plain- "tiffs dwelling houſe mentioned in the firſt agree- "ment between the ſaid teſtator and the plaintiff: "And whether ſuch defects were made good ac- "cordingly, and if not, to aſcertain the damages "occaſioned by breach of that agreement: To "enquire whether the ſaid teſtator did perform "the work, which he had agreed to perform over "and above the building of the dwelling houſe in "a faithful and workmanlike manner; and, if not "to enquire what damages the plaintiff ſuſtained, "by non performance of that work and infidelity "of the builder; and laſtly to enquire, whether "the damages ſuſtained by the plaintiff, for either

"or

"or both of those breaches, were satisfied, allowed, accounted for, or otherwise adjusted between him and the said testator, at the time of executing the forementioned bonds."

Upon these last issues, the jury found, "That the testator of the defendants did not agree, at the time of the execution of the bonds, to make good any defects in the building of the plaintiffs dwelling house; That he did not perform all the work which he had agreed to perform, over and above the dwelling house: But that there was a complete settlement between the plaintiff and the testator of the defendants, at the time of the execution of the bonds, and that no allowance was made by the plaintiff to the testator of the defendants at the time of executing the said bonds for any work, which was not done."

Upon this last verdict being certified into the Chancery, the plaintiff moved that the verdict might be set aside, upon two affidavits which he filed; but the motion was rejected, by that Court, Which decreed, "if the money for which the injunction was dissolved had been paid that the injunction as to so much should be perpetual, but for the whole of that money, or the part thereof, yet unpaid, the judgment, which was to be discharged by payment of £ 179, do remain as a security, and the bill was to be dismissed as to the other judgment."

From which decree Stannard appealed to this Court.

One of the affidavits, referred to in the decree, stated, that the witness after the last verdict moved the District Court to certify that it was contrary to evidence; and that one of the judges, (Mr. White,) after they had considered the motion said it was unnecessary, as it would appear from the account stated between the parties, which would be sent to the Chancery Court, that the verdict was against evidence.

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The other affidavit ſtated, That after the laſt verdict, one of the jurors, in a converſation with the witneſs, mentioned, that, as the ſaid Stannard had given his bonds to Blaydes, if all the proof in the world had been given in the ſaid Stannard's favor he would have given judgment againſt him; and that the reſt of the jury were led to give judgment from the ſame principle.

NICHOLAS, WARDEN and WICKHAM for the appellants, contended, that the evidence contained in the record was clear; and therefore the Chancellor ought to have decided on it himſelf. Conſequently, that he either ought to have directed no iſſue at all, (*Southall* vs *Le Keand* from the order book,) or if any, that it ought only to have been an iſſue to aſcertain the damages. That one of the judges who tried the cauſe, thought the verdict wrong, and when aſked, for a certificate to that effect declined it, ſaying that the account would ſhew it.

RANDOLPH for the appellee, contended, that the whole was a queſtion of fact; and therefore proper for the determination of a jury. 2. *Com.* 316, 626. Conſequently that the iſſues were properly directed; and, after three verdicts, that the queſtion ought to be at reſt. That there was no certificate, or other record, of the opinion of the judge; and no other evidence, of it, was admiſſible. Beſides, the reaſon aſcribed to him, for the opinion which he was ſaid to have expreſſed, was not ſufficient.

PENDLETON Preſident, delivered the reſolution of the court as follows.

The firſt queſtion made was, whether the Chancellor erred, in directing an iſſue to be tried in this caſe at all; or, at leaſt, other than to aſcertain the damages?

The appellants counſel were correct in ſtating that the diſcretion of the Chancellor, upon this and all other occaſions, is to be exerciſed, by him, upon

upon found principles of reaſon and juſtice; and that this as an appellate court, has a right to judge, whether he has ſo exerciſed his diſcretion, in the preſent caſe? But they are unlucky in the application.

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The obſervation urged that the evidence was ſo plain, the Chancellor ought to have been ſatisfied, might have been repelled by the event, ſince two verdicts had been given againſt this plain evidence. But how did it then appear?

The points in diſpute had been ſubmitted to a jury, in a ſuit on the bond: Whether properly or improperly is immaterial: Moſt of the ſame witneſſes were examined; particularly thoſe of the appellant, Long and Thorp, the moſt material; and a verdict paſſed againſt the claim. Three jurymen had ſworn they gave little credit to their teſtimony, for reaſons which they were the judges of; no matter what. Was the Chancellor to ſhut his eyes to this ſtrong bar againſt the claim, and ſay with the counſel, the evidence was plain, and the credibility of thoſe witneſſes not in queſtion? Strange ſuppoſition.

He might probably have been juſtified in diſmiſſing the bill, as the ſubject had paſſed a jury; but conſidering, that the jury might have been embarraſſed by the bond, he more wiſely directed an iſſue, framing it ſo as to avoid that embarraſſment.

A verdict is again found againſt this plain evidence, as it is called; and the appellant was indulged with a third jury, who ſtill find an according verdict: And why ſhould not the Chancellor be ſatisfied at laſt?

Perry ſpeaks of a converſation with a juryman, intimating that he decided upon improper principles; a converſation probably miſtaken, or garbled; and not to be regarded, on any view of propriety.

Mr.

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Mr. Brooke moved for a certificate, that the verdict was againſt evidence: Mr. White, the junior judge, ſaid, it was unneceſſary; for the account would ſhew it, and Mr. Brooke acquieſces: The other judge was ſilent, and might not think it againſt evidence.

The certificate muſt appear of record, from the court; or upon a bill of exceptions, if refuſed, and is not to be ſupplied by affidavits; eſpecially of lawyers; a moſt dangerous precedent.

Where is the account, which juſtifies Mr. White's opinion? The private accounts of the parties, in the record, prove nothing, not being authenticated themſelves, but mere *exparte* ſtatements.

The verdict ſtands unimpeached; was the third upon the ſubject; and all of them agreeing. It was therefore high time the matter ſhould be put at peace. This is done by the decree; which is affirmed.

COOKE

againſt

SIMMS.

The firſt judgment of the Court of Appeals in this cauſe, was as follows:

Ante 39, Oct. 27 1796

"THIS day came the parties by their coun-
" ſel, and the tranſcript of the record;
" of the judgments aforeſaid, having been mature-
" ly conſidered the Court is of opinion, that the
" judgment of the ſaid Diſtrict Court is erroneous.
" Therefore it is conſidered that the ſame be reverſ-
" ed and annulled, and that the appellant recover
" againſt the appellee his coſts by him expended in
" the

" the profecution of his appeal aforefaid here, and " this Court proceeding to give fuch judgment as " the faid Diſtrict Court ought to have given, be- " ing of opinion that there is no error in the " judgment of the faid Court of Huſtings upon the " demurrer joined, nor in the writ of enquiry ex- " ecuted thereupon, but that there is error in the " final judgment of the Court of Huſtings aforefaid " in this, that the appellee had not previouſly en- " tered, *nolle proſequi's* upon the three laſt counts " in his declaration, and had not after the judg- " ment entered a *nolle proſequi* as to the iſſue on " the firſt count, It is further conſidered that " the final judgment of the Court of Huſtings afore- " faid be alſo reverſed and annulled, and that the " appellant recover againſt the appellee his coſts " by him expended in the proſecution of his appeal " in the ſaid Diſtrict Court, and it is ordered that " the cauſe be remanded to the Court of Huſtings " aforeſaid for further proceedings to be had " therein, from the execution of the writ of en- " quiry."

Cooke vs. Simms'

The order for ſetting aſide the judgment was as follows: " On the motion of the appellant, by " his counſel, and for reaſons appearing to the " Court, It is ordered that the judgment rendered " in this cauſe the twenty ſeventh day of October " laſt be ſet aſide, and that the cauſe be continued " till the next Court, and be then reheard."

Novr. 2. 1796

☞ *It was thought, that printing the above, would make the former ſtatement, in page 42, more perfect.*

WHITE

WHITE
against
ATKINSON.

The Court of Chancery cannot make any alteration in the terms of a decree of this Court certified thither in order that a final decree may be made in the cauſe.

SEE the ſtatement and decree in this caſe, in 2. *Wash.* 94 to 106. Upon the cauſe going back, in purſuance of the decree of this court, to the Court of Chancery: *That* court, after the iſſue directed, had been tried, made the following decree.

"By the verdict certified to have been found upon trial of the iſſue, between the plaintiff and the defendant Roger Atkinſon, directed by the decree of the fourteenth day of March, in the year 1796, the 487 acres of land, mentioned in the ſaid decree, appearing to have been worth ſeven ſhillings and ſix pence by the acre, on the laſt day of September 1779, the court this 13th of September 1797, doth adjudge, order and decree, that the plaintiff do pay unto the defendant Roger Atkinſon £ 167: 12: 6, being, *with the eighteen pounds paid by the plaintiff*, the value of the land aforeſaid, with intereſt thereupon to be computed, after the rate of five *per centum per annum*, from the ſaid laſt day of December 1779, and that upon ſuch payment, the defendant Roger Atkinſon do ſeal and deliver, to the plaintiff, a ſufficient conveyance of the ſaid land, with a covenant for general warranty of the title: The Court of Appeals when they declared this court to have erred in decreeing to the defendant Roger Atkinſon the value of the money at the time appointed for payment thereof, inſtead of the value of the land, at the time of contract, and in not allowing to the plaintiff the option of abandoning his claim, and loſing the eighteen pounds, which he had paid, and the value of improvements, which he might have made, and when they corrected the decree in both inſtances, but in the former only, in caſe either

either party ſhould chooſe at his own expence, another trial to aſcertain the value of the land are ſuppoſed not to have intended, that the plaintiff in caſe of abandonment, ſhould make no ſatisfaction *for occupation of the land in the mean time:* And therefore this court doth further adjudge, order and decree, that the plaintiff, if he will not accept the conveyance aforeſaid, do reſign to the defendant Roger Atkinſon poſſeſſion of the land aforeſaid on the laſt day of December in the preſent year; and *for occupation of the land aforesaid*, pay that defendant the annual intereſt upon the ſaid £ 164 12: 6, to be computed from the ſaid laſt day of December 1779, and that the plaintiff do pay unto that defendant the further coſts expended by him &c." From which decree White appealed to this court.

RANDOLPH for the appellant. The Court of Chancery could not decree an account of the profits, as this court had made no proviſion for them. Becauſe that court can only execute the decrees of this according to the letter; and cannot extend them, on a preſumption that this court would have provided for the additional relief, if the ſuppoſed neceſſity of it had been foreſeen. Perhaps a bill of review might lie; but it was clearly out of the power of the Court of Chancery, as the proceedings ſtood, to afford any other relief, than the decree of this court had preſcribed.

CALL *contra.* Although the Court of Chancery cannot decree againſt the directions of this court, yet it may decree conſiſtently with them.

In the preſent caſe no direction was given, as to the profits; and therefore the Court of Chancery might provide for them, in conſequence of the new circumſtance of the abandonment having occurred. The Court of Chancery is to decree according to the principles of the decree here; which neceſſarily ſuppoſes, that it is to have power to

provide

White vs Atkinson.

provide for the unforeſeen contingencies which may take place, during the details of the buſineſs. If a bill of review would have lain for that purpoſe, it is deciſive; becauſe, whilſt the cauſe was ſtill unfiniſhed and the parties in court, the Chancellor might proceed to do effectual juſtice, without the formality of a bill of review; the only object of which is, to apprize the court of the new facts.

RANDOLPH. The difference would have been, that on a bill of review, White might have rebutted with new matter.

CALL. That would not be material in a caſe like this; becauſe the parties would have to go before a maſter, who would report the ſpecial matter.

Per Cur; The Court is of opinion, that if the proviſion in the ſaid decree, in the caſe of abandonment, had been proper, it ought to have gone further, and allowed the appellant the eighteen pounds, paid by him, and ſatisfaction for ſtable improvements alſo; but that the ſaid High Court of Chancery was precluded, by the former decree of this court from changing the terms of abandonment. Therefore, ſo much of the decree, as makes ſuch change is to be reverſed with coſts; and the reſidue affirmed.

KERR

KERR

against

DIXON.

KERR brought treſpaſs *quare clauſum fregit* againſt Dixon, in the Diſtrict Court. Upon the defendants coming in to ſet aſide the office judgment, the entry on the record is as follows: "This day came the plaintiff by his attorney, and "the defendant alſo by his attorney, who plead "*juſtification*, to which the plaintiffs attorney "replied generally. Therefore &c." in the uſual form, without any further pleadings on either ſide. Upon the trial of the cauſe the plaintiff filed a bill of exceptions to the Courts opinion; which ſtated, "that the defendant introduced William "Robinſon, as a witneſs to prove, that a large "white oak, on the plat filed in this cauſe, ſtanding in the line at the place marked on ſaid plat "No. 1. was a corner of Beverley Manor; and, "if the ſaid corner would ſtand at No. 7, on ſaid "plat, where the plaintiff inſiſted, the corner "ſtood, that then, the witneſs, ſtated that he "would loſe ſome of the land, which he the ſaid "witneſs then held, and would hold, if the corner was eſtabliſhed at No. 7; to which evidence "the plaintiff objected, as being intereſted; "which objection was overruled, and the ſaid evidence was ſuffered to go to the jury, to judge "of its credibility, as this verdict could not be "evidence in a ſuit by, or againſt the witneſs." Verdict and judgment for the defendant. Whereupon, the plaintiff appealed to this Court.

In treſpaſs, if the defendants pleads, the word *juſtification*, only, and the plaintiff replies generally, no iſſue is joined, in the cauſe; and therefore, after verdict for the defendant, a repleader will be awarded.

Quere. If, in a ſuit between K and D concerning lands, R, who is intereſted, in having a corner tree fixed at a certain point, claimed as the corner point by one of the parties, be a competent witneſs, or not?

CALL for the appellant. Made two points. 1. That there was no iſſue in the cauſe, as the plea contained no fact, upon which an iſſue could be joined. 2. That the witneſs was clearly intereſted.

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Dixon.

NICHOLAS *contra*. The plea amounts to the general iſſue of not guilty. It is a mere miſjoinder of iſſue; and therefore cured by the ſtatute of Jeoffails. For the plaintiff ought to have demurred; and having omitted it, he ſhall not be received to take advantage of his own fault. The witneſs was not intereſted; becauſe the verdict could not be given in evidence, in a ſuit againſt him.

CALL in reply. If the plea means any thing, it is that the defendant was juſtifiable in what he did, and therefore, inſtead of amounting to the general iſſue of not guilty, it rather admits the fact, but ſuppoſes an excuſe for it, of ſome kind or other. However, the very doubt ſhews the impropriety of the proceeding. For if the parties themſelves cannot interpret its meaning, much leſs could the jury, whoſe minds ought to be drawn to the conſideration of a definite point, and not to be embarraſſed and entangled with all the varieties, which the ingenuity of parties might ſuggeſt upon the evidence, at the trial. It was not a mere misjoinder of iſſue; which never happens but where a material fact is ſtated in the plea, but the iſſue is informally made up, upon the fact. In this caſe, however, no fact is ſtated in the plea, upon which an iſſue formal, or informal, could be joined; but all is conjecture and uncertainty. It is not neceſſary, in order to diſqualify a witneſs on account of intereſt, that the verdict ſhould be capable of being given in evidence, in a ſuit againſt him. It is ſufficient, if his intereſt appears to the court; and here it did in a remarkable degree. Inaſmuch as the eſtabliſhing a general corner tree, would be fixing a land mark, by which the neighbourhood would be regulated in future; and from which, impreſſions would be drawn, in every ſubſequent trial. For, although, the verdict could not be offered in evidence between other parties, yet it would fix a repute in the neighbourhood, which would have an influence on the minds of the jurors; who would be told of it, in ſpite of all the pains, to the contrary, which could be taken.

Cur. adv. vult.

ROANE

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ROANE Judge. After ſtating the caſe, proceeded as follows:

The firſt queſtion which occurs in this caſe is, whether the plea is good in itſelf? And, if not, then, ſecondly, whether it is cured by the verdict, under the ſtatute of amendment and jeofails?

As to the firſt queſtion, the general iſſue, in treſpaſs, is not guilty: Which denies the treſpaſs, ſtated in the declaration; and impreſes on the plaintiff the neceſſity of proving it; at the ſame time that it gives him an opportunity of knowing to what point to apply his evidence. On the contrary a plea of juſtification admits the taking, but ſets up a new ground ſhewing it to be juſtifiable.

On general principles it is as neceſſary, that the plaintiff ſhould be informed, by the plea, of the particular juſtification ſet up, in order that he may know how to rebut it, as it is that the defendant ſhould be informed, by the declaration, of the particular treſpaſs alledged, in order that he may deny, or juſtify it. The principal end of pleading is fruſtrated, whenſoever the one, or the other, is ſo general as not to ſhew the adverſe party, the particular ground which is relied on.

Theſe general principles are fully ſupported by authority. For the books uniformly prove, that, if a defendant has a ſpecial juſtification, he muſt plead it. 2. *Eſp.* 102. Nor do I recollect, to have, any where, ſeen, a plea of juſtification like the preſent.

The queſtion then is, how does this illegal plea ſtand, upon the ſtatute of jeoffails? The words of the act are indeed very large, as a verdict, under it, goes to cure miſpleading, inſufficient pleading, diſcontinuance, miſjoining of iſſue &c.

But even upon the text of the ſtatute itſelf, theſe extenſive words, *miſpleading* and *inſufficient*, might, perhaps, be deemed to be reſtrained to defects, which do not go to the git of the action or plea,

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plea, by being coupled with diſcontinuance, miſjoining of iſſue, lack of warrant of attorney &c; which are mere ſecondary and inferior defects, and, wiſely, not permitted to prevail after verdict.

This, however, is on the mere text of the act; but on the reaſon and deſign of it, ſhall a conſtruction be given, which will fruſtrate the end of all pleadings, and authorize a judgment, when it does not appear to the court, that a judgment ought to be rendered?

It has often been decided here, that a verdict did not cure a declaration, which omitted to ſet out the git of the action. The ſame principle will extend to the caſe of a plea, which does not ſet out the git of the defence. In both caſes a degree of particularity and certainty is neceſſary, not only, that the adverſe party may know preciſely what to anſwer (the end and object of ſpecial pleading,) but that the court may not paſs judgment in a caſe, which does not appear to them, to warrant it: And that, they may not, as for example, in the caſe before us, diſcharge a defendant, on a plea of juſtification, unleſs, there appears a good juſtification, in point of law.

Theſe principles have had the ſanction of this court, in the caſes of *Winston* vs *Francisco;* * *Chichester* vs *Vass* † and *Baird* vs *Mattox.* ‡ To the courſe of reaſoning, in which caſes, I beg leave to refer, by way of explaining the ground of my preſent opinion, and to ſave time.

The Court therefore ought to have awarded a repleader, the plea in queſtion being ſo ſubſtantially defective, that a final judgment, thereupon, ought not to have been given, for the defendant.

But

* 2. Waſhington's Rep. 187.

† 1. Call's rep. 83.

‡ Ibid. 257.

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But another point was made, by the plaintiff, and determined againſt him, as appears by the bill of exceptions, relative to the competency of a witneſs. Which point is neceſſary to be now decided, ſince if the Court erred therein, a direction ſhould be given to reject the witneſs, on a future trial.

It is neceſſary to conſider in what ſenſe the word "eſtabliſhed" is uſed in the bill of exceptions, as relative to the corner tree in queſtion. If the effect, of the witneſs's teſtimony would be, ſo to *eſtabliſh* it as to ſhut up the point, in all future enquiries, on the ſubject; ſo to *eſtabliſh* it, as that the verdict could hereafter be given in evidence, in favor of the witneſs, or his repreſentatives, then clearly, he was an intereſted witneſs and ought to have been rejected; but if the word only purported an *eſtabliſhment* of this fact, as between the then parties and in that ſuit, then I think, a contrary concluſion will follow.

The *laſt* is the only ſenſe in which the word could be underſtood, without infringing the plaineſt principles of law. And we muſt ſuppoſe the witneſs ſo underſtood it, as the contrary does not appear. If it did, I will not ſay, how far his teſtimony might be impeached, in conſequence of his thinking himſelf really intereſted, when in fact he was not.

That the word muſt be underſtood in the *laſt* ſenſe ſeems clealy to follow from theſe conſiderations. *That* a verdict can never be given in evidence, but between thoſe who are parties, or privies, to it. *Bull* 233. If the preſent witneſs ſhould ever have a controverſy, concerning his land, involving the line tree in queſtion, it would moſt probably not be with the plaintiff, or his repreſentatives. It is not ſtated, that in that caſe, the controverſy would be with them; and we cannot infer it. If ſo, the oppoſite party, in that fu-

ture

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ture action, would be an utter ſtranger to the fact, put in queſtion, on the former trial. It would, in the language of *Buller*, be, as to him, *res nova;* and he would be bound by a deciſion, which neither he, nor thoſe under whom he claims, had the liberty to controvert; than which, ſays the ſame writer; nothing can be more contrary to natural juſtice.

I aſſume it then, as a clear and incontrovertible poſition, that this verdict could never be uſed in favor of the witneſs, eſpecially, in a conteſt with thoſe, who are ſtrangers to the preſent plaintiff. And if ſo, how does the caſe ſtand with reference to the moſt approved deciſions? In queſtions, concerning the bounds of evidences there is a conſiderable degree of contrariety and contradiction. I have examined many caſes ancient and modern, and I infer, that the modern doctrines entirely ſuſtain my preſent opinion; and that few, if any, of the ancient caſes conflict with it, when we go into the reaſons, on which, ſuch deciſions are founded.

The caſe of *Bent* vs *Baker* 1 *Term Rep.* 27. is very full, and the moſt modern, which I have ſeen, upon the ſubject; and I entirely concur with the opinion of the judges therein; eſpecially, thoſe of Lord Kenyon and Mr. Juſtice Buller. The former Judge has fortified his opinion, with the high authority of Lord Mansfield and Lord Hardwicke, in the ſeveral caſes of *Walton* vs *Shelley*, and *The King* vs *Bray;* particularly referring thoſe, to whom my opinion is addreſſed, to the caſe of *Bent* vs *Baker* throughout, I beg to ſelect ſuch paſſages and doctrines, therefrom, as are deciſive, with me, in the preſent caſe; without, now, ſpecifying, individually, from which of thoſe eminent judges the doctrines have fallen. I omit this, as being unneceſſary, and for the ſake of brevity. It is there ſtated, *That* many of the old caſes, on the ſubject of competency, have gone on very ſubtile grounds; but that, of late years, the

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Courts have endeavored to let the objection go to the credit, rather than to the competency; *That* whenever there are no positive rules of law, to the contrary, it is better to receive the evidence, making, nevertheless, such observations, on the credit of the party, as his situation requires. *That* respect, on this subject, is to be paid to the question put on a *Voir dire;* namely, whether he is really interested, in the event of the cause? which question involves all particular questions, "of how interested? &c." and amounts to this, whether the record in that cause will affect his interest? *That* upon the ground of such record being admissible, only, has the case of commoners turned; they being incompetent witnesses, when such record can be used, but otherwise not. *That* where the proceedings in the cause cannot be used for the witness, he is competent whatever wishes he may entertain on the subject; which however may properly go to his credit. *That* on general grounds, in the case of under writers (which is very similar to this) there is no objection to one of them being examined for another, who has subscribed the same policy, notwithstanding a former case *Ridout* vs *Johnston*, which may have been determined on its own particular circumstances. *That* the true line is taken to be, whether the witness is to gain or lose, by the event of the cause? Which depends on the question (if the witness is not directly interrested in that very cause,) whether the verdict could be used for, or against him, in a future suit? And Judge Grose says, in the same case, that it is better to narrow the objection to those cases, in which the witness is interested in the event of the cause, unless in those exceptions which have been established by solemn decisions.

Fortified by such reasoning and such authorities, which entirely accord with my own inferences from the just theory of evidence, I need not go into a particular analysis of some old cases, which may, on a slight view, appear to conflict with my present opinion. I am free to declare, however,

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however, that, on an attentive conſideration of many of them, there are very few, if any, which do not appear clearly diſtinguiſhable from the preſent caſe; and particularly in that point, which reſpects the admiſſibility of the verdict on a future trial.

There is one poſſible point of view, occurring to me, in which the witneſs, in queſtion, or his repreſentatives, might be benefited by the teſtimony given, in the preſent cauſe: Which is this, that in queſtions concerning boundaries, at a great diſtance of time, traditionary evidence might, perhaps, be allowed concerning line trees; and this tradition might, poſſibly, in part, have ariſen from the verdict found, on the teſtimony of a perſon, who, or whoſe repreſentatives, may be parties to the future ſuit. This I admit is a poſſible caſe, but it is ſo remote, contingent, and uncertain, as not to form an exception, from the doctrine juſt ſtated.

In *Bull. n: pr:* 284, it is laid down, "that "an intereſt is ſaid to be, where there is a cer- "tain benefit attending the determination of the "cauſe one way;" and again "that it muſt be "a preſent intereſt, for a future and contingent "intereſt will not prevent a perſon from being a "witneſs."

Theſe paſſages ſeem fully to juſtify my concluſion, as to the witneſs in queſtion; and I think the Diſtrict Court did right, in permitting him to be ſworn in the cauſe.

In *Meade* vs *Tate* * in this Court, the judgment of the Diſtrict Court was reverſed, and that of the County Court, admitting the competency of a witneſs ſimilarly ſituated, was affirmed; and upon the whole, I am of opinion, that the witneſs, in the preſent caſe, was competent; but that a repleader ſhould be awarded, on account of the defective pleadings.

FLEMING

* Ante 125.

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FLEMING Judge. The pleadings in this cafe are, clearly, too looſe and indefinite. For the plea of the defendant only conſiſts of the word *juſtification*; and to this, the plaintiff replies generally: Upon which, the parties went to trial, without any particular fact being alledged, on either ſide, on which an iſſue could be joined. Of courſe, I am warranted, in ſaying, that there was no iſſue joined; and therefore, that the judgment, upon that ground, ought to be reverſed, and a repleader awarded.

I was at firſt inclined to think, that the objection to the witneſs went to his credit, and not to his competency; but, upon reflecting on his own declarations and his ſituation with reſpect to the controverſy before the court, I am decidedly of opinion that he ought not to have been admitted. The reaſon why an intereſted witneſs is not admiſſible is, that there is a preſumption, that his intereſt would produce an improper biaſs on his mind; and therefore, the law rejects him altogether. The ſlighteſt intereſt is ſufficient for this purpoſe. Hence one commoner cannot be a witneſs to prove a right, in an action brought by another. For the right being entire, he comes to ſupport his own title. So where lands lay in two pariſhes, the parſon of one was not received as a witneſs; becauſe he might enlarge his own pariſh, and conſequently the tythes. 2. *Bac. ab.* 590. 7. *Mod.* 6. Again a perſon, who had acted in breach of an alledged cuſtom, was not held a competent witneſs, to diſprove the exiſtence of the cuſtom, becauſe, if the cuſtom ſhould not be eſtabliſhed, he would be diſcharged from an action, on account of the breach. *Dougl.* 359. The principle of which caſes ſeems, to me, to apply, expreſsly, to that under conſideration. For in neither of them was the intereſt of the witneſs more immediate, than in the preſent caſe. He was only to be eventually affected; and that was the caſe here. The queſtion was, whether No. 1, or No. 7, in the ſurvey, was the true corner of Beverley Manor;

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Manor; and the witneſs appears to have been materially intereſted, in that queſtion. For, by his own confeſſion, if No. 1. is the true corner, he ſaves part of his land; but otherwiſe, if No. 7. be the corner. In this ſituation the preſumption of bias is ſo ſtrong, that it is ſufficient, in my opinion, to repel him; eſpecially, as his teſtimony went to prove, that No. 1. was the true corner; the very fact, which he was intereſted in having eſtabliſhed. I think therefore, that he was incompetent, and ought to have been rejected.

CARRINGTON Judge. There can be no doubt, but that there muſt be a repleader. For the plea is unqueſtionably bad, and not cured by the ſtatute; which was never meant to be extended to a caſe like this, where there is nothing certain or iſſuable in the pleadings.

But as to the point relative to the admiſſibility of the witneſs, I am equally clear, that he ought to have been received. For his intereſt cannot be affected, by this ſuit; inaſmuch as the verdict and judgment in this caſe cannot be given in evidence, for, or againſt him, in a future action. I am therefore of opinion, that he was admiſſible; and that the objection was matter of obſervation only; which went to his credit, and not to his competency.

LYONS Judge. We all concur, in opinion, that the plea is bad, and that a repleader muſt be awarded.

But I differ with thoſe who think, that it was right to receive the witneſs. For he and the defendant claim the ſame boundaries; and both are intereſted, in eſtabliſhing the corner tree, at No. 1. That no man can be a witneſs in his own cauſe, is a rule of univerſal juſtice; and it is alſo laid down that no perſon intereſted in the queſtion, before a court, can be a witneſs. Nay more, if a witneſs only apprehends himſelf to be intereſted, although, in fact, he be not, yet he is not admiſſible.

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ſible. 1. *Stra.* 129. Now here the defendant and the witneſs both claiming the ſame corner, they have equal intereſt in eſtabliſhing the ſame fact. Therefore although the witneſs is not ſubject to the coſts and damages in that ſuit, yet his title and boundaries are drawn into queſtion; and the verdict and judgment, in this caſe, will, as Lord Holt obſerves in *Salk.* 283, be ſure to be heard of, and may have an influence, on the jury, in any ſuit, which may be brought againſt him. I am therefore of opinion, that he was not a competent witneſs; but, as the court are divided upon this point, no direction, with regard to it, can be given. The judgment however, is to be reverſed for want of an iſſue, and a repleader awarded,

Judgment reverſed and a repleader awarded.

MAYO

againſt

CLARK.

The Court of Appeals has no original juriſdiction; and cannot decide the merits of any caſe until they are decided on by the Diſtrict Court.

THIS was a *ſupersedeas* to an order of the Diſtrict Court denying a *ſupersedeas* to an order of the County Court concerning a road.

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

The Court is ſatisfied that they cannot go into the merits of the caſe until the Diſtrict Court has decided on them. But they are equally clear that there are ſufficient grounds upon the record, for the Diſtrict Court to award a writ of ſuperſedeas to the order of the County Court. The order of the Diſtrict Court therefore is to be reverſed, and a writ of ſuperſedeas awarded from that Court; who are to proceed thereupon as in the uſual caſes of writs of ſuperſedeas to orders of this kind.

BROWNE

BROWNE *& al.*

against

TURBERVILLE *& al.*

Construction of the 7th section of the act of descents.

W. of full age, died intestate, without issue and unmarried, seized and possessed of an estate partly derived, by devise, from his father G. W. and partly by descent from his brother R. W. leaving an uncle and three cousins, children of a deceased uncle of the whole blood on the mothers side, and an uncle of the half blood likewise on the mothers side, and leaving, also, two relations on the fathers side. The estates were ordered to be divided into two moieties, of which, one was to be divided between the two relations on the fathers side, and the other moiety was to be allotted those on the mothers side as follows, to wit, two fifths to the uncle of the whole blood; two fifths to the three cousins; and one fifth to the uncle of the half blood.

THIS was an appeal from a decree of the High Court of Chancery, where John Turberville Gowen C. Turberville, Richard C. L. Turberville, Hannah L. Turberville and George Fitzhugh, brought a bill against Browne and wife and Morton and wife, stating, That, in 1796, George Waugh, of full age, died intestate, without issue, and unmarried. That he was seized and possessed of a considerable real and personal estate, part thereof derived to him, by devise, from his father Gowry Waugh, who died in the year 17—; and the residue, by descent, from his brother Robert Waugh, who died unmarried, and without issue in 1795. That the plaintiffs are the next of kin, on the part of his mother to the said George Waugh; that is to say, the plaintiff John Turberville and George Turberville deceased, (the father of the plaintiffs, Gowin, Richard and Hannah Turberville) were the uncles of the whole blood to the said George Waugh on the mothers side, and the plaintiff George Fitzhugh was half brother to the mother of the said intestate. That the wife of the defendant John Browne, and Hannah wife of Gorge Morton are next of kin to the said George Waugh, on his fathers side. That the plaintiff John Turberville and the said John Browne have taken administration upon George Waugh's estate. That the plaintiffs have applied to the said John Browne and George Morton and their wives for a division of the property of George Waugh, but, as

as the plaintiffs and defendants differ in opinion as to the portions to be allotted, nothing has been done. The bill therefore prays for a diviſion according to law, and for general relief.

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The anſwer of Browne and wife admits the facts ſtated in the bill; except, that they know not, in what manner Robert Waugh's ſuppoſed ſhare of his father Gowry Waugh's eſtate, is to be traced and derived from the ſaid Gowry Waugh, but reſerving to themſelves, a future right to inveſtigate that point, they, at preſent, admit the fact as to Robert Waugh's eſtate, as ſtated in the bill.

The Court of Chancery was of opinion, "That the ſtatute paſſed in the year 1792, *directing the course of descents*, ought to be underſtood in the following ſenſe. Firſt When any perſon, having title to any real eſtate of inheritance, ſhall die inteſtate, as to ſuch eſtate, it ſhall deſcend and paſs, in parcenary, to his kindred male and female, in the following courſe, that is to ſay; ſecond to his children, or their deſcendants, if any there be, third and ſixth, if there be no children, nor their deſcendants, then to his father, unleſs the inteſtate, who had derived the eſtate by purchaſe, or deſcent from his mother, die an infant, without iſſue, in which caſe, the father or his iſſue, by any other woman, than the mother, ſhall not ſucceed, if any brother or ſiſter of the infant, on the part of the mother, or any brother or ſiſter of the mother or any lineal deſcendant of either of them be living: Fourth and fifth, if there be no father, then to his mother, brothers and ſiſters, and their deſcendants, or ſuch of them as there be; unleſs the inteſtate, who had derived the eſtate, by purchaſe or deſcent, from his father, die an infant, without iſſue, in which caſe the mother, or her iſſue, by any other man than the father, ſhall not ſucceed with the inteſtates brothers and ſiſters, if any brother or ſiſter of the infant, on the part of the father, or any brother or ſiſter of the father, or any

lineal

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lineal deſcendant of either of them be living: Seventh, if there be no mother, nor brother, nor ſiſter, nor their deſcendants, then the inheritance ſhall be divided into two moieties (unleſs the inteſtate, who had derived the inheritance, either by purchaſe or deſcent, from either the father or the mother, die an infant, in which caſes, the paternal kindred ſhall not participate of the eſtate, derived from the mother, and *vice verſa*, the maternal kindred ſhall not participate of the eſtate derived from the father, by the fifth and ſixth ſections preceding) one of which moieties ſhall go to the paternal the other to the maternal kindred, in the following courſe, that is to ſay: Eighth, firſt to the grandfather: Ninth, if there be no grandfather, then to the grandmother, uncles and aunts, on the ſame ſide, or ſuch of them as there be: Tenth if there be no grandmother uncle nor aunt nor their deſcendants, then, to the great grandfathers, or great grandfather, if there be but one, and ſo on making the fifth and ſixth ſections, and that part of the ſeventh ſection, relative to the parent, from whom the eſtate had been derived, to an infant dying inteſtate, independent of all the ſubſequent, ſections until the fourteenth. Fourteenth and where for want of iſſue of the inteſtate, and of father, mother, brothers and ſiſters, and their deſcendants, the inheritance is before directed to go by moieties, to the paternal and maternal kindred on the one part, or, if the kindred, on the one part, ſhall be excluded from ſucceſſion, by the fifth and ſixth ſections preceding, the whole ſhall go to the other part: That by the ſtatute interpreted in the ſenſe, which this paraphraſe thereof exhibiteth and by the twenty ſeventh ſection of the ſtatute paſſed in the ſame year *concerning wills and the diſtribution of inteſtates eſtates*, all the eſtate of George Waugh, who was of full age, had no iſſue, and was not married, at the time of his death, derived to him, as well, from his father Gowry Waugh, as from his brother Robert Waugh, muſt be divided into

two

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two moieties, to one of which his paternal, and to the other his maternal kindred will ſucceed; that the only plauſible objection to this interpretation is, that theſe words, in the ſeventh ſection, *and the eſtate ſhall not have been derived, either by purchaſe or deſcent from either the father or the mother*, are taken out of their place, and expounded in a ſenſe, not agreeing exactly, if agreeing, at all, with their true meaning, and theſe words in the interpretation, '*or if the kindred on the one part, ſhall be excluded from ſucceſſion, by the fifth and ſixth ſections preceding*,' are arbitrarily ſupplied in the fourteenth ſection of the ſtatute directing the courſe of deſcents; that in anſwer to this objection, the tranſpoſition and expoſition of thoſe words in the ſeventh, and the ſupplement of thoſe in the fourteenth ſection, may be juſtified, by theſe conſiderations, firſt, the Legiſlature, forming the general ſyſtem of ſucceſſion to real eſtates of inheritance, manifeſtly ſuppoſed the canons ordained for regulating it, to be dictated by the natural affection which would have moved the owner, in diſpoſing his eſtate, whether of original or derivative acquiſition, if he had appointed teſtamentary ſucceſſors, in caſe he had no children, to appoint his kindred on both ſides, but the Legiſlature, in a ſingle inſtance only, which was the caſe of an infant, who deriving an eſtate from father or mother, died, without iſſue, and unmarried, thought proper, for ſome cauſe or other, to interrupt and divert the ſucceſſion: And the interpretation propoſed in the paraphraſe, will confine the operation of the fifth, ſixth and ſeventh ſections to that inſtance, and renders the ſupplement, to the fourteenth ſection, a neceſſary conſequence, leaving the operation of the other parts of the ſtatute undiſturbed, in every other inſtance. Second, the words tranſpoſed, otherwiſe expounded, will not only be inconſiſtent with the ſuppoſition and deſign of the Legiſlature, but will ſo derange the whole ſyſtem, that the greater part

of

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of it, will be, if not unintelligible, ineffectual, in numberleſs inſtances, for the ſeventh ſection, unconnected with the two, which immediately precede it may, without violating any rule of ſound criticiſm, be connected with all the ſubſequent parts of the ſtatute, and influence them in ſuch a manner that they will not operate, in any other caſe but that in which the inteſtate derived the inheritance from one, who was not his father, or mother." That court therefore appointed commiſſioners to divide the eſtates into two moieties; "And allot one half of one of the ſaid moieties to the defendants George Morton and Hannah his wife, and the other half of that moiety, to the defendants John Browne * and his wife, and to divide the other moiety into five equal parts, and allot of thoſe five parts, two to the plaintiff John Turberville, two others to the plaintiffs Gawin Turberville, Richard C. L. Turberville and Hannah L. Turberville, and the remaining part to the plaintiff George Fitzhugh." From which decree, Browne and his wife appealed to this Court.

April 1800.

RANDOLPH for the appellants. After ſtating, that the whole depended on the conſtruction of the 7th ſection of the act of 1792, Contended that the Chancellors expoſition of the ſtatute could not be ſupported. For the Court cannot ſubſtitute words merely becauſe the Legiſlature have not made any proviſion for the caſe. Indeed from the various alterations which the law had undergone ſince the act of 1785, it was fair to infer a change in the Legiſlative will upon the ſubject. So that the Court would rather view it, as a *casus omissus*, and reſort to the principles of the common law, than adopt the expoſition of the Chancellor.

WARDEN

* It appears by an entry at the foot of the decree of the Court of Chancery, that the defendants John Browne and his wife were miſtaken, for Rawleigh Travers Browne and Million his wife. The decree was therefore to be amended, in that reſpect, by conſent of the parties.

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WARDEN *contra.* The common law, upon the subject, cannot be revived, because it was repealed by the act of 1785, and has not been expressly revived by any statute since. There is no controversy, as to the moiety which he claimed from his brother, but the question merely is, as to that derived from his father. Which depends upon the sound exposition of the act of 1792; and the Chancellors decree contains a just construction of it. But in addition to that, it may be observed, that the act of 1792, only repeals so much of all other laws as comes within its own purview. Consequently no part of the act of 1785 is repealed, but what comes within the express provisions of the act of 1792. But if the present case is not within the act of 1792, then, it will be governed by the act of 1785, which, so far as respects the present case, is not repealed by the act of 1792; because it is not within its purview.

WICKHAM in reply. The Legislature, by the act of 1792, intended to provide for all cases of intestacy. The interpolation, in the seventh clause, was not in the revisal, prepared for the Legislature, but it was made by the Assembly themselves; which looks as if it was designed; and the Court cannot correct the oversights and omissions of the Legislature. The whole of the act of of 1785 is incorporated into that of 1792. So that it is the same law, with the alteration; which the Legislature might make, if they thought proper. The circumstances argue an intention to do so; which intention ought to prevail. Had the 7th section been wholly omitted there might have been some grounds for Mr. Wardens argument on the act of 1785; but, as it is, there can be no pretext for the construction, he contends for.

Cur: adv: vult.

October 1800.

WICKHAM and RANDOLPH for the appellants. The 7th section is to be taken independantly; and then no provision having been made for it, by the

act,

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act, it devolves upon the heir at common law: Which, regarding the blood of the firſt purchaſer, is conſiſtent with the views of the Legiſlature, manifeſted by the amendments and alterations in the act of 1785. Theſe were introduced into the acts of 1790 and 1792, for the expreſs purpoſe of reſtoring the eſtate to the family of the original purchaſer. The ſtatute of 1785, therefore, having been repealed by the act of 1792 (the title and object of which is to reduce all the acts, upon the ſubject, into one,) and the latter not having provided for the caſe, it muſt deſcend according to the rules of the common law; which, as to caſes of this kind, are reſtored by the repeal of the act of 1785. For the Chancellor's interpretation, which goes to ſupply words in a law, cannot be admitted; becauſe that is beyond the power of the court.

WARDEN and CALL *contra.* The eſtate muſt either go to the heir, at common law, eſcheat to the Commonwealth, or deſcend, according to the act of 1785, which, as to caſes of this kind, we contend, ſtands unrepealed.

It cannot deſcend to the heir at the common law; becauſe the common law, as to deſcents, was repealed by the act of 1785; and therefore, if the latter was repealed by the act of 1792, yet, as the common law was not expreſsly revived, by the laſt ſtatute, it remains repealed: according to the expreſs directions of the act of 1789 *c.* 9. *p.* 6. Which enacts, "that whenſoever one *law*, which ſhall have "repealed another ſhall be itſelf repealed, the for-"mer *law* ſhall not be itſelf revived, without ex-"preſs words to that effect." This applies as well to the common law, as to the ſtatute law; and makes a revival abſolutely neceſſary in both caſes.

Therefore unleſs the act of 1785, is in force, as to theſe caſes, there is no heir or other repreſentative who can take the eſtate; but it muſt eſcheat to the Commonwealth for defect of heirs.

Which

Which would be a very harsh construction, when there are so many blood relations of the decedent living; and therefore the court will adopt it with great reluctance.

Nor is it necessary to make that construction; since the act of 1785 is in force, as to cases of this kind: For cases of this sort are, in terms, provided for, by that act; and are altogether omitted, in the act of 1792. But the act of 1792 only repeals so much of every other act, as comes within its own purview and provisions. Therefore as cases, like the present, do not come within the purview or provisions of the last act, but are embraced, expressly, in that of 1785, it follows, necessarily, that the act of 1785, as to cases of this nature, is not repealed.

This interpretation will be the rather made, because, by this means, the intention of the makers of the law, to distribute the estate amongst the next of kindred, will be preserved; and there will be a canon of descent, for every case, which can happen, while, the rule of primogeniture will not be suffered to revive, against the positive will of the Legislature; who have, anxiously, sought to destroy it, as repugnant to the genius of the Government, and the principles of justice.

Curt: adv: vult:

FLEMING Judge. There seems to be considerable difficulty, in construing the acts of Assembly, concerning the course of descents and the distribution of intestates estates, as they now stand in our statute books; and therefore, it may not be improper to take a retrospective view of the whole of them.

The Legislature conceiving, that the rule of descents by the common law was not well adapted to the genius of the people and the form of our Government, totally changed it, by the act of 1785; which appears to have provided for every possible case. But, in 1792, an alteration was made,

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made, in the case of infants dying without issue; excluding the mother, when the inheritance was derived from the father, if there was living any brother, or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them. And *vice versa*, where the inheritance was derived from the mother.

These provisions are preserved in the 5th and 6th sections of the act of 1792: Which exclude any issue, which either the father or mother may have by any other person, than the deceased parent of such infant, where the inheritance was derived from such deceased parent.

So far the act is clear enough; but the difficulty arises from the words of the next section, which are, "If there be no mother nor brother, nor sis-"ter nor their descendants, and the estate shall "not have been derived, either by purchase or "descent, from either the father or the mother, "then, the estate shall be divided into two moie-"ties, one of which shall go to the paternal, and "the other to the maternal kindred."

This clause would have embraced the present case precisely, were it not for the words, *and the estate shall not have been derived, either by purchase or descent, from either the father or the mother;* which in strictness except the present case, and being words of important signification, I do not think myself at liberty to reject them. For I do not think it proper, in the construction of statutes to supply, reject or transpose significant words, as is sometimes done in cases on wills; because, in removing one difficulty, others may arise, and greater inconveniences, perhaps, be introduced. Thus, to add the words *in case of an infant*, after the word *not*, might remove the difficulty in the present case, as it would then run in this manner. "And the estate shall not, *in case of an infant*, "have been derived, either by purchase or de-"scent, from either the father or the mother." By which interpretation the present case would

not

not be within the exception, as George Waugh was of full age; but had he been an infant, the ſame difficulty would ſtill have exiſted; and the practice might, perhaps, be ſometimes extended beyond the intention of the Legiſlature, and caſes might, by the aid of ſupplement, be frequently brought within the meaning of a law, which were never contemplated by thoſe who made it. So that, beſides, the impropriety, of the courts undertaking to make the Legiſlature ſpeak a different language from that to be found in the ſtatute book, the addition would not be co-extenſive with the difficulties; and a new interpolation might become neceſſary, in each caſe that might ariſe. Some other more ſafe, and effectual mode of interpretation is therefore, to be ſought for; and, I think, it is to be found, by a careful peruſal of the acts upon the ſubject.

To me it appears, that it has been entirely owing to the mere inattention of the Legiſlature, and the unſkilfulneſs of the perſon, who drew the act of 1792, that caſes, like the preſent, have been left unprovided for; and that the Legiſlature did not intend, that ſo important a proviſion ſhould have been, altogether, omitted. It is therefore proper, to conſider, whether there be not a conſtruction of the acts, that will ſupport the intention of the Legiſlature? Which, evidently, was to provide rules of deſcent, for every poſſible caſe. And, I think, there is a plain natural interpretation which will effect this important object, without any violence to the text.

The 5th ſection of the act of 1785 fully embraces the caſe; and as the act of 1792 only repeals ſo much of other laws, as comes within its own purview; and as the preſent caſe is not within the purview of the act of 1792, which has made no manner of proviſion for it, it follows, neceſſarily, that the act of 1785 is ſtill in force, as to the preſent caſe: And thus a complete ſyſtem of deſcents is eſtabliſhed, agreeable to the view

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of the Legiſlature without recurring to the danger of interpolation, which might, perhaps, produce more miſchiefs than it would remedy.

With reſpect to the perſonal eſtate of George Waugh, the act of 1792, *concerning wills and the diſtribution of inteſtates eſtates*, directs that the goods and chattels of an inteſtate, if there be neither wife nor child, ſhall be diſtributed in the ſame proportions and to the ſame perſons, as lands are directed to deſcend, in and by the act to reduce into one the ſeveral acts directing the courſe of deſcents, paſſed the ſame ſeſſion, and is the one now under conſideration. Both theſe laws have the ſame repealing clauſe. So that the act concerning wills, like that of deſcents, only repeals ſo much of other laws, as comes within its own purview.

But the act of 1785 *concerning wills and the diſtribution of inteſtates eſtates*, refers to the acts of deſcents of the ſame ſeſſion, in the ſame manner, as that of 1792, concerning wills, refers to that of deſcents. Therefore, as, for the reaſons already given, I conſider the 5th ſection of the act of deſcents, paſſed in 1785, to be ſtill in force, I think ſo much of the 24th clauſe of the act of diſtributions, made in the year 1785, as refers to that ſection, is alſo ſtill in force; becauſe it does not come within the purview of the act of 1792. My opinion conſequently is, that the act of 1785, concerning the diſtribution of inteſtates eſtates, muſt give the rule for the diſtribution of the perſonal eſtate of George Waugh.

This way of conſidering the caſe obviates the objection made concerning the rule of the common law; which certainly has nothing to do with the queſtion.

Upon the whole, I am of opinion that the decree, although founded on principles differing from thoſe I have aſſumed, is ſubſtantially right, and ought to be affirmed.

CARINGTON

Browne vs Turberville.

CARRINGTON Judge. Upon the ſtatement made of this family, the queſtion is, who are entitled to the eſtates of the deceaſed?

The Legiſlature have paſſed three acts, relative to the courſe of deſcents. But the laſt, which paſſed in 1792, profeſſes to reduce all laws upon that ſubject, into one; and by it, every poſſible caſe of inteſtacy was meant to be provided for: At the ſame time, that all prior acts, were intended to be repealed, as embraced within the proviſions of the laſt. It becomes neceſſary therefore, to examine the meaning of the Legiſlature, in the clauſe in queſtion, and to carry it into effect, if we can.

The act of 1792 proceeds to eſtabliſh the different grades of deſcent for four ſections; and then it makes an exception, in the caſe of infants dying entitled to property derived from one parent, declaring that the other, and the relations on that ſide, ſhall not ſucceed to that property; after which comes the ſeventh clauſe, which is in theſe words, "If there be no mother, nor brother, nor "ſiſter, nor their deſcendants, and the eſtate ſhall "not have been derived either by purchaſe or de"ſcent, from either the father or the mother, "then the inheritance ſhall be divided into two "moities, one of which ſhall go to the paternal "the other to the maternal kindred, in the fol"ing courſe; that is to ſay, &c." going on in the next clauſes, to ſtate the rules.

Upon this clauſe the queſtion, in the preſent caſe ariſes.

If it be taken literally, the plain meaning of the Legiſlature, throughout the ſubſequent parts of the law, will be defeated; and the intended courſe will be fruſtrated. But it is obvious, that an interpretation, tending to produce that effect, ought to be rejected, and the intent of the makers of the act obſerved, if poſſible: And I think it may

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may be done without any great violation of the text, or overturning any rule of construction.

The difficulty has evidently arisen, from the omission of a few words in the sentence. The exception, *and the estate shall not have been derived either by purchase or descent, from either the father or the mother*, ought to be understood relatively only; that is to say, it relates to the two preceding sections, respecting infants, and was not intended to apply to any other cases; for the first and latter parts of the section refer generally to all intestacies, which proves, that the intermediate words were intended to operate as an exception. The meaning, then, of the Legislature is obvious; and to express it in more intelligible terms, I think, we should add after the word *Not*, in the second line of the section, the words, *in case of an infant:* After which the clause will read thus "If there be no mother, nor brother, "nor sister, nor their descendants, and the estate "shall not, *in the case of an infant*, have been de- "rived either by purchase or descent, from either "the father or the mother, then the inheritance "shall be divided &c."

This supplement which according to the rules of expounding statutes, I think we have a right to make, should also be applied to the 14th, section of the act. By this means, the whole act will be rendered consistent, and all cases of intestacy will be provided for, agreeable to the meaning and intention of the Legislature. Which is certainly better, than, by adhering to the literal expression, to disappoint the will of the Legislature, and defeat the intention of the law altogether.

Therefore, although I do not exactly agree with the Chancellor, in regard to the manner of expounding the law, yet I agree with him in the conclusion; and consequently, am for affirming the decree.

LYONS

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LYONS Judge. It is a rule in the conſtruction of ſtatutes, that the intention, when it can be diſcovered, muſt be followed with reaſon and diſcretion, although the interpretation may ſeem contrary to the letter of the ſtatute. 11. *Mod.* 161. 1. *Show.* 491. 10. *Rep.* 101. 10. *Mod.* 281. 4. *Com. Dig.* 338.

Now it is evident, that when the Legiſlature were reducing the ſeveral acts of Aſſembly, concerning the courſe of deſcents, into one act, they did not mean to leave any caſe unprovided for; but through overſight, or too great anxiety to expreſs their intention with caution, a difficulty has intervened; which, if taken literally, would fruſtrate the object of the Legiſlature and leave many caſes without a proviſion. To avoid which inconvenience it becomes neceſſary to give a reaſonable conſtruction to the act, ſo as to effectuate the intent and meaning of the Legiſlature, expreſſed in other parts of the ſtatute. This will be effected, by taking the whole act, and all other acts made on the ſame ſubject, into one view; moulding them according to the rule laid down, in *Hob.* 346, to the trueſt and beſt uſe; and, rejecting what ſhall appear to be inconſiſtent or abſurd, and tending to defeat the intention of the Legiſlature. Thus giving, to the law, ſuch a conſtruction, as will make it anſwer, fully, the purpoſes for which it was enacted.

With theſe principles in view, I am diſpoſed to affirm the decree of the Court of Chancery, upon different grounds than thoſe given by the Chancellor; which I do not entirely concur with him in: Becauſe by his mode of correcting the 7th ſection he makes it neceſſary to alter the 14th ſection; which might be going too far, and doing what the Legiſlature did not intend to do.

My own opinion is, that either, the whole interpolation, in the 7th ſection, ought to be rejected, as a ſaving repugnant to the body of the act,

according

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according to 1. *Co.* 47: Or that the act of 1785 is to be conſidered as not repealed, ſo far as reſpects ſuch eſtates, as are not diſpoſed of by the act of 1792. By either of which conſtructions, the eſtate derived from the father will be diſpoſed of, and will deſcend agreeable to the decree.

This interpretation puts all right; reconciles the whole courſe of legiſlation upon the ſubject; gives complete effect to the ſtatute; and fulfills the object of thoſe who made it.

For theſe reaſons, and not thoſe given by the Chancellor, I am for affirming his decree.

PENDLETON Preſident. To enquire from what ſource the force of the common law of England, in this ſtate, is derived, would, at preſent, be a uſeleſs ſpeculation; ſince all agree, that it is the general law of the land, where it is not taken away by our ſtatutes.

That the act of 1785 has totally done away that common law, as to the courſe of deſcents, has not been, nor can be doubted.

The rights of primogeniture are wholly aboliſhed; and wherever there are more perſons, than one, of equal degree of kindred to the inteſtate, they ſhare, equally, in the ſucceſſion. The ſucceſſion, in the right line aſcending, excluded by the common law, is here permitted: The objection, to the half blood, is removed; and the enquiry, through what blood the lands had deſcended to the inteſtate, is aboliſhed: The inteſtate is in all caſes conſidered, as the unreſtrained proprietor; and his ſuppoſed preference, from natural affection, purſued.

Under this act, it muſt be acknowledged, that no poſſible caſe, not provided for, can happen, ſo as to let in the rule of the common law.

Although this new ſyſtem was generally approved, yet there were citizens who might wiſh, that, in caſe of their not having children, their lands

ſhould

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ſhould return to the family they came from: This, adult perſons could provide for by their wills; but infants could neither make uſe of, nor exerciſe the power; for which reaſon, I ſuppoſe, and probably becauſe the infant might not generally have other eſtate, than what was ſo deviſed, the Legiſlature, in 1790, paſſed an act, which declares, amongſt other things, that an infant, dying inteſtate and without iſſue, having lands deviſed by deſcent or purchaſe from father or mother, the other parent and relations, on that ſide, ſhould be excluded from the ſucceſſion; but this is confined to *infant* inteſtates, and, no otherwiſe, alters the general law. Then comes the act of 1792.

We are told, by the counſel, that we are confined, in conſtruction, to the literal force of the words in the 7th clauſe; and no power, on earth, but the Legiſlature, could change it, was his emphatical expreſſion. I will leave it to that gentleman to reconcile this to his obſervations on the act of 1789, when he read the title, preamble, and all the clauſes of the law, for the purpoſe of confining the general term *law*, to ſtatute law.

And was he not right in the latter caſe?

Among the rules laid down, for the conſtruction of ſtatutes, as collected by *Bacon*, are the following.

1. That, in the conſtruction of one part of a ſtatute, every other part ought to be taken into conſideration, for that will beſt diſcover the meaning of the makers. 6. *Bac: abr: (new edition)* 380.

2. A ſtatute ought upon the whole to be ſo conſidered, that if it can be prevented, no clauſe, ſentence or word ſhall be ſuperfluous, void, or inſignificant. 6. *Bac: abr: (new edit.)* 380.

3. And, in the caſe relied on, that where words are expreſs, plain and clear, they ſhall be underſtood according to the general and natural meaning

and

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and import, it is added, "Unleſs by ſuch expoſi-"tion, a contradiction or inconſiſtency would "ariſe in the ſtatute, by reaſon of ſome ſubſequent "clauſe, from whence, it might be inferred that "the intention of the Legiſlature was otherwiſe." 6. *Bac: abr: (new edit.)* 380.

The conſtruction laboured, of the words of the 7th ſection, would render ſuperfluous and inſignificant the very important word *infant*, in the fifth and ſixth ſections; ſince it would put them and adults on one, and the ſame footing.

4. General words, in one clauſe of a ſtatute, may be reſtrained by a ſubſequent clauſe, 6. *Bac. abr. (new edition)* 381.

This applies directly, as I ſuppoſe there is no difference, whether the reſtraint be in a prior or ſubſequent clauſe: Eſpecially here, where the general words are uſed, by way of reference to the prior clauſe.

5. A remedial ſtatute ought to be conſtrued liberally, ſo as to ſuppreſs the miſchief intended to be remedied, 6. *Bac. abr. (new edition)* 389.

The miſchief was, the enquiry, when a man died inteſtate, perhaps at fourſcore, how he came by his land; and this was done away, except in the ſingle caſe of an infant dying inteſtate.

I will now proceed to the law of 1792. The title is, "An act to reduce into one the ſeveral acts directing the courſe of deſcents." which comprehended the two acts before ſtated (for I diſcover no other law;) and we find no change is made in theſe laws, except in the caſe of infant inteſtates, extending the excluſion, in the October ſeſſion of 1792, of one parent, where the eſtate came from the other, to the iſſue which the excluded parent may have by another huſband or wife.

The act then proceeds to direct the deſcent in the ſeveral caſes, as they may happen one after

another

another, repeating, in each proviſion, that the prior caſe, provided for, has not happened. To his children or their deſcendents, if any be; if there be no children or deſcendents, then to his father; if there be no father, then to his mother, brothers and ſiſters and their deſcendents, or ſuch of them as there be. Then comes the exception in the caſe of infants, from the act of 1792, with the extenſion of the excluſion to their iſſue; and then we come to the 7th ſection, ſuppoſed to be ſo powerful as to overturn the general ſyſtem, placing adults inteſtates on the ſame footing with infants, as to the enquiry from which parent the eſtate came; and to let in the common law as to them, as well, as to infants.

That this was the intention of the Legiſlature was admitted by the counſel; and, indeed, is ſo plain, that he who runs may read; and we come to the queſtion, whether we are compelled by force of the words to violate that intention.

The purpoſe of the clauſe was to proceed and make proviſion for the ſucceſſion, if none of the caſes, before provided for, ſhould occur. It takes it up, after the fourth which provides for the mother, brothers and ſiſters, in caſe there be no children or father, and provides if there be no mother brother or ſiſter, and the eſtate ſhall not have been derived by purchaſe or deſcent from either father or mother, plainly intending to take in the exception as to infants, but omitting to uſe the term *infant*.

I obſerved, that if this was to be underſtood as a ſubſtantive enacting clauſe, and taken ſtrictly, the caſe of the children and father not being put, the diviſion of the eſtate, between the paternal and maternal kindred muſt take place, in excluſion of the children and father.

The anſwer was, that theſe caſes were before provided for, prior to the claim of the mother brothers and ſiſters: And the anſwer was, to me

perfectly

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perfectly satisfactory; because this clause did not intend to affect any of the former provisions, but to state those which had not occured, and, in such events to provide for the new cases. In this statement it was necessary to notice the excepted case, of an infant intestate; but in doing this, there is an omission in the description of the case, provided for in the fifth and sixth sections, from their leaving out the words, "in the case of an infant as aforesaid."

Is it not, then, consistent with the rules, for construction of statutes, that the court shall supply those words to make the clause conformable to other parts of the law, and to its general system? I have no doubt but it is.

The same observations apply to the 14th section; where the case of the infant is omitted, but yet not affected: Since that clause proceeds upon a supposition, that, under the former parts of the law, there is no impediment to the partition between the paternal and maternal kindred, and only provides for the case of there being but one or neither of those heirs.

If I had any doubt upon this point, I should be of opinion, that, in every case, if there could be one, in which the act of 1792 makes no provision, the act of 1785 would not, in that case be repealed, but would controul the common law. However, I am satisfied, notwithstanding the 7th section, that the enquiry from whom the estate descended, is confined merely to infants, and does not extend to the case of other intestates.

As the Court differ in their reasons, the decree is to be affirmed without alteration.

Decree Affirmed.

ROSE

ROSE

against

MURCHIE.

THIS was an appeal from a decree of the High Court of Chancery, where Rose as executor of Banister brought a bill for relief against Murchie surviving partner of Donald, Fraser and company, James Fraser and David Maitland and Robert Maitland his attornies in fact. Stating, that on the 7th of January 1788 Banister gave his bond to Donald, Fraser & Co. for £ 200, being the conjectural balance of an account, but in fact only £ 172 19: 6½ according to account was due. That other transactions since (as per account annexed,) will reduce it to £ 43: 17: 7. That they have assigned the bond to Fraser, who was apprized of the errors, and promised to account, but had not. The bill therefore prays an account, and for general relief.

A is indebted to D, F & co. by bond; A dies, and at the sale of his estate, by his executors, F the acting partner of D, F & co. buys a slave; which he carries to his own plantation and there continues him:— The amount of the purchase for the slave is a good discount against the bond.

The answer of Murchie, states the assignment to Fraser, but that he was informed it was given for an unsettled account, and that it was taken without recourse. That he told him one of the discounts set up by the plaintiff was for a negro bought by Simon Fraser who was a partner of Donald, Fraser & Co. but that the defendant thought Simon Fraser only and not the company was liable for the negro.

The answer of Fraser, states, that he knows nothing of the transactions mentioned in the bill, except that Donald, Fraser & Co. being indebted to Thomas Fraser & Co. of which last named house the defendant is a partner and their agent and assignee, the defendant Murchie as surviving partner of Donald, Fraser & Co. assigned the said bond to him in discharge of the debt due Thomas Fraser & Co.

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The anſwer of the Maitlands, ſtates, that they aſſiſted in the ſettlement between James Fraſer and Donald, Fraſer & co: And that the bond was aſſigned without any knowledge of any equity againſt it.

The depoſition of a witneſs, proves that Simon Fraſer was the acting partner of Donald, Fraſer & Co.

Another witneſs, proves that there were mutual dealings between Baniſter and the company, and between the plaintiff and the company after Baniſter's death. That Simon Fraſer bought two ſows and a negro named Rocheſter, at the auction by the executors of Baniſter's eſtate. That bonds were generally taken of the purchaſers at the ſales except in a few inſtances, where diſcounts were admitted; that if Fraſer's bond had ever been applied for, he ſhould probably have been the perſon who made the application as he took ſeveral bonds from purchaſers reſiding in the town of Peterſburg. That he charged the two ſows and the negro in the following words " Simon Fraſer 2 do. (ſows being mentioned above) at 48/6 ſpotted and black with one ear. Simon Fraſer, Rocheſter £83:5:0."

Another witneſs ſays, that Rocheſter was always kept at Fraſer's plantation, and conſidered as his property.

The Court of Chancery referred the accounts to a commiſſioner, who corrected ſeveral articles, but ſubmitted it to the court whether credit for the two ſows and the negro Rocheſter was to be given the plaintiff?

The Court of Chancery confirmed the report and allowed the plaintiff a credit for the two ſows and the negro.

Upon application for a bill of review, the cauſe was reheard by conſent. When the Court of Chancery was of opinion, that the plaintiff was not entitled to a credit for the two ſows and the negro,

negro, and decreed accordingly. From which decree Roſe appealed to this Court.

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HAY for the appellant. Although it is generally true, that a debt due from an individual partner cannot be ſet off againſt a company demand, yet there are ſtrong reaſons to believe, from the circumſtances of the caſe, that the purchaſes here were intended to be on account of the company debt; and, under that impreſſion, that the executor took no bond, which indeed was never offered by Fraſers. Who thereby ſhewed his own conception of the tranſaction. Conſequently, it would be unreaſonable, that the confidence, repoſed in him by the executor, ſhould expoſe the latter to the loſs of the debt.

BENNET TAYLOR *contra*. It is a general principle, that if one does an act, it is as an individual, unleſs it be ſhewn, that he did it in a different character. Therefore Roſe ought to have ſhewn, that the purchaſe was made in his ſocial, and not in his individual character; or elſe he reverſes the general principle. But, in this caſe, there is the moſt concluſive proof, that the purchaſe was actually made in his individual capacity, and not as a partner; for the articles are ſet down to him, and not to the company; and the ſlave is proved to have been carried to his own private eſtate, and there kept as his own property: Which removes every poſſible preſumption, that the purchaſe was made, for the benefit of the copartnery. Beſides the articles bought were not of a mercantile nature, or purchaſed in the courſe of trade; and therefore the company could not be charged with them. Becauſe a tranſaction of a ſingle partner, unconnected with the nature of the buſineſs, does not bind the company 7. *Term. Rep.* 207. And this principle is correct; for otherwiſe it would be in the power of one partner to ruin the concern, by improvident ſchemes, of which they have no knowledge, and of which, conſequently, their approbation, cannot be preſumed.

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WICKHAM in reply. Although an individual partner will generally be underſtood to buy for himſelf, yet circumſtances may rebut it. The executor might think the purchaſe was only a continuance of the tranſactions between his teſtator and the company; and if Roſe had called for payment or a bond, Fraſer would certainly have refuſed, whilſt the companies debt remained unſatisfied.

Cur. adv. vult:

PENDLETON Preſident. Delivered the reſolution of the court to the following effect:

In January 1788, Baniſter gave his bond payable to Donald, Fraſer and company for £ 200, the ſuppoſed balance of dealings of Baniſter with that company, and another mercantile houſe of Robert Donald and company blended together; in both which Simon Fraſer was the active partner, and as ſuch took the bond.

In 1793, Murchie aſſigned this debt, with a large number of others due to Donald, Fraſer and company, to James Fraſer aſſignee of Thomas Fraſer and company of Britain, for a large debt due to them from Donald, Fraſer and company; which debts James Fraſer appointed the Maitlands to collect, who ſued Roſe the executor of Baniſter, upon the bond in the name of James Fraſer as aſſignee as aforeſaid. Roſe confeſſed judgment, reſerving his equitable defence; and filed this bill ſtating, that Baniſter's bond, intended to include the balance due to both companies, was taken, without ſettlement, for a conjectural ſum, far exceeding the real balance. He therefore prays an injunction; that the accounts may be adjuſted, and the real balance paid.

Upon the ſeveral anſwers coming in, a replication is filed, and depoſitions taken. An order was made by conſent, referring it to a commiſſioner to ſettle the accounts between the parties. Commiſſioner Hay reports the ſettlement, ſtating a balance of £ 41:3:7 to be due from Baniſter's eſtate,

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tate, unleſs the eſtate was entitled to a credit of £ 83:5, for a ſlave and two ſows, purchaſed by Simon Fraſer at a public ſale of that eſtate. If that was allowed, the balance of £ 43:15 would be due to the eſtate, with intereſt from April 1790.

To this article, the diſpute between the parties is confined: All other parts of the report being ſubmitted to.

The facts are, that Simon Fraſer was the acting partner of both companies; that, with him, the extenſive dealings of Baniſter were tranſacted; and all the other articles, credited in the company's account, delivered to him or his order; and no account ſubſiſted between them in the individual character of Fraſer. And that, Fraſer, at the public ſale, purchaſed the articles, which are charged to him, without any agreement or even converſation, about the application of the money.

Bander, who acted as clerk at the ſales ſays, he expected the amount was to be credited in the company's accounts, not then liquidated, and gives his reaſons. That the ſales were upon credit, the purchaſers giving bond and ſecurity, which was generally given, except where the executor allowed diſcounts to creditors. That he took the other bonds, and was not directed to take Fraſers; nor was one required, as far as he knows, or believes.

M'Donald ſays, that the ſlave purchaſed was always kept at Fraſer's plantation, and conſidered as his property, until he and other ſlaves, were conveyed, in a deed of truſt from Fraſer, to the Maitlands and others.

Upon theſe facts the commiſſioner reported his opinion in favour of the amount being charged to the company; and the Chancellor in his firſt decree confirmed it, making the injunction, to the judgment on the bond, perpetual; and decreeing the defendant to pay the £ 43:15, with intereſt from

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from April 1790, (the day of payment for the ſales) and coſts.

Upon a rehearing, by conſent as on a bill of review, the credit was diſallowed; the injunction diſſolved, as to the £41:3:7, intereſt and coſts; and perpetuated as to the reſidue. The appeal is from the latter decree.

The rule, that the private debt of a partner cannot be ſet off againſt a company debt, does not apply; ſince the queſtion is, whether, it was ſuch a private debt, or a payment of the companys debt to that partner, who, it is agreed, had authority to receive it?

In *Scott* and *Trent* in this court, * the articles, for which the diſcount was claimed, were confeſſedly delivered to the acting partner, on his private account; and, on a ſtate of them, it was indorſed, that, when ſettled, the balance was to be credited in the companys account. That private account had not been adjuſted, ſo as to fix the balance; and, on that ground, the diſcount was not allowed. But even there, the court ſaid, Scott might be relieved in equity. We are in that court.

In conſidering this ſubject, the court viewed the ſituation and practice of the country, as to the preſent ſubject. Simon Fraſer, or any other man, is the oſtenſible merchant opening a ſtore, for retailing goods and purchaſing commodities: It is the ſtore, which gives him credit, and that is anſwerable for any commodities furniſhed, whether it belongs to him alone, or to a company of which he is a partner, or for whom he acts as factor. True it is, if the company fails, the creditor may reſort to the agent or factor, on the common principle of maſter and ſervant, where both are liable. As to the article furniſhed not being within the nature of the trade, how is the planter to know the

* 1. Waſhington's Rep. 77.

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the objects of the trade? He takes goods, and, to pay for them, ſells the merchant whatever he is willing to receive; tobacco, wheat, a horſe, a ſlave, or any thing elſe, for which he is uſually credited in the ſtore books, without enquiry for whom purchaſed, or how applied. Here the ſlave was ſold to Fraſer, ſtill the acting partner, and no bond was required, as in the caſe of a creditor. He was not a creditor; in his private character, but as a partner of the company; and, in the ſtore book, the eſtate was entitled to a credit for the amount; which leaves the eſtate a creditor of Donald, Fraſer and company, for £ 43:15; to whom, or to Simon Fraſer's eſtate, the executor of Baniſter may reſort for ſatisfaction; but he has no claim, as to that, upon the defendant James Fraſer; although he is bound, ſo far as the debt aſſigned him was paid.

The laſt decrees are to be reverſed with coſts, and the firſt affirmed.

DEANS

againſt

SCRIBA *& al.*

A party, who takes no ſteps to procure the teſtimony of a ſeafaring witneſs, is not entitled to a continuance of the cauſe.

A conſignee, who neglected to render an account of the outſtanding debts for five years, charged with the amount.

THIS was an appeal from a decree of the High Court of Chancery, where Scriba Scroppal and Starman brought a bill againſt the Deans for an account of the ſales of goods conſigned by the plaintiffs to the defendants, and for payment of the balance due with intereſt.

The anſwer admits the conſignment, without inſtructions whether to ſell for caſh or on credit. States, that the defendants ſold ſome for caſh and others

The Court of Chancery, on debts not bearing intereſt, *in terms*, cannot carry intereſt down below the decree.

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others on credit; and have made several remittances. That there are £ 325 : 5 : 7 of outstanding debts. That the plaintiffs left with the defendants a cask described to contain snuff boxes, and directed some to be forwarded to Baltimore to M'Grea and Deans, to be left with the vendue master on account of the plaintiffs; which the defendants complied with.

The Court of Chancery referred the accounts to a commissioner. Who reported that he had appointed, at the instance of the plaintiffs agent, the 27th of September 1793 for carrying the decretal order into effect; notice of which not being served on the defendants on the 6th of November 1795, he appointed the 27th of that month for the purpose, but the defendants failing to attend, he appointed the 20th of September 1796, on the 14th of which month the plaintiffs agent and James Deane attended, and Deane having filed his affidavit that Rose a material witness was absent on a trading voyage, further time was allowed. That the commissioner afterwards appointed the 21st of April 1797, that a notice to this effect addressed to James and Thomas Deane was served on Francis B. Deane, who appeared on the 26th of May and said the notice was not legal as to James and Thomas Deane, because he Francis B. Deane was not a partner of the house of James and Thomas Deane, when the transaction happened, although he was at the then time of making the objection a partner in the business. That the said Francis Deane then agreed, that if the report was postponed to enable James and Thomas Deane to take the deposition of Rose, the report might be made to the September term and that a decree should be entered up at that term, and that the said James and Thomas would write to that effect, but as they had failed, he proceeded to report, making a balance of £ 95 : 15 : 3 due from the defendants to the plaintiffs.

The

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The defendants excepted to the report: 1. Becauſe the notice was not legal: 2. That the defendants were debited with the outſtanding debts. 3. That no commiſſion was allowed the plaintiff. 4. That the defendants were debited with £.94 3:9 Pennſylvania currency, for a box of hardware.

A witneſs examined for the plaintiff ſtates, That, in 1785 or 1786 he received from the defendants a large caſe ſaid to contain hardware; but no invoice or inſtructions to ſell the ſame were given. That it was afterwards taken away and ſent, (as he underſtood) to Philadelphia.

The Court of Chancery re-committed the report. And the commiſſioner in his ſecond report ſtated, That he appointed the 3d of March 1798; That he received a letter from James Dean requeſting a poſtponement until the 7th, when he attended with an affidavit to prove that Roſe had ſailed for New York, and prayed a continuance until he could procure his teſtimony. But as it was not proved that any ſteps to take his depoſition had been taken, he refuſed the continuance. That Francis Dean on the 26th May attended; and on behalf of the other defendants agreed that if the report was delayed till September a decree might then be entered up.

There is an affidavit on the 13th February 1798 ſtating that Roſe had ſailed from New-York to London, and was to remain there until April next, and that the deponent has reaſon to believe he will return to Philadelphia.

There is an invoice of the box of hardware, ſigned by the plaintiffs, which is headed as follows, "Contents of 1 box of ſundries marked A. No. 20 "conſigned to Meſſrs M'Grea & Deans at Balti"more, with the prices affixed to, in order to "direct them at the ſale of public vendue."

Upon the coming in of the ſecond report, which made no alteration in the firſt, the Court of Chan-

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cery decreed the defendants to pay the whole £495:15:3 with intereſt on £439:11:1 from the 15th of April 1790 until paid. From which decree the defendants appealed to this Court.

CALL for the appellants. The notice was inſufficient, for the law requiring actual notice to the party or a written notice to be left with ſome free perſon at the dwelling houſe, one of thoſe requiſites muſt be complied with; which has not been done in the preſent caſe. Further time ought to have been allowed the appellants, to procure the teſtimony of their witneſs, as they ſtate him to have been material. The box of hardware was ſent to Baltimore according to the directions which had been given; and there is no proof that it ever came to the hands of the appellants afterwards. Of courſe they ought not to be charged with it. The appellants were juſtifiable in ſelling on credit, and therefore the plaintiffs ſhould bear the loſs of inſolvencies, if any, and the decree ſhould have been, that the balance, in their hands, ſhould be diſchargeable in the bonds and debts due, for the ſales of the goods conſigned.

DUVAL *contra*. Contended that the notice was ſufficient upon the circumſtances of the caſe. That time enough had been allowed the appellants to take the teſtimony of their witneſs. That the evidence ſhewed, that the box of hardware was taken away by the order of the appellants. And that no regard ſhould be had to the objection concerning inſolvencies; becauſe none had been ſhewn to exiſt, from 1786 (the date of the ſales of the goods, as appears by the commiſſioners report, and the defendants own account) to this time: Which is fourteen years.

PENDLETON Preſident. Delivered the reſolution of the Court, as follows.

On the principle queſtion whether the Court of Chancery erred, in not giving a further indul-

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gence to the appellants, on account of his witneſs Hickman Roſe, the Court have no difficulty. The commiſſioner had indulged them from 1792 to 1797; and, during that time, the witneſs, who was a ſeafaring man, was going abroad and returning to America from time to time; and yet it does not appear, that the appellants had taken any ſteps to provide for taking his depoſition, whilſt he ſhould be in America.

But the principal diſpute was, whether he ſhould be accountable for the outſtanding debts? On which ſubject, it does not appear that Roſe was material. And, above all, it is remarkable, that, they never, in the five years of litigation rendered an account of thoſe debts, ſtating which had been collected, or remained due; and whether any of the debtors, and who of them, were inſolvents; which was in their own power, and which they ought to have rendered: Therefore the Court is of opinion, that they ought to ſtand chargeable for the amount; and that, ſo far, there is no error in the decree.

But as to the ſum of £ 75: 7 Virginia money, allowed by the commiſſioner for a cheſt of Hardware, that article is not ſufficiently ſupported by the teſtimony; and ought not at preſent, to be allowed; but, as there ſeems ſome colour for the demand, that it ought to be left open for further enquiry. Therefore, that the decree, as to ſo much, ought to be reverſed, with liberty to the appellees to make further proof, if they can, for eſtabliſhing that part of their demand.

The Court then conſidered the queſtion, whether the decree as to the remaining claim was right, in continuing the intereſt to the time of payment, inſtead of the time of entering the decree?

The caſe of *Skipwith* vs *Clinch*, * has been reviewed; and the queſtion examined upon princi-

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* Ante 253.

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ple and authority: And upon the fulleſt inveſtigation we are unanimouſly of opinion, that in all caſes of ſimple contract, not bearing intereſt in their original, but on which, at law, intereſt is given by juries in the way of damages, the intereſt in equity can only be continued to the time of entering the final decree; and in the preſent caſe the Court fix the intereſt to the period of entering the decree, on that part of the demand, which is affirmed. We are ſatisfied, that many decrees, for this contingent intereſt, have been affirmed; but they paſſed *sub silentio*, and never were conſidered until the cauſe of *Skipwith* vs *Clinch*, which is now approved of, and conſidered as giving the rule in future.

The decree was as follows,

"The court is of opinion, that there is error, "in ſo much of the ſaid decree as allows the ap- "pellees ſeventy five pounds ſeven ſhillings, for "a cheſt of hardware and the intereſt charged by "the commiſſioner and accruing thereon, that "article not being ſufficiently eſtabliſhed by the "teſtimony in the cauſe; that there is alſo error "in ſo much of the ſaid decree as to the reſidue "of the demand, which omits to allow the com- "miſſions for collecting the outſtanding debts "charged to the appellants and which continues "the intereſt thereon to the time of payment, in- "ſtead of cumputing it to the time of the decree "and making the recovery to be of the aggregate "of principal and intereſt. Therefore ſo much "of the ſaid decree, as is herein ſtated to be er- "roneous, is to be reverſed with coſts, and the "reſidue affirmed, with this direction, that the "commiſſions for collecting as aforeſaid be allow- "ed, and intereſt be computed on the balance to "the time of entering the final decree, (as to that "part,) in the ſaid High Court of Chancery, in "purſuance hereof, the appellants having unjuſtly "delayed the final decree, by their appeal to this "court: But the appellees are to be at liberty to

"make

"make further proof of the article aforesaid, in "the said High Court of Chancery, within a rea- "sonable time to be limitted by the said court."

Deans *vs.* Scriba.

ROBERTSON

against

CAMPBELL and WHEELER.

What shall be considered as a mortgage, and not a conditional sale.

THIS was an appeal from a decree of the High Court of Chancery. The bill states, that the plaintiff's brother was sued in Philadelphia, for 240,000 lbs. tobacco. That the plaintiff and Shore and M'Connico became his security to Wilson the creditor, for payment thereof. That the plaintiff conveyed property, to Shore and M'Connico, as counter security. That payments were made, which reduced the debt to 70,000 lbs. tobacco, and £ 200 sterling on a protested bill. For which balance suit was brought, judgment obtained, and an appeal taken to the General Court, where the judgment was affirmed in October 1787. That the plaintiff sold ten negroes, at vendue, and applied the amount to the discharge of the judgment, at which time the defendants advanced the plaintiff 90,000 lbs. tobacco, worth 22/ per cwt. which was likewise applied in payment of the judgment. That for this advance, the plaintiff delivered the defendants two slaves (shoemakers by trade) as security; and the defendants were to have the profits of them, for the use of the tobacco lent. That their profits were 20/ per week. That the deed was drawn by the defendant Campbell; and is in form an absolute conveyance the plaintiff believes, although intended only as a security. That, afterwards the defendants, with the plaintiffs consent, sold a female slave and children, for 4520 lbs. tobacco; and applied it towards re-pay-

ment

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ment of the loan; leaving a balance then due of 15,750 lbs. tobacco, beſides intereſt. That, on the day of the ſale of the ſlaves, 30,135 lbs. tobacco, and £ 207 ſterling, was the balance due Wilſon: Who agreed, in conſideration of the hardſhips the plaintiff laboured under, that if the plaintiff paid the defendants the ſaid balance by the day of he would remit of the damages on the affirmance of the judgment. Whereupon the plaintiff ſold his blackſmith, but fell ſhort of payment, 2560 lbs. tobacco, and £ 38:8. With which payment, however, the defendants appeared ſatisfied, as by a ſtatement of the judgments in Wheeler's writing; which does not mention the damages. That the plaintiff hoped the profits of the ſhoemakers would have been applied to the diſcharge of this balance; eſpecially, as the debt was aſſigned by Wilſon to the defendants. That the defendants have iſſued execution againſt the plaintiff for tobacco and will not remit the damages as Wilſon had promiſed. Therefore the bill prays, that an account may be taken of what is due on the judgments, and of the hire and profits of the ſlaves; that the damages may be remitted; and the defendants enjoined from further proceedings; and for general relief.

The anſwer admits the judgment; but denying that the 20,000 lbs. tobacco was advanced on mortgage, inſiſts that the defendants bought the ſhoemakers abſolutely, at 16000 lbs. tobacco, and the woman and children at 4000. Refers to the bill of ſale. Admits the promiſe to the plaintiff, that, if he repaid the tobacco in the courſe of the ſeaſon, they would return the ſlaves; but inſiſts that this was no part of the original contract; and that they had, poſitively, refuſed to advance the tobacco on mortgage. That if the ſlaves had died they would have been the defendants loſs. That the defendants purchaſed with reluctance, and only to ſerve the plaintiff. Admits the agreement to releaſe the damages, and to take, in lieu thereof, 5 per cent, provided the tobacco debt was fully

ly diſcharged, on or before the firſt of May 1788, and the ſterling money debt, on or before the firſt of July 1788; but ſtates, that no part of the ſterling debt was paid until January 1789. Admits that the defendants are entitled to the benefit of the judgments; and alledges that the complainant is indebted to them, on other accounts.

A witneſs ſays, that ſometime after he had heard, from the plaintiff, that he had let the defendants have the uſe of the ſhoemakers for an advance of 20,000 lbs. tobacco, the deponent was in converſation with the defendant Campbell, who obſerved to him, that it was a kind of property he did not wiſh to lay his money out in; which conveyed to the deponent an idea, that Robertſon had a right of rendemption, but there were no words reſpecting the inſtrument of writing, which ſecured their ſervices. That the deponents reaſon for thinking the bargain advantageous was, that the plaintiff ſaid, they produced £ 50 per annum.

Another witneſs ſays, that he was preſent at the bargain. That the plaintiff was to let the defendants have the uſe of the ſhoemakers for an advance of 20,000 lb. of tobacco. That he conſidered the plaintiff, notwithſtanding the bill of ſale, as having the right to redeem. That the value of the uſe of the ſlaves was eſtimated at 20/ per week, or £ 52 per annum. That he underſtood the woman and children were to be ſold in order to pay part of the balance due upon Wilſon's judgment; but underſtood afterwards, that the plaintiff had conſented, that the proceeds ſhould be applied towards repayment of the 20,000 lb. tobacco. That the deponent being informed by the defendant Campbell that the defendants were about to iſſue execution upon the judgments, he obſerved to them that as the balance was ſmall, it was hard to exact damages; whereupon Campbell obſerved, that Robertſon and Scott were indebted to him, and he knew not how elſe to recover the money. That

in

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in January 1789, the plaintiff paid through J. Barret £ 270, on account of the judgment on the ſterling debt. To a queſtion put by the defendants, whether it was an abſolute ſale, he anſwered that the defendants did object to any but a poſitive conveyance, and poſſeſſion of the negroes; although the deponent ſuppoſed, that was owing to the embarraſſed ſituation of the plaintiff's affairs; that he does not recollect that any time of redemption was ſpecified, but the defendants were to have the uſe of the negroes till that took place.

Barret ſays, That being indebted to Archibald Robertſon, he gave his bond to the defendants on the 10th of January 1789, for £ 300, with intereſt which he underſtood, the defendants, received, as a payment from Archibald Robertſon, on ſome account.

A fourth witneſs ſays, that the defendants, when they paid for the ſlaves made a memorandum in their day book, that the plaintiff was to return the price paid for them in ſix months; and they in the mean time were to have the hire or value of their labour. That the abſolute right, as per bill of ſale in and to the ſaid property, if the plaintiff failed ſo to do, was uniformly declared to be veſted in the defendants. At leaſt the defendants ſaid ſo.

A fifth witneſs ſays, that Shore & M'Connico diſcharged 20,000 lb. tobacco on account of Wilſons judgment, by the ſale of the ſhoemakers to the defendants. That therefore he does not think they or Robertſon would have been affected by their deaths. That the defendants refuſed to take a mortgage through fear of a Chancery ſuit.

Several witneſſes prove the value of the ſlaves, and their yearly profits.

The bill of ſale was as follows:

"Know all men by theſe preſents, that I William Robertſon in and for conſideration of the

"quantity

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"quantity of twenty thouſand weight of Peterſburg "crop tobacco to me in hand paid and ſatisfied, "the receipt whereof is hereby acknowledged, "have this day bargained, ſold and delivered unto "James Campbell and Luke Wheeler, four ne- "groes, to wit, Frank White and David White "ſhoemakers by trade, Fanny and her child at the "breaſt. And I do hereby warrant and defend "the property in the before mentioned negroes and "their future increaſe unto the ſaid Campbell and "Wheeler their heirs and aſſigns forever, againſt "all manner of perſons whatſoever claiming, or "who may hereafter claim the ſame. As witneſs "&c."

The Court of Chancery decreed in favor of the defendants; and Robertſon appealed to this Court.

WICKHAM for the appellant. Although the conveyance was abſolute, yet the conſideration was a loan; and the conveyance was intended merely to ſecure the repayment of the money. The evidence of M'Connico is concluſive as to this, and his depoſition is ſtrengthened, by other teſtimony in the cauſe. If this evidence had been part of the bill of ſale, there would have been no doubt; and the defendants apprehenſions of a ſuit in Chancery, which prevented its being inſerted, rather ſtrengthens the caſe. It may perhaps be ſaid, that there was no covenant to redeem, or to repay the money; but that would apply to moſt caſes of mortgage; and the plaintiff would ſtill have owed the money, like the caſe of a loſt pawn. *Co. Litt.* 89. *Salk.* 522. Beſides *Ross* vs *Norvell* 1. *Wash.* 17. is deciſive upon the ſubject. The hire of the ſlaves was to go againſt the intereſt of the money; which is a mortgage expreſsly.

But the contract was uſurious. For it was, as before ſtated, a contract for a loan; and the hire of the ſlaves was worth more than the intereſt of the money. 2. *Dougl. Low* vs *Waller.* The con-

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tingency was merely colourable; which is not ſufficient to take it out of the ſtatute. 5. *Co.* 69. *Burton's* caſe. Ibid. *Clayton's* caſe. *Cowp.* 770.

Wheeler's ſtatement ſays that the damages ſtand conditional; and, if the profits had been rightly applied, nothing was due, at the end of the year 1791.

The decree is therefore erroneous upon all the points, and ought to be reverſed.

CALL *contra.* It was not a mortgage; becauſe the ſale was abſolute, and the plaintiff had only a power of repaying the money, by way of repurchaſe. 2. *Fonbl. Eq.* 267. 1. *Pow. Mortg.* 156. In which reſpect it is leſs ſtrong, than the caſe of *Chapman* vs *Turner* * in this court. Where one gave an inſtrument of writing to another, ſtating that he had received £ 30, and had put a ſlave as a ſecurity into the hands of the other; who, if the money was not paid on or before a certain day, was to have the ſlave for the £ 30. This was held to be no mortgage, but a conditional ſale, and irredeemable. Such a conſtruction is more reaſonable, in the preſent caſe; becauſe the defendants had no other ſecurity for their money; and, if the ſlaves had died, the debt would have been, irretrievably, loſt.

There is no pretence for ſaying, that the contract was uſurious; becauſe the ſale was abſolute, and but a mere indulgence to repurchaſe allowed. Beſides the defendants did not loan any thing to the plaintiff; and, conſequently, there could be no uſury. For, in order to conſtitute uſury, there muſt be a borrowing and a lending.

The plaintiff not having paid the leſſer ſum in time, the defendants were entitled to the whole debt, and to the 10 per cent damages alſo. This is the conſtant rule. For, unleſs the money is paid

* 1. Call's rep. 280.

paid in time, the condition is forfeited, and the debtor has no equity, or conſcience on his ſide. But the preſent caſe is ſtronger; becauſe there was an expreſs ſtipulation to that effect.

The defendants are entitled to intereſt on the 10 per cent damages; becauſe it is a judgment; which is an aſcertained ſum. And Robertſon and Scott's debt ought to be deducted, becauſe the plaintiff was bound for it.

If the plaintiff were even entitled to redeem (which is denied) yet he would not have any right to an account of profits, becauſe it was agreed, that they ſhould go againſt the intereſt. At any rate, he would only have been entitled to the profits actually received, and not to ſuch, as might have been made, by the greateſt care. For the defendants would not have been bound to uſe extraordinary attention: and the plaintiff might have put an end to the loſs by payment of the money. 2. *Pow. Mort.* 272. Beſides, thoſe, who come into equity for an account, muſt take it as they find it.

HAY on the ſame ſide. There is a ſtriking difference between a mortgage and a conditional ſale. *Pow.* 37. 2. *Fonbl.* 237. 1. *Vern.* 268. and *Chapman* vs *Turner* in this Court. Robertſons right, in the preſent caſe, was only that of a conditional ſale. For the deed was abſolute; and he had only a right to re-purchaſe. Although parol evidence may be received to explain an abſolute deed, yet a mortgage will not readily be preſumed againſt an abſolute conveyance. *Fonbl.* 267. The anſwer denies that it was a mortgage; and *Pow.* 50, ſhews that the anſwer may be uſed to prove the nature of the agreement. The anſwer will prevail againſt a ſingle witneſs although poſitive, which M'Connico is not: for he only ſtates his opinion. There was no diſproportion in the price; but if there was, that is nothing in a conditional ſale, 1. *Vern.* 268. The property was delivered in the preſent caſe; which differs it from that of *Norvell* vs *Ross* 1. *Wash.* 17. There was

no

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no loan; for none is proved: and it is not likely, that the defendants, who were merchants, would wiſh to lend, when they could have made greater profit on it, in the courſe of their buſineſs.

If tobacco had riſen, the defendants could not have inſiſted on a loan; and therefore the right would not have been reciprocal, *Com. Dig.* 299.

The condition for remitting the damages, was not complied with; and therefore the plaintiff has no claim to it, *Pow. Contr.* 213. Becauſe the contract could not continue, as the term for performance was paſt.

WICKHAM in reply. The caſe of *Chapman* vs *Turner* is not like this. For there the whole caſe was reduced to writing, and nothing concealed; which was a ſtrong circumſtance in favor of the purchaſer. Beſides the full value was given in that caſe; but not in this. 1. *Pow. Mortg.* 156 was the caſe of a rent charge: and the exception proves the rule.

Cur: adv: vult.

PENDLETON Preſident. The firſt queſtion in this caſe is, whether the tranſaction, between the parties, reſpecting the two negro ſhoemakers put into the poſſeſſion of the appellees for 1600 lbs tobacco, is to be conſidered as a mortgage, or conditional ſale?

That there is a difference between thoſe modes of transfer, and that they produce different conſequences is certain. In the caſe of a mortgage, the eſtate is at all times, redeemable, until a decree of foreclosure paſſes, or a dereliction of the right to redeem is preſumed, from the length of time. In the other caſe of a conditional purchaſe the time of performing the condition muſt be ſtrictly obſerved. Theſe rules are ſeldom controverted; but the queſtions have generally been, to which claſs the tranſaction diſcuſſed belonged?

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And this muſt always depend, on the whole circumſtances of the contract; and is not confined to the mere written evidence of it.

In *Chapman* vs *Turner* * the writing imported to be a mortgage, drawn by Chapman, an over match for Turner an uninformed planter, but the circumſtances ſtated in the report of that caſe, abundantly ſhew that a purchaſe was the intention of the parties, and not the loan of money: Which Turner conſtantly refuſed; and purchaſed and paid his money, under an agreement, only, that the ſlaves ſhould be reſtored, on repayment of the money, without intereſt, at the next Hanover Court.

Chapman did not then, or during his life, offer to return the money: but his widow after his death and when the ſlave, who was a female, had two or three children, tendered the money, and demanded a redemption by her ſuit: Which was juſtly determined againſt her.

On the other hand, in *Ross* vs *Norvell* † altho' the bill of ſale was abſolute, as in the preſent caſe yet, on the circumſtances, it was decreed to be a mortgage, and Norvell let into a redemption upon the uſual terms.

It muſt often happen, in diſquiſitions of this ſort that there will be difficulty, in drawing the line, between thoſe two ſorts of conveyances. The great *desideratum*, which this Court has made the ground of their deciſion is, whether the purpoſe of the parties was to treat of a purchaſe, the value of the commodity contemplated, and the price fixed? Or whether the object was the loan of money and a ſecurity, or pledge, for the repayment, intended?

The former was the caſe, in *Chapman* vs *Turner:* The latter, in *Ross* vs *Norvell.* Then, what is the preſent caſe? And what commenced the treaty between the parties? We hear not a word of

* 1 Call's reports 280.
† 1 Waſhington 14.

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of purchaſing ſlaves, nor any conſideration had of the price, for which, Robertſon was willing to part with the property. On the contrary, Wilſon ſtates, that the 20,000lbs. tobacco was the eſtimated value of the four ſlaves; importing, that the eſtimate was made, for the purpoſe of conſidering, whether they were a ſufficient ſecurity? The real agreement was, that they ſhould be a ſecurity only; that the woman and child ſhould be ſold, and the produce applied to diſcharge the debt; and, for the balance, that the two ſhoemakers ſhould remain with Campbell and Wheeler, and their profits applied to diſcharge the intereſt, until the balance ſhould be repaid.

Why then was the abſolute bill of ſale taken? The appellees furniſh the anſwer: That it was the juſtice of this Court allowing redemption in caſe of a mortgage. An attempt, which the Chancery has conſtantly repelled, wherever it appeared, that the real contract was a mortgage, and which, this Court have no difficulty in fruſtrating, upon the preſent occaſion; allowing a redemption of the ſlaves, upon the uſual terms; that is to ſay, that Robertſon ſhall be charged with the principal and intereſt, and any other juſt demand, which Campbell and Wheeler may have againſt him; and they to be accountable for the profits, really made by them, and no farther; unleſs, in the caſe of groſs negligence to employ them.

The objection that Campbell and Wheeler riſked the lives of the ſlaves, ſince they could not have recovered their money, if the ſlaves had died, was truly ſaid, to be, only, another ſtate of the queſtion; which would, upon the evidence, have been decided the ſame way.

The agreement to ſet the profits againſt the intereſt, ſince, on any view of the ſubject, they will appear greatly to exceed the legal rate of intereſt, is ſo far uſurious, and void; and the account is to be taken on the uſual terms, where the mortgagee

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is in poſſeſſion; to charge the profits againſt principal and intereſt.

The remaining queſtion reſpects the damages recovered upon the affirmance of the common law judgment in tobacco, which, in April 1788, were agreed to be remitted, on condition, that the balance, with intereſt, was paid by the next month; or, as the appellees explain it, during the ſeaſon.

That the rule is, as ſtated by the counſel, "that "on an agreement to remit part of a debt, on "condition the reſidue is paid within a certain "time, the condition muſt be ſtrictly performed," is unqueſtionable; but ſurely the creditor may, by his conſent, enlarge the time: Which appears to have been done in the preſent caſe. This intention of keeping up the ſtrictneſs, expreſſed by Wilſon, was to be a *ſtimulus*, to Robertſon, to exert himſelf, in raiſing the money, in time, and the creditors, diſcovering, that he had done ſo, and probably made ſacrifices to effect it, as it appears he did of £ 30 in Barrett's bond, and he ſays he did in the ſale of a valuable blackſmith, meant not to inſiſt on a forfeiture; although, he had not fully compleated the payment. Accordingly, we find, that, as to the money on demand, they wholly remitted the damages; although, the balance was not paid, until November 1794; and, as to the tobacco, no damages are charged, but the balance with intereſt, only in Auguſt 1791; which amounted, then, to no more, than 3051 lbs. of the value of £ 34:6:5. In the ſame account, they ſtate the damages of 10,837 lbs. tobacco, to ſtand conditionally: Intended, no doubt, to keep up the ſtimulus, for payment of the balance; as they never could mean, to make Robertſon pay that enormous penalty, for his default, in paying leſs than a third of the ſum. Or if they did, a Court of Equity would ſet to very little purpoſe, if they did not relieve againſt it, upon making juſt compenſation. That compenſation, in equity, is fixed, at the intereſt of the money, in caſes of this

ſort;

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ſort; and not the profit, which they might have made, with the tobacco, by ſpeculation in a baſket of earthenware, or otherwiſe. Indeed, it appears, that, in a converſation afterwards with a friend, who intimated, that it was hard to inſiſt upon it, Mr. Campbell ſeemed to concede that it was; and then, as well as in his anſwer, ſaid, that his view was, to cover, by that means, a doubtful debt, due from Robertſon and Scott. That debt he will be allowed, in the account to be taken under the mortgage; which will remove the objection: And we think the damages ought to be wholly remitted; as they were in the caſe of the money, under the ſame circumſtances.

The decree is to be reverſed with coſts; and one, to the following effect, entered.

"The court is of opinion, that although the "writing, in the proceedings mentioned, pur-"ported to be an abſolute bill of ſale, yet, as the "real intention of the parties, at the time of the "contract, was a loan of the 20,000 lbs. tobacco, "and that the four ſlaves ſhould be pledged, as a "ſecurity for the repayment, the ſame ought to be "conſidered as a mortgage; and the appellant let "into a redemption of the two ſlaves, remaining "unſold, upon the uſual terms of his being made "chargeable for the 16000 lbs. tobacco and inte-"reſt, and any other juſt debt, for which he may "be liable to the appellees. Againſt which, he is "to be allowed the profits really made of the ſlaves, "by the appellees; and no further, except for the "time in which they may have groſsly neglected "to employ them. That the appellant ought to "be relieved againſt the damages, on the tobacco, "recovered by the judgment at common law, up-"on payment of the balance of principal and in-"tereſt: And conſequently, that the ſaid decree "is erroneous. Therefore it is conſidered that "the ſame be reverſed &c. and the court proceed-"ing to make ſuch a decree as the High Court

"of

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" of Chancery ought to have made. It is decreed " and ordered, that an account be taken between " the parties according to the principles of this " decree; and that upon payment of the balance, " if any, which ſhall be found due to the appellees, " and the coſts in Chancery, they ſhall deliver the " ſlaves, if living, to the appellant; to be held, " as of his former property therein, and, if a ba- " lance ſhall be found due to the appellant, that " the appellees be decreed to pay the ſame to " him."

HALCOMB *againſt* FLOURNOY.

If there be an order of reference made during the pendency of a ſuit, the award, in purſuance thereof need not lie in Court two terms, as it is not within the act of Aſſembly, upon awards.

What damages may be eſtimated by arbitrators upon a bond given by the deputy to indemnify and ſave harmleſs the High Sheriff.

FLOURNOY brought debt in the Diſtrict Court, againſt John Halcomb, Philemon Halcomb jr. William Watts, and Joſeph Scott jr. upon a bond, given to Flournoy as High Sheriff; with the following condition annexed:

" The condition of the above obligation is ſuch " whereas the ſaid John Halcomb is appointed " deputy ſheriff of the ſaid county, under the ſaid " Thomas Flournoy, now if the ſaid John Halcomb " ſhall well and truly execute the office of deputy " ſheriff, and honeſtly, juſtly, and according to " law collect and pay all public taxes either in " money, tobacco, or other article made payable " and receivable in taxes by any law now in force, " or by any future law, as alſo all levies, officers " fees, executions and other monies, tobacco, or " other article collected by virtue of his ſaid office " to ſuch perſon and perſons having a right to de- " mand and receive the ſame, within the time " preſcribed by law, *as alſo ſave harmleſs and in-*

" *demnified*

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"*demnified the ſaid Thomas Flournoy, from all "motions for judgments in any Court of record, "and from every action, or cauſe of action, that "the ſaid Thomas Flournoy, his heirs, executors "and adminiſtrators may be ſubject to, by his ſaid "office of ſheriff for the county aforeſaid*, then "this obligation to be void or elſe to remain in "full force power and virtue."

Various orders of reference were made; and at the September Court 1798, the ſuit was diſmiſſed as to Watts, and the arbitrators made their award as follows:

"Dr. John Halcomb, George Walker, Philemon Halcomb junior. William Watts and Joſeph Scott junior.

To Thomas Flournoy.

1789 Dec 2	To paid on account of an execution commonwealth againſt Thomas Flournoy, certfs.	125 14 8
1792 Oct. 11	To amount of certificates paid the treaſurer on account of execution commonwealth againſt P. Halcomb. Cts.	86 7 4
1793 June 18	To paid Martin Smith for balance due by J. Halcomb ſheriff for the redemption of negroes ſold by Richard Bibb Certificates.	8 14 6
	Certificates.	£220:16:5
1791 Dec. 2	To paid treaſurer on acct. of taxes for 1786.	42 10 6
	To paid clerk's Henrico, P. Edward, and ſheriff of ſame.	0 13 0
1792 Jan. 8	To paid Andrew Reynold.	4 4
	To paid William Cowan.	10

Jan.

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Jan 29	To paid an execution James Tinsley against T. Flournoy.	10	15	
Oct. 11	To paid treasurer on account of execution commonwealth against P. Halcomb.	7	10	2
1790. Mar. 29,	To paid an execution Thomas Watkins clerk of Chesterfield.	5	12	8¼
	To paid an execution Maurice Langhorne against Thomas Flournoy.	2	13	10¼
1798	Specie £	83	19	2¾
Aug. 10.	To interest on money advanced to this date, & damages sustained by the plaintiff to the date of the writ, rating certificates at 18/8.	150		
	Amount of cert. bro't down.	220	16	5
	£	454	15	7¾

CREDIT.

1791. *Dec.* 2,	By amount of sales of three negroes on execution, Flournoy vs Holcomb and others, dated Nov'r. 1st 1791, from Prince Edward court commissions deducted.	101	1	6
	By difference in amount of certificates 2/ in the £	22		
	Balance due T. Flournoy August 10th 1798.	331	14	1¾
	£	454	15	7¾

We

Halcomb vs Flournoy.

We certify, that agreeable to the annexed orders of the District Court of Prince Edward, We this day met at the house of Quin Morton, in the county of Charlotte, the plaintiff and defendant John Halcomb being present. We proceeded to examine the vouchers produced and make a statement as will appear from the foregoing account. It appearing to us, that the plaintiff hath been put to very great trouble by frequently travelling to the city of Richmond on account of the Commonwealths judgments against him for arrears of taxes and incurred considerable expence thereby. It also appears, that his negroes taken in execution to satisfy said judgments, were kept out of his possession and service at various times, from which he sustained losses. We have allowed interest on monies advanced, and rated the damages as will be seen in the debt. We find a balance of three hundred and thirty one pounds, fourteen shillings and one penny three farthings due to the plaintiff from the defendants, and which sum we award him with costs of suit given under our hands &c."

The District Court gave judgment, upon the day of the return of the award for the £ 331 14 1¾ awarded and costs. And the plaintiff agreed "to "release ten pounds for so much paid William "Cowan, and four pounds four shillings paid An"drew Reynold in the account aforesaid mention"ed."

To this judgment Halcomb and the others obtained a writ of *supersedeas* from this Court.

RANDOLPH for the plaintiff. The court were premature in entering up judgment upon the award; which ought to have lain in court two terms, according to the express directions of the act of Assembly; for it is not shewn, that the plaintiff appeared and contested the award: Which would have altered the case.

The item of £ 150 contains matters not within the submission. For that was of all matters in dif

ference

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ference between the parties in the ſuit; and, upon the trial, ſuch matters would not have been permitted to go in evidence to the jury. They were no more than the ordinary caſes, of expences incurred, and inconveniences ſuſtained, by a ſecurity. But theſe were never yet thought, to be a ſubject of damages, for which a ſuit could be ſuſtained. On the contrary, they are literally *damnum abſque injuria;* and no action lies for them.

WICKHAM *contra.* *Mitchell* vs *Kelly* * in this court, decided the firſt point; and proves, that an order of reference of this kind is not within the act of Aſſembly.

The £150 damages were juſtly allowed; becauſe it was a bond to ſave harmleſs, and therefore the appellee had a right to inſiſt on being completely indemnified; which could only be done, by making compenſation for his neceſſary expences, and the inconveniences and loſſes which he had ſuſtained, by the miſconduct of the appellant. Beſides arbitrators have more latitude than a court; and may decide according to equity.

RANDOLPH in reply. However reaſonable the demand, yet not being the ſubject of an action, it would not have been permitted to go to the jury: Whoſe enquiry would have been confined, by the court, to the money paid and intereſt; which is the only compenſation and meaſure of damages, which the law allows, in caſes of this kind.

Cur. adv. vult:

ROANE Judge. Two objections are taken in this caſe. 1. That the award did not lie long enough in court, according to the act of 1792, but was immediately confirmed by the judgment of the court. 2. That the arbitrators, as appears by the report, allowed damages, for matters, not within the terms of the ſubmiſſion.

Upon

* 1. Call's Rep. 379.

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Upon the firſt objection, it was obſerved by the appellees counſel, that it was decided in *Mitchell* vs *Kelly*, that the act of 1792 does not apply to orders of reference, of this kind, made during the progreſs of a ſuit, depending in court; nor, upon examination of the act, do I think it does.

As to the ſecond objection, I obſerve, that one of the conditions of the bond is, to indemnify the high ſheriff, from all motions, judgments &c. Now this condition, as to the indemnity, will certainly extend to all juſt expences ſuſtained, by the appellee, in conſequence of any ſuch motion judgment &c. as well as to all actual loſſes, occaſioned by the detention of his negroes &c. Theſe expences and loſſes, which are actual, are capable of being aſcertained, by computation: And, certainly, the party cannot be ſaid to be indemnified, that is, kept harmleſs, without they are allowed him.

At the ſame time I agree, entirely, with the appellants counſel, that the arbitrators ought not to have taken into conſideration, mere ſpeculative damages, ſuch as for trouble, anxiety &c. and that this would lead us into an imaginary and inexhauſtible field.

The queſtion then is, upon this diſtinction, how ſtands the report of the arbitrators?

The item in the account preſents nothing to impeach the award. Intereſt on the money advanced was certainly proper; and damages ſuſtained may juſtly be reſtricted, for any thing appearing to the contrary in the item, to ſuch damages as might legally be awarded. We are not to hunt out ſuch a ſenſe, as that damages may be underſtood to deſtroy the award; which ought to be favourably conſtrued.

I take this, to be merely a ſtatement of the evidence, which appeared to the arbitrators; and it does not irreſiſtably follow, that the damages were given on ſuch part of the evidence as would not

" warrant

warrant it; that is to say, an indemnification for the perſonal trouble &c. of the appellee. It is a juſt maxim, that *what is useful shall not be vitiated by that which is not so.* But it is not expreſsly ſtated, that the damages were given for perſonal trouble &c. and, if given for expences and loſſes, as before mentioned, it is right.

My opinion is, that, before we overturn an award (in a caſe where juſtice ſeems fully attained,) it ought certainly to appear, that the award was founded on illegal grounds. But this does not clearly appear to have been the caſe, in the cauſe now before the court; and therefore I am for ſupporting the award, as what is relied upon, to impeach it, is merely a ſtatement of the evidence, which appeared to the arbitrators. Upon theſe grounds I am of opinion, that the judgment ought to be affirmed.

CARRINGTON Judge. This was an action, founding in damages, for breach of a covenant. The arbitrators were judges of the parties own chuſing, to ſettle all matters in diſpute between them; and it is a rule, that awards ſhould always be conſtrued liberally. I think the items, including the damages, ſtated, by them, were clearly within the ſubmiſſion. The award therefore, (which, although not formal, is founded in ſtrict juſtice,) ought to be ſupported. I am for affirming the judgment.

LYONS Judge. I concur with the other Judges, upon the firſt point made, by the appellants counſel; but differ from them on the other. There is a reference to damages generally; but the principal and intereſt is the true meaſure of damages in law; and mere ſpeculative injuries and conjectural inconveniences do not enter into the ſubject of damages, at all. The court never enquires how the party got the money with which he paid the debt; but merely how much he paid? And when he paid it? Therefore, theſe conjectural damages

being

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being included, the award I think ought to be set aside; but there is a majority of the court for sustaining the judgment; and consequently it must be affirmed.

Judgment Affirmed

GEORGE STEPHENS

against

JAMES COBUN.

The judgment of the board of commissioners, under the land law, is conclusive; and cannot be impeached.

THIS was an appeal from a decree of the High Court of Chancery. The bill states, that John Stephens, in the spring of 1767, settled himself and family on Cobun's creek, extending down the said creek below an *agreed* line, which was afterwards made, by the said John Stephens and Jonathan Cobun, so as to include 400 acres. That the said John Stephens built a house, and moved his family thither; clearing 10 acres, and raising a crop. That the said agreed line continued, as a boundary between Stephens and Cobun's until four years after, when Stephens died; during which time, Stephens lived on the land, and raised corn. That his widow lived on the said land 5 or 6 years afterwards, with his family; and then sold it to Jonathan Cobun, who sold to James Cobun the defendant. That the plaintiff was then an infant, left by his mother, and supported by the bounty of his friends. That he was still an infant, when the commissioners sat; and, having no property, had no money to assert his right against the defendant, who then had the land in possession. That one Henry Stephens did, indeed, inform the board, that the land belonged to the plaintiff, but, being poor and ignorant, he was unable to support the claim against the defendant; who

apprized

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apprized of it, brought forward the claim of Workman; who had tomahawked a few trees, as Cobun ſaid, on the land before ſaid Stephens had ſettled there: By which means, the defendant obtained a certificate for the land. That Workman never had a reſidence in the country, except as a hunter; and if he marked any trees, it was for convenience as a hunter. It therefore prays, that the defendant may convey; and that the plaintiff may have general relief.

The anſwer ſtates, that John Stephens did *ſet down* on the land in the bill mentioned; and continued there, with his family, for ſome time: That both were wrongful; as Workman had previouſly improved and occupied the land; on which he had done work, as chopping and heaping bruſh; and that he had made ſome progreſs in building a houſe or cabin. But, going to remove his family thither, that ſaid John Stephens intruded on the land and held him out. That the agreement of Stephens and Jonathan Cobun, as to the *boundary line*, could not affect Workman; who was the true owner, *if any could be at that early period, before legal rights were obtained.* That Jonathan Stephens bought of Cobun's widow, and afterwards of Workman. That John Stephens knew of Workman's right, and offered £ 3 for it. That matters lay thus, until the commiſſioners ſat; when the defendant was cited before them, at the ſuit of the plaintiff, by Henry Stephens. That the claim was fully heard, and decided for the defendant. Denies any fraudulent application for the certificate, or that he bought of Workman, with a view to defraud the plaintiff. Says, that the defendant was threatened, by Lewis Rogers, with a ſuit founded on Workman's right; and therefore he bought it, for a horſe, which coſt the defendant £ 22.

Jonathan

Stephens vs Cobun.

Jonathan Cobun ſays, that in 67 or 68, Jonathan Cobun ſenr. and John Stephens ſettled on Cobun's creek, and, after dividing the lands by an agreed line, the ſaid John Stephens ſettled on that now in diſpute. That each diviſion was improved, but he does not know, which was the oldeſt. That Lewis Rogers forbid John Stephens to ſettle on the ſaid land, as Rogers and another had improved it, and had planted corn; although the deponent never ſaw any. However, that he did ſee ſome trees, which had been deadened, and ſome appearance of bruſh heaps, and the foundation of a cabin, two or three logs high. But does not know, if the whole or only a part of it was on John Stephens land. That he ſaw the letters T. B. on a honey locuſt in Jonathan Cobun's improvement, ſuppoſed to have been made by Thomas Banfield; who claimed the land and gave up his right to Jonathan Cobun ſenior, previous to the diviſion, between Jonathan Cobun and John Stephens. That the plaintiff and the defendant were preſent and conſenting. That the plaintiffs mother gave bond to indemnify the defendant againſt the heirs of John Stephens; and the deponant was ſecurity thereto. That the plaintiffs mother was daughter of Jonathan Cobun, deceaſed.

Meredith ſays, that he had heard Workman ſay he had ſold his right to John Stephens ſenior, for a quantity of liquor.

Ramſay ſays, that he had heard Rogers ſay, he and Workman had improved three places in one day; and that Workman loſt his gun. Upon which, they went away; and, on their return, that Stephens and Cobun ſettled. After which Rogers expected to loſe, and ſold for a horſe, which he ſaid was better than nothing.

A fourth witneſs ſays, that he had heard Workman ſay, if he could find his gun he would move away, as he did not like the country. That he did not underſtand that he had improved. That the

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the land in diſpute, is that, which was improved by Banfield.

Scott ſays, that John Stephens and Jonathan Cobun ſenr. ſettled on the lands, and made a dividing line. That Stephens cleared 4 acres, and raiſed corn.

Evans ſays, that the plaintiffs mother was on the land; and that 4 acres were cleared.

Banfield ſays, that he lay two weeks on the land; but not with intent to ſettle it. That he never claimed or ſold it. That there were ſome ſmall improvements, as bruſh heaps, deadened trees, &c. there, at the time; but does not know who had made them.

Workman ſays, that he ſettled the lands. That there were bruſh heaps, and a houſe 3 or 4 logs high. That he planted corn; and began to clear a meadow. That he loſt his gun and went away; leaving his crop in the care of Lewis Rogers. That he would have returned, but John Stephens, father of Geo: Stephens, had taken poſſeſſion, and kept him out. That he ſold his right to the ſaid Rogers; which he would not have done, had he known of the commiſſioners ſitting there. That ſome ſmall time after he had left that country, the ſaid Rogers alarmed him about the Penſylvanians and their proclamation. That he never told John Sempſon that he would not return. That he never ſaid that the defendant was to pay him if he gained the ſuit; although he might have ſaid that he was to pay the expence, he was at, in going to have depoſitions taken. That he never told Merrifield that he had given his right to John Stephens. That he never ſaw him. That Rogers told him that John Stephens had offered him £ 5 for the deponents right.

Lewis Rogers ſpeaks to the ſame effect as Workman; and ſays, that he bought of Workman and ſold to the defendant.

C.

Stephens vs Cobun.

C. Ratcliff says, that John Stephens drove a man off a piece of land as she heard; and that the said Stephens got on the land, in dispute.

William Haymond says, that he was one of the commissioners. That Henry Stevens, on behalf of the plaintiff, brought suit for the lands in dispute, which was decided in favor of Cobun because he had the eldest improvement, to wit, *Workman's*.

J. Ratcliff says, that he was present at the suit before the commissioners; and that it was decided in favor of Cobun; who had Workman's right.

C. Ratcliff further says, that the trees were deadened. That there was part of a small cabin before John Stevens took possession; but she knows not by whom it was put, further than that she heard Rogers say it was Workman's. That Rogers, in Workman's name, warned Stephens to go off the land, That Stephens refused, saying he had offered Rogers £ 3 for it. That she was present as a witness before the commissioners; who decided for Cobun.

Decker says, that, about the year 1765, Stephens, Workman and Lewis Rogers improved two tracts of land, as the deponent has heard; one for his father, the other for himself. That he planted corn on both places. That the deponent, his father, and the said Workman left the country; and that Rogers left it some time after. That in about two years after, old Cobun and John Stephens came and settled on the said land. That Stephens never bought Workman's right. That Rogers went off, on account of the Pensylvania proclamation. That John Stevens claimed to a fence, but he does not know the agreed line. That he saw the corn planted by Workman.

There are amongst the papers in the record, a copy of the judgment of the commissioners; and a copy of Cobun's surveys.

The

Stephens
vs.
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The County Court decreed a conveyance to the plaintiff. The High Court of Chancery reverſed the decree. 1. Becauſe the plaintiffs anceſtor had no title. 2. Becauſe the judgment of the commiſſioners was final, notwithſtanding the infancy of the plaintiff, as it had not been reverſed by the General Court. Whereupon the plaintiff Stephens appealed to this Court.

RANDOLPH for the appellant. Upon the principles of equity and the evidence in the cauſe, the title was clearly in the appellant originally. For the tranſitory poſſeſſion of Workman, if indeed it be true he ever had it, cannot be admitted to have conferred any right; or, if it did, he parted with it to Stephens. Therefore, unleſs the judgment of the commiſſioners, has barred his claim, he was clearly entitled to a decree for the land. But, as he was an infant and his caſe not fully before the board of commiſſioners, their judgment ought not to preclude him.

CALL *contra*. The merits, as well as the law of the caſe, are in favour of the appellee. For it is eſtabliſhed, beyond controverſy, that Workman made the firſt ſettlement and improvement. Therefore Stephens was an intruder on his right; and the weight of teſtimony is, that he never ſold to any perſon but Cobun. The judgment of the commiſſioners is deciſive; for the law expreſsly declares that it ſhall be final. *Chanc. Rev.* 93. The appellant was plaintiff, by a perſon who acted as his next friend, before the commiſſioners, and appears to have been fully heard. Therefore he ought to be barred by the judgment: For an infant plaintiff, when heard by his next friend, is as much bound by the judgment, as a perſon of full age Beſides it does not appear what teſtimony, was before the board; and, perhaps, much ſtronger evidence was adduced by Cobun on the merits, than appears in the preſent record. For, although, he has thought proper to adduce ſome

teſtimony

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testimony on the merits, he was not bound to do so; and therefore, if his testimony were defective, (which it is not,) yet that would not affect his case; because the judgment is conclusive, and cannot be impeached.

But, for another reason, the decree of the Chancellor is right; namely, that Cobun and Rogers are no parties to the present suit; for not having passed any deed for their title, and their rights having been drawn into controversy, they ought to have been made parties, *Buck* vs *Copland* * in this court. Which is the stronger in the present case, as their testimony is objected to on the ground of interest; and they ought certainly to be heard by answer or deposition.

Cur: adv: vult:

LYONS Judge. Delivered the resolution of the court, that the act of Assembly was conclusive; and that the decree was to be affirmed.

Decree Affirmed.

WALLACE

* Ante 218.

WALLACE *and wife*

against

TALIAFERRO *and wife.*

THIS was an appeal from a decree of the High Court of Chancery, where Taliaferro and wife brought a bill, for relief againſt Wallace and wife, ſtating, that William Rowley made his will on the 11th of May 1774, and deviſed to Lettice Wiſhart and Catharine Taylor ſundry ſlaves, together with the reſidue of his eſtate, ſubject to the payment of his debts and legacies. That he appointed their huſbands John Wiſhart and Richard Taylor executors of his ſaid will; and died before the 25th of September in that year. That the executors qualified; but John Wiſhart acted principally, and worked the ſlaves on the teſtators lands. That, after the death of the ſaid William Rowley, the ſaid John Wiſhart made his will, to wit, on the day of in the year 1774, and gave all his ſlaves to be equally divided between his two ſons, William and Sydney, and his daughter the plaintiff; but the enjoyment of the property was to be ſuſpended, until his ſons came of age. That Wiſhart died before the 25th of December 1774. That after the death of John Wiſhart, the ſlaves of Rowley were divided between the defendant Lettice and the ſaid Catharine Taylor, according to the will of the ſaid Rowley. That Lettice Wiſhart, after the death of the ſaid John Wiſhart, intermarried with the defendant Michael Wallace; who took poſſeſſion of all the ſlaves, and other eſtate, which were allotted to the ſaid Lettice. The bill therefore prays for the plaintiffs proportion of the ſlaves, and for general relief.

The anſwer of Michael Wallace denies that the ſlaves (except Lydia, who was claimed by his wife,

Conſtruction of the 4 ſection of the *explanatory act* of 1727, *chap.* IV.

W. R. made his will in May 1774, and deviſed to L. W. and C. T. ſundry ſlaves, with the reſidue of his eſtate, ſubject to the payment of his debts & legacies; and appointed J. W. the huſband of L. W. and R. T. the huſband of C. T. executors. Who qualified as ſuch. In Auguſt 1774, J. W. died, before any diviſion of the eſtate of W. R. was made, and by his laſt will deviſed all his ſlaves to his daughter & his two ſons. As J. W. was, at moſt, only poſſeſſed as executor, and not in right of his wife, her ſhare of the

ſlaves of W. R. ſurvived to herſelf; and did not paſs by the will of J. W.

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wife, by title paramount) were ever in poſſeſſion of John Wiſhart; but ſays, that Lydia and her iſſue have been divided, by a decree of the Court of Appeals. States that Richard Taylor alone acted as executor. That the ſlaves are not mentioned in the will or inventory of Wiſhart. That the debts and legacies were conſiderable; and that he has given up property to pay them.

The anſwer of Lettice Wallace, ſtates, that ſhe does not know that John Wiſhart ever had poſſeſſion of the ſlaves; and believes he had not.

The anſwer of William and Sidney Wiſhart ſtates, that they have relinquiſhed to Wallace.

Davies a witneſs ſays, that he lived with Rowley, when he died on the 20th of May 1774: That Wiſhart died about Auguſt 1774; but that during his life, the ſlaves were under his direction. That the legacies were not diſcharged, at the death of Wiſhart, but the lands were ſold by Taylor and wife and Wallace and wife to pay legacies, &c. That Wiſhart took upon himſelf the active management of the eſtate. That the widow reſided in the manſion houſe, and the ſervants waited on her as uſual; but ſhe did not controul the property. That there were about £ 3000 due the teſtator; that a good deal of money was collected; that it was not neceſſary to ſell the reſiduary eſtate to pay the legacies; and that from converſation with Wiſhart the deponent believes, he claimed the property deviſed to his wife.

Rowley a witneſs ſays, that Wiſhart was never on the plantation, where he reſided, after the death of Rowley the teſtator. Thinks however that Taylor was the acting executor, becauſe he attended the appraiſment.

The Court of Chancery was of opinion, "That "by force of theſe words, in the act of the General "Aſſembly, paſſed in the year 1727. *Where any* "*ſlaves ſhall be bequeathed to any feme covert,* "*the abſolute right, property and intereſt of ſuch*

"*ſlaves*

"*slaves is hereby vested in, and shall accrue* "*to, and be vested in the husband of such feme* "*covert*, the right of the defendant Lettice "Wallace to one moiety of the ſlaves bequeathed "to *her*, then Lettice Wiſhart, and to Catharine "Taylor, the wife of Richard Taylor, by Willi- "am Rowley, which bequeſt is no leſs efficacious, "than it would have been, if thereto, John Wiſ- "hart the former huſband of the defendant Let- "tice Wallace, who was one of the executors "of the ſaid William Rowley, and in whoſe poſ- "ſeſſion the ſaid ſlaves appear to have been, and "who, by a ſpecial aſſent, or other act, did not "ſhew himſelf to have taken poſſeſſion in character "of executor, and not in character of the legataries "huſband, was perfectly transfered to the defendant "Lettice, and conſequently veſted in the ſaid John "Wiſhart, and was ſubject to the bequeſt there- "of, by him to his three children." Therefore that Court decreed the plaintiffs a third of the ſlaves which had been allotted the defendant Lettice upon the diviſion of Rowley's eſtate.

From which decree Wallace and wife appealed to this Court,

RANDOLPH for the appellant. Contended: 1. That the perſonal chattels of the wife, not reduced into poſſeſſion during the coverture, ſurvive to the wife, if ſhe outlive the huſband. 2. *Black. com.* 433. 1. *Wms.* 378. 1. *Atk.* 459. *Co. Litt.* 351. 1. *Bac. abr.* 389.

2. That the ſlaves given to the wife and a ſtranger are, as to this purpoſe, perſonal chattels, and do not belong to the huſband, if he dies before the wife, without having had poſſeſſion of them, during the coverture.

The act of 1727 explains that of 1705: and was intended to let ſlaves remain real property, only in the two caſes of deſcents and intails. In all other inſtances they were to be perſonal eſtate. Accordingly the firſt ſeven ſections are all expla-

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natory; and particularly, the proviſion in the 6 §. that ſlaves ſhall not be forfeited, except in thoſe caſes, where lands and tenements would be ſubject to forfeiture, is deciſive, that in the contemplation of the Legiſlature, they were perſonal eſtate; and, as ſuch, would have been liable to forfeiture, without the proviſion. Therefore when the 4. Section declares, that they ſhall veſt in the huſband, the Legiſlature muſt be underſtood to mean, according to the nature of perſonal eſtate. This has been the conſtant courſe of deciſion in all the Courts of this Country, both before and ſince the revolution. *Steger* vs *Moseley* * and *Bronaugh* vs *Cocke* † in the old General Court. And *Drummond* vs *Sneed* ‡ and *Hord* vs *Upshaw* in the late Court of Appeals, referred to by the Court in 1. *Wash.* 30. Theſe deciſions will be regarded as ſacred; becauſe they are the deciſions of the Courts of this country, to which, ſlaves are peculiar; and which conſequently, muſt have its own laws and uſages concerning them. Thoſe uſages too, as ſerving to explain the public opinion on the ſubject, will be reſpected by the Court. *Downman* vs *Downman* 1. *Wash.* 26 *Granberry* vs *Granberry* 1. *Wash.* 246.

3. That Wiſhart was not in poſſeſſion; and conſequently having died before his wife, the ſlaves ſurvived to her, as chattels undiſpoſed of, by the huſband.

It is doubtful, whether he ever was in poſſeſſion at all; but, if he was, it was as executor. 3 *Bac. abr.* 488. *Wentw. off. ex.* 223. Indeed, as it appears that the legacies were not paid during his lifetime, he could not have taken poſſeſſion in right of his wife; for it would have been a *devastavit* in caſe of another perſon; and what he could not have done

* John Randolph's M. S. Reports.

† Ibid.

‡ Vid. The next caſe.

done in the case of another, he could not do in his own case. Besides, there must be an assent of the executor to the legacy, before the legatee can take possession; but there is nothing which shews, that even Wishart, and much less that Taylor, the other executor, ever assented to this devise.

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CALL *contra.* It would be difficult to maintain, on any principle of fair reasoning, that slaves since the act of 1727, are to be considered as personal property in every instance, but those of descent and intail. The words of the law according to the plain import of them, do not appear to me, to admit of such interpretation. For the act of 1705, which declares them real property, is the *substratum*, and that of 1727 only operates as exceptions out of it. Otherwise it would have been easier to have repealed that of 1705 altogether, and to have incorporated those two provisions relative to descents and intails, into that of 1727: But, if, according to just construction, this entire reversal of the principle of the act of 1705 cannot be sustained, it would deserve to be very seriously considered, whether the decision of any Court would beparamount to the positive directions of an act of Assembly.

However, it is unnecessary to argue that point at present; because the decisions, refered to, establish no more, in their utmost latitude, than that slaves are to be considered as personal property; and, whether, they be taken as real or personal property it will be equally true that by virtue of the first sentence in the 4th section of the act of 1727, they vested in, and belong to the husband, absolutely, and without any manner of qualification.

1. Because the words of the act are sufficient to produce that consequence.

For, by the first sentence of the 4th section, every interest of the wife is transfered to the husband. The words are, "that where any slave or "slaves have been, or shall be conveyed, given,

"or

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"or bequeathed, or have or shall descend to any "*feme covert*, the absolute right, property and "interest, of such slave or slaves, is hereby vested "and shall accrue to, and be vested in, the hus- "band of such *feme covert*." Which necessarily translates every interest of the wife into the husband; who, *ipso facto*, becomes compleat owner of the whole interest, to the utter exclusion of the wife: And this whether the slaves be considered as real or personal estate. It is impossible by any other construction, to satisfy the words, *the absolute right property and interest of such slave or slaves, is hereby vested, and shall accrue to and be vested in, the husband of such feme covert.* Because, if the whole right and property is vested in the husband, it must belong to him absolutely, and cannot enure to the wife. For *uno flatu* that it is given to the wife, it is, by operation of law, transfered to, and vested in the husband. So that nothing remains in the wife; and the husband may maintain an action in his own name to recover them.

This which is so plain upon the words of the first sentence, is rendered clearer still, by comparison with the next; which requires actual possession in the case of a feme sole, who afterwards marries. A circumstance which plainly shews, that the Legislature contemplated a difference in the two cases. That is to say, that the mere gift to a feme covert should transfer the estate to the husband, but that an actual possession should be necessary, during the coverture, in the case of a feme sole, who afterwards married. For unless a difference in the interest was intended, it will be extremely difficult to account for the difference in the language.

Therefore, although slaves should be considered as personal property, it will make no difference; for still the whole interest vested in, and belonged to the husband, without any possession. In the same manner, as if the act had said, that every

diamond

diamond, given to the wife during the coverture ſhould be veſted in, and belong to the huſband. Which, certainly, would ſo eſſentially transfer the property to the huſband, that the wife ſurviving could have no claim to it.

It is like the ſtatute of the 27. Henry 8. relative to uſes: Which transfers the poſſeſſion to the uſe; and gives complete ſeiſin to the grantee, without any act, to be done, on his part, to acquire it. So here the title is transferred to the huſband, without his obtaining actual poſſeſſion; and the only difference between them is, that the act of Aſſembly transfers the title only, whereas the act of Parliament transfers the poſſeſſion: A much more difficult operation.

There could have been no difficulty in the caſe, if the plain words of the law had been attended to, inſtead of reſorting to a ſyſtem of artificial reaſoning, founded on a ſuppoſed reſemblance to things, to which it bears no analogy. That is to ſay, the rules with regard to courteſy and poſſeſſion, in other caſes of property belonging to the wife. For the whole intereſt being, *ipsò facto*, transfered to the huſband by act of law, he does not ſtand in need of ſeiſin, or poſſeſſion, to complete his title.

In this view of the caſe, it bears no reſemblance to the caſe of courteſy in real, or poſſeſſion in the caſe of perſonal property. Becauſe ſeiſin and poſſeſſion conſtitute part of the right, in thoſe caſes; but, in the other, the gift and coverture only are requiſite.

All which ſeems perfectly conſiſtent, with what was ſaid, by the court, in *Dade* vs *Alexander* 1. *Wash.* 30. For the doctrine, there laid down, does not ſeem to require, that the ſurviving huſband ſhould take adminiſtration in order to entitle him; but conſiders him entitled, by virtue of his marital right, independant of the neceſſity for taking adminiſtration. Which is not ſtated, by the court, as one of the ingredients of his title.

Perhaps

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Perhaps it will be aſked how *Drummond* vs *Sneed* could have been decided upon the ground now taken. The anſwer is, that it might have been determined conſiſtently with the doctrine contended for, ſeveral ways. 1. The life eſtate and the remainder might have been conſidered, as forming only one eſtate; and the life intereſt, as being a mere exception out of it. 2. The deviſe of the remainder, according to the ſpirit of the 10. ſection, might have been conſidered, as giving the abſolute property; becauſe there would be no more impropriety, in ſaying, that the remainder ſhould veſt in the huſband, than that the whole thing ſhould. For it was the law which would veſt it in either inſtance; and it would be equally competent in both. 3. The court might have taken the ſtatute by equity; and conſidering, that the Legiſlature, having given the ſlaves to the huſband in other inſtances, probably intended to give remainders alſo, they might, in conformity to the Legiſlative will, have conſidered thoſe caſes as embraced within the equity of the act.

But whatever might have been the ground of the deciſion in that caſe, neither that or any other caſe has ever decided, that the firſt ſentence, in the 4. ſection, did not transfer the whole intereſt to the huſband; and therefore the words of the act of Aſſembly, being plain and unequivocal, muſt prevail againſt any artificial reaſoning, drawn from the rules of the common law. For, the Legiſlature having made an expreſs proviſion for the caſe, the act of Aſſembly and not the precepts of the common law muſt give the rule.

However, ſo far from the caſe of *Drummond* vs *Sneed* being repugnant to the doctrine contended for, it ſeems rather to ſupport it. Becauſe it appears, from the ſtatement of it, as if it muſt have been decided upon the principles of the firſt ſentence of the 4. ſection. For the intereſt of the wife, in the remainder was adjudged to belong to the huſband; which is conſiſtent with the words of the act.

2. But

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2. But, perhaps under another point of view, if they be conſidered as perſonal property, they ſtill belonged to the huſband. For, there are books, which ſeem to countenance the idea, that by the rules of the common law, the gift of perſonal things to the wife, during the coverture, veſts them abſolutely in the huſband. 2. *Com. Dig.* 82. *Bunb.* 188. 1. *Roll. Rep.* 134. 1. *H. Black.* 109. 3. *Lev* 403.

If this doctrine, be correct, then, this clauſe of the act only eſtabliſhed two principles, which were rules of the common law before; and the deciſion, in *Drummond* vs *Sneed*, provided for the third caſe: namely, that of the remainder.

But the huſband was in poſſeſſion.

1. Upon the proofs in the cauſe. For ſome of the witneſſes expreſsly ſtate him to have been the active executor, and to have had the management of the ſlaves. Added to which Davies ſays, he underſtood him, as claiming the property deviſed; which was equivalent to an aſſent to take.

2. By inference of law, his poſſeſſion, as executor, was a poſſeſſion in his own right. Becauſe, as he could not ſue himſelf, the rights were merged, *Moor:* 54. *Rep. T. Finch.* 370.

That the debts and legacies were unpaid, makes no difference; 1. Becauſe the merger was *sub modo* only, and contained an exception, as to creditor and legatees. 2. Becauſe a fund greatly more than ſufficient, was provided for the payment of them; and the witneſs ſays it was unneceſſary to ſell the ſlaves. So that taking poſſeſſion of the deviſed eſtate, would not have been a *devastavit*, as the appellants counſel ſuppoſed; and, as there was no reaſon for preventing the execution of the poſſeſſion, a Court of Equity will conſider it as done.

This is the more eſpecially true, as the huſband had taken all the poſſeſſion he could; for the law continued the ſlaves upon the teſtators lands until the

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the crop was finiſhed; and a contrary doctrine would put it out of the power of a man, to make a proviſion for his family, according to the wealth, which he might ſuppoſe himſelf to be poſſeſſed of. Becauſe, upon a ſimilar pretence of debts and legacies, years might elapſe, before the deviſed eſtate would be conſidered, as having veſted in actual poſſeſſion.

The reſult of the whole is, that the huſband and the other legatee were tenants in common of the deviſed ſlaves; and, of courſe, that the huſband was completely entitled to the whole intereſt.

WICKHAM in reply. The firſt point made by the appellees counſel has long been conſidered as at reſt. All the deciſions have been contrary to the doctrine he contends for; and rightly too. For the object of the act of 1705, in making ſlaves real eſtate, was only to improve eſtates, and encourage agriculture. But it was found inconvenient in many reſpects, and therefore, the act of 1727 was made; which reſtores them to perſonalty in moſt caſes; and particularly in that now under conſideration. The whole complexion of the firſt ſeven clauſes announces this to have been the intention of the Legiſlature. They are to paſs as perſonal property in conveyances; ſimilar rules for their veſting are eſtabliſhed; and they are ſubject to the rules of perſonal property, in the caſes of forfeitures and executions. All which ſhew the intention of the Legiſlature, to turn them into perſonalty; and the intention, and not the mere words of the ſtatute, ought to prevail.

It is not credible, that the Legiſlature intended, that this kind of property ſhould go neither as real or perſonal eſtate, according to the doctrine on the other ſide. Therefore Mr. Randolph's interpretation, of the firſt ſentence of the 4. ſection, is correct; namely, that they are to be conſidered as veſting in the huſband, according to the manner of perſonal eſtate. This ſeems to have been the principle adopted in *Drummond* vs *Sneed*; and in all

all the cases before the old General Court. Which ought to be considered, as having fixed the law, on a basis much too firm to be shaken, at this distance of time, when so many estates are enjoyed under them. In short slaves are chattels real, and like other chattels real survive to the wife, if not disposed of by the husband during the coverture. This is the spirit of the law; this the true construction of the words; and finally, this is the idea, which has always been adhered to by the courts; and ought not now to be disturbed.

It is not true that personal things given to the wife, during the coverture, vest absolutely in the husband; so that, if he die without reducing them to possession, they will belong to his executor, and not to the wife, if she survive him. None of the cases cited afford the least semblance of such a doctrine, (for, as to that in *Roll*, the husband survived the wife; and 1. *H. Black:* was only the assertion of counsel,) except that in *Bunb.* 188. And that is liable to two remarks; first, that it was the mere declaration of the party unsupported by evidence; secondly, that the defendant had received the husbands money from the wife; and therefore he was a trustee for the husband, and not for the wife. But opposed to this case, a great variety of decisions may be adduced. 1. *Vern.* 169. 2. *Show.* 247. 2. *Wms.* 496. 2. *Vez.* 675. *Co. Litt.* 351.

Wishart was not in possession, in right of the devise. The testimony is equivocal, even as to his possession, as executor; but it was absolutely necessary, that he should have been possessed in character of legatee. Of which there is no proof. So that, if he was possessed at all, it was in character of executor, and then, upon his death, the right survived to the other executor. Who had a right to the slaves, for the purposes of the administration; and Wishart's representatives, having no right to the executorship, could not hold with him.

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him. Beſides the aſſent of the executors, to the legacy, was abſolutely neceſſary, before any actual poſſeſſion could be taken; and there is no proof that any ſuch aſſent was ever given.

Cur. adv. vult:

ROANE Judge. This may truly be ſaid, to be an important cauſe. The conſequence of a deciſion either way, may be greater than I can foreſee or eſtimate. Leſs experienced than my brethren in the laws of this country, and leſs acquainted with the former adjudications, I am leſs capable than they to calculate the probable effects, which will flow from our preſent deciſion. Their ſuperior lights and more mature experience, better enables them to know what has been the underſtanding of this country, on the preſent ſubject; and what are the beacons, by which our countrymen have governed themſelves, in regulating their tranſactions, relative to the point in queſtion. Sincerely hoping, that the preſent deciſion may be the leaſt injurious in its conſequences, and the leaſt productive of litigation, it gives me great pleaſure to believe, that the opinion I now deliver, after the moſt mature deliberation, beſt anſwers that deſcription, and beſt accords with the general underſtanding of our fellow citizens. My own obſervation on the ſubject is entirely coroborated, by the teſtimony of ſome of my brethren; in whoſe obſervation, talents and experience I have the higheſt confidence.

Yet let me not be ſuppoſed to take refuge for the ſupport of my opinion, merely on the general underſtanding of the people, through a long ſeries of time; my concluſions are derived from a deliberate conſideration of the acts of Aſſembly themſelves, taken conjunctly with the principles of the common law; and from a conſideration, how far there have been deciſions in this country affecting this caſe, ſo as to become fixed rules of property. For I have ever been of opinion, that ſuch rules ought not, to be lightly departed from; and that

they

they cannot be, without producing extenſive evils and injuſtice.

The caſe has been rightly divided by the counſel into two general queſtions.

1. Whether a poſſeſſion of the ſlaves in diſpute was neceſſary to have been in the father of the appellee Wilhelmina, who was the former huſband of one of the appellants, in order to enable the appellees to recover? For, if not, there is an end of the caſe. But, if otherwiſe, then,

2. Whether ſuch poſſeſſion did actually exiſt in the preſent caſe or not?

The firſt of theſe two queſtions may again be conſidered, under two points of view; 1. Under our acts of Aſſembly, and the principles of the common law: 2. Under the deciſions in this country.

The acts of Aſſembly embraced, by the firſt view, are thoſe of 1705, and 1727.

The firſt of thoſe acts declares, that ſlaves ſhall be held, taken and adjudged to be real eſtate, and not chattels; and ſhall deſcend to the heirs and widows of perſons dying inteſtate, according to the manner and cuſtom of lands of inheritance held in fee ſimple. It further goes to ſpecify certain caſes, in which ſlaves are aſſimilated to chattels; and which form an exception to the general clauſe firſt ſtated.

Next came the act of 1727, which is entitled an act to explain and amend the former. Before we go, particularly, into this act, it may be neceſſary to fix its character. If it were merely an explanatory act, a queſtion might ariſe, how far a court could depart from the literal expreſſion, as it was a Legiſlative conſtruction of the words of a former ſtatute; and the ancient doctrine was, that the court, on ſuch a ſtatute, was tied down to the letter? But the better opinion ſeems to be, that ſuch ſtatute may now receive even an equitable conſtruction,

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conſtruction, ariſing therefrom, on a general view of the whole act. 6. *Bac: abr:* 388. But this ſtatute is alſo an amendatory ſtatute. It changes the old ſtatute, and introduces new principles; ſuch as neither a judicial or Legiſlative conſtruction could poſſibly have deduced from the former act. This is ſo evident to every body, that I need not cite particular examples. This ſtatute of 1727 ſtands, then, on the ſame footing, as to its conſtruction, with ſtatutes in general; and the general rules for conſtruing ſtatutes properly apply to it. Some of theſe rules, which I ſhall preſently have occaſion to mention, authorize even an equitable conſtruction of a ſtatute, under certain circumſtances; but I diſclaim a reſort to an equitable conſtruction, in the preſent inſtance, as wholly unneceſſary; and found my opinion, entirely, upon a juſt view of the legal conſtruction of the whole act, under the influence of the rules of conſtruction, before alluded to.

I will now read the title and the four firſt ſections of the act of 1727; which are as follows:

"*An act to explain and amend the act for declaring the Negro, Mulatto, and* Indian *Slaves, within this Dominion, to be real eſtate; and part of one other act, intituled an act for the diſtribution of inteſtates eſtates, declaring widows rights to their deceaſed husbands eſtates, and for ſecuring orphans eſtates.*

"I. Whereas the act made in the fourth year of the reign of the late Queen *Anne, declaring the Negro, Mulatto, and Indian Slaves, within this Dominion, to be real eſtate*, hath been found by experience very beneficial for the preſervation and improvement of eſtates in this Colony, yet many miſchiefs have ariſen, from the various conſtructions, and contrary judgments and opinions, which have been made and given thereupon, whereby many people have been involved in lawſuits and controverſies, which are ſtill like to increaſe: For remedy whereof, and to the

end

"end the ſaid act may be fully and clearly explained and amended.

"II. *Be it enacted, by the Lieutenant Governor, Council, and Burgeſſes, of this preſent General Aſſembly, and it is hereby enacted, by the authority of the ſame*, that the ſaid act ſhall hereafter be conſtrued, and the true intent and meaning thereof is hereby declared, to be, in the ſeveral caſes herein after mentioned, as the ſame is herein after expreſſed and declared, and not otherwiſe, that is to ſay:

III. Whenever any perſon ſhall by bargain and ſale, *or gift, either with or without deed*, or by his laſt will and teſtament in writing, or by any nuncupative will, bargain, ſell, give, diſpoſe, or bequeath, any ſlave or ſlaves, ſuch bargain, ſale, gift, or bequeſt, ſhall transfer the abſolute property of ſuch ſlave or ſlaves to ſuch perſon or perſons to whom the ſame ſhall be ſo ſold, given, or bequeathed, in the ſame manner as if ſuch ſlave or ſlaves *were a chattel;* and no remainder of any ſlave or ſlaves ſhall or may be limited by any deed, or the laſt will and teſtament in writing, of any perſon whatſoever, otherwiſe than the remainder of a chattel perſonal, by the rules of the common law, can or may be limited, except in the manner herein after mentioned and directed.

"IV. And that where any ſlave or ſlaves have been or ſhall be conveyed, given, or bequeathed, or have or ſhall deſcend to any feme covert, the abſolute right, property and intereſt, of ſuch ſlave or ſlaves, is hereby veſted, and ſhall accrue to, and be veſted in, the huſband of ſuch feme covert; and that where any feme ſole is or ſhall be poſſeſſed of any ſlave or ſlaves, as of her own proper ſlave or ſlaves, the ſame ſhall accrue to, and be abſolutely veſted in, the huſband of ſuch feme, when ſhe ſhall marry."

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The contrary conſtructions and opinions ariſing under, and the law ſuits produced by the act of 1705, are evils intended to be remedied, by this act. Two conſtructions of the 4th clauſe are now contended for, as relative to the preſent caſe: One which throws negroes into the claſs of chattels, and ſubject to the legal rules, doctrines and deciſions upon that ſubject: The other, leaving them neither in the claſs of real or perſonal property in the reſpect in queſtion; and conſequently without any legal doctrines, or deciſions, to govern them. By which of thoſe conſtructions will the declared object of the Legiſlature, as above, be beſt anſwered? Certainly by the former.

It ſeemed conceded in the argument, that if this caſe had ſtood ſingly upon the third clauſe, poſſeſſion would then have been neceſſary in the huſband, as falling within the general doctrine of Chattels perſonal; but that what are ſuppoſed the emphatical words of the fourth clauſe, could have been inſerted for no purpoſe, if not to diſpenſe with ſuch poſſeſſion.

My anſwer is, 1. That thoſe emphatic words mean nothing more, than would have been inferred from the general words of the 3d clauſe. 2. That if they did, yet there was a good reaſon for inſerting them, to anſwer which they were inſerted; and therefore, need not be conſtrued, to diſpenſe with poſſeſſion; nor to infringe the doctrine of the common law.

On the firſt point, I will call to my aid two rules of conſtruction: 1. That words and phraſes, whoſe meaning have been aſcertained in a ſtatute, when uſed in a ſubſequent ſtatute, are to be uſed in the ſame ſenſe. 6. *Bac abr.* 379; and clearly the ſame inference will follow, as between two clauſes of the ſame ſtatute. 2. That if a ſtatute uſe a word, the meaning of which is well known at the common law, the word ſhall be uſed in the ſame ſenſe in the ſtatute. 6. *Bac abr.* 383.

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In applying the firſt rule to the preſent caſe, I muſt obſerve that the ſame words *absolute property* are uſed in the third clauſe; which, ſtanding ſingly, would confeſſedly not diſpenſe with poſſeſſion, as thereupon ſlaves ſtand preciſely on the footing of chattels, by the common law. Thoſe who may incline to ring the changes on the words *absolute right, property and interest*, in the fourth clauſe, are reminded, that none of thoſe words are more emphatical, or extenſive, than the words uſed in the third clauſe above mentioned; and that the word *interest* was moſt probably inſerted therein, to comprehend limited rights of the wife; that is to ſay, thoſe where ſhe had not the abſolute property.

In applying the ſecond rule to this caſe, I will beg leave to read a paſſage from 2. *Black.* 433.

" A ſixth method of acquiring property in goods and chattels is by *marriage;* whereby thoſe chattels, which belonged formerly to the wife, are by act of law veſted in the huſband, with the ſame degree of property and with the ſame powers, as the wife, when ſole, had over them.

This depends entirely on the notion of an unity of perſon between the huſband and wife; it being held that they are one perſon in law, ſo that the very being and exiſtence of the woman is ſuſpended during the coverture, or entirey merged or incorporated in that of the huſband. And hence it follows, that whatever perſonal property belonged to the wife, before marriage, is by marriage abſolutely veſted in the huſband. In a real eſtate, he only gains a title to the rents and profits during coverture; for that, depending upon feodal principles, remains entire to the wife after the death of her huſband, or to her heirs, if ſhe dies before him; unleſs, by the birth of a child, he becomes tenant for life by the curteſy. But, in chattel intereſts, the ſole and abſolute property veſts in the huſband, to be diſpoſed of at his pleaſure, if he chuſes to take poſſeſſion of them; for, unleſs he reduces

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reduces them to poſſeſſion, by exerciſing ſome act of ownerſhip upon them, no property veſts in him but they ſhall remain to the wife, or to her repreſentatives, after the coverture is determined."

This paſſage I ſhall hereafter refer to, as giving the moſt modern and perſpicuous explication of the doctrine on this ſubject; at preſent, I only wiſh it to be remarked, that the perſonal property of a wife is ſaid to be abſolutely veſted in the huſband, at the ſame inſtant, that it is declared, that if he does not reduce them into poſſeſſion, during the coverture, they ſhall remain to the wife if ſhe ſurvives him. Here, then, is a deciſive quotation, from an eminent and accurate writer on the common law; ſhewing that the words, *abſolute property in the huſband*, are not to be conſtrued as diſpenſing with poſſeſſion in the caſe of chattels.

The third ſection of the act of 1727 has uſed the ſame words in the ſame ſenſe; and the meaning of the ſame words in the third ſection, and in Blackſtones treatiſe, under the influence of the two rules I have ſtated; both of which entirely accord with ſound reaſon, and pointedly apply. Let us then hear no more of the ſtreſs laid upon what are called theſe emphatical words; eſpecially, in oppoſition to the general ſpirit and purpoſe of the act.

But I have ſaid, that if theſe words ſhould even be conſidered, as being more extenſive than I ſuppoſe, yet there was a good reaſon for making them ſo, and conſequently they ought to be reſtricted to anſwer that end, and not kept up in ſuch enlarged ſenſe, ſo, as in other reſpects to conflict with the other parts of the act, and the doctrines of the common law.

It will here be remarked, that ſlaves coming by deſcent are not declared to be, or to go as chattels by the third clauſe. They therefore are, or at leaſt might have reaſonably been ſuppoſed, by the Legiſlature, to remain real eſtate, as under the act of 1705; being ſuch, the huſband, but for this clauſe, which expreſsly extends to ſlaves coming by

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by deſcent &c. would only have the ſame limited intereſt, in ſuch ſlaves, as deſcended to his wife during coverture, as he would have had in her lands; viz: the right of receiving their profits. It might therefore have been, to enlarge his intereſt in the ſlaves coming by deſcent, beyond what would have been the caſe, under the general words of the 3d clauſe, that theſe words abſolute right &c. were put in, as being contra-diſtinguiſhed, from the limited right, he would otherwiſe have had in ſuch ſlaves.

Theſe reaſons are concluſive, with me, as to the conſtruction of the act, admitting the words to be as extenſive as is contended for, a reaſon is hereby aſſigned for it; and being thereby juſtified we ought there to ſtop; and not give them, as to other caſes, a meaning, which they have not in the moſt approved treatiſes of the common law; which they have not in another clauſe of the ſame act; and which they cannot have without infringing the reaſon and ſymmetry of the common law, and introducing the uncertainty and litigation, which it is the declared object of the act to prevent.

Some ſtreſs may alſo be laid on the words, *hereby vested &c.* The anſwer is, that theſe words relate to the whole act and not to this ſingle clauſe; and that in its conſtruction we are as much bound by the principles of the common law, adopted by the third clauſe of the act of Aſſembly, as by the very expreſſions of the act itſelf.

Wherefore, then, it is aſked was this 4th clauſe put in, if in the preſent inſtance it is to have no greater effect, than the general proviſions of the third clauſe would have had, without it? The anſwer is, 1. To take in the caſe of ſlaves deſcending, as above ſtated: 2. To declare for greater certainty, the law in this inſtance. The latter parts of both the third and fourth clauſes, relative to remainders, and to the caſe of *femes sole* are alſo

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ſo put in, for the latter reaſon, although every thing therein enacted, would unqueſtionably have followed independent of them, from the general poſition laid down in the 3d, clauſe.

It may be contended, that the third clauſe of the act only relates to the mode of transferring ſlaves, and declares that that mode, incident to chattels as contra-diſtinguiſhed from real eſtate, ſhall govern in the caſe of ſlaves; but that its effect ſtops here, and does not attach to ſlaves (when transfered) all the principles which appertain to chattels. The anſwer is, that the proviſion concerning remainders (over and above the clear conſtruction of the act,) proves the contrary. The proviſion extends to a principle, relative to perſonal chattels, poſterior to, and independant of the act of transfer. It was intended to conform ſlaves, in this reſpect, to the doctrine of remainders, of perſonal chattels; it being then doubted, if not held, that ſuch limitations after a particular eſtate were void.

I will here remark, that it has ſome weight, with me, that the fourth ſection is not by way of proviſo, or exception. It does not, therefore reſtrain the operation of the third clauſe, but is additional to it; and is connected, with it, by the copulative *and*. And the juſt rule of conſtruing one part of a ſtatute by another, 6. *Bac: abr:* 380, holds with great force, where one part of an act is continued by, and connected with another, by copulative words. It is alſo a juſt rule of interpretation, that a ſtatute, continuing another with ſome additional clauſes, muſt be conſidered, as if the former had been recited therein. 6. *Bac: abr:* 382. I think this rule equally applies to a continuing of an additional clauſe of the ſame ſtatute; and if ſo, the words of the third ſection, *in the same manner, as if such slave or slaves were a chattel*, are to be conſidered as kept up, and repeated in the fourth ſection.

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I admit that it is alſo a rule of conſtruction, that general words, in one clauſe of a ſtatute, may be reſtrained by particular words, in a ſubſequent clauſe of the ſame ſtatute. 6. *Bac: abr:* 381. But I contend that this reſtriction muſt clearly appear to have been intended; which, I have endeavoured to ſhew, is otherwiſe in the preſent caſe.

Another rule of conſtruction is, that where the proviſion of a ſtatute is general, it is ſubject to the controul, and order of the common law; and that the beſt conſtruction of a ſtatute, in a doubtful caſe, is to conſtrue it, as near to the rule and reaſon of the common law as may be, and by the courſe it obſerves in other caſes; for it is not to be preſumed, that the Legiſlature will make any alteration in the common law, except what is expreſsly declared. 6. *Bac: abr:* 383, 384.

It is alſo held, that ſuch conſtruction is to be put upon a ſtatute, as may beſt anſwer the intention the makers had in view, 6. *Bac: abr:* 384: And, in the preſent caſe, the intention was to convert real property into perſonal in general, and not by throwing ſlaves out of both claſſes of property, as in the inſtance now contended for, to create a new ſpecies of property, and thereby promote lawſuits, which the act purports to do away. Theſe conſequences may alſo be taken into conſideration, ſuppoſing the law merely doubtful on this ſubject, to govern the court in their conſtruction of the ſtatute. 6. *Bac: abr:* 389.

I will conclude with a rule of conſtruction, which is, that the letter of an act of Parliament may be reſtrained, by an equitable conſtruction, in ſome caſes; in others enlarged; and in others taken contrary to the letter. 6. *Bac: abr:* 386. And if ſuch be the power of a court, on a ſingle clauſe of a ſtatute ſtanding independantly, it holds *a fortiori*, where ſuch ſingle clauſe is conſiſtent with the body of the act; and where an equitable conſtruction is not required, but only a juſt legal expoſition of the whole ſtatute taken collectively.

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These rules of construction, founded in good sense and sanctioned by high authority, are decisive, with me, as to the construction of the present law: They are so luminous, and apply, so pointedly, to the case in question, that I forbear to make a more particular application of them.

But what good reason exists, for giving a husband survived his wife a right to slaves accruing to her during coverture, but of which he was never in possession, more than exists as to slaves to which a feme sole is entitled, who afterwards marries? The reason assigned, in the last case, why a surviving husband cannot recover them (except in the character of her administrator) is, that the only method he had to gain possession, during the coverture, was by suing in his wife's right; but as, after her death, he cannot, as husband, bring an action, in her right, therefore he can never, as such, recover the possession. 2. *Black:* 435. This reason is supposed equally to hold in the case of chattels accruing, during the coverture.

I have said, that the passage, before read, from Blackstone, contains the best view of the doctrines on this subject, when he speaks (in page 435) of personal chattels in possession, he says, the husband has the absolute right thereto, not only potentially, but in fact; leaving the inference extremely plain, indeed, that the husband, in case of *choses in action*, has the absolute (although only potential) right thereto. And understanding the word *absolute* in this sense, will at once answer some of the cases cited by Mr. Call on the subject. An attempt to cite them in the sense he contended for would be to impeach the best established principles of the law, and I confess the attempt surprized me. It is true, the passages relied on from *Blackstone* relates to chattels owned by the wife, at the time of the marriage; but there is no difference, as to those accruing during the coverture. This is so plain a point, that I shall not cite authorities to shew it, except to refer to 1. *Bac: abr:* 481;

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who ſays, the law gives the huſband an abſolute power over any perſonal eſtate accruing to her, during coverture, by gift, deviſe, &c. thereby clearly conforming to the doctrine before ſtated from Blackſtone.

I have thus done with my own view of the law relative to this ſubject. It is fit that ſome notice be taken of ſuch deciſions, as have occured, in this country, affecting the caſe. On this ſubject, I beg to be excuſed, from ſaying much, as my experience does not reach far enough back, to know much of the deciſions of the old General Court. I had ſuppoſed that no queſtion would have been made of the competency of thoſe deciſions to fix rules of property in this country; as that Court, although not the dernier reſort, was at leaſt as much ſo, as the Court of Kings bench in England. How far the deciſions of that Court, on ſubjects, other than that of fixing rules of property, will bind us it is not now neceſſary to ſay; but, if we reject ſuch rules of property as have been fixed by that court, and under which our people have regulated their property through a long ſeries of time, the miſchief, which would enſue, is incalculable. I underſtand, that no deciſion one way, or the other, can be ſhewn, to have ever taken place, on the very point now in queſtion. The non exiſtence of ſuch a caſe, which muſt have occured a thouſand times in the ſpace of 73 years, is a perſuading circumſtance, that the general opinion has always been, that ſlaves under the firſt part of the 4th clauſe, go as chattels, as they evidently do under the 3d clauſe; and as they have often been decided to do, under the latter part of the 4th, clauſe. The opinion of the General Court on ſuch latter part, though not upon the very point now in queſtion, is ſuppoſed to have given a principle, which has governed this caſe, and produced a general acquieſcence under it. On no other ground can I poſſibly account for the non exiſtance of a deciſion, on the very point now in queſtion.

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In the caſe of *Steger* vs *Mosely* General Court October 1773, M. S. *Rep.* by *J: Randolph* 2 *vol page* 232, the caſe under the laſt part of the 4th ſection, was, Deviſe to A. for life and afterwards to B. a feme, who married C. *A.* dies living B. and C. and then B, dies living her huſband, the ſlaves having never been reduced into poſſeſſion: The queſtion was, whether they veſt in the huſband, or go to the heir of the wife, and without argument, (as often before been argued,) determined they go to the huſband. Hence to be concluded, that, notwithſtanding the 4th ſection of the act of 1727, yet negroes veſt in the huſband, as a chattel only; if huſband ſurvives they veſt in him as adminiſtrator of his wife (not being reduced in poſſeſſion,) *Squib* vs *Wynn*, 1. *Wms.* 378 and, if ſhe ſurvives, they go to her, or her repreſentatives. And in *Bromfield* vs *Cocke* and *Smyth* vs *Lucas (ſame reports)* the law is ſaid to be ſettled.

As the huſband was not poſſeſſed of the ſlaves in this caſe of *Steger* vs *Moseley*, and ſo did not entitle himſelf, under the words of the 4th clauſe, if they were real property and not chattels, they would have deſcended to his wifes heirs. But this was adjudged otherwiſe; which could not have been, on any other ground, than that they were perſonal eſtate, under the third clauſe of the ſame act. This principle is ſuppoſed to be the one, under which the caſes of *Drummond* vs *Sneed Hoard* vs *Upshaw* and *Dade* vs *Alexander* 1. *Wash.* have been decided; and this principle of ſlaves being perſonal eſtate, under the act of 1727, although eſtabliſhed in caſes depending on a different part of the 4th clauſe, may juſtly be deemed to operate in the preſent caſe; at leaſt as having by analogy, furniſhed a rule of property, in caſes like the preſent.

As to the rectitude of the deciſion in thoſe caſes of *Steger* vs *Moseley*, *Drummond* vs *Sneed* &c. I

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have not formed any opinion, except ſo far as the conſtruction of the third clauſe is involved. It is ſufficient to induce me to conform thereto, that they have been ſuppoſed univerſally to ſettle the law upon the ſubject, and have become a fixed rule of property.

I have now done with the firſt general queſtion, and conclude that poſſeſſion was neceſſary to have been in the father of the appellant Wilhelmina, to enable her to recover; and whether ſuch poſſeſſion did exiſt? remains now to be enquired into.

On this point I am clearly of opinion, from a conſideration of the teſtimony, that if Wiſhart ever was in poſſeſſion, at all, it was merely as a co-executor. The teſtimony is very full, to ſhow the other executor to have been the acting perſon, and conſequently to be in poſſeſſion of the eſtate; and very ſlight, as it reſpects the actual poſſeſſion of Mr. Wiſhart. But poſſeſſion as executor, is not ſufficient. Poſſeſſion in his character as huſband, and in right of his wife is indiſpenſable. Such poſſeſſion, if he were a different perſon from the executor, could not legally be without the executors aſſent; but the law is the ſame where both characters are united in the ſame perſon. In that caſe an aſſent or election to take as deviſee muſt be expreſſed or clearly implied. Otherwiſe his poſſeſſion will be conſidered, as in his character of executor, according to the authority cited by Mr. Randolph: and this general doctrine holds with greater force, under our act of Aſſembly; by which ſuch poſſeſſion could not legally have been given, until the end of the year.

For theſe reaſons I think the decree in the preſent caſe, is erroneous.

FLEMING Judge. There are two queſtions in this cauſe; one of law, and the other of fact. The queſtion of law is, whether, by virtue of the act of 1727, the ſlaves were ſo veſted in Mr. Wiſh-

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art, as to enable him to diſpoſe of them by his laſt will, without having reduced them into poſſeſſion, during his life time? The queſtion of fact is, whether, if it was neceſſary, that they ſhould be reduced into actual poſſeſſion, in order to enable him to diſpoſe of them, he did, in fact, obtain ſuch poſſeſſion?

Upon the firſt queſtion, it is to be obſerved, that by the act of 1705, ſlaves (except thoſe imported for ſale) were converted into real property, to all intents and purpoſes, under the following reſtrictions only, that is to ſay, that they were liable for payment of debts; they did not eſcheat for want of heirs; ſales of them needed not to be recorded; they did not confer a right to vote at the election of Burgeſſes; they were recoverable by actions perſonal; and thoſe of inteſtates were to be appraiſed, and the value divided amongſt the children, to be paid by the heir at law.

Several inconveniences however, aroſe from this extenſive converſion; and conſequences, not foreſeen at the making of the act, were found to reſult from it. To remedy which, the Legiſlature, in the year 1727, reſumed the ſubject; and paſſed a law to explain and amend that of 1705. In which, after reciting, that although the act of 1705 had been found very beneficial, for the preſervation and improvement of eſtates (which appears to have been the principal object for paſſing both laws,) yet that many miſchiefs had ariſen, from the various conſtructions and contrary judgments and opinions, which had been made and entertained upon it, they go on to declare "that "whenever any perſon ſhall by bargain and ſale or "gift, either with or without deed, or by his laſt "will and teſtament in writing, or by any nuncu-"pative will, bargain, ſell, give, diſpoſe or be-"queath, any ſlave or ſlaves, ſuch bargain, ſale, "gift or bequeſt, ſhall transfer the abſolute pro-"perty of ſuch ſlave or ſlaves, to ſuch perſon or "perſons to whom the ſame ſhall be ſo ſold, giv-

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"en or bequeathed, in the ſame manner, as if "ſuch ſlave or ſlaves *were a chattel;* and no re- "mainder of any ſlave or ſlaves, ſhall or may be, "limited by any deed, or the laſt will and teſta- "ment in writing of any perſon whatſoever, other- "wiſe then the remainder of *a chattel perſonal,* "by the rules of the common law, can or may be "limited, except in the manner herein after men- "tioned and directed."

This clauſe clearly renders them perſonal, as to the forms of conveyances; and the 4th ſection following, immediately afterwards, provides that "where any ſlave or ſlaves, have been, or ſhall "be conveyed given or bequeathed, or have or "ſhall, deſcend to any feme covert, the abſolute "right property and intereſt, of and in ſuch ſlave "or ſlaves, is hereby veſted in the huſband of ſuch "feme covert; and that where any feme ſole is, "or ſhall be poſſeſſed of any ſlave or ſlaves, as of "her own proper ſlave or ſlaves, the ſame ſhall "accrue to, and be abſolutely veſted in the huſ- "band of ſuch feme, when ſhe ſhall marry." Which makes a further alteration of the property from real to perſonal, by eſſentially changing the ownerſhip, where the property has actually come into poſſeſſion (thereby preventing many of the diſputes ariſing from the notion of their being real property, under the former act:) and where it has not, by giving the huſband an inchoate right, which he may enforce in caſe he ſurvives, as it had been doubted under the former act, whether he had any right at all. But to complete the ſcheme of alteration, infants are in the next ſection, enabled to diſpoſe of ſlaves by will, at the age of eighteen. Thus declaring them to be perſonal eſtate, in almoſt every inſtance, that could be named, but deſcents, entails and dower. By this ſtring of changes, the law inſtead of declaring that they ſhould be conſidered as real eſtate, (except in certain enumerated caſes) may now more properly be ſaid, to have, in effect, declared, that they

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they ſhould be conſidered as perſonal property in all caſes, except certain enumerated inſtances.

This idea receives conſiderable illuſtration from the following circumſtance, that the Legiſlature, in purſuit of their great object of preſerving and improving eſtates, in an after clauſe of the ſtatute, allow a perſon by deed or will, to annex ſlaves and their increaſe, to lands and tenements in fee tail. A proviſion which would have been unneceſſary, if they were to be conſidered as real eſtate altogether; and which ſerves to ſhew, that, in the Legiſlative belief, they were, by virtue of the preceding clauſes, reſtored to their priſtine ſtate of perſonal property.

Taking them, to be perſonal property then, and the conſequence is, that, by a fixed rule of law, in order to entitle the huſband to diſpoſe of them by his will, he muſt reduce them into poſſeſſion.

And this leads me to the ſecond queſtion:

There is ſome claſhing in the teſtimony, relative to the part, which Wiſhart took in the management of the eſtate; but the account, moſt favorable to the claim of the appellee, only amounts to this, that he qualified as one of the executors in June, in a bad ſtate of health; that he occaſionally viſited the plantations; was preſent, at the appraiſment of the eſtate; and died in Auguſt following, without having ever been heard to claim the legacy, or taking the leaſt notice of it, in his will written after the death of Rowley. Which, if it amounted to a poſſeſſion at all, was a poſſeſſion as executor, and not in the character of legatee. For the bequeſt was of an undivided moiety of forty ſix ſlaves, reſiding on different plantations, and of which no diviſion had ever been made; nor could well have been, as by law they were to remain on the plantations, to which they reſpectively belonged, until the laſt day of December, for the purpoſe of finiſhing the crops.

I am consequently of opinion that there was no possession; but that the slaves survived to the wife; and therefore that the decree of the High Court of Chancery ought to be reversed.

CARRINGTON Judge. The Court is now called upon to decide a question, which I did not expect to have heard discussed, at this time of day; as I had conceived, that the operation of the acts of Assembly, relative thereto, had long since been understood, acknowledged, and acquiesced in.

It will not be necessary for me to enter, again, into a critical review and examination of all the different laws upon the subject, as that task has already been performed, with great accuracy and ability by the two judges, who preceded me; and therefore it will be sufficient for me to declare my entire approbation of the interpretation, which they have put upon the laws; and that I perfectly concur with them in opinion, that the true effect of the statutes is, to render slaves personal property, except in those cases, which are particularly enumerated.

But it is a rule of the common law, that although personal chattels alienated to the wife shall go to the husband, yet in order to perfect his right, and complete his title, he must reduce them into possession. 2. *Black. Com.* 433. It follows therefore, that it was indispensably necessary, that Wishart should have reduced them into possession, or the right survived to the wife, and this has hitherto, as far as I am informed, been the course of opinion, throughout the state.

But it is said, that the case of a wife surviving her husband, not in possession, has never before been decided, and therefore that it is a new case. If it be true, that there has been no former decision, it can only be accounted for, upon the ground, that the question was considered as so well settled and understood, by the people, that nobody has

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ever thought it worth while, to ſtir it: And I am not much diſpoſed to indulge a conſtruction, which would put all to ſea again, and might diſturb the titles of thouſands.

The principles, however, have been ſhewn, to have been ſubſtantially decided in ſeveral caſes, in the General Court, under the former Government; and, notwithſtanding the authority of thoſe deciſions has been queſtioned, yet conſidering, that they are founded in a juſt and reaſonable conſtruction of the act; that they were made in perfect conformity with the public opinion; and have ever ſince been regarded as rules of property, I certainly conſider them as entitled to ſo much reſpect, as not to be departed from in the preſent caſe; although I do not conſider all the deciſions, of that court, as binding upon this.

My opinion therefore is, that it was neceſſary for the appellee to have ſhewn poſſeſſion in Wiſhart; and he himſelf will, I imagine, hardly be diſpoſed to find fault with me for it, as he appears to have been of the ſame opinion himſelf. For the whole ſcope of the amended bill goes to ſhew, an aſſent to the legacy; and by that means to eſtabliſh, if poſſible, a poſſeſſion in the huſband. This too appears to have been Wiſhart's own idea; as he did not attempt to deviſe them, and every body, who had any connection with the eſtate after him, ſeems to have thought the ſame way, until the preſent ſuit was brought, twenty one years after the tranſaction. It is therefore better to ſtop the controverſy, and not attempt *to move quiet things.*

The Chancellor, however, has aſſumed, in his decree, that Wiſhart was in poſſeſſion. An important fact, if true; and therefore neceſſary to be inquired into. But what was the poſſeſſion of which he ſpeaks? At moſt, (and even that is not free from doubt,) he was only poſſeſſed as executor. For the teſtator died between March and December, and by the law, the ſlaves were to remain

main on the lands, until the 25th of December, for the purpose of finishing the crop, until which time, the estate could not well be divided; and, in point of fact, it never was divided in Wishart's lifetime. So that, if he had any possession at all, it was in his character of executor, and not as owner.

Upon the whole, I think the decree is erroneous, and must be reversed.

LYONS Judge. In determining the present case, it does not appear, to me, to be important, whether slaves, since the year 1727, are to be considered as real or personal estate. For, in either case, the words of the act of Assembly will, in my opinion, transfer the right to the husband.

The case is the first of the kind, which I recollect; and, as far as my knowledge extends, the question has never been decided here before. It is therefore open to free discussion, and I am sorry to differ in opinion, from my brethren, concerning it. But it is my duty to deliver the opinion I have formed, whether that opinion be right or wrong.

The husband appears to me to have been the principal object of the Legislative care throughout the act of 1727: And an absolute transfer to him, of the wife's interest, in cases of this kind, seems to have been particularly contemplated by the fourth section. That is to say, the object of the act was to vest the title exclusively in the husband, without leaving any remnant of right in the wife.

The question therefore, seems to be, whether the Legislature, intending to vest the title in the husband immediately, and without regard to the rules of the common law, could do so? Or were bound to observe those rules against their own inclination, and what they supposed would be profitable to the country?

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There can be no difficulty, I presume, in answering these questions; because all must agree, that, if the Legislature could transfer, at all (which will scarcely be denied) they might do it absolutely, or conditionally, and in whatever manner they thought proper. So that it is merely a question of intention; and, upon that, I perceive no difficulty.

In deciding the cause, it may not be unimportant to observe, that the common law was as well known in the year 1727, the time of passing the explanatory act, as at this day. The Legislature knew full well the condition, upon which a husband obtained an absolute right to the wife's chattels. They knew, that actual possession, during the coverture, was necessary to vest the right in him. That, without it, the chattels survived to the wife, if she outlived him; unless he had assigned them, for a valuable consideration, during the coverture: And that, if he survived her, he could only take them in character of administrator.

Possessed of this knowledge, the Legislature seem to have been disposed to abrogate the rules of the common law altogether, with regard to slaves; and to establish a new system concerning them. So that although possession was before essential, in order to vest the property in the husband, it was, in future, to become unnecessary; and the interest was to be transfered to him, by operation of law, without it.

A few observations will evince this:

The professed intention of both the acts, upon this subject, that is to say, those of 1705 and 1727, was the settlement, and preservation of estates, by uniting slaves and lands in a common course of descents; so that the heir might have the benefit of the labour of the slaves for the improvement of the lands.

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That this was the intention of the Legiſlature, is proved, not only by the preambles to the ſtatutes, but by the 11th ſection of the act of 1727; which recites the true deſign and policy of the former law to have been, to preſerve ſlaves for the uſe and benefit of the perſons, to whom lands and tenements ſhould deſcend, be given, or deviſed, for the better improvement thereof; and that the ſame could not be done, according to the cuſtom and method of improving eſtates in this country, without ſlaves. This ſection embraces, almoſt in terms, the very obſervations, which I have been making; and to my mind, eſtabliſhes, very clearly, that the object of the Legiſlature was ſuch as I have deſcribed it.

This being the principle, on which they meant to legiſlate, it naturally occurred, that as the lands generally belonged to the huſband, and not to the wife, the object would be beſt attained, by transfering the title in the ſlaves to the huſband, ſo that in caſe of the premature death of the huſband, the proprietor of the lands might be enabled to cultivate them to advantage; which was thought of more importance, than preſerving occaſional rights of the wife, ariſing from accidental cauſes. Hence the prediliction for the intereſt of the huſband beyond that of the wife.

Thus diſpoſed, the Legiſlature paſſed the fourth ſection of the act of 1727, not in corroboration of the rules of the common law, but in expreſs abrogation of them.

It declares that, "Where any ſlave or ſlaves, "have been or ſhall be conveyed, given or be-"queathed, or have or ſhall deſcend to any feme "covert, the abſolute right, property and intereſt "of ſuch ſlave or ſlaves, is hereby veſted, and "ſhall accrue to, and be veſted in, the huſband of "ſuch feme covert."

This clauſe profeſſes to transfer the title and intereſt, in the ſlaves, to the huſband, without

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condition or reſervation of any kind; and therefore if the Legiſlature had both the inclination and the power to make ſuch a transfer, they certainly have effected it, by the extenſive terms, which they have uſed. For the language is expreſs, that the abſolute *right, property and intereſt* ſhall be veſted in the huſband: that is to ſay, it ſhall belong to him, free from all conditions and reſtraints. For if the right, property, and intereſt is veſted in him, he muſt be the complete and excluſive owner.

But it is ſaid that only the common law rights were given, or rather revived by the act. This however ſeems to me, to narrow the conſtruction more, than the plain, poſitive words of the law will admit of, and would render the act uſeleſs in many inſtances. For if the common law rights only were intended, a great proportion of the minute proviſions and multiplied details of the act would have been unneceſſary. Becauſe, it would have been much eaſier to have declared them perſonal eſtate, at once, with the exception of deſcents, entails, and dower; and to have left it in all other reſpects ſubject to the operation of the common law, without the aid of ſtatutary regulations; the only object of which would be to enact the proviſions, which the common law would have made without. Eſpecially as, by this means the property would have been liable to known rules, and would not have been perplexed with the difficulties and intricacies; which might ariſe in the conſtruction of a ſtring of ſtatutary proviſions.

It appears to me therefore, that the intention of the Legiſlature cannot be miſtaken: It muſt have been to enlarge the rights of the huſband; to put him in a better ſituation than he was at common law; and to transfer all the title of the wife to him immediately, and without regard to poſſeſſion or ſurvivorſhip. A proviſion calculated to put an end to all diſputes between the ſurvivor and the executors relative to the poſſeſſion, at the ſame

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time, that it comported with the preference ſhewn for the intereſt of the huſband, throughout the act. A preference which ought to be conſidered in conſtruing the law; becauſe no rule is better ſettled, than that the general intention of the Legiſlature ought to be obſerved. I conclude therefore, that the makers of the act intended, that the words, *right*, *property and interest* ſhould be underſtood, according to their full and natural import.

But when all the right and intereſt of the wife is transfered to the huſband, by plain and poſitive words, what remains to ſurvive to the wife? To contend that ſhe will take the ſlaves by ſurvivorſhip, appears to me to be ſaying, that the right is transfered out of her, and remains in her, at one and the ſame time. Which would be abſurd and impoſſible.

I ſaid that the ſentence was clear; and in my mind, no difficulty can ariſe upon it: Aſk a plain man the meaning of the words, *right*, *property and interest*, in any thing? The anſwer would be, the complete title to the thing, without condition, reſervation or reſtraint. Aſk a lawyer, what thoſe words would mean in a deed, or will? The anſwer would be, that they conveyed an unconditional eſtate. Why then ſhould a more limited conſtruction, of them, take place in the expoſition of a ſtatute? I can ſee no reaſon for it, and therefore am not diſpoſed to make a diſtinction.

Either the eſtate is veſted in the huſband by the words of the act, or it is not. If it is, how can it be diveſted, but by his own deed? And if it is not, what is to be done with the words of the ſtatute? Their operation is deſtroyed, and they are reduced to mere dead letters.

To obviate this however, a conſtruction was attempted, at the bar, to read the ſtatute diſtributively; and as the gentleman ſaid, according to the nature of the ſubject. That is to ſay, that the word *right*

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right ſhould be to the huſband as huſband, and *property and interest* ſhould be to him as huſband according to the common law; although the word common law is not once mentioned in the whole ſection. This may do credit to the ingenuity of counſel, but can hardly be conſidered as tenable by any perſon, who attentively peruſes the ſtatute. For not only, is the ſupplement unnatural, but it breaks the text; and therefore ought to be rejected. Beſides the words of the act veſt the title in the huſband abſolutely, and without reference to any thing elſe. Of courſe there is no occaſion for the ſupplement; which is altogether, calculated to defeat the general object of the law.

Beſides what is there to lead to this ſupplement? Suppoſe inſtead of ſaying they ſhould be veſted in the huſband, the act had ſaid they ſhould be veſted in the children or a ſtranger, would any body think of ſaying, in that caſe, that the *right*, to the children or ſtranger, ſhould be to them as children or ſtranger; and that the *property and interest* ſhould be to them, as children or ſtranger according to the common law? And if any body were to ſay ſo, what would he mean by it? Certainly no more, than that the right would be to them as children or ſtranger, and that the property and intereſt would go to them in the ſame manner. For the expreſſions would be ſynonymous, and the addition of the words "according to the common law," would create no diſtinction.

To conclude my obſervations upon the words of the clauſe.

The ſtatute has ſaid in plain and diſtinct terms, that the abſolute right ſhould be veſted in the huſband as a ſubſtantive individual character, and not as a perſon clothed with any particular qualities, or rights, at common law, but that his title ſhall grow out of the Legiſlative expreſſion itſelf. And can I, as a judge, diſappoint this declaration of the Legiſlative will, and lay it under reſtrictions and qualifications, which the Legiſlature themſelves

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ſelves have not thought proper to annex to it? I can only ſay, that I doubt my authority to do ſo; and that as the expreſſion is plain, I think it ought to be adhered to; having no idea, that it is in the power of the Court, to reject the force of plain words in a ſtatute. For the maxim is, that where there is no ambiguity in the words, there no expoſition, contrary to the expreſs words ought to be made.

From what has been ſaid, it is evident, that it is wholly immaterial, as before obſerved, whether ſlaves be conſidered as real property in general, with certain exceptions of a perſonal nature, or as perſonal property in general, with certain exceptions of a real nature. For either way, the words of the act are peremptory; and veſt the title in the huſband.

It was ſaid, by Mr. Wickham, however, that if this conſtruction prevailed, a difficulty would follow, as ſlaves would be tranſmitted neither as real or perſonal eſtate; and therefore would have no rules to regulate the ſucceſſion to them. But I ſee not the ſuppoſed inconvenience; for the ſucceſſion in all other inſtances is regulated according to the real or perſonal quality, which they aſſume; and with reſpect to the caſes enumerated in this ſection, the act itſelf regulates the diſpoſition, and declares the perſon who is to take, in conformity to the avowed object of the Legiſlature.

As to the caſe of *Drummond* vs *Sneed*, it was a queſtion of a different kind, ariſing upon another part of the clauſe, not well penned, and which, from the words, *as of her own proper ſlave or ſlaves*, looks as if it had been introduced merely to prevent the dower ſlaves of a wife, from being transfered to the ſecond huſband.

I had no difficulty in that caſe; for I thought the huſband entitled ſeveral ways. For inſtance, as the object was merely to prevent the transfer of the dower ſlaves, I thought the word *poſſeſſed*

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might be conſtrued *entitled;* and then it would be in the ſame ſituation with the proviſions of the firſt ſentence. Or, if that would not do, that the poſſeſſion of the tenant for life might be conſidered as the poſſeſſion of him in remainder; and then the literal expreſſion of the act would be ſatisfied. By both of which modes, all the parts of the ſection would be made to harmonize together; and the object of the Legiſlature would be attained. The judges, however, differed in opinion concerning the caſe. Some of them thought, that as the wife was not poſſeſſed during the coverture, the huſband had no right under the act, or at common law. Others thought he had a common law right ſurviving to him: For myſelf, as I thought him clearly entitled ſome way, it was matter of indifference to me, whether it was held that he had the right under the ſtatute or at common law, provided it was held that he had it all. Therefore I concurred in the certificate, that the decree of the County Court ſhould be affirmed; but I did not conſider the preſent queſtion, as having been decided at that time. On the contrary I thought it ſtill open; and reſerved for future diſcuſſion.

Of courſe I cannot agree, that that caſe forms a precedent for this.

The view, which I have taken, of the ſubject, renders it unneceſſary to conſider the other points made in the cauſe by the counſel for the appellees; becauſe, according to my opinion, the act of Aſſembly veſted all the right, property and intereſt of the wife in the huſband abſolutely; and in the ſame manner, as if they had been deviſed to him immediately.

Of courſe I think, that, by virtue of the deviſe to his wife, the teſtator John Wiſhart was entitled to a moiety of the ſlaves, and that they paſſed by his will to the plaintiff Wilhelmina and her two brothers. Therefore, I am for affirming the decree.

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PENDLETON Preſident. It is clear that ſlaves were conſidered as perſonal eſtate till 1705; when an act was made declaring them real eſtate and *not chattels*. Caſes however, are put, as exceptions, in which the converſe is to be the rule; that is to ſay, in which they ſhall be deemed chattels and not real eſtate, or in other words, that they ſhall return to their original nature.

No diſpute aroſe, that I know of, on any of theſe exceptions: But upon the 6th ſection doubts were entertained, whether it was confined to mere ſales? or was extended to other alienations, by deed or will, or by marriage, an alienation of all the wifes perſonal property?

The words are, "provided alſo, that no perſon "ſelling or alienating any ſuch ſlave ſhall be obliged to cauſe ſuch alienation to be recorded, as is "required by law to be done upon the alienation "of other real eſtate; but that the ſaid ſale, or "alienation, may be made in the ſame manner "as might have been done before the making of "this act."

Had this clauſe any other meaning than to diſpenſe with recording ſales? If confined to that, it would have made it ſtill neceſſary on a purchaſe of ſlaves to have had a deed, in writing, indented and ſealed; but the latter part of the clauſe reſtored them to the mode of transfering chattels. So that payment of money, and tranſmutation of poſſeſſion, paſſed the property without any writing.

This however occaſioned the various diſputes, which produced the explanatory act of 1727.

Altho' the rules of conſtruction, allow us to reject ſome words, ſupply others, or tranſpoſe them ſo as to make the act conſiſt with the deſign of the Legiſlature, yet it is ſaid that mere explanatory ſtatutes cannot be explained. Why? Is not the explained will of the Legiſlature to be purſued, as much as

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their original will, although terms may be uſed which might import a contrary will?

I proceed to ſhew, that it was the intention of the act of 1727, that in the caſe of theſe alienations by marriage, or otherwiſe, ſlaves ſhould be conſidered as chattels; and the huſband be veſted with the ſame intereſt (neither more or leſs) in his wifes ſlaves, as in her perſonal eſtate. Let it be remembered, that the Legiſlature are explaining the 6th ſection of the act of 1705, where it is declared that alienations ſhall be made in the ſame manner, as before that act. The 3d ſection is explicit, that in the caſe of ſales or gifts with or without, deed, or by will, written or nuncupative, the abſolute property ſhould paſs: But how? In the ſame *manner* as a *chattel*.

Having thus, in the 3d ſection, declared their intention to reſtore ſlaves to their perſonal nature in thoſe kinds of alienations, they proceed, in the 4th ſection, to the other kind by marriage; and although they do not repeat the words, *in the ſame manner as if ſuch ſlaves were chattels*, probably thinking it unneceſſary as they had once declared the principle, yet I will read the clauſe with thoſe words interpoſed, in each caſe of the feme covert and ſole.

It will then ſtand thus "and that where any "ſlave or ſlaves, have been or ſhall be conveyed, "given or bequeathed, or have or ſhall deſcend "to any feme covert, the abſolute right, property "and intereſt, of ſuch ſlave or ſlaves, is hereby "veſted, and ſhall accrue to, and be veſted in, the "huſband of ſuch feme covert, *in the ſame man-*"*ner, as if ſuch ſlaves were chattels;* and that "where any feme ſole is or ſhall be poſſeſſed of any "ſlave or ſlaves, as of her own proper ſlave or "ſlaves, the ſame ſhall accrue to, and be abſo-"lutely veſted in, the huſband of ſuch feme, when "ſhe ſhall marry, *in the ſame manner, as if ſuch* "*ſlaves were chattels.*"

Which

Which removes all difficulty and will give a meaning to thoſe imperious words *absolutely vest;* that is, in contra-diſtinction to the limited intereſt which the huſband has in the wifes real eſtate.

Wallace *vs.* Taliaferro.

The doubts which gave riſe to the ſeveral caſes of *Wild, Elliot* vs *Washington, Southall* vs *Lucas,* and *Steger* vs *Mosely,* reſpected remainders of ſlaves, which veſted an intereſt tranſmiſſible in the wife during her coverture, but as there was no right to the poſſeſſion, as the tenant for life ſurvived the wife, the huſbands after the death of the wives, claimed the ſlaves. The great objection to this claim, under this clauſe, was, that the property was to veſt in the huſband of a feme ſole, at the time the title commenced, in ſuch ſlaves, of which ſhe was poſſeſſed at the time of the marriage, and this occaſioned great difficulty. The clauſe in both parts, viewed as applicable to every ſuppoſable caſe, was eaſily ſoluble, by the principle, that ſlaves were, in theſe inſtances to be conſidered as chattels, making the marital rights of the huſband the ſame in both: And this principle, I ever underſtood to be eſtabliſhed, by the Court; and have conſidered it, as a fixed rule of property tending to quiet diſputes.

But it is ſaid the caſe of the wife ſurviving, and the huſband not in poſſeſſion, has never been decided and is a new caſe open for diſcuſſion on the act. Does any gentleman ſuppoſe this a new caſe, in fact? and that Mrs. Wilſhart was the firſt feme, who ſurvived her huſband, with her ſlaves in this predicament, becauſe Mr. Taliaferro is the firſt, who has brought on the queſtion for diſcuſſion? I believe the reaſon of there being no precedent is, that it was never doubted, that if the huſband was not in poſſeſſion, and the wife ſurvived, the right was hers: And that in both the caſes mentioned the clauſe; for there is no difference.

Yet there is no direct deciſion on the point; It was collaterally decided however, in *Harrison and wife* vs *Valentine.* Mrs. Harriſon, when ſole

Wallace vs Taliaferro.

sole was entitled to slaves which then lived with her mother; who, upon one of them, a woman misbehaving, sold her to Valentine, just before the daughter married. Harrison some years after the marriage, brought detinue, in the names of himself and wife, to recover the woman and her children from Valentine; who pleaded the act of limitations. More than five years had elapsed from the marriage but Mrs Harrison was an infant at the sale, and the suit was within time, after her coming of age. It was insisted for Valentine, that the act vested the right in the husband on his marriage; that he had improperly joined the wife; and that her infancy did not prevent his being barred. It was answered that the act only vested it as a chatel: That it was still the wifes personal interest which would survive to her if not reduced into possession during the coverture; and therefore that she was properly made a party; and that the true question was whether she was barred. The Court was of opinion in favor of the plaintiffs, and gave judgment against Valentine, deciding in fact, that the right would survive to the wife, if not reduced to possession in the husbands life time: The very case now before the Court.

I believe there is no instance of a husband suing, under either part of this clause, in his own name, for his wife's slaves, without joining her, except *Bronaugh* vs *Cocke*. And there the omission was made an objection.

But it is said, that there is no decision on the case, of slaves coming to a feme when covert. I recollect none, unless *Jones* vs *Shield* was such; which I do not remember distinctly. I know, that Jones claimed under the first husband against Shield the second husband; but failed here as well as in England. This case happened, before 1727; which might make a difference in the minds of some; although none in mine. Because I think the 6th

section,

Wallace
vs
Taliaferro.

section, of the act of 1705, puts the case on the same footing, as the act of 1727.

A doubt was stated whether the decisions of the old General Court were authority; since although it was our Supreme Court, yet an appeal lay to the King in council. I would ask the gentleman, if it was ever objected to the authority of the decisions in Westminster Hall, that an appeal lay to the Lords? Where there was an appeal, and the sentence changed, the opinion of the Lords gave the rule; but in other instances that of the courts did. Probably some such idea, as the present, produced the cases of *Drummond* vs *Sneed* and *Hoard* vs *Upshaw*, to discover if the Revolution had produced any change in the legal sentiment. Fortunately, for the peace of the country, the experiment failed; and the point was left at rest. I imagine some young gentlemen of the bar, not old enough to know the practice of the country, nor acquainted with the former decisions, advised this suit, on reading the clause, and being impressed with the force of the strong expressions.

As to the practice, I can truly say, that in my long experience, I do not recollect an instance, where the slaves of a feme covert, or sole, when the right came to her, if they were not taken possession of by the husband, during the coverture, and she survived, were not yielded to her. We find that even the Chancellor, whose opposition to the old decisions is well known, considering the principal to be settled, that slaves vested only as far as personal estate, has founded his decree upon Wishart's possession. In which, however, I think he is mistaken. The contradiction in the testimony, is about an immaterial fact. Some say, that Taylor was the principal acting executor, and that Wishart acted but little: And others that Wishart was the principal acting executor. There is no doubt, but both acted as executors; and neither

Wallace vs Taliaferro.

ther of them had any other poſſeſſion, than, as executors.

But all this would be a fruitleſs enquiry, if Mr. Call had been right in his opinion, that in caſe "of a legacy of a perſonal chattel to a feme co-"vert, the right is immediately veſted in the huſ-"band, whether he gets poſſeſſion of it or not." A poſition ſo contrary to every idea I had poſſeſſed on the ſubject, that it ſurpriſed me. On reviſing his caſes, I do not diſcover the ſmalleſt reaſon to doubt, but that they prove a contrary doctrine. They lay down the general poſition, that ſuch a legacy deviſed to the wife veſts in the huſband; but immediately explain how it veſts; that is, ſubject to the conditions of his reducing it into poſſeſſion or making a diſpoſition thereof, in his lifetime, or ſurviving his wife; otherwiſe that it will ſurvive to the wife.

Upon the whole, I am of opinion, that the right, to the ſlaves, ſurvived to the wife in this caſe; and am happy to find, that this is the opinion of the Court. Since I am ſatisfied it will tend to confirm long practice; and preſerve the peace of the country; which would have been diſturbed, by a contrary judgment.

The decree was as follows:

"The Court is of opinion, that the intereſt of "the ſlaves, deviſed by the will of William Row-"ley to Lettice Wiſhart, veſted in her huſband "John Wiſhart, in the ſame manner as if they had "been chattels and not otherwiſe, ſo as to become "his property, provided they were reduced into "poſſeſſion, during the coverture, or that he ſur-"vived his wife, but, if neither happened, the in-"tereſt ſurvived to his wife. That the ſaid John "Wiſhart during his lifetime had none other poſ-"ſeſſion of the ſaid ſlaves than as co-executor with "Richard Taylor, they being with the other "ſlaves of the teſtator, continued on his planta-"tions, under the direction of the executors,

"for

Wallace vs Taliaferro.

" for finiſhing the crops, according to the direc-
" tions of the act of Aſſembly, until after the
" death of the ſaid Wiſhart; and no act appears
" to have been done by him, teſtifying his elec-
" tion to hold the ſaid ſlaves in right of his wife
" and not as executor, and therefore that the
" right ſurvived to the ſaid Lettice, and that
" the decree aforeſaid is erroneous: Therefore it
" is decreed and ordered that the ſame be reverſ-
" ed &c. and this Court proceeding to make ſuch
" decree as the ſaid High Court of Chancery ſhould
" have pronounced, it is further decreed and or-
" dered that the bill of the appellees be diſmiſſed
" &c."

DRUMMOND

againſt

SNEED.

Novem: 1786.

THIS cauſe is an appeal from the court of the county of Accomack. There Charles Sneed, the appellee, exhibited a bill in Chancery againſt Robert Drummond, the appellant, and Jonathan Willet and Major Chambers, ſtating,

That one William Burton having a daughter named Agneſs married to one John Weſt, deviſed ſeveral ſlaves to her for life, with a remainder to all her children in equal diviſions.

That

W. B. deviſed ſlaves to his daughter A. W. for life remainder to all her children. One of whom by the name of C. married E. C. and died in the lifetime of her mother & huſband: Her huſband took adminiſtration on her eſtate. A diviſion was afterwards made of the ſlaves; and one by the name

---

of Lazer, was aſſigned, as the ſhare of the ſaid C. C. The ſaid E. C. the ſurviving huſband, took poſſeſſion of the ſaid ſlave, and ſold him to C. S. for a valuable conſideration; after this M. C. the eldeſt ſon of the ſaid C. C. took poſſeſſion of the ſaid ſlave and ſold him to R D. The ſale by E. C. the huſband was good, and C. S. the purchaſer, is entitled to the ſlave.

Drummond *vs.* Sneed.

That the ſaid Agneſs had nine children, one of whom named Catharine intermarried with one Edmund Chambers, and died in the lifetime of her mother and huſband.

That the ſaid Edmund Chambers adminiſtered on the eſtate of the ſaid Agneſs.

That at length a diviſion was made of the ſaid ſlaves, and a ſlave named Lazer was aſſigned as the ſhare of the ſaid Catharine, together with £ 21 : 16 : 8 with intereſt from the 3d day of November 1766.

That the ſaid Edmund Chambers poſſeſſed himſelf of the ſaid ſlave and ſold and delivered him to the ſaid Charles Sneed for a valuable conſideration *bona fide* paid.

That the ſaid ſlave was afterwards in 1768 ſpirited away from the ſaid Charles Sneed by one Jonathan Willet, who together with the ſaid Major Chambers, the eldeſt ſon of the ſaid Catharine, ſold the ſaid ſlave to the ſaid Robert Drummond, who knew all the circumſtances of the ſaid Charles Sneed's purchaſe, and that the ſaid Charles Sneed delayed the bringing of this ſuit until the 24th day of September 1771, merely to wait the event of a ſuit depending for the diviſion of the ſaid ſlaves. The prayer of the bill is for the reſtitution of the ſaid ſlave, an account for his hire and of the £ 21 : 16 : 8, aforeſaid.

Robert Drummond anſwers.

That he acknowledges the will of the ſaid William Burton, the deviſes therein, the intermarriage of Chatharine with Edmund Chambers, her death before her mother, the birth of Major Chambers, the letters of adminiſtration by Edmund Chambers on the ſaid Catharine's eſtate, as theſe different facts are ſtated in the bill.

The ſaid Drummond denies that he knew of any right to the ſlaves left by the ſaid Burton being veſted

vested in the said Edmund but in the right of the said Major his son; and asserts that by a partition under a decree of the General Court on the 26th day of February 1765 the slave Lazer was allotted to the said Major Chambers upon his paying the sum of £ 26: 15: 10 with interest from the 23d day of November 1766; that he was never acquainted with the possession of the said slave by the complainant; that Edmund Chambers could not avail himself of the aforesaid decree, not being a party thereto, nor being a child, or grand child of Agnes West; that he purchased the slave Lazer of Major Chambers for £ 45 *bona fide* paid after the partition aforesaid and an assignment of the rights of the children of the said Agnes to the said slave.

Jonathan Willet answers.

That he did never entice the said slave Lazer from the service of the said Charles Sneed, and disclaims all interest in the said slave; that he believes that Edmund Chambers took possession of the said slave as father of his son Major Chambers; that upon complaint of ill usage the County Court of Accomack, as the said J. Willet believes, put the said Major and the said slave into the hands of John West, who hired him for the benefit of the said Major; that the said John West for some unknown cause surrendered the said slave and the said Edmund took possession of him; that he has never received any money for the hire of the said slave, but what he has accounted for to Major Chambers.

Major Chambers answers, admitting the facts as to William Burton's will, the death of his mother Catharine in the lifetime of her mother and husband; that under the decree aforesaid the said slave was delivered to the said Jonathan Willet as agent for the said Major Chambers. That the said Major Chambers sold the said slave to the said Robert Drummond; that he never knew the said slave to have been in the possession of the said

Sneed;

Drummond vs. Sneed.

Sneed; that he never ſeduced the ſaid ſlave from him; that he has purchaſed all the rights of the children of the ſaid Agneſs Weſt; that the ſaid Drummond purchaſed the ſaid Major Chambers title to the ſaid ſlave at his own riſque; that the ſaid Major knows nothing of the £ 21: 16: 8 mentioned in the ſaid Sneed's bill and has received about £ 10 for the hire of the ſaid ſlave.

The exhibits conſiſt of the will of William Burton, the deed of Edmund Chambers to Charles Sneed bearing date the 30th day of January 1765, and paſſing the ſaid ſlave; the proceedings for the partition of the ſaid ſlaves in which proceedings Edmund Chambers is no party until he had ſold to Charles Sneed as aforeſaid, ſundry depoſitions, and the order for adminiſtration on his wife's eſtate in favor of the ſaid Edmund Chambers on the 1ſt of May 1765.

A decree was made in favor of the ſaid Charles Sneed and the ſaid Drummond appealed therefrom.

The cauſe came on to be heard before the High Court of Chancery on Thurſday the 22d day of May 1783 who adjourned it to the Court of Appeals on account of difficulty.

The counſel for the appellee. Inſiſted on the following points.

1. That Edmund Chambers had full power to ſell the ſlave Lazer, as huſband and adminiſtrator of his wife.

2. That he actually did ſell the ſlave to the ſaid Charles Sneed; which ſale they contended was good, whether the ſaid Edmund was conſidered as huſband, or adminiſtrator.

3. That the *partition* did not affect the right of the ſaid Charles Sneed.

The certificate of the Court of Appeals was as follows:

"The

Drummond vs Sneed.

"The Court this day gave their opinion, "that the decree of the County Court of "Accomack, mentioned in the tranſcript of "the record in this Cauſe, pronounced the 27th "day of April 1779, ought to be affirmed; which "opinion is ordered to be certified, with the al-"lowance of the coſts in this Court (except a law-"yers fee,) to the High Court of Chancery."

BLANE *againſt* SANSUM.

If a declaration in debt be blank as to the ſums, the date of the obligation, the aſſignment thereof to the plaintiff, and as to the damages, a judgment rendered thereupon is erroneous; and ought to be reverſed, and the ſuit diſmiſſed with the coſts of both courts.

BLANE, as aſſignee of Young, brought ſuit in the County Court againſt Sanſum. The writ is in debt, for one hundred and ſeven pounds, four pence ſterling. Damage ten pounds ſterling. The declaration is alſo in debt; but is blank as to the ſum declared for; as to the date of the bond; as to the aſſignment to the plaintiff; and as to the damage. The defendant having failed to appear upon the return of the writ, the proper proceedings were had, and an office judgment regularly obtained. The bond (which is in the penalty of £ 215 ſterling, conditioned for payment of £ 107 : 0 : 4½ ſterling) is copied into the record by the clerk.

The Diſtrict Court granted a writ of *ſupersedeas* to the judgment, and reverſed it with coſts; without entering a *nil capiat per billam*. Whereupon Blane appealed to this Court.

WICKHAM for the appellant. As the ſum is right in the writ, it is ſufficient under the act of Jeofails which ſays that the judgment ſhall not be arreſted, after verdict, in any ſuch caſe. Beſides the bond is part of the proceedings, and certainly contains the true ſum.

RANDOLPH

Blane
vs.
Lanfum.

RANDOLPH *contra.* There was no verdict in this caſe, but a mere office judgment. No oyer was taken of the bond; which therefore is no part of the proceedings. Conſequently the defects are not cured by the ſtatute of Jeofails. Reference to the writ will not do; for that does not ſay that the action is founded on a bond.

Cur. adv. vult:

PENDLETON Preſident. There is no error in the judgment of the Diſtrict Court as far as they went; but they ſhould have gone further, and reverſed the judgment of the County Court, and diſmiſſed the ſuit with the coſts of both Courts; Which is to be the judgment of this Court.

MACKEY

againſt

FUQUA.

What notice of a writ of *ſuperſedeas* is ſufficient, when the defendant is not found.

THE writ of ſuperſedeas in this caſe was returned by the ſheriff *a copy left;* and the queſtions were, whether, this return was ſufficient to enable the plaintiff to proceed to a hearing? or whether actual ſervice, on the defendant was neceſſary?

CALL for the plaintiff. Notice to the defendant is all that is neceſſary; and leaving a copy was ſufficient, for that purpoſe.

RANDOLPH *contra.* The ſame notice ought to be given, as is required, by the act of Aſſembly, in other caſes. That is to ſay, it ought either to have been perſonal, or left with ſome white perſon above the age of ſixteen, at the dwelling houſe of the defendant.

The Court took time to conſider, and then made the following order.

"The

Mackey vs Fuqua.

"The Court being of opinion, that in giving "notice of the writ awarded at the laſt Court, the "ſheriff ought to have purſued the mode preſcribed by the act of Aſſembly, for giving notice upon "replevy bonds and other lawful occaſions (which "does not appear to have been obſerved, from his "general return of *a copy left*,) On the motion of "the plaintiff, by his counſel, another writ of *su*-"*persedeas* is awarded him, returnable here at the "next Court."

HEPBURN

against

LEWIS.

THE queſtion made at the bar was, whether as the writ was for £ 50, the Diſtrict Court ought not to have given judgment for the appellant, although the ſum found by the verdict was leſs than £ 30.

The Court of Appeals cannot take cognizance of a leſs ſum than £ 30.

Quere If the ſum demanded by the plaintiff in the Diſtrict Court be more than £ 30, and the verdict find leſs, the Diſtrict Court can give judgment for the amount of the verdict?

Againſt the non ſuit it was ſaid, that the act of Aſſembly was, that where the plaintiff ſhall claim £ 30 or upwards, the court ſhall have juriſdiction; and therefore as more, than that ſum, was laid in the writ and declaration, the plaintiff below was entitled to judgment. That otherwiſe it would be in the power of the defendant, by holding up his diſcounts, always to nonſuit the plaintiff, and charge him with the coſts of ſuit; as the plaintiff could not poſſibly know the diſcount which would be claimed. That upon this principle the old General Court, and the Courts in England, have ſuſtained verdicts for ſums, below the ordinary juriſdiction of the court.

Per

Hepburn vs. Lewis.

Per: Cur: This court has no jurisdiction of the appeal. For the appellant appeals from the refusal of the District Court, to enter judgment, for the amount of the verdict; which verdict is for less money, than the law allows appeals to this court for; and therefore, as the very sum, which he asks this court, in the first instance, to give him judgment for, is below our jurisdiction, the appeal must be dismissed.

HERBERT

32 Gratt: 109

against

ALEXANDER.

What agreement of an attorney will bind his client.

ALEXANDER brought an action on the case against Herbert in the District Court, and declared, that whereas sometime in the year 178 an action of ejectment was instituted in the General Court by Charles Alexander against William Bryan, Benjamin Vanpett and Charles Curtis lessees and tenants of the said Herbert; and whereas the said Herbert employed Edmund Randolph atttorney at law, then practicing in the General Court, to defend the said action of ejectment on behalf of himself and the said tenants, by virtue of which authority, and with the consent of the said William Herbert, he the said Edmund Randolph on the day of 178 then and there agreed with the said Charles Alexander, that if judgment should be rendered in favor of the plaintiff in the said ejectment, it should be entered against the said William Herbert and Dennis Ramsay for their respective tenants, and avered that the said Bryan, Vanpett and Curtis were the tenants of Herbert, and that judgment was rendered in favor of the plaintiffs for the lands and his costs; by reason whereof Herbert became liable to

pay

pay to the plaintiff the costs: and being so liable assumed upon himself and promised to pay &c. with an averment of the amount of the costs.

There was another count to the same effect. The defendant plead *non assumpsit;* and the plaintiff took issue.

Upon the trial of the cause the defendant filed a bill of exceptions, to the Courts opinion, stating, that the plaintiff offered in evidence a copy of the declaration in ejectment, and various steps in the cause (setting them forth;) and stating also, that the plaintiff proved by sundry witnesses, that Charles Little and the defendant employed Edmund Randolph to defend the suit, and paid the costs; and that Herbert, as guardian of his son John Herbert, received some rents from the tenants, and had the charge of some slaves on the land, and claimed the said land as guardian of his said son; and that wood was cut off the land and carried to Herbert. That it was also proved that the tenants had moved off the land before the trial of the ejectment; and some of them complained that they were made defendants. That the plantiff also produced a writing signed by Edmund Randolph attorney employed as aforesaid, to defend said suit in these words:

"Alexander *vs* Vanpett &c. should judgment "be rendered in favor of the plaintiffs, it shall be "entered *vs* William Herbert and Dennis Ram-"say for their respective tenants.

EDM: RANDOLPH."

That this was signed previous to the trial of the said ejectment. It likewise set forth an execution against the tenants for the costs, which was returned *no effects.* That the defendant prayed the opinion of the Court, whether the said writing was binding on the defendant William Herbert? And whether, he the said William Herbert is chargeable with the costs of the ejectment under the foregoing circumstances, in this action?

That

Herbert
vs.
Alexander.

That the court was of opinion, that the ſaid writing was binding on the ſaid William Herbert, as being executed by the ſaid Edmund Randolph, in the line of his duty, to enable the parties intereſted in the title of the ſaid land then in queſtion to have a fair trial; although it was proved that the ſaid William Herbert the defendant was not preſent at the time the ſaid engagement was entered into, and it was not proved that the ſaid William Herbert the defendant either verbally, or by writing, ever authorized the ſaid Edmund Randolph to enter into ſuch engagement.

It appears by the proceedings in the ejectment, as if the declaration (which is in the name of Timothy Goodtitle, on the demiſe of the plaintiff Charles Alexander) had been originally filed up againſt Bryan, Vanpett, Curtis and Rullings the tenants in poſſeſſion. After which the names of Little and Herbert ſeem to have been inſerted. The tenants names thoſe of Wronghead the caſual ejector of Little and Herbert then appear to have been eraſed, and the names of the tenants only inſerted. *Not guilty* is put at the foot of the declaration; and Maſon added for the plaintiff and Randolph for the defendant. It appears to have been once indorſed *Alexander* vs *Wronghead, Little &c.* but the words, *Wronghead, Little &c.* are eraſed; and the words, *Bryan & al*, inſerted. On the 24th of April 1783. The ſuit after various continuances appears to have ſtood in the name of Timothy Goodtitle againſt Francis Wronghead; and upon that day, Little and Herbert were, on their motion, made defendants, and by Edmund Randolph, their attorney, plead the general iſſue &c. In October 1783, the tenants, with the conſent of the plaintiff, were again admitted defendants, in the room of Little and Herbert; and by Randolph their attorney plead the general iſſue &c.

The

The jury found a verdict, and the court gave judgment for the plaintiff. From which judgment Herbert appealed to this court.

RANDOLPH for the appellant. The diſtinction is between an act collateral to, and one which is directly within the duty of the attorney. 3. *Vin. ab.* 304. The laſt is binding on the client, but not the former; and here the agreement was entirely collateral.

CALL *contra.* The agreement was not collateral, but directly within the attornies duty; and if a rule of conſolidation had been applied for, it would have been granted, as all the ſuits were relative to the ſame object, and depended on the ſame title. The application was probably diſpenſed with, for the ſake of convenience, amongſt the counſel; and therefore it ought to be obligatory on their clients. The record clearly proves, that he was Herbert's attorney; and therefore had authority to conſent for him.

Curs: adv: vult:

ROANE Judge. The deciſion of this caſe turns upon the power of the attorney to bind the appellant, by the agreement ſtated in the bill of exceptions.

It ſtates, that a declaration, in ejectment, was ſerved upon all the tenants in poſſeſſion; that, in April 1783, Herbert and Little were made defendants, on their motion; and that, in October 1783, the tenants were made defendants, with conſent of the plaintiff, in the room of Little and Herbert.

This laſt order is not ſtated, to have been made, on the motion of the tenants; but, however the caſe may ſtand, as to the liability of the defendants, who are made ſo, without their own application, this order clearly diſcharged the appellant as a defendant.

The

Herbert
vs
Alexander.

The tenants in poſſeſſion are the proper, if not the natural defendants to an ejectment; although the landlord has a right to be made a defendant, through fear that he may be injured, by a combination between the plaintiff and his tenant; but he may waive this right, or having aſſerted it, he may relinquiſh it, by conſent of the plaintiff.

The queſtion then is, whether, after the order of October 1783, the attorney was the appellants attorney, ſo as to ſubject him to coſts of the ſuit? And I preſume he was not. He was the attorney of the then defendants. The direct end of his functions, as ſuch, was to finiſh the ſuit, between the real parties to it; and it was certainly collateral to that end, to bring in another perſon, as a defendant; and ſubject him to coſts, who had been diſcharged by conſent of the plaintiff.

The authorities, cited by the appellants counſel, ſhew, that the powers of an attorney do not extend to this collateral matter.

The bill of exceptions ſtates, that the appellant employed Mr. Randolph, and paid the coſts of the tenants; but this is the mere common caſe of one man (perhaps ultimately intereſted) defending a ſuit in behalf of another: His acting, however, being merely voluntary; and the attorney, employed by him, being the attorney of the party to the ſuit, and not his attorney.

It is ſtated, in the bill of exceptions, that the defendants had moved away, before the trial; but it is not ſtated, that this removal had taken place before the agreement, made, by the attorney. So that it may be, that the appellant, who had been diſcharged by conſent of the plaintiff, was again ſubjected, as defendant; when the real defendants were on the premiſes, and reſponſible perſons.

Upon the whole caſe, although perhaps juſtice would be promoted and circuity of action avoided by holding the appellant liable, yet it cannot be done, without infringing the principles of law,

and

and eſtabliſhing a dangerous precedent. Therefore I think the judgment ought to be reverſed.

FLEMING Judge. If the agreement was binding, at all, the plaintiff ſhould have had his judgment ſo entered up, and not have put the appellant, unneceſſarily, to the coſts of another ſuit, about it. But it certainly would be an extremely dangerous principle to lay down, that the agreement of an attorney, in a ſuit between other perſons, ſhould bind a man not before the court, without his conſent or knowledge. I cannot bring my mind to aſſent to ſuch a propoſition. Beſides it appears, to me, that the plaintiff, by taking his judgment againſt the tenants, and purſuing them, with an execution, waived the benefit of the promiſe, if it ever was binding upon the defendant. Upon the whole, I think the judgment is erroneous, and ought to be reverſed.

CARRINGTON Judge. Concurred, that the judgment ought to be reverſed.

LYONS Judge. It is extremely probable, that the attorney was authorized by the defendant to make the agreement; but as no ſuch authority ſpecially appears of record, the queſtion is, whether the agreement binds the defendant, who was no party to the ſuit?

An attorney at law only repreſents the plaintiff or defendant in court, to do ſuch acts as the plaintiff or defendant, if in court, might do himſelf; but he has no right to enter into private or executory contracts. Such a dangerous power ought not to be implied; eſpecially againſt a ſtranger to the ſuit, who had no occaſion for an attorney to repreſent him in it. For if ſo, he might ſubject any perſon he pleaſed (although ſuch perſon was no party to the ſuit) to payment of the debt, damages and coſts: Which would be intolerable. I am therefore of opinion, that the direction, given by the Diſtrict Judge, was wrong; and conſequently

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sequently that the judgment ought to be reversed, and a new trial awarded.

PENDLETON Preſident. It appears by the record that the Judge directed the jury, on the motion of the plaintiff, that Mr. Randolphs agreement was binding on his client Herbert, as being within the line of his duty, to enable the parties intereſted in the title to have a fair trial; although it was proved that Herbert was not preſent at the time, and it was not proved that he ever, verbally or by writing, authorized Mr. Randolph to enter into ſuch engagement.

And the queſtion is, whether this was a miſdirection?

For although I am ſatisfied, that the jury might fairly have preſumed Herbert's conſent either previous or ſubſequent, yet ſince they might have been influenced by the direction, if that was wrong, there ſhould be a new trial.

To come to the real queſtion, it is neceſſary to eſtabliſh ſome poſitions, which appear to me to have influence.

1. That although in ejectments tenants are made defendants, and in ſubſequent ſuits for meſne profits are, in ſome inſtances, conſidered as defendants, yet the landlord, whoſe title is controverted, is in fact the real and eſſential party; and ought in juſtice to pay the coſts of the conteſt, if they fail.

2. Ejectments, although poſſeſſory actions, are uſed to try titles; and being compounded of fiction, the proceedings are more under the power of the Court than ordinary caſes; and that they may, pending the ſuit, judge of the admiſſion, or change of defendants, as may appear neceſſary to juſtice, and a fair trial; that, but for this agreement, Alexander might, in 1786, have moved that Herbert ſhould be reſtored as defendant, ſhewing that he was deceived into a conſent to change him.

This

This anſwers the objection for want of conſideration, ſince, although the promiſe might not import gain to the promiſſor, yet if the other was induced by it, to waive any advantage he might have had, it is a good conſideration.

3. That the agreement was not unjuſt or unreaſonable. It was Herbert's title that was to be controverted; and the expence ſhould in juſtice fall upon him. He employs Mr. Randolph to defend the ſuit, is entered as defendant, and although others were afterwards entered (probably without their conſent, for it is proved they complained of it,) yet it appears that he continued to act as the real defendant by paying their coſts throughout; although the cauſe was not tried 'till 1793, ſeven years after this agreement. Circumſtances of important conſideration, in this liberal action on the caſe.

It is aſked why the judgment was not entered againſt the defendant?

I can aſſign the reaſon;—It might proceed from inattention; or from a confidence in the honor of the defendant; which might induce the plaintiff o ſuppoſe that it was unneceſſary. However, that it was not done, is the breach, which the plaintiff complains of.

The defendant was not preſent, and no ſpecial power appears to have been given to Mr. Randolph to make the agreement: Which comes to the queſtion, whether it is binding on the defendant, as a client, under his general authority?

When a man employs an attorney to defend a ſuit, he confides to him a power to judge of, and purſue the modes of defence throughout, and is bound by what the attorney does in the progreſs of that ſuit, ſo as it be confined to fair proceedings and not foreign to the defence of the ſuit; thus the attornies conſent, to ſtand to an arbitration, will bind his client. 1. *Bac: ab. (new edit.)* 292.

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To the preſent point, a caſe is there cited, from *Salk.* 86, which ſeems to apply.

In that caſe, the attorney agreed to waive a judgment obtained by his client, for want of the defendants joining iſſue, on a replication to the plea of the ſtatute of limitations, and to accept the iſſue. On a motion to compel him to accept it, it was oppoſed, becauſe the plea was a hard one, and the client having notice of the advantage, ordered the attorney to inſiſt upon it. The court ſaid as it was a hard plea, they would not have compelled him, if he had not conſented to waive the advantage; but now they would hold him to his conſent: And as for the client, he was bound by the conſent of his attorney, and they could take no notice of him.

Here the attorney waived, in effect, the change of others as defendants, and agreed to reſtore Herbert his only client, and the real perſon intereſted, to his original liability.

All which was fair; and within his power, as attorney. Therefore I think the judgment ſhould be affirmed. But as a majority of the court are of a different opinion, it muſt be reverſed with coſts.

The judgment was as follows:

"The court is of opinion, that the ſaid judg-
"ment is erroneous in this, that the ſaid court
"miſdirected the jury, reſpecting the writing in
"the bill of exceptions ſtated to have been ſigned
"by Edmund Randolph: Therefore it is conſi-
"dered that the ſame be reverſed &c. And it is
"ordered, that the jurors verdict be ſet aſide, and
"that a new trial be had in the cauſe."

HOME
against
RICHARDS.

76 Va. 507

PENDLETON Presidt. Home and Richards was thought to have been settled by the former decision; but the party desired to be heard on evidence; and the only question now is, whether the mill is injurious. The witnesses are divided; and the County Court and District Court sitting in the neighbourhood have both decided that it was not. The judgment of the District Court must therefore be affirmed.

Judgment Affirmed

Where in a petition for a mill the witnesses are divided whether it will be injurious or not, and the County Court and District Court both decide that it will not, this court will affirm the judgment.

DOWNMAN & *al* Exrs. of DOWNMAN
against
DOWNMAN & *al.*

THIS was an appeal from a judgment of the District Court upon a forthcoming bond given to the plaintiffs, by Rawleigh Downman, George Glascock and William Downman, upon an execution sued out by the plaintiffs against Rawleigh Downman and George Glascock. The motion was made against Rawleigh Downman, George Glascock and William Downman.

Upon the trial of the motion, the defendant George Glascock filed a bill of exceptions stating, "that he moved the Court to admit evidence to "establish, that the original judgment was obtained against Rawleigh Downman and George Glascock deceased, (and not the present defendant)

"who

In a motion on a forthcoming bond, the defendant not allowed to prove, that the execution issued against another person of the same name who is now dead.

Downman vs Downman

"who was bail for the appearance of the ſaid "Downman at the ſuit of the plaintiffs, and that "the execution was levied on the property of "George Glaſcock, the preſent defendant, and "not the property of George Gaſcock deceaſed: "To which the plaintiffs counſel objected; and "that the Court ſuſtained the objection."

The Diſtrict Court gave judgment for the plaintiffs againſt all the defendants; and thereupon Glaſcock appealed to this Court.

Per: Cur: Affirm the judgment of the Diſtrict Court.

Judgment Affirmed.

ALEXANDER *againſt* HERBERT.

After judgment for the plaintiff in ejectment, treſpaſs does not lie againſt one, who was no party to the ſuit, without proving an actual treſpaſs.

ALEXANDER brought treſpaſs *quare clauſum fregit* againſt Herbert, in the Diſtrict Court. The defendant pleaded not guilty; and the act of limitations. Iſſue.

Upon the trial of the cauſe, the plaintiff filed a bill of exceptions ſtating, that the defendant offered in evidence a caſe agreed or ſpecial verdict, in a ſuit between Charles Alexander plaintiff, and Vanpett &c. tenants of Carlyle defendants, relative to a tract of land, (ſetting it forth,) together with the judgment of the General Court, and Court of Appeals thereupon. Alſo a copy of a conſent rule in the General Court, that the ſuit of *Goodtitle* vs *Bryan* and others, * ſhould await the deciſion of the other. Likewiſe a copy of the proceedings in the ſuit of *Goodtitle* vs *Bryan* and others;

* Vid. Ante 498.

Alexander vs Herbert.

others; and of the agreement of Edmund Randolph. * That in caſe judgment ſhould be rendered for the plaintiff, it ſhould be rendered againſt Herbert and Ramſay for their reſpective tenants. That the plaintiff alſo proved, by parol teſtimony, that Randolph was employed by Little for himſelf and Herbert, to defend the titles as well of ſuch of the ſaid defendants in the ſaid ejectments as were tenants to Carliſle Fairfax Whiting, an infant, whoſe guardian Little was, as of ſuch of them as were tenants to John Herbert an infant, whoſe father and guardian the defendant William Herbert was. That the defendant objected, *to all which evidence*, and the court were of opinion, that it ought not to be admitted.

There was a verdict and judgment for the defendant, and from that judgment Alexander appealed to this Court.

CALL for the appellant. If there be judgment againſt the caſual ejector, treſpaſs lies againſt the owner, although not named in the record of the judgment againſt the caſual ejector. 2. *Wils.* 115; and this is ſubſtantially the ſame thing, as the record ſhews, that Herbert was really the true defendant; and perhaps this evidence was only intended as inducement to the proof of the treſpaſs, as the bill of exceptions does not ſtate the whole evidence.

RANDOLPH *contra*. There is nothing to ſhew, that any treſpaſs was committed: and if it was intended as inducement only, the other ſide ſhould have ſhewn it. Herbert was no party to the ſuit. For the agreement of the attorney was not applicable to the caſe; and therefore the whole evidence was irrelevant, and properly rejected.

Cur: adv: vult.

PENDLETON Preſident. There is ſome difference amongſt the Judges in their reaſons, but they

* Ante 499.

Alexander vs Herbert.

they all unanimously agree that the judgment should be affirmed.

15 Grats 180

BRANCH & al.

against

THE COMMONWEALTH.

THE plaintiffs became security for one Benjamin Branch, sheriff of the county of Chesterfield, in a bond in the following words:

"Know all men by these presents, that we Benjamin Branch sen. Benjamin Branch jr. and Edward Branch are held and firmly bound unto Benjamin Harrison Esqr. Governor of this Commonwealth, in the sum of ten thousand pounds current money of Virginia, to be paid to the said Benjamin Harrison Esqr, or to his successor or successors for the use of the said Commonwealth to the payment whereof, well and truly to be made, we bind ourselves jointly and severally our joint and several heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 5th day of November 1784.

"The condition of the above obligation is such, that if the said Benjamin Branch sen. Gent. sheriff of the county of Chesterfield do and shall, truly and faithfully collect, pay and account for all taxes, imposed in his said county, by virtue of an act of Assembly entitled an act for calling in, and redeeming certain certificates, then the above obligation to be void otherwise to remain in full force and virtue." On this bond suit was brought in the name of Edmund Randolph Governor and successor of Patrick Henry

Bond given by a sheriff, through mistake, for the taxes imposed under an expired law, will not bind the securities, for those of the true year.

But the commonwealth's remedy is by action against the sheriff.

Quere: If a sheriff's bond directed to be paid to the treasurer; is good, if made payable to the Governor?

Quere: also, if the sum due from the sheriff was payable in facilities, the jury may not consider the value of the certificates, at the time they ought to have been paid? and whether they are bound to allow the 15 per cent given on motion, or may not judge of the real damage?

Branch vs. Commonw'lth

Henry who was ſucceſſor of Benjamin Harriſon in the General Court in March 1787, for the uſe of the Commonwealth againſt the plaintiffs only without the principal. The declaration ſet out the condition, and charged the breach in the words of the condition. In June term 1797 the ſecurities, (who alone were ſued) pleaded conditions performed, on which plea the Attorney General took iſſue. The jury found a verdict for £ 3193 : 19 : 7; and the General Court gave judgment, for the ſame, with coſts: To which judgment Branch obtained a writ of *ſupersedeas* from this Court.

PENDLETON Preſident. A ſuit is brought in the General Court, by Edmund Randolph, as Governor and ſucceſſor to Benjamin Harriſon, on a bond entered into by Benjamin Branch, as ſheriff of the county of Cheſterfield, with the defendants as his ſureties, dated November 5th 1784 and payable to Mr. Harriſon, as Governor, and his ſucceſſors, for the uſe of the Commonwealth.

The declaration ſtates the bond and condition, which is, that the ſheriff "ſhall faithfully collect, "account for and pay the taxes impoſed in his "county, by virtue of an act of Aſſembly entitled "*An act for calling in and redeeming certain cer-*"*tificates;*" and the breach aſſigned is, that he had not collected, accounted for and paid the taxes impoſed in his county, by virtue of that act.

On the plea of *conditions performed*, and a general replication, the jury find, that Edward Branch ſenr. had not performed the condition of the bond, in the declaration mentioned, but had broken the ſame, as in the declaration is aſſigned; and they aſſeſs the damages to £ 3193 : 19 : 7. For which a judgment is entered; and to that judgment, the writ of *ſupersedeas* has been awarded.

In the record there is an account, in which the ſecurities are made debtors to the Commonwealth for the amount of the certificate tax of 1785; and after giving credit for commiſſions and payments in-

Branch vs Commonwealth

to the treasury, a balance is stated of £ 2777 : 7 : 6 on which 15 per cent damages are charged, and £ 50 added, without mentioning for what; making together the before mentioned sum of £ 3193 19 : 7, the amount of the verdict.

The first objection made to this judgment is, that the bond is payable to the Governor instead of the Treasurer; to whom the act of Assembly directed the bond to be made payable: This objection, with its consequences, the Court thought it unnecessary to consider; since a more material objection to the bond occurs, and which was the ground for awarding the *supersedeas*.

The title of the act, referred to in the condition is, *An act for calling in and redeeming certain certificates*. And the only act, we find with that title, passed in May 1782: Which imposed taxes to be collected in 1783 only; and was not a continuing tax. In May 1784, an act passed, entitled, *An act to revive and amend an act entitled an act for calling in and redeeming certain certificates*, reciting in the preamble, that certificates remained outstanding, and it was necessary to revive and amend that act, but without reference to, or other mention of that act, in the enacting part, the Legislature proceed to impose taxes for the purpose payable annually on the first day of January; and the Courts are directed to take bonds, yearly, of the sheriffs, in £ 10,000 penalty, payable to the Treasurer for the use of the Commonwealth; with condition for the faithful collection, accounting for, and payment of the taxes *thereby imposed*, according to the act *for establishing a permanent revenue*, subject to the regulations, allowances and penalties of that act; which passed in the year 1782.

It was under the new act, that the present bond should have been taken, for the collection of 1785: But by mistake, we suppose, it applies to the act of 1782, for the collection of the taxes in 1783; which Branch the sheriff had nothing to do with.

The

Branch vs Commonw'l

The ſecurities therefore are not bound for his collection in 1785; and the preſent ſuit cannot be ſupported againſt them on this bond: But the remedy of the Commonwealth is againſt the ſheriff (or rather his eſtate, as it ſeems he is dead,) for the amount of the taxes received. On this ground the judgment is wholly reverſed: Which renders a conſideration of the other objections unneceſſary.

On the trial in a new ſuit, two objections occur, as worthy of conſideration. The firſt is, as the taxes were payable in facilities, and the ſheriffs by ſubſequent laws are allowed to diſcharge their arrears by ſuch, whether the jury may not properly enquire, if the facilities were at the time, of equal value with ſpecie, and adjuſt their damages accordingly? The 2d is, whether they are bound to charge the ſheriff with 15 per cent given by law upon motion, or may not, unbound by that law, judge of the damages, which he ought to pay for his default? However theſe points are juſt hinted for conſideration, without the courts meaning to give any influential opinion, either way, upon the ſubjects.

CASES

APRIL TERM

CASES

ARGUED AND DETERMINED

IN THE

COURT of APPEALS

IN

APRIL TERM OF THE YEAR 1801.

MARTIN AND JONES EXECUTORS OF FAIRFAX

against

STOVER.

The Court cannot be called on, to inſtruct the jury to find a verdict for the defendants; although ſome of the evidence is written teſtimony.

THIS was an appeal from a judgment of the Diſtrict Court, affirming a judgment of the County Court. Where Stover brought an action on the caſe againſt the executors of Fairfax, and declared for money had and received *by the defendants* to the plaintiffs uſe. Pleas *non aſtumpſit*, and *non aſſumpſit* within five years. After which the record goes on in theſe words, *which plea the plaintiff by his attorney joined.* A jury was ſworn to try the *iſſue* joined. Who found that the dedefendants did aſſume, in manner and form &c. that the ſaid aſſumption was made within five years &c. and they aſſeſſed damages to 956 dollars 66 cents. For which the Court gave judgment, to be levied of the goods and chattels of Lord Fairfax at the time of his death &c. *Si non* then the coſts &c.

The defendants upon the trial of the cauſe filed a bill of exceptions, which ſtated, that the plain-

tiff

tiff offered, in evidence, a decree of the High Court of Chancery on the 8th day of May 1786, between the repreſentatives of Joiſt Hite, Robert Green, William Duff and Robert M'Coy plaintiffs and the executors and the heir at law of Lord Fairfax and others defendants; which decree is ſet forth in *hæc verba*, and directs that the heir and deviſee of Lord Fairfax ſhould convey certain lands, contained in the memorial of Thomas Marſhall and others, reſerving to all perſons (except the heirs, deviſees and executors of Lord Fairfax) any claim, which they may have in the ſaid lands. The defendants to have liberty of finiſhing, gathering, and carrying off, the then growing crops. That the plaintiff ſhould have an account againſt the eſtate of Lord Fairfax, for the profits of the ſaid lands, from the firſt day of January 1750, allowing for laſting improvements, compoſition money and quitrents (which account was ordered to be made before James Pendleton and others;) and that the plaintiffs ought to be at liberty to reſort to the Court, at any time before the final decree, for any damages, which they might make it appear, they had ſuſtained, in the loſs of any other ſurveys, not then carried into effect.

Alſo a paper purporting to be extracts, from the report of James Pendleton &c. which ſtates, firſt, the improvements on the plaintiffs lot of 38 acres, third rate high land, with the exceptions thereto. 2dly another ſtatement, between others of the claimants and the executors of Lord Fairfax under the decree aforeſaid with the exceptions thereto.

Alſo another decree of the High Court of Chancery November 19th 1787, between the repreſentatives of Joiſt Hite deceaſed and others plaintiffs, and the heir at law and executors, or other legal repreſentatives, of Thomas Lord Fairfax deceaſed and others; which after ſtating that the decree of the Court of Appeals had reſerved,

to

Martin &c. *vs.* Stover.

to Lord Fairfax's executors, the right of shewing, that his estate was not liable for the profits, decides that point against them, giving liberty to except to the items of account. It then states, that the parties consented to suspend the consideration of the account, so far as related to profits arising from lands, concerning which claims had been filed founded upon the titles derived from the plaintiffs or their ancestors, until those claims should be discussed; and that Lord Fairfax's executors waived their exceptions in the case of Holman's orphan from the 3 to the 8 inclusive, and all of a similar nature in other cases. Refuses interest on the profits: and provides for payment of the costs.

Also another decree of the High Court of Chancery between John Hite, Isaac Hite and others plaintiffs, and the executors and heir at law, or other legal representatives of Lord Fairfax defendants, dated May 8th 1786; which dismisses the bill of Soloman Huddle and others (of whom the plaintiff is one) for the *narrow passage* land; which they claimed under the decree of the 9th of May 1786 aforesaid.

Also the deposition of Isaac Hite, that he was present at a meeting at Woodstock, after the commissioners report aforesaid in the suit between Isaac Hite the father of the deponent, and one of the claimants, under Joist Hite of the *narrow passage* land. When there was a conversation relative to a compromise, concerning the rents and profits, mentioned in the decree. That the said Isaac proposed to the defendant Jones, that the persons entitled under the decree would take £ 8000; which Jones refusing, a lesser sum was agreed on by said Isaac; who, afterwards met Jones at the house of the defendant Martin: where Isaac proposed, that the claimants would take £ 7000: To which Martin agreed; and the money was paid to Isaac and the *other persons interested*; whereupon all claims to profits under the

decree

decree were releaſed *by the ſaid Iſaac Hite and the other claimants.* That the deponent doth not believe that his father would have conſented to take £ 7000, had he not ſuppoſed that the defendants were entitled to a credit, for improvements.

Martin &c. vs Stover.

Alſo the depoſition of Ulrich Keener, that, being intereſted in the decrees, he aſked the defendants Jones what he ſhould do? who referred him to George Nicholas. That at another time he aſked Jones, if he ſhould petition the Aſſembly reſpecting the land? That Jones, afterwards, drew the heads of a petition, and delivered them to the deponent.

"That there being no other evidence, the de-"fendants moved the Court to inſtruct the jury to "find for the defendants, the ſaid teſtimony be-"ing illegal and inſufficient, and therefore not en-"titling the plaintiff to his action againſt the de-"fendants; which the Court refuſed to do, and "the jury therefore acted on the ſaid teſtimony "without."

CALL for the appellant. There is no iſſue joined upon the plea of the ſtatute of limitations; for there is no replication denying any of the allegations contained in it.

Neither is the declaration maintained by the evidence. For the count is for money had and received, and there is no teſtimony tending to ſhew, that any money was received by the defendants: Whoſe promiſe, for the debt of their teſtator, would not bind, unleſs it had been reduced into writing, according to the directions of the act of Aſſembly, concerning frauds and perjuries.

But the plaintiff ought not to have been permitted to recover on this declaration; becauſe it was too general, and gave no notice to the defendant of the nature of the diſpute. 2. *Wash.* 172.

Upon

Martin &c. vs. Stover.

Upon theſe grounds the court below would have done right, in inſtructing the jury, that they ſhould find for the defendants; for the plaintiffs claim being ſupported by records, it was the province of the court, and not of the jury, to decide upon them. For wherever matter of law, or the conſtruction of written teſtimony, occurs, it belongs to the court to conſider it. 1. *Term Rep.* 180. *Calvert* vs *Bowdoin* * in this court, 1. *Wash.* 220. *Syme* vs *Butler* executor of *Aylett* † in this court.

WICKHAM *contra.* The doctrine, laſt contended for, is expreſsly contrary to that laid down in *Keel & Roberts* vs *Herbert.* 1. *Wash.* 203 and *Wroe* vs *Washington.* 1. *Wash.* 357, as well as to what was ſaid in the very caſe of *Finch* vs *Thweat*, cited on the other ſide. All which expreſsly ſtate, that the court cannot inſtruct the jury, to find a verdict for one of the parties. Which is conſiſtent with the deciſion in *Calvert* vs *Bowdoin;* for, in that caſe, the court below affirmed, to the jury, that the evidence was ſufficient to maintain the action; and this court reverſed the judgment.

Beſides the court has often decided, that a bill of exceptions cannot be conſidered as a demurrer to evidence; and the argument of the appellants counſel only amounts to an attempt of that kind: For, if his objections were well founded, they ought to have been brought on, by demurrer to evidence, and not by a bill of exceptions.

But there is no ground for the objections; becauſe the improvements made by the plaintiff, were allowed the executors of Lord Fairfax in the account, between them and the Hites; and therefore it was ſo much money received by them to the plaintiffs uſe. As to the exception relative to the iſſue, it is, at moſt, but a mere misjoinder.

CALL

* In 1791 M. S. Reports.
† 1. Call's Rep. 105.

CALL in reply. In *Calvert* vs *Bowdoin*, the court, not only declared, that the court below was wrong in affirming to the plaintiff that the evidence was sufficient, but they went on to nonsuit the plaintiff; and, therefore, decided on the competency of the evidence. Which being written, in that case, as well as in this, that case proves, that the court, and not the jury, should decide the matter of law. In that respect the present case differs from those relied on, upon the other side. In those the evidence was parol; but in this there was a construction of papers. The declaration was too general, and gave no notice to the defendants. Besides it should have been for money laid out and expended, and not for money had and received to the plaintiffs use.

Cur: adv: vult.

LYONS Judge. Delivered the resolution of the court, that the judgment of the District Court should be affirmed; that there was, perhaps, an error in the courts entering the judgment *de bonis testatoris;* but, as it was for the benefit of the appellant, and the other side was not disatisfied, that the appellant had no cause to complain.

Judgment Affirmed.

MORRIS

MORRIS and WIFE.

against

OWEN and WIFE and EDWARDS

et e contra.

Teſtator devises ſlaves and perſonal eſtate to his wife, during widowhood, and then to be divided, at her diſcretion amongſt his children. The wife gave one of the ſlaves, in 1774, to one of his children, by parol gift; It was a good execution of the power as to that ſlave.

The wife could not, under the power appoint to the teſtators grand children:

And the part of the property which was ineffectually appointed, or not appointed at all, remained as part of the reſiduary eſtate of the teſtator undiſpoſed of by his will; and ought to be

THIS was an appeal from a decree of the High Court of Chancery. Where Richard Brown Owen and Suſanna his wife, and John Edwards, brought a ſuit againſt Henry Morris and his wife, Maſon, who was a daughter of Henry Simmons deceaſed; and againſt the grand children of the ſaid Henry Simmons deceaſed.

The bill ſtates, that Henry Simmons by his laſt will deviſed, as follows, "Item I leave to my "dear and well beloved wife Suſanna, during her "widowhood, the plantation whereon I now live, "with the lands below the ſchool houſe branch; "together with the negro ſlaves here metioned, "Moſes, Cupid, Sam, Jemmy, David, Phillis "Phœbe, Palunce, Iſaac, Jacob, Amy with their "future increaſe; likewiſe all my ſtock of all "kinds, after the legacies hereafter mentioned, "and all my houſhold furniture to diſpoſe of among "my children as ſhe thinks proper:" And after other ſpecific legacies, "Item my intent and "meaning is, that my well beloved wife Suſanna "Simmons ſhall enjoy the labor of the ſlaves given "during widowhood, may be during her life, with "their future increaſe, and then to be divided, "at her diſcretion, amongſt my children." That Suſanna Edwards, one of the teſtators children, was living at his death; and that his widow, in purſuance of the power, appointed and diſpoſed of one of the ſaid ſlaves (named Joan) and her increaſe to the ſaid Suſanna Edwards, to take effect, in

divided amongſt his children, according to the ſtatute of diſtributions.

in poſſeſſion, after the death of the ſaid widow, who reſerved, to herſelf, the uſe of the ſaid ſlave and increaſe, during her own life. That the plaintiffs Suſanna Owen and John Edwards are the only children and legal repreſentatives of the ſaid Suſanna Edwards, who died inteſtate.

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That the ſaid Suſanna Simmons, the widow, afterwards, had her will wrote; and thereby, in purſuance of her power, deviſed four of the firſt mentioned ſlaves to the plaintiff Suſanna, and her ſiſter Martha; who is, ſince dead inteſtate, leaving the plaintiffs Suſanna Owen and John Edwards her co heirs. That ſhe, at another time, directed the writer of her ſaid will to inſert ſome other bequeſts, but expreſsly deſired, that juſt mentioned to be retained unaltered. That the writer, through hurry and miſtake in copying the original draft, left it out. That the will was executed, without being read to the teſtatrix; and therefore, although admitted to record ſince her death, is not the laſt will of the ſaid teſtatrix: But, if it is, that ſtill the plaintiffs have ſuſtained an injury thro' accident. That, of all the children of Henry Simmons the teſtator, only Maſon the wife of Morris was alive, at the death of the ſaid Suſanna Simmons, the widow: Who, by her ſaid will, deviſed ſundry of the firſt mentioned ſlaves to the ſaid Maſon; and others of them to the deſcendants of the other children of the ſaid Henry Simmons, except the plaintiffs Suſanna and John; who were deprived by accident as aforeſaid.

That the plaintiffs Suſanna and John are entitled to the firſt appointment of the ſlave Joan; and to the four intended to be deviſed, if the ſaid inſtrument is the laſt will of the ſaid Suſanna Simmons, the widow. Or if it is not; that then they are entitled, under the ſtatute of diſtributions, as repreſenting their mother.

The anſwer of Morris and wife, denies the appointment of the ſlave Joan. Admits the defendants

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ants have heard of the said first will being drawn but not executed, by the said Susanna Simmons. States that a will was, afterwards, duly made, and executed by her; which devised one of Joan's children, by the name of Moses, to the plaintiff John. That the defendants have heard, the testatrix intended to insert a clause in favour of the complainants, but know nothing of their own knowledge, and call for proof, if the allegation is material. Admits that the defendant Mason was the only child, living at the testatrix's death; and submits to the decision of the court. General replication and commissions.

A witness says, that she was present when the will was written: That it was not read to the testatrix; nor did she read it herself.

Another witness speaks to the same effect as the last; and adds, that his father carried the will home. So that the testatrix never saw it, afterwards.

A third witness says, that in 1774 she was called by Mrs. Susanna Simmons to take notice, that she gave Joan (who was then present) and her increase to her daughter Susanna Edwards; reserving her own life therein. That sometime afterwards Susanna Edwards wished to carry the slave home, but Mrs. Simmons refused, saying that she would never give them, out of her own possession, during her life.

A fourth witness says, that in 1792, Mrs. Simmons asked him to write her will; which he did; but no witnesses being present, she deferred executing of it, until another time. That she did not carry a copy of it with her, but the deponent sent it to her a few days afterwards. That in 1793, Mrs. Simmons sent for him, and told him she wished some alterations in the will; which he found still unexecuted. That the deponant wrote the alterations; but his mind was agitated on account of his wife, who lay dangerously ill; and he does not recollect,

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recollect, that he read over the transcribed copies to the teſtatrix. That the clauſes, in the old will, were numbered; and he did the ſame in the new, making them equal; without adverting to the additional bequeſts; whereby, the deviſe to the complainants was omitted. Recites the clauſe and ſays, that the ſlaves, mentioned in it, he knows were once intended for the plaintiff Suſanna, and her ſiſter Martha; although Mrs. Simmons, afterwards altered her mind as to Moſes, and gave him to the plaintiff John.

A fifth witneſs ſays, That after the death of Suſanna Edwards, ſhe heard Mrs. Simmons ſay, ſhe was ſorry ſhe had not given Joan to her, while living; as ſhe feared, ſhe could not give her to her children, now ſhe was dead.

The will of Suſanna Simmons (whereof the defendant Morris was appointed executor) gives a conſiderable proportion of the property to the defendant Maſon. It alſo deviſes ſome trifles to the plaintiff Suſanna, and her ſiſter Martha.

The Chancellor decreed that the parol gift of Joan and her increaſe to Suſanna Edwards was good. And being of opinion that the plaintiffs could not claim her and under the will too, waived deciding the other points relative to the paper being a will; and, if a will, as to the right of correcting it.

The defendants appealed to this Court; and ſo did the plaintiffs.

WICKHAM for the appellants. The parol appointment, if good, is not ſufficiently proved. For there was a previous altercation between Mrs. Edwards and her mother, at the time of the ſuppoſed gift; and after the death of Mrs. Edwards, the mother expreſſed her concern, that ſhe had not given her a ſlave, during her lifetime; as ſhe feared ſhe could not now give it to her children.

Beſides, in order to make a gift effectual, it ſhould be accompanied with a delivery of poſſeſſi-

on;

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on; otherwise, it amounts only to a mere intention, and is liable to be revoked. Want of possession therefore defeats the whole act.

But if the parol gift were complete in all respects it was still void, under the act of Assembly, for preventing fraudulent gifts of slaves.

The claim for a provision under the will cannot be supported. For although it might have been doubtful, whether, if the object of the intended appointment was capable of taking at the time, the court would not have supplied the defective act, yet that question is not worth discussing in the present case; because the objects were incapable of taking. For grand children cannot be substituted for children, under such a power as this. *Alexander* vs *Alexander* 2. *Vez.* 240. *Adams* vs *Adams Cowp.* 651. *Robinson* vs *Hardcastle* 2. *Bro. Ch. cas.* 30, 344. The last case shews, that Morris may take the benefit of the devise, and a share of the surplus too.

CALL *contra.* The gift is proved expressly; and the subsequent declarations of Mrs. Simmons did not destroy it. For it was not in her power to defeat the appointment, when once made.

Possession was not necessary to be delivered. Because the gift was not to take effect, in possession, until after the death of the mother. It was therefore a mere gift of a remainder; which does not require actual tradition of the property. In this case, possession was, in fact, given, as far as the nature of the thing would admit of; because the slave was present, and the gift was attended with every circumstance, which could serve to shew a disposing mind.

The statute respecting fraudulent gifts of slaves has no influence on the question. For the difference is, where an interest passes from the person making the appointment, and where it does not. The first requires the forms of the statute, but the other not. *Pow. Powers* 84. But here no interest passed

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paſſed from Mrs. Simmons; becauſe the deviſe to the children was abſolute, and the mother had only a power of controuling it. So that her power was only collateral, and the exerciſe of it rather tended to diveſt the rights of the others, than to transfer a new intereſt to the appointee.

Beſides it is a caſe not within the policy of the act; which was made to prevent *owners*, from making fictitious gifts of their ſlaves, to the prejudice of creditors and purchaſers. But here Mrs. Simmons was not owner, and therefore the ſtatute did not apply to her. For neither a creditor, or purchaſer, could complain of deception, with regard to property, which ſhe never owned; and with reſpect to which, ſhe was only a third perſon, exerciſing a collateral power over an eſtate, which belonged to another perſon.

The will of Mrs Simmons was void; becauſe neither written by herſelf; nor wholly dictated by her at the time; nor read by herſelf, or to her, after it was written.

But if the court ſhould be of opinion, that the parol appointment was inſufficient, and that the will is good, but the grand children could not be ſubſtituted for children, then the plaintiffs were entitled to their mothers ſhare of the unappointed ſurplus: Which ought to be decreed them.

WICKHAM in reply. If there is any queſtion about the validity of the will of Mrs. Simmons, there ſhould be an iſſue. But there is none, for it was written in her preſence, and by her direction. The gift of the remainder of a ſlave without poſſeſſion delivered, would not be good. In order to render it effectual the donor ſhould deliver the ſlave to the donee, with a ſtipulation, that the donee ſhould redeliver it to the donor, for his life. The act of fraudulent gifts does apply to the caſe. For if a purchaſer were to examine the will of Henry Simmons, and then to ſee a regular transfer from Mrs. Simmons in writing, he would be led

to

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to venture his money; although there might be a secret conveyance by parol, which was unknown to him.

CALL. The ſtatute neither in words or intention embraces a caſe of this kind; for it relates to owners only.

Per Cur: The Court is of opinion, *That* there is no error in ſo much of the decree, as eſtabliſhes the verbal gift, made by Suſanna Simmons to Suſanna Edwards, one of the children of Henry Simmons, of the negro girl Joan, and her increaſe; and as adjudges the ſame a good appointment of the ſaid ſlave to the ſaid Suſanna Edwards, purſuant to the power given to the ſaid Suſanna Simmons, by the will of her huſband Henry Simmons in the decree and proceedings mentioned; nor as orders the appellant Henry Morris, to deliver to the appellees, and the ſaid David Jackſon, the ſaid ſlave Joan, and her increaſe; and to account for their profits: *But* that there is error in ſo much of the ſaid decree as declares and determines, that the appellants are not entitled to any other part of the eſtate, which the ſaid Henry Simmons, empowered his widow, to diſtribute amongſt his children: This Court being of opinion, *That* ſo much, of that part of the ſaid Henry Simmons's eſtate, as was not, *by proper act or deed*, diſtributed, by the ſaid Suſanna Simmons, to and amongſt the children of the ſaid Henry Simmons, in execution of the power aforeſaid, remained as part of the reſiduary eſtate of the ſaid Henry Simmons, undiſpoſed of by his will; and ought to be divided amongſt all his children, according to the directions of the ſtatute, made for the diſtributions of inteſtates eſtates: *That* the ſaid Suſanna Simmons had no authority, under the power given by the ſaid will, to diſtribute, or appoint, any part of the ſaid eſtate to *grand children*, or to any perſon or perſons, other, than the children of the ſaid Henry Simmons: *That* the appellants are entitled to a diſtributive ſhare of the reſiduary

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residuary estate of the said Henry Simmons their grand father, in right of their mother Susanna Edwards deceased, who was one of the Children of the said Henry Simmons; and that, after an account thereof taken, their distributive share, or shares, thereof, should be decreed to them, according to law. *Therefore* so much of the said decree as is before stated to be erroneous, is to be reversed, with costs; but the residue is to be affirmed: *And* the cause is to be remanded, to the High Court of Chancery, for further proceedings to be had therein, according to the principles of this decree.

RICHARDSON.

against

JOHNSTON

RICHARDSON'S administrators brought suit in 1795, against W. Johnston executor of Richard Johnston deceased, and declared upon a joint bond given by Charles Tinsley and the said R. Johnston to Richardson in his lifetime; dated the 4th of *May* 1771; and conditioned for payment by Tinsley only. The defendant plead payment; and the plaintiff took issue. Verdict and judgment for the plaintiff: Which were afterwards set aside during the same term; and the defendant withdrawing his former plea, and taking *oyer* of the bond and condition, for plea said "that "the plaintiffs ought not to have their said action "against him; because he saith, that the said "Richard Johnston departed this life on the "day of 17 the said Charles Tinsley his "co-obligor being then in full life; whereby the "action survived to the said Tinsley, and the said "Johnston and his executors became wholly dis-

"charged

Plea allowed to be amended after a trial and verdict for the plaintiff.

Joint bond anterior to the act of 1786; the death of one obliger, before that act, discharges his executors.

Richardson vs Johnston.

"charged therefrom: Wherefore he prays judg-"ment &c."

The plaintiff demurred to the plea; and the defendant joined in the demurrer.

The plaintiff also filed a bill of exceptions to the courts opinion on their setting aside the verdict and judgment; which stated, "That the defend-"ant moved to set aside the verdict, and award a "new trial, for the purpose of introducing by way "of amendment to his former plea of payment the "fact as stated in the affidavit of James Turner "hereunto annexed:" Which affidavit is in these words, to wit: 'These are to certify that James 'Turner came before me the 9th day of Septem-'ber 1797, and made oath, that he went to the 'town of New Castle to live May 1772, and that 'at that time Colonel Richard Johnston, late resi-'dent of the said town, was dead; and that 'Charles Tinsley, merchant of the said town, was 'then living, and to the best of his knowledge di-'ed about two years afterwards. Given under 'my hand the day and year above writen.

JOHN BARRET.'

"Of which fact, and that the obligors to said bond were jointly and not severally bound, the defendants counsel, it is admitted by the plaintiffs, was ignorant, until the trial of the cause. To which motion the plaintiffs objected, but was overruled by the Court."

The District gave judgment for the defendant upon the demurrer, and the plaintiffs appealed to this Court.

DUVAL for the appellant. The District Court ought not to have granted a new trial. The ignorance of the counsel was no cause for it; 3 Burr. 1743. There is no more reason for allowing the new trial here, than there would be for allowing the act of limitations, or a tender after a judgment by default; because the justice of the

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caſe was with the appellant, as the debt was an honeſt one, and the attempt is to get rid of it, by a rigid rule of law. 5. *Bac.* 47. *Salk.* 647. Beſides the length of time, will now afford a preſumption againſt the bond.

SMITH *contra.* The debt was diſcharged, againſt his executors, by the death of the co-obligor; and therefore the cauſe of action was entirely gone. It was conſequently right, that the party ſhould have an opportunity of ſhewing the death. But it appears, upon the face of the declaration, that the co-obligor was dead; and therefore it was ſufficient cauſe to arreſt the judgment. Conſequently this Court, proceeding to give ſuch judgment as the Diſtrict Court ought to have given, may without regard to the bill of exceptions, arreſt the judgment now, and thus put an end to the cauſe.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court to the following effect. That the plea of payment was improperly put in, by the attorney inſtead of pleading the diſcharge. That this was done through inadvertance, and for want of information. Conſequently, that the Court was right in granting the new trial, and allowing the plea; which went to exonerate the defendant altogether, as the death of his teſtator diſcharged his eſtate, from the obligation.

Judgment Affirmed.

CUNNINGHAM

CUNNINGHAM *against* HERNDON.

If the declaration be bad, the defendant ſhould demur, or move in arreſt of judgment. But he cannot, upon the trial, object to the evidence in ſupport of it (provided it agrees with the declaration,) merely on the ground of its inſufficiency to maintain an action.

CUNNINGHAM & Co. brought debt againſt Herndon; and declared for that, "Whereas "the ſaid defendant on the 18th day of Auguſt "1775, at the county aforeſaid, by his certain "writing, acknowledged he had ſettled his ac- "count with William Reid of Frederickſburg, and "remained indebted to him in the balance of "£ 88:7 current money to be paid when he the "ſaid defendant ſhould be thereunto required; "and whereas the ſaid William Reid on the day "and year aforeſaid, by his certain writing, on "the ſaid bill of ſettlement aſſigned the ſame to "the plaintiffs by directing the ſaid acknowledg- "ment of the ſaid defendant for the ſaid £ 88:7:0 "to be underſtood as due to the ſaid plaintiffs for "tranſactions, by him the ſaid William Reid on "account of them the ſaid plaintiffs done. By "reaſon whereof, an action hath accrued to the "ſaid plaintiffs to demand and have of the ſaid de- "fendant the ſaid £ 88:7;0. Nevertheleſs &c." Plea *nil debit;* and iſſue.

Upon the trial of the cauſe, the plaintiffs filed a bill of exceptions which ſtated, that the plaintiffs offered in evidence to ſupport the iſſue joined on their part, a writing in theſe words, 'Spotſylvania Auguſt 18th 1775. This day ſettled my 'account with Mr. William Reid merchant in 'Frederickſburg, and find the balance due from 'me to him, eighty eight pounds ſeven ſhillings current money. Witneſs my hand the day and 'year above written. Edward Herndon.'

Alſo a writing, by the ſaid William Reid on the ſame paper as the above, in theſe words, "18th of Auguſt 1775. The above acknowledg-

"ment

"ment of Mr. Edward Herndon for £88:7, is to "be underſtood due to Meſſrs. William Cunning- "ham & Co. being for tranſactions by me on their "account, William Reid."

Cunningham vs Herndon.

To which the defendant, by his counſel objected; whereupon the matter being refered to the Court, they determined, that the ſame ſhould not be given in evidence. Verdict and judgment for the defendant.

The plaintiffs appealed to this Court.

ROANE Judge. After ſtating the caſe proceeded thus:

I will conſider the plaintiffs, on this declaration, as ſtanding in two different characters. 1. As aſſignees of W. Reid. 2. As real owners of the debt ſued for.

Under the firſt point of view, the teſtimony was improperly rejected; under the ſecond, the indorſement of W Reid was illegal teſtimony; and therefore rightly refuſed. But, in either caſe, the judgment rendered for the defendant is ſuſtainable.

In the firſt view, the memorandum of ſettlement and indorſement of Reid, were proper teſtimony, and ought to have been admitted; becauſe there is a ſubſtantial, if not a literal correſpondence, between them and the papers deſcribed in the declaration, and if the caſe, made in the declaration, is not ſuch an one as to juſtify a final judgment, for the plaintiff, that was not the proper time for the court to have made ſuch a deciſion. But when the Inferior Court has rendered a final judgment for the defendant, if there be an incurable defect in the declaration, this court will ſuſtain the judgment; although, at a prior time, ſuch Inferior Court erred; to wit, in rejecting the teſtimony offered, at the trial.

There

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There is an incurable defect in the declaration, conſidering the plaintiffs, as ſuing in character of aſſignees. The declaration indeed avers, that Reid aſſigned the memorandum of ſettlement to the plaintiffs. But this averment does not take, from the court, their province of deciding, whether there was, in point of law, an aſſignment or not: And, in making this deciſion, the court will look into the whole ſtatement, in the declaration. The latter part of the caſe ſtated, is a complete *felo de se* of the former; it ſhews that Reid was not owner of the debt, but a mere agent of the plaintiffs; and that what the plaintiffs have termed an aſſignment is merely a memorandum by him, that the debt acknowledged is the property of the plaintiffs. An aſſignment preſuppoſes a property in the aſſignor, and a recovery may be had againſt him on the failure of the obligor, on the ground of a debt due by him to the aſſignee; of which, the draft, called the aſſignment, is an evidence. Theſe principles were ſettled by the caſe of *M'Kie* vs *Davies* 2 *Wash.* 279; and telling the preſent tranſaction by them, the idea of an aſſignment is clearly refuted. It is moſt clear, that Reid had never had a property in this debt; never meant to transfer a debt of his own to the plaintiffs; but merely to inform the plaintiffs, that this debt was their property; and he cannot be inferred, from his memorandum to have owed the plaintiffs a ſum, correſponding with the ſum drawn for, but was merely their agent or factor in the whole buſineſs. If too the agent Reid ſhould ever be ſued by the appellants, in the event of the inſolvency of the appellee, on the ground of a debt imported to be due by the aſſignment, the declaration, in this action, would be a complete bar thereto; inaſmuch as it ſhews that no debt was due, nor can be inferred to be due, from him to the appellants, from the terms of his indorſement taken altogether.

The caſe, made in the declaration, ſhews, clearly, that there was no legal aſſignment of the debt

in

in queſtion; and, on this ground, judgment could never be rendered for the plaintiffs, upon this declaration.

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This view ſuperſedes the neceſſity of conſidering, whether the paper, in queſtion, is in fact aſſignable or not, under our act of Aſſembly. A queſtion, upon which, I ſhall now paſs no opinion.

Another view, under which the plaintiffs may be conſidered, on this declaration, is as real owners of the debt. As the latter appears to be really the caſe, although in form they may perhaps entitle themſelves as aſſignees, the declaration might probably be ſuſtained on the authority of *Byrd* vs *Cocke* 2. *Waſh.* 232; and on thoſe liberal principles of deciſion, which diſregard technical formality, for the ſake of ſubſtantial juſtice.

But the queſtion ſtill recurs, whether, in this view of the ſubject, the Diſtrict Court did right in rejecting the teſtimony offered? And I am of opinion, they certainly did right, in ſo far as they rejected the memorandum of W. Reid. Keeping the idea of an aſſignment out of view, for the preſent, W. Reid, as to the matter of this indorſement, can only be conſidered as a witneſs; and whether his evidence was, or was not, relevant, or neceſſary to corroborate the ſettlement of the appellant Herndon, it is clear that before it could be received, by the court, it ought to have been taken, under the cuſtomary ſanction. This not being done, his memorandum being, in fact, a mere aſſertion of an individual, it was rightly conſidered, by the court, as inadmiſſible.

In either view of the caſe therefore, I think the judgment of the Diſtrict Court was right, and that it ought to be affirmed.

FLEMING Judge. The note in queſtion amounted to a promiſe; and the memorandum was

Cunningham vs Herndon.

a good assignment; to constitute which no particular words are necessary. I think therefore that the plaintiff was intitled to his action; and I am equally clear that the paper should have been given in evidence. For it is enough, if the plaintiff shews a good cause of action, and the evidence corresponds with the statement made in the declaration; which was the case in the present instance. I am therefore of opinion, that there was error in refusing the evidence; and that the judgment should be reversed, the cause sent back for a new trial, and a direction given to admit the evidence.

CARRINGTON Judge. At the stage at which the cause was in the court below, I think it was improper for the court to decide, as to the validity of the note, or of the assignment; of which there was a *profert* in the declaration. They were the evidence declared on, and therefore the plaintiff ought to have been permitted to offer them to the jury, in support of it. Whether they would have maintained the action, if there had been a demurrur to the evidence, or a motion in arrest of Judgment, is unnecessary to be now decided; as the cause had not advanced to either of those stages, but its progress was prematurely arrested. In this view of the subject, the cases of *Brown* vs *Putney* 1. *Wash.* 202, and *Wilcox* vs *Higgins* 2. *Stra.* 907 concerning the act of limitations, can have no application. Upon the whole I am of opinion, that, as the case comes up, the District Court erred in suppressing the paper; that therefore the judgment should be reversed; and the cause sent back for a new trial, with instructions to admit the evidence; so that the plaintiff may have an opportunity of proving the note if he can.

LYONS Judge. If the declaration was bad, the defendant should have demurred, or taken advantage of it by pleading. But he could not, upon the trial of the cause, object to the introduction of the evidence, if it was consistent with the declaration. If the action was not sustainable, he

should

ſhould have demurred to the evidence, or moved in arreſt of judgment; but he could not prevent the plaintiff from proving his declaration, by teſtimony, which correſponded with the allegations of it.

I concur therefore with the two judges, who are for reverſing the judgment; and ſending the cauſe back for a new trial, with directions to admit the evidence.

The judgment was as follows:

"The Court is of opinion, that the ſaid judgment is erroneous in this: *That* the ſaid Court refuſed to admit the writings, in the bill of exceptions ſtated, to go to the jury as evidence; which were proper evidence, on the iſſue; and the appellants ought to have been allowed to prove them. Therefore it is conſidered that the ſaid judgment be reverſed &c. and it is ordered, that the jurors verdict be ſet aſide, and that a new trial be had in the cauſe; on which the ſaid writings are to be allowed to go as evidence to the jury, on proof of the execution thereof."

SKIPWITH
against
CLINCH.

Rule as to new appeals.

IN this case the Chancellor had made a decree at the September term 1800 upon a forthcoming bond, from which decree Skipwith appealed to this Court. The Court of Chancery allowed time for giving the appeal bond, which extended beyond the last term of this court. And it being a case for delay, Wickham for the appellee, now moved to bring it on, contending that this ought to be considered as the second term after granting the appeal. For the time allowed Skipwith for giving the bond, was for his own benefit, and therefore, that he should not be permitted to turn it to the disadvantage of his creditor.

But the court, after enquiring into the practice, denied the motion; being of opinion, that this was to be considered only as the first term after the appeal.

RANDOLPHS Ex'rs.

against

RANDOLPHS Ex'rs.

THIS was an appeal from a decree of the High Court of Chancery, where Thomas Randolph ſurviving executor of John Randolph deceaſed, brought a bill againſt David Meade Randolph and others executors of Richard Randolph deceaſed, ſtating,

An account of ſtale tranſactions refuſed.

Eſpecially where it appeared, that a bond was given by the plaintiffs teſtator to the defendants teſtator, after the tranſactions took place.

That Richard Randolph, the elder, died in 174 leaving a widow, ſome daughters, four ſons, to wit: Richard (his eldeſt ſon, and one of his executors,) Brett, Ryland and John; all of whom are ſince dead. That the teſtator deviſed lands and ſlaves of conſiderable value to his ſaid ſons; and being poſſeſſed of a great perſonal eſtate, and having debts outſtanding, more than ſufficient as he ſuppoſed to pay his debts, as well as of a large tract of land in Bedford, containing upwards of 50,000 acres, *then unpatented.* He deviſed all the *reſiduum* of his eſtate (which included the ſaid tract of unpatented land) to be equally divided between his ſaid four ſons.

That the ſaid Richard, the ſon, qualified as executor; received the profits of a conſiderable part of the eſtate allotted to the younger ſons; collected the debts due the teſtator; and ſold the ſaid tract of unpatented land; but never made up any account of his adminiſtration; nor did he ever account, with his brothers, for their proportion of the reſiduary eſtate, although conſiderable.

That the ſaid John Randolph being very young, at the death of the teſtator, lived with the ſaid Richard his brother, for many years; and ſome time after he came of age. That the ſaid Richard received the rents, and profits, of his eſtate, furniſhed

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Randolphs.

niſhed him, with ſuitable and neceſſary things, and probably made him advances in money.

That, on the 3d of April 1764, the ſaid John Randolph gave the ſaid Richard his bond, for £635:15:1 current money; but the plaintiff has reaſon to believe, that this bond did not include a full and final ſettlement, of all their accounts, to that period; but was rather intended as an evidence of the advances made, by the ſaid Richard to the ſaid John; ſubject nevertheleſs to a further ſettlement, when the accounts of the eſtate of the ſaid Richard Randolph, the elder, ſhould be made up. For the ſaid John Randolph having entered into an agreement, with Meſſrs. Capel and Ozgood Hanbury, of London, for a loan of £4000 ſterling, the ſaid John Randolph, out of that ſum, paid the ſaid Capel and Ozgood Hanbury, the ſum of £960:13:6 ſterling, due them from the eſtate of Richard Randolph, the elder, and chargeable, of courſe, to his executor; with whoſe privity and approbation the ſame was paid; and the plaintiff has no doubt, the ſame was to be accounted for to him, at the final ſettlement.

That this payment is proved by a mortgage from the ſaid John Randolph to the ſaid Capel and Ozgood Hanbury, dated the 22d of February 1768.

That the ſaid John Randolph and the ſaid Richard Randolph his brother being both dead, a ſuit was inſtituted in the General Court, by David Meade Randolph a ſon and one of the executors of the ſaid laſt named Richard Randolph, upon the bond aforeſaid, which had been aſſigned him by his father, in his lifetime; but the plaintiff knows not for what conſideration. In which ſuit, the ſaid David Meade Randolph, afterwards, obtained judgment in the Diſtrict Court, in April 1790, for £1271:10:2 and coſts: Which he threatens to inforce without any deduction; although the ſaid John Randolph never received any ſatisfaction for the ſaid £960:13:6, paid Capel and Ozgood Hanbury as aforeſaid, as the plaintiff believes;

nor

nor hath the ſaid Richard Randolph's adminiſtration account ever been made up, ſo as to aſcertain, whether any thing was due thereout, to the ſaid John Randolph.

Randolphs *vs* Randolphs.

That the plaintiff hath requeſted the ſaid David Meade Randolph to account concerning the adminiſtration aforeſaid; to give credit for the ſaid £ 960: 13: 6 ſterling, paid Capel and Ozgood Hanbury; and to let a full and fair ſettlement, of all accounts between their teſtators, take place. But he refuſes to do ſo, inſiſting that the ſaid ſum of £ 1271: 10: 2 is not ſubject to any deduction, and that the ſaid John Randolph had no ſett off againſt the ſaid bond; although the plaintiff alledges, that the bond having lain more than twenty years, without any claim made thereon, affords a ſtrong preſumption, that ſome right to a diſcount did exiſt: And, as the payment, to the ſaid Capel and Ozgood Hanbury, was made, ſome years ſubſequent to the date of the ſaid bond, and to diſcharge a debt properly payable by the ſaid Richard in his character of executor, out of the eſtate of his teſtator, which was amply ſufficient for the purpoſe; as the account of his adminiſtration had never been made up; and as the receipt granted to the ſaid John Randolph, for the money paid to the ſaid Hanbury's expreſſes (as the plaintiff hath been informed and believes) that it was to diſcharge a debt due from the eſtate of Richard Randolph, the elder, and was ſubſequent, in date, to the bond, the plaintiff has no doubt but that ſome ſuch ſettlement, as above mentioned, was to have been made between the ſaid John and Richard; which might have been prevented by the death of John, and the ſucceeding confuſion occaſioned by the war; and might have been further interrupted by miſplacing of the receipt the exiſtence of which the plaintiff doubts not, and truſts he ſhall be able to prove, as well as the payment of the ſaid £ 960: 13: 6 ſterling in manner above mentioned.

The

Randolphs vs Randolphs.

The bill therefore prays a full anſwer to the premiſes, interrogates the defendant David M. Randolph, as to the conſideration of the ſaid bond, the payment of the ſaid £ 960: 13: 6 ſterling, and the conſideration of the aſſignment to himſelf: It likewiſe prays a full ſettlement, of all accounts between the ſaid John and Richard, as well thoſe of a private nature, as thoſe which may relate to the eſtate of Richard Randolph the elder: that credit may be allowed the ſaid John Randolph, for the ſaid £ 960: 13: 6 ſterling, with intereſt from the time of payment: that the defendants may make up an account of their teſtators adminiſtration, on the eſtate of the ſaid Richard Randolph the elder, and credit be allowed the ſaid John Randolph for his proportion of the reſiduary eſtate if any; that the ſaid David Meade Randolph may be enjoined from further proceedings, on his judgment; and for general relief.

To this bill Jerman Baker made an affidavit, "That ſome time previous to the late war, about "the year 1774; he thinks he was appointed, by "an order of Henrico Court, a commiſſioner to "examine the account of the adminiſtration of "Richard Randolph upon the of his fa-"ther Richard Randolph the elder. Progreſs "was made in the ſettlement; but in conſequence "of the interruption occaſioned by the war, the "ſame was not finiſhed; nor doth he believe, that "an account of the adminiſtration aforeſaid was "ever made up, and rendered by the ſaid Rich-"ard Randolph; nor any ſettlement made with "his Brothers Brett, Ryland and John, who were "intereſted in the eſtate of Richard Randolph the "elder."

The anſwer of David Meade Randolph ſtates, That the ſaid Richard Randolph his father, a little before his death (in conſequence of the defendant having been his ſecurity for ſeveral ſums, and alſo for his adminiſtration of Ryland Randolph's eſtate, and having alſo paid for him £)

aſſigned

assigned the said bond to the defendant, on the 3d of March 1785, to the use, expressed in the assignment, but the same was intended as an indemnity to the defendant for his securityships and advance aforesaid. That his father was executor, and he believes sole acting executor of the said Richard Randolph the elder; but believes the said John was entitled to nothing or very little, as one of the residuary legatees, for the defendant has often heard his father say, that after the testators debts were paid, there was nothing to divide; except a debt due from Colonel R. Bland and from his brother Brett Randolph, the amount of which the defendant does not know, but the same were never received. That the defendant knows not whether the Bedford lands were ever patented, or sold by his father; in short he knows nothing about them; but when the defendant was in that county he understood they were barren, and not worth 6d. per acre. That the said John lived with the defendants father, until his marriage; which was some time after he came of age. That he was an expensive young man, and the testator furnished him with very large sums of money from time to time; and imported goods for him, to a great amount, from year to year, as appears by the annexed account, from the books of the said Richard; and by which, in 1762, there was a balance due the testator of £ 45: 15: 7. That the said account is carried down to 1769, when the balance due was £ 641; 13 11½ and, by inspecting the account; it appears, that the said Richard continued to make advances to him, and has credited him for considerable sums, but the balance almost always continuing nearly the amount of the bond. That it is probable the said Richard never may have made up any account of his administration, on the estate of the said Richard the elder; but the said John, who had attained his age of 21 years, some time before the bond was given, never would have entered into it, if he had not been satisfied that his brother Richard, as executor of

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his father, owed him nothing; and at this diſtance of time a Court of Equity will preſume ſo, unleſs there was any ſuggeſtion, or proof of undue influence; for which there is not the ſmalleſt ground, either from the character, or conduct of the ſaid Richard. That, although, the eſtates, deviſed the ſaid John, were conſiderable, yet it is well known that Virginia eſtates, at a diſtance are not profitable; that the ſaid Richard's under his own eye were not ſo; and it is probable, that the expences of the ſaid John were more than the profits of his eſtate. That as to the length of time, which elapſed after the date of the bond, before any ſteps were taken, with reſpect thereto, it was to be obſerved, that the ſaid John was the brother of the ſaid Richard; who always had an averſion to quarrel, as well as to bring ſuit againſt his brother. Beſides eight, or nine years of the time were during the war; near ſix of which are, by the act of Aſſembly, but one day; ſo that no concluſive argument is to be drawn, from the length of time. That, inſtead of a deduction for the £ 960: 13: 6 ſterling, the defendant is adviſed a contrary concluſion ought to be drawn; becauſe the ſaid John Randolph muſt, at the time of executing the ſaid mortgage, have been, at leaſt, 26 or 27 years of age; had been ſome years married, and muſt have known, whether it was incumbent, on him, to have ſecured that ſum, to the Hanbury's, and therefore took upon himſelf to pay the amount of his fathers debt to the houſe? Which aſſertion is corroborated by an account from the houſe of John Hanbury and company dated in 175 ; by which, there was then due to the ſaid houſe, a balance of £ 493: 10: 8 from the eſtate of the ſaid John, ariſing as the defendant preſumes for neceſſaries imported for the uſe of his eſtate; and it cannot be preſumed, that the ſaid John would have given his bond for £ 600, if nothing was due from him; and afterwards mortgaged his eſtate, for upwards of £ 900 ſterling, if not due alſo. That the facts, ſtated in the bill, appear to be the ſuggeſtions of

Jerman

Jerman Baker; who knew a great deal of the tranſactions between the ſaid John and Richard; and to whom the defendant ſhewed the bond before he brought ſuit. That Baker looked at it for ſome time, as if endeavouring to recollect the tranſaction, and then obſerved, that he was ſatisfied the money was due, and muſt be paid; or words to that effect.

Randolphs vs Randolphs.

In June 1796 general replication and commiſſions:

In January 1797 the cauſe was ſet for hearing.

There is, in the record, a copy of the will of Richard Randolph, the elder, dated the 18th of December 1747; and proved, and recorded in June 1749.

There is alſo a copy of the mortgage from John Randolph to the Hanbury's, dated the 22d of February 1768. Which reciting, that, "Whereas the ſaid Capel and Ozgood Hanbury have agreed and undertaken to advance and lend unto the ſaid John Randolph, the ſum of four thouſand pounds ſterling money of Great Britain (including the ſum of fifteen hundred and ſeventy four pounds, ſix ſhillings and ſix pence ſterling money, due from Ryland Randolph Eſquire, to the ſaid Capel and Ozgood Hanbury; and alſo the ſum of nine hundred and ſixty pounds thirteen ſhillings and ſix pence ſterling money to them due, from the eſtate of Richard Randolph of the county of Henrico Eſquire, deceaſed." Proceeds thus, "Now this indenture witneſſeth, that for and in conſideration of the ſaid agreement, and alſo in conſideration of the ſum of twenty ſhillings to the ſaid John Randolph by the ſaid Capel and Ozgood Hanbury in hand paid &c." It was re-acknowledged in October 1768, and again in November 1768. In May 1768, it was recorded, in the General Court.

The laſt account ſpoken of, in the anſwer, is in theſe words:

"Dr.

Randolphs vs Randolphs.

"Dr. The eſtate of Col. Richard Randolph on account of John Randolph. Cr.

1751 May	To balance of John Randolph's account then ſent him.	493 10 8

To intereſt from ſaid date till paid.

(E. E.) J. HANBURY, & Co.

February 20th, 1752."

In March 1799, the Court of Chancery, upon a hearing, diſmiſſed the bill, with coſts. From which decree, the plaintiff appealed to this court.

RANDOLPH for the appellant. It does not appear that there ever was a ſettlement of the executors and guardians accounts; which ought to have been done, as there was a large body of lands, and a conſiderable reſiduary eſtate appropriated to the purpoſe, of paying the teſtators debts; which muſt not only have been ſufficient for that purpoſe, but probably left a ſurplus. Added to which, the profits, of John Randolph's own eſtate, muſt have been very great, during his long minority; and it ought to be ſhewn, how they were diſpoſed of. Beſides the great payment made to the Hanburys, on account of the eſtate, ſeveral years after the bond was given, entitled the plaintiff to a diſcount for that ſum; and ought to have been ſo applied. At leaſt a further opportunity, of enquiring into the matter, ought to have been afforded the plaintiff, by ſending the cauſe to account, before a commiſſioner. The antiquity of the bond, moreover, affords a ſtrong preſumption, of its being ſatisfied. Otherwiſe, it is not eaſy to conceive, why it was ſuffered to remain, ſo long, without payment having been enforced, or even demanded. The account in the record related to another John Randolph, and not to this John Randolph; who, on account of his tender years, could have had no account againſt him.

CALL

Randolphs *vs* Randolphs.

CALL and WICKHAM *contra*. An account would have been improper, after so great a distance of time, when the circumstances must all have been forgotten, and the evidences lost. For as on the one hand the payments cannot be known, so on the other, the property, debts and transactions, must have escaped all recollection: Insomuch, that perhaps the delivery of a single slave, or any other article could not now be shewn. The Court therefore will not, at this day, indulge an inquiry into such stale matters; 4 *Bro. ch. rep.* 258. Which case expressly applies. For here the testator has lain by, and suffered the estate to be distributed, and then the appellant, in the language of the judge there, comes forward to demand an account, after the right has been so long *stept* on, of transactions originating above half a century ago. The granting of which request would expose the appellee to every possible inconvenience. But the bond is a presumption of a settlement, until the contrary is shewn; and the long acquiescence afterwards confirms the presumption; especially as the mortgage, itself, would have been an incitement to demand it. Added to which, Richard Randolph, whose character is not impeached, assigned this bond to his own son as a security; and it is not probable, that he would have done so, if he had not considered it as actually due. The mortgage was a transaction between John Randolph and the Hanburys; and therefore, strictly speaking, is no evidence against Richard Randolph: But allowing it the fullest force, yet it was probably no more than John Randolphs own share of the debt due from the estate; and although the mortgage states it as money *borrowed*, that was merely the mistake of the writer, and proves nothing. Besides the bond is due to Richard Randolph in his own right, and the sum, mentioned in the mortgage, was a debt due from the estate. So that the mortgage could not form a proper discount against the bond. The uncertainty, in all these matters, is alone sufficient

Randolphs vs Randolphs.

ficient, to repel the application for an account; becauſe it proves how unſatisfactory the enquiry muſt be, and to what difficulties it would expoſe the parties againſt whom it is prayed. The antiquity of the bond was a proper ſubject for the conſideration of the jury; and they have decided it in favor of the creditor. Beſides the delay, to ſue upon the bond, is accounted for, by the anſwer; and was owing to the family connection, and the friendſhip between the brothers.

RANDOLPH in reply. If the appellee would be under any difficulties in taking the account, it is the fault of his own teſtator; who ought to have come to a ſettlement, at an earlier period. But as it is not ſtated that any vouchers are loſt, it does not appear that there would be any inconvenience in taking the account. If it were true, that the bond was given for tranſactions between John Randolph and Richard Randolph, yet the debt, taken up by the mortgage, was more than ſufficient to pay it, and ought ſo to be applied. The caſe from 4. *Bro.* inſtead of repelling the application for an account, contains principles expreſsly proving our right to it.

HAY on the ſame ſide. Inſiſted, that it was plainly to be infered, from the whole complexion of the caſe, that the bond was given on account of tranſactions relating to the eſtate; and if ſo, then that the mortgage was a clear ſatisfaction of it.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court. *That* there was no error in the decree; and therefore that it was to be affirmed.

Decree Affirmed.

FIELD

FIELD

against

CULBREATH.

FIELD filed a *caveat* in the Land Office againſt any patent iſſuing to Culbreath. Which caveat is in theſe words: "Let no patent iſſue to "Thomas Culbreath, for thirty eight, and a quar- "ter acres of land, ſurveyed for him the thirtieth "day of October one thouſand ſeven hundred and "eighty eight, by John Holloway, aſſiſtant to Sa- "muel Deaman ſurveyor of Mecklenburg county, "and bounded according to the ſaid ſurvey as fol- "lows: Beginning at a white oak on Graſſy "creek, from thence, North thirty nine degrees "Eaſt ſixty ſix poles to corner pointers in John "Clark's line, from thence, South eight degrees "Eaſt one hundred and eighty four poles to Wil- "liams's corner poſt oak in Thomas Field's line, "from thence, North eighty three degrees Weſt "fifty ſix poles to a maple on Graſſy creek, thence "down the ſame, as it meanders, to the begin- "ning: And now caveated, and claimed by Tho- "mas Field, of the ſaid county of Mecklenburg, "for the following reaſons:

In 1788 C. located a land office treaſury warrant, iſſued 29th Nov. 1783, on lands on the Eaſtern waters; F. (who upon the trial, did not prove any title, in himſelf, to the lands located) entered a caveat, in the land office, againſt a patent to C. The Diſtrict Court gave judgment in favor of C. and this Court affirmed it.

What is a good Entry.

"Firſt, becauſe all the land contained in the "ſaid ſurvey and plot is the proper eſtate of the "ſaid Thomas Field in fee ſimple, and is includ- "ed within his ancient and known lines, duly "proceſſioned, and in quiet and peaceable poſſeſſi- "on of the ſaid Thomas Field, and thoſe whoſe "eſtate he hath and claimeth under the deviſe of "his late father Theophilus Field deceaſed, in his "laſt will and teſtament, for the ſpace of fifty "years laſt paſt, appropriated and occupied, with "a viſible perſonal property thereon of ſufficient "value to pay and diſcharge all the quitrents and "land taxes, wherewith the ſame was ever charge- "able.

Secondly

Secondly, becauſe all quitrents and land taxes, ever due upon the ſaid land, have been duly and regularly paid by the ſaid Thomas Field, and his predeceſſors in the freehold; agreeable to the quantity expreſſed in the old ſurveys and grants.

"Thirdly, becauſe the ſaid Thomas Field, was "in actual poſſeſſion of the ſaid land, at the time of "the ſaid ſurvey:

"And fourthly, becauſe the ſaid ſurvey and "plott, and the record and return thereof are ir-"regular, improper and contrary to law."

At Mecklenburg County Court November 1790 a jury were impanneled, *to find ſuch facts as are material to the cauſe, and not agreed by the parties.* The record then ſtates, that "It appearing to "the Court, that the warrant, under which the "defendant claims, iſſued previous to an act of "Aſſembly paſſed in the year one thouſand ſeven "hundred and eighty five, directing the manner "of obtaining rights to unappropriated lands, on "the eaſtern waters, and the ſurvey aforeſaid "made in conſequence of an entry by the ſaid "warrant, and that the ſaid defendant has no "right to a grant by virtue of the ſaid ſurvey un-"der the ſaid warrant: Therefore it is conſider-"ed that a grant iſſue to the plaintiff for the ſaid "lands, upon his complying with the laws in ſuch "caſes made, and that he recover againſt the de-"fendant his coſts."

The defendant filed a bill of exceptions to the foregoing opinion of the Court; which ſtated, that the defendant offered in evidence to the jury a Land-Office Treaſury Warrant, dated the 29th of of November 1783, iſſued to Daniel Carter for 300 acres due him, in conſideration of £ 480 current money paid into the public Treaſury. And aſſigned by Carter to Harper; and by him to Samuel Dedman: Who aſſigned two hundred acres thereof to Mitchell; and likewiſe indorſed that

he

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he had surveyed 38¼ acres of the warrant for Culbreath. That the defendant also offered in evidence an entry in the following words: "April "8th 1788 Thomas Culbreath enters, by Land "Office Treasury Warrant No. 20,900, granted "Daniel Carter, and dated the 29th day of No-"vember 1785, for all the vacant land, between "the lines of John Clark, Thomas Field, James "Williams, and William Culbreath deceased." That he also offered in evidence a survey, which begins at a corner White Oak on Grassy creek, thence to corner pointers in John Clarks line, thence to Williams's corner post Oak in T Fields line, Thence to a Maple on Grassey creek, thence down the same, as it meanders, to the beginning. That the plaintiff prayed judgment of the Court, because the defendant had located the said warrant on lands lying in Mecklenburg county, and not on the western waters, on which, alone the plaintiff insisted the defendant had a right to locate the said warrant, since the said act of 1785; and that the Court was of that opinion. The defendant prayed an appeal, which was refused by the Court.

The District Court granted a writ of supersedeas as to the judgment; which they reversed (because there were no facts found by the jury, nor were the jury discharged) and retained the cause for further proceedings. At a future court, it was sent to the rules, for an issue to be made up. Which order, at another court, was set aside, on the plaintiffs motion, and the cause put upon the issue docket.

In May 1797 a jury were charged, *to find such facts as are material to the cause, not agreed by the parties.* Who found a verdict in these words:

"We of the jury find the land warrant in these "words, to wit: (setting it forth) We also find "the following assignments on the back of the said "warrant (setting them forth as above.) We al-"so find, that the said Thomas Culbreath came

possessed

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"poſſeſſed of the ſaid land warrant, in a ſhort time "after the ſaid laſt aſſignment above written on "the back of the warrant aforeſaid. We likewiſe "find the teſtament and laſt will of Theophilus "Field deceaſed, in theſe words, refering to it "generally, but particularly ſtating the following "clauſe. 'Item I give and deviſe to my ſon "Thomas Field and to his heirs forever the ſeve-"ral tracts and quantities of lands, to wit: All "my lands and plantations on Graſſy creek, on "the South ſide of Roanoak river, containing 2898 "acres; of which 404 I formerly took up, 2300 "I bought of John Hood, 36 of John Breſſie, and "158 acres thereof I lately took up; alſo the land "and plantation on the North ſide of Roanoak "river, I bought of Thomas and John Satter "White, containing 400 acres,) That a woman "had built a log houſe on the ſaid 38¼ acres of "land, ſurveyed, as aforeſaid, for the ſaid Tho-"mas Culbreath, and dwelt on the ſaid 38¼ acres "of land, for eighteen years, or thereabouts. "We further find, that Lemuel Wilſon attended "the proceſſioning of the lines of the ſaid Thomas "Field and others twenty odd years ago, when "the ſaid Thomas Field informed him the ſaid "Williams, that the creek was the line, tho' he "knew there was an old line acroſs a place called "the Mountain, and further, that James Willi-"ams attended the proceſſioning of the lands of "the ſaid Thomas Field and others, three or four "times, at which times the ſaid line acroſs the "mountain aforeſaid was marked as the line of "the ſaid Thomas Field, and that the ſaid 38¼ "acres of land was conſidered as vacant and un-"appropriated land; but was informed, by the "ſaid Thomas Field, that he had an order of "counſel for the ſame. And we further ſtate, "that the ſaid 38¼ acres of land was vacant and "unappropriated land, and not included in the an-"cient boundaries of the ſaid Thomas Field, at "the time the entry was made by the ſaid Tho-"mas Culbreath."

Upon

Upon this verdict, the Diſtrict Court gave judgment for the defendant; and Field appealed to this Court.

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CALL for the appellant. By the act of 1785 *chap.* 42 a different land warrant was neceſſary. For the Legiſlature, by the that act clearly intended, that no lands upon the Eaſtern waters ſhould be granted, after the paſſage of that law, upon any other terms, than thoſe mentioned in it. Becauſe by preſcribing a particular mode, they thereby neceſſarily excluded every other; and becauſe too, by the laſt clauſe they, in expreſs words except two caſes from the operation of the ſtatute. 1. Caſes where a location had been already begun prior to the paſſing of the act? 2. Caſes of preemption rights to marſhes and ſunken grounds. Which obviouſly excludes the right of commencing an entry, under any former warrant. For by declaring the warrant good, where the entry was begun, or it was a caſe of preemption rights, they manifeſt their intention, that it ſhould not not be ſo, where the entry was not begun, or it was not a caſe of preemption rights. Again the object of the law was to provide a fund to aid the diſcharge of the public debt due to foreigners, which object would be utterly defeated, upon any other conſtruction of the act. Becauſe then the old warrants would all have been bought for locations upon the Eaſtern waters, at a leſs price, than the public would ſell new ones for; but greater, than the price of warrants for lands, on the Weſtern waters. So that the individual holders would be enriched, but the public purſe would remain as empty as before the paſſage of the law. Which would have wholly diſappointed the views of the Legiſlature. For the Eaſtern lands would ſtill have continued to be located on the ancient terms, and new warrants would only have been taken out, for thoſe on the Weſtern waters.

It cannot be ſaid, that the conſtruction now contended for, would give the act an *ex poſt facto* operation, which would be prejudicial to the hold-

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ers of the old warrants, whose former rights would be thereby divested or circumscribed. Because they may still lay them on the western waters, and thus have full satisfaction for the claim. So that the public faith is not violated towards them. Besides the warrant itself did not give them a right to any lands in particular, until they had made locations. It was only a right to locate them on unappropriated land; which they might never exercise; and therefore could acquire no right to any land, either on the Eastern or Western waters, until a location was made. Which is the first inception of a right to lands in any particular part of the state. *Walcott* vs *Swan* * in this Court. Therefore the warrant only gives a privilege of locating them on any waste and unappropriated lands, at the time of the proposed entry. For the very term *unappropriated* means not applied to, or set aside for, any particular use or purpose. But if a particular parcel is declared ungrantable, or specifically appropriated, before the holder has exercised the privilege, he can no more complain, than if an individual had made a location before him. The only difference is, that it is an individual who appropriates, instead of the public; but the public has as much right to do so, as the individual. Now, in the present case, the public have appropriated the lands, on the Eastern waters, to a particular purpose, prior to the exercise of the right under the old warrant; which only gave the holder a right to locate it on unappropriated lands: A term not applicable to the lands in question, at the time of the location. But as the warrant only gave them a right to locate it on *unappropriated* land, that necessarily supposed a right in government to appropriate; and the Legislature have done so, with regard to the lands on the Eastern waters, by creating them into an auxilary fund for the payment of the foreign debt. A contrary construction would defeat the

* Ante. 238

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the act of May 1780, which declares that commons &c. upon the Eaſtern waters, ſhould not be grantable in future; although the act admits they were ſo, before the paſſage thereof. Which is only juſtifiable, on the ground of argument now aſſumed; namely, that they were previouſly appropriated before any attempt to locate. In fine, no location having been made before the act, no injuſtice is done the holder; who may ſtill have ſatisfaction for his warrant on the Weſtern waters, and the meaning of all the laws be preſerved. Whilſt the contrary conſtruction would wholly defeat them.

But if the warrant were good, the entry is too vague and uncertain. For it has no beginning, as it ought to have: Nor does it aſcertain the lands with convenient preciſion, according to the caſe of *Hunter* vs *Hall* * in this court. For it does not appear, that the lines, deſcribed in the entry, do include the lands in queſtion, upon all ſides; and, in point of fact, when the ſurvey came to be made, not more than two of the lines, deſcribed in the entry, correſponded with thoſe mentioned in the ſurvey. So that the entry may have comprehended a great extent of country, and much beyond the quantity contained in the warrant; which was his only authority to locate at all. For a location without a warrant in poſſeſſion is actually void.

WICKHAM for the appellee. The queſtion is, whether the caveat ſhall be ſuſtained? Which can only be, where the party who caveats has a better right himſelf, than the perſon applying for the patent; for as to the point, whether the warrant is ſufficient to entitle the holder to locate on the eaſtern waters, that is a matter purely for the conſideration of the Regiſter; who will refuſe the patent if wrong, and grant it, if right. In the preſent

* 1. Call's Rep. 296.

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ſent caſe, Field ſhews no title; and therefore he has no right to prevent a patent, from iſſuing to another. No injury reſults from this doctrine; becauſe the Commonwealth will not be bound by the diſmiſſion of the caveat. The act of 1785 does not take away the right, to locate prior warrants, on the eaſtern waters. It does not do it in expreſs words; and the tenor of the law is proſpective. The Legiſlature did not mean to take away a veſted right, from the holder. The caſe of commons &c. ſtands upon the ſame grounds as public roads, mill-dams, and other public conveniences. The land warrant was a contract, allowing the holder to locate on any unappropriated lands; and therefore any extraordinary attempt, by the Legiſlature, to diminiſh the objects of location, would have been a breach of the public faith. The entry was ſufficiently certain. For it is for all the vacant lands lying within certain boundaries: Which ſuperſedes the neceſſity of a beginning; for that is only requiſite, where there are ſurrounding, unappropriated lands. A caveat is like a declaration; it ſtates facts, and the grounds of objection. But here, if it were even true, that a perſon having no title himſelf might caveat another's patent, the appellant has not ſtated, that the warrant could not be located on the eaſtern waters, or that the entry was defective.

CALL in reply. Any perſon, whether intereſted or not, may prevent a patent from iſſuing to a perſon not having title to one, in order to prevent impoſition on the public; and, if nothing of this kind be done in the Regiſter's Office, the court, as guardians of the public rights, would *ex officio* interpoſe, where it plainly appeared, that the party was endeavouring to procure a patent, contrary to law. For although ſuch a patent would be void againſt a future locator, yet no perſon would willingly involve himſelf in a law ſuit with another, who was in poſſeſſion, under a patent iſſued by the proper authority. The queſtion is

not,

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not, whether the Legiſlature could prevent the holders of old warrants, from locating them on the eaſtern waters, but whether they have not ſpecifically appropriated thoſe lands? For if ſo, no injury is done the holders, who may ſtill locate them on any unappropriated lands. The entry is altogether uncertain. A beginning was clearly neceſſary, according to the appellees own argument. For it does not appear, that there was no ſurrounding unappropriated lands, but the contrary; inaſmuch as the lines, deſcribed in the entry, do not agree with thoſe in the ſurvey. So that it does not appear, that the entry comprizes no more land than is contained in the ſurvey.

Per Cur. Affirm the judgment of the Diſtrict Court.

HYERS *& al.*

againſt

GREEN.

In a demurrer to evidence all the teſtimony on both ſides ought to be inſerted.

Quere: If non tenure may be given in evidence in a writ of right, where the miſe is joined on the mere right?

JAMES GREEN brought a writ of right in the County Court of Hardy, againſt Leonard Hyers, John Hyers, Lewis Hyers, Martin Shobe, Rudolph Shobe, Martin Powers, Jacob Shobe, Chriſtopher Ermontrout, Martin Shobe, jr. Abraham Stooky, Modlin Stooky and Conrad Carr, for "His fourth undivided part of one tenement, containing eleven hundred and twenty acres of land "with the appurtenances in the county aforeſaid, "late the county of Auguſta, on the South branch "of Potowmack river, and bounded as followeth, "to wit: Beginning at two red oaks, on the "South ſide the North fork of the ſaid branch, "thence S. 28 W. 106 poles to a black walnut, "white oak and Elm, on a branch at the foot of "a hill, thence N. 74 W. 400 poles to a red oak,

"at

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"at the foot of a hill, thence N. 57 W. 248 poles "to a white oak, on a hill, thence S. 52 W. 160 "poles to a white oak, thence N. 80 W. 48 poles "to two white oaks, thence N. 49 W. 100 poles, "thence N. 15 W. 40 poles to a ſugar tree and "hicory on the ſaid branch, thence down the ſe- "veral courſes of the ſame to the beginning."

The *miſe* was joined, by the parties, upon the mere right, according to the form of the act of Aſſembly.

There is a deed from Lord Fairfax to Jacob Stooky for three lives dated 3d Auguſt 1773. Another of the ſame date to Leonard Hyers for 223 acres. Another of the ſame date to Martin Shobe for 89 acres. Another of the ſame date to Martin Shobe for 211 acres. Another of the ſame date to Martin Powers for 130 acres. Another of the ſame date to Chriſtopher Ermontrout for 167 acres. Another of the ſame date to Barbary Shobe for 177 acres. And another of the ſame date to Jacob Shobe for 97 acres.

There is a patent to Robert Green for 1120 acres dated 12th January 1746.

There is a copy of the ſaid Robert Green's will dated 22d of February 1747. In which is the following clauſe, to wit: "I give and bequeath un- "to my ſaid ſons James and Moſes Green and "their heirs and aſſigns forever, one half of a tract "of land, containing two thouſand acres, lying "in Auguſta county, between the Shenandoah, "and the Peaked Mountain; and my will is, that "the ſaid lands bequeathed to my ſaid ſons James "and Moſes Green ſhall be equally divided be- "tween them, at the diſcretion of my executors."

There is a ſurvey of the lands demanded, made by order of the court, which ſtates them to be ſituated, as follows: "Beginning in the river "where the corner was ſuppoſed to have ſtood, "running acroſs the bottom S. 25 W. 106 poles

"to

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" to a small branch between the foot of two hills, " old deed calling for a black walnut, white oak " and elm, no mark to be found, the timber much " cut, thence N. 77 W. 400 poles to the top of a " knole, no mark found, the old deed calling for a " red oak at the foot of the hill, timber very little " cut, thence N. 60 W. 248 poles to the top of " the hill by Martin Jobs orchard, old deed calling " for a white oak, no mark, timber much cut about " there, thence S. 49 W. 160 poles, old deed call- " ing for a white oak, no mark found, timber not " cut, thence N. 83 W. 48 poles into Conrad " Carr's meadow, no mark found, old deed calling " for two white oaks, timber all cut down, thence " N. 52 W. 100 poles, old deed calls for no tree, " thence N. 18 W. 6 poles to the river, old deed " calling for 40 poles in this course and a sugar " tree and hicory on the bank of the river, no " mark found, the timber not much cut, only a road " on the bank, thence down the several meanders " of the river to beginning, containing one thou- " sand and fifty acres."

Upon the trial of the cause, the demandant filed a bill of exceptions to the courts opinion, which stated, that the demandant tendered a demurrer to the evidence, in these words, " the tenants in these " causes gave in evidence the following leases, " (naming them in the order above mentioned,) " and they and those to whom the said leases were " given, under whom they claim, have been in " possession twenty two years under the above- " mentioned leases, and twenty years previous, " that upper part of the land demanded by the de- " mandant in his declaration, lies one mile below " the confluence of the North fork, and the South " branch, and on the side opposite from the North " fork; and the demandants further proved by " Philip Paul Yoakum the lands whereon the a- " foresaid Leonard Hyers, and others now live, " (being the lands in dispute,) do lay on the South " branch of Potowmack, and that he has resided " in this county about fifty years, and never knew

" said

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" ſaid river called by any other name, and that " the ſaid lands lay ſome diſtance below the mouth " of the north fork and on the oppoſite ſide of the " South branch river. And by Jonathan Heath " that he was ſummoned by the ſheriff of Hardy " county, to attend the ſurveying a tract of land, " being the lands in diſpute between the parties " aforeſaid, whereon ſaid Leonard Hyers and " others now live; where was preſent, Colonel " Joſeph Nevill and John Foley ſurveyors. They " begun ſaid ſurvey about two and one half chains " in the South branch of Potowmack about four " miles below the mouth of the North fork, near " to where fort George formerly ſtood, the firſt " courſe extended eleven poles up a run, between " two hills, the ſecond courſe croſſed the point of " a hill which was not paſſable; they meaſured " back on the firſt courſe, into the bottom, to en- " able them to run the ſecond courſe. The ſe- " cond courſe, as the ſurveyor then run, was on " the point of a hill, where there was no timber " cut, at the third corner, there was but little tim- " ber, the fourth corner, no timber cut, the fifth " corner, cleared, the ſixth corner no timber cut, " at the ſeventh corner, no timber cut, except a " road along the river, the laſt courſe calls for " forty poles but found only ſix, when we came " to the river, which if they had extended agree- " able to the deed, would have carried them over " the South branch into a pine hill, they then " took down the different meanders of the river to " the beginning, that they diligently examined the " different courſes, but found no corner tree, nor " ſide mark, that there was an allowance made of " two and one half degrees variation. And fur- " ther proved by Michael Lee, that he has reſid- " ed in this county fifty years, that the north fork " enters into the South branch about a mile and " a quarter above the upper end of the land in diſ- " pute, that the South fork of the ſaid river emp- " ties into the South branch, about eleven miles " below the ſaid land. And further proved by

" Job

" Job Welton, that he was ſummoned by the ſhe-
" riff of this county, to attend a ſurvey on the
" lands in diſpute, and that they began the firſt
" courſe of the ſurvey about the middle of the
" South branch where fort George formerly ſtood,
" that they run the firſt courſe, about eleven
" rods up a run between two hills, where the
" timber was chiefly cut, they then ſtarted on the
" ſecond courſe, and run ſome diſtance when they
" came to a ſteep bank which they could not go
" down; they meaſured back on the firſt courſe
" into the bottom, to enable them to run the ſe-
" cond courſe. The ſecond courſe as the ſurvey-
" or then run was on the point of a hill where
" there was no timber cut, at the third corner,
" there was but little timber, the fourth corner,
" no timber cut, the fifth corner cleared, at the
" ſixth corner no timber cut, at the ſeventh corn-
" er no timber cut, except a road along the river,
" the laſt courſe called for forty poles, but found
" only ſix, when we came to the river they then
" took down the different meanders of the river,
" to the beginning, that they diligently examined
" the different corners, but found no corner tree,
" nor ſide mark, that there was an allowance of
" two degrees and an half in the variation, and
" that he was preſent when Aſleby run out the
" land in 1773. When no marks, line trees, or
" corners, could be diſcovered. To which evi-
" dence the demandant by his counſel demurred
" as inſufficient in law, to ſupport the right of the
" tenants to the land in conteſt, and produced in
" ſupport of his right a copy of a patent duly atteſt-
" ed as the law directs, from his late Majeſty George
" the ſecond, king of Great Britain; in the words
" and figures following George the ſecond &c. and
" the act of Aſſembly paſſed in the year 1748, en-
" titled, An act for confirming the grants made
" by his Majeſty, within the bounds of the North-
" ern Neck, as they are now eſtabliſhed; and alſo
" a copy of the laſt will and teſtament of Robert
" Green deceaſed, authenticated under the ſeal of

" Orange

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" Orange county, where the ſame was admitted to " record, in the words following to wit: In the " name &c. and prays the Judgment of the Court, " whether he has more right to the tenements, " which he demandeth againſt them, or they to " hold it, as they demand it."

That the court refuſed to permit the demurrer to be filed.

Verdict and judgment for the tenants; upon which the demandant appealed to the Diſtrict Court.

The Diſtrict Court was of opinion, that the judgment was erroneous, in this, " that the court " below ought not to have admitted the evidence " ſtated on the part of the tenants as mentioned " in the demandants bill of exceptions to have " gone as evidence to the jury; and in not re- " ceiving the demurrer of the ſaid demandant." That court therefore reverſed the judgment; and thereupon the tenants appealed to this court.

October Term 1800.

CALL for the appellant. A demurrer to evidence ſhould be capable of being reduced to ſo much certainty, that the court may aſcertain the fact; and although the court may preſume every thing againſt the party tendering the demurrer, they cannot preſume any thing againſt the other party. For it would be abſurd to oblige a man to admit, what he denies. But, in the preſent caſe, neither do the lands claimed agree with thoſe deſcribed in the count; nor does it appear, that the demandant was entitled, under the will of Robert Green. For it is not ſhewn, that the plaintiff is the perſon to whom the lands are deviſed; which it was neceſſary for the demandant to have done; becauſe that was the foundation of his title. It would have been clearly ſo in a ſpecial verdict, or in pleading; and as ſtrict a rule, at leaſt, ought to obtain againſt the party tendering a demurrer; who, by drawing the cauſe, from the jury to the court, and thus preventing an aſcertainment of

facts

facts by the country, takes upon himself, to state a complete title.

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WILLIAMS for the appellee. The demandant might demur to the tenants evidence. *Trials per pais.* And this upon principle; for the evidence begins with the tenant. *Booths real act.* 98; and therefore, if insufficient, the demandant may refer it to the judgment of the court. The evidence here did not go to shew, that the tenants had more mere right, than the demandant; for it is evident on the whole matter, that ours was the better title. The tenants could not be permitted to prove, that the land claimed was different, from that described in the count. For *non tenure* is a plea in abatement; and cannot be given in evidence, where the mise is joined upon the mere right. The act of 1786 will not be considered, as making any difference; for that only permits any thing to be given in evidence, that might have been specially pleaded; which means any thing, that might have been plead in bar, and not abatement. *Non tenure* is not only considered as a plea in abatement, by the common law, but the act of 1748 *Chap.* I. §. 21, treats in it the same manner. With respect to the certainty of the person demanding the land, it is sufficiently shewn: For James Green is the person named in the will; and James Green is the person, who brings the suit. Upon the whole, therefore, the court below ought to have compelled the tenants, to join in the demurrer.

WICKHAM on the same side. The demurrer ought to have been received. For the uncertainty, spoken of, related only to non tenure, and the identity of the lands; which were mere matter of abatement, both at common law, and by the act of 1748. But it has been, already, properly shewn, that the act of 1786 does not alter the law, in that respect. For it clearly means pleas in bar, and not in abatement: Like the ordinary case of the general issue, with leave to give the special matter

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matter in evidence; which means evidence relevant, and ſuited to the caſe. The count ſtates certain bounds, and the tenants defend thoſe bounds; it would therefore be ſtrange, to allow them to deny the very bounds, which they profeſſed to defend. That would be both to admit, and deny, the identity; which would be abſurd. But certainty to a common intent is ſufficient, as well in ſpecial verdicts, as in demurrers to evidence; and there was a certainty to a common intent, in the preſent caſe.

RANDOLPH in reply. The act of 1786 permits every thing to be given in evidence, which might have been ſpecially pleaded; and non tenure, or any other matter in abatement, might be ſpecially pleaded, as well as matter in bar. At common law, every thing might be given in evidence, but collateral warranty; *Booth. real act:* 98: According to which doctrine, non tenure might have been given in evidence, before the act of 1786; although the miſe was joined on the mere right. Beſides, non tenure may be pleaded, either, in bar or abatement. 1. *Mod.* 294, 214. 1. *Bac.* 14. The act of 1748 only relates to proceſs, and cannot affect that of 1786. There was no point of law in the caſe; and therefore the demurrer was improper. No evidence is offered to ſhew, that the demandant was the deviſee; and therefore the court cannot infer it.

WICKHAM. Non tenure could not be given in evidence; for the judgment would be a bar, and the demandant liable to be ſurprized. The 1. *Mod.* 214 does not prove, that it may be plead in bar; the diſtinction taken there, by *Burrel*, expreſsly proves the contrary. There were queſtions of law, in this caſe, ariſing upon patents, acts of Aſſembly, wills, &c. which rendered a demurrer proper.

RANDOLPH. The judgment would not be a bar in a ſuit for other lands; becauſe the demurrer would ſhew, that they were not the ſame.

This

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This term the court, defired the point, whether in a demurrer to evidence it was neceſſary to ſtate all the evidence on both ſides, to be ſpoken to by counſel.

CALL for the appellant. It is abſolutely neceſſary, both on principle and authority, that, in a demurrer to evidence, all the teſtimony, on both ſides, ſhould be ſtated.

I. Upon principle:

There is a ſtrict analogy, between a demurrer to evidence, and a demurrer to pleadings. Both are governed by the ſame principles: In each the plaintiff muſt ſhew a good title, againſt a weak defence: And the defendant muſt either ſhew, that no title is ſet forth by the plaintiff; or he muſt oppoſe a good defence, to the good title, alledged by the plaintiff.

Hence it follows, that, although the defendant may ſome times demur to the plaintiffs evidence, without ſhewing any, on his own part, as where the evidence, adduced by the plaintiff, renders it unneceſſary, for the defendant to produce any on his part, yet the plaintiff never can demur to the defendants evidence, without ſetting forth his own; becauſe he muſt ſhew a good title in himſelf to recover, or the weakneſs of the defendants title is of no conſequence. For he is to recover upon the ſtrength of his own, and not upon the weakneſs of his adverſary's title.

The end of all pleadings, and a demurrer to evidence is a ſpecies of pleading, is to bring the points, in controverſy, fairly before the court.

Therefore as the plaintiff in his declaration muſt ſet forth a good title, or the defendant may demur, without alledging any other matter of defence; ſince it is immaterial whether the defendant has a title or not, provided the plaintiff has none: So the plaintiff muſt prove a good title, or the defendant may demur to his evidence, and

pray

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pray judgment on account of its insufficiency, without offering any new matter upon his own part; for it would be useless to bring forward testimony, to avoid a title, which is not shewn to exist.

It results from all this, that it is absolutely necessary, that it should appear, by the demurrer, that the plaintiff has a good cause of action; which *prima facie* entitles him to judgment, unless it be destroyed by countervailing testimony.

But, if the plaintiff does set forth a good title in his declaration, the defendant must answer it by a good bar, or the plaintiff may demur. For, his own title being good, unless a proper defence to it is set up, he ought to have judgment. So if the plaintiff proves a good cause of action, the defendant must avoid it by a proper defence, or the plaintiff will be entitled to judgment. For an insufficient answer can be no bar to a good title; which necessarily stands, until it is obviated by a paramount defence.

But if the declaration contains a good title, and the plea a good defence, then the plaintiff must reply a sufficient matter, to avoid the plea, or the defendant may demur; because having given a sufficient answer to the claim it will stand, until it is repelled by some new matter offered by the plaintiff. So if the plaintiff proves a good cause of action, which is destroyed by the defendants evidence, the plaintiff must avoid the defence by countervailing evidence, on his part; for his first evidence being destroyed, by that of his adversary, his action is destroyed also, unless he can repel the defence. And so on, *in infinitum*.

Thus far is sufficient to shew the analogy between the demurrers; which upon examination will be found to run, through all the various stages of a cause; with this difference only, that where the demurrer is to the pleadings, the alternate steps are distinctly shewn; whereas, in the demurrer to evidence, the testimony is thrown to-

gether

gether, without order or arrangement; ſo that the alternate ſteps do not at firſt ſight appear. But ſtill the principles remain the ſame; becauſe they exiſt in the very nature of things; and the Judge, when he comes to decide, is neceſſarily drawn into the arrangement. Hyers vs Green.

It follows therefore that in every ſtep, in pleadings or in proof, unleſs where the defendant demurs to the plaintiffs evidence, in the firſt inſtance without offering any on his own part, the demurrant muſt ſhew, that his own title is good, before he can derive any advantage, from the weakneſs of the countervailing claim.

To illuſtrate this by ſome examples.

If in ejectment for lands, the defendant ſhews a conveyance from the plaintiff, the latter may prove that it was given during coverture: To which the defendant may ſhew ſubſequent acts of ratification, after the diſability removed; and to this the plaintiff may demur, if ſhe thinks the defence incomplete. But then ſhe muſt, in her demurrer, ſhew the coverture; or the conveyance being proved, ſhall entitle the defendant to judgment, whether, the defendants other teſtimony be important or not.

So, if in an action of *indebitatus aſſumpſit*, the plaintiff does not prove the conſideration and promiſe, the defendant may demur, for the inſufficiency of the teſtimony; but if the conſideration and promiſe be proved, and the defendant produce a receipt againſt all demands, here, if the plaintiff offers to prove, that it was given for a part, the defendant, if he thinks the teſtimony does not avoid the receipt, may demur to the evidence; but then he muſt produce the receipt itſelf, or the plaintiff, having proved an original cauſe of action, will recover, whether his ſubſequent evidence be important, or not.

So

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So that in every cafe the demurrants teſtimony muſt not only contain an anſwer to that of his adverſary, but it muſt moreover ſhew a complete title, through all the ſtages of the evidence.

The propriety of ſtating the whole evidence is more obvious, when the object of the demurrer is conſidered: Which is, that the jury, if they pleaſe, may refuſe to find a ſpecial verdict, and then the facts never appear upon the record; to prevent which inconvenience the party reſorts to the demurrer, in order to exhibit all the facts, for the judgment of the Court, *Dougl.* 127. So that the demurrer is, in fact, a mere ſubſtitute for a ſpecial verdict. But in a ſpecial verdict, all the facts on both ſides muſt be found, or the court will grant a new trial; and therefore in the demurrer, which is the ſubſtitute, the ſame thing muſt be done, or the Court may refuſe to receive the demurrer. For the Court are to judge of the *allegata et probata* on both ſides; and not upon thoſe of one ſide only. In other words, they are to decide upon the whole caſe, and not upon parts: or elſe, the truth of the title never could be diſcerned.

A moments reflection will inevitably lead us to this concluſion. For if the teſtimony on both ſides was not ſtated, the combination and connection of the parts could not be perceived. It would often times become a mere *farrago* of unintelligible jargon for want of knowing the points, to which, the repelling teſtimony, of the party demurred unto, was applied. So that, although the queſtion might turn upon the competency of the repelling teſtimony only, it would never occur; but the Court would have to decide upon that, which was offered, by the adverſary, before the demurrant ever produced any at all: And thus it would inevitably happen, that it would be impoſſible to have the very point determined, by the Court, which was meant to be decided.

It

It will be no objection to say, that, by this means, the person demurred unto, will be driven to admit the truth of the demurrants testimony. For that consequence does not follow.

There are but two grounds upon which that objection could possibly occur; namely, the credit of the demurrants witnesses; and the circumstances which he might insist on, to establish particular facts. For, as to facts actually proved, the demurrant has as much right to state those in his own favor, as the party demurred unto, has to state those in his favor.

But neither of those two cases produce the effect objected to.

Not the credibility of the demurrant witnesses: Because the demurrant, when stating his *own* testimony, can only insert the undisputed facts; and if any objection as to the credit of the witnesses, arises, that alone is a sufficient reason for rejecting the demurrer; because the credit of a witness is matter of fact, and not of law; and as the Court cannot try a matter of fact, it must, if insisted on, remain with the jury. Therefore if the demurrant chooses to take the cause from the jury to the Court he must relinquish the impeached witnesses.

Not the circumstantial evidence:

Because the demurrant necessarily yields up his presumptions and probabilites; for by drawing the cause from the jury to the Court, he loses the opportunity of insisting on them before those, who alone are able to draw conclusions of fact. But the case of the party demurred to is very different; for if he insists on probabilities and presumptions, the demurrant is bound to admit the fact he would infer from them; because he is forced into the demurrer against his consent, and has no opportunity of addressing the jury to infer them. He is not, on this account however, bound to admit the facts, which the demurrant would establish by such

testimony;

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teſtimony; becauſe the demurrant might have left them to the jury; and he cannot, by drawing the cauſe *ad aliud examen*, oblige the other party, againſt his inclination to confeſs what he was diſpoſed to deny. The demurrant is therefore driven to ſtate the facts he actually proves, without any inferences from circumſtances; and if any conteſt ariſes about the facts ſo proved, it is to be referred to the Court. Becauſe the whole operation of entering the matter upon record, and conducting a demurrer to evidence, is, and ought to be, under the direction and controul of the Court; ſubject however to an appeal, by bill of exceptions, if any point be improperly recited or rejected by them. For it is ſaid, that if the Court may overrule, it may alſo regulate the entry of the proceedings upon the record, and the admiſſions which are to be made previous to the allowing of the demurrer.

Thus then it clearly appears, that the objection is imaginary; and that the perſon demurred to is not bound to admit the truth of the facts inſiſted on by the demurrant; but that the latter muſt prove them. Yet when he has proved them he has a right to inſiſt on their efficacy, in deſtroying the oppoſite claim.

The propriety of theſe remarks is the more obvious from the following conſideration, namely, that the court is to pronounce, whether the plaintiff, or defendant, is entitled to the matter in controverſy; which they cannot do, if the whole evidence is not ſtated: Eſpecially as it ſeldom happens, that the demurrer is argued the ſame term, in which it is filed; and therefore whether they be the ſame, or other judges, they can know nothing of the matter, unleſs the whole teſtimony appears of record. Thus far on principle:

II. But upon authority the point is equally clear.

A

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A demurrer to evidence may be defined to be, an allegation of the demurrant, which, admitting the matters of fact alledged by the oppoſite party, ſhews, that, as ſet forth, they are inſufficient in law for the adverſary to proceed upon, or to oblige the demurrant to give any, or a further anſwer thereto; either becauſe they are, in point of law, defective in themſelves, or are, in law, deſtroyed by countervailing teſtimony. It is thus deſcribed by Sir William Blackſtone, "But a demurrer to "evidence ſhall be determined by the court, out of "which the record is ſent. This happens, where "a record or other matter is produced in evi- "dence, concerning the legal conſequences of "which there ariſes a doubt in law; in which caſe "the adverſe party may, if he pleaſes, demur to "the *whole* evidence; which admits the truth of "every fact that has been alledged, but denies the "ſufficiency of them *all*, in point of law, to main- "tain or overthrow the iſſue; which draws the "queſtion of law from the cognizance of the jury, "to be decided (as it ought) by the court." This paſſage proves expreſsly his own opinion to have been, that it was neceſſary to ſtate all the evidence. Becauſe he ſays, that the party may demur upon the *whole* evidence; which, admitting the facts, denies the ſufficiency of them *all* to maintain or overthrow the iſſue.

This agrees with the doctrine laid down by the court in the caſe of *Wright* vs *Pynder;* the ſtatement of which according to *Allens* report of it was as follows, "In a trover and converſion brought "by an adminiſtrator; upon *not guilty* pleaded, "the defendant upon the evidence confeſſes, that "he did convert them to his own uſe; but further "ſaith, that the inteſtate was indebted to the "King, and that 18. *May.* 14. *Car.* it was found "by inquiſition, that he died poſſeſſed of the goods "in queſtion; which being returned, *a venditioni* "*exponas* was awarded to the ſheriff, who by vir- "tue thereof ſold them to the defendant. And to "prove this, the defendant ſhewed the warrant of

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"the Treasurer, and the office book in the exche-
"quer, and the entry of the inquisition, and the
"*venditioni exponas* in the clerk's book: to which
"the plaintiff saith, that the matter alledged is
"not sufficient to prove the defendant *not guilty;*
"and that there was no such writ of *venditioni*
"*exponas*. And the defendant saith, that the
"matter is sufficient, and that there was such a
"writ."

In this case, according to *Styles* 34, "ROLLS
"Justice took two exceptions to the pleading;
"(meaning the demurrer; because the plea was
"*not guilty;*) 1. That the goods mentioned in
"the schedule appear not to be the same contain-
"ed in the declaration. 2. No title is made to the
"indenture by him, who brings the action, and
"concluded upon the whole matter that the de-
"murrer was not good, and that there ought to
"be a *venire facias de novo*, to try the matter
"again. *Bacon Justice* much to the same effect,
"but differed in this, that there ought not to be a
"*venire facias de novo*, but said, that judgment
"ought to be given against one party, to wit, the
"defendant, for ill joining in demurrer, to the
"intent, the party that is not in fault may be
"dismissed, and the parties here have waived the
"trial *per pays* by joining in demurrer. But *Roll*
"answered that no judgment at all could be given,
"for both parties be in fault, one by tendering
"the demurrer, the other by joining in it, and
"the defendant might have chosen whether he
"would have joined or no, but might have prayed
"the judgment of the court whether he ought to
"join."

Here both judges agreed that the demurrer was bad, in not ascertaining the goods, and setting forth the plaintiff's title to the indenture: They differed, indeed, as to the judgment to be given; one of them thought, there ought to be another *venire facias*, the other that there ought to be judgment final; but both opinions were grounded

on

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on the imperfection of the demurrer. Taking either opinion, however, to have been the correct one, and it equally proves, that the court were right in rejecting the demurrer in the preſent caſe. For if a new *venire facias* ought to have gone, then the court were not bound to receive a demurrer, merely for the form of ſetting it aſide again; and if there ought to have been final judgment, againſt the tenants, for joining in an inſufficient demurrer, that alone is a proof, that the court ought not to have received the demurrer, and compelled the defendants to join. In point of fact, however, a *venire facias* was actually awarded as appears by *Allens* report of the caſe.

We have then, both the opinion of a moſt able commentator, and an expreſs deciſion of the court, that it is neceſſary for the demurrant to ſtate the whole evidence, and to ſhew a complete title. They are therefore authorities in the very point; and decide the preſent queſtion, without any neceſſity for a further enquiry.

But, as this point is of importance, it may be worth while, to inveſtigate it a little further; and to examine precedents upon the ſubject, in books of entries: Becauſe the forms of pleadings are always conſidered as evidences of the law.

In *Rastalls* entries 148 pl. 12. there is a demurrer to evidence to the following effect:

"And upon this, the aforeſaid D. G. and M. "ſhewed in evidence to the jurors aforeſaid, to "verify and prove the iſſue aforeſaid, on their "part, to wit, *(as in the evidences,)* and the "aforeſaid I. B. and B. to verify and prove the "iſſue aforeſaid, on their part, to wit, that they "had not entered into the tenements aforeſaid, "with the appurtenances, ſhewed in evidence to "the jurors aforeſaid, and ſay &c. *(as in the evi-"dences.)* And the aforeſaid G. and M. ſay, "that they to the matter aforeſaid, by the ſaid I.

"B.

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"B. and B. above in evidence to the jurors afore-"said shewn &c." Going on to conclude the demurrer.

Which clearly proves, that the evidence, on both sides, is to be inserted. For such is the mode pursued in that form; as it first states the evidence of D. G. and M. and then that of I. B. and B.

This precedent agrees with the language contained in the first mentioned books; and the whole of them expressly supports the propriety of the doctrine laid down by this Court in the case of *Hoyle* vs *Young*, 1. *Wash.* 152.

In which the President, in delivering the resolution of the Court, says, "We think the proper "rule is to allow a demurrer to evidence at any "time before the jury retire, although the party "demurring may have examined witnesses on his "part, the *whole evidence on both sides* being stated; which in all cases ought to be done unless "the Court think the case clear against the party. "In which case, the books agree, that the Court "may refuse to receive the demurrer. In this "case, the opinion of the Court as to this point was "right, 1st, because the *whole evidence* was not "stated, and 2dly, because we think the case was "clearly against the defendant." This case therefore confirms the others; and leaves the question no longer doubtful.

So that it may now be considered as a fixed rule, that in every case, the demurrant must insert the *whole* evidence; in order that the Court may judge whether *all* of it is sufficient to maintain the issue.

But it is more necessary still in a writ of right.

1. Because no other action remains to redress the error, if one intervenes in the trial of the cause.

2. Because

2. Becauſe the court ought always to inſtruct the jury on the trial of a writ of right, *Co. Litt.* 293; and, by analogy, they ought to be able, on executing a writ of enquiry, after a deciſion of the demurrer, to ſay to the jury, that, upon the whole evidence, the right was with the tenant. But this they cannot do, if the evidence is not ſtated.

As therefore a faulty demurrer was offered, and as that demurrer did not ſhew title in the demandant, the County Court did right in refuſing to receive it.

In conſequence of the various deciſions in this court, that a demurrer to evidence cannot be uſed as a bill of exceptions, it becomes unneceſſary to add any thing on the ſubject of *non tenure*. Therefore I ſhall only obſerve, that the act of Aſſembly, to avoid difficulties on the trial, ſeems to have intended, that every thing, which would deſtroy the demandants action, might be given in evidence at the trial of the miſe, upon the mere right. And it can never be right to ſay, that the demandant ſhould recover lands to which he had no title, upon a mere ſlip in the pleadings. Beſides, in *Lucas pleadings* 321, *non tenure* is expreſsly called a plea in bar; and if ſo, it ends that queſtion.

WILLIAMS, *contra*. I do not mean to controvert the doctrine on demurrers to evidence. But *non tenure*, upon this iſſue, was clearly abſurd and improper. In a demurrer to evidence, every thing, which may be infered, is admitted, and, if the objection that the demandant was not the Robert Green mentioned in the will, be, at all, founded, it might have been corrected by the judges notes; or the court will now ſet aſide the proceedings, in order to ſupply the evidence.

Cur: adv: vult.

LYONS Judge. Delivered the reſolution of the Court, that the judgment of the Diſtrict Court was erroneous, and to be reverſed; and that of the county Court affirmed.

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☞ As the Court did not explain the grounds upon which the judgment was given in the laſt caſe, and as the following is a caſe upon nearly the ſame title, and ſome of the judges in giving their opinions on it, ſtated the ground of deciſion in the laſt, I have thought it would be agreeable to the reader to publiſh it at this time; although not decided until two terms afterwards.

HYERS *& al.*

againſt

WOOD.

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In a demurrer to evidence all the teſtimony on both ſides ought to be inſerted, and if the demandant in a writ of right demur to the evidence he muſt ſhew a title in himſelf.

Non tenure may be given in evidence where the miſe is joined on the mere right.

ROBERT WOOD brought a writ of right in the County Court of Hardy, againſt Leonard Hyers, John Hyers, Lewis Hyers, Martin Shobe, Rudolph Shobe, Martin Powers, Jacob Shobe, Chriſtopher Ermontrout, Martin Shobe, jr. Abraham Stooky, Modlin Stooky and Conrad Carr, for "His fourth undivided part of one tenement, containing eleven hundred and twenty acres of land "with the appurtenances in the county aforeſaid, "late the county of Auguſta, on the South branch "of Potowmack river, and bounded as followeth, "to wit: Beginning at two red oaks, on the "South ſide the North fork of the ſaid branch, "thence S. 28 W. 106 poles to a black walnut, "white oak and Elm, on a branch at the foot of "a hill, thence N. 74 W. 400 poles to a red oak, "at the foot of a hill, thence N. 57 W. 248 poles "to a white oak, on a hill, thence S. 52 W. 160 "poles to a white oak, thence S. 80 W. 28 poles "to two white oaks, thence N. 29 W. 100 poles, "thence N. 15 W. 40 poles to a ſugar tree and "hicory on the ſaid branch, thence down the ſeveral courſes of the ſame to the beginning."

The

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The parties joined the *mise* upon the *mere right* according to form in the act of Aſſembly.

There is in the record a patent to Robert Green dated 12th January 1746, for 1120 acres of land in Auguſta county, the boundaries of which are the ſame with thoſe mentioned in the count. Alſo a deed from Mary Wood deviſee of James Wood, to James Wood and Robert Wood for her undivided moiety of the ſaid tract of land. A copy of the firſt named James Woods will, whereby he deviſes all his eſtate to his wife the ſaid Mary Wood on condition that ſhe pay to each of his children £20 on their coming of age. Alſo a copy of the will of Robert Green, in which is the following clauſe. "I bequeath unto my ſons James and Moſes Green "and their heirs and aſſigns one tract &c. as alſo "all my part of the lands which now are patented "in my name on the South branches of Potowmack "river reſerving to Colonel James Wood of Fre- "derick county one half thereof, &c. And I do "give and bequeath to the ſaid James Wood and "his heirs and aſſigns forever one equal half part "of the ſaid lands patented, on the South branch "of Potowmack."

There are in the record ſeven leaſes for three lives from Lord Fairfax for ſmall tracts of land, to Jacob Stooky, Leonard Hyers, Martin Shobe, Martin Powers, Chriſtopher Ermontrout, Barbara Shobe and Jacob Shobe, all dated the 3d of Auguſt 1773.

Upon the trial of the cauſe, the demandants filed a bill of exceptions to the Courts opinion, which ſtated, that "the demandants having offered on "the trial a patent in the words and figures follow- "ing: George the ſecond &c." The tenants offered "evidence to prove, that the land, they are in "poſſeſſion of and claim, is not the land demand- "ed of them by the demandants:" That the demandant excepted to the admiſſion of the teſtimony but was overruled by the Court

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The demandants likewise filed another bill of exceptions in the following words.

"The demandants in these causes offered a demurrer to the evidence exhibited by the tenants, "setting forth that evidence and also the evidence "exhibited in behalf of the demandants, in the "words and figures following, to wit: On the "trial of these causes the said tenants gave in evidence the following leases from the late Lord "Fairfax to Jacob Stocky in the words and figures "following, to wit: This indenture &c. One from "the same to Leonard Hyers in the words and "figures following, to wit: This indenture &c. "One from the same to Martin Shobe in the words "and figures following, to wit: This indenture "&c. One from the same to Martin Powers in the "words and figures following, to wit: This indenture &c. One from the same to Christopher Armentrout in the words and figures following, to wit: "This indenture &c. One from the same to Barbara Shobe in the words and figures following, to "wit: This indenture &c. One from the same to "Jacob Shobe in the words and figures following "to wit: This indenture &c. And that they and "those to whom the said leases were granted, "had been in possession twenty two years under the "said leases, and twenty years previous, that "the upper part of the land demanded by the demandants in their declaration, lies one mile below "the confluence of the North, and the South "branch, and on the side opposite from the North "fork; and proved by Jonathan Heath that "he was summoned by the sheriff of Hardy "county, to attend the surveying a tract of land, "being the land in dispute between the parties aforesaid, whereon Leonard Hyers and "others now live; where was present, Colonel "Joseph Nevill and John Foley surveyors. They "begun said survey about two and one half chains "on the South branch of Potowmack about four "miles below the mouth of the North fork, near "to where fort George formerly stood, the first "course

" corner extended eleven poles up a run, between
" two hills, the ſecond courſe croſſed the point of
" a hill which was not paſſable; they meaſured
" back on the firſt courſe, into the bottom, to en-
" able them to run the ſecond courſe. The ſe-
" cond courſe, as the ſurveyor then run, was on
" the point of a hill, where there was no timber
" cut, at the third corner, there was but little tim-
" ber, the fourth corner, no timber cut, the fifth
" corner, cleared, the ſixth corner no timber cut,
" at the ſeventh corner, no timber cut, except a
" road along the river, the laſt courſe called for
" forty poles but found only ſix, when we came
" to the river, which if they had extended agree-
" ably to the deed, would have carried them over
" the South branch to a pine hill. They then went
" down the different meanders of the river to
" the beginning. That they diligently examined the
" different corners, but found no corner tree, nor
" ſide mark; that there was an allowance made of
" two and one half degrees variation. And fur-
" ther proved by Job Welton, that he was ſummoned
" by the ſheriff of the county, to attend a ſurvey on
" the lands in diſpute, and that they began the firſt
" courſe of the ſurvey about the middle of the
" South branch where fort George formerly ſtood,
" that they run the firſt courſe, one hundred
" and ſix poles, about eleven rods of which was
" up a run between two hills, where the tim-
" ber was chiefly cut; they then ſtarted on the
" ſecond courſe, and run ſome diſtance when they
" came to a ſteep bank which they could not go
" down; they meaſured back on the firſt courſe
" into the bottom, to enable them to run the ſe-
" cond courſe. The ſecond courſe as the ſurvey-
" or then run was on the point of a hill where
" there was no timber cut, at the third corner,
" there was but little timber, the fourth corner,
" no timber cut, the fifth corner cleared, the
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" er no timber cut, except a road along the river,

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"the laſt courſe called for forty poles, but found "only ſix, when we came to the river. They then "took down the different meanders of the river, "to the beginning. That they diligently examined "the different corners, but found no corner tree, "nor ſide mark, that there was an allowance made "of two degrees and an half in the variation, and "that he was preſent when they run out the "land in 1773; When no marked trees, nor "corners, could be diſcovered. They alſo gave "in evidence the act of Aſſembly paſſed in the "year 1736, intituled an act for confirming and "better ſecuring the titles to lands in the Northern "neck. And they further proved by Moſes Hut-"ton, that he the ſaid Hutton, has been in this "country fifty odd years, that he has always "heard the South branch, the South fork and the "North fork called as they now are; that the land "in poſſeſſion of the tenants lies on the South ſide "of the South branch, and he believes about one "mile below the North fork. And by William "Cunningham ſenr. that he has been on the South "branch fifty eight years, that Solomon Hedges "lived on the land in diſpute fifty five years ago, "that the father of the Shobe's, the preſent te-"nants, was in poſſeſſion of the ſaid land about "fifty years ago, and that the tenants have lived "there ever ſince, but the ſaid witneſs knows of "no title that they had. The ſaid land lies a mile or "a mile and an half below the North fork and on "the South ſide of the South branch. That the "South branch, the South fork and the North "fork have been underſtood as ſuch during the "whole time he lived in this country. To which "evidence the demandants counſel demurred as "inſufficient in law, to ſupport the right of the "tenants to the lands in conteſt, and produced in "ſupport of their rights a copy of a patent duly atteſt-"ed as the law directs, from George the ſecond, "late king of Great Britain; in the words and "figures following, George the ſecond &c. and "the act of Aſſembly paſſed in the year 1748, en-

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"titled, An act for confirming the grants made "by his Majesty, within the bounds of the North-"ern Neck, as they are now established; and also "a copy of the last will and testament of Robert "Green deceased, authenticated under the seal of "the county of Orange, where the same was admit-"ted to record, in the words and figures following "to wit: In the name &c. And a copy of the "will of James Wood deceased, certified under "the hand of the clerk of the county of Frederick "where the same was admitted to record, in the "words and figures following, to wit: In the "name &c. And also a copy of a deed from Mary "Wood to the said demandants, certified under "the hand of the clerk of the county of Hardy, "where the same is recorded in the words and "figures following, to wit: This indenture &c. "the above being the only evidence given on the "part of the demandants; and pray the judgment "of the court, whether they have more right to "the tenements which they demand against the "tenants, or they to hold as they demand. To the "reception of which demurrer the tenants by their "counsel objected, for the following reasons, be-"cause the demurrer contained as well the evi-"dence demurred to by the demandants, as the "evidence exhibited by the demandants; and that "the facts which that evidence relates contained "matter proper for the consideration of the jury. "Which objection was sustained by the court.

Verdict and judgment for the tenants; upon which the demandant appealed to the District Court.

The District Court was of opinion, that the judgment was erroneous, in this, "that the court "below ought not to have admitted the evidence "stated on the part of the tenants as mentioned "in the demandants bill of exceptions to have "gone as evidence to the jury; and in not re-"ceiving the demurrer of the said demandant."

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That court therefore reverſed the judgment; and thereupon the tenants appealed to this court.

CALL for the appellant. This caſe exactly reſembles that of *Hyers* vs *Green*, * except, that here is a bill of exceptions to the teſtimony proving the *non tenure*, and not a demurrer only, as was the caſe there. But that circumſtance will not make a material difference; becauſe, if the *non tenure* could not have been given in evidence, in that caſe, the Court could not have decided for the tenants, upon evidence introduced for the purpoſe of proving the *non tenure*. Beſides it may be a queſtion, whether the demandant, by offering to demur in this caſe, ought not to be conſidered, as thereby conſenting to waive his bill of exceptions?

WILLIAMS *contra*. Contended, 1. That *non tenure* could not be given in evidence at common law. 2. That the act of Aſſembly had not altered the common law, in this reſpect. 3. That, if *non tenure* could be given in evidence, the judgment ought to be the ſame, as the judgment on *non tenure* at common law.

Upon the firſt point: The miſe is joined upon the mere right; the pleadings are in that manner; and the party cannot alledge in evidence, what would go to falſify his own pleadings. When therefore the defendant pleads to the mere right in the land, he inſiſts upon his title only; and therefore renders it unneceſſary, for the other ſide to prove the identity. If then he is ſuffered to give evidence of *non tenure* on the trial, he will take his adverſary by ſurprize; as the latter will not come prepared to meet the objection. Beſides *non tenure* is a plea in abatement; and therefore ought to be plead, or it cannot be taken advantage of afterwards. 5. *Bac. abr. (laſt edit.)* 426.

Upon the ſecond point: The act of Aſſembly does not alter the rules of the common law upon this

* Ante. 555

this subject. For that only furnishes a shorter mode of joining the mise upon the mere right, but does not alter the rules of proceeding, prior to the mise being joined. For the act of 1780 *Rev: Cod. p.* 36, ought to be read with that of 1792 *Rev: Cod: p.* 118 *sect.* 25: Which expressly treats *non tenure* as a plea in abatement, and supposes that it will be insisted on, before the mise is joined. According to which reading, the act will stand thus: If the tenant shall not plead *non tenure, joint-tenancy, or several tenancy in abatement*, he may plead in this form, or to this effect, &c. as in the act of 1786. Another argument on this point is that, at common law, the mise was not joined upon collateral points, such as, *non tenure &c.* but they were tried by a common jury; and therefore as the act only speaks of the mise, it follows, that these collateral matters were not designed to be included.

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Upon the third point: If non tenure could be given in evidence, still the judgment of the County Court is wrong. For it ought to be according to the judgment at common law: which was not a judgment in bar: It acquitted the tenants indeed, but the demandant recovered the lands *Cook. Lit.* 362. 363. 1. *Bac. abr.* 21. Therefore the judgment, in the present case, which goes in bar of the demandants claim, is clearly wrong, and ought to be reversed.

The demurrer does not waive the bill of exceptions, as the counsel on the other side suppose. For if they be repugnant, it would only prove, that the demurrer ought not to be received, but not that the bill of exceptions should be relinquished.

CALL. *Non tenure* may be given in evidence, since the act of 1786, although the mise is joined upon the mere right. For the act is positive that *any matter may be given in evidence which might have been specially pleaded.* And as *non tenure*

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clearly might have been ſpecially pleaded before the act, it follows, neceſſarily, that it may be given in evidence ſince. This is the more neceſſary, becauſe, in practice as well as according to the principles of law, the defendant is now obliged to plead in the form preſcribed by the act of Aſſembly: For I am informed, that one of the Diſtrict Courts refuſed to permit the defendant to plead a common law plea. A refuſal warranted by principles of law, and the rules for conſtructing ſtatutes: By which, the word *may* is underſtood to be imperative, and ſynonymous with *ſhall*, 6. *Bac. abr:* (*new edit.*) 379. Of courſe there is no choice left to the defendant, but he is obliged to plead the plea, which is preſcribed by the act. But it would be prepoſterous to oblige him to paſs by a plea, which would defend him, and to put in another, which will not, without allowing him to give, the matter of the firſt in evidence. This would be an act of injuſtice, which ought not to be imputed to the Legiſlature, when an obvious conſtruction will avoid it.

There are other conſiderations, which render, what we contend for, peculiarly proper; namely, the object of the act, and the ſtate of the practice in this country. The object of the act was clearly to ſimplify the pleadings in this action, and to rid it of all its entanglements and difficulties, by permitting the parties to try their claims, without the dangers, to which, the common law pleadings were expoſed. The object therefore ought to be promoted, in the conſtruction of a remedial ſtatute. And this is rendered peculiarly neceſſary, when the ſtate of the practice is conſidered. For the gentlemen, who practiſe in the Inferior Courts, are conſtantly riding about from Court to Court, and are generally obliged to plead upon the ſpur of the occaſion, without an opportunity of conſulting their books, or reflecting on the nature of the caſe. In this ſituation, they are forced to make uſe of the firſt form which preſents itſelf; and none, in ſuch a dangerous action as this is, at

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common law, would ſo obviouſly occur, as the form in the act of Aſſembly: Eſpecially, as it muſt often times be impoſſible, for the client himſelf to ſay, whether the bounds, deſcribed in the count, correſpond with thoſe of his own land. Conſiderations of this kind ought to have weight; and accordingly, in the caſe of *Downman* vs *Downman's exr's* 1. *Wash.* 26, the ſtate of the practice, in this country, was one reaſon given, by the court, for the opinion, that a plea of tender, if right in form, might be offered, after an office judgment.

But there is another circumſtance which renders it highly important, that our conſtruction of the act ſhould be adopted; namely, that, at common law, the defendant had a right to demand a *view*, before he plead; and then he was at liberty to plead *non tenure* of the lands in the count, or of thoſe put in *view*, at his election. *Booths real actions* 30. 15. *Vin. ab.* 591—2. But, as by the act of 1748, this right to demand a *view* is taken away, the tenant has no opportunity of knowing the lands, which are ſpecifically demanded, until he comes upon the trial; and therefore, unleſs he may then object *non tenure*, and ſhew that the lands, which the demandant purſues, are different from thoſe he deſcribes in his count, and to which latter the defendant is really entitled, he muſt loſe his own lands; and the demandant, inſtead of recovering the lands he really ſued for, will have judgment for thoſe which did not belong to him, merely from a ſlip in the pleadings. Thus if the demandant has title to a piece of land, which in fact is claimed by C, but which he ſuppoſes to be in the ſeizen of B, and therefore brings ſuit againſt B. for it; but, by miſtake in ſetting forth the boundaries, he deſcribes the land which really belongs to B, and the latter, ſuppoſing that to be the ſubject of the ſuit, puts in the plea preſcribed by the act: Here although, upon the trial, it clearly appears, that the land ſued for is really that, which C. claims, and not that belonging to B, yet the latter will not be allowed to ſhew this fact, but muſt

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ſubmit to a judgment, although he does not hold the lands demanded. A conſequence which would not have followed, if he could have demanded *a view;* becauſe he might then have plead, that he did not hold the land put in *view*, and thus abated the writ. But ſurely if the law has taken away the *view* for the benefit of the demandant, ſo as to avoid delay, it ought not to deprive the tenant, of the benefit of the ſame matter, in evidence.

There is perhaps another ground, upon which, this right may be maintained. A well known diſtinction exiſts between writs, which are abateable merely, and writs which *de facto* abate. In the firſt caſe the matter muſt be plead, but not in the other. An inſtance of the latter kind, is this; if one brings a ſuit in the name of a dead man, or of a fictitious perſon, here, although the defendant may, by miſtake, happen to plead in chief, yet when the fact is diſcovered the proceedings will be ſtopped, and the ſuit abated. There is the ſame reaſon for abating the ſuit, where it is found, that the plaintiff ſues for different lands, than thoſe in the poſſeſſion of the defendant. For it would be abſurd, to permit the plaintiff to recover, againſt the defendant, lands, which the latter does not hold; and therefore could not render to him.

Theſe principles muſt have regulated the deciſion, in *Hyers* vs *Green,* becauſe it was impoſſible to have decided for the tenants, in that caſe, without overruling the exception in this. And in *Beverley* vs *Fogg* 1. *Call's Rep.* 484, the court muſt have been under the influence of ſimilar reaſoning. For there the exception was, that the boundaries of the land were not ſet forth in the count; and the anſwer was, that it was too late to make an objection upon that ground, at the trial. "For the tenant having gone to iſſue on the count, "he had taken on himſelf the knowledge of the "lands demanded." Which is the ſame objection, in other words, as that taken in the preſent caſe;

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for the objection, here, is no more, than that the defendant, by pleading in chief, undertook to know the lands; and that was the very argument made uſe of there. Of courſe, as it did not prevail there, no more ought it here: Eſpecially as the court, in giving judgment there, ſay, that the jury had not found the boundaries; which admits, that there may be a ſpecification of the lands, upon the trial.

The demandant receives no prejudice from our conſtruction; becauſe the judgment, in this caſe, will not bar his recovery of his own lands, if he has title, againſt the perſon who actually has poſſeſſion of them.

The judgment in *non tenure*, is not ſuch as the counſel ſuppoſes. For if non tenure be a mere plea in abatement, yet, as a plea in abatement it vacates and deſtroys the writ; and therefore the demandant cannot have judgment: Becauſe the writ is the foundation of the plaintiffs recovery. But if there be no writ, there can be no recovery; and after a writ is abated, it is the ſame thing, as if there never had been one at all; and both parties are out of Court. Therefore *Booth* * in his book on *real actions* ſays, that "if the tenant do not "hold any part of the land, *i. e.* be not tenant of "the freehold, the writ ſhall abate; becauſe, as "Bracton ſays, he cannot loſe that which he has "not; and therefore the writ ſhall fall." Which proves clearly that no judgment is to be rendered for the demandant, on ſuch a plea. Nor do the authorities, cited on the other ſide, prove it. For the paſſages quoted from *Littleton Sect.* 691, 692, only ſtate, what will be the conſequences of the demandants entering on the lands, after the judgment againſt him on the plea, and not that any judgment, at all, ſhall be rendered for him: Which is the very expoſition given of them, by *Lord Coke*, who

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who says *fol.* 363. *(a.)* "*Albeit* in this case, and "in the case before, the entry of the demandant "is his own act, and the demandant hath *no ex-* "*press judgment* to recover, yet he shall be re-"mitted." Which clearly repels the idea, suggested on the other side.

It is unnecessary, to say any thing, as to the merits; because they are admitted to be the same with those in *Hyers* vs *Green;* and consequently, in favour of the appellants; so that the case rests merely on the technical exception.

The offer to demur is a waiver of the bill of exceptions; because they are repugnant. For, by demurring, the party admits the evidence; but denies the inference of law. Therefore to except and demur too involves a contradiction; and, consequently, the one must be considered, as a waiver of the other; or else the court will permit the party, to take contradictory steps.

WICKHAM *contra.* The point of *non tenure* was not decided in *Hyers* vs *Green.*

LYONS Judge. I understood the decision in *Hyers* vs *Green,* to have proceeded on the ground that the plaintiff had not shewn any title in himself.

WICKHAM. Then we are still at liberty to argue the point of *non tenure.* If the counsel, on the other side, are right, in their construction of the act of 1786, then judgment final is to be entered against the demandant in favour of the tenant, who will thus become entitled to the lands of the demandant, although he had no right to them; for the demandant will be for ever barred to claim them in any other action: Which must certainly be contrary to the intention of the Legislature. The word demurrer in the act of 1786 shews, that the tenant is not obliged to join the mise upon the mere right; and consequently that the word *may* is not imperative, as those on the other side suppose. Nor do the cases, cited from

6. *Bac.*

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6. *Bac.* prove it; for they relate to the acts of public officers. The argument, drawn from the doctrine of views, is plausible, at first sight, but it is founded on a mistake of the subject; for that related to the title papers. Nor does the case of *Beverley* vs *Fogg* apply; because it is necessary, that the count should describe the bounds; so that the sheriff may know, what lands to deliver, and that the land marks should be perpetuated. The act of 1786 only relates to pleas in bar; like pleading the general issue, with leave to give the special matter in evidence.

The demurrer is no waiver of the bill of exceptions. For the exception is to the admissibility; but the demurrer denies its force, when admitted.

RANDOLPH in reply. If the tenants are entitled to the lands they hold, they ought not to lose them by a slip in pleading; yet such would be the consequence of the doctrine contended for, on the other side. But fortunately the law does not warrant the doctrine. The act of 1786 is express, that all matters of defence, of whatever description they be, may be given in evidence; and consequently *non tenure.* Which is agreeable to the doctrine of the common law; for, at common law, any thing but collateral warranty may be given in evidence. The tenants are obliged to plead the plea prescribed in the act; which is imperative, as has been rightly stated. This is proved by the case of *Beverley* vs *Fogg;* for the judgment there was reversed, merely because the bounds were not inserted in the count, agreeable to the directions of the act.

Cur: adv: vult:

ROANE Judge. This is a writ of right, for 1120 acres of land on the South branch of Potowmack; The count and plea are both conformable to the act of 1786, and both describe the tract, as comprehended within the same boundaries. At the trial of the cause, two exceptions were taken

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by the demandants: 1. To the admiſſion of teſtimony going to ſhew the non identity of the land poſſeſſed by the tenants, with relation to that deſcribed in the count and plea. 2. To the deciſion of the Court refuſing to compel the tenants, to join in a demurrer tendered by the demandants. In ſupport of this laſt deciſion, two grounds were ſtated by the tenants counſel. 1. That the demurrant had alſo inſerted, in his demurrer, his own teſtimony. 2. That the facts, to which the evidence related, contained matter proper for the conſideration of the jury. The judgment of the County Court was reverſed by the judgment of the Diſtrict Court, "for that, as they alledge, the Court be-"low ought not to have admitted the evidence "ſtated on the part of the tenants, as mentioned "in the demurants bill of exceptions, to have gone "as evidence to the jury; and in not receiving the "demurrer to evidence."

The rectitude, of this opinion of the Diſtrict Court, is now to be diſcuſſed; and I will firſt conſider the caſe, on the ſecond bill of exceptions, relative to the demurrer to evidence.

As to the firſt objection ſtated by the tenants, to the reception of the demurrer, I ſhall only ſay, that in the caſe of *Hyers* vs *Green*, this Court were of opinion, on conſideration of the caſe of *Hoyle* vs *Young* 1. *Wab.* 150. and other authorities, that the plaintiff ought, eſpecially in a writ of right, alſo to ſet out his own evidence; and in that caſe, juſtified the rejection of the demurrer, on the ground, that the demurrant had not ſtated a *title* to recover, in reſpect of *his own* identity. This objection does not hold in the preſent caſe, for the identity of the demandant is fully manifeſted. I am not certain, whether the Court, in *Green* vs *Hyers*, conſidered the ground of the ſecond objection, although the demurrers, in the two caſes, are in that reſpect, ſubſtantially alike. But I take the rule to be, that although a Court ought to award a joinder in demurrer, where the

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evidence demurred to is in writing, or, being *parol*, is explicit, and, and will not admit of variance, yet that, where the parol testimony is loose, indeterminate, and circumstantial, the party offering it, shall not be compelled to join in demurrer, unless the party demurring will distinctly admit every fact and conclusion, which such evidence, or circumstances, may conduce to prove. In support of this distinction, I beg leave to refer to 5, *Bac. abr.* (*new edit.*) 467, and the authorities there cited; and to say that the evidence in question, in this case, respecting the boundaries of the land, and the understanding of the country, relative to the description of the river, is entirely of this latter description, being both loose and circumstantial. The demurrer to evidence, therefore, may be thrown out of the case.

The only remaining point to be considered arises out of the first bill of exceptions; and is simply, whether, upon the *mise* being joined according to the form prescribed by the act of Assembly, evidence, going to shew a *non tenure* of the lands stated in the pleadings, be admissible?

The act of 1786, concerning writs of right, prescribes the manner in which demurrants *shall* count. It also prescribes a general mode in which the tenant may plead. I think it is not only inferrable, from the various use of the words *shall* and *may*, but from the actual existence, at that time, of the act of 22 *Geo.* 2. *ch* 1. (since re-enacted) authorizing a plea of *non tenure* in abatement, that the general plea, prescribed by the act of 1786, is concurrent, and not exclusive.

Nor will the inconveniences result, which the appellees counsel apprehended; and which he stated would arise, from the different judgments, prescribed by the common law, in the case of *non tenure* being pleaded, and the mise being joined. If *non tenure* be now pleaded, the Court will give such judgment, thereupon, as the common law requires: But if it be given in evidence, and the jury find a

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special verdict, affirming such evidence, the Court will give a similar judgment. If, however, such evidence be given, and yet a general verdict be rendered upon the right, such verdict is a negative of that evidence; and decides the right: In which case, a judgment, corresponding with the verdict, ought to be rendered.

For these reasons, I think the judgment of the County Court was correct; and that the judgment of the District Court, reversing that judgment, ought to be reversed.

FLEMING Judge. This is an appeal from a judgment of the District Court, reversing a judgment of the County Court, rendered in favor of the appellants in this Court; and the reasons, given by the District Court, are, 1. That the County Court permitted evidence to be given to the jury, that the tenants were not in possession of the lands demanded, when the mise had been joined, between the parties, upon the mere right. 2. That the County Court did not compel the tenants to join in the demurrer to the evidence, which was tendered by the demandant.

As to the first: The Legislature of this country, in order to simplify the pleadings; expedite the trials; and prevent unnecessary delays in writs of right, have taken away the *vicis* and other delatories, and obliged the tenant to plead the general issue, and put himself upon the assize; allowing him to give any matter in evidence, at the trial of the cause, which might have been specifically pleaded. This latter provision appears to have been made, in order to reserve to him the benefits, to which he would have been entitled by the common law proceedings; and therefore he ought not to be deprived of them by arguments drawn from the common law, before the mode of proceeding was changed by the act of Assembly.

But it is objected by the counsel for the appellants, that the act of Assembly does not oblige the

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tenant to put himſelf upon the aſſize; for, by uſing the word *may*, they leave it optional in him, to put in the plea preſcribed by the act, or to plead any matter ſpecially, according to the courſe of the common law. Such a conſtruction, however, would render the act a dead letter; for the tenant might, at common law, have joined the miſe upon the mere right, and put himſelf upon the aſſize, without the aid of a ſtatute, to enable him to do it. This ſhews that a change in the proceedings was contemplated; and that the word *may* was intended to be compulſory. In other words it was not intended, that it ſhould be left to the tenants option, what he would plead, but the meaning was, that he ſhould be obliged to uſe the plea preſcribed by the act: However, in order to prevent his ſuſtaining any prejudice thereby, he is allowed to give any matter, in evidence, which he might have ſpecially pleaded. By this means, the proceedings are ſimplified, and delays prevented, without any injury to the party: Which was the great deſideratum, and what the ſtatute was deſigned to effect. Conſequently, it would be thwarting the will of the Legiſlature, and defeating the end of the act of Aſſembly, if we were to throw the party back again upon the technical rules of the common law; which the ſtatute was made to correct.

I am therefore clearly of opinion, that the County Court very properly permitted the evidence of *non tenure* to be given to the jury; and conſequently that the opinion of the Diſtrict Court upon that point was erroneous.

With reſpect to the ſecond point relative to the demurrer to the evidence: After the County Court had permitted the evidence to go to the jury, the cauſe reſted on a ſingle point; namely, whether the lands in poſſeſſion of the tenants were the ſame, with that claimed by the demandant in his count? This was a mere fact, proper for the conſideration of the jury upon the evidence; and

therefore

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therefore I think the County Court very properly left it to their decision.

The result is, that I am of opinion, the judgment of the District Court was erroneous upon both grounds; and therefore, that it ought to be reversed, and the judgment of the County Court affirmed.

LYONS Judge. The demurrer, after stating the titles and claims of all the parties, reduces the question to a single fact; that is to say, whether the land claimed by the demandant, and in possession of the tenants, is within the bounds of the patent granted, to Robert Green, in the year 1746, for 1120 acres, in the county of Augusta? Or in other words, whether it is the same land, which was surveyed for, and granted, to Robert Green by that patent? This was a simple question of fact; which a jury alone could, and ought to have determined. Therefore I think, the County Court, very properly left it to their decision.

But it is objected, that the tenants, not having plead *non tenure* in abatement, were precluded from giving it in evidence, or in any manner questioning the identity of the land. Suppose that position, were to be granted, could the demandant recover without shewing some title? After offering, in his count, proof of his right, has he produced it, or shewn any title, to the land which he has surveyed in possession of the tenants? That land lies on the South side of the South fork of the South branch; and not on the South side of the North fork, as his patent calls for, and states the land he claims to be. Then is it just, or can it be law, that after an issue is joined on the mere right, that the claimant shall recover land to which he shews no right, merely because the tenant cannot produce a patent for it! Surely, possession in such a case gives the best right; and the demandant ought not to be allowed to disturb it, without shewing a complete title in himself.

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Suppose the tenants had produced a prior patent for lands lying in the county of Augusta, and insisted that the lands claimed were within the bounds of their patent, must not the jury have enquired into the bounds of both patents, and determined whether the lands were included in either? And, if not included in either, what must have been their verdict? Could they have found for the demandant, who had no better title than the tenants? Surely not, for he could have no claim to a verdict, without shewing a title. But if the tenants may controvert the boundaries, where differents patents are produced, without pleading *non tenure*, I see no reason why they may not do it in every other case. The difficulty arises on account of the judgment to be entered in such cases, as it is a bar to the demandant to sue the tenant again. This might have been provided for by the Legislature, when they were altering the mode of proceeding; but having omitted to do so, the legal consequences must take place.

If however the tenant does not chuse to enter into the controversy, respecting the title, or bounds, on the general issue, he may still plead *non tenure* in abatement, as the act does not forbid it. All the difference is, that a different judgment will be entered for the tenant in that case, if found for him, than would be entered on a joinder of the mise; and that the demandant may take issue on the *non tenure*, or discontinue his suit as he sees proper.

Upon the whole, I am of opinion, that the judgment of the *District* Court should be reversed; and that of the County Court affirmed.

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3 A, the clerk of K. a merchant, in the fair courſe of his trade,

trade, had a counterfeit certificate offered him; which B, who heard him enquiring of H, whether it was genuine, told him if he bought, that he B. would give him 5/6 in the pound for it; after which A. bought the certificate, and then B once or twice, applied to know of A whether he would sell it; and A afterwards sold it to B; who afterwards brought suit against K for the purchase money; and the facts being stated in a demurrer to evidence, the court was of opinion that the plaintiff could not recover. *Knox* vs *Garland*. 241

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2 The executors of a conſignee will not be liable for outſtanding debts, unleſs there be groſs negligence. Ibid.

3. And the appointment of agents to collect is *prima facie* evidence of due diligence. Ibid.

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1 A deed, in which an eſtate for life is given the huſband, made by huſband and wife of the wifes lands to a truſtee, will paſs the eſtate: although no

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2 Particularly if the verdict finds, that it was for the purpoſe of ſettling it in the wifes family. Ibid.
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1 In an action on the caſe, upon a note of hand, there muſt be an *aſſumpſit* expreſsly laid in the declaration, and merely reciting the note, *in hæc verba*, is not ſufficient. *Cooke* vs *Simms*. 39
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3 What is an inſufficient averment in a declaration. *Taliaferro* vs *Robb*. 258
4 If a declaration in debt is blank, as to the ſums, the date of the obligation, the aſſignment thereof to the plaintiff, and as to the damages, a judgment, rendered thereupon is erroneous; and ought to be reverſed, and the ſuit diſmiſſed with coſts of both courts. *Blane* vs *Sanſum*. 495
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1 Deed re-acknowledged, within eight months, from its date, and recorded within four months from the re-acknowledgment, is good from the date of the re-acknowledgment, notwithſtanding there are more than eight months, between the time, when the deed was firſt executed, and the day of recording it. *Eppes* vs *Rondolph*. 125

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1 If the demurrer to evidence ſhews that the plaintiff ought not to recover, the court cannot ſet it aſide, and award a new trial; but ought to enter judgment for the defendant. *Knox* vs *Garland*. 241
2 When the plaintiffs evidence is not doubtful and uncertain, but defective only, the defendant may demur. Ibid.
3 In ſuch a caſe, if the court does

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4 And if the defendant offers to appeal, and the court refuses it, this court will reverse the judgment, notwithstanding there was a continuance by consent at a subsequent term, and after that a verdict and judgment for the plaintiff. Ibid.

5 In a demurrer to evidence all the testimony on both sides, ought to be inserted. *Hyers* vs *Green*. 555

6 In a demurrer to evidence all the testimony on both sides ought to be inserted, and if the demandant in a writ of right demur to the evidence he must shew a title in himself. *Hyers* vs *Wood*. 574

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1 Construction of the 7th section of the act of descents. *Brown* vs *Timberville*. 390

2. W. of full age, died intestate, without issue and unmarried, seized and possessed of an estate partly derived by devise, from his father G. W. and partly, by descent, from his brother R. W. leaving an uncle and three cousins, children of a deceased uncle of the whole blood on the mothers side, and an uncle of the half blood likewise on the mothers side; and leaving also, two relations on the fathers side. The estates were ordered to be divided into two moieties: One of which was to be divided between the two relations, on the fathers side; and the other moiety was to be allotted those on the mothers side, as follows; to wit: two fifths to the uncle of the whole blood; two fifths to the three cousins; and one fifth to the uncle of the half blood. Ibid.

3 So much of the act of 1785, relative to descents, as is not within the purview of that of 1792, is not repealed. Ibid.

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1 If in a declaration, for several slaves, laying separate values, the jury find a joint value it is error: and as to that, a *venire facias de novo* will be awarded, under the act of Assembly, in order to ascertain the separate values. *Higginbotham* vs *Buckner*. 313

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1 What shall be construed an estate tail and not an executory devise. *Selden* vs *King*. 72

2 Testator devises, that if his wife be with child, and the said child *lives*, and prove a male child, and lives to 21 years of age, a house shall be built on his land, and that he shall have the privilege of part

part of the paſture and wood-land, and ſhall enjoy the ſame peaceably; and after the deceaſe of his mother, then he gives him and the heirs of his body all his lands, houſes and appurtenanances, both real and perſonal, forever; But if the child proves *a* female and lives till 21 or marriage, ſhe ſhall have one half of his perſonal eſtate, and all his lands to her and the heirs of her body forever: But if the ſaid child ſhould *die* then he gives to his wife and her heirs forever, all his lands, ſlaves, flocks of cattle &c. and appoints her and her father executors of his will. The child proved to be a daughter: On her birth, ſhe had a veſted remainder in tail, with remainder in fee to the teſtators wife. *Selden* vs *King*. 72

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2 An *Amicus Curiæ* cannot move to quaſh an inquiſition of eſcheat. Ibid.

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1 Executors, who appear to have made no advantage by it, will not be denied juſtice, for having failed to make up an account of their adminiſtration; although, ſtrictly ſpeaking, it is perhaps, a duty. *Jones* vs *Williams.* 102

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Deans vs *Scriba.* 415
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LANDS.

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3 In this case, W. B. and N. acquired no title in the lands, by their first agreement with S; because S. himself had no right thereto, but it was in the Commonwealth. Ibid.

4 But M. must take the entry as made for him, so as to include the prior rights; for he cannot reject them, and go for the full quantity besides. Ibid.

5 Nor can he hold S. to warrant the lands in R. free from the titles of others. Ibid.

6 The judgment of the board of Commissioners, under the land law, is conclusive; and cannot be impeached. *Stephens Coburn.* 440

7 And this notwitstanding the plaintiff was an infant, at the time, the judgment was given. Ibid.

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1 A. leases to B. for twenty years; with liberty to B. of surrendering the lease at any time before, on payment of 5*s*. A devises the rents, during the lease, to his five daughters, and the fee simple afterwards to his son P; who sells to A; who surrenders the lease. This surrender shall not disappoint the daughters legacies; but A will be decreed to pay the rents. *Graham* vs *Woodson.* 249

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2 Otherwise, if the recording was prevented by the fraud of the creditors. Ibid.

MILLS.
1 Where, in a petition for a mill, the witnesses are divided, whether it will be injurious or not, and the County Court and District Court both decide, that it will not, this court will affirm the judgment. *Home* vs *Richards.* 507

MORTGAGE.
1 What shall be considered as a mortgage, and not a conditional sale. *Robertson* vs *Campbell.* 421
2 There is a difference between a mortgage, and a conditional sale. *Robertson* vs *Campbell.* 428
3 There will often be a difficulty in drawing a line between a mortgage and a conditional sale; but the question always is, whether a purchase was contemplated, and the price fixed, or a loan of money, and a security intended. *Robertson* vs *Campbell.* 429
4 An absolute conveyance will not prevent its being considered as a mortgage. *Robertson* vs *Campbell.* 430
Vide account No. 1.
Usury No. 4.

NEW TRIAL.
1 After three verdicts, all agreeing, the Court of Chancery did right in decreeing according to the opinions of the juries. *Stannard* vs *Graves &c.* 369
2 If in an issue from the High Court of Chancery, the judge, who tried the cause, is dissatisfied with the verdict, it ought to be certified of record; or if that be refused, a bill of exceptions should be taken. Ibid.
3 And the omission cannot be supplied by affidavits, especially of the counsel; for it would be a most dangerous precedent. Ibid.

NEW APPEALS.
1 What shall be considered as a new appeal. *Skipwith* vs *Clinch.* 536

NON TENURE.
Vide writ of right.

OLD GENERAL COURT.
1 Their decisions, where they went to establish rules of property, are authority in this court. *Wallace* vs *Taliaferro* 469

PAPER MONEY.
1 Receipts and payments, by an

an adminiſtrator, ought not to be reduced to *ſpecie*, by the legal ſcale of depreciation; but ſhould be ſcaled in *paper money*. *Taliaferro* vs *Minor*, 190

2 The act of Aſſembly declares, that all actual payments, made in paper money in diſcharge of debts or contracts, ſhall ſtand at their nominal amount, without being ſcaled; nor are ſuch payments within the proviſo empowering the courts to vary the ſcale upon equitable circumſtances. *Taliaferro* vs *Minor*. 190

3 A. takes a leaſe of B. in May '77 for 21 years. In Auguſt 1778, a ſimilar leaſe of the ſame eſtate is executed. The rents are to be ſettled by the ſcale of May 1777. *Shipwith* vs *Clinch*. 253

4 The laſt clauſe, in the act of 1784, applies to debts contracted during the exiſtence of paper money only, and not to thoſe contracted before. *Shipwith* vs *Morton*. 283

Vide ſpecie.

PAROL AGREEMENT.

Vide agreement.

PARTIES.

1 It is not regular to make a decree between two defendants, unleſs they conſent. *Taliaferro* vs *Minor*, 197

2 Parties intereſted ſhould have an opportunity of being heard. *Pleaſants* vs *Pleaſants*. 319

PARTNERSHIP.

1 A, is indebted to D, F. & co. by bond: A. dies, and at the ſale of his eſtate, by his executors, T. the acting partner of D, F. & co. buys a ſlave, which he carries to his own plantation, and there continues him. The amount of the purchaſe money, for the ſlave, is a good diſcount, againſt the bond. *Raſe* vs *Murchie*. 409

2 In this country, where a retail ſtore is opened, it is the ſtore, which gives the acting partner credit; and which is liable for any commodities furniſhed him by the planter. Ibid.

PERPETUITIES.

Vide eſtates.

1 The doctrine of perpetuities, and executory limitations, conſidered. *Pleaſants* vs *Pleaſants*. 319

2 Teſtator, in Auguſt 1771, deviſed that all the ſlaves, he ſhould die poſſeſſed of, ſhould be free, if they choſe it, when they arrived to the age of 30 years, and the laws of the land would admit. This limitation was good in event. *Pleaſants* vs *Pleaſants*. 319

3 And therefore, after the act of 1782, on any perſons giving ſuch a bond, as that act requires, all of them above the age of 45, and their increaſe born after their reſpective mothers had attained the age of 30,

30, were entitled to freedom. But all, that were above thirty and under 45, were immediately entitled to emancipation. And all under 30, whose mothers had not attained that age, at their birth, and all their future descendants, born before their mothers attain 30, will be entitled to freedom on their arriving at the age of thirty. Ibid.

4 The policy of the law, leans at least, as strongly against perpetuities, in personal, as in real estates. Ibid.

PLEADINGS.

1 If in trespass, the defendant pleads the word *justification*, only; and the plaintiff replies generally. No issue is joined in the cause; and therefore, after verdict for the defendant, a repleader will be awarded. *Kerr* vs *Dixon*. 379

POINTS OF LAW.

1 If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed the appellant will pay him the full amount of the debt damages and costs, then due, upon the appeal; and the appellee consents, thereto, and the appeal is dismissed agreed, the appellee may maintain assumpsit on this promise; and the Court may leave the question of damages to the jury. *Spotswood* vs *Pendleton*. 209.

Although the jury may fairly presume the defendants consent, either previous or subsequent, yet if the judge gives them a direction, as they may have been influenced by the direction, if that was wrong, there ought to be a new trial. *Herbert* vs *Alexander*. 504

3 The Court cannot be called on, to instruct the jury, to find a verdict for the defendants; although *some* of the evidence is *written* testimony. *Martin* vs *Stover*. 514

POWERS.

1 Testator devises slaves and personal estate to his wife, during widowhood, and then to be divided, at her discretion, amongst his children: The wife gave one of the slaves, in 1774 to one of the children, by *parol* gift. It was a good execution of the power, as to that slave. *Morris* vs *Owen*. 520

2 The wife could not under the power, appoint to the testators *grand children*. Ibid.

3 And the part of the property, which was ineffectually appointed, or not appointed at all, remained as part of the residuary estate of the testator, undisposed of, by his will.

4 The forms and solemnities required, by statute, for conveyances, are not necessary to be observed by a person who executes a power of appointment. Ibid.

PRACTICE.

Plea allowed to be amended after

after a trial, and verdict for the plaintiff. *Richardson* vs *Johnston.* 527.

RELATION.

1 Relation, being a legal fiction contrived to support justice is never to be admitted to do an injury to a third person. *Eppes vs Randolph* 186

SCIREFACIAS

Vide Appeals No. 4.

SECURITIES.

Vide Sheriff No. 3.

SHERIFF.

1 If there be judgment, against a sheriff for the amount of mony levied on an execution with the 15 *per cent* interest, and he appeals, the appellee by waiving the 10 *per cent* damages, for retarding the execution, and taking a simple affirmance of the judgment, may still have his 15 per cent damages, according to the judgment of the Court below. *Guerrant* vs *Tayloe.* 208

2 If the Sheriffs deputy drive or cause to be driven, one mans property on the lands of another, in order that he may levy a *distress warrant* on it; which he accordingly does; an action will lie against the sheriff for it. *James* vs *M'Cubbin.* 273

3 Bond given by a sheriff, through mistake, for the taxes imposed under an expired law, will not bind, the securities, for those of the true year. *Branch* vs *Commonwealth.* 510

4 But the Commonwealth's remedy is by action against the sheriff. Ibid

5 *Quere* If a sheriffs bond, directed to be paid to the Treasurer, is good, if made payable to the Governor? Ibid.

6 *Quere* Also if the sum due from the sheriff, was payable in facilities, the jury may not consider the value of the certificates at the time they ought to have been paid? And whether they are bound to allow the 15 *per cent* given on motion, or may not judge of the real damages? Ibid.

SLAVES.

1 Slaves Recovering their freedom, are not entitled to damages for detention. *Pleasants* vs *Pleasants.* 319

2 Construction of the 4th section of the explanatory act of 1727 chap. IV. *Wallace* vs *Taliaferro.* 447

3. W. R. made his will, in May 1774, and devised to L W and C T sundry slaves, with the residue of his estate, subject to the payment of his debts and legacies; and appointed J W the husband of L W and R T the husband of C T executors; who qualified as such. In August 1774, J W died, before any division of W R estate was made and by his last will devised all his slaves to his daughter, and his two sons. As J W was at most only possessed as executor, and not in right of his wife

her

her ſhare of the ſlaves ſurvived to herſelf, and did not paſs by the will of J W Ibid.

4 W B deviſed Slaves to his daughter A W for life, remainder to all her children; one of whom, by the name of C married E C and died in the life-time of her mother and huſband: Her huſband took adminiſtration on her eſtate. A diviſion was afterwards made of the ſlaves; and one by the name of Lazer, aſſigned as the ſhare of the ſaid C C. The ſaid E C the ſurviving huſband, took poſſeſſion of the ſaid ſlave, and ſold him to C S for a valuable conſideration: After this, M C, the eldeſt ſon of the ſaid C C, took poſſeſſion of the ſaid ſlave, and ſold him to R D. The ſale by E C, the huſband, was good; and C S, the purchaſer is entitled to the ſlave. *Drummond* vs *Sneed.* 491.

SPECIE.

1 *Specie* during the war, was not an article of currency, but a commodity, at market; and items of *ſpecie*, advanced during that period, ſhould be extended, at the value, at the time of the advance made. *M'Connico* vs *Curzen.* 358

STATUTES.

1 Rules of conſtruction. *Browne* vs *Turberville.* 390

2 *Quere:* Whether, in order to effect the intention of the Legiſlature, words may be interpoſed? Ibid.

3 A ſaving repugnant to the body of a ſtatute is void. Ibid.

4 Rules for conſtruing ſtatutes. 462 to 468.

Vide deſcents No. 3.

SUPERSEDEAS.

1 If the Diſtrict Court refuſe to grant a *ſupersedeas*, to a judgment of the County Court and enter the refuſal on record, this court will not grant a *mandamus*, but will award a *ſupersedeas* to the order of the Diſtrict Court. *Mayo* vs *Clark* 276

TENDER.

1 If to a ſuit, on a bill of exchange, dated in 1775, the defendant pleads that he tendered the intereſt in *paper money*, without confeſſing the action, as to the principal, or ſaying any thing in bar of it, the plea is bad. *Skipwith* vs *Morton & co.* 277

2 The defendant may give ſuch tender in evidence, to extinguiſh the intereſt, on the plea of payment. Ibid.

3 But, if he withdraws the plea of payment, he relinquiſhes the evidence. Ibid.

4 And therefore, if there be a demurrer to the plea of *tender*, final judgment will be rendered for the plaintiff. Ibid.

USURY.

1 In order to conſtitute uſury, both parties muſt be conſenting to the unlawful intereſt; that is to ſay, the lender to aſk,

and

and the borrower to give. *Price* vs *Campbell.* 110

2 Therefore if a bill of exchange is drawn upon an obſtrue man in Scotland, although the payee may *expect* it will be proteſted, yet if there was no agreement between him and the drawee, that it ſhould be proteſted, the tranſaction is not uſurious. Ibid.

3 There muſt be proof of a *lending* and *borrowing* to conſtitute uſury. Ibid.

4 Where the profits of the mortgaged ſubject greatly exceed the intereſt of the money lent, if there be an agreement to ſet the profits againſt the intereſt, it is uſury. *Robertſon* vs *Campbell.* 430

WITNESS.

1 A witneſs received to prove that he paid a ſum of money for the defendant to the agent of the plaintiffs aſſignors, in diſcharge of the obligation, upon which the ſuit was brought; for he is not intereſted in the event of the ſuit. *Meade* vs *Tate.* 231

WRIT OF RIGHT.

1 *Quere:* If non tenure may be given in evidence, in a writ of right, where the miſe is joined upon the mere right? *Hyers* vs *Green.* 555

2 Non tenure may be given in evidence, in a writ of right, where the miſe is joined on the mere right. *Hyers* vs *Wood.* 574