DECISIONS

OF CASES

IN VIRGINIA,

BY THE

HIGH COURT OF CHANCERY,

With Remarks upon Decrees

BY THE

COURT OF APPEALS,

Reverſing ſome of thoſe DECISIONS.

RICHMOND:

Printed by THOMAS NICOLSON.
M,DCC,XCV.

Diſtrict of Virginia to wit.

BE IT REMEMBERED THAT, *on the ſixth day of january, in the year of our lord one thouſand ſeven hundred and ninety-five, and of the independence of the united ſtates of America the nineteenth,* GEORGE WYTHE, *of the ſaid diſtrict, has depoſited in this office the title of a book, the right whereof he claims as author, in the words following* " Deciſions of caſes in Virginia, by the high court " of chancery, with remarks upon decrees by the court of ap- " peals, reverſing ſome of thoſe deciſions," *in conformity to the act of the congreſs of the united ſtates, intituled,* " *an act, for the encouragement of learning, by ſecuring the copies of maps, charts and books to the authors and proprietors of ſuch copies, during the times therein mentioned.*"

WILLIAM MARSHALL, cl. D. C. V.

BETWEEN
BENJAMIN PENDLETON and JAMES PENDLETON, *plaintiffs*,
AND
JOHN HOOMES, *defendent*.

JOSEPH HOOMES made his teſtament, the 15 day of february, 1782, wherein after ſundry deviſes and bequeſts, are theſe words: 'i give all the reſiduum of my eſtate to be equaly divided between the chil-'dren of my uncle Benjamin Hoomes and my couſin John Hoomes, to 'them and their heirs forever, ſhare and ſhare alike.'

The teſtator died in april, 1785.

When the teſtament was made, Benjamin Hoomes had ſix children, of whom Martha, the mother of the plaintiffs, died about ſix months before the teſtator, her father then living.

If the ſhare, to which Martha in the event of her ſurviving the teſtator would have been intitled, be lapſed, the defendent, who was heir of the teſtator, ſucceded to the heritable parts of the reſiduary ſubject; if not, the reſiduum was diviſible in the ſame manner as it would have been if ſhe had never exiſted, and the plaintiffs, to whom the ſurviving children of Benjamin Hoomes have reſigned and conveyed their five ſixth parts of ſo much as would have been the ſhare of their ſiſter Martha, if ſhe had been a ſurviving child, are intitled to thoſe propotions, that is, five ſixth parts of one ſeventh part of the reſiduum, to recover which this bill was brought againſt the defendent, who was executor, as well as heir, of the teſtator.

By the court:

The terms in the teſtament of Joſeph Hoomes, deſignating thoſe to whom, with the defendent, the teſtator deviſed the reſidue of his eſtate, namely, 'the children of my uncle Benjamin Hoomes,' being predicable not leſs truly of the children only who ſhould be living at the time when the teſtator ſhould die, than of the children who were living when he made his teſtament, and neither of thoſe expoſitions appearing to be deciſively favoured by other clauſes in the teſtament, the court doth prefer the former, becauſe by that the declared intention of the teſtator, 'to give all the reſi-'duum of his eſtate,' and that it ſhould 'be equaly divided among the 'children of his uncle Benjamin Hoomes, and his couſin John Hoomes, ſo 'as that they ſhould ſhare it alike,' ſeems accompliſhed, in every event, as probably as it would have been by the latter, expoſition; whereas by this, in the event, which hath happened, of Martha's death before the teſtator, that intention, if ſome deciſions of the engliſh courts be orthodox, would be contravened; for part of the reſiduum would not be given, and the defendent, inſtead of ſharing alike with the children of Benjamin Hoomes, that is, taking ſo much as each one of them, would take one ſeventh part more.

Decree for the plaintiffs in october, 1790.

BETWEEN
WILLIAM NANCE and Mary his wife, *plaintiffs*,
AND
GEORGE WOODWARD and Lucy his wife, who was the widow and adminiſtratrix of Timothy Vaughan, the ſon, *defendents*.

TIMOTHY VAUGHAN, the father, in his teſtament, the 1 day of december, 1759, after deviſing lands to his three ſons David, Timothy, and Henry, and bequeathing ſome ſtock and a bed to his daughter the plaintiff Mary, and a gold ring to each of his daughters Sarah and Cate Rably,

Rably, added, 'item, i give to my wife Sarah Vaughan all my perſonal 'eſtate, and negros, named as followeth, Peter, Nat, Thomas Beef, Nan-'cy, Patt, and the uſe of the plantation whereon i now live, during her 'natural life:' and appointed his wife executrix, directing that ſhe ſhould not be required to give ſecurity, and that his eſtate ſhould not be appraiſed.

David, the eldeſt ſon, and the daughters Sarah and Cate Rably are dead, inteſtate, and unrepreſented otherwiſe than by their ſurviving brothers and ſiſter.

No inventory and appraiſement of the eſtate of Timothy Vaughan the father appear to have been returned by his executrix, who died in 1772.

Of the eſtate in her poſſeſſion at the time of her death, Timothy the ſecond ſon, to whom the adminiſtration thereof was committed, returned an inventory and appraiſement to New-kent county court, which eſtate is that bequeathed to her by the teſtament of her huſband; or what remained of it and proceeded from it.

The plaintiffs, in right of the wife, claimed her proportion of the appraiſed value of the negros, and diſtributive ſhares of the other chatels.

The defendents inſiſted, that the property of the perſonal eſtate and negros, and not the uſe for her life only, was bequeathed by the teſtator to his wife, by whoſe teſtament the negros were bequeathed to David the eldeſt ſon, from whom they deſcended to his brother Timothy, former huſband of the defendent Lucy.

The cauſe coming on to be heard, the ſecond day of march 1793, the court delivered this

OPINION.

That in the bequeſt by Timothy Vaughan to his wife of all his perſonal eſtate, and negros, and the uſe of the plantation whereon he lived, during her life, the words, 'during her life,' relating neceſſarily to the 'words, 'i give to my wife,' ought to be connected, and be underſtood to have been repeated, with them in every intervening member of the ſentence to which they apply, limiting the duration of her intereſt in all the things which were the ſubjects of the gift, and the bequeſt ought to be expounded in the ſenſe, wherein it would have been expounded, if it had been written thus: 'i give to my wife, during her life, all my perſonal eſtate, and negros, and 'the uſe of the plantation whereon i now live; or thus: 'all my perſonal 'eſtate, and negros, and the uſe of the plantation, whereon i now live, i 'give to my wife during her life; or, more explicitly thus: 'i give to my 'wife all my perſonal eſtate during her life, and i give to my wife my ne-'gros during her life, and i give to my wife the plantation whereon i now 'live during her life.'

That this expoſition is the more eligible than the other, according to 'which the words, 'during her life,' are applied only to that part by which the uſe of the land was given to her, would be, becauſe, the words, confined to that, would be ſuperfluous, for a deviſe of the land, without thoſe words, when this teſtator died, would have conveyed it to her during her life only; whereas the words, applied to the perſonal eſtate and negros, are ſignificant.

That, if the bequeſt be ſo expounded, and conſequently the wife could make no diſpoſition of the perſonal eſtate and negros, which would be effectual after her death, the former, or ſo much thereof as did not periſh, and was not in the uſe conſumed, in her lifetime, was, with the acceſſions, diſtributable, after her death, amongſt the children, and the latter, with the increaſe of the females, deſcended to the heir at law, of the teſtator, and

That the value of the negros, for proportions whereof the heir was accountable to the other five children, is the value of ſuch of the original ſtock, with the increaſe of the females, as ſurvived at the time of the wife's death, when he had a right to poſſeſſion of them; which value appeareth by the appraiſement returned by Timothy Vaughan the ſon to be 300l. 10s.

Conformably with which opinion, the eldeſt ſon having died inteſtate and childleſs, and thereby his brother Timothy, the inteſtate of the defendent Lucy, to whom the negros deſcended, being in like manner accountable; and two of the daughters, who are dead, not appearing to have been married, or to have made their teſtaments, and thereby the plaintiff Mary being intitled, as is ſuppoſed, to diſtributive ſhares of their proportions, the court pronounced this

DECREE,

That the defendents, out of the eſtate in their hands to be adminiſtered of their inteſtate Timothy Vaughan the ſon, do pay unto the plaintiffs 83l. 9s. 5d. being the ſum of the plaintiff Mary's proportion of the value of the negros, and her diſtributive ſhares of the defunct childrens proportions, and alſo pay unto them 17l. 4s. 8d. being the ſum of the plaintiff Mary's filial portion and diſtributive ſhares of 51l. 14s. the appraiſed value of the perſonal eſtate, excluſive of the negros, as appeareth by the ſorementioned exhibit, with intereſt upon both thoſe ſums from the laſt day of may, in the year 1773: liberty being reſerved to the defendents, on any day of the term next after they ſhall have been ſerved with a copy of this decree, to ſhew cauſe againſt that part thereof which relateth to the perſonal eſtate, excluſive of the negros, inaſmuch as they do not by their anſwer confeſs it to have come to the hands of their inteſtate.

BETWEEN

WILLIAM SHERMER, heir, executor, and reſiduary legatee of Richard Shermer, *plaintiff*,

AND

DUDLEY RICHARDSON, executor of John Shermer, and the heir and next of kindred of Ann Shermer, *defendents*.

IN this cauſe, upon theſe words in the teſtament of John Shermer, who died in 1775, 'i give to my wife the uſe and profits of my whole eſtate, 'both real and perſonal, during her natural life, and, after that is ended, 'my will and deſire is, that the whole of my eſtate, excluſive of that al-'ready given my wife, be equaly divided betwixt whoever my wife ſhall 'think proper to make her heir or heirs, and my loving brother Richard 'Shermer,' a queſtion was made, whether Anne Shermer, the wife of the teſtator, who died, a few days after him, in the ſame month, without making any diſpoſition of her eſtate, took a fee ſimple in one half of the land deviſed, and a property in one half of the other eſtate bequeathed, to her? the plaintiff, who is heir of John Shermer, and next of kindred to him, claming the half, of which ſhe had not the ownerſhip, as he inſiſts, but only power to diſpoſe; becauſe, by her failure to exerciſe that power, that half was undiſpoſed, and conſequently deſcended and devolved upon him.

BY THE COURT, the 27 day of ſeptember 1792.

By the firſt ſection of Lyttleton's tenures we learn, that, in feoffments and grants, a fee ſimple, or the greateſt property, in land is not conveyed to the taker, unleſs in the habendum after his name be inſerted the words, 'and to his heirs.' but theſe words, notwithſtanding the addition of them at that time was neceſſary, in thoſe acts, to augment the eſtate, from an eſtate for life, which without them it would have been, to an eſtate of inheritance, do not import, as an ordinary reader might ſuppoſe, a transfer of any right to the heirs. indeed if he, to whom and to whoſe heirs, land is conveyed, make no diſpoſition thereof, his heir will ſucceed to it. yet this is not becauſe he was indicated by the word, 'heirs,' in the deed of conveyance, for where an inheritance is acquired, not by tralatitious act, as by eſtopel, diſſeiſin, abatement, intruſion, &c. the heir, if no diſpoſition be made of it, will ſucede to it. it is becauſe, where the dying owner of an inheritance hath not appointed a ſucceſſor, the law appointeth one for him:

him: but he may prevent the heredetary ſucceſſion, by act taking effect in his lifetime, e g by ſale or gift, or not until after his death, e. g by appointment of a teſtamentary ſucceſſor or a haeres factus. the words, 'to 'his heirs,' therefore, even where they are requiſite, are an antiphraſis: they do not reſtrain the anceſtor from diſinheriting, but inſtead of that, making him abſolute owner, impower him to diſinherit, the heir. a grant to one and to his heirs then is, in effect, a grant of power, in popular language, to diſpoſe. ſo that a grant to one of a power to diſpoſe of lands, is a form naturally as apt to convey an inheritance, as a grant of the lands to him and to his heirs.

Accordingly in ſome formulae the word heirs is unneceſſary: in a teſtament technical language is diſpenſed with, and may be ſupplied by the teſtators intention; for if a man deviſe lands to one, TO GIVE, in this caſe a fee ſimple doth paſs by the intent of the deviſor. Cokes inſtitutes, 1 vol. fol. 9. b. and more than a myriad of other examples to the ſame purpoſe may be quoted. a deviſe then to one to give, is equivalent to a deviſe to one and to his heirs. a deviſe to my wife, 'and to whomſoever ſhe ſhall 'think proper to make her heir or heirs,' is equivalent to a deviſe to my wife, 'to give;' and conſequently equivalent to a deviſe to my wife and to 'her heirs.' a deviſe in this form, 'i make I S heir of my eſtate,' or 'i 'wil lthat I S inherit my eſtate,' hath been adjudged in a multitude of caſes, without an exception, to convey a fee ſimple; for, although, if I S be not he, whom the law denominateth the heir, the teſtator can no more make him heir than he can change the law, yet his intention being manifeſt, that I S ſhould have the ſame intereſt in the eſtate, as if the characters of an heir were verified in him, the meaning of technical words, which would effectuate that intention, is tranſuſed into the inartificial words by which the teſtator declared it in like manner in a deviſe to my wife, with this addition, 'and my deſire is that, after her death, the eſtate ſhall go to the 'heir or heirs whom ſhe ſhall think proper to make,' the intention being manifeſt, ſhe ſhould have ſuch a right and power that he to whom ſhe ſhould think proper to give the eſtate, or diſpoſe of it otherwiſe, ſhould have the ſame intereſt in it, as if he were in law her heir, or, if ſhe ſhould make no diſpoſition that her heir ſhould ſuccede to it, whether ſhe ſhould give or diſpoſe of it, or ſuffer it to deſcend, being a matter unimportant to the teſtator or his family, to the teſtators inartificial words ſhall be attributed the meaning of thoſe technical words, by which his deſire will be accompliſhed, that is, it ſhall be a deviſe to the wife and to her heirs.

Now the words of John Shermer's teſtament being, 'i give to my wife 'the uſe and profits of my whole eſtate, during her life, and after that is 'ended, then my will and deſire is, that the whole of my eſtate be equaly 'divided betwixt whoever my wife ſhall think proper to make her heir or 'heirs, and my brother Richard Shermer;' this deviſe, if for ſome terms in it be ſubſtituted the equivalent terms, being read thus: 'i give to my 'wife the uſe and profits of my whoſe eſtate, during her natural life, and, 'after that is ended, my will and deſire is, that the whole of my eſtate be 'equaly divided between my wifes heirs, and my brother Richard Shermer,' would unqueſtionably have conveyed a fee ſimple in one half of the lands, and an abſolute property in one half of the other eſtate to the wife; and ſuch ought to be the operation of the teſtators own words, unleſs it be interdicted by the gift to her for life. if this be relied upon, two anſwers are given to it, either of which is ſufficient to obviate the objection, if it deſerve that appellation; 1 that where an eſtate for life is given to one, and afterwards in the ſame conveyance the eſtate is given to the heirs of the donee, the donee takes the inheritance immediately. Cokes inſtitutes 1 vol fol. 22. b. and, by like reaſon, where an eſtate for life is deviſed to one, and afterwards in the ſame teſtament the donee is impowered to make an heir of the eſtate,

the

the donee takes the inheritance immediately. 2 that in the deviſe to the wife, the words, 'during her natural life,' ought not to be applied to that moiety of his eſtate which the teſtator deſigned for her heir or heirs, becauſe a power to diſpoſe, or to make an heir of the moiety, which ſhe undeniably had, and an inheritance or property in the moiety, being ſynonymous terms, the words, 'during her life,' can have no effect upon her right to that moiety, which was greater than an eſtate during her life, but ought to be confined to that moiety, which was deſigned for his brother, and in which her intereſt would ceaſe with her life. ſo that the deviſe ought to be expounded as if it had been written thus: 'i give one half of my eſtate to 'my wife, and to whomſoever ſhe ſhall think proper to make her heir or 'heirs, that is, i give one half of my eſtate to her and to her heirs, and i 'give the other half of it to her during her life only, and, after her death, 'to my brother Richard Shermer.'

This expoſition of the teſtament fulfilleth the intention of him who made it, to divide, after the death of his wife, his eſtate between their two families equaly.

Diſmiſs the bill as to the moiety of the eſtate whereof the wife had a power to diſpoſe.

This diſmiſſion was affirmed upon an appeal.

BETWEEN
THOMAS BAILEY and Anne his wife, *plaintiffs*,
AND
LEVIN TEACKLE, executor of Ralph Juſtice, Edward Ker, and William Harmanſon and Henry Harmanſon, executors of John Harmanſon, *defendents*.

RICHARD DRUMMOND by his teſtament deviſed as followeth: 'i give and bequeath to my wife Catharine Drummond the land left 'me by my father Richard Drummond, lying on Hunting creek, containing '600 acres, including the half of Halfmoon iſland, during her widowhood; 'and i alſo give my ſaid wife the uſe of my watermill, lying on the head of 'Hunting creek, during her widowhood. item i give and bequeath unto 'my daughter Alicia Drummond my aboveſaid plantation, lying on Hunting 'creek, after the time limited her mother, to her and to her heirs, and i alſo 'give my ſaid watermill to my daughter Alicia, to her and to her heirs. item 'i give and bequeath to my daughter Anne Drummond the plantation which 'my father bought of Jacob Litchfield, to her and to her heirs, and i alſo 'give my daughter Anne a negro boy named Jamey. and in caſe my two 'children Alicia and Anne Drummond ſhould die without heirs of their 'bodies then i give my ſaid wife my plantation, lying on Hunting creek, 'during her life, and after her death to my brother Spencer Drummond. 'my will is that my wife Catharine have all my eſtate till the firſt child 'marries or arrives to the age twenty one years. and my will is that there 'ſhall be an equal diviſion of my eſtate and ſettlement.'

The writing purporting to be this teſtament begins with theſe words, 'i Richard Drummond of Accomack county, &c.' do make and ordain 'this my laſt will and teſtament, &c.' and concludes with theſe words, 'revoking all other wills before made. in teſtimony whereof i have here-'unto ſet my hand and affixed my ſeal, this day of april, in the year 'of our lord 1744. ſigned, ſealed, publiſhed, and delivered in preſence of.' no name is written under it.

Richard Drummond died in february, 175[illegible]. probate of this writing for his teſtament was obtained in october, 1765, when three witneſſes, before the court of Accomack county, to whoſe juriſdiction the matter belonged, depoſed that they believed it to be all of his handwriting, with which they declared themſelves to have been well acquainted.

Adminiſtration

Adminiſtration of the goods chatels and credits of Richard Drummond, on the ſuppoſition of his inteſtacy, was committed to Catharine his widow, the mother of the plaintiff Anne and her ſiſter. the daughter Alicia died an infant, inteſtate, and not having been married, between three and four years after the death of her father.

In 1756, the widow was married to Ralph Juſtice, who died in her lifetime, in december, 1759, having made his teſtament, whereof he appointed the defendent Levin Teackle executor.

The plaintiff Anne, the other daughter of Richard Drummond, in may, 1759, being then an infant, was married to William Juſtice, ſon of the before named Ralph Juſtice, and after his death, which happened in april, 1762, was married in november, of the ſame year, whether then an infant or of full age doth not appear, to her preſent huſband.

Catharine Drummond, at the time of her marriage with Richard Drummond, was the widow of John Shepherd, to whom ſhe had borne two daughters, Margaret and Elizabeth, who were married, the former to the defendent Edward Ker, and the latter to John Harmanſon, the teſtator of the other defendents William Harmanſon and Henry Harmanſon.

The plaintiffs commenced their ſuit, firſt againſt the defendent Levin Teackle alone, by their bill filed in march, 1767. ſtating Richard Drummond to have died inteſtate, and alleging that Ralph Juſtice, after his marriage with the mother of the plaintiff Anne, entered into the lands, and took poſſeſſion of the ſlaves and other chatels, of Richard Drummond, and received the profits thereof, and converted to his own uſe part of the perſonal eſtate, and demanding an account of thoſe profits and perſonal eſtate, and praying a decree for the plaintiff Anne's proportions of them, or ſo much as had not been accounted for to her former huſband William Juſtice.

The defendent, by his anſwer to that bill, admitted that the daughter Alicia's part of her fathers eſtate had been by the defendent divided into four parts, and diſtributed among her mother, the plaintiff Anne, and her two half ſiſters, in ſuch manner as he was adviſed the law directed; and alleged that Ralph Juſtice, whoſe poſſeſſion of Richard Drummonds lands and other eſtate, from ſome time in 1756 until may, 1759, is admitted, delivered up the whole eſtate real and perſonal to William Juſtice, after the intermarriage of him and the plaintiff Anne, about the time laſt mentioned; which delivery, as the defendent inſiſted, diſcharged his teſtator from obligation to render any further account of that eſtate or its profits.

That cauſe was ſet for hearing in february, 1770. 14 of november, 1782, an order was made, by conſent of parties, appointing commiſſioners to ſtate and report an account of ſuch part of Richard Drummonds eſtate as came into poſſeſſion of his widow, before her marriage with Ralph Juſtice, and alſo of ſuch part of the eſtate of Richard Drummond as came into poſſeſſion of Ralph Juſtice, after his marriage with Catharine Drummond, and of the nett profits of the whole eſtate from the death of Richard Drummond, and an account of ſuch part of Catharine Drummonds eſtate as came to the poſſeſſion of Ralph Juſtice, after his marriage aforeſaid, and of the diſburſements and applications by Ralph Juſtice, or his executor, in diſcharge of debts and in delivery thereof to perſons claiming the ſame.

Similar orders, ſubſequent to this, appointed other commiſſioners, who made reports, upon which was no decree.

In may, 1787, the plaintiffs filed an amended bill, making the other defendents parties.

In the amended bill the plaintiffs ſet forth the teſtament of Richard Drummond, ſtated that it had been in poſſeſſion of Catharine Drummond, from the time of his death, until the year 1765, when the plaintiff Thomas Bailey procured it to be proved, and obtained a commiſſion of adminiſtration of that

that teſtators goods chatels and credits, with the teſtament annexed, that Catharine Drummond took her dower in the real, and received her diſtributive ſhare of the perſonal, eſtate of her ſaid huſband, and that the ſhare of Alicia was diſtributed among her mother, the plaintiff Anne, and her two half ſiſters; ſtated the intermarriage of Ralph Juſtice and Catharine Drummond, his death, and appointment of an executor, and the marriages of the plaintiff Anne; inſiſted that the half ſiſters were not intitled to any part of Alicia's eſtate, and that the right of Catharine the widow, who did not renounce the benefit ſhe might clame by the teſtament, to the profits of Hunting creek lands, ceaſed by her marriage with Ralph Juſtice, or, if not, that the plaintiff Anne was intitled to two third parts of thoſe profits, after the intermarriage; ſtated that the balance of the perſonal eſtate left by Richard Drummond, which came to the poſſeſſion of Ralph Juſtice, amounted to 689l 12s. 3d, the profits of the ſaid eſtate, during the widowhood of Catharine Drummond, that is from february, 175⅞, until may, 1756, to 641 9s. 6d, and the profits during the poſſeſſion of Ralph Juſtice, that is, from may, 1756, until 1759, to 372l. 4s. 9d; charged Ralph Juſtice, and after his death his executor, with receiving monies from the debtors of Richard Drummond and Catharine Drummond, and from the tenent of a plantation, belonging to Richard Drummonds eſtate, for rent; and prayed the like decree as they prayed by the original bill againſt the defendent Levin Teackle, and a decree againſt the other defendents to refund the money wrongfully received for the ſhares of the two half ſiſters.

The defendent Levin Teackle, after admitting by anſwer the ſeveral facts ſtated in the amended bill, except the receipts of profits, debts, and rent, to ſo much of the bill as demanded the profits of Richard Drummonds eſtate demurred, inſiſting that, by his teſtament, his widow, and, in her right, Ralph Juſtice, after their intermarriage, were intitled to the profits; by further anſwer, alleged that Ralph Juſtice delivered up the eſtate to William Juſtice, former huſband of the plaintiff Anne, after their intermarriage; and that the repreſentatives of Catharine, the adminiſtratrix of Richard Drummond, were reſponſible for her tranſactions in that office, not the defendent; demurred to that part of the bill, which demanded an account of monies which had been due to the ſaid Catharine, and with receiving which the defendent and his teſtator were charged, and of rent, becauſe, firſt, the charges were vague, ſecondly, the executor or adminiſtrator of the ſaid Catharine only can properly demand that account, and, thirdly, where the land for which the rent became due lieth, or when the rent became due, is not ſhewn; and demurred to that part of the bill which inquired after the diſtribution of Richard Drummonds eſtate, becauſe the defendent is not ſtated to be executor or adminiſtrator of Richard Drummond.

The defendent Edward Ker after by anſwer denying a demand from him by the plaintiffs before exhibition of their preſent bill, on account of any matter therein contained, and confeſſing himſelf, in right of his wife, to have received in february, 1762, 53l. 12s. 8¾ for her diſtributive ſhare of Alicia Drummonds perſonal eſtate, demurred to that part of the bill, which prayed a decree againſt him to refund the money ſo received, inſiſting that his wife was intitled to it by the ſtatute for diſtribution of perſonal eſtates undiſpoſed by teſtament, and, if ſhe were not intitled, that a demand of this nature, firſt made after the expiration of 27 years, ought not to be countenanced in a court of equity. and

The other defendents, executors of John Harmanſon, by their anſwer, relied upon the ſtatute for limitation of actions, in bar of the demand againſt them.

The caſe was argued on the ſecond day of march, 1793.

The validity of the writing, proved for the teſtament of Richard Drummond, to deviſe lands was not controverted, perhaps is not controvertible.

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the ſtatute made in 1748 (chap. III of the edition in 1769, ſect. VII) which required deviſes of lands to be written, and ſigned, and atteſted, or to be wholly written by the teſtator, diſpenſed unqueſtionably with atteſtation in the autograph. inſertion of the teſtators name at the top hath been adjudged, and in any other part probably would be adjudged, equivalent to ſignature of his name at the bottom of the writing for the purpoſe of ſignature being to indicate the author of the act, that indication in any part of the act ſeemeth ſufficient. the teſtator indeed by the two laſt clauſes in the writing ſheweth an intention to ſign it in preſence of witneſſes, but the abſence of a ceremony, for ſignature before witneſſes and their atteſtation were no more in this caſe, cannot fruſtrate an act defective in not one eſſential quality.

Upon the queſtions which were controverted the court delivered this

OPINION,

That the condition, annexed to the deviſe, by the teſtament of Richard Drummond, of his Hunting creek land, half of Half moon iſland, and a mill, to his wife Catharine, namely the continuance of her widowhood after his death, was not diſcharged by the ſubſequent deviſe to her of all his eſtate, until the elder of his children ſhould be married, or ſhould attain the age of eighteen years;

Becauſe the preſumption, that the teſtator, who with his own hand wrote his teſtament, did not remember, whilſt he was forming the latter deviſe, what was contained in the former, or that he had changed his mind, during the ſhort time in which ſuch an act as the writing this teſtament may be performed, ſeems leſs probable, than the preſumption, that he ſuppoſed the condition expreſſed in the one would be underſtood in the other, and therefore the inſertion of it in this would be an unneceſſary repetition; and that he had not changed an intention, indicated no leſs than three times in explicit terms, an intention originating from the comtemplation, in his wifes future matrimonial alliance, if not of an effect which would more divide her affection, at leaſt, of her inability to provide for her offspring by him ſo well as ſhe might otherwiſe have provided for them:

And altho the wifes intereſt in the teſtators other land was determinable, not by her marriage, but, by another event, this difference, which that the teſtator deſigned may be doubted no cauſe for it being deſcernible, if conſiderable at all, ought not to alter that interpretation of the teſtament according to which

The wife was intitled to all the eſtate, to one part, if ſhe continued a widow, and to the remainder, in either that, or the contrary event, until the elder of the children ſhould have been married, or, if ſhe had not died, would have attained the age of eighteen years, when an equal diviſion of the eſtate was directed to be, and the wife could have retained her dower only;— but if ſhe ſhould marry again, then her title by the teſtament to the land deviſed to Alicia ended and her title of dower in it remained, *(a)* and by which interpretation a harmony will be in all parts of the teſtament one with another, the reverſe whereof will be effected by any other interpretation.

And that the defendant Levin Teackle, out of the eſtate in his hands to be adminiſtered of Ralph Juſtice, ought to pay to the plaintiffs two third parts of the profits of the land, deviſed by the teſtament of Richard Drummond to his daughter Alicia, made by the ſaid Ralph Juſtice, after his marriage with

(a) The plaintiffs ſuppoſed the widow, by not renouncing the teſtament, to have been barred of dower in the land deviſed to Alicia, but the act of general aſſembly to which they allude for this, 1727, chap. IV. of the edition in 1769, ſect. XXI. doth not extend to lands.

with her mother, as well thoſe received by himſelf, as thoſe received, after his death, by his executor, which had not been accounted for with William Juſtice, the plaintiff Annes former huſband.

The court is alſo of opinion that the two ſiſters of Alicia Drummond by her mothers firſt huſband, John Shepherd, were not entitled to ſhares of the ſaid Alicias perſonal eſtate, becauſe, altho the ſtatute, then in force for diſtribution of the eſtates which the owners diſpoſed not by teſtaments, provided, 'if after the death of a father any of his children ſhall die inteſtate, without wife or children, in the lifetime of the mother, that every brother and ſiſter and the repreſentatives of them ſhall have an equal ſhare with her,' and although all the children of one woman, by divers men, are brothers and ſiſters to one another, yet in the ſame ſtatute the words, 'and if all the children ſhall die, inteſtate, without wife or children, in the lifetime of the mother, then the portion of the child ſo dying laſt ſhall be equally divided, one moiety to the mother, and the other moiety to the next of kindred by the father,' immediately following the words before rehearſed, ſo that in this caſe, after the death of Alicia, if the plaintiff Anne had died inteſtate, having never been married, her portion would unqueſtionably have been divided between her mother and next of kindred by her father, in excluſion of Shepherds daughters, ſuggeſt an argument which ſeems to prove, that by 'brother and ſiſter,' were intended brother and ſiſter by the ſame father, if the poſition, that the ſtatute appointed thoſe ſucceſſors to an inteſtate whom the legiſlature ſuppoſed his affection would have moved him to appoint, if he had made his teſtament, be true, as it is ſaid to be; for the predilection towards a paternal uncle or aunt, or even remoter kinsfolk, in the caſe of the child dying laſt, cannot operate ſo powerfully, as the ſuppoſed predilection towards the ſiſter by the father, in the preſent caſe operates to the excluſion of uterine ſiſters from the ſucceſſion;

And conſequently that the plaintiffs, in right of the wife, were intitled to one half of the ſhares of Alicia Drummonds perſonal eſtate, which were received by the defendents Edward Ker, and John Harmanſon the teſtator of the defendents William Harmanſon, and Henry Harmanſon, in right of their wives, the daughters of Catharine Drummond by John Shepherd, and were alſo entitled, if the ſaid Catharine died inteſtate, to one third part of the other half;

And that the plaintiffs are not barred, by the equity of the ſtatute for limitation of actions, of recovering the plaintiff Annes own half from the defendents Edward Ker, and William Harmanſon and Henry Harmanſon, unleſs ſhe had attained her full age at the time of her marriage with her preſent huſband, in which caſe the plaintiffs are not barred of recovering that half from the defendent Levin Teackle,

Who, by his anſwer to the original bill, having acknowledged himſelf to have diſtributed the perſonal eſtate of Alicia Drummond among her mother and three ſiſters, either, if ſuch his intromiſſion therein were wholly unauthoriſed, or if the adminiſtration thereof had been committed to him, was a truſtee for thoſe intitled to the ſaid Alicia Drummonds eſtate:

And that upon the ſame principle the plaintiffs are not barred of recovering from the defendent Levin Teackle the plaintiff Annes third part, if her mother died inteſtate, of the other half of the ſhares received as aforeſaid by the huſbands of her ſiſters.

And the court, overuling ſuch of the demurrers as this opinion contravened, directed maſter commiſſioner Hay to examine, ſtate, and ſettle all accounts between the parties, according to the opinion, to inquire of the plaintiff Annes age at her marriage with the other plaintiff, and what teſtament her mother made, if ſhe made a teſtament, and to report theſe matters, as they ſhall appear to him, with any other matters, by himſelf thought pertinent or by the parties required, to be ſtated, to the court.

Between

BETWEEN
JAMES HILL, *plaintiff*,
AND
ROGER GREGORY, executor of Fendall Southerland, *defendent*,
AND BETWEEN
CARTER BRAXTON, *plaintiff*,
AND
ROGER GREGORY, executor of Fendall Southerland, *defendent*.

THE facts conſiderable in theſe caſes are omitted here, becauſe they are ſtated, partly in the two following decrees, and partly in the remarks on the laſt.

At the hearing, the 27 day of october, 1790, the high court of chancery delivered this

OPINION,

That the goods and merchandize, ſold and delivered by the plaintiff Carter Braxton to the ſaid Fendall Southerland, between the years one thouſand ſeven hundred and ſeventy ſix, and one thouſand ſeven hundred and eighty one, ought not to be diſcounted, at the money prices then charged, againſt a debt contracted before the commencement of that period; but ought to be diſcounted at their true value, which, in this caſe, may be nearly perhaps aſcertained by reducing thoſe prices according to the ſcale for proportioning the depretiation of paper money; that the payments made to the ſaid Fendall Southerland, by the plaintiff Carter Braxton, not appearing to have been directed by him, at the times of payment or before, to be entered to his credit in that account wherein he is made a debitor for the bill of exchange, the ſaid Fendall Southerland might enter them to the credit of the plaintiff Carter Braxton in any other account ſubſiſting between thoſe parties; and that for the principal money, damages, and charges, due by the proteſted bill of exchange, in conſequence of the ſettlement thereof made the twenty eighth day of february, in the year one thouſand ſeven hundred and ſeventy ſix, the ſaid Fendall Southerland was intitled to no more than ſeven hundred and ſeventy eight pounds ſeven ſhillings and four pence, of current money of Virginia, with intereſt thereon, at the rate of five per centum per annum, from the firſt day of june thence next following. and pronounced this

DECREE,

That the defendent be perpetually injoined from proceding further on the judgment of the general court recovered by his teſtator, the ſaid Fendall Southerland, againſt the plaintiff James Hill, except as to two hundred and twenty five pounds eighteen ſhillings five pence and three farthings, of current money of Virginia, appearing by the account, ſtated according to the principles of this decree from the accounts annexed to the report, to have been due to the ſaid Fendall Southerland the ſeventh day of december, in the year one thouſand ſeven hundred and eighty four, with intereſt thereupon from that time; and except alſo as to the coſts in the action at common law: and that the plaintiffs do pay one half, and the defendents do pay the other half, of the coſts allowed to the commiſſioner.

The opinion and decree of the court of appeals the 29 day of october 1792:

The court is of opinion, that the application of the appellants to a court of equity for relief in this caſe was proper, notwithſtanding they might have defended themſelves at law, not only becauſe the omiſſion of ſuch defence proceded from miſtake or accident, but on the ground of original juriſdiction. to eſtabliſh the agreement between the parties, made on the twenty eighth day of february, 1776, and to be relieved againſt the unconſcionable and oppreſſive uſe made of the judgment, by directing the execution to be levied for one thouſand and forty three pounds nineteen ſhillings and one penny three farthings, when it appears that the utmoſt of the ſaid Southerlands

lands clame thereon was not more than two hundred and twenty five pounds eighteen ſhillings and five pence three farthings, with intereſt from the ſeventh day of december, 1784, and therefore that there is no error in ſo much of the ſaid decree as ſuſtains the ſuit for relief; but that there is error in the relief afforded, not only in the adjuſtment of the quantum, but in the application of it, as between the appellants. therefore it is decreed and ordered, that the decree aforeſaid be reverſed and annulled, and that the appellee pay to the appellants their coſts by them expended in the proſecution of their appeal aforeſaid here. and this court, proceeding to make ſuch decree as the ſaid high court of chancery ought to have made, is of opinion, that (without contravening the rule giving creditors the right of application of payments made indefinitely to either of different debts due at the time) from the combined circumſtances in this caſe, the whole of Butlers and Hilliards bonds, amounting to nine hundred and thirty five pounds fifteen ſhillings and one penny, ought to be applied to the credit of the proteſted bill, ſince it is evident that the payer ſo intended it; and that if the receiver did not aſſent thereto, yet he did not make ſuch a recent and proper application of it otherwiſe, as ought to controul the choice of the payer; and therefore that the application ought to ſtand as ſtated in the firſt account of the maſter commiſſioner. on viewing this account however a doubt aroſe, whether the mode of ſtating intereſt was a proper one, whereupon one of the judges, declaring himſelf affected, in his character of an adminiſtrator by a deciſion of the queſtion, retired from the diſcuſſion; and the court, diſcovering it to be of ſmall importance in its operation in the preſent caſe, choſe to paſs it over on the ground of the maſters report not having been excepted to, or the point argued in court; with this caution to avoid an inference of approbation, rather than by a deciſion either way to eſtabliſh a precedent which in other caſes might be important. and it appearing by the ſaid ſtate, that the ſum of thirty four pounds ſeventeen ſhillings and nine pence farthing only, was due on the proteſted bill, on the ſeventh day of december, 1784, and the court being of opinion, that the appellant Hill is not concerned with the other parts of the diſpute, unleſs he could have derived an additional credit therefrom: therefore it is decreed and ordered, that, upon payment of the ſaid thirty four pounds ſeventeen ſhillings and nine pence farthing, and intereſt from the time laſt mentioned till payment, and the coſts of the judgment at law, the ſaid appellant retaining thereout his coſts in chancery and this court, the injunction ſtand and be perpetual, but on failure in ſuch payment that the injunction be diſſolved as to, and that the appellee be at liberty to ſue out execution for, ſo much as he is intitled to by this decree. the court then proceeded to conſider the remaining parts of the diſpute, as between the appellee and the appellant Braxton, and is of opinion, that an account for goods, not delivered or accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper, ſo as to ſtand at the nominal value, according to the ſtrict words of the act of aſſembly, but viewed in the light of a ſet off, and to be adjuſted, eſpecially in equity, upon juſt principles; that in this proceding the court is of opinion, that the legal ſcale, ſo far as it operates in the years 1777 and 1778, is not a juſt rule in itſelf, not correſponding with the general opinion of the citizens at the time as to depretiation; nor does the ſcale at any period give a proper rule for fixing the price of imported goods, which was influenced by the expenſe and riſque of importation, as well as by the depretiation of the paper; that therefore the account of the appellant Braxton for goods delivered, to the end of the year 1778, ought, at the nominal value, to be ſet off againſt the principal and intereſt of Claibornes bond and Southerlands account; and that ſo much of the reſidue of his account, as will pay off the intereſt of the balance remaining due to Southerland, ought alſo to be ſet off at the nominal ſum; but that the reſidue of

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the amount of the ſaid account ought to be ſubject to the legal ſcale, for may, 1780, of ſixty for one, and at that reduced rate ſet off againſt the principal of Southerlands debt; a precedent for ſuch diſtinction, between principal and intereſt having, as is ſuppoſed, been furniſhed in this court. the court proceeding to correct the account of the maſter commiſſioner, upon theſe principles, find a balance due from the ſaid Braxton to the ſaid Southerland, of ſeventy pounds and four pence on the thirtieth day of april, 1783. and as the ſaid Braxton, by applying to a court of equity for an account has ſubjected himſelf, though plaintiff, to a decree for the balance found due from him, it is decreed and ordered, that he pay to the appellee the ſaid ſum of ſeventy pounds and four pence, with intereſt from the ſaid thirtieth day of april, 1783, till payment, retaining thereout his coſts in chancery and this court.

REMARKS:

The doctrine contained in this prôêmium to the latter decree, *that the application of the appellants to a court of equity for relief in this caſe was proper, notwithſtanding they might have defended themſelves at law, not only becauſe the omiſſion of ſuch defenſe proceeded from miſtake or accident, but on the ground of original juriſdiction to eſtabliſh an agreement between the parties, and to be relieved againſt the unconſcionable and oppreſſive uſe made by one of them of a judgment he had recovered againſt another of them,* was not controverted in the preſent caſe, nor is recollected to have been controverted for almoſt two centuries before it in any other caſe, and is thought not to have required at this day grave diſcuſſion and the ſanction of a ſolemn deciſion.

The words, *there is no error in ſo much of the ſaid decree* (that is, the decree of the high court of chancery) *as ſuſtains the ſuit for relief*, ſeem an approbation of ſomething done by the judge of that court in ſuſtaining the ſuit for relief: but if by any effort of him the ſuit for relief was ſuſtained, the effort muſt have been like the *vis inertiae*, for he was as inert in ſuſtaining the ſuit for relief as the ground, whereon the capitol ſtands, is inert in ſuſtaining that edifice.

Whether in the reverſed decree *error be in the relief afforded, not only in the adjuſtment of the quantum, but in the application of it*, will now be inquired.

The caſe as to the error in the application of relief afforded was:

Carter Braxton, indebted to Fendall Southerland on account of a proteſted bill of exchange, and alſo on account of a bond, having aſſigned to him ſome ſecurities, which were accepted for the ſame value as if they had been payments in money of the principal debts with intereſt due by the ſecurities, clamed a credit for theſe payments in the account of the bill of exchange.

Fendall Southerland clamed the right to apply the payments, firſt, to the credit of the debt on account of the bond, and the ſurplus, for they exceeded it, to the credit of the debt on the other account.

The H. C. C. in delivering its opinion did not enounce the rule of law, which governs caſes of this kind, in the form of an axiom, but exemplified it in theſe terms: *that the payments made to the ſaid Fendal Southerland, by the plaintiff Carter Braxton, not appearing to have been directed by him, at the times of payment, or before, to be entered to his credit in that account wherein he is made a debitor for the bill of Exchange, the ſaid Fendall Southerland might enter them to the credit of the plaintiff Carter Braxton in any other account ſubſiſting between thoſe parties.*

The argument included in this opinion is an enthymema, an imperfect ſyllogiſm, in which one of the propoſitions was ſuppreſſed, becauſe being ſuppoſed to be known by men of juriſprudence, and not more conteſtable among ſuch men, than a ſelf-evident truth is conteſtable among other men, it was underſtood.

If the argument be caſt in the figure of a perfect ſyllogiſm, the major propoſition would be: by law, if a debitor, who oweth money on ſeveral accounts,

accounts, making payments, do not, at the times of payments, or before, direct in which of thoſe accounts the payments ſhall be entered to his credit, the creditor may enter the payments to the credit of the debitor in any other account ſubſiſting between thoſe parties.

The minor propoſition would be: but Carter Braxton who owed money on ſeveral accounts, viz. on account of a bill of exchange proteſted, and on account of a bond, making payments, did not, at the times of payments, or before, direct that to his credit on account of the proteſted bill of exchange the payments ſhould be entered.

And the concluſion would be: therefore the creditor, Fendall Southerland, might enter the payments to the credit of the debitor, Carter Braxton, on account of the bond.

With this concluſion the reverſed decree accorded.

It is ſaid to be erroneous, and if it be ſo, it muſt be erroneous, either becauſe the major propoſition is falſe: or becauſe the minor propoſition is falſe: for if thoſe premiſſes be true, the concluſion is unavoidable; and the decree, according with it, cannot be erroneous.

Thoſe who condemned the decree of error have not denied the major propoſition, but inſtead of denying are ſuppoſed to have admitted it; for

Their words are: *this court is of opinion that (without contravening the rule giving creditors the right of application of payments made indefinitely to either of different debts due at the time) from the combined circumſtances in this caſe, the whole of Butlers and Hilliards bonds ought to be applied to the credit of the proteſted bill,* upon which is obſervable, 1 the exiſtence of ſome rule, giving creditors the right to apply payments made indefinitely to either of different debts due at the time, is in terms admitted; 2 they do not ſtate here, or in any other place, what that rule is; and 3 the particle 'the' connected with 'rule,' the rule, muſt allude not to ANY rule, but either to ſome rule in their contemplation, unknown to others, or to ſome rule ſtated or underſtood in the opinion, which was at that time the ſubject of their animadverſion.

That the alluſion was to ſome rule in their contemplation, locked up in their breaſts, or depoſited among their *arcana (a)* they ſurely would not wiſh men to believe; and if that were not the rule to which they alluded, the rule muſt be that which was ſtated or underſtood in the opinion of the H. C. C. that rule, the explication whereof is the major propoſition, and which they ſay they do not contravene, and, if not contravene, certainly not deny, and conſequently they admit the major propoſition, that *by law, if a debitor who oweth money on ſeveral accounts, making payments, do not, &c.*

If this major propoſition be true, the decree of this court was not erroneous, unleſs the minor propoſition be falſe; ſo that whether it be ſo or not, or, in other words, whether Carter Braxton did, at the times of the payments or before, direct that to his credit, on account of the bill of exchange, the payments ſhould be entered? is the only remaining queſtion in this part of the caſe.

This is a queſtion of fact and conſequently depending on evidence; but, without making obſervations on the evidence, the facts ſhall be admitted to be as they are ſtated to be by the court of appeals, with this caution, nevertheleſs, that this admiſſion is not to include an admiſſion that the operation of law upon thoſe facts is as that court hath affirmed it to be, for that cannot be admitted.

Then the queſtion is reduced to this, whether thoſe facts, conſidered ſeparately or conjunctly, evince, of themſelves, or by operation of law, Carter Braxtons direction to apply the payments to his credit on account of the bill of exchange?

1 The

(a) *If among them ſuch a rule be, a* PRECEDENT *for it would probably have been* FURNISHED.

1. The court of appeals ſay, *he*, Carter Braxton, *ſo intended*; to which an obvious anſwer is, an intention is not a direction, unleſs at the time of payment or before the intention had been communicated to the receiver. theſe circumſtances indeed combined would have been a complete direction; but a prior or concurrent communication, one of the eſſentials, is not alleged or pretended to be proved.

2. The court of appeals next words are, *and that if the receiver* (Fendall Southerland) *did not aſſent thereto, yet he did not make ſuch a recent and proper application of it, otherwiſe, as ought to controul the choice of the payer.*

The method of anſwering this ſentence moſt conveniently ſeems to be by commenting on the ſeveral members of it.

If the receiver did not aſſent thereto.] aſſent to what? to the intention of Carter Braxton to apply the payment to the credit of the proteſted bill. now Carter Braxton, at the time of making the payment, or before, not having communicated his intention to Fendall Southerland, how could he know it? and if he did not know on what ſubject Carter Braxton was meditating, or what he intended, how Fendall Southerland could aſſent to it? ſeems a queſtion not of eaſy ſolution.

He did not make ſuch a recent and proper application of it as ought to controul the choice of the payer.] on theſe words the beſt comment will be an explanation of the principles, on which the legal doctrine of thoſe elections, which are the ſubject of the preſent diſquition, are ſuppoſed to be founded.

It ſeems not an arbitrary but rational doctrine, founded on theſe principles: whilſt a man retaineth the money, whereof he had legaly acquired the poſſeſſion, the money, being his own property, is ſubject to his uncontrouled power; he may conceal it, before the face of his creditor may ſquander it, melt it in a crucible, ſink it in the ocean; in a word may do with it what he will: therefore when he delivereth it, even to a creditor, with an inſtruction to apply it in a particular manner, the receivers poſſeſſion is fiduciary, and he is bound to make the preſcribed application. e. g. if A, indebted to B and C, deliver money to B, directing him to pay it to C, the money in the hands of B is the property of C. for the ſame reaſon, if A be indebted to B on two or more ſeveral accounts, the money delivered by A to B, with direction to place it to the credit of A in this or that account, is received by B under a truſt, in which is implied, if not in terms declared, an oligation to place the money accordingly.

On the other hand when the debitor delivereth the money, which before was his property, to the creditor, without inſtruction to apply it to the credit of this or that account, the property is changed immediately to the receiver, who, ſo ſoon as it is in his poſſeſſion, is complete owner of it; it is his own money: if it be his own money, by what law is he bound to make a recent application of it, or an application which is called a proper application, or by what law reſtrained from exerciſing the ſame power over it which he can exerciſe over any other part of his own property?

Hence the election of the one, the payer, is prior to or concomitant with the payment, the election of the other, the receiver, is poſterior to the payment.

Controul the choice of the payer.] the meaning of theſe words, as they are here combined with the context cannot be developed. If the choice of Carter Braxton, or his power to direct the application of the credit, determined by the payment without that direction, at the time or before, which is thought to be admitted, or to be proven, if not admitted, that ſuch a choice, a choice no longer exiſting after the payment, was controulable, the ſuppoſed poſſibility of which is implied in the words, *yet he did not make ſuch a recent and proper application of it, otherwiſe, as ought to controul the choice of the payer*, ſeems incomprehenſible.

The argument of the court of appeals then, which is the ſubject of the preceding commentary, amounts to this: theſe circumſtances, namely, the intention of Carter Braxton, that the payment made by him ſhould be applied to his credit in a particular account, and Fendall Southerlands not making, after the payment, ſuch a recent and proper application of it to Carter Braxtons credit in another account as ought to controul the choice, which he had before the payment, to direct the credit to be applied to which account he pleaſed, but which choice doth not appear to have been communicated to Fendall Southerland; that is, the circumſtance of an undiſcloſed intention or choice of one party, and the circumſtance of a neglect in the other, to do ſomething recently and properly, in oppoſition to that undiſcloſed intention or choice, are circumſtances, which, combined together, produce the deſtruction of a creditors right to apply payments indefinitely made to either of different debts due at the time, or are equivalent to a direction by the debitor that the payments ſhould be applied to his credit in a particular account! now the art of combining the ſecret thought of one man s mind with the doing of nothing by another man, ſo as to produce this effect, is believed not to have been before diſcovered.

Algebraiſts indeed, in reſolving problems by equations, frequently uſe zero or nothing, and are much aſſiſted by it; but they do not pretend that any quantity is augmented or diminiſhed by adding to it or ſubſtracting from it nothing; on the contrary W. Emerſon, who in a diſpute with the monthly reviewers was a zealous ſtickler and ſtruggled vehemently for his nothings, admitted, that 0+0=9, or 9 combined with 0 is no more than 9. but, according to this decree, Carter Braxtons undiſcloſed intention, which of itſelf doth not produce a certain effect, combined with 0, doth produce that effect.

The facts deſerving attention in the other part of the caſe, where the decree of the H. C. C. is declared to be erroneous, that is, *in the quantum of relief which it afforded*, are theſe:

Carter Braxton, having in february, 1776, executed a bond for payment of 122l. 11s. 9½. to F. Southerland, ſells to him in ſeptember of 1777. in june, ſeptember, and december of 1778, and in may of 1780, ſundry merchandizes, charging for them the current paper money prices of thoſe times, and now clameth credit for them accordingly againſt the bond, which they with intereſt almoſt double; whereas the prices reduced by the ſcale with intereſt would be leſs than twenty nine pounds. the account is as follows;

			£	s.	d.	£
1777 ſept.	10 buſhels ſalt					8
1778 june.	2 pair cards					7
ſept.	a loaf ſugar 9-1	at 12s.	5	8	9	
	2 lb. twine			12		
	2 tumblers			12		
	2 ditto			18		
	1 ivory comb			18		
	thread			11	9	
	46 lb. tarred rope	at 4s.	9	4		
	98 lb. ſein twine	at 6s.	29	8		
	15 lb. ſugar		4	10		
	4 lb. coffee		1	4		
						53 6 6
1778 dec.	10 ½ buſhels ſalt	at 70s.				36 15
1780 may.	59 lb. iron ſent by Harrys flatt	at 80s.				142 10
						247 11 6

F. Southerland

F. Southerland objected againſt the allowance of ſuch a credit, except ſo much of it as was equal to a ſmall account of his own againſt C. Braxton for merchandize, ſold to him and charged in a like manner, inſiſting that the credit for the reſidue of the goods ought not to excede the true value of them, againſt a bond for money, due before the commencement of depretiation.

The H. C. C. ſuſtained the objection, being of opinion the goods ought to be diſcounted at the true value, and for aſcertaining the value referred to the ſtatutory ſcale of depretiation; not becauſe it was thought a meaſure of legal obligation in the caſe of goods ſold, but becauſe, at that time, no other meaſure, which ſeemed more juſt, occurred, as the language of the opinion indicates. another mode more regular, for aſcertaining the value of goods in ſuch a caſe as this, will be mentioned hereafter.

The court of appeals accommodate the controverſy thus: they allow part of C. Braxtons account to be ſet off, at the nominal value, againſt the bond, and F. Southerlands account; they allow part of the reſidue to ſet off ſome intereſt due to Southerland, at the nominal ſum; and they allow the remainder, reduced by the ſcale, to be ſet off againſt the principal of F. Southerlands account.

This accommodation is the reſult of certain propoſitions, ſtated in their opinion, which is the foundation of the reverſing decree. this opinion will be examined, in order to inquire whether from ſuch premiſſes ſuch concluſions are deducible.

The firſt paragraph of the opinion is, *an account for goods, not delivered or accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper, ſo as to ſtand at the nominal value, according to the ſtrict words of the act of aſſembly, but viewed in the light of a ſet off, and to be adjuſted, eſpecially in equity, upon juſt principles.*

Out of this paragraph, ſo far as the preſent queſtion is affected by it, might have been exterminated the words, 1 *not delivered or accepted as a payment*, 2 *nor liquidated between the parties*, and 3 *eſpecially in equity*. but let them remain.

The next paragraph of the opinion is, *the legal ſcale, ſo far as it operates in the years 1777 and 1778, is not a juſt rule in itſelf, not correſponding with the general opinion of the citizens at the time, as to depreciation; nor does the ſcale, at any period, give a proper rule for fixing the price of imported goods, which was influenced by the expenſe and riſque of importation, as well as by the depretiation of the paper.*

Immediately after which occur theſe concluſions, introduced with the word *therefore*. 1 *that the account of the appellant Braxton for goods delivered to the end of the year* 1778 *ought, at the nominal value, to be ſet off againſt the principal and intereſt of Claibornes bond (that is C. Braxtons bond in which Claiborne was his ſurety) and Southerlands account* 2 *and that ſo much of the reſidue of his account as will pay off the intereſt of the balance, remaining due to Southerland, ought alſo to be ſet off, at the nominal ſum, but* 3 *that the reſidue of the amount of the ſaid account ought to be ſubject to the legal ſcale for may*, 1780, *of ſixty for one, and at that reduced rate ſet off againſt the principal of Southerlands debt*; to which is ſubjoined, *a precedent for ſuch diſtinction between principal and intereſt having, as is ſuppoſed, been furniſhed in this court.*

The two paragraphs contain four diſtinct propoſitions; but between any one of them and the concluſions, or any one of the concluſions, or between all the propoſitions and all or any of the concluſions, doth not occur one ſingle inſtance of a middle term, *(b)* to connect the extremes together. this middle term ſhall be ſupplied occaſionaly. The

(b) In ſyllogiſmo fit reductio propoſitionum ad principia per propoſitiones mediας. hæc autem ſive inveniendi ſive probandi forma in ſcientiis popularibus (veluti ethicis, politicis, legibus, et hujuſmodi) locum habet. Fr. Bacon de augmentis ſcientiarum, lib. V. cap. II.

The firſt general propoſition: *an account for goods, not delivered or accepted as a payment, nor liquidated between the parties, ought not to be taken as a payment in paper, ſo as to ſtand at the nominal value, according to the ſtrict words of the act of aſſembly.*

Middle term; but Carter Braxtons account is an account for goods, not delivered or accepted as a payment, nor liquidated between him and F. Southerland.

One would expect this concluſion: therefore C. Braxtons account for goods ought not to be taken as a payment in paper, ſo as ſtand at the nominal value, according to the ſtrict words of the act of aſſembly.

But what is the concluſion of the court of appeals? either none at all, or one or two or all of theſe three; 1 *therefore the account of the appellant Braxton, for goods delivered to the end of the year* 1778, *ought at the nominal value to be ſet off againſt the principal and intereſt of Claibornes bond and Southerlands account,* 2 *and that ſo much of the reſidue of his account, as will pay off the intereſt of the balance remaining due to Southerland, ought alſo to be ſet off at the nominal ſum,* 3 *but that the reſidue of the amount of the ſaid account ought to be ſubject to the legal ſcale for may,* 1780, *of ſixty for one, and at that reduced rate ſet off againſt the principal of Southerlands debt.*

By what form of ratiocination can one or two or all of theſe concluſions be deduced from that propoſition? if neither, why was it ſtated?

II Propoſition: *an account for goods ought to be viewed in the light of a ſet off and to be adjuſted, eſpecially in equity, upon juſt principles.*

Middle-term; but Carter Braxtons account is an account for goods.

The rational concluſion is; therefore Carter Braxtons account ought to be viewed in the light of a ſet off, and to be adjuſted, eſpecially in equity, upon juſt principles.

The concluſion in the reverſing decree is *therefore the account, &c.*

A man, of ordinary underſtanding, muſt ſee the chaſm between the ſecond propoſition and theſe concluſions, and that the chaſm ought to be ſupplied by an intermediate propoſition in ſome ſuch form as this; to ſet off an account for goods, ſold during the period of depretiation, at the nominal value, that is at the prices charged in the account, againſt a debt, contracted before the commencement of depretiation, is to adjuſt an account for goods, eſpecially in equity, upon juſt principles.

If ſuch an intermediate propoſition had been ſtated, it is denied to be true; yet without it, or ſome others tending to effect the ſame thing, that the concluſions, at leaſt the firſt and ſecond concluſions, can be connected with the ſecond propoſition, is likewiſe denied: and in the firſt denial an appeal is made to all men who have adaequate ideas of juſtice; and in the other denial an appeal is made to all men who are not deſtitute of the reaſoning faculty, and are accuſtomed to exerciſe it, if they be not in the habit of obſequious ſubmiſſion to judgments, than which they have been taught to think their own leſs correct.

III Propoſition is, *the legal ſcale, ſo far as it operates in the years* 1777, *and* 1778, *is not a juſt rule in itſelf, not correſponding with the general opinion of the citizens at the time as to depretiation*

Before the enquiry what concluſion is deducible from this propoſition, a commentary upon its terms may not be improper.

The legal ſcale, ſo far as it operates in the years 1777, *and* 1778, *is not a juſt rule.*] the ſcale in this caſe was legaly obligatory, or not legaly obligatory; if the latter, it ought to be totaly rejected; if the former, the ſtatute, which authoriſed it, having declared, that it ſhould be a rule for determining the value of certain things, during a period of five years, when the court of appeals will not allow it to operate during two of thoſe years 1777, and 1778, as they do not in their firſt and ſecond concluſions, but allow it to operate in a ſubſequent year 1780, as they do in their third concluſion;

cluſion; is this exerciſing the power properly belonging to the judiciary department?

The ſcale is not a juſt rule in itſelf.] A rule may be unjuſt by allowing either too much or too little. whether its injuſtice be in its exceſs or defect we are not told here, nor told any where elſe, unleſs it may be ſaid to be in the next propoſition, or in the firſt and ſecond concluſions. if we look for this information in the next propoſition, that indeed may be ſaid to imply, but not directly to affirm, that the ſcale valued goods imported leſs than was juſt; and to look into a concluſion for that which ought to be predicated in the premiſſes, is not a logical mode of inveſtigation, and is unſatisfactory to a candid inquirer, as well as prepoſterous; for a concluſion ought to be a deduction from what was aſſerted in the premiſſes for its ſupport, not, like the ſpider, to contain in its own bowels that which it is to ſpin for its ſupport.

Not correſponding with the general opinion of the citizens at the time as to depretiation] let us ſuppoſe Carter Braxton to have ſold to J. S. an ivory comb the laſt day of december, 1778, and another, of the ſame value, in 1780, charging 18 ſhillings for each; according to this opinion of the court of appeals, they would have allowed him to ſet off, againſt a bond given to J. S. three or five years before, one of theſe combs at 18 ſhillings, and the other at 18 pence, and would have called this, in their language, an adjuſtment on juſt principles. Carter Braxton poſſibly might have thought it ſo.

But ſuppoſing the third propoſition to be unexceptionable; *the legal ſcale, ſo far as it operates in the years* 1777 *and* 1778, *is not a juſt rule in itſelf, not correſponding with the general opinion of the citizens, at the time as to depretiation*, the rational concluſion from it is, therefore reject the ſcale, becauſe, ſo far as it operates in the years 1777 and 1778, it is not a juſt rule, not correſponding with the general opinion of the citizens at the time, as to depretiation, and ſubſtitute ſome other rule which, ſo far as it operates in the years 1777 and 1778, is a juſt rule, correſponding with the general opinion of the citizens at the time, as to depretiation. the concluſions of the court of appeals are *therefore the account, &c.*

But to connect theſe concluſions with that propoſition muſt be admitted, or proved, this middle propoſition: for eſtimating the value of goods, ſold in the years 1777 and 1778, in order to ſet off a debt, contracted before the commencement of depretiation, the rule, juſt in itſelf, and correſponding with the general opinion of the citizens at the time, as to depretiation, is the nominal value, that is the prices charged by the ſeller in his account of the goods.

That the court of appeals have proved the truth of this intermediate propoſition is not admitted, nor will the truth of it be admitted, before they or others prove, that one peny weight of gold, 22 carrats fine, is equal in value to five or more peny weights of gold, of the ſame degree of fineneſs.

IV. Propoſition: *nor does the ſcale, at any period, give a proper rule for fixing the price of imported goods, which was influenced by the expenſe and riſque of importation, as well as by the depretiation of the paper.*

This propoſition is the ſame as the laſt, appearing in another garb, which betrayeth a weakneſs of argument undiſcovered in that.

The ſuppoſed difference is, that the goods mentioned now are imported, the price of which was influenced by the expenſe and riſque of importation, then the ſeller augmented his retailing price accordingly; and conſequently the difference vaniſheth.

The weakneſs of argument is thus betrayed; depretiation of the paper is acknowledged to be one cauſe, and was in truth the ſole cauſe, which influenced that price of goods, about which the queſtion is; for in the true value the expenſe and riſque of importation is included.

But if depretiation were only one of the cauſes, ought the ſeller alone to experience the beneficial effects of it? if the ſeller, who was a debtor, had the advantage of depretiation, by augmenting the price of his goods, ought not the creditor to have a reciprocal advantage, in augmenting the value of his debt, which is ſet off by thoſe goods? would this contravene the rule qui ſentit onus ſentire debet et commodum; or equality is equity? a man, who in 1776 had bought from another a flock of ſheep, agreeing to pay for them in kind on the firſt day of january, 1779, muſt have returned an equal number, and of equal value, although at the date of contract he could have bought the ſheep for 1 ⅓ dollar each, but at the time of reſtitution could not buy them for leſs than 10 dollars each; becauſe the value of the ſheep remained the ſame, although that of the money had varied: and no reaſon can be aſſigned, where money was to be paid for the ſheep, why the money when paid ſhould not be made equal in value to what it was when the ſheep were delivered, ſuppoſing the act of general aſſembly, as the court of appeals ſuppoſe it, not applicable to the preſent queſtion.

The court of appeals, about the middle of their decree, ſeemed cautious of eſtabliſhing precedents, no doubt that inferior judges might not be miſled by them near the end of it, after dividing an account, of 14 articles, into three unequal parts, and with one of thoſe ſetting off ſome of the principal and intereſt of a debt, and with another ſetting off ſome of the intereſt of what remained of the ſame debt, both theſe parts at the nominal value during the time of depretiation, and with the third part, ſubjected to the ſcale of depretiation, ſetting off ſome of the foreſaid debt, at the reduced value; after theſe various valuations and applications of articles in the account, they add theſe words, 'a precedent for ſuch diſtinction between principal and intereſt having, AS IS SUPPOSED, been furniſhed in this court,' leaving the exiſtence of ſuch a precedent incertain

That ſuch a precedent, which is only ſuppoſed, did not exiſt being poſſible; and the decree in the principal caſe not reſtraining inferior courts from deciding queſtions of this kind in another mode, the H. C. C. will probably refer the deciſion of ſuch as may occur there hereafter to juries, directing iſſues to be made up for that purpoſe.

BETWEEN
PHILIP TURPIN, *plaintiff*,
AND
THOMAS TURPIN, William Turpin, and Horatio Turpin, executors, and the ſaid Horatio Turpin, deviſee of Peterfield Turpin, *defendents*.

PETERFIELD TURPIN, who was brother of all the parties, by his teſtament, dated in february, 1789, among other deviſes, gave and bequeathed to the defendent Horatio the land and plantation whereon his father lived, alſo 732 acres of land in Buckingham, near the head of Appomattox, and alſo ten negro ſlaves diſtinguiſhed by names.

At that time, this teſtator owned not any of the things thus given and bequeathed, and poſſeſſed only the land in Buckingham.

His father Thomas Turpin, who was owner of them, and poſſeſſor of all, except the Buckingham land, by his teſtament, dated in march, of the ſame year, gave the ſame lands and ſlaves to Peterfield Turpin.

Both the teſtators are dead, the ſon having ſurvived the father.

The plaintiff clamed a ſhare of the lands and ſlaves, inſiſting they deſcended to the heirs of Peterfield Turpin, who were his brothers, not being diſpoſed by his teſtament, becauſe he had them not at the time when he made it, although he had them at the time when he died.

Some examinations of witneſſes were taken, to prove, on one ſide, a revocation,

cation, and, on the other, a republication of his teſtament by Peterfield Turpin; but the proof was defective.

By the court, 8 day of november, 1791.

Deciſions of queſtions, ariſing both on the engliſh ſtatutes, and on the cuſtoms of particular places in that country, authorizing alienations of land by teſtament, had declared the law to be, that a deviſe of land which the teſtator had not, i. e. of which he was not ſeiſed, at the time when he made the deviſe, was void, although he ſhould have the land at the time when he died.

Memorable examples of theſe deciſions occur, one on the ſtatutes, in the caſe between Butler and Baker, 200 years ago, which, as Coke the reporter of it ſays, had been argued one and twenty times, and the other on the cuſtom of gavelkind, in a caſe between the heir and widow, who was deviſee, of William Bockenham, near 100 years ago, which is publiſhed, with the arguments, in the book called, law of deviſes and revocations.

If the law with us had not been altered, theſe two caſes might have been relied upon, as authorities, in the preſent controverſy, with reſpect to the lands.

But a ſtatute of this commonwealth, made in 1785, and taking effect in january, 1787, and therefore being the law by which the queſtion in this caſe muſt be decided, hath enacted *that every one, aged twenty one years or upwards, being of ſound mind, and not a married woman, ſhall have power, at will and pleaſure, by laſt will and teſtament in writing, to devise all the eſtate, right, title, and intereſt in poſſeſſion, reverſion or remainder, which he or ſhe hath or, at the time of his or her death, ſhall have, of, in, or to, lands, tenements, or hereditaments.*

By the terms of the ſtatute, power being given to deviſe an eſtate in poſſeſſion, reverſion, or remainder, which one hath, that is, at the time of making his teſtament hath, or an eſtate in *(a)* poſſeſſion, reverſion, or remainder which at the time of his death he ſhall have, in lands—power to deviſe a future or a poſſible, as well as a preſent or an actual eſtate; the identity of the lands, ſaid to be given and bequeathed to Horatio Turpin, and the lands, in which Peterfield Turpin, at the time of his death, had an eſtate, being confeſſed; and the deviſe either being a deviſe of the eſtate which Peterfield Turpin, at the time when he made his teſtament, had in the lands, or being a deviſe of the eſtate which at the time when he ſhould die, he ſhould have in them; (for the deviſe muſt be underſtood in one of thoſe two ſenſes,) the only queſtion in this caſe, as to the lands, is whether the words in the deviſe of them do or do not comprehend a future eſtate, that is, an eſtate which Peterfield Turpin at the time of his death ſhould have in thoſe lands? if the words do comprehend that eſtate, Horatio Turpin hath a right to the whole lands of which the bill clames a ſhare.

The deviſe, underſtood in the former ſenſe, that is, a preſent inchoate alienation of the right which he then had in the lands, would be adjudged void; unleſs the executor would have been bound to purchaſe the lands for the legatary or pay the value of them to him, out of the teſtators eſtate, as the executor, by the roman civil law, was bound to do, in a like caſe, where the teſtator knew the thing bequeathed not to be his. I. l. II. tit. XX §4. C. l. VI. tit. XXXVII. l. 10. yea, if the teſtator had owned an eſtate in the lands, but an eſtate leſs than that which was bequeathed to him by his father, the deviſe, underſtood in that former ſenſe, would have been void;

(a) No man, as is believed, will refer the terms, ſhall have *to an eſtate in reverſion or remainder only; for a reverſion, or a veſted remainder is a preſent eſtate, and a remainder contingent at the death of the teſtator, if his death were before the event, cannot be called an eſtate which the teſtator either had or ſhould have.*

void; becauſe an ademption of the legacy, without a republication of the teſtament, would have been wrought by the change of the eſtate deviſed.

But the deviſe may be underſtood, with equal propriety, in the latter ſenſe; for the words *i give and bequeath the land and plantation where my father lived, alſo 732 acres of land in Buckingham, near the head of Appomattox*, do not confine the deviſe to an eſtate, which Peterfield Turpin had in the lands at one time, more than to the eſtate which he ſhould have in them at another time. indeed, the terms, *i give*, although they purport an immediate alienation of the thing given, are, when uſed in a teſtament, from the nature of that act, no more than a declaration of a teſtators will, that the legatary, at a future day, ſhall have the thing ſaid to be given to him, and even that not certainly, but ſubject to a change of will, which may appear by revocation, ademption, tranſlation, &c. ſo that the terms, *i give*, in a teſtament, are underſtood more properly of a future, than of a preſent time. and the teſtator, having a power to deviſe, and no doubt, expecting to own, a future eſtate in theſe lands, and willing in every event that his brother Horatio ſhould ſuccede to them, and not having altered that will, the law, which favours acts authoriſed by itſelf, as teſtaments are, will ſuppoſe the teſtator to have exerciſed his power to deviſe a future eſtate, and accordingly approve that expoſition of the deviſe by which it will be valid; that is, in the ſame ſenſe, as if the teſtator had uſed theſe words: *i give to Horatio Turpin the land, &c. if i have them at the time of my death, and do not alter my will.*

Whether the defendent Horatio hath a title alſo to the ſlaves bequeathed to him by the ſame paragraph in the teſtament? would not be a different queſtion from that already diſcuſſed, if the ſtatute be ſuppoſed to have deſigned to comprehend ſlaves, which in ſome inſtances are an hereditary kind of property, in the term, *hereditaments*, uſed in the ſtatute, to deſignate one of the ſubjects of deviſes which it authorizes.

But this ſtatute is ſuppoſed not to have comprehended ſlaves; becauſe that kind of property was bequeathable by the common law, which lands are ſaid not to have been; and becauſe, as the law is now, and always hath been, a bequeſt of ſlaves transfers the property of them in the ſame manner as if they were chatels.

Then let the bequeſt of the ten ſlaves here be conſidered independently of the act of 1785, and as a bequeſt of chatels.

A man bequeaths ſlaves by their names, which at the time of making the teſtament were not his property, but afterwards became his property; whether hath the legatary a right to the ſlaves?

Swinburne (part III. § VI. no. 17.) hath ſtated this caſe, without any important variation, propounding the ſame queſtion. in conſidering it, he obſerves that, by the civil law, the thing bequeathed is not due to the legatary, but in ſome few caſes. he adds *by the laws of this realm* (England) *it seemeth that we are to diſtinguiſh whether some special thing be devised or not. for if a special or certain thing be devised, as if the teſtator do bequeath the manor of Dale, then tho the teſtator had no such manor, when the will was made, yet by the purchase made afterwards, the teſtator is presumed to have had this meaning from the begining, to purchase the same for the benefit of the legatary: and so the devise is good. but if the legacy be not special, but general, as if the teſtator do bequeath all his lands, then the teſtator having some lands at the time of making the teſtament, and purchaſing other lands afterwards, those lands purchased after making the teſtament ſhall not paſs.*

This writer quoted, for the civil law, what is called the *regula catoniana*, and for the engliſh law, the caſe between Brett and Rigden, in Plowdens commentaries; neither of which is ſatisfactory, as to this queſtion.

The *regula catoniana*, which occurs in Dig. lib. XXXIV. tit. VII. is this: *quod ſi teſtamenti facti tempore deceſſit teſtator, inutile foret: id legatum, quandocunque*

decunque deceſſerit, non valet. this rule, in ſeveral inſtances there mentioned, is ſaid to be falſe. it is true, without doubt, in other inſtances: e g. if one, before he is of the proper age, if one, non compos mentis, if a married woman, making a teſtament, and ſurviving the inability to perform ſuch an act, die without a republication, the teſtament is void, no leſs than it would have been void if the inability had not ceaſed, before the death happened. but it ſeems an improper canon in many caſes to which it may be extended, and perhaps is true only where the vice in the original conſtitution of the teſtament is defect of age, underſtanding, or freedom of will, in the teſtator.

The quotation from Plowdens commentaries is appoſite to the principal caſe, and a rational opinion, but is not of deciſive authority, becauſe the example is a deviſe of lands, and becauſe it is an opinion only of ſerjeant Loveleſe, and denied to be law by the chief juſtices Holt and Trevor, in their arguments of the caſe on Bockenhams will.

Chief juſtice Holt, in his argument, on that occaſion, mentions two caſes, one in Goldeſborough 93, and the other in March 137, which may ſeem, at firſt view, not unlike this; but, upon conſideration, they are thought to differ from it, ſo as not to be applicable. in the former caſe, the ſurrender of the leaſe was an ademption of the legacy; and in the latter caſe, if the executor did not aſſent to the legacy before the death of the legatary, who bequeathed the ſubject of it, and whether he did aſſent or not doth not appear, the caſe cannot be compared with the principal caſe.

In this diſquiſition, any caſe adjudged, which is a direct authority, not being remembered, we muſt have recourſe to ſome other topics.

If a bequeſt, like a gift among the living, were a preſent alienation or conveyance of a right in the thing ſaid to be given, the objection to the validity of this bequeſt muſt prevale, for the tranſition of a right, which doth not exiſt, or, rather before it exiſts, is prepoſterous.

But a bequeſt is not a preſent alienation; the teſtator doth not intend nor doth the law declare it to be ſo. it is no more than the appointment of him whom the teſtator wiſhes to ſuccede him after his death in the ownerſhip of the thing ſaid to be bequeathed. and why ſuch an appointment ſhould not be fulfilled, if the teſtator at his death, before which it is not intended to be effectual, have the thing, no good reaſon hath yet been, nor, as is believed, can be, aſſigned.

On the contrary, by the roman civil law, which is ordinarily thought a reaſonable rule of deciſion, the bequeſt of that which the teſtator never had is valid in many caſes, and in ſome caſes, whether he knew or did not know the thing to be the property of another; ſo that the executor was bound to purchaſe it for the legatary, or pay the value of it to him out of the teſtators eſtate. this is manifeſt by the Inſtitutes and Code in the places before mentioned. and that this particular doctrine is ſtill approved in thoſe countries where that law has been generaly adopted, appears by the Code de l'Humanite in the word LEGS. if, to ſuſtain ſuch an appointment, where the teſtator never owned the thing, be reaſonable, to ſuſtain it, if he do own the thing at the time of his death, when the ſucceſſion is to take effect, can not be leſs reaſonable, all other circumſtances remaining the ſame.

And the appointment ſeems authorized by deductions from legal principles. nothing is pretended to invalidate this bequeſt, but that the teſtator, when he made it, did not own the ſlaves ſaid to be given, although when he died, he did own them. but, if the propoſition that the teſtator muſt own the thing at the time of bequeathing it were true, which is not admitted, becauſe it is thought not poſſible to be proved, the teſtator in this caſe is affirmed to have bequeathed the ſlaves at the time when he owned them, that is, to have bequeathed them when his father died; for, the teſtament not having been revoked, the law ſuppoſes the benevolence of the teſtator to-

words the legatary to have continued. this is aſſumed as a propoſition incontrovertible. now, the continuance of Peterfield Turpins deſire, when he became owner of the ſlaves, that, after his death, his brother Horatio ſhould have them, is, by operation of law, a repetition or republication of the bequeſt at that time, becauſe it hath the ſame effect; for a republication is no more than an evidence that the teſtators deſire continues; and if the law ſuppoſes it to continue, the republication is unneceſſary. if indeed, a man who had lands at the time of making his teſtament, deviſe his lands, by a general deſcription, and afterwards purchaſe other lands, a republication might perhaps be neceſſary, to transfer the after purchaſed lands, if neceſſary in any caſe. Holt, in his argument of the caſe on Bockenhams will, calls the notion, ſtated in the preceding part of this ſection, to wit, that the teſtator, *eo inſtanti* that he becomes owner of the thing deviſed, may be ſuppoſed to make his will, abſurd and repugnant. but it is denied to be abſurd and repugnant, and ſeems dictated by the ſpirit of the law, which doth not appoint a ſucceſſor, unleſs the deceaſed owner hath omitted an appointment, and will always, if it can, eſtabliſh the right of the teſtamentary ſucceſſor.

The right of Horatio Turpin is thought to be ſupported no leſs by authorites, as far as thoſe authorities will apply, than by the principles of law and reaſon.

By a bequeſt of chatels generaly, thoſe which were acquired after the teſtament was made, have been frequently adjudged, and are univerſaly admitted, to be transferred to the legatary. ſo that if Peterfield Turpin, who bequeathed ſome ſlaves to ſeveral of his relations, had bequeathed the reſidue of the ſlaves, without naming them, to his brother Horatio, he would have been intitled to theſe ten confeſſedly: but they who confeſs this deny him to be intitled to them in this caſe, where they are bequeathed to him by their names.

This diſtinction, between a general and a ſpecific bequeſt, ſeems thus founded: its favourers ſay, the law allows a power to bequeath future acquiſitions of chatels, by general deſcriptions, to prevent the inconvenience of making a teſtament, which otherwiſe might be neceſſary, every time changes, frequent in that kind of property, happen. whereas there is not the like reaſon to allow that power in the caſe of a ſpecific bequeſt. but, if the opinion before explaned, be correct, the diſtinction doth not exiſt; the power of the teſtator is the ſame in both caſes; and the times when the bequeſt of chatels generaly, and the bequeſt of a ſpecific thing, ſhall begin to operate upon the after acquired property, are the ſame; and thoſe times are when he becomes owner of the things; although neither bequeſt is an act ſo complete as to transfer the property before his death.

Diſmiſs the bill.

The plaintiff appealed.

The decree was affirmed.

BETWEEN

MILES CARY and Grizzel his wife, and Joſiah Buxton, *plaintiffs*,

AND

NATHANIEL BUXTON, *defendent*.

JAMES BUXTON, ſeiſed of lands, part in fee ſimple, and other part, by the teſtament of Richard Bennett, in fee taille, in the year 1751, deviſed the former, called his old plantation, to his eldeſt ſon John, to whom he alſo bequeathed ſeveral negro ſlaves and chatels, and deviſed the latter, conſiſting of two tenements, one called Bacons, to his ſon Thomas, and the other called Jordans, to his ſon William, and to their reſpective heirs. the deviſe to John was without words of inheritance. in a ſubſequent clauſe is a deviſe to the teſtators ſon Joſiah, and to his heirs, of the plantation given to any of his ſons who ſhould die without iſſue; whereby the eſtate deviſed to every ſon, except Joſiah, was an entail.

The

The defendent, only child of John, recovered the lands entailed by Bennetts teſtament from the plaintiffs, who had ſucceded to the rights of Thomas and William.

The plaintiffs, by their bill, prayed that the defendent might be decreed to convey and deliver to them the lands and ſlaves, and pay to them the value of the other eſtate, which had been deviſed and bequeathed by his grandfather to his father, and had come into poſſeſſion of the defendent himſelf, if he elected to retain the lands recovered, and that the judgment might be enjoined until further order, which injunction was awarded.

The defendent, by his anſwer, inſiſted that the deviſe to his father, if the words were proper to convey a fee ſimple, was void, becauſe being heir he took by deſcent, but, whether he took by deſcent, or whether a fee taille were deviſed, he claimed the lands deviſed by both teſtators; electing however, if he muſt be confined to one, to hold thoſe deviſed by Bennett: and ſtated that of the ſlaves bequeathed to the defendents father, and their increaſe, ſome were dead, one had been ſold by the defendent, and the remainder, who had eloped to the britiſh enemy, never returned.

The caſe was argued the 2 day of march 1793, when the court delivered this

OPINION.

That the defendent, who, claiming by the teſtament of Richard Bennett, hath recovered the entailed lands deviſed by James Buxton to his ſons Thomas and William, ought not to retain any eſtate or intereſt derived from the ſaid James Buxton by *(a)* teſtament, but ought to yield the ſame to the plaintiffs; becauſe the preſumption, that this teſtator, if he had known that right to exiſt, the aſſertion of which after his death deranged the partition of his eſtate made by him, would have provided ſome other way for thoſe younger ſons, at leaſt would have beſtowed upon them what he deviſed and bequeathed to his eldeſt ſon, or would have directed their loſs to be compenſated out of his legatary portion, is no leſs cogent of our belief, than a paragraph, to one or other of thoſe purpoſes, inſerted in his teſtament, would have been; and this preſumption will authoriſe the ſupplement of ſuch a proviſory ſubſtitution of Thomas and William for John, in the teſtament. the ſupplement *(b)* is conceived to be ſanctified by the neceſſity of ſome expedient

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(a) In this part of the opinion prefixed to the decree, as it is entered on the record, are the words, hereditary ſucceſſion or, *which were inſerted inadvertently.*

(b) Examples of ſupplements to render effectual the preſumed wills of teſtators.

1 Curius ſubſtitutus heres erat, ſi poſthumus ante tutelae ſuae annos deceſſiſſet. *non eſt natus. propinqui bona ſibi vendicabant. quis dubitaret, quin ea voluntas fuiſſet teſtantis, ut is non nato filio heres eſſet, qui mortuo? ſed hoc non ſcripſerat. Quinctil. de inſtitut. orator.* lib. VII c. VI. *Cicero. orat. pro A. Caecina,* c. 8. *ſee eq. ca. abr. part* 1 p. 245. c. 10. *and eq. ca. abr. part* 2 p. 294. c. 24. *that the teſtator, who willed, if a poſthumous ſon ſhould die before a certain age, Caius to be his heir, muſt have willed the same Caius to be heir if no poſthumous ſon exiſted, was ſo preſumable that non could doubt it. the judges in that caſe therefore allowed his clame; but this could not be done without ſupplying words adapted to the event, ſo that the teſtament would be underſtood as if the terms had been theſe:* Curius heres eſto, ſi poſthumus mihi natus non fuerit, aut ſi ante tutelae ſuae annos deceſſerit.

2 *Si ita ſcriptum ſit,* ſi filius mihi natus fuerit, ex beſſe heres eſto, ex reliqua parte uxor mea heres eſto; ſi vero filia mihi nata fuerit, ex triente heres eſto, ex reliqua parte uxor heres eſto: *et filius et filia nati eſſent, dicendum eſt (according to the opinion of Julianus) aſſem diſtribuendum eſſe in ſeptem partes, ut ex his filius quatuor, uxor duas, filia unam partem habeat: ita enim ſecundum*

dum

expedient to effectuate, as much as is now poſſible, and with leaſt inconvenience, the intention of a teſtator to give ſome of his lands to two of his children; an intention, otherwiſe, wholely fruſtrated through error in him. and this expedient is recommended by its concordance with the principles of equity, which forbid him, who gaineth by aboliſhing one part of a teſtament, to gain alſo by another part of the ſame teſtament ſuffered to retain its vigor, and require the ſharer in a general allotment, who occupieth the portion

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dum voluntatem teſtantis, filius altero tanto amplius habebit quam uxor, item uxor altero tanto amplius quam filia. licet enim subtili juris regulae conveniebat, ruptum fieri teſtamentum, attamen quum ex utroque nato teſtator voluerit uxorem aliquid habere, ideo ad hujuſmodi ſententiam humanitate ſuggerente decurſum eſt; quod etiam Juventio Celso apertiſſime placuit. Dig. lib. XXVIII. tit. II. l. 13. *words muſt alſo be ſupplied here; the teſtament not having provided for the caſe of twins, undoubtedly becauſe the event was not contemplated.*

This opinion of Julianus ſeems not approved by Home, in his principles of equity, book 1 *part* 1, *ſect.* 3. *art.* 2. *yet, in the next paragraph, he approves a deciſion, perhaps not leſs exceptionable, of a caſe thus reported by him:*

In a contract of marriage there was the following clauſe: and in caſe there ſhall happen to be only one daughter, he obliges him to pay the ſum of 18000 merks; if there be two daughters, the ſum of 20,000 merks, whereof 11000 merks to the elder, and 9000 to the younger; and if there be three daughters, the ſum of 30000 merks, 12000 to the eldeſt, 10000 to the ſecond, and 8000 to the youngeſt. *a fourth daughter having exiſted of the marriage, the queſtion occurred, whether ſhe could have any ſhare of the* 30000 *merks, upon the preſumed will of the father, or be left to inſiſt for her legal proviſion ab inteſtato. the court decreed* 4500 *merks as her proportion of the* 30000 *merks; ſo as to reſtrict the eldeſt daughter to* 10500 *merks the ſecond to* 8500, *and the third to* 6500. *though the exiſtence of a fourth daughter was a caſus incogitatus, for which no proviſion was made, yet as it appeared to be the fathers intention to provide for all the children of that marriage, there was a right created in the fourth daughter by this intention, which intitled her to a ſhare of the* 30000 *merks.*

3 *Clemens Patronus teſtamento caverat* ut ſi ſibi filius natus fuiſſet, heres eſſet: ſi duo filii, ex equis partibus haeredes eſſent: ſi duae filiae, ſimiliter: ſi filius et filia, filio duas partes, filiae tertiam dederat. *duobus filiis et filia natis, quaerebatur quemadmodum in propoſita ſpecie partes faciemus: cum filii debeant pares, vel etiam ſinguli duplo plus quam ſoror accipere. quinque igitur partes fieri oportet, ut et ex his binas maſculi, unam foemina accipiat.* Dig. lib. XXVIII. tit. V. l. 81.

4 *Gilberts reports of caſes in equity*, p. 15 *nearly reſembling the principal caſe.* Bur. rep. part 5 p. 2703 1 ld. Raym. rep. 187.

Examples of total reſciſſions of teſtaments, preſumed to be contrary to the wills of the teſtators, because they were impreſſed with the belief of falſehood.

1 *De militis morte, cum domum falsus ab exercitu nuntius veniſſet, et pater ejus, re credita, teſtamentum mutaſſet, et quem ei visum eſſet, feciſſet heredem, eſſetque ipſe mortuus: res delata est ad centumviros, cum miles domum reveniſſet, egiſſetque lege in hereditatem paternam nempe in ea causa quaeſitum est de jure civili, poſſetne paternorum bonorum exheres eſſe filius, quam pater teſtamento neque heredem, neque exheredem, ſcripſiſſet nominatim?* Cicero de oratore, lib. 1. c. 38. *how the queſtion was then decided this author doth not say.* Valerius Maximus, lib. 7. c. 7, *reports that adolescens, omnibus, non solum conſiliis sed etiam, sententiis superior deceſſit. to ſhow how it would be now decided, any modern adjudication, inducing a probable conjecture, is not recollected.*

2 *Pactumeius Androſthenes Pactumeiam Magnam filiam Pactumeii Magni*

ex aſſe

portion deſtined for a fellow ſharer to cede to him the portion deſtined for himſelf *(c)*

And the court pronounced the following

D E C R E E,

That the defendent, do convey, with warranty againſt any claming under him, to the plaintiffs Miles Cary and Grizzel his wife, and to the heirs of the wife, one moiety, and to the plaintiff Joſiah Buxton, and to his heirs, the other moiety, of the old plantation, which the teſtator deviſed to the defendents father, at the coſts of the plaintiffs, and reſign the poſſeſſion thereof to them; that the injunction, awarded for preventing emanation of the habere facias poſſeſſionem, in execution of the judgement againſt the plaintiffs recovered by the defendent, be diſſolved; but that the defendent be not intitled to the benefit of this diſſolution, until he ſhall by affidavits have proved to the clerk of the general court that he the defendent had executed the conveyances, and reſigned the poſſeſſion, of the old plantation before mentioned to the plaintiffs, or that he had offered to do ſo, and that the

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ex aſſe heredem inſtituerat: eique patrem ejus ſubſtituerat. Pactumeio Magno occiſo, et rumore perlato, quaſi filia ejus quoque mortua, mutavit teſtamentum, Noviumque Ruſum heredem inſtituit, hac praefatione; quia heredes, quos volui habere mihi, continere non potui, Novius Rufus heres eſto: *Pactumeia Magna ſupplicavit imperatores noſtros; et cognitione ſuscepta, licet modus inſtitutione contineretur, quia falsus non ſolet obeſſe, tamen ex voluntate testantis putavit imperator ei subveniendum: igitur pronunciavit,* hereditatem ad Magnam pertinere, ſed legata ex poſteriore teſtamento eam praeſtare debere, proinde atque ſi in poſterioribus tabulis ipſa fuiſſet heres ſcripta. *Dig. lib.* XXVIII. *tit.* V. *l.* 92. *the former part of this sentence is thought indubitably right.*

Example of a testament becoming null by a presumed change of will from an event not expected when the testament was made.

Num quis eo testamento, quod paterfamilias ante fecit quam ei filius natus est, hereditatem petit? nemo quia constat agnascendo rumpi testamentum: ergo in hoc genere juris judicia nulla sunt. Cic. de oratore, lib 1. c 57. *this author supposed no man would question whether the rupture of a testament were wrought by the posterior birth of a son this was perhaps because by the roman civil law,* qui filium in poteſtate habet, curare debet ut eum heredem inſtituat (quamvis ex minima parte) vel exheredem eum nominatim faciat: alioquin ſi eum ſilentio praeterierit, inutiliter teſtabitur. *Just. institut. lib.* II. *tit* XIII. teſtamentum dicitur nullius eſſe momenti, cum filius, qui fuit in patris poteſtate, praeteritus eſt. *Dig. lib.* XXVIII. *tit.* III. *l.* 1. *see Home's pr. eq. book* 1, *part* 1. *ſec.* 3. *art.* 3. *Bur. rep. part* 5. *p.* 2703. *acts of gen. aſſembly, oct.* 1785. *c.* 63. *ſect.* 3.

(c) To prevent that which a teſtator willed not to be, is as pious an act as to perfect that which a teſtator willed to be.

That the teſtator, in this caſe, willed his son John not to have all the three tenements old plantation, Bacons, and Jordans we know with certainty.

To prevent this, ſince the heir of John hath, by an extraneous right, vindicated to himſelf two of the tenements, is impoſſible, if the deviſe of old plantation to John remain as it is. to declare it intirely void would be nugatory, becauſe he would then take the land by hereditary ſucceſſion. the only method, therefore, by which the effect deſired can be accompliſhed, is a tranſlation of the benefit intended by that devise for John, if he would have acquiesced in other parts of the teſtament, to his brothers, Thomas and William, who were deprived by him of the benefits intended for them. thus the benevolence of the teſtator, interrupted in the courſe directed by him, will be diverted into the courſe which he would have directed if he had foreknown the cauſe of the interruption, although perhaps leſs copiouſly than he wiſhed. H.

the plaintiffs had failed to procure the one, and refuſed to accept the other; that accounts of the rents and profits of the plantation to be conveyed to the plaintiffs, and alſo of the lands recovered from them by the defendent, ſince the laſt day of december, 1770, and accounts of the ſlaves and perſonal eſtate of James Buxton, which came into poſſeſſion of the defendent, and of the profits of the ſaid ſlaves, and value received by the defendent for any of them which he hath ſold or otherwiſe diſpoſed of, being made up before commiſſioners afternamed, the plaintiffs to be made debitors for the rents and profits of the lands recovered from them, and creditors for the other articles, with the coſts expended by them in proſecution of this ſuit, the party from whom the balance ſhall appear to be due do pay the ſame to the adverſe party; and that the defendent do deliver ſuch of the ſaid ſlaves as remain, if any remain, ſubject to his power, to the plaintiffs. and Solomon Sheppard and others were appointed commiſſioners.

BETWEEN
JOHN DANDRIDGE and William Armiſtead, executors of Bartholomew Dandridge, *plaintiffs*,
AND
THOMAS LYON, *defendent*.

THOMAS LYON, owner of a woman ſlave named Hannah, whoſe progeny are the ſubject of the preſent controverſy, by his teſtament, after bequeathing to his wife Mary Lyon, whom he appointed one of his executors, his whole eſtate, during her life, bequeathed the three firſt children which Hannah ſhould bring forth to three of his children ſeveraly, of whom Mary Frazer was one. Mary Frazer, who ſucceded to all the deſcendible property of the other two legataries, as well as to that of a fourth child, undiſpoſed by them, made her teſtament, which, beſides the bequeſt of a negro girl to Elizabeth Willis after the death of her mother, contained theſe words: *i give and bequeath unto my dear mother Mary Lyon all the remainder part of my eſtate real and perſonal during her natural life; then, after the death of my ſaid mother, for this eſtate to return to William Poindexter.*

After the death of Mary Lyon, John Lyon, the heir at law of Mary Frazer, commenced an action of detinue, in the county court of New-kent, againſt Bartholomew Dandridge, demanding the ſlaves in controverſy from him, in whoſe poſſeſſion they were, and who had the right of William Poindexter. the parties in that action, by rule of court, ſubmitted the controverſy between them to the arbitrament of three men, conſenting that their award ſhould be made the judgment of the court. the arbitrators, by their award, affirmed the right of Bartholomew Dandridge, and a judgement was entered occordingly.

After the deaths of John Lyon and Bartholomew Dandridge, the defendent, ſon and heir of the former, claming the right, in attempting to aſſert which his father had failed, commenced an action of detinue againſt the plaintiffs, executors of the latter, in the county court of James city, for the ſame ſlaves. on the trial of the iſſue in this action the award and judgement before mentioned, having been deſtroyed by fire, could not be produced, nor legaly authenticated, although they have been ſince authenticated, and a general verdict was found, and a judgement thereupon rendered, for the defendent, affirming his right to the ſlaves.

For an injunction to that judgement, this bill was brought.

By the court, 31 day of october, 1791.

Whether the bequeſt to William Poindexter by Mary Frazer comprehended theſe ſlaves? was made a queſtion by the defendents counſil.

The words of that bequeſt, *all the remainder part of my eſtate*, are comprehenſive of every intereſt not before diſpoſed which the teſtatrix had; ſo that

that, if between the bequeſt to Elizabeth Willis and that to Poindexter the bequeſt to the mother had not been inſerted, the declaration of the teſtatrix that this eſtate, i. e. *all the remainder part of her estate, ſhould return to William Poindexter*, would have transferred to him her intereſt in the ſlaves as effectualy as if they had been deſignated by their names.

How will the intervening bequeſt influence the expoſition of the teſtament?

The defendents counſil objected, that no eſtate was bequeathed to Poindexter, after the death of the mother, beſides the eſtate which was bequeathed to the mother for her life; but theſe ſlaves could not be properly bequeathed by Mary Frazer to her mother for life, becauſe by her huſbands teſtament ſhe had before a right to them for that time; and from Mary Frazers want of power to make ſuch a bequeſt of the ſlaves to the mother, the objector concluded they were not comprehended in the bequeſt to the mother; and, if not in that, they were not comprehended in the bequeſt to Poindexter, but deſcended to the heir of Mary Frazer.

If the ſlaves in controverſy be the three firſt children of Hannah and their iſſue, Mary Lyon perhaps had no right to the uſe of them for her life, otherwiſe than by the teſtament of her daughter, unleſs the bequeſts in the teſtament of her huſband Thomas Lyon to his three children be void. and, notwithſtanding the objections made by ſome to a bequeſt of that kind founded on the ſuppoſed inability to appoint an owner before the exiſtence of the thing to be owned, and on conſiderations of humanity, this court, whoſe deciſions muſt be here authorities, until they be diſapproved by the wiſdom of a ſuperior tribunal, hath formerly ſuſtained ſuch a bequeſt, for theſe reaſons;

1. The power to appoint an owner not in exiſtence, at the time of appointment, for example, a child who ſhall be born twelve months, or twenty or more years, afterwards, is tolerated by law; but this cannot be leſs exceptionable than the power to bequeath a thing not in exiſtence at the teſtators death. to bequeath to one who is not, and to bequeath that which is not, may ſeem abſurd, becauſe in ſuch a bequeſt the right of the teſtator is ſuppoſed to continue after he ceaſeth to be, and conſequently ceaſeth to have any right, until a taker ſhall exiſt, in the former inſtance, and until a thing to be taken, which is to be produced by ſome other thing, ſhall exiſt, in the other inſtance. but they are not more abſurd than teſtamentary ſucceſſions in ordinary caſes. the difference between them, namely, that the right of the legatary commenceth immediately after the death of the teſtator, in the ordinary caſe, but not until a more diſtant event in the other caſe, are unimportant in this diſquiſition; for the tranſition of a right implieth in the nature of the thing two ſucceſſive events, and conſequently ſome time muſt intervene, and during that time, whether it be long or ſhort, the right of the former owner continueth.

2. The diſpoſition attempted by ſuch a bequeſt of what is not in being the law allows to be effected by this mode: a teſtator may bequeath his ſlaves to truſtees, directing them, at the end of a limited term, to diſtribute their increaſe in the manner then preſcribed by him. and that may be ſaid to be the caſe here; for this teſtator appointed executors, who are truſtees, although by a different name, directed to fulfil his deſire to provide for his children.

3. The roman civil law, the authority of which, if not deciſive, is reſpectable, in caſes of teſtamentary diſpoſitions of chatels, allowed ſuch bequeſts as this.

Inſtit. lib. II. tit. 20. § 7. *Ea quoque res, quae in rerum natura non eſt, ſi modo futura eſt, recte legatur, veluti fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.*

Dig. lib. XXX. l. XXIV. *quod in rerum natura adhuc non sit legari poſſe, veluti, quidquid illa ancilla peperiſſet, constitit.*

4. No

4. No danger of a negro childs periſhing by the cruelty of the mothers owner, in not allowing her time to nurſe and cheriſh it, for the benefit of another, is to be apprehended in the caſes where ſuch bequeſts occur. the moſt frequent caſe is, where the teſtator, owning one woman ſlave only, and wiſhing to provide in the beſt manner he can for a needy family of children, would diſtribute among them the offspring which ſhe, with kind treatment, may rear, left in the hands of his childrens mother, as in this inſtance, or of ſome friend, in whoſe goodneſs to ſupply the place of a parent he confides. if negro children do periſh, by cruelty of thoſe with whom their mothers live, as is ſuppoſed, it is believed to be in caſes where they are hired out, or are under the direction of overſeers at places far diſtant from the habitations of their owners

But the ſlaves in controverſy not appearing to be the three firſt children of Hannah and their iſſue; let the ſuppoſition be, that the contrary is true, and that Mary Lyon was intitled to them by the teſtament of her huſband for her life; yet the objection founded on that ſuppoſition that they were not comprehended in the bequeſt to William Poindexter, is diſallowed. the propoſition, that no eſtate was bequeathed to William Poindexter, except the eſtate which was bequeathed to the mother for her life, if by the words, *bequeathed to the mother*, be underſtood, *effectualy bequeathed to the mother*, in which ſenſe they muſt be underſtood, or elſe from the propoſition the concluſion drawn doth not follow, is not true.

Upon the words, *then after the death of my mother, for this eſtate to return to William Poindexter*, the queſtion is, not whether by *this eſtate* ſhe deſigned an eſtate which ſhe had or had not bequeathed, or had or had not a power to bequeath, to her mother for her life? but what eſtate ſhe deſigned William Poindexter ſhould enjoy after the death of her mother, whether ſhe or any other had bequeathed it to her mother for life? this refers to the deſcription of the eſtate, which deſcription is *all the remainder part of my eſtate*, i. e. all that remainder after deducting the negro girl bequeathed to Elizabeth Willis; and conſequently includes the ſlaves in controverſy.

Perhaps the mind of no man who conſidered this teſtament, deſirous only to diſcover the meaning of it, would have entertained a doubt, before the invention of an intereſted party or his counſil ſuggeſted a doubt, that the teſtatrix intended to diſpoſe all her eſtate among three people. That intention is the type after which, if the foregoing verbal criticiſm be not ſo juſt as it is at preſent ſuppoſed to be, her teſtament may be moulded, ſo as to effectuate the intention. let her teſtament be thus paraphaſed: *i give my negro girl Poll to Elizabeth Willis, after the death of my mother; and i give all the reſt of my eſtate to my mother, during her life; and, after her death, i give this eſtate, that is, all the reſt of my eſtate; except the girl given to Elizabeth Willis, to William Poindexter.* this is planely her meaning. by the other expoſition, according to which that only was given to William Poindexter, the uſe of which the teſtatrix had power to give to her mother for life, if theſe ſlaves were the principal part, as they probably were, if not the whole, of her eſtate, William Poindexter, for whom ſhe deſigned the bulk, would have taken little or nothing of it, in contradiction to her meaning.

If by the true expoſition of the teſtament, and by the plain intention of her who made it, the ſlaves in controverſy were comprehended in the bequeſt to William Poindexter, the verdict and judgement, by which the defendent recovered them, were manifeſtly contrary to right.

Preſumptions can not be made in favour of the verdict, becauſe all the facts and documents, pertinent to the diſpute between the parties, pretended by either of them to have exiſted, appear in the preceding ſtate of the caſe, and by the verdict and judgement the defendent recovered ſlaves, to which, according to that ſtate, the plaintiffs indubitably had the right.

No

No court of law can now give the redreſs, which they ought to have, to the plaintiffs; and, if they cannot ſue for it in a court of equity, they muſt ſuccumb.

Ought this to be ſo? ought a verdict and judgement, when the opportunity to prevent the verdict, or to ſet it aſide, or to reverſe the judgement, hath been ſuffered to ſlip unheeded, to be fate, ſo that their doom, however unrighteous, is irrevocable? if by a wrong deciſion one be injured, why ſhould he not have redreſs, as well as when the injury is occaſioned otherwiſe.

Our ſyſtem of juriſprudence ſeems not ſo defective as to ſuffer a right to redreſs for any injury to be without a remedy. the common law delights, if the proſopopoëia may be allowed, in redreſſing injuries, by whatever cauſes produced. in ſome inſtances, it is reſtrained from granting any redreſs, and in others, the redreſs which it can grant is inadaequate, being either too much, or too little, or not early enough. in ſuch inſtances, the court of equity, ſupplying or proportioning the remedy, or applying it in time, exerciſeth the functions which were the objects of its inſtitution. in proceding thus, the court of equity maintains a perfect harmony with the court of common law, or is not at variance with it, aiding the party to aſſert, or to aſſert in the moſt convenient form, thoſe rights which the common law either recognizeth, or doth not reprobate, and giving remedies which that law reluctantly witholds, and thereby contributing its part towards accompliſhing the main deſign of both, which is the attainment of juſtice.

In the court of common law, the plaintiffs, in this caſe might obtain a kind of redreſs by proſecuting a writ of attaint againſt the jury for their falſe verdict, but this objection ought not to effect a repulſe of the plaintiffs addreſs to the court of equity; becauſe, if to conduct ſuch a proſecution, of which an example is believed never to have been in Virginia, and ſuppoſed not to have been in England during the laſt three hundred years, would be found to be practicable, the remedy would be inadaequate in two reſpects: for 1 the injury to the plaintiffs, which is not complete until the execution of the defendents judgement, ought not to be complete; but the proſecution of an attaint would not impede the execution in the mean time; and, 2 the defendent, if not hindred, obtaining poſſeſſion of the ſlaves, removing them with himſelf, might render this remedy by attaint ineffectual: againſt both which this court may provide.

If for the reaſons before explaned application to this court be not proper to obtain redreſs againſt a falſe verdict, it ſeems proper for another reaſon, namely, that the plaintiffs could not regularly be permitted to give evidence of the judgement upon the award, which was an important part of their defence.

Let the injunction to ſtay execution of the defendents judgement be perpetual.

BETWEEN
CARTER BASSETT HARRISON, and Mary Howell his wife, and Anne Armiſtead Allen and Martha Bland Allen, infants, by the ſaid Carter Baſſet, their next friend, *plaintiffs*,
AND
WILLIAM ALLEN, *defendent*.

THE plaintiffs femes and the defendent were the children of William Allen, by a ſecond wife.

His ſon, by a former wife, John Allen, by his teſtament, which was dated in may, 1783, deviſed all his eſtate to his father, and died in may, 1793, being ſeiſed of lands of inheritance acquired after the date of his teſtament.

William Allen, the father, in ſeptember, 1789, made his teſtament, containing deviſes of lands, and a bequeſt of the reſidue of his eſtate, after ſome ſpecific and pecuniary legacies, to his ſons, and died in july,. 1793.

By ſtatute, paſſed in 1785, to be in force from and after the firſt day of january, 1787, was enacted *that when any perſon having title to any real eſtate of inheritance ſhall die inteſtate as to ſuch eſtate, it ſhall deſcend to his children; if any there be; if there be no children, nor their 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.*

On the 8 day december, 1792, a ſtatute was made, to reduce into one the ſeveral acts directing the courſe of deſcents. the words of it are the ſame as the words before rehearſed of the ſtatute of 1785. a ſubſequent ſection of it (22) is in theſe words: *all and every act and acts, clauſes and parts of acts heretofore made containing any thing within the purview of this act ſhall be and the same are hereby repealed.* this act by the laſt ſection of it is to commence in force from the paſſing thereof

In the ſame ſeſſion, on the 28 day of the ſame december, 1792, a ſtatute was made, by which the operation of ſeveral acts of that ſeſſion, among which is the foremention-ed ſtatute of the 8 day of december, was ſuſpended until the firſt day of october, 1793.

By ſtatute paſſed in november, 1789, *whenſoever one law, which ſhall have repealed another law, ſhall be itſelf repealed, the former law ſhall not be revived without expreſs words to that effect.* (a)

William Alle.. having died whilſt the operation of the ſtatute of the 8 day of december, 1792, which is ſuppoſed to have repealed, the ſtatute of 1785, was ſuſpended; whether during that period the common law which excluded the daughters from a p rticipation of the fathers inheritance with their brother was reſtored, ſo that he al ne ſucceded to the lan.s the deviſe whereof to John Allen was ineffectual by his death in the teſtators life time? was the queſtion argued by counſil.

A ſecond queſtion occurring in the caſe is whether by the deviſe in the teſtament of John Allen of all his eſtate to his father, the lands acquired after the date of the teſtament were transfered? this queſtion dependeth upon the principles which govern the decision of the firſt, as inſpection of the ſtatutes of 1785, chap. 63. of the 13 day of december, 1792, intituled *an act reducing into one the ſeveral acts concerning wills, &c.* and of the forementioned 28 day of december, in that ſeſſion, will ſhew. and

A third queſtion is, whether John Allens after acquired lands, if they were not transfered by his teſtament, deſcended to his father? which will be reſolved by the reſolution of the firſt queſtion; ſo that the diſcuſſion of this ſhall ſuffice for all.

By the court, 27 day of ſeptember, 1794.

I. The ſtatute of 1785 was not repealed by the ſtatute of the 8 day of december, 1792.

II. The ſtatute of 1785, if it were repealed by the ſtatute of the 8 day of december, 1792, remained during twenty days only repealed, being at the end of that period reſuſcitated by the ſtatute of 28 day of december, 1792.

I. The

(a) *Hence was infered by the counſil for the defendent, that ſuspersion of the operation of the ſtatute made the 8 day of december 1792, did not revive the statute of 1785; a ſuspension differing from a repeal in their duration only, that of one being for a limited, of the other for an indefinite, period. to which the plaintiffs counſil retorted, the act of 1785 repealed the common law, by which the defendent would exclude his ſiſters from ſhares of his fathers lands of inheritance, and by repeal of that act the common law was not restored, any more than the act of 1785 was revived by ſuspenſion of the act which repealed it.*

I. The ſtatute of 1785 was not repealed by the ſtatute of 8 day of december, 1792, as to the ſubject of the preſent litigation, becauſe both ſtatutes, being in the ſame words, have the ſame meaning.

A ſtatute is the legiſlative will

If the lawmakers of any country aſſembling will, for example, that in the occupation and enjoyment of things, the dying owner whereof ſhall not have appointed a ſucceſſor, his children, or their deſcendents, or, if he be childleſs, his father, or, if fatherleſs, his mother brothers and ſiſters, &c. ſhall ſuccede to him, this will would be a law, if it were only regiſtered in the memories of thoſe by whom and for whom it was ordained, no leſs than if the words which ſignified it, cut in wood, or engraved on ſtone or braſs, were expoſed to the view of all, or inſcribed or impreſſed on paper or parchment, were depoſited among the popular archives.

Surely laws of civil inſtitution might be eſtabliſhed, if the arts of writing ſculpture and printing had not been invented.

They are indeed exceedingly beneficial, enabling men to preſerve the records of acts neceſſary to be known by monuments more faithful than tradition, more intelligible than hieroglyphics, for which thoſe arts have been happily ſubſtituted.

But the columns, or tables, or folia, or ſkins which exhibit the words ſignifying the will of the legiſlature are not theinſelves the legiſlative will—are not the ſtatutes—

A ſtatute being the legiſlative will, the repeal of a ſtatute is a change of the legiſlative will.

The lawmakers then, in 1785, having willed that all a mans children, or, if he had not children, his father, or, if the father were dead, his mother brothers and ſiſters, &c. ſhould ſucceed to his undeviſed lands of inheritance; and that this ſhould be the law, after the firſt day of january, 1787; and having, on the 8 day of december, 1792, willed that all a mans children, &c. ſhould ſucceed to his undeviſed lands of inheritance, rehearſing the identical words contained in the ſtatute of 1785;—when after this the legiſlature added that the ſtatute of 1785 was and ſhould be repealed, what could they mean?

We cannot ſuppoſe them to have meaned that the will of the legiſlature had changed between 1785 and the 8 day of december, 1792. the fact is proved to be otherwiſe by the continuance in force of the ſtatute, which alone can indicate a continuance of the legiſlative will.

The legiſlative will could not alter between repealing one ſtatute and enacting the other, becauſe no time intervened—they were *simul ac semel*, they were both, if the former were at all, *uno flatu*, in the ſame breath.

The only other meaning of the repealing ſection is that the legiſlative will was changed in 1792 but that meaning is repugnant to the ſtatute which containeth the repealing ſection, and which willeth the ſame courſe of deſcent which the ſtatute of 1785 willed.

The repealing ſection therefore is rejected, except in caſes where the ſtatute made in 1785 is altered by ſubſequent ſtatutes, among which caſes is not the preſent caſe of ſiſters demanding a partition with a brother.

II. The ſtatute of 1785, if it were repealed by that of the 8 day of december, 1792, was reſuſcitated by the ſtatute of the ſame ſeſſion.

This, as is believed, muſt be manifeſt to him who will tranſlate the language of the three ſtatutes into equivalent terms with ſuch explications of them by way of paraphraſe as are evidently requiſite to adapt a law in general terms to particular caſes: for

Then it would be read thus: the operation of the act paſſed during the preſent ſeſſion, by which an act paſſed in the year 1785, directing that lands of inheritance ſhall deſcend to all the children of an owner dying inteſtate &c. was repealed, is ſuſpended until the firſt day of october, 1793. and

conſequently

conſequently until that time the ſtatute ſaid to be repealed would not be repealed, unleſs it was between the 8 and 28 day of december, 1792.

Decree for the plaintiffs.

BETWEEN
JAMES MAZE, *plaintiff*,
AND
WILLIAM HAMILTON and Andrew Hamilton, *defendents*.

THE ſubject of controverſy in the cauſe was 400 acres of land, in the county of Greenbrier, with a right of preemption. the plaintiff clamed by virtue of a ſettlement in 1764. the defendents clamed by virtue of both a ſettlement and a ſurvey, alleging the ſurvey, when they firſt pretended to derive a title by it, to have been made in 1774, altho the ſurvey to which they alluded appeareth to have been made in june, 1775, by an order of council, granted to the Greenbrier company, in 1751.

Before the ſpecial court of commiſſioners, conſtituted by the act of general aſſembly, paſſed in the may ſeſſion of 1779, the plaintiff exhibited his clame, and the defendents oppoſed it.

The commiſſioners, by their ſentence, the 14 day of january, 1780, affirmed the clame of the defendents, certifying Andrew Hamilton to be intitled to the 400 acres of land, by right of ſettlement, before the 1 day of january, 1778, being part of a ſurvey of 1100 acres, made for him, in the year 1774, alſo to have the right of preemption for 500 acres adjoining the ſettlement.

This ſentence, from which the plaintiff appealed, entering a caveat againſt emanation of a grant in conſequence of it, was reverſed the 9 day of october, 1782, by the general court, who ordered that a grant iſſue to the plaintiff for the ſaid 400 acres of land, in right of ſettlement, and for 1000 acres more, in right of preemption, to which no other perſon had any legal right or clame.

A motion to that court for an appeal from this judgement was denied. the court of appeals, on the 30th day of april, 1783, awarded a writ of error to the judgement; 29 day of october following quaſhed the writ of error, declaring their opinion to be, that they had no juriſdiction over judgements, rendered by the general court, on caveats ſued forth in that court againſt the judgements of diſtrict commiſſioners; the next day ſet aſide the caſſation; and finaly, on the firſt day of november following, reinſtated it.

The ſurvey, under which the defendents clamed, is certified to have been made by Samuel Lewis, ſurveyor of the county, who at that time was an agent of the greenbrier company.

Upon the petition of Andrew Lewis, alſo an agent of the greenbrier company, the court of appeals to whom it was addreſſed, on the 2 day of may, 1783, entered this opinion decree and order: *the ſeveral clames of Thomas Walker, eſquire, on behalf of himſelf and the other members of the loyal company, and of Thomas Nelson, eſquire, on behalf of himſelf and the other members of the greenbrier company, to grants of all the lands ſurveyed under ſeveral orders of council, bearing date the* 12 *of july*, 1749, *the* 29 *of october*, 1751, *the* 14 *of june*, 1753, *and the* 16 *of december*, 1773, *came on to be heard yeſterday and this day, and thereupon the arguments of counſil for the clamants, and of the attorney general for the commonwealth, having been fully heard and conſidered, it is the opinion of the court, and accordingly decreed and ordered, that all ſurveys, made by a county ſurveyor, or his deputy properly qualified according to law, previous to the year* 1776, *and certified to have been made, by virtue of the orders of council to the loyal and greenbrier companies, or either of them, ought to be confirmed; and that the regiſter be directed to iſſue patents*

upon

upon all ſuch ſurveys as ſhall be returned and ſo certified. this act of the court of appeals was authoriſed, if authoriſed at all, by the 10th ſection of the ſtatute before mentioned, which is to this purpoſe, *all clames for lands upon ſurveys under orders of council, or entries in the council books, ſhall by the clamers be laid before the court of appeals, at a time appointed by the act; and ſhall be heard and determined in a ſummary way, without pleadings in writing, upon ſuch evidence as in the opinion of the court the nature of the caſe may require; and no clame ſhall be valid, but ſuch only as ſhall be heard and eſtabliſhed by the ſaid court of appeals, and, on their certificate, that any ſuch clame hath been eſtabliſhed, the regiſter is required to iſſue a warrant or grant thereupon; and the attorney general is required to attend, on behalf of the commonwealth.*

A grant of the 1100 acres in the ſurveyors certificate to Andrew Hamilton paſſed the ſeal the 5 day of november, 1783; and the plaintiff, who was thereby deprived of that, to which his title was aſſerted by the judgement of the general court, for the land recovered by that judgement was included in the grant, filed a bill in the high court of chancery, complaining of the fraud, in procuring ſuch a grant, and ſeeking redreſs.

The defendents, in their anſwer, relied upon the matters which were diſcuſſed before the general court, on hearing the appeal from the ſentence of the court of commiſſioners, and relied upon no other matters. the clames of the defendents to part of the 400 acres purchaſed from John Tackett, ſaid to have been a joint ſettler of them with the plaintiff, and to the whole purchaſed from the companys agent, and certified by him to have been ſurveyed for the defendent Andrew Hamilton, are not indeed ſaid to have been diſcuſſed, and do not otherwiſe appear to have been particularly noticed, in the judgement of the general court; but that the former of them muſt have been conſidered by that court is manifeſt by this paper, certified by the proper officer to have been produced and read at the trial: *i do hereby aſſign all my right and title in and to a ſettlement and improvement made by me known by the name of Maze cabin, firſt improven by myſelf and James Maze, to Andrew Hamilton. witneſs my hand and ſeal, this firſt day of januarv, 1780, John Tackett, ſeal. teſte James Macordle*; and that the other clame by ſurvey, which was mentioned in terms in the very ſentence, the rectitude whereof was the ſubject of diſquiſition, was likewiſe conſidered by the general court, no other cauſe to doubt appeareth but the miſtake of a year in the date of the ſurvey.

When the cauſe came on to be heard before the court of equity in october, 1789, the judgement of the general court, the 9 day of october, 1782, having reverſed the judgement of the court of commiſſioners, ſo far as that judgement related to the 400 acres of land, lying in the county of Greenbrier, called the cabin place, and any right of preemption of the defendents belonging thereto; and the ſaid judgement of the general court having awarded that a grant ſhould iſſue to the plaintiff for the ſaid 400 acres of land, in the right of ſettlement, and for 1000 acres, in right of preemption, to which no other perſon hath any legal right or clame, complying with the terms of the law, in ſuch caſes provided; which judgement of the general court the court of appeals have judicialy diſaffirmed their power to reverſe, by their order, the 1 day of november, in the year 1783, quaſhing the writ of error brought for that purpoſe; the high court of chancery delivered this

OPINION,

That by the ſaid judgement of the general court, the right clamed by the defendents, under the ſurvey certified by Samuel Lewis, the 19 day of june, in the year 1775, to have been made by him for the defendent Andrew Hamilton, ſo far as that ſurvey includes any land to which the right of the plaintiff is aſſerted by the judgment, was annulled: that the decree and order of the court of appeals, the 2 day of may, in the year 1783, on hearing the ſeveral clames of Thomas Walker, and Thomas Nelſon, on behalf of themſelves, and the loyal and greenbrier companies, if it contravene, which however is con-

teſtable, the judgement of the general court, ought not to bar the plaintiff; not only, becauſe he was no party to the order and decree, but becauſe the judgement of the general court, whoſe authority in that particular inſtance is ſupreme, and therefore equal to the authority of the court of appeals in general, is prior in time to the ſaid decree and order, and conſequently will prevale againſt them; and that the ſubſequent conduct of the defendent Andrew Hamilton, which was not ſanctified by the ſaid decree and order, in proceding to obtain a grant from the regiſter of the land office, and in attempting thereby to fruſtrate and elude the judgement of the general court, was a fraud; againſt which the plaintiff ought to be relieved. and pronounced this

DECREE,

That the defendents be injoined from obſtructing the plaintiff in proceding to carry the ſaid judgement of the general court into execution, and do, at his coſts, convey to him the inheritance of the 1100 acres, mentioned in the ſaid ſurvey, and granted to the defendent Andrew Hamilton, by letters patent, the 5 day of november, in the year 1783, or ſo much thereof as ſhall be included within the bounds of the land to be ſurveyed for him, in perſuance of the ſaid judgement; and do alſo pay unto him his coſts expended in proſecuting this ſuit: but the plaintiff is underſtood to be accountable, to the greenbrier company, for ſo much of the land, as he ſhall take out of the defendents ſurvey, in the proportion of three pounds for every hundred acres. and liberty is reſerved to the parties to report to this court, for its further direction, as to any matter relating to the ſubject of this decree.

The author of this decree, ſome time after it was ſigned, thought it not correct in aſſerting the plaintiffs right to more than 400 of the 1100 acres of land, becauſe the reſidue might be appropriated by the ſurvey, in 1775, the ſettlers right of preemption being given not before 1779, and being different from the right of ſettlement, which latter the legiſlature, by their act of that year, recognize in terms implying a preexiſtence of the right. but, upon further reviſion, he is inclined to approve that part as it is, for if the right by ſettlement ought to prevale againſt a ſurvey poſterior to the ſettlement, to prove which will be attempted hereafter, that its appendage, or ſhadow as one called it, the right of preemption, ſhould accompany it ſeemeth a natural conſequence. and he confeſſeth another part of the decree which admitteth the plaintiff to be accountable to the greenbrier company for three pounds for every hundred acres of the land recovered by him to be wrong, *quacunque via data*; for if the ſettlement right be prevalent againſt the right by ſurvey, the ſettler is intitled to a grant upon payment of the fiſcal compoſition only; and if the right by ſettlement prevale not againſt the other, the plaintiff, not being intitled to the grant, can not be bound to pay any money for it. and no other error in the decree is yet diſcerned.

But, on the 20 day of june, 1791, the court of appeals, before whom the decree was impeached, declared it in general terms to be erroneous, and, reverſing it, made the following

DECREE AND ORDER,

That a ſurvey be made of the 400 acres of land for the ſettlement, to lie ſouth of a line, to be run from a ſpring oppoſite to Chriſtopher Wachubs, as the ſame ſhall appear to have been made by agreement between the appellee and John Tackett in the procedings mentioned, ſo as to include the cabin and ſettlement, and which may be laid down as either party ſhall direct, to enable the court of chancery to decide between them on the propriety or reaſonableneſs of the location; that the appellant Andrews patent of 1100 acres be alſo ſurveyed and laid down, to ſhew how far the ſame doth interfere with the ſaid 400 acres, which being adjuſted by the court of chancery, that the ſaid appellant be decreed to convey to the appellee the inheritance of ſo much of the ſaid 400 acres as ſhall be found to lie within the bounds of the ſaid appellants patent. with warranty againſt himſelf, and all perſons claming

claming under him, and deliver him poſſeſſion thereof, upon the appellees paying to him, at the rate of three pounds per hundred acres, for the quantity ſo to be conveyed: and as to the reſidue of the ſaid 1100 acres, that the bill be diſmiſſed. but the appellee is, nevertheleſs, to be at liberty to proceede to ſurvey the ſaid 1000 acres of land for his preemption, if he can find land to ſatisfy the ſame without interfering with the ſaid patent, or other prior clame.

The decree, in the terms of it, affordeth ſcanty matter, but certain propoſitions reported, from good authority, to have been the foundation of it afford abundant matter, for

REMARKS.

I. The court of appeals are believed to have aſſumed in this ſuit, the object of which was to remove an obſtruction to the execution of a judgement of the general court, a power to correct that judgement, which they had renounced the power to correct, in a writ of error. by the act of their conſtitution, they are impowered to affirm or reverſe decrees judgements and ſentences intirely, or, if they do not affirm or reverſe them intirely, may give ſuch decree, judgement or ſentence as the court, whoſe error is ſought to be corrected, ought to have given but they can only correct the decree judgement or ſentence which is brought before them by appeal or writ of error. in this caſe the general court adjudge and order that a grant of 400 acres of land ſhall iſſue to the plaintiff. the defendents bring this judgement before the court of appeals by writ of error. then was the time to affirm, reverſe, or reform the judgement. the court of appeals do neither; becauſe they have no juriſdiction of the matter, or becauſe, in other words, they have no power to reverſe or reform that judgement.

Notwithſtanding this, what is done? a few days after the writ of error was quaſhed, Andrew Hamilton, on the ſurvey of 1100 acres, procures a grant to himſelf of the land, which the general court had adjudged and ordered to be granted to the plaintiff this grant was obtained by a deception practiſed upon the regiſter for that officer, if he had known that the land granted to Andrew Hamilton included the land which, by a judgement of the general court, irreverſible by the court of appeals, he had before been ordered to grant to the plaintiff, ought not to have iſſued, and therefore probably would not have iſſued, ſuch a grant to Andrew Hamilton to be relieved againſt this fraud, the plaintiff brought this ſuit. the high court of chancery put the plaintiff in the ſtate in which he would have been, if the fraud had not been practiſed. the court of appeals, reverſing that decree, reform the general courts judgement; for of the 400 acres, to the whole of which that aſſerts the plaintiffs title, he is allowed only ſo much as is on one ſide of a dividing line, and for that he is to pay three pounds by the hundred acres.

The propriety of reforming, in an original ſuit, a judgement which was incorrigible in a writ of error, and the conſiſtency of this deciſion with that of november, 1783, by the court of appeals, have not been ſhewn, as is believed.

But let the caſe be now conſidered in the ſame manner as if the right of the defendents, by the ſurvey, or, which is the ſame thing, the right of the greenbrier company, had not been diſcuſſed before the court of commiſſioners or the general court.

II. The court of appeals are reported to have aſſented, whether unanimouſly, or by a majority only, hath not tranſpired, to this propoſition, that the companys right to this ſurvey ſtands eſtabliſhed by the deciſion of that court in may, 1783, unalterably by any tribunal; ſo that the plaintiff, claming by right of ſettlement, cannot call in queſtion the validity of the ſurvey, and right of the company, or of the defendents, who in this inſtance repreſent the company, before any court.

The

The truth of this propoſition cannot be admitted; becauſe, firſt, the plaintiff was not a party to the proceding, then before the court of appeals, and the deciſion between any two parties cannot in law or equity conclude the right of another who deriveth it not from either of them; ſecondly, this act of the court of appeals, which is called a deciſion, is a manifeſt delegation to the regiſter of the land office of a power committed by the ſtatute to the court itſelf. and altho that court is indeed ſupreme, and its deciſions not alterable elſewhere, in caſes where before it are brought the ſentences of inferior tribunals, to be approved or corrected finally; yet when a matter is referred to the court of appeals in the firſt inſtance, as was the preſent caſe, where the judges of it do not act in their appellate character, that their determination is definitive, ſo that the juſtice of it cannot be reviſed even by themſelves, perhaps may be diſputed, as it undoubtedly might have been diſputed, if the determination had been referred to the men who compoſe that court, deſignated by their names. and this, without derogation from their power, ſince by them the matter, brought up by writ of error or appeal, may be ultimately adjuſted.

III The court of appeals are reported to have denied that any right, by ſettlement on unappropriated land, exiſted before the recognition of ſuch a right by the ſtatute of 1779, ſo that between the plaintiffs right, by ſettlement, which was not before that act, and the defendents right, by ſurvey, which was four years before it, a competition for priority could not be.

This doctrine ſhall be here examined.

Between the kings proclamation, in 1763, and the governors order in council of december, 1773, all other people, as well as mere ſettlers, were reſtrained from obtaining grants of land on the weſtern waters. this reſtraint is conceived to have been unlawful. lands, before they were granted, were indeed called the kings lands. but he was only the diſpenſer of them to others, being unable to appropriate, by his ſingle act, one acre to his own uſe, and, on the contrary, being bound to grant them to thoſe, who were proceding, in the courſe preſcribed by law, to acquire excluſive ownerſhip of them, and who, if not obſtructed in that courſe, would have been complete proprietors. thoſe who affirm the regal territorial dominion to have been other than that which is now defined, if they attempt to maintain it by adjudications of engliſh courts, or even of american courts before the late revolution, or by acts of engliſh governors, are warned, that the authority of theſe documents in this queſtion is denied

In the mean time, theſe propoſitions are aſſumed, becauſe they are believed to be undeniable: 1 that every man had power to enter with the ſurveyor for any land, not exceeding a certain quantity, and not having been appropriated, and had a right to a royal grant of the land. this power and right have not perhaps been aſſerted by legiſlative acts in direct terms, becauſe ſuch an aſſertion ſeemed unneceſſary; but the exiſtence of the power and right is ſuppoſed and implied by the act paſſed in 1748, chap 14, of the edition in 1769, ſect. 2. and by ſeveral other acts; and ſuch a ſuppoſition and implication in ſuch a caſe as this are conceived to be equivalent to an aſſertion in poſitive terms. the 2 propoſition is, that the kings proclamation reſtraining the exerciſe of the power, and interrupting the enjoyment of the right, was void, and his witholding the grants was contrary to his duty. if theſe premiſſes be true, he, who, being illegaly reſtrained from uſing the means of appropriating a thing unoccupied, takes poſſeſſion of it, and is hindered from procuring a ſanction of the poſſeſſion in ſolemn form, by another who ought to ſupply the form, ſuch a poſſeſſor is affirmed to have an equitable right to the thing poſſeſſed; affirmed with the more confidence becauſe it coincides with the ſentiments of the legiſlature declared in the act now the ſubject of conſideration; and coincides too with the primitive natural right which reſumes its vigor when its correſpondent civil right

is

is denied. that the plaintiff had this equitable title, after the judgement of the general court, ſupporting it as a ſettlement right, is inconteſtable. whether the time of ſettlement were the epocha of the title will be enquired in conſidering the next propoſition to which the court of appeals are reported to have aſſented, and that unanimouſly. it is

IV. That a right, clamed by ſettlement, cannot, in any caſe, be oppoſed to a right, clamed by ſurvey, authoriſed by order of council.

In examining this propoſition the following queſtions are propounded 1, what is a right by ſurvey? 2, what is a right by ſettlement? 3, at what time a right by ſettlement originated? and 4, to what time a right by ſurvey ought to have a relation? which queſtions will be ſolved by the true expoſition of the ſtatute of may ſeſſion 1779.

1. What is a right by ſurvey? the words of the firſt ſection, after extermination of thoſe which are unimportant in this diſquiſition, are, *all ſurveys of waſte and unappropriated lands, upon the weſtern waters, made before the* 1 *day of january*, 1778, *by the proper officer and founded on orders of council, ſhall be and are declared valid.* from this ſection alone can the ſurvey, by which the defendents clame, derive validity; for by the third ſection, orders of council, except ſo far as they had been carried into execution by actual ſurveys in manner before mentioned, that is, by ſurveys of waſte and unappropriated lands, &c. are declared void. if the lands ſurveyed for the defendents were waſte and unappropriated, the ſurvey, in which all the other characters requiſite by the act are admitted to be verified, was valid, and the right of the defendents undeniable; but if the land was wholy or partialy appropriated, or, to apply it to the preſent caſe, appropriated by ſettlement, the ſurvey was wholy or partialy invalid.

2. What then is a right by ſettlement? in the preamble to the fourth ſection, the waſte and unappropriated lands, upon which people had ſettled, are called *property acquired by them.* a thing appropriated, and a thing whereof one hath acquired the property, are convertible terms. if they be convertible terms, the lands on which people had ſettled were appropriated, and conſequently a ſurvey of them, by authority of an order of council, after that appropriation, was not valid by the firſt ſection. but this appropriation by ſettlement is ſaid not to have been an appropriation before it was recognized by the act of 1779, and therefore was poſterior to the ſurvey in 1775, at which time, conſequently, the land was waſte and unappropriated. this introduceth the

3. queſtion, at what time a right or appropriation by ſettlement originated? that it originated at the time of ſettlement is believed to be demonſtrable from the phraſeology and reaſon of the act. the preamble to the fourth ſection is in theſe words: *whereas great numbers of people have ſettled in the country upon the weſtern waters, upon waſte and unappropriated lands, for which they have been hitherto prevented from ſuing out patents or obtaining legal titles by the king of Great-britains proclamations or inſtructions to his governors, or by the late change of government, and the preſent war having delayed; until now, the opening of a land office, and the eſtabliſhment of any certain terms for granting lands, and it is juſt that thoſe ſettling under ſuch circumſtances ſhould have ſome reaſonable allowance for the charge and riſk they have incurred, and that the property, ſo acquired, ſhould be ſecured to them.* and the enacting words are theſe: *that all perſons who, at any time before the* 1 *day of january, in the year* 1778, *have realy and bona fide ſettled themſelves or their families, or at his, her, or their charge, have ſettled others upon any waſte or unappropriated lands on the ſaid weſtern waters, to which no other perſon hath any legal right or clame, ſhall be allowed for every family ſo ſettled,* 400 *acres of land, or ſuch ſmaller quantity as the party chooſes, to include ſuch ſettlement. and where any ſuch ſettler hath had any ſurvey made for him or her, under any order of the former government, ſince the* 26 *day of october, in the year* 1763,

in conſideration of ſuch ſettlement for leſs than 400 *acres of land, ſuch ſettler, his or her heirs, may clame and be allowed as much adjoining waſte and unappropriated land, as together with the land ſo ſurveyed will make up the quantity of* 400 *acres.* now 1, the reaſonable allowance, which the preamble declares that the ſettlers ought juſtly to have, was a remuneration of ſervices performed at their charge and riſk, in protecting the frontier, deemed meritorious by the law makers. the merit was in the ſettlement, and therefore is neceſſarily côêvous with the ſettlement. the right to remuneration is the correlative of the merit, and therefore of the ſame age with it, and conſequently muſt begin with the ſettlement too. 2, the act declares the land ſettled by them to be their property, acquired by them, and acquired at their charge and riſk. the act therefore did not create the property, or bring into being a right which exiſted not before. it acknowledged the property or right indeed, but acknowledged it to be a pre-exiſtent property or right, pointing out a mode by which the owners might ſue out grants, which they had been theretofore prevented, without their own default, from ſuing out, in order to ſecure their legal titles; planely intending to put the ſettlers in the ſtate in which they would have been, if the royal proclamation had not inhibited the ſurveyors from receiving and making entries. The property or right of the ſettlers was conſequently acquired, not by the act, but before it, and if before it, muſt have begun with the ſettlement, which was the mean of acquiring it. that the law-makers intended to put ſettlers in the ſame ſtate, as to the antiquity of their titles, with thoſe who clamed by ſurveys, or by entries, or orders of council, before the act, is manifeſt by the 6 ſection, enacting, *that perſons ſuing out grants, upon ſurveys theretofore made, under entries with ſurveyors, or under orders of council, for which rights had not formerly been lodged in the ſecretarys office, and alſo thoſe, ſuing out grants for lands, upon the weſtern waters, allowed to them in conſideration of their ſettlements, or under former entries with the county ſurveyor, for lands upon the eaſtern waters, ſhould be ſubject to payment of the usual compoſition money, under the former government, and to no other charge or impoſition, ſave the common office fees.* the right of a ſettler, if it originated with the ſettlement, was a complete right at that time, although not formaly declared to be legitimate before the ſtatute in 1779, for an act ſanctified by a ſubſequent ratification is as legal and as much an act of the time when it was commenced, as if an authority to do the act had been prior to it.

An argument, urged againſt the preceding expoſition of the 4 ſection, hath been drawn from a verbal criticiſm on a part of it. the criticiſm is ſtated thus: the legiſlature, on purpoſe to prevent the conſtruction, by which the ſettlement-right would be made to exiſt before the act which recognized it, to the words, *waſte or unappropriated lands*, add the words, *to which no other perſon hath any legal right or clame*, that is, hath in 1779, not had at the time of ſettlement, any legal right or clame. upon which two or three obſervations will be made. 1, if the words, *waſte and unappropriated lands*, mean lands to which none have right or clame, and he who affirmeth them to mean any thing elſe is required to ſay what that meaning is, then to the words, *waſte and unappropriated lands*, the addition of, *to which no other perſon hath any legal right or clame*, is a tautology, for the meaning of the ſentence, without them, would have been the ſame as it is with them. 2, unleſs the word, *hath*, import that he, who hath a right to day, could not have the ſame right before, which the critic probably will not venture to ſay, how will this prove, that he who had a right in 1779, when the act was made, might not have the ſame right in 1764, when the ſettlement was made? and 3, let the words be read, as the critic would have them underſtood, thus; *people who have ſettled on waſte or unappropriated lands, to which no other perſon, now, in* 1779, *hath, not at the time of ſettlement had, any legal right or clame, ſhall be allowed, for every family,* 400 *acres.* now to whom

whom do the words, *hath*, and *had*, refer? to the people who ſettled? no man will anſwer this affirmatively; and if they refer to other perſon, the criticiſm, inſtead of opugning, aids the right by ſettlement, poſtponing to it a ſubſequent ſurvey.

Another argument, urged againſt the preceding expoſition of the 4 ſection hath been drawn from the preamble to the 7 ſection, in theſe words: *whereas upon lands ſurveyed for ſundry companies ſeveral people have ſettled*, &c. and from the enacting part in theſe words: *all perſons ſo ſettled ſhall have their titles confirmed, upon payment of the price for which the companies or their agents had publicly offered the lands for ſale*, whence was inferred, that ſettlers upon lands ſurveyed for the companies, after the ſettlements, as well as before, could entitle themſelves no otherwiſe than by purchaſing from the companies. but this ſection planely deſignates ſettlers upon lands ſurveyed before the ſettlements only, as is manifeſt from the diction. the words, *upon lands ſurveyed for ſundry companies, many people have settled, &c.* to include ſettlers before the ſurveys muſt be paraphraſed thus: *upon lands which have been ſurveyed for ſundry companies many people had ſettled before the lands were ſurveyed.* but 1, the more natural, the only true, explication of the terms is, *upon lands which had been ſurveyed many people have ſettled ſince the lands were ſurveyed*; ſo that the ſurveying muſt have preceded the ſettling. if a man ſhould ſay, into the houſe built for me one entered, or on the horſe brought for me one rode; would any hearer underſtand that the building of the houſe, or the bringing of the horſe, was poſterior to the entry into the one, or the riding of the other? is this leſs prepoſterous than the expoſition of this 7 ſection, by which it would comprehend ſettlers on lands before they were ſurveyed for the companies? 2, by the enacting part of this ſection, the companies were bound to confirm the titles of ſettlers upon lands ſurveyed, and not before the ſettlements notoriouſly reſerved by the companies for their own uſe. but how could lands, not ſurveyed before they were ſettled, be notoriouſly reſerved before the ſettlement by the companies for their own uſe? alſo by the enacting words the ſettlers were to pay intereſt on the conſideration money from the times of ſettlement. would this be juſt, and can one ſuppoſe it to have been intended where the ſurvey was after the ſettlement? in this caſe the ſurvey was more than ten years after the ſettlement.

If the appropriation by ſettlement be an appropriation at the time of ſettlement, which is believed to be proven inconteſtably by the words of the ſtatute; the ſettlement of the plaintiff having been in 1764, the land was not waſte and unappropriated in 1775, when the ſurvey for the defendents was made; conſequently the ſurvey was not valid.

But perhaps the order of council, in 1751, may be ſaid to have appropriated the land, and therefore to have prevented the efficacy of the plaintiff's ſettlement poſterior to it: which leads to the

4th queſtion, to what time a right by ſurvey ought to have a relation, that is, in this caſe, whether the ſurvey ſhall have the ſame effect as if it had been an act of the time when the order which authorized it was granted? in other words, the queſtion is whether the order of council appropriated from the date of it all the lands within its limits?

By this order, which is not among the exhibits, otherwiſe than as the ſubſtance of it is ſtated in the forementioned petition of Andrew Lewis from which is extracted what followeth, leave was granted to the greenbrier company to take up 100000 acres of land, lying on Greenbrier river, nothweſt and weſt of the Cowpaſture and Newfoundland; and a time was limited, within which the company was required to pay the rights, and to procure the ſurveys to be made.

This order, with others, except ſo far as it had been carried into execution by actual ſurveys before the firſt day of january, 1778, was declared void by the third ſection of the act of 1779. if that act had not paſſed, an order,

order, the terms whereof are ſo vague and indefinite, perhaps would not have withſtood a legal inquiſition into its validity, even if the intereſt of others individualy were not oppoſed to it.

But the order, if its terms import, or if it be expounded ſo as to purport; a grant of authority to this company to ſeiſe parcels of land, for which other men had entered, or on which other men had ſettled, before particular locations by the order, indicated by actual ſurveys, would ſo far have been an invaſion of the peoples rights in general, for reaſons explaned before. and if that be true, the ſurvey, by which the defendents clamed, cannot have a relation to the order, by authority of which it was made, for the law ſuffers not a relation to work a wrong.

V. From the propoſitions of the court of appeals, an ordinary judge would have expected a diſmiſſion of the plaintiffs bill intirely. but that court, on the contrary; have made a decree partly in his favor.

The judge of the H. C. C. hath been informed of the conſiderations, on which this part of the correcting decree was formed; but he will ſay nothing of them more than that they are not ſuggeſted by any part of the act of 1779; and that this act, and two or three others, without thoſe conſiderations, ſupply ſufficient light for deciding the preſent queſtion

The judge of the H. C. C. who is bound to adopt the decrees of the court of appeals, for he muſt regiſter them, and enforce execution of them, when he is performing this duty, in ſuch an inſtance as the preſent, where the ſentence, for which he is compelled to ſubſtitute another, was the reſult of conviction, imagines his reluctance muſt have in it ſomething like the poignancy which Galileo ſuffered, when, having maintained the truth of the copernican in oppoſition to the ptolemaic ſyſtem, he was compelled, by thoſe who could compel him, to abjure that hereſy.

After the foregoing remarks were cloſed, the writer of them was favored with this

'ARRANGEMENT OF JURISDICTIONS

'for aſcertaining clames under the act of 1779, to ſhew that, though the 'rules of grammar may not be tranſgraſſed, by conſtruing the words, 'prior "clame,' in the ſettlement clauſe, not as prior to 1779, but as prior to the 'ſettlement in queſtion, yet ſuch conſtruction does not conſiſt with the words 'and ſpirit of the whole law, taken together.

'The firſt clauſe eſtabliſhes all ſurveys regularly made under entries, or-'ders of council particularly defined, or the kings proclamation.

'Thoſe under orders of council were to be laid before, and decided upon, 'by the court of appeals; and with them no other tribunal could inter-'meddle.

'Surveys under entries, or the proclamation, patents were to iſſue on of 'courſe, unleſs a caveat was entered in the regiſters office, which was to be 'heard in the general court, and with theſe the commiſſioners in the coun-'try had nothing to do, either to aid, or deſtroy them.

'The commiſſioners were to act upon mere ſettlement clames, not op-'poſed by actual ſurveys confirmed before, and between contending clam-'ants upon the waſte lands of the commonwealth, to decide by priority of 'ſettlement; another branch of duty was aſſigned them, to enquire between 'contending clames of ſettlements under the companies, not to judge of the 'validity of the companies ſurvey, for that was referred to the court of ap-'peals, but to decide who, by priority of ſettlement, had a right to a grant 'from the company, on paying the purchaſe.

'This being the general arrangement; can thoſe lands be ſaid, under the 'ſettlement clauſe, to be waſte and unappropriated in 1779, and liable to be 'granted by the commiſſioners, which had been before regularly ſurveyed, 'and that ſurvey before confirmed by the ſame act, unleſs impeached before 'another tribunal? and will not the words, 'to which no other perſon hath

a

" a prior legal claime or title,' include an exemption of the ſurveys to con-
' firmed? i am ſure the interpretation is more natural, more proper, as
' making the act conſiſtent with itſelf, and i believe at leaſt as grammatical
' as the other.'

COMMENTARY.

Though the rules of grammar may not be transgreſſed, by conſtruing the words, 'prior claime,' &c. yet ſuch conſtruction does not conſiſt, &c.] until the inconſiſtency be particularized, one, who doth not yet ſee it, can only ſay, that the words of the ſettlement clauſe (that is the fourth ſection) of the act, underſtood in the proper ſenſe of them, ſeem to breathe no ſentiment, which doth not harmonize with every other ſentence in the law taken together.

The firſt clause eſtabliſhes all ſurveys regularly made, &c.] the firſt ſection of the act declareth all ſurveys of WASTE and UNAPPROPRIATED lands, made, &c. good and valid. this quotation therefore leaves the queſtion, whether the land ſurveyed in this caſe was appropriated by a ſettlement before the ſurvey? undecided, otherwiſe than by a ſimple affirmation, that it eſtabliſhed all ſurveys, without diſtinction, that is, by taking for granted what is denied; a kind of argument which one party in this controverſy uſeth as if it were not a ſophiſm.

Thoſe under orders of council were to be laid before, and decided upon by, the court of appeals;] by the decree, as it is called, of the 2 day of may, 1783, directing the regiſter to iſſue patents upon all ſuch ſurveys AS SHALL BE RETURNED, or by any other words in that act of the court of appeals, doth this ſurvey, or any other ſurvey, appear to have been laid before that court, and, if not laid before them, to have been eſtabliſhed, that is legaly eſtabliſhed?

And with them no other tribunal could intermeddle.] by the ſeventh ſection of the act, people, who had ſettled upon unpatented lands, ſurveyed for companies, except only ſuch lands as, before the ſettlement of the ſame, were notoriouſly reſerved by the companies, for their own uſe, ſhall have their titles confirmed by the members of ſuch companies. this decree of the 2 day of may, 1783, did not decide the queſtion between the ſettlers and companies in ſuch caſes. it could not decide the queſtion in caſes where the ſurveys were returned after the decree, upon which alone it ſeemeth to operate. if then no other tribunal could intermeddle with this matter, the ſettlers muſt loſe their rights, although they were able to prove their ſettlements before the reſervations, yea, although no reſervations had been.

Surveys under entries, or the proclamation, patents were to iſſue on of courſe, unleſs a caveat, &c.] this is certainly correct, but unimportant.

The commiſſioners were to act upon mere ſettlement claimes, not oppoſed by actual ſurveys confirmed before, and between contending claimants upon the waſte lands of the commonwealth, to decide by priority of ſettlement; another branch of duty was aſſigned them, to enquire between contending claimes of ſettlements under the companies, not to judge of the validity of the companies survey, for that was referred to the court of appeals, but to decide who, by priority of settlement, had a right to a grant from the company, on paying the purchase.] inſtead of this farrago of text and gloſs let the unſophiſticated words of the act be ſubſtituted. they are, ' the commiſſioners have power to hear and
' determine titles, clamed in conſideration of ſettlements, to lands, to which
' no perſon hath any other legal title, and the rights of perſons claming
' preemption, as alſo the rights of perſons claming unpatented lands, ſur-
' veyed for companies, and ſettled.'

This being the general arrangement;] what then? let us try whether it will ſhew what it was ſtated to ſhew. the argument intended by the arrangement may be exhibited thus: by the eighth ſection of the act, juriſdiction being given to commiſſioners to hear and determine the rights of people claming in virtue of ſettlements; by the ſame ſection, and by ſome other

acts, juriſdiction being given to the general court to hear and determine the rights of people, who had entered caveats againſt emanations of grants upon ſurveys returned; and by the tenth ſection of the act of 1779, juriſdiction being given to the court of appeals to hear and determine clames laid before them for lands upon ſurveys under orders of council, to the diſcuſſion of which clames the attorney general was required to attend, on behalf of the commonwealth; this being the general arrangement of juriſdictions, it ſhews, that, though the rules of grammar may not be tranſgreſſed, by conſtruing the words 'prior clame' in the ſettlement clauſe, not as prior to 1779, but as prior to the ſettlement in queſtion, yet ſuch conſtruction does not conſiſt with the words and ſpirit of the whole law taken together. this perhaps may paſs for demonſtration with thoſe who have ſagacity to diſcern a concatenation of the arrangement with what is ſaid to be ſhewn by it.

Can thoſe lands be ſaid under the ſettlement clauſe to be waſte and unappropriated in 1779?] this is nothing more than a repetition of the principal queſtion, namely, whether the lands in controverſy, by the words of the fourth ſection of the act of 1779, were, notwithſtanding the ſettlement thereon by the plaintiff in 1764, waſte and unappropriated, ſo that the ſurvey thereof for the defendents was good and valid by the firſt ſection of the act?

And liable to be granted by the commiſſioners,] if the plaintiff had, by his ſettlement, acquired a property in the land, as hath been attempted to be proved, he ought not to be deprived of that property, becauſe the commiſſioners had no power to award it to him.

Which had been before regularly ſurveyed,] if the land was appropriated by the ſettlement, the poſterior ſurvey of it was not a legal ſurvey, ſo far as it included the ſettled land.

And that ſurvey before confirmed by the ſame act, unleſs impeached, &c.] a ſurvey, if it were not of waſte and unappropriated lands, was not before confirmed by the ſame act.

And will not the words 'to which no other perſon hath a prior legal clame or 'title' include an exemption of the ſurveys ſo confirmed?] this is the fourth petitio principii occurring in leſs than twice four lines, to which the anſwer is, the words recited do not include an exemption of ſurveys, if the lands ſurveyed were not waſte and unappropriated, becauſe thoſe ſurveys were not confirmed by the act.

I am ſure the interpretation is more natural, more proper, &c.] the interpretation here meant is that, by which a ſurvey of lands is good and valid, although the land had been ſettled before the ſurvey, and the other interpretation is that, by which ſuch a ſurvey is not good and valid. confidence cannot determine which interpretation is more natural, more proper, more conſiſtent with the act, and more conſiſtent with the principles of juſtice. however as much confidence is on the ſide of the latter interpretation as is on the ſide of the former.

BETWEEN

ISAAC WILLIAMS and Joſeph Tomlinſon, *plaintiffs*,

AND

JOHN JEREMIAH JACOB and Mary his Wife, and David Jones, *defendents*.

THE plaintiffs, in right of ſettlement, clamed the land in controverſy, lying in the county Ohio.

They ſtated in their bill that they had located on this land a military warrant. no proof of the warrant and entry with the ſurveyor for the purpoſe of locating it appeareth; but the grants to them, herein after mentioned, are proof of this warrant, or of ſome other legal warrant, becauſe, otherwiſe, thoſe grants could not regularly have iſſued.

David

David Rogers, in 1775, located a military warrant partly on the lands claimed by the plaintiffs, and at that time in their poſſeſſion, and partly on land then claimed by the defendent David Jones, in right of ſettlement, or in character of agent for the indiana company, and procured a ſurvey of them, with other lands adjacent, the ſum of all which quantities was 1193 acres, to be made and certified by the proper officer.

The plaintiffs exhibited their claimes before the ſpecial court of commiſſioners, conſtituted by ſtatute of may ſeſſion, 1779, who, on the 19 day of february following, affirmed the right of the plaintiff Joſeph Tomlinſon; but do not appear to have given ſentence on the clame of the other plaintiff. they poſtponed it, at their firſt meeting, as he ſuggeſted, becauſe the defendent Mary, who clamed the land in controverſy by deviſe in the teſtament of David Rogers then dead, did not attend, and they declined any further conſideration of it, at a ſubſequent meeting, becauſe they thought the matter transferred to another tribunal by the caveat after mentioned. but theſe procedings before the court of commiſſioners ſeem unimportant, unleſs it be to ſhew that the plaintiffs perſiſted in endeavouring to aſſert the rights which they clamed.

The plaintiff Joſeph Tomlinſon, however is ſuppoſed to have believed his right ſecured by the adjudication in affirmance of it by the court of commiſſioners; for he did not unite with the other plaintiff in a caveat which he entered againſt emanation of a grant upon the ſurvey made for David Rogers.

The plaintiff Iſaac Williams ſtated, that counſil was retained and inſtructed to proſecute the caveat; but that ſubpoenas, which were ſent by the counſil, for ſummoning witneſſes to ſupport objections againſt the grant, not having come to him in due time, which is ſuppoſed to have happened from the diſtance between Ohio, the place of his reſidence, and Richmond, where the counſil reſided, the caveat was diſmiſſed.

After diſmiſſion of the caveat, a grant to the deſendents John Jeremiah Jacob and Mary his wife of the land ſurveyed for David Rogers, dated the firſt day of april, 1784, paſſed the ſeal.

The plaintiffs obtained grants alſo of the lands which they clamed, but the operation of thoſe grants, as conveyances of legal titles, the dates of them being, one in 1785, and two others in 1787, was hindered by the anterior grant to John Jeremiah Jacob and Mary his wife.

To remove this impediment to the benefit of their grants the plaintiffs filed their bill in the high court of chancery, praying that thoſe deſendents might be decreed to convey to the plaintiffs ſo much as they clamed of the lands granted to the repreſentatives of David Rogers.

The defendents John Jeremiah Jacob and Mary his wife, by their anſwer, inſiſting that David Rogers had the right, by ſettlement, prior to the ſettlements, in virtue of which the plaintiffs clamed, ſaid they had ſold their right to David Jones, and required that he ſhould be cited to defend it.

Before this anſwer, to which oath was made in november, 1789, was filed, David Jones was no party to the ſuit, and, for ſome time, inſtead of claming any title derived from the repreſentatives of David Rogers, had confederated with the plaintiffs in oppoſition to that title, which was adverſe to his own right by ſettlement, or derived from the indiana company, ſtated before. but his purchaſe of that title ſince from the other deſendents did neither vitiate his preſent right, becauſe he was not bound, by any general praecept of juſtice, or by a particular compact, to admit the plaintiffs to participation of the benefits of the purchaſe, nor render his title to the litigated lands better than the title of thoſe from whom he purchaſed, becauſe he had notice of the clames which the plaintiffs at that time were endeavouring to aſſert, and never had abandoned.

The plaintiffs appriſed of the purchaſe by David Jones, finding that thereby, from a ſyntagoniſt with them, he was become the only party againſt whom

whom they muſt finaly have redreſs, and whoſe change of ſides, they ſeem improperly to have thought a perfidious tergiverſation, filed a bill againſt him. if he were a *lite pendente* purchaſer, this bill was unneceſſary, becauſe, without being made a party, he would have been made ſubject to a decree againſt the other defendents.

Great part of the anſwer to this bill by the defendent David Jones is the hiſtory of his procedings in the character of agent for the indiana company, which is unimportant; for he did not ſtate that he derived his title from the company, nor explane what their title was. in the remaining part of the anſwer he chiefly relied upon the priority of ſettlement by men from whom David Rogers clamed.

By the examinations of witneſſes which, although taken before David Jones was made a defendent, might regularly be read againſt him, if he were, as he is preſumed *(a)* to have been, a *lite pendante* purchaſer, the priority of ſettlement by men, whoſe titles the plaintiffs have, appeared to the court of equity, at the hearing in may, 1792, to be proven.

If that fact had not been proven, and if the evidence of priority had ſeemed otherwiſe equilibrious, which was thought to be more than the defendents could plauſibly allege, the court allowed actual poſſeſſion of the plaintiffs, at the time of location by David Rogers of his warrant, to preponderate, and preſumed, in conformity with the maxim *in aequali jure potior eſt conditio poſſidentis*, the right by ſettlement to be in the plaintiffs.

Upon this proof or preſumption; whether the owner of a military warrant could lawfully locate the warrant upon land in poſſeſſion of another who had ſettled upon it before the year 1779, and deprive him thereof? was the queſtion, which the H. C. C. determined on the ſide of the ſettler, for reaſons ſtated in the caſe between Maze and Hamiltons, decreeing accordingly.

The court of appeals, in november, 1793, reverſed the decree, *(b)* firſt, becauſe the examinations of witneſſes, on behalf of the plaintiffs, to prove the priority of their ſettlements, ought not to have been read againſt the defendent David Jones, who was not a party at the time the examinations were taken; and, ſecondly, that court were of opinion unanimouſly, that a ſettlement gave no right to lands, in law or equity, before the act of 1779, and was then to operate upon mere waſte land, not to defeat any clame of a citizen to lands under ſurveys eſtabliſhed by that act.

REMARKS.

I. Upon the rejection of the examinations.

1. The court of appeals, in delivering their opinion, ſtated that the plaintiffs replied to the anſwer of the defendents John Jeremiah Jacob and Mary his wife, took out commiſſions, and examined the witneſſes on notice to Jacob and wife; inſinuating, that after that anſwer, diſcloſing the purchaſe by Jones, the witneſſes were examined. but the tranſcript, then before that court, ſhews the witneſſes, to prove the priority of ſettlement on behalf of the plaintiffs, to have been examined before thoſe defendents had ſworn to their anſwer, and before David Jones was formaly made a party.

2. When no exception to reading examinations appeareth to have been taken, at the hearing, before the inferior court, the ſuperior court, upon an appeal, may properly, as is conceived, preſume the reading of the examinations to have been unexceptionable.

3. Perhaps

(a) Presumed because, 1, he doth not ſhew when he became a purchaſer, nor even allege the purchaſe to have been prior to the inſtitution of the plaintiffs demand by filing their original bill, and, 2, he was confeſſedly for ſome time a confederate with them in oppoſing the title of David Rogers.

(b) The decree of reverſal doth not explane the reaſons of it; but that they are here truly ſtated unqueſtionable authority can be produced to ſhew.

3. Perhaps the examinations ought not to have been rejected, if the exception had been taken before the inferior court: for if the defendent David Jones were a *lite pendente* purchaſer, the examinations, unqueſtionably, might be regularly read againſt him.

4. If he do not appear to have been a *lite pendente* purchaſer, there being good reaſon to preſume him to have been ſuch a purchaſer in this caſe, ought the decree, on the ground of examinations having been improperly read againſt the defendent David Jones, to have been reverſed againſt the defendents John Jeremiah Jacob and Mary his wife? and ought the reverſal and diſmiſſion of the bill, upon the ſame ground, to have been abſolute, as to the defendent David Jones? ought not the diſmiſſion to have been without prejudice? in which caſe the plaintiffs might have carried their decree againſt Jacob and his wife into execution, even againſt the defendent David Jones, unleſs he ſhewed himſelf not to have been a *lite pendente* purchaſer.

5. The poſſeſſion of the plaintiffs, at the time of the ſurvey by David Rogers, a fact admitted, is ſufficient preſumptive proof, as hath been obſerved, of a prior ſettlement by them, until the contrary be proved by the other party, which is not pretended to have been done.

But if proofs of prior ſettlements by the plaintiffs were inconteſtable, they would not avale: for

II. That court have reſolved, that a ſettlement gave no right in law or equity before 1779. upon which to the remarks made in the caſe between Maze and Hamiltons ſhall be here added only, that the right by ſettlement, which the general aſſembly ſolemnly adopted, dignifying it with the emphatical appellation of property, now appeareth to have been a property, from which any man, with a military warrant, might extrude the proprietor; and that the military man, with his warrant, was a more terrific invader than a company, with their order of council; for the latter were obliged to let the ſettler keep the land upon payment of a certain price; but the military man plundered, without permitting the ſettler to ranſome; who, in the anguiſh of ſoul, felt by one forced to yield up that, which toil expenſe and danger in the acquirement amelioration and preſervation had endeared to him, could only bewail his misfortune in ſome ſuch terms perhaps as—*dilecta linquimus arva*, and mutter to himſelf

Impius haec tam culta novalia miles habebit?

BETWEEN
JAMES BURNSIDES, *plaintiff*,
AND
ANDREW REID, Samuel Culbertſon, Thomas Walker, *defendents*, and
BETWEEN
ANDREW REID, attorney in fact and aſſignee of Samuel Culbertſon, *plaintiff*,
AND
JAMES BURNSIDES, *defendent*.

THE ſubject of controverſy in theſe cauſes, between James Burnſides, and Andrew Reid, on behalf of Samuel Culbertſon, was four hundred acres of land, called Culbertſons bottom, clamed in right of ſettlement, with ſix hundred acres of the land adjacent, clamed in right of preemption.

Andrew Culbertſon had made a ſettlement on the land called his bottom, in 1753; left it through fear of the indians; and afterwards ſold it to Samuel Culbertſon.

During ſeveral years afterwards, that part of the country was infeſted by the enemy, ſo that the place appeared to be deſerted by the Culbertſons, although they ſeem to have done every thing, which they could do ſafely, to prevent the belief of an intended dereliction.

Their removal however having been to a great diſtance, before Samuel Culbertſon could aſſert his title conveniently, other men clamed the land which had been ſettled, all whoſe pretenſions at length concentered in Thomas Farley or Farlow, who paid for it the purchaſe money demanded by ſome men, called the loyal company, to whom the governor in council had granted leave to appropriate an enormous territory, including within its limits, if it can be ſaid to have limits, this parcel.

In march, 1775, Thomas Farley procured the land, which he had thus bought, being 355 acres, to be ſurveyed, and took a certificate thereof, in order to obtain a grant ſo ſoon as the land office, then occluded, ſhould be opened; and aſſigned his right to James Burnſides.

In may, 1779, Samuel Culbertſon, by letter of attorney, impowered Andrew Reid to demand, and inſtitute proceſs for recovering, poſſeſſion of the land.

In 1782, the controverſy was exhibited before the court of commiſſioners, a tribunal, conſtituted by ſtatute in 1779, for deciding caſes between litigant ſettlers. by their ſentence the right of James Burnſides to four hundred acres of land, including the three hundred and fifty five, which had been ſurveyed for Thomas Farley, in right of ſettlement, and to ſix hundred acres adjacent, in right of preemption, was ſuſtained.

Andrew Reid, having entered a caveat againſt emanation of a grant to James Burnſides, which otherwiſe would have paſſed the ſeal, upon a certificate of the adjudication by the commiſſioners, preſented a petition to the general court, ſtating that unavoidable accidents had diſabled him to produce before the commiſſioners, at the time of their ſeſſion, teſtimony, which otherwiſe he could have produced, ſufficient to ſupport his clame, and praying the ſame to be conſidered. the general court allowed a hearing, and thereupon, the 12 day of october, 1784, reverſed the adjudication of the commiſſioners, and awarded that a grant ſhould iſſue to Samuel Culbertſon for the lands clamed both by ſettlement and preemption.

To obtain an injunction for ſtaying execution of this judgement of the general court, on certain grounds ſtated in the bill, and to compel the defendent Thomas Walker, an agent for the loyal company, to yield his conſent to a grant to James Burnſides of the land clamed by him, were the objects of the ſuit, in which he was plaintiff an injunction, until further order, was granted, in may, 1785. the grounds ſtated in the bill were, 1, that the right of Culbertſon, which originated in a ſettlement, a ſpecies of right never adopted for legitime before 1779, was, by the ſtatute of that year, poſtponed to every other right therein recognized; ſo that the right of Thomas Farley now derived to James Burnſides, which was by ſurvey, and eſtabliſhed by that act, although the ſurvey were poſterior to the ſettlement, muſt be ſuperior to the right by ſettlement, and therefore ought to prevale againſt it. *(a)* 2, that the decree, as it is called, of the court of appeals, the 2 day of may, 1783, on the clames of Thomas Walker and Thomas Nelſon, ſome way or other, determined the queſtion in this caſe in favour of James Burnſides. *(b)* 3, that James Burnſides had the right even of Andrew Culbertſon by purchaſe from one to whom it had been transfered, before the pretended ſale to Samuel Culbertſon. *(c)*

Before the defendents in that ſuit had anſwered the bill, James Burnſides, having, in january, 1786, procured to be made a ſurvey of 1200 acres of land

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(a) The climax of rights, here attributed to the ſtatute, ſeems to have been fabricated by the companies of land mongers, who, not content with the extravagant licenſe granted to them by orders of council, perhaps as beneficial as if they had been boundleſs, wiſhed to convert them into monopolies.

(b) See the caſe between Maze and Hamiltons, ante 36.

(c) The teſtimony in proof of this purchaſe is incredible.

land, including the lands in controverſy, and a certificate thereof, ſurreptitiouſly obtained a grant to himſelf of the ſaid lands, of which grant a repeal is the object of the other ſuit, commenced againſt him by Andrew Reid.

On hearing theſe cauſes together the 15 day of may, 1792, the opinion and decree of the high court of chancery were pronounced in theſe terms:

'The court is of opinion that James Burnſides, after obtaining an injunction to ſtay execution of a judgement by the general court againſt him, having procured a ſurvey to be made, and a grant to himſelf to paſs the ſeal, of land, to which land the title of Samuel Culbertſon was aſſerted by that judgement, and which according to the judgement would have been ſecured to him by a grant, if James Burnſides had not prevented it, was guilty of a fraud, becauſe the regiſter of the land office, if he had known ſuch a judgement to have been rendered, by which he was ordered to iſſue a grant of that land to the ſaid Samuel Culbertſon, ought not to have iſſued, and therefore probably would not have iſſued, the grant to Burnſides. and the court is alſo of opinion that Andrew Reid, on whom the right of Samuel Culbertſon hath devolved, is not barred of relief againſt James Burnſides, by the decree and order of the court of appeals, on hearing the clames of Thomas Walker and Thomas Nelſon, not only becauſe a clame under the ſurvey for Thomas Farlow, which James Burnſides in his bill ſuggeſts to be the foundation of his title, doth not appear to have been eſtabliſhed by the decree and order of the court of appeals, and could not be legaly eſtabliſhed, ſo as to bind the right of any who were not parties in that proceeding, but, becauſe the grant to James Burnſides was founded, not on that ſurvey but, on a ſurvey certified to have been made for himſelf, in januarv, 1786, by virtue partly of an entry, on a certificate from the commiſſioners for the diſtrict of Waſhington and Montgomery counties, for 400 acres, dated the 10 of ſeptember, 1782, which certificate of the commiſſioners. with their adjudication affirming the right of James Burnſides, was annuled by the general courts judgement aforementioned. and now the court would have pronounced ſuch a decree as in its opinion, if what followeth had not happend, ought to be made—a decree nearly like that which was pronounced in the caſe between James Maze, plaintiff, and Andrew Hamilton and William Hamilton, defendents; but that decree hath been reverſed by the court of appeals; and this court, from that reverſal, ſuppoſeth, perhaps erroneouſly, the opinion of that honorable court to have been, that, by the order of council, granting leave to the greenbrier company to take up 100000 acres of land, lying on Greenbrier river, northweſt and weſt of the Cowpaſture and Newfoundland, all lands within thoſe limits, if they muſt be called limits, were appropriated, ſo that the company or their agent had power to ſurvey and ſell any parcel, which they ſhould chuſe, of ſuch land, although another man had ſettled on the parcel before the ſurveying and ſelling, and although the act of general aſſembly, paſſed in the year 1779, had declared to be juſt, that thoſe who had ſettled on the weſtern waters, upon waſte and unappropriated lands, for which they had by ſeveral cauſes been prevented from ſuing out grants, under ſuch circumſtances, ſhould have ſome reaſonable allowance for the charge and riſque they had incurred, and that the property ſo acquired ſhould be ſecured to them; the honorable court ſeeming to have underſtood that, by the terms *waſte and unappropriated lands, to which no other perſon hath any legal right or clame*, the act intended lands which the company had not choſen to ſurvey, after, as well as before, they had been ſettled; whereas ſome, who have obſerved that the ſurveys made by orders of council and confirmed by the act are ſurveys of waſte and unappropriated lands likewiſe, think the application of the term, *unappropriated*, in the caſe of lands ſurveyed by orders of council, to lands not ſettled before the ſurveys, would be found criticiſm; eſpecialy the act having dignified the ſettlement with the emphatical

tical appellation of property, property acquired, and acquired at charge and riſque, means of acquirement generaly eſteemed meritorious; and think the words *lands, to which no other perſon hath any legal right or clame,* more reſtrictive than the words *lands unappropriated,* which comprehend lands to which no other perſon hath any right or clame, whether legal or equitable; and the honorable court ſeeming to have underſtood that the act, by the terms *upon lands ſurveyed for ſundry companies, &c. people have ſettled, &c.* in the ſeventh ſection, deſigned to include lands ſurveyed as well after, as before, the ſettlements; whereas ſome commentators conceive that the interpretation, which confineth the words to ſurveys prior to the ſettlement, is not inconſiſtent with the rules of grammar, with the intention of the legiſlature, or with the principles of natural juſtice. and this court ſuppoſeth the opinion of the honorable court to have been, that where a ſettler of land, ſurveyed after his ſettlement by virtue of the companys order of council, had obtained a grant of the land, including an additional quantity in right of preemption, one, who was a prior ſettler, recovering the ſettlement from the grantee on that principle, ſhall not recover with it the preemption land; whereas others think that he, who recovereth in right of priority, ought to be in the condition in which he would have been, and conſequently ought to have the preemption, to which he would have been intitled, if the poſterior ſettler had not obtained the grant. and this court alſo ſuppoſeth the rights of the loyal company, under whom James Burnſides in the principal caſe clameth, and the territorial limits of whoſe order of council are not more definite than thoſe of the other company, to be no leſs extenſive, and not leſs to be prefered to the rights of ſettlers, than the rights of that other company; on theſe ſuppoſitions, this court, in order to ſuch a final decree as at this time is believed to be congruous with the ſentiments of the court of appeals, doth direct *(d)* that a ſurvey be made of the 400 acres of land, for the ſettlement by Andrew Culbertſon, which may be laid down as either party ſhall deſire, to enable the court to decide between them on the propriety or reaſonableneſs of the location; that the patent of James Burnſides be alſo ſurveyed and laid down, to ſhew how much it includeth of the 400 acres; and when this ſhall be adjuſted, the court doth adjudge order and decree that James Burnſides do convey to Andrew Reid the inheritance of ſo much of the 400 acres as ſhall be found to lie within the bounds of the ſaid patent, with warranty againſt himſelf, and all claming under him, and deliver poſſeſſion thereof, upon Andrew Reids paying to him, at the rate of three pounds per hundred acres, for the quantity ſo to be conveyed, that as to thoſe 400 acres the bill of James Burnſides be diſmiſſed; and, as to the reſidue of the land contained in the patent, that the bill of Andrew Reid be diſmiſſed; but Andrew Reid is nevertheleſs to be at liberty to procede to ſurvey the 600 acres of land for his preemption, if he can find land to ſatisfy the ſame, without interfering with the ſaid patent, or any other prior clame.'

From this decree both parties appealed, each from ſo much of it as partialy diſmiſſed his bill.

On the 19 day of november, 1794, the court of appeals pronounced their opinion and decree in theſe terms:

'The court, having maturely conſidered the tranſcript of the record and the arguments of the counſil, is of opinion, that the ſaid decree is erroneous in this, that, after ſetting aſide Burnſides patent, for fraud, ſo far as it comprehended the lands adjudged by the general court, in 1784, to Samuel Culbertſon for his ſettlement right, it makes the preemption clame of the ſaid Culbertſon, founded on the ſaid judgement, yield to the patent of the ſaid

(d) Conformably with the decree entered by order of the court of appeals in the caſe between Maze and Hamiltons.

ſaid Burnſides, which was not obtained till 1786; which patent appears to have been obtained upon a ſurvey made in 1786; and herein this caſe differs from the caſe of Maze againſt Hamilton, becauſe that ſurvey was made under the greenbrier company in 1775: therefore it is decreed and ordered, that the ſaid decree be reverſed *(e)* and annulled, and that the ſaid James pay to the appellees, in the firſt ſuit, and to the appellant, in the ſecond, their coſts by them in this behalf expended. and this court, proceding to make ſuch decree as the ſaid high court of chancery ſhould have pronounced, it is further decreed and ordered that a ſurvey be made of 400 acres of land, for Culbertſons ſettlement, and 600 acres adjoining, which may be laid down as either party may require, to enable the court of chancery to determine as to the reaſonableneſs of the location; that the patent to James Burnſides be alſo ſurveyed and laid down, to ſhew how much it includeth of the 1000 acres, and, when this ſhall be adjuſted, that the ſaid James Burnſides be decreed to convey to the ſaid Andrew Reid the inheritance of ſo much of the 1000 acres as ſhall be found to lie within the bounds of the ſaid patent, with warranty againſt himſelf and all claming under him, and deliver poſſeſſion, upon his paying to the ſaid Burnſides, at the rate of three pounds per hundred acres, for the quantity ſo to be conveyed; that as to thoſe thouſand acres the bill of the ſaid Burnſides be diſmiſſed; and, as to the reſidue of the lands contained within his patent, that the bill of the ſaid Reid be diſmiſſed, and that the ſaid Burnſides pay to the other parties their coſts in each ſuit in the high court of chancery.'

REMARKS.

The decree is admitted to be erroneous, by him who delivered it, and who declared, at the time, that it did not accord with his own opinion, but that it was congruous, as he believed, with the ſentiments of the court of appeals. he was miſtaken. but, perhaps, to avoid ſuch a miſtake will not ſeem eaſy to one who peruſeth the reverſing decree, and endeavoureth to connect the concluſion, begining at the word, *thereſore*, with the premiſſes. *(f)*

The reverſed decree is ſaid to make the preemption clame of Culbertſon yield to the patent of Burnſides, obtained not before 1786; but that decree is denied to contain ſuch terms, or terms of ſuch meaning.

This caſe is ſaid to differ from the caſe of Maze and Hamiltons, becauſe that ſurvey was made under the greenbrier company in 1775.

Let us inquire whether this difference exiſts.

In 1775, Samuel Lewis, an agent of the greenbrier company, ſurveyed 1100 acres of land, including a place on which James Maze had ſettled more than ten years before; whence the place derived the appellation Mazes cabbin.

In the certificate of ſurvey a blank was left for the name of him who ſhould purchaſe from that company. both Hamilton and Maze had treated with the agent for a purchaſe. but, before any bargain with either, both of them exhibited their clames before the court of commiſſioners, who ſuſtained that of Hamilton this judgement, upon a caveat and petition by Maze,

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(e) This naughty decree, as to the 400 acres of land, is repeated almoſt literaly, altho it is ſaid to be reverſed intirely, by the correcting decree. another example of a decree ſaid to be reverſed, that is, intirely reversed, and yet agreeing in moſt parts of it with its corrector, occurreth in the caſe between Roſs, plaintiff, and Pleaſants and others, defendents.

(f) An example of this kind of argumentation may be ſeen in the caſes between Hill and Braxton, plaintiffs, and Gregory, defendent, ante 13.

Maze, was reviewed and reverſed by the general court, who awarded to him the ſettlement and preemption.

Hamilton, thus defeated, and being denied by the general court an appeal from their ſentence, and being alſo denied a writ of error, for which he applied to the court of appeals, renewing the treaty with the agent, concludes a bargain, procures his name to be inſerted in the blank left for it in the certificate of ſurvey, and, bringing that certificate to the land office, obtains a grant; the regiſter not knowing the land, to which Mazes title had been aſſerted by the general court, to be included in the grant.

Maze brought a bill in equity to be relieved againſt the grant; and, by the decree of this court, was reinſtated in the condition in which he would have been, if Hamilton had not practiſed the fraud, for which decree the reaſons were ſtated at large. it was reverſed by the court of appeals, declaring it in general terms to be erroneous, and directing another decree to be entered, whereby Maze was allowed to retain ſo much of the ſettlement as lieth on one ſide of a line, *(g)* ſaid to have been made by agreement between Maze and one Tacket, to run from Wachubs ſpring; and Hamilton was allowed to retain all the reſt of the land, and conſequently the preemption.

Whatever principles may have governed the court of appeals, in the formation of their decree, in the caſe between Maze and Hamiltons, this appeareth certain, namely, that, according to their opinion, the preemption was attached to the right by ſurvey, and not to the right by ſettlement: and, if ſo, the caſe of Reid and Burnſides, differs not, as is conceived, from the caſe of Maze and Hamilton, as the court of appeals ſay it doth in that particular.

For although the grant to James Burnſides was obtained upon the certificate of a ſurvey performed in 1786, yet the identical plot of ground in controverſy, Culbertſons bottom, included in that ſurvey and grant, had been ſurveyed in march, 1775, for Thomas Farley, who had purchaſed from the loyal company, and tranſfered his right to James Burnſides.

If then to the right by ſurvey, in 1775, was attached the preemption, in the caſe between Maze and Hamiltons, to the right by ſurvey, in 1775, was attached the preemption, in this caſe; *herein* therefore *the caſes do not differ.*

But from a real difference between the caſes, he, who knew the grounds of deciſion in one of them, perhaps might have expected a deciſion in favour of James Burnſides in the other. The difference is this: the Hamiltons had not the greenbrier companys right to the ſurvey, which included Mazes cabbin, until after his right to it had been aſſerted by the ſentence of the general court. But Thomas Farley, from whom James Burnſides derives his clame, had the loyal companys right to the ſurvey itſelf of Culbertons bottom, long before the right of Culbertſon, repreſented by Reid, was aſſerted by the ſentence of the general court.

Now the court of appeals, when they decided the caſe between Maze and Hamiltons, declared their opinion unanimouſly to be, *that ſettlement gave no right to lands, in law or equity, before the act of* 1779, *and was then to operate upon mere waſte land, not to defeat any clame of a citizen to lands under ſurveys by order of council, although the ſettlements were before the ſurveys*—and when they decided the caſe between Williams and Tomlinſon, plaintiffs, and Jones, defendent, declared their opinion, without diſſention, to be, and accordingly

(g) From reports of the ſurveyor, directed to perform the decree of the court of chancery entered in obedience to the decree of the court of appeals, whether this line will ever be found ſeems doubtfull; and the reſearches for diſcovering the ſpring, either perennial or temporary, ſeem to have been hitherto not more ſucceſsfull.

accordingly reſolved, that a ſurvey, by authority of even a military warrant located upon land, then in actual poſſeſſion of ſettlers, ſhould prevale over their right, and ſanctify their expulſion.

Why then was the right of James Burnſides under a ſurvey, which the loyal companys order of council authorized, defeated by Culbertſons ſettlement right? for that Culbertſon derived any right from that company, by purchaſe or agreement, is not proved or even ſuggeſted.

That the decree now directed is the decree which, one part of it excepted, the high court of chancery ought to have pronounced, is admitted, for reaſons ſtated in the decree of that court in the caſe between Maze and Hamiltons, and herein after mentioned the exceptionable part is that whereby the three pounds per hundred acres, which was the money demanded by the loyal company illegaly, as is believed, from prior ſettlers were decreed to be paid.

The high court of chancery would have pronounced the decree here approved, becauſe the judgement of the general court, in ſuch a caſe as this, was, by ſtatute, declared to be definitive; ſo that no appeal from it ſhould be allowed. if nevertheleſs the court of appeals felt themſelves at liberty to examine the merits of ſuch a caſe, and to alter the judgement in it, as they certainly did in the caſe between Maze and Hamiltons, this queſtion might have occured which, perhaps, deſerved attention, whether a judgement or decree againſt James Burnſides, who confeſſedly was a purchaſer for valuable conſideration, and who neither knew, nor is ſuggeſted to have known, any thing of Culbertſons title, unleſs he be preſumed to have known it, becauſe the place was called by that name, be conſiſtent with precedents which can be FURNISHED in the court of appeals?

BETWEEN
JOSEPH WOODSON, *plaintiff*,
AND
JOHN WOODSON, *defendent*.

BY writing, which the parties ſigned, the 17th day of april 1782, the plaintiff agreed to let the defendent have a negro man ſlave named Jacob, for the conſideration of 13000 pounds of nett tobacco, to continue in the ſervice of the defendent, as his own, until that quantityof tobacco ſhould be paid; and the plaintiff alſo agreed, if Jacob ſhould die, or by any other accident be rendered unfit for ſervice, to ſuſtain the loſs, and either put a negro of like value in his ſtead, or pay the 13000 pounds of tobacco, when demanded, and not to force the defendent, in the begining or middle of his crop, to receive the tobacco, ſo as that the plaintiff might recover his negro again.

The negro, admitted to be a valuable labourer, was put into the poſſeſſion of the defendent.

Early in the year 1786, Richard James contracted with the plaintiff to purchaſe the negro Jacob for 15000 pounds of tobacco, and to pay 13000 thereof to the defendent in march, when the negro ſhould be delivered to the purchaſer, and the reſidue to the plaintiff at a future day.

About a fortnight before the time appointed for the firſt payment, James communicated the contract to the defendent, acquainting him, tha the tobacco would be ready accordingly, but was informed by him, that he would not deliver the negro, before the then preſent crop ſhould be finiſhed, ſhewing the written agreement to juſtify the detention till that time.

The 20th day of january, 1787, the parties ſubmitted the controverſy between them, without explaning, in the ſubmiſſion, what was the controverſy, to the arbitrament of three men, who ſigned a writing, which they named

named an award, and which is in theſe words: *we, being choſen by John Woodſon and Joſeph Woodſon, to arbitrate and determine a matter in diſpute between them, relative to the loan of a quantity of tobacco by John to Joſeph, do make our award and determination, as follows: that is to ſay, that John ſhall have peaceable poſſeſſion of Jacob, until Joſeph ſhall redeem him by payment of* 13000 *pounds of tobacco; and when Joſeph ſhall pay or tender to John that quantity of tobacco, then John ſhall deliver to Joſeph the negro Jacob if living, or, if not, then Joſeph ſhall put in Johns poſſeſſion another negro, of equal value, until the above quantity of tobacco ſhall be paid to John, agreeable to contract, conſidered by us, in the arbitration.*

In january, 1788, the plaintiff brought a bill in equity againſt the defendent before the county court of Goochland, complaining, that the defendent, by not conſenting to ſurrender Jacob to the man who would have purchaſed him of the plaintiff, and paid the tobacco due to the defendent, in march, had broken the agreement; requiring an account of the profits of Jacob; and praying, that the ſurplus of thoſe profits, after diſcharging the annual intereſt of the 13000 pounds of tobacco, to ſecure which the ſlave was pledged, might be applied towards diminiſhing the principal debt; or that the plaintiff might be otherwiſe relieved.

The defendent, by his anſwer, inſiſted, he was not accountable for the profits of Jacob, by the terms of the agreement; denied, that he had any tobacco offered him, when Richard James applied for the delivery of Jacob, declaring, that *he never thought himſelf ſecure to deliver him, without firſt receiving the tobacco, not being bound by the contract to do ſo*; and clamed the benefit of the award.

The county court diſmiſſed the bill, awarding coſts, againſt the plaintiff; from which diſmiſſion he appealed.

By the court, the 31 day of october, 1791:

The award ought not to obſtruct the plaintiff in his application for any redreſs, to which, if no award had been made, he might have been intitled; becauſe the terms of the award are indeciſive, obliging the parties to perform nothing more than what the agreement obliged them to perform; and it ought not, even for preventing its perdition, to be extended, by implication, ſo as to determine, that, by the agreement, the defendent ſhould retain all the profits of Jacob, in ſatisfaction for the intereſt of the tobacco due to him; for ſuch determination, if what followeth be right, would have been unjuſt, inſomuch, *ut magis pereat quam valeat*: and the award, ſo expounded, would approve the defendents interpretation of the agreement, an agreement, which, if that be the true interpretation, pourtrays uſurious oppreſſion.

The award then being neglected, the queſtion is, whether a creditor, with whom a pawn, yielding profit, is depoſited, ought to account, not having undertaken by ſpecial pact to account, for ſuch profit? reaſon ſeems to dictate, and the precedents recollected, ſo far as they are applicable to the queſtion, ſeem to affirm, that the creditor is accountable. a creditor, taking poſſeſſion of land mortgaged to him for payment of his debt, is accountable, altho he do not, by covenant in the mortgage, or by other contract written or verbal, oblige himſelf to account, for the profits of the land. in the eye of reaſon and equity the debtors ownerſhip of the land continues, until his right to redeem is ſuperannuated. the ſecurity of a debt, not the ſale of land, is in contemplation of the parties; the value of the land is not compared with the debt, for the purpoſe of immediately paying the one by transferring the other, although the creditor will, at all times when he can, take a mortgage of what is ſufficient, that he may be ſafe, if he ſhould be compelled, finaly, to reſort to it; the debt is not diſcharged, but, on the contrary, the mortgage uſualy contains a covenant for payment of it, and ſometimes a ſeparate obligation for the payment is granted; and that one

ſhould

ſhould be intitled to his debt, and own the land, and the other be chargeable with the debt, and deprived of the land, at the ſame time, is inconſiſtent. the creditor then, entering into the land mortgaged, poſſeſſeth the property of the debtor, and, taking the profits, likewiſe receiveth his property: for the owner of the land is owner of the profits, which it produceth, alſo. now, when one by right poſſeſſeth a thing which is the property of another, the poſſeſſion is ficuciary—is for the benefit of the owner. hence a creditor, in poſſeſſion of the land mortgaged, to which he hath a legal title, is called a truſtee for the debtor, who hath an equitable title. from the nature of his function therefore, without any pact, reſults the creditors obligation to account for the profits of the land, no leſs than to reſtore the land, which produced the profits.

If this doctrine be ſound, in the caſe of land mortgaged, a creditor ſeems charged with a ſimilar obligation to account for the profits of a ſlave, pledged for payment of a debt.

No engliſh adjudication, in any caſe, except that of land, reſembling the principal caſe, is recollected.

By the roman civil law, to which recurrence is frequent in queſtions ariſing on pigneratitious contracts, the creditor was accountable for the profits of a pledge, without any diſtinction between land and other things.

Cod. lib. 4. tit 24. § 1. *Ex pignore percepti fructus imputantur in debitum; qui, ſi ſufficiunt ad totum debitum, ſolvitur actio, et redditur pignus; ſi debitum excedunt, qui ſuperſunt, reddantur; videlicet, nata actione pigneratitia.*

Ibid. § 2. *Quod ex operis ancillae, vel ex penſionibus domus, quam pignori detineri dicis, perceptum eſt, debiti quantitatem relevabit.*

Ibid. § 3. *Creditor, qui praedium pignori nexum detinuit, fructus, quos percepit, vel percipere debuit, in rationem exonerandi debiti computare, neceſſe habet: et ſi agrum deteriorem conſtituit, eo quoque nomine pigneratitia actione obligatur.*

This differs not from the deciſions of the engliſh courts of equity, in caſes of land mortgaged, unleſs it be that, by the former the creditor is accountable, not only for profits *quos percepit*, but for profits *quos percipere debuit*, whereas, by the latter, he is not accountable for profits which he might have made.

Indeed the defendent muſt admit himſelf to be accountable for ſomething, notwithſtanding he inſiſts by his anſwer, that he was not: for he hath not inſerted in the agreement an article for payment of intereſt, and being bound to reſtore the pledge, on receiving the principal debt, hath no ſatisfaction for it, otherwiſe than by the profits. now, if he be accountable for any profits, he ought to be accountable for the whole profits.

The decree of the county court, diſmiſſing the plaintiffs bill, is erroneous: reverſe it, and let an account be ſtated of the profits of the ſlave Jacob, to be applied towards diſcharging, firſt, the intereſt of the debt, and then the principal, if there be a ſurplus.

Note. the court did not conſider another queſtion, which ſeemed intended to be propounded by the bill, ariſing thus; by the agreement, the plaintiff was reſtrained from offering to pay the debt, in the begining, or middle of a crop: James would have paid the debt for the plaintiff in march: that month, by the act of 1785, cap. 63. ſect. 43. ſeemed to the plaintiffs counſil to be the time to be accounted the beginning of a crop. now, whether was the defendent bound to receive the tobacco, which, if he had not declared his reſolution not to receive it, would have been offered in march? and by his declaration, that he would not deliver up the negro before the end of the year, preventing the offer, and ſo defeating the contract between the plaintiff and James, ought he to make amends to the plaintiff for loſs occaſioned thereby? the court did not conſider this queſtion, becauſe the decree, as it is, was thought to do compleat juſtice between the parties.

BETWEEN
LAMBERT CADWALLADER and Philemon Dickenſon, executors of John Cadwallader, and Edward Loyd, adminiſtrator of Edward Loyd, with his teſtament annexed, *plaintiffs*,
AND
ELIZABETH MASON, Abraham Barnes Thomſon Maſon, John Thomſon Maſon, and Bailey Waſhington, *defendents*.

UPON the principal queſtion in this cauſe, the court, on the 8 day of march, 1793, delivered the following

OPINION:

That a mortgager, or his deviſee, who will not redeme the eſtate pledged, but retaining the poſſeſſion taketh the profits thereof, after the time limited for performance of the condition, ought to account for ſuch after-taken profits; becauſe, during this period, he is an unrighteous poſſeſſor, neither having the legal title, nor aſſerting his equitable title, probably conſcious that the eſtate is of leſs value than the debt with which it had been incumbered, and yet diminiſhing that value, by witholding the poſſeſſion ſo long as the laws delay preventeth the wreſting it from him, and by enjoying the fruits in the mean time and to this opinion the court adhereth, notwithſtanding the objection, that a mortgager, or his deviſee, doth not appear to have been made ſo accountable in any inſtance, but, on the contrary, demands of ſuch accounts againſt a mortgager have been judicialy rejected, in ſome inſtances: for the inference, againſt the exiſtence of a right, drawn from defect of precedents in affirmance of the right, is not allowed alone to be deciſive, in any caſe; and, oppoſed to the principle before explaned, if that be true and well applied, is affirmed to be not deciſive, in this caſe; and the reaſon aſſigned for the rejection, to which the later part of the objection alludeth, namely, that *the mortgagee ought to take the legal remedies to get into the poſſeſſion*, ſeemeth not pertinent to the queſtion, nor congruous with the praecepts of juſtice: for this court cannot diſcern how, from the mortgagees obligation to reſort to legal remedies for recovering poſſeſſion of land, to which his right is undeniable, is deducible this conſequence, that he muſt be deprived of profits taken before the remedies, dilatory in themſelves, and often made more ſo through induſtrious procraſtination by the other party, are efficatious—profits which the former would have taken, and to which his right would have been the ſame as his right to the land which produced them, if the mortgager had not wrongfully detained the poſſeſſion of this; and to a deciſion, by any court, which reſults not, by fair deduction, from the principles alledged to warrant it, the authority of a precedent, which ought to govern in like caſes, is denied. nor can this court grant that the mortgager, retaining profits, which, on the ſuppoſition that he doth not intend to redeme the eſtate mortgaged, he ought not to have taken, may thus juſtly enrich himſelf out of the mortgagees loſs.

BETWEEN
ALEXANDER LOVE, *plaintiff*,
AND
CARTER BRAXTON and Thomas Ham, *defendents*.

UPON one queſtion in this cauſe, the court, on the 19 day of march, 1792, delivered this

OPINION:

That, if the defendent Thomas Ham had notice of the agreement between

tween the other defendent, Carter Braxton, and the plaintiff, of the 28 day of june, 1783, and the letter of attorney, of the firſt day of july thence next following, given by the former of thoſe parties to the later, before the defendent Thomas Hams purchaſe of the London eſtate, mentioned in thoſe exhibits, from the other defendent was complete, and before payment of the purchaſe money, the plaintiff, who, by decree of any court in this commonwealth, cannot ſubject the eſtate, becauſe it lieth in Great-britain, to his demand, ought to recover ſatisfaction for the damage which he hath ſuſtained, if indeed he hath ſuſtained damage, by that purchaſe; that, by this intromiſſion of the defendent Thomas Ham, if he had ſuch notice, the plaintiff was injured, being hindered from enjoyment of a right, and from exerciſe of a lawful power, derived to him by that agreement and letter of attorney; that, for redreſs of ſuch an injury, he ought not to be compeled to reſort to a court of Great-britain, where, if the opinion that the defendent Thomas Hams intromiſſion was injurious be correct, the remedy is not more proper than here, and where, in one event, which may indeed not have happened in this caſe, but which may happen in a ſimilar caſe, he might be diſappointed of his remedy againſt the land, by a ſale thereof to one who had not notice of the plaintiffs clame; but that for ſuch an injury an action at common law to recover ſatisfaction in damages is maintainable; and that the plaintiff may now procede to obtain that ſatisfaction in this court, where the ſuit originated properly for diſcovering a neceſſary fact which he ſuggeſted his inability to prove: for although the bill was partly for diſcovering that fact by the defendent Thomas Ham, namely, his notice of the agreement before his purchaſe, and although by his anſwer he denied the notice to have been prior to his purchaſe, the bill is ſuppoſed to be ſuſtainable afterwards, in order that the oppoſite party might endeavour to prove the purchaſe to have been ſuch an one as ought not to avale him, who pleaded it.

BETWEEN
The executors of DUNCAN ROSE, *plaintiffs*,
AND
CARTER NICHOLAS, *defendent*.

BY written agreement, the plaintiffs had bound themſelves to convey a parcel of land, when it ſhould be ſurveyed, to the defendent, and he had bound himſelf to give his bonds for payment of the purchaſe money to the ſellers at ſeveral days of payment.

A conveyance of the land, after it had been ſurveyed, was offered by the plaintiffs to be made to the defendent, upon his performing what by the agreement he was bound to perform, which he refuſed.

Whereupon the plaintiffs brought a bill for a ſpecific execution of the agreement, adding the uſual prayer for further relief; and the defendent brought a croſs bill to ſet aſide the agreement.

The defendents bill was diſmiſſed.

And the decree pronounced for the plaintiffs, the 5th day of may, 1794, was, that, upon their executing a conveyance of the land, and delivering it to the defendent, or, if he will not accept the conveyance lodging it, for his uſe, with the clerk of this court, he the defendent do pay to the plaintiffs the purchaſe money, the days of payment which ought to have been limited in the conditions of the bonds, being now paſt, with intereſt thereon from thoſe days reſpectively.

The plaintiffs counſil inſiſted, that the decree ought moreover to have authoriſed a ſale of the land, thereby to raiſe the money, if it ſhould not be paid in a reaſonable time, and if the product of the ſale ſhould not be equal to the debt, to have authoriſed an execution of the decree for the deficiency againſt the body or eſtate of the defendent. But By

By the court,

A party injured by breach of an agreement, at his election, may have either of two remedies; he may bring an action at common law, and recover damages for the injury, or he may bring a bill in equity, and compel the other party to perform the agreement ſpecificaly.

An agreement is underſtood to be performed ſpecificaly, when the parties are put into the ſtate in which they would have been, if the agreement had been punctualy performed. if this be not the true criterion by which decrees in ſuch caſes ought to be examined, let the fallacy of it be ſhewn.

If it be the true criterion, we will ſuppoſe the agreement to have been punctualy performed, that is, that ſoon after the ſignature of it, one party had procured the ſurvey to be made and had conveyed the land, and the other party had ſealed and delivered his bonds for payment of the purchaſe money. in ſuch a caſe,

If the plaintiffs had brought a bill praying a decree for ſale of the lands in order by the product of ſale to raiſe the purchaſe money, the queſtion would be, ought the court of equity to decree, or rather hath the court of equity power to decree the ſale?

To authoriſe the decree ſome deciſions by the engliſh court of chancery, in caſes ſaid to be ſimilar to this, were produced by counſil for the plaintiffs; and others, to the ſame purpoſe, were ſaid by him to be extant. but the ſimilitude of thoſe produced is not admitted, and, if it were admitted, and the number of them were greater, the example will not be followed by this court, until the judge thereof ſhall be convinced, otherwiſe than by precedents only, that he hath power to make ſuch a decree in the caſe ſuppoſed; and if he hath not the power in the caſe ſuppoſed, he hath it not, as is believed, in the principal caſe.

The ground for interpoſition by the court of equity in decreeing execution of agreements ſeemeth to be this: for injury by breach of an agreement the court of common law can only award a compenſation in damages, which cannot be certainly known to be commenſurate exactly to the injury, becauſe the things compared are heterogeneous, ſo that by no ſtandard, common to both, their equality or difference can be diſcerned. the action at common law therefore is not an adaequate remedy.

But the court of equity can decree performance of the agreement, which performance expunges the injury itſelf. The bill in equity therefore is an adaequate remedy.

The terms adaequate remedy are relative. an adaequate remedy muſt be accommodated to the wrong which is to be redreſſed by it. the manifeſt analogy between an adaequate remedy and its correlative wrong, limits the progreſs of the former by the extent of the latter. the remedy, which doth more than redreſs the wrong, is not adaequate,—ſo far as it goeth beyond the wrong, is not a remedy, unleſs its metaphorical ſenſe, in which it is here uſed, vary from its proper ſenſe, any more than the remedy in medicine, whoſe virtue and efficacy are adapted peculiarly to ſome certain diſeaſe, and are adaequate to it, can be called a remedy for a different diſeaſe.

Now what is the wrong of which the plaintiffs complain, and for which they ſeek redreſs? the queſtion is anſwered in theſe words in their own bill: ‘ but now ſo it is that the ſaid Carter Nicholas hath altogether refuſed to comply with his agreement aforeſaid, and will neither attend to have the boundaries of the land laid off, nor accept a deed for the ſame, or paſs or ſeal and deliver his bonds for the purchaſe money, which is contrary to equity.’

If the court decree the land to be ſold for payment of the purchaſe money, it would decree ſomething to be done, not which the parties agreed but, which the parties did not agree ſhould be done, and, under pretext of exerciſing a power to adminiſter a remedy for redreſs of a wrong in non performance

formance of an agreement, would extend that agreement to a ſubject manifeſtly not in contemplation of the parties, creating another wrong for the ſake of adminiſtering a remedy to redreſs it.

If indeed the defendent, after the days of payment elapſed, had brought a bill for execution of the agreement, the court would have allowed the preſent plaintiffs to retain the legal title, oppignerated in equity for the purchaſe money, until it ſhould be paid or ſecured. where the party, againſt whom a bill for execution of an agreement is brought, ſhews that a ſtrict execution would be inequitable, and prays that a decree may not be made but upon ſuch terms as are equitable, the court, which is not bound to make any decree if it ſeem not equitable, may impoſe thoſe terms upon the plaintiff, or, if he will not ſubmit to them, may diſmiſs his bill, leaving him to his remedy by action at common law; but where the party bringing a bill for execution of an agreement, alledging that the execution will not ſufficiently relieve him, prays a decree for ſomething more which the agreement doth not comprehend, the court of equity cannot, as is conceived, juſtify ſuch an amplification of the plaintiffs remedy. the court can only decree an execution in both caſes the difference between them is that in one the court witholds the remedy, which it hath power to grant, but is not obliged to grant, until the defendent will conſent to do ſomething which will make the decree an equitable adjuſtment; in the other it doth not withhold the remedy.

The plaintiffs counſil objected, that the decree reſerves liberty to the defendent, at any time indefinitely, to demand a conveyance, upon payment of the conſideration money and intereſt, which is unreaſonable. but the plaintiffs might have prevented it, by conſenting to a reſciſſion of the agreement, according to the prayer of the defendent's bill, inſtead of preſſing for a diſmiſſion of the bill,—may prevent it now, by conſenting to this addition to the decree, 'that the defendent be barred of his title to the land, and reſtore the poſſeſſion thereof to the plaintiffs, unleſs he pay to them the debt intereſt and coſts before a time to be limited,' the conſequence of which would be a diſcharge of the debt. if the plaintiffs will not conſent to this, the decree muſt remain.

If the defendent had brought a bill for execution of the agreement, and the cauſe had come on to be heard, before the day of payment had elapſed, perhaps the court would have decreed the conveyance upon his ſealing and delivering his bonds for payment of the purchaſe money, unleſs his credit appeared to be more dubious than it was at the time of the agreement; becauſe this court cannot diſcover that it hath power to alter agreements by ſupplying defects in the ſecurities thereby ſtipulated by the parties themſelves. if the court would not have decreed the conveyance upon thoſe terms, the conſequence is not that the decree muſt have ſubjected the land to ſale for payment of the purchaſe money. the court either might have refuſed to make any decree, ſo that the party muſt have reſorted to his remedy at common law, or might have decreed the conveyance upon the terms of paying or ſecuring the purchaſe money, whereby the debt would be ſo far a lien upon the land, that before one was paid, or ſecured, the title to the other would not be conveyed. but this would have been a different decree from that now deſired, for ſubjecting the land to ſale for payment of the purchaſe money, or ſo much as will be thereby raiſed, charging the purchaſer with a deficiency.—a decree which not only is not juſtifiable by the agreement but, which, in one event ſeeming not improbable, would give the ſellers a double ſatisfaction for the ſame thing; for if the land be ſold, and the ſale produce not the whole purchaſe money, for example not more than half, which the defendent ſuppoſeth equal to the full value of it, the plaintiffs, for the ſame land, beſides that product, will recover from the defendent, if he

he be able to pay it, the other half of the purchaſe money—a decree aſked, without grace, as is conceived, from a court, of whoſe attributes one is a power and diſpoſition to alleviate, inſtead of aggravating, the burdens which legal rigor ſometimes impoſes.

BETWEEN
WILLIAM COLE, *plaintiff*,

AND

MARY SLOMAN SCOTT, executrix, and Francis Scott, James Scott, and Frederick Scott, ſons, of Thomas Scott, *defendents*.

IN this cauſe, which was a bill for ſpecific execution of an agreement to purchaſe land, and which was heard the 15 day of may, 1794, the court, for reaſons ſimilar to thoſe explained in the caſe between Roſe and Nicholas, refuſed to ſubject the land to ſale for payment of the purchaſe money.

BETWEEN
CHRISTOPHER ROANE, Frederick Woodſon, William Armiſtead, Thomas Quarles, John Fleet, Dudley Digges, Nathaniel Littleton Savage, William Graves, Samuel Tinſley and Thomas Carter, officers of the ſtate line, *appellants*,

AND

JAMES INNES, attorney general, and Jaquelin Ambler, treaſurer, *defendents*, and John Pendleton, auditor for public accounts, *appellee*.

THE plaintiffs, who were officers in one of the legions, raiſed for defence of the commonwealth, by an act paſſed in the ſpring ſeſſion of 1781, continued in ſervice, from the time of entering into it, until february, 1783, when they were diſcharged by the governor, after which time they were not required again to enter into ſervice.

They, ſuppoſing that officers of the comnionwealth's battalions who were ſupernumerary by reduction of their battalions before the end of the war, if they were not required to enter into ſervice again, were intitled to half pay, during life, by the words of the act of general aſſembly, paſſed in the may ſeſſion of 1779, concerning officers, ſoldiers, ſailors and marines, *(a)* and alſo ſuppoſing themſelves, by the act of 1790, giving compenſation of half pay to certain officers of the ſtate line intitled to the ſame compenſation as the law allowed to officers of the battalions, exhibited their clames for half pay, or, in lieu of it, the commutation of five years full pay, to the auditor for public accounts, who diſallowed their clames.

From

(a) '*All general officers of the army being citizens of this commonwealth, and all field officers, captains, and ſubalterns, commanding, or who ſhall command in the battalions of this commonwealth on continental eſtabliſhment, or ſerving in the battalions raised for the immediate defenſe of this ſtate, or for the defenſe of the united ſtates: and all chaplains, phyſicians, ſurgeons, and ſurgeon's mates, appointed to the ſaia battalions, or any of them, being citizens of this commonwealth, and not being in the ſervice of Georgia, or of any other ſtate, provided congreſs do not make ſome tantamount proviſion for them, who ſhall ſerve henceforward, or from the time of their being commiſſioned, until the end of the war; and all ſuch officers who have, or ſhall become ſupernumerary on the reduction of any of the ſaid battalions, and ſhall again enter into the ſaid ſervice if required ſo to do, in the ſame or any higher rank, and continue therein until the end of the war, ſhall be intitled to half pay during life, to commence from the determination of their command or ſervice.*' 1779 *c.* 4.

From his diſallowance the plaintiffs appealed ſeparately, each of them ſtating his caſe in a petition to the judges of the diſtrict court, holden in Richmond.

That court referred the caſe to the general court, who certified their opinion in theſe terms.

'That under the act of may, 1779, the general officers, field officers, captains and ſubalterns, phyſicians, ſurgeons, and ſurgeons mates, then on duty, or who ſhould afterwards be placed on duty, in the battalions at that time raiſed, for the continental or ſtate ſervice, were intitled to half pay, unleſs they failed to ſerve until the end of the war, or being ſupernumerary refuſed to enter again into the ſervice on a command to that effect, or unleſs they were in the ſervice of Georgia, or another ſtate, or provided for in this reſpect by congreſs; that the reſpective laws, under which they have been appointed, and the act of 1790, intitle all ſuch perſons as are deſcribed in the act of 1779, who belonged to the ſtate line, and who have been appointed ſince the paſſing the act of 1779, to the like allowance of half pay, provided they ſerved to the end of the war, or being ſupernumerary did not refuſe to enter again into the ſervice, on a command to do ſo, and that the troops being diſbanded in the month of february, 1783, and the preliminary articles of peace being ſigned before that period, the officers ought to be conſidered to have ſerved to the end of the war.'

Whereupon the diſtrict court adjudged the plaintiffs intitled to the commutation clamed by them, and ordered the auditor to iſſue to each petitioner a certificate accordingly

From which judgement, on the prayer of the attorney general for the commonwealth, an appeal was allowed; and

The court of appeals, on the 2 day of may, 1792, delivered the following opinion in the caſe of one of the petitioners:

'That under the act of Aſſembly, paſſed in May, 1779, intituled an act concerning officers, ſoldiers, ſailors, and marines, and all ſubſequent acts made reſpecting them, only ſuch of the general officers of the ſtate army, being citizens of this commonwealth, and ſuch of the field officers, captains, and ſubalterns, ſerving in the battalions raiſed for the immediate defenſe of this ſtate, and ſuch of the chaplains, phyſicians, ſurgeons, and ſurgeons mates as were appointed to the ſaid battalions, being citizens of this commonwealth, and not being in the ſervice of Georgia, or any other ſtate, and for whom congreſs hath not made any adaequate proviſion, and only ſuch of them as actualy ſerved thence forward, or from the time of their being commiſſioned, until the end of the war, unleſs reſtrained by being priſoners of war, on parole, *or otherwiſe*, and alſo only ſuch of the ſaid officers who became ſupernumerary on the reduction of the ſaid battalions and again actualy entered into the ſaid ſervice, in the ſame or higher rank, having been required ſo to do, and continued therein until the end of the war, are intitled to half pay during life, under the ſaid acts, to commence from the determination of their command or ſervice, when the ſame was duly ſignified to them by the governor, or executive of this ſtate, and their regiments diſbanded in perſuance thereof, after the preliminary articles of peace between America and Great-britain were ſigned and notified to the executive of this ſtate, which appears by the procedings in council, in evidence in this caſe, to have been on the 19 day of ap il, 1783, and the army diſbanded in perſuance thereof on the 22 of the ſaid month, and it appearing by the petition of the appellee, that he was a ſupernumerary officer, and diſcharged as ſuch on the 9 day of february, 1783, before the ſaid preliminary articles were notified, and the legion, to which he belonged, diſbanded as aforeſaid, and that he did not again enter into the ſervice and continue therein until the end of the war, this court is of opinion, that he is not intitled to half pay for life, and that the opinion of the general court, and order of the diſtrict court thereon, are erroneous:' therefore

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The order of the diſtrict court was reverſed, and the diſallowance by the auditor affirmed. to which was added this entry: ‘ but this judgement is not to bar or prejudice any future clame of the appellee, made on fuller proof to the auditor.’

Several of the parties, whoſe clames were decided by the court of appeals not to be maintainable, nevertheleſs, exhibited the ſame clames again to the auditor, ſuppoſing the entry ſubjoined to the judgement of reverſal to have reſerved to them liberty to do ſo.

The clames were again diſallowed by the auditor. and from that diſallowance the clamants appealed to the high court of chancery, proſecuting their appeal by way of original bill againſt the attorney general, the treaſurer, and the auditor, who were made defendents, and of whom the laſt only anſwered, diſcloſing however nothing more than what appeareth in the foregoing ſtate of facts.

The cauſe came on, before the H. C. C. by conſent of parties, to be heard in october, 1793.

The court at firſt haeſitated to interpoſe in the matter, firſt, becauſe it ſeemed proper to be brought before the common law court, and, ſecondly, becauſe the clames, which the court of appeals permitted to be made again to the auditor, were permitted to be made, on fuller proof; but no proof was now exhibited more than or different from what was exhibited before the court of appeals. the firſt difficulty was removed by the anſwer of one defendent, which did not except to the juriſdiction of the court of equity, and by the conſent of the other defendents that the cauſe ſhould be heard on its merits by that court. the other difficulty was removed by this conſideration: the facts ſtated by the clamants in their petitions of appeal to the diſtrict court were all admitted to be true by the attorney general, who was the proper party to controvert the facts, if they had not been true, and whoſe admiſſion is equivalent to the fulleſt proof. fuller proof being therefore impoſſible, thoſe terms in the reſervation ſubjoined to the reverſing judgement were ſuppoſed to have been uſed inadvertently, and the reſervation was underſtood in the ſame ſenſe as if it had not contained them: and the court of chancery delivered the following

OPINION:

‘ That by the words in the act of general aſſembly of the may ſeſſion, in the year 1779, intituled *an act concerning officers, ſoldiers, ſailors and marines*, ‘ officers who have or ſhall become ſupernumerary on the reduction of battalions and ſhall again enter into the ſervice, if required ſo to do, and continue therein until the end of the war, ſhall be intitled to half pay during life, to commence from the determination of their command or ſervice,’ the officers intended to be provided for were of two claſſes; one, thoſe who had continued in the ſervice until their battalion was reduced, and their command determined, and were not required to enter again into the ſervice; and the other, thoſe who, after the reduction of their battalion, were required to enter, and did enter, again into the ſervice, and continued in it until the end of the war; and that the ſaid words ought to be interpreted thus: officers who have or ſhall become ſupernumerary ſhall be intitled to half pay during life, to commence from the determination of their command, if they were not required to enter again into the ſervice and refuſed to do ſo; and officers who have or ſhall become ſupernumerary, and ſhall again enter into the ſervice if required ſo to do, ſhall be entitled to half pay during life, to commence from the determination of their ſervice;’ becauſe, by any other interpretation, the words, ‘ command or,’ in the laſt member of the ſentence would not only be ſuperfluous but have no meaning; and becauſe the words, although they may be interpreted in another ſenſe, ought to be interpreted

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in a ſenſe moſt beneficial for the officers whom the general aſſembly were inviting into their ſervice by offers of gratuities the moſt liberal in their power to make. but this court is of opinion that by the latter part of the act of general aſſembly, made in the year 1790, intituled *An act giving compenſation of half pay to certain officers of the ſtate line*, ſuch of the petitioners as belong to the firſt of the two claſſes before mentioned are ſo diſtinguiſhed from officers of the other claſs that the petitioners are not intitled to half pay by that part of the act, although the court can not believe that the general aſſembly intended to deprive them of it, being unable to divine any reaſon for the diſtinction. Nevertheleſs this court is of opinion that by the former part of the laſt mentioned act the officers, who were diſcharged by proper authority, and not required to enter again into ſervice, after the 30 day of november, in the year 1782, that is in february following, are intitled to their half pay no leſs than thoſe who were not diſcharged before the 22 day of april, in that year, to whom the compenſation for half pay hath been allowed; becauſe the former may be ſaid, with as much propriety as the latter, to have continued in the ſervice until the end of the war, ſince they were in the ſervice on the ſaid 30 day of november, when the proviſional articles between the united ſtates of America and the king of Great-britain were done, by the ſeventh article whereof it was agreed that there ſhould be a peace between thoſe parties, and their reſpective citizens and ſubjects, and that all hoſtilities ſhould ceaſe, and by the ninth article reſtitution was agreed to be made of whatever might be conquered by the arms of either from the other before the arrival of thoſe articles in America: whereas if the end of the war was not before the definitive treaty of peace between the ſame parties, which was done the 3 of ſeptember, 1783, thoſe officers who were diſcharged before that day, that is thoſe who were diſcharged on the 22 day of april, 1783, had not ſerved until the end of the war;'

And decreed the auditor to allow half pay for life, or, in lieu thereof *(b)* five years commutation, to ſuch of the plaintiffs as ſhould appear to be intitled thereto according to the foregoing opinion.

From which decree the defendents, on their prayer, were allowed an appeal.

In juſtification of this opinion, which differeth from that of the court of appeals, upon the latter are ſubmitted theſe

REMARKS.

This opinion of the court of appeals conſiſts of theſe propoſitions:

1. Officers who continued in the ſervice until the end of the war, are intitled to half pay during life, to commence from the determination of their ſervice

2. Officers, who were reſtrained, by being priſoners of war, or on parole, or otherwiſe, from continuing in the ſervice until the end of the war, are intitled to half pay during life, to commence from the determination of their command. this propoſition is not explicitly ſtated, but is implied in the opinion.

3. Officers, who became ſupernumerary on reduction of their battalions, and again entered into the ſervice, having been required ſo to do, and continued therein until the end of the war, are intitled to half pay during life, to commence from the determination of their ſervice.

4. Such ſupernumerary officers as did not enter, although they were not required to enter, again into the ſervice, are not intitled to half pay during life.

(b) This alternative was inſerted because the court of appeals, as was ſaid, and ſeemed admitted, had allowed it in ſome caſes where the clames for half pay were ſuſtained.

life. This propoſition follows from the word 'only' in that part of the opinion from which is formed the next preceding propoſition.

5. Officers, to be intitled to half pay during life, muſt have continued in the ſervice until the ſignature of the proviſional articles, here called the preliminary articles, of peace between the united ſtates of America and the king of Great-britain, was notified to the governor of the commonwealth, and duly ſignified by him to the officers.

The firſt propoſition is admitted by all. and upon it partly is founded the decree of the high court of chancery, as is there explaned.

The ſecond propoſition may be doubted until the ſtatute can be ſhewn, by which half pay for life was promiſed to thoſe officers, who were hindered, by being priſoners of war, or by being on parole, OR were hindered OTHERWISE, from continuing in the ſervice until the end of the war. but if the propoſition be true, the concluſion from it is thought to be oppoſite to the concluſion drawn by the court of appeals. for if an officer hindered from continuing in ſervice until the end of the war, by being a priſoner, or on parole, OR hindered OTHERWISE, be intitled to half pay during life, a ſupernumerary officer, who not being required to enter again into the ſervice, is hindered from continuing in the ſervice until the end of the war, no leſs effectualy than the officer who is an immured captive, or is enlarged on parole, ſeems no leſs intitled.

The third propoſition is true. but the plaintiffs cannot intitle themſelves by it; becauſe, if they were properly ſupernumerary officers, they did not, after they became ſo, enter again into the ſervice.

The fourth propoſition is founded, as is conceived, in a miſconſtruction of the act of 1779.

Two arguments are ſtated in the decree of the court of chancery, to prove that the act ought ſo to be expounded as to intitle the ſupernumerary officers who were not required, after reduction of their battalions, to enter again into the ſervce, to half pay during life; firſt, that, otherwiſe, the words, 'command or,' in the act, would have no meaning, as will be manifeſt to one who reads the act without thoſe words; for he will ſee, if they be left out, it hath exactly the meaning which the court of appeals have given to it, with them; whereas the words, 'command or,' applied to ſupernumerary officers, not required to enter again into ſervice, are ſignificant: ſecondly, that the act, if it could be expounded in two ſenſes, ought to be expounded in the ſenſe which is moſt beneficial to the officers, for the reaſon there mentioned. to which, after premiſing that the act of 1779, in its nature, is a compact between the commonwealth and the officers, the author of that decree, now adds, thirdly, the parties entering into the compact may reaſonably be ſuppoſed to have treated and concluded in ſome ſuch form as this:

COMMONWEALTH.

We agree to allow to you officers, who will ſerve us in our army until the end of the war, half pay, during your lives, to commence from the determination of your ſervice.

OFFICERS.

We are willing to ſerve for the ſtipend you offer. but you may deprive us, or ſome of us, of it, by diſbanding your army, or part of it, before the end of the war.

COMMONWEALTH.

If we diſband our army, or part of it, before the end of the war, we will allow to you, who thereby become ſupernumerary, half pay during your lives, to commence from the determination of your reſpective commands:

but

but upon this condition, which no doubt you will think juſt, that you ſhall enter again, if we require you to enter again, into our ſervice, and continue therein until the end of the war, in which laſt caſe your half pay ſhall commence from the determination, not of your command but, of your ſervice.

OFFICERS.

To all this we agree; and accordingly we enter into your ſervice. whether the act of 1779 ought not to be expounded, as ſuch articles would have been expounded? is referred to the candid and judicious. fourthly, where one party hindereth another from performing a duty, by which he would earn a reward, the hindrance is in fraud of the party willing to perform; from which fraud he who practiſeth it ought not to derive benefit, nor ought the other to loſe that to which he would otherwiſe have been intitled. and in this caſe the commonwealth hindered the officer from performing the duty by which he would have earned a reward. and, fifthly, the words of the act, 'if, being required again to enter, they again do enter, into the ſervice, and continue in it until the end of the war,' ſeem the denuntiation of a penalty for breach of a duty. the half pay would be earned by ſervice before the officers became ſupernumerary. but, to ſecure their future ſervice, if it ſhould be requiſite, they ſhould forfeit the half pay, if they failed afterwards to perform another duty enjoined. this duty was again entering into the ſervice, if they were required, and continuing in it until the end of the war. but if they were not required again to enter into the ſervice, no duty was enjoined to be performed, and conſequently by failure to perform the duty no forfeiture was incurred.

Therefore that the plaintiffs, if they had been officers in the battalions, for whom the act of 1779 provided, upon the ſuppoſition that they were ſupernumerary officers, would have been intitled to half pay, is thought to be evinced.

But they are believed not to have been comprehended in that act, nor to be intitled to the half pay, which it allowed to officers in the battalions, unleſs it be by the act paſſed in 1790, giving the compenſation of half pay to certain officers of the ſtate line.

The words of that act are, 'that the ſame compenſation of half pay ſhould be extended to thoſe officers of the ſtate line, who continued in actual ſervice to the end of the war, as was allowed to the officers of the continental line; and alſo to thoſe who became ſupernumerary, and, being afterwards required, did again enter into actual ſervice, and continue therein to the end of the war.'

The act, in the latter part of it, includeth ſupernumerary officers, who did again enter into actual ſervice, only; and conſequently doth not include the plaintiffs, who confeſs themſelves not to have entered again into the ſervice.

If then the plaintiffs be intitled to half pay, it muſt be by the former part of this act, that is, they muſt have been, not ſupernumerary officers but, officers who continued in actual ſervice to the end of the war. ſo that whether this can be praedicated of them? is the queſtion. which will lead us to conſider

The fifth propoſition of the court of appeals.

The plaintiffs are admitted to have been in actual ſervice before and on the 30th day of november, 1782, when the proviſional articles were done, and to have continued in the ſervice until february afterwards, when they were diſcharged by order of the executive.

If the war ended when thoſe articles were done, the plaintiffs, by the terms of the act, by the terms of the compact, if the act of 1779 be in the nature of a compact, and by the terms of the act of 1790, were intitled to

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their half pay, to commence from february, 1783, the determination of their actual ſervice.

The proviſional articles prove the war to have been ended by that act.

The articles indeed were not to be concluſive until the terms of a peace ſhould be agreed upon between Great-britain and France. but when thoſe terms were agreed upon, the articles were concluſive. and they were an act of the day on which they were done, not of the day on which the terms of peace between Great-britain and France were agreed upon. if the terms of peace between Great-britain and France had not been agreed upon, the proviſional articles would not have been in force from the begining; this being true, its converſe, if the terms of peace between Great-britain and France were agreed upon, the proviſional articles were in force from the begining, muſt alſo be true. yea, the court of appeals theirſelves in this opinion admit the war to have been ended by thoſe articles. for,

If the war was not ended by the proviſional articles, it was not ended before the definitive treaty in ſeptember, 1783; *(c)* but the court of appeals have allowed thoſe officers who were in ſervice until april, one thouſand ſeven hundred and eighty three, to be intitled to half pay, and therefore the war to have ended before the definitive treaty, and conſequently to have ended when the proviſional articles were done. *(d)*

If the war was ended by the proviſional articles why are not the officers who continued in the ſervice until the ſignature of thoſe articles, including the plaintiffs, intitled to their half pay? becauſe, ſay the court of appeals, *officers, to be intitled to half pay, muſt have continued in the ſervice until the ſignature of the articles was notified to the governor, and ſignified by him to the officers.* *(e)* did the commonwealth agree with the officers that they ſhould not be intitled to half pay, unleſs they would continue in ſervice until ſuch notification and ſignification? do the ſtatutes declare ſo? when the ſtatutes had enacted, that officers, who continued in ſervice until the end of the war, ſhould receive half pay during life, can any court, without aſſuming the power to change the law, determine, that the officers ſhall not receive half pay, although they ſhall have ſerved until the end of the war, unleſs they ſhall moreover have continued in the ſervice until a notification to the governor, that the war was ended: and this too, notwithſtanding the officers continued in ſervice until they were diſcharged by the governor, and were not required to enter into it again? and hath any court power to change the law? if theſe queſtions be anſwered negatively, as probably they will be, the principal queſtion, namely, whether officers, who continued in ſervice until the proviſional articles were done, and afterwards until they were diſcharged, be intitled to half pay, muſt be anſwered affirmatively.

BETWEEN

(c) No man will pretend that the proclamation by the governor of Virginia, one of thirteen confederated ſtates, could end the war which was proſecuted by the britiſh king againſt all thoſe ſtates united; and if the war ended not by the governors proclamation, it muſt have ended by the proviſional articles, or the definitive treaty.

(d) This is not a mere argumentum ad homines, *but is concluſive in this caſe; the ſupreme court, by determining thoſe officers to be intitled who did not continue in the ſervice until the definitive treaty, having implicitly decided the war to have ended before.*

(e) By this doctrine, the officer, who was unluckily diſcharged a few weeks, or a few minutes, before official notification of the peace to the executive, inſtead of being gratified by enjoyment of thoſe delectable things, the promiſe of which had tempted him to enter into the ſervice of the commonwealth, and encouraged him to continue, ſo long as they would permit him to continue, in their ſervice, with the thirſt and appetite of Tantalus,

Nec bibit inter aquas, nec poma natantia carpit

Petronius Arb.

BETWEEN
DAVID COCHRAN, *plaintiff*,
AND
JOHN STREET, *defendent*.

THE defendent, in an action on the caſe againſt the plaintiff for ſlander, commenced in Hanover county court, to the declaration in which the plea was not guilty, had recovered 150 pounds damages.

The county court granted an injunction to ſtay execution of the judgement until further order, upon a bill filed by the preſent plaintiff, ſtating that the trial of the iſſue had been brought on unexpectedly and as he conceived irregularly, and when for that reaſon he was not prepared to make a defenſe, that not only the damages were exceſſive, if the words alleged to be defamatory had not been true, but, that the truth of them would have been proved, if the plaintiff had not been ſurpriſed by a premature trial, and that ſome of the jurors, who were diſpoſed to condemn the plaintiff in trifling if in any damages, being convinced by the reaſoning of their more experienced, and as they believed at that time more knowing, brethren, who affirmed that the leſs number were bound by law to acknowledge their agreement in a verdict, however diſcordant with their own ſentiments, which the greater number had approved, concured in the ſentence, of which the plaintiff complaineth, and to which they would not otherwiſe have aſſented.

The defendent by anſwer denied the trial to have been brought on irregularly; and neither admiting nor denying the allegation relative to the influence of ſome jurors over others, objected that the examination of them, in order to prove their own miſconduct, would be a miſchevious practice.

No irregularity in bringing on the trial of the iſſue was made to appear.

Several witneſſes were examined to prove, on one ſide, the truth, and, on the other, the falſehood, of the words alleged to be defamatory.

As to the influence of ſome jurors over others, one juror depoſed, that, from the evidence, he was of opinion no damages ought to have been found againſt the plaintiff, but being unacquainted with the law concerning juries, he was impoſed upon by ſome of his brethren, who told him that all the jurors muſt acknowledge their agreement in any verdict, in which a majority were agreed; and under this impoſition he did acknowledge his agreement in the verdict then found; whereas had he known that his own conſcience ought to be ſatisfied in the propriety of the verdict, he would not have conſented to a verdict for any damages againſt the plaintiff.

Another juror depoſed to the ſame purpoſe with reſpect to himſelf, and indeed in the ſame words, adding, that he deſired the foreman, whilſt he was writing the verdict, to conſider him the deponent as diſſenting from it.

A third juror depoſed to the ſame purpoſe as the firſt, adding that he de ſired the foreman to write that the majority but not the whole were for a verdict in favour of the plaintiff.

And a fourth juror alſo depoſed to the ſame purpoſe as the firſt.

Not one of them, when the verdict was returned, and the uſual queſtion 'have you agreed in a verdict?' was propounded, ſignified his diſſent.

Four other jurors, who were examined, acknowledging the diverſity of opinions among them, at firſt, inſomuch that ſome would have found 500 pounds damages, others leſs damages, and others no damages at all, do not admit or believe any means to have been practiſed by any of the jury for the purpoſe of miſleading others, and ſtate their own opinions reſpectively to be, that, after ſome time, the majority appearing inclined to find 150 pounds, all of them agreed to the verdict returned for thoſe damages.

The

The county court decreed another trial of the iſſue, between the parties.

From this decree the defendent appealed to the high court of chancery, who, the 28 day of october, 1791, delivered this

OPINION:

That, if the damages, found on trial of the iſſue in the action at common law, had been exceſſive, the application to obtain redreſs, for that cauſe, to the court of equity, in the firſt inſtance, was improper, unleſs, for ſome reaſon not apparent in this caſe, a motion to the court before which that trial was, to award another trial, either could not have been made, or if made muſt have been unſucceſsfull; *(a)* and that no other good cauſe for awarding the new trial in this caſe, appeareth, the ſurpriſe upon the appellee (plaintiff) not being proven; the truth of the ſlanderous words ſpoken by him of the other party being a proper ſubject of inquiry, upon a motion, which ought to have been made inſtead of a bill in equity, for awarding a new trial; and that ſome of the jurors ſhould at length join in a verdict which they do not approve, prevailed upon by their fellows to do ſo, being in moſt caſes unavoidable, and perhaps generaly thoſe verdicts being the moſt juſt, which are the reſult of diſcuſſion introduced by diverſity of ſentiments profeſſed by different jurors on their firſt conſultations:

And, reverſing the decree of the county court, diſmiſſed the bill.

This decree was reverſed the 16 day of may, 1792, by the court of appeals, whoſe opinion was, ' that the fact, ' that the verdict in the ſuit at common law between the parties was founded in miſtake of ſome of the jurors,' being well eſtabliſhed by the depoſitions was a good ground for a court of equity to decree another trial in the ſaid ſuit '

This laſt decree is acknowledged to be right if we may attend to four jurors, of whom, although three of them were more than 30 and the other 26 years of age, neither had before ſerved in that office, and who having declared their diſapprobation of the ſentence in which they ſeemed to concur to have been ſo invincible that they would not have concured in it, if they had not been miſled by ſome of their brethren into a belief that in queſtions refered to juries the opinion of a majority was deciſive. but to permit part of a jury to retract a verdict recognized in ſolemn form is thought by ſome a dangerous precedent.

BETWEEN
JOHN HOOMES, *plaintiff*;
AND
JACOB KUHN, *defendent*.

THE bill in this cauſe, brought for another trial of the iſſue in an action of aſſault and battery, was diſmiſſed, the 28 day of october, 1791, the opinion of the court being, that, a motion for the new trial having been rejected by the judge before whom the verdict was found, and no matters now appearing to this court, which, if they had been known to that

(a) In ſome caſes, where the damages were ſaid to be exceſſive, two or three judges, who heard the evidence, would have approved motions for new trials; but the others would give no opinion, becauſe they were not preſent at the firſt trials: ſo that there were no courts who would hear the motions. in other caſes, where verdicts have ſeemed exceptionable for various reaſons, prejudices againſt one of the parties have been ſo prevalent that from their influence even juſtices of the peace have not been free. motions for new trials to courts compoſed of ſuch judges muſt be vain. in caſes like theſe interpoſition of the court of equity may be juſtified.

that judge, ought to have wrought a change in his ſentiments, in ſuch a caſe the interpoſition of this court would be improper.

This decree of diſmiſſion, from which the plaintiff appealed, was affirmed, the 20 day of october, 1792.

BETWEEN
THOMAS COBS, *plaintiff*,
AND
JOHN MOSBY, *defendent*.

IN this cauſe, heard the 28 day of october, 1791, the bill, brought for relief againſt a verdict, was diſmiſſed, a motion to the court, before which the iſſue was tried, to award a new trial, for the cauſes now ſuggeſted, having been rejected, and no other cauſe for the interpoſition of a court of equity appearing upon the proofs.

BETWEEN
DAVID ROSS, *plaintiff*,
AND
BENJAMIN PINES, *defendent*.

IN an action on the caſe by the defendent againſt the plaintiff for ſlandering the title of the former to certain ſlaves by him expoſed to public ſale, upon trial of the general iſſue, the jury found a verdict for him, aſſeſſing his damages to 500 pounds.

The plaintiff brought a bill, to be relieved againſt the verdict, praying an injunction, which was granted until further order, and afterwards, when the anſwer was filed, diſſolved upon a motion.

At the hearing, in May, 1788, the court ordered another trial of the iſſue; the plaintiff paying all the coſts at law, and entering into bond, with ſurety, in the penalty of five hundred pounds, on condition to be void, if he ſhould perform the future order of the court. at the ſame time the court gave leave to the defendent to amend his declaration as to the number of ſlaves the title of which was ſuppoſed to have been ſlandered.

On the ſecond trial, which was before the diſtrict court holden at King and queen courthouſe, the evidence was to this purpoſe: Edward Graves depoſed that Roſs treated with Pynes, at his own houſe, for the purchaſe of his ſlaves. they agreed upon the price, but the one offering to pay it by bills of exchange, and the other declaring that he muſt have money, which alone his creditors, for payment of whoſe demands he was obliged to ſell his ſlaves, would accept, they parted, and Roſs ſaid he would meet Pynes at the place and time appointed for the ſale, with the money. the witneſs underſtood it to be a bargain.

Benjamin Temple depoſed, that he was empowered by Roſs to purchaſe the ſlaves of Pynes, taken in execution, which Roſs ſaid he had been attempting to purchaſe, adding that he had heard there was ſome defect in the title, but the witneſs might diſregard it, and notwithſtanding purchaſe at the ſtipulated prices. The witneſs, in his way to the place of ſale, ſaw a letter, ſhewn to him by John Davis, from Roſs, which related to his agency in the purchaſe of ſlaves generaly, and ſignified a deſire that the ſame ſhould be continued the ſale was begun, and ſome of the ſlaves were ſold to one Markham. ſoon afterwards a report, that the title of the ſlaves, was not good, produced altercation between Markham and Pynes, the former refuſing to take the ſlaves bought by him, without bond and ſecurity, which the other was not able to give, for warranting the title. The ſale by auction, before a ſecond lot was bought, ceaſed, and the byſtanders diſperſed. John Davis, to whom the report was traced, being required to ſhew his

authority

authority for it, produced the letter, dated the 7 day of december, 1767, the words of which are herein after inſerted, and which was publicly read. the ſlaves were ſold next day privately for much leſs money than would have been produced by the ſale of them publicly, as the witneſs, forming his calculation by the ſale to Markham, believed. *(a)*

The part of the letter, mentioned by Benjamin Temple, which relates to the ſubject is in theſe words:

I expect mr Temple, the ſheriff of King and queen will be over with 11 *negroes belonging to Benjamin Pynes of that county. he proposed to sell them at the Ridge on tuesday. i ſaw them when down the country, and offered him* 330 *pounds for the whole. there were four fellows, two [illegible], and five boys and girls. i have wrote a line to Temple, that i will still give Pynes the same. if he comes over you may try to bargain with him, and give him an order on me at Williamsburg for the money. i imagine Pynes will send the same negroes that i saw, viz. Tom, and his wife and daughter, Adam, his wife, and four children, and two other fellows, Sauny and however one of them has a ſore on his chin, and the other is a little old and a cooper. if you think the negroes look well, you need not stand on five or ten pounds more: there have been ſome diſputes raiſed about the title. they say Mann Page sets up a clame to them. but i believe there is but little danger. be up as soon as poſſible. am in haste, sir, your's David Roſs. 7 of december,* 1767. *to mr John Davis at Henrico court.*

To this evidence the plaintiff demurred. the defendent joined in demurrer. and the jury being directed by the court, if they ſhould find any damages, to find them conditionally, aſſeſſed the damages of the defendent, if the law ariſing on the demurrer to evidence be for him, to one thouſand pounds.

The diſtrict court did not give judgement on the demurrer, but certified it, with the verdict, to this court, and alſo certified it, as the opinion of the judges of the ſaid diſtrict court, that the weight of teſtimony on trial of the iſſue was on the part of Roſs, and therefore that the verdict was not ſatisfactory to that court. by the latter part of which certificate the judges are ſuppoſed to have meaned that the evidence was not ſufficient to ſupport the iſſue on the part of Pynes.

The cauſe coming on, the 12 day of october, 1789, to be again heard on the bill, anſwer, exhibits, examinations of witneſſes, and tranſcript of proceedings before the diſtrict court, among which examinations is that of John Davis, not ſtated in the demurrer, explaning the manner in which the letter to him from the plaintiff came to be made public, and ſtating ſeveral circumſtances, in order to exculpate the author of that letter, the court delivered this

OPINION,

That the loſs to the defendent in the ſale of his ſlaves muſt be attributed to the plaintiff, his letter addreſſed to John Davis being the only apparent origin of the report which occaſioned that loſs; and that the plaintiff, although he is believed not to have deſigned any injury, ought to make reparation; *(b)*

And

(a) The residue of the testimony of this witneſs, and the whole testimony of some others, and alſo the certificate of a sale by Pynes of his land, tending to prove the quantum of the damages sustained by Pynes, being unimportant, as to the principal question now only considerable, namely, whether Roſs ought to make reparation for the damages, are omitted.

(b) No proof that any other man ever pretended to clame a title to the ſlaves exposed to sale by the defendent appeared. hence the report that ſuch a clame exiſted was supposed by the defendent's counsil to be a figment of the plaintiff. in which case

And the meaſure of that reparation obſerved in the firſt verdict having been more than approved by the ſecond;

The court therefore diſmiſſed the bill with coſts:

And this decree of diſmiſſion, from which the plaintiff appealed, was affirmed the 8 day of december, 1790.

BETWEEN
JAQUELIN AMBLER, *appellant*,
AND
THOMAS WYLD, the younger, *appellee*.

THE parties in Auguſt, 1778, had agreed, the appellant to ſell, and the appellee to buy, the lots and houſes of the former in York town, for the price, to which they ſhould be valued by three men appointed by mutual conſent, and which price ſhould be paid, one half at the time of valuation, and the other at the expiration of twelve months thereafter.

The men appointed reported their eſtimate in theſe words: *York, ſeptember* 18, 1778, *we the ſubſcribers, by deſire of mr Ambler and mr Thomas Wyld, junior, have, this day, viewed the lots and houſes belonging to mr Ambler, where he formerly reſided, and are of opinion that, in the preſent ſituation of the lots and houſes, they are worth one thouſand pounds. Mat. Pope, Corbin Griffin, Wm Reynolds.*

Five hundred pounds of the purchaſe money were paid as appeareth by this paper, *october* 20, 1778, *received of mr Thomas Wyld the ſum of five hundred pounds, current money, in part payment of the tenement in York town, purchaſed of the ſubſcriber. and mr Wyld agrees, on his part, not to demand a title to the ſaid tenement until the remaining ſum of five hundred pounds is paid. witneſs our hands. J. Ambler, Tho. Wyld, jun.* and in autumn, 1779, the appellee, by an agent, offered to pay five hundred pounds more, in paper money, to the appellant who declined acceptance of them, ſaying he ſhould ſee mr Wyld that afternoon.

The appellant afterwards procured *(a)* from the valuers a paper, on which were written the following words: *ſome time in the year* 1778, *the underwritten*

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caſe his obligation to compenſate the other party's loſs is unqueſtionable. if the report were true, but the pretended title groundleſs, the plaintiff, by circulating the report, was no leſs culpable than if he had been the author of it. the letter committed to Davis a matter of information or pretended information, concerning the title of ſlaves, confeſſed by the writer to be unimportant to himſelf, for he impowered his agent to purchaſe the ſlaves, diſregarding any report of defect in the title;—unimportant to himſelf, if his motive were not to depretiate the ſlaves, which would have been worſe. his only motive then, if not that, muſt have been to warn his agent not to decline bidding, alarmed by the report, if he ſhould hear it. ſo far the plaintiff was juſtifiable. his fault was in not guarding againſt the conſequences of the report publiſhed by his agent, and by him only. this want of caution rendered him juſtly obnoxious to compenſation. with the rule of the roman law, culpam antem eſſe, quod, cum a diligente provideri poterit, non eſſet proviſum. Dig. lib. IX. tit. II, l. XXXI, the common law is believed to concur.

(a) This paper is ſtated to have been procured by the appellant, because, in answer to a part of the bill alleging that to have been the fact, and propounding this interrogetary, whether he, Jaquelin Ambler. or ſome person for him, did not procure the valuation to be ſigned by the men whoſe names are ſubſcribed to it? he, after explaning his motives for what followeth, ſays, he requeſted that a certificate of the valuers might be obtained and ſhewn to the complainant ſtating the ideas on which the valuation was made.

written were called upon, by mr Thomas Wyld, to value the houſes and tenement, in York town, then the property of mr Jaquelin Ambler, which houses and tenement the ſaid Ambler, as we were informed, had agreed to ſell the ſaid Wyld at ſuch a price as disinterested persons ſhould determine the ſame were worth. agreeably thereto the underwritten did value the aforesaid houses and tenement to one thousand pounds. and it being contrary to the laws of the land, at that time in force, to make any difference between paper money and ſpecie, we the underwritten do further declare that we did then, and do now, think the aforeſaid houſes and tenement were worth one thousand pounds ſpecie. in teſtimony whereof we have hereunto ſet our hands, this tenth day of february, 1782; and to which paper the names of the valuers were ſubſcribed.

An action, which had been commenced by the appellant againſt the appellee, in the general court, to recover the money due, was diſcontinued, for want of proſecution, the 20 day of October, 1783.

The appellant afterwards commenced an action againſt the appellee, in the county court of Henrico the declaration contained three counts, the firſt, upon a promiſe to pay 600 pounds for lots and tenements, lying in York town, ſold by the appellant to the appellee; the ſecond, upon a promiſe for lots and improvements, lying in York town, ſold by the appellant to the appellee, to pay ſo much money as they were worth, with an averment that they were worth 600 pounds; and the third, upon a promiſe to pay ſix hundred pounds for ſo much money expended by the appellant for the uſe of the appellee.

The appellee pleaded that he did not aſſume, upon which the iſſue was joined, the appellant conſenting that the other party might give any ſpecial matter in evidence.

On trial of the iſſue, the appellants counſil offered in evidence to the jury the paper before mentioned, dated the 10 day of february, 1782, ſubſcribed by the three valuers. the counſil of the other party excepted to it, and the court would not allow it to be delivered to the jury. notwithſtanding which, the jury took the paper with them, when they were ſent out of court to conſult of their verdict.

The jury found a verdict for the appellant, aſſeſſing his damages to 374l. 1s. 7½

The counſil for the appellee moved for a new trial, ſhewing, for cauſe, that the jury, without permiſſion of the court, carried that paper with them. the motion was rejected, becauſe, as is ſtated in the bill of exceptions ſigned by one of the judges, *the three men who ſubſcribed the paper were preſent in court, to give full teſtimony of the import of the ſame, which paper having been read to the court, after the return of the verdict, appeared to be a certificate ſigned by three of the witneſſes in the cauſe, and not to vary from their viva voce teſtimony:* and this rejection of the motion for the new trial, and, in conſequence, the judgement for the damages, upon an appeal to the general court, were affirmed the 22 day of june, 1789.

The appellee, on the 16 day of march, 1791, filed a bill in equity againſt the appellant, in the county court of York, ſtating, in addition to the matters herein before mentioned, and ſeveral others omitted here, becauſe now thought unimportant, that, on trial of the iſſue before the county court of Henrico, he produced witneſſes to contradict the witneſſes on behalf of the appellant, or rather to invalidate their teſtimony, by proving the valuers to have acknowledged, that they made their eſtimate in current money, and had not ſpecie in their contemplation at that time; but that the court would not ſuffer the witneſſes of the appellee to be examined; and alſo ſtating that the valuation of ſeptember, 1778, which was required by the appellees counſil to be produced, was denied by the appellants counſil to be in exiſtence; and praying to be relieved againſt the judgement, by which the appellee was condemned to pay the damages aſſeſſed by the jury, which,

aggravated

aggravated with the additional damages upon affirmance, and with the coſts, amount to 550l. 12s. 1 ¾.

The appellant, by anſwer, declared, that the trial before Henrico court was fair, as he believes, admitted a valuation in ſeptember, 1778, but ſaid how or in what manner that valuation was expreſſed he did not recollect; did not ſay any thing in anſwer to the allegation of the bill, repeated interrogatorialy, concerning the ſuppreſſion of the valuation in 1778, unleſs it be by theſe words, *had they (the valuers) even pretended to make their certificate of* 1782 *the foundation of this reſpondents clame, which is not the fact, the real valuation muſt have been brought forth*, by which words the ſuppreſſion is underſtood to be admitted; that he acquieſced in the verdict, feeling himſelf bound by it, although it gave him leſs than he thought himſelf intitled to; contended that no court hath power to interpoſe, and wreſt from him the benefit of his verdict; eſpecialy as the court before whom the trial was ſhewed their approbation of the verdict by denying the motion for a new trial, conceived the reaſon of rejecting teſtimony on behalf of the appellee, if it were rejected, to have been that the teſtimony was inadmiſſible; and, with reſpect to the proof that the valuers had ſaid they eſtimated the tenement in current money, the appellant obſerved the contrary was never contended; that the valuers thought the property worth ſo much ſpecie, and rated the current money at par with ſpecie, which was the only matter inſiſted on.

The appellee replied to the anſwer, and ſeveral witneſſes were examined.

Samuel Eddins depoſed, that doctor Mathew Pope, being charged by Wyld with injuſtice in ſigning the paper of the 10 day of february, 1782, the ſubſtance of which was then rehearſed, declared it to be wrong, and that neither he nor thoſe with whom he was joined in the valuation of 1778 thought of ſpecie at that time; and that when he ſigned that paper his intention was that Wyld ſhould make the ſecond payment of 500 pounds equal to the firſt, and ſaid that it would come to one hundred pounds ſpecie, according to the ſcale of depretiation, and that mr Ambler had a right to no more. the ſame witneſs depoſed, that doctor Corbin Griffin, whom Wyld charged in like manner with injuſtice, denied his ſignature to a ſecond valuation or certificate, but being reminded that his ſignature was atteſted by Hugh Nelſon, acknowledged he had ſigned a paper preſented by mr Nelſon in behalf of mr Ambler, and ſaid, if it contained a word of ſpecie, it was wrong and an overſight, for neither he nor the other two thought of ſpecie in the valuation of 1778, adding he was confident the houſes would not ſell for that money in ſpecie the ſame witneſs depoſed, that he had heard thoſe men declare, ſince the trial in Henrico court, that they did not value the houſes in ſpecie but in current money.

Thomas Gibbs depoſed that he heard doctor Griffin declare that the houſes were not valued in ſpecie, and that the valuers at that time dared not to have mentioned ſpecie in their valuation, paper money being the legal circulating medium.

Laurence Gibbons depoſed that he had often heard the valuers of the houſes, ſince the trial in Henrico court, declare, that they did not value them in ſpecie.

Corbin Griffin, to this interrogatory, propounded to him by the appellant, *did you not, at the requeſt of ſaid Wyld and ſaid Ambler, value the houſes and tenements as aforeſaid, in auguſt,* 1778, *for the ſum of one thouſand pounds, good money?* made anſwer in theſe terms:

Some time in the autumn of 1778, *i was appointed with doctor Mathew Pope and mr William Reynolds to value the houſes aforeſaid, and their value was fixed at one thouſand pounds:* and

To this interrogatory, *what was intended by the term, 'good money;' did you ſuppoſe the houses and tenements worth one thousand pounds at the depretiation*

tion of five for one, or of the value of one thousand pounds in specie; or the value thereof in paper currency according to the scale of depretiation? made anſwer in theſe terms:

I knew of no depretiation, nor of any difference between paper and specie.

William Reynolds, to the former of the two interrogatories mentioned to have been propounded to Corbin Griffin, made anſwer in theſe terms:

I was appointed one of three to value the houses, and fixed them at one thousand pounds, current money of Virginia; and to the other of thoſe interrogatories, made anſwer in theſe terms:

I knew of no depretiation at the time, but valued them in the money then in circulation.

Several witneſſes depoſed that the houſes, which had been uſed for barracks, when Wyld bought them, were ſo ruinous as not to be then tenentable, without being repaired. and one witneſs depoſed, that in 1784, before which time the houſes appear to have been repaired by Wyld, at conſiderable expenſe, when the houſes and lots were expoſed to public ſale, at the price of five hundred pounds, no bidder offered more.

And Thomas Gibbs depoſed, that the court of Henrico county would not permit him and two other witneſſes to be examined in order to invalidate the teſtimony of the witneſſes who were examined for the appellant.

The county court of York decreed the appellant to pay to the appellee 395l. 11s. 7 ½, with intereſt thereon, to be computed, after the rate of five per centum per annum, from the 10 day of june, 1789, till payment, and the coſts.

The high court of chancery, before which the cauſe was brought by appeal, the 28 day of ſeptember, 1793, delivered this

OPINION AND DECREE,

That, if the appellee were injured by the verdict of the jury, and judgement of the county court of Henrico ſtated in his bill, the only mode by which he could regularly obtain redreſs was a new trial of the iſſue between the parties in the action at common law, and conſequently that the decree of the county court of York, which ſeems to have thought the principal money recovered by that decree ſo much more than the appellant ought to have received from the appellee, is erroneous; and therefore this court doth reverſe the ſaid decree. but this court ſuppoſeth that if certain facts now appearing by the teſtimony in this cauſe had been known to the jury who tried the iſſue, or to the court who rejected the motion for a new trial, either the former might not have found ſuch a verdict, or the other, if they had found it, might have awarded another trial: and is of opinion, that, although the county court of York perhaps had no power to award ſuch new trial, this court retaining the cauſe may now procede in it, as if it had been originaly commenced here; and therefore this court doth direct the ſaid iſſue to be tried again before the ſaid county court of Henrico, and the verdict thereupon to be certified to this court. and the appellee here in court doth conſent, without which conſent the new trial would not have been awarded, that if the damages which ſhall be aſſeſſed upon ſuch trial excede the damages aſſeſſed on the former trial, which may be the event, this court may decree him to pay the exceſs and award execution againſt him for the ſame.

The facts unknown to the court of Henrico, and to the jury who tried the iſſue, are

That the men who ſigned the paper, dated the 10 day of february, 1782, ſigned it at the requeſt of one party, without giving notice of it to the other party, and when they were not together, and are proved by three witneſſes, ſince the trial, to have contradicted the matter affirmed by them in that paper; and that two of them (the other being dead) who were examined on oath in this

this cauſe, did not give a categorical anſwer to an interrogatory propounded explicitly to extort from them ſuch an anſwer, to the only material queſtion in controverſy.

The appellants counſil objected, that the jury's having taken with them the paper of february, 1782, ought not now to be adjudged by this court a good cauſe for another trial for two reaſons, one, that the ſame matter had been determined by another court, of competent juriſdiction, not to be a good cauſe for a new trial. which adjudication this court hath no power to correct. which reaſon perhaps would not have been mentioned, becauſe it ought not to have been mentioned, if the objector had recollected that the bill of exceptions ſtated the viva voce teſtimony of the valuers not to have varied from the paper. whence is inferred that the court would have awarded a new trial, if they had known the facts now diſcloſed, that is, the manner of procuring that paper, and the uſe which was made of it, and that the viva voce teſtimony and paper vary from what thoſe men afterwards confeſſed to be the truth.

The other reaſon mentioned by the counſil for the appellant for diſregarding the jury's taking the paper, is that it did not govern them in their verdict. for if it had governed them, they would have aſſeſſed more damages. which reaſon was not thought ſatisfactory. that all the jurors were not governed by the paper with the concurrent teſtimony of the witneſſes who ſigned it was indeed manifeſt. but that ſome of them were governed by it, and that it had influence on the aſſeſſment, is probable; and if it had influence, that is conceived to be good cauſe to award another trial.

How the jury formed their eſtimate of the damages can only be conjectured. the admiſſion into that eſtimate of fractional quantities, whoſe denominators were ſo low as farthings, ſhews the eſtimate to have been the reſult of a calculation ſomewhat complex. If they allowed intereſt upon the money remaining due to the appellant as they are believed to have done, the principal, with which they charged the apppellant, was about 292l. 17s. 6d. for the ſum of that and the intereſt from ſeptember, 1779, to the day of finding the verdict, being 81l. 4s. 1 $\frac{1}{2}$ is equal to the 374l. 1s. 7$\frac{1}{2}$ aſſeſſed. the jury, differing in their eſtimates according to a mode of adjuſtment ſaid to be frequently practiſed where unanimity is deſperate, are ſuppoſed to have agreed, that, the ſum of their eſtimates added together being divided by their own number, the quotient ſhould be the meaſure of their damages.

If five jurors had been guided by the paper of february, 1782, and three by the ſtatutory ſcale of depretiation, and the other four, neglecting both, had fixed on what they thought the true value of the houſes and lots, the calculation might have been made in this manner: 5 x 500 + 3 x 100 + 4 x 1781. 12s. 6d. their ſum would be 3514l. 10s. and this being divided by 12, the quotient would be 292l. 17s. 6d.

This although merely conjectural ſhews a probability at leaſt, that ſome of the jurors were governed by that paper; and a probability that they were governed by ſuch a paper and its corroborative evidence, as this laſt now appeareth, is deemed a good cauſe for a new trial.

The appellee ſtated in his bill other matters, of which notice was not taken in the opinion or decree of the high court of chancery, but which perhaps deſerved notice.

One was, that, on trial of the iſſue in Henrico court, the valuation in ſeptember, 1778, was required by the appellees counſil to be produced, but was denied by the appellants counſil to be in exiſtence. the only part of the appellants anſwer, which is reſponſive to this allegation, if any part be reſponſive to it, ſeems to admit implicitly that the paper could have been produced, but that it was not produced, by the appellant. when this matter was mentioned in the high court of chancery, the appellants counſil obſerved that the appellee had the valuation of ſeptember, 1778, for it appears by the tranſcript of procedings before the county court of York to have been one of

his exhibits. but this doth not prove that he had it at the trial in Henrico court, which was in april, 1785.

The other matter ſtated in the bill, and unnoticed in the opinion or decree, is that the witneſſes offered by the appellees counſil to prove that Griffin, Pope and Reynolds had invariably acknowledged, that they made the valuation in currency, and that they never thought of ſpecie at that time, were rejected by the court of Henrico: and the fact, which is neither confeſſed nor denied by the appellant, is proved by a witneſs.

BETWEEN
RICHARD WOODS, *plaintiff*,
AND
PHILIP MACRAE, *defendent*.

SOME of the jurors, on trial of the iſſue in an action at common law, brought by the defendent againſt the plaintiff, appearing by their own examinations, *(a)* taken in this cauſe, to have believed the defendent intitled to one half of a lottery ticket, and upon that ſuppoſition to have calculated the damages aſſeſſed for him, although that he was intitled only to one fourth, if to any, part of the ticket, appeared manifeſtly from abundant teſtimony; the court, the 8 day of march, 1794, ordered another trial of the iſſue.

BETWEEN
DANIEL LAWRENCE HYLTON. *plaintiff*,
AND
ADAM HUNTER and Abner Vernon executors of James Hunter, *defendents*.

JOHN DIXON *(b)* of Jamaica, 30 july, 1762, had executed 15 bonds for payment of money to James Hunter, at ſucceſſive yearly payments, with intereſt at ſix per cent from the days of payment. and for ſecuring principal and intereſt had executed a mortgage of an eſtate called Salem in Jamaica. the bonds and mortgage were depoſited with Hibbert and Jackſon reſiding in Jamaica attorneys of James Hunter. the principal and intereſt due by the 1, 2, 3, 4 and 5, bonds had been received by James Hunter. on part of the principal or intereſt due by the other 10 bonds was ever paid to the executors of James Hunter; but Hibbert and Jackſon had received the whole of the principal money and intereſt due by the 6 bond, and part of the principal money and intereſt due by the 7 bond, which they retained, and on which R. Hibbert, their repreſentative, refuſeth to account for intereſt.

25 day of april, 1785, Adam Hunter the heir, reſiduary legatee, and one of the executors, of James Hunter entered into the following agreement with Daniel L Hylton:

'Memorandum of agreement with Daniel L Hylton, eſquire. the ſub-'ſcriber, executor to the will of James Hunter deceaſed, bargaineth to aſ-'ſign over to the ſaid Hylton all his right and title in nine bonds, granted 'by John Dixon, eſquire, of the iſland of Jamaica, for the ſums under 'mentioned, viz.

				Jamaica currency
'I bond, dated	30 july, 1762,	payable 1 auguſt,	1775, for	700
'I ditto	ditto	1 auguſt,	1776	700
'I ditto	ditto	1 auguſt,	1777	700
'I ditto	ditto	1 auguſt,	1778	700
				'I ditto

(a) See the case between Cochran and Street ante.
(b) In one of the exhibits called James Dickſon.

' 1 ditto	ditto	1 auguſt, 1779	700
' 1 ditto	ditto	1 auguſt, 1780	700
' 1 ditto	ditto	1 auguſt, 1781	700
' 1 ditto	ditto	1 auguſt, 1782	700
' 1 ditto	ditto	1 auguſt, 1783	1747 1 3

' alſo his right in a mortgage, granted to James Hunter, by the ſaid Dixon, ' on an eſtate, called Salem eſtate, in Hanover, formerly the property of ' John Campbell, eſquire, in ſaid iſland, as collateral ſecurity for payment ' of ſaid bonds. in conſideration whereof, the ſaid Hylton agrees to pay the ' ſaid Hunter the ſum of 5500 pounds, current money of Virginia, in gold ' and ſilver, at the rates now current, to ſay, gunieas, &c; at the following ' terms of payment, viz: 1833l. 6s. 8d. ſix months after the date of aſſignment; ' 1833l. 6s. 8d. fifteen months after date, and 1833l. 6s. 8d. in twenty ſeven ' months after date; for which reſpective ſums the ſaid Hylton ſhall execute ' bonds, with ſuch ſecurity as the ſaid Hunter ſhall approve. Adam ' Hunter. Daniel L Hylton. Richmond 25 april, 1785. N B. in caſe ' any part of the within mentioned bonds have been paid to meſſieurs Hib- ' berts and Jackſon, of Kingſton, the attornies of the ſaid James Hunter, ' the ſaid ſums to be refunded to the ſaid Hylton. Adam Hunter. Daniel ' L Hylton. witneſſeth in preſence of W Fouſhee.'

27 day of april, 1785, Adam Hunter and Abner Vernon, the two executors of James Hunter, executed a bond, in the penalty of 20000 pounds, of current money of Virginia, payable to Daniel L Hylton and to William Hylton, in Jamaica.

To this bond, after a recital, ' that John Dixon, on the 30 day of july, ' 1762, had executed 14 ſeveral bonds to James Hunter, 9 of which ſtill ' remain due and unpaid, and amounted, in the whole, to 14794l. 2s. 6d. ' Jamaica currency, to be diſcharged by payment of 7347l. 1s. 3d. at ſeveral ' days of payment, as would fully appear by reference to the bonds, and all ' which bonds, together with the intereſt accruing thereon, ſtill remained ' due and unpaid;—that John Dixon had executed to James Hunter, as ' a further ſecurity for payment of the moneys due by the bonds, a mortgage ' for the eſtate of John Dixon, called Salem, in Hanover, in Jamaica, for- ' merly the property of John Hodges Campbell;—and that it had been ' agreed between Adam Hunter and Abner Vernon, on the one part, and ' Daniel L Hylton and William Hylton, on the other part, that they, ' Adam Hunter and Abner Vernon, would, by their attorney to be made by ' them for that purpoſe in Jamaica, for a valuable conſideration, which they ' acknowledged themſelves to have received, transfer and aſſign to Daniel ' L Hylton and William Hylton, as ſoon as their attorney ſhould be re- ' quired ſo do to, all the before mentioned obligations, with the intereſt ' which had accrued thereon, as alſo the mortgage aforementioned,' was annexed a condition, ' that if Adam Hunter and Abner Vernon ſhould com- ' ply with the abovementioned agreement, then the bond ſhould be void.'

21 day of june, 1785, Daniel L Hylton executed a bond, in the penalty of 20000 pounds, of current money of Virginia, payable to Adam Hunter and Abner Vernon.

To this bond, after a recital, ' that Adam Hunter had ſold to Daniel L ' Hylton a debt, which was due from John Dixon, of Jamaica, on account ' of John Campbell formerly of Spotſylvania, in Virginia, and, to ſecure ' the payment of that debt, had executed, 30 day of july, 1762, 14 bonds, ' 5 of which had been paid to James Hunter, the other 9 amounting to ' 7317ls. 11s. 2d. of Jamaica currency, and that Adam Hunter, with con- ' ſent of his co executor, had, for the conſideration of 5500 pounds, of ' current money of Virginia, to Adam Hunter paid by Daniel L Hylton, ' made the ſale to him;—and that, as there was a riſque to run in collecting

the

'the money due by the 9 bonds, with the intereſt thereon, Daniel L Hyl-
'ton had agreed to have no recourſe againſt the eſtate of James Hunter, or
'againſt the perſons or eſtates of his executors,' was annexed a condition,
'that, if Daniel L Hylton ſhould abide by that agreement, and ſhould
'not reſort to the eſtate of James Hunter, in caſe any part or the whole of
'the 9 bonds ſhould not be collected, nor reſort to Adam Hunter and Ab-
'ner Vernon, in caſe of ſuch failure, then the bond ſhould be void.'

On the day when this later bond was executed, the following writen ſtatement was ſigned by Adam Hunter and Abner Vernon:

Richmond, june 21, 1785.

'Statement of nine bonds from John Dixon, of the iſland of Jamaica, to
'James Hunter, eſquire, deceaſed, ſold meſſieurs William Hylton and Da-
'niel L Hylton, viz.

'1775, auguſt 1.	6 bond of this date	700 pounds	
'1776 auguſt 1	9 years and 8 months intereſt on ditto	406	1106
	7 bond of this date	700	
'1777 auguſt 1	8 years and 8 months intereſt on ditto	364	1064
	8 bond of this date	700	
'1778 auguſt 1	7 years and 8 months intereſt 6 per cent	322	1022
	9 bond of this date	700	
'1779 auguſt 1	6 years and 8 months intereſt	280	980
	10 bond of this date	700	
'1780 auguſt 1	5 years and 8 months intereſt	238	938
	11 bond of this date	700	
'1781 auguſt 1	4 years and 8 months intereſt	196	896
	12 bond of this date	700	
'1782 auguſt 1	3 years and 8 months intereſt	154	854
	13 bond of this date	700	
'1783 auguſt 1	2 years and 8 months intereſt	112	812
	14 bond of this date	1717 11 2	
	1 year and 8 months intereſt	171 15 0	
			1889 6 2
		Jamaica currency	9561 6 2

witneſſes
'JOHN M'KEAND. } ADAM HUNTER, }
'JAMES BUCHANAN.' } ABNER VERNON, } executors.

1 day of auguſt, 1785, Daniel L Hylton, with Francis Eppes and John Tayloe Griffin, his ſureties, executed three bonds, each in the penalty of 3666l. 13s. 4d. with conditions for payment of 1833l. 6s. 8d. of current money of Virginia—one the 16 day of february, 1786, another 16 day of november, 1786, and the third 16 day of november, 1787.

William Hylton, then in Jamaica, had demanded from the forenamed R Hibbert intereſt for the money before mentioned to have been received by thoſe whom he repreſented; to which demand he gave this written anſwer:
'Kingſton, 19 november, 1785, i incloſe you a ſketch of the account, ba-
'lance 920l. 14s. 11d. which as i have never made uſe of it, and have been
'conſtantly ready to pay it, i ſhall not allow one ſix pence intereſt on it,
'even if no legal repreſentative appears for twenty years to come, ſo far

'from

'from it, i think an allowance ought to be made to me, for the riſk i have 'run, in preſerving them from five hurricanes, and for ſuch a length of 'time. our ſtate of bonds muſt be right, becauſe it agrees with the bonds 'themſelves, and mortgage. no. 7 has due upon it 5061 14s. with intereſt 'from 26 july, 1777, and no. 8 to no. 14 are for 700 pounds each, and 'are intire, as is no. 15, which is for 1109l. 17s. 7d.

'copy of account.

'The eſtate of James Dickſon eſquire to James Hunter of Virginia dr.

'1777 july 26	to balance of bond no. 7 due this date	506	14	
	intereſt from this date to 1 april 1784	203	2	
'auguſt 1	to principal of bond no. 8 due this day	700	0	
	intereſt from this date to 1 april 1784	280	0	
	coſts of ſuit		4 16	5
'1778 'auguſt 1	to principal of bond no. 9 due this day	700	0	
	intereſt from this date to 1 april 84	238	0	
	coſts of ſuit		4 16	6
'1779 'auguſt 1	to principal of bond no. 10 due this day	700	0	0
	intereſt from this date to april 84	196		
	coſts of ſuit		5 14	
'1780 'auguſt 1	to principal of bond no. 11 due this day	700		
	intereſt from this date to april 84	154		
	coſts of ſuit		5 14	
'1781 'auguſt 1	to principal of bond no. 12 due this day	700		
	intereſt from this day to april 1784	112		
'1782 'auguſt 1	principal due this day no. 13	700		
	intereſt from this day to april 1784	70		
'1783 'auguſt 1	principal no. 14 due this day	700		
	intereſt from this day to april 1784	28		
'1784 'auguſt 1	principal no. 15 due this day	1109	17	7
		(b) 7815	14	7

Adam Hunter, to whom the ſtate of the account immediately preceding had been communicated, on the 27 of february, 1787. conſented to make a deduction for the ſuppoſed difference between the money due by the bonds, aſſigned to Daniel L Hylton and William Hylton, and the money realy due from the obligor in thoſe bonds, out of the money to be paid for them by the Hyltons; which difference was erroneouſly ſtated, by one to whom the parties refered the matter, to be 1055 pounds, current money of Virginia; and Adam Hunter accordingly indorſed credit for 5271. 10s. on the ſecond bond, and the ſame on the third bond, given by the Hyltons.

Adam Hunter, having diſcovered the error, mentioned it in a letter to D L Hylton, who, in anſwer thereto, by letter, dated 18 of ſeptember, 1788, aſſured Adam Hunter every miſtake ſhould to rectified and the correction of this miſtake was refered by the parties no leſs than three times, as if it had been a queſtion of difficulty, firſt to Henry Banks and William Hay, then to Jerman Baker and John Marſhall, and laſtly to George Weir.

After this affair was adjuſted, the executors agreed with D L Hylton not to commence ſuits againſt him, for ſome time, on pretenſe that the aſſignment of the bonds and mortgage, and the power to collect the money due thereby, were inſufficient.

A few days before this time expired as to one of D L Hyltons bonds in the county court of Henrico ſuits were commenced, upon all of them, againſt

(b) *here is a miſcaſting.*

againſt him, who ſuffered judgements to paſs, without claming the deduction for the 1055 pounds.

Afterwards, in the ſame court in chancery, he brought a bill for an injunction, which was granted. in anſwer to that bill, the executors of James Hunter admited to be juſt the clame for a deduction, ſuch as, at that time, they thought right. a motion was made to diſſolve the injunction, which was nevertheleſs continued for the whole.

The cauſe being afterwards removed, by certiorari, into the high court of chancery, the defendents, by a ſuppletory anſwer, retracted their conſent in the former anſwer, for reaſons which will be ſtated in the following

OPINION AND DECREE:

'This cauſe came, on the laſt term, and again this 25 day of may, in the year of our lord 1793, to be heard on the bill, anſwers, exhibits. examinations of witneſſes, and report of the commiſſioner, perſuant to the order of the 28 day of may, in the year 1791, with exceptions to the report by the plaintiff, and was argued by counſil: on conſideration whereof the court doth now deliver its opinion, under the articles controverted between the parties, as followeth:

ARTICLE I.

A deduction of 1055 pounds from the 5500 pounds, to pay which, at three inſtallments, the plaintiff had given his bonds; for which deduction he clameth a credit, alleging that the Jamaica debts aſſigned did not amount to ſo much money as the parties ſuppoſed at the time of the agreement; and excepteth to the commiſſioners report for diſallowing the clame, the plaintiff in the referrences, among the exhibits, firſt to Henry Banks and William Hay, and afterwards to Jerman Baker and John Marſhall, ſuppoſed the ſum of the Jamaica debts, agreed to be aſſigned, to be 9561l. 6s. 2d. and the deficiency to be 779l. 8s. 5d. and in the reference to George Weir, alſo among the exhibits, ſuppoſed the ſum of the debts, agreed to be aſſigned, to be the ſame, but the deficiency to be 821l. 6s. 8d.

Which ever it was, the deduction could not be 1055 pounds. if the former were the deficiency, 9561l. 6s. 2d. : 5500l. :: 779l. 8s. 5d. : 448l. 7s. if the later were the deficiency, 9561l. 6s. 2d. : 5500l. :: 821l. 6s. 8d. : 472l 9s. 2d. and the deficiency ought to have been 1833 pounds, to intitle the plaintiff to the 1055 pounds.

Yet he perſiſteth in the clame, and would juſtify it, in his remarks on the commiſſioners report, by propounding the queſtion, and giving to it the anſwer, following: 'if 5500 pounds is to produce 9596 pounds, what muſt 821 pounds produce? anſwer, 'Jamaica currency 1055 pounds,' ſaith he; ſuppoſing the deficiency now to be 9596, inſtead of 9561l. 6s. 2d. on which is obſerved: firſt, the four terms in the queſtion and anſwer are not, as they ought to be, geometrical proportionals; for the product of the extreme terms is not equal to the product of the mean terms. ſecondly, the fourth term, the deduction, is Jamaica currency; whereas the deduction clamed is Virginia currency. thirdly, the firſt term is Virginia currency, and the others are Jamaica currency; whereas the firſt ought to have been of the ſame denomination with the third. fourthly, if the queſtion propounded by the plaintiff be reſolved by the problem, by which queſtions of that kind are uſually reſolved, that is, by dividing the product of the ſecond and third terms by the firſt term, and if the deficiency had been more than it was ſuppoſed to be, the aſſignors would have been bound to make good more than 9596. for example: if the deficiency had been 1000, inſtead of 821, the defendents muſt have made good 10340 : for 5500 : 9596 :: 1000 : 1744, and 9596—1000 + 1744=10340 if the deficiency had been 2000, inſtead of 821, the defendents muſt have made good 11085, inſtead of 9596:

and

and ſo on; the money to be made good increaſing as the ſum of the debts aſſigned decreaſed.

But enough hath been ſaid on the ratio, by which the deduction ought to be adjuſted, and to have ſaid any thing of it was unneceſſary, if the opinion, the foundation of which ſhall now be explaned, namely, that the plaintiff is not intitled to any deduction, be correct. every part of the agreement made the 25 day of April 1785, which Adam Hunter had bound himſelf to perform, was effectually performed by him. firſt, he aſſigned his right and title in John Dixon's nine bonds, and alſo in one other bond, which, although not enumerated in the liſt, which forms part of that agreement, was transferred, by aſſignment of the mortgage, to Daniel Laurence Hylton; ſecondly, the ſum of the principal moneys, which had been due by the ten bonds, exceeded the 7347l. 1s. 3d. which were ſuppoſed by the agreement to be due on the nine bonds; and thirdly, the money due upon the firſt of the nine bonds, that is number 6, and part of the money due upon the ſecond of the nine bonds, that is number 7, which had been paid to Hibbert and Jackſon, the attorneys of James Hunter, was refunded to D. L. Hylton, that is, was paid for his uſe, and by his authority, to his brother William Hylton.

But the repreſentative of Hibbert and Jackſon refuſeth to account for intereſt of the money ſo received by them—for this intereſt the plaintiff clames the credit, which he would have deducted from the 5500 pounds, the principal money due by his own bonds.

He muſt be intitled to it, if intitled to it at all, either by the agreement of 25 of april, 1785, or ſome other agreement poſterior to it.

I. Not by the agreement of 25 of april, 1785,—by that Adam Hunter bargained to aſſign his right and title in certain bonds: if he had a right and title to intereſt upon the money which had been due by thoſe bonds, or any of them, the plaintiff, by the aſſignment had the ſame right and title; and therefore might have recovered the intereſt from thoſe who were accountable for it. if Adam Hunter had not a right and title to intereſt on the money, which had been received by Hibbert and Jackſon, the attorneys of James Hunter, the plaintiff had no right or title to the intereſt; becauſe by the agreement it was not bargained to be aſſigned to him; but Adam Hunter was bound by the agreement only that, in caſe any part of the bonds had been paid to Hibbert and Jackſon, the ſums ſhould be refunded to Daniel L. Hylton; not that they ſhould be refunded with intereſt: ſo that, by the agreement of 25 of april, 1785, the plaintiff is not intitled to the deduction clamed.

II. Is he intitled to it by any poſterior agreement?

1. In the condition of the bond, executed by Hunters executors, 27 of april, 1785, obliging themſelves to make the aſſignment, is contained a recital, that of John Dixons bonds to James Hunter nine, amounting to 7347l. 1s 3d with the intereſt accruing thereon, ſtill remained due and unpaid. theſe words, 'with the intereſt ſtill remain due and unpaid,' are underſtood by the plaintiff to refer, as well to the intereſt on the bonds, of which one had been wholy, and the other partly, diſcharged by payments to Hibbert and Jackſon, as to the intereſt on the other bonds. but this expoſition is rejected, becauſe it is inconſiſtent with the agreement, made two days before; an agreement which doth not appear to have been ſet aſide by the parties, but, on the contrary, is ſuppoſed to be the agreement recited in the ſame condition; and to be the agreement in execution of which this bond was granted: and therefore to be ſtill in force.

The inconſiſtency of the expoſition is manifeſt; for the agreement ſuppoſed part of the bonds might have been paid to Hibbert and Jackſon, becauſe it had, in that event, provided that the ſums, which had been paid to Hibbert and Jackſon, ſhould be refunded to Daniel L. Hyton, not that more than the ſums paid to Hibbert and Jackſon ſhould be accounted for to Daniel Laurence Hylton.

The

The words, 'all which bonds, together with the intereſt accruing 'thereon ſtill remain due and unpaid,' in the recital, therefore, ought to refer to the agreement, and, congruouſly with it, to be underſtood thus: all which bonds, together with the intereſt accruing thereon, ſtill remain due and unpaid, notwithſtanding any act of the obligors; and if, by act of Hibbert and Jackſon, any of the bonds had been paid, in that caſe, the ſums paid to them ſhould be refunded.

The plaintiff, in his remarks, ſaith 'in caſe Hibbert had received the 'whole, and witheld or failed in any reſpect to pay it to the plaintiff, the 'defendents were obliged to make it good.' if by, 'the defendents were ob-'liged to make it good,' be meaned the defendents muſt have refunded, or were obliged to make good, the whole which Hibbert had received, the propoſition is admited to be true; but the plaintiffs inference, that the defendents muſt not only have refunded what Hibbert had received, but have paid intereſt for it, is denied to be deducible from that propoſition.

2. By a ſtatement, 21 june, 1785, to which are the ſignatures of Adam Hunter and Abner Vernon, the nine bonds with intereſt are ſuppoſed to amount to 9561l. 6s. 2d. to this ſtatement, as well as to another paper hereafter to be mentioned, the plaintiff is believed to allude, where, among the queſtions, preliminary to his remarks upon the commiſſioners report, he propounded the following: 'have the defendents not covenanted and war-'ranted to make a title to a certain intereſt, ſpecifying a fixed ſum to be 'due therein, at the time of agreement, with a condition annexed to re-'fund whatever was ſhort of this ſum?' to which queſtion the anſwers are: firſt, the ſtatement containeth no expreſs terms by which the defendents covenanted to do any thing, or warranted any thing; and ſeemeth deſigned, not to make a new agreement, as to the amount of the debts aſſigned, but only to give the plaintiff the beſt account, which the books of the defendents teſtator enabled them to give, of the bonds, the money due by which he or they had not received. and ſecondly, the warranty, which might be perhaps implied in the term, 'ſold,' in the ſtatement, if a formal agreement had not been made, ought not to be further obligatory on the defendents than the agreement of the 25 of april preceding, the extent of which hath been defined: becauſe this very ſale was contracted by that agreement; becauſe the ſame agreement is mentioned in the condition of the plaintiffs bond to the defendents, of the ſame date with the ſtatement, and appeareth thereby to have been conſidered by the parties as a pact not invalidated, nor altered; and becauſe, by the terms of the agreement recited in the condition of that bond, of the 21 of june, 1785, compared with the agreement of 25 of april, the defendents were liberated from obligation to make good any deficiency, refund any money, or allow any deduction, more than the money which Hibbert and Jackſon had received, and that money, not with intereſt.

3. A paper, introduced by the plaintiffs counſil at the hearing laſt term, called an extract from the record of an aſſignment, enrolled in the ſecretarys office of Jamaica, ſeemed relied upon to prove, that 'the defendents had cove-'nanted and warranted a title to a certain intereſt, ſpecifying a fixed ſum to 'be due on the bonds, at the time of aſſignment.' this paper is not authenticated, and therefore not allowed to be a proper exhibit; but, if it were a proper exhibit, it would not prove the money, actualy aſſigned, to be ſo much as the defendents admit it to be.

4. The endorſements on the plaintiffs ſecond and third bonds, by Adam Hunter, acknowledging the plaintiff to be a creditor on each bond for 527l. 10s. or one half of the deduction of 1055, clamed by the plaintiff, are relied upon as proofs of an agreement to allow that deduction. but that agreement ought not to bind the defendents; becauſe, at that time, they did not know that ten bonds, inſtead of nine, by the aſſignment of the mortgage had been

transfered

transfered to the plaintiff; and becauſe, if conſent, yielded under a miſapprehenſion, were ordinarily binding, this caſe ſhould be an exception to the rule, the plaintiff in his letter, to Adam Hunter, dated the 18th day of ſeptember, 1788, having aſſured him, 'that every miſtake ſhould be 'rectified.' and

5. The defendents firſt anſwer is alſo relied upon by the plaintiff to prove the agreement to make a deduction for ſome deficiency. but the defendents ought not to be bound by their conceſſion in that anſwer, for the reaſons ſtated in the next preceding ſection; eſpecially the defendents having retracted that conceſſion in a ſuppletory anſwer.

ARTICLE II.

The defendents clame a credit for 62l. 16s. 4d. of current money of Jamaica, the money due by the ten bonds, whereof the plaintiff had the benefit, by ſo much exceeding the amount of the money, ſuppoſed to be due by the nine bonds, enumerated in the agreement of the 25 april, 1785. and if the foregoing opinion be correct, the defendents ſeem intitled undoubtedly to this credit, reduced to Virginia current money, by the ratio of that agreement, with intereſt

ARTICLE III.

Exception by the plaintiff to the commencement of intereſt on his bonds, at periods too early, that is, at the times when, by the conditions of the bonds, the principal moneys were payable. the legal title to intereſt generaly commenceth when the time, limited by the contract, for payment of the principal expireth. by the agreement of the 25 of april, 1785, the terms of payment were for one third of the 5500 pounds, ſix months, for another third, fifteen months, and for the remaining third, twenty ſeven months, after the date of aſſignment. the defendents, as appeareth by a recital in the condition of their bond to the plaintiff, executed two days after, had agreed that they would, by their attorney, to be made by them for that purpoſe in Jamaica, transfer and aſſign to the plaintiff and William Hylton the bonds and mortgage, ſo ſoon as their attorney ſhould be required ſo to do. the day when the aſſignment was made doth not appear. but the plaintiff in his bill admitteth it to have been made before the 16 day of auguſt, 1785; and probably the buſineſs was done the firſt day of that month, becauſe, on this day, the plaintiff executed his three bonds, for payment of the conſideration money by inſtalments, at about a fortnight more than the before limited terms of payment. to ſhew why intereſt ſhould not be computed from thoſe times, the plaintiffs objections urged before the commiſſioner, and contained in the remarks upon his report, may be reſolved into two. the one, that the powers given by the defendents to their attorney in Jamaica were defective; and the firſt aſſignment ineffectual; to which, either of two ſeveral anſwers is thought ſatisfactory: firſt, the inſtruments, committing the powers, and evidencing the aſſignment, are not exhibited, and therefore the court cannot decide whether they were exceptionable, or not; and to ſhew them to have been exceptionable, otherwiſe than by his own word, was incumbent on the plaintiff. ſecondly, the plaintiff, having accepted the inſtruments, and having executed bonds for payment of the conſideration money, by which the defendents legal title to intereſt became perfect; the defendents having done every thing required of them, towards perfecting the plaintiffs right to the money due in Jamaica; and the plaintiff not appearing to have ſuſtained any, or but inconſiderable, damage by the pretended defect of powers, or inſufficiency of the aſſignment; to ſuſpend the defendents right to the whole intereſt of the Virginia money ſeems aſked with no grace, in a court of equity, by the plaintiff, who, during that whole time, hath been

receiving intereſt, at ſix per centum, for all the Jamaica money to which he was intitled;—a court of equity, with whoſe principles ſuch a rigour ſemeth inconſiſtent, and which would rather amand the plaintiff to his remedy by action at common law. The other objection, urged by the plaintiff, to the commencement of intereſt is founded on the endorſements on the plaintiffs ſecond and third bonds, and is thought to be utterly groundleſs from the terms of the endorſements themſelves.

ARTICLE IV.

Expenſes incurred by the plaintiff in authenticating the ſecond powers and aſſignment, for which the plaintiff clameth a credit, and expenſes incurred by the defendents in procuring the execution of thoſe ſecond powers and aſſignment, for which the defendents clame a credit: the rejection of the former and the admiſſion of the later by the commiſſioner are approved; becauſe the inſufficiency of the firſt powers and aſſignment doth not appear, as hath been obſerved, and ought to have been made to appear, before the plaintiff can juſtly clame the one, or the defendents ought to be burthened with the other.

ARTICLE V.

Half the expenſes incurred by the defendents, in negotiation of the plaintiffs bill on Shoolbred and Moody, with part of which half only the plaintiff, in his remarks on the commiſſioners report, admiteth himſelf to be chargeable. the charge of half the expenſes is allowed; becauſe the report ſtateth the parties to have agreed to divide between them the expenſes, that is, to divide the whole expenſes equaly.

ARTICLE VI.

Coſts of ſuit on the third bond, with which the plaintiff, excepting to the report, allegeth he ought not to be charged, becauſe the action was commenced a few days before the time, when it ought, by the agreement, endorſed on the bond, to have been commenced. this exception is diſallowed, becauſe, if the commencement of the action were premature, the plaintiff might have pleaded it, and he waved it, by not pleading it, and becauſe the money was confeſſedly due before the judgement was rendered.

Therefore the court, upon the whole matter, diſallowing the plaintiffs exceptions to the report, and approving the ſame report corrected, and by the ſupplements thereto accommodated to the preceding opinion, doth adjudge order and decree that the injunction, to ſtay execution of the defendents judgements, be perpetual, as to the whole of the firſt judgement, and as to ſo much of the ſecond judgement as excedes 9481. os 3d. and the coſts, with intereſt upon 9361. 8s. 2¾, from the 24 day of november, in the year 1791, and that the ſaid injunction be diſſolved, as to the ſaid 9481. os. 3d. with coſts, recovered by the ſecond judgement, with intereſt upon the ſaid 9361. 8s. 2¾. from the 24 day of november, in the year 1791, and alſo be diſſolved, as to the third judgement, which was to be diſcharged by the payment of 1833l. 6s. 8d. with intereſt thereon, from the 16 day of november, 1787, and the coſts; and that the plaintiff, who appeareth to have complained againſt the defendents without juſt cauſe in every inſtance, except where they controverted the credit clamed by him for his order on James and Macomb, and who appeareth to have delayed the defendents unrighteouſly, do pay unto the defendents the coſts expended by them in their defenſe, both in the county court, and in this court.'

The court of of appeals, before whom the cauſe was carried by the plaintiff, on the 31 day of october, 1794, delivered the following

Opinion

OPINION AND DECREE:

'The court is of opinion that there is no error, in ſo much of the ſaid decree, as diſalloweth the clame of the appellant, to ſuſpend the commencement of intereſt on his bonds, contrary to the terms of them, on account of the ſuppoſed delay in the transfer of the ſubject purchaſed, nor in the allowance to the appellee of half the expenſes only in negotiating the bill on Shoolbred and Moody, nor in awarding the appellant to pay all coſts in the ſuits at law, nor in allowing the appellant a credit for his order on James and Macomb; but that the ſaid decree is erroneous, ſo far as it diſallows the clame of the appellant, for a deficiency, in the ſubject aſſigned, of what it was ſtated to be, at the time of the contract, and allowing the appellee for a ſuppoſed ſurplus in the transfer, beyond the ſaid firſt ſtate; on which ſubject this court is of opinion that there was a deficiency in the aſſignment, of what it was ſtated to be of 1435l. 11s. 7d. from which, deducting the ſum of 920l. 14s. 11d. received of Hibbert by the appellant, which is all the appellant ought to be accountable for on that occaſion, there remains a balance of 514l 16s. 8d. for which, with intereſt from the 1 day of april, 1785, the appellant is intitled to a credit againſt his bonds, without recourſe to any rule of proportion for increaſing or diminiſhing the ſum, ſo as to throw either gain or loſs upon the appellant; that the ſaid decree is alſo erroneous, in this, that the court diſallowed the appellants expenſes, in the execution of the ſecond power, and allowed the appellee his expenſes, on that occaſion, ſince neither of the parties appearing to be more in fault than the other, in producing the defect in the firſt power, the expenſes of both ought to be allowed, and being added together equaly borne by the parties; and alſo in this, that the appellant is decreed to pay the whole coſts in equity, whereas being relieved partly in the ſaid court of chancery and more extenſively in this court, he ought to recover his coſts in equity, as well in the ſaid court of chancery, as in the county court; and that the account, ſtated by the commiſſioner, ſo far as it is inconſiſtent with this decree, ought to be ſet aſide, and ſtand as to the reſidue. therefore it is decreed and ordered, that the ſaid decree, ſo far as the ſame is above ſtated not to be erroneous be affirmed; that the reſidue thereof be reverſed and annulled, and that the appellee, out of his teſtators eſtate, in his hands to be adminiſtered pay to the appellant his coſts by him expended in the proſecution of his appeal aforeſaid here. and it is ordered that the cauſe be remanded to the ſaid court of chancery, for that court to have the account between the parties reformed, and a decree entered, according to the principles of this decree.'

REMARKS.

I. The principal queſtion controverted by the parties was, whether James Hunters executors were bound, by their contract, to account with Daniel Laurence Hylton for the intereſt of that money, which Hibbert and Jackſon had received, and for which they refuſed to pay intereſt, whilſt they retained it? which queſtion was reſolved into this other, in the language of the court of appeals, whether a deficiency was in the ſubject aſſigned by the executors to D L Hylton?

The judge of the high court of chancery, in a lengthy perhaps taedious diſcuſſion, which preceded his decree, endeavoured to prove the executors not bound, or, in other words, to prove no deficiency.

This is refuted by the court of appeals, after mature deliberation, in the following terms:

'*The court is of opinion that the ſaid decree is erroneous, ſo far as it diſallows the clame of the appellant for a deficiency, in the ſubject aſſigned, of what it was ſtated to be, at the time of the contract ** on which ſubject, this court*

is

is of opinion, that there was a deficiency, in the aſſignment, of what it was ſtated to be, of one thouſand &c. that is, this court is of opinion the ſaid decree is erroneous, in diſallowing a clame, which this court is of opinion ought to have been allowed.

This ſpecimen of refutation ſeemeth not leſs happy than compendious. 1, it is oeconomical, for by it are ſaved the expenſes of time and labour requiſite, in a dialectic inveſtigation, which is ſometimes perplexed with ſtubborn difficulties. 2, it is a ſafe mode; for fallacy, if it exiſt in the refutation, cannot be detected. 3, it prevents unimportant diſcuſſion; for a detection of fallacy would be nugatory, the doom of judges in appeal being fate.

2. The allowance of a ſurplus to the executors is confeſſed to be erroneous, if the ſubject aſſigned, inſtead of being ſuperabundant, were deficient.

3. The rule of proportion, at a recourſe to which in the reverſed decree, the reverſing decree ſeems to glance, as if it had been impertinent, was not introduced, as is there ſuppoſed, *for increaſing or diminiſhing the ſum ſo as to throw either gain or loſs upon the appellant*, which would have been truly ridiculous, but, upon the ſuppoſition that the appellant was intitled to any allowance for a deficiency, to ſhew the arithmetic, by which he clamed for that deficiency ſo much as 1055 pounds, to be falſe. and for that purpoſe a recourſe to the rule of proportion was not impertinent.

4. In defence of that part of the decree, which diſallowed the appellants expenſes in execution of the ſecond power, and allowed the appellee his expenſes on that occaſion, and which is condemned of error, the author of that decree propounds for examination theſe queſtions: 1, whether any proof hath been exhibited of defect in the firſt power? 2, whether every purchaſer doth not prepare the acts by which the right to the thing purchaſed is transfered? 3, if the purchaſer, who hath accepted a transfer, and bound himſelf to pay the purchaſe money, diſcovering a defect in the transfering act, and deſiring it to be ſupplied, ought not to pay the expenſes incured thereby?

5. In many caſes, determined by the high court of chancery, the plaintiff, partly ſucceſsfull, hath recovered only part of the coſts, in ſome hath recovered no coſts, and in ſome hath been condemned to pay all the coſts; and the preſent judge of that court will feel grievous diſtreſs, if he is to underſtand theſe words in the reverſing decree: *the appellant being relieved partly in the court of chancery he ought to recover his coſts in equity*, to be the canon, preſcribed for his regulation in awarding coſts in future, from which no circumſtance can juſtify a deviation—however that the plaintiff is intitled to his coſts in this caſe, as much as he is intitled to the extenſive relief afforded to him by the court of appeals, the judge of the h. c. c. will admit without haeſitation.

BETWEEN
WILLIAM FARRAR, *plaintiff*,
AND
FRANCIS JACKSON, *defendent*.

THOMAS FARRAR, tenant in taille of lands, to which ſlaves were annexed, ſold, for his life, two of them, a woman and a boy her child, to James Waddill, who ſold them to John Pruett, from whom the defendent, ſuppoſing them to be the property of John Pruett, purchaſed them for 75 pounds.

The plaintiff, eldeſt ſon and heir in taille of Thomas Farrar, was not able to diſcover in whoſe poſſeſſion the two ſlaves, with ſeveral others born by the woman after the ſale of her, were, until more than five years had elapſed

elapſed from the time, when his right of action accrued by the death of his father; but ſoon after he diſcovered them to be in poſſeſſion of the defendent, againſt him this ſuit was commenced, in Amelia county court in chancery, to recover the two negroes, with the afterborn children of the woman, and their profits.

The bill ſtated, that the defendent knew or ſuſpected the ſlaves which he bought to be under incumbrance, and John Pruett not to have power to convey a legal title to them, and therefore took from him a warranty in the bill of ſale.

The defendent, by anſwer, alledged himſelf to have been a purchaſer for a valuable conſideration honeſtly paid, and denied notice of the plaintiffs title before the purchaſe, but confeſſed that he had notice, ſome time after he had purchaſed the ſlaves, and paid for them, that they were entailed; and pleaded the ſtatute for limitation of actions in bar of the plaintiffs demand.

The plaintiff replied, that he ought not to be precluded, becauſe the ſlaves were removed, by John Pruett, to ſuch a diſtance from the plaintiffs reſidence, for the purpoſe of concealment, that, though the five years had elapſed from his coming of age, before ſuit commenced, he could not, in all that time, by the moſt diligent ſearch, find out where, or in whoſe poſſeſſion, the ſlaves were, and never made this diſcovery until three months before the commencement of this ſuit.

Many witneſſes were examined, but no material fact, more than the facts ſtated before, and admitted by the anſwer, were proved, unleſs it be this; that the defendent, after having notice of the plaintiffs title, which notice probably was in the life time of Thomas Farrar, propoſed to ſell the ſlaves to one who might carry them to ſome remote parts, perhaps with deſign to prevent a recovery of them by the plaintiff.

The county court diſmiſſed the bill. the high court of chancery, to which the plaintiff appealed; on the 20 day of may, 1788, reverſed the decree, two of the three judges, whereof the court at that time conſiſted, declaring their opinion, in oppoſition to the other, to be, that the plaintiffs title to the ſlaves claimed by him is well eſtabliſhed, and that, upon the whole CIRCUMSTANCES of the caſe, the defendent ought not to be admitted to avale himſelf of the act of limitations in bar of ſuch title, and decreed the defendent to deliver up the ſlaves, and pay their profits, an account whereof was directed to be ſtated by auditors, to the plaintiff.

Upon this opinion, he who diſſented from his colleagues ſubmits to cenſure theſe

REMARKS:

The circumſtances, upon which the plea was diſallowed muſt be one or ſome or all of the following: the warranty contained in the bill of ſale from John Pruett to the defendent; the removal of the ſlaves by John Pruett to a great diſtance, for the purpoſe of concealment; the defendents failure to diſcloſe his poſſeſſion of the ſlaves to the plaintiff, after his title to them, and ſearches to diſcover the poſſeſſor of them, were known to the defendent; the defendents treaty, with a dealer in ſlaves, to tranſport them to remote places, and thereby to hinder the plaintiff from reclaming them.

The firſt of theſe circumſtances, is, at moſt, a ſlight preſumptive evidence of a ſuſpicion that John Pruetts title might not be a good title. but how this can prevent the operation of the ſtatute is not diſcerned; and therefore this circumſtance is believed not to be one of thoſe to which the two judges alluded.

The ſecond circumſtance is thought to be not more pertinent, and therefore perhaps was alſo not intended. for any thing done by John Pruett, in which the defendent did not act a part, ought not to be detrimental to the latter, and that he acted any part in the removal of the ſlaves by John

Pruett is not proved, nor even pretended, in the bill or replication.

The third circumſtance is not admitted to be one upon which the defendent ought not to have the benefit of the ſtatute. for a bona fide purchaſer for a valuable conſideration, without notice of the title of another, according to numberleſs determinations by courts of equity, is not bound to diſcover that which will enable the true owner to recover the thing clamed. and ſuch a purchaſer was the defendent. his failure then to diſcover his poſſeſſion of the negroes, which diſcovery a court of equity would not have compelled him to make, was not a wrong. nor is ſuch a ſilence comprehended in the 6th ſection of the ſtatute for limitation of actions, providing *that a party abſconding or concealing himſelf, or by removal out of the country, or out of the county of his reſidence, when the cauſe of action accrued, or by any other indirect ways or means, defeating or obſtructing any perſon or perſons, who have title thereto, from bringing and maintaining actions within the times limited by the act.* if this ſilence be comprehended in that ſection, it muſt be by the words, *indirect ways or means defeat or obſtruct any perſon or perſons from bringing and maintaining actions.* a man who defeateth another muſt do ſomething. but he who is ſilent doth nothing. a man, who obſtructeth another, muſt either throw the obſtruction in his way, or muſt ſuffer the obſtruction which he, the obſtructor, had thrown in the others way, to remain there. for the words of the act are, *if any perſon obſtruct another, in bringing his action within the time limited, ſuch defendent, that is the party obſtructing, ſhall not be admitted to plead the act.* The party therefore who is not admitted to plead the act is he who originaly cauſed the obſtruction, not he who ſuffered an obſtruction, which a third party had cauſed, to remain. the obſtruction to the plaintiffs commencement of his action within the time limited in this caſe was, that he did not know in whoſe poſſeſſion the ſlaves were. but John Pruett, by removal of the ſlaves to a great diſtance, not the defendent, cauſed that ignorance. the defendent, therefore, did not obſtruct the plaintiff in commencing his action within the time limited. conſequently the defendent is not inhibited to plead the act. the defendent doth not appear at any time to have denied the ſlaves to be in his poſſeſſion, and that he was bound to go or ſend to the plaintiff and give him information thereof perhaps no man will ſay.

The fourth circumſtance was, that the defendent meditated and propoſed a ſale of the ſlaves to one, who might tranſport them to places remote, for the purpoſe probably of defeating or obſtructing the plaintiff. but the defendent did not proſecute his deſign; the defendent, therefore, did not thereby defeat or obſtruct the plaintiff, more than he would have defeated or obſtructed him, if the deſign had never been conceived. conſequently the defendent, by this circumſtance, was not inhibited to plead the act. beſides the court could not regularly conſider this circumſtance, becauſe it was not charged in the bill. if it had been charged, the defendent, by anſwer, might have denied the fact, and againſt that denial the proof, which was the atteſtation of a ſingle witneſs, would not have prevaled.

From the decree of the high court of chancery the defendent appealed, but the parties compounded the matter.

BETWEEN
EDMUND PENDLETON, *plaintiff*,
AND
THOMAS LOMAX, adminiſtrator of Lunsford Lomax, *defendent*.

THOMAS WYLD, on the firſt day of may, 1753, drew a bill of exchange, on Berkeley, Chauncey, and company, of London, for 440l. 12s. od. ſterling, payable to Lunsford Lomax and the plaintiff, who endorſed it, and endorſed it, at the requeſt of the drawer, to give him a credit,

dit, thereby becoming his ſureties. the bill was proteſted. the holder of it was Benjamin Waller, for the benefit of John Harmer and John Lidderdale, in England, to whom the money was due.

The plaintiff moreover endorſed two other bills of exchange, drawn by Thomas Wyld, on Berkeley, Chauncey, and company, which were proteſted: one for 400 pounds ſterling, to which Thomas Turner was intitled, and the other for 500 pounds ſterling, to which James Mills was intitled.

In order to indemnify the plaintiff from loſs by means of his endorſements, Thomas Wyld, by indenture, on the 8 day of june, 1753, conveyed all his eſtate, and aſſigned all his credits, to the plaintiff, giving him an irrevokable power of attorney to collect the latter, in truſt to ſell the eſtate, and to apply the money, to be raiſed by ſale thereof, and by collection of the credits, to payment of the debts of Thomas Wyld in this order, to wit, 601. 13s. 6d. of current money of Virginia, due to Preſwick and Thomas; 660 pounds of current money due to James Mills, for which Thomas Birch and James Falkner were Thomas Wylds ſureties; 400 pounds ſterling due to Thomas Turner by a proteſted bill of exchange, drawn by Thomas Wyld, and endorſed by the plaintiff and James Taylor; 500 pounds ſterling due to James Mills, by a bill of exchange, drawn by Thomas Wyld, and endorſed by the plaintiff, if the bill ſhould be proteſted, as was expected; 440l 12s. ſterling due to John Harmer and John Lidderdale, by the bill of exchange drawn by Thomas Wyld, and endorſed by the plaintiff and Lunsford Lomax, if the bill ſhould be proteſted, as was alſo expected; and ſeveral other debts therein after mentioned.

The money produced, by the ſale of Thomas Wylds eſtate, and the collection of his credits, after being applied to payment of thoſe debts which, by the deed of truſt, were to be firſt diſcharged, was ſo far from being ſufficient to indemnify the plaintiff that, on account of the bill for 440l. 12s. ſterling, 531l 1s. 7d. of current money of Virginia, remained due; which the plaintiff diſcharged, taking up the proteſted bill, and giving his own bond, for payment of the money remaining due on the bill, to Benjamin Waller.

The proteſted bill of exchange was taken up, and the bond executed in diſcharge of it was dated, in november, 1756.

But the plaintiff, as he alleged, perplexed with much buſineſs, did not, until ſome time in the year 1766, demand one half of this money, with intereſt, from Lunsford Lomax, who refuſed to pay it.

To recover the money and intereſt the plaintiff commenced a ſuit againſt Lunsford Lomax in the county court of Caroline in chancery.

That defendent pleaded the ſtatute for limitation of actions, in bar of the plaintiffs demand; to which the plaintiff replied, that, in the ſale of Thomas Wylds eſtate, and collection of his credits, the plaintiff was employed many years, and until it was completed, his loſs, and the moiety of it, which the defendent ought to contribute, could not be aſcertained. Lunsford Lomax died before the argument.

A bill of revivor was filed againſt the preſent defendent, who relied upon the ſame plea.

The county court overuled the plea.

The defendent appealed to the high court of chancery, which at that time conſiſted of three judges.

One of them was the plaintiff, who therefore could not ſit in the cauſe. another was of opinion that the plaintiffs right of action accrued the fourth day of november, 1756, when he took up the bill of exchange, and gave his own bond for payment of the money due upon it; and that not having commenced his ſuit before the year 1768, his demand was barred by the ſtatute for limitation of actions, and that the decree was erroneous. the third judge ſeemed inclined to affirm the decree. and therefore the caſe,

that

that it might not remain undecided, *(a)* was adjourned, for difficulty, as it was ſaid, to the court of appeals: who on the 7 day of july, 1790, delivered this

OPINION,

'That the act of limitations is no bar to the demand of the plaintiff, under the particular CIRCUMSTANCES of his caſe.'

REMARKS:

In this opinion is implied, that if theſe circumſtances had not been in the plaintiffs caſe, he would have been barred. let us then enquire if the circumſtances ought to have prevented the bar.

The circumſtances are not particularly mentioned in the opinion. the multiplicity of buſineſs, with which the plaintiff in his bill allegeth himſelf to have been perplexed, will ſurely not be pretended to be one of thoſe circumſtances. the only others are thoſe ſtated in the replication. in conſidering which the following facts, proved by the plaintiffs own documents, deſerve attention.

The bill of exchange was drawn and endorſed the firſt day of may, 1753; the deed of truſt was executed the 8 day of june, 1753, and acknowledged before Hanover county court on the ſame day. the truſt eſtate was ſold before the 25 day of april, 1754, perhaps ſix months before, for on that day the money due for the ſale was payable, and by the deed the ſale was to be on ſix months credit. the bill of exchange was taken up by the plaintiff, and his own bond executed for payment of the money remaining due upon it, the 4 day of november, 1756. of Thomas Wylds credits collected by the plaintiff, amounting to 1103l. 11s. 8d. all except 9l. 10s. 10d. were collected before and in the month of february, 1762, which laſt was ſix years before the plaintiff commenced his ſuit.

Now with what propriety could the replication ſtate that the plaintiff could not aſcertain his loſs early enough to commence his ſuit for a contribution before 1768?

But whether he could or could not aſcertain his loſs ſooner ſeems unimportant. if the deed of truſt and letter of attorney had not been executed, the plaintiffs cauſe of action would have accrued, and conſequently the time of limitation againſt him would have begun, on the fourth day of november, 1756; becauſe at that time the plaintiff diſcharged the bill of exchange, by executing his own bond for payment of the money due thereby, and became the holder of the bill. the plaintiffs right of action, if he had a right of action, which ſeemeth indiſputable, was founded, either on a compact, which

(a) Whether the decree in this caſe, the court being divided, ought not to have been affirmed was not diſcuſſed at the hearing. the conſequence of equal ſuffrages, in criminal proſecutions, is abſolution of the accuſed. Aeſchylus, in his Eumenides, informs us that ſuch was the dictate of Minerva, in the caſe of Oreſtes, when of the judges, who tried him for ſlaying his mother, the ſame number was on each ſide of the queſtion. the like in trial of a ſlave, by the ſtatute made in 1748, *chap.* 31. *of the edition in* 1769, *ſect.* 7. *the reaſon may be that the accuſed is preſumed to be innocent until he ſhall be condemned; and a majority at leaſt muſt condemn. in the court of appeals, by the act of their conſtitution, the ſentence is affirmed, if the votes for reverſal be not more than the votes for the contrary; becauſe the ſentence, before it ſhall be condemned for error, is preſumed to be correct; and when the balance is in aequilibrio, the ſcale for affirmance of the ſentence under examination having that preſumption thown into it praeponderates. in the courts of common law, certain motions fail, if approved by half the judges only.*

which, if not declared, is underſtood to exiſt, between thoſe who jointly aſſume a burthen, that they will bear the burthen equaly, where different proportions have not been ſtipulated; in the ſame manner as a correſpondent compact is underſtood to exiſt between joint adventurers in an enterpriſe, that they ſhall ſhare the profit: or founded on a ſubſtitution of the plaintiff by Harmer and Lidderdale in their place, by delivering the bill of exchange, which was an implicit aſſignment of their right, to him. on a ſubſtitution only, by the roman civil law, could a ſurety or a joint ſurety, who voluntarily paid the debt for which they were bound, compel the debitor, in one caſe, to reimburſe the money, or the confidejuſſor, in the other caſe, to contribute towards his alleviation. *(b)* for, in the firſt caſe, the creditor, when he received his money from the ſurety non in ſolutum accepit, did not receive payment; it was not a payment, becauſe a payment is the proper act of a debitor, and although the creditors right to receive the money afterwards cannot be exerted by him, any more than if he had formaly aſſigned the right to another man, the debitors obligation to pay the money to ſome one is not diſcharged;—the thing which he was bound to perform is not performed. a right to exact that performance, which remaineth unextinguiſhed, not being exerciſeable by the original creditor, is competent to the ſurety alone. to him therefore the creditor, when he received the money, quodammodo nomen debitoris vendidit; transfered the right to demand the money from the debitor; a ſilent tranſition of the right being wrought by the praecept of juſtice, which intitleth him, who is injured by the default of another, to reparation, and conſequently granteth to him the means neceſſary to effect the reparation. the ſame reaſoning is applicable, in the other caſe, where one ſurety payeth the whole debt; for to him the creditor is underſtood vendere caeterorum nomina, to transfer his right to demand ſo much of the money as the other ſureties ought to contribute. the plaintiffs right of action, which ever be the foundation of it, began, when he diſcharged the whole money due to Harmer and Lidderdale, or when he was ſubſtituted in their place. the ſame muſt be the commencement of that period at the end of which the defendents right to preſcribe was complete. if this would have been the caſe, on a ſuppoſition that the deed of truſt and letter of attorney had not been executed, are any tranſactions between the plaintiff and Thomas Wyld, tranſactions too in which Lunsford Lomax did not concur, which he doth not appear to have known, and of which he probably never heard, are theſe tranſactions ſuch circumſtances in the caſe of the plaintiff that the act of limitations ought to be no bar to his demand? or, in other words, can the obligations and rights of one man be changed by tranſactions between other men, to which he, not only did not conſent but, was not even privy? if the plaintiff, by action commenced againſt Lunsford Lomax in 1756, had recovered one half

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(b) Fidejuſſoribus ſuccurri ſolet, ut ſtipulator compellatur ei, qui ſolidum, ſolvere paratus eſt, vendere caeterorum nomina. Dig. l. XLVI. tit. 1. l. XVII.

Cum alter ex fidejuſſoribus in ſolidum debito ſatisfaciat, actio ei adverſus eum, qui una fidejuſſit, non competit. potuiſti ſane, cum fiſco ſolveres, deſiderare, ut jus pignoris, quod fiſcus habuit, in te transferretur: et ſi hoc ita factum eſt, ceſſis actionibus uti poteris. quod et in privatis debitis obſervandum eſt. C. l. VIII. tit. XLI. l. XI.

Cum is qui, et reum et fidejuſſores habens, ab uno ex fidejuſſoribus accepta pecunia praeſtat actiones: poterit quidem dici nullas jam eſſe, cum ſuum perceperit, et perceptione omnes liberati ſunt; ſed non ita eſt. non enim in ſolutum accipit, ſed quodammodo nomen debitoris vendidit, et ideo habet actiones, quia tenetur ad id ipſum, ut praeſtet actiones. Dig. lib. XLVI. tit. 1. l XXXVI.

half the money for which the bill of exchange was drawn, without deducting the money received by the ſales of Thomas Wylds eſtate and by the collection of his credits, Lunsford Lomax, if he might have compelled the plaintiff to apply the money ſo received towards his alleviation, would have been intitled to the ſame remedy, although the deed of truſt and letter of attorney had not been executed. ſo much for the circumſtances in the caſe of the plaintiff.

Now let a few words be added on the circumſtances in the caſe of Lunſford Lomax. that this man knew, had heard, or ſuſpected, until the ſummer of 1766, that the bill of exchange, endorſed by him thirteen years before, had been proteſted, doth not appear, and is not even alleged. Benjamin Waller, or they for whoſe benefit he acted, if notice of the proteſt had not been given of it to Lunsford Lomax, in a reaſonable time, could not have charged him by his indorſement; and no man will pretend thirteen years to be a reaſonable time. in theſe circumſtances, the plea of the ſtatute for limitation of actions in this caſe would be thought by ſome to be a legal and conſcientious defenſe, if better judges had not determined the contrary.

BETWEEN
EDMUND PENDLETON and Peter Lyons, ſurviving adminiſtrators of John Robinſon, with his teſtament annexed, *plaintiffs*,
AND
ELIZABETH WHITING, executrix of Peter Beverley Whiting, and Warner Lewis and John Seawell, executors of Thomas Whiting, *defendents*.

THE plaintiffs, in their bill, ſtated that, an intimacy and friendſhip having been between John Robinſon and Beverley Whiting, the former, not only advanced to the latter moneys at different times, but, being treaſurer of Virginia, did, at his requeſt, allow to ſheriffs and inſpectors money due to them from Beverley Whiting, charging them to him in account, and giving him ſundry credits. a copy of this account, number 1, ſupported by vouchers, is annexed to the bill, whereby a balance, including intereſt, of 4181. 16s. 10d. appeared to be due to John Robinſon from Beverley Whiting, when the latter died, in 1755. Beverley Whiting appointed his brothers Thomas Whiting and Francis Whiting, with John Robinſon, executors of his teſtament, and appointed John Robinſon Guardian to his ſons, which truſt the teſtator hoped he would vouchſafe to take upon him, as a teſtimonial of the laſt favour he could beſtow upon the teſtator. the bill ſtated that John Robinſon was induced to accept the truſt of executor and guardian, by the promiſe of Thomas Whiting (for Francis Whiting would not intermeddle in the matter) that he would manage the plantations and other affairs of the eſtate, and attend to the education of the children, and recur to John Robinſon for advice when it ſhould be neceſſary. of this promiſe no proof is exhibited. The bill ſtated that John Robinſon did not concern himſelf in the affairs of Beverley Whiting, otherwiſe than in ſettling with ſheriffs, and other public collectors for levies due from the eſtate, and in paying ſome debts, all which advances are entered in the account, number 2, annexed in the bill for which vouchers are alſo exhibited. the plaintiffs however admit, from information, that John Robinſon had drawn orders on an overſeer, at one of Beverley Whitings plantations, for corn, for the amount whereof, when it could be aſcertained, the plaintiffs were willing to give credit. the bill ſtated that Thomas Whiting ſhipped the crops of his brothers eſtate, and imported goods for his family, and therefore accounts of the diſpoſition of thoſe crops could not reaſonably be required from the plaintiffs, whoſe teſtator tranſacted no buſineſs relative to the eſtate otherwiſe than as before mentioned.

The

The bill further ſtated that Peter Beverley Whiting and John Whiting, who were ſons of Beverley Whiting, and to whom he had deviſed his eſtate, after, by the profits of it, kept together, his debts ſhould be diſcharged, having attained their full ages, and ſomehow got poſſeſſion of their reſpective eſtates, John Robinſon was deſirous of having the accounts of the adminiſtration ſettled, that he might receive the conſiderable balance due to him, and procured ſeveral times and places to be appointed for meeting with Thomas Whiting and the ſons for that purpoſe, but they did not meet, and he died in may 1766.

The bill further ſtated, that the plaintiffs, to whom with another ſince dead, the adminiſtration of John Robinſon's eſtate with his teſtament annexed was committed, employed George Brooke to adjuſt the accounts of the eſtate and collect the money due to it, delivering into his hands the books and papers for that purpoſe, until his death, in the year 178 , during which time, from the confidence repoſed in that agent, the plaintiffs doubted not that he had collected the debt, or ſecured it by a bond or a judgement. they had not diſcovered that a ſettlement had been made or a ſpecialty taken. however they believed and hoped to prove, that George Brooke furniſhed copies of the accounts, numbers 1, and 2, to Peter Beverley Whiting (John being dead inſolvent) and ſhewed him the vouchers for the ſame, which were found carefully wrapped up with the accounts, and that Peter Beverley Whiting had no objection to that account, but did not pay or give a ſpecialty for it, until he ſhould have a general account of the adminiſtration of his fathers eſtate ſettled, which he knew was only to be expected from his uncle Thomas Whiting, but which he hoped might be forwarded by the aſſiſtance of George Brooke, if payment to the plaintiffs were delayed. in part proof of theſe ſuggeſtions, the plaintiffs ſtated, that one John Hobday, who had been an overſeer for Beverley Whiting, and after his death in his eſtate, had a demand, on that account, of 35l. 16s. 6d beſides intereſt from june, 1758, and, being indebted to the eſtate of John Robinſon, inſiſted that George Brooke ſhould allow his demand, for which he alleged John Robinſon to have been liable, out of his debt; and thereupon Peter Beverley Whiting, that he might induce George Brooke to give the propoſed credit, ſigned the note following: *the money that is due from my fathers eſtate, to mr John Hobday i will pay, whenever my fathers eſtate is ſettled with the ſpeakers, Peter Beverley Whiting. june the* 10, 1767 from whence the plaintiffs inferred that Peter Beverley Whiting knew an account to be then ſubſiſting between his father and John Robinſon, and that he meaned to have a fair ſettlement thereof at a future day; and that he alſo knew he ſhould be indebted on that account would appear, as the plaintiffs alleged, from an order drawn by him on Leroy Hipkins, dated the 7 day of november, 1771, in theſe words: *ſir, pleaſe to pay to the adminiſtrators of John Robinſon eſquire* 35*l.* 16*s.* 6*d. and you'll oblige, ſir, your humble ſervant Peter Beverley Whiting.*

The plaintiffs further ſtated, from information, that George Brooke, Peter Beverley Whiting, and Thomas Whiting had obtained an order of Glouceſter county court, appointing commiſſioners to examine and ſettle the reſpective accounts of John Robinſon and Thomas Whiting with the eſtate of Beverley Whiting, but the order was not performed, through the failure of Thomas Whiting to attend the commiſſioners at their meetings, until the late war, which interrupted buſineſs of this kind.

The plaintiffs further ſtated, that, in conſequence of an inquiry made by their agent, after the death of George Brooke, into the ſtate of this buſineſs, the plaintiff Edmund Pendleton received from the defendent Elizabeth Whiting a letter, dated 16 day of auguſt, 1783, of which a part quoted in the bill is in the words following: *i have informed colo Whitings executors, that i intend, next court, to petition for a ſettlement of the eſtate, which they*

ſay

they are willing to have done; and i doubt not you are equaly ſo. you will probably wonder why you were not applied to ere now. the reaſon, ſir, was, that the ſpeaker was ſaid to die inſolvent. the report of this account will only bring on a ſettlement a few months ſooner than was intended; for i was always determined to perſue the meaſures our friend would have taken, had it not pleaſed the almighty to take him from us.

In anſwer to this letter, the plaintiff Edmund Pendleton wrote a letter to the defendent Elizabeth Whiting, pointing out the mode in which the accounts between the parties might be conveniently adjuſted; he afterwards wrote another letter to her, deſiring to know what ſhe had done, or meant to do, in the buſineſs.

But the plaintiffs ſtated that the defendent Elizabeth Whiting, combining with the other defendents, who are the executors of Thomas Whiting, refuſed to procede in the ſettlement of accounts between the parties, although, at her inſtance, in january, 1784, an order was made by Glouceſter county court, appointing commiſſioners for that purpoſe, ſaying that as ſhe was adviſed, the demand of the plaintiffs was barred by the ſtatute for limitation of actions. whereas the plaintiffs charged, that, John Robinſon and Thomas Whiting acting as truſtees, no length of time would bar their being accountable to the children for the truſt, and, equality being the equity of this court, the remedy in ſuch caſe ought to be mutual. and that in this light Peter Beverley Whiting underſtood it was ſaid to be plane, who from the letter and notes before mentioned, as well as the orders of court for ſettlement of the accounts, never meaned to avale himſelf of the length of time, but to have a fair and juſt ſettlement, and to pay or receive the balance as it ſhould happen to be due; on which notes and orders, as well as the letter of, and order obtained by, the defendent Elizabeth Whiting, the plaintiffs relied, to obviate the act for limitation of actions, if it ſhould be inſiſted on.

And the plaintiffs, alledging themſelves to be relievable in a court of equity only, becauſe their teſtator was one of the executors of Beverley Whiting, from whom and whoſe eſtate the debt was due, and that eſtate muſt be there perſued for ſatisfaction, prayed that the defendents might be decreed to account, and to pay to the plaintiffs ſo much money as ought to be charged on Peter Beverley Whitings proportion of his fathers eſtate, the plaintiffs ſubmitting to loſe ſo much as ought to be charged on the eſtate of John Whiting, the inſolvent ſon.

The defendent Elizabeth Whiting pleaded the ſtatute for limitation of actions. She likewiſe put in an anſwer, to ſtate the ſubſtance whereof here will appear to be unneceſſary.

The other defendents alſo put in an anſwer, containing nothing important, and relied upon the ſtatute for limitation of actions.

The plaintiffs replied to the plea of the defendent Elizabeth Whiting, as followeth, that for ſo much of their ſaid demand as accrued during the life time of the ſaid Beverley Whiting, in as much as the ſaid John Robinſon was executor of the will of the ſaid Beverley, and all ſuits for the recovery of the ſaid demand thereby ſuſpended, the act of limitations is not pleadable, in bar of the ſaid demand, by the rules of law or equity; and although the ſaid John Robinſon might have retained ſatisfaction for his ſaid demand, yet the ſaid plaintiffs do aver, and will maintain and prove, that he was prevented from ſo doing by the two ſons Peter Beverley Whiting and John Whiting having reſpectively taken poſſeſſion of their eſtates (conſiſting of lands, ſlaves, and ſtocks, not in the daily view of the ſaid John Robinſon) without his privity or conſent, thereby ſubjecting themſelves to the payment of the ſaid demand, which they frequently promiſed to pay, and thereby gained the forbearance of the ſaid John Robinſon. and the ſaid complainants further inſiſt, that as it appears, of the defendents own ſhewing,

ing, and by the records of the county court of Glouceſter, that the ſaid Peter Beverley Whiting in his life time, and the defendent ſince his death, have ſeveraly applied for and obtained, from the ſaid county court, orders that the executors of the will of the ſaid Beverley Whiting ſhould make up an account of their adminiſtration, the ſaid defendent can not now, by the rules of equity, be allowed to plead the act of limitation in bar of ſuch account, nor avoid payment of any balance which, upon ſuch account, may appear to be due to the teſtator of the complainants, which is the end and ſcope of their bill.

On the ſecond day of march, 1791, the court delivered the following

OPINION,

That the demand of the plaintiffs is, in its nature, preſcriptible; for the doctrine ſtated in the bill, that as a truſtee, that is one, to whom the management of an affair is confided for the benefit of another, is not diſcharged, by length of time, from the obligation of accounting for his tranſactions and adminiſtration in and about the ſubject committed to him, ſo a like privilege ought to attend a remedy of the former requiring an account from the latter, is ſuppoſed to be fallacious, becauſe the poſſeſſion of what the one receiveth is fiduciary,—is the poſſeſſion of him, for whom he acteth, and whom he repreſenteth, in that inſtance, and therefore never begineth to work a preſcription; but the ſame can not be praedicated of the others poſſeſſion, which is, on the contrary, for himſelf, and adverſary to all others: thus, although an executor cannot by length of time bar the right of the legatary, yet poſſeſſion delivered to the legatary, or ſuffered to be taken and kept by him, without caution to return the thing bequeathed, in the event of future recoveries of debts, may, as is apprehended, in proceſs of time, extinguiſh the right as well of the executor, as of any other man, who, neglecting to vindicate the right within the period limited by law for aſſerting it, is preſumed to have either abandoned it, or received ſatisfaction for it; the latter of which preſumptions is the ſtronger in this caſe of an executor and guardian, who, having power to retain and appropriate ſo much of his conſtituents eſtate, or the profits of it, as was equal to his demand, did actualy convert to his own uſe a part thereof, without giving credit for it, and, for any thing ſhewn to the contrary, may have applied more of it in the ſame manner,—who left no account of a bill *(a)* for two hundred pounds ſterling paid to John Robinſon, ſuppoſed to be the teſtator of the plaintiffs, by John Hanbury and company, of London, with which the executors of Beverley Whiting were charged;—and who doth not appear, and is not pretended, to have rendered, or even kept, any account whatever of his executorſhip, or guardianſhip, the account number 2, to which the bill referreth, ſeeming, according to the ſtate of it there, to have been formed from papers found by rummaging in a great maſs ſince his death; for the promiſe of Thomas Whiting, by which the ſaid John Robinſon is alleged in the bill to have been induced to accept the truſt, if the promiſe had been proved, could not have diſpenſed with his obligations to fullfill the truſt, after he had accepted it; nor do his attention to the duties of his public office or his ſervices in the execution of it appear, by any thing diſcloſed in this caſe, to have been, the one ſo ſedulous that he could never advert to the duties of this private office, or the other ſo beneficial to the community that their merit can atone for the neglect of a truſt accepted as the laſt favor he could beſtow on a dying friend.

Neither

(a) This appeareth by exhibits annexed to the anſwer of Elizabeth Whiting.

Neither doth the court admit the propoſition aſſumed in the replication, that the ſaid John Robinſon being an executor, as well as a creditor of Beverley Whiting, all ſuits for the recovery of the plaintiffs demand were thereby ſuſpended, to be true, nor, if it were true, to be effectual to prevent the operation of the ſtatute for limitation of actions; for an executor who had not aſſented to a legacy, which the plaintiffs deny the ſaid John Robinſon to have done, may maintain an action in a court of common law, even againſt the legatary, for recovering the thing bequeathed, and then may retain for his debt, or may proſecute a ſuit in the court of equity to recover his debt in the firſt inſtance; but, if the ſaid John Robinſon could not have maintained a ſuit, as executor he might have maintained a ſuit, to recover poſſeſſion of the eſtate as *(b)* guardian in either court.

And if the executorſhip obſtructed the proſecution of ſuits by him, the obſtruction, ceaſing with his death, did not impede the operation of the ſtatute afterwards.

Nor is the fact avered in the replication, that the ſaid John Robinſon was prevented from retaining ſatisfaction for his demand by the two ſons Peter Beverley Whiting and John Whiting having taken poſſeſſion of their eſtates, without his privity or conſent, thereby ſubjecting themſelves to the payment of the ſaid demand, which they frequently promiſed to pay, verified by the teſtimony, or preſumable after ſo many years, as to Peter Beverley Whiting, to charge whoſe eſtate is one principal object of this ſuit, the demand as to his brother being waved.

The court is alſo of opinion that neither the note ſigned by Peter Beverley Whiting, the 10 day of June, 1767, nor the order drawn by him, the 7 day of november, 1771, on Leroy Hipkins, nor the letter, dated the 16 day of Auguſt, 1783, from the defendent Elizabeth Whiting to the plaintiff Edmund Pendleton, nor the order of Glouceſter county court, made on the motion of the defendent Elizabeth Whiting, the firſt day of January, 1784; upon which the plaintiffs rely to obviate the ſtatute for limitation of actions, ought to have that effect.

Not the firſt, becauſe, if a conſent or an obligation to account be contained in the terms of that note, the right of action originating thereby would have been barred by the time elapſed between the date of it, and the day when this ſuit was commenced, nor doth Peter Beverley Whiting appear, of the defendents own ſhewing, as the replication ſtateth, or otherwiſe, to have applied for, and obtained from the county court of Glouceſter, an order or orders, that the ſaid executors of the ſaid Beverley Whiting ſhould make up an account of their adminiſtration; the defendent, by her anſwer, having confeſſed that ſhe remembered to have only heard of orders, from the motion of Peter Beverley Whiting, to have his fathers eſtate ſettled, nor is any ſuch order now among the exhibits.

Not the ſecond, becauſe, if that could be ſo interpreted, as to contain a conſent or obligation to account, it is alſo ſuperannuated.

Not the third, becauſe in one paragraph of that letter the writer of it declareth her opinion to be, that the length of time is ſufficient to ſet aſide all clames of the ſort of that made by the plaintiffs, and, this being connected with the paragraph quoted in the bill, upon which the plaintiffs rely to prove her ſubmiſſion to a ſettlement of the executors account of adminiſtration of Beverley Whitings eſtate, if a commentary be made on both of them together, the fairer interpretation is, that ſhe did not, by the latter, relinquiſh the defenſe, which in the former ſhe thought a good defenſe, and that in favor to executors, of whoſe negligence, infidelity, and delinquency the letter

is

(b) This is inaccurate. The ſons were not intitled to poſſeſſion of their eſtates before the debts were paid. in the mean time therefore the executors might have retained or recovered the poſſeſſion.

is replete with accuſation; and if the defenſe and ſettlement be incompatible, ſhe ought to be allowed her election to abide by the former, which ſhe declared, as is confeſſed, before the commencement of the ſuit, and determined by her plea afterwards. becauſe no part of the letter diſcovereth, although ſhe had been informed indeed of ſome account againſt the eſtate of Beverley Whiting, that ſhe knew the nature or amount of the plaintiffs demand, or ſuſpected that her huſband was indebted to them, the contrary of which laſt may be inferred, as well from her forwardneſs to bring on a ſettlement, which, if the demand be eſtabliſhed, would terminate in aggravated diſtreſs to herſelf and her family, as from that member of the paragraph quoted in the bill, wherein the ſpeakers (Robinſons) inſolvency is mentioned, as the cauſe of delaying an application to him to whom the letter was addreſſed, his ſolvency or inſolvency being unimportant to her, otherwiſe than as ſome part of that reparation, for the loſſes her huſband had ſuſtained through the miſconduct of his fathers executors, which was deſperate in the latter event, ſhe hoped might be obtained in the other: and if thus uninformed, and ignorant, and unapprized of the extent of the propoſed ſettlement, ſhe had explicitly and unconditionaly promiſed to enter into it, the ſpirit of equity dictates rather abſolution from ſuch a promiſe than exaction of its performance. and becauſe the writer of the letter had no power thereby to bind the eſtate of her huſband for payment of that with which if he had been then living, he would not, by any thing now appearing, have been made chargeable; for that an executor or adminiſtrator, by his contract, ſhould create an obligation in the teſtator or inteſtate; who had not delegated a ſpecial authority for that purpoſe, ſeems prepoſterous. and

Not the fourth, as well for the reaſon laſt aſſigned in the next preceding ſection, as becauſe the plaintiffs were not a party to the order, and were purpoſeley omitted by the defendent Elizabeth Whiting, ſaying, as they confeſs in the bill, ſhe was adviſed their demand was barred by the act of limitations; ſo that the plaintiffs relying upon this order, taken with that ſaying, to obviate the act of limitation, ſeem to rely upon this, that when ſhe reſerved the power to plead the act, ſhe relinquiſhed the power to plead the act.

And, upon the whole matter, the court reviewing and frequently pondering the ſubjects of the foregoing diſquiſition, and obſerving that this bill requireth an account relating to the adminiſtration of an eſtate from one who was never bound, nor doth repreſent any who were bound, originaly, if at all, to render it, and that this requiſition is made by repreſentatives of an executor and guardian, who was bound to render accounts of his adminiſtration and management of the ſame eſtate in both thoſe characters, but confeſſedly never did render, and doth not appear to have even kept, an account of them in either, and by whoſe defaults in thoſe inſtances, and poſſibly in other inſtances, no ſettlement of thoſe accounts, free from injuſtice to one or other of the parties, can be made now, when thoſe who tranſacted the matters propoſed to be examined are dead; when the evidence, by which ſome debits, now ſeeming indiſputable, might have been controverted, and credits omitted might have been juſtified, in an earlier diſcuſſion, hath vaniſhed by time, frequently producing ſuch changes, that the ſame thing which appeareth in one form to day, may have worn a different form ſome years before; when documents, pertinent to this buſineſs, may have been miſlaid, loſt, or deſtroyed, ſome of them not impoſſibly by the means of that executor and guardian, who had a right to the poſſeſſion of them; and when the ſame cauſes would prevent a recovery of ſatisfaction for the injury, which, according to the letter often mentioned before, Peter Beverley Whiting complained, he had ſuffered by the malverſation of his fathers executors; the court is of opinion this is one of thoſe caſes, in which the ſtatute for limitation of actions, a law believed by moſt men eſteemed well

learned

learned in juriſprudence to be congruous with the principles of natural law, and to be ſanctified by public utility, may be honeſtly and conſcientiouſly pleaded; and therefore the court allowing the plea of the defendent Elizabeth Whiting, and, being of opinion, that a demand barred by the ſtatute for limitation of actions, exiſteth not afterwards, ſo that the plaintiffs could not recover their demand againſt the other defendents, if they were indebted to Peter Beverley Whiting,

Diſmiſſed the bill, with coſts.

BETWEEN
WOOD JONES, *appellant*,
AND
ELISHA WHITE, *appellee*.

A TRACT of vacant land was ſurveyed for Henry Hatcher, in the year 1740, and was granted to him by letters patent, which were ſealed the 16 day of auguſt, 1756.

Leave was granted, by the governor in council, the 3 day of may, 1744, to Wood Jones, to ſurvey and obtain a grant of land, which was accordingly granted to him, and within the bounds of which is included the land granted to Henry Hatcher.

The appellee, in the year 1780, filed a bill in equity againſt Wood Jones in the county court of Charlotte, ſtating that, in the year 1761 or 1762, the appellee purchaſed the title of Henry Hatcher, paying to him a valuable conſideration for it; that the appellee being afterwards informed of the grant to Wood Jones, and that it included the land granted to Henry Hatcher, upon inquiry diſcovered that by occaſion of a diſpute between the people and governor of Virginia, the latter of whom demanded a fee, which the other thought unlawfull, for his ſignature to the grants of land, the grant to Henry Hatcher had been detained in the land office, and in the mean time the title was liable to forfeiture by nonperformance of the conditions in the grant; and that the appellee, in order to ſave it, entered a petition for a grant of the land to himſelf, which he obtained. this grant, ſealed the 15 day of auguſt, 1764, is annexed to the bill. the appellee charged that Wood Jones clandeſtinely, whilſt the diſpute before mentioned depended, paid the fee demanded by the governor, and procured his grant; and prayed a decree that Wood Jones ſhould give up and reſtore to the appelle the land granted to Henry Hatcher.

Wood Jones died, not having anſwered the bill.

A bill of revivor was filed againſt his ſon and heir of the ſame name,

Who in his anſwer thereto denied notice of Hatchers ſurvey, and ſaid nothing ſuppoſed to be material, unleſs it be this: *that he did not conceive this diſpute to be the proper object of a court of chancery.*

The cauſe being heard on the bill, anſwer, and certificate of ſurvey for Henry Hatcher, order of the governor in council to Wood Jones, and the grants to Henry Hatcher, and the appellee, read as exhibits, the county court decreed that the plaintiff (appellee) recover againſt the defendent the land clamed by him; that the appellee be quieted in poſſeſſion, and that the defendent pay to the appellee his coſts.

From this decree the defendent, on his petition, was allowed an appeal to the high court of chancery; on hearing which, the 12 day of may, 1791, that court delivered this

OPINION,

That the appellees title, if any he hath, to the land in controverſy, muſt be ſupported on this foundation: that the grant to Henry Hatcher operated retroactively,—giving to his title like vigor as if the conſummation thereof,

by

by the grant, had been cotemporaneous with the commencement, which preceded the commencement of the appellants right;—or on this other foundation: that the grant to Wood Jones was obtained ſurreptitiouſly, when the officer, to whoſe function the tranſaction of that buſineſs belonged, did not know part of the land comprehended in the grant to have been appropriated, or clamed, by another, who, in not perfecting his title, had been in no default, or was obtained by colluſion between the officer and the grantee. and upon ſuppoſition that the grant to Henry Hatcher by relation was prior in effect, although poſterior in date, to the other, or that the latter was fraudulent, this, ſo far as it tended to intercept his right, was void, and the appellees remedy in a court of common law was proper and adaequate. and this court diſcerning no ground for application by the appellee to a court of equity, eſpecially when that ſo great a length of time had elapſed, after the commencement of Hatcher's title, before any one appeareth to have attempted to aſſert it, and the manner in which it was derived to the appellee, are remembered, is of opinion the decree of the county court is erroneous, and

Reverſing that decree, diſmiſſed the appellees bill. from which decree Eliſha White appealed.

OPINION AND DECREE of the court of appeals,

13 day of october, 1792.

This day came the parties and on mature conſideration of the tranſcript, and the arguments of the counſil, although this court doth not approve of the general reaſoning in the introduction to the decree of the high court of chancery, being of opinion that in controverſies of this nature, where fraud is ſuggeſted and proved, courts of equity have competent juriſdiction, are moſt uſualy and properly reſorted to, and can afford ample and adaequate relief; yet ſince the appellant (Eliſha White) hath made no proof in ſupport of the allegations of his bill, or of any fraud on the part of Wood Jones, father of the appellee, in obtaining his patent, this court is of opinion there is no error in the ſaid decree, therefore it is decreed and ordered that the ſame be affirmed.

REMARK.

The decree of the court of chancery is, upon reconſideration, admitted to have been made upon a wrong foundation, namely, *that the appellee, if he had any title, having an adaequate remedy to recover it by action in a court of common law, ought to have reſorted to that remedy*; the nature of this controverſy being ſuch that to the court of equity the appellee might properly reſort, as the court of appeals have ſtated in their opinion. if Wood Jones, the father, before the grant to him, had known of the grant to Henry Hatcher, or perhaps of the ſurvey for him, the latter grant would have related, as is conceived, to his ſurvey, the origin of his title, and have avoided *pro tanto* the grant to Wood Jones, as well in a court of law as in a court of equity, but that notice not being confeſſed or proved, nor even explicitly charged in the bill, the relation, which is never allowed to antedate an act, if an innocent ſtranger would be thereby harmed, is inadmiſſible. the doctrine contained in the decree conformably with what is ſaid here, on the ſubject of relation, is ſuppoſed not to have been diſapproved by the court of appeals.

BETWEEN

BETWEEN
SARAH HOOE, who ſurvived her huſband Gerrard Hooe, and John Alexander and Elizabeth his wife, *plaintiffs*,
AND
MARY KELSICK, who ſurvived her huſband, Younger Kelſick, and Jonathan Beckwith, who ſurvived his wife Rebecca, *defendents*,
BETWEEN
JONATHAN BECKWITH the ſurviving huſband, and Jennings Beckwith and others the children, of Rebecca Beckwith, and Mary Kelſick, *plaintiffs*,
AND
SARAH HOOE, and John Alexander and Elizabeth his wife, *defendents*,
AND BETWEEN
JONATHAN BECKWITH, *plaintiff*,
AND
JOHN ALEXANDER and Elizabeth his wife, *defendents*.

THE facts thought to deſerve attention in theſe cauſes, which were heard together the 8 day of march, 1793, will appear in the following

OPINION AND DECREE, with the notes:

That Richard Barnes, *(a)* having made all the proviſion which he intended to make for his only ſon by a marriage contract, after thus forisfamiliating that ſon, intended to diſtribute the remainder of his eſtate among his daughters, in equal or nearly equal portions, the diſtribution to take effect perhaps partly before and partly after the death of himfelf and his wife; and that this intention was declared and publiſhed by him in ſuch a manner that it muſt have been known, and deſigned by him to be known, to his children, and to thoſe who frequented his houſe, and eſpecialy ſuch as were wooing for alliances with his family; theſe facts appear to the court, not only naturaly preſumable, but moreover indiſputably proven by teſtimony of witneſſes, *(b)* of whom ſeveral are unexceptionable.

And the court is of opinion that the declaration by Richard Barnes of his intention to make ſuch a diſtribution, and the communication of his teſtament, *(c)* congruous with that intention, to Jonathan Beckwith and his wife, purpoſeley to ſatisfy them that he deſigned to fullfill it, as appeareth by the letters among the exhibits which paſſed between Jonathan Beckwith and Richard Barnes, in the month of january, 1758, and in conſequence of which an attempt by Jonathan Beckwith and his wife to aſſert their right to what he and her repreſentatives are now claming at an earlier day when that aſſertion might have been leſs difficult, was poſſibly declined, the ſaid Richard Barnes in equity was bound to beſtow on his daughter Rebecca, the

(a) He was the father of M Kelſick, R Beckwith, S Hooe and E Alexander; and by his teſtament 15 day of july, 1754, had deviſed lands to theſe daughters, and bequeathed twenty negro ſlaves to his wife Penelope Barnes during her life, inpowering her to diſpoſe of them among his daughters, or ſome of them, and bequeathed one ſlave to each daughter, and the reſidue to be divided among them all.

(b) The ſame of John Belfield one of the principal witneſſes to prove the declarations of Richard Barnes could not be the leaſt ſoiled by the foul aſperſions with which the tongue of ſlander was long employed to blemiſh it.

(c) John Alexander in his anſwer to one of the bills wherein he is a defendent ſeems confident that Jonathan Beckwith had ſeen the codicil of july, 1757, to the teſtament of Richard Barnes; but that he did not ſee it is thought to be much more probable.

the wife of Jonathan Beckwith, the land ſlaves and other eſtate deviſed and bequeathed to her by the ſaid teſtament, as effectualy as he could have been bound by a formal compact to do ſo;—and this notwithſtanding *(d)* the ſaid Jonathan Beckwith had juſtly incurred the diſpleaſure of the ſaid Richard Barnes;—becauſe the ill behaviour of Jonathan Beckwith, if it could have deprived him of his own right, which however is not admitted, could not have deprived his wife of her right, his wife, who, if ſhe offended her father by her marriage, the only inſtance wherein her conduct towards him is pretended to have been culpable, was cordialy forgiven by him for it, as is proven by infallible documents.

The caſe of Mary Kelſick appearth to the court to be diſtinguiſhable from the caſe of her ſiſter Rebecca by no circumſtance leſs favourable to the former; for the communication of his teſtament by Richard Barnes to Jonathan Beckwith and his wife, which poſſibly prevented a ſuit meditated in one caſe, is countervaled by the circumſtance in the other caſe of Younger Kelſicks ſuit actualy commenced, and diſcontinued probably in conſideration of the matters mentioned in the ſection next following.

And the court is of opinion, that the acceptance by Gerrard Hooe and John Alexander of the ſlaves allotted to them for their wives portions according to the teſtament of Richard Barnes; their acquieſcence under that allotment for almoſt eight years, without diſcloſing in the mean time a purpoſe to aſſert their title to more by the codicils; *(e)* and the letters among the exhibits to Younger Kelſick from Gerrard Hooe dated one the 23 day of march, 1762, and the other the 12 day of february, 1767, by the former of which the author diſavoweth his deſign or deſire to eſtabliſh the codicil, confeſſing his opinion to be that the eſtabliſhment of it was impoſſible, and his wiſh to be that it had not been annexed to the will, and by the latter deſireth to know when he ſhould receive his wifes part of ſome caſh from the eſtate of Richard Barnes; whence Younger Kelſick, who did not afterwards proſecute *(f)* a demand inſtituted for recovering his wifes marriage portion, and Jonathan Beckwith might conclude with reaſon that their claimes by the will unrevoked would not be controverted: theſe topics ſupply arguments ſufficient to prove that Gerrard Hooe and John Alexander were bound to abide by the teſtament and conſequently that the codicils annexed to it, ſo far as they contravene the deviſes and bequeſts thereby to Mary Kelſick and Rebecca Beckwith, are void.

But the court is of opinion that the money mentioned in one of the codicils to have been advanced by the teſtator to Younger Kelſick ought to be deemed

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(d) Between Richard Barnes and Jonathan Beckwith the viciſſitudes of harmony and diſcord friendly intercourſe and ſpitefull objurgation, which appear by ſome exhibits and the narratives of ſeveral witneſſes ſhew them to have been ſudden and quick in quarrel, yet not implacable after quarrel. however the behaviour of Jonathan Beckwith was far more reprehenſible than that of his wifes father.

(e) Richard Barnes made three codicils to his teſtament, dated the firſt the 10 day of july, 1757, another 10 day of july, 1759, and the third 30 day of june, 1760. by them the alterations of the teſtament were favourable to the daughters Sarah and Elizabeth. the codicils upon a conteſtation by Thomas Barnes the heir, were adjudged void and ſet aſide by Richmond county court, the 7 day of july, 1761; and this ſentence, upon a proceeding, in nature of an appeal, was reverſed and the codicils eſtabliſhed by the general court, the day of 17 .

(f) That a ſuit was commenced is admitted by all parties; but the preciſe object of it, none of the procedings being among the exhibits, doth not appear: that it was however to recover either a marriage portion, or what was deviſed and bequeathed by the teſtament is not denied by any party.

deemed a ſatisfaction (g) for the tract of about 400 acres of land deviſed by him to the ſaid Mary Kelſick and ſaid to have been taken up and patented by him lying near unto the poiſon old fields likewiſe deviſed to her.

And the writing (h) proved and admitted to be recorded as and for the teſtament of Penelope Barnes in the general court in which court the validity of that act was not conteſted, becauſe the fabricators of it, if this failed, had another not more beneficial to Younger Kelſick ready to ſupply the place of it; a writing which, upon a full inveſtigation of its validity before the county court, to whom parties and witneſſes were probably better known than they were to the other court, was rejected; a writing which, inſtead of being the affectionate valediction of a tender parent to her neareſt kinsfolk, on whom, taking her laſt leave of them, ſhe would wiſh to beſtow a bleſſing before ſhe died, the phraſes and ſentiments of it evince to have been the machination of thoſe who were contriving to ſanctify gain, already made, and to appropriate to themſelves and their families almoſt the whole of what the teſtatrix had power to give, and deſiring to palliate the odium to which they would otherwiſe be obnoxious by inſerting in the writing an apology for the pretermiſſion of a daughter, which apology muſt have ſtung that daughters ſenſibility by upbraiding her huſband; a writing inconſiſtent with the former declarations of the teſtatrix, and with a teſtament made by her when ſhe was not unduly influenced; which circumſtances render credible moſt of the facts narrated by the witneſſes examined to prove the malverſation of thoſe who tranſacted the buſineſs; this writing appeareth to the court to have been iniquitouſly procured to be executed.

And the court is of opinion that neither the probate of the ſaid writing, nor Younger Kelſicks confeſſion of error in the ſentence of Richmond county court rejecting it ought to preclude the application of Mary Kelſick to a court of equity to ſet aſide the ſaid writing; and therefore the court doth annul the ſame for the fraud practiſed in obtaining it.

And upon the whole matter the court doth adjudge order and decree that the ſaid John Alexander and Elizabeth his wife do convey to the ſaid Jonathan Beckwith for and during the term of his natural life and after his death to the before named children of the ſaid Rebecca the land (i) recovered by the ſaid John Alexander and Elizabeth his wife againſt the ſaid Jonathan Beckwith, and deliver poſſeſſion thereof to him, and pay to the ſaid Jonathan Beckwith the profits of the ſaid land ſince that recovery, and that the injunction (k) obtained by the ſaid Jonathan Beckwith to ſtay execution of the ſaid John Alexanders judgement for the meſne profits be perpetual; and that the ſaid John Alexander do pay to the ſaid Jonathan Beckwith as well the coſts expended by him in defending the action of ejectment for recovering poſſeſſion of the land, and the action of treſpaſs for recovering the meſne profits, as the coſts recovered againſt him by, and paid to, the ſaid John Alexander in both theſe actions; that the ſaid Jonathan Beckwith do releaſe the 500l. legacy to him by one of the aforeſaid codicils; that the ſaid Mary Kelſick do releaſe her right in and to the tract of about 400 acres of land ſaid to lie near the poiſon old fields deviſed to her by the teſtament of her father; and that the diviſion of the ſlaves among the daughters of Richard Barnes the teſtator

(g) *This money is mentioned in the codicil of july, 1757, and ſaid to be nearer four than three hundred pounds.*

(h) *This writing, upon a conteſtation, was rejected by the county court of Richmond. but that ſentence was reverſed and the writing eſtabliſhed for the teſtament of Penelope Barnes by the general court, the 4 day of may, 1769.*

(i) *This land by the teſtament was deviſed to Rebecca Beckwith, and by the codicil of 30 day of june, 1760. ſuppoſed to be deviſed to Elizabeth the wife of John Alexander.*

(k) *John Alexander had recovered the meſne profits.*

teſtator made perſuant to the order of Richmond county court be confirmed; and the court doth order and direct that all the other ſurviving ſlaves of which the ſaid Richard Barnes and Penelope his widow died poſſeſſed reſpectively with the increaſe of the females be divided into four equal parts to be allotted one to Jonathan Beckwith the father and to each of the ſaid Mary Kelſick, Sarah Hooe, and Elizabeth Alexander; that an account of the profits of the ſaid ſlaves, ſo to be now divided, and of ſuch of that ſtock as are dead, which have been received by all or any of the parties and by Gerrard Hooe in his life time, ſince the death of Penelope Barnes, be made up; that the ſaid Jonathan Beckwith do make up an account (*l*) of his adminiſtration of Richard Barnes; and that the ſaid John Alexander and Sarah Hooe do make up an account of ſuch eſtate of the ſaid Richard Barnes and Penelope Barnes, excluſive of the ſlaves firſt divided, as came to the hands of the ſaid Gerrard Hooe and John Alexander and their wives, and the court doth appoint commiſſioners to make the ſaid diviſion of ſlaves and to examine, ſtate, and ſettle the ſaid accounts and report the ſame with any matters thought pertinent by themſelves or required by the parties to be ſpecialy ſtated, to the court, authorizing any or more of the commiſſioners to act, and to procede in the abſence of any party failing to attend them after notice of the time and place appointed for that purpoſe, and for information upon the ſubjects of reference to examine any of the parties in a ſolemn manner.

BETWEEN
ROBERT GAINES BEVERLEY, *plaintiff*,
AND
JOHN RENNOLDS, executor of Leroy Hipkins, *defendent*.

THE plaintiff Beverley, an improvident young man, in order to be ſupplied with money for preſent purpoſes of gaming and ſquandering, having agreed, whilſt he was under age, to ſell his land, worth four hundred pounds, for the value of forty or fifty pounds, to Hipkins, who paid the conſideration partly in tobacco, and partly in paper money, refuſed to abide by the bargain, when he attained his full age; offering however to repay the value which he had received, with intereſt. Hipkins, unwilling to forego the benefit of the contract, and complaining of the breach of it by Beverley, propoſed a reference of the controverſy between them to arbitrators. the friends of Beverley, knowing the influence over his mind, which, by miniſtring aliment to his rage for play, and practiſing on his habits of diſſipation, Hipkins had gained, and ſuſpecting (*a*) that this propoſition was made with hopes to profit by that influence, would have diſſuaded Beverley from conſenting to the reference; and he declared to them he would not conſent to it. notwithſtanding which, the ſame day, he was prevaled upon to ſubmit the matter to the arbitrators, who adjudged him to pay three hundred pounds, to ſecure which he granted his bond. ſome time afterwards Beverley became bail for appearance of Hipkins, arreſted in an action of debt againſt him brought by one Buckner, and, by the management of Hipkins, was compelled to pay the money recovered by Buckner, which exceded one hundred pounds. the defendent commenced an action, and obtained a judgement, againſt the plaintiff, on the bond for payment of the three hundred pounds awarded; and to be protected from that judgement, by an injunction to ſtay execution of it, was the object of this ſuit. The

(*l*) *The adminiſtration of the eſtate of Richard Barnes had been firſt committed to his widow Penelope Barnes, and afterwards to Jonathan Beckwith in conjunction with her.*

(*a*) *Their ſuſpicion ſeemed juſtified by the ſequel.*

The court was of opinion that by the award the plaintiff ought not to have been charged, becauſe refuſing to perform a contract, which was not only void in law but made in ſuch circumſtances that, if infancy of one party were not in the caſe, a court of equity ought not to have decreed a performance of it, the plaintiff did no injury; ſo that the award condemning him to pay damages for that refuſal ſeemed illegal; and if it be illegal, relief againſt it, a bond having been granted in conformity with it, was conceived to be properly ſought in equity. and the court was alſo of opinion, if the plaintiffs refuſing to perform ſuch a contract could be denominated an injury, or if relief in equity could not be properly ſought againſt an award condemning him who hath not done injury to pay damages, that the damages awarded in this caſe exceeded any meaſure of reparation, authoriſed by the principles of equity, ſo far, that this alone is ſufficient to prove the arbitrators to have proceded in ſome unjuſtifiable manner, (*b*) for which their act, and the bond in conſequence of it, ought not to be accounted valid; and the plaintiff, in ſatisfying Buckners judgement, having paid more than he juſtly owed to the defendents teſtator; the court, 26 day of october, 1791, decreed the injunction, which had been awarded upon preſenting the bill, to be perpetual.

BETWEEN
WILLIAM DAWSON, *plaintiff*,
AND
BEVERLEY WINSLOW, *defendant*.

THE bill was to enjoin a judgement, founded on an award.

The plaintiff, in ſeptember, 1783, agreed to purchaſe 150 acres of land from the defendent for 200 pounds, and, ſome weeks afterwards, executed two bills penal for payment, one of 100 pounds, and the other of 150 pounds, to the defendent, on or before the 25 day of december, in the ſame year.

The defendents deſign in taking one bill, which the plaintiff reluctantly ſigned, for 150 pounds, inſtead of 100 pounds only according to the agreement, was, by ſubjecting the plaintiff to the penalty of 50 pounds, to ſecure punctual payment or an equivalent. this, if it were not confeſſed by the defendent, in his anſwer, would be manifeſt by a memorandum on the ſame paper, ſigned by him, purporting to be an agreement that the bill might be diſcharged by payment of 100 pounds, on or before the 25 day of december then next, or by delivering to the defendent a bond which he had given for 100 pounds payable to Henry Garrett the 10 day of february thereafter; and that the plaintiff had liberty til that day to procure the bond.

Henry Garrett had promiſed the defendent, at his requeſt, the time of which requeſt doth not appear, not to part with this bond, before the money ſhould become payable.

The plaintiff, a few days before the day of payment, applied to Henry Garrett, and propoſed to take up the bond, offering to give his own bond, with a ſurety, for payment of the money, to which Henry Garrett would have conſented, if he had not made the promiſe; although he had agreed to aſſign

(*b*) *The injury for which Hipkins demanded reparation was that Beverley endeavoured to eſcape the ruin which the art of Hipkins was contriving. thoſe, who could approve ſuch a demand, perhaps would have thought the demand of Fimbria plauſible, who having wounded Scaevola, whom he intended to ſlay, and finding the wound not mortal, cited him, after he recovered, to appear before the judges, and being required to ſtate the cauſe of his complaint againſt Scaevola, anſwered* quod non totum telum corpore recepiſſet. *Cic. orat. pro S. Roſcio Amer.*

aſſign the ſame bond, when the money ſhould be payable, to David Garth, if a contract made with him ſhould not be diſcharged otherwiſe. Henry Garrett referred the plaintiff to Garth that by a treaty between them the plaintiff might obtain the bond. a treaty was accordingly between them, but without effect at that time, Garth refuſing to accept the plaintiffs, in exchange for the defendents, bond, from whom the money, or a negro in part payment, was expected.

On the 8 day of november, 1784, the defendent paid 14l. 6s. 2d. to Garth, now the holder of the bond, by which, after 3l. 14s. 3d. deducted for intereſt, 89l. 8s. 1d. of principal money, remained due.

David Garth, on the 19 day of february, 1785, aſſigned the bond, for the money then due by it, which was 90l. 13s 3d. to the plaintiff, and he ten days afterwards was preparing to deliver it, with 7l. 6s. 0d. in money, to the defendent, who eluded a formal tender thereof, ſo ſoon as he diſcovered the plaintiffs intention, by withdrawing abruptly. yet the defendent on the bill penal for the 150 pounds endorſed a credit for Henry Garretts bond.

The defendent having commenced actions at common law on the bills penal, in the county court of Spotſylvania, and the plaintiff having confeſſed a judgement for 41 pounds, which was three pounds and ſome ſhillings leſs than was due to the defendent, if the plaintiff were chargeable by both the bills penal with no more than two hundred pounds of principal money; *by conſent of parties, on the 3 day of november, 1785, all other matters in difference between them, reſpecting thoſe ſuits, were refered to the final determination of Joſeph Brock, William Smith, Edward Herndon, and James Lewis, or any three of them, whoſe award thereupon was to be made the judgement of the court; and all errors in the procedings were releaſed.*

Three of theſe referees reported, *that having heard the parties, and examined their accounts and papers, they founa a balance due to the plaintiff* (who is defendent in this ſuit) *of 55l. 16s. 6d. excluſive of the judgement confeſſed for 41 pounds, and awarded the preſent plaintiff to pay the 55l. 16s. 6d. with intereſt from the date of that act, and coſts, to the preſent defendent.* according to which award the judgement ſought to be enjoined was entered.

Two of the referees, examined as witneſſes, depoſed, that when they were appointed arbitrators, and undertook the office, which had frequently happened, they ſuppoſed themſelves judges both of law and equity; and confeſſed that to them the defendent or his attorney read a ſtate of his caſe, but do not remember whether the rehearſal had or had not influence on the referees; and by one of them this queſtion, which the defendent propounded, *were not the parties and their attorneys heard with patience; and were not their accounts and other papers examined; and all other teſtimony that was offered by either party at the trial properly attended to?* was reported by the commiſſioners, who took the examination, to have been *anſwered in the affirmative.*

Two witneſſes, attending the referees, on behalf of the plaintiff, were not examined by them, who declared it was not worth while to examine any witneſſes, nor do they appear to have examined any.

The plaintiff excepted to reading the ſtatement of facts by the defendent, which nevertheleſs was read by him and his attorney, before the arbitrators, and ſeems to have been admitted, although the plaintiff alledged that he could diſprove ſome of the facts by witneſſes, if the arbitrators would examine them.

The memorandum on the bill penal for 150 pounds had been torn off by the defendent, although it was produced, with other papers, to the referees.

At the hearing, 20 day of may, 1791, the high court of chancery delivered this

Opinion

OPINION,

That the defendent, in profecution of a deſign to gain and ſecure to himſelf a profit illegal and unrighteous, was guilty of fraud, both in tearing the memorandum from one of the bills penal, and in obſtructing the plaintiff in the procurement of Henry Garretts bond, mentioned in the memorandum; *(a)* and that the referees, in deciding the difference ſubmitted to them, acted in ſuch a manner that the award made by them ought to be ſet aſide; and

Decreed a perpetual injunction to the whole judgement, awarding to the plaintiff the coſts in the action wherein the judgement was given, with the coſts of the ſuit in equity.

The court of appeals, before whom the cauſe was brought by the defendent, 17 day of october, 1792, pronounced the following

OPINION AND DECREE,

'That there is error in the ſaid decree, in making the injunction therein ſtated perpetual, as to the whole judgement for fifty five pounds ſixteen ſhillings and ſix pence, and the intereſt, whereas three pounds twelve ſhillings and eight pence, part thereof, appears by the record to have been due to the appellant, on the 3 day of november, 1785, for the balance of the bond for 100 pounds and the money paid by the appellant to Garth in part of his bond to Garret and intereſt to that time, over and above the 41 pounds, for which judgement was on that day confeſſed, and made no part of the 50 pounds and intereſt in diſpute between the parties; that as to the ſaid 50 pounds and intereſt, there is no error in the ſaid decree, the court, being of opinion that the ſaid 50 pounds was to be conſidered as a penalty for further enforcing the payment of 100 pounds, or procuring an aſſignment of the appellants bond to Garret for that ſum, againſt which penalty the appellee was intitled to relief in equity, not only by the general principles of that court, to relieve againſt penalties on making compenſation, but, becauſe in this caſe, the appellee was prevented in performing one by the alternatives by the interpoſition of the appellant, and that the ſaid decree is not erroneous as to the coſts at law, more money appearing to have been tendered to the appellant before ſuits brought than was due to him at that time. therefore it is decreed and ordered that the ſaid decree be reverſed and annulled as to 31. 12s. 8d. part of the judgement for 551. 16s. 6d. with intereſt from the 3 day of november, 1785, that the injunction obtained by the appellee in the ſaid high court of chancery be diſſolved as to ſo much; that the reſidue of the ſaid decree be affirmed, and that the appellee pay to the appellant his coſts by him expended in the proſecution of his appeal aforeſaid here.

REMARKS.

The court of chancery is confeſſed to have erred in perpetuating the injunction to the whole judgement. an account was not ſtated, as it ought to have been, at the hearing, to ſhew that the money due from the plaintiff to

(a) The court of chancery would not, for this reaſon only, have ſet aſide the award, if the arbitrators had not appeared to have acted improperly; becauſe the ſentence of arbitrators, even if to a court it ſeem unjuſt, was theretofore thought to be definitive: but the arbitrators were believed to have miſbehaved in refuſing to examine witneſſes produced by the plaintiff, whoſe teſtimony appeareth, by their written examinations, to have been pertinent and important, and might and probably would have contradicted or repreſented differently the facts ſtated by the defendent before the arbitrators, and ſuppoſed to have been admitted by them.

to the defendent was between three and four pounds more than the 41 pounds, for which the judgement had been confeſſed.

Upon the main queſtion in the caſe, namely, whether the plaintiff ought to be relieved by a court of equity againſt the judgement? the opinion of the court of appeals is ſtated in theſe terms, *that the ſaid 50 pounds was to be conſidered as a penalty for further enforcing the payment of 100 pounds, or procuring an aſſignment of the defendents bond to Garrett for that ſum, againſt which penalty the plaintiff was intitled to relief in equity, not only by the general principles of that court, to relieve againſt penalties on making compenſation, but, becauſe in this caſe the appellee was prevented in performing one of the alternatives by the interpoſition of the appellant.* by which that court is ſuppoſed to have conſidered the caſe in the ſame manner as if no award had been made in it; and conſequently to have eſtabliſhed this poſition, that a court of equity hath power to relieve againſt a judgement founded upon an award, if the award appear to be contrary to the principles of equity, and if, as in the preſent caſe, the party, in whoſe favor the award is, had by his interpoſition prevented the other party from performing ſomething whereby he would have ſaved a penalty, which he was condemned by the award to pay; and this, notwithſtanding the whole matter diſcuſſed before the court of equity had been diſcuſſed before the arbitrators.

That, in this caſe, the matters diſcuſſed before the court of chancery were diſcuſſed before the arbitrators is manifeſt by the exhibits and teſtimony, the queſtion controverted between the parties, before both tribunals, being only, whether the defendent ought or ought not to have the fifty pounds penalty?

The act of the arbitrators may be underſtood therefore in the ſame ſenſe as if their ſentence had been declared in theſe terms: *upon the two queſtions controverted between the parties we are of opinion,* 1, *that the defendent* (that is the plaintiff in the court of chancery) *ought not to be relieved againſt the penalty of fifty pounds, upon making reparation for all damage ſuſtained by his failure to deliver to the plaintiff* (that is the defendent in the court of chancery) *his bond to Henry Garrett, within the time limited. (b) and* 2, *that the plaintiff is intitled to the fifty pounds penalty, although it was incurred by his act and default, the one, in obtaining a promiſe from Henry Garret not to part with the bond before a certain time, and the other, in not having releaſed Henry Garret from the promiſe before the defendent applied to him for the bond. and therefore we do order and award, that the defendent pay to the plaintiff 55l 16s 6d. the principal money, including that penalty, found due to him from the defendent, excluſive of the 41 pounds for which judgement hath been confeſſed, with intereſt from this time, and coſts.*

Let us admit the opinion of the arbitrators to have been erroneous in each queſtion; hath any court, for that reaſon only, power to correct their ſentence?

The object of theſe compromiſſary diſceptations is to prevent the expenſe, delay, turbulence, and other inconveniences of forenſic litigation. the parties intend the determination of the arbitrators to be final. it is ſo declared in the formula by which the controverſy is ſubmitted to their determination. it was ſo declared in the ſubmiſſion in this caſe.

When parties differ in opinion, or pretend to differ in opinion, each thinks, or pretends to think, the opinion of the other wrong. the queſtion then between them is which is right? unable theirſelves to decide this queſtion they

(b) In truth no damage was ſuſtained; but the plaintiff derived no leſs benefit from the defendents procurement of the bond, at the time when it was procured, than he would have derived from a procurement before expiration of the time limited.

they empower other men to decide it for them. the ſubmiſſion to thoſe men imports an agreement by each party that he will allow to be right that opinion which the arbitrators determine to be right. the judgement of the arbitrators therefore is the judgement of the parties. he whoſe former opinion the arbitrators condemn is ſelfcondemned. this is believed to be the genuine ratio which breathes in the trite argument, againſt reſciſſion of awards, unleſs for ſome miſbehaviour in the arbitrators, namely, that they are judges choſen by the parties themſelves. the choice of parties cannot make the arbitrators abler judges. and if the arbitrators may juſtly be ſuſpected of inclination to favor the party who choſe them, they ought not to be choſen, nor ought their ſentence to bind the other party, if he knew not the cauſe of ſuſpicion. from the ſentence of arbitrators no direct appeal lieth to any court. accordingly courts of appeal are appointed to reverſe and correct the deciſions of courts which form part of the judiciary ſyſtem, not to reverſe and correct the deciſions of judges whom the parties appoint to adjuſt their diſputes.

This doctrine is not peculiar to us, nor to our times.

In Athens, the ſentences of their diallacterioi, who were judges choſen by the parties, differing from our arbitrators only in being ſworn, were not reverſible, as we learn from the oration of Demoſthenes againſt Midias.

By the roman civil law *arbitrorum genera ſunt duo, unum ejuſmodi, ut ſive aequum ſit, ſive iniquum; parere debeamus: quod obſervatur, cum ex promiſſo ad arbitrium itum eſt.* Dig. lib. XVII. tit. LVI. l. 76. *qualem autem ſententiam dicat arbiter, ad praetorem non pertinere, Labeo ait, dummodo dicat quod ipſi videtur.* Dig. lib. IV. tit. VIII.

In many caſes, however, a refuſal to abide by an award is juſtifiable, and in ſuch caſes the magiſtrate, without whoſe authority execution of the ſentence cannot be enforced, may, not only deny his aid but, abrogate the ſentence. for example, 1, where an arbitrator giveth ſentence for the party by whom he is bribed, or giveth ſentence for one party, moved by good will toward him, or illwill toward his adverſary; becauſe the arbitrator is diſqualified to perform the office undertaken by him, that is, the office of a judge, who ought to give the ſentence which the praecepts of juſtice dictate, not the ſentence which corruption in the one caſe, or affection or malice in the other caſes, may prompt: the ſentence of a judge, who thereby earneth ſordid wages, or gratifieth a vicious paſſion, is no leſs a void act, than it would be, if he were to gain a part of the thing in controverſy. 2, where the arbitrator giveth ſentence for one party whom he doth hear, without hearing the other party, or giveth ſentence without hearing either party, or, after hearing both, without beſtowing convenient time in deliberating on the ſubject of controverſy; becauſe he doth not perform the office of a judge, which is to decide after hearing both parties, and to decide after duly deliberating on their allegations, the former being idle, if not rendered momentous by the other. 3, where the award itſelf is ſhewn to be ſuch as could not have been made without corruption, improper influence, *(c)* or precipitancy in the arbitrator, which hath frequently happened.

The writer of theſe remarks perhaps hath miſtaken the decree of the court of appeals, if not, he aſks whether it be not a decree *primae impreſſionis*, and whether it doth not conſtitute every court of equity a court of appeal from awards?

BETWEEN

(c) See *the caſe immediately preceding this.*

BETWEEN

FREDERICK WILLIAM HEARNE and Anne his wife, *plaintiffs*,

AND

THOMAS ROANE, John Roane, James Upſhaw, and William Latane, executors of William Roane, *defendents*.

THE plaintiff Anne was the widow of William Roane, the teſtator of the defendents. before their intermarriage, on the 24 day of october, 1782, they had executed an agreement, the articles of which were to this purpoſe: 'firſt, that the parties, during their covertue, ſhall hold poſſeſs 'and enjoy all ſuch rights and privileges as belong to them, in as ample 'manner as if the agreement had not been made. ſecondly, if he ſhould 'die before her, that ſhe ſhall immediately hold and poſſeſs, during her life, 'the dwelling houſe, outhouſes, orchard, and appertinences, with 800 'acres of land, and one third part of a griſt mill, all which are in the coun-'ty of Eſſex, in lieu of her dower in his lands to which ſhe would other-'wiſe have been intitled: and ſhe ſhall, immediately after his death, poſ-'ſeſs twenty good negroes, including a full proportion of houſe ſervants, 'ſuch as ſhe may chooſe, and, if the twenty negroes ſhould not amount in 'value to a full third part of the negroes whereof he ſhall die poſſeſſed, then 'ſhe ſhall have as many more as will amount to a full third part of all the 'negros, which are to be in lieu of dower of his ſlaves, and ſubject to the 'ſame laws and regulations. thirdly, if ſhe ſurvive him, and have no child 'living at the time of his or her death, that the negroes, which ſhould come 'into his eſtate by the intermarriage, with their increaſe, ſhall be veſted in 'her in ſuch abſolute manner that ſhe may diſpoſe of them, or otherwiſe 'they ſhall deſcend to her heirs. but if he, with her conſent, ſhould ſell 'any of the negros which came by her, his eſtate ſhould not be accountable 'for them. fourthly, at his death, that ſhe ſhall have the beſt riding car-'riage, and horſes belonging to it, which ſhall not be brought into account 'at the diviſion of the perſonal eſtate. and laſtly, that ſhe ſhall be intitled 'to a third part of his perſonal eſtate in the ſame manner as if the agreement 'had not been made.'

William Roane, about a fortnight after the marriage contract, by deeds of gift, conveyed ſeveral of his ſlaves, with lands, to his ſons Spencer Roane and Thomas Roane.

William Roane died in november or december, 1785, without a child by the plaintiff Anne, having made his teſtament, wherein he declared his deſire to be, 'that in addition to that part of his houſehold furniture, to 'which his wife would be intitled by her marriage contract, his executors 'ſhould allow and aſſign to her ſo much more as they ſhould judge neceſſary 'for her uſe, to be poſſeſſed during her widowhood, but returned if ſhe 'ſhould marry.'

At a ſale of the perſonal eſtate of William Roane by his executors, the plaintiff Anne bought ſundry articles amounting to 3681. 17s. 9½, for which the defendents in an action at common law recovered a judgement.

In obedience to an order of Eſſex county court, dated in january, 1786, and a decree, as it is called in the exhibit, of that court, in the following month, commiſſioners thereby appointed, after laying off and aſſigning to the plaintiff Anne that part of the ſlaves of William Roane to which, as the commiſſioners ſtate, ſhe was intitled by marriage-contract, divided the reſidue among his children.

The whole number of negros ſaid to be thus aſſigned to the plaintiff were nineteen, of which ſome had been the ſlaves of the plaintiff at the time of the marriage, and among theſe was accounted one who had died in the life-time of William Roane.

The

The plaintiffs, by their bill, clamed dower, over and above the wifes proper ſlaves at the time of the intermarriage with William Roane, and an allowance for two, ſold by the defendents, of the four carriage horſes, inſiſting they were intitled to four, and prayed an injunction to the judgement for the money recovered on account of the goods bought by the plaintiff Anne.

The defendents inſiſted that the marriage articles, upon which the plaintiffs relied for aſſerting, did oppugn, the demand of dower; that only two, inſtead of four, horſes belonged to the carriage; and that the whole of William Roanes perſonal eſtate, with the articles bought by the plaintiff Anne, was not equal to the debts due from him.

The cauſe came on to be heard, in october, 1790, when the court delivered this

O P I N I O N,

That in the ſlaves, to the poſſeſſion of which the plaintiff Anne, by the marriage contract between her former huſband William Roane, the teſtator, and herſelf, was intitled, in lieu of dower, thoſe which were her property, at the time of her intermarriage, ought not to have been included, becauſe the ſlaves, which by the contract, ſhe ſhould have and enjoy in the event of her ſurviving him, whether having a child by him or not, are ſuppoſed to be his proper ſlaves, ſince a power to ſettle them on her, in lieu of dower, or otherwiſe, implieth a property in him at the time of the contract, or at the time of his death; whereas the ſlaves which the plaintiff Anne had, at the time of the contract and intermarriage, were not his property, but were her property, and remained her property, when he died without having a child by her, and were not ſubject to the laws and regulations of dower ſlaves; that the plaintiffs ought not to be precluded, by the order and decree of Eſſex county court and the diviſion and aſſignment made in obedience thereunto, from recovering now ſo many of the ſlaves as the plaintiff Anne was intitled to more than what were then aſſigned to her, becauſe ſhe was not a party in the ſuit, if it can be called a ſuit, wherein that order and decree were made; nor doth her preſent demand appear to have been diſcuſſed at that time; that whether the gifts by the teſtator to his ſons Spencer and Thomas be fraudulent as to the plaintiff Anne? is a queſtion not proper to be decided in this caſe, as it is now brought on, the donees not being parties; and that the plaintiff Anne was intitled to the two horſes only, which ſhe hath received, becauſe only that pair, having ordinarily drawn the carriage, to which the horſes were ſaid to ‘ belong,’ are underſtood to have been deſignated. and made this

D E C R E E,

That of the ſurviving ſlaves which were in poſſeſſion of the teſtator William Roane, at the time of his death, excluſive of the unprofitable from old age and infirmity, and alſo excluſive as well of the plaintiffs now proper ſlaves, and the nine formerly received by the plaintiff Anne, as thoſe given by the deeds of gift to the teſtators ſons Spencer and Thomas, although they might have been in his poſſeſſion at his death, eleven, or ſo many more as, with thoſe nine, will be equal to one third part, be aſſigned to the plaintiffs, together with the children of any females among thoſe ſo to be aſſigned, born ſince the teſtators death, the value of which ſlaves ſo to be aſſigned ſhall be in like proportion to the value of the ſtock, whence they are to be taken, as one of the numbers is to the other; and that the defendents account with the plaintiffs for the profits of the ſlaves ſo to be aſſigned from the end of the year in which the teſtator died; and the court doth award an injunction to the judgement of the defendents againſt the plaintiffs in the action at common law,

law, until the account of adminiſtration of the teſtators eſtate, now directed to be ſtated and reported, ſhall diſcover whether a ſurplus thereof remain, the plaintiffs ſhare of which may diſcharge, or be diſcounted out of, that debt.

This decree, from which the defendents appealed, was affirmed in november, 1791.

BETWEEN
ARCHIBALD HAMILTON and company, *plaintiffs*,
AND
WILLIAM URQUHART, executor of Nathaniel Flemyng, *defendent*.

IN this cauſe, heard the day of ſeptember, 1794, the court decreed ſo much of a debt, ſecured by bond in 1777, as appeared to have become due for dealings in preceding years, to be paid, without being reduced according to the ſcale of depretiation, eſtabliſhed by the act of general aſſembly, paſſed in the november ſeſſion of 1781, or according to any other ſcale; that ſtatute, in the laſt ſection thereof, being underſtood to have authorized an examination into the origin of the demand, and a rejection of the ſcale, and the ſubſtitution of ſome other mode of adjuſtment more equitable, where that ſhall be diſcovered to have graduated the decrement in value of paper money in particular caſes inadequately; and the value of paper money, during the period of dealings between the plaintiffs and the teſtator of the defendent before the ſtatutory period of depretiation began, not being ſhewn to have been leſs than the value of money current at this time.

BETWEEN
WILLIAM WILSON, *plaintiff*,
AND
ANGUS RUCKER, *defendent*.

THE defendent loſt a military certificate, which was his property, and procured a duplicate thereof from the auditor for public accounts, in the manner preſcribed by the ſtatute of may ſeſſion, 1783, chap. 1. before the date of the duplicate, another man ſold the certificate, then in his poſſeſſion, to the plaintiff, who paid a valuable conſideration for it, at that time not knowing it to have been loſt by the defendent. the duplicate was returned.

Theſe facts were ſtated in a ſpecial verdict, found on a new trial of the iſſue, in an action of trover, brought by the preſent defendent againſt the preſent plaintiff in the diſtrict court of Dumfries; which new trial this court directed by *(a)* conſent of parties.

Opinion

(a) The cauſes, for which the plaintiff, by his bill, prayed a new trial, with an injunction in the mean time, to be awarded, were, 1, the jury, without hearing the queſtion of right argued by counſil, and although they were inſtructed by the counſil of both parties, that the queſtion would be aiſcuſſed before and decided by the court, and that aſſeſſment of the damages, ſubject to the opinion of the court, was the only matter refered to the jury, nevertheleſs returned a general verdict for the defendent; and having reſumed their ſeats by direction of the court in order to hear the arguments of counſil, one of the jurors, whilſt they were attending to thoſe arguments, being ſeiſed with a convulſive paroxyſm, was neceſſarily removed, and was not able to reaſſociate with his fellows before the term for the courts ſeſſion ended; notwithſtanding all which the court, having rejected a motion for the plaintiff to ſet aſide the verdict, and award another trial, recorded the verdict, and entered a judgement accordingly. 2, one of

Opinion of the court the day of ſeptember, 1794.

A military certificate is transferable by ſimple delivery of it; and therefore the holder of it is preſumed to be the owner, and to have derived a right to it immediately or mediately from the officer or ſoldier to whom it was originaly granted.

But againſt this preſumption proof of the contrary may preponderate: and here is ſufficient proof of the contrary.

That the man, from whom the plaintiff bought the certificate, had acquired a right before the loſs, may be confidently denied, becauſe a jury, whoſe veracity in ſuch a caſe cannot be controverted, affirm it at that time to have been the property of the defendent.

And that it was aſſigned by the defendent afterwards, is ſo incredible that it may be denied with confidence juſtified by theſe conſiderations: 1, the plaintiff in his bill doth not alledge ſuch an aſſignment to have been made, which undoubtedly he would have alleged, requiring a diſcovery, if he had even ſuſpected it to be true; 2, the defendent procured a duplicate of the loſt certificate, which he muſt have known to be worthleſs if the original ſhould be produced; and which was accordingly returned, to be canceled, when the original was diſcovered to have been found, and clamed by another; and 3, no man, as is ſuppoſed, would have bought the loſt certificate from the defendent, if he had offered it for ſale.

Payment of value for the certificate doth not alter the queſtion, which is only, whether one can transfer a right which he hath not to another?

Nor is this caſe like the caſe of loſt money found and paid away, where the identity of the money cannot be proved *cannot be proved*, is ſaid, becauſe where the money can be identified, e. g. if the lock of a caſket or cheſt or ſeal of a bag in which it was depoſited appear not to have been broken, it is not diſtinguiſhed from the caſe of any other thing found, or taken from the owner by ſtealth or violence.

Neither is this caſe like the caſe of a bill of exchange with a blank indorſement, which the holder may fill up with his own name, or like the caſe of an order payable to bearer, by the terms of which thoſe who poſſeſs the draughts are empowered to receive the money.

DECREE, *(b)*

That the plaintiff reſtore the certificate, with all the intereſt thereon received, to the defendent; or pay the value of the principal money and intereſt to him; and alſo in either caſe pay the coſts.

Between

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the jurors informed the plaintiff, after having heard what had been urged by his counſil, he the juror was not ſatisfied with his former opinion, and that he believed, upon a ſecond conſideration of the matter, a different verdict would have been rendered. and 3, the damages were alleged to be exceſſive. whether for theſe cauſes or any of them a court of equity ought to have directed a new trial? was not determined in this caſe, the defendent, without anſwering the bill, having conſented that the new trial be directed. ſee the caſes between Hoomes and Kuhn, Cochran and Street, and Cobbs and Moſby 28 of october, 1791.

(b) This decree, condemning a plaintiff to pay money to a defendent who had not demanded it by a croſs bill, is believed to be ſupportable upon the ſame grounds as a decree againſt a plaintiff bringing a bill for an account. beſides, if this court could only have diſſolved the injunction, the defendent could have recovered no more than the damages aſſeſſed by the firſt verdict; for the diſtrict court could not have entered a judgement on the ſecond verdict, the action not then depending.

BETWEEN
JOHN HOLCOMB OVERSTREET, *plaintiff*.
AND
RICHARD RANDOLPH, and David Meade Randolph, executors of Richard Randolph, and William Griffin, *defendants*.

THE plaintiff had executed an obligation for payment, to Richard Randolph, the teſtator, of three hundred pounds, the price for a negro ſlave ſold. the ſeller had acted ſo unfairly in the bargain that, if he and the buyer only had been intereſted, the latter ought to have been diſcharged from the obligation. but the court, on the 5th day of auguſt, 1789, delivered an opinion, that the plaintiff was not intitled to relief againſt the obligation in the hands of the aſſignee, the defendent William Griffin, who having paid a valuable conſideration for it, without knowledge of unfairneſs in the ſale of the negro, and being impowered, by ſtatute, made in 1748, (ch. 27 of the edit. in 1769, ſect. 7) to commence and proſecute an action in his own name, had a legal right to the money acknowledged by the obligation to be due, and whoſe equity was not leſs than the obligors equity. in conſequence of which opinion the bill of the plaintiff, which was partly for an injunction to ſtay execution of a judgement recovered in an action upon the obligation by the aſſignee, was diſmiſſed, as to that defendent.

Againſt this opinion, when the ſame queſtion hath been ſeveral times ſince diſcuſſed in other caſes, were objected,

1, That it exalteth a derivative right over the primitive right, implying that the obligee may transfer a right which he hath not, or a greater right than he hath, to the aſſignee.

2, That the opinion ſuppoſeth the aſſignees equity not to be leſs than the obligors equity, the truth of which was not admitted.

3, That the doctrine, inculcated in the opinion, will encourage fraud and produce more inconvenience than the contrary doctrine. obligees, conſcious that, that by their malverſation, they were ſo obnoxious as that demands, in their own names, were not ſuſtainable, will aſſign the obligations, and, becoming inſolvent, which is ſaid to have happened in the principal caſe, or removing to parts unknown, prevent or render ineffectual recourſe to them by injured obligors. more reaſonable would be to put the aſſignee in the ſame condition in which the obligee is; for the aſſignee, before he accepts the aſſignment, might, by inquiry, be informed if the obligor admitted or denied the money to be juſtly due, whereas the latter can ſeldom or never give timely notice to the former of exceptions to the demand.

4, That, by equity of the ſtatute, which authoriſed commencement and proſecution of actions in the names of aſſignees, directing diſcounts, before notice of aſſignment, to be allowed, obligations in the hands of aſſignees ought to be liable to objections which might be urged againſt them, if they had remained in the hands of the obligees.

ANSWERS:

To the firſt objection. the opinion is not ſuch a paradox as the objector ſuppoſed. if the obligation be ſuch that the action upon it, brought by the obligee himſelf, would not be barred by any legal plea, the court of law could not hinder him from recovering a judgement and ſuing forth execution, although he ſhould appear to have practiſed fraud in obtaining the obligation. the court of equity can reſtrain him, by injunction, from enjoying the benefit of his judgement, upon this principle; that he who had injured the obligor, by foul dealing, ſhould make reparation for it. the obligee, when he aſſigns the obligation, transferreth ſimply his right to the money thereby acknowledged to be due; but doth not transfer, cannot transfer, thereby, his

his duty to make that reparation, *(a)* nor can be ſaid to transfer a right which he hath not, although it be a right from enjoying which the court of equity may reſtrain him. but ſuch a power cannot be warrantably exerciſed by that court againſt the aſſignee, if he were innocent of the fraud, becauſe it would be manifeſtly forcing one man to make reparation for injury done by another man. and accordingly a court of equity doth never deprive the purchaſer of a legal title, although unfairly acquired by the ſeller, if the purchaſer were not an accomplice in or privy to the unfairneſs. conſequently the aſſignee, who is not a *particeps criminis*, either by his own act or by acceptance of a title known by him to have been unfairly acquired, hath the ſame right to the money, acknowledged by the obligation to be due, as if it had been made payable to himſelf, with this difference only, that the aſſignee muſt allow diſcounts to which the obligor was intitled againſt the obligee, the nature of which diſcounts will be explaned in anſwer to the fourth objection.

The obligor, if, before diſcovering the unfairneſs in the ſale, he had paid the money to the ſeller, might have recovered it from him.

But could the obligor, before the diſcovery, paying the money to the aſſignee, have recovered it from the latter?

This indeed is only ſtating the caſe and propounding the queſtion over again, with a circumſtance which ought not to vary the determination, but which will exhibit more plauſibly this defenſe, which the aſſignee might urge againſt the demand from him by the obligor of reparation for a wrong done by the obligee: *i have received what was confeſſedly due to me, and received it from thee, who didſt acknowledge thyſelf to be debitor for it;—i truſted the obligee on thy credit;—if thou hadſt not enabled him to turn thee over a debitor to me, i might not have dealed with him,—might have required caution from him,—or might have recovered a judgement againſt him, before he became inſolvent; finaly i have done thee no wrong.*

The ſame defence urged by the aſſignee, before receipt of the money, ought, as is conceived, to prevale; for the following aphoriſm is believed to be a juſt rule; of two innocent men, in which predicament are obligor and aſſignee in the principal caſe, the loſs, which one muſt bear, ought to reſt on him, by whoſe act it was occaſioned; becauſe, without that act, the loſs would have been prevented. in this caſe, the act which occaſioned the loſs was granting the obligation.

To the ſecond objection. the reaſon of the opinion, namely, that the aſſignees equity is not leſs than the obligors equity, is ſtill believed to be correct. for although where the equity of one party, and the equity of another are homogeneous their quantities may be compared together, and their difference, if they be not equal, may be determined as accurately, perhaps, as quantities, which are the ſubjects of geometrical calculation: yet the equity of an obligor, injured by the fraud of the obligee, and the equity of an aſſignee of the obligation, for valuable conſideration, without notice, injured by loſs of his debt, being ſo unlike, that they can not be compared together, in order to ſhew which is the greater, muſt be ſuppoſed equal.

To the third objection. if the law be, as it is ſuppoſed to be, in favor of the aſſignee, the court of equity hath no power, in conſideration of inconveniences, to change the law. that the inconveniences would be leſs, if the law were determined to be otherwiſe, is not granted; becauſe that it can be proved is not believed. moreover the obligor in almoſt every caſe may, as is ſuppoſed, be ſecure againſt danger from an aſſignment: for recent and diligent proſecution of a bill in equity, for relief againſt fraud in obtaining the obligation, will put a poſterior aſſignee in the predicament of a *lite pendente purchaſer*.

To

(a) Some, perhaps, would rather ſay transfer his SUABILITY.

To the fourth objection. 1, the ſection of the ſtatute, to which the objector alluded, is confined, by the terms of it, to ſuch diſcounts as are admiſſible on trial of an iſſue, in an action at common law; but the plaintiffs demand of a reparation, in this caſe, is not of that nature. if damages, which may be recovered, by way of reparation, for a fraud, can properly be diſcounted againſt the debt due by obligation, damages, which may be recovered for any other injury, committed by the obligee, may be diſcounted in like manner; which hath never been pretended. 2, the legiſlature, by allowing the action to be commenced and proſecuted in the name of the aſſignee, is ſuppoſed to have intended to put him in the ſame ſtate as the indorſee of a bill of exchange, againſt whom the drawer would not be intitled to ſuch relief as he might have obtained againſt the payee. 3, a proviſo in a ſtatute reſtrains the enacting words from operating upon the caſe deſcribed in the proviſo, but upon no other; and accordingly, the proviſo being in the nature of an exception, the maxim is *exceptio probat regulam*, or the enacting words apply to every caſe but that which is exempted from them by the exception, and conſequently the proviſo, by the *argumentum a pari ratione*, or even *a fortiori*, cannot be extended by equity; the proviſo is a meaſure limiting the extent of the enacting words, and, from the nature of the thing, ſhould no more be applied to any caſe, to which the words of it have not adapted it, than it ſhould be variable, in its reach, and eſpecialy in this caſe, where the proviſo warns the aſſignee, that the riſque which he runs is, not that the debt was never due but, that it hath been paid, its original juſtice being ſuppoſed.

BETWEEN
JAMES SOUTHALL, *plaintiff*,
AND
JOHN M'KEAND, John Powell, John Mayo and Charles Carter, *defendents*.

IN 1767, William Byrd, by advertiſements in the gazette, publiſhed his intention to diſpoſe, by lotery, twenty nine improved tenements, of which one, called John M'Keands, valued at one hundred and forty four pounds, was demiſed to that tenent at the yearly rent of twelve pounds, and eight hundred and ten unimproved parcels of land, whereof one hundred contained one hundred acres each, others half an acre each, and ſome were iſlands. the eſtates lay at and near the falls of James river.

Before the lotery was drawn, William Byrd was preparing to ſurvey the lands, deſigning to mark the boundaries of the tenements, and half acres, and ſo to delineate them as that they might form a town on each ſide of the river, with convenient ſtreets for paſſage.

Some of the tenents oppoſed the execution of this deſign, alledging it would derange their tenements, and threatening, if William Byrd perſiſted in it, to return the tickets which they had taken to ſell for him.

Whether John M'Keand, the holder of the tenement called by his name, joined in the oppoſition doth not appear. that he did not join is moſt probable, becauſe he neither occupied nor clamed any ground more than the area of his dwelling houſe.

The ſurvey was not then proſecuted, if begun.

Some time afterwards, whether the tenents who had been adverſe to the menſuration and delineation were now reconciled to it, or whether they knew not of it, or connived at it, William Byrd procured the lands to be ſurveyed, laying off for John M'Keands tenement half an acre, and plans of the towns to be drawn, which were hung up, expoſed to public view, in one part of the old capitol in Williamſburgh, and remained ſo expoſed during the time the managers ſuperintended the drawing of the lotery, in another part of the ſame houſe, in november, 1768. A

A ticket owned by the plaintiff won the prize marked 327, which by recurrence to the plan appeared to be John M'Keands tenement.

How much land, more or leſs than half an acre, was contained in this tenement, before he was a tenent of it, doth not appear. he did not cultivate any part of it, as hath been obſerved——if all the parts occupied by the preceding tenents, with ſome other ground not actually cultivated but ſituated ſo that it could not have been excluded, were included in one figure, the area would be more than half an acre——but ſuch a figure would not coincide with any ſtreet, or with the lines of coterminous grounds drawn prizes by other adventurers—muſt have been an irregular polygon, inconvenient to the fortunate adventurer himſelf, as well as to his neighbours—moreover, if the tenement had been ſurveyed in ſuch a manner as to include the grounds only which had been actualy occupied by any one tenent, bebefore John M'Keand, that it would have exceeded half an acre doth not appear—neither doth the part, which had not been actualy occupied, but which is included in the ſurvey, appear to be leſs than the occupied part, which is excluded—finaly, the plaintiff intitled confeſſedly to John M'Keands tenement, for which a rent of twelve pounds was annualy paid, actualy poſſeſſeth, for his prize, all the tenement which John M'Keand ever occupied or ever clamed, and for which he paid that rent, and almoſt half an acre more.

Nevertheleſs, the plaintiff, 14 years and half ſo many months, after the lotery was drawn, and almoſt as long after the land now clamed by him, for part of John M'Keands tenement, was poſſeſſed and improved by other men, and had been transferred for valuable conſideration oftener than once, brought a bill, in the county court of Henrico in chancery, to vindicate his title, and to compel the defendent Charles Carter, in whom the legal eſtate reſted, to convey it to the plaintiff.

The defendents John M'Keand and John Mayo, at that time the only intereſted defendents, anſwered the bill; and many witneſſes were examined. their teſtimony was chiefly to prove the ſituation of the ground in diſpute which had been cultivated by three men, Letcher, Woodſon, and Gunn, tenants who had lived in the houſe which, in 1767, and for the two next preceding years, was the dwelling houſe of John M'Keand, before it was called his tenement,—that a horſe-rack was on the land in diſpute, on the pins of which people, who frequented this place where a tavern was then kept, and thoſe who came to a public tobacco inſpection, called Byrds warehouſe, in the neighbourhood, uſed to hitch the bridle reins of their horſes—that a cock-pit was dug by Gunn, whilſt he kept the tavern, on part of the land in diſpute—to prove that a tree ſtood ſome where or other, upon the warehouſe ground, or the ground in diſpute, or between them, where the inſpectors uſed to prize tobacco,—to prove the ſituation of the place which the people, bringing tobacco to the warehouſe, uſed for a way,—to prove that the plaintiff gave notice of his title to M'Keand when he bought the land in diſpute from William Byrd, and that he had, ſome time before the war, applied to counſil to aſſert his title.

The county court diſmiſſed the bill.

The high court of chancery, to which the plaintiff appealed, directed an iſſue to be tried, in order to determine the boundaries of John M'Keands tenement, and a ſurvey of the land in controverſy to be made and reported to the court before which the iſſue ſhould be tried, and alſo directed the copied plan of Richmond, to which the plaintiff excepted, to be admitted in evidence at the trial.

The jury who tried the iſſue by their verdict found the boundary of the tenement to be that which agreed with the ſurvey and plan of the town of Richmond, which was in effect a verdict in favour of the defendents.

The court, before which the iſſue was tried, certified the weight of evidence

to be in favour of the plaintiff, and that the only evidence offered at the trial was the writen teſtimony (that is the teſtimony which was before the court of chancery) and the oral teſtimony of James Vaughan and James Price, whoſe writen examinations were likewiſe before the court of chancery, and who are not alledged to have depoſed any thing more when they were axamined *viva voce*.

The high court of chancery, on the firſt day of march, 1791, delivered the following opinion and decree:

'The court is of opinion, that a ſurvey and plan of the parcels of land, to be prizes in the lotery, from which this controverſy aroſe, was a neceſſary part of that ſcheme, as well for laying off the ground in convenient figures, as for indicating the ſituations, aſcertaining the quantities, and defining the boundaries of them; that the ſurvey and plan thereof, made for thoſe purpoſes, was not fraudulent as to any purchaſers of tickets; eſpecialy as probably all thoſe tenements, exceding half acres, the holders of which objected to diviſions of them, were laid off intire; as, at the time of drawing the lotery, the plan, ſuſpended in a public place, was expoſed to the view of all who would look upon it; and as, for any thing ſhewn to the contrary, all parties, until the lotery was drawn, yea all parties, except the appellant, even afterwards, acquieſced in that plan, as an authoritative terrier; that the tenements, denominated in the ſcheme Byrds and M'Keands, which are contiguous, laid off by the plan in parallelograms, were ſo much more commodious than the figures, into which an incluſion of the ground clamed by the appellant in the latter tenement any way would throw them, that the court believes the adventurers, if they could have been conſulted before the drawing of the lotery, would have approved that mode of laying them off; that the ground, cultivated or occupied by any holder of M'Keands tenement, doth not appear to have exceded much, if at all, at any time, in quantity, or, before the buildings erected on it, in value, the ground aſſigned to that tenement by the plan; that the plan ought to bind the appellant, becauſe by that alone he can clame, not only the lot which was drawn a prize againſt the ticket numbered 1158, *(a)* and ſo much of what is called M'Keands tenement in the plan as lieth between the ſouthern end of the houſe, in which he dwelled, and the ſaid lot adjoining to it, no part of which interjacent ground appeareth to have been cultivated or otherwiſe occupied by M'Keand or any tenent before him but, even M'Keands tenement, however bounded, ſince by the figures 326, *(b)* on the paper drawn againſt the appellants ticket numbered 5187, refering to the plan in which thoſe figures are found, that ticket is ſhewn to be fortunate. and the original plan having been probably deſtroyed, the copy, among the exhibits, mentioned in the examination of James Lyle, is ſufficiently proved to be correct, by the teſtimony, by the appearance of the thing itſelf, and by its congruity with the printed liſt of fortunate numbers, exhibited by the appellant, which was taken from the plan: *(c)* and therefore the court, approving the ſaid verdict, which findeth the line B G in the ſurveyors plot to be the boundary, dividing Byrds inſpection and M'Keands tenement, and rejecting a motion, made laſt term and repeated in this, for a new trial of the iſſue, and being of opinion that the appellant is not intitled in equity to the land clamed by him, doth adjudge order and decree that the decree of the county court

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(a) Marked 326 *bought by the plaintiff from Tayloe and Thornton.*

(b) It ought to be 327.

(c) The original plan being archetype both of the liſt exhibited by the plaintiff, and of the copied plan exhibited by the defendents, the agreement of theſe together, which is exact in all their parts wherein they can be compared, and thoſe parts are many, and pertinent to the preſent queſtion, demonſtrates the fidelity of the later; for the original plan and the plan ſaid to be copied from it, if they both agree with the liſt, muſt agree between themſelves.

court, by which was decreed and ordered that the bill of the appellant be diſmiſſed, and that he pay to the appellees their coſts, be affirmed, as it is hereby affirmed, and that the appellant do pay to the appellees the coſts expended by them in their defenſe, including the coſts of the trial before the diſtrict court.'

The court of appeals, before whom the cauſe was carried, on the 6 day of november, 1794, delivered the following

OPINION AND DECREE,

'The court, having maturely conſidered the tranſcript of the record, and the arguments of the counſil, is of opinion, that the verdict in the diſtrict court ought not to be conſidered as ſettling the bounds of the ground in diſpute, ſince the ſame is certified by the judge to have been given againſt the weight of evidence; but that the deciſion ought to be made upon the proofs and exhibits in the cauſe; that, under the ſcheme publiſhed by William Byrd, eſquire, the adventurers in the lotery had a right to expect, in the prize called M'Keands tenement, all the ground that had been occupied, as part thereof, which occupation ought rather to be collected from that of former tenents, who kept a public tavern on the tenement, which drew the attention of the public thereto, than from that of M'Keand, a private ſingle man, who had not occaſion to occupy the whole, and that the occupation of ſuch former tenents extended ſo as to include the ground in diſpute; that the ſurvey made by Benjamin Watkins, at the inſtance of the ſaid Byrd, after the publication of the ſcheme, by which the bounds of the tenement are ſuppoſed to be narrowed, ought not to affect the intereſt of the appellant, ſince neither he nor M'Keand, the tenent at the time, appear to have been preſent, ſo as to imply the conſent of either, that the occupied bounds ſhould be changed; nor is ſuch implied conſent in the appellant to be infered from the expoſure of that plan in the room where the lotery was drawn, even if he had read it, which does not appear; ſince he could not from thence diſcover whether the tenement was deſcribed therein according to the occupied bounds or not; and therefore it is unneceſſary to decide how far the copies from that plan ought to be admited as evidence; that the appellant, being thus intitled to the ground in diſpute, and M'Keand a purchaſer with full notice of that title, if the appellant had proſecuted his clame immediately, and M'Keand had proceeded in improving the ground, he would probably have loſt both together; but ſince the appellant did not proſecute any ſuit til after great improvements had been made, under the idea, as is to be preſumed, that the clame was abandoned, it would be unreaſonable for the appellant to take advantage of his own delay, to avail himſelf of thoſe improvements; and therefore his clame ought to be reduced to the value of the ground, as it ſtood at the time M'Keand purchaſed, for which value the tenement would have been conſidered as charged ſo long as it continued in M'Keands poſſeſſion, and to have been ſo charged in the hands of a purchaſer with notice; but ſince it appears the appellee Mayo holds under his father, who was a purchaſer without notice, the ground in his hands is diſcharged; and that there is no error in ſo much of the decree of the county court, nor in ſo much of the decree of the high court of chancery in affirmance thereof, as diſmiſſes the appellants bill, as to that appellee, with coſts; but that there is error in the ſaid decree, ſo far as the bill is diſmiſſed as to the ſaid M'Keand, who was anſwerable to the appellant for the value of the ground, as before mentioned: therefore it is decreed and ordered, that ſo much of the ſaid decrees as relates to the appellee Mayo be affirmed, that the appellant pay him his coſts by him about his defenſe in this behalf expended; that the reſidue of the ſaid decrees be reverſed and annulled, and that the appellants coſts in this court be paid him

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by the executors or adminiſtrators of the ſaid M'Keand, out of his eſtate, if ſo much thereof they have in their hands. the court would have proceeded to make ſuch decree as the ſaid court of chancery ſhould have pronounced, to wit, that an iſſue ſhould be made up, by direction of the ſaid court of chancery, and tried by a jury, to aſcertain what was the value of the ground in diſpute, on the 26 day of july, 1779, independent of any improvement made thereon ſubſequent to the 8 day of october, 1769, which being aſcertained ſhould be paid to the appellant out of M'Keands eſtate, with intereſt on ſuch value from the ſaid 26 day of July, 1779, together with the appellants coſts in chancery and the county court; but the ſaid M'Keand having died pending the appeal in this court, although the ſame hath been revived by conſent of parties as to his heirs and repreſentatives in their general character, without naming them, it is judged neceſſary they ſhould reſpectively be made ſpecific parties, that they may diſcover a ſtate of the ſaid M'Keands aſſets real and perſonal, in caſe there ſhould not be ſufficient of the latter to ſatisfy this demand: therefore the cauſe is remanded to the high court of chancery, for the ſuit to be revived there againſt his executors or adminiſtrators, as well as the heirs or deviſees of his real eſtate, and further proceedings to be had therein, in order to ſuch final decree.'

COMMENTARY.

The verdict in the diſtrict court ought not to be conſidered as ſettling the bounds of the ground in diſpute, ſince the ſame is certified by the judge to have been given againſt the weight of evidence;] if the judge of the high court of chancery have the ſame evidence before him which was before the diſtrict court, as was the caſe here, and ſhall happen to differ in opinion with the judge of that court, as was likewiſe the caſe here, being of opinion that the weight of evidence was in favour of the defendents, to evince the rectitude of which opinion will be attempted anon, what ought the judge of the court of chancery to do? ought he, diſregarding the verdict, and not only reſigning but contradicting his own opinion, to form ſuch a decree as will accord with the ſentiments of the diſtrict judge? ought he to award another trial? and that toties quoties? if, upon another trial, before a different judge, he and the jury ſhould change ſides, or if the court ſhould certify the evidence to have been in equilibrio, ſo that it would juſtify a verdict in favour of either party, of which one example is extant; what courſe ought the court of chancery to perſue? to theſe queſtions a fit anſwer perhaps occurs in the next words:

But that the deciſion ought to be made upon the proofs and exhibits in the cauſe.] be it ſo.

That under the ſcheme, publiſhed by William Byrd, the adventurers in the lotery had a right to expect, in the prize called M'Keanas tenement, all the ground that had been occupied, as part thereof;] theſe terms, notwithſtanding the ſeeming plenitude of their ſenſe, are ſo defective that, until an elliptis be ſupplied, a fair reaſoner might neither yield nor withold his aſſent to the truth of the propoſition, which they now exhibit. the ellipſis is of the occupier, ſo that whether he were Letcher, or Woodſon, or Gun, or M'Keand, or whether the occupiers were all the three former, or any two or one of them, is uncertain. if it be ſupplied ſo that the propoſition be read thus: 'under the ſcheme, publiſhed by William Byrd, the adventurers in the lotery had a right to expect in the prize, called M'Keands tenement, all the ground that had been occupied by Letcher, Woodſon and Gun, or any two or one of them, whilſt they were tenents of the houſe which John M'Keand afterwards held,' the truth of the propoſition is denied. 1, becauſe the exhibit, to which the reverſing decree refereth to prove the truth of the propoſition, will be hereafter ſhewn to prove the contrary. 2, becauſe the occupations of the land in diſpute are not proved to have been ſo uniform and permanent as that the ſaid occupied land could be truly ſaid either in

the technical or popular ſenſe to be appertinent to the houſe in which John M'Keand afterwards dwelled. 3, whether the cultivating tenants had any kind of title to the ground which they cultivated doth not appear. that they were intitled to what is called a curtilage may rationaly be ſuppoſed; but this term is believed to comprehend only thoſe accommodations which are convenient to mere indwellers, ſuch as a way, a yard, and ſome others.

Again; the word 'thereof' is put for 'M'Keands tenement.' if then theſe terms be put in the place of their repreſentative 'thereof,' the propoſition will be read thus: 'under the ſcheme, the adventurers had a right to expect, in the prize, called M'Keands tenement, all the ground that Letcher, Woodſon and Gun had occupied, as parts of M'Keands tenement;' that is, the adventurers had a right to expect, in the prize, called M'Keands tenement, in 1767, all the ground that Letcher, Woodſon and Gun, ſeveral years before it was M'Keands tenement, had occupied, as part of M'Keands tenement.

If the propoſition be read thus: 'under the ſcheme, publiſhed by William Byrd, the adventurers in the lotery had a right to expect in the prize, called M'Keands tenement, all the ground that had been occupied by John M'Keand, as part thereof,' the truth of the propoſition is admitted—then let us appeal to the ſcheme, the exhibit to which the reverſing decree refereth to prove the other ſenſe—'i will diſpoſe,' ſays William Byrd, 'by lotery, twenty nine improved lots, and, among them, John M'Keands tenement, for which he payeth me twelve pounds annual rent.' now the tenement, for which John M'Keand paid twelve pounds annual rent, was a houſe, and nothing but a houſe. the whole deſcription of that prize, offered to the adventurers by the ſcheme, therefore, was verified in the houſe, without the ground: ſo that William Byrd, by annexing ground to the houſe, gave more than the adventurers had a right to expect.——beſides no proof is exhibited of the rents paid by the predeceſſors of John M'Keand. that occupying ground, as well as the houſe, they paid more rent than he paid, who occupied one of the ſubjects only, is preſumable. if it be preſumable, and if the deſcription of the prize offered to the adventurers, by the appellation of John M'Keands tenement demiſed for the annual rent of twelve pounds, be more than completely verified, as it certainly is, no reaſon can be aſſigned for extending that deſcription, as the reverſing decree hath extended it, according to which it muſt be underſtood as if it had been in theſe, or ſome ſuch terms: 'the tenement formerly Letchers, afterwards Woodſons, lately Guns, now John M'Keands, worth 144 pounds, and rented at 12 pounds,' an interpolation which ſeemeth unjuſtifiable, and the more unjuſtible if the value of the houſe with the occupied land exceded one hundred and forty four pounds, or if the annual rent thereof exceded twelve pounds.

Which occupation ought rather to be collected from that of former tenents, who kept a public tavern on the tenement, which drew the attention of the public thereto, than from that of M'Keand a private ſingle man who had no occaſion to occupy the whole,] that is, which occupation by Letcher, Woodſon and Gun of ground near the houſe in which they lived before John M'Keand, ought rather to be collected from the occupation of thoſe tenents, than from the occupation of M'Keand, who occupied no part of the ground, except that on which the houſe ſtood. undoubtedly.

And that the occupation of ſuch former tenents extended ſo as to include the ground in diſpute:] if the occupation of former tenents did extend ſo far, this will not prove the plaintiffs title to the ground in diſpute, unleſs his title be proved to all the ground which thoſe former tenents occupied.

That the ſurvey made by Benjamin Watkins, at the inſtance of the ſaid Byrd, after the publication of the ſcheme by which the bounds of the tenement are ſuppoſed to be narrowed, ought not to affect the intereſt of the appellant, ſince neither

ther he nor M'Keand, the tenent, at the time, appear to have been preſent ſo as to imply the conſent of either that the occupied bounds ſhould be changed; without a ſurvey and plan or map, how could the lotery, that is, ſuch a lotery as was propoſed by William Byrd, and expected by the adventurers, have been drawn? how could any man know whether a prize were an improved tenement, or one hundred acres, or half an acre of bare land, or whether it were on this or that ſide of the river, or whether it were on neither? muſt not the fortunate adventurers have divided among them the prizes equaly, which was never deſigned, or have divided them by another lotery, inconſiſtently with the original propoſal, according to which the deſtiny of every ticket ought to have been decided by a ſingle ſortilege?

A ſurvey and map then, if without them the lotery could not have been drawn in the manner propoſed, were neceſſary; as in the reverſed decree they are ſtated to have been. if they were neceſſary, to give them efficacy, conſent of the ticket holders, if their conſent could not have been obtained, was unneceſſary. for that an act, the performance whereof was neceſſary, ſhall not be valid, without the intervention of ſomething which is impoſſible, is denied; the terms of the propoſition implicating this abſurdity, that what muſt be done ſhall be a nullity after it is done.

And the impoſſibility to obtain the conſent in queſtion, that is, the conſent of all the holders of tickets, for the conſent of every other was neceſſary, if the conſent of the plaintiff were neceſſary, will perhaps be confeſſed by every candid man, who adverts to the number of people intereſted in ten thouſand tickets, the diſperſed places of their reſidence, the number of thoſe who ſold the tickets, not fewer than ten having been firſt nominated for that office, the multifarious transfers of tickets, the ſales of tickets after the ſurvey, and among them poſſibly the plaintiffs ticket, and other impediments to procuring the conſent too many to be enumerated eaſily.

If William Byrd had indeed narrowed the bounds of the tenements, in ſuch a manner that they did not contain the quantities of ground, for which tenents paid the rents publiſhed in the advertiſement, he would undoubtedly have done wrong. that he narrowed the bounds of John M'Keands tenement perhaps muſt not be now denied. but if he narrowed the bounds, that he did it ignorantly and without deſign to injure any man is moſt probable; becauſe the ground, of which the abſciſſion is ſuppoſed, was not, by the ſurvey and map, made a ſeparate lot, by which, being proprietor of the ſoil, he might have been a gainer, but, inſtead of being included in John M'Keands tenement, was included in Byrds warehouſe tenement, by which he could not have been a gainer, otherwiſe than as a fortunate adventurer. he was indeed that fortunate adventurer. but, at the time of the ſurvey, that the ticket, againſt which Byrds warehouſe tenement was drawn a prize, would be left upon William Byrds hands, or would be fortunate, could not be known. if any other man, inſtead of William Byrd, had drawn the warehouſe tenement, the plaintiff, as is ſuppoſed, could not have recovered the ground in diſpute, but, if he were injured by the ſurvey, muſt have clamed a raparation from William Byrd. and that is thought to be the only remedy to which the plaintiff was intitled, if he were intitled to any remedy, in the principal caſe.

By the words '*the ſurvey ought not to affect the intereſt of the appellant, ſince neither he nor M'Keand, the tenent at the time, appear to have been preſent, ſo as to imply the conſent of either, that the occupied bounds ſhould be changed*, thoſe who uſed them are ſuppoſed to have implicitly conceded, that the ſurvey, if either the plaintiff or M'Keand had been preſent, ſo that his conſent might have been implied, would have affected the intereſt of the plaintiff. the conceſſion is ſuppoſed, becauſe it is believed to be unavoidable that the ſurvey then, made with conſent of John M'Keand, would have affected the intereſt of the plaintiff, that is, would have bound the plaintiff

plaintiff to abide by the ſurvey, being granted; if ſuch an obligation could not have been wrought by ſuch a conſent, the obligation, which is admited to exiſt with the conſent, exiſts without it. for the abſence of that, which, if preſent, would not produce or preſerve a thing, cannot prevent or terminate its exiſtence. now the conſent of John M'Keand to the ſurvey could not have bound James Southall to abide by the ſurvey, unleſs James Southall had authoriſed M'Keand to conſent to it, or derived the right, which he endeavoured to aſſert, from John M'Keand; neither of which is pretended. however, that the conſent of John M'Keand to the ſurvey ſhould be doubted ſeemed impoſſible before the reverſing decree, becauſe, 1, no reaſon for his diſſent is aſſignable; 2, he hath been claming under the ſurvey, and endeavouring to prove the validity of it, ever ſince it was made, and doth not appear to have objected to it at any time.

Nor is ſuch implied conſent in the appellant to be infered from the expoſure of that plan in the room where the lotery was drawn, even if he had read it, which does not appear,] if, becauſe he doth not appear to have read the plan, the evidence of his conſent to the ſurvey be defective, it ſeems defective in two other inſtances: firſt, that he could read doth not appear; ſecondly, that he underſtood what he read doth not appear.

Since he could not from thence diſcover whether the tenement was deſcribed therein according to the occupied bounds or not: the court of appeals ſeem to have ſuppoſed that, againſt the paper, having the ſame number with that of the plaintiffs ticket, was drawn another paper, on which were writen the words *John M'Keands tenement*; which, without reference to any map, was ſufficient to point out his prize. upon which ſuppoſition the tranſaction between William Byrd and the plaintiff, the terms thereof being tranſlated into the language of a ſolemn agreement, would be exhibited in this or ſuch like form; 'in conſideration of five pounds, received from James Southall, to whom is delivered a ticket, numbered 5187, if againſt a paper, on which that number ſhall be inſcribed, be drawn a paper, whereon ſhall be written the words 'John M'Keands tenement,' i, William Byrd, oblige myſelf to convey the title of the ſaid tenement, called John M'Keands, by whatever bounds it ought to be limited, to the ſaid James Southall.' but that any paper, on which were writen 'John M'Keands tenement,' was drawn, is not proved; the contrary is preſumable, from the ordinary courſe of proceding in ſimilar caſes, which is, by numerical characters on the papers drawn, to refer to ſome catalogue, where particular deſcriptions of the prizes may be found—and, not only preſumable but, proved undeniably by the liſt of fortunate numbers publiſhed by the managers, the very exhibit on which the plaintiff chiefly relied, and which concludes thus: 'N B. in the firſt column of figures are the numbers of the tickets, in the ſecond the NUMBER to each prize.' this being the caſe then, the compact between William Byrd and the plaintiff is exhibited truly in this form: 'in conſideration of five pounds, received from James Southall, to whom is delivered a ticket numbered 5187, if againſt a paper, whereon that number ſhall be inſcribed, be drawn a paper, which is marked with the characters 327, i, William Byrd, oblige myſelf to convey to the ſaid James Southall the title of a parcel of land, repreſented in the map of Richmond, by that diagram, which is marked with the characters 327, and on which is writen the word M'Keands.' if this be correct, the plaintiff, when he quarreled with the plan, excepting to the admiſſion of it in evidence, was thought ungratefull to a benefactor, and is thought ſo ſtill, by one, who is not enough enlightened by the reverſing decree, nor enabled otherwiſe, to diſcover that, without the aid of the plan, the plaintiff could have ſhewn any title whatever to the tenement now holden by him for M'Keands. how, with the aid of the plan, the title might have been ſhewn, and probably was ſhewn, will be explaned.

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In the mean time, let one aſk if that part of the reverſed decree, which ſtates part of the land included in M'Keands tenement by the ſurvey never to have been cultivated or otherwiſe occupied by M'Keand or any tenant before him, deſerved to have been totaly neglected in the other decree? ought the plaintiff to recover the value of the land which had been occupied by the former tenents, in right of that occupation, and in violation of the ſurvey, and yet retain the ground which had not been occupied by thoſe tenants in right of that ſurvey!

And therefore it is unneceſſary to decide how far the copies from that plan ought to be admited as evidence.] a hearer of the reverſing decree, convinced perhaps by the preceding parts of it, may yield aſſent to this part, in which the plan of Richmond, even if the original were produced, is treated as a *tabula raſa*, merely becauſe a certain James Southall, owner of one ticket, which before the drawing of the lotery no man could know to be more the darling of fortune than any other of ten thouſand tickets, DOES NOT APPEAR to have been preſent, when the lands repreſented in the plan were ſurveyed, or to have read the plan, ſuſpended in the houſe where the lotery was drawn, at the time, or to have been able to diſcover from the plan whether the tenement called John M'Keands was deſcribed according to the occupied bounds. in oppoſition to this a man, who is not convinced, ventures to declare that, in his judgement, the plan alone, if admited to be evidence, is deciſive of the queſtion.

In ſhewing this, the copy exhibited by the defendents, may be taken to be a faithful exemplar of the original, not only becauſe the proofs that it is ſo, explicitly ſtated in the decree of the high court of chancery, have not been controverted, but becauſe thoſe who reverſed the decree, waiving that queſtion, have denied that the ſurvey, repreſented by the plan, that is the original plan, if it were produced, ought to affect the intereſt of the appellant, James Southall, or the intereſt, if not of him, of any other fortunate adventurer. an hypothetical argument may fairly be anſwered hypotheticaly.

The caſe then may be ſtated, as to this queſtion, thus:

William Byrd owned the towns, as he called them, although the grounds do not appear at that time to have been diſpoſed in lots and ſtreets, of Rockyridge and Shockoe, the names of which were afterwards changed to Manchester and Richmond by which they are now diſtinguiſhed, lying on oppoſite ſides of the James. he alſo owned other lands in the neighbourhood. within the limits of theſe towns and adjacent to them were twenty nine tenements, for which were paid by the holders of them certain annual rents. one of theſe tenements was holden by John M'Keand who paid twelve pounds annual rent, occupying a houſe, but not any part of the land about it.

William Byrd publiſhed his intention to ſell the inheritance of theſe lands to thoſe people who, paying the value of them, equal to fifty thouſand pounds, would conſent that the ſubjects to be ſold, inſtead of being divided into ſo many parts as were equal to the number of purchaſers, and being diſtributed ſo that every one of the later would be intitled to one of the former, ſhould be divided into 839 parts or lots, in ſuch a manner that every improved tenement ſhould be one lot or prize, every hundred of ten thouſand acres of land, ſituate in this place, ſhould be one lot or prize, and every half acre of the land ſituate in another place ſhould be one lot or prize, and every one of certain iſlands ſhould be a lot or prize.—that every perchaſer ſhould have one or more ſlips of paper called tickets, paying five pounds for each, on which were writen, after the number, ſhewing its place in the arithmetical ſeries of 1 to 10000 incluſive, theſe words: 'this ſhall intitle the owner to ſuch prize as ſhall be drawn againſt it, in W Byrds lotery, 1767, W. Byrd.' ſuch a ticket, the number whereof was 5187, had the plaintiff.

For purpoſes explained in the decree of the high court of chancery, William Byrd procured the lands to be ſurveyed and the ſituations and boundaries of them were repreſented in a plan. tickets were ſold and in the hands of perhaps 2500, 3000 or more purchaſers.

In order to determine which ticket would win a lot or prize, the managers appointed to ſuperintend the drawing are ſuppoſed to have conducted the buſineſs in the following manner: 10000 other ſlips of paper, on which were written numbers correſponding with the numbers of the tickets holden by the purchaſers, were droped into a wheel, wherein was a cavity cloſed ſo that they would not fall out in revolutions of the wheel; and into a ſimilar wheel were droped ſlips of paper equal in number to the others, of which 9161 were blank, no letter or figure being writen on them, and the others were marked by the characters 839 inſcribed on one, the character 1 inſcribed on another, and characters ſignificant of the numbers between thoſe extreme terms inſcribed in a progreſſive order on the remainder.

When, from the wheels, after being turned for confuſing their contents, the attendant upon each drew one paper, if that drawn from the prize and blank wheel were marked, the characters thereof were entered in a liſt oppoſite to the number on the paper drawn from the other wheel.

For example: when the paper numbered 5407 was drawn from one wheel, oppoſite to it were entered in the liſt the characters 301, on the paper drawn at the ſame time from the prize and blank wheel: when the paper numbered 5187 was drawn from the former wheel, oppoſite to it were entered the characters 327 on the paper drawn at the ſame time from the later wheel: and ſo on until all the 839 characterized papers were exhauſted.

The entries were in different columns. the column which contained the numbers correſponding with the numbers of the tickets ſhewed to the holders of thoſe tickets that they were fortunate; and the other column, containing the characters on the papers drawn at the ſame time, refered the holders to ſome map, by which they would diſcover in what their felicity conſiſted; ſo that this later column was nothing more than an index to that map in which correſponding characters would deſignate the prize; and that map was the plan in this caſe.

When therefore the paper numbered 5187 was drawn from one wheel, the characters 327, on the paper drawn from the other, refered to the plan which ſhewed the ſame characters there inſcribed; ſo that the plaintiff muſt have reſorted to this very plan in order to intitle himſelf to the prize which his ticket won, and that would have been no more than the quantity repreſented in the plan.

But after the lotery was drawn, the managers, for information of the purchaſers, publiſhed in print a liſt of the fortunate numbers in this form:

No. 5407	a double forge and mill with 2000 acres of land.	No. 301
5254	a ferry &c.	
5187	M'Keands tenement.	327

N. B. In the firſt column of figures are the numbers of the tickets; in the ſecond the number to each prize.

Every candid man will probably grant, without a proof, that the managers, or their amanuenſis, in preparing this liſt, had recourſe to the plan. for that they could otherwiſe know whenever a prize was drawn what it was; or, if they could, that they would have ſuffered an enquiry, for obtaining the knowledge, to interrupt their progreſs in a buſineſs which muſt have employed them ſeveral weeks, cannot be ſuppoſed.

But the plaintiff, inſtigated by zealous friends, who diſcovered that the lines, including the lot 327, upon the area of which in the plan the ſurveyor had written the word *M'Keands*, would not include all the ground which

which had been occupied by that tenents predeceſſors, in order to aſſert his title to the ſurplus ground, waived the plan, as not binding upon him becauſe he did not agree to the ſurvey, and pretended to clame by the original ſcheme, and the publication of the managers, prepoſterouſly ſuppoſing the later to refer to that ſcheme, and not to the plan, whence one can ſcarcely doubt it was taken. and he hath been more ſucceſsfull than his counſil ſeemed to expect; for, the original plan not being oſtenſible, they laboured to prove that the copy ought not to be admitted in evidence; but, according to the reverſing decree, the former, if admitted, would not hurt him.

That the appellant being thus intitled to the ground in diſpute and M'Keand a purchaſer with full notice of that title, if the appellant had proſecuted his clame immediately, and M'Keand had proceeded in improving the ground, he would probably have loſt both together:] if the plaintiff could have vindicated his title in a court of common law, and there had proſecuted his remedy, and been as ſucceſsfull as he was in the court of appeals, M'Keand muſt have loſt both together, unleſs the court of equity would have relieved him, ſo far as to award ſome kind of compenſation. whether it would or would not have relieved him? is a queſtion which, when to determine it in ſome other caſe may become neceſſary, will ſeem to deſerve conſideration to one who reads what Home had ſaid, on this queſtion, in his principles of equity, part I. ſect. II. art. I.

But however it might have been in that caſe, the plaintiff, for recovering what he clamed in this caſe, the title which only could demand audience in the court of common law, reſting at this day in Charles Carter, one of the defendents, neceſſarily reſorted to the court of equity; a court which requireth of its votaries that they perform that juſtice which they exact from others

But ſince the appellant, &c. to the end of the paragraph.] what law will authorize the application of John M'Keands real eſtate, in the firſt inſtance, to ſupply the deficiency in his perſonal eſtate, to ſatisfy the damages which may be found, on trial of the iſſue to be directed? perhaps the deficiency intended is what may be cauſed by diſcharging out of the perſonal eſtate demands chargeable on the real eſtate. can execution be awarded againſt the executors or adminiſtrators of John M'Keand for the coſts in the court of appeals? as they are now to be made parties muſt they not be convented by ſubpœna to anſwer the bill, or, being called ſpecific parties, muſt they only diſcloſe the aſſets?

BETWEEN

CARTER PAGE executor of Archibald Cary, *plaintiff*,

AND

EDMUND PENDLETON and Peter Lyons, adminiſtrators of John Robinſon, and other creditors of Archibald Cary, and Benjamin Wilſon, *defendents*.

IN this cauſe, upon the following queſtion, whether payments by the plaintiffs teſtator, a citizen of this commomwealth, into the loan office, of paper money, in ſatisfaction of his debts to creditors, who were britiſh ſubjects, diſcharged the debitor; a ſtatute, by the legiſlature of the commonwealth, having enacted that ſuch payments ſhould have that effect? the court, on the 3 day of may, 1793, after premiſing *(a)* that a controverſy between a britiſh creditor or debitor, and his american debitor or creditor,

(a) A judge ſhould not be ſuſceptible of national antipathy, more than of malice towards individuals—whilſt executing his office, he ſhould be not more affected by patriotic conſiderations, than an inſulated ſubject is affected by the electric fluid in the circumjacent maſs, whilſt their communication is interrupted.

what

ditor, diſcuſſed before a tribunal in the country of either party, ſhould be decided by thoſe principles, which ought to govern the deciſion, if the ſame controverſy were diſcuſſed before a tribunal in the country where both parties were aliens, publiſhed an opinion in theſe terms:

That, after, by the declaration of independence, the united ſtates of America were diſmembered from the britiſh empire, the rights of war and peace between thoſe two nations, which, by that event, became diſtinct politic bodies, were equaly vigorous with thoſe rights between nations never dependent either on the other;—

That a war, of itſelf, doth not extinguiſh the rights, and, conſequently, doth not diſcharge the obligations, which exiſted before the commencement of it, between members of the different belligerent ſocieties, although, during the continuance of the war, forenſian aſſertions of the one, that is, the rights, and exactions of performance of the other, that is, the obligations, are not permitted in that country where the clamants are aliens;—

That the right to money due to an enemy cannot be confiſcated; *(b)* becauſe

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what is juſt in this hall in juſt in Weſtminſter-hall, and in every other praetorium upon earth. ſome judges in the weſtindian iſlands have been execrated, by citizens of the united american ſtates, for ſeveral late ſentences againſt the latter, in favour of britiſh ſubjects, in certain maritime cauſes; juſtly execrated, if fame hath not miſreported their conduct. none of thoſe citizens, ſurely, can wiſh to ſee the tribunals of their own country ſo polluted; for which pollution the men who ſit in them would, perhaps, deſerve the puniſhment related by Herodotus to have been inflicted on the corrupt Sijamnes, for the alluſion to whoſe ſtory, among the devices on the ſeal of the Virginia high court of chancery, the preſent judge of that court acknowledgeth his obligation to the ingenious B WEST. *if one aſk why is this premiſed? let him be informed that when, ſome months before this opinion was delivered, a ſimilar caſe was argued in another court, a ſtranger, who heard the rhetoric copiouſly poured forth, on that occaſion, in order to prove, that an american citizen might honeſtly as well as profitably withold money which he owed to a britiſh ſubject, and who obſerved what conviction, careſſes, addreſſes, admiration, adulation, adoration, followed, ſuch a man might have ſuſpected that one of the caſdinal virtue, as they are called, either is not cultivated in America, or is not underſtood to be the ſame there as it is in all other civilized countries. to ſuch a ſtranger this* prôêmium *would not appear improper.*

(b) If this ſeem contrary to what is called authority, as perhaps it may ſeem to ſome men, the publiſher of the opinion will be againſt the authority, when, in a queſtion depending, like the preſent, on the law of nature, the authority is againſt reaſon, which is affirmed to be the caſe here. in truth, acquirement by conqueſt is a relick of barbariſm. capture and detention af an enemys goods is juſt only where members of one community, injured by thoſe of another, had not been able to obtain reparation otherwiſe than by repriſal. and there the reparation ought to be commenſurate to the injury. to excede that meaſure would be more rigorous in this than in ordinary inſtances; becauſe they who are forced to make the reparation ſeldom or never happen to be thoſe who had been perpetrators of the injury. peiracy is now generally denominated hoſtility to mankind, although it was eſteemed, as Thucydides relates, by thoſe whom he calleth antients, both of greeks and barbarians, not opprobious but, honourable, and is ſo eſteemed at this day no doubt by ſome people on the african coaſt of the mideterranean sea. but is privateering, which many of the present enlightened age ſeem to think juſtifiable, any thing but peiracy licensed imperialy, and can ſuch a license conſecrate it? a commiſſion authoriſing reprisals would ſeem like a license for robbing Peter to pay Paul, if the members of a whole community, when, without their knowledge, ſome of their fellow-citizens or fellow-ſubjects act unjuſtly, be not involved in the guilt. a commiſſion for privateering ſeems a license to rob Peter for enrjching Paul.

becauſe only things whereof manual occupation may be, to which claſs a right, being incorporeal, doth not belong, are confiſcable; inſomuch that perdition of the hoſtile proprietors right is not effected by his captivity, or even ſlaughter, but, in the later event, his repreſentative ſuccedes to it;—

That, by the act of general aſſembly, paſſed in the year one thouſand ſeven hundred and ſeventy ſeven, intituled *an act for ſequeſtering britiſh property, and enabling thoſe, indebted to britiſh ſubjects, to pay off ſuch debts, and directing the proceedings in ſuits wherein ſuch ſubjects are parties,* the legiſlature of this commonwealth hath admitted, that the law and uſages of nations require, that the debts of britiſh ſubjects ſhould not be confiſcated, before their ſovereign ſhould, by his example, have provoked and juſtified ſuch a retaliation, on the part of this commonwealth;—and thereby *(c)* the legiſlature recogniſed the obligation of that law and of thoſe uſages;—that this recognition, to the efficacy whereof diplomatic ceremony or a pragmatic ſanction was unneceſſary, did ſufficiently declare, and was equivalent to an explicit and ſolemn pact yielding, the conſent of the legiſlature, and the conſent of the people of this commonwealth too, if the legiſlature could bind them in that inſtance, to obſerve the praecepts of that law, and conform to thoſe uſages;—a people who, before their ſeparation from the britiſh empire were, and ever ſince have been, in the habits of ſuch obſervance and conformity;—and a legiſlature, who, by an act paſſed in 1779, conſtituting the court of admiralty, hath adopted into its ſtatutory code the laws of nature and nations;—

That the legiſlature could not retract their conſent to obſerve the praecepts of the law, and conform to the uſages, of nations; for the act, by which the conſent was teſtified, although it be in form of a ſtatute, the exiſtence of which generally begins, continues, and ends, with the will of its creator, was indeed a convention in which the legiſlature was but one party; and the king of great britain not having authorized the confiſcation of debts, owing by his ſubjects to the citizens of this commonwealth, the legiſlature of the commonwealth could not confiſcate debts owing to britiſh ſubjects, without violating the public faith; that money, in the hands of the debitor, due to an enemy, cannot be confiſcated, upon the principle, that it is the creditors property, for ſuch money remaineth the property of the debitor, and doth not become the property of the creditor, before a payment of it to himſelf, or a payment to his repreſentative acting by virtue of a prior authority, or a payment to an officious ſtranger ratified by poſterior conſent of the creditor; and

That the acts of general aſſembly, on the ſubject of confiſcation, may be ſo expounded, without contravening the principles of ſound criticiſm, *(d)* as not to purport that effect, and that by ſuch an expoſition the dignity of the commonwealth and honour of its legiſlature would be conſulted.—

That the right to money due, which is concomitant with the perſon of the creditor, cannot be extinguiſhed by the legiſlature of the debitors country, if, at the time of the legiſlative act, by which the extinguiſhment was intended to be wrought, the creditor were not a citizen or a ſubject of that country, or, being a foreigner, were not a reſident or had not a *domicilium* therein; *(e)* becauſe ſuch a creditor was not ſubject to the authority of

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(c) The whole of what is ſtated in this and the next following paragraph is believed to be inconteſtable.

(d) This is ſubmitted to cenſure.

(e) The poſition in the ſixth article of our bill of rights, namely, that men are not bound by laws to which they have not, by themſelves, or by repreſentatives of their election, aſſented, is not true of unwritten or common law, that is, of the law of nature, called common law, becauſe it is common to all mankind. the prohibitions to kill or wound our fellow men, to defame them, to invade their property, the praecepts to deal faithfully, to make reparation for injury, and others, are perceived intuitively to

of that legiſlature, and conſequently not bound by its acts. if the parliament of Great-britain ſhould, by an act, declare the rights of creditors, of any other, or all other, countries, to money due from britiſh ſubjects, to be extinguiſhed, all courts, perhaps thoſe of Weſtminſter hall not excepted, would abjure ſuch legiſlative omnipotence, arrogated by the parliament. but that parliament hath not leſs power than any other legiſlature:—

Here

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harmonize with our innate notions of rectitude, ſo that every man, not under the temptations of revenge luſt or avarice ſolicited by opportunity, feels the obligation to obey thoſe prohibitions and praecepts, more forcibly than if the duties were capable of demonſtration. theſe laws of nature are, as Antigone ſays to Creon, in Sophocles, v. 463.

> ——————— unwritten laws divine,
> Immutable, eternal, not like theſe
> Of yeſterday, but made e'er time began.
>
> *Francklin.*

They are laws which men, who did not ordain them, have not power to abrogate.

Neither is the poſition true of inſtituted laws, if it be literaly underſtood, that is, if it be applied to individuals, in the caſes of thoſe who were not in being at the inſtitution of the law, nor even in caſes of the greater number of thoſe who were in being at that epocha.

Women, infants, and many others, deprived of ſuffrage, cannot, either by themſelves or their repreſentatives, be truly ſaid to yield their aſſent to any law. they would not be permitted, if they ſhould be willing, and even offer, with any ceremony whatever, to declare their aſſent; and yet they are bound by the law. the obligation of the law, therefore, did not derive its force from their conſent. if the obligation of a ſtatute, upon ſome who were confeſſedly bound by it, derived not its force from their conſent explicitly declared, that ſuch an obligation can derive force from their implied or tacit conſent is denied.

Again, a man is confeſſedly bound by a ſtatute, enacted when he was a foetus, or an embryo, or before he was either. but, according to this article of the bill of rights, underſtood literaly, he is not bound by the law, becauſe he did not conſent to it.

If obligation of the ſtatute be ſaid to derive its force from aſſent ſubſequent to the inſtitution, and one aſk, at what age the aſſent can be yielded, and by what acts it may be indicated? to define either ſatisfactorily, in anſwering the queſtion, will be difficult, perhaps, impoſſible.

That laws, of civil inſtitution, derive their obligation from conſent of thoſe, who were members of the community, when the laws were inſtituted, muſt be admitted: but, if the obligation ceaſe with the exiſtence of thoſe individual legiſlators, which muſt be the conſequence of denying the obligation of the law upon individuals, who did not conſent to it, the laws could not be perpetual, as many laws are ſaid to be, nor catholic, as all laws ought to be. beſides many laws are enacted againſt the conſent of great part of the community.

The vigor of inſtituted laws, if it ſurvive the original legiſlators, muſt be continued, not by conſent of ſucceding generations, declared individualy out, by ſome other principle: and that is natural reaſon.

Without ſociety, mankind, if they could exiſt and propagate, would be wretched; their native rights would be frequently violated; the enjoyment of acquired rights would be precarious; nor could ſociety be preſerved without civil inſtitutions and regulations. hence the obligation to obſerve and conform to thoſe inſtitutions and regulations, by the law of nature, devolves upon men, who could not conſent to them.

This doctrine is not derogatory to rational civil liberty, which is to be free from all civil obligations, except ſuch as laws, enacted by conſent of the ſociety, or repreſentatives of their election, had created; and to be free from thoſe obligations, when the ſame ſociety, or repreſentatives, ſhall ſignify their will to abrogate the laws, which did create the obligations.

But what is the ſame ſociety? for no nation, at the end of an hour, conſiſts of thoſe individual men of whom it conſiſted at the beginning of that period.

By national identity muſt be meaned a myſtical union of members by ſucceſſive generations, whereof one imperceptibly renovates the decay of another, a kind of immortality being one of the attributes of a nation, in like manner as (to compare ſmall things with great) in place of ſoldiers who were removed, by any mean, from the macedonian lochos athanatos, and the roman legio immortalis, others were ſurrogated, ſo as to perpetuate them

This identity is familiar to us in ordinary diſcourſe. when the romans are ſaid to have expelled the Tarquins, and to have conquered Perſeus, by romans are underſtood the ſame nation, although between thoſe two events more than three hunared years had paſſed.

National identity hath been repreſented by ſenſible images:—by a river; the Potowmac, for example, which is called the ſame river, although not a drop of the water, which covered its bed, when it was firſt diſtinguiſhed by that appellation, hath flowed or ebbed in its chanel for many by paſt ages:—by a tree; as in the epiſode of the iliad, Z, containing the dialogue between Diomede and Glaucus; by a ſhip, which is called the ſame ſhip, when, from decays and reparations, not one atom of the materials, with which it was launched, remains about it.

But no image, perhaps, can repreſent national identity ſo completely as a mans ſelf. in the caurſe of his life, ſuch changes happen both in body and mind, that Pythagoras, at 90 years of age, ſeemed no more to be the Pythagoras, of nine days, nine months, or nine years old, than he was Euphorbus, Callides, Hermotimus or Pyrrhus each of whom he ſuppoſed himſelf, by the metempſychoſis, ſucceſſively to

have

Here is excepted the caſe, in which, by legiſlative authority, remedies are provided for condemning the credits and effects of an abſentee to the payment of his own debts to his creditors; which the laws of nature and nations permit for preventing a failure of juſtice.

That if the creditors right to money due from his debitor, of another country cannot be extinguiſhed by a legiſlative act of that country, the debitors obligation to pay the money cannot be abſolved by a legiſlative act of the ſame country; becauſe the legiſlature, which is at moſt only the repreſentative of the debitor, and hath not more power than its conſtituent had, could not do that which the debitor could not have done; but the debitor could not, by any act of his own, other than payment to the creditor, or to ſome other empowered by him to receive the money, diſſolve the obligation to pay it; and although, during a war between the nations of creditor and debitor, the former cannot compel the later, by a judiciary ſentence in his own country, to pay the money, ſuch a ſentence may be obtained, during the war, in another country, if the debitor be found there;—

That, for reaſons before explaned, the legiſlature of any nation hath not power to ſubſtitute a different thing for the money which their people had before obliged themſelves to pay to the people of another nation: if the britiſh parliament ſhould enact, that the money due from britiſh ſubjects might be diſcharged by delivering malt, to the creditors, ſuch an act would here, and, perhaps, every where elſe, be adjudged void, as to all creditors, who were not britiſh creditors.

That the legiſlature, by their act, paſſed in january, 1788, having declared, *that the commonwealth ſhall, in no event or contingency, be liable to any perſon or perſons whatſoever, for any ſum, on account of payments made by american debitors into the loan office, other than the value thereof, when reduced by the ſcale of depretiation*, that is, other than the true value of the paper money, when it was paid, could not believe, that to compel britiſh creditors to allow more value, if compellable to allow any value, for payments, without their authority, againſt their conſent, and never accepted, than thoſe would allow for them, who pretended to authorize the payments, receive the money, and applied it to their uſes, would be thought juſt, by any men, except the debitors, thus enriched by diſcharging debts, incurred for things of real value, with paper money, of little or no value *(f)* for any other purpoſe; and therefore the general aſſembly may be preſumed to have intended, by their ſeveral acts on this ſubject, and thoſe acts compared together may be ſo interpreted, as, to intitle the debitor to retribution from thoſe by

have been. and with no leſs propriety than Pythagoras may be called the ſame man, notwithſtanding the changes which happened to him, may the nation, whoſe ſocial compact hath not been diſſolved, be called the ſame nation, for any period of time.

If thoſe, who enacted the laws, and thoſe, who, ſeveral ages afterwards, abroſhed them, can be called the ſame nation, the laws may be truly ſaid to begin and end by the ſame authority. and men conſidered, not as individuals but, as a nation may be truly ſaid not to be bound by any laws, of civil inſtitution, except thoſe to which they, that is the nation, had given their conſent. in this ſenſe, the poſition before ſaid to be in our bill of rights is admitted to be true; and in the like ſenſe only this propoſition of chief juſtice Hobart, in the 256 page of his reports; namely, an act of parliament hath every mans conſent as well TO COME as preſent, *can be free from anachroniſm.*

Upon theſe principles, men are bound by the ſtatutes of the country, whereof they are members, although, conſidered as individuals, they did not, by themſelves, or repreſentatives of their election, conſent to the ſtatutes.

Aliens are bound by the laws of the country in which they reſide in conſideration of the protection enjoyed by the government.

But that laws of civil inſtitution cannot bind the perſons of men, who are not members of the ſociety, nor reſident within its territory, is believed to be an irrefragable truth.

(f) Theſe payments, if they muſt be called payments, into the loan office were made, when the paper money had ſo depretiated that, according to the ſtatutory ſcale, 70 pounds, in ſome inſtances, and 1000 pounds, in other inſtances, were worth no more than one pound.

by whom he was encouraged to depoſit his money in their funds; which ſeemeth to be the leaſt exceptionable mode of adjuſting this matter;—

That the proviſional articles and definitive treaty of peace between the united ſtates of America and the king of Great-britain, after the ratifications thereof, if they be valid, abrogated the acts of every ſtate in the union, tending to obſtruct the recovery of britiſh debts from the citizens of thoſe ſtates; and that the treaty, admitted to have been once valid, hath been rendered invalid, by the failure of the britiſh king to perform the articles thereof *(g)* this court hath no more power *(h)* to declare than it hath to declare the britiſh king and the united ſtates of America to be in a ſtate of war; and

Finaly that, if this court be reſtrained from making decrees, by which britiſh creditors in time of peace may recover money due to them from the people of this commonwealth, the judge of this court, who hath ſworn, in obedience to legiſlative injunction, an oath, with which no human power can diſpenſe, that he will do equal right to all manner of people, ought not to make decrees by which Virginia creditors may recover money due to them from the people of Great-britain;—

And therefore the court, upon the principles before ſtated, being of opinion that the payments into the loan office, made by the plaintiffs teſtator, did not diſcharge his debts to his britiſh creditors, directed the plaintiff in diſtributing the aſſets of his teſtator, not to diſtinguiſh britiſh creditors, on account of their nation from other creditors.

BETWEEN

(g) Upon this point the argument urged on behalf of american debitors may be exhibited in this form: the britiſh king, by his garriſons, retaineth certain poſts within the territorial limits of the united american ſtates dominion, and alſo hath not reſtored or paid the value of ſlaves which his troops plundered from ſome of our fellow-citizens, in which articles he hath been a league-breaker. the two nations, by theſe breaches, are in a ſtate of war; every article in the treaty of peace being a condition, ſo that by non performance of any one the whole act is annulled. in that ſtate of war every man woman and child of each nation is an enemy of every man woman and child of the other nation. property taken from an enemy is lawfull prize—becomes by ſeiſure the property of the captor. americans, paying the money due to britiſh ſubjects, may take it from them, being enemies. if repriſal of money paid would deprive the creditor of his right, detention of the money unpaid ought to extinguiſh the creditors right; and the rather, becauſe this ſaves to the debitor the trouble and danger of a conflict to recover the money paid, and to the creditor the mortification of a tantaliſm.

(h) The queſtion here diſcuſſed is depending, perhaps at this time, before the circuit court. what they may determine the judge of this court will not take the liberty to conjecture. if a ſolitary judge of a ſubordinate court, in one ſtate, ſhould circumſcribe the jurisdiction of the ſupreme american tribunal, he would ſeem to act as irrationaly, as if one, with a radius, equal to the ſemidiameter of the orbit of a ſatelles, ſhould attempt to deſcribe the orbit of its primary planet.

BETWEEN
PHILIP NATHANIEL DEVISME and Henry Smith, of the city of London in the kingdom of Great-britain, merchants and partners, *plaintiffs*,
AND
HENRY MARTIN and company, of London, merchants, Hudſon Martin and Nathaniel Anderſon, *defendents*.

IN this cauſe, the queſtion was, whether the right to money, due to a bankrupt, from citizens of this commonwealth, was ſo transferred to the aſſignees of his effects that a britiſh ſubject, who was a creditor of the bankrupt, reſident in England, and did not clame any benefit from the aſſignment, could recover ſatisfaction for his demand out of that money? upon which the court, the 26 day of ſeptember, 1794, delivered this

OPINION,

That the queſtion controverted between the parties, in this cauſe, which is, in truth, a queſtion between britiſh creditors, on one ſide, and the aſſignees of a britiſh debitor or debitors, declared a bankrupt or bankrupts, according to the laws of their country, on the other ſide, diſcuſſed before an american court, ſhould be decided by thoſe principles which ought to govern the deciſion, if the ſame queſtion were diſcuſſed before an engliſh court; and that, by the engliſh ſtatutes concerning bankrupts, all the perſonal property of a bankrupt, wherever it be, is ſo transfered to the aſſignees that an engliſh ſubject cannot recover a debt, contracted before the aſſignment, by an action againſt the bankrupt himſelf, or ſatisfaction for it out of his effects in the hands of others, although a creditor, who is not a britiſh ſubject, and conſequently not bound by the laws of Great Britain, *(a)* and perhaps too a britiſh ſubject not having a domicilium in England, *(b)* may recover ſuch debt, by an action againſt the bankrupt, or ſatisfaction for it out of his effects.

In conſequence of which opinion the bill was diſmiſſed.

(a) Upon the principles ſtated in the note (e) to the caſe between Page, executor of Cary, plaintiff, and Pendleton, &c, defendents, the engliſh ſtatute laws bind engliſh ſubjects and regulate their perſonal rights every where, unleſs the caſe mentioned in the next following note to this caſe may be an exception. if an engliſh ſubject die inteſtate, his relations, whom the engliſh ſtatute of diſtribution appoint to ſuccede, will be intitled to his perſonal eſtate which may, at that time, be in Virginia, not thoſe relations whom our ſtatute of diſtribution, ſo far as it differs from the engliſh, appoints; for example: brothers and ſiſters of the half blood will ſhare equaly by the one, and but half ſo much by the other, &c. if an engliſh trader be declared a bankrupt, and his eſtate be aſſigned by thoſe who have the adminiſtration of ſuch affairs, in that country, the title of the aſſignees would be ſupported, in the courts of this country, and the right of ſuch creditors as are ſubject to the laws of England would be bound by the aſſignment.

If the bankrupt happen to have property which lies out of the juriſdiction of the law of England, if the country, in which it lies, procede according to the principles of well regulated juſtice, there is no doubt but it will give effect to the title of aſſignees. by Loughborough, H. Blackſtones reports, p. 691. this poſition is too general, and is not ſufficiently qualified by what follows it in p. 693.

' Solomons vs Roſs, in canc. 26 january, 1764, before mr. juſtice Bathurſt, who ſat for lord chancellor Northington. meſſieurs Deneufvilles, merchants and partners at Amſterdam, correſponded with Michael Solomons and

and Hugh Roſs, merchants in London. on the 18 day of december, 1759, the Deneufvilles ſtoped payment. on the 1 day of January, 1760, the chamber of deſolate eſtates in Amſterdam took cognizance thereof, and, on the next day, they were declared bankrupts, and curators or aſſignees appointed of their eſtates and effects. on the 20 day of december, 1759, Roſs, who was a creditor of the bankrupts to the amount of near 3000 pounds, made an affidavit of his debt in the mayors court of London, and attached their moneys in the hands of Michael Solomons, who was their debitor to the amount of 1200 pounds. on the 8 day of march, 1760, Roſs obtained judgement, by default, on the attachment, and thereupon a writ of execution was iſſued againſt Michael Solomons, who was taken in execution, but, being unable to pay the 1200 pounds, gave Roſs his note payable in a month; on which Roſs cauſed ſatisfaction to be entered on the records of the judgement. a few days after, one Iſrael Solomons, who had a power of attorney from the curators to act for them in England, filed a bill, making himſelf and the curators plaintiffs, praying that the defendent Michael Solomons might account with them for the effects of the bankrupts, which were in his hands, might pay and deliver the ſame over to Iſrael Solomons for the uſe of the curators, and be reſtrained from paying or delivering them over to Roſs. Michael Solomons then filed a bill, by way of interpleader, praying an injunction, and that he might be at liberty to bring the 1200 pounds into court. this money was accordingly paid into the bank, in the name of the accountant general, perſuant to an order of the court. The decree directed, inter alia, 'that the ſtock purchaſed with the money paid into the bank ſhould be transfered to Iſrael Solomons, for the benefit of the creditors of the bankrupts, and that Roſs ſhould deliver up the note, given by Michael Solomons for 1200 pounds, to be canceled.' H. Blackſtone, p. 131. in the notes.

Similar decrees were made in two other caſes there ſtated.

The principle of the decrees doth not appear.

In the firſt and ſecond, it is ſuppoſed to be this: the laws of Holland diveſt the bankrupts property out of him, and veſt it in the curators or aſſignees, in that country, for the purpoſe of diſtributing the property among his creditors, and that the aſſignment comprehended the bankrupts right to moneys due to them in England: for

It is a clear propoſition, ſaid Lougborough, H. Blackſtone, p. 690, *not only of the law of England, but, of every country in the world, where law has the ſemblance of ſcience, that perſonal property has no locality. the meaning of that is, not that perſonal property has no viſible locality but, that it is ſubject to that law which governs the owner.*

This propoſition is not free from ambiguity. the ſenſe intended by the author of it is believed to be this: that the owners right to a perſonal thing, which is in one country, is ſubject to diſpoſition of the law of another country, whereof the owner is a member; and, in that ſenſe, is admitted to be true, with reſpect to the owner himſelf, and to all other people who are members of the ſame ſtate with him; but is not admitted to be true with reſpect to men who are not members of the ſame community.

The writer of theſe notes, differing in this point with three capital engliſh judges, is aware, that he will be regarded with a faſtidious eye by men, whoſe veneration for the weſtmonaſterian oracles is equal to the veneration of the antients for the dodonaean and delphic oracles; but, when he has reaſon, the only deſpot, * to which he profeſſeth unconditional ſubmiſſion, on his ſide, he will venture to differ with any man. he diſapproves the determination in the caſe between Solomons and Roſs, on theſe conſiderations,

1. That Roſs, if he were an engliſh ſubject, as he is ſuppoſed to have been

* John Horne Tooke.

been, was not bound by the laws of Holland. this is aſſumed for a propoſition incontrovertible.

2. That a creditor, in juſtice, hath a right to ſo much of his debitors eſtate as is equal to the demand, or to a proportion of the eſtate, if it be not ſufficient to ſatisfy the demands of all the creditors. the truth of this propoſition is admitted, by the bankrupt laws both of England and Holland, appointing the aſſignees in one, and the curators in the other, diſtributors of the eſtate among the creditors; ſo that the aſſignees and curators are the truſtees for and repreſentatives of the creditors, and are choſen by them in one, and, perhaps, in the other too.

3. The law which authoriſeth this appointment, if it do not bind the foreign creditor, can not legaly deprive him of his right to recover what is due to him, becauſe the law was enacted without his conſent, either individualy, or as a member of the community.

4. The right of Roſs to ſatisfaction for his demand againſt Deneufvilles out of moneys in the hands of Solomon their debitor, whether, in Loughboroughs language, it had or had not locality, was as much ſubject to the law which governed Roſs, that is the law of England, as the right of the bankrupts to the ſame moneys was ſubject to the law which governed the Deneufvilles, the owners, that is the law of Holland: and, by the law of England, Roſs was authoriſed to procede as he did to attach thoſe moneys—now where ſuch an oppoſition between two laws upon the ſame ſubject happeneth, why the law of Holland, which favoured the right of the curators, ſhould prevale againſt the law of England, which favoured the right of the engliſh creditor, or, in other words, why the court ſhould have prefered the title of the curators to the title of the creditor uſing the proceſs of attachment, is not diſcerned.

The moſt juſt mode ſeemeth to be, in whatever court the matter be diſcuſſed, to accommodate it by a proportionable diſtribution of the bankrupts effects among all the creditors of every country.

If the aſſignees of an engliſh bankrupt bring ſuits in this court to recover money due from his debitors, and parties, not engliſh ſubjects, demand a ſatisfaction of their demands out of the ſame money, the court will appoint a receiver of the money and not allow the aſſignees any part thereof, until they ſhall have thrown the effects collected by them into a common fund, for the benefit of all the creditors.

(b) Becauſe, 1. ſuch a ſubject is not repreſented in the britiſh parliament, and, therefore, as is conceived, ought not to be bound by its acts, although the engliſh courts have determined otherwiſe, and the american courts too, before the late revolution, admitted britiſh ſubjects, reſiding in the plantations, as they were then called, to be bound by acts of parliament, the terms of which ſpecialy comprehended the plantations. and 2. The bankrupts effects in England may be all diſtributed among the creditors there, in ſome caſes, before the creditors in the plantations could have notice of the bankruptcy in time to clame their ſhares.

BETWEEN

JOHN SIMON FARLEY and Elizabeth Morſon, *plaintiffs*,

AND

THOMAS LEE SHIPPEN and Elizabeth Carter, late Elizabeth Carter Baniſter, his wife, Champe Carter and Maria, late Maria Farley, his wife, Mary Byrd Farley, and Rebecca Parke Farley; which two laſt named parties, being infants, appear by John Dunbar their guardian, *defendents*.

FRANCIS FARLEY and Simon Farley, brothers, britiſh ſubjects, and fathers each of ſeveral children, in the year 1755, bought of William Byrd 26000 acres of land, called the Saura town, or the land of Eden,

Eden, in Northcarolina, for 1000 pounds of ſterling money. the conveyance was to Francis Farley and Simon Farley, and to their heirs. they bought alſo, together with one Francis Miller, ſeveral parcels of land, in the county of Norfolk in Virginia, which were conveyed to the three purchaſers, and to their heirs.

Simon Farley paid one half of the purchaſe-money for the land in Northcarolina, and one third part of the purchaſe-money for the land in Virginia. ſlaves belonging to both the brothers were employed in cultivating the Northcarolina land; and Francis Farley debited Simon with one half of certain expenſes incurred many years after the death of the later, on account of that eſtate.

The whole buſineſs of treating for the purchaſes, taking the conveyances, and managing the eſtates, was tranſacted by Francis Farley, who was ſeveral times in Virginia, his brother reſiding in Antigua.

Simon Farley died about the year 1756, and, by his teſtament, whereof he appointed his brother Francis one of the executors, his children, the plaintiffs, to whom the ſaid Francis was appointed teſtamentary guardian, with others, clame what they now demand, which is one half of the Northcarolina land, and one third part of the Virginia land.

After his death, Francis Farley bought from Francis Miller his third part of the land in Virginia.

25 of january, 1757, Francis Farley wrote to Francis Miller a letter in theſe words: *i pray the favour of you to ſend me by the firſt opportunity a copy of the ſale or conveyance to my brother and myſelf of the land bought from col. Byrd, for, as my brother is dead, i am as ſurvivor intitled by law to the whole, ſo i want the ſale, that i may have a conveyance drawn for one half to my brothers children; for god forbid i ſhould ever take ſuch an advantage as his death gives me; and, for this reaſon, i want copies of thoſe other lands bought between you him and myſelf * * * the ſooner you ſend me theſe papers the better, and the more you will oblige me; for life is very uncertain, and i want to get this buſineſs done for fear of accidents.*

In another letter, dated 14 of auguſt, 1758, from Francis Farley to Francis Miller, are theſe words: *i imagine ſome of my laſt letters to you have miſcarried, as you take no notice in yours to me of ſome things i mentioned to you, particularly the ſending me copies of the conveyance made by col Byrd to my brother and myſelf of the land we bought of him in Carolina. i have mentioned this two or three times, and muſt beg you will furniſh me with it, by the very firſt opportunity: do not ſend the original deed, but copies by two opportunities. i want it prodigiouſly that i may ſettle this matter, leſt any accident ſhould happen my life; and god forbid that i or mine ſhould take the advantage the law gives, by my ſurviving my poor brother; and i find you are of the ſame honeſt and honourable way of thinking. ſo you will be ſo kind to have this matter ſettled with you by a proper deed as to your ſurvivorſhip, with regard to the lands we purchaſed in partnerſhip in Virginia. charge me for all the expenſes that may attend your doing it, and ſending copies of the deed from col. Byrd.*

In a letter from Francis Farley to his ſon, James Parke Farley, dated the 31 of march, 1772, are theſe words: *i believe Jack Farley will ſoon be obliged to go with the regiment to Ireland, &c. that poor family will i fear be infallibly ruined, and obliged to ſell their ſhare of the land of Eden.*

In a letter from Francis Farley to John Simon Farley, dated 11 of june, 1777, are theſe words: *i am very apprehenſive, that, if the americans find out you are one of the kings officers, they will confiſcate your lands in America, in that caſe you will have nothing to depend upon, but your commiſſion, and i ſhall loſe above 3000 pounds.*

In a letter from Francis Farley to John Simon Farley, dated 13 of july, 1778, are theſe words: *if you do not quit the army you will certainly loſe your*

*your property in Northamerica, which i truſt is worth more than a colonels commiſſion, and a regiment, or two or three regiments *** ſurely you cannot have the leaſt doubt whether it will be beſt to preſerve valuable property, in ſuch a country, or to continue a ſlave in the army of a very declining almoſt ruined country *** in my laſt, i ſaid, i ſhould not again preſume to adviſe you, but, in a very ſhort time, things are ſo vaſtly altered, i cannot help attempting it once more. i then thought that all of us, that had property in Northamerica, and were abſent from the country, would forfeit it; but, from the late accounts we have, we find the congreſs acts upon more liberal principles; and intend to give time to all abſentees to return and clame their property; even thoſe that deſerted them in the day of diſtreſs, and bore arms againſt them; but, if they do not return in a certain limited time, their property is to be confiſcated, and you may take for granted, they will have no partiality towards on officer in the kings ſervice. i therefore hope you will ſee this matter in the light i do, and think it better to part with the commiſſion you now have, and come over to be ready to go to America to clame your property, ſoon as matters are ſettled, than to loſe conſiderable property in a very growing country. *** p. s. if you have purchaſed a captains commiſſion before you receive this, i muſt beg you will ſell it, &c. then go to America to clame your land, if you ſhould not like to remain in that country, you may ſell the land, and live in a country you like better. you cannot afford to loſe that land.*

The writing which, after the death of Francis Farley, was proved for his teſtament, and by which all his eſtate in Northcarolina and Virginia was deviſed *(a)* to the children of his ſon, James Parke Farley, the female defendents, without making any declaration in favour of the plaintiffs, was lodged in the hands of Thomas Warner, attorney general of Antigua, the counſil of that teſtator, with a paper, on which were written by his direction the following words: *my late brother Simon Farley, was half concerned with me in the purchaſe of a tract of land from the honourable William Byrd eſquire and Elizabeth his wife, and known by the name of Saura town, or the land of Eden, in the province or ſtate of Northcarolina. he was alſo one third concern d with mr Francis Miller of Virginia merchant, and myſelf, in the purchaſe of the following tracts of land, viz:*

one tract purchaſed from Robert Ives and Kezia his wife,
one ditto do. from Anne Ludgall widow, John Biggs and Bathia his wife, William Dale and Mary his wife, and Sarah Ludgall Spenſter.
one do. do. from John Ivy and Elizabeth his wife,
one do. do. from James Tucker.
note i have ſince purchaſed Francis Millers title to his one third part, ſo that i now poſſeſs two third parts of thoſe ſeveral tracts of land.

My late brother is no how concerned with me in the great diſmal ſwamp, or any other lands that i have in Virginia or Northcarolina, except the five parcels above mentioned. and a man, who in march, 1779, had been ſent for the ſaid teſtamentary writing, in order to return it to Francis Farley, was informed by the counſil, that Francis Farley had wiſhed to make a declaration in his will, as to the title of John Simon Farley to the ſaid lands in America, which the counſil, as he informed the meſſenger, declined to do from reaſons of policy, and Francis Farley, when the teſtament was brought to him, with that information, lamented that ſuch declaration could not be made.

To the bill of the plaintiffs, who inſiſted that Francis Farley held in truſt for their benefit the proportions of the lands now clamed by them, and

(a) Francis Farley, who appeareth to have expected that the property in America of britiſh ſubjects would be confiſcated, probably hoped to prevent the loſs of these lands by deviſing them to his grand children, who were american citizens, praetermitting his brothers children, because a devise to them might be vain.

and prayed a decree for an execution of the truſt, and for the rents and profits, the defendents, by their anſwer, relying upon their legal title by ſurvivorſhip, and not admiting the exiſtence of the truſt, alleged the plaintiffs to be aliens, diſabled to hold lands of inheritance, in any of the united american ſtates, and, conſequently, to maintain any action for recovery thereof; and, as to the land in Northcarolina, excepted to the juriſdiction of this court, and objected, that the action of the plaintiffs was barred by the ſtatute for limitation of actions, in that country.

The cauſe was argued the 18 day of march, 1794.

BY THE COURT.

I. The firſt queſtion is, whether Francis Farley was a truſtee for his brothers children, the plaintiffs, as to one moiety of the Northcarolina, and as to one third part of the Virginia, lands? for, if he were a truſtee, the defendents, volunteer claimants under him, are in the ſame predicament undoubtedly.

In the caſe between Fiſher and Wigg, Peere Williams, b. 1. p. 21. reports chief juſtice Holt to have ſaid, *jointenancy is favoured in law; (b) because as the law does not love fractions of eſtates; ſo neither does it encourage diviſion of tenures, or multiplication of ſervices. now as long as the jointenancy cantinues, there is a joint tenure, but when the tenancy becomes in common, then the tenures and services are severed. *** this is the true and only reason why joint eſtates are favoured in law; at leaſt, i can invent no other.*

The

(b) *That common law courts are diſpoſed to favour jointenancy, and the conſequent right of ſurvivorſhip appeareth by numerous examples, and by none more ſignaly than the following:*

Lyttleton, in the 298 *ſect. of his tenures, ſaith,* if lands be given to two, to have and to hold, s. the one moiety to the one, and to his heirs, and the other moiety to the other, and to his heirs, they are tenents in common. *and this hath never been denied to be law, even where the gift was by deed.*

But if lands be given by deed to two, to be equaly divided between them, and their reſpective heirs, the law hath been declared by many adjudications to be, that the donees are jointenents, and not tenents in common. the reaſon of the caſe in Lyttleton is ſaid by Coke, 1. *inſt. p.* 190. *b. to be,* becauſe, they have ſeveral freeholds, and an occupation pro indiviſo; *and by Holt,* 1. *P. Will. p.* 18. becauſe the deed operates as ſeveral conveyances, and not as one, for two liveries muſt be made, there being ſeveral freeholds, and livery to one, ſecundum forman chartae, not enuring to the other; and that caſe is not like to ours, *(Fiſher v. Wigg)* in regard there is an actual diviſion and diſtribution of the land: whereas the words equaly to be divided, do not aſſign ſeveral parts.

Yet a man, not converſant with law books, nor an admirer of law jargon, would be puzzled to diſcern a ſolid difference between the two caſes, and would incline to think, with the chancellor, 2 *chan. ca.* 65, *the law was ſo, becauſe the judges would have it ſo. he would not haeſitate to affirm the donors intention to have been the ſame in both caſes, becauſe the words,* i give lands to A and B to be holden, one moiety by A and his heirs, and the other moiety by B and his heirs, and the words, i give lands to A and B, to be equaly divided between them and their reſpective heirs, *are convertible terms; for, if one moiety were holden by A and his heirs, and the other moiety were holden by B and his heirs, the lands would be equaly divided between A and B and their reſpective heirs: and, vice verſa, if the lands were equaly divided between A for himſelf and his heirs, and B for himſelf and his heirs, or between A and B and their reſpective heirs, they would be holden, one moiety by A and his heirs, and the other moiety by B and his heirs. he would be unable to diſ-*

cover

The court of equity, inſtead of favouring the right of ſurvivorſhip, hath, on the contrary, oppoſed it, wherever it could be oppoſed, without uſurping unwarrantable powers.

The only caſe, in which the right of ſurvivorſhip doth not ſeem rigid, groundleſs, and unjuſt, is that wherein the tenents deliberately agree to take their chances for it.

Where the tenents become intereſted gratuitouſly e. g. by deviſe, to deprive the family of the tenant who died firſt, ſeems unjuſt, and more ſo, if he had improved the land, by beſtowing labour and expenſe upon it. in ſuch a caſe however their ſupplication to the court of equity for relief would be vain, perhaps, becauſe that court can no more decree directly againſt the right of ſurvivorſhip, the exiſtence of which is recognized by law, than it can alter the law, in any other inſtance.

If two men, whoſe object is not of a mercantile nature, for there is no right by ſurvivorſhip, advance equal portions of the money for lands purchaſed by them, and conveyed by words, which, in conſtruction of law, would transfer a joint intereſt, whether the court of equity, ſimply for the reaſon that the purchaſe money was equaly advanced, ought to declare the ſurvivor a truſtee for the repreſentatives of his deceaſed companion? is a queſtion upon which an opinion will not now be delivered, becauſe it is unneceſſary. for

In addition to payment by Simon Farley of his proportions of the purchaſe money, in the principal caſe, ſeveral circumſtances, thought abundantly ſufficient to conſtitute Francis Farley a truſtee for his brother, as to the lands now clamed, occur.

1. The brothers did not intend that either of them ſhould acquire by ſurvivorſhip a right to the whole eſtates purchaſed. Simon probably probably did not know that ſuch a right could exiſt, and certainly did not expect it would be clamed in the event which happened. This is manifeſt by his teſtament, which, deviſing thoſe eſtates, and appointing Francis an executor, ſuppoſed the validity of the one, notwithſtanding ſurvivance of the other. if Simon did not know that the right by ſurvivorſhip could exiſt, or did not expect it would be clamed in the event which happened, hence is concluded that he never intended to purchaſe theſe eſtates in ſuch a manner that a right to the whole of them ſhould accrue to the ſurvivor. that Francis did not intend originaly to purchaſe the eſtates in that manner is proven 1, by his abjuration of the right by ſurvivorſhip, which he thought iniquitous, but which could not be iniquitous if it had been in contemplation of the parties at the times of the purchaſes; and 2, by his purchaſe, after his brothers death, from Francis Miller of one third part, inſtead of one half, of the lands in Norfolk. and a court of equity may ſet aſide or reform a conveyance not agreeing with the intention of parties; for the conveyance written, nor for its own ſake but, for exhibiting and fulfilling that intention, ought to be a true image of its archetype. if it be not ſo, the court of equity, decreeing a party, holding a legal property by the terms of ſuch a conveyance, to reſtore ſo much of it as he ought not to retain, to him, who would have been the legal owner, if the conveyance had faithfully exhibited the intention, is exerciſing one of the functions univerſaly conceded to be proper to that tribunal.

2. Accompliſhment

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cover why, in the one caſe, as well as in the other, the donees might not, according to Coke, have ſeveral freeholds and an occupation pro indiviſo, *and why the deed might not, according to Holt operate, as ſeveral conveyances, and not as one; and why there might not have been two liveries; nor would he be able to reconcile the words of thoſe two judges, of whom, commenting on Lyttletons text, one ſays the donees* have an occupation pro indiviſo, *that is, an undivided occupation, or no diviſon or diſtribution of the land being made; and the other ſays,* there is an actual diviſon and diſtribution of the land.

2. Accompliſhment of an act by Francis Farley, after the legal title by ſurvivorſhip accrued, for preventing aſſertion of that title by his repreſentatives, was hindered by failure of counſil to obſerve inſtructions ſent to him for that purpoſe. and when the progreſs of an act, which is admitted by all to be juſt, and which the party, confeſſing himſelf in honour bound to perform, had begun to perform, hath been interrupted, without any default of him whoſe benefit was the object, a decree, putting matters in the ſame ſtate wherein they would have been, if the act had been accompliſhed, is dictated by the ſpirit of equity, and believed to be not inconſiſtent with the practice of this court.

The common rule in a court of equity is, where an agreement made upon a good conſideration is not performed, the party intereſted ſhall have the benefit to which performance would have intitled him. Strange's rep. 456. The ſpirit which ſuggeſted this rule cannot diſapprove the following rule: where the completion of an act, which one in obedience to the precepts of conſcience had earneſtly begun to perform, was prevented againſt his will, the party intereſted ſhall have like benefit as if the act had been completely performed. the inſtructions to counſil by Francis Farley, which was the begining of an act intended to ſecure to his brothers family an eſtate to which he knew them to be juſtly intitled, was undoubtedly equivalent to an agreement to that purpoſe; and his motive to it, namely, that he might be eaſed of that compunction, which one conſcious of witholding diſhoneſtly the property of another feels, is affirmed with equal confidence to be a good conſideration.

Where a legal title, for recovering which a legal remedy had been proſecuted, is rendered an abortion by ſome event poſterior to inſtitution of the demand, the court of equity may ſupply that remedy which the law had not provided. e. g. a writ de partitione facienda between two jointenents will abate by death of either party before the firſt judgement awarded, although not afterwards. ſee Bacon's abr. tit. coparceners (D) where is quoted Daliſon 59. in ſuch a caſe, on application by the heir or deviſee of the defendent, if by his death the writ abated, the court of equity, as is believed, would be juſtified in decreeing a partition, becauſe it would be the conſummation of an act begun by the plaintiff himſelf. if the plaintiff were the party by whoſe death the writ abated that on behalf of his heir or deviſee the court would make a like decree is as little doubted, not only becauſe the remedies of the parties ought to be reciprocal, and conſequently if the plaintiff ſurviving would have been compeled to make partition, the defendent in the contrary event ought to be likewiſe compellable, but becauſe an aſſignable right ought not to be deſtroyed by an event, which the owner could not prevent, that is, his own death in the life time of another man, an event againſt the conſequence from which he was actualy endeavouring to guard, and in relieving againſt which the court of equity would exerciſe one of the powers acknowledged, as is conceived, to belong to it.

Where a man, intending to ſettle an eſtate, over which he hath a power, ſo that it may be ſubject to teſtamentary diſpoſition, or, in default of that, to hereditary ſucceſſion, neglects a form which the law requires to perfect the ſettlement, but of which the abſence or preſence could not influence the intention, the party intereſted ſhall have the benefit to which obſervance of the form would intitle him. e. g. a writing ſigned and ſealed by one jointenent, declaring the intention thereof to be to ſever the jointure, and purporting to be a conveyance of his moiety of the land in truſt for thoſe to whom he ſhould deviſe it, or for his heirs, if he ſhould not deviſe it, omits the name of the truſtee, or appoints a truſtee who had died before, in ſuch a caſe a court of equity, diſpenſing with the truſtees intervention, who, if he had exiſted, could not have done more in the buſineſs than his portrait or his ſtatue, would decree the partition, conſummating the parties intention:

becauſe

becauſe that court, if power and will, alone eſſential naturaly to tranſlation of property, concur, will aid the act deſigned for a memorial of the tranſlation, ſupplying defects in the form, in which office the court fullfills the purpoſe of inſtituting forms, which was that they might be ſubſervient to the intentions of parties, not that the want of forms ſhould defeat theſe their intentions.

3. Francis Farley was the agent for his brother in purchaſing the lands. and, when two or more men employ another to purchaſe lands for them, the preſumption being that a wager upon longevity was not in contemplation of the purchaſers, the court of equity may with propriety decree the ſurvivor, in caſe a joint eſtate be conveyed, to be a truſtee of ſo much as excedes his juſt proportion, unleſs inſtructions to the agent ſhew the intention of his conſtituents to have been to take their chances for ſurvivorſhip; becauſe ſuch a conveyance being an unauthorized act binds not in equity the rights of the conſtituents. now in this caſe not only inſtructions to take a conveyance of a joint eſtate are not produced, but, that the parties did not deſign or deſire ſuch a conveyance to be taken ſeems manifeſt.

4. Francis Farley, in 1765, and the year following, debited Simon with proportions of money paid on account of the lands, and particularly for quit-rents of thoſe in Northcarolina, with which the repreſentatives of Simon could not have been juſtly chargeable, if his ſurviving brother remained ſole proprietor of the lands. This therefore is an implicit acknowledgement of the right of thoſe repreſentatives. Francis doth not indeed appear to have rendered an account of profits, for which one of his letters contains the reaſon, that is, the lands had not yielded profits.

5. Francis Farley explicitly, repeatedly, and uniformly acknowledged the right of his brothers repreſentatives to the lands now clamed by them. and that acknowledgement includeth an admiſſion of every thing eſſential to the perfection of that right, and conſequently an admiſſion of a truſt in him who held the legal title.

6. The inſtructions written by direction of Francis Farley, and ſent by him to his counſil, were profeſſedly deſigned to preſerve to his brother's repreſentatives the right which they are endeavouring to aſſert. theſe inſtructions, ſlighted and diſobeyed, contrary to the anxious deſire of their author, ought in equity to be deemed a declaration of truſt by him for the benefit of thoſe repreſentatives.

II. The next queſtion is whether the plaintiffs, who, being natural born ſubjects of Great-britain at the time of the american ſeparation, did not afterwards become citizens of the united ſtates, are aliens to thoſe ſtates, and conſequently diſabled to proſecute any action to recover, becauſe diſabled to hold, lands of inheritance, in the ſaid ſtates?

The ſtatute of may ſeſſion, 1779, c. 14 ſect. 1 in the preamble recites, that by the ſeparation of the united american ſtates, which had been part of the britiſh empire, the inhabitants of the other parts of that empire became aliens and enemies to the ſaid ſtates, and as ſuch incapable of holding property real or perſonal acquired therein, and ſo much of the property as was within this commonwealth became by the laws veſted in the commonwealth.

The laws, to which the legiſlature refers, muſt be the common law, as is ſuppoſed, becauſe no other law then exiſting is recollected by which aliens are incapable of holding property of any kind, in the country to the ſovereign whereof they are not ſubjects. By the common law, if we allow it to be contained in thoſe archives which alone have hitherto been conſulted in order to diſcover it, a natural born ſubject of Great-britain cannot by any mean become an alien to thoſe who, at the time of his birth, were his fellow ſubjects. this appears by 7 Co. Calvins caſe *paſſim.* on which caſe, one obſervation by the reporter is, that *ſuch a concurrence of judgements reſolutions and rules there be in our books in all ages concerning this caſe. as if they had*

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been prepared for the deciding of the queſtion of this point: and that (which never fell out in any doubtful case) no one opinion in all our books is againſt this judgement. which obſervation, unleſs it can be contradicted, ought to make proſelytes to the doctrine aſſerted in that caſe thoſe who were before fautors of the contrary doctrine ſtated in that ſtatute of 1779. c. 14. Francis Bacon, in his argument of the ſame caſe, goes ſo far as to ſay, *if a man look narrowly into the law in this point, he ſhall find a conſequence that may ſeem at the firſt ſtrange, but yet cannot well be avoided; which is, that if divers families of engliſhmen and women plant themſelves at Middleborough, or at Roan, or at Liſbon, and have iſſue, and their deſcendents do intermarry among themſelves, without any intermixture of foreign blood, ſuch deſcendents are naturalized to all generations: for every generation is ſtill of liege parents, and therefore naturalized; ſo as you may have whole tribes and lineages of engliſh in foreign countries.* and to the words quoted by Coke in Calvins caſe fo. 27 b. from Bracton, the laſt mentioned author ſubjoins, ' *et ita tamen ſi contingat guerram moveri inter reges, remaneat perſonalitur quilibet eorum cum eo cui fecerit ligeantiam, et faciat ſervicium debitum ei cum quo non ſteterit in perſona.* fol. 427. b.

The inconveniencies from permitting the permanent property in any country to be holden by thoſe who, although they be not in a legal ſenſe aliens, may be, and actually were in this caſe enemies, in the popular ſenſe, muſt not be remedied by *judges who have not power to judge according to that which they think to be fit, but that which out of the laws they know to be right, and conſonant to law.* 7 Co. fol. 27. a. *judges muſt judge according as the law is, not as it ought to be.* Vaugh. 285.

When, out of empires violently diſmembered (which was the caſe between America and Great-Britain) ſeparate, and independent nations are formed, ſuch of the evils, which muſt happen, both during the conflict, and after it, as can be cured, may be cured by treaties between the nations, when tranquillity is reſtored, more humanely than by fulminating the panoply of eſcheats forfeitures confiſcations, involving in diſtreſs and ruin many people on both ſides innocent, otherwiſe than by a fiction, of thoſe injuries which cauſed the ſeparation. *(c)*

If the common law be as it hath been ſtated, the recital in the ſtatute of 1779, which was conſequently untrue, did not change the law; for a recital, even in a legiſlative act, hath not a plaſtic energy—a declaration that a thing is, which is not, will not make the thing to be. if this ſtatute had recited that by a former ſtatute, which did not exiſt, the people of other parts of the britiſh empire, born before the ſeparation, were aliens to the united american ſtates, and diſabled to hold property within them, ſuch a recital would not have been a legiſlative act, nor had the force of a law. and if ſuch a recital could have altered the common law in this commonwealth, it would have been ineffectual as to the lands clamed by the plaintiffs in Northcarolina.

Of the remaining queſtions, which affect the lands in Northcarolina only, the third is

III. Whether the plaintiffs, who did not commence this ſuit within the time preſcribed by the ſtatute for limitation of actions in that ſtate, are barred?

To which the anſwer is, the ſtatute is not pleadable by the defendents, who are truſtees, becauſe in equity their poſſeſſion is the poſſeſſion of the plaintiffs.

By

(c) May we not hope the period not to be far diſtant, when the regum ultima ratio *will give place to modes of diſceptation, rational, juſt, humane, for terminating national differences, if every kind? what nation, by their example, fitter than americans, to recommend thoſe modes.*

By the common law poſſeſſion is homologous with the right of the poſſeſſor. of two men abiding in the ſame houſe, if one only have right to the poſſeſſion the law ſhall adjudge him only in poſſeſſion. Lyttleton's tenures, ſect. 701. *et vice versa* of two parceners, jointenents, or tenents in common of the ſame houſe, if one only abide in the houſe, the law will adjudge both in poſſeſſion. ſee 1 Salk. 285. ſo that a poſſeſſion, actualy ſocial, is legaly private, if the right be private; and a poſſeſſion, actualy private, is legaly ſocial, if the right be ſocial.

By parity of reaſon, the poſſeſſion of the defendents, who were truſtees for the plaintiffs, as to their proportion, and in equity tenents in common with them, that is, holding one moiety to their own uſe, and holding the other moiety to the uſe of the plaintiffs, was in equity the poſſeſſion of thoſe plaintiffs *pro tanto*.

IV. The fourth queſtion is, whether a court of equity in this commonwealth can decree the defendents, who are within its juriſdiction, to convey to the plaintiffs lands which are without its juriſdiction?

The power of that court being exerciſeable *(d)* generaly over perſons they muſt be ſubject to the juriſdiction of the court; and moreover the acts, which they may be decreed to perform, muſt be ſuch as, if performed within the limits of that juriſdiction, will be effectual.

That the defendents are ſubject to the juriſdiction of the court, and ameſnable to its proceſs hath not been denied; and that a charter of feoffment containing a power of attorney to deliver ſeiſin, a deed of bargain and ſale, deeds of leaſe and releaſe, or a covenant to ſtand ſeiſed, executed in Virginia, would convey the inheritance of lands in Northcarolina as effectualy as the like acts executed in that ſtate would convey ſuch an inheritance, hath not been denied, and is preſumed, until ſome law there to the contrary be ſhewn, becauſe the place where a writing is ſigned ſealed and delivered, in the nature of the thing, is unimportant.

If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey land in Northcarolina, why may not a court of equity in Virginia decree that party, regularly brought before that tribunal, to perform the act?

Some of the defendents counſil ſuppoſed that ſuch a decree would be deemed by our brethren of Northcarolina an invaſion of their ſovereignty. to this ſhall be allowed the force of a good objection, if thoſe who urge it will prove that the ſovereignty of that ſtate would be violated by the Virginia court of equity decreeing a party, within its juriſdiction, to perform an act there, which act voluntarily performed, any where, would not be ſuch a violation.

The defendents counſil objected alſo, that the court cannot, in execution of its decree, award a writ of ſequeſtration againſt the lands in Northcarolina, becauſe its precepts are not authorative there. but this, which is admitted to be true, doth not prove that the court cannot make the decree, becauſe, although it can not award ſuch a writ of ſequeſtration, it hath power confeſſedly to award an attachment for contempt in refuſing to perform the decree. this remedy may fail indeed by removal of the defendents out of the courts juriſdiction. yet ſuch a removal, after the party had been cited, is not an exception which can be interpoſed to prevent a decree. a court of common law may enter up a judgement againſt him, who, by removal of his goods and chatels with himſelf, after having pleaded to the declaration,

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(d) Acts of general aſſembly have given power to the court of equity to condemn the property in this commonwealth of thoſe, who do not reſide there, and are not regularly ameſnable to the proceſs of that tribunal, to ſatisfaction of demands againſt them.

declaration, or after having been arreſted, rendereth vain a *capias ad ſatisfaciendum* or a *fieri facias*. *(e)*

From a doctrine contrary to that now ſtated and believed to be correct may reſult both inconvenience and a failure of juſtice.

1. A man agrees to ſell to another, or holds in truſt for another, lands in Georgia, Kentuckey, or one of the new ſtates northweſt of the Ohio, but he cannot be decreed to execute the agreement, or to fullfill the truſt by any tribunal but that in one of thoſe countries, ſeveral hundred miles diſtant from the country e. g. Northcarolina, in which both parties, and the witneſſes to prove matters of fact controverted between them, reſide. like and greater inconveniencies may happen in numberleſs other caſes. whereas a caſe can rarely if ever occur, the diſcuſſion of which can be ſo convenient to the defendent in any other as in his own country.

2. An agent, employed to purchaſe lands for people intending to migrate to America, or for others, having laid out the money depoſited for that purpoſe with him by them, and having taken conveyances to himſelf or to a friend for his uſe, refuſeth not only to make titles to his conſtituents, but alſo to diſcover the lands purchaſed. they meet with him in one of the ſtates, and in the court of equity there file a bill againſt him, praying a diſcovery and a decree for conveyances. he excepts to the juriſdiction of the court as to any lands not lying within that ſtate, and denieth by anſwer that any lands within that ſtate were purchaſed by him for the plaintiffs, which was true. the bill in ſuch a caſe, according to the doctrine of the defendents counſil in the principal caſe, muſt be diſmiſſed. and this muſt be the fate of every other bill, until he ſhall have the good fortune to find out in what ſtate the lands purchaſed are: and if they be in ſeveral ſtates, a bill muſt be filed in every one. if to this be ſaid, that the court may compel the diſcovery, although it may procede no further, the anſwer is, that this is directly the reverſe of the rule in the court of equity, namely, that the court, when it can compel the diſcovery, will compleat the remedy, without amanding the party elſewhere for that purpoſe, and decree to be done what ought to be done in conſequence of the diſcovery.

Therefore the court is of opinion, that Francis Farley, the grand father of the female defendents, after the death of his brother Simon Farley, was a truſtee for the plaintiffs, the children, deviſees, and legatees of the decedent, as to one moiety of the lands in Northcarolina, bought by the brothers from William Byrd, and as to one third part of the lands in the county of Norfolk, in this commonwealth of Virginia, bought by them and Francis Miller from Robert Ives and Keziah his wife, from Anne Ludgal widow, John Biggs and Bathia his wife, William Dale and Mary his wife, and Sarah Ludgal Spinſter, from John Ivy and Elizabeth his wife, and from James Tucker, and that ſome of the exhibits are proofs of ſuch truſt, equivalent to a formal declaration thereof: and that the defendents, whoſe title was not acquired by purchaſe for valuable conſideration, can not bar the demand

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(e) By the firſt ſection of the IV article of the conſtitution for the united ſtates of America full faith and credit ſhall be given in each ſtate to the public acts, records and judicial procedings of every other ſtate. *and the ſubſequent words*, and the congreſs may by general laws preſcribe the manner in which ſuch acts, records, and procedings, ſhall be proved, and the effect thereof, *ſeem to ſhew that proviſion for ſuch cases as these, among others, was intended to be made until ſuch proviſion ſhall be made, perhaps the decree, judgement or ſentence of any ſtate court may be eluded by retirement of the party into another ſtate. yet a bond or other contract is obligatory every where. the ſentence of arbitrators is ſupposed to be binding every where. why ſhould not the ſentence of a judge bind the party every where else as much as it would have bound him where it was pronounced?*

demand of the plaintiffs, by length of time; and that the plaintiffs, whoſe right accrued before the ſeparation of the united ſtates of America from Great-britain, are not diſabled to proſecute this ſuit: and that this court hath juriſdiction thereof, the defendents being ameſnable to its proceſs. and therefore the court, declaring the ſaid Francis Farley to have ſtood ſeiſed, and the defendents now to ſtand ſeized of one undivided moiety of the lands in Northcarolina, and of one undivided third part of the lands in the county of Norfolk, which proportions are clamed by the bill, in truſt to the uſe of the plaintiffs, doth adjudge order and decree that the defendents, when the females ſhall attain their ages of twenty one years, do convey the ſaid moiety and third part to the plaintiffs, at their coſts; and in the mean time that the defendents Thomas Lee Shippen and Champe Carter, and their reſpective wives, and the guardian of the other defendents, do permit the plaintiffs to enter into and peaceably hold the ſaid moiety and third part, and to receive the rents and profits thereof; and that the ſaid defendents do pay unto the plaintiffs one half of the rents and profits of the ſaid lands in Northcarolina, and one third part of the rents and profits of the ſaid lands in the county of Norfolk from the time of commencing this ſuit: accounts of which rents and profits are directed to be made up before one of the commiſſioners of this court, who is required to examine ſtate and ſettle the ſame and make report thereof to the court, with ſuch matters ſpecialy as he may think pertinent, or as the parties may require.

BETWEEN
THOMAS HINDE, *plaintiff*,
AND
EDMUND PENDLETON and Peter Lyons, adminiſtrators of John Robinſon, with his teſtament annexed, *diſendents*.

A NEGRO woman ſlave and her four children had been in poſſeſſion of the plaintiff and his wife, the parent many years, and the others from their reſpective births, probably believed by the poſſeſſors, during the greater part of that time, to be their property.

After the woman ſlave was diſcovered to have been, by the father of the plaintiffs wife, who had received her from him, conveyed long before to John Robinſon, the teſtator of the defendents, the five ſlaves, by direction of one of the defendents, were ſold by auction.

The plaintiff, at the time and place appointed for the ſale, attended with his wife, who manifeſted a tender affection for the ſlaves, and ſuch anxiety to retain them, which was increaſed by a reciprocal abhorrence in them from a ſeparation, that ſhe ſeemed reſolved to buy them at any price.

The defendents were not at the ſale. one of them, ſuſpecting that ſome people, diſpoſed to favour the plaintiffs wife, might decline bidding againſt her, inſtructed the agent who managed the ſale not to let them be ſold under a reaſonable value.

The agent employeth a by-bidder, not being particularly inſtructed ſo to do by the defendents; the ſlaves are expoſed to ſale, in four lots, for tobacco; the plaintiff is the higheſt bidder for all; the ſum of the prices bidden is ſomewhat more than 52000 pounds of tobacco, confeſſed to be enormous, for payment of which the plaintiff, with a ſurety, executed a bond.

The defendents, in an action for the tobacco appearing due by the bond, recovered a judgement, to enjoin which the plaintiff commenced this ſuit, in his bill claming a property in the ſlaves, by a gift, which he alleged the father of the plaintiffs wife to have made at their intermarriage, or, if that title could not be maintained, inſiſting that the conduct of the agent in employing a by-bidder, was ſo unfair that in equity the obligor ought not to be charged, by the bond, with more than the true value of the ſlaves, far

exceded by the price which was bidden by the plaintiff, and which he was urged to bid by the agents practices upon the ſolicitude of a diſtreſſed woman.

The anſwer of the defendents to the bill did not admit the gift to the plaintiff, and he did not prove it, nor would the gift, if he had proved it, have been effectual againſt the prior conveyance to the teſtator of the defendents.

In the anſwer the firſt named defendent in a diſſertation endeavoured to prove the employment of a by-bidder not to be unlawful or exceptionable in general, and ſtated that, not long before this tranſaction, the plaintiff, at a public ſale, gave 255 pounds for a negro boy thirteen years old, and that other extravagant prices were given about the ſame time; adding, *he ſuppoſed the juſt creditors of mr Robinſon, for whoſe benefit the defendent acted, had a right to be availed of the prevailing temper though it ſhould be thought a phrenzy.*

By the court, 10 day of march, 1791:

The act of by-bidding is a dolus malus. 1, the by-bidder, offering a price for the thing proclamed to be ſold, profeſſeth a wiſh to buy it; which profeſſion is falſe: for he, not only doth not wiſh to buy the thing but, wiſheth another man to buy it, and tempteth him to bid more for it. 2, the by-bidder, inſtead of being one who would be a buyer, as he pretendeth to be, is in truth the ſeller diſguiſed, lending his own perſon to the ſeller. his office is dramatic, no leſs than the office of an actor in theatrical exhibitions. they both repreſent others; and the object of both is to deceive. in this latter character however they differ thus: they uſe their art to perſuade, one that he is, the other that he is not, whom he perſonateth. *(a)* by which duplicity in the by-bidder the true bidders are deluded, who ſuppoſe the deſign of themſelves and this by-bidder to be the ſame, that is, to buy the thing as cheap as they can, and do not ſuſpect that a bidder, apparently deſiring to buy, is inſidiouſly watching the eagerneſs of others to buy, and graduating his offers by that ſcale, inſtead of his own eſtimate of the value, and his own ability to pay the value.

Now a ſimulation, a feigning himſelf to be what one is not, i. e. a true bidder, and a diſſimulation, an induſtrious concealment of what he is, that is a ſeller or ſellers ſubſtitute, from others intereſted in knowing what he is, and this with a deſign to profit by their credulity and ignorance, exhibit a complete and lively contour of that, which, if it muſt not be called by the name of a dolus malus, or by a name of like meaning, muſt want a name.

Again, the offer of a by-bidder, from the nature of the tranſaction, is a nullity a ſale by auction is a compact between the ſeller and higheſt bidder, whereby the property paſſeth from one to the other. the higheſt bidder therefore muſt be a bidder to whom the property can paſs. but to a by-bidder can be no ſuch tranſition of the property. for, if the thing proclamed for ſale be, in the auctionary language, ſtricken off to the by-bidder, the property remaineth unchanged; he being the agent, and conſequently his offer being the offer, of the ſeller.

The inconvenience, if the practice of by-bidding be not tolerated, of which the active defendent ſeemed apprehenſive, from combinations formed to the injury of the ſeller, may be honeſtly prevented by his preliminary declaration, that his property ſhall not be diſpoſed of at leſs than a certain price, and an expoſition of it to ſale at that price, or a greater, if a greater be bidden. but a deception, exerciſed in order to counteract a combination to injure the ſeller, which may or may not be formed, doth not conſiſt with the praecepts in any ſyſtem of ethics hitherto approved. The

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(a) Another difference between them is, men moſt commend him who moſt deceives them, becauſe

Doubtleſs the pleaſure is as great
Of being cheated as to cheat,

as Butler hath obſerved, when they are cheated out of their ſenſes only: but when by a deception they are injured in their property, they are not diſpoſed to commend him who deceived them.

The ſame defendent, by his anſwer, ſeemed to think, that the plaintiff ought not to be relieved in this inſtance, becauſe, in another inſtance of a public ſale, he had bought a ſlave at a more extravagant price, and other people had made ſimilar indiſcrete bargains about the ſame time, againſt which on that account, the parties ſuffering by them had not been relieved. upon this is obſerved in the caſes, to which the defendent alluded, the parties, if by intromiſſion of by-bidders they were led to give extravagant prices for things which they bought, have not been relieved, becauſe perhaps they have not ſought relief. if by-bidders did not intromit, the parties were not intitled to relief. the man, who ſuffers himſelf to be ſo much the dupe of epidemical phrenzy, which is ſuppoſed to have been prevalent at this time, or of his own deſires, as by thoſe ſtandards, to meaſure the value of things which he buys, inſtead of meaſuring the value of them by their utility to him, and congruency with his faculties, can not, on that principle, be diſcharged from an improvident bargain by the court of equity, the judge of which neither is the curator, nor hath the power which the roman praetor had *(b)* to appoint a curator, for a prodigal.

And finaly, the emyloyment of a by-bidder, on this occaſion, was peculiarly exceptionable. in other caſes, a man, who bids againſt a ſecret by-bidder, will be reſtrained by the conſideration that the price, bidden by his oſtenſible competitor, excedes the true value. but in this caſe the plaintiff did not conſider the true value; to gratify a wife, for a family of ſervants, endeared to her probably by an intercourſe of obſequious attention and faithful miniſtration, on one ſide, in return for benign treatment and provident care on the other, he bid the *pretium affectionis*, which is unlimited, and which therefore was——WHAT THE BY-BIDDER AND HIS PROMPTER PLEASED.

The ſale ought not to be ſet aſide intirely, as the active defendent propoſed, although the laſt price, bidden by the plaintiff, above a true bidder, can not be now diſcovered, becauſe this incertainty was occaſioned by the defendents agent and by-bidder; but the ſale ought to be effectual upon payment of ſo much tobacco as is equal to the value of the ſlaves at the time of the ſale.

For aſcertaining this value, an iſſue would have been directed; but, by the parties conſent, it was referred to commiſſioners, upon whoſe report, in may 1791, the injunction, awarded when the bill was filed, was perpetuated as to all the tobacco recovered by the judgement, except ſo much thereof as was equal to their eſtimate.

BETWEEN
DAVID ROSS, *plaintiff*,
AND
PLEASANTS, Shore, and company, and William Anderſon, *defendents*.

THOMAS PLEASANTS, Thomas Shore, David Roſs, William Anderſon, and others, aſſociated by the firm Pleaſants, Shore, and company, having purchaſed lands, which had eſcheated from Lewis Burwell Martin, and Samuel Martin, David Roſs, who owned one fourth part, in february, 1780, bought the ſhares of all his companions, agreeing to pay ſo much crop tobacco, inſpected in 1779 or 1780, at the upper warehouſes on James and York rivers, as William Cabell, George Carrington, Roger Thompſon, John Coles, and Nicholas Lewis, or any three of them, ſhould adjudge

(b) Prodigi, licet majores viginti quinque annis nati ſint, tamen in curatione ſunt agnatorum, ex lege duodecim tabularum. ſed ſolent Romae praefectus urbi, vel praetores, et in provinciis praeſides, ex inquiſitione, eis curatores dare. Juſtiniani inſtitut. lib. I. tit. XXIII. § III.

adjudge to be the value of thoſe ſhares, with a commiſſion of five per centum over and above the valuation, and, in caſe the lands ſhould not be valued before the firſt day of may then next, to pay five per centum per annum intereſt from that day, upon any balances which might be found due on account of the purchaſe at a final ſettlement; and, for performance of theſe agreements, bound himſelf, by one obligation, in the penalty of 1600000 pounds of merchantable crop tobacco, payable to Pleaſants, Shore and company, whoſe ſhare was two fourth parts, and by another obligation, in the penalty of 800000 pounds of like tobacco, payable to William Anderſon, owner of the remaining fourth part; and the lands were to be granted to David Roſs, which was accordingly done: he alſo bought the companys ſhare of the black cattle on the lands.

About the ſame time, Thomas Pleaſants, and William Anderſon, the agents for Pleaſants, Shore, and company, ſold 400 hogſheads of their tobacco, at twenty ſhillings ſterling by the hundred pounds, to David Roſs, Thomas Shore, and others, deſignated by the firm Roſs, Shore, and company, who aſſumed, on their parts, to pay ſo much of the money, in ſix weeks from that time, as was equal to the debts which Pleaſants, Shore and company owed to Abel James, and Thomas Paſchall, and the reſidue in ſix months to Iſaac Governeur, towards diſcharging a debt which they owed to him.

David Roſs made ſome payments to William Anderſon, in may and june, 1780, procured a transfer to himſelf of the bond from Pleaſants, Shore, and company, for payment of the debt which they owed to Thomas Paſchall; and, on the ſecond day of november, 1780, drew bills of exchange, on Walter Chambre, for more than 1200 pounds ſterling, payable to Pleaſants, Shore, and company, which Thomas Pleaſants, one of their agents, acknowleged to have been received by him, and, with Paſchalls transferred debt, to be a partial payment for the lands purchaſed of them, by mutual agreement to be ſettled in tobacco at twenty ſhillings ſterling by the hundred pounds: but the bills were not applied to the uſe of Pleaſants, ſhore, and company, and were proteſted.

Four of the men appointed to value the lands met for that purpoſe, the 18 day of april, 1781, attended by David Roſs and William Anderſon.

To them, in order to prove the low price of tobacco, William Anderſon produced a certificate that it had been very lately ſold for ten ſhillings by the hundred pounds weight, and obſerved further, that the britiſh enemy, then in the country, might deſtroy or carry away what was in the warehouſes: to obviate the argument from this danger, David Roſs, after urging ſome conſiderations to ſhew that the tobacco ought to be rated higher, propoſed that the circumſtance of the hoſtile invaſion ſhould not affect the valuation of the lands at all, and, in that caſe, declared he would conſent to be reſtrained from making payment, unleſs William Anderſon ſhould demand it, before the enemy ſhould evacuate the country. this propoſition William Anderſon rejected, declaring that the tobacco was immediately wanted, and giving ſome other reaſons.

The four referees then proceeded in the buſineſs, and ſtated their act on written papers, delivered to the parties, containing theſe words:

'We the ſubſcribers, being mutually and indifferently choſen by David Roſs, of the one part, William Anderſon of a ſecond, and Pleaſants, Shore, and company, of a third part, to arbitrate and determine a matter of difference in diſpute between them concerning the purchaſe of ſeveral tracts of land formerly the property of Lewis Burwell Martin, and Samuel Martin, and after viewing the lands, and taking other information for our direction, and maturely and deliberately conſidering the ſubject matter of the ſaid diſpute, do value the ſaid land at 959205 pounds of tobacco; and do find, after deducting the ſeveral payments made by the ſaid Roſs, as well to the ſaid Anderſon, as to the ſaid Pleaſants, Shore, and company, that there is a

balance

balance of 110537 ½ pounds of tobacco due to the ſaid Anderſon, and to the ſaid Pleaſants, Shore and company, 93003 ½ pounds of tobacco; therefore do award, that the ſaid Roſs do pay to the ſaid Anderſon the ſaid quantity of 110537 ½ pounds of tobacco, and to the ſaid Pleaſants, Shore and company the ſaid quantity of 93003 ½ pounds of tobacco, and on payment thereof that they ſeverally do execute full and clear diſcharges for the ſame. it is to be remembered, that, in valuing the land above mentioned, ſo far as relates to the quantity of low-grounds, it being uncertain, we ſuppoſed it to be four hundred acres, and valued at the rate of one thouſand pounds of tobacco per acre; and if it ſhall prove to be more than the quantity of real river low grounds, or leſs, as the caſe may be, that then they add or leſſen to or from the price of the low ground, and of courſe, either add or leſſen to or from the price of the high ground, that being valued at eighty five pounds of tobacco per acre. in witneſs whereof we do hereunto ſet our hands, the 18 april, 1781. George Carrington, John Coles, Roger Thompſon, Nicholas Lewis.' on it was endorſed 'memorandum that 386600 pounds of tobacco is allowed for the ſterling money paid by mr Roſs to Pleaſants, Shore, and company, and that neither intereſt nor commiſſion are reckoned in the within valuation. Geo Carrington, John Coles.' whereby the valuers appear to have diſcounted, at the rate of one hundred pounds for every ten ſhillings ſterling, the tobacco ſuppoſed by them to have been paid by David Roſs to Pleaſants, Shore, and company in Paſchalls bond, and the bills of exchange mentioned in the receipt of Thomas Pleaſants, although, by the terms of that receipt, they were to be ſettled in tobacco at one hundred pounds for every twenty ſhillings ſterling, they alſo gave David Roſs credit againſt William Anderſon for 26055 pounds of tobacco, a difference by them ſuppoſed between the value of 60994 pounds of tobacco, at the time when they were paid in may and june 1780, and the value in april following, when the lands were valued. but two of the referees in their examinations depoſed, one, that, unleſs he had conceived himſelf authorized to ſettle the tobacco and money paid by David Roſs, by the ſame ſcale as that by which he valued the land, he would not have valued it, or not in the manner he then did; and the other, that, if he had been prevented from adjuſting the payments on the ſcale by which he valued the lands, he would either have valued the lands in another manner, ſo as to have been conformable to the payments, or not have acted at all in the buſineſs.

On the 28 day of April, 1781, David Roſs ſent notes for a quantity, about 174300 pounds, of tobacco to William Anderſon, to be tendered to him, as well on his own, as on Pleaſants, Shore, and company's, account, and, in a letter by the ſame bearer, after explaning his reaſons for making a tender, in the circumſtances of the country at that time, when the britiſh army, among other inſtances of the havock by which their progreſs might be traced, had burned one of the public tobacco warehouſes, propoſed another mode of payment, if the tobacco ſent ſhould not be acceptable.

Neither of theſe was approved of by William Anderſon, who, at the meeting of the referees, had excepted to, and in a manner proteſted againſt, their doing more than valuing the land in tobacco, the only matter ſubmitted to them; and Pleaſants, Shore, and company, as well as he, relying upon this exception, moreover inſiſted, that the referees, when they undertook unwarrantably to adjuſt the accounts between the parties, not only gave David Roſs improper credits, that is, for Pleaſants, Shore, and company's bond to Thomas Paſchall, and the bills of exchange drawn on Walter Chambre, but, if they had been proper credits, allowed too much for them by one half: and William Anderſon complained, of their increaſing the payments made to him and conſequently leſſening the value of his ſhare.

The parties being thus at variance, in September, 1782, actions of debt

upon the obligations of David Roſs, were commenced in the general court, by Pleaſants, Shore and company, and William Anderſon, in which actions, the declarations, after reciting the agreements, and ſtating the valuation, aſſigned the breaches of the agreements in non-payment of the half, in one caſe, and of the fourth, part in the other caſe, of the 959205 pounds of tobacco to which the lands were valued, with the commiſſion and intereſt.

On trial of iſſues, made up on the pleas of conditions performed, with leave to give any matter in evidence, the jury charged in both together found that David Roſs had not performed the agreements, and that from him were due to Pleaſants, Shore and company, 339890 ½, and to William Anderſon 119370 pounds of tobacco, whereby the jury, although they allowed the plaintiff to diſcount the articles for which the referees gave him credits, appeared to have differed from thoſe gentlemen in the quantity of the credits, probably accounting every twenty ſhillings ſterling of the debt to Thomas Paſchall and of the money for which the bills of exchange on Walter Chamble were drawn equal to one hundred pounds of tobacco, and deducting 26055 pounds of tobacco added to the payments made by David Roſs to William Anderſon in may and june 1780: and after motions for new trials, which were rejected, judgements were entered for the penalties of the obligations, to be diſcharged by payment of the tobacco ſo found due by the verdicts reſpectively.

For an injunction to ſtay execution of theſe judgements, and for relief againſt them, ſo far as the tobacco recovered thereby might appear to excede what was juſtly due, David Roſs filed his bill in the high court of chancery; and an injunction was awarded untill further order, according to the uſual courſe of the court, chiefly upon theſe grounds ſtated in the bill: that the referees had informed David Roſs, they valued the lands ſo highly, expecting the tobacco would be demanded and paid in a ſhort time, which they were led to expect from William Anderſon's declarations that the tobacco was immediately wanted, and the profeſſed readineſs of David Roſs to make the payments: and that the defendents, if they would not abide by every part of what was done by the referees, ought not to have the benefit of one part, that is, of the high valuation made by them, which would not have been made but upon a ſuppoſition that the parties would acquieſce in the whole.

Upon filing the anſwers, ſuppoſed to have denied the equity of the bill, a motion was made to diſſolve the injunction; but the court inclining to diſſolve it in part only at that time, the defendents counſil conſented that the matter ſhould reſt as it was, until the final hearing, which was appointed to be at the then next term.

At the hearing, which did not come on before the 13 day of may, 1788, this opinion and the decree following it were entered:

'It appears to the court that the valuers of the land bought by the complainant of the defendents, having valued the ſame in tobacco, when that commodity was in their opinion worth only ten ſhillings ſterling per hundred weight, upon a ſuppoſition that they were at liberty to eſtimate upon the ſame ſtandard the payments, which had been previouſly made in tobacco of greater value, and it appearing by their depoſitions, taken in this cauſe that if they had conceived differently, they would either have not valued the land at all, or would have adopted ſome other meaſure of its value, which ſuppoſition appears not to have been admitted on the trials at law, where their valuation was taken ſimply, and without connexion with the antecedent payments as not being within the ſubmiſſion to them; and therefore that the valuation thus made can not be conſidered as a juſt and equal baſis to the judgements which were founded thereon in a court at law: therefore it is decreed and ordered, that the ſaid former valuation be ſet aſide, and it is referred to William Cabell, John Minor, Reuben Lindſay, Joſeph Carrington,

ſon, and Charles Irving, gentlemen, or any three of them, to view and value in tobacco the land purchaſed by the complainant, as aforeſaid, from the defendents, as the ſame was in their opinion worth at the time of the contract made between the parties, to wit, on the eighteenth day of february, one thouſand ſeven hundred and eighty, without regard to any payments, and make report to the court in order to a final decree. and it is further ordered that the injunction granted againſt the judgement obtained by the defendents, Pleaſants, Shore, and company be diſſolved, as to one hundred thouſand and thirty one pounds of tobacco, with intereſt from the 18 day of june, one thouſand ſeven hundred and eighty two, and againſt the judgement obtained by the defendent Anderſon, as to ninety ſeven thouſand eight hundred and two pounds of tobacco, with intereſt alſo from the twenty ſeventh day of june, one thouſand ſeven hundred and eighty three, and the coſts at law in each ſuit.'

One of the court, which was compoſed of three judges at that time, diſſented from ſo much of this decree as appointed other valuers for the reaſon ſtated in the next opinion and decree by himſelf, when, in conſequence of an act of the general aſſembly, he remained ſole judge.

Four of the valuers laſt appointed reported their opinion to be, that the land purchaſed by the plaintiff of the defendents was worth 609600 pounds weight of tobacco of Pages, Richmond, Mancheſter, and Peterſburg inſpections, the eighteenth day of february, 1780.

On the 2 day of june, 1789, the cauſe was again heard, and the court, rejecting this report, becauſe ſo much of the order as appointed another valuation of the land by different men, without conſent of parties, was ſuppoſed upon reviſion not to be authoritative, and if what followed were right to be unneceſſary, delivered an opinion to this purpoſe; that the former valuation, now re-inſtated, is a proper foundation for a juſt and equitable deciſion, if it be ſo underſtood and interpreted as to correſpond with the intention of thoſe who made it, which intention is explaned by themſelves to be this: to declare that the land with the improvements was worth 959205 pounds of tobacco at the time of making the eſtimate, when 100 pounds of tobacco were ſuppoſed by them to be equal to ten ſhillings ſterling, according to which ratio the value in tobacco was announced, from an expectation cauſed by declarations of the defendent William Anderſon that payment of ſo much of the conſideration as remained due would be exacted before the price of tobacco would alter; and therefore the opinion of the court is, that 4796l. os. 6d. ſterling ought to be conſidered as the true value of the land and improvements at all times, not variable by changes in the price of tobacco, they who were appointed by the parties to make the valuation having confeſſedly referred to ſterling money, compared with tobacco, as the balance by which they adjuſted the value of the latter, and having conformably thereto augmented the quantity of proceding tobacco credits which they allowed to the plaintiff, and having unwarrantably made the valuation according to the price at that time, inſtead of the price at the time of the contract, or at the time limited by it for payment of the conſideration. but the court is of opinion that the plaintiff is not intitled to credits againſt the defendents Pleaſants, Shore, and company for the bills of exchange payable to them drawn by him on Walter Chambre, becauſe the bills were not applied to their uſe, but were negotiated by the agents of the plaintiff, nor for the money due by their bond to Thomas Paſchall, becauſe before the aſſignment of that bond to the plaintiff the payment of that debt had been aſſumed by Roſs, Shore, and company, for value received by them, of which aſſumption the plaintiff, a member of the laſt named company alſo, either had notice, or was obliged at his peril to take notice. the court therefore decreed, that, upon payment by the plaintiff to the defendents Pleaſants, Shore, and company of one half, and to the defendent William Anderſon of one fourth part, of the ſaid 4796l. os. 6d. ſterling, with the addition of

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five per centum commiſſion thereon, to be reduced into current money of Virginia, at the rate of thirty five per centum difference of exchange, and alſo their proportions of the value of the black cattle ſold by them to the plaintiff, with intereſt upon the ſaid ſeveral proportions, from the firſt day of may, 1780, after deducting the payments made by the plaintiff as well before, as ſince the judgements, the injunction obtained by the plaintiff be perpetual. of which payments an account was directed to be made up.

From this decree, except as to taking the account, the defendents appealed; and here follow the

Opinion and decree of the court of appeals:

'That there is error, as well in the ſaid decree (that is, the decree of 2 day of june, 1789) as in that of the thirtieth of may, 1788, therefore it is decreed and ordered, that the ſaid decrees be reverſed and annulled, and that the appellee pay to the appellants their coſts by them expended in the proſecution of their appeal aforeſaid here. and this court, proceeding to make ſuch decree as the ſaid high court of chancery ſhould have pronounced, doth declare, that, the parties having choſen certain perſons to value the land purchaſed, none others could without their mutual conſent be ſubſtituted to perform the ſame; that the power delegated to thoſe perſons was merely to value the land, and not to adjuſt accounts, or ſettle any other diſputes between the parties; that no time being fixed for the valuation to be made, or to which it ſhould refer, in caſe of a fluctuation in the price of land or tobacco, it ought to be governed by circumſtances at the time of making the valuation, and not at the time of the contract; and no objection ariſes from the ſituation of the country at the time of proceding to the work, ſince it was then done by the mutual conſent of parties, who equally riſqued a change from ſubſequent accidents; that what the valuers did in adjuſting the accounts between the parties, was not only void as exceeding their powers, but improper in the exerciſe of what they aſſumed, in their allowing a credit to mr Roſs, againſt Pleaſants, Shore, and company of 386,685 pounds of tobacco, for 1933l. 8s 7d. ſterling, for bills of exchange never applied to their uſe, and for a debt due from them to Patchall. for which they had already made an appropriation of money due to them from Roſs, Shore, and company by mutual conſent, and in their allowance of a credit to the ſaid Roſs againſt William Anderſon for 26055 pounds of tobacco, for a ſuppoſed difference between the value of 60994 pounds of tobacco paid in may and june 1780, at that time, and the value at the time of the valuation, there being neither law nor cuſtom to warrant the ſetling of a tobacco payment made in diſcharge of a tobacco debt; that what the arbitrators ſo did beyond their powers, being void and ſet aſide, it would follow that the valuation ſhould ſtand as an independent act purſuant to the power delegated, but ſince it appears that the valuers in eſtimating the ſterling value of the land in tobacco, combined the idea of the adjuſtment they made of the accounts, without which they declare they would not have ſo eſtimated the price of tobacco, it is inequitable that the ſaid eſtimated price of tobacco ſhould bind the parties; that therefore the ſterling value of the land then fixed by them, independent of the other circumſtances, ought to ſtand as the baſis of its value: and there being no precedent of a court of equitys decreeing a payment in money of any kind, in diſcharge of a ſpecific contract, where the thing covenanted for may be had, that the ſterling money ought to be turned into tobacco at what was the current price of that commodity at the time of the valuation, which being a ſimple fact, independent of the value of the land, may and ought to be ſettled by a jury. therefore it is decreed and ordered that the ſecond valuation of the land be ſet aſide, and ſo much of the firſt valuation as fixes the value of the land in tobacco, but that 4796l. os. 6d. ſterling ſhall ſtand as the value of the land in that money; that an iſſue be directed by the court of chancery to try what was

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the current and average price in ſterling money on the 18th day of april, 1781, of tobacco, paſſed at the inſpections of Page's, Richmond, Mancheſter, and Peterſburg; which, being tried and certified to the ſatisfaction of the ſaid court of chancery, ſhall be the rule by which the ſaid ſterling ſhall be turned into tobacco, and five per centum being added thereto for profit according to the contract, ſhall be made the ground of the debit to the ſaid Roſs as well by the company as the ſaid Anderſon, to bear intereſt from the 1 may, 1780, and the accounts of intereſt and payments to be adjuſted between the parties by order of the ſaid court and a final decree made for the balance in tobacco, diſcarding from ſuch payments the 1933l. 8s. 7d. ſterling, and the eſtimated value thereof in tobacco, as well that made by the firſt valuers, as by the jury in the trial at law; leaving that article to be ſettled between the two companies; diſallowing alſo any claim on either ſide for a ſuppoſed difference in the price in any tobacco payment, as being more or leſs than the price to be fixed by the jury as aforeſaid, and on payment of the balances due the injunction to the judgement at law to be made perpetual.'

A commentary upon this opinion and decree.

There is error in the ſaid decree, that is, the decree of the 2 day of june, 1789.] that decree ſurely was not erroneous intirely, although it was reverſed intirely; for in ſeveral parts it agreeth with the decree of the court of appeals, and the latter in the moſt important part wherein they differ will perhaps be found to differ with itſelf.

The parties having choſen certain perſons to value the land purchaſed, none others could, without their mutual conſent, be ſubſtituted to perform the ſame.] upon this principle the ſecond decree ſet aſide the valuation made perſuant to the firſt decree. but from this principle the court of appeals are ſuppoſed to have deviated in a ſubſequent part of their decree.

The power delegated to thoſe perſons was merely to value the land, and not to adjuſt accounts, or ſettle any other diſputes, between the parties.] one of the reverſed decrees ſet aſide every thing which thoſe perſons did, and the other approved nothing more of what they did than that part which the correcting decree eſtabliſhed, namely, the valuation of the land in ſterling money.

No time being fixed for the valuation to be made, or to which it ſhould refer, in caſe of a fluctuation in the price of land or tobacco, it ought to be governed by circumſtances at the time of making the valuation, and not at the time of the contract; and no objection ariſes from the ſituation of the country at the time of proceeding to the work, ſince it was then done by the mutual conſent of parties, who equaly riſqued a change from ſubſequent accidents.] in a barter the parties contemplate the values of the things which are the ſubjects of it, compared with ſome third ſubject for which they are more uſually exchanged. in this caſe, where land was bartered for tobacco, the perſons appointed by the parties to value the land in tobacco compared the values of both land and tobacco with ſterling money, and declared the value of ſo much tobacco to be equal to the value of the land, becauſe thoſe articles, being each equal to the ſame quantity of ſterling money, are equal to one another.

The values of all things vary at different times; but their variations are not iſochronous. the values of land and the precious metals are generaly leſs variable than the values of annual fruits of the earth, theſe fluctuating by accidents to which the others are not liable. time therefore is conſiderable in every caſe where value of the things exchanged is the ſubject of enquiry; and more conſiderable where annual fruits of the earth are one of the things exchanged. that the valuation ought to relate to ſome time being admitted, the time which was in contemplation of the parties is ſuppoſed to be the time to which the valuation ought to relate, becauſe that it ſhould ſo relate is believed to be undeniable. this muſt be either the time of contract, or the time of payment, or the time of valuation. the ſecond moſt probably was

in contemplation of the parties, becauſe one of them had bound himſelf to pay, and the other were intitled to receive, the tobacco, at that time: this was the 1 day of may, 1780, for from that day, if the tobacco were not paid before, the purchaſer had agreed to pay intereſt. and that to this time ſhould be preferred the third, that is the time of valuation, to aſſign a good reaſon is thought impoſſible.

The court of appeals ſay, at the time of proceding to the work, *it was done by mutual conſent of parties, who equaly riſqued a change from ſubſequent accidents.* but, firſt, the parties mutualy conſented that the time of valuation ſhould be regarded, not becauſe it was in itſelf conſiderable but, becauſe one of them pretended, and as appeared afterwards only pretended, that he would receive the tobacco immediately, and the other expected that it would be demanded immediately; this is manifeſted by the act of the referees, who allowed the purchaſer to ſet off for the tobacco paid before the valuation more than the numerical quantity, intending thereby to countervale the difference in prices at one time and the other. if David Roſs, in may and june, 1780, had advanced to the ſellers 672101 pounds of tobacco, the referees would have declared that quantity of tobacco to be the value of the land. for by them 60994 pounds of tobacco, paid in may and june, 1780, were equal to 87049, the 18 day of april, 1781; and 60994+26055= 87049: 959205:: 60994: 672101 nearly. now let us ſuppoſe David Roſs, before the referees, to have alleged himſelf to be a creditor of the other party for 672101 pounds of tobacco, paid in may and june before, and William Anderſon to have objected, that to value the lands was the only matter ſubmitted to the referees, not to adjuſt their accounts; and let us ſuppoſe the referees, nevertheleſs, to have reported their eſtimate in this form: ' after viewing the lands, and taking other information for our direction, and maturely and deliberately conſidering the ſubject matter of diſpute between the parties, we do value the ſaid lands at 959205 pounds of tobacco, if the whole price agreed to be paid be now due; but David Roſs alledging that, towards diſcharging the price he had, in may and june laſt, paid 672101 pounds of tobacco; if that allegation be true, we do value the lands to no more than 672101 pounds of tobacco, becauſe that quantity, paid in thoſe two months, was equal in value to 959205 pounds of tobacco, to be paid now:' and let us alſo ſuppoſe them to have ſubjoined what followeth: ' and, according to that ratio, if, upon a ſettlement of accounts between the parties, the tobacco paid by David Roſs in may and june, 1780, appear to be leſs than 672101 pounds, we reduce our eſtimate, or, which is the ſame thing, the ſum of the payments, encreaſed in that ratio, ſhall be ſet off againſt the eſtimate; for example: if the ſum of the payments to William Anderſon in may and june, 1780, be 60994 pounds of tobacco, which he admitteth it to have been, then it ſhall ſett off 87049 pounds of tobacco againſt his proportion of the 959205 pounds of tobacco; for 672101: 60994:: 959205: 87049;' would the court of appeals have diſapproved and ſet aſide the eſtimate, becauſe it related to the times of the payments? the commentator believes that they would not have ſet it aſide, for that reaſon, if they could properly have diſcuſſed the queſtion. and if they would not, their direction in the principal caſe that the jury in the eſtimate to be made by them ſhould refer to the 18 day of april, 1781, inſtead of the times of payment, ſeems equaly ill founded. and, ſecondly, at the time of valuation in april, 1781, William Anderſon, being only an agent for Pleaſants, Shore, and company, was not authoriſed, as he pertinetiouſly urged before the referees, to make a new agreement for his conſtituents, and he made no new agreement for himſelf, to riſque a change in the values of land and tobacco from ſubſequent accidents.

What

What the valuers did in adjuſting the accounts between the parties was, not only void in exceding their powers but, improper in the exerciſe of what they aſſumed in their allowing credits to mr Roſs, &c.] for the ſame reaſons theſe credits are diſallowed by the reverſed decrees.

Neither law nor cuſtom to warrant the ſcaling of a tobacco payment made in diſcharge of a tobacco debt.] the payment, to which here is an alluſion, not being ſcaled, otherwiſe than by debiting the receiver with the true value in money of the tobacco paid, in diſcharge of a money debt, by the ſecond reverſed decree, this part of the correcting decree miniſtereth occaſion to enquire, whether the debt in this caſe, which is confeſſed to have been originally a tobacco debt, after what hath happened, remained a tobacco debt?

Men choſen by ſellers and purchaſer to value land ſold in tobacco, paſſed in 1779 and 1780, at the upper inſpections on James and York rivers, firſt make the eſtimate in ſterling money, and then compute how much tobacco, of thoſe ages and inſpections, is equal to that money, but perform the buſineſs in ſuch a manner that the court of appeals annihilate the part relative to the converſion of the money into the tobacco, eſtabliſhing the other part of the referees act, that is, the valuation in money.

When the converſion of money into the tobacco was annihilated, either no tobacco debt exiſted, more than a tobacco debt would have exiſted if the referees had not uttered or written one word about tobacco, or, if any tobacco debt did then exiſt, it muſt have been an incertain tobacco debt, to be reduced to certainty by the ſame referees in another valuation; for a debt is a contract, a contract derives its obligation from conſent of parties; and the parties never conſented to be bound that one ſhould pay and the other receive the tobacco which any men, except thoſe referees, ſhould declare to be the value of the land ſold. then after the valuation in tobacco was ſet aſide, either no debt exiſting, or, if any debt exiſted, it being a money debt, if it be ſince a tobacco debt, its tranſubſtantiation, unleſs it be a myſtery, muſt be wrought by the court of appeals, who directed the value of the money in tobacco to be determined by a jury; by what law or cuſtom warranted is not eaſy to diſcover

But if this be a tobacco debt, the prices of that commodity having varied ſo, that 100 pounds of it appear to have been agreed by the parties to be equal to 20 ſhillings ſterling at the time of contract, and to have been thought by the referees leſs by nearly one third two or three months afterward, and leſs by one half at the time of valuation; the court of appeals, preſcribing the rule by which the converſion of the ſterling money, into the tobacco ſhould be directed, namely the current and average price of tobacco in ſterling money on the 18 day of april, 1781, that is, the time of valuation, manifeſtly ſcale a tobacco debt. now, when a tobacco debt is ſcaled, that either law or cuſtom forbids the ſcaling of a tobacco payment made in diſcharge of that ſcaled tobacco debt ſome men will not admit to be ſufficiently proved by a ſimple dictum.

What the arbitrators ſo did beyond their powers being void and ſet aſide, it would follow, that the valuation ſhould ſtand as an independent act perſuant to the power delegated, but ſince it appears that the valuers in eſtimating the ſterling value of the land in tobacco combined the idea of the adjuſtment they made of the accounts, without which they declare they would not have ſo eſtimated the price of tobacco, it is inequitable that the ſaid eſtimated price of tobacco ſhould bind the parties.] between this paragraph and any ſentiment in the reverſed decree no diſcrepancy appeareth.

Therefore the ſterling value of the land then fixed by them, independent of the other circumſtances, ought to ſtand as the baſis of its value.] the difference between the ſecond erroneous decree and its corrector is, by one the 4796l. os 6d. ſterling, which the referees declared the land to be worth, ought to be conſidered as its true value, by the other the ſame ſterling money ought

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to ſtand as the baſe of its value, upon which another fabric, that is, a ſecond valuation of the money in tobacco, not by the referees but, by a jury, is to be conſtructed.

And there being no precedent of a court of equitys decreeing a payment in money, of any kind, in diſcharge of a ſpecific contract, where the thing covenanted for may be had; that the ſterling money ought to be turned into tobacco at what was the price of that commodity at the time of the valuation, which being a ſimple fact, independent of the value of the land, may and ought to be ſettled by a jury.] when a caſe like this ſhall be ſhewn, perhaps a precedent for the reverſed decree may be ſhewn. the ſpecific contract here was that a buyer ſhould pay to the ſellers the tobacco to which men choſen by thoſe parties ſhould value the land ſold. the choſen men do value the land in tobacco. the court of appeals, ſaying to bind the parties by that valuation would be not equitable, ſet it aſide, and decree that the purchaſer pay to the ſellers, not the tobacco to which the men choſen by the parties value the land but, the tobacco to which men not choſen by the parties, namely, a jury, ſhould value the land, for to value in tobacco 4796l. os. 6d ſterling money is to value in tobacco the land, agreed to be equal in value to ſo much ſterling money: that is, the parties having choſen certain perſons to value the land purchaſed; others, without their mutual conſent, were ſubſtituted to perform the ſame. is this conſiſtent with the principle which is the baſis of the reverſing decree, ſtated in theſe terms, *the parties having choſen certain perſons to value the land purchaſed, none others could, without their mutual conſent, be ſubſtituted to perform the ſame.* trial of a fact by a jury is undoubtedly regular and conſtitutional; when the fact is put in iſſue by the parties, in the ordinary mode; but when the parties have referred the matter to men choſen by themſelves, inſtead of a jury, for ſubſtituting a jury inſtead of thoſe men to perform the whole buſineſs or part of it the only precedent perhaps is the reverſing decree. and that the precedent is a good precedent in this caſe may be doubted; for by the ſecond decree juſtice was certainly done to the parties, if 4796l. os. 6d. were the value of the land in ſterling money, which doth not appear to have been diſputed: but that juſtice would be done by the reverſing decree, which, ſuppoſing parties to have been ſpeculating on the riſque of change in the value of land and tobacco from accidents, directed the money to be converted into that commodity, by a jury, and to be converted into that commodity, according to its value in april, 1781, when it was leſs by nearly one third, than it had been during a long period before, and leſs, in perhaps a greater proportion, than it was ſoon afterwards, and than it hath been ever ſince, and directed the tobacco, which, according to the agreements, muſt have been inſpected in 1779, or 1780, to be paid to the ſellers, that juſtice would be done by ſuch a decree, is believed to be incertain.

Therefore it is decreed that &c. and that an iſſue be directed to try what was the current and average price in ſterling money, on the 18 day of april, 1781, of tobacco at the inſpections of Pages, Richmond, Mancheſter, and Peterſburg, which ſhall be the rate by which the ſterling ſhall be turned into tobacco.] that no tobacco of thoſe inſpections was ſold for ſterling money on the 18 day of april, 1781, or for ſeveral days before or after, in a bill hereafter mentioned William Anderſon ſtated to be true; and the contrary did not appear. then what could a jury have found to be the current and average price? if a jury had been charged, and had found, that no tobacco, of thoſe inſpections, had been ſold on the 18 day of april, 1781, or for ſeveral days before or after, ſo that they could not ſay what was the current and average price of tobacco at that time, the court of chancery ought not to have awarded a new trial, becauſe the jury would have found the truth confeſſedly; nor could the court of chancery have varied the iſſue, becauſe by law its decree muſt have been formed after the prototype thereof, which was the decree of the court of appeals; nor hath any mode been yet diſcovered, by which that

court

court can vary one of its own decrees: if ſo, muſt not the cauſe, which could not have a motion progreſſive or retrogade, have remained ſtationary? whoſoever can ſhew what elſe would be done with it

——————— *erit mihi magnus Apollo.*

According to the decree of the court of appeals, an iſſue was directed by the high court of chancery the parties waving that mode of trial referred the queſtion intended to be tried by a jury to the determination of five merchants, who made their report. the defendent William Anderſon moved that the report ſhould be ſet aſide, filing a bill for that purpoſe, with certain exhibits and affidavits. the court refuſed to ſet aſide the report, ſeeing no cauſe to be diſſatisfied therewith, and, being of opinion the parties were bound by the act of the referees, made a decree according to what the court of appeals preſcribed, except that the current and average price of the tobacco reported by the merchants, inſtead of being found by a jury, was the rule by which the money was turned into that commodity; and this laſt decree, from which William Anderſon appealed, was affirmed.

FINAL DECREE upon the report.

THE court, on the day of march, in the year of our lord one thouſand ſeven hundred and ninety five, took into conſideration the report of commiſſioners, made perſuant to the order, of the ſeventeenth day of may, in the year one thouſand ſeven hundred and ninety three, with the exceptions thereunto. on which the reſult of the courts deliberation followeth.

The doctrine, that a purchaſer of land may not, againſt his obligation, for payment of the price, diſcount money appearing due to him by the vendors aſſigned obligation, as well as money appearing due to him from the vendor, by his own immediate contract, the aſſignees equitable right to the money having always exiſted, and his legal right to it having exiſted continualy ſince he hath been permited to maintain an action in his own name on the obligation, which permiſſion was anterior to this tranſaction, is repugnant to the principles of juſtice, as well as to the words of the ſtatute, paſſed in the year one thouſand ſeven hundred and forty eight, chap. 27. ſect. 6. of the edit. 1769, ' when any ſuit ſhall be commenced and proſecuted in any court for any debt due by judgement bond bill or otherwiſe the *(a)* defendent ſhall have liberty to make all the diſcount he can, and upon proof thereof the ſame ſhall be allowed.' the defendents, therefore, in the introduction to their exceptions, ſtating ſuch a doctrine to have been authoriſed by a deciſion of the court of appeals, are believed to have miſunderſtood that deciſion. but although the plaintiff is intitled to a credit, in account with the defendents Pleaſants, Shore and company, for the three hundred and ſixty pounds paid, with intereſt, to William Macon, in diſcharge of the obligations of thoſe defendents, aſſigned to the plaintiff, and might have diſcounted ſo much againſt a money debt, this credit cannot be diſcounted againſt the defendents tobacco debt, becauſe the comparative values of the two ſubjects are not aſcertainable by any data to be diſcovered from the exhibits. ſome agreement between the parties is ſuppoſed to have appeared to the commiſſioners, authoriſing them to ſet off the other articles, for which credits are allowed to the plaintiff in the ſame account with the defendents Pleaſants, Shore and company, and which are alſo money articles, againſt the tobacco debt. ſuch an agreement is ſuppoſed to have exiſted, becauſe no exception appeareth to the allowance of the laſt mentioned articles. otherwiſe thoſe articles ought not to have been entered in that account at all;

(a) A plaintiff claming a diſcount undoubtedly ſhall have like liberty.

all; and the decree ought to have been that the injunction be diſſolved, as to two hundred and eighty eight thouſand pounds of the tobacco recovered by the judgement of Pleaſants, Shore and company, with intereſt; and be perpetual for the reſidue; and that thoſe defendents pay to the plaintiff the ſaid money credits, with intereſt. the latter part of which decree would not have been inconſiſtent, as is conceived, with the decree, pronounced by the court of appeals in this cauſe, the eighth day of december, in the year 1790. for that court is believed not to have intended by their decree to leave one party, exaſperated perhaps by frequent altercation during a long courſe of litigation, and thereby become averſe from conciliatory modes of adjuſtment, at liberty to indulge a vindictive ſpirit, and with an execution make havock of the other partys eſtate, who was, at the ſame time, a creditor of his perſecutors on another account, without enabling him to ſhield himſelf from their oppreſſion partly by his juſt credits.

The court would have allowed to the plaintiff credit for the obligation of the defendents payable to Thomas Patchall, and aſſigned to the plaintiff, but is of opinion he is not intitled to that credit in this caſe, for reaſons explained in the decree of this court, of the ſecond day of june, in the year one thouſand ſeven hundred and eighty nine, namely, 'before aſſignment of that obligation to the plaintiff, payment of the debt due thereby had been aſſumed by Roſs, Shore and company, for value received by them,' and therefore the plaintiff, who, being a member of that houſe, either had notice, or was obliged at his peril to take notice, of the aſſumption, muſt be a creditor with them, who had agreed to diſcharge the defendents from it; for ſo much of the money due by this obligation as, upon a ſettlement of accounts between thoſe two houſes, ſhall remain due from the defendents to the other houſe.

For the one thouſand and fifty ſix pounds eleven ſhillings and eleven pence which had been due from the defendents to Iſaac Gouverneur, a credit is not properly clamed in this caſe by the plaintiff, who allegeth himſelf to have paid the money: becauſe, for ſatisfaction of this debt, the property of Roſs, Shore and company had been attached, in the iſland of Sainthomas, and whoſoever, by diſcharging the demand, redeemed their property, became a creditor in account with them, who muſt reſort to the defendents for reimburſement, and therefore this article is a proper ſubject of examination in adjuſting the accounts between thoſe parties.

The mode of adjuſting intereſt, approved by two of the commiſſioners in oppoſition to the third, in the accounts ſtated by them, annexed to the report, whereby they allow to the debitor intereſt upon the whole of the payments by him, is erroneous. the error may be developed thus: the debitor, allowed intereſt upon his payments, profiteth doubly by ſo much as countervaleth intereſt of the debt; once, by extinction of that intereſt, and then by being credited with intereſt upon the whole payment, including that part which extinguiſhed the intereſt of the debt, and to which that extinction was equivalent; whilſt the creditor receiveth his intereſt ſimply; and conſequently ſo much leſs than he ought to receive as is equal to intereſt on that part of the payment, which extinguiſhed his own intereſt.

This may be exemplified in the two accounts ſubjoined, where one thouſand pounds are ſtated to have been due from D to C, and payments to have been made at the times therein mentioned; in one, intereſt on the payments being credited only, and in the other intereſt being charged on that part of the intereſt which was extinguiſhed by the payments:

D in account with C	debitor	creditor
1793, 31 december to	1000	
1794, 31 december intereſt	50	
14 march by payment		202
intereſt 292 days		8,08
	1050	210,08

		debitor	creditor
	brought over	1050	210,08
1794, 16 may,	payment		204
	intereſt 219 days		6,12
7 auguſt,	payment		206
	intereſt 146 days		4,12
19 october,	payment		208
	intereſt 73 days		2,08
31 december,	payment		210
		1050	1050,4

here the creditor appeareth to have received 8 ſhillings more than the intereſt charged. but that theſe eight ſhillings are equal to the intereſt upon thoſe parts of the payments which extinguiſh intereſt is thus ſhewn:

D in account with C			debitor	creditor
1793, 31 december, to			1000	
intereſt on ſo much of payments as extinguiſheth intereſt on the debt, ſay				
1794, 14 march	£ 2.	292 days	,08	
16 may	4.	219 days	,12	
7 auguſt	6.	146 days	,12	
19 october	8.	73 days	,08	
31 december intereſt on debt 50, 14 march &c. by payment and intereſt.				1050,4
			£ 1050,4	£ 1050,4

here this method of ſtating an intereſt account, if the principle thereof were right, would be corrected, the benefits to both parties, of whom one would receive intereſt ſimply, and the other be diſcharged from intereſt ſimply, being reciprocal.

A mode of adjuſting intereſt, indubitably leſs exceptionable than that whereof the error hath been developed, becauſe differing from it only in being free from that error, is the mode by which a debitor, for a partial payment, is allowed a credit againſt ſo much of the principal debt as is equal to the remainder of the payment, after a deduction therefrom of its intereſt; according to which the credits of the plaintiff would ſtand thus, in the account with Pleaſants, Shore and company:

1783, 16 of december	22164
which, with 4020 intereſt for 1324 days, from 1 day of may, 1780, diſcounted, are equal to 26184	
1784, 29 of april	32050
with 6411 intereſt for 1460 days, from 1 day of may, 1780, diſcounted, equal to 38461	
28 of auguſt	35442
with 7668 intereſt for 1579 days, from 1 day of may, 1780, diſcounted, equal to 43110	
1788, 18 of june	57570
with 23406 intereſt for 2968 days from 1 day of may, 1780, diſcounted, equal to 80976	
1789, 6 of june	34365
with 15655 intereſt for 3321 days, from 1 day of may 1780, diſcounted, equal to 50000	
the ſum of which, equal to	181591
being deducted from 283265, half the price of land, and 4961 for one fifth of the value of cattle =	288226
to thoſe defendents would remain due	106635
to bear intereſt from the 1 day of may, 1780. and in the account with William Anderſon,	1780

1780, 10 may, 3995
with 5 intereſt for ten days, from 1 day of may, 1780; diſcounted,
equal to 4000
16 of june 56639
with 355 intereſt for 46 days, from 1 day of may, 1780,
diſcounted, equal to 56994,
1781, 1 of april, 60574
with 2780 intereſt for 335 days, from 1 day of may, 1780,
equal to 63354.
1782, 11 december 13880
with 1120 intereſt for 589 days, from 1 day of may, 1780, } ——
equal to 15000
the ſum of which equal to 135088
being deducted from $\frac{566520}{4}$ 141632
the plaintiff would then be a debtor to that defendent 6544
this, with intereſt to 28 of june, 1783, 178
was that day diſcharged by 13019
received by that defendent from the plaintiff, who thereby } 7297
would become a creditor for the difference
and, on the 11 day of june, 1789, a creditor for - - - } 11295
more, then received from him, by the ſame defendent.

This mode of proportioning intereſt, in an account, after it had been ſome time conſidered, ſeemed to the court unexceptionable. for that C, to whom D, by one obligation, had been bound to pay 1000 pounds, with intereſt, was intitled to the ſame intereſt to which he would have been intitled, if D had been, by ſeveral obligations, bound to pay the 1000 pounds, divided into ſeveral parts;—and, by parity of reaſon, intitled to the ſame intereſt to which he would have been intitled, if D and ſeveral other men had been bound, every one, by a ſeparate obligation, to pay part of the 1000 pounds, was a poſition conceived to be undeniable, and therefore taken for a poſtulatum.

Example: D, bound, by one obligation, to pay to C 1000 pounds, on or before the 31 day of december, 1793, paying, on the

1794,	14 day of march,	202 pounds
	26 may	204
	7 auguſt	206
	19 october	208
	31 december	210

would have paid all the intereſt as well as all the principal to which C was intitled; in like manner as

D, bound to pay to C, on or before the 31 day of december, 1793, by every one of five obligations, 200 pounds, by thoſe payments would have diſcharged the intereſt, as well as the principals, to which C was intitled; or in like manner as

D, E, F, G, and H, who had been bound, every one by a ſeparate obligation, to pay 200 pounds to C, on or before the 31 day of december, 1793, making ſimilar payments reſpectively, would have diſcharged the intereſt, as well as principals, to which C was intitled.

Hence, the court, in ſuch caſes as this, was inclined to obſerve the following

RULE

To place the value of a partial payment, after a defalcation of five per centum diſcount therefrom, to the credit of the debitor againſt the capital debt, ſo that upon the remainder of the capital the current of intereſt ſhould not be interrupted.

This value, after the diſcount allowed, may be diſcovered by the following

ing theorem; *(b)* if we put the rate per centum, or the intereſt of one hundred pounds for one year,=r; the months weeks or days in one year=t; the months weeks or days which any ſum, a, is witheld by the debitor=n; the amount of that ſum, in the ſaid time, viz. principal and intereſt=b:

Then it will be as t, the time in which the intereſt of 100 pounds is produced, is to n, the time of retention, ſo is $\frac{ar}{100}$, the intereſt in the former of thoſe times, to $\frac{anr}{100t}$, that in the latter, which added to a, the principal, gives $a + \frac{nr}{100t} = b$, the whole amount.

Example: what credits ought the plaintiff to have for his partial payments 26184 &c. pounds of tobacco, paid 16 day of december, 1783, &c. againſt the capital debt 288226 pounds of tobacco, due and bearing intereſt from 1 day of may, 1780?

Here r being = 5, t = 365, n = 1324 &c. and b = 26184 &c. we have

$a = \frac{100 \times 26184 \times 365}{100 \times 365 + 1324 \times 5} =$ 22164

$a = \frac{100 \times 38461 \times 365}{100 \times 365 + 1460 \times 5} =$ 32050

$a = \frac{100 \times 43110 \times 365}{100 \times 365 + 1579 \times 5} =$ 35443

$a = \frac{100 \times 80376 \times 365}{100 \times 365 + 2968 \times 5} =$ 57569

$a = \frac{100 \times 50000 \times 365}{100 \times 365 + 3321 \times 5} =$ 34365

the plaintiffs credits in the account with the defendents Pleaſants, Shore and company; and $a = \frac{100 \times 4000 \times 365}{100 \times 365 + 10 \times 5} = 3994$, &c. in the account with the defendent William Anderſon.

But the court, upon a reviſion of the ſubject, doth now condemn the rule formed in conſequence of the poſition lately ſtated, *(c)* perceiving the compariſon of the caſe therein ſuppoſed, where D and ſeveral others were bound by ſeparate obligations, with the caſe, where D was bound, by one obligation, or, by ſeveral obligations, to be inept, and, in this caſe, the inference not to be deducible from the poſition, becauſe the inference alloweth a debitor, on ſeveral accounts, to arrogate a right, which he hath not; namely, a right to direct a payment, at any time after it had been made, to be placed to his credit in any one of the accounts, although, by law, his election, which is acknowledged once to have exiſted, to aſſign the ſtation of the credit, muſt be previous to the payment, or ſimultaneous with it, and accordingly muſt be explained to the receiver: for if the payment be tacit, the election, which the debitor had before, devolveth upon the creditor afterwards. in the caſe ſuppoſed in the poſition, when D paid 202l on the 14 day of march, 204l on the 26 day of may &c. he had a right to direct the application of the payments; but if the right were not exerciſed at the times of payment or before, C, afterwards, had the right to apply the payments firſt to diſcharge the intereſt which he might then lawfully receive: that he might lawfully receive intereſt on the whole 1000 pounds, at the time of the firſt payment, will be ſhewn hereafter; and conſequently the poſition doth not warrant the inference.

This doctrine of elections is not an arbitrary but a rational doctrine, and ſeemeth founded on theſe principles: whilſt a man retaineth the money whereof he had fairly acquired the poſſeſſion, it is his; he may ſquander it, melt it in a crucible, ſink it in the ocean; in a word may do what he will with it. therefore if he deliver the money to another, even to a creditor, with inſtructions to apply it in this or that manner, the poſſeſſion of the receiver is fiduciary, and he is bound to make the preſcribed application; in ſo much, that

(b) Treatiſe of algebra by Simpſon, Ward &c.

(c) The rule, nevertheleſs, would be more righteous than any other, if, upon the intereſt, compounded, at the end of the year after it began to run, with the principal, intereſt were allowable.

that if A, indebted to B and C, deliver money to B, to be paid to C, it is the property of C, and he may recover it from B. on the contrary, when a debitor delivereth money to his creditor, without inſtruction to apply it to his credit on this or that account, the property is immediately changed to the receiver; it is his; he may do what he will with it, and conſequently may place it to the other partys credit in any account between them. the law, if it were otherwiſe, would be inequitably beneficial to the debitor and detrimental to the creditor in many inſtances, and among them in that which is the ſubject of this diſquiſition, where a debitor, whilſt he is enjoying a revenue from an eſtate, bought with money borrowed, or, which is the ſame thing, with tobacco, for which he bound himſelf to pay intereſt, would gradualy diminiſh, as he could conveniently diminiſh, the capital debt, which is a fund fruitfull of intereſt, and render the accumulated intereſt, from which witholding it he likewiſe deriveth a profit, a fund utterly barren, whilſt it is witheld, to the creditor. ſo that to the latter here concur *damnum emergens and lucrum ceſſans*.

The court, therefore, to the firſt and ſecond modes of adjuſting intereſt upon which the foregoing ſtrictures have been made, doth prefer the mode obſerved in this caſe by maſter commiſſioner Dunſcomb; whereby ſo much of the payments as is equal to the intereſt being applied to the diſcharge thereof, the remainder, unleſs the debitor at the time of payment or before directed otherwiſe, is applied towards diſcharging the principal debt, or, from the ſum of principal and intereſt upon it computed to the time of payment, the payment is ſubtracted, and upon the remainder of the principal debt, as a new capital, intereſt is computed from the time of payment, but with this caution that the new capital be not more than the former capital; ſo that if the payment be leſs than the intereſt due at the time of payment, the ſurplus of intereſt due muſt not augment the foenerating capital, becauſe thereby the creditor would receive compound intereſt, or intereſt upon intereſt, which is generaly ſuppoſed to be unlawfull. *(d)* to the mode now recommended

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(d) Compound intereſt, that is intereſt which ariſeth from principal debt, compounded with intereſt due for the uſe of that principal, during a certain time, is not prohibited by the ſtatute to reſtrain the taking of exceſſive uſury, in theſe terms; 'no perſon ſhall upon a contract take for loan 'of money &c. above the value of five pounds for the FORBEARANCE 'of one hundred pounds for a year, and ſo after that rate for a greater or 'leſſer ſum, or for a longer or ſhorter time.' for intereſt ſuffered to remain, after it had become due, in the debitors hands may be ſaid, with no leſs propriety than principal, to be FORBORN. and the demand of compound intereſt is more reaſonable in the caſe which frequently happeneth, where the debitor witholdeth both principal and intereſt ſo long as he can, maugre every effort of the creditor to extort them from him.

Nor is the taking of compound intereſt generaly forbidden by the precepts of conſcience.

A capital debt with intereſt yearly compounded may indeed be augmented two fold in 14 years and 75 days; for

'Let { R = the amount of 1l. in one year, viz. principal and intereſt
P = any ſum put out at intereſt.
n = the number of years for which it is lent
a = its amount in that time.

'Therefore, ſince one pound, put out at intereſt, in the firſt year is increaſed to R, it will be as 1 to R, ſo is R, the ſum forborn the ſecond 'year, to R^2, the amount of one pound in two years; and therefore as 1 to 'R, ſo is R^2, the ſum forborn the third year, to R^3, the amount in three 'years: whence it appears that R^n, or R raiſed to the power whoſe exponent

commended its illegality, in a caſe where the payment hath been made before the end of a year from the term when the intereſt commenced, hath been objected but the objection is founded in a miſinterpretation of the act to reſtrain the taking of exceſſive uſury, the words of which (acts of 1748, cap. 30 edit. 1769 ſect. 2.) are 'no perſon ſhall take above the value of

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'nent is the number of years, will be the amount of one pound in thoſe 'years. but as 1l. is to its amount R^n, ſo is P to (a) its amount, in the 'ſame time; whence we have $P \times R^n = a$.

'From which original equations, others may be derived, by help where-'of the various queſtions, relating to compound intereſt, may be reſolved.

'Thus, becauſe $P R^n$ is $=a$, there will come out $P = \frac{a}{R^n}$, and $R = \frac{a}{P}^{\frac{1}{n}}$, '&c. or, by exhibiting the ſame equations in logarithms (which is the moſt 'eaſy for practice) we ſhall have

'1°. log. a = log. P + n x log. R.

'2°. log. P = log. a — n x log. R.

'3°. log. $R = \frac{\text{log. } a - \text{log. } P}{n}$.

'4°. $n = \frac{\text{log. } a - \text{log. } P}{\text{log. } R}$.

'which four theorems, or equations, ſerve for the four caſes in compound intereſt.' Simpſons algebra.

Example of the fourth theorem. in how long time will 27 pounds be doubled at five per cent.

In this caſe we have $R = 1{,}05$, $P = 27$, and $a = 54$. whence $n = \frac{\text{log. } 54 - \text{log. } 27}{\text{log. } 1{,}05} =$ 14 years and 75 days, the time required. for

The logarithm of 54 is 1.7323938, and the log. of 27 is 1.4313638. this being ſubtracted from that, and 3010300, the remainder, being divided by, 0211893, the log. of 1,05, the quotient, 14,2066 is=14 years and 75 days.

The principal may be trebled in 22 years and 188 days, may be quadruple in 28 years and 150 days, &c. but a man, who had another way, inſtead of lending, employed his money, might have made greater profit, without practiſing the arts of modern archſpeculators.

What hath been here ſaid is intended to be applied to the caſe where intereſt compounded with capital had been current a year. for an unconſcionable lender might, every month, or week, or day, prevale upon the borrower to execute an obligation, compounding principal and intereſt. if it were daily executed, how the debt at the end of one year, would be exaggerated may be ſeen by this problem in W Emerſons treatiſe of algebra, b. II. ſect. II. the principal being ſuppoſed to be 100 pounds, and the rate of intereſt 5 pounds.

Let	1	r = intereſt of 1 l. for a year.
	2	n = 365, the parts of a year.
	3	$\frac{r}{n}$ = intereſt for 1 day.
	4	$1 + \frac{r}{n}$ = money due at one days end.
prob. 32*	5	$\left(1 + \frac{r}{n}\right)^n$ = money due at the year's end.
by logs	6	n x log. $1 + \frac{r}{n}$ = log. amount for a year = 0215694.
6,	7	1.0509 = amount for a year.
6 x 100	8	105.09 = amount of 100l.
or 5,	9	$\left(1 + \frac{r}{n}\right)^n = 1 + r + \frac{n.\overline{n-1}}{2nn} rr + \frac{n.n-1.\overline{n-2}}{2.3n^3} r^3$ &c. the amount for a year.

* The principal, time, and rate of intereſt being given, to find the amount at the end of that time, at compound intereſt.

Let

of five pounds for the forbearance of ONE HUNDRED pounds for a YEAR, and ſo AFTER THAT RATE for a greater or leſſer ſum, or for a longer or SHORTER TIME,' and which do not prohibit him, who had lent 7300 pounds, to take every day one pound for intereſt, more than they prohibit him to take, at the end of the year, 365 pounds; the law not requiring a year, more than a day, to mature the lenders right to that intereſt, which is in the compound ratio of the capital and the time it is forborn. although a new bond daily taken by the lender for the daily intereſt perhaps would be deemed an uſurious ſhift condemned by the third ſection of that act. intereſt taken or ſecured for a leſs time than a day would undoubtedly be criminal; fractions of a day, in legal ſupputations of time, which are generally rejected, being in no inſtance more exceptionable than in dealings between a griping uſurer and a needy borrower. *(e)* a judgement in an action of debt on an obligation awards intereſt until payment, whether before or after expiration of the year: which would not be awarded if the receipt of intereſt computed upon the whole debt unto the time of payment were unlawfull, unleſs with that payment the period of a year coincided. that a creditor without the ſentence of a judge, may lawfully receive that which the judge, the *lex loquens*, (a proſopopoeia confeſſed univerſaly to be proper) would award to him, is aſſumed for a true propoſition. the creditor, who receives his intereſt half yearly, quarterly, monthly, weekly or daily, although he hath indeed a profit greater than he who doth not receive his intereſt before the years end, is not culpable, more than the landlord, who receives his rent half yearly or quarterly, the hireling, who receives his wages monthly or weekly, and the like, is culpable.

Upon the whole matter, the court, allowing to the plaintiff a credit for the money paid by him to William Macon, inſtead of diſcounting the value thereof in tobacco, and having reformed the ſtatement of intereſt in the account of the plaintiff with Pleaſants, Shore and company, annexed to the report, ſo that it may correſpond with the foregoing opinion, as followeth:

David Roſs with Pleaſants, Shore and company.

ſtatement of intereſt upon payments to the 6 day of june, 1789.

1780,

Let	1	p=principal, t=time, r=intereſt of 1l. R=1 x r the amount of 1 l. and its intereſt. s = ſum of money due at the end of that time.
per queſt.	2	1 + r or R=money due at 1 years end.
by proportion.	3	1 : R :: R : RR =money due at 2 years end.
	4	1 : R :: RR : R^3 =money due at 3 years end.
	5	Rt = money due at t years end.
	6	1 : R^t :: p : R^t = the amount of p for the time t.
1, 6	7	p. R^t = s.

cor. 1 $p=\frac{s}{R^t}$

cor. 2. $R^t=\frac{s}{p}$, or $t=\frac{\text{log. s}-\text{log. p.}}{\text{log. R.}}$

cor. 3. $R=\sqrt[t]{\frac{s}{p}}$, or log. $R=\frac{\text{log. s}-\text{log. p.}}{t.}$ Emerſon's algebra.

(e) Perhaps intereſt, accumulated in periods of leſs duration than a day, was in contemplation of Richard Price, when, in the introduction to his obſervations on reverſionary payments &c. he wrote this note: 'a peny, put out to five per cent compound intereſt at our ſaviour's birth, would, by this time, have increaſed to more money than would be contained in 150 millions of globes, each equal to the earth in magnitude, and all ſolid gold.'

1780, 1 day of may, 283265 pounds of tobacco for half the land.

4961	$\frac{1}{5}$ of cattle	
288226	intereſt from 1 may 1780 to 16 december 1783, 1324 days	52275
	paid 16 december, 1783 360l.	26184
		26091
288226	intereſt from 16 december 1783 to 28 of auguſt 1784, 255 days.	10068
		36159
	paid 28 auguſt 1784 851l. 8s.	43110
6951		6951
281275	intereſt from 28 auguſt, 1784, to 18 june 1788, 1389 days	53519
	aſſumed to pay 18 june, 1788, 910l. 19s. 2d.	80976
27457		27457
253818	intereſt from 18 june, 1788 to 6 june, 1789, 353 days	12273
	paid 6 june, 1789, 500l.	50000
37727		37727
216091		

doth adjudge order and decree that the injunction obtained by the plaintiff to ſtay execution of the judgement recovered againſt him by the laſt named defendents on the 27 day of october, in the year 1784, be diſſolved as to two hundred and ſixteen thouſand and ninety one pounds of tobacco with intereſt thereupon to be computed from the 6 day of june, in the year 1789, and be perpetual as to the reſidue of the debt and intereſt recovered by that judgement. and that thoſe defendents do pay unto the plaintiff three hundred and ſixty pounds of current money of Virginia with intereſt thereupon to be computed from the 18 day of june, in the year 1782. and that the injunction obtained by the plaintiff to ſtay execution of the judgement againſt him recovered by the defendent William Anderſon on the foreſaid twenty ſeventh day of october, in the year 1784; be perpetual; and that the defendent William Anderſon do pay unto the plaintiff fifteen thouſand nine hundred and thirty pounds of tobacco, paſſed at the public inſpections of Pages, Richmond, Mancheſter and Peterſburg, or at ſome or one of them, with intereſt thereupon to be computed from the 11 day of june, in the year 1789; and that the parties bear their own coſts, in this court, the plaintiff paying one half of the allowance to the commiſſioner, and the defendents paying the other half thereof.

A TABLE of NAMES of CASES.

ERRATA.

Page 7 line 1 for 'heredetary' read 'hereditary'
21 for 'wil ,lthat' read, 'will that'
45 for 'whoſe' read 'whole'
8 30 for 'iſland' read 'iſland'
11 6 after 'writing' inſert a ';'
12 31 for 'defendents' read 'defendent'
16 21 for 'indifinitely' read 'indefinitely'
17 22 for 'diſquition' read 'diſquiſition'
21 To the paragraph ending at 'ſo' in the twenty third line, add 'but that any other citizen beſides the judges of appeal might have thought ſo, the commentator doth not know. he doth not even recollect what he thought about depretiation at that time his ſelf—poſſibly he was aſleep when the year 1778 ended and its ſucceſſor began their revolutions—be that as it may, he inclines to believe that he thought or dreamed that depretiation, if he thought or dreamed at all about it, was the ſame on the new years day of 1779, as it was the day before.
26 1 for 'words' read 'wards'
33 34 for 'hindred' read 'hindered'
36 8 for 'the,' where it firſt occurreth, read 'this'
41 38 for 'queſtion' read 'Queſtion'
43 3 for 'opugning' read 'oppugning'
51 for 'nothweſt' read 'northweſt'
44 32 for 'tranſgraſſed' read 'tranſgreſſed'
45 20 for 'deceded' read 'decided'
48 14 for 'pendante' read 'pendente'
49 35 for 'eulta' read 'culta'
51 29 for 'annuled' read 'annulled'
58 35 for 'efficatious' read 'efficacious'
73 3 in note *(a)* for 'interrogetary' read 'interrogatory'
78 33 for 'on' read 'no'
82 12 for 'came, on' read 'came on,'
23 for 'ſupppſed' read 'ſuppoſed'
24 after clame for ',' read '.'
128 in note *(a)* line 1 for 'in' where it occureth in the ſecond place read 'is'
17 for 'caſdinal virtue' read 'cardinal virtues'
in note *(b)* for 'opprobious' read 'opprobrious'
154 52 for pertinetiouſly' read 'pertinaciouſly'

Account.

If plf files a bill for an account, and a balance is found in favor of dft, the plf shall in that suit be decreed to pay it. Braxton. v. Gregory. 14.

Agreement.

Specific execution of an agreement to pay a sum of money for a tract of land decreed - Rose - v. Nicholas. 59.

Alien.

Alien, born before revolution, may take and hold lands here by descent or purchase - Farley. v. Shippen Val. 141.

Assignment.

Military certificate passes by delivery. Wilson .. v Rucker 114.

Assignee of a Bond.

Assignee of bond, without notice is not affected by any equity between the Obligor and obligee - Overstreet - v - Randolph. - 115.

Award.

Award not binding where submission was made under improper circumstances and undue influence of one of the parties over the other. Beverley. v. Reynolds 105-106.

What are good grounds to set aside award. Davison - v - Winslow. 108. 110.

Excessive damages awarded for small or no injury good ground to set aside award. 105-6.

See titles 'Referees' and 'Reference'.

Bankrupt.

A British subject, creditor of the Bankrupt, and residing in England, cannot recover his money against the Bankrupts debtor in the courts of this country, the debt being by the laws of England [which between two subjects of that kingdom ought to govern], transferred to the assignees under the Commission. Devisme Val - vs - Martin Val. 133.

But a citizen Creditor here, shall recover against the debtor of the Bankrupt here - Because the citizens of this country are not bound by the laws of another - Devisme Val - v - Martin Val. 134-5.

Bargain.

Unreasonable bargain with infant not to be decreed, though not absolutely disaffirmed to after he comes of age - Especially if obtained by improper means and undue influence - Beverley - v - Reynolds. 105.

Bonds and Obligations.

If penalty be taken for £100. and it be contained therein, that in case of non payment at the day the Obligor shall pay £150. this only a penalty for further enforcing payment of the £100. and not recoverable. Davison - vs - Winslow. 108.

British Debts.

British Creditors may recover debts though paid into the treasury. Page - v - Pendleton &c. 127.

See title Bankrupt.

Bye Bidder.

Bye bidding not allowable - Hincle. v - Pendleton &c. 145.

Costs.

Costs to be allowed where relief is granted in Equity. Hylton - vs - Hunters extrs. 87.

Contract.

Equity never decrees a payment in money in discharge of a specific contract, where the thing covenanted for, may be had. Ross. v. Pleasants Shoe Company. 152.

Curtilage.

Curtilage what. 122.

Debts British.

See titles, Bankrupt, British debts.

DEEDS AND CONVEYANCES.

Imperfect deed aided in Equity. Farley -v- Shippen. 140.

DEPOSITIONS.

What depositions may be read against a purchaser lite pendente. Williams - vs - Jacob. 46.

DESCENTS.

The act of 1785, in force till the first day of October 1793, notwithstanding the suspending act of the 8th day of December 1792, Harrison - v - Allen. 33.

Unless between the 8th and 28th day of December 1792. ibid. 36.

DEVISE.

Devise of Residue to the children of A. and B. at the time of making Will, A. had six children, one of whom, dies before testator leaving children, the share of the dead child dont lapse; but the residuum is divisible amongst the five surviving children of A. and the children of B. - Pendleton - v - Hoomes. 4.

And if the surviving children grant - what would have been the dead childs share had she outlived testator, the grant is good. ibid.

Devise to my wife of all my personal estate & negroes; and the use of the plantation wherein I now live during her natural life, the wife only takes an estate for life in any part of the things devised. Name - vs - Woodward. 4.

And her exrs shall account for the personal estate, not consumed in the use Name - v - Woodward. 5.

I give my wife, the use and profits of my whole estate during life, and after that is ended, my will and desire is, that the whole of my estate exclusive of that already given my wife, be equally divided between whomever my wife shall think proper to make her heirs and my brother R. S. gives the wife an estate for life in one moiety, and a fee in the other moiety. Shermer - v - Richardson exr of Shermer. 6.

Devise of lands, to testators wife Catharine during widowhood - then to his daughter Alicia in fee - with a devise to his daughter Anne of other lands in fee - and in case his said two daughters should die without heirs of their bodies, then a devise of part of the lands devised Alicia, to his brother Spencer - "and my will is that my wife Catharine have all my estate, till the first child marries or arrives to the age of twenty one years, and my will is that there shall be an equal division of my estate and settlement" - These last words do not controul the condition of widowhood annexed to the first part of the devise to the wife. Bailey & ux - vs - Teakle - 8.

Devise of lands which testator had not at the time of making his will / since act of 1785 /, but which he owned at the time of his death good. Turpin - -vs - Turpin. 22.

Devise of specifick slaves, which the testator owned not at the time of making his will, but which he acquired afterwards is good. Turpin - v - Turpin. 24.

Testator having fee tail lands and fee simple lands, devises his fee simple lands to his heir in tail, and the fee

tail lands to his other sons, if heir in tail claim the fee tail lands he must he must yield the fee simple lands to the other devisees the sons - and e-- converso - Cary & Ux - v - Burton - 26.

T. L. devised all his estate to his wife M. L. for life - He then devised the three first children his slave Hannah should bear, to three of his children, of whom M. F. was one - M. F. afterwards succeeded to all the descendable property of the other two children the said devisees, and by her last will and testament devised one slave to E. W. and then devises thus "I give & bequeath unto my dear mother Mary Lyon all the remainder part of my estate real and personal during her life; then after the death of my said mother for this estate to return to W. P." this devise includes the three first children of Hannah, though not born. Dandridge - v - Lyon - 30.

DILIGENCE.

Whoever acts without caution shall bear loss if any happen. Ross. v. Pines. 73.

Of two innocent men he shall bear the loss by whose act it was occasioned. Overstreet vs - Randolph. 116.

DISCOUNTS.

Rule as to discounts. Ross - vs - Pleasants, Shore & Company. 157.

DISTRIBUTION.

By the act of 1727, if a Father having married a widow, who had children by a former husband, die, leaving several children by such widow - of whom one dies afterwards, the distributive share of the child so dying, shall be divided amongst its brothers and sisters by the fathers side only - Bailey & Ux. v. Teakle. 12.

See title Devents.

DOWER.

Wife is entitled to dower though she don't renounce her benefit under the will. Bailey & Ux - vs - Teakle. 11.

EXECUTORS.

Cannot by his contract create an obligation in his testator. Pendleton & - vs - Whitings exrs. 99.

One executor may sue another in Equity for a debt due from testator in his lifetime. ibid.

FOREIGN COUNTRY.

What Jurisdiction a Court of Chancery here can exercise over and respecting lands lying in a foreign country. Love - v. Braxton & Ham. 58.

Court of Chancery here, will decree defendants residing within its jurisdiction to convey lands lying in another State without its jurisdiction - Farley - v. Shippen & al. 143.

FRAUD.

Equity will relieve against fraud in obtaining a Judgment at law. Maze. v. Hamilton. 37.

Fraud may be enquired into before a court of Equity. 101.

If one having it in his power to perform one of two alternatives, is prevented from performing one, by the act of the opposite party, the party opposing is guilty of fraud. Dawson - v - Winslow 108.

INTEREST.

IOINTENANCY.

IURISDICTION.

LIMITATATION OF ACTIONS.

LANDS.

LIEN.

LENGTH OF TIME.

Party bound by long acquiescence 103.

If party does not prosecute his suit for lands; even against a purchaser with notice, before improvements are made, he shall not take advantage of his own delay; to avail himself of those improvements - But shall only have the value of the lands, at the time they were bought, by such purchaser with notice - Southall - vs - Mc. Keand. 120.

MORTGAGE.

If mortgagee take possession of the mortgaged lands he shall account for profits. Woodson. vs. Woodson. 56.

Mortgagee retaining possession of the mortgaged lands; after the time for payment has expired shall account for profits. Cadwallader - vs - Mason. 58.

MARRIAGE CONTRACT.

Declarations in family by father of the portions he intends to bestow. 102.

By agreement before marriage, the wife is to have the slaves she brings, and a stipulated proportion of husbands real and personal estate in lieu of dower - This allowance for dower is to be understood exclusive of her own slaves. Hearne Wife. v. Roane 111.

MISTAKE & MISREPRESENTATION

If the subject sold be less than represented, the purchaser is entitled to a deduction equal to deficiency. Hylton - v - Hunters exrs. 87.

MONEY PAPER.

Account for goods sold during war, to be viewed as a set off, and not regulated by scale Braxton - vs - Gregory. 14.

Valuation during paper money without expressing whether paper or specie was contended - Evidence to shew which was meant is admissible. Ambler. vs. Wyld - 73.

Bond in 1777 for money due before war, decreed that obligor should pay specie value at the time when debt was contracted. Hamilton vs. Urquhart. 113.

NEW TRIAL.

Court of Equity to grant new trial on mistake of some of the jurors. Cochran - vs. Street. 69.

Court of Equity will not grant new trial where it has been refused, by the Judge who tried the cause; if no new circumstances shewn. Hoomes - vs - Ruffin 70

Causes why Court of Equity will grant new trial after a trial at law. 70.

Not producing a paper called for by the other side, and not hearing evidence of the declaration of two of the valuers chosen to estimate properly sold, with regard to the kind of money they meant, is good cause for a new trial - Ambler - vs - Wyld. 77.

If Jurors found calculation on mistake it is cause for new trial. Woods. v. Mc. Roe. 78.

See 'Verdict.'

NOTICE.

Purchaser of slaves, without notice; and for money paid; shall not protect himself thereby. Farrar. vs. Jackson. 89.

OFFICERS.

What officers entitled to half pay, or Commutation for five years. Roane pal. vs. Attorney Gen.l Val. 62.

PARTIES.

No decree concerning rights of parties not before the court. Hearne & Wife - vs - Roane - 112.

PAYMENT.

If money is paid indefinitely, receiver may credit it to either of two debts due from payer. 14.

But this application of payments should be recent ibid.

PAWN.

If the thing pawned produces profits, pawnor shall account for those profits - Woodson. v. Woodson. 55.

POSSESSION.

Possession is homologous with the right of possession. So that a possession actually social may be legally private; and actually private legally social. Farley. v. Skipper. 143.

REFFERREES.

Refferees, chosen to value lands, cannot adjust accounts, or settle any other disputes Between the parties. Ross. v. Pleasants Shore Company. 152.

Where the parties have agreed on certain persons to make valuation, Court can't appoint others. ibid.

REFERENCE.

Reference, by consent of parties, in an Issue directed by the Court of Chancery is good. Ross. v. Pleasants Shore Company. 157.

RELATION.

Relation not allowed to antedate an act in prejudice of an innocent man. Jones. vs. White. 101.

STATUTES.

How a statute suspending a Law, which repeals a former Law shall be construed. Harrison vs. Allen. 33.

How the rule by the act of November 1789 concerning repealing Statutes is to be understood. ibid.

TENDER.

If obligee avoids tender it shall not avail him. Dawson. Winston. 108.

VERDICT.

Equity will relieve against a verdict which is contrary to Law, though all the circumstances which are alledged in Equity were before the Court of Law. Dandridge v. Lyon. 33.

Equity will relieve against a Verdict, if the party has testimony which was not regularly admissible at Law. Dandridge vs. Lyon. 33.

On issue from Court of Chancery, if the Judge of the Court of Law certify that the weight of evidence was against the verdict, the court of Equity will not for that alone set it aside. Ross. v. Pines. 71.

However if the Judge at Law certify that the verdict is against the weight of evidence, the Verdict ought not to bind. But the Court of Chancery ought to decide in such case upon the evidences in the cause. Southall v. Mc. Keand. 120.

See title, 'New trial.'

VALUATION.

Where no time no time is fixed for valuation, it shall be governed by circumstances at the time of the valuation made, not at the time of making the contract. Ross vs. Pleasants Shore Company. 152.

WILLS AND TESTAMENTS.

If testators name be inserted in part of a Will, written all in his own hand, it is sufficient. Bailey Wife vs. Teakle. 11.

And this, though the conclusion is 'Witness my hand' but no subscription of his name. ibid.

And though also, it says 'signed &c in presence of Witnesses' when none attest it. ibid.

Will set aside by Court of Chancery after probat in the General court. 104.