REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

CHAS. H. WYNNE, PRINTER, RICHMOND.

COMMONWEALTH *v.* BEAUMARCHAIS.

Monday, November 2d, 1801.

A settlement of a public account, by the *Solicitor General*, in consequence of an order of the Executive, did not bind the claimant; although he received some payments, under the settlement.

An appeal lies, from the decision of the *Auditor* to the Courts, in all cases.*

A foreigner who came here and contracted with the government, during the paper money rage, is bound by the act establishing the scale of depreciation.

The written instrument is, in general, to be resorted to, in order to ascertain whether the contract was for specie or paper.

A rejection by the Legislature, of a claim against the State, is no bar; but, the creditor may, notwithstanding, apply to the *Auditor*, and if refused, appeal to the Courts.

When an interlocutory decree is entered at one term of the Court of Appeals, it may be set aside at a subsequent term.

When only four Judges are sitting, and they are equally divided in opinion as to a part of the decree appealed from, the reversal ought not to be extended farther, than they all [or a majority] concur that there is error; and the residue (as to which they are equally divided) ought to be affirmed.

Beaumarchais appealed from a decision of the Auditor of Public Accounts, to the High Court of Chancery.

The bill and petition state, that in the year 1778, the plaintiff's ship, the Fier Roderique, arrived at Yorktown, in this State, with military stores, which were purchased for the State by Armstead, the State agent, and refers to the contract signed by Armstead, and Chevallie, the supercargo. That, previous to the purchase of the cargo, a committee of merchants offered four dollars, specie, for each dollar in the invoice, payable in bills on France, or in tobacco, at 20s.; but the supercargo preferred selling to the State, though not so advantageous. That the contract was for specie; and to prevent all misapprehension, a silver dollar was, at the time, produced to the Executive by Chevallie, as explanatory of the currency in which he expected to be paid. That in 1785, the claim was referred to the Solicitor by order of the Governor and Council, who reported £154,413 19s. 1d. due in money, which he reduced by the scale of five for one, and 973,023 lbs. tobacco. That it appears by the certificate of the Governor, dated 12th May, 1780, that there was due to the plaintiff, the

[* *The Attorney General* v. *Turpin*, 3 H. & M. 548.]

See Code of 1849, p. 234, §11; giving the first Auditor cognizance of all pecuniary claims against the Commonwealth, except certain classes of claims; and p. 238, §1, 2, &c., giving appeals in such cases to the Circuit Court of Henrico.

sum of £161,603 13s. 0d. with interest from the 1st July, 1778. That the plaintiff has received several payments in warrants which have depreciated from ten to twenty-five per cent. That he applied to the Legislature in 1793, who rejected the claim, although all the facts aforesaid were proved, and admitted by the committee to be true. [123] That, notwithstanding the premises, the Auditor refuses to settle the account, except by the scale of 5 for 1. Therefore, the plaintiff prays an appeal, and that the balance in specie may be decreed to him, with interest, and reimbursement for the depreciation of the warrants.

The answer of the Auditor admits the contract with Armstead, but says that a sensible depreciation was felt at the date of it, which was known to commercial men in Europe and America. That the contracting parties, in this case, seemed sensible of it, when the plaintiff's agent agreed to give £4 as the price of each 100 cwt. of tobacco he contracted to receive in payment; which is about four times the sum the same quantity of tobacco could have been purchased at before the Revolution, and that it could have been purchased for less than 20s. specie at the time of the contract. That the contract is expressed to be for Virginia currency, though it was easy to have said *for gold or silver*, had specie been intended. That the interest was above the legal rate, which, with the greater credit of the State, and the large advance in tobacco, or hopes of paper money appreciating, might have induced the plaintiff to contract. That the contract ought to be expounded as if it had been between individuals. That the defendant knows nothing of the statement relative to the silver dollar as explanatory of the contract, and calls for proof. That there was a settlement by the Solicitor, and that the Governor gave the certificate, but that it does not mention specie. That Governor Henry's certificate, afterwards, is, that it is to be discharged according to contract; which, if obtained at the plaintiff's instance, shews he so considered it himself at the time. That the plaintiff acquiesced under the report till the year 1792. That, as to the loss of the warrants, if it happened at all, it originated from the hurry of the plaintiff to receive what the State would have paid without loss. [124] That such warrants have always been received at par by foreign creditors. That the House of Delegates considered the report of the Solicitor as proper; but, if not, that the report of the committee of the House of Delegates is no evidence.

The answer of the Attorney General, refers to that of the Auditor, and calls for proof of the equity of the claim.

George Picket's deposition states, that in 1778, the Fier Roderique arrived at York. That the merchants of York and Williamsburg were informed, that the State agent intended to buy the military stores, but that many goods would still remain. That, as soon as her arrival was known, merchants from Philadelphia, Baltimore, and other places, came to York to purchase. That they were informed that the Supercargo offered to sell the whole cargo which remained, (after the State was supplied,) together; and, that payment was to be made in specie, or tobacco, at specie price. That a number of merchants offered 4s. 6d. specie, payable in tobacco, at 20s. per cwt. for each livre, paid for the goods in France. That this offer was refused by the Supercargo, because he said, the State Agent had offered him a better price, to wit: 6s. for each livre, and to take the whole cargo: which, he believed, he should accept. That, if paper money would have been received by the Supercargo, the merchants would have given at least 20s. per livre, for each livre paid for the goods in France; but no such offer was made, because it was understood the sale would be for specie, or tobacco rated at 20s. per cwt.

The Court of Chancery was of opinion, that there was no proof of a contract for 6s.; but, that the settlement with the Solicitor was not obligatory; and that the plaintiff ought to be allowed 4s. 6d. at least, for each livre, according to the offer
[125] by the merchants: Therefore, that Court reversing the opinion of the Auditor, and decreeing, according to the foregoing opinion, referred it to a Commissioner to take an account agreeably thereto.

The report of the Commissioner states the money account of £154,413 19s. 1d. and reduces it to livres at 4s. 6d.; after which it states the tobacco amount also, credits the payments, and finds a balance of £125,595 2s. 1¼d. due.

The agreement between Armstead and the Supercargo, is for 6s. for each livre which the goods cost in France; and the public, in part pay, to deliver 1,506 hhds. tobacco, within 90 days, at the rate of £4 per cwt.; and 500 hhds. more, at the same rate. The balance then remaining due to be paid in warrants, bearing 6 per cent. interest as long as the plaintiff should choose to let it remain there, or to be laid out for him in tobacco. The Supercargo to deliver all the goods, in the invoices shewn the Executive, except a few for his own use.

The High Court of Chancery decreed to the plaintiff the sum reported due by the Commissioner; and the defendant appealed to this Court.

NICHOLAS, Attorney General.

The account was settled by the Solicitor, and no objection made to it until the year 1792, when a petition was presented to the Assembly. This circumstance shews, that Beaumarchais was then satisfied with the settlement; and that he did not consider it as a specie contract. But, the Court of Chancery had no jurisdiction; for, the State is sovereign, and independent of other States and nations: therefore, she is not amenable either to foreign or domestic Courts. Vatt. 1, 138; 3 Black. Com. 254; [*Nathan* v. *The Commonwealth of Virginia*,] 1 Dall. 77. This argument is not answered by the act allowing appeals from the decision of the Auditors; for that relates to the appeals of citizens, and not of foreigners; and the whole complexion of the acts proves it. Again, the acts of 1778, p. 85, [c. 17, § 5, 9 Stat. Larg. 540,] and the R. C. 147, 148, [c. 85, § 6, ed. 1803; c. 174, § 6, ed. 1819,] speak of cases where the Auditor acts, according to his discretion, in disallowing or abating any demand: but here he refused altogether, because the Executive had decided it; and, therefore, the case does not come within the meaning of those laws. The settlement of the Solicitor was conclusive; for the act of 1784, c. 46, p. 197, [c. 7, 11 Stat Larg. 483,] provided a fund for payment of the foreign creditors; and, under that law, the case was referred to him, by the Executive, in the year 1785. This created a jurisdiction; which, being exercised, was conclusive; especially, as Beaumarchais did not apply to the Auditor recently, and appeal, but lay by, and received warrants, agreeable to the settlement. Added to all this, the Legislature twice rejected it; which is also an argument of considerable weight, and amounts to a bar to the claim. [126]

But, upon the merits, Beaumarchais is not entitled; because it was a paper money contract: for, the State had no specie in the Treasury: and, therefore, a certificate of the debt, if it had been a specie claim, would have been of no use: a circumstance, which is conclusive to shew, that paper money only was contemplated by the parties. This is illustrated by that part of the contract which was for tobacco; because Beaumarchais was to be allowed the price and costs of that to be purchased; which was plainly intended to meet any future depreciation, or, even, appreciation. Again: more than the usual interest was to be paid; for, it is six, instead of five per cent.; which looks as if it was intended as compensation for the probable depreciation. Thus far, upon the written argeement: but

parol evidence is offered to explain it. That, however, is not allowable. [Lord *Irnham* v. *Child* et al.] 1 Bro. C. C. 92. But, this case here is stronger; because the parol testimony would go to contradict the contract in the present case: which would be contrary to all the decisions. [*Smith* v. *Walker*,] 1 Call, 39; [*Bogles* et al. v. *Vowles*,] Ibid. 244. If the situation of the country, at that time, be considered, it is not con-
[127] ceivable that the government would have made a contract for specie; because paper was the only medium, and the Legislature had great difficulties to keep up the credit of it. Act 77, p. 11; Ch. Rev. p. 51, [c. 5, 9 Stat. Larg. 286.] It is not probable, therefore, that the Executive would have made a contract, tending to sink its credit. The offer of the merchants proves nothing; because Chevallie had many inducements to prefer the State; whose credit he thought better, and more secure than that of speculators and adventurers. Besides, the depreciation of paper money was as well known to him as to the government; and, therefore, if specie was in contemplation, why did he fail to have it inserted, in the contract, or provided for, in some other way? No fraud, or imposition, is alleged or pretended; and, therefore, the presumption is, that a man apprised of the situation of the country, contracted in the usual way, as he did not make any exception. Fonb. Treat. Eq. 116. He probably calculated, like others, upon the advantage of his bargain, in case the money should appreciate; for, in that case, he would have been entitled to the nominal sum. 1 Dom. 64; [*Chesterfield* v. *Janssen*,] 1 Atk. 339; [*Cass* v. *Ruddle* et al.] 2 Vern. 280. Therefore, Beaumarchais had no claim, but to the value of the money, according to the scale. This he has had; and, of course, nothing is due. But, if any thing were due, interest on it, according to the decree of the Court of Chancery, is clearly not demandable. 2 Com. Dig. 248; 2 Atk. 218; [*Attorney General* v. *The Brewers' Co.*] 1 P. Wms. 377; [*The Drapers' Co.* v. *Davis*,] 2 Atk. 212; [Countess of *Ferrers* v. Earl of *Ferrers*,] Cas. Temp. Talb. 2; [*Pomfret* v. *Windsor*,] 2 Ves. sen. 488. These cases prove, that under the circumstances of the present case, interest would not be due, even if the principal were justly demandable; which it certainly is not, for the reasons already mentioned.

CALL, contra.

1. The contract was for specie: For, *six shillings* is an equivocal term, and might relate either to *specie* or *paper* mo-

ney, which creates an ambiguity; for, as it may relate to either subject, the term is ambiguous, and altogether uncertain. [128]

This produces two enquires.

1. Whether parol evidence can be received to explain it?

2. Whether the evidence adduced proves it to have been a specie contract?

As to the first:

The rule is universal, that, wherever a latent ambiguity exists, parol evidence may be received, in order to explain it: As in the case of a devise to I. S. when there are two of that name; for, it being uncertain which was meant, and the words applying to both, parol evidence must be received, in order to shew which was intended.

The same reason holds in the present case; for there being two *media*, to both of which the term applies, parol evidence may be received, in order to shew which was in contemplation of the contracting parties.

The cases cited on the other side are not against us.

Ross v. *Norvell*, 1 Wash. 14, is not: For there, parol evidence was received; and, therefore, if it proves any thing, it is a decision in our favor. Neither does that of *Irnham* v. *Child*, 1 Bro. C. C. 92, because that contained no ambiguity; and, therefore, was not within the principle. Besides, that was the case of a voluntary bequest, not influenced by circumstances, and the justice due to the other contracting party.

Smith v. *Walker*, 1 Call, 28, affords no greater obstacle: 1st. Because the evidence there, was expressly repugnant to the bond, which stated the money to have been received on the day of the date; and, therefore, evidence of a receipt, at an anterior period, was contradictory to the words of the bond. 2. Because the Court, in that case, took a distinction between a suit at law and in equity; allowing that it might be proper in equity, though not at law; and we are in a Court of Equity. 3d. Because the Court, there, expressed a doubt, under the last clause, and the President stated, that there was a diversity of opinion amongst the Judges upon it. 4th. Because that was the case of a contract executed; but this, from its nature, was executory, and, in some measure, dependent upon circumstances. [129]

Bogles et al. v. *Vowles*, 1 Call, 244, although somewhat stronger, is yet susceptible of a plain answer. 1st. It was a case without circumstances, and, therefore, it does not resemble our case. 2d. It was also the case of a contract executed, and

not executory; which latter circumstance the Court seem to have thought made a difference; for, they say, *in the case of a bond*, the circumstances must be very strong to produce a departure. 3d. That case proves, that circumstances may control the contract; for, in addition to what has been already observed, they say, that the circumstances must be such as arise in the contract itself, which is exactly the case now before the Court; because the circumstances all arose in, and were part of the contract itself, or were closely connected with it. 4th. In that case, a new day of payment was given, which made an entire new contract; and, therefore, the Court observed, that the parties might have increased the sum, on account of the depreciation. Under this idea, parol evidence of the old debt would have been wholly repugnant, and, therefore was clearly inadmissible.

The decisions, then, being out of the way, the case stands on the broad principle, which determines that a latent ambiguity may be explained by evidence *de hors* the writing. Of course, as such an ambiguity exists in the present case, it is liable to the influence of parol evidence: which, therefore, is clearly admissible; especially as it was an executory contract, which it has been decided is liable to an explanation by testimony *aliunde*. *Flemings* v. *Willis*, 2 Call, 5, in this Court.

[130]

As to the second:

The circumstances are external and internal. The external are,

That Chevallie was a foreigner, unacquainted with our language and internal affairs: He must, therefore, have dealt for such money as he was acquainted with, which was specie only; for paper was unknown to his own country; and, therefore, paper bills would have been of no use there. Consequently, if we suppose him to have been contracting with a view to advantage, we cannot presume him to have sold for a *medium* which would have been of no use to him. Standing as he did, the only enquiry he had to make was, what proportion a Virginia shilling nominally bore to a France livre, supposing the *media* the same; and not what was the relative value of the Virginia paper shilling, compared to a French specie livre. Accordingly, he appears to have acted upon that principle, since he refused to deal for paper money; and when the merchants offered 4s. 6d. specie, he rejected it, because he could get more of the State; which could only have been true of specie, because the dollar of paper money was worth less than the 4s. 6d. specie. Another decisive circumstance is, that the loss,

which would otherwise have been sustained, would have been immense. For the price agreed to be given, if reduced by the scale, would have been less than the *prime cost* in France; and the freight here, as the *resolution* of the committee of the Legislature states, was equal to the prime cost. So that the value of the whole cargo, and more, would have been sunk. A contract, which no man in his senses can be presumed to have entered into; especially when it was in his power to have made one with the merchants which would have been really beneficial. [131] But this is not all; Chevallie was a mere agent for Beaumarchais, who wanted the proceeds of the cargo to make use of in France; and, as paper bills would not have answered that purpose, it cannot be presumed that he would have so far abandoned the interest of his employer, as to sacrifice his property for an article which would have been useless to him. It cannot be presumed that he would have faithlessly refused 4s. 6d. specie, and taken 6s. paper, which was not worth more than 13d. This conduct could not have been justified, but would have subjected him to the action of Beaumarchais; and, therefore, if his integrity had not operated, his fears would.

So much for the external circumstances; which clearly prove that specie, and not paper, was contemplated by the parties.

The internal circumstances are, the mention of *six shillings*, instead of a *dollar*, the term then generally in use; which looks as if a distinction was intended, and that the term was understood to apply to a different *medium*, than that of the *paper dollar*. Accordingly, in all the accounts stated on both sides, the term is preserved: for, Chevallie, in the account stated by him, takes a distinction between the silver of Virginia, and the money *coined of paper* in Virginia: and when he comes to strike the balance, he does it in *silver*. Another circumstance is, that the payment was to be postponed; for, the money was to remain with the State, until called for: a part of the contract, which certainly never would have been made, if paper money was to have been received. 1st. Because a more secure period, for returning the proceeds to France, was not likely to have happened soon, as the cargo was brought in an armed ship, which promised more than usual security. [132] 2d. Because the State, having plenty of paper money, would not have stood in need of credit. Of course, it must have been postponed until the State should be able to obtain specie; which it then had not; for, as the paper money was already depreciated, *and rapidly deprecia-*

ting, postponing the payment of that *medium*, was to hazard the whole value of it.

But, it is asked, why, if 6s. specie was intended, and tobacco only worth 20s. specie, he should agree to give £4 per cwt. for tobacco? This question is answered by another, namely: Why, if the tobacco was worth more than £4 of paper money per cwt., did the State agree to take that sum for it? The public officers were as much bound to save the difference to the State, as Chevallie to his principal; which shews that the parties had motives for it, and these will be explained. In the first place, the high price of tobacco in France, justified it; and, therefore, for the sake of the whole contract, he agreed to make a sacrifice upon the tobacco. Chevallie was connecting and weighing the different offers which had been made him together; and, by this means, he found the result would be favorable to him. Thus, 4s. 6d. was about the true value of the cargo, and 6s. above it; so, 20s. was the true value of the tobacco, and £4 above it. But, because he was to get an excess on the price of the cargo, he could afford to give the excess on the price of tobacco. Of course, this was a mode which was agreeable to both parties. For it accommodated the State, without their making an apparent distinction between specie and paper money, so as to contribute to the depreciation of the latter; and it gave to Beaumarchais the value of his cargo certainly, with a prospect of advantage from the sales of the tobacco in France. The propriety of these remarks will appear from the following estimates:

The value of 809,824 livr. at 6s. per livr. is	£242,947 9 6
The value of 809,824 livr. at 4s. 6d. per livr. is	179,810 10 1
[133] The difference in Virginia currency is to be accounted for;	£63,129 19 5

Which is done as follows:

The value of 20,000 hhds. tobacco at £4 is	£80,000 0 0
Deduct the real value, equal to ¼ or 20s. is	20,000 0 0
Gained by the State on the tobacco,	£60,000 0 0
From	£63,129 19 5
Take	60,000 0 0
Gained by Beaumarchais, by the 6s. instead of 4s. 6d.	£3,129 19 5

Virginia currency.

And, if to this, the prospect of an advantageous sale of the tobacco in France be added, there will be found no reason to wonder at the supercargo's contracting to allow £4 for the tobacco; because, instead of losing, he became an actual gainer thereby. As little is it to be wondered at, that the State contracted on those terms. For they lost nothing by it; as the excess of the 6s. was sunk in the price of the tobacco, and they gained a credit for the specie, without discovering a distinction between the two circulating *media*, that might affect paper money; which was an object of importance to the government. Since, besides that the immediate possession of such a cargo was extremely desirable, the merchants would otherwise have bought it up, and sold it to the State, at an advanced price; or Chevallie would have gone to Congress with it; from which he had been with difficulty diverted, at first, by the pressing entreaties of the government.

But it is said that £1,300 paper money was actually received. This, however, proves nothing; as it was, probably, in small sums, drawn for little contingent charges for the ship's use, whilst she lay in the country, and no es- [134] timate or liquidation of its value made at the time; or, on account of its insignificance, perhaps, intended: especially, as the government, which was desirous of concealing a distinction between the two *media* in the main contract, would scarcely have consented to acknowledge it by adjusting too little payments.

The result is, that each party had views, in arranging the contract upon the principles they did. For, both were accommodated. The State lost nothing by the 6s., because it was made up to them in the price of the tobacco. And Beaumarchais was to lose nothing by the tobacco; because he received it in the 6s. with the prospect of ulterior advantages, in the sales of the tobacco.

This way the contract is intelligible, and consistent with liberal views of advantage on both sides. But the other would be a proof of illiberality in the government; and of folly, or wickedness, or perhaps of both, in the supercargo. In such a case, reason dictates that we should adopt that which is most agreeable to justice and good sense.

I conclude, therefore, that the evidence and circumstances clearly prove that it was a specie contract.

2. But, if this was not so clear upon the evidence, and the principles of general law, it would be plain under the last clause of the scaling act; which enacts, "that where circumstances arise which would render a determination agreeable to

the scale unjust, the Court shall award such judgment as to them shall appear just and equitable." [10 Stat. Larg. 473.]

This necessarily introduces the parol evidence; for, it gives the Court jurisdiction over the circumstances. But, in order [135] to judge of the circumstances, the Court must know them. And, in order to shew them to the Court, parol evidence must be received.

This brings all the circumstances before the Court; and then the clause of the act strictly applies.

1. Because Chevallie lost an opportunity of making a contract for specie with the merchants; and, therefore, he ought not to be injured by the contract with the State. For that, in the language of the act, would render the determination, according to the scale, unjust.

2. Because a settlement by the scale would not only deprive the seller of gain, but would subject him to a very heavy loss; since he would lose more than his whole cargo.

3. Because the parties do not appear to have contemplated depreciation at the time, and to have allowed a greater price, with that view. For, Chevallie proposed to deal by his invoice, to take the prime cost and freight, with a profit, not equal to what was usually demanded. But he will get neither costs nor charges, if it be scaled; for both will be sunk: which would be unjust; and, therefore, according to the act, the contract ought to be settled by equity.

4. Because the real justice of the case is to give what the goods might have been sold for here. Because the State ought not to have them for less than they were worth; nor Beaumarchais to get more. This worth was the cost and charges, with a reasonable profit. And that was actually offered by the merchants; which decides what ought to be allowed under the act.

5. Because the public agent made Chevallie discount the [136] boxes of cards, which were retained at four dollars for one. But that could not be just for the State, which would not be equally just for Beaumarchais; and, therefore, if a discount was made for the benefit of the State, equity demands that it should be for Beaumarchais likewise.

In fine, the Court ought to consider only what would be strict moral justice between the parties, without regard to the technical rules of law, or even those which have been adopted in a Court of Equity. For the act gives greater authority than a Court of Equity has ever exercised. Because that Court must follow the law; but here the Court is expressly exempted from such necessity, and is left to decide according to the broad principles of justice.

These observations are illustrated, confirmed and extended by the decisions which have taken place in this Court. For, in the first place, it has been decided that the Court may enquire into the circumstances, and from a view of them, determine whether an adherence to the scale would be unjust, and if so, to substitute another; nay, that a jury might do it on evidence of the intention of the parties. That parol evidence would be sufficient; and that if the contract was to be performed at a distant period, that was an evidence of a specie contract, which would prevent the operation of the scale. *Watson et al.* v. *Alexander*, 1 Wash, 353–4. But the case goes further, and declares, that the "contracts of men should be governed by the comparative value of paper to specie, as they understood it when those contracts were entered into; and, if that be more or less than the rate at which the scale afterwards settled it, the latter ought not to be a rule for them. Circumstances, therefore, tending to elucidate their ideas upon this subject, collected from their expressions in the treaty, the general opinion of the parties, and of others in the neighborhood at the time, and such like, seem to be what the law contemplates, and can be only collected from parol testimony:" which is a full authority that the real justice of the cause is to be attained; and, that what it is, must be [137] decided by the circumstances shewn by parol testimony.

But it has been decided that a contract of this kind was not within the operation of the scale. For, in *Hill et al.* v. *Sutherland's ex'r.* 1 Wash. 128, it was held that imported goods were not within the act. The words of the Court are: "We are of opinion that the legal scale, so far as it operates in the years 1777 and 1778, is not a just one 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 risk of importation, as well as by the depreciation of the paper money:" which decides the question completely; and proves that this contract, being for imported goods, could not be scaled.

3. The statement by the Solicitor, does not bar the claim; because it was a reference by the Executive, without the consent of the agent of Beaumarchais. It was meant as an estimate for the use of the Executive only, and was not intended to bind either party. Of course, it has no operation.

But, under another point of view, this settlement, as it is called, does not affect the case; namely, that his province was not to decide upon claims, but merely to solicit them. He was

not judge in any sense, but a prosecutor altogether. And as to the words of the act which relate to the sums due from the public, they only mean that he should report the balances as they appear on the public books, and not those which he has decided on to be just. In short, it was like making out the estimates for the service of the current year.

[138] 4. The Court of Chancery had jurisdiction. For the terms of § 6 are extensive enough to include every case; and expressly subject the State to the jurisdiction of the Courts. The words are: "Where the Auditor, acting according to his discretion and judgment, shall disallow, or abate any article of demand against the Commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the High Court of Chancery, or the District Court holden in the city of Richmond, according to the nature of his case, for redress, and such Court shall proceed to do right thereon; and a like petition, shall be allowed in all other cases, to any person who is entitled to demand against the Commonwealth, any right in law or equity." This clause appears to embrace every case that can be conceived, and to leave nothing for ingenuity to exert itself upon. The language of § 2, which was relied on by the Attorney General, makes no difference. 1st. Because the power of government to contract, at all, originated under acts of Assembly; and, therefore, it is within the very letter of the law. 2d. Because the latter part of § 6, as just observed, includes all possible cases. For, there the expression is not confined to any act of Assembly, if that were the true reading of § 2, but it is extended in all cases to any person who is entitled to demand against the Commonwealth, any right *in law or equity*. Terms, than which nothing can be more comprehensive; and, therefore, it would be a waste of time to discuss them.

But, then, it is said that the claim is barred by the decision of the Assembly. That, however, is not correct; for the word *bar* always means the decision of some arbiter between the parties: whereas, this is a refusal to pay by the debtor. Besides, it is not even the decision of the whole Assembly, but

[139] only of one branch; and, therefore, it has no force, according to the constitution; because both houses must concur, in order to give validity to any Legislative act. Again, the legislature, by refusing to do any thing, left the case unaltered. And, therefore, if the Auditor would have been authorized, if no petition had been presented to the Assembly, he was authorized afterwards. For the Legislature, by refusing to make a new law, did not alter the old one.

With respect to interest, if the principal be due, interest is due also. And, therefore, the decree is right in that respect likewise.

HAY, contra.

The decision of the Auditor ought not to have been reversed. He refused to enter into a new investigation justly; because the Solicitor had settled the account before; and therefore he had no authority to unravel it, but was bound by that statement. For he is only authorized to settle unliquidated accounts, and not those which have been adjusted before. A contrary interpretation would convert the Auditor into an appellate Judge, and would not only prevent accounts from ever being closed, but would totally destroy the effect of the act of limitations in such cases; for, if no previous decisions are to be final, without the judgment of the Auditor, and an appeal is to lie from his sentence, an act of limitations can never begin to run, until his decision is had, so that no length of time will bar a claim. It follows, then, that the Auditor was correct in refusing to enter into a new examination, notwithstanding the words *all other cases*, in the § 6 of the act of 1792, R. C. 147; for, those words were plainly intended to apply to cases not of a pecuniary nature. The settlement of the Solicitor was final; and no appeal lay from his judgment. Chanc. Rev. 133. He was directed to settle the accounts; the State agent and the agent for Beaumarchais were both present; no objection was made to the scale, although the agent of Beaumarchais did object to the deficiency on the to- [140] bacco; the account, as settled, was afterwards carried to the Executive, for their approbation; and ten years elapsed before any application was made to the Chancellor. It is therefore too much to say, that a re-examination of accounts ought now to take place; for, if an account is not recently excepted to, it is presumed to be acquiesced in. [*Willis* v. *Jernegan*,] 2 Atk. [252.] Which presumption ought the rather to be made, because all accounts between the State of Virginia and the United States are now closed; and, therefore, if the appellee should succeed, the State will lose the money, without any opportunity of redress, owing to the supineness of Beaumarchais, in not asserting his claim at an earlier period. The decisions of the Legislature preclude all judicial enquiry. Before the year 1780, the Assembly was the only tribunal, and the jurisdiction which was afterwards given to the Courts was concurrent only; for the word used is *may*, a term which

by no means excludes the cognizance of the other tribunal. Besides, it is universally true, that when the Legislature act within the limits of their constitutional power, no other tribunal can say that they have done wrong. In the present case, it never could have been intended to give the Courts power to control the concurrent acts of the Legislature; and much less to give the party the benefit of two trials; one by the Assembly, the other by the Courts. The appellee asks of the Courts to say, that an act shall be done, which the Legislature said should not be done; which would be, to put the authority of the Court above that of the Legislature. If a judgment had been given in the case by any other Court, it would have been a clear bar to the suit in the Court of Chancery, and, therefore, *a fortiori*, the decision of the Legislature ought. Otherwise, more respect will be given to the acts of a Court, than to those of the Legislature; and the decisions of a Court will, in effect, repeal a law. The contract was clearly liable to be scaled. For the words shew that current money was intended; [141] and if so, it was necessarily subject to the scale. Had specie been meant, it would have been so expressed; such an important stipulation never would have been omitted; because it would have been one of the most essential parts of the bargain. But the reception of the £1,300 in paper money is decisive; and shews, very clearly, that Chevallie's own idea was, that the contract was for the common currency of the country. These arguments receive additional weight, when it is considered, that, at that time, there was no specie in the Treasury, or in the country even; and therefore, it is impossible it should have been contracted for. The government must have foreseen their own inability to raise it; and Chevallie, the total impossibility of their procuring it. There is nothing in the objection, that the offer of the merchants would have been better; because Chevallie knew nothing of them, and therefore did not care to contract with them, as not knowing whether they might be safely trusted. There is nothing in the case, then, which ought to exempt it from the operation of the scale; for that would be to let the parties loose from their contract, contrary to the intention of the act, which was only to allow a departure, where the circumstances rendered it necessary. 2 Wash. 36, 300, 301.

WICKHAM, for the appellee.

It cannot be doubted, that an appeal lay in this case from the decision of the Auditor; and that the Court of Chancery

had jurisdiction of the cause. Chan. Rev. 84, R. C. 148. The language of those acts clearly comprehend the case; and where the words are plain, artificial rules of construction are never resorted to. States, as well as individuals, are bound to do justice; but, as they may sometimes mistake it, there is great propriety in having a tribunal, properly authorized, to decide between the parties; and it was with this view that the law, allowing an appeal from the judgment of the Auditor, was made, which embraces, and was intended to [142] embrace, every controversy of a pecuniary nature between the State and an individual. The statement by the Solicitor was no bar; for the act of Assembly, which constituted him, Ch. Rev. p. 132, [c. 5, 10 Stat. Larg. 358,] did not mean to make his sentence definitive. He was a mere assistant to the Attorney General and other officers, but was not authorized to settle the claims of creditors; for that was the proper business of the Auditor. The words of the act, which relate to the sums due from the State, only meant that the Solicitor should send an estimate to the Assembly, in order that they might know what sums to appropriate. In the present case, the reference to him was only to enable the Executive to form some judgment of the answer they ought to give to those who applied for the money; and neither did, nor was meant to bind any body. There is no ground for the argument, that the settlement was acquiesced in; for it does not appear that La Til ever saw the statement. It was said that the decision of the Executive was a bar: But the first answer is, that there never was a decision by that body; and the next is, that the Executive had no authority to decide upon it; and, consequently, no opinion of theirs could prejudice the claim. It was also said, that the decision of the Legislature precluded any further investigation: But they did not act in a judicial capacity; their functions are legislative only, and not judicial: for, the Constitution has wisely said, that the Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that one cannot exercise the powers belonging to another. In a judiciary point of view, therefore, the case, when before the Assembly, was *coram non judice.* Again, the Legislature were parties to the controversy, and, therefore, could not decide it. But the words of the acts, concerning the Auditor's office, put the matter beyond question; for it would be absurd to say, that the Court might decide between the State and an individual; and yet, that it could not decide against the pretensions of the State. Besides, if the Legislature [143] could exercise judicial powers, it would be requisite

that both branches should concur. But here only one of them has acted; and therefore, even under that point of view, the resolution has no operation. It is clear, however, that they had no judicial power, nor could they take away a vested right, by any *ex post facto* law. *Turner* v. *Turner's ex'rs.*, 1 Wash. 139. Upon principle, therefore, the resolution of the Assembly did not bar the right; and so it has been decided in this Court. *The Auditor* v. *Walton*, at the last term. The scale of depreciation does not affect the case. For Beaumarchais was a foreigner, and contracting on equal terms with the State; of course, he was not bound by the laws of Virginia, made posterior to the contract; because, not being a citizen, and dwelling abroad, he cannot be presumed to have assented to it. But the act does not appear to have contemplated the cases of the Commonwealth; which are not expressly named; and, as on the one hand, the Commonwealth would not have been bound by such an act, if it had been disadvantageous to her, so, on the other, she ought not to take the benefit of it, when it would be advantageous to her. It never was the intention of the Legislature, that the sale of imported goods, under circumstances like the present, should be subject to the scale of depreciation: which would be too severe in its effect, where the paper money price was never arbitrary, and was always intended to bear a just relation to the actual specie price, paid for them in Europe. It would, therefore, be very harsh to regulate them by a scale, which was intended to apply to arbitrary cases, not founded upon any such relation. That the relative price was in view, at this time, is proved by the circumstances: For, Picket's deposition shews, that Chevallie was offered 4s. 6d. specie *per* livre; and, therefore, it is impossible to believe that he would agree to take less. The price allowed for the tobacco, does not produce the effect contended for upon the other side: for [144] all the parts of the contract were considered together; and according to that view of the case, nothing would be lost, but Beaumarchais would actually have gained a few thousand pounds; to say nothing of his preferring a contract with the State. It is not important that specie was not expressed in the contract: Because the public would naturally wish to conceal, and not to proclaim, the depreciation. The receipt of £1,300 proves nothing: It was a trifle in itself, and might have been received to pay duties, running charges, &c. If paper had been contemplated, why take credit? There was paper money enough in the Treasury, or more might easily have been emitted. The circumstances of the case for-

bid the operation of the scale; because the act gives power to the Court, to consider the intention of the parties, and the hardship of the case; and the injustice of the scale in the present instance, would be extreme, where goods of this nature had been sent, in order to serve America, at immense expense, trouble and peril; and where the application of the scale would not leave money enough to pay the prime cost of the articles.

RANDOLPH, in reply.

The Court of Chancery had no jurisdiction; because it was not one of those cases, where the Legislature intended an appeal should lie to the Courts: For, the act of 1778 does not include it; and the first section of the act of 1792 only relates to cases growing out of laws or resolutions; and the sixth to cases not pecuniary. The Executive had already decided the case; and, therefore, the Auditor could not admit the claim, but very properly rejected it. But the decision of the Legislature, however, was conclusive; and it never could have been the intention of the law to enable the Judiciary to disregard the judgment of the Assembly. But, upon the merits, the case is in favor of the Commonwealth. Beaumarchais was as much bound by the scale as a citizen; for, if he came here to contract, he was necessarily bound by the laws of the country. The general currency of the country was contemplated in the agreement; for the State had no [145] specie, and, therefore, could never have meant to contract for it. Besides, the Executive could not, by law, have contracted for specie; and public officers will not be permitted to make illegal contracts. 2 T. R. 271. If specie had been intended, it would have been expressed; and at any rate no parol evidence is to be received. *Bogle* v. *Vowles*, 1 Call, 244, and 1 Wash. 78, 352, 194, 94; *Clinch* v. *Skipwith*, in this Court. The conduct of Chevallie, in receiving the £1,300 paper money, proves his own idea of the contract: No objection to the depreciation was made before the Solicitor, and warrants have since been drawn according to that settlement. There is nothing, in the case, to exempt it from the general operation of the law concerning depreciation; and, therefore, the scale was properly applied.

Cur. adv. vult.

ROANE, Judge. This cause has been rightly considered as an important one: not so much on account of the magnitude of the sum in dispute, (for that is but a secondary considera-

tion with every just government, and no consideration at all with every upright Judge,) as on account of certain important principles involved in the discussion, and of an opinion which may have gone abroad, that the honor and justice of our country might be implicated. Whether, and to what extent, such an opinion may really exist at this time, or, from what source the impressions lately floating in the public mind relative to this cause, may have been derived; whether from the incorrect allegations of interested parties, (which I understand to have been even carried into prints,) or otherwise, I pretend not to say: but certain I am, that a decision founded on the basis of those impressions, of which, as a citizen, I could not be entirely ignorant, would be very different indeed, from [146] one which results from a minute and critical investigation of the contract, and testimony before us.

Many important points have been made in the discussion of this cause, and it has been very ably argued. If I shall pass over some of those points in silence, it is because I deem them unnecessary to be decided: If I shall pass over without an answer many objections which were taken, it is by no means for want of a due respect for the gentlemen who made them; but on account of that pressure of business, which now, as often heretofore, compels me to give rather a general, than a detailed opinion, upon the case before me.

However unquestionable the claim of this Commonwealth to unabridged sovereignty, as at the date of this contract, may be: however clear the position, that such a sovereignty cannot, without its consent, be impleaded before any human tribunal: it is not at this day to be questioned, (and it has, accordingly, been properly conceded for the Commonwealth,) that when such consent has been given, through the legislative organ of our government, the objection on this score must cease. The only question then, on this part of the case, is, whether by a fair construction of the laws, a cognizance of the cause before us has been yielded to this Court, and in that form of proceeding which the appellee has chosen to adopt.

It has been said on the part of the present appellee, that this foreigner, claiming the benefit of our laws, existing at the time of the contract, is not bound by the posterior laws, because he has never assented thereto: But in fact, he has never assented to any of our laws; and it is not on account of such assent, on his part, that he is bound by, or can take the benefit of them. A better objection, on his part, would be, that the act of 1781 does not bind him, because it is a retrospective [147] law: But even that objection would not avail; for it is not at this day to be questioned, that it binds our own

citizens, in whose favor the objection lies at least with equal force. That law is, indeed, a retrospective law; but one often sanctioned by the judgment of this Court; a law dictated by imperious State necessity, and even by justice; its object being to give to creditors the real value of their nominal contracts.

Putting this foreigner, then, on the same footing with our own citizens; nay, even on a better, if in a doubtful case it be proved that he were ignorant of our laws and language; if, as I am ready to admit, he is more meritorious than a citizen, in serving the cause of liberty, in a strange land: he shall be considered as even a Virginia citizen, with these circumstances, in an equiponderant cause, ready to incline the balance in his favor. This is as much as would be granted in any country under Heaven, and this the benign and liberal policy of our laws will permit.

If the contract in question is proper for judicial cognizance, it is not necessary that that cognizance should have existed at the time of its date; but the contract, construed indeed as to its operation by the laws then in being, may, when a tribunal shall afterwards arise for its decision, be properly submitted thereto. If this were not the case, what would become of innumerable instances in this Commonwealth of existing contracts being decided by newly erected tribunals? It would be impossible to foresee the extent, or consequences of a contrary position. But, in all the instances of pending improvements in our Judiciary system, I have never heard of the objection being taken, either in the Legislature or elsewhere.

If this position be correct, the appellee, although his contract bears a previous date, is entitled to the benefit of that clause of the Auditor's law of 1778, [c. 17, § 5, 9 Stat. Larg. 540,] allowing an appeal; although, as is supposed, the original law of 1776, [c. 51, 9 Stat. Larg. 245,] has [148] not a similar provision.

By that law, (the act of 1778,) a claimant like the present had a right to have his claim audited; having a claim upon the Treasury for money, and the laws denying him access thereto, through any other medium than the Auditor's board, except in those cases, where (which is not pretended in the present instance,) an act of Assembly shall forbid the claim to be audited.

This too was a case proper for the exercise of the Auditor's discretion and judgment; for, although there was a written contract, it was a proper subject of his enquiry how far that contract had been complied with, how many goods had been

delivered pursuant thereto, &c.; to say nothing of the question which afterwards arose, and is now contested, of specie and paper money.

If, then, there had been no interference on the part of the Executive, relative to this claim, no interception of the appellee's regular progress to the board of Auditors, there is no doubt but that a decision against him, by that board, would create a jurisdiction in the Court of Chancery. What was the nature and effect of that Executive interference, and what its influence in the present case? For, I put entirely out of the question the decisions of the Legislature. An application to that body, for a gratuity, was proper; but, for a right, under a contract, an appeal to the Judiciary was more proper; and possibly, on that ground, the rejection by the Legislature was founded.

A settlement by the Solicitor was not the proper course for a public creditor to pursue; either as giving him access to the Treasury, or as entitling his case to a judicial cognizance. Before, therefore, a conclusion shall follow, depriving a party of these privileges, and ousting our Courts of their ordinary jurisdiction, it ought at least to be shewn that the party [149] claimant agreed to a substitution of that officer in lieu of the Auditor, and waived his right of appeal from the decision of the latter. But, although the Solicitor was not invested with the proper functions of the Auditor, he was yet an useful agent of the Executive, in making statements relative to foreign claims, &c. There is no testimony in this cause, that the Solicitor was applied to, in the instance before us, in any other sense than this: There is, I believe, no testimony, other than an *ex parte* representation by the Solicitor, that the agent of the appellee consented even to this reference: But, certainly, there is no testimony, that both (if either) of the parties, applied to this officer as a substitute for the Auditor: Nor do I see that the report of the Solicitor was ever ratified by the Executive. The certificate of the Governor is merely that L. Wood was Solicitor, &c. It was his act, not that of the Council, and may be considered as merely a thing of course.

The Auditor ought not, therefore, on the ground of the existence of this settlement by the Solicitor, to have rejected the application of the appellee: But if, on the merits, his decision adopting in effect that of the Solicitor, was right, though founded on an improper reason, that decision must be affirmed by this Court.

This brings us to consider the case upon its merits.

The counsel for the appellee repeatedly brings us to the decision of questions, often and often settled by the supreme tribunals of this country, and which would, if disturbed, agitate and convulse of the Commonwealth. Of this nature is the question, whether the act of 1781, [c. 22, 10 Stat. Larg. 471,] extends to contracts with the public. I do not consider myself now at liberty to discuss that question, and I only notice it, to shew that it has not escaped me.

If, then, this act extends to contracts with the Commonwealth, as it unquestionably does, it clearly applies [150] to the present contract, considered merely on its face and independent of other testimony. The contract is for "Virginia currency," which terms are explained by the act of 1781 to mean paper money, as at this era. A great part of the debt is also to be paid in tobacco at £4 per cwt., whereas the appellee now contends, that that article was then worth only twenty shillings in specie. And, further, payment was to be made of the balance of the contract, by warrants to be drawn upon the Treasury. I believe I may challenge the annals of those times to produce a warrant drawn on the Treasurer for specie. In fact there was none amongst us, or at least none in the public Treasury; and we shall not presume, without express words, that the Executive of that day would have adopted an expedient, interdicted by law, and tending to damn the credit of that currency which was the *sine qua non* of our liberty. These circumstances (without enumerating others,) are conclusive to establish a position, which is scarcely denied, and is corroborated by all the testimony in the cause, except Mr. Picket's deposition. It is especially corroborated by the credit given for £1,300 paper money in part of this contract. I shall, therefore, pass on to that deposition, as the only evidence in the cause which can possibly present us with a question whether, independently of the written contract itself, as on its face it appears, either that no depreciation at all was contemplated by the contracting parties, or a different rate of depreciation from that which results from the application of the legal scale.

As I am decidedly of opinion, for reasons to be now assigned, that this testimony, admitting its fullest force, cannot possibly vary the construction which would be made without it, it is unnecessary to enquire, whether and how far parol testimony is admissible in a case similar to the present.

In this view of the deposition, also, I shall lay no [151] stress upon the circumstance of its being a solitary one, nor on the presumption arising against the present appellee,

from the consideration, that better testimony might probably have been obtained by him, as appears from the record. Better, I mean, not in respect of credibility; but from a superior opportunity of knowing the real intention of the parties at the time of the contract. This inference is drawn, inasmuch as persons are living, who attested the contract and were present at its completion.

There is no decision in this country, which exempts a contract from the operation of the legal scale, upon testimony shewing a different idea in the parties, unless such testimony plainly related to the time of the contract. A contrary decision would involve the greatest absurdity, since, whatever ideas may have prevailed at a prior time, may have been changed and conformed to the legal scale at the making of the contract. Neither is there any decision in this country, nor ought there to be, which varies the application of the scale, in conformity to the ideas of one party only. A contrary idea is also pregnant with absurdity and injustice, since a legal right, vested in one, is to be divested by a secret, undivulged idea, existing in another contracting party. Now, it is remarkable, that Mr. Picket's testimony, not only applies to a point of time anterior to the date of the contract, (how long before, is not disclosed,) but relates, if at all, to the ideas of Mr. Chevallie only. It is, therefore, in a great measure, if not wholly, inapplicable to the case before us. If it be said, that the ideas of the State at a *previous* time may be inferred from the offer of the State, stated by Mr. Chevallie, I answer, that this is not only the allegation of a party which cannot benefit him, but relates not at all to the price of tobacco; and, therefore, can give no rule for estimating depreciation in the present case.

But, supposing it otherwise, what reasons does he assign? 1st. To shew that no depreciation was contemplated by the parties? Or, 2dly. A different rate of depreciation from that established by law?

As to the first, he says: "We were informed that the super-
[152] cargo proffered to sell the surplus of the cargo (after the State was supplied,) for specie or tobacco at specie price." But, who gave them this information? He does not say that Mr. Chevallie gave it: On the contrary, it is evidently hearsay testimony; and, as such, entitled to no credit. Besides, it only applies to the surplus of the cargo; and, if true, it does not follow that the residue of the cargo might not be for sale in paper; although I admit that this conclusion is improbable. He further says, as coming from Chevallie, that the

State had made him an offer of 6s. for each livre, for the whole cargo, which was a better offer than theirs: But he does not add, as coming from Chevallie, (nor indeed from any other,) that this 6s. was to be paid in specie or tobacco at specie price, although it is scarcely to be believed, that that agent would have omitted to mention that circumstance, if it had existed, or that the witness would have forgotten it. Mr. Picket, indeed, infers this to have been the case, because the offer of the State was said to be a better offer than theirs, which he supposed could not be the case, unless that offer was in specie. Whether an offer in paper money was, in fact, a better offer, or not, is wholly immaterial. It is sufficient that the agent thought so; and his opinion, in such a case, might involve numerous and various considerations: As, 1st. His opinion of the credit of the paper money, and its probable appreciation. 2dly. The superiority of the national credit over the individual credit of these adventurers, or, possibly, over any other individual credit whatsoever. 3dly. The offer of the State extending to his whole cargo; whereas, that of the merchants embraced the surplus only. And, 4thly. (Without extending the catalogue;) his possible opinion that Picket's offer, though nominally an offer of 4s. 6d. specie per livre, was in fact an offer of less; for, as it was to be paid in [153] tobacco, at 20s. per cwt., it is evident that the offer would be diminished; in so far as the tobacco was really worth less than the aforesaid sum in specie. Now, Mr. Picket has not proved, (nor has any other person,) that tobacco was really worth that price in specie at that time.

Mr. Picket indeed says, that if paper money would have been received, (but he was not informed by the agent that it would not,) they would willingly have given 20s. paper money, per livre for the cargo. But he admits at the same time that the offer was not made. If it had been made and refused, it might have been a strong, though probably not, even then, a conclusive circumstance, from whence to infer Mr. Chevallie's idea that the offer of the State was in specie. As the offer, however, was never made, no positive inference can be drawn therefrom. It serves, however, plainly to shew an existing state of things, at that time, which clearly refutes an idea that depreciation was not sensibly felt by the contracting parties. On Picket's further allegation, that this offer was not made, because it was generally understood, that no sale would be made, but for specie or tobacco, at specie price, I will only remark, as in a former instance, that it is merely hearsay testimony.

This testimony, then, is entirely insufficient to shew, that no depreciation was contemplated by the parties. How does it stand to shew that a different rate of depreciation was contemplated, from that established by law? If Mr. Picket's, or any other testimony, had shewn, that, at the date of the contract, tobacco was really worth 20s. per cwt. in specie; or, that it was generally understood to be worth this; or, had shewn any circumstances from whence it could be fairly inferred, that
[154] both the contracting parties considered this as the real specie value of that article: as the contract before us, has rated the tobacco at £4 per cwt. in Virginia currency, it might reasonably have been argued, that a depreciation of four for one was contemplated. But the case is entirely naked in all these respects; and there are no proofs or data from which such a conclusion can possibly be drawn. On the contrary, the Auditor says in his answer, (and there being no conflicting testimony, it is immaterial to consider whether this allegation be evidence in the cause or not,) "that he believes tobacco could have been purchased, at the time of the contract, for less than 20s. per cwt. in gold or silver coin." Now, if the Auditor is right in this opinion; if an actual diminution existed of 4s. from this conjectural price of 20s. per cwt., then it is evident, that so far from a different rate of depreciation being inferable, a conformity would be produced between the supposed ideal, and the legal rate of depreciation.

If it be said, that Mr. Picket's offer to pay tobacco at 20s. per cwt. might justly have excited an idea in Mr. Chevallie, that that. was the real specie value of that article, I answer that, as a man of business, he must have known that merchants generally overrate their commodities in their dealings, and especially in their first overtures. Such an idea, therefore, cannot justly be inferred to have arisen from that offer. But, if it were otherwise, there is no testimony whatever that this circumstance was ever made known to the other contracting party, and the idea of both parties must concur, before the legal scale be departed from. Besides, whatever may have been Mr. Chevallie's opinion, at a prior time, on this subject, it shall rather be presumed that, at the time of entering into the contract, he had relinquished that idea. In a state of total uncertainty, and an absolute deficiency of evidence, that presumption shall rather prevail, which corresponds with, than departs from the law.

In truth, therefore, this testimony of Mr. Picket is
[155] entirely too loose and unsatisfactory, to justify any departure from the written contract. We might as well at once

repeal, and set at naught the law concerning depreciation, as to deny its application, on such testimony as the present. That law, (not losing sight of exceptions, to meet the real ideas of the parties,) was intended, and has had the effect, to prevent an infinitude of litigation; and no Court in this country has power to depart from it, except in cases excepted from the general rule therein laid down, either expressly in the act itself, or adjudged to be within the reason and meaning thereof, by the decisions of the Judiciary; and it is clearly supposed, that an exception, in so weak a case as this, has never been adjudged by any Court whatever, prior to the case before us.

From this view, it results as my opinion, that the Chancellor was right in deciding, that neither by the contract itself, nor by any evidence in the cause, do the 6s. per livre, appear to have been intended by the parties to have been in specie: But I differ from that Judge, in supposing the settlement by the Solicitor to have been unjust, and in setting the same aside, and substituting another rate of compensation in lieu thereof: not only because he had no power so to do, upon his own premises, because the offer of the merchants, which he has made the standard of the substituted compensation, is not proved to have been, in reality, an offer of 4s. 6d. per livre, for the reasons already assigned; but because, however unprofitable a bargain the appellee may have made, a circumstance which may be regretted, but not remedied, by this Court, there is no evidence in the cause shewing injustice to have been done the appellee by the Solicitor's settlement; or, in other words, no evidence to shew that that settlement will not yield to him the real value, in specie, of the currency contracted for, as at the time of the contract: and I cannot help here observing, as remarkable, that the Chancellor, in [156] a contract confessedly for paper money, should, for the attainment of justice, as he supposed, over-leap an express act of the Legislature, when at the same time he would have considered himself inhibited from giving a sum in nature of damages, if necessary for the attainment of the same object, thereby giving to a principle of decision, adopted by the Courts, greater efficacy, than to a positive legislative act!

Admitting, then, this creditor to be highly meritorious (for even he is meritorious who combines the public good with private emolument,) and considering the decision of the Auditor, in effect, as an adoption of the Solicitor's settlement, though for an improper reason, I must be of opinion, that that decision is substantially right, and ought not to have been reversed

by the Chancellor, but that the bill of the appellee ought to have been dismissed.

FLEMING, Judge. Three points were made in the argument of this cause.

1st. Whether the Court has jurisdiction in the case?

2d. Whether the contract between William Armstead, the agent for the Commonwealth, and Chevallie, the agent of Beaumarchais, was a *specie* or a *paper money* contract?

3d. Whether, if it was a paper money contract, there are circumstances in the case sufficient to take it out of the general scale of depreciation, as established by the act of 1781?

With respect to the first, I have no doubt. The act of 1778, establishing the board of Auditors, is decisive. It declares, that "where the Auditors, acting according to their discretion and judgment, shall disallow or abate any article of demand against the Commonwealth, and any person shall [157] think himself aggrieved thereby, he shall be at liberty to petition the High Court of Chancery, or the General Court, according to the nature of the case, for redress; and such Court shall proceed to do right thereon; and a like petition shall be allowed in all other cases, to any other person who is entitled to demand against the Commonwealth, any right in law or equity." The generality of these terms, which are copied into the act of 1792, embraces the present case, and leaves no room for dispute.

But it was argued by the counsel for the Commonwealth, that the act of 1780, [c. 15, 10 Stat. Larg. 358,] appointing a Solicitor General, and defining his powers and duty, took the business entirely out of the hands of the Auditor; and that the reports of the Solicitor, of the 16th of December, 1784, and the 6th of January, 1785, are conclusive and binding upon the appellee. On recurrence to that act, however, the power will be found to fall far short of this. It is merely, "to examine from time to time, the books of accounts kept by the Board of Auditors, and to compare the same with their vouchers; to see that all moneys to be paid by their warrants were entered and charged to the proper accounts therefor, or to the persons properly charged therewith, and that the taxes levied be also credited to their respective and proper accounts, keeping all taxes raised under any one law separate and apart from the other; to cause a correct list of all balances due, either to or from the public, to be stated, together with the amount of the several taxes, and lay the same before the General Assembly, at the first meeting of every session."

Which certainly cannot, by fair reasoning, be construed so as to erect the Solicitor into a definitive arbiter between the State and the creditor: and much less to supersede the power of the Auditors. On the contrary, he was not even authorized to settle and liquidate the claims of individuals against the Commonwealth. His province was to examine into the regularity of the accounts, and from them to make his annual reports to the Legislature. Therefore, he could give no definitive sentence upon the subject. [158]

From this view of the case, then, I am clearly of opinion that the appellee had a right to his petition of appeal from the decision of the Auditor, and that this Court has jurisdiction of the cause. Which brings me to the consideration of the second question: Whether the *contract* was for *specie*, or *paper money?*

The counsel for Beaumarchais laid great stress upon the risk he run, and upon what they called his generous conduct towards the State. Such arguments, if correct, should have been addressed to another tribunal: here they can have no weight; for his claim, according to the laws, is all that he has a right to ask, or this Court has power to award.

I view the case, then, precisely as if the contract had been made between two individuals; and to form a correct judgment of the intention and understanding of the contracting parties, shall refer first to the writing itself; then to the subsequent conduct of those concerned; and lastly, to the evidence that has been adduced to elucidate and explain it.

The written contract states, "That Mr. Chevallie be allowed six shillings *Virginia currency* for each *livre* which the said goods and merchandise cost in France, and in part payment therefor, Armstead to deliver along-side of the said ship at York, 1,500 hogsheads of tobacco, within ninety days, to be reckoned from the day the said Armstead shall be notified of her arrival at York, at the rate of four pounds *per centum*, and 500 hogsheads of tobacco more, along-side any ship Mr. Chevallie may send to Alexandria, on Potomac river, within sixty days after the said ship arrives at Alexandria; at the same rate of four pounds *per centum:* The balance that may then be due to Mr. Chevallie, to be paid by warrant on the treasury of Virginia, to bear six *per cent.* interest, as long as he chooses to let it remain there, or be laid out for him in tobacco, for which tobacco he is to pay the costs, and all charges paid by our agent." [159]

At the time of this contract, it must have been known to Mr. Chevallie, not only that there was no specie in the trea-

sury, but that *paper money* was the sole *currency of Virginia*, then in circulation; and, from the advanced prices of every necessary of life, it must have been obvious that this currency was greatly depreciated; of which, a stronger evidence could not have been adduced, than that furnished by Chevallie himself, who agreed to allow £4 per cwt. for 2,000 hogsheads of tobacco; when it might have been purchased with specie for twenty shillings, or perhaps at a lower price. But this is not all; for the whole cargo in the invoices, with a charge of fifteen livres on a box of shoes, cost in France 929,700 livres; which, at six shillings the livre, amounted to £278,910 *Virginia currency*. Deduct the £36,006 for the goods retained by Chevallie, according to the contract, and £80,000 for 2,000 hogsheads of tobacco at £4 per cwt., and there remained a balance of £158,904 due to Beaumarchais; which balance, by the contract, was to be paid in warrants on the Treasury, to carry six *per cent.* interest, as long as Chevallie should choose to let it lie there, or to be laid out in tobacco, at his option. Now, can it be believed, that a man extensively engaged in mercantile affairs, should have contracted for so large a sum in specie, to be called for at his pleasure, as exigencies might require, when he knew there was no specie in our Treasury, and very little in the State? or that our Executive would have been so extremely indiscreet (to say no worse) as to [160] have made a contract for specie to that amount, to be paid when demanded, at a time they neither had any, nor the means of procuring it? To me it appears to be morally impossible. Had specie been contemplated, the insertion of that word in the contract was obviously the means of putting it out of doubt; and, therefore, it would not have been omitted, and *currency* substituted in its room. But there are other circumstances, which serve to strengthen the idea that it was considered by the parties as a *paper money* contract: for it appears, both by a memorandum of Mr. Armstead, and by an account exhibited by Chevallie, that he received in part payment for the cargo (but at what time is not stated) the sum of £1,300 in paper money, for which he gave credit, at the nominal amount; thereby shewing that paper money was contemplated. But it was said by the counsel for the appellee, that this circumstance should have little weight, as the sum (compared with the whole debt) was too trifling to be an object with Mr. Chevallie; and that he did not, at that critical period, wish to excite any uneasiness in the government, respecting the depreciation of our *paper money*. The argument, however, is more specious than solid; for although the sum, com-

pared with the whole contract, was not very large, yet £1,300 were certainly sufficient to have attracted the attention of a man situated as he was; especially as, in another part of the account, he has entered the trifling item of 15 livres on a box of shoes; which discovers an anxious regard to the smallest sums. Besides, it could not have escaped a man of his understanding and experience in business, (had he really considered it as an agreement for specie,) that by receiving this paper money, and giving credit for it at its nominal value, he was furnishing a precedent that might very materially affect the whole contract at a future day; whereas, considering it as a *paper money* contract, his conduct in this respect was perfectly consistent with the nature of the agreement. Considerable stress was laid on the circumstance of Mr. Chevallie's [161] being a foreigner, and unacquainted with our language; in answer to which, it may be sufficient to observe that he had interpreters with him, both of whom were witnesses to the contract. Again, the whole of the goods, (except a deficiency in salt, which it was agreed should be supplied at a future day, or the price of it discounted,) were delivered to the Commissary of Stores at York, on the 1st of July, 1778, and on the 8th of August following, Mr. Armstead stated an account between Mr. Chevallie and the Commonwealth, making the balance of £225,381 9s. 11d. due to the former; of which he, on the same day, obtained a certificate from Mr. Henry, the Governor, with a *nota bene*, that the account was to be discharged according to the contract made with Armstead on the 8th of June, 1778. Here again we find, that nothing is said about specie; but this is not all. Between the date of the certificate and the 12th of May, 1780, payments had been made so as to reduce the balance to £161,603 13s. exclusive of interest; and Mr. Defrancy, the agent for Beaumarchais, on that day, obtained a certificate from Mr. Jefferson, the Governor, that the above sum, with interest at six *per cent. per annum* from the first of July, 1778, was due to Defrancy, as agent for Mr. Beaumarchais, and that his drafts for that amount, on Mr. Armstead, Commissary of Stores, would be duly honored.

Now, can it be believed that Mr. Jefferson, in the year 1780, would have certified that Mr. Defrancy's drafts for £161,603 13s. with almost two years' interest at six *per cent.* would be duly honored, if specie had been in contemplation? Or would Mr. Defrancy have required such a certificate, when they both knew there was neither any specie in the Treasury, nor the least prospect of procuring any?

But the counsel for the appellee, insisting that the term *Virginia currency* is equivocal, have, in order to explain it, resorted to the testimony of Mr. Picket, who says, [162] "That a number of merchants assembled at Yorktown, and offered the supercargo of the ship Fier Roderique, for the remainder of the goods, after the State should be supplied, at the rate of 4s. 6d. *Virginia currency*, in specie, for each livre paid for the goods in France, payable in tobacco at 20s. *per* hundred weight, which offer was rejected by the supercargo, because he said that the agent for the State of Virginia had made him a better offer of 6s. for each livre, and to take the whole cargo at that price. That he *believed* he should accept the offer, unless they (the merchants) would give more." But there is nothing in all this which goes to the contract itself; nor can any inference be justly drawn from it to support the idea that specie was contemplated. On the contrary, I think it may be fairly inferred therefrom, that Mr. Chevallie did not expect to contract with the government for specie; for when the supercargo rejected the offer of the merchants, saying that the agent for the State had made him a better one, of six shillings *per* livre for the whole cargo, and that he *believed* he should accept it, unless the merchants would give more, he appears to have been hesitating which offer to accept; but if he had expected to have received specie from the government, could he have doubted for a moment whether he should take six shillings the livre for his whole cargo, or 4s. 6d. for a part of it only?

Much stress was laid, in the argument, on the loss Beaumarchais would sustain, if the contract was not considered as a specie one. But, whether he made an advantageous or an unprofitable contract with the government, is not a proper enquiry in this Court; for, here, the only question must be, what the contract really was; and, when that is discovered, it must be adhered to. But it was probably not so disadvantageous to Beaumarchais as the appellee's counsel seem to apprehend: For, by agreement between the parties, Chevallie was [163] to retain out of the cargo, for his own use, sundry specified articles, which were entered on the back of the contract; and, when making up his accounts in conformity thereto, he charges the whole cargo to the State, agreeably, no doubt, to the invoices laid before the Council board, and then gives credit for the several articles retained for his own use, amounting to 120,021 livres and nine sous, or £36,006 6s. Virginia currency, at 6s. for each livre; which was all proper enough. But, in the account of the articles retained, there is a quan-

tity of brandy (20 pipes and 18 barrels,) stated to have cost in France 12,043 livres 10 sous. The pipes are said to contain about 125 gallons each, but no mention made of the contents of the barrels. Suppose them, however, to have contained 33 gallons each; then there were 3,094 gallons, charged at almost four livres per gallon: which is more (I believe) than three times what the brandy actually cost in France. And, if the other articles were priced according to this example, the advance upon the prime cost must have covered all his losses. Besides, the expedition which he expected to derive from that part of the contract which related to the tobacco, was a great inducement.

There is no evidence, then, of a specie contract, unless the story of the silver dollar being laid on the Council board, and the argument of Chevallie's being a foreigner, unacquainted with our language, are entitled to any respect. But they have no weight, for the first is not proved, and the latter is no objection, as Chevallie was provided with interpreters.

I come now to consider the third point: whether there are circumstances in this cause sufficient to take it out of the general scale of depreciation, as established by the act of 1781? And I think there are.

During the progress of paper currency, tobacco was generally resorted to, in order to ascertain the state of [164] depreciation; and twenty shillings per hundred having been, for some years back, about the average price of that article, were generally adopted as the standard. Comparing, then, those circumstances with the contract now under consideration, in which we find £4 per cwt. allowed for the tobacco, it strikes me very forcibly, that a depreciation of four for one was contemplated by the parties, and that they regulated their contract accordingly. But, if so, then by the express provision of § 5 of the act, the Court has power to adjust the contract according to that ratio; and, therefore, my opinion is, that it should be settled by a scale of four for one.

It was observed by the counsel for the Commonwealth, that the settlement made by the late Solicitor General in December, 1784, in which the money balance was scaled at five for one, ought not to be disturbed, as La Til, the agent of Beaumarchais, acquiesced in it, and received sundry payments under it, without complaining. But to this it may be answered, that La Til was the third agent of Beaumarchais, not privy to the original contract, but sent over here six years after the debt had been due, in order to collect the large balance then un-

paid, which he found attended with great difficulty and obstruction; and, therefore, he was glad to receive any payments that were offered him. Besides, there is no evidence that he ever consented to the settlement of the account, scaled at five for one; and, consequently, his transactions afford no inference against the claim; especially when it is recollected that he was not dealing with an individual upon equal terms; but was a foreigner, just come to the country, contending with and entirely in the power of a sovereign State, as he thought, and against which he did not discover that he had any compulsory remedy. Under such circumstances, I should not have thought Beaumarchais himself concluded, had he been here transacting the business in person. Upon the whole, I am of [165] opinion that the decree of the Chancellor ought to be reversed; that the balance of the money debt should be scaled at 4, instead of 5 for 1; and the balance of the tobacco debt at twenty, instead of sixteen shillings per hundred weight.

CARRINGTON, Judge. That the Court had jurisdiction of the cause is very clear, for the reasons already given by the Judges; and, therefore, it is unnecessary to discuss that point any further. But, upon the merits, I am of opinion that Beaumarchais was not entitled to relief. The written contract purports upon the face of it to be for the *current money* of Virginia; and, therefore, it is necessarily subject to the scale of depreciation, unless the appellee is able to shew that specie was intended. But the inference appears to me to be directly otherwise. For, in the first place, it is not probable that the Executive would have contracted for specie when they had none in the Treasury, nor were likely to have any. Such a conduct would have argued such gross inattention to the honor of the country, and such perfidy towards the creditor, that it ought not to be attributed to them without the clearest proof of the fact. But no such proof is adduced. Even the story of the silver dollar is not proved; but, if it had, the circumstance of the total absence of the precious metals as a circulating medium at the time, affords so strong a presumption that specie was not intended, that something more than the bare production of a silver dollar at the Council board ought to have been shewn, in order to remove it; because, as the performance of such a contract would have been so wholly impracticable in the then situation of the country, it seems almost impossible that the terms could have been accepted; and, therefore, where the probability is so great that a contract for specie was refused, the appellee ought to have been able to shew,

not only that the silver dollar was produced, but that those terms were accepted, and that the contract was for specie. Instead of this, however, there is not the [166] slightest proof of the allegation, with regard to the silver dollar; and, therefore, it may be laid entirely out of the case. But there is another circumstance which has great weight, and affords a very strong inference that specie was not intended. It is this, that Beaumarchais, by the contract, agrees to allow £4 per cwt. for the tobacco; although it is stated, that it might have been bought for less than 20s. specie.

Now, how can this be accounted for upon any other ground than that the contract was for paper money? Would the supercargo have allowed £4 specie per cwt. for an article that he could have bought at less? The thing is impossible. These arguments are considerably strengthened by the circumstances which followed after the contract; such as the credit of the £1,300 at the nominal value, the certificate of the Governor to Defrancy, and the long acquiescence under the Solicitor's settlement, which all serve to explain the meaning of Chevallie, in the apprehension of all those concerned in the transaction. But, then, it is said that the circumstances entitled him to relief under § 5 of the act establishing the scale of depreciation, since he rejected a better offer, in specie, from the merchants; and, therefore, that he must have calculated on being paid in that medium. The only testimony on this point is the deposition of Picket, taken *ex parte*, and after a great lapse of time, when many of the circumstances might have been forgotten, or not distinctly recollected.

In this situation of things, his declarations ought to be very strong indeed, in order to outweigh the numerous circumstances leading to a belief that specie was not intended. But, instead of this, he does not profess to have been present when the contract was made, or to have known any thing about it. He only relates what passed between Chevallie and the merchants, who offered 4s. 6d. specie the livre, for a [167] part of the cargo only, to be paid in tobacco at 20s. per cwt. But does this prove that the whole cargo was not sold to government upon other terms? Certainly not; for he was not present at the contract with the State, and knew nothing about it. The price offered by the merchants forms no objection; for, as they were not known to Chevallie, he was not satisfied of their solidity, and, therefore, preferred a contract with the State, especially as he thereby got 6 per cent. interest, whereas he must have been content with five from individuals. There is, consequently, no ground for the scale adopted by the Court

of Chancery; and that of four for one is equally without foundation. For, it is not proved that the specie price of tobacco was 20s. per cwt.; the Auditor states it to have been less; and that position is fortified by the circumstances of the country. The scale of 4 for 1, therefore, which is bottomed on the notion that 20s. was the standard price of the article, cannot be sustained. Under every point of view, then, it appears to me, that the contract was for paper money, and that specie was not intended. The plain consequence is, that it was subjected to the scale which the Auditor applied, as there is nothing to distinguish it from contracts in general of the same period. My opinion, therefore, is, that the decree of the High Court of Chancery, is altogether erroneous, and that it ought to be reversed, and the bill and petition dismissed.

PENDLETON, President. I do not feel my passions in the least disturbed by the objection to the jurisdiction of the Judiciary over this case. It is an objection of right, which I can view *in the calm lights of mild philosophy.* Indeed, it cannot be supposed that any member of this Court is so fond of power as not to have cheerfully transferred this troublesome discussion to any person that would take it, if they could have done it with propriety; but we are as much bound [168] to support the legitimate powers of the Judiciary, as that that branch is not to invade what hath been assigned to the others. It was truly said by Mr. Hay, that the legislative acts were uncontrollable in all things within their *constitutional powers,* which powers are only restrained by our Bill of Rights and Constitution. That Constitution creates three branches of government, and declares that their powers shall be kept separate and distinct, and those of one not exercised by the others. We must consider, then, what are their distinct powers: The Legislature are to form rules for the conduct of the citizens, and to make regulations for the disposition of property; they hold the *sword* and the purse, to be used for the purpose of defending the society against foreign invasions or domestic insurrections; and, to come to the present purpose, it was to provide military stores and necessaries for the army. It is the duty of the Executive to see that all laws of a public nature are carried into execution; and to make contracts in cases of the present nature, directed by law, and which, when made, the society are bound to perform; but they cannot originate any claim upon the public. It is the province of the Judiciary to decide all questions which may arise upon the construction of laws or contracts, as well between the government and individuals as between citizen

and citizen. They can neither make a *law*, nor *contract*, but decide what the law is, upon any question before them; and if the Legislature shall declare the construction of a law formerly passed, although that declaration will operate as a law prospectively, the Judges are not bound to adopt that construction in prior cases, unless they approve of the sense declared: And this was the opinion in the case of *Turner* v. *Turner*, [1 Wash. 139.] Upon the same principle, if a contract is entered into in behalf of the government, pursuant to an existing law, and a contest shall arise about the meaning of the contract, it belongs to the Judiciary to decide what the contract was, and if the Legislature shall decide [169] that question, they invade the province of the Judiciary, contrary to the Constitution. But this is said, by one gentleman, to be an invasion of the State sovereignty and its attributes, and by another to be a prostration of the Legislature at the feet of the Judiciary. Sounding terms! but which would have been more properly used, when the Constitution was framing, in opposition to the creation of the three departments, than now, as objections to the exercise of the powers allotted to each. When the *Federal* Court decided that a State was suable in any Court,* besides the absurdity of applying the ordinary process to such a suit, the States were justly alarmed at the attack upon their sovereignty; which was surely invaded by calling them into a defence in any foreign Court. I, as a citizen of Virginia, participated in feeling the wound; but my reflections on the subject then produced this opinion, that although a State could not be thus called upon in a foreign Court, or in its own Courts, without its consent, yet the honor and justice of every State required that an independent tribunal should be appointed within itself, to decide upon all claims against the public, and not leave them to the decision of a popular assembly, improper from the nature of its existence, as well as from their numbers, to decide upon contracts made; that is, to say what they are, and whether they will perform them or not: And I feel a pleasure, indeed a pride, in discovering that the Legislature of my country had provided such a tribunal, by allowing an appeal from the Auditor of Public Accounts, an Executive officer, to the Judiciary, independent in the tenure and emoluments of office, and bound to decide according to the laws on which the contract was founded; for in that light I view the law giving the appeal,

[* *Chisholm* v. *State of Georgia*, 2 Dall. 419. See 11 Am. Const. U. S. and *Cohens* v. *State of Virginia*, 6 Wheat. 405; *Osborn* v. *U. S. Bank*, 9 Wheat.]

which establishes a general mode of bringing all claims against the public before that tribunal; and the general words of the law are fully sufficient for that purpose. After all, however, the Legislature have a check upon the decision; for the
[170] Court, when they have determined in favor of the claim, can only order the Auditor to issue warrants upon the Treasury, but the Legislature must provide a fund to answer those warrants, as the only means of giving the judgment effect. At the same time, I must be permitted to declare my opinion, that they would act dishonorably in withholding such funds, unless in cases of very glaring injustice to the State. The situation of England, in regard to this point, has been mentioned. The petition of right was the mode adopted there for referring such claims to their Judiciary; and although originally, in high prerogative times, it could not be proceeded upon until the King had underwritten, *Let justice be done*, yet that has long since been dispensed with, and the petition is taken up as an ordinary proceeding. That petition, and the *monstrans de droit*, subjects all the claims of individuals against the Crown, or the public, to legal decision: but the great case of the Bankers shews the effect of the controlling power of the Legislature; for after their claim was allowed, the Legislature refused to provide a fund until a compromise took place, by which the Bankers agreed to receive a moiety of their claim. Thus much upon a supposition that the Legislature had rejected the legal claim of the appellee under the contract in the present case; which I do not consider to have been the case. His petition to the Assembly states his great loss under the contract, and since he entered into it to serve the United States, and Virginia in particular, and that service was essential to the interest of both, he founds his claim upon the justice and generosity of the Legislature to compensate him for his loss by the event of the bargain. To such a claim, not a right fixed by the terms of the contract, the Legislature only could open the public purse. That body rejected it; and it is not for this Court to say whether they acted upon proper principles or not: for my position is, that all claims must originate with the Legislature, or they cannot be allowed by the Executive or Judiciary; but when, as in this case, the Execu-
[171] tive are authorized by law to make a contract, and they do make it accordingly, if any dispute arises upon that contract, it belongs to the Judiciary to decide upon it, and not to either of the other departments. Whether the Auditor acted prudently or not in rejecting the claim, because it had been decided upon by the Solicitor and Executive, no more

blame attaches upon him for his decision, than is attributable to an inferior Court, whose judgments are reversed by a superior tribunal. I consider the application to him as the legal mode of bringing the question before the Judiciary. The Solicitor's decision, which he thinks prohibited him from considering the claim, is referred to, and made a part of the record, and is to be examined as if it had been his own. Upon the whole, I am for over-ruling the objection to the jurisdiction. I proceed to consider the question upon the merits, which depends upon the written contract and the testimony of Mr. Picket. Upon the contract, the payment of the *money part* was to be paid in *Virginia currency*, which brings it expressly within the § 2d of the scaling act; and the only question is, whether the circumstances disclosed in the contract itself, or arising from the testimony of the witness, brings it within the § 5th of that act?

It is objected that Beaumarchais is a foreigner, not bound by the act of 1781. But foreigners coming here, and making contracts, have a right to sue in our Courts for a breach of such contracts, and are bound by all laws for regulating them. And here it may be necessary to consider what those prevailing circumstances are to relate to. In all former decisions they have been confined to the single point, whether the legal scale be such as met the ideas of the parties at the time of the contract? And I think very rightly. *Hill & Braxton* v. *Southerland* is no exception, since there was no contract for price. No scale had been fixed till the act of 1781; and when the Legislature were providing [172] one to operate upon contracts during the period of five years preceding, when the paper money had been in the progress of depreciation, and made, perhaps, the best general regulation which they could adopt, yet since, in those contracts, the parties might not be sensible of any depreciation at an early day, or of one different from the legal scale, this proviso justly meant to make the legal scale yield to the real contract of the parties. It is, therefore, to the scale that the proviso is to be applied; and not to circumstances tending to shew the motives of the parties for entering into the contract, or whether the bargain was a good or a bad one, either in prospect at the time, or in event; which would indeed be to overturn the provision in the second clause, and open a door for endless litigation: an extreme never intended by the Legislature, and not to be adopted by this Court. On the other hand, to admit of no circumstances to prove the idea of the parties, at the time, as to the state of the depreciation, would

be wholly to reject the proviso, which the Court are equally restrained from doing. The evidence of Mr. Picket, therefore, so far as it may relate to the motives which induced the agent of Mr. Beaumarchais to prefer the contract with the government to one with his company of merchants, have no influence upon the question; although I cannot help observing, without intending to reflect upon the witness, that his testimony conveys a strange idea for that preference. They would accept the offer of the government, as better than the other, unless the merchants would give more; and yet no person can doubt but that 4s. 6d. per livre, paid in tobacco at 20s. per hundred, was a better offer than 6s. per livre, paid in tobacco at £4 per cwt.; at which rate a considerable proportion of the debt was to be paid by the public. The deposition can only be regarded so far as it may relate to the ideas of the parties as to the real depreciation; as to which, it tends to shew that [173] their idea was, that the difference between specie and paper was four for one; that being the difference between the price contracted to be given for tobacco, and that to be allowed the merchants on a specie contract. The observation that Mr. Chevallie was a stranger, unacquainted with our laws and language, has no weight with me. Intrusted with the care of so large a mercantile concern, he was, no doubt, a man of understanding and experience in such business. He was attended, in the contract, by two interpreters, and had been before surrounded by a company of speculators; who best of any knew the real state of depreciation; and no doubt, in the course of their treaty, discovered to him what that state was. For when they offered, in their proposals, to furnish tobacco at 20s. per hundred, in paying for the goods, he would naturally enquire why they would sell tobacco at that price, when the country demanded for it £4 per hundred? and their answer must be as obvious, that the former was the specie price, and the latter the price in paper; which shews the difference to have been well understood. It is immaterial what were his motives to prefer a contract with the government; for it is sufficient that this difference in the price of tobacco conveyed to him an idea that the depreciation was four for one, and that he contracted under that idea. That such was the idea of the Executive also, is obvious from the same circumstance; if they were acquainted with the offer of the merchants, as no doubt they were, since Mr. Chevallie would naturally disclose it, in order to raise his demand upon the public; or perhaps they might fix the offer of the demand of four pounds per hundred, upon a well-known custom, as no

scale was then fixed, of making the usual price of tobacco at 20s. specie per hundred, compared with the current price in paper, the standard by which to regulate paper contracts. To one of these the Executive must have had recourse, when they settled the price to be allowed for tobacco at £4: which fixes the scale at four for one in the idea of both parties; and, in my opinion, that ought to be the scale by which that [174] contract ought to be adjusted. The Executive, in 1775, adjusted it at five for one, probably thinking themselves bound by the legal scale; but as that idea has been over-ruled by the opinion of this Court in several cases, the appellee has a right to have it corrected to four for one, unless he is barred by his acquiescence, and what has happened since.

It was not till 1785 that his agent discovered his demand was to be reduced by a scale of five for one. The agent, as was his duty, took a copy of the statement, and the Governor's testimonial, and, no doubt, transmitted them to France, for his principal's directions how he should conduct himself; which he, probably, did not receive till 1787. What those were, does not appear; but the agent here proceeded to receive warrants, from time to time, which he could not turn into specie without loss. Thus the matter continued till 1792, when that loss made part of the appellee's claim in his petition to the Assembly; at which time he disclosed his objection to the settlement, and insisted that it ought to be adjusted upon the footing of a specie contract. The Legislature directed some allowance to be made him on account of his loss by the warrants, but rejected his extensive claim. He renewed his application for the latter in 1793, but without success; and, in April, 1795, he applied to the Auditor, in order to bring the matter before the Judiciary; and, being refused, he filed his petition of appeal, in 1796, to the High Court of Chancery. During all this period, although he continued to receive payments that were offered him, yet he never gave a *release*, or did any *act* relinquishing his claim, to which he was entitled by the contract; and, therefore, although the Court is of opinion, in which I concur, that the contract was for paper, yet my judgment is, that we are not precluded from rectifying the mistake in the settlement which reduced the money to five, instead of four for one. It was objected, with a considerable degree of force, that, by his delay, he has deprived the [175] State of recourse to the United States, who ought to pay the demand; but this is not conclusive in my mind, for two reasons: First. That I suppose Congress will pay the money, because I think they ought, not only upon the general

principle adopted of the war having been a common concern, but that I believe many of the articles purchased were sent to the Continental army. Secondly. If they shall refuse, since the contract was made with the State government, and the delay has been occasioned by the mistake of our Executive in adjusting the claim under it, I think the State bound by honor and justice to pay the balance arising from a correction of that mistake, although they should not be reimbursed by the Union.

This objection had considerable weight in the decision of the cases of the *Commonwealth* v. *Banks*, and others; but there they had neglected to have their property valued, which they claimed to be allowed for, although laws had passed from time to time, directing such valuation to be made; the last of which declared that no such claim should be allowed, unless the valuations were made within a limited time. That this was the principal ground of decision will appear from another case, where the claim was allowed because the property had been valued, although there was some irregularity in the proceedings, not imputable to the claimant, which the Court of Equity supplied. My opinion, therefore, is, that the money demand ought to be reduced by a scale of four for one, and the tobacco balance corrected from 16s. to 20s. per cwt., in order to correspond with the scale. It only remains to consider the interest; which, I think, ought to be allowed from the date of the contract in 1778, to the 6th of January, 1785, and then to stop; since the agent then knew how the adjustment was made, and ought to have proceeded to his appeal at that time, if he meant to complain of it; but the interest ought to revive from the time of pronouncing the final decree, and be continued till payment.

[176] The Judges being thus all agreed that the decree of the Court below, as it stood, was erroneous, but equally divided in opinion whether the contract should be settled by a scale of four for one, instead of the statutory scale of five for one, a decree was entered, stating that by the unanimous opinion of the Court, the decree of the High Court of Chancery was reversed; and, on account of the division among the Judges, as to the scale, that no further decree could be made, as the case was not provided for by the act of Assembly.

May, 1803. At this term the Court desired it to be argued whether, under the act of Assembly relative to cases where the Court is divided in opinion, [May, 1779, c. 22, 10 Stat. Larg. 92,] the decree ought not to have been affirmed for the balance due according to the scale of four for one, agreeable

to the opinion of the two Judges, who thought that scale ought to have been adopted.

CALL and WICKHAM, for the appellee.

The former decree ought not to have been entered. 1st. Upon general principles. 2d. Upon the act of Assembly. With respect to the first: The Court ought never to reverse farther down than a majority of the sitting Judges concur the Court below erred; for that is all in which it can truly be said to contain error; since that cannot be deemed erroneous which a majority do not pronounce to be so. But that which is not erroneous ought to be affirmed. For the claim is separable in its nature; since the Court have only to say what remains after the deduction is made, according to the opinion of the two Judges who are for the lesser sum; which is all that the whole Court concur in reversing; when two think it ought not to be reversed as to the lesser sum. With respect to the second: The act plainly contemplates a partial as well as a general reversal. For the object of the Legislature was to prevent a suspension of the cause, whenever the Court should happen to be divided in opinion; and an adequate provision was intended. But this could not be, without [177] extending it to a division in both cases. For the difficulty of making a decree was as great, and the suspension as certain, in the case of a partial, as of a total division. Of course, if it is not within the letter, it is within the equity of the act; and the rule, in such cases, is to adopt the construction, which is agreeable to the equity of the statute. [*Eyson* v. *Studd*,] Plowd. 467. But it is within the letter of the act: for the words, *affirming in those cases where the voices shall be equal*, apply as well to a part as to the whole. It follows, therefore, that the former decree ought not to have been entered.

But, if so, the Court may still set it aside and enter the proper decree. Because, that entry was interlocutory, and the cause is still upon the docket.

NICHOLAS and HAY, contra.

The term having passed, the Court cannot now make any alteration in the decree. But if they could, this is not a case contemplated by the act; which relates to cases of a division upon the whole cause, and not upon a part only. Besides, the Chancellor and the two Judges who were for the lesser sum, did not concur; because he was for allowing the whole amount, and not the lesser sum only.

Cur. adv. vult.

Friday, May 10, 1803. PENDLETON, President, delivered the resolution of the Court, as follows:

The Court have revised the decree of November, 1801, and are unanimously of opinion: 1st. That, on the equal division of the Judges in the partial affirmance of the decree, it ought to have been affirmed as far as the two Judges thought it just, in like manner as if the division had been on a question of a total affirmance or reversal.

[178] 2. That the Court are not precluded from correcting the mistake in the former entry, since the record remains in Court, and the cause undecided. It would seem strange, indeed, that when we are constituted to correct the errors of other Courts, we should not have power to set right our own mistakes, in the course of proceedings in a cause yet depending.

The following decree is, therefore, to be entered:

The Court having revised and maturely considered their decree of the second day of November, 1801, which left the cause undecided, is of opinion that the said decree ought to be, as it is hereby set aside, and the following substituted as the final decree of the Court. The Court having maturely considered the transcript of the record, and the arguments of counsel, is of opinion, that in the contract stated in the proceedings to have been entered into between William Armstead, as agent for the Commonwealth, and Monsieur Peter Francis Chevallie, as agent for the said Caron Beaumarchais, the parties having stipulated for the payment in Virginia currency, such payment might be made in the paper money of the State then in circulation, and under the second section of the act of Assembly, passed in the year 1781, entitled "An act directing the mode of adjusting and settling the payment of certain debts and contracts," was subject to be reduced to specie by some scale, but that under the proviso in the 5th section of that act, the Court is at liberty to enquire into the circumstances tending to shew whether the legal scale, as of the period of the contract, accorded with the idea of the parties at the time, and to that enquiry alone ought the proof to be confined, and not to extend to circumstances relative to the motives of the parties for contracting, or whether the bargain was to produce gain or loss on either side, either in prospect or event, and, therefore, that the decree of the High Court of

[179] Chancery, rather making a new contract for the parties than pursuing their real contract, is founded upon wrong principles, and the quantum of the sum decreed erro-

neous. And the Court proceeding to consider what decree the said High Court of Chancery should have pronounced, were equally divided, two Judges being of opinion that the legal scale of five for one, by which the account was settled by the Executive, and according to which the said Caron Beaumarchais is paid his whole demand, was the proper scale; and, therefore, that the decree and order ought to be reversed, and the appeal from the Auditor dismissed; and two other Judges of opinion, that from the contract and other testimony in the cause, it is apparent that four for one was the scale, or relative value between paper money and specie, as contemplated and understood by both parties at the time of the contract, and therefore ought to be the rule of adjustment under the proviso in the scaling act before-mentioned, which would leave a balance of seven thousand seven hundred and twenty pounds fourteen shillings still due to the appellees of the money part of the contract; that the price of the balance due in tobacco ought consequently to be changed from sixteen shillings to twenty shillings per cwt., which will add to the said balance seven hundred and twenty pounds two shillings and eight pence; and that, upon the aggregate of the said balance, interest ought to be allowed at six per centum per annum from the first day of July, 1778, to the first day of January, 1785, (amounting to three thousand two hundred and ninety-one pounds, eighteen shillings and sixpence,) and then cease, as the said Caron Beaumarchais then knew of the adjustment, and did not complain of it at an earlier day; that the decree and order, therefore, ought to be affirmed as to so much, and be reversed for the residue. The voices of the Judges being thus equal, pursuant to the act of Assembly in that case made, it is decreed and ordered, that the decree and order of the said High Court of Chancery be affirmed, as to the sum of eleven thousand seven hundred and thirty-two pounds, fifteen shillings and two pence, part thereof, and be reversed as [180] to the residue; and that the appellees pay to the appellants, as the party substantially prevailing in this Court, their costs, expended in the prosecution of the appeal aforesaid here.