1784. the cellars are frequently overflowed, have sustained great loss of effects, and detriment to their health, occasioned by putrid exhalations from the same in the most sickly seasons, and the conduit being proved not large enough to carry off the redundant water, the nuisance is aggravated as the city increases, and the streets are regulated: And whereas it is just and reasonable that the said inhabitants should be relieved: For remedy whereof,

Street commissioners authorized to enlarge the arch.

SECT. VI. *Be it enacted by the authority aforesaid*, That the said street commissioners be, and they are hereby, authorized and empowered to enlarge the arch from Market, or High-street, where it may be requisite, to allow a free passage for the redundant water, in such manner as shall remedy the evil aforesaid effectually.

SECT. VII. *Provided always*, That the monies raised, or to be raised, for the purposes aforesaid, shall not exceed the sum of five thousand pounds.

Passed 30th March, 1784.—Recorded in Law Book No. II. page 298.

CHAPTER MLXXXIII.

An ACT *for opening the Land-Office, for granting and disposing of the unappropriated lands within this state.*

SECT. I. WHEREAS the estates of the late Proprietaries of Pennsylvania were, by a law, passed the twenty-seventh day of November, in the year one thousand seven hundred and seventy-nine, vested in this commonwealth: And whereas, by a subsequent law passed the ninth day of April, one thousand seven hundred and eighty-one, the Land-Office was opened, for the completing all such titles as had commenced before the tenth day of December, one thousand seven hundred and seventy-six, and inasmuch as it is just that all the citizens of this state, holding lands, should be placed on the same footing, with respect to their titles, and the legal demands of government, and the time being now come when it appears necessary, not only to increase the population of this state, but to enable government to draw every possible advantange from the estates so vested in them:

SECT. II. *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same*, That

Land-Office to be opened on the 1st of July, 1784.

the Land-Office shall be opened, for the lands already purchased from the Indians, on the first day of July next, at the rate of ten pounds for every hundred acres, with the usual fees of granting, surveying and patenting, excepting such tracts as shall be surveyed westward of the Allegheny mountain, which shall be three pounds ten shillings, and no more; and that the several officers of the Land-Office are hereby fully empowered and directed to do and perform every act and thing incident, or in any wise appertaining, to their said offices, with respect to receiving, filing and entering locations, granting warrants on the same, receiving the consideration, directing copies of warrants, or other rights, receiving returns, and issuing patents of confirmation, as heretofore, agreeable to the former customs and usages of the said offices.

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SECT. III. *And be it further enacted by the authority aforesaid,* That every applicant for lands shall produce to the Secretary of the Land-Office a particular description of the lands applied for, with a certificate from two Justices of the peace of the proper county, specifying whether the said lands be improved or not, and, if improved, how long since the said improvement was made, that interest may be charged accordingly.

Each applicant to produce a description.

SECT. IV. *And be it enacted by the authority aforesaid,* That the quantity of land granted to any one person shall not exceed four hundred acres, and that all grantees under this act, as well as all claimants of unpatented lands whatsoever, be, and they are hereby, confined to the same time with respect to patenting, as is limited and directed by the law of this state, entitled "An act for establishing a Land-Office, and for other purposes therein mentioned," and the law, entitled "An act to vest certain powers in the President of this state, together with the other officers therein named, and for other purposes therein mentioned."

Grant to one person shall not exceed 400 acres.

SECT. V. *And be it further enacted by the authority aforesaid,* That all persons possessed of old rights, unsatisfied warrants, or other grants from the late Proprietaries, be, and they are hereby confined, in locating the same, to the lands already purchased from the Indians; and in order to prevent disputes, touching the same, it is hereby enjoined on the commissioners appointed for making a further purchase, that they ascertain, in their negociations with the Indians, with the greatest possible precision, the line between the lands already purchased and those that shall be by them purchased. (z)

Old rights, &c. confined to former purchases.

[SECT. VI. *And be it further enacted by the authority aforesaid,* That when the Indians shall be satisfied for the unpurchased lands, within the limits of this state, the Supreme Executive Council shall give official information thereof to the Surveyor-General, who shall, thereupon, appoint district surveyors for laying out all such lands within the said purchase, as shall be found fit for the purpose of cultivation, into tracts of not more than five, nor less than two hundred, acres each, numbering the same on the general draught or plot of each district; and so soon as two hundred lots are surveyed, the said Surveyor-General, together with the Secretary and Receiver-General of the Land-Office, or their lawful deputies, by them respectively appointed, shall proceed to sell the same by public auction, at such place or places, and at such times, and subject to such regulations, as the Supreme Executive Council may direct. And upon the payment of the full consideration bid at such sales, in the certificates herein after mentioned, specie, or money of this state, together with all fees, in specie, of surveying and patenting, a title shall be granted in the usual manner and form, for the land so sold. But in case the vendee should desire further time, for the payment of a moiety of the said consideration, two years shall be allowed him, on his paying all fees, and giving bond for the remaining moiety due to the state, with lawful interest, in specie, or money of this state only, and upon this last payment his title shall be completed, before

Surveyor-General shall appoint district surveyors, who shall lay out lands.

(z) This section explained, *postea,* by an act of the 21st December, 1784. (*Note to former edition.*)

1784. which time the lands shall stand charged with, and be subject to said payment. *(a)*]

SECT. VII. And whereas the citizens of this state, as well as the late officers and soldiers of the same, have long laboured under manifold inconveniences, by reason of the many just debts due to them from the United states remaining unpaid, and inasmuch as it is the duty of the legislature of this state to see justice done to them:

Certificates receivable in payment.

SECT. VIII. *Be it therefore enacted by the authority aforesaid*, That the Receiver-General of the Land-Office be authorized and required to receive in payment, for all lands sold and granted, in pursuance of this act, as well in the old purchase, as in that which is about to be made (the lands which are appropriated for the redemption of depreciation certificates, and the donation lands, only excepted,) all certificates of depreciation granted to the officers and soldiers of the late Pennsylvania line, the certificates for money loaned to the United States by citizens of this state, or granted in the name of or for the use of such citizens, and such certificates as have been or may hereafter be granted to the officers and soldiers of the late Pennsylvania line, and all other depreciation certificates granted to officers and soldiers of this state, and all certificates for commutation and for arrearages of pay, and the certificates of the commissaries, quarter-masters and forage-masters; also certificates for debts due to the citizens of this state from the United States, or from this state, when liquidated by the proper officers of the continent, or of this state, respectively, with all the interest due on the same at the day of payment; all such certificates which remain unliquidated to be reduced to specie value, agreeably to the continental scale of depreciation, by the commissioner of loans, or by some continental officer, or an officer to be for that purpose appointed, before they are offered in payment at the said Receiver-General's office, in order that the United States may be charged with the same; and that gold, silver, and the paper money of this state, shall be receivable at the said office from all applicants whatsoever, but that those applicants, who are not citizens of this state, shall be restrained in their payments to specie and Pennsylvania money alone: *Provided always*,

Exception.

That no certificate be received from any person, who was not at the time of issuing such certificate a citizen of this state, and that no certificate be received that hath been alienated, transferred, or sold by any person, not a citizen of this state, to a citizen of this state. And the Receiver-General is hereby enjoined and required, in all cases of doubt, to make strict enquiry touching the right of citizenship in the parties applying, either by the oath of the party (which he is hereby empowered to administer,) or otherwise, as to him shall seem meet.

Receiver-General shall account with Comptroller-General.

SECT. IX. *And be it further enacted by the authority aforesaid*, That the Receiver-General shall, at the time of settling his accounts in the Comptroller-General's office, render and pay over all certifi-

(a) The sale by auction, and the allowance of credit for the purchase money, were prohibited by an act of the 21st of day December, 1784. *(Note to former edition.)*

cates by him received, unto the Comptroller-General, and in his accounts which he shall render, for the aforesaid purpose, he shall distinguish between the several payments he may receive in specie, in Pennsylvania money, and in the certificates aforesaid, with the interest due on each certificate at the time he may receive the same, which time of receiving, and the interest due, shall be indorsed on the back of each certificate respectively; and the said Comptroller-General shall, and he is hereby authorized and directed to pass to the credit of the cash account of the said Receiver-General, all such certificates so produced, as it shall appear have been received by him as aforesaid, together with the interest thereon, to the time he may have received the same. And the said Receiver-General shall, once in every month, pay and deliver over to the Treasurer of this state all. such monies as shall be received by him, by virtue of this act. 1784. neral, and pay over all certificates.

SECT. X. *Provided always*, That the said surveyor or surveyors, so appointed, or to be appointed as aforesaid, shall have and receive, for their trouble and expense of surveying, paying chain-carriers, markers, returning the survey of each and every survey within the purchase to be made from the Indians, with a complete draught or plot of the same, three pounds ten shillings, to be paid by the purchaser in specie, by adding the said sum to the amount of sales of each and every tract. Proviso.

Passed 1st April, 1784.—Recorded in Law Book No. II. page 313. (b)

PART I.

(b) The importance of the following note must be an apology for its length. It is the editor's desire to lay before the public a connected view of the land titles of Pennsylvania from its first settlement to the present time; an attempt of equal difficulty and interest. That it will be free from errors, is perhaps rather to be wished than expected; as, from the lapse of time, some material documents, once known to have existed, can no longer be traced. Fortunately, however, much of what may be now considered as depending upon tradition, is more the subject of curiosity than of real utility. The public records furnish ample materials of all that is of moment at the present time.

The royal charter from Charles the Second to William Penn, bears date at Westminster, March 4th, 1681, in the thirty third year of the reign of that king. The extent and limits of the territory of Pennsylvania may be seen in the charter itself, in the Appendix to this work; and in the course of the note, its present boundaries, as settled with the adjoining states, or enlarged by purchase, will distinctly appear.

It were needless, at this time of day, to question the validity of royal charters. A principle had obtained among the European nations, that a new discovered country belonged to the nation whose people first discovered it. Eugene the 4th, and Alexander the 6th, successively granted to Portugal and Spain all the countries possessed by Infidels, which should be discovered by the industry of their subjects, and *subdued* by the force of their arms; and we are told, that no person, in the fifteeth century, doubted that the Pope, in the plenitude of his apostolic power, had a right to confer it; and all Christian princes were deterred from intruding into the countries those nations had discovered, or from interrupting the progress of their navigation and conquests. But William Penn, although clothed with powers as full and comprehensive as those possessed by the adventurers from Portugal and Spain, was influenced by a purer morality, and sounder policy. His religious principles did not permit him to wrest the soil of Pennsylvania by force from the people to whom God and nature gave it, nor to establish his title in blood; but under the shade of the lofty trees of the forest, his right was fixed by treaties with the natives, and sanctified, as it were, by incense smoking from the calumet of peace.

The settlement of the Swedes and Dutch on the lands near the river Delaware, and their subsequent subjection to the English government, previ-

1784. ous to the royal grant to William Penn, are the subjects of general history. The Indian deed for the purchase made by the Dutch, of the lands between Bombay hook and Cape Henlopen, is now the property, and in possession, of the state of *Delaware*. The purchases made by William Penn, and his successors, are of no small importance in the consideration of the land-history of Pennsylvania.

It was a principle adopted in all new settlements, that the laws of the mother country, at least so far as they are not inconsistent with the situation and circumstances of the infant colony, should have a binding force until altered by the authority of the new government. But that binding force arises only from the necessity which supposes that they receive those laws under which they lived before their settlements, into their new plantations, and agree to be governed by them for want of another law. But in the instance of the grant of Pennsylvania, it was incorporated in the charter "That the laws for regulating and governing property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, &c. shall be and continue the same, as they shall be for the time being, by the general course of the law of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates, or deputies, or the greater part of them." It is clear, therefore, that from the date of the charter, until acts of assembly were made to alter the same, lands within the province descended according to the course of the common law. Such is still the rule, as will be seen in the course of this work, in cases omitted by the intestate laws of Pennsylvania. See 4 Dallas, 64.—2 Binney, 279.

William Penn, being possessed of the absolute Proprietaryship of all the lands in the province, so far as the charter, independent of his Indian purchases, could vest such right, and the consequent right, (defined in the 17th section of the charter,) to parcel them out among purchasers, to be holden of himself and his heirs, "by such services, customs and rents, as to him or them should seem fit, and not immediately of the crown," sold large tracts of land to persons who were called *first purchasers*. These sales, it is believed, amounted to considerably more than three hundred thousand acres.—The price for which these lands were sold, was forty shillings sterling for one hundred acres, and one shilling, quit rent. These grants or sales have been since denominated *old rights*, and had peculiar privileges annexed to them, which will be immediately detailed. They had no location, but were to be surveyed any where in the province. There were three lists of original purchasers; but only the two first were filed in the Land-Office; and the authenticity of the third list, by reason of its not having been filed with the public records, was questioned before the revolution, by the proprietary officers.

In the conditions and concessions, agreed upon between the proprietor & first purchasers, (which may be seen in the appendix,) it was stipulated, "that as soon as they should arrive, a certain quantity of land, or ground plat should be laid out for a large town, or city, in the most convenient place upon the river for health and navigation, and that every purchaser should have, by lot, so much land therein, as should answer to the proportion which he had bought, or taken up upon rent.—That the proportion of lands that shall be laid out in the first great town or city, should be after the proportion of ten acres for every five hundred acres purchased, *if the place will allow it.*"

Accordingly, when the first colony sailed from England, in October, 1681, certain commissioners were appointed to execute the conditions on the part of William Penn; that is, to lay out the great town, and to proceed to survey the country lands. This commission remains in the office.

It is known that difficulties existed with respect to the construction of these concessions and conditions; and the place of the great town was not fixed by these commissioners. No place could be found which would bear a town of six or seven thousand acres, the proportion to the lands already purchased, if such had been the construction of the concessions and conditions; and if the idea of a city of such extent had not been absurd and impracticable. Tradition tells us, therefore, that the commissioners did nothing but explore the country till William Penn's arrival. What knowledge they had gained of it they laid before him; and after deliberation, and, it must now be presumed, upon consultation with the settlers, he laid out a town of about two square miles, or twelve hundred and eighty acres, nearly as the city of Philadelphia now stands. The whole construction of the great town was therefore altered. The city was divided into lots of different sizes, and a large tract adjoining it, was surveyed, and called

the Liberties: and out of the city and Liberties the first purchasers were to have their two per cent.

Not a single memorial can be found of this plan, nor any record of the alteration, or any written evidence of the consent of the inhabitants to the new arrangement; but a regular series of uniform facts, upon the books of the Land-Office, establish it beyond a doubt.

The river Schuylkill divided the Liberties into two parts; the lots beyond the Schuylkill were of a less value than those on the town side; and it is remarkable, that the Liberty lands, without a single exception, laid out on the town side of the Schuylkill, were in proportion of eight acres to five hundred acres, and the warrants are uniformly for 492 as of country land, and eight acres in the Northern Liberties, and in the same proportion for larger purchasers; and those whose liberty land lay beyond Schuylkill, in the western Liberties had their warrants for 490 acres of country land, and 10 acres of liberty land. It is therefore presumed by those, whose age and information give weight to the fact, that one fifth part taken from the holders in the Northern Liberties made up the city plot, and the superiority in value made up for the deficiency in quantity, and time has amply realized their foresight.

The city of Philadelphia was laid out, according to Proud's assertion in the end of the year 1682. But the most prevalent opinion is, that the plan was not completed until the month of June, 1683. As the ground chosen for the scite of the city was claimed by some Swedes, the proprietor gave them in exchange for it, a larger quantity of land at a small distance from it.

William Penn, in a letter to the society of free traders, dated August 16th, 1683, writes thus (see his select works:) "Philadelphia, the expectation of those that are concerned in this province, is *at last laid out* to the content, &c.—I say little of the town itself, because a plat from it will be shewn you by my agent, in which those who are purchasers of me will find their names and interests, &c.

"For your particular concern, I might entirely refer you to the letters of the president of the society; but this I will venture to say, your provincial settlement, both within and without the town, for situation and soil, are without exception:—Your city lot is a whole street, and one side of a street from river to river, containing near one hundred acres, not easily valued; *which is besides your four hundred acres in the city Liberties, part of your twenty thousand acres in the country, &c.*" 1784.

When the city plan was made out, two large lots were laid down for two purchasers of twenty thousand acres; others to suit the purchasers of ten thousand, five thousand, one thousand, five hundred and less, and numbered on the draft, and some mode was devised for drawing the names of the purchasers, with the number, of the size belonging to each.—Thus William Penn, junr. drew No. 1, and the Society of Free Traders drew No 5.

There were but three purchasers of twenty thousand acres, viz. The Society of Free Traders, William Penn, junr and Letitia Penn. The lots of the two latter were disputed, and after several trials by Jury, it is said they have obtained but 244 feet in breadth from Delaware front street to Schuylkill. The lots of the purchasers of ten thousand acres, bore no manner of proportion to the foregoing—They had six lots of 102 feet in breadth from second to third, and from third to fourth street, on *each front*, that is Delaware front, second and third streets, and Schuylkill front, second and third streets, not amounting to more than six acres—Nicholas Moore and John Marsh, two of these great purchasers, drew on Delaware front, No. 6 and 7.

Purchasers of five thousand acres had two lots, one on front street 102 feet in breadth, extending from front to second street, and one on high street, 132 feet in breadth, and extending half the depth, northward towards Mulberry street, or southward towards Chesnut street, or about 300 feet, being less than two acres.

Purchasers of 1000 acres had two lots, one of twenty, or twenty-one feet in breadth on front street, extending to second street, and the other on high street, believed to be 32 feet, by half the depth to the next street.

Purchasers of 500 acres had lots on the back streets, as all the streets were called, except front, or high streets, 49 1-2 feet in breadth, by half the depth to the next street, or thereabouts.—This is a general outline, as far as it can now be ascertained, of the regulations of the city lots. Holmes' printed map, in a very multilated state, from long use, is yet remaining in the Surveyor-General's office, but there is also there a correct copy on parchment. The names of the first purchasers, annexed to the map, which is the original used, and referred to by the commissioners of property, must soon disappear, if not copied. The editor has taken a correct copy, which may be

1784. given in the appendix, if it shall be deemed necessary or useful. In this place it is necessary to refer only to the following parts of the printed list, viz.

"The purchasers from one thousand acres and upwards, are placed in the fronts and high streets, and begin on Delaware front, at the south end, with No. 1, and so proceed with the front to the north end, to No 43."

Then follows the list of names who drew the 43 lots or numbers.

"The high street lots begin at No 44, and so proceed on both sides of the high street, upwards to the centre square."

Then follow the names of the persons who drew the lots, amounting to 39 lots.

"Here follow the purchasers under one thousand acres, and placed in the back streets of the front of Delaware, and begin with No. 5, on the southern side, and proceed by numbers, as in the draft."

Then follow the names of the persons who drew the lots, the number of lots, 192.

"Here follow the lots of Schuylkill front to the centre of the city, the purchasers from one thousand acres and upwards, are placed in the fronts and high streets, and begin on Schuylkill front at the south end with No. 1, and so proceed with the front to No. 43."

Here follow the names of the persons who drew the 43 lots, and it is to be remarked, that the first seven names on both lists are the same, viz. William Penn, junr. No. 1. William Lowther, No. 2. Lawrence Growdon, No 3. Philip Ford, No. 4. The society No. 5. Nicholas Moore, No. 6. and John Marsh, No, 7. And it is presumed these were the large lots appropriated to the purchasers of twenty and ten thousand acres.

"The high street lots begin at No. 44, and so proceed on both sides of that street to the centre square."

Then follow the names to the lots, in number 43, but some are blank, and have no names annexed.

"Here follow the purchasers under 1000 acres, placed in the back of the front on Schuylkill, and begin on the southern side with No. 1, and so proceed by the numbers as in the draught."

Then follow the names annexed to the lots, the lots being 149 in number, but several are blank, without names annexed, and several names in manuscript, where the printed list has been worn. The whole is thus headed, "Directions of reference in the city draught of Philadelphia, to the lots of the purchasers, &c. by way of numbers, being too small to insert their names, so that by the number, the lots may be known." It is to be assumed as a principle, of which the evidence is abundant and conclusive, That liberty lands were always considered as part of the quantity purchased, and were taken out of it when the warrant issued for the country land; but the city lots were considered as *appurtenant* to the purchase, but no part of it; and in the lessee of Hill, v. West, and lessee of Moore v West, in the supreme court, December term, 1804, it was held, that the right to city lots was so connected with the first purchases, that by a general deed, made in 1704, by *first purchasers* of 5000 acres, with the *appurtenances*, city lots, incident thereto, though previously surveyed, will pass together with the liberty-lands, unless a contrary intention can be shewn. MSS. Reports.

That this was the course of the Land-Office, is evident, from innumerable records; but it is ascertained only from such evidence, and from tradition; as it has been already stated, that no trace can now be found, of any written documents, to show when, and in what manner, these important transactions were settled between the proprietor and the purchasers.

In the minutes of the commissioners of property, Book H. page 22. upon application to them for a city lot, the following entry is to be found The *concessions* only relate to the *liberty-lands*, and the first purchasers had no right to city lots, from the first location thereof, but only from the proprietor's grant, *after his arrival here.*

Upon the second coming of William Penn, after governor Fletcher's time, viz. in the year 1701. The assembly, in an address to the proprietor, claimed certain privileges in the city, which they alleged, had been violated. The seventh and eighth articles are as follow,

"8th. That whereas the proprietary *formerly* gave the purchasers an expectation of a certain tract of land, which is since laid out, about two miles long, and one mile broad, whereon to build the town of *Philadelphia*, and that the same should be a *free gift*; which since has been clogged with divers rents, and reservations, contrary to the first design and grant, and to the great dissatisfaction of the inhabitants. We desire the governor to take it into consideration, and make them easy therein."

"9th. That the land lying back of that part of the town already built, remain for common, and that no leases be granted for the future to make inclo-

sures to the damage of the public, until such time as the respective owners shall be ready to build or improve thereon." Votes of assembly, vol. 1, part 1, page 145.

The proprietor, in his answer, ten days afterwards, says "you are under a mistake in fact; I have tied you to nothing in the allotment of the city, which the *first purchasers, then present*, did not readily seem to comply with, and I am sorry to find their names to such an address as that presented to you, who have got double lots by my *re-applotment* of the city, from fifty to one hundred and two feet front lots; and if they are willing to refund the fifty-two feet, I shall as you desire, be easy in the quit rents; although this matter *solely refers to the first purchasers*, and to me as proprietary."

"You are under a misapprehension, to think, that a fourth part of the land laid out for a city, belongs to any body but myself, it being reserved for such as *were not first purchasers*, who might want to build in future time; and when I reflect on the great abuse done me in my absence, by destroying of my timber and wood, and how the land is overrun with brush, to the injury and discredit of the town, it is small encouragement to grant your request; however, I am content that some land be laid out for the accommodation of the town, till inhabitants present to settle it, under regulations that shall be thought most conducing to the end desired; about which I shall consult with those persons chiefly concerned therein. Ibid. 148.

The assembly in their reply, tell the proprietor, that they had tenderly weighed and debated these two heads, and voted that they be still insisted upon; and further application to be made to the proprietary, humbly requesting him to ease the party concerned therein, ibid. 153. But nothing further appears respecting this controversy.

That the original concessions and conditions, made in England, related merely to the *first purchasers*, is evident from a variety of entries in the books of the commissioners of property, corrobated by general opinion, and uniform construction. See book G, page 73. "I. F. being none of the *first* 100 *purchasers*, had no right to liberty lands, according to the concessions," so in Book H, page 38.

The point has however undergone judicial investigation and decision, that the concessions are confined to the first purchasers, 2 Binney, 476, and in the case of Springetsbury Manor, in York county; judge *Washington* decided that the ninth section, which runs thus, "In every 100,000 acres, the governor and proprietary by lot reserveth ten to himself, which shall lie but in one place," was confined to the cases of the first purchasers. Cited, ib. 486. 1784.

This subject has become more matter of curiosity than utility. Yet it is necessary to observe, that under the commonwealth, the state paid great regard to those ancient claims of original purchasers to city lots; and provided a mode to ascertain those claims, and to grant patents for the lots, or an indemnification for them, in case they had been sold or appropriated; but limited the time in which such claims should be made, which is now expired, and the remaining lots appropriated by the state, for which see vol. 1, (chap. 931,) page 533, and the note thereto subjoined.—

Before we proceed to consider the mode of granting and settling lands in Pennsylvania, it will be useful to ascertain the Indian purchases, and to give a comprehensive and connected view of the deeds, and boundaries, as far as they can be ascertained. The Dutch and Swedes, as has been already observed, were peaceably settled on the Delaware, and after their subjection by the English, were under the government of New-York, and had acquired rights under that government. And several instances occur in the minute books, in which the commissioners of property confirmed by patent lands derived from grants and promises from *Sir Edmund Andross*, the governor of New-York.

One of the first acts of William Penn, was to naturalize all the settlers who had seated themselves previous to, and had remained after his arrival, and it appears to have been his earnest desire to extinguish every kind of title, or claim to the lands necessary for the accommodation of his colony, and to live on terms of friendship with the Indian natives.

The early Indian deeds are vague, and undefined as to their boundaries, and the stations cannot be precisely ascertained at this day; but these circumstances have long ceased to be of any importance; and the deed of September 17th, 1718, seems to define pretty clearly, the extent and limits of the lands acquired by the several purchases, to that period.

We shall begin with the deed of July 15th, 1682, procured at a treaty held with the Indians, by William Markham, the deputy governor, a short time previous to the first arrival of William Penn, from *Idquahon, Iannottowe, Idquoqueywon, Sahoppè*, for himself and *Okonichon, Merkekowon, Oreekton*, for

1784. *Nannamsey, Shaurwacighon, Swanpisse, Nahoosey, Tomackhickon. Weskekitt* and *Talawsis*, Indian Shackamakers, for the following lands, for themselves and their people. "Beginning at a certain White Oak, in the land now in the tenure of John Wood, and by him called the Gray-stones, over against the fall of Delaware river, and so from thence up the said river side to a corner marked Spruce-tree, with the letter P, standing by the Indian path that leads to an Indian town called Playwisky, and near the head of a creek called Towissinon, and from thence westward to the creek called Neshammonys creek, and along by the said Neshammonys creek, unto the river Delaware, *alias*, Makerisk-kitton; and so bounded by the said river to the said first mentioned White-Oak, in John Wood's land, and all those islands called or known by the several names of Matiniounsk island, Sapassineks island, and Oreskons island, lying or being in the said river Delaware, &c.

By an indorsement on this deed, dated August 1st, 1682, sundry Indian chiefs, not present at the execution of the deed in July, and who style themselves the right owners of the land called Sœpassineks, and the island of same name, ratify and approve it; signed, *Idquoqueywon, Swanpisse, Filerappomond, Essexamarthake, Nanneshessham, Pyserhay.* (Note. In a duplicate of this deed, the river Delaware is called Makerisk-kiskon.) These deeds are not recorded. This purchase was of inconsiderable extent.

The deed of June 23d, 1683, is in these words, "We *Essepenaike, Swanpees, Okettarickon,* and *Wessapoak,* for us, our heirs and assigns, do dispose of all our lands lying betwixt Pemmapecka and Neshemineh creeks, and all along upon Neshemineh creek, and backward of the same, and to run two days journey with an horse up into the country, as the said river doth go, to William Penn, proprietor and governor of the province of Pennsylvania, &c. his heirs and assigns forever, for the consideration of so much wampum, and so many guns, shoes, stockings, looking-glasses, blankets, and other goods, as he the said William Penn, hath pleased to give unto us, hereby for us, our heirs and assigns, renouncing all claims or demands of any thing in or for the premises for the future, from him, his heirs or assigns."

By another deed, of the same date, *Tamanen* and *Metamequan,* release to William Penn, the same territory, omitting the *two days journey.*

The extent of this purchase would be considerable, and greatly beyond the limits of the subsequent deed of September, 1718. Neither of these deeds is recorded.

June 25th, 1683. An Indian called *Wingebone,* conveys in the following terms, viz. "For me, my heirs and assigns, do freely grant and dispose of all my lands lying on the west side of the Schuylkill river, beginning from the first falls of the same all along upon the said river, and backward of the same; so far as my right goeth, to William Penn, &c. for so much wampum and other things, as he shall please to give us, &c.

July 14th, 1683. *Secane* and *Icquoqushan,* Indian Shackamakers and right owners of the lands lying between Manaiunk, alias Schuylkill, and Macopanackhan, alias Chester river, grant and sell all their right and title in the said lands, lying between the said rivers, beginning on the west side of Manaiunk, [ ] called Consohockan, [here an obliteration,] and from thence by a westerly line to the said river Macopanackhan.

And, on the same day, *Neneshickan, Malebore* alias *Pendanoughhah, Neshanocke,* [and *Osereereon,* but not signed by him,] Shackamakers and right owners of all the lands lying between Manaiunk, *alias* Schuylkill, and Pemmapecka creeks, grant all their right, title and interest in their lands betwixt Manaiunk and Pemmapeckha, so far as the hill called Consohockan on the said river Manaiunk, and from thence by a *northwest line* to the river of Pemmapecka. None of these deeds are recorded.

What was the true situation of the Conshohockan hill, cannot perhaps, be now ascertained. That it could not be very high up the Schuylkill is apparent; otherwise a *northwest* line from it, as mentioned in the deed last recited, would never strike Pennepack creek; nor would the line mentioned in the deed of July, 1685, hereafter cited, touch the Chester and Pennepack creeks.

Though the name is now lost, it is most probable that it referred to some of the highlands between Wissahickon and Norristown.

September 10th, 1683. Grant from *Keketappan* of *Opasiskunk,* for *his* half of all his land betwixt Susquehanna and Delaware, which lieth on the Susquehanna side, with a promise to sell at the next spring, on his return from hunting, his right to the other half of said lands. (This deed is not recorded.)

October 18th, 1683. *Machaloha,* calling himself owner of the lands from Delaware river to Chesapeak bay, and up to the falls of the Susquehanna,

conveys his right to William Penn, to said lands, to enjoy them, live upon and quietly. (This deed is signed in the presence of many Indians, whose names are partly eaten off by mice, as is also a small part of the deed, where the blank is.—It is not recorded.)

June 3d, 1684. Deed from *Manghougsin*, for all his land upon *Pahkehomu*, (*Perkeominc*, now *Perkioming*. This deed is not recorded.)

June 7th, 1684. *Richard Mettamicont*, calling himself owner of the land on both sides of Pemmapecka creek, on the river Delaware, releases to William Penn.—Not recorded.

July 30th 1685. Deed from *Shakhoppoh, Secare, Malibore, Tangoras*, Indian shackamakers, and right owners of the lands lying between Macopanackan, *alias* Upland, now called Chester creek, and the river or creek called Pemmapecka, now called Dublin creek, (Pennypack,) for all the land, beginning at the hill called Conshohockin on the river Manaiunk, alias Schuylkill, from thence extending a parallel line to the said Macopanackan, by a south-westerly course, and from the said Conshohockin hill to the aforesaid Pemmapecka, by the said parallel line northeasterly, and so up along the said Pemmapecka creek, as far as the creek extends, and so from thence northwesterly, back into the woods, to make up two full days journey, as far as a man can go in two days from the said station of the parallel line, at Pemmapecka; as also beginning at the said parallel at Macopanackan, and so from thence up said creek as far as it extends, and from thence northwesterly back into the woods to make up two full days journey as far as a man can go in two days from the said station of the said parallel line at the said Macopanackan. (This deed is not recorded.)

October 2d, 1685. Deed from *Pare, Packenah, Tareekhan, Sichais, Pitquassit, Towis, Esseponaick, Peskoy, Kekelappan, Eomus, Machaloha, Mesheconga, Wissapowey*, Indian kings, shackamakers, right owners of all the lands from Quing Quingus, called Duck creek, unto Upland, called Chester creek, all along by the west side of Delaware river, and so between the said creeks, backwards as far as a man could ride in two days with a horse, which they convey to William Penn. Recorded at Philadelphia, in book F. vol. 8, page 121.

In this place should follow a deed alleged to have existed, dated August 20th, 1686, for the walking purchase, and which occasioned much controversy, and dissatisfaction among the Indians; it is, however, referred to, included in, and confirmed by the deed of August, 1737. It is certain no such original deed was in existence at the treaty of Easton, in 1757. It will be further noticed in the proper place. 1784.

June 15th, 1692. King *Taminent*, king *Tangorus*, king *Swampes*, and king *Hickoqueon*, by deed, acknowledge satisfaction for all that tract of land belonging to *Taminent* and others, "which they parted with unto William Penn, &c. the said tract lying between Neshamina and Poquessing, upon the river Delaware, and extending backwards to the utmost bounds of the province." This deed is not recorded.

These limits on the Delaware, are precisely defined. The Poquessing, a name still retained, (as is Neshaminey,) is the original boundary between the counties of Philadelphia and Bucks, as ascertained in April, 1685: And tradition informs us, that near the lower side of the Poquessing, on the Delaware, on an elevated piece of ground, the city of Philadelphia was first intended to be built.

January 13th, 1796. Thomas Dongan, afterwards earl of Limerick, in the kingdom of Ireland, late governor of New York, by deed, conveys to William Penn, all that tract of land lying on both sides of the river Susquehanna, and the lakes adjacent, in or near the province of Pennsylvania, in consideration of one hundred pounds sterling,—Beginning at the mountains, or head of the said river, and running as far as, and into the bay of Chesapeak, which the said Thomas lately purchased of, or had given him by the Susquehanna Indians, with warranty from the Sasquehanna Indians.

The Indian deed to Col. Dongan is not known now to exist, nor is there any trace of it in the public offices. It is known, however, that he was the agent of William Penn to make the purchase.

This deed was confirmed in 1700.—Yet we find the Conestogoe Indians complaining of it, at the treaty with Sir William Keith, in 1722, and alleging that William Penn, forty years before, got some person at New-York, to purchase the lands on Susquehanna from the Five Nations who pretended a right to them, having conquered the people formerly settled there; and when the Conestogoes understood it, they were sorry; and that William Penn took the parchment, and laid it upon the ground, saying to them, it should be common amongst them, viz. The English and the Indians, &c. The governor answered, "I am very glad to find that you remember so perfectly the wise and kind expressions of the great and good

1784. William Penn towards you; and I know that the purchase which he made of the lands on both sides of Susquehanna, is exactly true as you tell it, only I have heard further, that when he was so good to tell your people, that notwithstanding that purchase, the lands should still be in common between his people and them, you answered, that a very little land would serve you, and thereupon you fully confirmed his right, by your own consent and good will, &c."

The curious inquirer who wishes to be further informed of these transactions, now very unimportant, may consult the treaties of 1722 and 1727, in the council books

July 5th, 1697. The deed from the great Sachem *Taminy*, his brother and sons, is in these words,—"We *Taminy Sathimack* and *Weheeland*, my brother, and *Wehequeckhon*, *alias Andrew*, who is to be k ng after my death, *Yaqueckhon*, *alias Nicholas*, and *Quenamockquid*, *alias Charles*, my sons, for us, our heirs and successors, grant, &c. all the lands, woods, meadows, rivers, rivulets, mines, minerals and royalties whatsoever, situate, lying and being between the creek called Pemmopeck, and the creek called Neshaminy, extending in length from the river Delaware, so far as a horse can travel in two summer days, and to carry its breadth according as the several courses of the said two creeks will admit, and when the said creeks do so branch, that the main branches, or bodies thereof cannot be discovered, then the tract of land hereby granted, shall stretch forth upon a direct course, on each side, and so carry on the full breadth, to the extent of the length thereof.

Acknowledged in open court, at Philadelphia, 6th July, 1697. Recorded in the Rolls-Office, 7th of the 12th month, 1698, in book E 3, vol. 5, page 57, &c.

September 13th, 1700. *Widagh* and *Andaggy-junkquagh*, kings or sachemas of the Susquehanna Indians, and of the river under that name, and lands lying on both sides thereof. Deed to W. Penn for all the said river Susquehannagh, and all the islands therein, and all the lands situate, lying and being upon both sides of the said river, and *next adjoining to the same*, to the utmost confines of the lands *which are*, or *formerly were*, the right of the people or nation called the Susquehannagh Indians, or *by what name soever they were called*, as fully and amply as we or any of our ancestors, have, could, might or ought to have had, held or enjoyed, and also *confirm* the bargain and sale of the said lands, made unto *Col. Thomas Dongan*, now earl of Limerick, and formerly governor of New York, *whose deed of sale* to said governor Penn *we have seen*. Recorded in Book F. vol. 8, page 242.

The above is the deed referred to by Sir William Keith, at the treaty with the Conestogoes, in 1722. It is remarkable, that the Indian deed to Col. Dongan was not produced, and it seemed to have been conceded, that his purchase was from the Five Nations, who pretended right to the lands by conquest; and the words in italics appear to have been intended to embrace and confirm the title however derived. Nor did the purchase include any extent of land. It is true it is left indefinite; being for land on *both sides* of the river, and *next adjoining to the same;* but the great object of William Penn was to secure the river through the whole extent of the province; and although it was not designed for immediate settlement, the great foresight of the proprietor would not permit him to relinquish this important grant, which was to secure the whole of the Susquehanna, from the pretensions of the adjoining colonies, and at this time the charter bounds were not distinctly known, but, for a long time afterwards they were considered as extending at least to the *Owegy*, and including a considerable part of the river, now, unquestionably, known to be within the limits of New-York. No opportunity was therefore lost to bring this title to the view of the Indians. Accordingly, in articles of agreement between William Penn, and the Susquehanna, Shawona, Potowmack and Conestogoe Indians, dated April 23d, 1701. (Recorded in Book F, vol. 8, page 43.) Among other things they ratify and confirm governor Dongan's deed of January 1796, and the above deed of the Susquehanna Indians, of September, 1700.

And notwithstanding the limits defined in the deed of September 1718, which will shortly follow, we find Dongan's deed insisted on, and acquiesced in, at Susquehanna, in 1722; and, again, at a treaty held at Philadelphia, in July 1727, between governor Gordon, and the deputies of the Five Nations; in answer to the deputies, who said the governor had divers times sent for them and they had therefore come to know his pleasure, and made an offer to sell lands; the governor tells them, "that he is glad to see them, that he takes their visit very kindly at this time, but that they were misinformed when they supposed the governor had sent for them; that governor Penn had, by means of *Col. Dongan*, already bought of the *Five Nations*, the lands on Susquehanna; that the chiefs of the Five Nations, when

Sir William Keith was at Albany, had of themselves confirmed the former grant, and absolutely released all pretensions to these lands." The release here stated to have been made at Albany, in 1722, is however, not to be now found.

About this period the Indian purchases become more important, and the boundaries more certain and defined, and principles were established, and acquired the force of settled law, of deep interest to landholders; and which have been since uniformly recognized, and at this moment govern and control our judicial tribunals.—To live in peace and friendship with the natives, was a part of the benevolent system of the venerable and virtuous founder of Pennsylvania. To a people averse from warfare, from consciencious motives, every thing which would tend to provoke their warlike neighbours, and irritate them to lift the tomahawk, was most carefully to be avoided; and we find no common attention bestowed upon this momentous subject by the government. When the natives sold their lands, it was understood distinctly, that the white people should not settle or encroach upon their hunting grounds, and lands reserved by them; nor was a single attempt thus to settle, unattended by complaints and uneasiness. The Indians observed their treaties with fidelity, and the boundaries appear to have been always accurately understood by them.

On the 17th of September, 1718, there is a deed of release from sundry Delaware Indian chiefs, viz. *Sassoonah, Meetashechay, Ghettypeneeman, Pokehais, Ayamackan, Opekasset,* and *Pepawmamam,* for all the lands situate between the two rivers, Delaware and Susquehanna, from Duck-creek, to the mountains on this side *Lechay,* with an acknowledgment, that they *had seen and heard divers deeds of sale* read unto them, under the hands and seals of former kings and chiefs of the Delaware Indians, their ancestors and predecessors, who were owners of said lands, by which they had granted the said lands to William Penn, for which they were satisfied and content, which, for a further consideration of goods delivered them, they then confirmed.—This deed is recorded, May 13th, 1728, in Book A. vol. 6, page 59.

It is therefore to be observed, that the undefined limits of all the preceding deeds, westward, *two days journey* with a horse, &c. which would have extended far beyond the Lehigh hills, are here restricted to those hills, which so far as related to the purchases from the Delawares, were the boundaries of the purchased lands.

The settlers, notwithstanding, encroached on the Indian lands beyond this boundary, which occasioned great anxiety and uneasiness among the Delawares. The complaints of the aged *Sassoonan,* were eloquent and pathetic. Violence had ensued, and blood had flowed. Preparations had been made, and alliances were forming for war; but by prudence and skill, the danger was turned aside. 1784.

At the treaty at Philadelphia, in 1728, *Sassoonan,* addressing himself to Mr. James Logan, the proprietary secretary, and principal commissioner for land affairs, said "That he was grown old, and was troubled to see the christians settle on lands that the *Indians* had never been paid for; they had settled on his lands, for which he had never received any thing; that he was now an old man, and must soon die; that his children may wonder to see all their father's lands gone from them without his receiving any thing for them; that the christians made their settlements very near them, *and they would have no place of their own left to live on;* that this might occasion a difference between their children hereafter, and he would willingly prevent any misunderstanding that might happen."

Mr. Logan, with the leave of the governor, answered, "That he was no otherwise concerned in the lands of the province, than as he was entrusted with other commissioners, by the proprietor, to manage his affairs of property in his absence; that William Penn *had made it a rule,* never to suffer any lands to be settled by his people, *till they were first purchased of the Indians; that his commissioners had followed the same rule,* and how little reason there was for any complaint against him or the commissioners, he would make appear. He then proceeded to relate to them the circumstances connected with the release of 1718, for the lands from *Duck Creek, to near the forks of Delaware,* and that the Indians were then entirely satisfied with it; and the instrument of release was then read to them.

Sassoonan and *Opekasset,* both acknowledged this deed to be true, and that they had been paid for all the lands therein mentioned; but *Sassoonan* said, the lands beyond these bounds had never been paid for; *that these reached no farther than a few miles beyond Oley, but that their lands on Tulpyhockin, were seated* by the christians.

Mr. Logan answered, that he understood, at the time that deed was drawn, and ever since, that the *Lechay* hills or mountains, stretched away from a little below *Lechay,* or the forks of Delaware,

1784. to those hills on Susquehanna, that lie about ten miles above *Pexton*; Mr. Farmer said those hills passed from *Lechay*, a few miles above *Oley*, and reached no further, and that *Tulpyhockin* lands lay beyond them.

Whether, continued Mr. Logan, those lands of *Tulpyhockin* were within or without the bounds mentioned in the deed, he well knew that the Indians some few years since, were seated on them, and that he, with the other commissioners, would never consent that any settlement should be made on lands where the Indians were seated; that these lands were settled wholly against their minds, and even without their knowledge; but he desired of the Indians, that though these people had seated themselves on the *Tulpyhockin* lands without the commissioners leave or consent, yet that they would not offer them any violence, or injure them, but wait till such time as that the matter could be adjusted."

In this the Indians acquiesced, and having waited some time without receiving any satisfaction for their land, and the encroachments still increasing, they renewed their complaints. The French at Montreal were likewise endeavouring to gain them over to their interest, and it was seen both by the assembly and governor, that it was but just and reasonable, and that it concerned the peace of the country, that the Indians should be made easy respecting their lands, and their complaints removed. This state of affairs gave rise to the treaty of 1732, shortly after the arrival of Thomas Penn, who was present at it. See votes of assembly, vol. 3, page 158.

Previous, however to this treaty, there appears to have been a release, but not recorded, from sundry Indians, for all the land on both sides of the Brandywine Creek, from the mouth thereof, where it enters the river Delaware, up to a certain rock in the said creek, near the upper line of Abraham Marshal's land. It is unimportant to inquire at what point this purchase ended. It could have been intended merely to extinguish some claims, probably not well founded; and the same land was included in the release of 1718. This release is dated, May 31st, 1726.

September 7th, 1732, *Sassoonan, alias Allummapis*, sachem of the Schuylkill Indians, *Elalapis, Ohopamen, Pesquetomen, Mayemoe, Partridge, Tepakouset*, alias *Joe*, grant all those tracts of land or lands, lying on or near the river Schuylkill, or any of the branches, streams, fountains or springs thereof, eastward or westward, and all the lands lying in or near any swamps, marshes, fens or meadows, the waters or streams of which flow into, or towards the river Schuylkill, situate, lying and being between those hills, called Lechay hills, and those called Kekachtanemin hills, which cross the said river Schuylkill, about thirty miles above the said Lechay hills, and all land whatsoever lying within the said bounds, and between the branches of Delaware river on the eastern side of the said land, and the branches or streams running into the river Susquehanna on the western side of the said land. That is to say, all those lands situate, lying and being on the said river Schuylkill, and the branches thereof, between the mountains called Lechay to the south, and the hills or mountains called Kekachtanemin on the north, and between the branches of the Delaware river on the east, and the waters falling into the Susquehanna river on the west.

Ratified by *Lingahonoa*, a Schuylkill Indian, who was not present at signing the foregoing deed, 12th July, 1742.

Confirmed by deed of release, 20th of August, 1733, which is in fact a release for the consideration of said lands, received by them. This release is also confirmed by *Lingahonoa*, 12th July, 1742, acknowledging that he had received his portion of the consideration.

These deeds and releases have never been recorded.

The lands at Tulpehocken were quieted by this deed; but as it embraced none of the lands on the Delaware, or branches leading into it, the discontent of the Indians still continued with regard to the settlements at the Minissinks, near forty miles above the Lechay hills, which was the northern boundary, according to the deed of 1718. Although considerable obscurity rests upon the deed of 1686, yet presuming its existence, the purchase had never been *walked out*. And if any reliance can be placed in the authenticity of a letter from James Logan, dated 20th November, 1727, and printed at *London* in the year 1759, and said to have been compared with the original then in being, any claim under the deed of 1686, would appear to have been abandoned. The letter is in these words, "Friend Thomas Watson, this morning I wrote to thee by *Joe Taylor*, concerning warrants that may be offered thee to be laid out on the *Minissink* lands, and was then of opinion, that the bearer hereof, *Joseph Wheeler*, proposed to lay his there. Having since seen him, he tells me he has no such thought, but would have it laid three or four miles above *Durham*, on a spot of pret-

ty good land there amongst the hills, and I think, at some distance from the river, proposing, as he says, to live there himself with his kinsman, who was here with him; pray take the first opportunity to mention it to *I. Langhorne*, for if he has no considerable objection to it, (that is, if he has laid no right on it,) I cannot see that we should make any other than *that it is not purchased of the Indians*, which is so material an one, that without their previous engagement to part with it very reasonably, *it cannot be surveyed there*. But of this, they themselves, I mean *Jos. Wheeler*, &c. propose to take care. This is what offers on this head, from thy loving friend, *James Logan*." The forks of Delaware were notwithstanding, settled; and to this, among other causes, was attributed by the writers of the day, the alienation of the Delawares and the Shawanese, from the British interests.

After several ineffectual attempts to compose the clamours of the Delawares, it is said the proprietor complained of them to the Five Nations. In 1736, the deputies of the Five Nations arrived, and a treaty was held with them, at which *Conrad Weiser* was an important agent. The deed of 1736, is as follows:—

October 11th, 1736. Whereas the late proprietary of the province of Pennsylvania, William Penn, Esq. soon after his first arrival in the said province, took measures to have the river Susquehanna, with all the lands lying on both sides of the same, purchased for him and his heirs, of those Indians of the Five Nations inhabiting in the province of New-York, who claimed the property thereof, and accordingly did purchase them of Col. *Thomas Dungan*, formerly governor of New-York, and pay for the same; notwithstanding which, the Indians of the Five Nations aforesaid, have continued to claim a right in and to the said river and lands, nor have those claims been hitherto adjusted; whereupon the said sachems or chiefs, having, with all the others of the said nations, met the last summer at their great council, held in the country of the said Onondagoes, did resolve and conclude that a final period and conclusion should be put to all disputes that might possibly arise on that occasion, and having appointed the aforenamed sachems or chiefs, as plenipotentiaries of all those nations to repair to Philadelphia, in order to confirm the several treaties of peace which have hitherto been concluded between them, and the said province, and also to settle and adjust all demands and claims that have been heretofore made, or hereafter may be made, touching or concerning the aforesaid river Susquehanna, and the lands lying on both sides thereof; and the said sachems or chiefs of the Five Nations aforesaid, having for themselves, and on behalf of the said nations, renewed and ratified the treaties of friendship and peace subsisting between them and the said province, did afterwards proceed to treat and agree with the honourable the proprietaries thereof, about the said river and lands. Now know ye, &c.—— grant, &c. to John Penn, Thomas Penn, and Richard Penn, their heirs, successors and assigns, all the said river Susquehanna, with the lands lying on both sides thereof, to extend eastward as far as the heads of the branches or springs which run into the said Susquehanna, and all the lands lying on the west side of the said river, to the setting of the sun, and to extend from the mouth of the said river, northward, up the same to the hills or mountains called in the language of the said nations *Tayamentasachta*, and by the Delaware Indians, the Kekachtanamin hills Signed by 23 Indian chiefs of the *Onondago*, *Seneca*, *Oneida* and *Tuscarora* nations, recorded in Book C, vol. 1, page 277, May 7th, 1741. 1784.

What is remarkable at this period, is, that the Indian chiefs on their return, staid several days with *Conrad Weiser*, at *Tulpehocken*, and there executed the following deed, dated October 25th, 1736, which is proved and recorded in Book C, vol. 2, page 350, May 22d, 1741.

We the chiefs of the Six Nations of Indians, the *Onondagoes*, *Isanundowans* or *Sennekas*, *Cayoogoes*, *Oneydas*, *Tuscaroroes*, (in behalf also of the *Canyingoes*, or *Mohacks*,) who have lately, at Philadelphia, by our deed in writing, dated the 11th day of this instant, October, released to John Penn, Thomas Penn, and Richard Penn, proprietors of Pennsylvania, and to their heirs and successors, all our right, claim and pretensions, to all the lands on both sides of the river Susquehanna, from the mouth thereof as far northward, or up the said river as that ridge of hills called the *Tyoninhasachta*, or endless mountains, westward to the setting of the sun, and eastward to the farthest springs of the waters running into the said river, do hereby further declare, that our true intent and meaning by the said writing, was and is to release, and we do hereby more expressly release to the said proprietors, &c. all the lands lying within the bounds and limits of the government of Pennsylvania, beginning

1784. eastward on the river Delaware, as far northward as the said ridge, or chain of endless mountains, as they cross the country of Pennsylvania, from the eastward to the west; and they further engage, never to sell any of their lands to any but the proprietors, or children of William Penn.

There is an indorsement of ratification on this deed, dated 9th of July, 1754, signed by nine Indians.

But notwithstanding this latter deed, it was earnestly contended by those who were unfriendly to the proprietary proceedings, and probably from an apprehension, or foresight of the disasters which ensued, that the right of the Five Nations lay only on the waters which run into the Susquehanna; and as they claimed no lands on the Delaware, they could by that instrument convey none. However this fact may have been, we find, about eight months afterwards, the proprietors procured a release from the Delawares, for at least part of these lands, or a confirmation of the supposed deed of 1686, or *the walking purchase*. This singular release is in the following words.

August 25th, 1737. We *Teshakomen*, alias *Tishekunk*, and *Nootamis* alias *Nutimus* two of the sachemas, or chiefs of the Delaware Indians, having almost three years ago, at Durham, begun a treaty with our honourable brethren John and Thomas Penn, and from thence another meeting was appointed to be at Pennsbury the next Spring following, to which we repaired, with *Lappawinzoe*, and several others of the Delaware Indians, at which treaty several deeds were produced, and shewed to us by our said brethren, concerning several tracts of land, which our forefathers had more than fifty years ago, bargained and sold unto our good friend and brother William Penn, the father of the said John and Thomas Penn, and in particular one deed from *Maykeerickkisho*, *Sayhoppy* and *Taughhaughsey*, the chiefs or kings of the northern Indians on Delaware, who for, &c. did grant, &c. all those lands lying and being in the province of Pennsylvania, beginning upon a line formerly laid out from a corner spruce tree by the river Delaware, (Makeerikkirton,) and from thence running along the ledge or foot of the mountains, west-north-west to a corner white oak, marked with the letter P, standing by the Indian path that leadeth to an Indian town called Playwickey, and from thence extending westward to Neshameny creek, from which said line, the said tract or tracts thereby granted doth extend itself back into the woods, *as far as a man can go in one day and an half*, and bounded on the westerly side with the creek called Neshamony, or the most westerly branch thereof, and from thence by a line to the utmost extent of the said one day and an half's journey, and from thence to the aforesaid river Delaware, and from thence down the several courses of the said river to the first mentioned spruce tree, &c.—But some of our old men being absent, we requested more time to consult with our people, which request being granted, we have, after more than two years, from the treaty at Pennsbury, now come to Philadelphia, together with our chief sachema *Monockykichan*, and several of our old men. They then acknowledge that they were satisfied that the above described tract was granted by the persons above mentioned, and agree to release to the proprietors all right to that tract, and desire it may be walked, travelled, or gone over by persons appointed for that purpose. (Signed) *Manockykichon, Lappawinzoe, Teshacomin, Nootamis*—And witnessed by twelve other Indians, in token of full and free consent, besides other witnesses. Recorded May 8th, 1741, in book G, vol. 1, page 282.

The walk was accordingly made; but it tended only to increase the dissatisfaction of the Indians.—In giving this summary of the causes and effects of the Indian treaties, it is not designed, nor is it calculated, to encroach on the province of history, which embraces a broader ground; but merely to connect them together and shew how intimately they depend on each other. Nor will it escape the observation of the reader, how materially the frequent recurrence to, and confirmation of, Col. Dongan's deed, bears upon the deed of the 11th of July, 1754, from the Indians to Connecticut claimants, whether that deed were real or fictitious.

This walk extended, it is said, about thirty miles beyond the Lehigh hills, over the Kittatinny mountain; and a draught of it was made by Surveyor-General *Eastburn*, including the best of the lands in the forks of Delaware, and the Minissinks. The walkers were expert, and the Indians who could not keep up with them, complained that they ran; and moreover it would appear that their expectation was that the walk was to be made up the river, by its courses. It is not intended to enter further into the controversy than to exhibit the general grounds which are said to have estranged the Delawares from our interest, and drove them into that of the French, who were always ready, in those times, to increase their dissatisfaction

with the English. *Nutimus* and others, who signed the release of 1737, were not willing to quit the lands, nor give quiet possession to the people who came to take up lands and settle in the forks. They remonstrated freely, and declared their resolution of maintaining possession by force of arms. In the year 1741, therefore, a message was sent to the Six Nations, who, it was well known, had great authority over the Delawares, to press them to come down and force the Delawares to quit the forks. They accordingly came in the summer of 1742, to the number of two hundred and thirty. Governor *Thomas*, in his message to the assembly of the 24th of July, in that year, among other things, tells them, "That their coming down was not only necessary for the present peace of the province, in regard to some *Indians* who had threatened to maintain by force their possession of lands which had been long ago purchased of them, and since conveyed by the proprietaries to some of our own inhabitants: but for its future security, likewise, in case of a rupture with the French, who will leave no methods unessayed to corrupt their fidelity, and to persuade them to turn their arms against us. Votes of assembly, vol. 3, page 481-2.

At this treaty, at Philadelphia, the governor informed the deputies of the conduct of their cousins, a branch of the Delawares, who gave the province some disturbance about the lands the proprietors purchased of them, and for which their ancestors had received a valuable consideration above fifty-five years ago, (alluding to the deed of 1686, confirmed by the deed of 1737.)—That they continued their former disturbances, and had the insolence to write letters to some of the magistrates of this government, wherein they had abused the worthy proprietaries, and treated them with the utmost rudeness and ill manners; that being loth, out of regard to the Six Nations, to punish the Delawares as they deserved, he had sent two messages to inform them the Six Nation deputies were expected here, and should be acquainted with their behaviour. That as the Six Nations, on all occasions, apply to this government to remove all white people that are settled on lands before they are purchased from them, and as the government use their endeavours to turn such people off, so now he expects from them that they will cause these *Indians* to remove from the lands in the forks of *Delaware*, and not give any further disturbance to the persons who are now in possession.

The deeds and letters were then read, and the draught exhibited.

Canassatego, in the name of the deputies, told the governor, "That they saw the Delawares had been an unruly people, and were altogether in the wrong; that they had concluded to remove them, and oblige them to go over the river *Delaware*, and quit all claim to any lands on this side for the future, since they had received pay for them, and it is gone through their guts long ago."—Then addressing himself to the *Delawares*, in a violent and singular strain of invective, he said, "They deserved to be taken by the hair of the head, and shaked severely, till they recovered their senses, and became sober; that he had seen with his eyes a deed signed by nine of their ancestors above fifty years ago for this very land, (1686,) and a release signed not many years since, (1737,) by some of themselves, and chiefs, yet living, (*Sassoonan* and *Nutimus* were present,) to the number of fifteen and upwards; "but how come you, continued he to the *Delawares*, to take upon you to sell lands at all? We conquered you; we made women of you; you know you are women, and can no more sell land than women; nor is it fit you should have the power of selling lands, since you would abuse it. This land that you claim is gone through your guts; you have been furnished with clothes, meat, and drink, by the goods paid you for it, and now you want it again like children as you are. But what makes you sell lands in the dark? Did you ever tell us that you had sold this land? Did we ever receive any part, even the value of a pipe shank, from you for it? You have told us a blind story, that you sent a messenger to us, to inform us of the sale, but he never came amongst us, nor we ever heard any thing about it. This is acting in the dark, and very different from the conduct our Six Nations observe in the sales of land. On such occasions they give public notice, and invite all the Indians of their united nations, and give them all a share of the present they receive for their lands. This is the behaviour of the wise united nations. But we find you are none of our blood; you act a dishonest part not only in this, but in other matters; your ears are ever open to slanderous reports about your brethren. For all these reasons *we charge you to remove instantly; we don't give you liberty to think about it.* You are women. Take the advice of a wise man, and remove instantly. You may return to the other side of Delaware where you came from; but we do not know whether, considering how you have demeaned yourselves, you will be permitted to

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1784. live there, or whether you have not swallowed that land down your throats, as well as the land on this side. We therefore assign you two places to go to, either to *Wyomen* or *Shamokin*. You may go to either of these places, and then we shall have you more under our eye, and shall see how you behave. *Don't deliberate, but remove away*, and take this belt of *wampum*." He then forbid them ever to intermeddle in land affairs, or ever hereafter pretend to sell any land, and commanded them, as he had something to transact with the *English*, immediately to depart the council.

The Delawares dared not disobey this peremptory command. They immediately left the council, and soon after removed from the forks; some, it is said, went to *Wyoming* and *Shamoken*, and some to the *Ohio*. Thus strangely was terminated the purchase of 1686—admitting the deed to have once existed. But even at this treaty with the Six Nations, it was not admitted that the proprietary right extended *beyond the Kittochtinny* hills; and the deputies complained, that they were not well used with respect to the land still unsold by them. "Your people, (they said,) daily settle on these lands, and spoil our hunting. We must insist on your removing them, *as you know they have no right to settle to the northward of the Kittochtinny hills*. In particular we renew our complaints against some people who are settled on *Juniata*, a branch of Susquehanna, and all along the banks of that river as far as *Mahaniay*, and desire they may forthwith be made to go off the land, for they do great damage to our cousins the Delawares."

With respect to the people settled at *Juniata*, the Governor replied, "that some magistrates were sent expressly to remove them, and he thought no persons would presume to stay after that." Here they interrupted the Governor, and said, "These persons who were sent do not do their duty; so far from removing the people, they made surveys for themselves, and they are in league with the trespassers; we desire more effectual methods may be used, and honester men employed," which the Governor promised should be done. But we shall have occasion again to recur to this point. It is necessary only to add, at this time, the strong expressions of the speaker to the Governor—"We have given the river Juniata for a hunting place to our cousins, the Delaware Indians, and our brethren the *Shawnese*, and we ourselves hunt there sometimes. We therefore desire you will immediately *by force remove all those that live on the river Juniata*." And what less could be demanded after the expulsion of the *Delawares* from the Forks?

Soon after this it appeared that the Shawnese were endeavouring to draw the Delawares from *Shamokin* to the *Ohio*, and that there were some heart-burnings between the Delawares and the Six Nations, and that the former only wanted a favourable opportunity to throw off the yoke, which they afterwards did, and to revenge the insults that had been offered to them at Philadelphia, in 1742. See votes of assembly, vol. 3, p. *555*.

We shall now proceed to the causes and circumstances which produced the treaty and purchase of 1749.

A meeting of deputies from each of the Six Nations, had been appointed, by the grand council at *Onondago*, to go to Philadelphia, on business of importance. The Senecas first arrived there. "One of the most considerable points," (said their speaker to the governor,) "which induced the council to send deputies at this time, was, that they had heard the white people had begun to settle on their side the blue mountains. And we the deputies of the *Senecas*, staying so long at *Wyomen*, had an opportunity of enquiring into the truth of this information, and to our surprise found the story confirmed, with this addition, that even this spring, since the governor's arrival, numbers of families were beginning to make settlements. As our boundaries are so well known, and so remarkably distinguished by a range of high mountains, we could not suppose this could be done by mistake, but either it must be done wickedly by bad people, without the knowledge of the governor, or that the new governor has brought some instructions from the king, or the proprietaries relating to this affair, whereby we are like to be much hurt. The governor will be pleased to tell us, whether he has brought any orders from the king or the proprietaries for these people to settle on our lands; and if not, we earnestly desire they may be made to remove instantly with all their effects, *to prevent the sad consequences which will otherwise ensue*."

The governor acknowledges, in answer, That the people's settling on *Juniata was contrary to the engagements of this government to the Indians*; that he had received no orders in favour of them; that they had no countenance from the government, and that no endeavours should be wanting on his part to bring the offenders to justice, and to prevent all future cause of complaint. Nothing else was done at this meeting, and the Senecas departed; but on their return

they met the other deputies; and after considerable deliberation, and notwithstanding the opposition of *Conrad Weiser*, they all came to Philadelphia, accompanied by some *Mohickans*, *Tutelas*, *Delawares*, and *Nanticokes*, in number two hundred and eighty, about the 14th of August, 1749. Canassatego was again the speaker. They renewed the complaints about the settlements on the unpurchased lands; *that by treaties all white people were to have been hindered from settling the lands not purchased of them; and if they did, the government engaged to remove them when discovered;* but since it might be attended with a great deal of trouble, and having observed the people's settlements, they were willing to give up the lands on the east side of Susquehanna, from the blue hills to where *Thomas Magee*, the Indian trader lived, and leave it to the government to assign the worth of them. *But as to the hunting grounds of their cousins the Nanticokes, and other Indians, living on the waters of Juniata, they must use more vigorous measures, and forcibly remove them.*

On consultation, and their agreement to extend the purchase, so as to carry its breadth to the Delaware, the following deed was executed on the 22d day of August, 1749.

We *Canasatago*, *Sataganachly*, *Kanalshyiacayon*, and *Canechwadeeron*, sachems or chiefs of the Indian nation called the *Onontagers*, *Cayanockea*, *Kanatsany-Agash Tuss*, *Caruchianachaqui*, sachems or chiefs of the Indian nation called the *Sinickers*. *Peter Ontachsax*, and *Christian Diaryhogon*, sachems or chiefs of the Indian nation called the *Mohocks*; *Saristagnoah*, *Watshatuhon* and *Anuchnaxqua*, sachems or chiefs of the Indian nation called the *Oneyders*. *Tawis Tawis*, *Kachnoaraasaha*, and *Takachquontas*, sachems or chiefs of the Indian nation called the *Cayiukers*. *Tyierox*, *Balichwanonach-shy*, sachems or chiefs of the Indian nation called the *Tuscorrorow*. *Iachnechdorus*, *Sagoguchiathon*, and *Cachnaora-katach-ke*, sachems or chiefs of the Indian nation called the *Shomokon* Indians. *Nutimus* and *Qualpaghach*, sachems or chiefs of the Indian nation called the Delawares; and *Bachsinosa*, sachem or chief of the Indian nation called the *Shawanes*, in consideration of £.500, grant, sell, &c. all that tract or parcel of land lying and being within the following limits and bounds, and thus described. Beginning at the hills or mountains called in the language of the Five Nation Indians *Tyanuntasachta*, or endless hills, and by the Delaware Indians *Kekactany* hills, on the east side of the river Susquehanna, being in the north west line or boundary of the tract of land formerly purchased by the said proprietaries from the said Indian nations, by their deed of the 11th of October 1736; and from thence running up the said river by the several courses thereof to the first or nearest mountain to the north side or mouth of the creek called in the language of the said Five Nation Indians, *Cantagwy*, and in the language of the Delaware Indians *Maghonioy*, and from thence extending by a direct or straight line to be run from the said mountain on the north side of the said creek to the main branch of Delaware river, at the north side of the mouth of the creek called *Lechawachsein*, and from thence to return across *Lechawachsein* creek aforesaid down the river Delaware by the several courses thereof to the Kekachtany hills aforesaid, and from thence by the range of said hills to the place of beginning, as more fully appears by a map annexed; and also all the parts of the rivers Susquehanna and Delaware from shore to shore which are opposite to said lands, and all the islands in said rivers, &c. 1784.

This deed is recorded, May 6th, 1752, in book H, vol. 2, p. 204.

This purchase is distinctly marked by natural boundaries, so as not to be mistaken. And at this treaty the engagement was renewed, that the white people should be removed from the Juniata. Proclamations were accordingly issued, but disregarded by the settlers on the unpurchased lands. In May 1750, *Richard Peters*, then secretary of the Land Office, with some magistrates, was sent to remove them. Of this circumstance further notice will be hereafter taken, in the course of the note. See votes of assembly, vol. 4th, p. 137. But these proceedings appear to have had little effect. Numbers were spirited up to stay, and others went and settled by them, so that in a few years the settlements in the *Indian* country were more numerous and farther extended than ever See governor Hamilton's message, *ibid.*—and also p. 509, 517, 528.

It is necessary merely to mention the treaty of Carlisle in 1753. *Canassatego*, and several of the sachems attached to the British interests, were dead; and the sachem at the head of the council of the Six Nations was known to be in the French interest, and the affections of that people appeared to be much shaken. Those who adhered to us were threatened by the arms of the French, and Indian affairs wore a most gloomy aspect. See votes of assembly, vol. 4, p. 152. At this critical time the Indian friends were unwilling to do any thing which would give room to sus-

1784. pect their fidelity. They remonstrated it is true; but they remonstrated without threats. They desired that our people would forbear settling on the Indian lands over the Alleghany hills; for so far had they now encroached, although none of the land on the west side of Susquehanna beyond the north, or Kittatiny mountain had been purchased. They *advised* the government to call back their people; that none should settle on the *Juniata* lands, till matters were settled between them and the French, "*lest damage should be done, and we should think ill of them.*" The council books, and votes of assembly shew the great anxiety of the government to strengthen the fidelity of the Six Nations, and of the Delaware and Ohio Indians; communications by means of agents were frequent, and the presents considerable; until the unfortunate purchase of 1754, contributed to kindle a flame which could be extinguished only by a deluge of blood. See votes of assembly, vol. 4, pages 336, 392—4—9.

The treaty of *Albany*, in 1754, with the Six Nations, was held by orders of the king. The lords of trade and plantations had recommended this, that all the provinces, if practicable, might be comprised in one general treaty, to be made in his majesty's name, as the practice of each province making a separate treaty for itself in its own name, was considered to be improper, and attended with great inconveniences to his majesty's service; votes of assembly, vol. 4, pages 279, 280, 286. See the whole proceedings in the minutes of council, Book M, page 339, to 386.

The Indian deed executed at Albany, is dated July 6th, 1754, and is as follows:—

Henry Peters, Abraham Peters, Blandt, Johannes Satfyhowano, Johannes Kanadakayon, Abraham Sastaghredohy, sachems or chiefs of the Mohock nation. *Aneeghnaxqua Taraghorus, Tohaghdaghquyserry, alias Kachneghdackon*, sachems or chiefs of the Oneydo nation. *Otsinughyada, alias Bunt*, in behalf of himself, and all the sachems and chiefs of the Onondago nation. *Scanuraty, Tannaghdorus, Tokaaiyon, Kaghradodon*, sachems or chiefs of the Cayuga nation. *Kahichdodon, alias, Groote Younge, Takeghsatu, Tiyonenkokaraw*, sachems or chiefs of the Seneca nation, *Suntrughwackon, Sagochsidodagon, Tohashuwangarus Orontakyon, alias John Nixon, Tistoaghton*, sachems or chiefs of the Tuscarora nation, in consideration of £. 400 lawful money of New-York, grant, &c. to *Thomas and Richard Penn*, "all the lands lying within the said province of Pennsylvania, bounded and limited as follows, namely, beginning at the Kittochtinny or Blue hills, on the west branch of Susquehanna river, and thence by the said, a mile above the mouth of a certain creek called *Kayarondinhagh*; thence *northwest and by west* as far as the said province of Pennsylvania extends *to its western lines or boundaries*; thence along the said western line to the south line or boundary of said province; thence by the said south line or boundary to the south side of the said Kittochtinny hills; thence by the south side of said hills, to the place of beginning: recorded in Book H, vol. 5, page 392, February 3d, 1755.

The history of this eventful period is still within the memory of many yet living. Many of the Indian tribes *seeing their lands gone*, joined the French, and in the following year fatally evinced their resentment at *Braddock's* field. The settlers were driven into the inferior, their improvements were laid waste, and desolation marked the path of the warriors.

Governor Morris, in his address to the assembly, November 3d, 1755, expressly tells them, "that it seemed clear from the different accounts he had received, that the French had gained to their interest the *Delaware and Shawanese Indians*, under the ensnaring pretence of *restoring them to their country*: votes of assembly, vol. 4, page 492. The assembly themselves, in a reply to governor *Denny*, in June 1757, say, "it is rendered beyond contradiction plain, that the cause of the present Indian incursions in this province, and the dreadful calamities, many of the inhabitants have suffered, have arisen, in great measure, from the exorbitant and unreasonable purchases *made, or supposed to be made* of the Indians, and the manner of making them.—So exorbitant, *that the natives complain they have not a country left to subsist in*;" ib. 718, 722, 728, 737, 738 The fact was indeed notorious in both hemispheres, although some palliation was attempted in the report made of the conferences at Carlisle in 1753. After the treaty of 1758, it was however fully admitted by *John Penn* himself, who was then governor, upon communicating a letter from general Gage, on the subject of the continued discontent of some of the western Indians; "I would willingly, he said to the assembly, take every measure in my power, not to remove the *just causes of their complaints of past injuries*, but to protect their persons and properties for the future." And general *Gage's* letter thus communicated, has this remarkable paragraph. "The encroach-

ments made upon the *Indian* lands, for which they could obtain no justice, with the daily threats of more invasions of their property, lost us the affections of the savages before, *and was the principal reason for their throwing themselves into the arms of the French for protection. From hence arose the hostilities they committed upon us in 1754 and 1755, and the war that followed.* The same causes will have the same effects. Votes of assembly, vol. 6, pages 7—8.

It further appears from *Conrad Weiser's* Journal of his conference with the *Indians* at *Aughwick*, that the dissatisfaction with the purchase of 1754, was general. They said they did not understand the points of the compass, and if the line was so run as to include the west branch of Susquehanna, they would never agree to it Whatever pretences there were for it, (for it was suggested that the Connecticut commissioners were endeavouring to treat for some lands claimed by them, and had been making surveys above *Shamoken*, and that this deed was intended to prevent the interference,) it is evident it left but a small part of the province to the natives, and that mountainous, and in a part, too, most open to the Connecticut claimants The lands where the *Shawanese* and *Ohio* Indians lived, and the hunting grounds of the *Delawares*, the *Nanticokes*, and the *Tuteloes*, were all included.

It will be evident also, that the course of the deed from *Kayarondinghagh*, or *Penns-Creek*, was greatly mistaken, and that the line *northwest* and by *west*, would not strike the *western* boundary of the province; but would most probably have crossed the west branch of Susquehanna, a few miles below the mouth of *Sinnemahoning*, and have intersected the northern boundary a little to the west of *Conewango* creek.

The serious consequences likely to ensue to the British interests, occasioned an application to the proprietors in *England*, from the government, through the lords commissioners of trade, and the proprietors agreed to limit the bounds of the purchase; and a commission was sent over, authorizing and directing a treaty to be held for that purpose, which commission is in the office of the secretary of the Land-Office.

Previous to this treaty, great exertions were made to bring about an accommodation with the *Delaware* and *Shawanese* Indians, which was at length accomplished. These transactions will be found in the council books, and in the votes of assembly, vol. 4, p. 563, 583, 671, 672, 681.

We come therefore to the deed of October 23d, 1758, executed at *Easton*, which is as follows. 1784.

We *Nichai Karaghiagdatie*, one of the chiefs and sachems of the Mohock nation, *Assarodumqua*, one of the sachems and chiefs of the Onondago nation, *Sagehsadon*, or *Tageshata*, one of the sachems or chiefs of the Seneca nation, *Thomas King*, *alias Saguhsonyont*, sachem and chief of the Oneyda nation, *Tokahoyon*, sachem and chief of the Cayuga nation, *Wishaquontagush*, sachem and chief of the Tuscarora nation, on behalf of ourselves and all the nations aforesaid, send greeting.—Whereas by a deed poll, bearing date at Albany, the 6th day of July, 1754, the sachems and chiefs of the said Six Nations, for, &c. (£.400,) did grant and confirm to Thomas and Richard Penn all the lands lying within the said province, &c. beginning at the Kittochtinny or blue hills on the west bank of Susquehanna river, and thence by the said river to a mile above the mouth of a certain creek called *Kaarondinhah* (since John Penn's creek,) thence north west and by west as far as the said province of Pennsylvania extended, to its western line or boundary, thence along the said western line to the south line or boundary of the said province, then by the said south line or boundary to the south side of the said Kittochtinny hill, thence by the south side of the said hill along the said hill to the place of beginning, &c. And whereas by an endorsement in writing on the back of the said deed, it was stipulated and agreed on the part of the said proprietaries, by their agent, that whenever the lands in the said deed, over the Apalachian or Alleghany hill, should be settled, the Indians who signed the deed were to receive a further sum, not exceeding the consideration-money in the said deed mentioned, &c. And whereas since the execution of said deed, it having been represented to the said proprietors, that notwithstanding the said purchase was fairly made, yet there were some among the Indians who were disgusted with the said purchase, and were desirous that all that part of the said purchase for which they were to receive a further consideration by the terms of the indorsement of the said deed should be reserved for them, they the said proprietors, Thomas Penn and Richard Penn, did authorize, appoint and empower Richard Peters and Conrad Weiser, esqrs. their agents and attornies, to release and surrender to the said Six Nations all the lands comprised within the herein before recited deed, lying to the northward and westward of the Alleghany hill, provided they the said Six Nations or their deputies at the same time, did fully and effectually agree, stipulate and settle the exact

1784. and certain bounds of the residue of the said lands included in the before mentioned purchase, which were still to remain to the said proprietors, after such surrender made, as by a letter of attorney duly executed by the said proprietors, dated 7th of November last past, may more fully appear. And whereas at a treaty held at Easton, on the 23d October, instant, the certain and exact bounds of such parts of the lands included in the before mentioned deed of purchase, which are and shall remain to the said proprietors, have been amicably and freely stipulated and settled between the aforesaid sachems and chiefs, and Richard Peters and Conrad Weiser, esqrs. &c. and are hereby declared to be as follows, that is to say, beginning at the Kittachrinny or blue hills on the west bank of Susquehanna river, and running thence up the said river, binding therewith, to a mile above the mouth of a creek called *Kaarondinbah*, (or John Penn's creek,) thence north west and by west to a creek called Buffaloe's creek, thence west to the east side of Alleghany or Apalachian hills, thence along the east side of said hills, binding therewith, to the south line or boundary of the said province, thence by the said south line or boundary to the south side of the Kittatinny hill, thence by the south side of the said hill to the place of beginning, in consideration of the said surrender, and five shillings, &c. And there is a covenant not to convey the residue to any persons else than the proprietors.

Recorded in book 1, vol. 4, p. 488, September 5th, 1768.

There is a rude map annexed to this deed, intended to represent the waters on the line from Buffaloe creek to Alleghany mountain, which line is represented as passing very near the junction of Spring creek with the Bald Eagle. It is probable the true line, relying on the correctness of Howell's map, would pass Belfont at the mouth of Logan's branch of Spring creek. So cautious, however, were the proprietors, at this period, of offending the Indians, by making surveys beyond the line, that the most positive instructions were given to the deputy surveyors on this head; and as the line was not run, nor its exact position known, the end of *Nittany* appears to have been assumed as a station, and a west line from thence presumed to be the purchase line. The error was on the safest side, although it is now known the end of Nittany is several miles within the deed of confirmation and surrender. In many instances, applications, where it was probable they called for lands near the line, were retained in the office, and endorsed "*quære*, if in the purchase." As controversies have existed, and may still exist, respecting this boundary, more cannot with propriety be said upon this point.

The last purchase of the proprietaries from the Indians, was made at Fort Stanwix, November 5th, 1768, and was as follows.

We *Tyanhasare*, alias *Abraham* sachem or chief of the Indian nation called the Mohocks; *Senughsis*—of the Oneydas; *Chenughiuta*—of the Onondagos; *Guastarax*—of the Senecas; *Sequarisera*—of the Tuscaroras; *Tagaaia*—of the Cayugas, in general council of the Six Nations at Fort Stanwix, assembled for the purpose of settling a general boundary line between the said Six Nations, and their confederates and dependent tribes, and his majesty's middle colonies, send greeting, &c.—In consideration of ten thousand dollars, they grant to Thomas Penn and Richard Penn, all that part of the province of Pennsylvania, not heretofore purchased of the Indians, within the said general boundary line, and beginning in the said boundary line, on the east side of the east branch of the river Susquehanna, at a place called *Owegy*, and running with the said boundary line, down the said branch on the east side thereof till it comes opposite the mouth of a creek called by the Indians *Awandac*, (*Tawandee,*) and across the river and up the said creek on the south side thereof, and along the range of hills called *Burnett's* hills by the English, and by the Indians , on the north side of them, to the heads of a creek which runs into the west branch of Susquehanna, which creek is by the Indians called *Tiadaghton*, and down the said creek on the south side thereof, to the said west branch of Susquehanna, then crossing the said river, and running up the same on the south side thereof, the several courses thereof to the fork of the same river which lies nearest to a place on the river Ohio, called the *Kittanning*, and from the said fork by a straight line to Kittanning aforesaid, and then down the said river Ohio by the several courses thereof to where the western bounds of the said province of Pennsylvania crosses the same river, and then with the said western bounds to the south boundary thereof, and with the south boundary aforesaid to the east side of the Alleghany hills, and with the said hills on the east side of them to the west line of a tract of land purchased by the said proprietors from the Six Nation Indians, and confirmed October 23d, 1758, and then with the northern bounds of that tract to the river Susquehanna, and crossing the river Susquehanna to the northern boundary line of another tract of land purchased of the Indians by deed, (August 22d, 1749,) and then with that northern boundary line to the river Delaware at the

north side of the mouth of a creek called Lechawachsein, then up the said river Delaware on the west side thereof to the intersection of it, by an east line to be drawn from Owegy aforesaid to the said river Delaware, and then with that east line to the beginning at Owegy aforesaid.

There is also in this deed a release of the Indian tract in Conestogoe manor, in Lancaster county.

Recorded at Philadelphia, in the Roll's Office in book of deeds, No. 3, p. 23, July 12th, 1781; and at Lancaster, in the recorder's office, in book U, p. 68, July 23d, 1781.

This deed incloses a part of Scull's map, with the boundaries marked thereon.

The line from the canoe place, near the head of the west branch of Susquehanna, to the Kittanning was run, and is marked on the maps; but what was the boundary on the northern side of the west branch was uncertain. To prevent controversy with the Indians, no lands were permitted to be surveyed to the west of Lycoming creek, which was considered the probable boundary on that side, although many applications were deposited for lands between Lycoming and Pine creek.

At the treaty at Fort Stanwix in October, 1784, the Pennsylvania commissioners were instructed to enquire what creek was meant by *Tiadaghton*, and also the Indian name of *Burnett's* hills, which was left blank in the deed of 1768 The Indians told them *Tiadaghton* is the same we call Pine creek, being the largest emptying into the west branch of Susquehanna. As to *Burnett's* hills, they called them the *Long Mountains*, and knew them by no other name.

At this treaty, a purchase was made of the residue of the Indian lands within the limits of Pennsylvania, and the deed signed by the chiefs of the Six Nations, is dated October 23d, 1784. The boundaries are thus described, "Beginning on the south side of the river Ohio, where the western boundary of the State of Pennsylvania crosses the said river, near *Shingo's* old town, at the mouth of Beaver creek, and thence by a due north line to the end of the forty-second and beginning of the forty-third degrees of north latitude, thence by a due east line separating the forty-second and forty-third degrees of north latitude, to the east side of the east branch of the river Susquehanna, thence by the bounds of the late purchase made at Fort Stanwix, the fifth day of November, *anno Domini* one thousand seven hundred and sixty-eight, as follows: "Down the said east branch of Susquehanna, on the east side thereof, till it comes opposite to the mouth of a creek called by the Indians, *Awandac*, and across the river, and up the said creek on the south side thereof, all along the range of hills called *Burnet's hills*, by the English, and by the Indians 1784.

, on the north side of them, to the head of a creek which runs into the west branch of *Susquehanna*, which creek is by the Indians called *Tyadaghton*, but by the Pennsylvanians, *Pine Creek*, and down the said creek on the south side thereof to the said west branch of Susquehanna, then crossing the said river, and running up the same on the south side thereof, the several courses thereof, to the fork of the same river, which lies nearest to a place on the river Ohio, called *Kittanning*, and from the fork by a straight line to *Kittanning* aforesaid, and then down the said river *Ohio*, by the several courses thereof to where the western bounds of the said State of Pennsylvania crosses the same river," at the place of beginning.

At a treaty held at Fort *M'Intosh*, with the *Wyandott* and *Delaware Indians*, by the same commissioners, January, 1785, a deed was executed by those nations, for the same lands, in the same words, with the same boundaries, which deed is dated January 21st, 1785. Both these deeds, with the treaties, or conferences, are printed at large, in the journals of the assembly, in the appendix to the journal of the session of February—April, 1785.

Thus, in a period of about one hundred and two years has the whole right of soil of the Indians, within the charter bounds of Pennsylvania, been extinguished. The legislature being apprehensive, that the directions given to the commissioners to ascertain the precise boundaries of the purchase of 1768, might produce some inconveniences, declared, by the third section of the act of December 21st, 1784, (post, chap 1111,) "That the said directions did not give, nor ought to be construed to give to the said commissioners, any authority to ascertain, definitively, the boundary lines aforesaid, and that the lines of the purchase so made, as aforesaid, in the year one thousand seven hundred and sixty-eight, striking the line of the west branch of Susquehanna, at the mouth of *Lycomick* or *Lycoming* creek, shall be the boundaries of the same purchase, to all legal intents and purposes, until the general assembly shall otherwise regulate and declare the same."

It is necessary to state, that on the 3d of October, 1783, an act was passed, entitled, an act to authorise the supreme executive council to draw on the state treasurer for a sum of money, for defraying the expense of purchasing of the Indians, lands on lake Erie, (chap. 1355.) By which act a sum of £.1200 was granted to purchase the Indian rights, in the lake Erie tract, bargained to be sold by the *United States* to *Pennsylvania*, and a further grant was added for the same pur-

1784. pose, by an act of the 28th of September, 1789, (chap. 1439.)

The Indian cession of the *Presque-Isle* lands, is dated January 9th, 1789, and is in these words.—"The signing chiefs do acknowledge the right of soil, and jurisdiction to, and over that tract of country bounded on the south by the north line of the State of Pennsylvania, on the east, by the west boundary of the State of *New York*, agreeable to the cession of that State and *Massachusetts* to the United States, and on the north by the margin of lake *Erie*, including *Presque Isle*; and all the bays and harbours along the margin of said lake *Erie*, from the west boundary of *Pennsylvania*, to where the west boundary of the State of *New York* may cross or intersect the south margin of the said lake *Erie*, to be vested in the said State of *Pennsylvania*, agreeable to an act of congress dated the 6th of June last, (1788.)

The said chiefs agree, that the said State of Pennsylvania shall and may, at any time they may think proper, survey, dispose of and settle all that part of the aforesaid country, lying and being west of a line running along the middle of the Conowago river, from its confluence with the Alleghany river into the *Chadochque* lake, thence along the middle of the said lake to the north end of the same, thence a meridian line from the north end of the said lake to the margin or shore of lake Erie.

By an act of the 13th of April, 1791, (chap. 1556,) the governor was authorized to complete the purchase from the *United States*, which, according to a communication from him to the legislature, was done in March, 1792; and the consideration money, amounting to 151,640 dollars and twenty-five cents, paid in continental certificates, of various descriptions.

The deed of confirmation from the United States is dated March 3d, 1792, which is recorded in the Roll's Office, in deed book, No. 31, p. 107, April 25, 1792.

A draught is annexed of the triangle, as containing two hundred and two thousand one hundred and eighty-seven acres.

These papers remain in the office of the secretary of the commonwealth.

Having thus given a connected view of the Indian purchases, and some notices of the discontent occasioned by encroachments on the Indian lands; it is material to state the acts of the government, legislative and executive, to restrain these illegal proceedings and restore harmony between the province and the Indian tribes; and finally to shew their operation upon a certain class of land titles.

The proprietors professed not to sell any lands beyond the boundaries of the purchases. If surveys were made over them without their consent, they were illegal and void. To have departed from this principle would have occasioned wars of a most fatal kind to the interests of the province; and would have been a violation of the most solemn engagements with the natives. The line of duty was therefore plain, and every moral and political obligation, commanded them to pursue it.

By an act passed in 1700, (chap. 20,) it was enacted, "That if any person, presume to buy any land of the natives, within the limits of this province and territories, without leave from the proprietaries thereof, every such bargain or purchase shall be void and of no effect. To this act there was a supplement, passed February 14th, 1729-30, (chap. 312.)

By an act passed February 3d, 1768, (chap. 570,) after the preamble in these words, "Whereas many disorderly people, in violation of his majesty's proclamation, have presumed to settle upon lands not yet purchased from the Indians, to their damage and great dissatisfaction, which may be attended with dangerous and fatal consequences to the peace and safety of this province," it was enacted, that if any person settled on the unpurchased lands, neglected or refused to remove from the same within thirty days after they were required so to do, by persons to be appointed for that purpose by the governor, or by his proclamation, or being so removed, should return to such settlement, or the settlement of any other person, with or without a family to remain and settle on such lands, or if any person, after such notice, resided and settled on such lands, every such person, so neglecting or refusing to remove, or returning to settle as aforesaid, or that should settle after the requisition or notice aforesaid, being legally convicted, *was to be punished with death without benefit of clergy.* But this act was not to extend to persons then, or thereafter settled on the main roads, or communications, leading through the province to *Fort Pitt*, with the approbation and permission of the commander in chief of his majesty's forces, &c. or in the neighbourhood of *Fort Pitt*, under such permission, or to a settlement made by *George Croghan*, deputy superintendant of Indian affairs, under Sir *William Johnson*, on the *Ohio*, above the said fort.

And if any person or persons, singly or in companies, presumed to enter on any such unpurchased lands, to make

surveys thereof, mark, or cut down trees thereon, and should be convicted thereof, was, or were, to be punished by a fine of fifty pounds, and three months imprisonment.

This act was limited to one year, and to the end of the next session of assembly. On the 17th of February, 1768, an act was passed, appropriating a sum of money to be applied to removing the discontent of the Indians, &c. (chap. 571.)

And on the 18th of February, 1769, an act was passed (chap. 587,) with a similar preamble, to punish by a fine of five hundred pounds, and twelve months' imprisonment, any person or persons, who, singly, or in companies, should presume to settle upon any lands within the boundaries of this province, not purchased of the Indians, or who should make, or cause any survey to be made of any part thereof, or mark or cut down, any trees thereon, with design to settle or appropriate the same to his own, or to the use of any other person, &c. (Galloway's edition, page 355.)

This act, being without limitation, expired only on the extinguishment of all the Indian titles.

The reason of passing laws so highly penal, will be found in the votes of the assembly, vol. 6th, p. 7—8. The intruders who had been removed, had returned to their settlements. By the communications from Sir *William Johnson* and General *Gage*, it appeared that there were apprehensions of an immediate rupture with the Indians; proclamations had proved to be ineffectual, and it was earnestly required that more effectual provisions should be made for that purpose, "before it should be too late to prevent the devastations, cruelties and effusion of blood attendant on an Indian war, which might be experienced soon, unless active measures were adopted, for the redress of the grievances of which the Indians complained."

Indeed, so desirous was the government to prevent any cause of uneasiness with the Indians, that in April 1760, an act was passed (chap. 456, vol. 1, p. 227,) inflicting the penalty of fifty pounds, and twelve months' imprisonment, to hunt, or follow wild beasts, &c. without the limits of the lands purchased of the Indians by the proprietaries.

We have already given some account of the complaint of the Indians against the encroachments on their lands at Tulpehocken, on the lands on the Juniata, over the Kittatinny hills and in the forks of Delaware, and the manner by which they were quieted. All the different conferences and treaties with the natives are fairly entered in the council books, to which access has been had to establish facts; this part of the note will therefore be closed with a brief view of such acts on the part of the executive as have been deemed material. 1784.

A proclamation was issued July 18th, 1749, in consequence of the complaint of the Senecas, previous to the purchase of 1749, commanding all persons seated on lands not purchased of the Indians, lying westward of the blue hills, to remove therefrom; reciting, among other things, "That these persons had neither license from the proprietaries, nor colour of title to said lands, and to permit them to stay there, *would not only be a breach of the public faith given to the Six Nations*, but may occasion dangerous quarrels with them, and be the cause of much bloodshed." Council books, M, p. 30.

At the treaty which ended in the purchase of 1749, the speaker *Canassatego*, mentions that he had seen the papers, (proclamations,) ordering the people to remove in consequence of the complaints made by the *Senecas*, and thanked the governor for taking notice of them, and taking measures to turn them off; but, said he, we are apprehensive that no better effects will follow these, than former ones of the same nature; if not, we must *insist on it, that as this is on the hunting ground of our cousins the Nanticokes and other Indians living on the waters of the Juniata, you use more vigorous measures, and forcibly remove them. We must not be deprived of our hunting country;* and indeed it will be an hurt to you, for all we kill goes to you, and you have the profit of all the skins. We therefore repeat our earnest intreaties, that they may all be immediately made to go away with their effects, that this country may be entirely left vacant, *ibid.* p. 36. This was promised to be done; and some kind of force became necessary; which will produce to view a transaction ever memorable in the land history of Pennsylvania.

On the 25th of May, 1750, governor *Hamilton* informed the council, that Mr. *Peters* the secretary, and Mr. *Weiser*, the Indian interpreter, were then in *Cumberland* county, in order to take proper measures, with the magistrates, to remove the settlers over the hills, who had presumed to stay there, notwithstanding his proclamation; and laid before them the minutes of a conference held at Mr. *Croghan's* in *Pennsborough* township, as well with Mr *Montour*, as with some *Shamokin* and *Cones-*

1784. *togoe* Indians. The Indians expressed themselves pleased, to see them on that occasion; and as the council at *Onondago* had this matter exceedingly at heart, they desired to accompany them; but, said they, notwithstanding the care of the governor, we are afraid that this may prove like many former attempts; the people will be put off now, and come next year again; and if so, the Six Nations will no longer bear it, *but do themselves justice.* Then follows the report of Mr. *Peters*, entered at large, and also printed in the votes of assembly, vol. 4, p. 137. By which it appears, that on the 22d of May they proceeded to a place on Big Juniata, about twenty-five miles from its mouth, where there were five cabins, or log houses, one possessed by *William White*, another by *George Cahoon*, the others by men of the names of *Hiddleston*, *Galloway*, and *Lycon*. These men, except *Lycon*, were convicted by the magistrates upon view, in pursuance of the act of February 14th, 1729-30, (chap. 312,) and the cabins were burnt. A number of cabins were also burnt at *Shearman's* creek, and Little *Juniata*. On the thirtieth of May, they proceeded into the Tuscarora path, or Path valley, and burnt eleven cabins; at Aughwick, they burnt the cabin of one *Charlton*, and another unfinished one, and three were burnt in the big cove. The settlers, who were numerous, were recognized to appear at the following court. The report is long, but interesting, and may be readily referred to in the printed journals. Every public document thus incontestibly proves the invalidity of settlements and surveys on the unpurchased territory. See minutes of council, Book, M, p. 58 to 71.

April 18th, 1752, commission and license to *Andrew Montour*, to settle and reside in any place he should judge convenient and central, and to preserve the lands from being settled by others, and warn all off who had presumed to go there; and to report the names of such as settled there, that they might be prosecuted. *Ibid.* 151.

The proceedings at *Albany* in 1754, have been already transiently mentioned. One of the great objects of that treaty was to remove the discontents, and strengthen and confirm the wavering fidelity of the Six Nations; and, as is expressed by the lords of trade, "at so critical a conjuncture, to put them upon their guard against any attempts which may be made to withdraw them from his majesty's interest; and that nothing may be wanting to convince the Indians of the sincerity of our intentions, you will do well to examine into the complaints they have made of being *defrauded of their lands*, to take all proper and legal methods to redress their complaints, and to gratify them by reasonable purchases, or in such other matter, as you shall find most proper and agreeable to them, for such lands as have been unwarrantably taken from them, or for such other as they may have a desire to dispose of." Ibid 341.

The proceedings of this treaty enter deeply into the provincial history of this country, and but a small part of it is applicable to the subject of this note. The editor cannot, however, avoid remarking, that here may be traced, in considerable detail, the artful measures of persons pretending claims under *Connecticut* to lands within the charter bounds of *Pennsylvania*, and their clandestine proceedings in obtaining a deed from certain Indians for the *Susquehanna* lands, after the sale to *Pennsylvania*, and a full view, exhibited by the proprietary commissioners to them, at their own request, of all the original deeds; the cause of infinite trouble and expense, the effects of which are yet painfully experienced. At this treaty, also, a plan of union among the colonies, was drawn up and adopted, to be laid before the respective colonies, on principles which have since more extensively and beneficially been carried into effect by the constitution of the *United States*.

Proclamations for the removal of certain settlers at *Cushietunk* on Delaware, Feb'y 20th, 1761, council books, S, p. 85—and September 16th, 1761, *ib.* 179—and June 2d, 1763, ib. 387.

The royal proclamation of 7th October, 1763, expressly prohibited any settlements on lands unpurchased from the Indians, and commanded such settlers forthwith to remove. Ib. p. 431.

Proclamation commanding settlers on unpurchased Indian lands immediately to evacuate and abandon them. Council books, T, p. 121. Dated September 23d, 1766.

On the 24th of February, 1768, a proclamation was issued by governor *John Penn*, which, after reciting the act of February 3d, 1768, (supra) proceeds thus. "In pursuance therefore, of the said act, I have thought proper, by the advice of the council, to issue this my proclamation, hereby giving notice to all and every such person and persons who are settled upon any lands within the boundaries of this province, not purchased of the Indians, by the proprietaries thereof, (except as in the said act is excepted,) to remove themselves and their families, off and from the said lands, on or before the first day of May next ensuing. And I do hereby strictly charge and command such person and persons, under the pains and penalties by the said act imposed, that they do not, on any pretence whatever, remain or continue on the said lands, longer than thirty days after the said first day of

May next." Council books, T, page 288.

The next matter to be considered, is, how far judicial decision has strengthened and supported the principles apparent in all the foregoing proceedings.

In *Plumsted's* lessee *v. Rudebagh, Westmoreland*, May 1795, before M'Kean, C. J. and Yeates, J. *MSS. Reports*. Plaintiff claimed under a special order of survey to *D. Franks*, on the 1st of April, 1769. Surveyed in June, 1769, and followed by patent, in Feb'y, 1787.

The defendant offered to prove, that his father, *Christopher Rudebagh*, settled on these lands in 1761, before the Indian purchase, in consequence of a military permit from colonel *Boquet*, which he alleged was lost by the casualty of fire; but that his uninterrupted possession until his death would be *presumptive* evidence thereof, and that he had made considerable improvements thereon. (Defendant had obtained a warrant for the land in December, 1784.)

This evidence was excepted to, and overruled.

By the Court.—How can the parol evidence affect the present question of right? In 1761, the soil belonged to the *Aborigines*. Neither the act of assembly, nor the proclamation of 1768, gave the settler before the Indian purchase any title to the lands. By the act it was made highly penal either to make other settlements on the Indian lands, or not to remove from those already made.

On the opening of the Land-Office, on the 3d of April, 1769, it was declared "That those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward, should have a preference"—What does this preference mean? Does it not suppose that an application should be made by such settlers, to the Land-Office, on 3d April, 1769, or in a reasonable time, afterwards, for this *favour*, in order to secure their possessions? Neither old *Rudebagh*, nor his son, applied for any supposed preference of these lands until December, 1784, above fifteen years after the commencement of the plaintiff's title; and this will not be pretended to be in due and convenient time. To introduce witnesses to prove these improvements would, in our idea, be irrelevant to the point of right, after such great negligence. Such a measure would make the titles of lands, which should be permanent and fixed, to depend on parol evidence, and open a wide door to perjury.—Verdict for plaintiff.

So, in the lessee, of *David Sherer* v. *Thomas M'Farland, Westmoreland*, May 1797, before *Yeates* and *Smith*, Justices, *MSS. Reports*. The plaintiff claimed under a warrant for 200 acres of land, including an improvement, on the waters of *Sewickly*, &c. dated 24th of June 1785, and a deed poll of the improvement from *John Loydick* to *William Mount*, dated 11th of January, 1775, and another deed from *Mount* to *Sherer*, dated 21st January, 1778, and he offered to prove, that one *Abraham Leasure* made a considerable improvement on these lands in 1768 and 1769, before the opening of the Land-Office, and that *John Loydick* derived title under him: This evidence was objected to. 1784.

By the Court. We are no enemies to *bona fide* improvements, restricted within rational limits; but these were never deemed to extend beyond the lands purchased from the Indians. Such a system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities.

Under the law of 3d of February, 1768, all persons were interdicted from settling on the Indian lands, under the highest forfeiture known in society; and by an act of 18th of February, 1769, persons making such settlements, or making surveys, or marking, or cutting down trees with design to settle, or appropriate such lands, incur a penalty of £.500, and twelve months' imprisonment. It cannot be possible, that such daring infringers of the laws, could gain any title by unauthorized acts of trespass, against the solemn declared will of the community?

It must be admitted, that the lords of the soil had the exclusive right of disposing their lands in their own mode. Immediately after the Indian treaty at *Fort Stanwix*, was closed on the 4th November, 1768, the people were publicly notified, that improvements on the newly purchased lands should give them no advantage whatever; and the same information was given on the opening of the Land-Office. It cannot therefore be doubted, but that to obtain a title to the lands lately sold by the natives, it was absolutely necessary to apply to the Land-Office in the usual and accustomed method.

Such have been the uniform decisions of courts of justice, in which we fully acquiesce. To establish a contrary doctrine, would introduce insecurity of property, and every species of mischief. The testimony offered is therefore overruled.

Defendant claimed under an application of 3d of April, 1769, a survey and patent. The plaintiff suffered a nonsuit.

1784. And, in *Drinker's* lessee, *v. Hunter*, Northumberland, October, 1796, before the same judges. (MSS. Reports.) The court after argument, declared that no settlement on, or improvement of lands out of the limits of the Indian purchases, after the law of 3d of February, 1768, gave any pretensions of pre-emption to the parties making them, or shadow of title, nor would the court suffer evidence of such settlements or improvements to go to the jury.

And in a still stronger case, at the same court, (MSS. Reports,) in the lessee of *Peter Weiser*, v. *Samuel Moody*, The plaintiff claimed under a patent dated 7th of July, 1755, issued to *Conrad Weiser*, his grandfather, in consideration of his services, as interpreter to the Six Indian Nations, and of £. 5. It recited a warrant dated 21st of January, 1755, (which was not shewn in evidence,) and a survey thereon of 305 acres, 36 perches, and allowance made on the 9th of June, 1755.

The warrant issued in consequence of the special directions of the late proprietaries, dated the same day. It was an order in favour of *Conrad Weiser and Richard Peters*, for 4000 acres, *in any part of the new purchase* lately made of the Indians; and the deputation from *Nicholas Scull*, the Surveyor-General, to *Samuel Weiser*, was to survey for his father, a tract on Susquehanna, a small distance above the tract lately confirmed to him. This tract lay two miles from the land in question.

Nothing appeared on the face of the survey, or any of the papers produced by the plaintiff, which could have denoted, that the lands in controversy lay out of the then Indian purchase, which was admitted to be the case.

The defendant claimed under an application dated 24th of May, 1769, after the treaty at *Fort Stanwix*, descriptive of the disputed grounds, and a survey made thereon, on the 23d of August, 1769.

The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for *Conrad Weiser*, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the patentee, when the lands came afterwards to be purchased of the Indians; and the proprietaries could not pass the title to a stranger. It might be compared to a person's selling lands without title, and afterwards obtaining a right thereto, where the vendor would hold in trust for the vendee.

The proprietaries enjoyed a grant from Charles II, to their ancestor *William Penn*; but they did not rely solely thereon. They bought the lands from the natives, and gave them valuable considerations therefor. Herein they evinced a strong sense of moral honesty, as well as sound extended policy. It cannot, therefore, be presumed that the proprietary officers knew the lands surveyed for *Conrad Weiser*, to be without the limits of their purchases. It would form an exception to their uniform established practice, and ought to be *clearly* shewn. The warrant in all probability, pursued the terms of the special order, and was for lands "in some part of the new purchase." The order to *Samuel Weiser*, to make the appropriation, called for lands a *small distance* from another tract, which was confessedly within the purchase. If other words were used in the warrant, it ought to be shewn; and its absence induces a presumption, that if produced, it would operate against the party. No mountains or waters are to be seen on the survey, from whence it might be inferred, that the lands designated thereby, were out of the Indian purchase. If the king is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by *allegatio falsi, sive suppressio veri*. The plaintiff suffered a nonsuit.

This principle is fully recognized in *Kyle's* lessee *v. White*. Both plaintiff and defendant had settled on the Indian land, on Juniata, previous to the purchase of 1754. Neither of them, says the chief justice, can derive title from the date of their improvements, because they were made *against* law, on lands not purchased of the Indians. 1 *Binney*, 248. This case will be again cited for other purposes.

As settlements under military permits are excepted by the act of February 3d, 1768, and the proclamation of the 24th of the same month, it is proper that class of cases should be considered here. During the Indian warfare, it was necessary for the accommodation of the armies on the line of their march, that such settlements should be encouraged in the wilderness. And it was reasonable, that persons who by such permission, had settled plantations, at the risque of their lives, for public accommodation, (throwing aside all motives of private interest, which, no doubt, had their influence,) should have the preference, when the office was open for the sale of the lands. Such preference was accordingly given.

In *Blaine's* lessee *v. Crawford, Alleghany*, May, 1793, before *M'Kean*, C. J. and *Yates*, J. (MSS. Reports.) It is

recognized as a principle, that a military permit to settle and improve lands, is not to be regarded, unless followed by a settlement and improvement.

In the lessee of *Todd, v. Ackerman, Westmoreland,* May, 1793, before *M'Kean,* C. J. and *Yeates,* J. (MSS. Reports.) A question was raised, whether a person claiming under a *military permit,* did not lose his preference, by not entering his application on the third of April, 1769. On the single abstract point, it was held, "that a settler under a permission of a commanding officer, to the westward, did not lose his preference by omitting to apply to the Land-Office on the third of April, 1769." But how early such application ought to have been made, was not then decided. It must be in a *reasonable* time, as mentioned above in *Plumsted* and *Rudebagh.*

But, in the lessee of *Bernard Gratz,* v. *Patrick Campbell,* Westmoreland, November, 1800, before *Yeates* and *Smith,* Justices, (MSS. Reports,) The plaintiff claimed a moiety of the land under a special order to *David Franks,* of the 1st of April, 1769, a survey thereon made 1st June, 1769, and a conveyance from *Franks.*

The defendant offered to shew, that he made a settlement on these lands in 1761, before the Indian purchase, under a military permit, which he asserted to have been lost; and that *Christopher Hayes,* the agent of the said *Franks,* had agreed to the running of a line between him and his principal. It was admitted, that he took out no office-right until 1784.

But the Court said, that such evidence, in a case so circumstanced, would introduce the utmost confusion, and impair former determinations. Here it is not attempted to shew by parol evidence, that such a military permit ever existed. But if this had been shewn, it was incumbent on the party too btain an office-right after the opening of the Land-Office on the third of April, 1769, or in a reasonable time afterwards; and no case has yet gone further than by extending that time to the month of *July* following. Here the warrant was not obtained till 1784, and the military permit had, long before, lost its preference. As to the consent of *Hayes* to a line, it can have no effect, unless he was authorized to settle boundaries. The evidence was over-ruled, and verdict for plaintiff.

Before we proceed to the general subject of the Land-Office, it is proper to bring into view the public transactions respecting boundaries with the adjoining states.

1784.

New-Jersey.

With respect to the state of *New-Jersey,* there could be no controversy as to the general boundary of the river *Delaware,* but the jurisdiction in and over that river, and the islands therein, became the subject of compromise.

An agreement was accordingly entered into by the two states, by means of commissioners, on the 26th of April, 1783, and ratified by act of assembly, passed 20th of September, 1783, (chap. 1024,) all which may be seen at large in this volume, ante. page 77, and need not be repeated here; see also an act annexing the different islands in the Delaware allotted to this state, to the jurisdiction of the adjoining counties, 26th of September, 1786, (post. chap. 1234.)

New-York.

With respect to *New-York,* commissioners were appointed, in pursuance of an act passed 31st of March, 1785, (chap. 1143,) to join with commissioners on the part of the state of *New-York,* to ascertain the northern boundary of this state, from the river Delaware, westward, to the northwest corner of *Pennsylvania.* This duty was executed, and the line run and marked, which line was ratified and confirmed by an act passed September 29th, 1789, (post. chap. 1446,) which, as it may be seen at large in this volume, need not be repeated in this note. By an act passed 27th of March, 1790, (chap. 1489,) three hundred pounds were granted to *Reading Howell,* for delineating on his map all the lines of this state, as established by law, or otherwise fixed and ascertained.

The draughts of the Delaware, and the boundary line between this state, of and the state of New-York, returned by the respective commissioners, are deposited in the office of the secretary of the commonwealth.

Virginia.

A considerable part of the lands now within the jurisdiction and boundaries of *Pennsylvania* was claimed to be within the dominion of *Virginia,* and was possessed by rights under that colony. It was determined in 1754, to build a fort, to prevent the encroachments of the French, at the Fork of *Monongahela,* where *Pittsburg* now stands. And to encourage the enlistment of troops, the following proclamation was issued, by governor *Dinwiddie,* on the 19th of February, 1754:

"Whereas it is determined, that a fort be immediately built on the river *Ohio,* at the fork of *Monongialo,* to oppose any further encroachments, or hostile attempts of the French, and the Indians in their interest, and for the security and protection of his majesty's subjects in this colony, and as it is absolutely ne-

1784. cessary, that a sufficient force should be raised to erect and support the same: For an encouragement to all who shall voluntarily enter into the said service, I do hereby notify and promise, by and with the advice and consent of his majesty's council of this colony, that over and above their pay, two hundred thousand acres of his majesty, the king of Great-Britain's lands, on the east side of the river *Ohio* within this dominion, (one hundred thousand acres whereof to be contiguous to the said fort; and the other one hundred thousand acres to be on or near the river *Ohio,*) shall be laid off and granted to such persons, who by their voluntary engagement, and good behaviour, in the said service, shall deserve the same. And I further promise, that the said lands shall be divided amongst them immediately after the performance of the said service, in a proportion due to their respective merit, as shall be represented to me by their officers, and held and enjoyed by them without paying any rights, and also free from the payment of quit-rents, for the term of fifteen years. And I do appoint this proclamation to be read and published at the court-house, churches and chapels, in each county within this colony, and that the sheriffs take care the same be done accordingly."

As this proclamation was transmitted by governor *Dinwiddie* to governor *Hamilton*, the latter gentleman wrote thus, in answer, on the 13th of March, 1754.

"The invasions, &c. having engaged me to inquire very particularly into the bounds and extent of this province westwardly; I have from thence the greatest reason to believe that the fort and lands (intended to be granted,) are really within the limits of *Pennsylvania*. In duty to my constituents, therefore, I cannot but remind you of what I had the honour to write to you some time ago, upon this subject; and transcribe for your consideration the following extracts from two letters of the honourable Proprietor *Thomas Penn*, in relation to this matter.

"I desire you will enter into any reasonable measures to assist the governor of *Virginia* to build a fort there, to wit, at the *Ohio, taking some acknowledgment from him*, that this settlement shall not be made use of to prejudice our right to that country, at the same time you give him assurance the settlers shall enjoy the lands they settle *bona fide*, on the common quit-rent, &c. March 9th, 1752"

"I hope you will, as I wrote you on the 9th of March, acquaint the governor of Virginia that we consent to this, (that is, to the building of a fort at *Ohio,)* without prejudice to our right to the land, in case it should be found to lie within our province, to be granted to the *bona fide* settlers *on the same rent and conditions as they are to have it from Virginia*. July 13th, 1752."

"As Mr. *Penn's* expectations herein appear to me extremely reasonable, and cannot, I apprehend, at all interfere with the well judged encouragement you have thought fit to promise to such as shall enter into this service, I flatter myself you will find no difficulty in making the acknowledgment therein mentioned, as I on my part am ready to give you any assurance that the *bona fide* settlers shall be entitled to the lands under this government on the same rent and conditions as are granted by you, &c."

March 21st, 1754, governor *Dinwiddie* writes in reply, "I am much misled by our surveyors, if the forks of *Monongahalo* be within the limits of your Proprietor's grant; I have for some time wrote home to have the line run, to have the boundaries properly known, that I may be able to appoint magistrates on the *Ohio*, (if in this government,) &c.

In the mean time, that no hindrance may be given to our intended expedition, I think it highly reasonable, if these lands are in your Proprietor's grant, that the settlers thereon should pay the quit-rents to Mr. *Penn*, and not to his majesty; and therefore, as much as lies in my power, I agree thereto, after the time granted by them by my proclamation to be clear of quit-rent, ceases; but surely I am from all hands assured, that *Logs-town* is far to the west of Mr. Penn's grant."

This fort was shortly afterwards, taken, and possessed by the French under the name of fort *Du Quesne*; and the military grants never fully took place; but divers settlements had from time to time been made under Virginia rights, which in the amicable settlement of the boundary, in and after the revolution, were provided for as follows.

By an act passed April 1st, 1784, (post. chap. 1088,) a certain agreement between the states of Pennsylvania and Virginia, concluded and signed, on the 31st of August, 1779, was recognized and finally ratified, together with the conditions proposed by the state of Virginia, in their resolves of the 23d of June, 1780, as follows; to wit, "That the line commonly called *Mason* and *Dixon's* line, be extended due west, five degrees of longitude to be computed from the river Delaware, for the southern boundary of Pennsylvania, and that a meridian drawn from the western extremity thereof, to the northern limits of the said states respectively, be the

western boundary of Pennsylvania, forever, on condition that the private property and rights of all persons, acquired under, founded on, or recognized by, the laws of either country, previous to the date hereof, be saved and confirmed to them, although they should be found to fall within the other, and that in decision of disputes thereon, preference shall be given to the elder, or prior right, which ever of the said states the same shall have been acquired under, such persons paying, within whose boundary their land shall be included, the same purchase or consideration money, which would have been due from them to the state under which they claimed the right, &c. This agreement, and conditions annexed, had been adopted by resolution of the legislature of Pennsylvania, Sept'r 23d, 1780.

Hence has arisen, in *Pennsylvania*, a particular, local, species of land titles, out of the common terms and usages, of the Land-Office, and laws respecting it.

To connect the subject, and, as much as possible, to avoid confusion in so long a note, the cases decided on this part of the general subject, will be here given.

In *Smith's lessee* v. *Basil Brown, Fayette*, May, 1795, before *M'Kean*, C. J. and *Yeates*, J. it was held—That a prior improvement under Pennsylvania, shall prevail against a Virginia certificate, under the compact between the two states. The custom of granting the lands to real improvers, is recognized by our laws. Between claimants under Virginia, the certificate of the commissioners is conclusive, but not where one of the parties claims under Pennsylvania. There can be no doubt, but that on every principle of moral and political obligation, the compact between the two states should be held inviolate. *MSS. Reports.*

This case will be cited more at large upon another point.—

And, in the lessee of *Samuel Hyde* v. *William Torrence, Washington*, May, 1799, before *Yeates* and *Smith*, Justices. *MSS. Reports.* The plaintiff claimed the premises under an early improvement made by *Thomas Provence*, which originated in 1767, and was continued until 1783, without interruption. On the 8th of May, 1782, he conveyed to *Aaron Jenkins*, in consideration of £.200, who leased to *Joseph Ross*, under the yearly rent of 150 bushels of corn; and the tenant afterwards improperly permitted *Martin Harden*, the son of defendant's landlord, to come into possession, on his receiving a bond of indemnification. On the 26th of July, 1783, *Jenkins* conveyed to the lessor of the plaintiff in consideration of £.300, who, on the 24th of November, 1789, obtained a warrant for 200 acres, including *Provence's* improvement, whereon interest was to commence from the 1st of March, 1770, but got no survey. 1784.

The defendant, as tenant to *John Harden*, claimed under two titles. 1st. An application of *John Husk*, for 300 acres, on the west side of *Monongahela*, at the mouth of Big White Lick creek, dated 13th of June, 1769; a deed from *Husk* to *Harden*, in consideration of £.50, dated 20th of April, 1783; and a survey of 222 1-2 acres, made on the 18th of July following. 2d. A certificate of the Virginia commissioners, "That *Edward Arsken* is entitled to 400 acres, on Monongahela river, on the mouth of Whitely creek, *to include the settlement and improvement whereon Thomas Provence lives*, made in 1767, dated 9th Feb'y, 1780, which was regularly entered with the surveyor of the county, on the 7th of March following; and a conveyance from *Arsken* to *Harden*, dated 20th January, 1783, in consideration of £.200.

Evidence was offered to prove, that *Arsken* was no settler under the Virginia law of 3d of May, 1779, "by making a crop of corn, or residing on the land for one year before the 1st of January, 1778," and that if he asserted himself as such to the commissioners, he was guilty of misrepresentation and gross deception, which would have been examinable by the chancellor of *Virginia*, either as a fraud, or trust. But on the face of the certificate, it would rather appear, that Arsken did not claim under a settlement made by himself, or others for him, but would avail himself of the improvement and settlement made by *Provence* in 1767.

This was opposed by defendant's counsel, who contended that the certificate was conclusive evidence of the facts which it contains, and cannot be contradicted by any proof consistently with the solemn compact between the two States. It must be considered as the judgment of a court of justice, acting on a subject within its jurisdiction. The laws of Virginia must govern. It must be presumed that the acts of the commissioners were rightfully done, and that they did not exceed their authority. Their duty was to adjust the claims of settlers, and it is absurd to suppose they would give a certificate to any one, without previously determining that he was a settler. If *Provence* intended to controvert the truth of the certificate, he might have prosecuted his claim by appeal to the general court before the 1st of December, 1780. If

1784. no other way could the certificate be impugned. It is admitted that an elder, or prior right under *Pennsylvania* may be opposed to it, but non such exists here. After the 1st of December, 1780, the certificate could not be controverted in *Virginia*, by the laws of that State; nor, in Pennsylvania, after the compact. *Provence* did not prosecute his right before the *Virginia* commissioners, nor by appeal to the general court: and he cannot set up a title under his improvement *begun before the treaty* at Fort *Stanwix*, on the 4th of November, 1768

By the Court. Is a *Virginia* certificate undeniable evidence of the facts set forth in it? or is it competent to a claimant under this State, to examine into the merits of such certificate? This is the mere abstract question, and in the determination thereof, we feel ourselves bound to pay the most sacred regard to the compact between the two States.

We think the point has already been resolved in this court, in *Smith's* lessee v. *Brown*, "between claimants under *Virginia*, the certificate of the commissioners is conclusive evidence, but not where one of the parties claims under *Pennsylvania*." We apprehend this must have been the clear intention of the contracting States. A Pennsylvania claimant is at liberty to shew fraud, mistake, or a trust. Suppose a certificate stating a party to have made a settlement in a particular year, and it could be shewn he did not come in from *Europe* till after the 1st of January, 1778, and that a title under this State did accrue before his arrival; what good reason can be assigned why these facts should not be received in evidence?

The operation of the certificate necessarily must be, that, *prima facie*, the facts contained in it shall be deemed true; but not undeniably so. But it has been said that *Provence* should have gone before the *Virginia* commissioners, or have appealed to the general court of that commonwealth. This cannot reasonably be insisted on, as to a person asserting a different jurisdiction! Besides, how does it appear that he had notice of *Arsken's* application for the certificate, or of its being granted to him? This was *res inter alios acta*, and a judgment affects only *parties* or *privies*.

Our opinion on the present point, is confined to the defendant's *Virginia* title The plaintiff sets up no claim under Virginia. The plaintiff cannot found his pretensions to the land under the laws or customs of *Pennsylvania*, *by any improvements made thereon before the 4th of November*, 1768 But here his settlement has been continued peaceably down until 1783, when he was stripped of possession by a trick practised on his tenant Opposed *merely* to the defendant's *Virginia* certificate, if there really was no settlement made by *Arsken*, his improvements and peaceable possession ought to prevail.

Whether the application of *Husk*, calls for the land with clearness and precision—Whether it has been abandoned, or, the not obtaining a survey thereon, until 1783, can rationally be accounted for, under the circumstances of the country resulting from a conflict of jurisdictions, are matters of fact to be determined by the jury, but thereon the verdict ultimately depends. Verdict for the plaintiff.

In the lessee of *Thomas Jones* v. *James Park* and *Benjamin Kinsole*, *Alleghany*, May 1799, MSS. Reports. The plaintiff claimed under a patent, dated in 1785, and made a regular title under divers mesne conveyances, to 340 acres of land, the subject of controversy.

The defendant held under a certificate granted by the *Virginia* commissioners to *Zadock Wright*, on the 18th of February, 1783, stating that he was entitled to 400 acres of land, *at the mouth of Montour's run, in Youghiogena* county, to include his settlement made in 1772."

A witness proved, that in 1772, *Zadock Wright* had settled a tract *at* the mouth of *Montour's* run, different from the lands in question. That *John Westfall* had settled another tract 3-4ths of a mile *above* the mouth thereof, and *Abel Westfall* one other tract *below* its mouth; and that the title of *Zadock Wright's* tract, since became vested in *Jeremiah Wright* On inspection of a diagram, which represented all the tracts together, it was manifest that the terms of the *Virginia* certificate called for the lands held by *Jeremiah Wright*.

It was then offered to prove that the *Virginia* certificate was intended to protect and secure the improvement of *John Westfall*, which was objected to, and overruled.

Such testimony would render all property held under titles of this nature insecure. The terms of the written paper must govern, and it is evident that the certificate was intended for the lands now occupied by *Jeremiah Wright*. *Zadock Wright*, made *his* settlement there, *at the mouth* of *Montour's* run. We are no strangers to the mode of procedure adopted by the *Virginia* commissioners. They never

granted *two* certificates to the same person, unless he claimed *one* of the tracts *as assignee* of some other, and in such case it was uniformly expressed in the certificate. Here it is not so expressed, and the consequence is obvious, that the plaintiff is entitled to recover. Verdict for the plaintiff *instanter*. Same judges

The different laws of Virginia respecting military land warrants, and rights under the royal proclamation, and the material parts of that proclamation, may be seen in 3 *Dallas* 425, to 466, in *Sim's* lessee v. *Irvine*, stated in the special verdict, in the circuit court, and decided in the supreme court of the *United States*, on an ejectment for *Montour's* island, in the Ohio river, founded on the right of major Douglas, located in May, 1780, and on which the plaintiff recovered against a patent granted to the defendant by act of September, 1783, and in which those rights, and the construction of the agreement between the two States, came fully to the view of the court. As the case could not be abstracted within a reasonable compass, without mutilating the facts, and being in print, it is here referred to generally. See the royal proclamation at large, dated 7th of October, 1763. Council books, S, p 427.

The controversy respecting boundary between the provinces of *Pennsylvania* and **Maryland*, was of early and long standing. It was not rendered less difficult and tedious, by the situation of the parties; and even after an agreement by the respective proprietaries to adjust their limits, nearly thirty years were passed in expensive litigation, before the controversy could be terminated. The history of this dispute and the records and papers respecting it, could not be brought within the compass of a note. They would of themselves form a considerable volume. Extracts are, however, here furnished, sufficient to give an understanding of the border titles In any other point of view than as they affect the landed interest of the country, they have, from the lapse of time, and a settled boundary, become unimportant.

By the charter, Mr. *Penn's* grant was to be bounded on the north, by the beginning of the three and fortieth degree of northern latitude, and on the south *by a circle drawn at twelve miles distance from Newcastle* northward and westward, unto the *beginning of the fortieth degree of northern latitude*, and then by a straight line westward, &c.

The lord *Baltimore* insisted that the *whole fortieth degree of north latitude*, was included in his charter, which was prior in point of time. Mr. *Penn* insisted that lord *Baltimore* was precluded by a recital in his charter, that the land was uncultivated and possessed by barbarians; whereas it was not so, but possessed by *Dutch* and *Swedes*; and therefore the king was deceived in his grant. The early part of this controversy, especially respecting the three lower counties, now state of Delaware, may be seen in the beginning of the first volume of the votes of assembly. A principal difficulty was also made concerning the circle of twelve miles to be drawn about New-Castle, and the true situation of Cape *Henlopen*.

1784.

In order to bring this dispute, which had been then depending nearly fifty years, an agreement was entered into between Charles *lord Baltimore*, and *John Penn*, *Thomas Penn and Richard Penn*, Esquires, May 10th, 1732, which recited several matters as introductory to the stipulation between the parties, particularly the respective charters; and the title derived from *James* duke of *York*, to the three lower counties by two feoffments, dated 24th of August, 1682. That several controversies had been between the parties concerning the boundaries and limits of the two provinces, and three lower counties. They then make a particular provision for settling them by drawing part of a circle about the town of *New-Castle*, and a line to ascertain the boundaries, &c. and a provision in what manner that circle and line should be run and be drawn; commissioners were to be appointed for that purpose, who were to begin the work in the month of October following, and complete the same on or before the 25th of December, 1733. *Maryland.

In the eleventh section, a clause is inserted, quieting the occupiers and possessors of lands held under the respective proprietaries, on their attorning, and paying arrears of rent, duties, &c. to the said several proprietaries.

November 24th, 1735, the commissioners on both sides reported, that having used their endeavours towards the execution of the articles of agreement, they had respectively broken up, as they differed in running the circle from *New-Castle*; the *Pennsylvania* commissioners insisting that the circle should begin twelve English statute miles from New-Castle; and the *Maryland* commissioners insisting that the periphery of the circle to be run, should be twelve miles, whose diameter would be somewhat less than four miles from *New-Castle*.

Lord *Hardwicke* expressed great dis-

1784. satisfaction with the conduct of the *Maryland* commissioners, and said they behaved with great chicane in the points they insisted on. 1 Vez, 455, *Penn* v. *lord Baltimore*.

May 25th, 1738, the royal order issued, founded on the agreement of the proprietaries of *Pennsylvania* and *Maryland, before the committee of council*.

It recites the first royal order made on the 18th of August, 1737, that "the respective governors should not make grants of any part of the lands in contest, nor permit any person to settle there, or even attempt to make a settlement, until his majesty's pleasure should be signified.

In the third section of the agreement previous to the royal order of 25th of May, 1738, there is this clause. "All lands in contest between the said proprietors *now possessed*, by, or under either of them, shall remain in possession as they now are, although beyond the temporary limits hereinafter mentioned. The respective jurisdictions to continue over such lands until the final boundaries shall be settled, and the tenants of either side not to attorn to each other, nor the respective proprietaries to accept of such attornments."

The king took the report of the committee of council into consideration, and approved of the agreement of the proprietaries, and by the advice of his privy council, ordered the same to be carried into execution.

In the year 1739, the temporary line was run between the two provinces.

A suit in chancery was depending for many years, upon a bill exhibited by the proprietaries of *Pennsylvania*, against lord Baltimore, to obtain a specific execution of the agreement of 1732, which agreement was decreed to be carried into effect in the year 1750, and after a bill of revivor and supplemental bill, the final agreement between the different proprietaries was executed on the 4th of July, 1760.

This agreement recites the original charters to lord *Baltimore* and *William Penn*, and the grants to and from the duke of York, for the three lower counties, and that very long litigations and contests had subsisted from 1683, down to the present time, and many orders in council had been pronounced relative thereto. The agreement of 10th of May, 1732, at full length. That the time being expired for completing the said articles, *Charles*, lord *Baltimore*, petitioned the king in council to confirm to him by another charter the Peninsula granted to *Cecilius*, lord *Baltimore*, on the 8th of August, 1734, which was opposed by a counter petition by *John*, *Thomas*, and *Richard Penn*, on the 19th of December, 1734, and upon references and report thereon, the king, on the 16th of May, 1735, ordered the consideration of the report to be adjourned, that Messrs. *Penn* might proceed in equity. That they petitioned Chancery on the 21st of June, 1735. It then recites the proceedings in Chancery, and the decree of the lord Chancellor at large, that the agreement of 1732, should be carried into specific execution. The appointment of commissioners in pursuance of the decree. The death of *Charles*, lord *Baltimore*, the proceedings in chancery, upon a bill of revivor, and supplemental bill, &c. And whereas the parties to these presents (*Frederick*, lord *Baltimore*, and *Thomas Penn*, and *Richard Penn*,) have come to an amicable agreement in manner as hereinafter mentioned. It then proceeds to describe and make provision for fixing the circle and running the line, &c. Then there is the following *proviso*, "That nothing therein contained shall extend to the right of any grantee, or those claiming under him to any of the farms or lands in the actual possession and occupation of any tenant or occupier which have been at any time and in any manner heretofore granted by or under the authority of the said *Frederick* lord *Baltimore*, or by or under the authority of any of the ancestors of him the said *Frederick* lord *Baltimore*; but that it shall and may be lawful to all, and for all and every such tenants and occupiers of the same premises, and every part thereof, their and every of their heirs, executors, administrators and assigns, from time to time, and at all times hereafter, to hold and enjoy the said farms, lands, tenements, and hereditaments, and every of them, and every part thereof, for and during all and every such, their several and respective estates, terms and interests in the same, and every of them, and every part thereof, subject nevertheless to and by, and under all and every the same quit rents, reservations and services, to be from henceforth paid, rendered and performed to the proprietaries of the said province of Pennsylvania, for the time being, as they the said tenants and occupiers and every of them were liable at the time of, and immediately before the execution of these presents, to have paid, rendered and performed to the proprietary of the said province of *Maryland*, any thing herein before contained, to the contrary in any wise notwithstanding."

Provided also, and it is hereby further declared and agreed, &c. That

neither these presents, nor any clause, article or thing whatsoever therein contained, shall extend or be deemed, construed or taken to extend to the right of any grantee or grantees, or those claiming under them, to any the farms, lands, tenements or hereditaments, situate, lying and being on the east side of the river Susquehanna, and within the space or distance of one quarter of a mile more south than the east and west line mentioned in the sixth article of the said articles of agreement, of the 10th of May, 1732, and which have been at any time, and in any manner heretofore granted by or under the authority of the proprietaries of the said province of Pennsylvania, for the time being, and are now in the actual possession or occupation of all, every, or any of the tenants or occupiers of the said province lands, hereditaments and premises, but that it shall and may be lawful to and for all and every such tenants and occupiers of the said last mentioned lands and premises, and every part thereof, their and every of their heirs, executors, administrators and assigns, from time to time, and at all times hereafter, to hold and enjoy their said farms, lands, tenements and hereditaments, and every of them, and every part thereof, for and during all and every their several and respective estates, terms and interests in the same, and every of them, and every part thereof, subject nevertheless to, by and under all and every the same quit rents, reservations and services to be from henceforth paid, rendered and performed to the proprietary of the said province of Maryland, for the time being, as they the said tenants and occupiers, and every of them, were liable at the time of, and immediately before the execution of these presents to have paid and rendered and performed to the proprietaries of the said province of Pennsylvania, any thing herein before contained to the contrary in anywise notwithstanding."

Mason and *Dixon's* line was run n the year 1767, and 1768, and the agreement and proceedings thereon were approved and ratified by the king, by his order in council, on the 11th day of January, 1769, and the proclamations of the respective proprietaries, to quiet the settlers &c. were issued in 1774, that of Pennslyvania, bears date the 15th of September, 1774: council Books, U, page 466.

The agreement of 1760, was inrolled in chancery, in *England*. The original is now deposited with the secretary of the commonwealth.

This original agreement was produced in evidence at *Bedford*, October, 1806, on the trial of *Ross'* lessee, v. *Cutshall*, reported in 1 *Binney*, 399, and admitted after argument, and decided to be proper evidence by the supreme court, on an appeal, because it was an ancient deed, ascertaining the boundaries of the then provinces of *Pennsylvania* and *Maryland*, and may be considered in the light of a *state paper*, well known to the courts of justice, and which had been admitted in evidence on former occasions. 1784.

The plaintiff claimed under a warrant of the 1st of February, 1760, from lord *Baltimore* to *David Ross*, "for 500 acres of vacant land, in *Frederick county*, *Maryland*, between *Little Meadow* and *Buck Lodge*, on *Potomac* river, above *Fort Cumberland*, partly cultivated. On the 30th of April 1762, a survey was made for *Ross*, the certificate of which stated that by virtue of a renewed warrant of 4th of February, 1762, 295 acres were surveyed, called the *Dry Level*, beginning at two white oaks, standing on the top of a hill, on the west side of *Will's* creek; but the survey said nothing of *Little Meadow* and *Buck Lodge*, or of its being partly cultivated; and it was said to be ten miles from the *Potomac*, and *below Fort Cumberland*; a Maryland patent to Ross, was dated in December, 1762.

The court said, the case depends upon the articles of agreement of 4th of July, 1760, between lord *Baltimore* and the *Penns*. By these articles, the estates of all persons were protected, who had, *before that time*, acquired title by any kind of grant from lord *Baltimore*, or his ancestors. The question then is, had lord *Baltimore* made a grant to *David Ross*, prior to 4th of July, 1760? *If the original warrant had called for the land afterwards surveyed*, we think that the title of *Ross*, would have related to the date of that warrant, although the survey was not made until some years after, provided the warrant had been renewed according to the practice of the Land-Office of *Maryland*. But supposing, as we do, that the warrant did not call for the land surveyed, the grant to *Ross* cannot be said to commence before the time of surveying it, viz. 30th of April, 1762, and is therefore a mere nullity. We can find nothing in the articles of agreement between the proprietaries, to establish a title of this kind, to land in this state, against a person, who, like the defendants, afterwards acquired a regular title from the proprietaries of *Pennsylvania*, (which, as appears by the report, commenced in August, 1766,)

1784. a new trial was therefore granted, on the point of fact, whether the land was called for by the original warrant of 1760.

In the lessee of *Thomas Lilly* v. *George Kitzmiller*, at York, May, 1791, before *Shippen* and *Yeates*, Justices, (MSS. Reports,) the case was as follows.

The lessor of the plaintiff grounded his title on a *Maryland* patent for 6,822 acres, dated 11th of October, 1735, founded on an original warrant for 10,000 acres, dated 1st of April, 1732, which, according to the custom of the Land-Office of Maryland, had been several times renewed; also, on a Maryland warrant of re-survey, to re-survey the ancient metes and bounds, correct errors in the first survey, and add contiguous vacancies, whether cultivated or not, dated 15th of July, 1745. A survey thereon, of 3,679 acres, made in October, 1745, and a patent dated 18th of October, 1745.

He also relied on the two agreements of the proprietaries of *Maryland* and *Pennsylvania*, the first dated May 10th, 1732, under the 11th article whereof, "Persons holding lands under either of the proprietors, though beyond the division line of the two provinces, were secured and quieted in their rights and possessions," and the order in council made in pursuance thereof, on the 25th of May, 1738. And the second agreement on the 4th of July, 1760, under the proviso whereof, it was declared, that "nothing therein contained should be construed to extend to the respective grantees, or those claiming under them," and deduced his title to both patents, under a will, and divers mesne conveyances and descents.

The defendant's title rested on a warrant to *Martin Kitzmiller*, for 150 acres of land, including his improvements, from the Land-Office of Pennsylvania, dated 5th of February, 1747; a survey thereon of 164 acres, made 30th of May, 1759; a patent dated 17th of September, 1759; and a conveyance from the patentee to him. It was proved that the defendant and his ancestor, had been in possession of the lands in question since the year 1738, or 1739. It was admitted on both sides, that the temporary line between the two provinces, was run in 1739—the final division line run by *Mason* and *Dixon* was completed in 1767, and that the proclamations of the respective governors issued in 1774.

The instructions of lord *Baltimore* to *Charles Carrol*, his agent, dated 12th of September, 1712, were also given in evidence on the part of the defendant, whereby the mode of assigning warrants was pointed out, and wherein he directs, that in each survey, the boundary tree alone should be marked, and the courses and distances specified in the return of survey, as the *fairest* mode, and best calculated to *prevent civil suits!*

With an intention to shew fraud or mistake in the deputy-surveyor, it was proved by an ancient witness, that the deputy surveyor did not return the first survey as actually made by him on the ground; that the quantity of 10,000 acres was really contained within the lines of the lands run by him, including the lands in question, and that upon making his plat, and finding the figure to be very irregular, he got displeased, and swore he would not cast up the contents, or return it in that form, and then reduced a number of lines into one, struck off five or six angles in different places, and made a new plat different from the courses and distances run on the land, and of 270 courses contained in the field notes, which were several years in witness's possession, he left out above one hundred and fifty of them; and the witness afterwards delivered the field notes to *John Digges*, the patentee.

The lands in possession of defendant were thus thrown out of the returned survey, but were included in the re-survey, which was said to have corresponded with the lines originally run upon the ground.

There was much other testimony, but not material to the point now under consideration.

The court in their charge to the jury, said, in substance, as follows.—The lands in dispute lie four miles north of the boundary line between the States of *Pennsylvania* and *Maryland*. Independent of the proprietaries' agreements, lord *Baltimore* could have no right to grant lands beyond the limits of his province. Whatever, however, was granted by either proprietor, though beyond their respective limits, before the royal order in 1738, was secured to the settlers by their mutual agreement; but the subsequent agreement of 1760, could not affect the rights of persons claiming under either proprietor, previous thereto. The great question in this cause is, whether the first survey included the lands now possessed by the defendant.

It appears to us there is a failure in the plaintiff's title in this early stage of it. Under the practice in Pennsylvania, of making proprietary surveys, trees are marked on the ground, and where there are no trees, or natural boundaries, artificial marks are set up to distinguish

the survey. By these means, if the surveyor returns a draught, different from the courses and distances actually run, the mistake is easily corrected. Should the surveyor commit an error in his return, it shall not affect the right of the party. Such cases have frequently happened.

But the case is very different under the ancient practice of making surveys under the proprietaries of Maryland. Such surveys were merely ideal, and precisely fixed on paper alone. No trees were marked, except the beginning boundary. Lord *Baltimore's* instructions, which have been read, clearly shew us, what his intentions were, and that he was concluded only by the courses and distances returned. The survey was ambulatory, not confined to a certain spot of land, but was governed by the variation of the compass, and was continually shifting. *The courses and distances returned* formed the *survey*, and determined, on an exact admeasurement, the particular lands granted, as often as they were run. Those courses and distances alone were binding on the proprietor, and consequently on his patentee. It necessarily follows under our idea, that as the testimony of witnesses, or any other circumstances shewn in the cause, cannot establish a title to lands without the limits of the original survey *as returned*, that the plaintiff must fail in the present suit. 1784.

We mean, however, in thus giving our opinion, which we have taken some pains to form, to confine ourselves to the express case before us.—It is not intended to affect other rights.—Persons who have bought lands from plaintiff, even within the resurvey, may have acquired titles by their possessions and improvements, which should not now be shaken. The plaintiff suffered a nonsuit.

PART II.

Of the ancient practice and customs of the Land-Office, previous to the year 1765.

By force of the royal charter, *William Penn*, and his successors, as proprietaries, were the undoubted lords of the soil. They stipulated, however, with the purchasers under them, to extinguish the aboriginal right of the natives. They alone had this power. No individual, without their authority could purchase of the Indians; and the people themselves, by legislative acts, recognized, and aided them to inforce, this important principle.

They had the unquestioned right to dispose of their lands in any manner they thought proper. But without settlement, a grant of an extensive territory would have been useless. If the condition of colonization had failed, the grant must have been resumed; and, if the disposition of the great founder had not been the most benevolent, a commanding necessity obliged him to encourage emigration and cultivation, and to part with his lands upon reasonable terms.

The officers of the Land-Office were his officers and agents. The commissioners of property were controlled by his regulations and authority; and it will appear, that from the acts of these proprietary agents, many rights to lands have sprung up from time to time, which have, not improperly, been termed, inchoate, irregular, imperfect, and equitable titles; founded, not only upon warrants, surveys and patents, but upon settlements, connived at, or acquiesced in, depending sometimes upon the situation of the proprietor's title, or the unsettled state of his family, upon the supposed circumstance of the Land-Office being shut, or encouragement given to settlers on or near controverted boundaries, and to promises.—Hence also custom and usage of the Land-Office from early times have vested interests, which have afterwards been confirmed by judicial decision, and recognized by laws. Thus in an instance which may be found in *Kyle* v. *White*, 1 Binney, 247, a promise made to a trespasser, to induce him to move off of the unpurchased Indian lands, by secretary *Peters*, was considered as entitling the trespasser to a preference after the purchase.

Whatever uniform plan of settling the country and conveying his lands, the first proprietor may have contemplated, or devised, it must very early have been found impracticable on experience. At present no regular system can be traced upon the public records. The terms of sale were changed from time to time; and as the affairs of the Land-Office were not familiar to the mass of the people, it is not to be wondered at, that the assembly, even in the year 1755, in an address to governor *Morris*, declare, "that the state and management of the Land-Office, is pretty much of a mystery." Votes of assembly, vol. 4, page 464.

1784. *Of First Purchasers, or Old Rights.*

The original lists of first purchasers are recorded in the Land-Offices. The privileges to which these were entitled, with respect to city lots, and liberty lands, and the price paid by them, and the quit-rents to which they were subject, have been already stated. To these first purchasers, the conditions and concessions made in *England*, chiefly related. Wherever they desired to *sit* together, and their quantity amounted to five or ten thousand acres, they were to have their lot, or *township*, cast together, &c. and, in every one hundred thousand acres, the governor, or proprietor, reserved ten to himself, *by lot*, which shall lie but in one place. It has been already shewn, that this related merely to the original purchasers.

Many of these original rights were long out standing, and several not surveyed until after the revolution, and, probably, some few have been entirely abandoned. The subject is at this day intricate from a variety of causes. Many of the purchases appear to have been made upon speculation by persons who never came into the province; and transfers were made of parts or parcels of large warrants to different individuals. For these parcels separate warrants were again issued to survey the subdivisions to the under-purchasers. By such means, it has not unfrequently happened that a considerable surplus has been surveyed beyond the amount of the original purchase. By the accumulation of old rights, by purchase, in one person, it has also happened, that entire squares of city lots, as appurtenant, in early times have been granted to individuals, with large appropriations of liberty lands, and it became almost a science to trace out original titles. From such cause is to be attributed the singular appearance of the original minutes of property, which exhibit a record of transfers and mesne conveyances in abstract, and pedigrees, and even of intermarriages. It is not improbable, however, that, in some cases, these may be valuable documents at this day.

In the minutes of the Board of Property, August 15th, 1765, there is a special order respecting *old rights*. The preamble suggests that great quantities of lands on such rights had been again applied for, and twice granted, and, "The deputy surveyors are directed to send in to the surveyor-general's office, all the surveys on old rights which they can discover not to have been yet returned—And all future surveys thereon to be returned in two months after made."

By the seventh section of what has been termed the divesting act, ante. vol. 1, page 481, all rights, titles, estates, claims and demands, which were granted by, or derived from the proprietaries, their officers, or others, duly commissioned, authorized and appointed, or otherwise, or to which any person or persons, other than the said proprietaries, were, or are entitled, either in law or equity, by virtue of any deed, patent, *warrant, or* survey; or by virtue of any location filed in the Land-Office at any time or times before the 4th day of July, 1776, were ratified, confirmed and established forever, &c.

By the 5th section of the act in the text, persons possessed of old rights, &c. were confined in locating the same to the lands already purchased of the Indians.

Of Quit-rents.

All quit-rents were abolished by the ninth section of the divesting act before mentioned.—Any observations respecting them, therefore, can have no further interest than as they may be considered as a part of the history of the titles to lands as they stood under the proprietary government.

It does not appear that any certain standard or rule was established with respect to quit-rents at the first settlement of the province, except with the first purchasers, which was one shilling sterling for one hundred acres.—See votes of assembly, vol. 1, part 2, page 41.

Lands which were allotted to servants, who came over with the first settlers, and faithfully served out their time, were not liable to purchase money; the quit-rent was therefore greater. The seventh article of the conditions and concessions runs thus, "That for every fifty acres that shall be allotted to a servant, at the end of his service, his quit rent shall be two shillings per annum; and the master, or owner of the servant, when he shall take up *the other fifty acres*, his quit-rent shall be four shillings by the year; or if the master of the servant, (by reason in the indentures he is so obliged to do,) allot out to the servant fifty acres in his own division, the said master shall have on demand allotted to him from the governor, the one hundred acres, at the chief rent of six shillings *per annum*."

When warrants were issued upon what were called the new terms, it appears by the minutes of the commissioners of property, the price was five pounds for one hundred acres, and the quit-rent sometimes a *bushel of wheat*,

sometimes *one shilling sterling*. This latter was called the common rent. The new rent, and the most usual, was one penny sterling per acre. Whatever reservation was made, was stated in the warrant, as part of the contract.

In the commission of October 28th, 1701, to *Edward Shippen, Griffith Owen, Thomas Story*, and *James Logan*, as commissioners of property; authority is given to them to grant lands for *such sums and quit rents*, &c. as to them, or any of them, should seem reasonable.

The same authority is given by the new commission of November 9th, 1710.

The assembly in their address to the proprietor, when he was about to sail for *England*, September 20th, 1701, request of him, "That the inhabitants, or possessors of land may have liberty to purchase off their quit rents, *as formerly promised*. Votes of assembly, vol. 1, part 1, p. 146.

In his answer, he tells them, "If it should be my lot to lose a *public support*, I must depend upon my rents for a supply; and therefore must not easily part with them; and many years are elapsed since I made that offer, *that was not accepted*. Ibid. 149.

Some controversy, indeed, there was about this *public support*; and the assembly alleged that quit-rents were originally agreed to be paid to the proprietor, on account of the extraordinary charge he would be at in the administration of the government. That he had sold lands to a great value, and reserved rents sufficient, in a moderate way, to maintain him or his lieutenant, answerable to their station. What if we add, say they, that we desire the proprietary would be content to live upon his rents, &c. Considerable altercation, and no little warmth took place upon this subject between govern. or *Evans* and the assembly. The dispute, however, died away. The assembly continued to provide for the governors down to the revolution. See votes of assembly, vol. 1, part. 2, p. 41, 45, 155; vol. 2, p. 10, 12, 15.

Of the six per cent. allowance.

The allowance was originally ten *per cent.* In the address of September 20th, 1701, before-mentioned, the assembly request "That the ten acres in the hundred, may be allowed *according to the proprietary's engagements*." I am very willing, answered the proprietor, to allow the ten acres *per cent.* for the ends proposed by law, and not otherwise.

The law referred to, was the law of property, made shortly before at *New-Castle*, with which the people were dissatisfied, and some misunderstanding had taken place respecting it. The assembly, therefore, on the 9th of October following, (1701,) again request "That the misunderstanding about the ten acres *per cent.* be rectified; and the allowance for roads and highways be allowed to all lands whatever, whether already taken up, or to be taken up hereafter." On the 23d of October, they sent a member to the governor, with the request, varied in this manner. "The assembly desires that the proprietary will be pleased to allow ten acres *per cent.* for roads, uneven grounds, &c. unto all persons, purchasers and renters, either taken up, or to take up; and for such as shall hereafter rent, *five* per cent. at least." The proprietor sent them the following message on the 25th.—"Friends, complaint having been made, that some persons had not the benefit of the law of *New Castle*, with respect to the allowances of *ten* per cent. I consented to allow the said ten acres per cent. according to the said law; but never intended to make myself debtor for those deficiencies which were not to be had; and understanding you look upon that law unequal, as giving to some ten *per cent.* where there is overplus, and but two per cent. upon surveyed land, where no more is to be found; I am therefore willing to allow or make good *six per cent.* to all persons, as well to those that want, as to those who do not want the same upon a re-survey." This did not meet the sentiments of the assembly; and the amendment proposed by them to the bill of property was, "That whereas ten per cent. is allowed by the law made at New Castle, for roads, barren lands, uneven grounds, and difference of surveys unto all such persons who have overplus in their tracts; the same ten *per cent.* may be allowed unto all persons whatsoever, who have taken up lands by right of purchase, or on rent, or that shall hereafter take up by virtue of former grants; and that all persons hereafter purchasing may have *five per cent.*" 1784.

By the act of 1712, chap. 183, it was provided "That for all lands hereafter to be taken up, or surveyed in this province, the surveyor, that lays out the same, shall allow for roads and barrens, after the rate of six acres for every hundred acres to the owner of such lands, for which said allowance of six per cent. no rent shall be paid to the proprietary, his heirs or assigns!"

This act was repealed by the queen

1784. in council, Feb'y 20th, 1713; but the custom was established, and continued from that time to this day.

See votes of assembly, vol. 1, part 1, p. 145, 148, 153, 161, 163, 164, and appendix, 14.

Of Townships.

It appears to have been part of the plan of William Penn to have laid out the province into townships, of 5000, or of 10,000 acres, and to have surveys made within the respective boundaries of such townships; and that purchasers of large tracts might lie together; he accordingly introduced this clause into his warrants, "According to the method of townships appointed by me." This plan could not be long pursued. The clause in the warrants, however, continued long after the object of it ceased. It was omitted in the warrants for the lands in the purchase of 1784, but was not discontinued in the preceding purchases, until it was struck out by the present Land-Officers, as having no present meaning, or utility.

Of Head Lands.

A township was appropriated under this name, and in which, as appears from the minute books, all the servants' lands were to be surveyed, so many acres *per head*, according to the conditions and concessions. This could be claimed only by such servants who came in with the first purchasers.

Of Manors.

Manor courts were never established in the province. The great troubles of William Penn in all probability, prevented his attention to this subject, which would perhaps have failed in the experiment, and might have been obnoxious to the people, and have introduced a state of vassallage, to which they could not long have submitted. That he kept it in view, appears from the following entry, in minute book, C, p. 6. "The proprietor gave to *Martin Zeal*, a paper wrote all in his own hand, and signed by him in the following words, (I am willing to let Elizabeth's husband have 50 acres in my manor of *Pennsbury*, on the other side of the run, near to the Shoemaker's, lying upon the said creek, and running back to *William Biles'* line, at three pence sterling per acre, to begin to be paid the third year, and so forever after, *holding of the said manor, and under the regulations of the court thereof*, when erected." Warrant ordered by the commissioners accordingly, (1701.)

Technically speaking, therefore, there were no manors in Pennsylvania, although the proprietary tenths, and other large surveys for them, were so called. The tenure by which the charter was held, was that species of feudal tenures called *Socage*, by fealty only, in lieu of all other services; and the tenures under William Penn were by a kind of rent service. The patents were in free common socage, in lieu of all other services. By the abolition of quit rents all estates derived immediately from the commonwealth, are unconditional fees simple, with a reservation only of a fifth part of gold and silver ores, at the pit's mouth. Happily for Pennsylvania, this reservation has been merely nominal, and the surest mines of wealth, are the virtue, industry and simplicity of the people. Every grant of land, however, under the proprietary government, was nominally declared in the patent to be held as of some certain manor.

In the eighth section of the divesting act, vol. 1, p. 481. In the reservation of the private estates of the proprietaries the manors are thus mentioned, "Likewise all the lands *called and known by the name of the proprietary tenths or manors.* It has already been shewn, in *Carson* v. *Blazer*, before cited that the terms of the conditions and concessions, confining the tenths of the proprietaries to one place, and to be taken by lot, related only to the grants to the first purchasers. But the proprietor had the right to withdraw any land, not previously appropriated to individuals from the general mass of property, and to appropriate it to his own use. Such was the judicial construction, upon the Springetsbury manor case; See *Penn* v. *Kline*, 4 Dallas, 407.

William Penn issued his warrant, dated 1st of September, 1700, to *Edward Pennington*, then Surveyor-General, to survey for the proprietor 500 acres of every township of 5000 acres; and generally, the proprietary tenth of all lands laid out, and to be laid out; and similar warrants were issued by the successive proprietaries, to every succeeding Surveyor-General. Warrants were likewise issued for the appropriation of the islands in the different purchases.

All these special appropriations to proprietary use, are entered together, since the revolution, and are preserved in the Surveyor General's office.

Regulations of Settlement.

By the fourth section of the conces-

sions and conditions, any number of purchasers, whose number of acres amounted to five or ten thousand, desired to sit together in a lot, or township, their township was to be cast together, in such places as had convenient harbours, or navigable rivers attending them, if such could be found; and in case any one or more purchasers did not plant according to agreement in this concession, to the prejudice of others of the same township, upon complaint made to the governor, or his deputy, he might award (if he saw cause) that the complaining purchaser might, on paying the surveying, purchase money, and interest, be entitled to, and invested in the lands so not seated. And by the preceding article, purchasers from one to ten thousand acres, or more, were not to have above one thousand acres together, unless in every three years they planted a family upon every thousand acres: and by the tenth section, every man was bound to plant his lot within three years after it was set out and surveyed, otherwise it was to be lawful for new comers to be settled thereon, paying the survey money, and the first purchasers were to go higher up for their shares.

These regulations were certainly neglected, and the proprietor endeavoured to enforce it by proclamation, which still exists on the journals of the commissioners of property, 1687, letter F, in these words,

Proclamation concerning seating of land by WILLIAM PENN, *proprietor and governor.*

"Since there was no other thing I had in my eye in the settlement of this province, next to the advancement of virtue, than the comfortable situation of the inhabitants therein; and for that end, with the advice and consent of the most eminent of the first purchasers, ordained that every township consisting of five thousand acres, should have ten families at the least, to the end that the province might not lie like a wilderness, as some others yet do, by vast vacant tracts of land, but be regularly improved, for the benefit of society, in help, trade, education, government, also roads, *travill*, entertainment, &c. and finding that this single constitution is that which eminently prefers the province in the esteem and thoughts of persons of great judgment, ability and quality, to embark with us, and second our beginning, I do hereby desire, and strictly order my trusty and loving friends and commissioners, *William Markham, Thomas Ellis*, and *John Goodson*, or any two of them, that they inspect what tracts of land taken up, lie vacant and unseated, and are most likely to give cause of exception and discouragement to those that are able and ready to seat the same, and that they dispose of, *if not seated by the present pretenders* within six months after the publication hereof, provided always, the usual time allowed for plantations, be already expired; and that this extends not to those persons that have forfeited their lands in the annexed counties, (the three lower counties,) to whom I allowed a year and an half time, after my arrival, to settle at the old rent, and have nevertheless neglected to do the same; and that the said commissioners are further desired and required to take the greatest care, that justice and impartiality be observed towards all in the disposal of land, as well in reference to quality as quantity, that what is right in the sight of God and good men, may always be preferred, for it is the best and lastingest bottom to act and build upon."

1784.

Given at *Worminghurst* place, in old England, the 24th of the 11th month, 1686.

This proclamation was published in the province the 26th of the 5th month, 1687.

These proceedings, however, appear, to have had no operation, nor does any record appear of any forfeiture, or regrant of any of the lands surveyed on the original rights. The province continued to increase and prosper, and applications for new lands were almost daily made; the *method of townships* was very soon lost sight of, and surveys promiscuously made according to the wishes of the purchasers. The warrants in 1701, express "That the land shall be seated within two years after the survey. *Vacating* warrants will be hereafter considered.

Of resurveys, and surplus lands.

This subject engaged much of the attention of the first proprietor; he was desirous to be just, but he was tenacious of his rights. There was at the date of his charter, a very considerable settlement on the banks of the Delaware, and the titles were generally derived from the governors of New-York, under the crown. The inhabitants were quieted in these titles; and instances occur of grants from sir *Edmund Andross*, which had not been surveyed, being ratified, surveyed and patented by order of the commissioners of property. But it was

1784. supposed that these old rights included a large quantity of land more than was expressed in the patent, or the possessor had any right to by the original warrants, or orders for the surveying or laying out the same. Large quantities of surplus lands were also supposed to have been included within the patents issued from his own office. A method was therefore adopted of issuing warrants of re-survey, and after cutting off the overplus, confirming the quantity first purchased, by a new patent. The practice, however, eventually failed. It may have been possible that in some cases too much land was fraudulently included; but in most instances it may have happened through mistake, or want of skill in the surveyors. Experience has proved that surveys made in early days, especially in a new country, have most generally overrun the measure, upon a resurvey. The system must therefore have become impracticable, and was discontinued after the year 1713. The proceedings are however here given, as part of the ancient land history of the country.

The following instructions were given by *William Penn*, on the first of the 2d month, called February, 1686, to his commissioners.

"That no warrant of re-survey be granted by you for land within five miles of the river Delaware, or any navigable river."

"That all overplus lands, upon re-surveys, granted by the former commissioners, not already granted finally, or not patented, be reserved to my use and disposal."

"No lands to be laid out next or adjoining to that inhabited, and that in every township one share be reserved for the proprietary, with all the Indian fields that are in the said township."

"No land containing mines, to be granted without *William Penn's* express warrant. Book F.

In the commission of October 28th, 1701, when the proprietor was about to sail for England, (book G,) among other things, he authorizes the commissioners of property, "To grant lands for such sums, and quit-rents, &c. as to them, or any three of them should seem just and reasonable; also, to sell intervening, concealed, or vacant lands; to dispose of *surplus lands;* and *to make satisfaction out of my other lands and estate,* (my appropriated land excepted,) in the said province and territories, as the law in that case directs, *for all such deficiencies in measure,* as upon a due re-survey shall be found in any tract or tracts, or parcels of land, to the respective persons thereby grieved, &c. And while on ship board, on the first of November, by a second commission, he gives them power to erect manors, with jurisdiction thereto annexed, as fully as he could do by the charter This latter power, however, they declined exercising, on the application for such a manor in Buck's county by Mr. *Growdon*.

The law alluded to, was the law of property, passed at *New Castle*, in 1700, and confirmed in 1701; which enacted (among other things,) "That any person's lands in this province should be re-surveyed; and if upon such re-survey (after allowance of four acres in the hundred, over or under, for difference of surveys, and six per cent. for roads,) an overplus shall be found, the possessor thereof should have the refusal of it from the proprietary, at reasonable rates; and in case of disagreement about such rates, the proprietary was to choose two men, and the possessor two more, who should either fix a price on the said overplus land, or appoint where it should be taken off for the proprietary in one entire piece at an outside (saving to the purchaser or renter, his improvements and best conveniences,) any three of whom agreeing, should be conclusive; and the charges of re surveying should be borne by the purchaser, or renter of the main tract, if he bought the overplus, or if not, then by the proprietary; and that deficiencies should be made good by the proprietary, according as he received for overplus land as aforesaid."

Under this act many re-surveys were made, and over measure found; but the act expired before the same could be cut off, or the rates settled; and the proprietary was not satisfied for his over-measure; in consequence of which the act of 1712, entitled "An act confirming patents and grants," (chap. 183, and Carey's and Bioren's appendix,) was passed.

This act confirmed all lands which any person or persons held and enjoyed, or ought to have, hold, and enjoy within the province, as well by or under any old grant or estate from the proprietor, or his commissioners of property and agents, pursuant to such person's right, &c. as also by, or under, any old grant, patent or warrant obtained from governors or lawful commissioners under the crown of England, before the charter to the proprietary, or by any other legal, or equitable grant, right, title, entry, possession, or estate whatsoever; but it was not to be construed or adjudged to confirm any lands taken up by virtue of the said old grants, which were not duly seated or improved by the grantees, or their assigns before the year 1682, nor for any more, or greater quantity, than should appear by any grant from the proprietary, or from his predecessors, the former governors aforesaid, to be the grantee's just due (over and above the six acres by the said proprietary allowed to be added to every hundred acres of

land for roads and barrens, *and the four acres, over or under, to be accounted for difference of surveys*;) nor to create a right to the possessor or claimer of lands, that were not taken up, or surveyed by virtue of a warrant, or order, from persons impowered to grant the same, and by a surveyor appointed for that purpose.

The Roll's office was declared to be an office of record; and all patents to be matters of record, and to have no need of delivery before witnesses, livery and seizin, or acknowledgments, as deeds of other persons. No patents to be prejudiced by mis-recitals, or for misnaming, or not true naming counties, or places where the lands were situated, &c. But nothing therein contained, obliged the proprietary to make good any patent annihilated, or made void by due course of law; or to make good to any purchaser of a right, or rights to unlocated lands, who inadvertently, or by misinformation, had obtained, or should obtain a patent or confirmation of lands which should be discovered to be the prior right of another person, *further or any more, than the same quantity of land in the next advantageous place that such purchaser should choose and discover to be vacant and free from all other claims.* But where such prior right should appear and take effect against any such person or persons, who had purchased the same tract, or parcel of land of the proprietary, or his commissioners, or agents, by a *certain name, or by any agreed location in that particular place*, or the warrant expressing the same accordingly, then, and in such case, the proprietary, his heirs and executors, should *refund and make good* to such second purchaser *the full sum or value*, which he the said proprietary, or his agents, did receive for the same, *together with lawful interest*, from the time such payment was made; and in both the above mentioned cases, if the latter purchaser, his heirs or assigns, shall have made any improvements on the said land, such improvements were to be valued by persons indifferently chosen, and paid for by the first purchaser.

And as several persons had obtained grants or patents before the date of the charter, for more lands than they had any right to by their original warrants, or orders for the surveying, or laying out the same, they were not to be confirmed, but as to the residue or overplus of said lands, were declared to be null and void, and of none effect; and new patents were to issue for the quantity they were entitled to.

The act then proceeded with respect to the re-surveys which had been made under the act of 1700, and the overplus was to be offered to the possessors at reasonable rates, to be fixed, in case of disagreement, by referees, who were to fix the price, or appoint where it should be taken off for the proprietary, in one entire and convenient piece, at an end or outside, saving to the possessor his improvements and best conveniences, and the residue was to be confirmed to the owner by a new patent, and the overplus be disposed of by the proprietor. 1784.

If upon any such re-surveys any tract had been found deficient in the number of acres for which it was at first granted, all such deficiencies were to be made good by the proprietary, after the same rate he received for overplus lands in that neighbourhood.

This act was repealed in council, 20th of February, 1713. Votes of assembly, vol. 2, p. 150.

The resuming surplus lands, and allowing for deficiencies, appear by this act to have been mutual stipulations between the proprietary, and the people. We find nothing more, however, upon record, respecting re-surveys, after this period. With respect to the allowance for deficiencies, the instances in the proprietary times are numerous; and it appears to have been a principle, to allow a credit for over payments, upon the most equitable of all rules, that no man should be compelled to pay for that which he could not obtain, or where the consideration had failed. With respect to laying warrants, or locations *on other advantageous places*, not at first contemplated, or what is called *shifted* warrants; that subject will be considered in its proper place, in this note.

Miscellaneous Facts.

Edward Pennington, the second Surveyor-General of the province, died on the 10th of January, 1701.—Thereupon,

The commissioners of property, resolved, That no such officer should be appointed till the pleasure of the proprietor be known.

That the said office with all the books, records, warrants, and papers belonging thereto, shall be taken into the commissioners' hands, and remain under their care, and that the secretary shall chiefly superintend the same, with an able and fit hand, well skilled in surveying.

That Jacob Taylor, now concerned in a school at *Abingdon*, be invited to take the management of said office under the secretary.

All warrants to be directed to the several surveyors of the respective counties, to be returned into the surveyor's office, at *Philadelphia*.

That only copies of the warrants shall be sent into the country, attested by the secretary, and the original remain in the

1784. office *as before*, and be entered on the books, and every original warrant shall express that the original shall remain in the surveyor's office, in *Philadelphia* Book C, p. 64.

The proprietor had mortgaged the province, by deeds of lease and release, dated the 6th and 7th of October, 1708, to *Henry Gouldney, Joshua Gee, Sylvanus Grove, John Woods, Thomas Callowhill, Thomas Oade*, and *Jeffery Pinnel*, with power to sell, &c.

On the ninth of November, 1711, William Penn executed a commission to *Edward Shippen, Samuel Carpenter, Richard Hill, Isaac Norris*, and *James Logan*, as commissioners of property, with the same powers, and in the same terms, as the commission of October, 1701.

The mortgagees, by deed, dated November 10th, 1711, empower the same commissioners to collect rents, grant and confirm lands, &c. (Book H.)

There was no Surveyor-General from the 10th of January, 1701, until the beginning of March, 1706-7, when Jacob Taylor was appointed, who continued until Benjamin Eastburne was appointed, on or about the 29th of October, 1733, who continued until 1741. William Parson's commission, as Surveyor-General, bears date, August 22d, 1741. His successor, Nicholas Scull, was appointed in the beginning of 1748. John Lukens, who succeeded him, was appointed in December 1761, and continued, by re-appointment under the commonwealth, until his death, in 1789.

Daniel Brodhead was appointed 3d of November, 1789, and continued by re-appointments until 23d of April, 1800

Samuel Cochran, was appointed 23d of April, 1800.

Andrew Porter was appointed April 4th, 1809.

A tract of land, called the Welsh tract, containing forty thousand acres, was surveyed by virtue of a warrant, dated, March 13th, 1684. The object of it was to accommodate the settlers, who came from Wales, and desired to be seated together. It appears, however, from the early records, that they were not numerous enough to occupy the whole of it; but they applied to the commissioners of property for liberty to appropriate it all; but the commissioners insisted on interest and quit-rents from the date of the warrant, which they did not accede to. The unsettled part of it was therefore left open to other purchasers, and many warrants were afterwards issued to survey lands within its bounds.

There was no uniform frame of warrants in early times. Previous to the year 1733, they contained this clause, "*If not seated by the Indians;*" but in the warrants issued by *Thomas Penn*, this clause was omitted.

In the warrants issued by *Thomas Penn*, especially for lands within manors, an entire new clause appears to have been introduced: viz. "to pay a year's rent at every alienation;" but in those rights which were taken out at fifteen pounds ten shillings for one hundred acres, this clause was omitted.

In many warrants it is expressed that the warrantee should *forthwith* fulfil the terms, or the warrant to be void; but most generally, it runs thus, "That the purchaser should comply with the terms within *six months*, or the warrant should be void." And in the earliest times, interest is made to commence from the time of any settlement, or improvement.

The terms of sale were equally irregular and uncertain. As the commissioners had authority to grant lands, for such sums and quit-rents, as to them, or any three of them, should seem just and reasonable; so there was no uniform system before the year 1732. Not only the prices, but the quit-rents were various. The warrants sometimes expressed the terms of the contract; but very frequently did not. In many cases the quit-rents to be paid are inserted in the warrants, without purchase money; and from the variety, and amount of quit-rents in several cases, it would appear as if the grant had been without purchase money. Before the year 1713, five pounds a hundred acres, and a bushel of wheat, more frequently one shilling sterling, quit-rent, were the common terms, and called new terms. In 1713, lands were granted at seven pounds, ten pounds, and fifteen pounds a hundred acres, and the common quit-rent of one shilling sterling. From 1712 to 1715, lands at *Oley*, and at *Conestogoe*, were granted at ten pounds a hundred; but the quit-rents varied; in some cases one shilling sterling a hundred acres; in others, a half-penny, and a penny sterling, an acre. In 1730, lands at Oley are charged at fifteen pounds a hundred acres; and in some scattered cases, appearing in the records, the price was still higher. No connected view can therefore be given of the customs of the Land-Office in this respect previous to the year 1732. From that time a system begins to appear; and the fixed price was fifteen pounds ten shillings a hundred acres, and one half-penny sterling an acre, quit-rent, which continued until 1765, excepting a variation about, and between the years 1761 and 1763, when warrants were issued at nine pounds a hundred acres; but the quit-rent was increased to one penny sterling an acre. In the warrants issued under the authority of the trus-

tees of the province, after the year 1719. the terms were, most commonly ten pounds, *and* one shilling quit rent, for one hundred acres; and *then* the warrants are for the first time expressed to be under the *less* seal of the province, which was continued afterwards, and the reservation is, (varying the expressions) "for the use of the trustees of the province" or "for the use of the proprietary trustees."

It has generally been supposed, that the land-office was closed from the year 1718, when William Penn died, until the arrival of Thomas Penn in the year 1732. With respect to the lands on the east side of Susquehanna, this needs some observations. Warrants appear to have been issued during the whole time, almost without interruption, and in very great numbers. In May 1719 warrants began to issue for taking up lands, under the less seal, paying, as before stated, "*to the use of the trustees of the province.*" As to the proprietaryship, it is well known, it was some time in controversy, and the will of William Penn was finally established, and the right declared to be in the younger branch of his family. It is true, that from 1720 to 1730, the warrants were generally to survey old rights, and city lots; but there are some new warrants between those periods, and the warrant for lands at *Oley*, abovementioned, at the price of fifteen pounds a hundred, was issued in 1730. But on the west side of the Susquehanna the lands were not then purchased, and no other right to them was vested in the proprietaries, except so far as *Dongan's* deed, subsequently confirmed, as we have seen, may have been supposed to have given a right to the lands on both sides of Susquehanna, to an indefinite extent. But the terms of the confirming deed of 1700, for the lands on both sides of the river, are "*next adjoining to the same;*" and the lands were not clearly purchased until 1736. However this may be considered, we nevertheless find from the records, that *Sir William Keith*, in 1722, with consent of the Indians, as it is said, had a survey made for himself on the west side of the river; which survey is recognized in, and is one of the boundaries of, the first survey of the Springetsbury manor; the warrant for which issued on the 18th of June 1722, and recites it to be the request of the Indians, that a large tract of land, right over against their towns on Susquehanna, might be surveyed for the proprietor's use only, &c. The warrant of re-survey, of May 21st, 1762, recites, among other things, that sundry Germans and others, afterwards seated themselves by leave of the proprietors, on divers parts of the said manor, but confirmation of their titles was delayed, on *account of the Indian claim*—and that after the purchase of 1736, licences were given to them, (*called Blunston's Licences*) the whole granted to be about 12,000 acres. The whole of this transaction may be seen in 4 Dallas, 402, to 410: (*Penn's* lessee and *Kline,*) in the report of which, it is said, that the original warrant and survey could not be returned into the land-office at that time, "*because the land-office continued* SHUT *from the death of William Penn in* 1718, *until the arrival of T. Penn, in* 1732." The report also states, That Thomas Penn, having purchased the Indian claim to the land, empowered Samuel Blunston to grant licences for 12,000 acres, to satisfy the rights of the settlers, &c. These licences, or rather promises to the settlers to grant them patents for the lands they had settled, are signed by Thomas Penn himself, when at Lancaster, October 30th, 1736. 1784.

It may be suggested, that there were other reasons why the survey was not returned into the land-office, at that, or any other time. (Unimportant indeed as to the title, after its recognition, and warrant of re-survey in 1762.) The warrant itself was not issued from the land-office, but under the private seal of governor *Keith*, at Conestogoe. The land had not been purchased from the Indians; the office was not open for the sale of them; and it was out of the usual course to grant warrants for unpurchased lands. The council, on the report of the proceedings, seemed cautious about it, and refused to interfere, further than to permit the warrant, and return of survey to be entered on their minutes; although Col. French defended the proceedings, because the facts and circumstances recited in the warrant were truly stated, "and, in his opinion, *Springet Penn*, in whose name the warrant issued, was the late proprietor's heir at law; and whatever turn the affairs of that family might take, to re-settle the property and dominion of the province, he did not conceive this measure would be interpreted, or deemed to the prejudice of a family, for whose service it was so plainly meant and intended."

But although the land was out of the purchases, as the Indians consented to the survey, the measure itself cannot but be considered as having been founded on the soundest and wisest policy, and *Sir William Keith* conducted himself with great zeal for the proprietary interest. The controversy with Maryland, with respect to the provincial boundaries was at its height, and the Marylanders were surveying their warrants, and

1784. pushing their settlements along the Susquehanna, and within a short distance from the present town of York, with rapidity. At the treaty, therefore, on the 15th of June 1722, the governor consulted the natives about making this survey; he told them, that when the land should be marked with the proprietary's name upon the trees, it would keep off the Marylanders, and every other person whatsoever from coming to settle near them to disturb them.

We have considered, say they, of what the governor proposed to us yesterday, and think it a matter of very great importance to us to hinder the Marylanders from settling, or taking up lands so near us on Susquehanna. We very much approve what the governor spoke, and like his counsel to us very well. But we are not willing to discourse particularly on the business of land, *lest the Five Nations may reproach or blame us.*

They then asked the governor, whereabouts, and what quantity of land he proposed to survey for Mr. *Penn;* who answered,—" from over against the mouth of Conestogoe creek, up to the governor's new settlement, (Sir *William's* own survey) and so far back from the river as no person can come to annoy or disturb them in their towns on this side."

They then desired the governor would immediately cause the surveyor to come and lay out the land for *William Penn's grandson:*—The warrant was thereupon issued, and the survey made.

Information of these proceedings was immediately sent by express from governor *Keith,* to the governor of *Maryland.*

In order to counteract the Maryland incroachments, it appears further to have been the policy of the proprietary agents to invite and encourage settlements on the borders; and such settlements were made within the manor of Springetsbury. A certain right was acquired, and a contract existed, that the title should be made to such settlers, when the purchase from the Indians should be made. Certificates or licences were accordingly issued, as we have seen, promising patents upon the usual terms other lands in that country were sold for—and this contract was afterwards faithfully complied with. The year following the arrival of Thomas Penn, this system of settlement was recognized and pursued by him. The settlements increased; but titles could not be acquired; nor could the land-office be opened for lands on the west side of Susquehanna, as it had not been purchased of the Indians. *Thomas Penn,* therefore, departed from the practice of his great ancestor. The complaints of the Indians against the settlements at Tulpehocken and the purchase of those lands in 1732 should have been a sufficient caution against settling the lands over the river, if some overruling necessity had not existed; and what that necessity was, we have seen. The Indians seem to have acquiesced, and *Dongan's* deed had been brought before them at every treaty.

A commission was issued to Samuel Blunston, on the 11th of January 1733-4, to grant licences to settle and take up lands on the west side of Susquehanna. Not because the land office was at that time closed, as has been generally conceived, but because the office *could not be opened* for those lands, which were not yet purchased of the Indians.

The first licence issued by Samuel Blunston was dated on the 24th of January 1733-4, and the last on the 31st of October 1737, all of which, (and they were numerous,) prior to the 11th of October 1736, were for lands out of the Indian purchases. These grants the proprietors were bound to confirm, being issued by their express consent, as soon as they purchased the lands from the natives, upon the clearest legal principles, as expressed in the case of *Weiser's* lessee and *Moody,* before cited.

Here then appears a distinct species of land titles; local in their nature, and different from all the former practice of the province. They were not like the locations or applications of later times, but grants of a higher nature. In *Calhoun's* Lessee v. *Dunning,* 4 Dallas, 120, the court say, that Blunston's licences have always been deemed valid, and many titles in Pennsylvania depend on them; and in the lessee of Dunning and others v. Carothers, in the supreme court, December 1803. *Mss. Reports,* The court say, " That Blunston's licences partake more of warrants than locations, and have all the essential parts of a warrant.

We have already seen, that the *promise* of Richard Peters, to give a preference to a settler to induce him to remove from unpurchased Indian lands has been recognized. We will now proceed to exhibit other instances of recognition of titles irregularly commenced.

In the lessee of *Fothergill* v. *Stover,* 1 Dallas, 6, a letter from *James Steel,* receiver-general and secretary of the land-office, to the surveyor-general's deputy in Chester county, in these words. " Friend Isaac Taylor, Philadelphia, 3, 2d mo. 1719. *James Logan* has agreed, that the bearer hereof, *William Willis,* shall have 500 acres of land at *Conestogoe,* please to survey it to him, and the warrant shall be ready. Thy loving friend *James Steel*" was offered in evidence as the foundation of the defend-

ant's title. Objected on the part of the plaintiff, that James Steel, by his order only, without a warrant from the proprietors, or the commissioners of property, could not authorize the location of lands; and even supposing it to amount to an order from *James Logan* himself, as he was only one of *three* commissioners, such order cannot be a sufficient warrant.

But the court said, that under these sort of orders from the proprietors' officers, a great part of the province had been settled, and that for the general conveniency they had been heretofore allowed to be given in evidence, and particularly in *M'Dowall's* case. In that case, last April term, a letter from *Richard Peters*, secretary of the land-office, to the same effect as the above, was allowed; and the letter in this case was accordingly ruled to be given in evidence.

A plot of a survey made in pursuance of the above letter, in *Isaac Taylor's* own hand writing, with a note at the bottom, thus " Surveyed in 1720," and in the body of it the words " William Willis, 400, as" not returned into the surveyor-general's, or secretary's office, but found among *Isaac Taylor's* land papers, many years after his death, was allowed to be given in evidence against a regular warrant and survey posterior to the above; a settlement and possession being proved to have been made, *and the land-office appearing to have been shut between the years* 1718 *and* 1732. Supreme court, April term, 1763,—And judgment affirmed, on appeal to the king and council.

It appears also, upon examination, that the practice was very common of permitting surveys to be made without any warrant, or order, either by connivance of the officers, or consent of the proprietor, expressed in some manner, not of record. This gave rise to a new kind of warrant, since rendered common in a different sort of inceptive right, called *a warrant of acceptance*. In the years 1760 and 1761, this warrant was frequently issued in the following form. " Whereas, by *our consent and direction* a survey was made, &c." and then requiring the survey to be accepted.

About the year 1762, when William Peters was secretary, another practice was resorted to, of a very inconvenient kind, and leading to much irregularity; which was, to issue certificates of warrants having issued, when in fact no warrant was issued, or any purchase money paid; and on these certificates surveys were made without any authority or direction from the surveyor-general. But after the year 1765 this practice was prohibited by special instructions to the deputy surveyors. These certificates were in the following form.

September 10th, 1762. I do hereby certify, that a warrant of this date is issued to *A. B.* for 150 as. of land, &c. on common terms of *l.*15 10 per hundred acres, and a half penny sterling per acre, forever. Interest and quit rent to commence from, &c. *W. Peters.* 1784.

This also required warrants of acceptance in order to confirm the proceedings, and these warrants of acceptance contained a suggestion, that the original warrant *could not be found*—and are in this form: " Whereas it appears by the book of entries of warrants kept in our land-office, that on the 10th day of September 1762, a warrant was issued to *A. B.* for 150 acres of land, &c. And whereas the said *A. B.* hath now represented to us, that he hath procured a survey of 218 acres upon the said warrant, but the said warrant not being now to be found, the said *A. B.* hath humbly besought us to grant him our warrant of acceptance, &c.—Of this practice there are many instances about this time.

It would be very material to ascertain the exact state of the land-office at every period of the provincial government; but from what has been shewn, it must be seen that it is impracticable to delineate any uniform, or regular system, None such existed. A knowledge of the customs and usages must therefore be derived from instances and facts scattered through its records. A variety of these have been already shewn; and the proprietors appear to have recognized the acts of their officers and agents, however irregular, with respect to the lands within the purchases. These acts, practices or customs, grew into rights, and have been considered as contracts, which the law would have enforced against the proprietor; and they have succeeded in courts against younger rights, however regular, as in *Fothergill* and *Stover*. So in the years 1719 and 1720, we find warrants issuing on settlements, said to have been made upon agreements previously made; a distinct matter from the *surveys by consent*, or the *certificates* before mentioned—Numerous warrants therefore run thus: " Whereas in pursuance of an *agreement* made by us about five years ago to settle and improve (certain lands) you are required to survey, &c." But no evidence of such original agreements exists. If reduced to writing, it must have been delivered to the party obtaining the licence, and not entered in the minute books. But it clearly appears, upon a very minute examination, that there was *no time* when the *land-office* can be said to have been *shut*, or when warrants could not be procured. The examination has been laboriously made with a view to ascertain the correctness

1784. of a circumstance stated in *Fothergill* and *Stover*, and *Penn* and *Kline*, and very frequently mentioned in the courts in the present times, that the *land-office* was *closed* from 1718 to 1732, during the minority of *William Penn's* children. It has been one of the causes assigned for the origin of improvement rights, which must be traced to a higher source, the *implied consent* and *acquiescence* of the proprietors and their agents, notwithstanding some of their public acts seem to discountenance them; and which will be related by and by.

In *Fothergill* v. *Stover*, when the receiver-general writes to the deputy-surveyor of Chester county to make a survey, he at the same time tells him that "*the warrant shall be ready*," which could not be, if the land-office was shut, and the powers of the commissioners of property suspended. It has been already shewn, that, independent of promises, licences to settle, and licence to make surveys, without warrants, a very great number of warrants issued in the usual form, changing only the clause of "paying to our use" to "paying to the use of the trustees of the province," in regular succession, from 1718 to 1732.

But it is equally certain that none of the warrants thus issued, were transmitted, as usual, to the surveyor-general's office, nor were they entered there at any subsequent time. To give a single instance: A warrant issued to one *Peter Bartolet*, for land at *Oley*, on the 25th of March 1720. But this warrant is not to be found in the surveyor-general's office. But although not deposited there, when it came to be patented, on the 29th of June 1736, it is recognized, and the surveyor-general makes his return to the secretary, in the usual manner, thus. "Pennsylvania, ss. By virtue of a warrant from the proprietary's late commissioners of property, dated 25th of March 1720, surveyed to *Peter Bartolet* on the 30th of same month, a tract of land situate in Oley, in the county of Philadelphia, beginning, &c. containing 150 acres, returned into the secretary's office, 29th of June 1736. Further, on examination of the receiver-general's books, from 1718 to 1732, monies appear to have been received for lands, and accounts settled, during the whole period, without interruption. Again, on examining the patent books, for the same period, it appears that an immense number of patents issued. For all these patents which were for old rights, and surveys made before 1718, and on some warrants of re-survey, and for city lots, the surveyor-general makes his returns to the secretary, in the usual manner. But for patents which issued during that period, on *new rights*, granted during the minority of the proprietors, no returns are made by him for patenting in the accustomed manner, nor does any record exist of them in his office. It remains to account for this departure from practice; and it will appear, that, although the office of surveyor-general continued, and surveys were made by his deputies as usual, yet for all other purposes (making returns of surveys already in his office excepted) his usual duties, and general powers were suspended. And although no difficulty existed as to obtaining and confirming titles, through a certain channel, yet as the old practice of his office was interrupted, the idea must have arisen, that the *land-office* was closed, when in fact one branch of it only, partially ceased to act. To all substantial purposes it remained open. And if we descend to a very nice distinction, and say, that all *proprietary* authority ceased with the death of William Penn, and could not be revived, *as such*, during the minority of his successors, yet a power remained behind, unextinguished, which answered all useful and beneficial purposes; and whether the public business was conducted by trustees, or agents, yet if it was efficiently done, it was the same to the people. A few more observations, therefore, will close this point.

William Penn, by his will, dated in 1712, appointed certain trustees, and devised to them all his lands, &c. in America, upon trust to sell and dispose of so much of his said lands as should be sufficient to pay all his just debts. Supposing this will could operate only on his private estate, which was excepted out of the Pennsylvania mortgage; or, that no power could be immediately derived from it, during the litigation respecting the will, which was established in the court of exchequer in July 1727, and not before;—yet it must be remembered, that the legal estate of the province was not in *William Penn*, at the time of his death, but in the mortgagees; and it will also be remembered, that when *William Penn* executed a commission to certain persons, in 1711, to be his commissioners of property, it was necessary for the mortgagees to execute a similar commission, which was done on the following day; and power was given by them to grant the lands of the province and receive the monies for the purpose of extinguishing the debt. This mortgage was unsatisfied, and *Richard Hill*, *Isaac Norris*, *Samuel Preston*, and *James Logan*, the commissioners of property appointed in 1711, still survived, and were also the trustees of *William Penn's* will. They therefore granted warrants and issued patents; if not as proprietary

officers, yet under ample and existing powers. But the mode was varied. When surveys were made, if a patent was required, they took the first return of survey, without requiring it to be entered in the surveyor-general's office, and a formal return transmitted from thence. The patents were in their own names, and recited as well the commission of William Penn, as of the mortgagees, *Joshua Gee*, and others, of 1711, and thus very many patents exist, a trace of which cannot be found in the surveyor-general's office.

It becomes necessary now, to notice another mode of selling lands in the province, which was adopted in the year 1735, by lottery; the scheme of which was published on the 12th of July, in that year, and was as follows.

Scheme of a lottery for one hundred thousand acres of land in the province of Pennsylvania.

The honourable the proprietaries of the province of Pennsylvania, having considered a proposal made to them for the sale of one hundred thousand acres of land, by way of lottery, and finding that the same tends to cultivate and improve the lands, and consequently increase the trade and riches of this province; and also considering that many families are, through inadvertency, settled on lands to which they have no right, but by becoming adventurers in such a lottery may have an opportunity of securing those lands and settlements at an easy rate, to themselves and their posterity; have therefore agreed,

1. To sell by way of lottery 100,000 acres of land, and estimate the same at the settled price of fifteen pounds ten shillings, current money of this province, for one hundred acres, which amounts unto the sum of £.15,500. and that the same be purchased by the sale of 7,750 tickets, at forty shillings each, which likewise amounts to 15,500 1784.

2. That whereas a quit rent of one half penny sterling for every acre, (or four shillings and two pence for every hundred acres) is now annually reserved on all lands granted by the proprietors; yet for the particular benefit and advantage of the adventurers in this lottery, no more than one shilling sterling shall be reserved on every hundred acres of the said 100,000 acres, as was agreed to, and paid by the first purchasers and settlers in the province. The reservations as to mines to be as usual; that is to say, three-fifth parts of all royal mines, and one-fifth part of all other mines, free of all charges for digging and refining the same.

3. That the tickets to be delivered to the adventurers be expressed in the words following, viz.

This ticket entitles the bearer to whatever prize shall be drawn against the number hereunto prefixed, in the lottery for the sale of one hundred thousand acres of land in the province of Pennsylvania.

4. That the number of blanks and prizes be as followeth, viz.

Prizes.		*Acres.*		
1		3000		
2 of	1500 acres	3000		
10 of	1000	10,000		
20 of	500	10,000		
140 of	200	28,000		
150 of	100	15,000		
250 of	50	12,500		
720 of	25	18,000		
Benefits 1,293		99,500		
Blanks 6,457		200 first	drawn	besides any other prize that may be drawn against them.
		300 last		
Tickets 7,750		100,000		

5. That the number of acres the adventurers shall be entitled to, may be laid out any where within the province, except on manors, lands already surveyed, or agreed for with the proprietors or their agents, or that have been actually *settled or improved* before the date of these proposals; provided nevertheless, that such persons who are settled on lands without warrants for the same, and that may be entitled to prizes, either by becoming adventurers themselves, or by purchasing of prize tickets, may have liberty to lay their rights on the lands where they are so seated.

6 and 7 Managers appointed, to draw the lottery, publish the prizes, &c.

8. That the adventurers entitled to prizes, are to bring or send in their tickets to be examined with the books kept by the managers, that certificates of the prizes belonging thereto may, by

1784. any one of them, be endorsed thereon, which being produced at the secretary's office, warrants shall immediately issue to the surveyor-general, directing returns to be made accordingly; on which returns patents of confirmation shall be forthwith granted, on the usual fees to the several officers concerned. For which examination and certificate two shillings and no more shall be paid.

9. That any person having a right to sundry small prizes, may have them, or as many as he shall chuse, included in one warrant, or a large prize divided into smaller parts, not less than 200 acres in one parcel, and take warrants accordingly.

10. That for the more effectual securing to the adventurers the surveying and taking up of lands they may be entitled to; and to the end that the same may be laid out to their satisfaction and advantage; it is agreed by the proprietors, *that from the date of these proposals, and for twelve months after* the drawing is finished, *no warrants shall issue* for the taking up any vacant land within the province, nor that any lands therein be surveyed, except only on former contracts, and warrants that have issued, *or lands seated and improved before the date hereof.*

11. That the lottery be drawn in public, in the month of December or January next, or sooner, if the whole number of tickets shall be disposed of before that time.

Lastly, Whereas several of the adventurers may be unacquainted with proper places whereon to locate their prizes they will be entitled to; it is therefore further agreed, that several tracts of the best vacant land shall be laid out, and divided into lots, for all prizes not less than 200 acres; all which lots shall be numbered, and drafts thereof lodged with the managers, and the surveyor-general. The prize tickets of 200 acres and upwards, (which will be mixed with the other prizes and blanks) are likewise to be numbered on the inside thereof, so that the situation of all such prizes will be determined at the same time that the tickets are drawn, by corresponding numbers on the said drafts; exact registers of the numbers on such tickets are to be made with the daily entries of prizes drawn, that the adventurers may, on examination, know what lots they are entitled to.

But for the further satisfaction of the adventurers entitled to such prizes, they shall have the choice either of abiding by their respective lots, or of laying their rights on any other lands within the province, as is provided in the fifth article. And such of the adventurers as shall be entitled to prizes of 500 acres and upwards, may have them subdivided into parcels of not less than 200 acres, by regular lines, conformable to the courses of the whole tract, and take either one or more of those subdivisions.

The several located tracts abovementioned, with the usual allowance for roads and highways, shall be reserved for the use of the adventurers twelve months after the drawing shall be finished, and no longer; that is to say, six months for the use of those entitled to prizes of 200 acres and upwards; but if they do not within that time declare to the said managers their intention of taking the lots that fall to their share, any adventurer, possessed of other prizes, may, within the remaining six months, lay their rights, by regular lines as aforesaid, on such appropriated lots.—(Proprietary papers, No. 197.)

This lottery never filled, and was therefore never drawn; yet as many tickets were sold, they became the titles to lands. But the surveys were made, and the lands surveyed were for a long time kept apart from the common mass of property; and so late as the years 1769, and 1770, we find warrants of acceptance for part of these lottery lands, on special terms. Upon inspection of the warrant book, no warrants appear to have issued for more than a year, but for parts of old rights, or such as were founded on previous settlements and improvements, on former agreements, or warrants of re-survey, as promised in the lottery scheme.

Of the law of improvements, we shall speak at large in another part of this note. It grew up from a very early period, by the acquiescence of the proprietors, and their officers. In this lottery scheme they are recognized, and excepted from other appropriations, although there could be no necessity arising from the shutting of the land-offices in 1735. It is true, in the beginning of the scheme, improvers are spoken of, as persons who had *inadvertently* settled on lands to which they had no right; yet they were never disturbed, although some of the public acts of the proprietors *seem to discountenance the practice.* It had however taken so deep a root, that at this period, and in later times, it became a part of the settled law of the board of property to give the preference to the improver in every case of conflicting rights.

Improvements, without warrants, did not form part of the system of William Penn; nor did he contemplate any other kind of title, than legal purchases from himself. Thus, in 1687, one *Allen* had seated land contrary to order, and without being surveyed. He was therefore

ordered to appear before the commissioners, to give his reasons therefor, or process to issue against him in the proprietary's name. He appeared accordingly, and was ordered to leave it in a reasonable time, or be prosecuted. Journal F.

November 23d, 1738, the following proclamation issued, by the proprietaries of Pennsylvania.

Whereas great numbers of people have heretofore obtained from our commissioners of property and lately from ourselves, warrants directed to our surveyor general, for surveying to them the quantities of land mentioned in their respective warrants, for which they agreed to pay to us the consideration money and quit-rents, therein specified and reserved, with express conditions in the said warrants likewise contained, that in case the persons to whom the said lands should be surveyed, did not fulfil their respective agreements within the space of six months from the date of the said warrants, that then the said surveys were to be void.

And whereas many persons have by colour of the said warrants and surveys, possessed themselves of the lands mentioned in the said warrants, without having complied with any part of the conditions upon which they obtained the same within the time therein limited, by reason whereof the said warrants and surveys, and all the estate thereby intended to be conveyed, are become utterly void.

And whereas others under pretext of leave from our commissioners, and some without any leave, licence, warrant, or other authority whatsoever, have entered into the possession of our lands, and have taken upon them to transfer their claims, under the name of improvements, to others for considerable sums of money, and great numbers of all sorts have cleared great part of the land upon which they are seated, and continue to cut down and destroy the timber, without any regard to our property, and in manifest prejudice of our right; so that we might legally proceed without further delay, to remove all such persons from their possessions; yet in consideration of the hardships which many of the persons might suffer in the winter season, should they now be turned out of their dwellings, we have thought fit to give this public notice to all who hold any of our lands under any warrants or surveys, or pretended assignments, or under pretence of a possession without authority as aforesaid, or otherwise howsoever, who have not paid any consideration money for the same; that unless they shall before the first day of March next, pay unto our receiver general the consideration money which ought to be paid according to the usage of our land office, for the lands of which they are possessed by colour of the premises, so that they have them confirmed by patent, they will be proceeded against according to law, in order to be removed from their possessions; and the lands from whence they shall be removed, will be granted to such as will pay for, and improve the same. By order of the proprietaries. *Richard Peters*, Sec'y. 1784.

That this call upon the people was not complied with in very many cases, is certain. That any measures were pursued to remove settlers does in no wise appear; and but a little reflection is necessary to persuade any one that proceedings of that nature would have been impracticable. The strong presumption is, therefore, that such a measure never was attempted. But to this period we trace a new kind of warrant, called a *vacating warrant*. These warrants, recite, "That a former warrant of a certain date had been granted for the land, and that no money had been paid, and that the warrantee had not complied with the terms." The proprietors therefore vacate the old warrant and direct a survey to be made of the land to the new warrantee, or that the survey already made be returned and accepted to his use, (as the case may be.) The other recitals are various according to the circumstances attending the particular case. Sometimes they recite transfers from the original warrantee; but in many cases, where no money was paid, there are no recitals which can lead to any facts respecting the nature of the transaction, or enable us to determine precisely, whether in any case such vacating warrant issued *adversely*. In many cases, where money had been paid on account, such payment is carried to the credit of the new warrantee; which could not have been done, but by some compromise with, or satisfaction to, the original owner, manifestly appearing to the officers. In other instances a mixed kind of warrant appears, partaking partly of a vacating warrant, and partly of a warrant of acceptance.—An instance of this latter kind is here given: "Whereas a warrant dated the 6th day of January, 1737, was granted to Joseph Scott for two hundred acres of land, &c. but the said J. S. did not comply with the terms of the said warrant, whereby the same *became void;* nevertheless his executors *took upon them* to sell the said land at public vendue, &c." it then recites that the pur-

1784. chaser procured a survey to be made to *H. B.* "who hath humbly requested us to grant him a warrant for the acceptance of the said survey, and we favouring his request, &c."

There is but one case on this subject, the lessee of *Robert Lowrey* v. *James Gibson* in Cumberland, April 1796, before *Shippen* and *Yeates*, Justices, *Mss. Reports.*

Ejectment for 200 acres of land in Hopewell township, brought in the common pleas to October term 1781.

The plaintiff claimed under a survey, of 200 acres, made by Thomas Cookson, D. S. on the 11th of September 1744, marked "surveyed *on a ticket, warrant to be made out,*" and a subsequent warrant to the lessor of the plaintiff for 100 acres of land in Hopewell, and dated 18th of February 1744-5. Both the survey and warrant were indorsed—vacated and returned for the use of *George Croghan.*

The vacating warrant was dated 22d of June 1749, in favour of the said *George Croghan*, and recited that "the conditions of the former warrant had not been complied with." The defendant claimed under a patent issued on the day following to *Croghan.*

It did not appear, that any money had been paid by *Lowrey*, when he obtained his warrant, or that he had ever been in the actual possession of the lands in question. On the contrary, it was sworn by one witness, that in 1779 he wished to buy the lands from plaintiff, and offered him *l.*100 for them, if he could make him a good title; and enquired of him whether he had not contracted with *Croghan* for the tract, to which he replied in the affirmative, but that he had received from him only *l.*6. The land was then uncleared, but now almost all of it was in cultivation.

The plaintiff's counsel contended, that *vacating* warrants were utterly against law, unless preceded by an actual entry. The late proprietaries were as much bound by settled legal principles, as any individuals. No private person, after any lapse of time, however great, could annul by his own power, a contract of sale, by a memorandum endorsed thereon. Warrants to survey lands, recite the agreement of the parties, the terms of purchase, and the time of payment. Money was commonly paid on the issuing of the warrant, and so the jury would presume in the first instance, though no proof was given of it.

At all events a warrant effected an estate on *condition*, and in case of a condition broken, the law was clear, that a re-entry was necessary to defeat the first estate granted. Co. Lit. 202, b, 218, a b, 2 Black. Com. 155. Supposing it to be a mere agreement for the sale of lands, the vendor, after he had contracted to sell, stands in trust for the vendee. The maxim in equity is clearly established, that what ought to be done, shall be taken as done. 3 P. Wms. 215. 3 Black. Com. 438. 2 Vez. 631. 638. and a covenant for a valuable consideration, is, in equity, tantamount to a conveyance. *Powel* on Dev. 594. Where there is a condition for the payment of money, the court will grant relief. 1 Stra. 453. If paid with interest it is sufficient, 1 Fonb. 388. The prevailing distinction in equity, is to relieve against conditions, as well precedent, as subsequent, where compensation can be made. 1 Eq. abr. 108. Ambl. 511. 514. 1 Salk. 156. 1 Chan. ca. 49. 96. 12 mod. 184. 2 Vern. 222. 366. 594. But this condition is not precedent to the vesting of the estate. It is similar to the case in Gilb. Eq. Rep. 43. Prec. Chan. 387. S. C.

The clause usual in all warrants, that "in case the party fulfils his agreement within six months from the date, the warrant and survey shall be valid, otherwise void" has never been construed with the strictness contended for by the defendant: and if such was the law, the most pernicious consequences might ensue to the community. A custom to vacate warrants has never existed, where surveys have been made on them; and such warrants have never prevailed, unless by the agreement of the party who took out the first right.

The defendant's counsel argued, that whatever effect the words of a warrant might have, the fact was notorious, that many valuable titles depended on vacating warrants, which it would be highly dangerous now to unsettle. The late proprietaries, as lords of the soil, granted their lands in their own mode, and in many instances adopted the practice of issuing vacating warrants. The proof of particular equitable circumstances, inducing them thereto, cannot reasonably be expected after a great lapse of time. They will be presumed after a length of years and possession. Livery and seisin shall be presumed after a possession of twenty-five years. 12 Vin. 126.

Cases have occurred of warrants having been granted where no money has been paid, though it is admitted they are rare; but from no proof being given of such payment, the jury should not conclude there was money paid.

Though an individual cannot by his own act defeat a purchase made from him, yet chancery would not decree the specific execution of a stale agree-

ment; and hence it is, that warrants and locations not pursued up with proper diligence, will not give a title to lands. One coming to be relieved against a forfeiture, must claim within a reasonable time, 1 Vern. 450. One conusant of his right, suffering another to build on his land, shall be postponed, 2 Atk. 89. A defective estate shall not be aided against one who has the estate on good consideration.

The court recommended to the counsel to state the case, in order that the legal point respecting *vacating* warrants might be solemnly settled in bank; but they declined it on each side.

The court then summed up the evidence to the jury, and premised, that in all cases where there had been great length of possession, and improvements made under a complete legal title, the jury should be very cautious before they find a verdict againt such person.

As to vacating warrants, many titles depended on them. Whether the common provisions in warrants, that "If the agreement was not fulfilled in six months, the warrant and survey should be void," were *limitations* or *conditions*, the court would not now determine; nor what was the strict legal operation of such warrants, giving a surveyor an authority to survey and make return of lands. Certainly the party in whose favour the warrant issued, might *abandon* his claim, and forfeit it by great *laches*, or neglect; or, in those early times, *sell and transfer* it by *parol*. Where one has trifled, or shewn a backwardness in performing his part of the agreement, chancery will not decree a specific execution. So where a contract has lain dormant many years.

When a warrant right, therefore, has not been pursued within a reasonable time, owing to such circumstances as have been before stated, or of a like kind, the proprietary officers pursued the custom of issuing vacating warrants, and such power, in the settlement of a young country, was absolutely necessary for the common welfare. It was not the usage to grant them, unless after full inquiry, and the special equitable circumstances thus ascertained, were never recited in the vacating warrants. The proprietaries were not in the habit of hunting for forfeitures, or of strictly exacting them. Some proof of a sale by *Lowrey* to *Croghan*, has been produced; but from the length of time since the transaction happened, it would be reasonable to presume some grounds on which the vacating warrant issued, if no such evidence had been given. The law greatly favours a long possession, and it is fair, just, and legal, to presume a contract of the plaintiff with *Croghan*, without positive testimony. An act of parliament may be presumed; a grant may be presumed from great length of possession, Cowp. 215. No evidence has been given of any collusion between the proprietary officers and *Croghan*. 1784.

Supposing, however, the complete legal right of the defendant out of the question, and that he relied solely on his possession, and those who preceded him, how would the case stand? The survey was made on a ticket, previous to the plaintiff's warrant, which does not appear to have been accepted in the proper office, whether he paid money on his warrant, or not, of which there is no evidence. If he did not with due diligence follow up his warrant, lay by 37 years before he brought his ejectment (which is near 15 years ago;) took no possession, nor did any act of ownership, but silently permitted others to improve the soil by their labour, he cannot now expect to succeed on any principle of law or equity. Verdict for defendant.

But that the cases are *rare* in which warrants issued without the money being paid, as stated by the defendant's counsel, in the foregoing case, cannot be admitted. On the other hand they will be found to be very numerous; and are of two classes: Such as issued with the proprietor's knowledge and consent, expressed; in which cases an entry will appear, in the margin of the warrant "*By special order*,"—and such as went out without such consent expressed, for reasons which perhaps cannot be ascertained.

There is a large number of warrants in the office in a situation still more singular; many which have never been acted on, and others which have; and which form the basis of many titles. We allude to such as have never been signed by the governor, whose signature was necessary. For one class of warrants under this circumstance, the records of the Board of Property furnish a satisfactory reason; and as some titles may depend upon it, the explanation becomes indispensable.

In the year 1755, a warrant issued for lands on the *Juniata*, in the name of *Barnaby Barnes*. It was not *signed, nor any money paid upon it*. A survey was however made upon it, which was not returned, until a subsequent warrant was applied for, and issued, for the same land, on which money was paid; and it came before the Board of Property, on a contest between the two warrantees, for decision, as to which

1784. warrant the survey should be returned, on the 15th of May, 1768. The Board decided, (governor John Penn being present,) that *Barnaby Barnes's* warrant was in *the same situation as that of many others* in *Governor Morris's* time; they were made out and entered in the warrant book in the secretary's office, and *sent to him to sign,* but were never signed by him. They therefore held *Barnes's* warrant to be the first appropriation of the land, and confirmed it accordingly. Minute book I. page 121. The patent issued, but the warrant was never in the Surveyor-General's office. The proprietor did not permit any person to be injured by the negligence of his own deputy. *Robert Hunter Morris* was governor from the beginning of October, 1754, until about the 20th of August, 1756.

The foregoing being a case in which the warrant was not only *unsigned,* but on which *no money was paid,* is in opposition to the sentiments of the court in the lesse of *Daniel Gripe* v. the *Rev. David Baird, Huntingdon,* May, 1803, before *Yeates* and *Smith,* justices, MSS. Reports; in which the remarkable fact of governor *Morris's* negligence in signing warrants, was either not known, or not mentioned; although the plaintiff's warrant was exactly in the same situation, having been issued in governor *Morris's* time. The case was as follows:

The plaintiff claimed under a warrant issued to *Samuel Smith,* for one hundred acres, in, &c. dated 3d of February, 1755, upon which a survey of one hundred and eighteen acres and allowance was made on the 3d of December, 1774, by *Thomas Smith,* D. S.

The original warrant directed to *Richard Tea,* the former deputy surveyor of the district, and indorsed by T. Smith, "Executed 3d December, 1774, Spring meadow," together with two other office copies of the warrant, were severally *unsigned* by the governor.

Mr. Smith was examined as a witness, and proved that it was the uniform practice of succeeding deputy surveyors to execute warrants directed to their predecessors, without a new direction for that purpose, and such surveys had been invariably received in the Surveyor-General's office; but having made the survey, Mr. Smith declined sitting as a judge in the cause.

After the testimony was closed, *Yeates* J. interrupted the defendant's counsel, who were opening their defence. He said: Judge Smith's testimony had fully obviated one difficulty which presented itself respecting the survey; but he thought it impossible to support the survey, unless the original warrant had been signed by the governor for the time being, as the chief commissioner of the Board of Property, or money had been paid thereon to the Receiver-General. The objection, however, appearing to be a surprise on the plaintiff's counsel, which they were unprepared to meet or answer, a juror was withdrawn by consent.

The case came on again, before the same judges, in May, 1805, when a credit was produced from the Receiver-General's books for £.5, on account of the warrant; and it was admitted to be an authority to survey the lands, as the party had complied with the contract on his part. But a verdict was found for the defendant on other grounds. MSS. Rep.

In bringing together so great a number of facts, it is impossible to avoid some repetition; nor can the order of time be distinctly observed; this part of the note is, as it is called, entirely miscellaneous; and perhaps as irregular as the subject.

It must have been observed, that in *Barnaby Barnes's* case, a survey made on a warrant, which was not only *unsigned,* but no *money paid,* nor the *survey returned,* was not for any of these reasons considered to be illegal; but was adopted, as being the *first appropriation* of the land by the governor, who was himself one of the proprietaries, and the whole Board of Property, in opposition to a regular warrant, and money paid. It is true the warrant was issued in governor Morris's time, who appears generally, to have neglected to put his signature to the warrants, without which they could not be entered with the Surveyor-General.

It also appears by the recital of a very great number of vacating warrants, where surveys were made, that *no money* was paid; so that the practice must have been pretty general.

In coming down to Secretary *William Peters's* time, in 1762, we find certificates delivered that warrants had issued, when none had, nor can be found; and no money was paid. Yet we find surveys made on these, which were legalized in Mr. Secretary *Tilghman's* time, by warrants of acceptance. These entries on the warrant books, where the warrants did not formally issue, in 1762 and 1763, have been likened to applications, to which they bear no correct resemblance. Certificates were *printed* for the purpose of being sent into the country, upon which the surveys were made; and it rather appears to have been a plan adopted by the secretary, (however irregularly and improperly, certainly not *improvidently,* in the technical sense of the word,) for the accommodation of the people who were

willing to settle in a remote and mountainous country, and probably could not afford to pay down even the price of a warrant.—And whatever complexion might be given to a single case coming before a court of justice, without a view of the extent of a particular practice; that complexion would be changed by proof of such frequency in the mode, as evidently to shew it to have been intentional, and the deliberate act of the proprietary's *own agent*. And it is further presumed, that the special instructions given to the deputy surveyors, at a subsequent period, not to make any surveys, but upon orders from the Surveyor-General, for the future, looked back to this irregular practice, and impliedly recognized it. So, with respect to warrants which issued in very great numbers, without money paid; the same mode of reasoning would apply. The practice was too common. The mischief of declaring such warrants void, would be extensive; nor would it be for the benefit of the commonwealth, that they should be declared void.

But it is our duty to exhibit every bearing of every case; to give the practice of the country as it was or is. The legislature and the courts alone can establish systems.

In the lessee of *Bernard Dougherty* v. *John Piper*, *Bedford*, November, 1801, before *Yeates* and *Smith*, justices, (MSS. Reports,) which was an ejectment for 108 acres, and 152 perches, in *Coleraine* township.

The plaintiff claimed under a slight improvement of some adjacent land, made by *James Wells*, who sold to *Edward Logston*, on the 16th of January, 1765. *Logston* conveyed to *Dougherty*, on the 26th of the same month.

He offered in evidence a copy of an original warrant in his own name, dated 17th of April, 1766, for 250 acres, including his improvement, which he purchased of Edward Logston, who purchased of James Wells, lying on a branch of Juniata, called Piper's run, known by the name of the Flag-bottom, about 14 miles from *Bedford*. Interest to commence from 1st of March, 1762, on this warrant was endorsed a direction, under the signature of John Lukens, then Surveyor-General, to *Richard Tea*, deputy surveyor, to execute the warrant; also, in the hand writing of the said *Richard Tea*, "Executed, November 11th, 1766, 293 1-4 as. recorded by *R. Tea*."

The plaintiff likewise offered the draught of survey made by the said *Tea*, on the 11th of November, 1766, containing 293 1-4, acres.

To the reading of these papers to the Jury, the defendant's council excepted; and produced a certificate from *Samuel Cochran*, Surveyor-General, that no such original warrant, nor any traces thereof, could be found in his office; a second certificate from *Francis Johnson*, Receiver-General, that no money appeared in his office, to have been paid thereon; and a third certificate from *David Kennedy*, secretary of the Land-Office, that the original warrant then remained in his office. 1784.

It likewise appeared, by the testimony of Mr. Justice *Smith*, that during the period in which *William Peters* acted as secretary of the Land-Office, some complaints existed, as to issuing warrants, where they had not been paid for, *but that all these irregularities were cured*, when *James Tilghman* came into that office.

By the Court. Let the warrant and survey be received in evidence. Their operation will be judged of afterwards. It will be remembered, that the warrantee has not conveyed his right to any other person; and the warrant has issued from the office *improvidè*.

The residue of the case goes to other points, not applicable here.

Again, in the lessee of *John Nicholas*, and others, v. *William* and *John Holliday*, *Huntingdon*, May, 1802, before the same judges. MSS. Reports, on an ejectment for 200 acres of land in *Frankstown* township.

The plaintiff claimed under a warrant to *Edward Nicholas*, for 150 acres, including his improvement, about one mile and a half from the forks of Frankstown branch of *Juniata*, in Cumberland county, dated 6th of September, 1762, on which £. 7, 10, *s.* was paid into the office of the Receiver-General, and a survey thereon, of 199 acres, and 17 perches, made 25th of May, 1765, by Samuel Finlay, who acted under *Richard Tea*, the surveyor of the district.

The defendants set up a defence under the copy of an *application* entered in the Land-Office, in *warrant book*, T, on the 3d of March, 1763, in the name of *James Haldane*, for 300 acres, on the south side of the middle fork of the Frankstown branch, including a dry draft above the hill, which closes in and stops the passage on that side of the creek, in *Cumberland* county; also on a like application, entered on the same day, in the name of *Timothy M'Kinley*, for 300 acres, (described as above,) about a mile and an half above the draft.

Two warrants appeared to have issued on the same 3d of March, 1763, to *Haldane* and *M'Kinley*, describing the lands as in their respective *applications*. They were both directed to

1784. *Thomas Smith*, with the following indorsements, signed by *John Lukens*, Surveyor-General. "It is supposed the land for which this warrant was granted, interferes with prior warrants. Execute this warrant on lands left out by prior warrants, and make return into my office."

Copies of surveys made by *Richard Tea, in pursuance of these warrants*, on the 18th of May, 1765, were offered to be read in evidence, the one for *Haldane* containing 301 acres, the other for *M'Kinley*, containing 287 acres, which appeared to be returned into the Surveyor-General's office, on the seventh of March, 1767.

These applications, warrants and surveys, were opposed as evidence, by the plaintiff's council. As grounds of objection, they shewed a certificate from the Surveyor-General, that there were no warrants in his office to *Haldane* and *M'Kinley*, but that certified copies of the applications were filed therein, as of the date of 14th of July, 1794. Another certificate from the Receiver-General, that no money appeared to have been paid in his office, either on the application of *Haldane* or *M'Kinley*. Also two surveys by *Thomas Smith*, made on the 2d of December, 1774, the one for *Haldane*, containing 243 acres, and the other for *M'Kinley*, containing 202 3-4 acres.

They contended that an application for a warrant was no authority to survey lands in 1763. The papers produced were mere copies from the warrant book, and it is well known, that the introduction of locations, or applications as grounds of survey, did not obtain until August, 1766, in the proprietary Land-Office. (This is a mistake of a year, as applications originated on the east side of Susquehanna, in 1765.)

The warrants must have issued fraudulently, or improvidently, No warrants ever issued without money being previously paid, or without reciting a consideration, as services performed, &c. But granting to these warrants a degree of validity to which they are not intitled, what authority had *Richard Tea*, to execute them? He could not legally act without a deputation. But they were specially directed to *Thomas Smith*, and he is interdicted expressly from surveying any lands which might interfere with prior warrants, which he certainly would not have done, if he had known the true state of the facts. The very execution of the warrants by *Mr. Smith*, was an abandonment of the former surveys, supposed to have been made by *Tea*. They were not warrants of re-survey. To afford a feeble prop to the inofficial surveys by *Tea*, copies of the applications are surreptitiously thrust into the Surveyor-General's office, as of July, 1794.

By the Court. The papers offered, come before the court in a very questionable guise, and wear a suspicious appearance But let them be read, as was done last circuit court, at Bedford, in *Dougherty's* lessee, v. *Piper*, in a case resembling the present. We will judge of their legal operation; and facts will arise on them, of which the jury are the constitutional judges.

It appeared in the course of the trial, that *Haldane* and *M'Kinley* had in June, 1764, conveyed their respective warrants to *John Little*, and *Richard Tea*, in consideration of £. 5, and that the defendant, William Holliday, on the 25th of April, 1774, had entered into an agreement for 500 acres, part thereof, at 20 *s.* per acre.

After the cause had been fully argued, the court charged the jury, that it was obvious the application for a warrant in 1763, before the system of locations was adopted, did not authorize a survey. Neither could a warrant directed to Mr. *Smith*, justify a survey and return by *Tea*, unless by the authority of the former. The act was inofficial. It is true the late proprietaries might bind themselves by warrants issued in a new mode; but this departure from the usual forms of the Land-Office, must be shewn to have been intentional by strong and cogent proof: otherwise the transaction would give just cause of suspicion of unfair practice; and it is clear, that the proprietary officers could not, by such unusual procedure, divest or affect the interest of grantees claiming under *prior* rights, who had paid their money in confidence of such contract.

It may be remarked, on the above case, that it was not the usual practice to transmit the warrants, although sealed and signed, into the Surveyor-General's office, until the money was paid; although they have been both signed and sealed *before* the money was paid; and even this was contrary to usual practice to annex the *seal* before the money paid. But although the warrant for these reasons, was not *filed* in the Surveyor-General's office, yet it is evident he assented to its going out, by his special directions upon it, and two of the three officers of the Land-Office must have been fully aware of the facts. It is moreover not *universally* true, that unpaid warrants were not deposited in the Surveyor-General's office. The instances to the contrary are numerous.

It has been already stated, that there

are a great number of warrants of acceptance, which recite "—*Whereas, by our consent and direction, a survey was made*, &c." But there are no entries to establish the fact of consent. In the lessee of *Benjamin Elliott*, v. *Jacob Bonnet*, *Bedford*, November, 1801, before Yeates, J. MSS. Reports. The defendant produced a warrant of acceptance, dated 26th of May, 1763, issued in favour of *George Croghan*; reciting, that by *our consent and direction*, there was surveyed in 1755, by *John Armstrong*, D. S. a tract of land, &c. and requiring the Surveyor-General to accept the survey, and return it into the secretary's office. The survey offered in evidence was dated in 1755, with the signature of *John Armstrong*, D. S. but without specifying any authority under which it was made, and was received in evidence after opposition, being called for in the warrant of acceptance.

The judge, in his charge, told the jury, that for any thing that appeared, this survey was an inofficial act, made without authority. The recital of it in the warrant of acceptance, as made by the consent and direction of the proprietaries, cannot legitimate it, as against the plaintiff, and those claiming under him. The recital is evidence against the late proprietaries and those claiming under them by subsequent conveyances, but not against those holding under an earlier right.

This case will be again cited for other purposes.

But although, generally, a survey would not be considered legal without authority, yet a particular custom to make surveys *without warrant*, upon payment of money to the deputy-surveyors, has been established by solemn decision. A single case will elucidate the whole law upon this point.

Lessee of *George Woods*, v. *John Galbreath*, Cumberland, May, 1798, before *Shippen* and *Yeates*, justices. MSS. Reports.

Ejectment for 70 acres of land, in West Pennsborough township.

The plaintiff claimed the lands under an early settlement made on them in 1744, by his father *James Woods*. Two surveys made by *George Smith*, a deputy employed by *Thomas Cookson*, deputy-surveyor of the district, in 1745, said to contain 235 3-4 acres, and allowance, *without warrant*. A receipt of *Lynford Lardner*, Receiver-General, for £.17 18*s*. on account of lands in Pennsborough township, *by the hands of Thomas Cookson*, dated 24th of May, 1746. A second receipt of *Edmund Physic*, Receiver-General, for £. 30, on account of his land in the said township; a warrant to himself for 235 acres, including his improvement, and a survey made by *Thomas Cookson's* deputy in 1745, for his father, and a re-survey by *William Lyon*, thereon, containing 258 acres and 32 perches, on the 31st of October, 1771, and his father's will. 1784.

The defendant claimed under a warrant to his father, *James Galbraith*, for 150 acres, adjoining his dwelling plantation, dated 15th of April, 1763; a survey thereon of 222 acres and 127 perches, on the 2d of June, 1763; a patent dated 12th November, 1763, and his father's will.

On a *caveat* filed by *James Galbreath* against the acceptance of *Wood's* survey, the board of property, on a hearing, on the 29th of May, 1775, rejected part of the original survey, the same being said not to have been returned, and *made without warrant*, he having no improvement thereon.

The plaintiff offered *William Lyon* as a witness to prove the general usage of the Land-Office, and of the deputy-surveyors in that district, in early times, in making surveys *without warrants*, agreeably to instructions received from the secretary of the Land-Office, on £.5 per hundred acres, being paid to such deputies, besides the surveying fees. That surveys thus made had uniformly been sanctioned by the commissioners of property: and that many titles to valuable estates depended on surveys of this nature, subsequent warrants having usually been taken out by the deputy-surveyors, to whom the money had been paid.

The defendant's counsel objected thereto, and insisted that such usage could not with propriety, be received in evidence. Surveys made without the proper and usual authorities, were mere private acts, and could confer no right whatever. The defendant claims under a patent near 35 years old. This very point was determined between the same parties on a former trial in this court on the 1st of June, 1781, and *M'Kean*, C. J. then held, that a survey under such circumstances gave no title, and was wholly invalid; and the plaintiff thereupon suffered a nonsuit.

The plaintiff's counsel answered, that true it was, such was the event of the former cause, and such were the sentiments of the court shortly after the Revolution, and in 1781. But a more minute consideration of the settlement of the country, and of the circumstances attending it, had since produced a different doctrine. So, of improvements, against which the courts at first much inclined, but on being afterwards much encouraged by the policy of the legislature, it became their duty, and it was now their practice to protect them. But there was little occasion to go into a system of reasoning upon the subject. In the case of the lessee of *Samuel*

1784. *Turbett*, v. *William Nicholls*, and *Elizabeth Vance*, at *Nisi Prius* at *Chambersburg*, on the 27th of May, 1789, the former question was again revived, on the deposition of general *John Armstrong*, being offered in evidence by the defendants to prove the custom now contended for. The adverse counsel relied on the authority of the court's decision between these parties in 1781, as conclusive. But after full argument the deposition was ordered to be read in evidence. The chief justice then expressed himself thus;—"Cases in *England* are not strictly applicable to the modes of granting lands by the late proprietaries. Such titles are founded on usage; and usages, if reasonable and beneficial to the people, form a law. The law has great regard to the praetice and usage of the people, the law itself being nothing else but common usage, 2 Mod. 238. So, of the custom of a parish, that tenant for years to reap and carry away his way going crop, after the determination of his lease. Dougl. 191.

By the Court. The evidence appears to us to be admissible. The case of *Turbett's* lessee *v. Vance*, in 1789, is expressly in point. Courts of justice are frequently governed in their determinations by the customs of the country; as in the case of administrators selling in early times, improved and even warranted and surveyed lands, as mere chattels, without any order of Orphan's Court. So, of the practice of the Land-Office, under which a great part of the country has been settled, though not strictly regular in itself. Surveys under the usage, if established, cannot be considered as private acts. They are the proceedings of known proprietary officers, duly authorized by their principals, to receive money for them as their agents, and to make appropriations of land by surveys. The practice tended to unite the proprietary and individual interests, and contributed greatly to the ease of the people. The characteristics of a good usage, are, that it be generally used and approved; and according to the case cited by the chief justice, in 2 Mod. 238, the law is but common usage, with which it complies, and alters with the exigency of affairs. The witness was accordingly received, and the usage fully proved by him. Verdict for plaintiff.

On motion for a new trial, in bank, it was refused; and this opinion was not questioned.

Note. The Land-Office opened for the purchase of 1754, on the 1st. of Feb'y, 1755.

PART III.

Of the practice and customs of the Land-Office, from the year 1765, until the Revolution.

The peace of 1762, brought a considerable degree of repose to the long harassed British colonies. In October, 1764, the turbulent and restless *Kayashuta* buried the hatchet on the plains of *Muskingum*; and the final humiliation of the *Delawares* and *Shawanese* enabled the husbandman to reassume his labours, and to extend his cultivation and improvements. The prosperity of Pennsylvania increased rapidly. Those who were compelled, by Indian warfare, to abandon their settlements, eagerly returned to them. There exists in man, says lord *Kaimes*, a remarkable propensity for appropriation; "A man who has bestowed labour in preparing a field for the plough, and who has improved that field by artful culture, forms in his mind an intimate connection with it. He contracts by degrees a singular affection for a spot, which in a manner is the workmanship of his own hands. He is fond to live there, and there to deposit his bones. It is an object that fills his mind and never out of thought at home or abroad. After a summer's expedition, or perhaps years of a foreign war, he returns with avidity to his own house, and to his own field, there to pass his time in ease and plenty. If he happen to be dispossessed in his absence, the injustice is perceived and acknowledged."

The correctness of these sentiments of lord *Kaimes*, could not be more strikingly exemplified, than in the case of *Elliott's* lessee, v. *Bonnet*, before cited.

Thomas Croyle had an ancient settlement and improvement, made near the *head* of the Snake Spring, begun in 1754, and continued by him, and those who held under him, whenever the state of the country would admit of it, until December, 1788. Valuable improvements were made on the land, as well by buildings, as otherwise.

In June, 1763, he sent his son with money to the secretary of the Land-Office, with directions to procure a warrant for 300 acres of land, including his improvements. He made three applications to the office for that purpose, but met with refusals, and was permited to take out a warrant for 100 acres only, dated 10th of June, 1762; adjoining lands surveyed to *George Croghan*, and including his improvement at the *mouth* of Snake Spring. On this warrant, a survey of 123 acres, and 123 perches, was made so late as 4th

of March, 1768, by *George Woods*, for *Richard Tea*, deputy-surveyor of the district.

The survey for *Croghan*, in 1755, and the warrant of acceptance on the 26th of May, 1763, and the patent on the 30th of May, 1763, under which the defendant claimed, have been already mentioned. This survey called for *Thomas Croyle* on one of the lines, by which the previous settlement of *Croyle* was clearly recognized by *John Armstrong*, the deputy.

On the 3d of August, 1767, *Thomas Croyle* obtained an application for 200 acres, adjoining his warranted land in *Croyle's* valley, on the east side of the *Ray's* town branch of *Juniata*, on which there was surveyed 158 acres, by *George Woods*, on 12th of March, 1768.

On the 14th of April, 1774, *Croyle*, executed a deed to *Robert Elliott*, in consideration of £.330, for three tracts of land; the first including the *mouth* of Snake Spring, in pursuance of his warrant for 100 acres; the second adjoining thereto, in pursuance of his application; and the third, held by *improvement*, including the *fountain* of Snake Spring; with a covenant therein, that he would *prove his right of improvement* to be *antecedent* to the right or claim of any other person. On the 30th of March, 1780, *Robert Elliot* conveyed the same lands to the lessor of the plaintiff, with covenant of general warranty as to the improvement right. In December 1788, the tenant of the lessor of the plaintiff was dispossessed of the lands claimed by improvement, under a judgment, without a hearing of the merits.

After the case had been fully argued, *Yeates*, J. told the jury, that the case resolved itself into two questions, 1st, whether the settlement title being the earliest, was not preferable to the patent? 2d, Whether the improvement right had been abandoned?

If the witnesses were believed, they shewed an actual personal resident settlement by *Croyle*, at the *head* of the Spring, though he had a shed, and some cleared land at the *mouth*. He had cleared several acres towards the mountain, and downwards towards the *Juniata*, and must, in the nature of things have intended to include the whole in his settlement right. His continuance on the land when there was not *impending danger*; his early returns after the dangers had ceased, evince his unequivocal intentions. The survey of 1755, calls for his lands as a boundary, and corroborates the testimony of the witnesses. He applied in 1762, with his money for a warrant for 300 acres, to include his improvement, according to the uniform usage of the office, but was refused, and could only obtain a warrant for 100 acres, to include his improvement at the mouth of Snake Spring. He could do no more; and it would seem, that the patent, unless there has been an abandonment of the improvement right, must give way to it. 1784.

The abandonment must be judged of by the jury, as a matter of fact, under all the circumstances. When *Croyle* applied for his warrant for 300 acres by his son, he did not mean to abandon, he was dissatisfied with what his son had done, and said he would apply to Mr. *Penn* for justice. *He clings to his improvements, and will not surrender the possession of them*; and when he sells to *Elliott*, he pledges himself to prove his prior right. If the present defendant or any persons under whom he claims, had made valuable improvements since the former recovery by default, and before the present ejectment was commenced, it would avail him much, as proof of an abandonment, but no such evidence has been given.

The jury gave a verdict for the plaintiff for 176 acres and 37 perches, finding where the same should be surveyed; which, with the survey of 123 acres, and 123 perches, already surveyed on his warrant, made up the exact quantity of 300 acres, without any surplus, upon an established principle, which will hereafter be considered.

This view of the doctrine of improvements is here given, for the purpose of introducing the *application* system of the year 1765. Whether improvements were at first only connived at; or whether they were expressly encouraged, as seems to be the prevailing idea, (notwithstanding some public acts and proclamations, and the act of assembly of February 14th, 1729-30, (chap. 312,) which declared, "That all and every person or persons, entering into, and taking possession of any lands within the province of Pennsylvania, not located or surveyed by some warrant or order from the proprietary or proprietaries, his or their agents or commissioners, to the person or persons possessing the said lands, or to some person or persons under whom they claim, and upon reasonable notice and request, refusing to remove, deliver up the possession, or to make satisfaction for such lands, shall and may be proceeded against, in such manner as is prescribed by the several statutes of that part of Great Britain, called *England*, made against forcible entries and detainers; and that no length of possession *shall* be a plea against such prosecution;" yet) they had acquired at this period, an establishment not to be shaken; and had contributed, very greatly, to the prosperity of Pennsylvania. The mild laws of our country, the benevolent system of the venerable *Penn*; the forbearing spirit which cherished and protected the rights of conscience, which

1784. were trampled on, and almost extinguished, in the nations of Europe calling themselves enlightened; and, with these, a land great in extent, happy in its climate, and exuberant in its soil, invited and encouraged emigration from every corner of the old world. Wealth flowed in upon us; but poverty also found its asylum. It was indulgence to the industrious poor that invigorated the country, and changed an uncultivated desart into fruitful fields; and the inhabitants were enabled to draw from the soil itself the means of acquiring the legal title to it, and laying the foundation of future independency. This easy mode of acquiring an exclusive property in land was a principal source of attachment to the country. "A person, says the late Judge *Wilson*, becomes very unwilling to relinquish those well known fields of his own which it has been the great object of his industry, and, perhaps, of his pride, to cultivate and adorn. This attachment to private landed property has, in some parts of the globe, covered barren heaths, and inhospitable mountains, with fair cities and populous villages; while, in other parts, the most inviting climates and soils remain destitute of inhabitants, because the rights of private property in land are not established or regarded."

This state of things with respect to settlements, unquestionably was one of the causes which gave rise to the application system; and we may trace the source in every public act and proceeding. Warrants, on which money had been usually paid, gave place to applications, on which no money was paid. The reason was, that whilst the proprietaries now professed to give a preference to settlements and improvements, they were justly attentive to their own interest, and required proof of the dates of settlements, either in the application itself, or on the return of the survey, that they might know how to charge the interest in arrear, before they were willing to confirm a title by warrant; and the accustomed warrant from henceforth, was called a warrant of acceptance. The accommodation of the poorer class of people, may have been another inducement to this system.

The land on the west side of Susquehanna to the blue mountain, or Kittatinny hill, was purchased in 1736, and from thence, by the purchase of 1754, limited by the surrender and confirmation of 1758, to the west line from Buffaloe creek, including a very great part of the Juniata lands, and intersecting the Alleghany mountain as its extreme boundary, as has been already shewn. Warrants issued uninterruptedly for the lands in both these purchases, (in the latter from February, 1755,) until a stop was put to issuing warrants on the 17th of June, 1765, when the Land-Office continued shut for one year, on the west side, excepting for improved lands. On the 5th of August, 1765, the office opened on the new plan, for the east side generally; and on the west side for settled lands only. The plan was made known to the people by the following official advertisement.

Land-Office, 17th of June, 1765.

The honourable the proprietaries having been apprized, that many persons have been, and still continue in the practice of taking up large quantities of land within this province, only with a design to retail them out at advanced prices, by which means, persons really in want of lands, and willing to make immediate settlement, are often prevented from obtaining them on those moderate and easy original terms, proposed by the proprietaries for the encouragement of the inhabitants: and the proprietaries, being desirous to put a stop to a practice so repugnant to the general good, and, as far as in their power, prevent the troublesome and expensive contentions and attendances in the Land-Office, and other proprietary offices, (owing to the long delay of the people in applying for a confirmation of their titles, which necessarily creates intricacies in their claims, frequent impositions on the offices, and applications for lands either granted before, or to which other persons have prior claims, with many other inconveniences difficult to be avoided on the present mode of granting lands.) It is therefore proposed to make some alterations in that mode, and that, for the future, the following method shall be observed for granting lands within this province, *viz.*

First, That every person desirous to settle any vacant land purchased of the Indians, and not appropriated to the proprietaries' use, shall apply to the secretary of the Land-Office, who, in a book to be opened for that purpose, shall instead of granting a warrant, regularly enter such person's name, with the date of his application, and the description, or location of the land.

Provided nevertheless, that no such application shall be received by the secretary, for more than 300 acres to any one person, without the special order of the proprietaries, or their commissioners of property; and that every evening, the secretary shall cause a true copy of all the applications of that day,

regularly numbered in the order as applied for, to be sent to the Surveyor-General's office.

Second, That on receipt of the copies of such applications, the Surveyor-General shall, with all possible despatch, transmit transcripts of them to his deputy in each county, in whose respective districts they fall, with their dates of entry respectively, and an order for surveying the lands agreeably thereto.

Third, That the deputy surveyor shall, within six months after the date of the entry of each application respectively in the Secretary's office, finish, and make return into the Surveyor-General's office, of the survey of the land, specified in each application and order of survey, provided the copies of such applications be delivered to him in a reasonable time, and the persons for whom the surveys are to be made, or some other on their behalf, shall duly attend the deputy surveyor, to show him the land at the time he shall appoint; whereof the deputy shall give due and timely notice to the appliers. And for the more regular management of this, the Surveyor-General shall frame and send to his deputies, proper instructions, and by all means in his power, take care that they do their duty. And if any deputy surveyor shall be guilty of neglect, or breach of duty in the premises, he, upon complaint, and due proof, made to the commissioners of property, or Surveyor-General, shall be superseded from his office. But if through any neglect of such applier to attend the deputy surveyor, to shew the land at the time appointed, or for any other good cause, such deputy shall not have it in his power to make the return in the time limited, he shall, before the expiration of that time, certify such cause to the Surveyor-General.

Fourth, That as all possible care will thus be taken on the part of the officers to give despatch, it is expected and required, on the part of the people, that every applier shall within six months after the date of the return of the survey into the Surveyor-General's office, (which day he shall carefully minute on the back of each return respectively,) be obliged to come and pay in full for the land, to the Receiver-General, on the new terms of five pounds sterling per hundred acres, or value thereof, in current money of Pennsylvania, at the rate of exchange between the cities of *London* and *Philadelphia*, with interest from six months after the date of such application to the time of payment, and the quit-rent to be one penny sterling per acre. And on producing to the secretary of the Land-Office, the Receiver-General's receipt in full for the land, a warrant shall issue to the Surveyor-General to accept and make return of the survey into the secretary's office, who shall, on receipt thereof, make out the patent with all reasonable expedition, unless the commissioners of property, on account of some other person having a prior claim, or other just reason, shall, for preventing any of the mischiefs before specified, see good cause to refuse such applier a patent. And every applier for land is to take notice, that if he shall neglect to shew the deputy surveyor the land at the time appointed, or shall not pay to the Receiver-General, the full purchase money within the said six months next after the return of the survey as aforesaid, that then, in such, or either of these cases, the proprietaries, or their commissioners of property, shall be at full liberty to grant the land to any other person or persons. 1784.

Fifth, That all persons possessing or claiming lands, on account of any settlements or improvements, are required to enter their applications, in the Land-Office, whether on the *east* or *west* side of Susquehanna, and to bring with them authentic certificates from some neighbouring magistrate, of the nature of their improvements, *and the time when their settlements first began*, and in default or neglect of such applier so to do within six months from the time of opening the said office, on the fifth of August next, the application of any other person or persons will be received for such lands.

Sixth, That as by the almost total stop put by the late Indian wars to surveying on the west side of Susquehanna, a great many warrants on that side of the said river, yet remain unexecuted, the proprietaries' commissioner of property and agents, judge it necessary to open the office first for the east side of that river, in order to give further time to the deputies to execute and return the former warrants for land on the west side. And therefore notice is hereby given, that on the fifth day of August next, the Land-Office will be opened for receiving applications for lands on the east side of the river Susquehanna only, upon the plan and terms aforesaid; and will be opened also for receiving the like applications for land on the west side of Susquehanna, as soon as the said business yet remaining to be done there shall be completed, or in such forwardness as to admit of it, whereof due notice will be given.

And further, That as a considerable

1784. part of the proprietaries purchase money remains unpaid for many plantations which have been settled a great number of years, notwithstanding the owners thereof have been frequently called on, by public advertisements to pay for the same; all persons, therefore, who have not yet taken out their patents for any such lands, are required, between this and the first day of March next, to come and take out their patents for the said old surveyed lands, to prevent that trouble and inconvenience, both to themselves, and to the office, which must necessarily ensue from their neglecting longer to complete their titles. *William Peters*, Secretary.

Thursday, August 1st, 1765. The Land-Office being to open for the east side of Susquehanna, on the new plan, next Monday, it is resolved, that the secretary give *warrants* to such persons as have *built on*, and *resided* on the land they apply for, *and have a just claim to as an improvement*, bringing a certificate from a neighbouring magistrate, or other satisfactory proof of *the nature* of the improvement, and *first settling* thereof, *when* the interest and quit rent is to commence.

Improvements made before the land purchased of the Indians, not to be regarded, unless the applier had secretary *Richard Peters's promise of a warrant*, as in case of the manor of *Maske, &c.*

In minute book, 1, (east side) there is this entry.

August 10th, 1765, agreed to, and ordered by the governor, respecting warrants and applications.

Where a piece of land applied for *joins a settled plantation*, the secretary to grant a warrant with interest and quit rent from time of settlement of the *old plantation.*

Where no certificate of a justice produced respecting an improvement, and warrant applied for; the secretary to grant it on certificate or proof of other respectable person, especially where at a great distance from a magistrate.

Where no such proof made, then secretary to enter it as an *application*, and order survey to be made, and the deputy to report, and then issue warrant (if) approved by the governor.

The first *item* of this minute of the 10th of August, *particularly*, and the whole minute, *generally*, seems to have been designed to detect and prevent that species of *fraud*, which has since been so successfully practised on the commonwealth. An improver, to avoid paying *back* interest as much as possible, would take an application or warrant for but the actual quantity covered by his buildings, and cleared fields, and would then enter an application for the adjacent woodland, as *vacant* and *unimproved*, although he originally claimed it, and intended to cover it, and hold it under his improvement right. So far as this rule applied to such adjoining quantity, as with the *settled land* made up no more than the usual plantation quantity of three hundred acres, allowed to improvers, it was correct and proper. But if such quantity had been fairly applied for, under the improvement, and interest charged on the whole from the date of the settlement; it would have been unjust to have extended it to a distinct and independent application for another vacant, and unimproved tract.

But frauds have been practised on the commonwealth to a very great extent. Old warrants have been abandoned, and new warrants have been taken out for the same lands, at reduced prices. Where surveys have been made on unpaid warrants, but the surveys not returned, those surveys have been abandoned, and new returns procured including but part of the lands; and new warrants taken for the residue, at reduced prices. The commonwealth has been aware of this; and a limited act has been passed to enable such persons to purge the fraud, by paying up the difference; but the act has not had much effect; and the people do not seem to be aware how much the neglect of this provision for their benefit, may, at some future day, affect their titles.

On the 3d of October 1765, (minute book I. pa. 7,) the following additional instructions on this subject, were given by the Surveyor-General to his deputies.

"I am particularly ordered by the governor, and proprietary agents, to enjoin you to be very careful in every survey you make, either in applications for land as unimproved, or on warrants for improvements since the opening the office for granting land on the new plan, the 5th of August last, that where you find any improvement on the land, you are fully to inform yourself, and report to the office, with your return of the survey, when such settlement, or improvement, was first began, and where the land has no improvement on it, *but joins some other land* of the *appliers*, which has been settled or improved, or has been granted to him by warrant, you are then to express in your draught, or return of survey, that it joins such other land of the appliers."

There are also two sets of general instructions, to deputy surveyors, as follow—

Thomas Penn and *Richard Penn*, esquires, true and absolute proprietaries and governors in chief of the province

of Pennsylvania and counties of Newcastle, Kent and Sussex, on Delaware, to A. B. send greeting. Whereas, &c. our Surveyor-General, with our approbation, hath by a commission bearing even date herewith, deputed you the said A. B. to be surveyor of *(naming the district and its bounds.)*

Now know, that for your better guidance and direction in the execution of the said commission, we have thought fit to enjoin the following instructions for your observation:

1. You shall faithfully execute every such warrant as shall be directed to you, to the best of your skill, knowledge and understanding, according to the express words and order of such warrants, and no otherwise, without special leave first had from us for your so doing.

2. You shall not execute any warrant upon any surveyed lands, or manors, or reputed manor lands, or on any other land appropriated to our use, by any former survey, unless such lands be expressly mentioned in your warrant.

3. You shall lay out all lands as regular and nearly contiguous, as the places will bear, admit or allow of, unless directed by your warrant to the contrary.

4. You shall make returns of every warrant into the Surveyor-General's office at Philadelphia, with a protracted figure of the land exactly performed, and the field works annexed, and that within six months after the receipt of such warrants or order of survey, but if any thing shall happen that the survey cannot possibly be performed within that time, you shall transmit an account in writing into the Surveyor-General's office containing the reason of such delay.

5. You shall not deliver unto any person whatsoever, any draughts, plots or field works of his land before your return be made into the Surveyor-General's office, and be there allowed of.

6. You shall not make use of any chain carriers, but such as are of known honesty, and of good repute amongst their neighbours, which chain carriers shall take a solemn attestation before some magistrate, justly and exactly to execute their trust without favour, partiality or affection.

7. You shall not make return of any surveys but what hath been actually made by you on the spot; and you shall take care that all outlines and bounds shall be fairly and visibly marked before you quit the field.

8. You shall keep fair and regular entries in order of time, of all surveys and re-surveys by you made from time to time, in pursuance of any warrant or order of survey, which you shall receive, with a draught or plot thereof, and field works annexed, in books to be by you kept for that purpose, and our Surveyor-General shall, from time to time, have free access to the said books of entries and other papers relating to your office as deputy-surveyor, when he shall think necessary, and the said book of entries, and other papers relating to your said office shall be by you (or those into whose hands your papers may fall after your decease,) delivered up into the hands of our Surveyor-General for the time being, or such other persons as we shall appoint, when you (or those into whose hands your papers may fall,) shall be by us thereunto required. 1784.

9. Out of all fees that you receive for surveying, or re-surveying of lands or lots during the force of your commission, you shall pay unto our Surveyor-General, the full third part thereof. For the true performance of which instructions you shall give bond to us with security in the sum of *l.* and sign a counterpart of these presents by indenture.

To A. B. deputy surveyor.

In consequence of sundry letters received from the honourable the proprietaries, and the new regulations in the Land-Office, you are to observe the following rules and orders in surveying of all lands in this province, as part of your instructions.

1st. You shall survey for the use of the honourable the proprietaries, in regular figures generally one-tenth of all lands, or *500* acres out of every *5000* acres that you shall survey, and make return thereof for their use on a warrant dated the 13th of October 1760.

2dly. By their direction and order, you are not to survey on any one warrant, more land than ten per cent. over and above the quantity mentioned in such warrant, with the usual allowance of six *per cent.* and this rule you are to observe with respect to all past warrants, not yet executed, as near as reasonably may be.

3dly. You are not to survey any of the proprietaries vacant or unappropriated land whatever, *on any ticket or order from any person but the Surveyor-General*, nor unless you have a copy of a regular warrant, or application numbered, and to you directed by the *Surveyor-General himself, or his order.*

4thly. You shall lay out all lands that adjoin rivers or large creeks, at least three times the length from the river or creek, as they are laid out in breadth on the said river or creek, so that each purchaser may have a proportionable front on the water, provided the ground will in any wise admit of it, and to lay out all lands contiguous, and as regular as possible; and you are to give at least ten days notice in each township in your

1784. district, by fixing up advertisement, or otherwise, in one or more of the public places therein, signifying at what time you will attend in that township to execute the new applications for all lands therein, requesting all persons concerned to attend, and provide to have their business completed.

5thly. You shall execute every application to you directed, and make return thereof into the Surveyor-General's office, within six months after the date of such application, provided the persons who shall obtain the same, or some other person in their behalf, will attend and shew the land to be surveyed, and pay for surveying the same as soon as completed; but in case the applier, or some person for him or her, do not shew the land, and also pay the fees for surveying as soon as the same is done, or any other reasonable cause shall oblige you to delay the execution thereof, you shall enter your reasons for not performing the same on the back of the copies of such applications, and transmit an account thereof to the Surveyor-General, with all convenient speed; and you may observe by the regulations proposed in the Land-Office, that much will depend on the care and despatch of the deputy surveyor, and I desire the people may not have any cause of complaint of your neglecting their business. (Signed by the surveyor-general.)

On the 1st of August, 1766, the office was opened on the new plan, for the west side of Susquehanna, on the same terms as on the east side.

It had been the practice to survey large tracts of land upon warrants calling for but a small number of acres; fifty acres warrants were usual, and several hundreds had been returned on them: and warrants in general were permitted by this custom, to cover a large overplus. To restrain this practice, the following orders were issued.

April 13th 1767. Upon its being represented that many surveys are made, and making, which contain more land than the warrant or application specifies, the governor orders, that no surveys be received consisting of more than ten acres *per cent.* above the quantity specified in the warrant or application. (Minute book I. pa. 69.)

May 1st 1767. Upon the representation of the Surveyor-General, that great numbers of surveys had been returned, both on warrants and applications exceeding the quantities mentioned in the warrants or applications, and the ten *per cent.* allowed the surveyors to exceed; and at this time to cut off the excesses of those surveys, would, in a manner, put a stop to the business of the whole province. And it appearing that the surveyors have certified, that in many cases these excesses of quantity are to the advantage and interest of the proprietors, as they include land which by itself would probably never be taken up from its barrenness. The governor is pleased to order, *that as to what is past,* the Surveyor-General receive the returns of the surveys, though they should exceed the quantities mentioned in the warrants or applications, and the ten *per cent.* But that for the future, he strictly charge his deputies, that they shall not, on any pretence, return more than the quantity, with the usual allowance for roads, and the *ten per cent.* upon pain of being obliged, at their own expense, to rectify any surveys they shall return with such excess of quantity. (Minute book I. pa. 74.)

This latter order appears to be explicit and peremptory; yet it does not appear to have been rigidly adhered to in the letter; and in some instances was certainly departed from. Some allowance would naturally be made for the difference of surveys, as in former times. On a re-survey it might turn out a little more or less. It was to be observed, according to the latter instructions of the Surveyor-General "*as near as reasonably may be.*" The exact measure in every case might be impracticable in common experience. An acre, or a few acres, more, or less, could not possibly be the object, or be considered as a violation of the *spirit* of the rule; and common understanding and experience would, in a moment, be able to decide what ought to be considered an *accidental,* or *intended* departure from it. Should the mere circumstance, in running round a survey, of setting a course an half or a quarter of a degree too wide, and including an acre or more too much, be made use of to prevent the acceptance of a survey, the common feelings of the people would revolt at it; nor could the mere letter of any law justify the mischief, the inconvenience, and expense which would follow from the construction; and every law should be construed reasonably; as a good general rule, however, it has been adopted by the courts, which regard the customs of the Land-Office. But even the ten *per cent.* must be relinquished, where the interest of other purchasers would be affected by it. If an adjoining warrantee would be diminished in quantity, the elder warrant must be restricted to its quantity without any surplus, which can be retained only where it does no injury to others; and the first applier has no right to complain, if he gets what he purchased. The whole law, therefore, as far as it has been considered by the courts will appear in the following cases.

The point was started in the case of the lessee of *Merchant* and *Bright* v. *John Millison*, before *Yeates* and *Smith*, justices, *Westmoreland*, November 1800. *MSS. Reports.* But the case appears to have gone on other grounds, and will be stated here so far only as connected with this subject, and introductory to other cases.

The plaintiff claimed the land under a warrant for 250 acres, dated 10th February 1786, on which 268 acres, and 155 perches, were surveyed on the 12th of April following, and a patent thereon 27th of October, 1787.

Jacob Millison, the father of defendant, on the 4th of December 1784, obtained two warrants, for 300 acres—each, calling for an improvement. One in his own name, on which interest was to commence on the 1st of March, 1780—the other in the name of his son Philip, interest to commence on the 1st of March, 1782.

The assistant of the deputy surveyor made a large survey on these warrants, of 900 acres, on the 26th of April 1785, but afterwards returned above 300 acres on each warrant.

The plaintiffs survey included some of the improved, and some of the best land in the large survey, by a supposed line, which was not marked, about fifty perches from defendant's house, leaving to defendant, a quantity of poor, thin land, on the back part of the survey.

Immediately after the plaintiff's warrant was taken out, *Millison* built a cabin on the lands in controversy, and retained possession of them. On the 23d of October, 1786, *Jacob Millison*, as administrator of his father, obtained a warrant for 200 acres, in trust for the heirs, and procured a survey of 220 3-4 acres, on the 12th of September, 1786, and a patent on the 12th of October, 1786—which included the lands in question.

Three surveyors were examined, who declared, that where there was no dispute, they found little or no difficulty, when they returned more than ten *per cent.* surplus, on surveys made by them since the Revolution. In some instances, 350 and 360 acres had been surveyed, and returned on warrants for 200 acres; and in some others, double the quantity of the lands mentioned in the warrants, and they had been all accepted.

Judge Smith, who, by reason of the indisposition of the presiding judge, delivered the charge, said, "I, however, for my own part, do not go so far as the witnesses, with respect to surveying, and returning surplus lands. I rather think the deputy was not obliged to make a return of so large a survey as 900 acres, under warrants for 600 acres; and that the Land-Office was not bound by their usage, to accept so large a return. The first instructions to the deputy surveyors, not to survey more than a surplus of *ten per cent.* on each hundred acres contained in a warrant, took place in 1767, and arose from a desire to accommodate the different appliers with lands, and the fees of the different officers were regulated thereby. But when it was discovered that the proprietary institution might be evaded by taking out warrants in the names of other persons, the rule of practice still continued, though the reason of it had long before ceased. However, before the Revolution whenever the deputy surveyor certified, that the surplus lands beyond the *ten per cent.* were only desirable for the lands in the warrant, there was little hesitation as to the accepting of the return of survey of such surplus. I know of no rule on the subject. If the present contest rested merely on the point, whether 450 acres should not be returned on each of *Millison's* warrants, as a *matter of right*, I should incline against the defendant; but I give no decided opinion thereon. The practice of surveyors, since the Revolution, would have great weight."

1784.

The main question, however, was, whether taking the new warrant for the 200 acres, was not an abandonment of the first survey, and an acquiescence in the two returns excluding the land; and whether the defendant knew and consented to it; and if he did, the plaintiff's warrant must be preferred.—And it was said that the surveyor had no right to garble lands at his will and pleasure, and return what parcel he thinks proper; and that in an instance like the present he should have stated the contents of the first survey to his employer, and taken his directions therein. And it resulted to this, whether the assistant surveyor had been guilty of a *legal fraud*, or not? and the jury, under the circumstances, found a verdict for the defendant, with the approbation of the court.

So, in *Kyle's* lessee v. *White*, decided in 1808, in the Supreme Court, the defendant held under two warrants, dated 3d Feb'y, 1755, for one hundred acres, each, on which a survey of 562 1-2 acres was made on the 28th of November, 1760, but not returned, from accidental circumstances, into the Surveyor-General's office, until November, 1766.

Tilghman, C. J. In considering the objection as to the quantity of land, we must advert to the time when the survey was made. If made *at this day*, the objection would be decisive. But

1784. in the year 1760, when it was made, it was customary to include much larger quantities than the warrants called for. It was not until 1767, that this practice was altered by instructions of the governor to the surveyors. The plaintiff had notice of defendant's survey, before he took out his warrant. 1 Binney, 249.

And, in 1810, the case came before the Supreme Court, in the lessee of *Steinmetz* v. *Young*, under the following circumstances, on appeal from the circuit court, at *York*.

The plaintiff claimed under a warrant to *William Grouce* for 100 acres in the year 1751, founded upon an improvement. In October, 1761, *Grouce* conveyed to *George Stevenson* and *George Ross*, describing the property as "a plantation and tract of land, containing by estimation 300 acres more or less." A survey of 279 3-4 acres was made on the warrant by *T. Armor*, an assistant deputy-surveyor, on the 26th of Feb'y, 1764, which was never returned, and it was clear from the surveyor's field notes, that the survey was not correct, because 159 acres of it were included in another survey made three days before by *Armor*, for *Ross* & co. who were still the owners of *Grouce*'s warrant. On the 9th of November, 1788, a survey of 287 acres and 137 ps. was made for the lessor of the plaintiff, on *Grouce*'s warrant which he then owned, including but a small part of the first survey; and this was returned and filed in the Surveyor General's office, on the 16th of April, 1790.

The defendant, who claimed under a warrant for 60 acres, including an improvement, dated June 4th, 1802, interest to commence on the 4th March, 1790, which was offered in evidence, and overruled, but also waved, on plaintiff's consent to read it, contended that the survey of 1788, could not be maintained, in consequence of the orders of 1767; and because the act of assembly of the 8th of April, 1785, in effect imposed the same restriction, was in many respects a general law, extended to every part of the State, and was a direct obstacle to the acceptance of the plaintiff's survey, which no practice, or custom in the Land-Office could obviate; and cited *Kyle* v. *White*, where it is said, that if the survey in that case had been made at the present day, the objection founded upon its excess, would have been decisive.

The point reserved at the trial was, whether on the warrant for 100 acres, a survey of 287 acres, in 1788, could be accepted, and it was fully argued on this appeal.

Tilghman, C. J. delivered the judgment of the court as follows:

There is no doubt, but that prior to the year 1767, a survey of 300 acres might have been made on a warrant for 100; such was the practice of the Land-Office. But in the year 1767, the Board of Property made an order, that no survey should be accepted, containing more than *ten per cent.* surplus, above the quantity called for by the warrant, with the usual allowance of *six per cent.* for roads, &c. An act of assembly to the same effect was made in April, 1785; but as it has been expressly decided by this court, in the case of *M'Ginnis's* lessee, v. *Albright*, December, 1799, *that this act does not extend to any part of the State, but that which lies within the last purchase of the Indians, it has no bearing on the present case.*

Judge *Smith*, who had great experience in the business of the Land-Office, and was himself a deputy-surveyor before the Revolution, mentions, in his charge, that he had himself surveyed 400 acres, on a 300 acre warrant, after the year 1767, which had been accepted, the party paying for the surplus; and that he knew of *no instance*, where a survey, containing more than *ten per cent.* surplus, had been *rejected* by the Land-Office, if it did not interfere with the rights acquired by others, before the return of the survey. It is certain that the proprietary officers were in the habit of sometimes dispensing with the general rules of office, where no injustice was done by it; and it is a striking feature in the present cause, that in the year 1761, *Grouce* considered himself as intitled to 300 acres on this warrant. At that time he might have had his 300 acres surveyed; and if it was understood in the neighbourhood, that he meant to take 300 acres; or there were any lines, or marks, by which notice was given of the extent of his claim, I think it highly probable, that the proprietary officers would have accepted a survey for 287 acres, after the year 1767, provided he had stated, his case to the Board of Property, and made it appear, that no other person had acquired an interest in the surplus. The acceptance of such a survey was a matter between the warrantee and the proprietaries. No third person could be injured. Nor has the present defendant the least particle of equity in his case. What is it to him whether the plaintiff had more or less land included in his survey?

I have endeavoured to ascertain the practice of our own Land-Office, since the Revolution; and it appears that many surveys have been accepted, made since the year 1767, on old warrants, containing more than *ten per cent*, surplus. Considering all the circumstances of this case then, without laying down any general

rule, it is my opinion, that the return of the plaintiff's survey, which was filed in the Land-Office, before any other person had acquired a right, and to which no objection was made by the Surveyor-General, gave him sufficient title to recover in this ejectment. Judgment affirmed.

But all the cases recognized the principle, that if a third person should be injured, or there should be an intervening right before the survey made, though on a younger warrant, the first warrant will not be entitled even to the *ten per cent.* surplus, if it would thereby deprive the second warrant of any part of its quantity.

Thus, in *Elliott's* lessee, v. *Bonnet*, twice before cited, the judge concluded his charge to the jury, thus, "If the jury shall decide for the plaintiff, the only remaining thing to be considered, is, what ought he to recover? He has got under the warrant to *Croyle*, including his improvement, 123 acres, and 123 perches; and there being another legal right in the hands of the surveyor (though posterior to *Croyle's* application) before the survey was made, he is now intitled only to 176 acres, and 37 perches; the difference between what is already surveyed to him, and the strict quantity of 300 acres, under his improvement, and not to any surplus quantity of *ten per cent.* and that finding for the *ten per cent.* might possibly endanger their verdict.

And in the lessee of *Gripe* v. *Baird*, *Huntingdon*, May, 1805, before *Yeates* and *Smith*, Justices, MSS. Reports. The rule was thus recognized, "That under the order of May, 1767, the deputy-surveyors were not to return more than *ten per cent.* beyond the usual allowance for roads, on the quantity of lands contained in the application or warrant; but this only held when there was no conflicting right when the survey was made; for in such case the deputy was not permitted to exceed the quantity called for with the allowance of *six per cent.* for roads. This was equal justice, and conformable to the settled practice of the Land-Office. It had been pursued in the circuit court, at *Bedford*, in November, 1801, in *Elliott's* lessee, v. *Bonnet*, where the jury were strongly disposed to find the surplus of *ten per cent.* for the plaintiff.

On the fourth *item* of the second set of instructions to the deputies, before noted, the following case has occurred.

Lessee of *Bear* v. *Russel*, *Northumberland*, October, 1796, before *Yeates* and *Smith*, justices, MSS. Reports.

An application was entered, on the 3d of April, 1769, No. 164, in the name of *John M'Grath*, for 300 acres of land, on the south side of the west branch of Susquehanna, about 25 miles from *Fort Augusta*, concluding a bottom called *Oughcoughpockeny*.

A survey was made thereon, by *Charles Lukens*, of 330 acres and allowance, on the 26th of June, 1769, which contained a front of 902 *perches on the river*. 1784.

Caveats were filed against the return of this survey; and on the 26th of March, 1770, the Board of Property, on the claims of *John Stephens*, *John Montgomery*, and *John Morgan*, against *William Plunket*, (who obtained a transfer of *M'Grath's* location on the 21st of March, preceding,) decided, that the narrow bottom on the river should be divided by *Charles Lukens* and *William Scull*, into as many tracts as it would allow of, taking in as much of the back lands as were fit to be taken up, or as the parties should be willing to take into their surveys; and that it should stand over, until the matter should be decided between *Stephens* and *Plunket*, as to *Plunket's* location. A patent, however, issued to *Plunket*, on the 17th of August, 1774, and on the next day he mortgaged the lands to the trustees of the general Loan-Office, to secure the payment of £. 200, and interest, on the 22d of April, 1793, the lands were sold by *Flavel Roan*, sheriff, (the mortgage money being unpaid,) to the lessors of the plaintiff, for £. 811.

The defendant held as tenant, under the heirs of *John Montgomery*, who entered an application on the third of April, 1769, No. 916, for 300 acres, on the west branch of Susquehanna, upon the south side of the said branch, opposite the lower end of the proprietaries survey, upon a small run on the river, opposite to the upper end of Muncy hill.

It appeared in evidence, that the defendant's location described the lands in question, and that if *Plunket's* survey had been bounded by the run therein mentioned, it would have excluded the controverted grounds. There was a long narrow bottom of excellent land along the river; the grounds back were arable, and fit for cultivation, though being Pine Barrens, they were of much inferior quality to those in front of the river. Application was made in June, 1769, to *Levy Stevens*, who surveyed under *Charles Lukens* to make the survey for *Montgomery*. He promised to do it, and return the lands above the mouth of the run for him, and a large walnut tree there, was afterwards fixed as a corner of his survey; but the promise was not complied with.

Notice was given at the sheriff's sale, of *Montgomery's* claim.

Yeates, J. being one of the executors of *S. Chambers*, who claimed part of the land, declined taking any part in the decision.

Smith, J. I feel no difficulty whatever, sitting alone in this cause. It is so plain that it cannot be perplexed. The instructions formerly given to deputy-surveyors, and their usage, will readily determine the dispute between the parties.

1784. He then mentioned the 4th item of the instructions, before given at large.

If there were no other warrants or applications than those they were executing, they assumed greater liberties; and if, in such instances, they gave a larger front on a river, or creek, than their instructions admitted, and their surveys were accepted, no injury was done, and no one could reasonably complain. The proprietaries might, in such a case, dispense with their usual rule, and grant their lands as they pleased. But where there were other rights, though subsequent in point of time, which also called for execution, the due proportion of front on the water, and extent back, ought, in justice to be adhered to. To deviate from the established rule under those circumstances, would do manifest injustice to third persons. I will not say, that in practice, the surveyor is restricted to one, or even two perches beyond his directions, where the situation of the grounds calls for a latitude in judgment; but I will assert, that to go 902 perches, by the margin of a navigable river, and where the lands back are of a quality proper for cultivation, to fill up an order for 300 acres, is altogether unprecedented, and unwarranted by any law or usage, where it would operate against the rights of others. By such improper practices, in garbling the whole of the lands of the first quality, the settlement of the country is retarded, besides doing essential injustice to individuals.

There was accordingly a verdict for defendant. But on the erection of *Lycoming* county, in which the lands now lie, the controversy was renewed; but it has since been compromised.

When the Land-Office was about to open for the lands purchased in 1768, the following advertisement was published for general information.

Advertisement.

The Land-Office will be opened on the third day of April next, at ten o'clock, in the morning, to receive applications from all persons inclinable to take up lands in the new purchase, upon the terms of five pounds sterling per hundred acres, and one penny per acre, per annum, quit-rent. No person will be allowed to take up more than three hundred acres, without the special licence of the proprietaries, or the governor. The surveys upon all applications are to be made and returned within six months, and the whole purchase money paid at one payment, and patent taken out within twelve months from the date of the application, with interest and quit-rent from six months after the application. If there be a failure on the side of the party applying, in either procuring his survey and return to be made, or in paying the purchase money, and obtaining the patent, the application and survey will be utterly void, and the proprietaries will be at liberty to dispose of the land to any other person whatever. And as these terms will be strictly adhered to by the proprietaries, all persons are hereby warned and cautioned, not to apply for more land than they will be able to pay for, in the time hereby given for that purpose.

By order of the governor,

JAMES TILGHMAN,

Secretary of the Land Office.

Philadelphia, Land-Office, Feb. 23, 1769.

N. B So long a day is fixed, to give the back inhabitants time to repair to the office.

At a special meeting at the governor's, on Wednesday, the 25th day of January, 1769, previous to issuing the above advertisement, present, the governor, Mr. *Hamilton*, the Secretary, Mr. *Tilghman*, Auditor-General, Mr. *Hockley*, the Receiver-General, Mr. *Physic*, the Surveyor-General, Mr. *Lukens*. The Board, assisted by Mr. *Hamilton*, took into consideration the terms on which the office should open for the late new purchase, and are of opinion that the application plan in general be continued, but are of opinion, that there should be some alteration as to the time of returning the surveys, and paying for the land, and taking out patents, which is referred to further consideration.

It appears by the advertisement above, that no alteration was made as to the time of surveying and patenting; nor was the limited period, in either of the purchases, or under previous warrants, either as to surveying, or patenting, ever, generally regarded by the people. They were indulged from time to time. As to the proprietaries, no forfeitures were insisted on; and by various proclamations and advertisements, after the respective periods, any forfeiture may be presumed to have been waved, by demanding the performance of the terms or conditions. And on the 25th of April, 1774, by a notice, which is filed in the Surveyor General's office, it is stated, "That as the several deputy-surveyors, propose giving due attendance in their respective districts throughout the province the present summer, all persons who have entered applications for land, and have not got them surveyed, are hereby desired to attend the deputy-surveyor, in whose district the land may be, shew the same, pay the charges of surveying, in order that the same may be returned

into the Surveyor-General's and Secretary's offices, in order for patenting (agreeably to an advertisement lately published by the Secretary of the Land-Office.) By order of his honour the governor.

JOHN LUKENS, *Surveyor-General.*

But as it concerned the people themselves, a new doctrine necessarily arose out of this state of things, which will be considered in its order. Where surveys were not made in a reasonable time, without confining it to the six months, a principle has grown up, which may be termed a *constructive* abandonment of an inceptive right to land. An actual intentional abandonment, it would not be in one case out of a thousand, and the law itself has been declared upon the active pursuit of the claim, when, after the presumed abandonment, other rights have been fixed. This doctrine was essential to the settlement of a new country. But when the survey was duly made, the principle would not apply; no one would be deceived; the land could not be considered as vacant, and unappropriated, and any neglect in perfecting the title was a matter solely between the proprietaries, and the holder of the warrant, or application, with which, third persons, who were not injured, had nothing to do.

It will be observed, further, that there are several marked distinctions between the *applications*, of 1765 and 1766; and the *applications*, or *locations* of 1769. In the first, it was an immediate application, and direct grant of the land, on a new plan to be sure, but claiming priority from the time of application; and they were numbered as they came in. But the locations of the *third* of April, 1769, (for there were many before and after that day, which did not fall within the rule,) were *contingent*; they were lottery tickets, and many of them were to draw blanks. Applications, or locations were admissible, and were received, for the same spots of land, from different persons, under various, or similar descriptions. They were not numbered as delivered, but received their number and priority, by the chance of a lottery.

The settlement system could have no operation; (except on one particular line of the purchase under peculiar circumstances, which were provided for.) The lands had been purchased but a few months preceding from the Indians; settlements, or improvements thereon were illegal; nor could any settlement have been made, with any effect, in the winter season, between the purchase, and the time of opening the office. All equitable circumstances were therefore out of the question; the chance was equal to all; and any attempt to obtain a preference, by cutting a few trees, under the misapplied name of an improvement, would have been a *fraud* upon the adventurers in the lottery, and could not, justly, be entitled to any preference. 1784.

Preferences, however, there were previous to opening the office; and to a very considerable extent, of the choicest lands. One of the inducements to the purchase of 1768, was the accommodation of the officers of the provincial regiments, who had served during the Indian campaigns, and were desirous (as they represented,) to settle together. One hundred and four thousand acres were appropriated for this purpose; 24,000 of which quantity were for the benefit of the officers of the first and second battalions. Large preferences were also given to individuals. These were called special grants, and were excepted out of the lottery. The officers' lands, proprietary reservations, and special grants, a few instances excepted, were surveyed and appropriated previous to opening the office; and so notoriously done, as to prevent any deception on the people, who of course avoided these surveys in the descriptions of their locations.

Every thing was therefore prepared for opening the office on the day appointed; the plan was finally adopted, and notice given of it. This plan forms the heading of the book of locations, and the locations follow it, in the order in which they were drawn and numbered; each number containing the precise description.

"The third day of April, 1769, being appointed for opening the Land-Office for the new purchase made at the treaty of *Fort Stanwix*; and it being known that great numbers of people would attend ready to give in their *locations* at the same instant, it was the opinion of the governor, and proprietary agents, that the most unexceptionable method of receiving the locations, would be to put them all together, (after being received from the people,) into a box, or trunk, and after mixing them well together, to draw them out and number them in the order they should be drawn, in order to determine the preference of those respecting vacant lands. Those who have settled plantations, especially those who settled by permission of the commanding officers, to the westward, were declared to have a preference. But those persons who had settled, or made what they call im-

1784. provements, since the purchase, should not thereby acquire any advantage.

The locations, (after being put into a trunk prepared for the purpose, and frequently well mixed,) were drawn out in the following order, by an indifferent person."

As the owners of the locations, in a great number of cases, made use of other names than their own, it was common to endorse the list given in, with their own names. This circumstance, and the hand-writing in the body of the location have frequently been considered as of importance; and have, more than once, decided the right to the land against the nominal locator.

In taking leave of the proprietary regulations, and before we come to consider the legal effect and operation of all that has preceded, it may be necessary to observe, that notwithstanding the terms of the advertisement of June, 1765, *warrants* continued to issue, upon *improvements*, and for lands *adjoining* improvements, or old surveys; and *applications* were adhered to only where improvements were not certified. But warrants did not issue for lands in the new purchase until after 1772, or in some part of that year; and when the warrants were there introduced, and at the same period elsewhere, it was generally the practice to pay the whole purchase money at the time of the warrant being granted.

A great mass of property in Pennsylvania is held, by what is called an equitable title; that is, where, the purchase money being unpaid, no patent has issued. It was necessary therefore, to recognize this kind of title, as sufficient to support an ejectment. Originally, however, a different opinion prevailed; and the change in the practice can be collected from the following case.

Lessee of *Patrick Campbell* and others v. *Lear*, Dauphin, October, 1796, before *Yeates* and *Smith*, justices, MSS. Rep. Ejectment for lands in Derry township.

It appeared in evidence, that *David Campbell*, on the 28th of May, 1748, took out a warrant for 200 acres, including his improvement, the interest to commence March 1st, 1739. He also paid £.10, on that day, into the Receiver-General's office. He died intestate, on the lands in 1758, leaving *Susanna*, his widow, and several issue, now lessors of the plaintiff, who were all young at his decease, but their ages were not ascertained. His stock of creatures were sold shortly after his death. There was proof by the acknowledgment of the eldest son, that at the time of his death he owed one bond of £.50.

The interest of the intestate, in the lands, was sold by the widow, and *John Byers*, her brother, at public vendue, for £.140. 10*s*. And they executed a bill of sale thereof, to Robert Taylor, and others, and also an assignment of the original receipt for £.10, both bearing date on the 11th of May, 1758. The whole premises being afterwards vested in Taylor, were conveyed, on the 1st of January, 1761, by his administrators, in pursuance of a sale directed by the Orphans' court, to *John Sterling*, under whom, by several mesne conveyances, the defendants made title.

Byers and his sister were dead. No letters of administration to them were shewn in evidence, but their bill of sale styled them administrators. Nor were any inventory, or administration account shewn to the court, or search made for them.

The counsel for the plaintiff admitted, that formerly equitable titles to lands, under improvements, and even warrants and surveys, were considered as personal property, appraised as such in inventories, and settled in administration accounts, without any orders of Orphans' court, empowering the administrators to sell; or, in the case of wills, without any authority from the testators.—But they contended, that this usage ceased in 1753 or 1754, and consequently, that the sale made by the administrators in 1758, was not protected thereby.

The court, after stating the titles of the contending parties, observed there was a considerable interval, during which equitable titles to lands were not viewed in the same light as at present. It was not then supposed, that ejectments could be supported on the grounds of an improvement, warrant, or survey, the legal title being in the proprietaries. Amongst some of the first instances, in this court, of a different practice, may be reckoned the case of the lessee of *George Sprenkel* v. *George Stevenson*, at York, *May assizes*, 1772.

In more ancient times, such equitable claims to lands were ranked as mere chattels, and sold as such by executors, without powers in the wills, and even by executors in their own wrong, and by administrators without the intervening orders of the Orphans' courts. Such sales formerly made, *bona fide*, for payment of debts, or maintenance of minor children, have frequently been sanctioned by courts of justice. A determination on this very point was had at Lancaster, June assizes, 1792, between *Means's* lessee v. *Flora*, by *M'Kean*, C. J. and in many other cases before the war.

The titles to many valuable estates

depend on sales of this nature, and it would be highly inconvenient and dangerous now to impeach them. The custom of the country of that day, was *usitata et approbata*, and became the received law. Indeed the law itself has been said to be nothing but common usage.

But the plaintiff's counsel insist that this usage ceased in *1753* or *1754*.—We apprehend this not to be the fact. In *Duncan's* lessee v. *Walker*, determined in bank, January term, 1793, the court expressed themselves, that improvements made, *animo residendi*, and even warranted and surveyed lands made *thirty-five years ago, or thereabouts*, were generally considered as chattel interests, and appraised as such in the inventories of deceased persons, &c. The verdict was for the defendant, but the residue of the case more properly belongs to another branch of the law.

The practice of bringing ejectments has now become settled law, though the legal title is in the commonwealth; the custom of the country is, in this respect, *usitata et approbata*, and is recognized and adopted in the supreme court of the *United States*, in *Sims's* lessee v. *Irvine*, 425-466.

And, in the Lessee of *Paxton* v. *Price Bedford*, April, 1795, before *M'Kean*, C. J. and *Yeates*, J. MSS. Reports. It was said by the court, on an objection to the evidence, That such inchoate rights as applications, have been frequently transferred by mere blank indorsements. The strict forms of conveyances have not been applied to such imperfect rights; and in the case of improvements, it is well known, that the sale of them has been proved by parol.

So, in the Lessee of *Lynn* v. *Downes*, at *Fayette*, May, 1795, before the same judges, MSS. Reports. *Thomas Downes*, filed an application for 300 acres of land, including an improvement, on the 3d of April, 1769.—He made his will in 1778, and devised the land to his widow and children. The only part of the case material to the present question, is as follows:

On the 21st of October, 1788, the widow and executrix, and three of the children, convey their shares and interests to *Benjamin Brashiers*, and his heirs, in consideration of 20*s.* an acre; and on the 28th of March, 1789, *Brashiers*, by an *assignment*, endorsed on the former bill of sale, "Sells and transfers all his right, title and interest, in the within writings, to *Andrew Lynn*, (father of lessors of the plaintiff,) for value received," without using any words of *inheritance* therein.

It was contended for defendant, that *Brashiers'* deed, containing no words of inheritance, passed no more than an estate for life to *Lynn*, which was now spent; and therefore the plaintiff shewed no title to the lands. The rule of law was so clearly settled, that in deeds the word "*heirs*" was so indispensably necessary to vest an estate in fee simple, it could need no animadversion. 1784.

But, *by the Court*. The operation of applications and surveys thereon, is best explained by the usage of the state; and as that usage alters, so will the law. No such titles are known in *England*, and the strict rules of law there, are inapplicable to our system. An application is the mere inception of a title, on which no more is paid than 7*s.* 6*d.* the mere office fees of entering it. It vests a mere equitable interest in the party, the legal estate remaining in the commonwealth in trust. The right is eventually completed by obtaining a patent.

We have often seen, that rights under applications and warrants, have been assigned by blank endorsements, and that the sale of improvements has taken place by payment of money, or the delivery of a specific article by way of consideration; and such transfer and sales have always been established. This point was resolved at *Bedford*, during our present circuit, in *Paxton's* lessee v. *Price*.

In the instance before us, the subject matter must be considered; and *Brashiers'* assignment conveys to *Andrew Lynn*, all his right, title and interest, in the *within* writings. It refers to the other conveyance, on which it is endorsed.

The intention of the parties is clear. The title passed for a valuable consideration, and the money paid, raises an use, which chancery would carry into execution. It operates as a statute conveyance; and we apprehend, that the vendor would be considered as a trustee for the vendee, and consequently, that all his equitable interest passed to the ancestor of the lessors of the plaintiff. Verdict for plaintiff.

And in *Lowrey's* lessee v. *Gibson*, before cited, it was said, that even warrants might pass by *parol*.

And a devise of an improvement, in 1745, without words of inheritance, held to vest a fee. Lessee of *Green* v. *Creamer*, Supreme Court, December, 1798, MSS. Reports, S. C. 3 Dallas, 477.

A location entered by one person in the name of another, such nominal person is to be considered as a trustee for the person who made the entry.

Thus, in the Lessee of *Cornelius Cox* v. *Thomas Grant, Northumberland*, May, 1792, before *M'Kean*, C. J. and *Yeates*, J.

1784. Both plaintiff and defendant claimed under the same location, entered in the name of *Thomas Grant*, dated 3d of April, 1769. It appeared in evidence that the location was put into the office by Alexander Grant, father of defendant, in his name, and that he was then eleven years old; that the lands were taken up by the said *Alexander* and *Cornelius*, in partnership; and, that sometime afterwards, during the minority of his son, *Alexander Grant* agreed to sell to *Cox* the other moiety of the land for £.20, part of which was paid: Cox continued in possession; he had paid the surveying fees. *Alexander Grant* obtained a judgment against him for £.9. 8s. and issued a *fi fa.* returnable to August, 1773, upon which these lands were levied as Cox's property.

By the Court. We must take notice of the usual practice which has prevailed in the country, to obtain a title to lands from the late proprietary officers. The rule which obtained amongst them, that a person should not be permitted to take out a warrant, or location for more than 300 acres of land, was probably first introduced to prevent the ingrossing of real property, and was perhaps continued afterwards for the emolument of the officers. But we well know, that, in general, the name in the location was merely nominal, and used as a kind of scaffolding for building up a formal and regular title. The person whose name was used stands as a mere trustee for him who took out the warrant, or entered the location, and paid the surveyor, or other officers. The latter is the *cestui q'use*. It has been long settled, that one purchasing lands in the name of another, and paying the money, it is a resulting trust. (See 1 P. Wms. 321. 1 Wils. 21. 1 Eq. Ca. abr. 380. 2 Eq. Ca. abr. 744. 1 Atk. 60. 2 Atk. 150.) Here *Alexander Grant* made use of his son's name, merely for the purpose of obtaining the title, and having sold to the plaintiff, his sale must be established.

And in *Fogler's* lessee v. *Gobach*, Dauphin, October, 1796, (MSS. Reports,) *Smith*, J. held the same doctrine. He said it had always been understood in Pennsylvania, that one entering a location in the name of another, it shall enure for the benefit of the party applying, without other proof. So, in the case of the father making application in the names of his children, it shall be *presumed* to be for the use of the father. The practice of the proprietary Land-Office first introduced this system of taking up lands, and the effects of it have been generally understood. But as this trust is founded on mere *presumption*, I think it may be repelled by evidence of the contrary reputation of the country being opposed to it in particular instances. (1 Ld. Raym. 311.)

Of the law respecting improvements.

This subject has been already noticed. From the peculiar circumstances attending the settlement of a new country, it has at present grown into importance. Though singular in its origin, it has gradually grown into a system, which has been moulded by time and common sense into an intelligible and reasonable branch of settled law. It may hereafter form a striking feature in the history of property; but in times not very remote it must inevitably become obsolete in practice and use. As in the country from which we derive the principles of our laws, it is no longer necessary to enquire whether some powerful baron acquired the possession of a manor or a castle, by the grant of his sovereign, or by force, or by fraud; so, in the course of time it may be altogether unnecessary to enquire into the particular origin of our titles.

An attentive examination of the minutes of the Board of Property, commencing in the year 1765, will shew the great consideration shewn to improvements by the proprietaries themselves; and a variety of instances appear in which regular warrants and applications have given way to mere improvements without other title.

The first judicial report we have on this subject, is the lessee of *Patrick Campbell* v. *Benjamin Kidd*, at *Carlisle, Cumberland County*, June 1774, before *Chew*, C. J. and *Morton*, J. (MSS. Rep. *Thomas Orbison* settled on the lands in dispute, in 1748, cleared 14 acres, built a cabin and barn thereon, and otherwise improved the same; that in doing this he was not in the least obstructed by the neighbours having interfered with the lines, or claims of none of them; and that on the 21st of Feb'y, 1750-1, he sold his improvement to *John Gilmore* for £.20. *Gilmore*, on the 26th of May, 1753, sold the improvement to the lessor of the plaintiff for £.60, who continued in possession of the same, until his house was burnt by the Indians in 1759.

This evidence was objected to. It was said, the improvement offered on the part of the plaintiff can give him no legal title, without acquiring some right under the proprietaries. They are the owners of the soil, and unless they grant away the lands, no improvement thereon, or settlement by consent of a neighbourhood, can give a

right. The title, if it can be termed one, is founded on a trespass, from which the plaintiff can derive no benefit, either in law or equity. Besides, more lands are claimed by the plaintiff than what he has actually improved and settled on, and the ejectment is brought in consequence of such claim. Can he recover the adjacent wood land under his claim? And how shall his claim be restrained within proper bounds? The defendant's counsel therefore moved for a nonsuit, and cited 1 Burr. 119. Plaintiff in ejectment must have both the right of possession, and the right of property, Buller 108. If defendant prove the title out of the lessor of the plaintiff, it is sufficient for him.

For the plaintiff, it was said, that this province, and particularly the more remote counties, owe their present flourishing state to the doctrine of improvements. The original proprietor, Mr. *Penn*, gave general invitations, throughout Europe, for adventurers to come in, and settle on his lands. And the proprietary officers have uniformly encouraged improvements since the settlement of the province; and have constantly given the pre-emption of improved lands to the first settlers, or to those who claimed under them. The people, therefore, justly considered this preference as due to improvers, and the conduct of the proprietors establishes the custom as the law of the land. The rigid rules of law which have obtained in England respecting real property, cannot be applicable, in every particular, to the circumstances of this province. Such principles would be similar to those of the unskilful physician, who prescribed the same medicines to different disorders and constitutions. Should we judge by the rules of the English constitution, the titles of many very valuable tracts would be destroyed for want of naturalization in the original grantees, many of whom were foreigners. It is agreed there is a wide difference between improvements made since the Indian purchases made in 1736, and 1754, and that in 1768. In the lands granted by the latter, it is acknowledged on all hands, that improvements give not the shadow of title. The advertisement issued from the Land-Office, and the opening that office shortly after for the benefit of appliers, must clearly take away any pretence of improvements founding a title to lands bought in 1768. But the case is different with the other purchases. The Land-Office favoured improvers of these lands, and gave a tacit consent to settlements made according to the usage of the country. Persons obtaining warrants could not lay them on improved lands; they were considered as "appropriated." 1784.

Old improvements have been sanctified by the adjudications of courts of justice. At *Northampton*, at March term, 1769, in *Hoover's* lessee v. *Shreeder*, the plaintiff recovered under a mere improvement, though the doctrine now contended for was then warmly pressed. An improvement was established, and took place of a patent, in *Myers'* lessee v. *Heffinfinger*, at *Nisi Prius*, at *Lancaster*, in November, 1768; and at *Nisi Prius*, at *York*, May, 1772, in an ejectment brought by *George Sprenkel* v. *George Stevenson*, an improvement was given in evidence on the part of the plaintiff, though made within the reputed bounds of Springetsbury manor; and this, too, against a patent, accompanied with a long possession. Numberless are the cases wherein this doctrine has prevailed in the different courts of Common Pleas.

An ejectment is a possessory action; and it is settled, that one having a right of possession may recover in such action, though the title may appear in a third person. Vaughan 239. Cro. Eliz. 322, 438. Cro. Jac. 437. Cro. Car. 58. 1 Wils. 72, 272. 2 Wils. 338-9. They also cited 4 Rep. 26, a. b. Lessee of copyholder for a year may maintain an ejectment against a stranger, under the custom. Cro. Car. 169. Lands may be appertaining to a messuage.

By the Court. There is a *jus proprietatis*, and a *jus possessionis*. One having the latter right, may, in some instances, recover in ejectment, though he has not the legal title, as in the case of a disseisor before a descent cast. Did the dispute concern improved lands only, the plaintiff should recover the possession. For improvers of lands purchased of the Indians in 1736 and 1754, under circumstances similar to the present, have the most equitable claim to a confirmation of their titles. The encouragement given by the proprietors and their officers to improvements, have clearly expressed their assent to the usage, and is such a sanction as amounts to an implied contract on the part of the proprietors, that they will grant the lands to such persons on the usual and common terms. Were the proprietors to refuse the terms so offered to them by an improver, chancery would decree a specific performance against them. It is certain, however, that a right to improved lands will not carry an indefinite claim to adjacent, unimproved lands. The grand difficulty here, will be, admitting the improvement offered

1784. to the jury on the part of the plaintiff, to found an equitable title to the improved lands, whether that title should also prevail as to unimproved circumjacent land, necessary to accommodate the improvement, and to be ascertained by a jury; or whether such woodland should be determined by the proprietary officers, and be solely judged of by them?

Though the granting lands to improvers be highly agreeable to the principles of reason, and natural justice, yet, *stricto jure*, such improved lands, until an office right is obtained, may be considered as vacant. The term "appropriated" in warrants, does not relate to improved lands, but rather seems to refer to lands surveyed for the use of the proprietors. The distinction between improvements made since the three Indian purchases, has been well taken by the plaintiffs' counsel. To lands granted under the first two purchases, the *bona fide* improver has an equitable title. Under the latter, an improvement can give no preference, or shadow of title. If an improver of lands in England, when entered on by another, cannot recover the possession from the wrong-doer, the title being in a third person; yet in this province such a one surely may, and ought to have relief from the peculiar circumstances and settlement of the country. In this case the possession of the plaintiff should be the sole object of the jury. Verdict for plaintiff—and the court ordered that his counsel should have liberty to move the court at the day in bank, to give evidence (if they think it regular and proper) of the practice of the country and Land-Office, with respect to the *quantum*, or proportion of adjacent unimproved lands, properly claimable, or grantable under improvement rights.

The doctrine of improvements was most fully considered as well by the court, as the counsel, at *Nisi Prius*, at *Washington*, May, 1795, in *Howard's* lessee v. *Pollock* and *Burk*, before *M'Kean*, C. J. and *Yeates*, J. (MSS. Reports.)

Matthew Karr made a small improvement on a plantation in 1768, by deadening a few trees, and making some brush heaps. In the succeeding year, *Joseph Proctor* came up, and settled near him. Some differences arose between them; but at length they mutually fixed on a line between themselves, and agreed that it should be marked. This was accordingly done, and Proctor built a snug cabin, cleared six acres of land, lived thereon two years, and raised grain during that period. He then sold his improvement to the lessor of the plaintiff for £. 30, who possessed himself thereof, and lived thereon three years, until he was driven off by the savages.

Karr sold his improvement to one *Charles Burkham*, who again sold to *Pollock*, one of the defendants; Burk is the tenant of Pollock. It was offered to prove the *consentable* line shewn by the two original settlers, by several witnesses, and to establish that *Pollock* knew of this boundary when he purchased, and that he was forewarned not to go over it.

Exception was taken to this testimony.

The plaintiff must recover according to his title at the time of the demise laid in the declaration, which is on the 2d of October, 1780. If his title then was not good, it shall not defeat the equitable title of defendant, by improvement, aided by a warrant dated 20th of January, 1785, and a survey made on the 17th of February following, before the commencement of the suit.

Whatever effect subsequent laws may be supposed to have on the doctrine of improvements, they cannot affect the present question, which must be judged of by the existing law of 1781, (chap. 929.) It is also remarkable, that the act of 30th of December, 1786, (chap. 1248,) recites, that settlers were not secured in their preemption rights, by the law of 1st of April, 1784, and affords them a temporary advantage, which has since been continued by subsequent acts. If under any previous law, or established custom, the titles of improvers had been fixed and ascertained, there could have been no necessity for passing this act.

It was answered by the plaintiff, that though he conceded he could recover only according to his right at the time of the feigned lease; yet different acts of the legislature, expressive of their sense of improvements, had shewn in what light real settlements should be viewed, and were declaratory of former established usages. It was not meant to carry the improvement doctrines to the wild extremes to which they were brought shortly before the Revolution; but that a *bona fide* improvement, made *animo residendi*, pursued in all its stages, and never abandoned, had certain benefits annexed to it from the uniform practice of the Land-Office, and of courts of justice, was now the generally received opinion of the western country; and it was apprehended, these advantages were sanctified by divers laws of the state.

The state of *Virginia* recognized by a municipal regulation of May 3d, 1779, actual settlers, "who had made a crop of corn, or resided on the lands for one year before January 1st, 1778," as freeholders of that commonwealth, and entitled to the farms they occupied, not exceeding 400 acres. An unfair advantage would be had against the *Pennsylvania* settlers, particularly those near the disputed territory,

unless a similar doctrine was extended to them also. The public advertisement, on opening the Land-Office for the new purchase, on the 3d of April, 1769, commonly called the preambie to the lottery, explicitly declares, that "Those who had settled plantations, should have a preference."

The act of 1st of April, 1784, opening the Land-Office, states, in sect. 1, the equal justice *due to all persons holding lands*, that they should have equal opportunities of completing their titles; and in sect. 3. directs that each applicant shall produce a certificate, specifying whether the lands are improved, or not, that interest may be charged accordingly.

The funding law of the 16th of March, 1785, (chap. 1126,) directs that improvements shall be subject to taxation, and thereby recognizes those claims.

The limitation act of 26th of March, 1785, (chap. 1134,) declares, that no persons claiming lands in consequence of any prior settlement, improvement or occupation, *without other title*, shall recover the same, unless they have had the peaceable possession thereof within seven years before action brought; with a *proviso*, in favour of persons driven from their possessions by the savages, &c. Now it is evident, that here is a necessary implication from the words of the law, that an ejectment may be maintained under a *prior settlement, improvement*, or *occupation*, where there has been a possession within seven years next before the commencement of the suit, by the party, his ancestors, or predecessors.

As to the argument drawn from the penning of the preamble of the act of 30th of December, 1786, it may be obviated, by considering that it arose from the abundant caution of the legislature, and from some former decisions at law.

By the Court. Cases of improvements depend on a great variety of circumstances, all of which must be taken into consideration by a jury. The practice of the late proprietary Land-Office, and divers laws since the Revolution have annexed to them certain claims; so that they may be now classed among the *imperfect rights* to lands. It is a matter of fair argument, when the testimony is given, what will be its operation. We will therefore hear the evidence. It is a more favourable case than improvements generally are, there being an agreed line between the parties, if the plaintiff should bring home the knowledge of that fact to *Pollock*, before he purchased. The jury found a verdict for the plaintiff; and established the agreed marked boundary.

Besides the laws cited, see the act for raising 5,700,000 dollars, passed 10th of October, 1779, (chap 855,) which declares, in sect. 11, that lands held by improvement, are thereby made taxable.—Act for emitting £. 500,000, in bills of credit, passed 7th of April, 1781, (chap. 928,) which enacts, in sect. 7, that, together with the guarantee of the state, so much as shall be sufficient of the arrears due for land, granted, or claimed by virtue of warrants, locations, surveys, *or any other title*, that might be deemed good and valid, according to the *law, custom, or usage in force* under the late government, shall be pledged as a fund out of which the said bills of credit shall be redeemed, &c.—Act passed 5th of April, 1782, (chap. 953,) instituting a Board of Property, to hear or determine in all cases of controversy touching escheats, &c. *rights of pre-emption, promises, imperfect titles*, or otherwise, which may arise in the Land-Office.—Act passed 12th of March, 1783, sect. 6, (chap. 996.)—Act passed 22d of April, 1794, (chap. 1755,) sect. 2, directing that no warrants shall issue after 15th of June, 1794, for the lands therein mentioned, except in favour of persons claiming under some settlement and improvement.—Act passed 22d September, 1794, (chap. 1773,) sect. 1, declaring, that after passing of the law, no applications shall be received in the Land-Office, for any lands, except such, whereon a settlement has been, or thereafter shall be made, grain raised, and a person or persons residing thereon. 1782.

In the Lessee of *Smith* v. *Brown, Fayette*, May, 1795, formerly cited, on the point of the note respecting *Virginia* certificates of settlement, *M'Kean*, C. J. in his charge to the jury, on the improvement point of the case, observed, that "To give an improvement any equity whatever, it must not have the smallest cast of an abandonment.—So wild and extravagant have been the notions of many people about improvements, that it is not easy to define them. In the language of the act of 30th of December, 1786, (chap. 1248,) it is understood to be "an actual personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war."

The chief justice then proceeded to give an account of the origin of improvements, and the state of the Land-Office at a particular period, from which the editor has in some degree dissented, upon an investigation of certain facts, already exhibited.—But the reader will be able to form his own judgment, upon a full view of the whole subject, and

1784. of the different sentiments which have, from time to time, been expressed respecting it.

There are three kinds of rights; (he adds,) *jus proprietatis*, *jus possessionis*, and *jus vagum*, or, an *imperfect right*; settlements may be ranked among the latter species; it is a right to a pre-emption.

William Penn, the first proprietary, died in England, in 1718, and his son *Thomas* continued in his minority until 1731.—*Richard*, his other son, until 1732. In this interval their Land-Office was shut up, so that during that time, warrants and patents were not regularly granted by the commissioners of property, for transferring lands to applicants.

To further the settlement of the then province, within that period, tickets, signed by one of the commissioners of property, or by the secretary of the Land-Office, came into practice. Hence it would seem sprung improvements.

The old rule being once relaxed, greater liberties were taken by the people, and emigrants from abroad often seated themselves on vacant lands without permission, and made valuable improvements. The usage of the proprietary Land-Office was favourable to these settlements.—The interests of the proprietaries were promoted; and the pre-emption of the lands they occupied, was generally considered as belonging to the settlers. The inhabitants of the frontier counties, in particular, availed themselves of the usage, and in many instances went much further than was ever intended by the lords of the soil, or their officers. He then referred to the acts mentioned in the preceding case, particularly the limitation act, which, he said, presupposes, that under the received usage a recovery might have been before legally had under a prior settlement, improvement, or occupation, where there had been an attendant possession within seven years before the suit brought. The former custom of granting the lands to real improvers, is clearly hereby recognized.

"Improvements must not have the smallest cast of an abandonment." Thus in *Neave's* lessee, v. *Edwards* and *Wisegarver*, *Bedford*, June, 1799, before *Yeates* and *Smith*, justices. (MSS. Reports.)

Ejectment for one messuage, six acres of meadow, twenty acres of arable land, and one hundred and forty-six acres of wood land, in Bedford county.

The plaintiff claimed under a warrant to *James Caldwell* for 400 acres in the forks of Dunning's creek, including his improvement, in *Cumberland county*, dated 31st of May, 1763. A survey of 850 acres and allowance by *Richard Tea*, 16th of May, 1765, and sundry mesne conveyances. It being afterwards discovered, that the survey included, patented lands, held under an elder right, a warrant of re-survey was obtained, upon which a re-survey was made by *George Woods*, on the third of May, 1776, containing 586 acres and 125 perches, excluding the patented lands, but including the defendant's house and claim, which were also comprehended within the lines of the original survey.

The defendants produced witnesses, who swore, that in August, 1762, one *Robert Owings* made improvements on the land, by building a small cabin, clearing a field of near two acres, inclosed with a brush fence, and planting corn thereon. In the spring following, the settlers were driven off by the Indians; *Owings* left the place among the rest, and never returned.

In 1776, *Robert Adams*, jun. understanding that *Owings* had relinquished all claim, came to the old improvement, and cleared a small spot for hemp seed. In the succeeding year he raised another small cabin, and was then driven off by the Indians. *Wisegarver* lived about three miles distant, and took possession, but *not claiming under Owings*. About 1783, he applied to *Adams* to purchase his improvement.

The plaintiffs' counsel offered to prove, that *Owings* had entirely given up his claim, before the survey in 1765, but were stopped by the court, who said there was already given full and satisfactory evidence of an abandonment. *Owings* quitted his cabin in 1763, and never returned, nor claimed the land. Under a warrant like the present, not precisely descriptive of particular lands, and when there was much vacant land in the forks of Dunning's creek, a fair *bona fide* settlement, made before the survey, and continued from time to time, unless interrupted by the enemy, would be entitled to the preference. Here no less than 850 acres were surveyed under a 400 acre warrant. But circumstanced as the case is, the plaintiff's title must necessarily prevail. Verdict for the plaintiff, *instanter*.

And, in the case of *Thomas Sturgeon's* lessee v. *Alexander Waugh*, before the same judges, Dauphin county, October, 1799. In ejectment, for 46 acres of land, in Lower Paxtang township, an abandonment of an improvement for 36 years, the party living at no great distance even if the limitation act created no legal bar, was adjudged to form an insuperable obstacle to a recovery. In *England*, a long possession without a deed, is preferable to an ancient deed without possession. The rule holds with much greater force in new coun-

tries, where the community are peculiarly interested in the cultivation of the soil, and manual labour so much enhances the value of real property. Such are the grounds of policy in the law, and such have been the uniform decisions of courts of justice, to prevent litigation on slight pretensions, and give security to landed titles. MSS. Reports.

And, by *M'Kean*, C. J. If one in possession has a legal title, and sells to a purchaser, *bona fide*, and without notice, an equitable title by *improvement* shall not affect him; nor indeed ought it to go to the jury in evidence. (See Talb. Ca. 187, 258, 260. 2 Freem. 43. 3 Chan. Ca. 123. 2 Blackst. Com. 329, 337.) *Cherry's* lessee v. *Robinson, Fayette*, May, 1795. (MSS. Reports.)

In the lessee of *Hugh Neilly* v. *Benjamin M'Cormick*, Allegheny, May, 1799, before *Yeates* and *Smith*, justices, (MSS. Reports.) In ejectment for lands, on a mere improvement right, a witness proved that the lessor of the plaintiff had a small nursery, and trees deadened on the land, about 22 years before the bringing of this suit.

The defendant's counsel objected, that the action cannot be maintained on the prior settlement right, without other title, unless the plaintiff, his ancestors, or predecessors, have had the quiet and peaceable possession, within seven years next before bringing the action, under the limitation act of the 26th of March, 1785, sect. 5.

The counsel for the plaintiff answered, that an inquisition of forcible entry, and detainer had been found many years ago against the defendant, in *Washington county*, and had been removed to the supreme court, where it remained untried, and that consequently the possession of the defendant must be deemed tortious; and moreover, this was a case on the frontiers, where the inhabitants had been driven off by the savages.

But, *by the Court*, Why have you not gone on with your indictment, and obtained possession thereon? If you have been forced from the lands by Indians, or others, you might have brought your ejectment before the 26th of March, 1790. The case is clearly within the limitation act. The courts not being open has been held no answer to it. 1 Lev. 31. 2 Salk. 420. 1 Keb. 157.) When the time once begins, it runs over all mesne acts, such as coverture and infancy. (1 Stra. 556. Plowd. 355. 4 Term Rep. 306, 310, 311, 312.) Plaintiff nonsuit.

An improver may also abandon his improvement, by his own act, in obtaining his warrant 1784.

Thus, in the Lessee of *Richard Carrol* v. *Robert Andrews*, Washington, October, 1800, before *Yeates* and *Smith*, justices, (MSS. Reports,) in ejectment for one messuage and 150 acres of land, on the waters of Ten Mile creek.

It was admitted, that the lessor of the plaintiff, and *Samuel Parkhurst*, under whom the defendant claimed, originally held the lands in question by improvement rights.

The facts turned out in evidence as follow.

Stephen Carter settled on the lands in 1785, built a house and barn, planted a nursery, and cleared about 30 acres. He took out a warrant, and obtained a survey of 400 acres and allowance in 1787, by *Thaddeus Dodd*, an assistant surveyor under *David Reddick*, esq. Two years after, he removed to the *Miami*, leaving his farm under the care of *Samuel Parkhurst*, to be sold or rented. *Parkhurst*, as his agent, on the 25th of November, 1790, conveyed to the defendant 400 acres and allowance, as surveyed under *Carter's* warrant, in consideration of £.140. The defendant afterwards, on the suggestion of *Daniel M'Farland*, procured *Carter's* warrant to be returned *unsatisfied*: and on the 18th of December, 1794, obtained a new warrant for 400 acres on the head waters of Ten Mile creek, adjoining the lands of *Richard Carrol* and *Lawrence Craft*, at 50 shillings per hundred acres, upon which 406 acres and allowance were surveyed by *John Hoge*, on the 9th of Jan'y, 1796.

Previous to the last warrant, the lessor of the plaintiff made a settlement and improvement on the lands in question.

The court said, that they had been led into the evidence of the improvements made by *Carter*, by the opening counsel; but had the facts been fully stated, they would not have permitted such evidence to have been given under the circumstances of this case.

The conduct of the defendant was a *fraud* on every citizen of the State; instigated by avarice, and the low cunning of *M'Farland*, he has abandoned his elder and better title, under *Carter's* warrant, and he must now be concluded by his warrant of 1794, as for unimproved lands. Though evidence has been received of valuable improvements made by *Carter*, it cannot avail the defendant, who, by his own voluntary act, has defeated his claim thereto.

The defendant's counsel then relied on the bill of sale from *Parkhurst*, of the

1784. warrant right and survey of *Carter*; and offered to shew by *parol* evidence, a purchase from *Parkhurst* of the improvement right.

But, *by the Court*, How can you intitle yourself under a warrant, which you have obtained a return of as *unsatisfied*? Can you relinquish your interest under it, and yet retain your right against the commonwealth, whom you have attempted to defraud? One may lose an honest debt by playing a trick to come at it; as by adding a seal to a note, which was sufficient without it. (2 Vern. 162.) You have produced a written conveyance from the agent of Carter, and are precluded from shewing the transfer by oral testimony.—Verdict for the plaintiff.

The same principle is recognized in Merchants' lessee v. Millison, before cited. And in the Lessee of *John Nicholls* v. *William Lafferty*, *Allegheny*, November, 1801, before the same judges, (MSS. Reports.) The defendant claimed under a warrant to *William Harvey*, dated 27th of July, 1785, including an improvement made by *William M'Murray*, interest to commence from 1st of March, 1780.

The defendant's counsel proposed to examine witnesses as to the improvements made by *M'Murray* antecedent to the 1st of March, 1780, on the lands in question.

But, *by the Court*, This point has been so often decided, and even in some cases apparently hard, that we cannot permit it at this time to be debated. The warrant-holder has precluded himself from deriving his equitable title of improvement beyond the day called for in his warrant. The decision will conduce to good morals, and serve as an additional proof of the old adage, that honesty is the best policy; and we will not deviate from it.

So, in the lessee of *Gotliep Reigart*, and *Conrad Haverstock*, and *Christiana Samuel*, before the same judges, at *Bedford*, November, 1803. (MSS. Reports.)

The plaintiff claimed under an application entered November 17th, 1766, and a survey thereon made 10th of April, 1790. The defendants claimed under a warrant dated 2d November, 1774, whereon interest was to commence from the 1st of March, 1767, a survey made thereon, 27th of December, 1785, and a patent dated April 13th, 1786.

The defendant's counsel offered to shew a settlement made on the lands in question in 1761, and continued since that time.

It was objected that he could go no further back than 1767, when the interest on his warrant commences.

The defendants replied, that they might shelter themselves under a settlement, prior to the period of interest commencing as expressed in their warrant, although a plaintiff out of possession was bound thereby, and could not do so.

By the Court. There can be no just ground of distinction between the two cases. When either the plaintiff or defendant attempt to defraud the commonwealth, by not charging themselves with the full interest from their respective periods of improvement, it must at least operate as an abandonment of their claim for such intermediate time as they have dropped; and we shall hold them bound thereby. Both instances must rest on the same uniform principle. If, indeed, the defendant does not shew his warrant or application in evidence, and it is not produced by the adverse party, the defendant may rest on his possession, and prove his settlement from its first commencement. Circumstanced as this case is, the objection must be sustained; and so have been our decisions.

The evidence having been gone through, it appeared that the lessor of the plaintiff had been guilty of gross *laches*, and the charge being decidedly for defendant, the plaintiff suffered a nonsuit.

And mentioning an improvement in an *application* is mere matter of description, if the party do not state when it began; and he abandons his equity of improvement, by not paying back interest from the time of its commencement, and evidence of the improvement must be overruled. So held by *Yeates*, J. circuit court, *Bedford*, October, 1807, in *Coxe's* lessee, v. *Ewing*, and others, (MSS. Reports.) Although it was warmly contended by defendant's counsel, that the applications of 1766 were not within the rule, and that back interest was never calculated on applications; and that it would be highly unjust, that one should suffer in his claim to lands by reason of his conformity to the regulations of the proprietary officers, over whom he had no control. The court said, that the regulations of the Land-Office in 1766 seem to have blended the proprietary interests, with those of the poorer class of the community, who might not have ready cash to advance for the purpose of taking out warrants, but who, by the addition of labour to the value of the soil, would give a permanent security for the payment of the consideration money. The new institution, however, cannot be regarded as a variation of the rights of the proprietaries, or the duties of individuals. Warrants have been taken out for improvements after 1766, which fully evince the mode of procedure,

when improvements previous thereto, were intended to be secured. The old consideration and quit rents are specified therein, as the terms on which such warrants issued. It follows, that such improvements cannot be adduced to establish a title to the lands anterior to such application.

On the foregoing case, it is to be observed, that the ground taken by the counsel for defendant, was entirely mistaken. By a reference to the proceedings introductory to the opening of the office on the new plan, in 1765, particularly the advertisement of 17th of June, 1765, it will appear, that every person desirous *to settle* any *vacant* land purchased of the Indians, and not appropriated to the proprietaries' use, were to apply to the secretary, who, instead of granting a *warrant*, was to enter the *person's name*, with the date of his application, and the *description*, or *location* of the land. And they were to attend the deputy-surveyor, at a time to be appointed, to *show* him the land, and have it surveyed; and to pay interest *from six months after* the date of the application.—Every idea of improved land is here excluded.

But, all persons *possessing*, or *claiming* lands, on account of any *settlements*, or *improvements*, whether on the *east* or *west* side of Susquehanna, were to make application, and to bring with them *authentic certificates*, of the nature of *their improvements*, and the time when their *settlements* first began. So, although the office was closed on the *west side* to any application for *unimproved* lands, for one year, it was open to applications for *improved* lands.

And, on the 1st of August, 1765, it was *resolved*, that the secretary give *warrants* to such persons as have *built on*, and *resided* on the land they apply for, *and have a just claim to, as an improvement*, bringing a certificate from a neighbouring magistrate, or *other satisfactory proof* of the *nature* of the improvement, and *first settling* thereof; *when* the interest and quit-rent is to commence. But if *no such proof* was made, it was to be entered as an *application*; the *deputy was to report* on the *return of survey*, and *then* warrant to issue, *if approved* by the governor.

And, on the third of October, 1765, the deputy-surveyors were *particularly enjoined* either in *applications* for land as *unimproved*, or on *warrants for improvements*, since the opening of the office on the new plan, to report with the return of survey, where they found any improvements on the land, and fully to inform themselves, and report when such settlement and improvement first began.

The office opened, generally, on the *west* side, on the same plan, August 1st, 1766. The Land-Office, therefore, unquestionably had it in view, to detect *frauds* in the two cases: 1st, where, in *warrants*, the time of the commencement of the improvement was not truly stated; and, 2d, where the *application* called for no improvement, or, no *certificate* was produced where an improvement was part of the *description*. Applications, therefore, to cover lands antecedently improved, were *frauds* upon the Land-Office. And if the survey was returned without a reference to such improvements; the fraud was two-fold. And the principle applied to all other cases, must apply in its fullest force, to the applications of 1765 and 1766 and later, in the old purchases. 1784.

Yet where the survey, on a prior *indescriptive* warrant, covered the whole of the defendant's claim, as well that which had been actually improved and settled previous to such survey, as the adjoining woodland, which was an act never sanctioned by the Land-Office; in the same case, the improvements, antecedent to the defendant's application, were so far admitted, as to shew the invalidity of the plaintiff's survey.—Such survey, the Judge added, if it included the real *bona fide* settlements of third persons, would not have received the sanction of the Land-Office, or of the country, from their uniform usages. May not such evidence be admitted, to shew, that the plaintiff's survey could not legally take effect? It is true, that by going into this testimony, the defendants will derive a degree of benefit from improvements, the equity of which they seem to have abandoned. But this appears inevitable, and flows as a necessary consequence from the investigation of the validity of the survey made for the plaintiff. The point was, however, reserved at the plaintiff's instance; but it does not appear to have been again stirred. But if the point should arise in other cases, the reconsideration of it would not be precluded; but it would be still open for a more solemn decision.

In *Nicholl's* v. *Holliday*, before cited, it was held, that an early settlement, accompanied with a subsequent warrant and survey, is preferable to a prior warrant and survey.

The plaintiff settled on the land in 1774, and built on, and improved it, and constantly resided in a cabin very near the land in dispute, except when the inhabitants were driven off by the Indians. A consentable line was established between this place and a tract whereon one *William M'Manimy* lived;

1784. whose house was about half a mile from the acknowledged boundary.

Nicholl's on the 22d of March, 1798, took out a warrant for 389 acres, including his improvement, &c. interest to commence from the first of March, 1774, and obtained a survey thereon of 380 acres and 48 perches, on the 6th of September, 1799, whereof 108 acres were claimed by *William Harvey*, which included the lands in dispute, but no one had lived hereon until 1785.

The defendant claimed under a warrant to *William Harvey*, dated 27th of July, 1785, including an improvement made by *William M'Murray*, interest to commence from 1st of March, 1780, and a survey thereon of 108 acres, made on the 30th of June, 1786.

By the Court. Has not enough been shewn, to evince that the plaintiff has the earliest and best possessory right, and must necessarily recover? He claims under a *bona fide* settlement eleven years earlier than the defendant's warrant, uniformly pursued and continued, which must embrace the 108 acres in dispute, and to this he unites a title by a warrant and survey, paying interest to the commonwealth from his first improvement.

The jury gave a verdict for the plaintiff, *instanter*. (MSS. Reports.)

No actual settlement, subsequent to an adverse survey, can confer a title; or be received in evidence. *Eddy's* lessee v. *Faulkner*, Allegheny, November, 1803, (MSS. Reports) which will be referred to more at large, in another part of this note.

An improver of lands taking out an application, including his improvement, and obtaining a survey, is thereby concluded, and cannot hold contiguous lands under the same improvement right. Lessee of *John Holmes* v. *Thomas Kay*, *Bedford*, November, 1803, before *Yeates* and *Smith*, justices, (MSS. Reports.)

Improvements made on land, after an early, descriptive, adverse warrant, and a survey returned, cannot be received in evidence against a *distant* owner.

Thus, in the lessee of *Frederick Pigou* v. *Nicholas Nevill* and *James Graham*, at a circuit court, at Northumberland, October, 1805, before *Yeates*, J. in ejectment for 350 acres of land, in Buffalo township.

The plaintiff claimed under a descriptive warrant, in the name of *Ludwig Karcher*, dated 25th of October, 1774, and a survey made thereupon on the 27th of April, 1775, which was returned into the Surveyor-General's office, on the 12th of March, 1776.

The defendant's pretensions rested on a later descriptive warrant, granted to *Conrad Sharpe*, on the 26th of October, 1774, and a survey thereon made 8th of Nov. 1774, but the time of its return did not appear.

The defendants shewed in evidence, without opposition, that *Sharpe* came upon the lands in October, 1775, cleared three or four roods square, fell some trees, planted a few apple seeds, and raised part of a cabin four logs high. They then offered to prove the extent of the improvements made on the lands since October, 1775, up to the time of bringing the ejectment, in 1800, which was opposed.

Yeates, J. I am constrained to overrule the testimony. Improvements made on lands in dispute, after an adverse early descriptive warrant has issued, and a survey made thereupon, which has been returned into the Surveyor-General's office within 10 1-2 months afterwards, can give no pretence of equity against the distant owner, and can only serve to mislead the jury. Verdict for the plaintiff. To the same point see *Calhoon* v. *Dunning*, 4 Dallas, 121-2.

The doctrine of improvements will be occasionally mentioned, with reference to certain acts of assembly, at the close of this note. It remains only to notice the printed authorities on this point.

M'Curdy v. *Potts*, 2 Dallas, 98. This case is of little, if any, importance; and the principal point of it has been differently decided, subsequently, by the same judge, in cases already noticed.

Buchanan's lessee v. *M'Clure*, adjudged in July, 1808, depended on the lottery applications of 3d of April, 1769. The plaintiff's number was later than that of the defendant, but he endeavoured to support his claim to preference, by a settlement made on the land after the purchase made of the Indians in 1768, and before the time of opening the office, the 3d of April following.

The judge who tried the cause, charged the jury, that this settlement and improvement gave a preference to the settler, even against an application properly describing the land; and that No. 2, accompanied with such settlement, was entitled to a preference over No. 1, and the jury found a verdict for the plaintiff. The judge, on the motion for a new trial, adhered to this opinion, for reasons given at large in the report. The chief justice, and two other judges were of a different opinion, and the judgment of the court was delivered by the chief justice.

The terms on which the office was opened, were stated at large, (as they

are before given.) The counsel for the appellee have made two points. 1, That the settler was entitled to a preference by the law of the land, of which the proprietaries could not deprive him. 2, That he was entitled to a preference by a fair construction of the terms on which the office was opened, 3d of April, 1769.

Title by settlement has always been favoured, and under proper restrictions it deserves favour; but it must not be supported to the destruction of all other rights. It cannot be denied, that the late proprietaries, who were absolute owners of the soil, had a right to make sales, and to grant rights, on what terms they pleased. If they had thought proper to grant no kind of right, but on payment of the purchase money, neither the legislature, nor the courts of justice could have controlled them. But as they had been in the habit of encouraging poor settlers, who were in the beginning unable to pay any money, this practice at length grew into a right, and what had originated in benevolence, became the law of the land. I speak now of the lands sold by the proprietaries prior to the year 1769. The last purchase made by them of the Indians, was at *Fort Stanwix*, 4th of November, 1768. In opening their office for the sale of these lands, they determined to give no preference to persons who settled between 4th of November, 1768, and 3d of April, 1769. To have given such preference, would in a great measure have defeated the equitable intention of putting all persons on an equal footing. Nor could there be any just cause of complaint against the regulation adopted by the Land-Office. Only a few months intervening between the purchase, and the notice of the opening of the office; and those months including the winter, when improvements cannot be carried on to a great extent, it was improbable that any one could have been induced to go to a considerable expense, under an idea that he would obtain a preference by settlement.

But there was a class of settlers of another description, whose case was entitled to a different consideration. This leads me to the *second* point, the true construction of the terms proposed by the Land-Office. Although it had always been the policy of the proprietaries and the legislature to discourage settlement on lands not purchased of the *Indians*, because it gave offence to the Indians, and might produce war, yet when the seat of war between *Great Britain* and the colonies, and *France* and the *Indians* allied to her, was transferred to the *Ohio* and the country between *Pittsburg* and the great lakes, it became extremely convenient, and almost necessary, that there should be a chain of inhabitants on the military roads leading from the settled country to the western waters. For this purpose the commanding officers of the *British* forces had been in the habit of granting licences to settle, and in many instances persons seated themselves without licences, but under an implied permission. These people were exposed to great danger, and many of them were cut off by the savages in their frequent incursions. This kind of settlement had taken place, chiefly, but not altogether, in the western parts of the State. It is to be remarked too, that many of those who had settled without licence, were entitled to favour, because they had relinquished their settlements in consequence of an act of assembly passed in the spring of the year 1768, and a proclamation issued by the governor in pursuance of it. It was thought reasonable therefore, that a preference should be given, on the opening of the Land-Office, to "those who had settled plantations, especially those who had settled by permission of the commanding officers to the westward." 1784.

Had the proprietary order stopped here, there might have been some ground for arguing that the words of the order included *all* settlers, prior to the opening of the office, however different their cases or merits might be. But, to take away all doubt, the order proceeds to exclude *certain settlers* by negative expressions, viz. "Those who had settled, or made what they call improvements since the purchase." It is contended that these negative words are to be restricted to those persons who only made trifling improvements, without having settled plantations. But neither the expression, nor the reason of the thing, justifies this restriction; the words "those who had settled," include all kinds of settlement; and the reason of the order, as before explained, certainly demanded that no preference should be given to any kind of settlement made after the purchase.

I have hitherto considered this matter as if it were a new point. But that is far from being the case. It has been understood ever since the opening of the office in 1769, that those persons who settled between 4th of November, 1768 and 3d April, 1769, were entitled to *no preference*. The Board of Property determined so in the case of the very land now in dispute, on the 26th of March, 1770. The same principle was laid down by chief justice

1784. Chew, before the Revolution, in *Campbell's* lessee v. *Kidd*, and by chief justice *M'Kean*, and other judges of the supreme court since the Revolution, in *Thompson's* lessee v. *Beeler*, and *Sheerer's* lessee v. *M'Clure*; and it is admitted that this has been the uniform opinion and course of decision at *Nisi Prius*. Now, although the point has never been brought before the court in Bank; yet, when a principle affecting titles to land has been supported for near forty years, by repeated decisions at *Nisi Prius*, from which no appeal has been made, it appears to be so incorporated with the law as to render it dangerous to touch it. A new trial was awarded. 1 Binney, 385.

If the plaintiff claims under an improvement right *only*, he cannot support an ejectment, unless he has been in possession within seven years before the suit was brought. *Burd* v. the lessee of *Dansdale*, on error. 2 Binney, 89.

Of Warrants.

A warrant must be judged of as it appears on the face of it; and whether it is sufficiently descriptive of, or locates precisely the lands in question, can only be determined by testimony ascertaining the local situation of the grounds, and the natural and artificial boundaries and marks contained therein. And the intention of the party is of no moment, unless it is reduced to writing in the warrant. But such intention may be given in evidence against the warrantee.

So determined, at *Huntingdon*, May, 1793, before *M'Kean*, C. J. and *Yeates*, J. in the Lessee of *J. M. Nesbit* v. *Titus*, *Kerr* and *Rankin*, (MSS. Reports.)

The witness was offered, to prove the parol declarations of the secretary of the Land-Office at the time of issuing the warrant, the claim of *Rankin* to the lands in question, and his intentions in taking out the warrant; and also the applications of the witness, as agent of *Rankin*, to *Richard Tea*, the deputy-surveyor of the district to cause the lands to be surveyed, and what passed thereon.

The court expressed themselves as above stated. They said it would be of the most mischievous consequences to the community to allow the two first species of evidence to be given; nor under such a practice would any one be safe in his title to lands. It would introduce every evil which the act of assembly respecting frauds and perjuries, was intended to prevent. The declarations of the secretary of the Land-Office cannot have any legal operation. If any particular agreement was made, or special indulgences intended by him in behalf of the applicant, they should have been committed to writing, or inserted in the warrant, or in the written directions to the deputy-surveyor to make the survey, that they might be open to the view of every one who might be desirous of investigating the title.

As to the applications by the witness to the deputy-surveyor to make the survey, and what passed thereon, it is proper evidence; because it is an act done in prosecution of the title, and tends to shew, that no *laches*, or neglect, is imputable to the party who took out the warrant, but that he makes the proper efforts to complete his title. Such evidence is constantly received. Were it otherwise, it would scarcely ever be possible to shew fraud or improper conduct on the part of the deputy-surveyor. In contests like the present, it is of great moment to establish that the party's pretensions have been duly followed up without negligence; that he has not lain idly by, while surveys have been made on the lands for other persons; and that when a survey adverse to his claims has been made, he has filed his *caveat* in a reasonable time for bringing the matter to a hearing before the Board of Property.

And in the Lessee of *Bartram Galbreath* v. *Philip Maus*, at *Northumberland*, Oct. 1797, before the same judges, (MSS. Reports.) On argument, the court ruled, that parol evidence of party's intentions in entering an application for lands in the secretary's office, cannot be received to assist, or bolster up an indescriptive location of the lands in controversy. The efficacy of an application must depend on the written words of it; this is the only notice the applier gives of his intentions to appropriate certain lands, and the adverse party shall only be affected therewith. Absolute, precise certainty, however, is not to be expected in the descriptions of lands to be surveyed in a new country. It has been often said, that they need only to be certain to a common intent. Yet the intentions of an applier for lands may be given in evidence against him to defeat his pretensions to the object in dispute, by shewing that he intended to locate other lands. Because the mischiefs and inconveniences attending the former case, do not exist here. The rest of mankind are not prejudiced, or injured by such testimony; it only affects the party who declares his views and designs in the contract, to what particular spot he considered it as referable.

In the Lessee of *Irwin* v. *Bear* and *Owen*, at a circuit court, Northumberland, October, 1805, before *Yeates*, J. The controversy was chiefly respecting the relative merit of the applications, whether they were descriptive of the lands in question.

The defendant's counsel offered to shew that the original owner of the application under which he claimed, who made the discovery, was, when he made the

description thereof, on a certain stream of water running through the land in question, and that the said stream of water was then considered by him, and the people with him as the *second fork of Fishing Creek*, (which the location called for;) and that then, and sitting upon a log on the land, he made the description thereof, which was inserted in his application; which was opposed.

By the Court. Part of the testimony offered is admissible, and part thereof is inadmissible.

The sentiments of the people as to streams of water, and the names whereby they were usually called, at an early day, when the country was unexplored, may certainly be given in evidence; and due allowance will be made for inaccuracies in these particulars: but this indulgence must be confined within reasonable bounds;—it cannot vary the locality of the lands described in the warrant or application.

The decisions have uniformly been, that such inceptions of right, must be judged of *ex visceribus suis*, from what appears on the face of them. Whether they sufficiently describe, or locate precisely, particular lands, can only be determined by comparing the terms wherein they are expressed, with the natural, or artificial boundaries described therein; and these boundaries must be ascertained by evidence, either written or oral. It is of no avail what the intention of the party is, if he does not reduce it to writing when he applies for the lands; though his intention may be given in evidence against him to defeat his claim to other lands than those he really meant.

These rules are bottomed on sound policy, and conduce to justice, common safety, and public convenience. A contrary practice necessarily tends to error, litigation, fraud, and perjury. A contract is the act of two minds: it either binds both parties, or is obligatory on neither. The vendors of lands, whether they be the general lords of the soil, or private individuals, are bound by the plain meaning of their written contracts. If the description of lands be materially, or radically defective, and naturally lead to mistake, the party applying must impute his misfortune to himself. How can any man safely lay out his money in taking up lands, unless by applying to the public offices, he can discover whether the lands have been before appropriated? He cannot penetrate into the bosoms of others, nor receive information, that a particular tract not described in a location, was *intended* by the party sitting on a log, lying on the land! The latter part of the evidence offered, must be overruled. (MSS. Reports.) 1784.

The location of a warrant must be collected from its own words compared with the state of the country at the time; not from the terms of the Receiver-General's receipt, which remains in the party's custody, and could not operate as notice of his pretensions to other appliers for lands, before a survey is made. *Peters's* lessee v. *Fetter*, *Bedford*, October, 1809. (MSS. Reports.)

A warrant describing lands particularly, but stating their situation in one county when they lie in another, is binding on the commonwealth, after receipt of the purchase money. So held in the Lessee of *Thomas Grant* v. *Daniel Eddy*, *Northumberland*, October, 1796, before *Yeates* and *Smith*, justices, (MSS. Reports.) The court observed that the name of the county must be considered as matter of description. The lines of the two contiguous counties were not run. The plaintiff knew not in which of the counties the lands would lie, and therefore designates them in his warrants in the one county, *or* the other.—An individual conveying 400 acres of land for an adequate consideration to another, and placing its situation in the county of *Luzerne*; yet if it should afterwards appear, (from other precise descriptions, and adjoining lands,) that the tract intended to be purchased, was situate in the county of *Northumberland*.—It will not be seriously doubted, that the vendor should be bound thereby, and that he is not at liberty to grant the same tract to another. Why from parity of reason, should not the commonwealth be bound by the act of their proper officers.

The court also observed, that it would be highly unreasonable to expect the same precision and correctness in the descriptive parts of warrants to take up lands in a tract of territory newly explored, as where the adjacent country had been fully settled and long known. This remark holds with peculiar force, in the description of waters flowing through a considerable extent of ground, where parts of the stream may be properly deemed *main branches* in reference to other parts in the newly discovered lands, but which, on taking the *whole* river, or creek, into view, could not thus be denominated with propriety. It has long been considered sufficient, if the warrant is so couched, as to point out the lands contemplated with certainty to a common intent. Where an object visibly marked is referred to, it reduces general and indescriptive expressions to a fixed certainty.

1784. *Of abandonment, and of shifted or removed warrants and applications.*

The subject of abandonment has been incidentally mentioned in *Nesbit* v. *Titus*; but the circumstances under which an abandonment shall be presumed are so various, that it is necessary to a full understanding of the law on this head to give the cases pretty much in detail; and the doctrine of removed warrants will be found to be connected so much with that of abandonment, as to render it impracticable to separate them without a tedious and unnecessary repetition.

Lessee of *Ephraim Blaine* v. *George Crawford*, and *Henry Fore*, *Allegheny*, May, 1793, before *M'Kean*, C. J. and *Yeates*, J. (MSS. Reports.)

The plaintiff founded his title on an application, dated 6th of April, 1769, No. 2860, in the name of *James Byers, jun.* for 300 acres of land, up the bent of *Monongahela*, on the west side, near or adjoining general *Braddock's* road. A conveyance from *Byers* to *Blaine*, dated, 28th of June, 1769; a judgment of the Board of Property on the 1st of September, 1783, (which was not shewn in evidence further than as recited in plaintiff's patent.) A warrant for the acceptance of a survey said to have been made for *Alexander Ross*, 25th of November, 1769. On an application in his name, dated, 20th of April, 1769, No. 3116, whose right was declared to be invalidated, on *Byers's* application, December 23d, 1784, and a patent to *Blaine*, 26th of December, 1784, reciting as above.

The defendants held under one *James M'Kee*, who claimed the premises under a permission granted by Captain *Charles Edmonstone*, commanding officer at *Fort Pitt*, dated, 29th of September, 1768, to the said *Alexander Ross*, "To settle and improve a tract of land at *Braddock's* crossings, on the west side of *Monongahela* river, 14 miles from *Fort Pitt*." The foregoing application of *Ross*, No. 3116, calling for 300 acres at Braddock's upper crossings, on the west side of *Monongahela*, about 14 miles from *Fort Pitt*," and the survey returned thereon; the attainder of said *Ross* of high treason, in consequence of the act of assembly of 6th of March, 1778. A sale by public vendue by the agents of forfeited estates of *Westmoreland* county, (before the division of *Allegheny* therefrom,) to the said *James M'Kee*, for *l.* 35, on the 12th of March, 1784, and a patent thereon to him, reciting the above particulars, dated 29th of December, 1785.

It did not appear in evidence, that *Blaine*, after the conveyance to him by *Byers*, took any steps whatever to obtain a survey, or file a *Caveat* against the survey of *Ross*, or use any diligence in following up his pretensions to the land, until he obtained the judgment of the Board of Property in 1783. But how the controversy originated before them was not shewn, or whether any person was notified, or did appear, in support of the claim, late of *Alexander Ross*.

But it was proved by several witnesses, that the said *James M'Kee* first seated himself on the land, and began to build a cabin about Christmas, 1768, which was finished in 1769; after the office opened, and originally held it by what he *falsely* called an *improvement*, which he had continued by himself or his tenants, up to the present period; and that at the time of commencing the ejectment, he had a good house, barn, stables, some meadow ground, and above 60 acres of land cleared on the farm. That an application had been sent to *Philadelphia*, to be entered for this land, which had miscarried; but that under an impression that the location had been sent by mistake to a wrong surveyor, the survey had been actually made for the said *James M'Kee*, and *l.* 5, paid for surveying fees.

It was also proved by one of the agents of forfeited estates, that the premises had been advertised for sale by order of the supreme executive council, and were publicly sold at Pittsburgh, by outcry, on the 12th of March, 1784, (no one setting up, or pretending any claim or title,) to the said *James M'Kee*, for *l.* 35, who paid him the consideration money at that time; that he made return thereof within five or six months afterwards to the council; and that in December, 1785, he paid the money into the treasury; and *Blaine* meeting him in *Philadelphia*, first acquainted him of his having a title and patent for the lands, and desired him not to proceed on the sale; to which he answered, that having sold, and paid the money into the treasury, he was bound to go on, in discharge of his duty; that he informed the council of what had passed between himself and *Blaine*; but on consideration they awarded a patent to issue to *M'Kee*.

It was likewise shewn, that the location of *Ross* was more precisely descriptive of the lands in question, than that of *Byers*; the former being better adapted to the swell of the bottom land in the bend of the river *Monongahela*. To obviate the objection that Blaine did not give notice of his title to the lands at the sale made by the agents, it was proved, that he proceeded from *Pittsburgh* to *Kentucky*, on the 21st of November, 1783, and did not return from thence until the month of June following.

Yeates, J. (the C. Justice being indis-

posed,) charged the jury. He observed that it was incumbent on the plaintiff to make out a good title before he could recover the lands in question; and that the real *gist* of the controversy lay in a proper comparison of the rights of *Blaine* and *Ross*, previous to either of the patents being issued. Applications in the Land-Office, after the opening of it, on the 3d of April, 1769, are the inceptions of titles when duly pursued. Merely of itself such a location creates no right; no part of the purchase money is paid. No title vests thereby, nor does it form any contract on which the party could be sued by the proprietaries, or the state, until a survey is made, designating the party's pretensions by metes and bounds. When such a location is followed up with proper diligence, it will give a right of pre-emption to the lands prescribed therein. But any location may, like the imperfect title of improvement, be forfeited by abandonment or dereliction. Where there has been negligence in obtaining a survey, a subsequent location may, by due industry, defeat its operation, as to lands, which it might be supposed to describe with sufficient accuracy and certainty.

If these general rules are correct, and it is presumed they are, the application of them to the case before us, is familiar and easy. The plaintiff's location does not precisely describe these lands. It calls for the land in the bend of the river. That of the defendants is more close and descriptive. The plaintiff has been guilty of gross *laches* and neglect in laying by for fourteen years, without getting a survey made, or making any pretensions to the lands, during which period they have been rendered much more valuable by the labours of the occupier. *Ross* gets a survey returned, which appears however to be made for *James M'Kee*, and paid for by his agent. If the plaintiff has suffered a survey to be made, though he might originally have included the lands in question, and not entered his caveat in due time, or made his objections thereto, he shall be postponed. Such is the practice of all courts and juries, and of the Land-Office; and ought to be so, on general principles of convenience to the community. For no one should be permitted under a general, though early application, to thumb the face of a whole country, and retard its settlement and cultivation by his own negligence.

The question then, if determined on the relative merits of the titles of *Blaine* and *Ross*, immediately before the latter joined the common enemy, will admit of an easy solution. The maxim "*Vigilantibus non dormientibus leges subservi-*

1784.

unt," applies with peculiar force, in the case of rights founded on locations. I throw out of view the permit of *Captain Edmonstone*, as it does not appear that a settlement attended it, but an adverse possession has been shewn in evidence.

The judgment of the Board of Property cannot alter the nature of the title; what grounds they proceeded on, we know not; but this we know, that the parties interested have a legal right to contest their decision in a court of law, by the express words of the act of assembly of 5th of April, 1782; no *caveat*, or judgment of the Board of Property is produced on the part of the plaintiff. It does not appear that any notice previous to the hearing, was given to the attorney-general, the agents of forfeited estates, or to any executive officer whatever; we must therefore conclude it to be *exparte*, nor can I bring myself to believe, if the Board of Property knew as much of the case as we are now possessed of, they would have given such a judgment.

By the attainder of *J. Ross* for high treason, his whole estate, real and personal, became vested in the commonwealth, under the 5th section of the act of 6th of March, 1778, and under this law, and the supplement thereto, passed the 29th of March, 1779, the agents of forfeited estates were directed to sell the estates of traitors in a certain mode prescribed. The same laws which vested the property in the state, qualified the sale of it by the instrumentality of certain persons authorized for that peculiar purpose, and such a restriction was highly necessary for the general benefit: otherwise, highly improved lands, lying perhaps in the vicinity of the metropolis, or in the heart of the state, forfeited by the attainder of persons who had joined the enemy, might be disposed of on the common terms of vacant and unappropriated lands; which never could have been the will of the people. These acts are certainly more than *directory*; they are *restrictive*.

It appears to me, therefore, that it is an insuperable bar to the plaintiff's recovery, that he does not deduce his title through the proper and legal conduct of sale and conveyance, supposing the adverse legal title of *Ross* to be most preferable. The agents of forfeited estates sold these lands on the 12th of March, 1784, and then received the money of the purchaser. It is not possible to conceive, that the commonwealth, above nine months afterwards, could convey a legal right to the lessor of the plaintiff, after they had parted with their title through the medium of agents of forfeited estates. They could not grant what they had not. And neither the state, nor

1784. an individual, can do an act, and produce an effect morally impossible in itself. The plaintiff thereupon suffered a nonsuit.

And, in the Lessee of *Irwin* v. *Nicholls* and *Swan*, at *Westmoreland*, May, 1793, before the same judge, (MSS. Reports,) in which it appeared, that the plaintiff, who claimed under a location of 3d of April, 1769, had made no application for a survey until some time between the years 1774 and 1776, when, on being informed that the location was more descriptive of other lands than the lands in dispute, he declined making the survey, without any force or threats from the then holders of the land, and in fact no application for a survey was afterwards made, nor any survey ever made, and it was also sworn that the location might be supposed to describe with convenient certainty, the lands in possession of defendant, but not exclusively of other tracts.

The defendant claimed under posterior locations, and a settlement in 1770, and cultivation of the lands, but had no survey.

The court, independent of the operation of the limitation act, recognized the same principles, and observed, that a location independent of due diligence being used to obtain a survey, or to prosecute the claim of the party, gives no legal, or equitable right to the pre-emption of lands. It is of itself no title. Like the fancied land jobbing improvements of girdling a few trees, or picking some brush heaps, such applications give no equity; and when deserted and abandoned, like them, they afford not a shadow of a right. The party by his negligence and laches, forfeits all his pretensions to a claim, which, if duly pursued, would be the inception of a title.

So, in the Lessee of *Henry Drinker* v. *William Holliday*, *Huntingdon*, May, 1796, before *Shippen* and *Yeates*, justices, (MSS. Reports.) The court in their charge, laid down the general doctrine, as follows, "Much will depend on a party's pursuing his pretensions on a warrant, or location, with due diligence; where he is guilty of delay and laches, his claim to particular lands, which he might otherwise secure, shall be postponed to a subsequent warrant and survey, aided by vigilance and industry.

When a survey has been made, which is supposed to be injurious to another claimant, he ought to file his caveat, or institute his suit in a reasonable time, or account satisfactorily for his neglect. Failing herein, he shall suffer for his negligence; and particularly so, where his adversary has proceeded to complete his legal title, or bestowed considerable labour in improvements.

The case of the lessee of the reverend *John Ewing* v. *Daniel Barton*, furnishes a striking instance of an abandonment, different from that of adverse locations.

Both parties claimed under the *same* application, in the name of *Nathaniel Breden*, 3d of April, 1769. The defendant was a tenant under the heirs of *William Ross*, deceased.

It was proved that the name of *Breden* was made use of by *Dr. Ewing*, and that the original application was in his *hand writing*. Indorsed, "*John Galloway*."

A survey of 334 acres was thereon made by *William Scull*, on the 27th of June, 1772, but at whose instance or expense, did not appear. It was returned on the 27th of October, 1772, for *William Ross*, and a patent issued to him on the same day.

A certain *Nathaniel Breden* conveyed the location to *William M'Cord*, on the 7th of August, 1772, in consideration of five shillings; and *M'Cord* conveyed to *William Ross* on the 27th of September, 1772, in consideration of *l.* 200. Both deeds were recorded on the 3d of July, 1784, and it appeared, that in the spring following his purchase, Ross began to improve on the lands, cleared six acres, and fenced the same, and built a house thereon. He had occupied the lands ever since by his tenants, and had paid all the taxes. It was shewn, that at the time of trial, there were on the place, between 80 and 90 acres of cleared land, a large house and barn, a good orchard, and six acres of meadow made thereon.

The plaintiff claimed under a conveyance from another *Nathaniel Breden* to *Dr. Ewing*, in consideration of five shillings, dated 20th of October, 1773, and recorded 9th of February, 1793; and this *Breden* swore that *Ewing* had made use of his name, and that he had made a conveyance to no other person.

The acknowledgment of *M'Cord*, that he had procured a person to assume the name of *Breden*, and personify him, was given in evidence by the deposition of another witness.

But the court said this part of the deposition ought not to have been read, and could have no weight in the cause; because *M'Cord*, if living, could not have been received as a witness to invalidate the deed he had executed, nor shall his subsequent confession, after his death, be received for such purpose. Several other witnesses swore, that *M'Cord*, was a reputable man, and of a good moral character.

The court gave it in charge to the jury, that the only question which occur-

red, was, whether the location had been followed up, with due diligence by Dr. *Ewing*, for if he has been guilty of neglect and *laches*, he has forfeited his pretensions to the land. In ejectment it became the indispensable duty of the plaintiff, to establish his own title, against the defendant's possession.

If the survey had been made at the expense, or by the procurement of Dr. *Ewing*, it was capable of proof. It could not be presumed that it was made by the *Breden*, under whom he claimed, because he was a mere nominal person; and his deposition, moreover, has been read. The survey preceded the assignment to *M'Cord* only one month and ten days, and might have been made with a view of a sale to *Ross*; no claim is made while the defendant's landlord is paying taxes, and laying out large sums of money for the improvement of the lands; no suit is brought until October term, 1793, in the common pleas: nor does it appear that Dr. *Ewing* made any effort whatever, respecting his claim, till near twenty years after the assignment of the location to him.

The case also appeared to be within the words and intention of the limitation act passed on the 26th of March, 1785. Though there is a survey on this application, it is not shewn that it was effectuated by the lessor of the plaintiff, or that he ever attempted to make one; and therefore it shall not enure for his benefit. The survey is adverse to his title; has been returned for *Ross*, and the legal title is now vested in his heirs. There was a verdict for the defendant. *Northumberland*, May, 1798, before *Shippen* and *Yeates*, justices, (MSS. Reports.)

In the Lessee of *Daniel Gripe*, v. Reverend *David Baird*, *Huntingdon*, May, 1805, (MSS. Reports.) *Yeates*, J. laid down the following as a general rule.

"When there has been negligence in obtaining a survey, a warrant or location, generally descriptive, but vague in its terms, must give way to a subsequent warrant or location, equally vague whereon a survey has been made; or to a subsequent precise warrant and location, even without a survey, where it accurately describes the lands."

In *Lowrey's* lessee, v. *Gibson*, before cited, it was held, that one having a warrant, and not following it up with diligence, but silently permitting others to improve, shall be postponed.

Lessee of *John Irwin*, v. *Andrew Moore*, *Westmoreland*, May, 1797, Yeates, J. (MSS. Reports.)

The lessor of the plaintiff grounded his pretensions on a military permission of Captain *Charles Edmondson*, commanding officer, at *Fort Pitt*, to him, dated 18th of September, 1767, "To *improve* and *occupy* a plantation and tract of land for himself, and one for his relation or friend, on the south side of the great road, near the mouth of Bushy run, in Beyerley's neighbourhood, he paying forty shillings yearly, if demanded, and subject to the regulations of the commanding officer at *Fort Pitt*, for his majesty's service. "In pursuance hereof, *Irwin* in 1768, built a small cabin, cleared one acre of ground, and made a small deadening on lands about half a mile distant from those in question, and a quarter of a mile from his present place of abode, and had a tenant in the cabin for some little time. 1784.

On the 25th of July, 1769, he filed two applications in the Land-Office, one marked, No. 3663, for 300 acres on the waters of Brush creek, on the southwest side of the new road joining land of Thomas Lyons, and from thence extending down the run to Brush creek, in his own name. And the other, No 3665, in the name of *James Irwin*, for 300 acres on the waters of Brush creek, bounded by lands of John Irwin and Christopher Rudeback, under this latter application he claimed the lands in dispute, and gave some slight evidence of a survey thereon, which was strongly controverted.

The defendant claimed under an application of *Casper Geyer*, for 300 acres on the head of Sewickley, about four miles from Beyerley's, entered on the 3d of April, 1769, No. 105, and a survey thereon of 301 1-2 acres, made 10th of April, 1770, and a patent dated 14th of August, 1770. He also gave in evidence a recovery in ejectment by the lessee of *Casper Geyer* against the said John Irwin, of the premises, at November assizes, 1788, by counsels confessing judgment to the plaintiff.

It was asserted by each party, that the application of his adversary did not describe the lands in dispute, but was intended for another tract; and evidence was given on both sides as to this point. The defendant insisted, that the military permission not being followed by a settlement, gave no preference.

The court submitted the respective locations to the jury, who were to determine as a question of fact, which of them was most applicable to the controverted grounds. They laid it down in their charge, that a precise, close, descriptive warrant, or application, would take place of a general, loose, indescriptive one, though earlier in number or date; but a warrant or application of the latter kind, even though shifted at a distance from the spot seemingly called for therein, if fairly surveyed, returned and appropriated by the proper authority, *when there was no intervening, opposing right*,

1784. will hold and secure the lands; because no injury is thereby done. In general, convenient certainty to a *common intent*, is amply sufficient in cases of this nature; and in a country newly explored, it would be highly unreasonable to expect, that applicants for lands should furnish minute descriptions. Those persons who are intitled to a preference in lands, under a military permission, must be such as have made *actual settlements* thereon. This is the express language of the exception in the law of 3d of February, 1768. Governor *Penn's* proclamation of the 24th of the same month, and of what is called the preamble to the opening of the Land-Office on the 3d of April, 1769. In what other manner could those claimants conduce to the more convenient accommodation of the soldiery, or others? and if in the present instance, a claim of preemption is set up, under Captain *Edmondson's* licence, must not the conditions thereof, of "*improving* and *occupying*" the same lands, be fully complied with? Verdict for defendant.

In the case of the Lessee of *Jesse Funston* v. *John M'Mahon, Northumberland*, October, 1797, before *M'Kean* C. J. and *Yeates*, J. Both parties claimed under *removed* or *shifted* applications. A survey was said to have been made on the plaintiff's application on the 6th of June, 1771, but it did not appear how, or when it was returned into the Surveyor-General's office.

The defendant's survey was made in July 1782, on which a warrant of acceptance issued 20th of February, 1790, and a patent 23d of February, 1790.

It was much contested, whether any survey had ever been actually made on the plaintiff's application; but the verdict was for the defendant on other facts in the case, not illustrative of the present subject; yet the doctrine of removed warrants was one of the points, and was fully debated.

For the defendant it was contended, that though by the usage of the proprietary Land-Office, before the revolution, a deputy-surveyor might shift a lost location to other lands, where there was no prior right, yet no contract took place as to the lands surveyed, between the proprietaries and the individual, until the time of issuing the warrant of acceptance. Then the title first commenced, the original contract having been for other lands. There is no similitude between this case, and that of removing warrants, where the money has been paid in whole or in part, before the warrants issued. Here nothing has been paid to the late proprietaries, or the commonwealth, by the lessor of the plaintiff, in order to raise an use, and the owners of the soil could not compel the payment of the purchase money under such circumstances.

For the plaintiff, it was answered, that it has been admitted by the defendant, that his title first began with the warrant of acceptance on the 20th of February, 1790. If the plaintiff's title is earlier and better, it ought to be preferred. The general practice of all the deputy-surveyors, in shifting lost locations, is perfectly familiar to the whole country, and was never questioned before the Revolution. If no private person could claim any right or interest in the lands so surveyed, there could be no pretext of injury or hardship done to any individual; and the proprietaries attained their object, by disposing of their lands. But it was necessary there should be a return thereof made into the Surveyor-General's office, to operate as *constructive notice* to other applicants. For if one ignorant of the survey made, should apply for the same lands, and obtain a survey, before the former was returned, the latter would be entitled to a preference. Many valuable titles in this state depend on these grounds, which it would be dangerous to impeach. The return of a survey, fairly made by a deputy-surveyor, into the Surveyor-General's office, is *ipso facto*, an acceptance thereof unless a contrary intent is expressed at the time. It becomes the duty of the proper officer to examine the returns immediately, and if the dissent therefrom can be deferred for a length of time, why may it not be deferred for thirty or forty years, after making the most valuable improvements thereon?

There can be no real difference between warrants and applications *shifted*. When a survey is made under the former, on different lands from those designated therein, a warrant of acceptance is there also necessary. It may there, with equal propriety be said, that the first contract was for other lands. Yet the surveys made both on warrants and applications, shall be presumed to be with the consent of the party, unless the contrary be shewn; and indeed, in most instances, they are directed either by him or his agent. Hence, on the return of surveys, either on a warrant or location varied, a new contract for those lands may fairly be said to be agreed upon by the proprietaries and the individual, the deputy of the former having made the survey, subject to the approbation of his constituents.

M'Kean, C. J. gave it in charge to the jury, that the plaintiff made pretensions to the land in question, on a removed application, without shewing how, or when

the survey was returned into the Surveyor-General's office, without ever having been in possession of any part of it, and without having paid one shilling of the consideration money. It was incumbent on him to have shewn, at least, when the surveys were returned, if he claims under the usage spoken of. It would seem, however, that something more is necessary, than a mere return of survey on a shifted application, to vest an equitable interest. The bare act of the deputy surveyors alone could not give a title by surveying lands on a spot not called for by the order. Until a patent issues, there is no complete legal right; and then the patent refers back to the previous application or warrant. The defendant is possessed of this patent, and has paid a large consideration therefor, and has made many valuable improvements, without any knowledge of the plaintiff's claim.

Yeates, J. subjoined. We lay down no general rule on this subject. Several suspicious circumstances attend the plaintiff's survey, and it is highly dubious whether it was actually made on the ground. It is admitted by plaintiff's counsel, that a chamber survey cannot vary the description in the application, and that the real survey must be returned into the office of the Surveyor-General. The time when the survey was returned, becomes important to the true decision, and it lay on the plaintiff to shew it satisfactorily. Unless there has been an actual survey, and that too returned before the defendant's warrant of acceptance, the plaintiff is not entitled to recover.—I agree there must be something more than an actual survey by the deputy to vest the equitable interest on a removed application. But it rather appears to me, that the return of such a survey, fairly and duly made, is *prima facie* evidence of its acceptance by the proper authority. (MSS. Reports)

The above case was cited in *Armstrong's* lessee v. *Morgan*, at *Huntingdon*, May, 1803, before *Yeates* and *Smith*, justices, to prove that on indescriptive orders, the legal right did not rest until the return of survey.

Yeates, J. That case is perfectly familiar to me. The applications on both sides designated other lands than those in dispute. The members of the court disagreed in opinion. *M'Kean*, C. J. held, that until the warrant of acceptance issued, no right vested in the party, on a *shifted* application. I thought, that the return of survey was *prima facie* evidence of the acceptance; and I still adhere to that opinion. But it has been always understood, that on an *indescriptive* location, wanting precision in its terms, the interest vests from the time of survey. 1784.

Smith, J. Such has been the invariable rule on *vague* warrants or applications, on *shifted* locations the title does not vest until the *return* of survey into the *Surveyor-General's office*, unless the owner of the adverse title had notice of the survey prior to the commencement of his right. And so have been the different adjudications that I know of. (MSS. Reports.)

And in the Lessee of *William Bell* v. *Robert Levers*, *Northampton*, June, 1800, before *Shippen*, C. J. and *Yeates*, J. MSS. Reports—The chief justice delivered the opinion of the court, on this subject, in the following terms.

The fatal exception to the defendant's title consists in his not obtaining a return of his survey into the Surveyor-General's office, which was executed on grounds different from those called for in his application. The due diligence of persons who take up lands in this mode, forms an essential feature in constituting their rights. Hence where negligence occurs, a subsequent order of survey, industriously followed up, may defeat the operation of a former one, which, in the due course of business, might be supposed to describe the lands with convenient precision and certainty. It lies in the power of no individuals to lock up the Land-Office against the settlement of the country; or other applicants by their wilful neglect and delay.

It has long been the settled usage and practice, both before and since the Revolution, for deputy surveyors and their assistants to remove lost locations to other lands, where there were no existing, prior, opposing rights. No injury was done thereby, either to the lords of the soil, or to individuals. The pretensions of the party were thereby ascertained, and the contract was completed on his part, but subject to be annulled on the return of survey. But it has always been deemed essential in cases of this nature, that the returns of such *shifted* surveys should be made in a reasonable time, in order to prevent others from bestowing their labour and money in a fruitless pursuit of the same lands. Without such *constructive*, or *actual* notice, what footsteps remain in the proper offices, to guide the enquiries of subsequent applicants? The terms of the prior applications afford no light whatever. A mere survey on a lost location, removed from the lands for which it was originally designed, has no more efficacy and consideration, than a *pocketed* application, which, it is universally admitted, can give no

1784. title. Such have been the uniform decisions of the courts of justice, founded on the fair principle of plain sense and common honesty, and highly conducive to the security of landed titles. The establishment of the rule tends to certainty, and the prevention of law suits, and we are bound to follow it. S. C. 4 Dallas, 210.

While one set of judges, in one part of the State, was recognizing and deciding upon these principles; another set at the same period, in a distant county, was recognizing and adopting the same law. Thus at Mifflin, May, 20th, 1800, in the Lessee of *Abraham M'Kinney* v. *Jacob Houser*, before *Smith* and *Brackenridge*, justices. (MSS. Reports, 8.)

Smith, J. in the charge to the jury, pronounced as follows:

In this cause, the title of 300 acres of land is in litigation; you are informed of the situation by a view; we will lay down some general rules, of which you will judge as to their application to the facts. It is of importance that the rules of property should be certain and known, and unless they are so, no country can prosper. We have in many instances, no cases in point, regulating all disputes. We have to take property from the foundation, which is not the case in that country from which we derive our laws. Our experience is so short, that few general rules can be laid down, clear of exceptions. We must take such as our best experience warrants. That experience, then directs what I have laid down to the bar as *general rules*. I now repeat the same observations to you, and you, only, can be the judges whether they apply to the facts in this case.

1. If the location under which plaintiff claims be descriptive of the land in question, and the survey made in fact before the date of the warrant under which defendant claims, although not returned, the plaintiff would clearly be entitled to recover. So, if it describes the land with reasonable certainty.

2d. If the description in the location be *vague*, and not descriptive of other land, yet the deputy-surveyor, the public agent of the owner of the soil, must have a certain degree of discretionary power; and if he has reduced that to a certainty, which was uncertain before, and before any other appropriation of the land in question, it may, if returned in a *reasonable time*, hold the land so surveyed; much more if it described the land with convenient certainty.

3d. If the location be what is called a *lost* location, that is, the land described by it, taken by a prior title, it was very generally the practice at the time this survey was made, (1775,) to survey other vacant lands in the vicinity, on such lost locations; and surveys were never refused to be accepted in the Land-Office, although the surveyor had no direct authority for making them. It was a title acquired by the connivance of the proprietary officers for the ease of the public, and to avoid expense; but such surveys being *fairly made, and known* to be so, by any one applying for an adverse title before he made such application, and returned without delay, the owner of such application would hold the land against the person so knowing of his title. When I say plaintiff, or defendant, I include all those under whom they respectively claim.

4th. But if the plaintiff's survey was made on a warrant or location descriptive of other land, and without the knowledge of defendant, before the warrant under which he claims was obtained, if such warrants are certainly descriptive of the land, they would hold it against such latent survey, even if the owner of it should know it, before his survey. But if such warrants are not descriptive of the land; if they are descriptive of other land, the owner of them is just in the same situation as is the owner of the location, and the same rules apply.

In ejectment, the plaintiff must recover by his own title; and though defendant has no title, his possession is good against all but him having a good title.

The plaintiff's title is a location, &c. If this location be descriptive of the lands in question, he would be entitled to recover. A location is no title, but the inception of a title; but in those early times money was very scarce; and in many cases, those who held titles by location, could not pay the fees of surveying, and many would not apply for the survey to be made, until they were able. Whether this is descriptive of the land in question you only can judge. In this case the location is for land adjoining a survey within the old purchase. It does join a survey in the old purchase; but if the survey is particular which it calls for, it is our duty to state it to you; you must consider what weight this has. We must only give you the evidence.

There is a singular circumstance respecting the survey, and I think it highly probable this dispute has arisen from gross neglect, if not misconduct in the surveyor. As he is not here, we can only state it. If he were alive, he could probably explain it. We must adhere to the general principle we have laid down, "*if the survey be fairly made*"

Nothing more is done on this survey, except the conveyance of the land to the father of the lessor of the plaintiff.

Defendant has a warrant, &c. If his title depended on the descriptive part of this warrant, it would be very *vague*. For there can be no certainty in calling for a survey of *Reuben Haines*. In 1775, a survey was made by *C. Lukens*. We presume it was returned in April, 1776, instead of 1775, as endorsed; the rather, as the patent issued in June that year to *S. B.* Here let the original description be what it will, the rule we have laid down applies to both parties; and unless there is some obstructing circumstance, the defendant by his possession must hold the land.

If the plaintiff's title describes the land in question, and the survey fairly made, he would hold the land notwithstanding the defendant's patent. But unless you find it does so, our principle must apply. The verdict was for defendant.

This is called a leading case, and always cited and recognized, when any of the four points come in question.

And, in *Kyle's* lessee v. *White*, it is held by the chief justice and concurred in, that in case of a survey on a *shifted location*, it is good against a person who had actual notice before the commencement of his title, even although the survey was not returned. 1 Binney, 249.

And see the same points recognized and confirmed, in *Hepburn's* lessee v. *Levy*, 4 Dallas, 218, and *Miles'* lessee v. *Potter*, 2 Binney, 65. In which latter case it was also held, that where on the 28th of July, 1773, *A.* took a warrant from the Land-Office, descriptive of certain land, but which was surveyed on other land the 15th of June, 1774. The survey was returned before the 26th of August, 1783; for on that day an indorsement was made on the return, by a clerk in the Surveyor-General's office, that "A. believed the survey wrong laid, and requested the surveyor to adjust it, which he had agreed to." On the 17th of September, 1787, A. applied to the Board of Property for an order to survey his warrant upon the land it called for, which was granted; and the survey was accordingly made on the 26th of November, 1787, and returned 27th of February, 1788. 1784.

On the 26th of October, 1772, *B.* took a warrant descriptive of certain land, and on the 19th of June, 1785, surveyed it upon land it did not call for, namely, on the land called for in A.'s warrant of 1773, the premises in the ejectment. The survey was returned into office, probably in 1785, or 1786, but at the latest, on the 9th of June, 1787, and was patented 14th of January, 1788.

Held, that *A*, by his *neglect*, to follow up his objection to the survey made in 1774, had lost his claim to the land described in his warrant of 1773, and that B. was entitled to recover. That it was too long to suffer the matter to rest from August, 1783, to September, 1787, and in the mean time the land had been appropriated by B.

PART IV.

Of the Land-Office under the Commonwealth.

By an act passed 27th of November, 1779, (chap. 863, ante. vol. 1, page 479,) the estates of the late proprietaries of Pennsylvania, were vested in the commonwealth. The soil and lands, (with certain exceptions,) were made subject to such disposal, alienation, conveyance, division and appropriation, as to that, or any future legislature, should, or shall from time to time, seem meet and expedient, in pursuance of such law or laws, as should for that purpose, thereafter, be made and provided.

By sect. 7, all and every the rights, titles, estates, claims and demands, which were granted by, or derived from the said proprietaries, their officers or others by them duly commissioned, authorized and appointed, *or otherwise*, or to which any person or persons, other than the said proprietaries, are or were, either in law or equity, by virtue of any deed, patent, warrant or survey, of, in or to any part or portion of the lands comprised and contained within the limits of this state, or by virtue of any location filed in the Land-Office at any time or times before the 4th day of July, 1776, were confirmed, ratified and established forever, according to such estate, or estates, rights or interests, and under such limitations and uses, as in and by the several and respective grants and conveyances thereof, are directed and appointed.

Sect. 8. Reserved to the proprietaries their private estates, and all the lands called or known by the name of the proprietary tenths or manors, duly surveyed and returned into the Land-Office, on or before the 4th of July, 1776, with the quit-rents, and other rents, and arrearages thereof, reserved out of

1784. the same, or any part thereof which had been sold.

Sect. 9. All other quit-rents were abolished.

Sect. 10. The arrears of purchase money, other than for lands within the tenths or manors, were made payable to the commonwealth.

Sect. 16. Provided for the delivering up to the state, the books, papers and documents of the Land-Office.

The celebrated case of the Springetsbury manor, already noticed, brought into the consideration of the circuit court of the United States, the 8th section of this act, for which, see *Penn's* lessee v. *Kline*, 4 Dallas, 402.

On the 9th of April, 1781, an act was passed, entitled, "An act for establishing a Land-Office, and for other purposes therein mentioned." (Vol. 1, pa. 529, chap. 929.)

The object of this act was, to enable the holders of existing rights to pay in their purchase money, or arrearages, and obtain patents to complete their title to the same; but not to open any office for the sale of vacant lands.

An office was instituted, consisting of the secretary of the Land-Office, Receiver-General, and Surveyor-General, into which was to be removed and safely kept all the records and papers of the former Land-Office and Board of Property; and all future grants and confirmations of land, were directed to issue from that office.

These officers were to be appointed by the General Assembly, and commissioned by the President or Vice President, in council, for five years, unless sooner removed by the assembly; were to receive such fees, as had theretofore been allowed by law, until altered by the legislature; and respectively to appoint deputies or clerks, for whose conduct they were to be responsible; and copies of records, entries and records of said office, duly attested by them, or their lawful deputies, under their hands and seal of office, are declared to be as good evidence as the original, by law, might or could be. And the Surveyor-General was authorized to appoint a deputy, or deputies, in any county, for whose conduct he was made responsible. Security to be given by each officer, for the faithful discharge of his office.

Persons entitled to any lands within the limits of the Indian purchase, by virtue of any *grant, warrant,* or *location,* either in law or equity, before the 10th of December, 1776, on which patents had not issued, were entitled to receive patents for the same, on payment to the Receiver-General, of the purchase money and interest thereon, or the arrearages of such purchase money, and interest agreed on for the said lands, together with the office fees, or if no purchase money, or interest due, then on payment of office fees, and where surveys had not been returned to the former Land-Office, on any *grant, warrant* or *location,* issued before the 10th of December aforesaid, the owner or owners thereof, on applying to the Land-Office, at any time within one year after passing the act, and paying one third of the purchase money, and interest due thereon, was to be entitled to receive an order directed to the Surveyor-General, to have the same surveyed and returned, and then to have a patent on payment of the residue. (See the case of *Howard* v. *Pollock,* before cited.)

The sixth section directed that all purchase money due for lands in this State taken up, or *entries* thereof made, by any *grant, licence, warrant, application, or office right whatever,* before the 10th of December, 1776, should be paid in four annual instalments; and in case of neglect or refusal of paying the said quotas of purchase money, and interest at the limited times, by the space of six months, it was made lawful for the commissioners of the county where the lands lay, to issue their warrant to the sheriff to sell the lands, or so much as should be necessary, to discharge the sum due, &c. and transmit the same to the Receiver-General, and to give the purchaser a deed, on payment of the purchase money and interest.

7. But no warrant was to issue, nor any sheriff to sell lands, where actual settlements had been made by the owners thereof, and such owners had been driven off by the power of the enemy.

8. Lists of delinquents were to be transmitted annually to the county commissioners by the Land-Officers.

The time was extended, however, from time to time, as will hereafter appear, until a new system was adopted, and these impracticable parts of the law never had any operation.

By sect. 9. All lands therefore surveyed under any grant, warrant, location, or other office right, not returned, were directed to be returned into the Surveyor-General's office, in the space of nine months from the passing of the act, with a penalty for refusal or neglect in the deputy-surveyor, on application made to him by the owner or owners, and his legal fees being paid or tendered.

Sect. 10. Prescribes the form of patents.

Sect. 11. The lands to be patented in pursuance of this act, to be free and clear of all reservations and restrictions, and to be held in absolute and unconditional property, reserving only the fifth

part of all gold and silver ore for the use of the commonwealth, to be delivered at the pit's mouth, clear of all charges.

Sect. 12. But the act was not to be construed to extend, or give validity to any grant, warrant or location issued after the 4th of July, 1776, for any lands or lots within ten miles of the city of Philadelphia, or within three miles of any county town in the State, or to any warrant, grant or location for a greater quantity of land than 500 acres in one tract, or to any lands or lots not granted in the usual forms of the Land-Office, or to lands not within the Indian purchase.

(See the construction of this section, in *Hubley's* lessee v. *Chew*, (in the note to chap. 953, ante. p. 15.) By a supplement to the foregoing act, passed June 25th, 1781, (chap. 936, ante. p. 7,) the word *location*, is defined, and declared to be "An application made by any person or persons for land in the office of the secretary of the late Land-Office of Pennsylvania; and entered in the books of the said office, numbered and sent to the Surveyor General's office."

The president, or in his absence, the vice-president in council, was directed to sign all and every warrant and warrants of acceptance, resurvey and partition, as fully as the governor of the late province, or commissioner of property, might or could have done.

The Receiver-General was directed to pay all monies in hands, by virtue of the said act, to the state treasurer, once in every month, to be at the disposal of the legislature, to whom he was to account once in every year. The rate of exchange was fixed at the rate of one hundred and sixty-six and two-thirds of the currency of this State for one hundred pounds sterling.

By the act of 5th of April, 1782, (chap. 953, ante. p. 13,) the Board of Property was instituted, to consist of the president, or vice-president, and a member of the supreme executive council, appointed by council for that purpose, and the three officers of the Land-Office before named "to hear and determine in all cases of controversy on caveats, in all matters of difficulty, or irregularity, touching escheats, warrants on escheats, warrants to agree, rights of pre-emption, promises, imperfect titles, or otherwise, which heretofore have, or hereafter may arise, in transacting the business of the said Land-Office. The secretary of the Land-Office is empowered and directed to receive and enter *caveats* in his office, copies whereof to be transmitted to and entered in the Surveyor-General's office, and the said secretary, with the approbation and consent of the president or vice-president, to appoint days of hearing, and grant citations, at the reasonable request of any party or person applying for the same, or otherwise as the case may require, taking therefor, the customary fees of the former Board of Property. But no determination of this Board of Property, shall be deemed, taken, or construed to extend, in any measure whatever, to the preventing either of the parties from bringing their action at the common law, either for the recovery of possession, or determining damages for waste or trespass, but the courts of law shall remain open to the said parties, in as full and ample manner, as if no determination had ever been given." 1784.

The times limited in the act of April 9th, 1781, for the payment of the purchase monies on former rights, were extended for two years; and the time fixed for returning surveys was repealed, and the Surveyor-General was authorized to receive returns of such surveys, as shall appear to him to have been faithfully and regularly made from the late deputy-surveyors, their heirs or legal representatives, for such further period as to him shall seem just and reasonable; and no action, loss or damage shall accrue to any person, by reason of neglect in complying with the said section before the passing of this act; in all other respects these sections were continued in force. (See the notes to this act, ante. p. 15.)

The act in the text opened the Land-Office for the lands purchased of the Indians under the proprietary government. The lands in the purchase of 1784-5, are regulated by other laws, and the auction system provided for in the 6th section was entirely abandoned.

The third section of this act was considered in the case of *Grant's* lessee v. *Eddy*, before cited. The lands claimed lay in the county of Northumberland. The defendant claimed under a number of applications and warrants, and surveys thereon made. The certificate that the lands were unimproved, was subscribed by two justices of the peace of Luzerne county, and the warrants called for lands in that county. The ridge between the east and west branches of Susquehanna, was one of the limits of the two counties, but it appeared in evidence that the same had not been run.

The defendant's counsel began their evidence by offering to read their *leading* warrant. It described "400 acres on the main branch of big *Mehoopeny* creek, beginning about 13 miles from

1784. the mouth of the said creek, where it forks on the south branch, (near which stands a birch tree marked with a blaze,) which empties into the west side of the north east branch of Susquehanna, and adjoining lands this day granted to Christopher Marshall, situate in Luzerne county.

This was objected to by the plaintiff's counsel, who contended, that under the third section of the act in the text, every applicant was bound to produce a certificate from two justices of the peace of the *proper* county, that the lands were unimproved. This, then, is an essential pre-requisite to vest a title under the commonwealth; and the certificate whereon the defendant grounds his right, might with equal propriety be given by two justices of *Alleghany* or other remote county. Besides a warrant to appropriate lands in Luzerne county, will not authorize a survey of lands in Northumberland county; (see this point ante.) and the defendant under such warrants, cannot hold lands in the latter county.

The defendant's counsel insisted, that the warrants were clearly good against the commonwealth, after they had received their purchase money, and third persons had nothing to do with the certificate. There are no negative words in the law in question, which declare that warrants issued otherwise than the law prescribes shall be void. No injury can be done to the State, because the section relied on directs, that the person applying shall produce to the secretary of the Land-Office, a particular description of the lands. The stat. 13 Eliz. c. 10, says, that all leases made by any persons therein mentioned, contrary to the tenor of that act, shall be *utterly void*, and of *none effect, to all intents, constructions* and *purposes*; yet it has been adjudged, that a lease made by Dean and Chapter against the said statute, shall not be avoided, during the life and continuance of the dean that made the lease. 3 Bac. abr. 391. 1 Black. Com. 87. So, where certain statutes have directed warrants to issue upon oath, and they have issued without oath, still they have been held good. So, a mortgage though not recorded within six months, has been resolved to be good against the mortgagor. 1 Dallas, 430. And several other cases of the same kind are put by the chief justice in delivering the opinion of the court.

By the Court. The objection appears to us to be ill grounded. Such informalities cannot, in our idea, defeat a right. The words of the act are merely *directory*, and do not avoid a warrant for want of a certificate, or for an improper one. The object of the legislature was to prevent persons obtaining a title to lands which had been before occupied and improved, without paying interest on the purchase money during such occupation. Here that design was fully answered. The certificates both of the plaintiff and defendant shew that the lands were wholly unimproved, and no fraud could possibly be intended against the state. The boundaries between the two counties could only be guessed at.

To the cases already cited by defendants' counsel may be added. Under the act of assembly of 4. ann. it is directed, that it shall not be lawful for any sheriff to sell, or expose to sale, any lands, &c. which shall or may yield yearly rents or profits sufficient beyond all raprizes, to pay the debt and costs within seven years. Nevertheless, in the case of *Duncan's* lessee v. *Laurence*, at *Nisi Prius*, May, 1769, at *Carlisle*, it was resolved, that the want of an inquisition did not vitiate the sale, where it was evident, that the debt and costs could not be satisfied within seven years out of the annual rents and profits. Let the warrants be read.

By an act of the same date as the act in the text, (chap. 1089) "enabling the comptroller general to issue certificates for the balances due on the accounts of the late ranging companies, raised for the defence of the frontiers, and other accounts due to the citizens of this state." The certificates issued in pursuance thereof bore an interest of six per *cent.* per *annum*, from the 1st of July, 1783, and were made transferrable in like manner as promissory notes are, and the said certificates were declared to be receivable as specie in payment for the purchase money of lands, either within the late Indian purchase, or the new purchase when made, agreeably to the regulations of the act in the text.

On the 21st of December, 1784, an act was passed entitled "An act to alter and amend an act of assembly, entitled "An act for opening the Land-Office, for granting and disposing of the unappropriated lands within this state." (Post, chap. 1111.)

At the passing of this act, the result of the treaty at Fort *Stanwix*, in the month of October preceding, was known: and that *Pine* creek, instead of *Lycoming*, was the western boundary on the north side of the West Branch of Susquehanna, of the purchase of 1768, and that *Pine* creek was made the boundary of deeds of October and January, 1784 and 1785, in consequence of the explanations and declarations made by the Indians at Fort Stanwix.

The following facts and circumstances were also well known.

There existed a great number of locations of the third of April, 1769, for the choicest lands on the West Branch of Susquehanna, between the mouths of *Lycoming* and *Pine creeks*; but the proprietaries, from extreme caution, the result of that experience, which had also produced the very penal laws of 1768, and 1769, and the proclamation already stated, had prohibited any surveys being made beyond the *Lycoming*. In the mean time, in violation of all law, a set of hardy adventurers, had from time to time, seated themselves on this doubtful territory. They made improvements, and formed a very considerable population. It is true, so far as regarded the rights to real property, they were not under the protection of the laws of the country; and were we to adopt the visionary theories of some philosophers, who have drawn their arguments from a supposed state of nature, we might be led to believe that the state of these people would have been a state of continual warfare; and that in contests for property the weakest must give way to the strongest. To prevent the consequences, real or supposed, of this state of things, they formed a mutual compact among themselves. They annually elected a tribunal, in rotation, of three of their settlers, whom they called *fair play men*, who were to decide all controversies, and settle disputed boundaries. From their decision there was no appeal. There could be no resistance. The decree was enforced by the whole body, who started up in mass, at the mandate of the court, and execution and eviction were as sudden, and irresistible as the judgment. Every new comer was obliged to apply to this powerful tribunal, and upon his solemn engagement to submit in all respects, *to the law of the land*, he was permitted to take possession of some vacant spot. Their decrees were, however, just; and when their settlements were recognized by law, and *fair play* had ceased, their decisions were received in evidence, and confirmed by judgments of courts.

The facts and circumstances above stated furnish the history of many of the provisions of this act of December, 1784, which follow.

The legislature declare, that the directions in the act in the text "did not give nor ought to be construed to give, to the said commissioners, any authority to ascertain, definitively, the boundary lines aforesaid, and that the lines of the purchase of 1768, striking the line of the West Branch of the river Susquehanna, at the mouth of *Lycomick*, or *Lycoming* Creek, shall be the boundaries of the same purchase, to all legal intents and purposes, until the general assembly shall otherwise regulate and declare the same.

The act in the text, so far as it authorizes the laying out the lands in the new purchase, in lots, and selling them by public auction; and so far as it directs, and enables the officers of the Land-Office to give credit for any part of the purchase money, or to take bonds for the same, is repealed. 1782.

It was declared that the Land-Office should be opened for the new purchased lands from and after the 1st of May, 1785, and not sooner, for applications for lands within the same (the lands appropriated for the redemption of depreciation certificates, and the donation lands to the officers and soldiers of the Pennsylvania line only excepted,) at thirty pounds for every hundred acres, and in proportion for greater, or less, quantities; such application, or the survey thereof to be made, not to exceed one thousand acres and allowance, &c.; and every applicant for any of the same lands, shall, before the warrant for the same issue, produce to the secretary of the Land-Office, an acquittance, signed by the Receiver-General, that the purchase money has been paid; and the bills of credit, of the 20th of April, 1781, gold and silver, and the certificates described in the act in the text, shall be received in satisfaction of all purchase money.

Warrants issued in pursuance of this act, were not to be confined to any particular place, but might be located upon any vacant land where the applicant should think fit, (except as aforesaid,) the survey not to exceed the number of acres expressed in the warrant; and the same to be located and surveyed in one tract or parcel.

And whereas divers persons, who have heretofore occupied and cultivated small tracts of land, without the bounds of the purchase made as aforesaid in the year 1768, and within the purchase made, or now to be made, have, *by their resolute stand and sufferings during the late war*, merited, that those settlers should have the pre-emption of their respective plantations, it is enacted—That all and every person, or persons, and *their legal representatives*, who has, or have heretofore settled, on the north side of the West Branch of Susquehanna, between *Lycomick* or *Lycoming* Creek on the east, and *Tyagaghton*, or Pine Creek, on the west, as well as other lands within the said residuary purchase from the Indians, of the territory within this state (excepting always the lands herein before excepted,) shall be allowed a right of pre-emption to their respective possessions, at the price aforesaid.

But no person was to be entitled to such pre-emption, unless he had made such actual settlement before the year 1780, and no claim was to be admitted, to or under any such person, for more than three hundred acres of land, with the usual allowance for roads, to be sur-

1784. veyed together, and in one tract, nor unless application for the same be made, and the consideration thereof tendered to the Receiver-General of the Land-Office, on or before the 1st of November, 1785.

The following cases have been decided under the pre-emption clause of this act.

Lessee of *John Hughes* v. *Henry Dougherty*, *Northumberland*, October, 1791, before *Shippen* and *Bradford*, justices. MSS. Reports.

Ejectment for 324 acres, part of the Indian lands.

Plaintiff claimed under a warrant issued on the 2d of May, 1785, for the premises, and a survey made thereon, 10th of January, 1786.—The defendant on the 20th of June, 1785, entered a *caveat* against the claims of the plaintiff, and on the 5th of October following, took out a warrant for the land in dispute, on which he was then settled. Both claimed the pre-emption under the act of 21st of December, 1784. And on the evidence given, the facts appeared to be;

That in 1773, one *James Hughes*, a brother of the plaintiff, settled on the land in question, and made some small improvement. In the next year he enlarged his improvement, and cut logs to build a house. In the winter following, he went to his father's in *Donegal*, in Lancaster county, and died there. His elder brother, *Thomas*, was at that time settled on the Indian land, and one of the "*Fair play men*," who had assembled together, and made a resolution, (which they agreed to enforce as the law of the place,) that "if any person was absent from his settlement for six weeks, he should forfeit his right."

In the spring of 1775, the defendant came to the settlement, and was advised by the *Fair play men*, to settle on the premises which *Hughes* had left. This he did, and built a cabin. The plaintiff soon after came, claiming it in right of his brother, and aided by *Thomas Hughes*, took possession of the cabin. But the defendant collecting his friends, an affray ensued, in which *Hughes* was beaten off, and the defendant left in possession. He continued to improve; *built a house and stable*, and cleared about ten acres. In 1778 he was driven off by the enemy, and went into the army. At the close of the war, both plaintiff and defendant returned to the settlement, each claiming the land in dispute.

Shippen, J. in the charge of the court, said, The dispute here is between a first improvement, and a subsequent, but much more valuable improvement. But neither of the parties has any legal or equitable right but under the act of 21st of December, 1784. The settlement on this land was against law; it was an offence that tended to involve this country in blood. But the merit and sufferings of the actual settlers cancelled the offence, and the legislature, mindful of their situation, provided this special act for their relief. The preamble recites their "resolute stand and sufferings" as deserving a right of pre-emption. The legislature had no eye to any person who was not one of the occupiers after the commencement of the war, and a transient settler removed, (no matter how,) is not an object of the law. This is our construction of the act.—*James Hughes*, under whom the plaintiff claims, died before the war; the other occupied the premises, after, and in the language of the act, "stood and suffered." If this construction be right, the case is at an end. Besides the plaintiff claims as heir of *Thomas*, who was the heir of *James*, the first settler. I will not say the *Fair play men* could make a law to bind the settlers; but they might, by agreement, bind themselves. Now *Thomas* was one of these, and was bound by his conduct, from disputing the right of the defendant.

The warrant, it seems, is taken out in the name of the father, and, it is said, as a trustee for his children. It is sometimes done for the benefit of all concerned. If this be the case, it may be well enough; but still it is not so regular as it might have been. The jury found a verdict for the defendant.

Lessee of *Morgan Sweeny* v. *John Toner*, at the same court.

Shippen, J. charged the jury as follows:

It appears, that both plaintiff and defendant have warrants for the land in dispute, the defendant's being one day older than the plaintiff's, and the question is, which of them, on the facts laid before us, is entitled to pre-emption, under the act of 21st of December, 1784.

The facts are clear; *Toner* went upon the Indian land in 1773, and made a settlement; but he exchanged this for another, on which he continued with a view to make a settlement for his family, till the war broke out, and there was a call for soldiers. He inclined to list, but was afraid of losing his land, and his friends attempted to dissuade him. However they promised to preserve his settlement for him, and he inlisted.

In 1775, the plaintiff went up, and there was some contract in writing, by way of lease, between him and *Toner*,

and by virtue of that, he entered into possession of the premises. The terms of the lease were, that he should make certain improvements on the place for the benefit of *Toner*. This lease was deposited in the hands of a third person, and the plaintiff's wife, by a trick, got possession of it; and she and her husband determined to destroy it, and so make the place their own. They continued there until driven off by the enemy. During all this time *Toner* was absent from the settlement but in the service of his country. Here the question of law arises.—It was attempted to confound this case with that of *Hughes* and *Dougherty*. There the court considered that *Hughes* died before the war commenced, and that the object of the act could never reach to him. The legislature never intended to obliterate the offence of these settlers who did not continue their possession during the war. *Dougherty* settled in the place of *Hughes*, but in *his own right*, and brought himself within the meaning and intention of the act. That case is very distinguishable from this. Here a man continues his improvement after the commencement of the war, till, at the call of his country, he leaves it. He did not by this relinquish his residence; and we consider his merit as equal with that of those who staid. We think he is an object within the spirit of the act. Besides, the plaintiff was the tenant of the defendant, and kept possession for him, and his improvements were *Toner's*. The plaintiff has also declared, that he made an improvement for himself in another place. This is the law, and the facts we submit to you. Verdict for the defendant. (MSS. Reports.) S. C. with the arguments of counsel, 2 Dallas, 129.

In *Duncan's* lessee v. *Walker*, the case was; a person of the name of *Campbell*, being a settler within the description of the act, died in 1781, before the act passed His heir had sold the premises, being part of the pre-emption district, to the plaintiff, and his administrators, without any order of court, had sold them to the defendant; and both plaintiff and defendant had taken out warrants within the limited time, though neither had obtained a patent. Hence the question arose at the trial, and was reserved for the opinion of the court, whether the right of pre-emption, granted in the terms of the act, should vest in the real, or the personal representatives of the grantee?

After argument, the court were of opinion, that by the words "*legal representatives*," heirs, or alienees, were to be understood; for, though the expression might, in the abstract, appear equivocal, and ambiguous, it was explained by the *subject matter*; and land, *ex vi termini*, importing *real* estate, the *legal* representative must, in legal contemplation, be the heir, and not the administrator. Judgment for the plaintiff, accordingly; 2 Dallas, 205. 1784.

And in *Cook's* lessee, v. *Epple*, in the supreme court, January term, 1794. It was determined, that in an ejectment for lands, claimed by pre-emption under this act, it was indispensably necessary, to shew in evidence, that the lessor of the plaintiff had paid or tendered the consideration thereof to the Receiver-General, on or before the 1st of November, 1785. (MSS. Reports.)

In *M'Connel's* lessee, v. *Porter*, a pre-emption warrant granted to the plaintiff in ejectment, under this act of December, 1784, though he had not been on the pre-emption, or Indian lands, since the commencement of the late war, was held to intitle him to recover against a defendant who had not taken out his warrant until after the 1st of November, 1785. In the supreme court, September term, 1794. (MSS. Reports.)

The lands set apart for the redemption of the depreciation certificates, and for donation to the officers and soldiers of this state, in the federal army are described, ante. page 62-64, (chap. 996,) and see the act for distributing the donation lands, post. chap. 1128, and the notes thereto subjoined.

See the act for the limitation of actions to be brought for the inheritance or possession of real property, post. chap. 1134. and the notes thereto subjoined.

The act to provide further regulations, whereby to secure fair and equal proceedings in the Land-Office, and in the surveying of lands, (chap. 1153,) was passed on the 8th of April, 1785.

Sect. 2. The office was to open on the first day of May, 1785, and to prevent all undue preferences;—from and after the time assigned, until the end of the tenth day thereafter, being the eleventh day of the month, the secretary of the Land-Office, upon the Receiver-General's receipt being shewn to him for the whole purchase money, and not otherwise, was to receive all applications made to him for lands in the said late purchase, not exceeding one thousand acres in one application, numbering them respectively, from number one, after the common progression, to the last which should be received within the same ten days; every application to set forth in words at length, and not in figures only, the number of acres asked by each applicant respectively: a lottery was then to be made, and preference or pri-

1784. ority to be given to the warrants accordingly, which were to be numbered according to the decision of the lottery, and to be dated on the day on which the drawing should be finished. And all applications made after the said ten days, for lands within the said late purchase, made as above directed, were to have priority in the order in which they came to the secretary's hands, and be numbered accordingly, and not otherwise.

Sect. 3. All warrants issued for lands in the said purchase, were to be directed by the Surveyor-General, to the deputy-surveyor of some one district within the same purchase, that it might be duly executed, and the quantity of land therein specified, surveyed and located, according to the tenor of such warrant; but if land, to the satisfaction of such warrant owner could not be found within such district, the deputy-surveyor, on the desire of the person intitled to the same, was to certify, by writing indorsed on the warrant, in the presence of two subscribing witnesses, that the same had not been executed within his district, and then re-direct the same to the deputy-surveyor of some other district, who, upon such warrant being produced to him, so certified, was to proceed upon and execute the same, in like manner and with the like effect, as if it had been so directed to him by the Surveyor-General.

Sect. 4. No deputy-surveyor was to execute any such warrant, unless it was directed to him as aforesaid, nor was any deputy to proceed to make surveys upon any warrant within the said late purchase, until the expiration of thirty days after the date of the warrant, which for preference or priority, was dependant on the lottery; and during the last twenty of the said thirty days, each deputy within the said late purchase, was to keep his office open, and personally attend therein, at least six hours in every of the said twenty days, (Sundays excepted,) for the purpose of receiving the warrants to be issued, and directed as aforesaid, and every deputy was directed to certify in writing, to the Surveyor-General, on or before the first of May, the place where he was to keep his office open for the purpose aforesaid, that all persons who might apply for lands might be duly informed thereof; and every deputy who received any such warrant, was directed to make fair and clear entries of all such warrants put into his hands, in a book to be provided by him for that purpose, distinguishing therein the names of the grantees, quantities of land, number and date of each warrant, and the day on which he received the same respectively, and whatever should be done concerning such warrant; which book was to be open at all seasonable hours to every applier, who was entitled to copies of any entry therein, to be certified as such, and signed by such deputy-surveyor.

Sect. 5. After thirty days from the date of every such warrant, the priority of which depended on the lottery aforesaid, but not sooner, the deputy to whom the same was directed was to proceed to execute it in the usual manner, if requested by the owner or his agent, giving preference always to the lowest in number of those unexecuted warrants which had come to his hands, in case the owner, or his agent was ready to proceed with him, and direct him to the place where he desired him to execute it.

Sect. 6. But none of the said warrants which were not finally lodged and left with one of the deputy surveyors of the lands within the late purchase, for survey and location within the district of such deputy, before the thirty days were expired, were intitled to priority, but were to be considered as posterior to any warrant that had been lodged within the thirty days, and to be surveyed and located accordingly.

Sect. 7. Any person having a right to a warrant for lands within the said late purchase, who should desire it to be located to a particular place, the deputy, in whose hands the warrant should be, was to make an entry thereof in his book aforesaid, and afterwards to survey it accordingly, unless some person claiming under a warrant intitled to priority by the lottery, should insist on having his surveyed at the same place, in which case the warrant so located and superseded, was intitled to a second location as before, liable to a claim under another prior warrant, as before, and so, *toties quoties*, till the same should be undisputed. But any person, before survey made, might renounce his location, and withdraw his warrant, and have it certified, redirected and delivered to another deputy within the same purchase, and again, in the same manner to another deputy, till the quantity of land therein mentioned was surveyed and established.

Sect. 8. All warrants issued after (the priority of which depended on,) the drawing of the lottery, for lands within the said purchase were to be executed in the order, and to have preference of survey, as they were earliest delivered to the deputy of the district to whom they were directed, who was to make survey thereon; and for that purpose the Surveyor-General was to register the warrants in the order they came to his office. And every survey of lands within

the said purchase, made in pursuance of this act, and of former acts for opening and regulating the Land-Office, was to be duly returned into the Surveyor-General's office, as soon as conveniently might be, after survey made, on payment or tender of the surveying fees. And surveys made on or before the thirty-first of December, in any year, and not returned into the Surveyor-General's office on or before the last day of March, in the year next following, were to be void as to future surveys sooner returned and filed in the office of the Surveyor-General; and if such avoidance happened by the neglect or default of the deputy who surveyed the same, he was declared to be answerable to the party damaged, for all damages he sustained by such neglect, and the party was to be entitled to a new warrant, to survey other land elsewhere to satisfy his original application.

Sect. 9. All surveys to be returned on any warrant issued after passing this act were to be made by actual going on and measuring the land, and marking the lines to be returned upon such warrant, *after* the warrant authorizing such survey shall have come to the hands of the deputy-surveyor to whom it was directed. And every survey made *theretofore*, was declared to be clandestine and void, and of no effect whatever. Every deputy, on request, was directed to give a written receipt, signed by him, to the person delivering the warrant for the fee of six pence, setting forth the day and year when, and the order in which such warrant came to his hands, and the grantee's name and surname the number of acres to be surveyed thereon, and the number of the warrant.

Sect. 10. Every deputy, in the month of February, in every year was directed to make a general list (to be returned into the Surveyor-General's office,) of all the warrants on which he made surveys during the preceding year, setting forth in a summary way, the quantity of land surveyed on each warrant, distinguishing it by its number, date, and name of the grantee, and situation of every tract surveyed, respectively.

Sect. 11. Deputies were to be appointed by the Surveyor-General, subject to the approbation of council, for whom the Surveyor-General was to be answerable. Each deputy to give bond with two sureties; the land officers and deputy-surveyors to take a certain, prescribed oath, &c.

Sect. 12. Districts were to be formed, and their boundaries declared by the Surveyor-General, with the approbation of council, but they might afterwards be altered.

Sect. 13. The islands in the *new* purchase, in both branches of Susquehanna, Ohio, Allegheny & Delaware. The appropriated lands northwest of the rivers Ohio and Allegheny, and the pre-emption to one thousand acres at the forks of Sinnemahoning, granted to general James Potter, were reserved from application, and the islands were directed to be sold by public auction, and all occupancy of, or claims thereto, were declared void, saving the pre-emption of Montour's island to general Irwin. 1784.

Sect. 14. The punishment was prescribed for neglect and refusal to perform any duties enjoined by this act, (besides being liable in damages to the party grieved,) or for any other misbehaviour, abuse of trust, or fraud in any officer, &c.

Sect. 15. Any survey made by any deputy-surveyor, out of his proper district, was declared void; the manner of making surveys was prescribed; and surplus lands, not exceeding one tenth of the number of acres mentioned in the warrant, besides the usual allowance for roads, were admissible in the returns, and might be patented, paying *pro rata* for such surplus.

Sect. 16. The fees receivable in the Land-Offices were also prescribed; but this part was repealed by act of 20th of April, 1795, and new fees established.

Sect. 17. The fees collected were directed to be paid over to the state treasurer, and the salaries of the officers, respectively, were fixed.

Under this act, it has been adjudged, that a warrant dated in 1792, shall be preferred to a later one in 1793, though the latter was first delivered to the district surveyor, if the same was *not actually surveyed* when the oldest warrant came to his hands, and the party was ready with his hands and provisions for the survey. Lessee of *Willink* and others, v. *Morris* and others, supreme court, December, 1800. (MSS. Reports.)

In the Lessee of *M'Rhea* v. *Plummer*, 1 Binney, 227. The question was, whether, where a survey had been made under legal authority, (being part of the depreciation lands surveyed in 1785, and 1786, and divided into tracts, which remained unsold by the state, and open to purchasers under the act of 3d of April, 1792,) a warrant coming *afterwards* to the hands of the deputy, may be applied by him to the survey already made, without running and marking the lines anew, notwithstanding the 9th section of the act of 8th of April, 1785.

Tilghman, C. J. delivered the opinion of the Court. As it is admitted that the commonwealth had received the full

1784. price of the land, that there has been at *some time* an accurate survey marked on the ground, and that when the appropriation was made for the plaintiff, there was no settler on the land, nothing but very clear and positive law ought to deprive the plaintiff of his purchase.

The objection to the survey is founded on the 9th section of the act of 8th of April, 1785. I shall give no opinion at this time whether the provision of this section extends to surveys made under the act of 3d of April, 1792. I understand, that in the case of *Wright's* lessee v. *Wells*, tried at *Nisi Prius*, at *Washington*, before the late C. J. *M'Kean* and judge *Yeates*, it was held that it was restrained to lands then lately purchased by the commonwealth, and intended to be sold in a short time. But supposing it extended to all surveys on warrants issued after the passing of that act, though the present case may fall within the *words*, it is evident that it is not within the spirit and intention of the act. The intent was to prevent all persons, surveyors as well as others, from making surveys without authority, and to declare all surveys so made, void. Now the surveys of the depreciation lands were made under the authority of the State. Let us compare this case with others that have been decided, and concerning which there is no question. Suppose a surveyor receives a warrant, and the land to be surveyed on it is bounded on three sides by the lines of other tracts, which he has surveyed *before*. It is not contended that he is obliged to run these three lines over again; and why? —Because it would be useless trouble, those lines having been run and marked by *legal authority* before; and yet he does not comply with the words of the act, which require him to run the lines, and mark them, after the warrant comes to his hand. Here then is an implied exception from the words, in order to comply with the spirit of the act. Nothing more is to be done in the case before us. What mischief can arise from this construction? It is said the actual settlers will be deceived, because they find no marks made since 3d of April, 1792. But if they take due pains they cannot be deceived. It is in vain for any man to seek for proper information by hunting for marks on the ground, without applying to the deputy-surveyor, who is obliged to keep books for the purpose of information. The marks on the ground give no satisfaction, for they may have been made by unauthorized persons. But the surveyor's books, combined with the marks on the ground, will make every thing clear. The entries in the books of the surveyor would have shewn that *this land* had been surveyed; and if upon comparing the marks on the ground with the surveyor's entry, a difficulty had occurred, because the marks appeared older than the entry, this would have been at once explained by the surveyor, on application to him. Every prudent and honest man would naturally make such an application before he expended his time, labour and money in making a settlement. If in any case it has happened that a settler has in fact been deceived, even through his own inadvertency; I can only express my hope, that the warrantee will take that circumstance into consideration, and let him have a reasonable portion of the land on moderate terms. But at present we are called upon to decide the law. Three judges were of this opinion. *Brackenridge*, J. dissented. "I cannot assent to the opinion delivered by the C. J. The act of 1785, I have no doubt, extends to this case; and although I will not say that an omission to go on the ground and mark the lines avoids the survey, as this part of the section may be considered *directory*; yet, if the survey is not made *after* the warrant comes to the hands of the deputy-surveyor, it is absolutely *void*; for that part of the section is *positive*, and not directory. In this case the survey was not made *after* the warrant was delivered to the deputy-surveyor

In *Woods* v. *Ingersol*, 1 Binney, 149, the chief justice, in delivering the judgment of the court, says, upon the 9th section aforesaid—"Although the *directing* part of the section is not strictly complied with, still the survey may be sufficient to entitle the warrantee to a patent, provided the surveyor has been upon the ground, and run lines sufficient to identify the tract, and ascertain the quantity contained in it. I mention this, because it has been insinuated, although the point was not formally made, that perhaps the surveys made by the plaintiff were void, inasmuch as all the lines of each tract were not run and marked. I understand that the construction which I have put upon the 9th section of the act of assembly in question, has always been, and it still is, held by all the judges of this court. And it is of consequence that there should be no misunderstanding on the point, as the titles of a vast number of persons, who have taken up lands from the commonwealth, and paid for them, would be shaken by a contrary opinion.

The case of the Lessee of *Alexander Wright* v. *Benjamin Wells*, was as follows:

Ejectment for a tract of 440 acres of land, called "Danger," situate on Racoon creek.

The lessor of the plaintiff founded his legal title on a warrant dated 16th March, 1786; a survey thereon by John Hoge, deputy-surveyor, and a patent dated 7th of September, 1786.

The defendant's counsel objected that the survey was made by one who had no authority; that the lands lay within the district of *Pressly Nevil* and *Matthew Ritchie*, and that by the 15th section of the act of 8th of April, 1785, it is provided that no deputy-surveyor shall go out of his proper district, and every survey made by *any* deputy-surveyor out of his proper district shall be void and of none effect.

The court after full argument, ruled, that the 15th section of the act related solely to the lands lately purchased at Fort *M'Intosh*. The general object of the legislature was to introduce a new system, and secure fair and equal proceedings as to the lands newly purchased from the Indians, but did not respect the lands included in the old purchase; and such has been the practice under the law. The patent recognizes the authority under which *John Hoge* proceeded to make the survey. Verdict for the plaintiff. (MSS. Reports.)

By an act entitled "An act to compel the speedy settlement, and the paying or securing of the debts due to this State for lands held by location, or other office right, obtained before the tenth day of December one thousand seven hundred and seventy-six, and yet remaining unpatented," passed 16th of September, 1785, (chap. 1169,) it was enacted, that all persons who were, or should be, entitled in law or equity, to any lands in the old purchases, by virtue of any grant, warrant, location, or other office right whatsoever, made or accrued before the 10th of December, 1776, upon which patents had not issued, might, and such persons were enjoined and required as soon as conveniently might be, to settle and adjust the sums due to the State for the purchase money of such lands respectively, and to pay or secure the same by giving bond for the whole, or residue thereof, as the case might be, to the president of council for the time being for the use of the State, conditioned for the payment of the sum due in five equal annual instalments, together with the whole interest due at each and every of the said periods respectively; the first payment to be made on or before the 10th of April, 1787; each instalment to be recoverable by suit, as they respectively should become due; and on such bond being lodged with the Receiver-General, the party was entitled to receive a patent on payment of the legal office fees; a mortgage to be taken by the Receiver-General, in every case, to secure such payments, and the sum due, and conditions of payment were directed to be endorsed on every patent. Such mortgage to be recorded in the office of the secretary of the Land-Office, &c. 1784.

Actual settlers on the northern and western frontiers of the State, who had been driven by the Indians from their habitations in the course of the late war, or their legal representatives, were to be exonerated from interest from the 1st of January, 1776, to the 1st of July, 1784, provided they paid, or secured the payment of the purchase money, in the manner, and within the time herein before mentioned. All persons applying for the benefit of such exoneration, to prove by the oath of a credible person, that he, or the person in whose right he claimed, was in the course of the war, actually driven from his habitation on the said land, through force or fear of the Indians, and that the said plantation was consequently left without inhabitants.

Any person refusing, or neglecting to comply with the terms of this act, on or before the 10th of April, 1787, was declared to be barred and precluded from the benefit intended by this act, with respect to further time of payment, and to be proceeded against for the monies due, by sale of the lands, according to law, without delay.

The time for patenting has been extended by successive acts; and the only operative part of the foregoing act is the *exonerating* section.

The act passed December 30th, 1786, (chap. 1248,) "for giving, during a limited time, a right of pre-emption to the actual settlers within that part of this State, which is within the territory purchased by the king of Great Britain, of or from the Indians, at *Fort Stanwix*, in the year of our Lord one thousand seven hundred and sixty-eight," after reciting that the act of 1st of April, 1784, made no reservation, nor gave any right of pre-emption to settlers in the purchase of 1768, but it was left in the power of all persons whatever to make application, and take out warrants for those lands, enacted, that no warrant should issue from the Land-Office of this State, for any tract of land on which a settlement was made, unless to

1784. such person, or persons, respectively, who had made the settlements, or their legal representatives, until the 10th of April, 1788. And if any such warrant issued otherwise than aforesaid, it should be deemed to have issued by surprize, and should be of no avail in law.

Provided always, that by a settlement shall be understood, an actual personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war.

This act to extend only to the purchase of 1768, and no settler to have the preemption of any tract, exceeding 400 acres, by reason of any such settlement.

By an act for facilitating the redemption of the bills of credit, emitted in the year 1781, &c. passed 28th of March 1787, (chap. 1272.) Secr. 2. It was enacted, That the time limited in the act of 16th of September, 1785, (chap. 1169,) for paying or securing the payment of the purchase money of unpatented lands, should be extended to the 10th of April, 1788,—and the periods prescribed for the payments to become due on the securities therein directed to be taken were extended to one year later than the periods in the said act mentioned.

Every person entitled to demand a patent, according to the direction of the said act, on paying one fourth part of the amount of the purchase money, or the arrearages then due, with interest thereon, in lawful money of this state, or in bills of credit emitted by the act of 7th of April, 1781, together with the whole of the office fees, in current lawful money, might, at his option, pay the residue and interest, in lawful money, or the bills of credit aforesaid, or in certificates of debt due from this state, then by law entitled to draw interest from the treasury, commonly called funded certificates, on which certificates interest should be computed, and allowed till the time of such payment; *Provided* such payments were made and completed before the 10th of April, 1788.

All who neglected or refused these terms, on or before the said 10th of April, were declared to be barred and precluded from all benefit intended by this act, with respect to further time of payment, and the mode of such payment, and forthwith to be proceeded against, by sale of his land, according to law, as if this act had not been made.

The terms of the above act were extended for one year, by an act passed 29th of March, 1788, (chap. 1337.)—And the act of 30th of December, 1786, was also extended to the 10th of April, 1789, and see chap. 1391, 1491, 1565, 1598.

By an act passed 3d of October, 1788, (chap. 1353,) entitled "A supplement to an act entitled "An act for granting and disposing of the unappropriated lands within this state." The price of the unappropriated lands of this state, within the seventeen districts of the counties of Northumberland and Luzerne, part of the last purchase, was reduced to twenty pounds for every hundred acres, payable before the warrant issued, in gold and silver money, or in bills of credit of the 16th of March, 1785, or in certificates of this state, which had been, or should be, issued according to law, and the bearers whereof were entitled to receive of the treasurer, an annual interest thereon, after the rate of six *per cent.* half yearly, and no other satisfaction for the said price. But this act not to extend to any lands which had been, or which should be surveyed by virtue of any warrant before issued for surveying of lands within the said purchase.

By an act passed 20th of November, 1789, (chap. 1456.) So much of any act or acts, as authorized or directed the receiving any certificates, issued or granted by the United States, in payment of any lands purchased, or to be purchased of this commonwealth, was repealed.

By an act passed 19th of Feb'y, 1790, (chap. 1469,) the Land Officers are directed to pay the fees by them collected, quarterly to the treasurer, and account for the same upon oath or affirmation, to be administered by the treasurer.

By an act passed 29th of March, 1790, (chap. 1491,) the Receiver-General was authorized to receive any part of the purchase money for lands in the old purchase, one fourth in lawful money of the state, or in bills of credit emitted by the act of 7th of April, 1781, and three fourths in depreciation certificates, or other certificates of original state debts, on which interest was payable annually at the treasury of the state, provided each payment so made should not be less than one fourth part of the original purchase due on such lands.

On the 8th of January, 1791, (chap. 1511,) the Board of Property was organized under the new constitution, with the same powers as before; and the Master of the Rolls was constituted a member of the Board with the three Land Officers—any three of them to form a Board. The secretary of the Land-Office to appoint days of hearing, and grant citations. All warrants to be under the lesser seal of the state, and signed by the governor. The form of patents prescribed, and to be under the great seal—See the notes to chap. 953 *ante*, pa. 14.

On the 29th of March 1792, (chap. 1602,) an act was passed, allowing a credit for unsatisfied warrants. It was provided, that where any warrants since the first of April, 1784, had issued, or should thereafter issue from the Land-Office, and had not been, or could not be,

executed in the whole, or in part, by reason that the lands therein described, or some part of them, had been previously appropriated by or for any other person, or persons according to law, or having been executed, interfered with some prior appropriation, as aforesaid, the deputy surveyor of the district, or county, at the reasonable request of the party, his heirs, executors, administrators or assigns, was directed to certify to the Surveyor-General's office, whether any, and how much of the lands in the said warrant described, had not been, or could not be surveyed, for the reasons aforesaid, or having been surveyed, interfered with prior surveys or appropriations; and the Surveyor-General, having proof of the same, was enjoined, upon the like reasonable request, to certify to the Receiver-General, the number of acres that remained unsatisfied, on any warrant issued after the first of April, 1784.

And whenever it should appear to the Receiver-General, by original receipts or other legal voucher, or by entries made in his books, that any person had paid into the Land-Office any monies or certificate for lands granted to him, by virtue of warrants issued after the 1st of April, 1784, and which he had not obtained; or that he had paid any monies or certificates over and above what was due to the commonwealth for the lands obtained by virtue of such warrants, he was enjoined to carry such money, or balance to the credit of such person, his heirs, executors, administrators or assigns, in payments then, or thereafter to become due, for the purchase of any lands within the commonwealth, together with lawful interest for the same, from the time of the original payment, to the time of such credit being applied for and made.

But, by an act passed the 6th of March, 1793, (chap. 1648.) So much of the above act, as authorized the allowance of interest, on any money or balances, carried to the credit of any person, by virtue of the above act, from the time of the original payment, to the time of credit being applied for and made, was repealed: provided, that where such money had been paid, or balances had become due, prior to the passing of this supplement, interest was to be allowed upon such money, or balances, from the time of making the original payments, respectively, until the day of passing this supplement, and no longer.

And, from and after the 1st of January, 1795. All persons who should not previously apply for, and procure a credit to be entered in the books of the Receiver-General, for any such money, or balances, was thenceforth to be forever barred and excluded from all claim, right, or title thereto, and to every part and parcel thereof, and from any benefit or advantage, which could, or might have been obtained, by, from or under the said recited act; and all such monies, or balances, and the right and claim thereto, were declared from thence to become, and be, forever, forfeited and cancelled. 1784.

On the 3d of April, 1792, (chap. 1613,) an act was passed, entitled, "An act for the sale of the vacant lands within this commonwealth."

Sect. 1. The price of all the vacant lands, within the purchase of 1768, and the preceding purchases, excepting such lands as had been previously settled on, or improved, was reduced to the sum of fifty shillings for every hundred acres; and the price of vacant lands, within the limits of the purchase of 1784, and lying *east* of *Allegheny* and *Conewango* Creek, was reduced to the sum of five pounds for every hundred acres: and the said lands were offered to any person or persons applying for the same, at the price aforesaid, in the manner and form accustomed under the laws in force.

Sect. 2. All the lands lying *north* and *west* of the rivers *Ohio* and *Allegheny* and *Conewango* Creek, except such parts thereof as had been, or thereafter should be, appropriated to any public, or charitable use, were offered for sale "to persons who will *cultivate, improve* and *settle* the same, or *cause* the same to be *cultivated, improved* and *settled*, at and for the price of seven pounds ten shillings for every hundred acres thereof, with an allowance of six *per centum* for roads and highways, to be located, surveyed and secured to such purchasers, in the manner herein after mentioned."

Sect. 3. "Upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid, to the secretary of the Land-Office, which application shall contain a particular description of the lands applied for, there shall be granted to him a warrant for any quantity of land within the said limits, not exceeding four hundred acres, requiring the Surveyor-General to cause the same to be surveyed for the use of the grantee, his heirs and assigns, forever, and make return thereof to the Surveyor-General's office, within the term of six months next following, the grantee paying the purchase money, and all the usual fees of the Land-Office.

Sect. 4. The Surveyor-General to divide the lands offered for sale into districts, and appoint one deputy for each district, who shall give bond and security as usual, and reside within, or as near as possible to, his district, and within sixty days next after his appointment, certify to the Surveyor-General the place where he shall keep his office open for the purpose of receiving warrants, that all persons who

1784. may apply for lands may be informed thereof. And every deputy-surveyor, who shall receive any such warrant, shall make fair and clear entries thereof in a book, to be provided by him for the purpose, distinguishing therein, the name of the person therein mentioned, the quantity of land, date thereof, and the day on which he received the same, which book shall be open at all seasonable hours, to every applicant, who shall be entitled to copies of any entries therein, to be certified as such, and signed by the deputy-surveyor, the party paying one quarter of a dollar therefor.

Sect. 5. The deputy, at the reasonable request, and at the cost and charges of the grantees, to proceed to survey the lands in such warrants described, as nearly as may be, according to the respective priorities of their warrants; but they shall not survey any tract of land, that may have been actually settled and improved prior to the date of the entry of such warrant with the deputy-surveyor of the district except for the owner of such settlement and improvement. And having perfected such surveys, shall enter the same in a book to be kept by him, and to be called the survey book, which shall remain in his office, liable to be inspected by any person whatsoever, upon payment of eleven pence for every search; and he shall cause copies of any such survey to be made out, and delivered to any person, upon the payment of one quarter of a dollar for each copy.

Sect. 6. Every survey made by a deputy out of his proper district shall be void, and of none effect. The Surveyor-General and his deputies, are enjoined to survey or cause to be surveyed, the full amount of land contained and mentioned in any warrant, in one entire tract, if the same can be found, in such manner and form, as that such tract shall not contain in front on any navigable river or lake, more than one half of the length, or depth of such tract, and to conform the lines of every survey in such manner, as to form the figure or plot thereof, as nearly as circumstances will admit, to an oblong, whose length shall not be greater than twice the breadth thereof.—Ten per cent. surplus to be allowed, and paid for *pro rata*, on patenting.

Sect. 7. Every February, the deputy is to return into the office of the Surveyor-General, plots of every survey he shall have made in pursuance of any warrant, connected together in one general draught, so far as they may be contiguous to each other, with the courses and distances of each line, the quantity of land contained in each survey, and the name of the person for whom the same was surveyed.

Sect. 8. "The deputy-surveyor of the proper district shall, upon the application of any person who has made an actual settlement and improvement on lands lying *north* and *west* of the rivers *Ohio* and *Allegheny*, and *Conewango* creek, and upon such person paying the legal fees, survey and mark out the lines of the tract of land to which such person may, by conforming to the provisions of this act, become intitled by virtue of such settlement and improvement; *provided*, that he shall not survey more than four hundred acres for such person, and shall, in making such survey, conform himself to all the other regulations by this act prescribed."

Sect. 9. "No warrant or survey, to be issued or made in pursuance of this act, for lands lying north and west of the rivers *Ohio* and *Allegheny* and *Conewango* creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, or caused to be made, or shall within the space of two years next after the date of the same, make, or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years next following his first settling of the same, if he, or she, shall so long live; and that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so as often as defaults shall be made, for the time, and in the manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this act. PROVIDED ALWAYS NEVERTHELESS, *that if any such actual settler, or any grantee in any such original or succeeding warrant shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner, as if the actual settlement had been made and continued.*

Sect. 10. The lands actually settled and improved according to the provi-

sions of this act, to whosesoever possession they may descend or come, shall be and remain liable or chargeable for the payment of the consideration or purchase money, at the rate aforesaid, for every hundred acres, and the interest thereon accruing from the dates of such improvements; and if such actual settler, not being hindered as aforesaid, by death, or the enemies of the United States shall neglect to apply for a warrant for the space of ten years after the time of passing this act, it shall and may be lawful for this commonwealth to grant the same lands, or any part thereof, to others, by warrants, reciting such defaults; and the grantees, complying with the regulations of this act, shall have, hold and enjoy the same, to them, their heirs and assigns; but no warrant shall be issued in pursuance of this act, until the purchase money shall be paid to the Receiver-General of the Land-Office.

Sect. 11. When any *caveat* is determined by the Board of Property, in manner heretofore used in this commonwealth, the patent shall nevertheless be stayed for the term of six months within which time the party against whom the determination of the board is, may enter his suit at common law, but not afterwards; and the party in whose favour the determination of the Board is, shall be deemed and taken to be in possession, to all the intents and purposes of trying the title, although the other party shall be in actual possession, which supposed possession, shall, nevertheless, have no effect upon the title; at the end of which term of six months aforesaid, if no suit is entered, a patent shall issue according to the determination of the Board, upon the applicant producing a certificate of the prothonotary of the proper county, that no suit is commenced, or if a suit is entered, a patent shall, at the determination of such suit, issue in common form to that party in whom the title is found by law; and in both cases, the patent shall be and remain a full and perfect title to the lands against all parties and privies to the said *caveat* or suit; with the usual saving to infants, &c.

Sect. 15. The holders of unsatisfied warrants heretofore issued agreeably to the 7th section of the act of 21st of December, 1784, may locate them in any district of vacant and unappropriated land within this commonwealth; provided the owners thereof shall be under the same regulations and restrictions, as other owners of warrants taken for lands lying north and west of Allegheny river and Conewango creek are made subject by this act, the said recited act, or any other acts to the contrary notwithstanding. 1784.

Much controversy has arisen out of this act. Its evident object was to encourage the population and improvement of the country. An important section has received various construction. The consequences of unsettled titles are always certain. The population and improvement of the country have been impeded and retarded. Nineteen years have elapsed; but the dispute is still undecided, and whilst to the north, and to the west of these controverted lands, the country increases with industrious citizens, and smiles with cultivation; here the half-finished cabin and remaining forests, proclaim that the land is without a certain owner.

It is important in the consideration of this controversy, that at the time of passing this act, there existed a war between the United States, and the Indian nations, in the western country. The armies of the United States had experienced signal defeats from the savages. In 1791, general *Harmar* was defeated. On the 4th of November in the same year, general *St. Clair* was defeated with great slaughter. It was considered unsafe to attempt an immediate settlement, beyond the Allegheny in a country exposed to the inroads of a subtle and vindictive enemy, whose mode of warfare was peculiar; and whose approach was often in secret, and could not be guarded by common precaution.

On the 20th of August, 1794, general Wayne defeated the Indians at the *Miamis*; his treaty with them, was on the 3d of August, 1795, when hostilities ceased, and the treaty was ratified by the senate of the United States, on the 3d of December, 1795.

In the Lessee of *Grant* v. *Eddy*, before cited, both parties claimed under warrants issued by virtue of the act of 3d of April, 1792.

It appeared in evidence that the defendant had paid into the Receiver-General's office £.420 on the 17th of November, 1792—£.620 on the 10th of January, 1793—and £.2170 on the 12th of August, 1793, besides the usual office fees. But the proof on the part of the plaintiff was extremely defective in this particular. The certificate of the Receiver-General charged the "Lands Dr. to Cash," and there was only one entry of cash credited, as applicable to the subjects in dispute, viz. £.94 10*s*. 6*d*. on the 26th of January, 1793.

The lands lying east of the Allegheny river, were not subject to settlement conditions. A caveat had been filed on

1784. the part of the plaintiff on the 26th of February, 1793, and a decision of the Board of Property was had on the 28th of March, 1794, that the deputy surveyor should execute the defendant's warrants, the same having the priority in point of time, and well describing the lands. The present ejectment was commenced within six months thereafter.

By the Court. The warrants lately granted by the Land-Office, bear equal date with the applications of the different parties. But the periods when they have actually issued, can only be ascertained from the payment of the purchase money. In this mode the time of issuing the defendant's warrants may be ascertained; but from the deficiency of the proof adduced by the plaintiff, it cannot be pronounced with certainty, when his warrants issued.

We know, however, that the *applications* of the defendant are earlier than those of the plaintiff, and that the former must succeed, provided the lands are described with convenient certainty, and the party has not incurred a forfeiture of his pretensions, by gross *laches* or delay.

Priority of application gives a certain degree of equity.—The deputy-surveyors, by the 5th section of the act of 3d of April, 1792, are directed to survey according to the priority of the warrants. But all applications must be pursued within a reasonable time by payment of the purchase money, and taking out warrants, and procuring surveys to be made. It would, under a different construction, lay in the power of the earliest applier, to ingross and monopolize the whole country, by a long list of applications, contiguous to each other; beginning at a certain fixed point, without paying a single shilling into the coffers of the state, until it suited his conveniency! This never could have been the intention of the legislature.

What that reasonable time is, appears unnecessary to be determined, in the present suit; because it cannot come in question, unless it clearly appears that the lessor of the plaintiff has paid his money into the treasury sooner than the adverse party, and that the latter has been guilty of manifest negligence. Verdict for the defendant.

Lessee of *Lewis Bond* v. *Robert Fitzrandolph.*

Ejectment for one messuage, and 400 acres of land on French creek.

This was a contest between two settlers, without warrants, to lands west of the river Allegheny, and on the east side of French creek.

In 1789, one *Cornelius Vanhorne* erected a cabin of heavy logs on the land. The lessor of the plaintiff in 1792, was an officer of the army under general *Wayne*, and was stationed by him, with a detachment of 28 men, at *Cussewago*, to protect the inhabitants from the Indians. During the winter he pulled down *Vanhorne's* cabin, and made rails of the logs. He erected a new cabin, fifty or sixty perches from the former, with the assistance of two soldiers, whom he hired for that purpose, and also cleared and fenced a field of ten acres, which had formerly been cultivated by the natives. In the spring of 1793, he planted one half of an acre of corn, and one half of an acre of potatoes; and was recalled the same spring, having first placed one *Licquers*, who had intermarried with an Indian woman, in his cabin, and contracted with a trader to supply him with meat and flour.

After *Bond* was withdrawn, the defendant in behalf of *Vanhorne*, forced *Licquers* from the possession of the tract, and in August, 1793, cut and made hay thereon. He then fled, on hearing that no treaty had been concluded with the Indians. In the course of the following month he returned with his horses, broke up the field which had been fenced by *Bond*, (the rails whereof had been burnt,) put the fence in order, and sowed turnips. On the 8th of May, 1794, he obtained a survey by *William Power*, a deputy-surveyor, of 401 as. and 29 ps. in pursuance of his improvement, dated 1st of March, 1791. He lived on the lands, extending his improvements, erected three other houses, cleared and fenced 20 acres more of ground, and had the whole in good cultivation. Neither *Bond*, nor *Licquers* had been in that country since 1794. They obtained no survey, nor did it appear that they had attempted to procure one.

On opening the plaintiff's title, it was objected, that he should have filed his *caveat* under the 11th section of the act of 3d of April, 1792, and have first tried his claim before the Board of Property.

By the Court. The two clauses of the act refer to different objects. Though the words of the 11th section are general, they have been held not to extend to lands claimed under rights or contracts previous to the passing of this law. The law does not require *in terminis*, that a *caveat* shall be filed to try a title to lands. There are no words restrictive of the jurisdiction of the ordinary courts of justice in the first in-

stance; and we will not, by construction, increase the powers of the Board of Property. The parol evidence, therefore, must be received.—But what operation the bare improvement will have, where the plaintiff must recover, on shewing a title, is another question.

After the testimony, and arguments were closed, the court delivered the following charge, in substance.—This is a case of the first impression under the act of 3d of April, 1792. That law has introduced a new species of title; but whether it will effectuate the intentions of the legislature, time only can determine. In the mean while, it behoves us to move with caution, and to reflect fully before we form an opinion. No warrant exists on either side. Both parties claim as actual settlers and improvers under the 8th and 9th sections of the act. The plaintiff who must recover by his own strength, must bring himself clearly within the law. "On his conforming to the provisions of the act," depends the validity of his right. An application to the deputy-surveyor of the district, and payment of the legal fees, form a part of that conformity. The plaintiff has given no survey in evidence, nor can we collect from presumption, that he has attempted to make one. His pretensions, therefore, are not designated, or defined. His house, and part of his original inclosure, are excluded by the defendant's survey. He cannot claim under agreed lines made by the predecessors of the defendant and others, while he sets up a title adverse to the former. How then shall his improvement be extended, or in what direction shall it go? Confining ourselves to the case now before us, we are of opinion, that the plaintiff having shewn no survey, nor even an attempt to make one, his claim is not recognized by the law, so as to entitle him to recover.

If the deputy surveyor had refused to do him justice, he might have complained thereof to the Surveyor-General or the Board of Property; and he would then have evinced an endeavour, on his part, to conform to the law. But no pretext of that kind exists in the present case. Verdict for defendant.

Allegheny, May, 1797, before *Yeates* and *Smith*, justices. (MSS. Reports.)

That a recovery cannot be had on a mere settlement without a survey, was also held in the Lessee of *Benoni Dawson* v. *William Laughlin*, *Allegheny*, May, 1799, before the same judges. (MSS. Reports.)

In *Hubley's* lessee v. *Chew*, before cited, a *caveat* had been entered by the plaintiff against the defendant, on the 11th of April, 1793. The Board of Property decided in favour of the defendant; but stayed issuing the patent for six months. The ejectment was not brought within the six months; but it was brought to April term, 1794, in the common pleas of Northumberland county, before any patent actually issued. 1784.

The defendant offered in evidence a patent dated 22d of March, 1796, to him, and insisted that the same was a full and perfect title to the lands against the plaintiff in the present suit, being grounded on the decision of the Board of Property, and no action had been entered at common law, by the plaintiff *within six months* after the determination.

On the ground that the patent was dated subsequent to the suit brought, the court were clearly of opinion it could not be evidence: But how far the words and intention of the legislature, in the law relied on, may effect an exception in the general practice, was the great question.

By the Court. We cheerfully disclaim all legislative power; but it will not be denied, that we possess the right of putting such construction on the acts of the legislature, as appears to us, best to accord with their intention, either express, or implied. We cannot construe a law differently from the plain, clear words of it, under any ideas of convenience or equity. Arguments *ab inconvenienti*, only apply where the law is dubious. It is sufficient for us to declare our opinion on the present question, that the 11th section of the act of 3d of April, 1792, does not extend to the case before us. We do not much regard the *title* of the law, it is said to be no part of a statute. But the *preamble* has considerable weight in discovering its meaning. Though it will not control the clear and positive words of the enacting part, it may explain them if ambiguous. The declared object of the whole act goes to the *unsold* and *unsettled* lands within the Indian purchase at fort *Stanwix* in 1768, and the preceding purchases; and to the *vacant* lands included in the Indian purchase of 1784, at fort *M'Intosh*.

All the provisions of the law go merely as to *unappropriated* lands; except that in the last section, it is directed, that unsatisfied warrants issued under a former law, may be located on *vacant* and *unappropriated* lands.

To comply, therefore, with the whole scope of the act, and declared intention of the legislature, the generality of the expressions in the beginning of the 11th

1784. section, "When *any caveat* is determined, &c." must necessarily be restrained to any *caveat* relating to *lands then vacant and unappropriated.* The clause in question cannot be extended, in our apprehension to *caveats* respecting other lands, held under rights or contracts, antecedent to the passing of this law.

The words of the section now under consideration, are not more large and comprehensive, than those used by the legislature in the 15th section of the act of 8th of April, 1785. "That in making *any* survey by *any* deputy-surveyor, he shall not go out of his proper district, &c." Nevertheless, in the case of the Lessee of *Alexander Wright* v. *Benjamin Wells*, at *Washington*, May, 1793, *M'Kean*, C. J. and *Yeates*, after full argument, ruled that the expressions related solely to the lands purchased at *Fort M'Intosh.* (MSS. Reports.)

And in *Albright* and others, v. *M'Ginnis's* lessee. In the supreme court, December, 1799, it was solemnly adjudged by the whole court, "That the 11th section of the act of 3d of April, 1792, does not apply to cases of lands *improved* at the time of passing that law. (MSS. Reports.)

This decision is recognized, at Lancaster, June 2d, 1810, in *Steinmetz* v. *Young*, 2 Binney, 523. So that the construction is settled.

To give efficacy to an improvement against a written title, under the law of 3d of April, 1792. The improvement must appear clearly to subsist *as such* before the commencement of the written title.

Thus, in the Lessee of *James Hepburn* v. *William Hutchinson*, *Northumberland*, October, 1798, before *Yeates* and *Smith*, Justices, (MSS. Reports,) in ejectment for 202 acres of land, on Delaware run, in Turbutt township. The case was;

The plaintiff claimed under an application dated 20th of March, 1792, founded on a certificate of two justices of the peace, that the lands were unimproved; a consequent warrant of the 11th of April following, and a survey of 202 acres on the 28th of the same month, and patent dated 14th of May, 1792.

The defendant rested on a supposed prior improvement. He began to cut logs on the ground on the 9th of April, 1792, two days anterior to the date of the plaintiff's warrant.

The court were clearly of opinion, that this case was not within the provision contained in the 5th section of the act of 3d of April, 1792, "That deputy-surveyors shall not by virtue of any warrant, survey any tract of land that may have been actually settled and improved, prior to the date of entry of such warrant with such deputy, except for the owner of such settlement and improvement." A settlement is defined by the third section of the act of December, 1786. To make an improvement efficacious, it must subsist clearly as such before the commencement of an adverse written title. If the defendant's doctrine should be sustained, there could be no possible security for any paper title, where the lands contemplated to be surveyed, lie at a distance from the seat of government. Verdict for plaintiff.

The *service* of a declaration in ejectment, *within* the six months, although the suit was not *entered* on the docket, until *six* days after the expiration of the six months, was held to be sufficient to save the limitation of the 11th section of the act of 3d of April, 1792. *Nicholson's* lessee, v. *Wallis*, 4 *Dallas*, 154.

Lessee of *Samuel Ewalt* v. *Martha Highlands.*

The plaintiff claimed 400 acres of land, across the Allegheny, at Girty's run, under a settlement and survey.

It appeared in evidence, that the lessor of the plaintiff, with two hands, on the 30th of April, 1792, crossed the Allegheny to make an improvement. They deadened about an acre of timber; returned, and in about two weeks more, deadened some little more. He erected a cabin with a clap-board roof, 8 feet to the square, and cut out logs for a door, and planted a few peach stones, apple seeds and potatoes, but made no other improvements, nor ever resided himself, nor had tenants on the land.

A survey made by *Jonathan Leet* under the settlement, on the 9th of April, 1794, was offered in evidence, but excepted to, as not being sufficient authority to make a survey, under the act of 3d of April, 1792.

By the Court. Though the validity of the survey depends "On the actual settlement and improvement" of lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, yet the deputy-surveyor must necessarily judge thereof in the first instance, a court and jury must afterwards judge of the settlement, and his consequent authority. His act is not conclusive evidence hereof. Let the survey be read.

On the 10th of February, 1796, *Ewalt* leased to one *Peter Smith*, who came over the river, kindled a fire in the cabin, staid there an hour, and then removed. His landlord lived on the east side of the river with his family. The defendant and her family resided on the lands in question above three years.

A motion was made for a nonsuit.

By the Court. What a deputy-surveyor of a district does, must be always un-

der the control of the court and jury, who are competent to determine on the validity of his acts. The second section of the law offers these lands for sale to persons "Who will cultivate, improve and settle them, or cause the same to be cultivated. improved and settled;" but the legislature have not ascertained in the 8th section, how far "An actual settlement and improvement" must have progressed to warrant a survey, as they have laid down no general rule or criterion on the subject, neither will this court attempt it; yet we are bound to say, that a *personal residence* must in the nature of things accompany an actual settlement, unless impending, imminent danger exists, which would prevent a man of reasonable firmness of mind from continuing on the land.

The *animus residendi* must be fully evinced. Negatively, we may safely say, that what has been mentioned at the bar, deadening one or two acres of timber, planting a few peach stones, apple seeds, potatoes, or grains of corn, or the doing of other such acts, though a small cabin is also put up, will not, *merely of themselves*, constitute a settlement, where the party actually lives at a distance, and has no tenant occupying the ground. Neither will a man's setting his *foot* or *heart* on a tract of land, and claiming it as his own, give such a preference as the law contemplates. Fancied rules of honour cannot determine the question. A settlement must depend on the peculiar circumstances of every case, which may be greatly varied. We cannot, however, pronounce, that the plaintiff's proofs came up to our idea of an actual settlement which would authorize a survey. The plaintiff took a nonsuit immediately. *Allegheny*, May, 1799. (MSS. Reports.) S. C. 4 Dallas, 161.

The Lessee of *Neal M'Glaughlin* v. *Nicholas Dawson*, is reported in 4 Dallas, 221. But not sufficiently full to give an extended view of the principles adopted and established under this act.

Both parties claimed the land by virtue of actual settlement. The plaintiff, on the 4th of April, 1792, crossed the Ohio, grubbed a small piece of ground near to a cabin which had been erected and covered in by one *Link*, in 1790; cleared a spot about 40 feet square, made 10 or 15 rails, which he put up, and planted a few seeds of corn. On the 11th of the same month, he is found living and sleeping in the cabin, and in the two following months, occupied in digging his small patch, planting potatoes, and sowing garden seeds. He made a chimney; and though notified of danger from the Indians, staid one night longer. In August he made a door to the cabin. In October he carried out with him provisions, &c. and a straw mat to sleep upon; a mattock and an axe, and occupied himself in making rails. Only he and *Charles Philips*, were known to have resided on the northwest side of the Ohio, with the intention of making settlements, in the year 1792. In 1793, he made several hundred rails, continued to grub, made a small piece of meadow, and lived in the cabin, with his bedding and small household utensils about him. On the 16th of May, 1793, he obtained a warrant, descriptive of the lands, and procured a survey of 400 acres and 68 perches, on the 11th of December following, and paid the surveying fees. In 1794, he burnt the logs and cleared the ground, and with his oxen, put in 4 or 5 acres of Indian corn, attended it during the season, and raised a crop of near 60 bushels. In 1795, he lived in his cabin, and had his cattle on the land, he raised turnips, and hauled them home. In 1796, he continued his settlement, and added an acre to his former field: and in 1797, he cleared 8 or 10 acres of land more, and constantly lived on the ground, except when the immediate approach of danger from the savages induced him to remove occasionally therefrom. 1784.

The first commencement of the defendant's improvement, was one day earlier than the opposing claim. On the 3d of April, 1792, he crossed the river, in company with two others, in search of lands. On that day he planted 10 or 15 hills of Indian corn, deadened 7 or 8 trees, and marked the initial letters of his name, with gun powder, on *Link's* cabin. In the two following months he planted four hundred hills more of Indian corn, and hoed them occasionally. In September he grubbed two acres, rolled the logs, burnt them and the brush, and cleared the ground. In October he took out a plough and horses, ploughed the ground he had cleared, sowed two bushels of rye, and built a good block house, about 12 feet square, but did not cover it in. During this year he lived with his brother *Benoni Dawson*, at the mouth of Mill creek, about four miles distance from the lands in dispute. In February and March, 1793, he made clap-boards, covered his block-house, made a door, and slept one or two nights therein. He cleared four acres more land, and mawled rails for six acres. In the following month he inclosed a field of 7 acres with a fence, planted it with Indian corn, and afterwards attended it from time to time. He and one *George Clark* were seen together in the block-house; and one *Daniel Swearingen* demanded of the district surveyor's assis-

1784. tant, to make a survey in consequence of the defendant's settlement, which was refused on the ground of the plaintiff's earlier application for a survey to him. In due season he pulled his corn, and lodged it in the loft of his block-house. During 1793, defendant was engaged as a six month's man, at *Philips's* station. In 1794, he was seen ploughing, and he disposed of his former crop of corn. He put in more corn which was seen growing during this year; and he was also engaged during this year, as a volunteer on the frontiers. In 1795, he put in 2 1-2 acres of Indian corn. He cropped with his brother *Thomas* at the distance of 5 miles from these lands, and lived with his father occasionally. In February, 1796, he married, and removed with his wife into the block-house, where they have resided since. He had 8 or 10 acres cleared, and under good fence; and in 1797, he grubbed and cleared 3 acres additional, near the block-house.

In 1792, the parties, respectively, warned each other against continuing their improvements. The plaintiff's warrant was not entered in the office of the deputy-surveyor of the district, until the 23d of August, 1793.

By the Court. The question is, which of these claims ought to prevail, and is naturally subdivided into two points.

1st. Whether the pretensions of the plaintiff as an *actual settler*, are preferable in law to the defendant's previous to the 23d of August, 1793, when his warrant was entered with the deputy-surveyor? 2d. Whether since that period he is not vested with additional equity?

The act of assembly of 3d of April, 1792, certainly had in view the population of the back country, and the forming a barrier on the frontier lands, north and west of the rivers Ohio and Allegheny and Conewango creek, by placing numerous families thereon. Whether the titles are derived originally from labour bestowed on the ground, or disbursement of cash, no warrant, or survey shall, by the 9th section, vest any title to such lands, "Unless the grantee has made, or shall within two years thereafter, make, or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years next following his settling the same, &c."

Link's cabin being erected before the passing the law, empowering the sale of these lands, gives no equity either to him, or plaintiff; nor can the planting of a dozen hills of corn, deadening 7 or 8 trees, or marking the defendant's name on the cabin, confer any right.

The improvements and cultivation of the plaintiff, will be found, on an accurate review of the evidence, to be inferior in extent to those of the defendant, in each distinct year, except 1797. The one depended on his own exertions, and was poor; the other could call to his assistance the services of his friends and connections, and commanded money. But the former possessed one strong, prominent feature of an actual settler, a constant, personal residence on the ground, unless when intimidated by the impending danger of a savage foe, encompassed by his small stock of provisions and bedding, and his few family utensils, and implements of husbandry; while the latter was engaged as a volunteer in the public service, or lived with his father or brothers. In correct language, it is physically impossible, that a man should have two homes at the same time. It may as well be said, that a body may be in different places at the same instant, acts are the most unequivocal proofs of the bent of the mind. Here *M'Glaughlin's* intention to reside on the lands in dispute, is completely demonstrated by personal residence, and a permanent adherence to the soil. The intent is executed in fact.

In *Ewalts'* lessee, v. *Highlands*, we delivered our explicit opinion, on due consideration, that "A personal residence must, in the nature of things, accompany an actual settlement, unless impending imminent danger exists, which would prevent a man of reasonable firmness of mind from continuing on the land;" and we are now more firmly impressed with the correctness of these sentiments. But it has been asserted at the bar, that this construction would throw actual settlers in a worse situation than warrant holders, under the proviso contained in the close of the 9th section of the act of 3d of April, 1792. This we deny. That *proviso* only respects the *progress* of the improvement, in clearing 2 acres for every 100 acres in each survey, erecting a messuage thereon, and residing thereon for five years. It does not relate to the *commencement*, or *origin* of the title. In the reason of the thing, the rights of actual settlers must depend on the priority of their settlements; and a settlement necessarily involves in itself a personal residence of the party on the ground. And such is the legal idea of an improvement, as depending on the act of 30th of December, 1786.

The light in which we have viewed the first point, renders it unnecessary to go into the second in the present case. The

court conceiving that the plaintiff is the first actual *resident* settler on the lands in question, according to the true meaning of the legislature, and intitled in that character to recover the possession of the lands, will only add, that to his former right he has added the legal right of a warrant. Verdict for the plaintiff. Allegheny, October, 1800. (MSS. Reports.)

The Lessee of *James Scott* v. *William Anderson*, was settled on the same principles, the same day.

The case of the Lessee of *Robert Morris* v. *William Neighman*, *Allegheny*, May, 1799, before *Yeates* and *Smith*, Justices, is briefly stated in 4 Dallas, 209. But as this controversy greatly agitates the country, and has hitherto much engrossed the attention of the legislature, it is deemed of importance to give the different decisions pretty much in detail; a full statement of facts is also necessary to a competent understanding of each particular case. *Same plaintiff* v. *Adam Sheiner*. (MSS. Reports.)

The plaintiff claimed the lands in question, on the waters of *Big Conequanessing creek*, under two warrants dated 4th of March 1793, and surveys made thereon, 12th and 19th of November, 1794.

It appeared, that when these surveys were made, with many others, for the plaintiff, there had been erected on *all* the tracts, seven small cabins by persons who intended thereby to hold the lands; and the agent of the plaintiff, to preclude dispute, had bought from the different claimants for 110 dollars. On the 25th of July, 1796, the agent took out a mill wright, to build a mill on the lands then occupied by *Neighman*, and demanded the possession thereof. The latter permitted him to level the water, but would not suffer him to do other work, as he insisted the plaintiff's warrants were *dead*, for defect of settlements within the two years. At this time *Neighman* had a small cabin, and about one acre of timber deadened, but had no family on the ground. On the 1st of March, 1797, the defendant settled with his family on the land, and before the bringing of the ejectment, had built a large cabin, 16 feet by 18, and a barn, cleared 10 acres of land, and had begun to make the dam and forebay of his mill, which he afterwards completed.

Sheiner, the other defendant, came with his family on the other tract of land, on the 8th of April, 1797, under *Neighman*, who was bound to make him a good title to one moiety thereof. Just as he was beginning to work, one *Jacob Rudolph*, a tenant who had accepted a lease under Morris, warned him off, but he refused going, and would not permit *Rudolph* to take possession. 1784.

It further appeared, that in 1793, and 1794, no settlements were made across the *Ohio* and *Allegheny*. Early in March, 1795, a few individuals removed without their families, to the vicinity of *Fort Franklin*, *Cussewago*, and *Craig's Station*, but none settled at a distance, or detached from the garrisons. Some of the white people, in the spring of 1795, fired on the Indians; this incited them to make reprisals, and they accordingly, in the same spring, killed two persons near *Cussewago*, on French creek. It was totally unsafe to remove families into the interior of the country until 1796, when settlements in general took place.

Two questions were made. 1st. Whether the plaintiff forfeited his right under the warrants, by not making his settlements on the lands within the two years? 2d. Whether, if a forfeiture was incurred, the defendants might not enter, and, the condition being broken, take advantage thereof?

By the Court. These causes are said to involve extensive interests, and the magnitude of the case demands peculiar attention. The solution of the questions which have been agitated, depends more immediately on the 9th section of the act of 3d of April, 1792.

The act appears to be the result of a spirit of compromise between the advocates of actual settlements, and warrant rights. The only distinction between them is made in the 5th section, which declares that "Lands actually settled and improved *prior* to the date of the entry of a warrant with the deputy-surveyor of a district, shall not by virtue of such warrant be surveyed except for the owner of such settlement or improvement." This is confessedly a great preference; for if the particular lands were actually vacant and unimproved, when the warrant issued, a subsequent settlement and improvement made the day before its entry with the deputy-surveyor, shall postpone the warrant right.

The 9th section prescribes the terms on which warrants and surveys shall *vest a title* to lands lying north and west of the rivers *Ohio* and *Allegheny* and *Conewango creek*. "The grantee shall within two years, &c. But it is provided in a subsequent clause, that "If any such actual settler, or grantee in any warrant, shall by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall *persist* in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and hold the said lands, in the same

1784. manner, as if the actual settlement had been made and continued."

It is a matter of public notoriety, that a war subsisted between the citizens of the United States, and the western Indians from 1790 to 1796. The expedition of General *Harmar* into the Indian territories took place in 1790, which was succeeded by that of General *St. Clair*, who was defeated on the 4th of November, 1791. These are facts which cannot be forgotten by the people on the frontiers. The sum of *l.* 4000 was appropriated for the defence of the western frontiers of this commonwealth, "In imminent danger of being invaded by the Indian tribes, *then* at war with the United States," by an act passed 17th of March, 1791. The same language is spoken in the preamble of another act passed 20th of January, 1792; and the governor was thereby empowered to engage three companies of rifle men to protect and defend the western frontiers, and *l.* 4,500 were appropriated for that purpose. The same provisions were made by another act passed 3d of April, 1793, and 14,000 dollars allowed. These infantry companies were to be raised and stationed for the protection of the frontiers of *Westmoreland, Washington and Allegheny*, by a law of 28th of February, 1794, and 130 men were to be raised by another law passed 23d of September, 1794. These different public acts comport with the oral testimony given in the course of the trials. Until 1796, it was unsafe for families to cross the river, into the newly granted lands. In 1795, some few bold, adventurous persons settled in the spring near the garrisons; yet no families removed thither with women and children. Indictments for *robbery* uniformly charge that the party robbed was *put in fear*; and if the fact be attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property for the safety of his person; it will amount to a robbery; the law will presume fear, where there is a just ground for it. The same principle applies to the section of the law under consideration. For though the act certainly contemplated the settlement of the country within a period not remote, it provides for persons prevented from making such settlements "By force of arms of the enemies of the United States." It cannot reasonably be taken to be the will of the community, that these settlements should be made under imminent, impending danger, at a distance from the garrisons, or where there was just ground to fear such danger. The *war* continued *in fact* until the treaty was concluded at *Fort Grenville*, on the 3d of August, 1795, between General *Wayne* and the Indian tribes; and *peace* with them could not be said to be established, until that treaty was ratified by the president and senate of the United States, on the 22d of December, 1795. Here then is a safe rule to go by, freed from all danger of introducing perjury. The *terminus a quo* settlements shall commence, may safely be dated from the constitutional ratification of the *Grenville* treaty with the Indian nations, and if after that period, actual settlers or grantees "shall *persist* in their endeavours" to make their settlements, they shall not incur a forfeiture of their lands. This we take to be the true meaning, or spirit of the law.

But granting, for argument sake, that forfeitures were incurred by reason of non settlement for two years after the date of the warrants; who shall enter for the condition broken? The words of the law in the 9th section are freed from all doubt and difficulty on this head. "In default of such actual settlement and residence, it shall and may be lawful to and for the commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so, as often as defaults shall be made, for the time, and in the manner aforesaid, which new grants shall be under and subject to all and every the regulations contained in this act."

The new warrants, issued under proper circumstances, operate as *inquests of office* to devest the former estates granted; and no individuals can take advantage of the breach of the condition, unless through the instrumentality of the state, by granting new warrants, in a specified form. This method of procedure is obviously pointed out by the legislature, to avoid the mischiefs necessarily attendant on private persons assuming upon themselves to determine, when the estates of the persons settling, or obtaining warrants, should cease and become void: and least of all ought those persons to have advantage of forfeitures, if they really took place, who by their own acts, and more wills, prevented a compliance with the terms enjoined by the law, on the part of those who were desirous of settling and improving, and had fully paid for the lands. If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing, that no persons should take advantage of their own wrong; and that it does lie in the mouths of men like the present defendants, to say "The warrants are *dead*, we will take and withhold the possession, and

thereby intitle ourselves to reap benefits from an unlawful act." We are bound to say, that on both the questions which have been made, the plaintiff is intitled to verdicts. The verdicts were, accordingly, for the plaintiff.

The point of forfeiture was also determined in the same manner in *Wilkins's* lessee, v. *Allenton, Allegheny*, November, 1801, before the same judges, (MSS. Reports.)

In the Lessee of *Hazard* v. *Lowrey*, in the supreme court. 1 Binney, 166. The case was :—The plaintiff's warrant bore date the 13th of April, 1792, and called for 400 acres "Adjoining land this day granted to *Walter Stewart*." On the 17th of June, 1794, more than two years after the date of the warrant, a survey was made upon it by the deputy-surveyor of the district, according to the description in the warrant, "Adjoining *Walter Stewart*;" but no entry was made at that time by plaintiff, or by any one under him, with a view to settlement. The defendant entered on the land in July, 1795, and plaintiff brought his ejectment to September, 1797, more than a year and a day after General *Wayne's* treaty, but less than two years.

Three points were reserved on the trial. 1st. Whether, as no survey was made upon the plaintiff's warrant, within two years next after the date, any survey thereon made afterwards, could vest a title in the warrantee. 2d. Whether any title vests in a warrantee under the act of 3d of April, 1792, unless he has made an actual settlement before the date of the warrant, or within two years next afterwards. 3d. Whether, supposing the plaintiff to have been prevented during the two years after the date of his warrant, from making an actual settlement, he had proceeded to make it within a *reasonable* time after the prevention ceased.

Tilghman, C. J. delivered the opinion of the court. The *first* and *second* points may be considered under one view. They as well as the third point, arise out of the act of the 3d of April, 1792, and principally out of the 9th section of that act.

Although this section is expressed with such obscurity as to have occasioned great diversity of opinion among men of the first abilities, yet there are some points concerning which there can be little doubt. One of these points is, that if the settlement required by law is prevented by force of arms of the enemies of the United States, the interest of the grantee does not revert to the commonwealth, although the settlement is not made within two years from the date of the warrant. Now, in the case before us, the warrant bears date the 13th of April, 1792, and it is notorious, and not denied by the defendant, that for more than two years from that time, there was open war with the Indians, which rendered it dangerous to attempt a settlement of the land in dispute. It may be safely affirmed, from the public acts of the common wealth in granting money and raising troops for the protection of the country, that this state of danger existed until the pacification by General *Wayne's* treaty with the Indians. If the danger arising from this war excused the warrantee from making a settlement, so did it likewise excuse the deputy-surveyor from surveying the land. The counsel for the defendant contends that in as much as the warrant does not describe the land, except as "Adjoining a tract granted to Walter Stewart," which had not been surveyed, the warrantee could not know where it lay, until it was surveyed, and of consequence he could not be prevented from settling what he had no right to enter on. But this argument has more of refinement than solidity. When the warrantee paid his money, and took out his warrant, his title commenced, he obtained a right to reduce the land to a certainty by survey, and he shall not be deprived of that right by the event of war. There is nothing in the act which authorizes such a position. On the contrary, the *proviso*, in the 9th section, which excuses the settlement, does virtually excuse the survey. 1784.

The *third* point for our decision supposes that the warrantee was prevented by the enemy from making a settlement for two years from the date of the warrant; but the defendant contends that a settlement was not made within a *reasonable* time after the prevention ceased. It was decided by my three brethren at a special court at *Sunbury*, that a *reasonable* time for such settlement should be allowed; and to that opinion I subscribe. The question then is, what is that reasonable time? The law has not fixed it. But as two years are allowed for building, clearing and fencing, in case the country had been in a state of peace; it seems most consonant to the spirit of the law, that where war existed from the date of the warrant for two succeeding years, not less than two years should be allowed from the pacification by the treaty by which the war was concluded. I understand this to have been the opinion of the judges of this court, and I see nothing which should induce us to depart from it. The defendant, then, having entered during the time the plaintiff had a right to hold the land, for the purpose of making a settlement, was a wrong-doer, and subject to be removed either by an

1784. entry or by ejectment. It follows that the plaintiff was entitled to judgment in the circuit court, and that judgment must now be affirmed.

This judgment fully confirms the doctrine of *Morris* v. *Neighman*, and the point is settled.

But another question of very great importance has arisen upon the *proviso* in the 9th section, which has divided the judges of the same court: and upon the construction of which, the judgments of different courts have been contrary. It is lamented by the editor, that the history of this interesting conflict, will swell this note to an *unreasonable length*; but as the work is professedly designed, (not for the bar, to whom the whole subject is familiar, but) for the information of the citizens of the commonwealth, who have not access to the books and authorities, the detail is considered indispensable.

The question is, whether the conditions of *actual settlement*, by reason of the Indian hostilities for two years after the date of a warrant for lands across the Allegheny, are extinguished, or dispensed with, by the *proviso* in the 9th section of the act of the 3d of April, 1792?

Under the idea, that by the prevention of the enemies of the United States, the lands could not be settled within the two years, and that therefore the condition of settlement was extinguished; the Board of Property, in governor *Mifflin's* time, by the opinion of the then Attorney-General, had devised a form of certificate, which has been termed a *prevention certificate*, as follows: "We do hereby certify, that A. B. (the warrantee, or settler,) hath been *prevented* from making a settlement on a tract of land, containing 400 acres, situate, &c. conformable to the *proviso* contained in the 9th section of the act, entitled "An act for the sale of vacant lands within this commonwealth," passed the 3d day of April, 1792, by force of arms of the enemies of the *United States*; and that he, the said A. B. hath *persisted* in his endeavours to make such settlement."

Upon this certificate, signed by two justices, being produced at the Land-Office, a patent issued, notwithstanding the warrantee had neither improved, nor settled. The patent recited, that "A. B. has made it appear to the Board of Property, that he was, by force of arms of the enemies of the *United States*, prevented from making such settlement on the hereinafter described tract of land, as is required by the 9th section of an act of the general assembly of this commonwealth, passed the 3d day of April, 1792, entitled "An act for the sale of vacant lands within this commonwealth," within the time therein mentioned, and that he the said A. B. had *persisted* in his endeavours to make such settlement, there is granted by the said common wealth unto the said A. B. a certain tract of land, &c.

But a change having taken place in the Land-Officers, a new construction was given to the proviso, attached to the 9th section of the act; it was insisted that no patent could issue, unless the terms of settlement and residence, were, at some period, completed, though the obligation to complete them, during the Indian war, was suspended, and the resolutions and proceedings of the former Board of Property, on the subject, were not deemed authoritative and conclusive upon the new board. At the same time a number of persons entered upon the lands of the warrantees, on the pretence that the forfeiture for non-settlement, was absolute, at the expiration of two years from the date of the warrants, and set up claims as actual settlers. When the company, known by the name of the *Holland land company*, who had received many patents under *prevention certificates*, applied, with similar certificates, for the rest of their patents, the secretary of the Land-Office refused to issue them. The company therefore, by their council, moved in the supreme court, for a rule on the secretary of the Land-Office, to shew cause, why a *mandamus* should not be awarded, commanding him to prepare and deliver patents to the company, for various tracts of land, &c.

The case was argued at March term, 1800, and is reported at great length, in 4 *Dallas*, 170, &c. under the name of "*The commonwealth v. Tench Coxe, esquire.*"

The court differed in opinion, but the motion was overruled by the majority.

The opinion of Shippen, C. J. is as follows.

The legislature, by the act of the 3d of April, 1792, meant to sell the remaining lands of the state, particularly those lying on the north and west of the rivers *Ohio* and *Allegheny*. The consideration was to be paid on issuing the warrants. They had, likewise, another object, namely, that if possible, the land should be settled by improvers. The latter terms, however, were not to be exacted from the grantees at all events. The act passed at a time when hostilities existed on the part of the *Indian* tribes. It was uncertain when they would cease. The legislature, therefore, contemplated, that warrants might be taken out during the existence of these hostilities, which might continue so long, as to make it impossible for the warrantees to make the settlements required, for a length of time; not, perhaps, until after these hostilities should entirely cease. Yet,

they make no provision, that the settlements should be made within a reasonable time after the peace; but expressly within two years after the date of the warrants. As, however, they wished to sell the lands, and were to receive the consideration money immediately, it would have been unreasonable, and probably, have defeated their views in selling, to require settlements to be made on each tract of 400 acres, houses to be built and lands to be cleared; in case such acts should be rendered impossible by the continuance of the Indian war. They therefore make the *proviso*, which is the subject of the present dispute, in the following words; "provided always, &c."

When were such actual settlements to be made? The same section of the act which contains the above *proviso*, gives a direct and unequivocal answer to this question, "within the space of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force, or reasonable dread, of the enemies of the *United States*, and it was evident that the parties had used their best endeavours to effect the settlement; then, by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with; and their title to the lands was complete, and patents might issue accordingly. It is contended, that the words "*persist in their endeavours*" in the *proviso*, should be extended to mean, that if within the two years, they should be prevented by the *Indian* hostilities from making the settlement; yet when they should no longer be prevented by those hostilities, as by a treaty of peace, it was incumbent on them, then to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms; (and they would not, perhaps, have been unreasonable) but they have not done so; they have expressly confined the time of making such settlements to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for from the words they have used, in which, there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made use of the word "*endeavours*," which supposes a possibility, at least, if not a probability, as things then stood, of those endeavours failing on account of the hostilities, and would, therefore, have expressly exacted actual settlements to be made, when the purchasers should no longer run any risk in making them.

The state having received the consideration money, and required a settlement within two years, if not prevented by enemies; and in that case dispensing with the condition of settlement and residence, and declaring that the title shall be then good, and as effectual, as if the settlement had been made and continued; I cannot conceive they could mean to exact that settlement at any future indefinite time. And, although it is said, they meant that condition to be indispensable, and that it must be complied with in a reasonable time; we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves. 1784.

It is urged that the main view of the legislature was to get the country, settled and a barrier formed; this was undoubtedly one of their views, and for that purpose they have given extraordinary encouragement to individual settlers; but they had, likewise, evidently, another view, that of increasing the revenue of the state by the sale of the lands. The very title of the act, is "For the sale of the vacant lands within this commonwealth;" this latter object they have really effected, but not by the means of the voluntary settlers; it could alone be effected by the purses of rich men, or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued upon the presumption, that the words, "*persist in their* endeavours," relate to the grantees, as well as the settlers; but, in considering the words of the *proviso*, it may be well doubted, whether they relate to any other grantee, or settler, than those who have been driven from their settlements. The word "*persist*" applies very properly to such. The words of the *proviso* are, "If such actual settlers, &c." Here, besides that the grammatical construction of referring the word "*persist*," to the last antecedent, is best answered; the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence, one relates to the grantees, who it is supposed may be prevented from making their settlements; the other to the settlers, who are supposed to be driven away from the settlements. The latter words, as to them, are proper, as to the grantees, who never began a settlement, improper. The act says, in *either case*, that is, if the grantees are prevented from making their settlements, or if the settlers are driven away, and persist in their endeavours to complete their settlements, in either case they shall be entitled to the land.

I will not say this construction is intirely free from doubt; if it was, there would be an end of the question.

But taking it for granted, as it has

1784. been done at the bar, that the words relate to the grantees, as well as to the settlers: yet although inaccurate, with regard to the former, it seems to me, the legislature could only mean to exact from the grantees, their best endeavours to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then intitled to their patents. If the legislature really meant differently, all I can say is, that they have very unfortunately expressed their meaning.

Yeates, justice. I have long hoped and flattered myself, that the difficulties attendant on the present motion would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision. The question has often occurred to our minds, under the act of 3d of April, 1792, which has so frequently engaged our attention in our western circuits.

The *Holland* company have paid to the state, the consideration money of one thousand one hundred and sixty two warrants, and the surveying fees, on one thousand and forty eight tracts of land; besides making very considerable expenditures by their exertions, honourable to themselves, and useful to the community, (as has been correctly stated,) in order to effect settlements. Computing the sums advanced, the lost tracts, by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands; it is said, that averaging the whole, between two hundred and thirty, and two hundred and forty dollars, have been expended by the company, on each tract of land they now lay claim to.

The *Indian* war, which raged previous to, and at the time of the passing the law, and until the ratification of the treaty at *Fort Grenville*, must have thrown insurmountable bars in the way of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances; the scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions: besides, it is obvious, that settlements in most instances, could not be made, until the lands were designated, and appropriated by surveys, and more especially so, where warrants have express relations to others, depending on a leading warrant, which particularly locates some known spot of ground.

On the head of merit, in the *Holland* land company's sparing no expense to procure settlements, I believe there are few dissenting voices beyond the mountains; and one would be induced to conclude, that a variety of united, equitable, circumstances, would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion, upon the abstract legal question, whether if a warrant holder, under the act of the 3d of April, 1792, has begun to make his actual settlement, and is prevented from completing the same, "by force of arms of the enemies of the *United States*, or is driven therefrom," and shall make new endeavours to complete the same; but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with, and extinguished?

I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons, collected from the body of the act itself.

1st. The motives inducing the legislature to enact the law, are distinctly marked in the preamble, that "The prices fixed by law for other lands," (than those included in the *Indian* purchase of 1768,) are found to be so high, as to discourage *actual settlers* from purchasing and *improving* the same.

2d. The lands lying north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek, are offered for sale, to persons who will *cultivate*, *improve* and *settle* the same, or cause the same to be cultivated, improved and settled, at and for the price of *l.* 7. 10*s.* for every hundred acres thereof." By sect. 2, the price of lands is thus lowered, to encourage actual settlements.

3d. By sect. 3, "Upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid; there shall be granted to him a warrant not exceeding 400 acres, &c."

The application granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form all such warrants have issued.

4th. By sect. 5, "Lands *actually settled and improved*, prior to the date of the entry of a warrant, with the deputy-surveyor of the district, shall not be

surveyed; except for the owner of such settlement and improvement."

This marked preference of actual settlers over warrant holders, who may have paid their money into the treasury for a particular tract; even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intention of the legislature.

5th. By sect. 8. The deputy-surveyor of the district, shall, upon the application of any person, who has made an actual settlement and improvement on these lands, survey and mark out the lines of the tract of land, not exceeding 400 acres for such applicant."

The settlement and improvement alone, are made equivalent to a warrant, which may be taken out, by sect. 10, ten years after the time of passing this act.

6th. I found my opinion on what I take to be the true and legitimate construction of the 9th section; in the close of which is to be found the *proviso*, from whence spring all the doubts on the subject.

It has been said at the bar, that three different constructions have been put on this section.

1st. That if the warrant holder has been prevented by *Indian* hostilities, from making his settlement within two years, next after the date of his warrant, and until the 22d of December, 1795; (the time of ratification of general Wayne's treaty,) the condition of residence and settlement is extinct and gone.

2nd. That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavours, to make an actual settlement and residence for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the condition; and

3rd. That in all events, except the death of the party, the settlement and residence, shall precede the vesting of the complete and absolute estate.

Though such great disagreement has obtained, as to the true meaning of this 9th section, both sides agree in this, that it is worded very inaccurately, inartificially and obscurely Thus it will be found towards the beginning of the clause, that the words "*Actual settlement*," are used in an extensive sense, as inclusive of residence for five years: because its constituent parts are enumerated and described, to be by "*Clearing, fencing* and *cultivating* at least two acres for every hundred acres, contained in one survey; erecting thereon, a messuage for the habitation of man, and residing, or causing a family to reside thereon, for the space of five years, next following the first settling of the same, if he or she shall so long live. "In the middle of the clause, the same words are used in a more limited sense, and are coupled with the expression "*and residence*," and in the close of the section, in the *proviso*, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense, as they first conveyed; because the terms, "*Such actual settlement*," used in the middle of the section, are repeated in the *proviso*, and refer to the settlement described in the foregoing part; and the words, "actual settlement as aforesaid," evidently relate to the enumeration of the qualities of such settlement. Again, the confining of the settlement to be within the space of two years, next after the date of the warrant, seems a strange provision. A war with the *Indian* natives subsisted when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay, could not be ascertained generally. 1784.

Still, I apprehend that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction, said to have been made of the *proviso* in the 9th section; because it rejects, as wholly superfluous, and assigns no operation whatever, to the subsequent expressions, "If any grantee shall persist in his endeavours, &c." which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me to militate against the general spirit and words of the law, and distorts its great prominent features in the passages already cited, and for other reasons which I shall subjoin. I adhere to the third construction, and will now again consider the 9th section. It enacts, in the first instance, that, "No warrant, &c. Provided, &c.

"*Persist*" is the correlative of attempt or endeavour, and signifies "hold on," "persevere," &c. The beginning words of the section, restrict the settlement, "to be within two years *next after* the date of the warrant, by *clearing*, &c. and *by residing* for the space of five years, *next following* his first settling of the same, if he or she shall so long live;" and in default thereof, annexes a penalty of forfeiture, in a mode prescribed. But the *proviso* re-

1784. lieves against this penalty, if the grantee is prevented from making such settlement by force, &c. and shall *persist in his endeavours* to make *such* actual settlement as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the *proviso* declares, that *persisting*, &c. shall be equivalent to a continuation of the settlement.

To be more intelligible, I paraphrase the 9th section, thus:—Every warrant holder shall cause a settlement to be made on his lands within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture by a new warrant. Nevertheless, if he shall be interrupted, or obstructed, by external force, from doing these acts within the limited periods, and shall afterwards persevere in his efforts in a reasonable time, after the removal of such force, until those objects are accomplished, no advantage shall be taken of him, for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question proposed by the counsel of the *Holland* company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground the 11th of April, 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defence; and then fixes his residence as near the spot, as he can, consistently with his personal safety, does the warrantee lose all pretensions of equity? or, suppose he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the Indian hostilities; but is, at length, compelled to remove by a superior force; is all to go for nothing, and must he necessarily begin again? I answer to both queries in the negative; by no means. The *proviso* supplies the chasm of successive years of residence; for every day and week he resides on the soil, he is intitled to credit in his account with the commonwealth: but, upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement. Although a charity cannot take place according to the letter, yet it ought to be performed *cy-pres*, and the substance pursued. 2 Vern. 266. 2 Fonbl. 221

It has been objected, that such a contract with the state, is unreasonable and hard on the landholders, and ought not to be insisted upon. It will be said in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences. The only question is, whether the interpretation of it be correct or not.

7th. A due conformity to the provisions of the act, is equally exacted of those who found their preference to lands on their personal labour, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of land holders, as to actual settlement and residence; than that the claims of the former, must be limited to a single plantation, and the labour be exerted by them, or under their direction; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. *Addison*, 340-341.

It is admitted, on all sides, that the terms of actual settlement and residence, are, in the first place, precedent conditions, to the vesting of absolute estates in these lands; and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in the case of warrant holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controlled by imperious circumstances, was the great criterion, which marked the preference in such cases; and I have seen no reason to alter my opinion.

8th. Lastly, it is obvious from the preamble, and section 2, that the settlement of the country, as well as the sale of the lands, was meditated by this law; the latter, however, appears to be a secondary object with the legislature. The peopling of the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute in delivering my opinion, it remains for me to say a few words, respecting these persons who have taken possession of part of these lands, supposing the warrants to be *dead*, according to the *cant word* of the day, and who, though not parties to the suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the common-

wealth, in a method prescribed by law. Innumerable mischiefs, and endless confusion, would ensue, from individuals taking upon themselves to judge when warrants and surveys cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in *Morris's* lessee, v. *Neighman and Sheiner*: "If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing, that no person should take advantage of their own wrong, and that it does not lie in the mouths of men, like those we are speaking of, to say the warrants are *dead*; we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act." On the whole, I am of opinion, that the rule should be discharged.

Smith, J. I have had a full opportunity of considering the opinion delivered by my brother *Yeates*; and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent.

Brackenridge, J. having been concerned for the *Holland* company, when at the bar, declined giving any opinion.

By the Court. Let the rule be discharged.

This decision, however, had no tendency to settle the controversy subsisting between the warrant holders and the settlers. Petitions were presented to the legislature by the settlers, requesting their interposition. These were encountered by memorials from the companies But on the 2d of April, 1802, an act was passed, entitled "An act to settle the controversies arising from contending claims to land, within that part of the territory of this commonwealth, north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek, (chap. 2277.)

The preamble recites at large the 9th section of the act of 3d of April, 1792, "That applications were making for new warrants, in cases, where in the opinion of the applicants, the original warrantees are barred from claiming title by their own default, in not complying with the conditions required in the said section, &c. with other recitals, which will appear in the case which follows.

The first section then directs the judges of the supreme court to meet together within three months from the 1st of April, and devise a form of action for trying and determining *certain proposed questions* relative to these disputed titles, and transmit the same to the governor, whose duty it was made, with the assistance of the Attorney-General, to carry the same into effect without delay. 1784.

Sect. 2, prescribed the manner in which the said questions were to be decided. And, sect 3 directed that the judges should devise and direct, in what manner, and under what circumstances, parties should be admitted to the suit, and what notice should be given respecting the same, &c. and that they should certify the verdict and judgment to the governor, previous to the meeting of the next legislature.

Sect. 4. And in order to prevent the confusion that would arise from issuing different warrants for the same land, and to prevent law suits in future respecting grants from the Land-Office under the act of 3d of April, 1792, the secretary of the Land Office was prohibited from granting any new warrant for land which he had reason to believe had been already taken up under a former warrant, but in all such cases he shall cause a duplicate copy of the application to be made, on which he shall write his name, with the day and year in which it was presented, and file the original in his office, and deliver the copy to the party applying. *Provided*, that on every application so to be made and filed, shall be certified, on the oath or affirmation of one disinterested witness, that the person making such application, or in whose behalf it is made, is in actual possession of the land applied for, and such certificate shall mention also the time when such possession was taken; and the application so filed, shall be intitled to the same force and effect, and the same priority in granting warrants to actual settlers, as though the warrants had been granted at the time when the applications were filed; and should the decision of the court and jury, at the trial aforesaid, be in favour of the claims of the actual settlers, the secretary of the Land-Office shall proceed to grant the warrants, upon the purchase money being paid, according to the priority of the applications filed in his office.

The *proposed questions* stated in the act, are as follow:

1st. "Are warrants heretofore granted under the act of 3d of April, 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the said act, at any time before the

1784. date of the said warrants respectively, or within two years after?"

2d. "Are the titles that have issued from the Land-Office, under the act aforesaid, whether by warrant or patent, good and effectual in law against this commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded upon the certificates of two justices of the peace, usually called prevention certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence, required by the said act, could not be complied with?"

The *Holland* company declined this special jurisdiction. In their reasons delivered to the judges, they said they could not approve of the terms of the preamble of the act, by which the legislature had undertaken to declare the meaning and construction of the original contract, (the very point in controversy;) nor could they admit the right or propriety of dictating a new, and perhaps, unconstitutional mode of settling a judicial question, without the assent of all the parties in interest.

The merits of the case, they say, evidently involve the following considerations; 1st. Whether the company have complied with the condition of the 9th section of the act of April, 1792? 2d. Whether the reasons assigned for a non compliance with the condition, bring their case within the *proviso?* 3d. Whether the *proviso* operates upon cases that are brought within its terms, to discharge the condition entirely, or only to enlarge the time for performing it? 4th. Whether the company have so persisted in their endeavours to perform the condition, as to be still within the benefit of the proviso? And, 5th. Whether the government, by prescribing the evidence, on which patents had actually issued, in cases brought within the *proviso,* could now take advantage of the forfeiture, for a supposed non compliance with the original condition?

But, in their opinion, the questions proposed by the legislature, excluded an investigation and decision, upon any other point than the following: 1st. Whether, if the *Holland* company have not performed the condition, on which the warrants originally issued, within two years, though the residence could not be completed till the expiration of five years, the state is barred from granting the same lands to other applicants? And 2d, whether patents having issued on the evidence of prevention certificates alone, they are not void, so as to authorize the state to sell the same land to other purchasers?

On the first of these points, they observed, that it had never been contended, that the *Holland* company had performed the condition within two years; but only, that the condition was discharged, or suspended, by the operation of the *proviso,* on the facts of their case; particularly the fact, that an *Indian* war existed for several years, beyond the term of two years specified in the act of Assembly. And, on the second point, it was sufficient to say, that although the prevention certificate was the evidence prescribed by the public officers, and ought, therefore, to be binding on the government, yet that even waiving that objection, the patentees would be deprived of their land, when other satisfactory, and legal evidence, was, and is in their power, to prove the circumstances which entitled them to patents.

They therefore declined becoming a party to the proposed suit, because a decision on the two abstract questions, would still leave untouched, and undecided, the great and essential part of the controversy.

The judges, having devised and published the form of a feigned issue, on a wager to try the two questions proposed in the act; having given public notice, that all parties, interested in the issue, would be heard at the trial; and having settled and prescribed the other necessary proceedings, the court met on the 25th of November, 1802. (The chief justice not attending,) at *Sunbury,* when a jury was impannelled, and sworn. No counsel appeared for the grantees. The case is reported in 4 Dallas, 237. By the name of "*Attorney-General* v. the *Grantees* under the act of April, 1792. On the 26th of November, *Yeates,* J. who presided, delivered the following charge to the jury.

That the decision of the court and jury, on the present feigned issue, should "settle the controversies arising from contending claims to lands north and west of the rivers *Ohio,* and *Allegheny,* and *Conewango creek,*" is an event devoutly to be wished for, by every good citizen. "It is indispensably necessary that the peace of that part of the state should be preserved, and complete justice done to all parties interested, as effectually as possible." (Preamble to Act of 1802.)

We have no hesitation in declaring, that we are not without our fears, that the good intentions of the legislature, expressed in the law under which we

now sit, will not be effected. We hope we shall be happy enough to acknowledge our mistake hereafter.

It is obvious, that the validity of the claims of the warrant holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of 3d of April, 1792, considered as a solemn contract between the commonwealth and each individual.

The circumstances attendant on each particular case, may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act.

The first question proposed to our consideration, is as follows; (see it before stated.)

It will be proper here to observe, that on the motion for a *mandamus*, to the late secretary of the Land-Office, at the instance of the *Holland* company; the members of the court, after *great* consideration of the subject, were divided in their opinions.

The *chief justice* seemed to be of opinion, that if the warrantee was "by force of arms of the enemies of the *United States*, prevented from making an actual settlement, as described in the act, or was driven therefrom, and should *persist* in his endeavours to make such actual settlement thereafter. "It would amount to a performance of the condition in law. Two of us thought, that in all events, except the death of the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant holder, &c." (reciting the 9th section,) to this opinion judge *Brackenridge* subscribes.

It would ill become us to say, which of these constructions is intitled to a preference. It is true, that in the preamble of the act of the 2d of April, 1802, it is expressed, that "it appears from the act aforesaid, (3d of April, 1792,) that the commonwealth regarded a full compliance with those conditions of settlement, improvement and residence, as an indispensable part of the purchase, or consideration of the land itself." But it is equally certain, that the true test of title to the lands in question must be resolved into the legitimate meaning of the act of 1792, extracted *ex visceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered in bank; yet, if a different interpretation of the law shall be made by courts of a competent jurisdiction in the *dernier resort*, I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question be, are titles under warrants, issued under the law of 3d of April, 1792, for lands north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the law, at any time before, or within two years after the dates of the respective warrants, *in time of profound peace, when they were not prevented from making such actual settlement by force of arms of the enemies of the United States*, or reasonable and well grounded fear of the enemies of the *United States*? The answer is ready in the language of the acts before us, and can admit of no hesitation. (Reciting the 9th section of the act of April, 1792, and the above cited part of the preamble of the act of 1802.)

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But if the true meaning of the question be, whether under *all* given, or supposed, circumstances of *peace* or *war*, of times of *perfect tranquillity*, or *imminent danger*, such warrants are not *ipso facto* void and dead in law, *we are* constrained to say, that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant taken out early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the lands applied for, by all the necessary preparation of provisions, implements of husbandry, labourers, cattle, &c. cannot, with any degree of personal safety, seat himself on the lands within two years after the date of the warrant, and by reason of the just terror of savage hostilities? Will not the *proviso* in the 9th section of the act of 3d of April, 1792, excuse the *temporary* non performance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no controul?

Or, suppose another warrant, depending, in point of description, on other leading warrants, which the district surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey until the two years were nearly expired, and the depredations of the *Indians* should intervene for the residue of the term; will not this, also

1784. suspend the operation of the forfeiture? Nothing can be clearer to *us*, than that the terms of the *proviso* embrace and aid such cases; and independent of the strong expressions made use of, *we* should require strong proof to satisfy our minds, that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.

It is said in the books, that conditions rendered impossible by the act of God, are void. Salk. 170. 2 Co. 79, b. Co. Lit 206, a. 290, b. 1 Roll. abr. 449, l. 50. 1 Fonbl. 199

But *conditions precedent* must be strictly performed to make the estate vest, and though become impossible, even by the act of God, the estate will not vest; *aliter* of *conditions subsequent*. 12 Mod. 183. Co. Lit. 218, a. 2 Vern. 339. 1 Chan. ca. 129, 138. Salk. 231, 1 Vern. 183. 4 Mod. 66. We desire to be understood to mean, that the "prevention by force of arms of the enemies of the United States," does not in *our* idea, absolutely dispense with, and annul the conditions of actual settlement, improvement, and residence, but that it *suspends* the forfeiture by protracting the limited periods. Still the conditions must be performed *cy-pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavours to make such actual settlement, improvement and residence, until the conditions are fairly and fully complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretence of being an actual settler, shall seat himself on lands, previously warranted and surveyed within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. Co. Lit. 206. Dougl. 661. 1 Roll's abr. 454, pl. 8. Godb. 76. 5 Vin. 246, pl 25.

We trust that we have said enough to convey our sentiments on the first point. Our answer to the question, proposed, is, that such warrants may, or may not, be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of *our* opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by, its own peculiar circumstances.

The second question for decision is, "Are the titles that have issued, &c.?" (as before stated.)

It was stated in evidence on the motion for a *mandamus*, and proved on this trial, that the Board of Property being desirous of settling a formal mode of certificate, on which patents might issue for lands *north* and *west*, &c. required the opinion of the Attorney-General thereon; and on due consideration, a form was afterwards adopted on the 21st of December, 1797, which was ordered to be published in the Pittsburg Gazette, and patents issued of course, on the prescribed form being complied with

The received opinion of the supreme Executive Magistrate, the Attorney-General, the Board of Property, and of a respectable part of the bar (whose sentiments on legal questions will always have great and deserved weight,) at that day, certainly was, that if a warrant holder was prevented by force of arms of the enemies of the United States, from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavours to make such settlement, that the condition was extinguished and gone. *Persisting in endeavours*, was construed to mean something; attempts, essays, &c.; but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some it was thought that the endeavours were only to be *commensurate as to the time* of making the actual settlement, and were tantamount, and should avail the parties "in the same manner as if the actual settlements had been made and continued."

The decisions of the court in *Morris's* lessee v. *Neighman* and others at Pittsburg, May, 1799, tended to make the former opinion questionable; and two of the justices of the supreme court, adopted a different doctrine, in their judgment between the Holland company and Tench Coxe.

In the argument in that case, it was insisted by the counsel for the plaintiffs, that the Board of Property, in their resolves, and the governor, by his patent, represented the commonwealth, *pro hac vice*; and that interests vested under them, which could not afterwards be defeated.

We cannot subscribe hereto. If the conditions of settlement, improvement, and residence, are indispensable at all events; they become so by an act of the different branches of the legislature. The governor who has a qualified negative in the passing of laws,

cannot *dispense* with their injunctions; and it cannot be said, that this case falls within the meaning of the 9th section of the second article of the constitution: "The governor shall have power to remit fines and forfeitures, and to grant reprieves and pardons, except in case of impeachment." It relates merely to penalties consequent on public offences. Nor can it be pretended that the Board of Property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the law of 1792, cannot with any degree of justice, be ascribed to the governor, or Board of Property for the time being. They considered themselves, in their different functions, virtually discharging their respective duties, in carrying the act into execution, according to the general received opinion of the day: they never intended to purge a forfeiture, if it had really accrued, nor to excuse the non-performance of a condition, if it had not been complied with; agreeably to the public will, expressed in a legislative contract.

The rule of law is thus laid down in England. A false, or partial suggestion by the grantee of the king, to the *king's prejudice*, whereby he is deceived, will make the grant of the king void. Hob. 229. Cro. El. 632. Yelv. 48 1 Co. 44 a. 51 b. 3 Leon 5. 2 Hawk. 398. 1 Black. 226. But where the words are the words of the king, and it appears *he has only mistaken the law, there he shall not be said to be so deceived* to the avoidance of the grant. *Per sir Samuel Eyre*, J. Ld Raym 50. 6 Co. 55 b. 56 b. *accord* But if any of the lands concerning which the question arises, became forfeited by the omission of certain acts enjoined on the warrant holders, they do not escheat to the governor for the time being, for his benefit, nor can he be prejudiced, as governor, by any grant thereof, they become vested in the whole body of the citizens, as the property of the commonwealth, subject to the disposition of the laws

We are decidedly of opinion that the patents, and the prevention certificates recited in the patents, are not conclusive evidence against this commonwealth, or any person claiming under the act of 3d of April, 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the land-officers. But we, also, think, that the circumstance of recital of such certificates, will not *ipso facto* avoid and nullify the patent, if the actual settlement, improvement and residence, pointed out by the law, can be established by other proof. 1784.

We must repeat on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2d Here we feel ourselves irresistibly impelled to mention a difficulty, which strikes our minds forcibly. Our reflections on the subject have led us to ask ourselves this question on our pillows. What would a wise, just, and independent chancellor decree on the last question? Executory contracts are the peculiar objects of chancery jurisdiction, and can be specifically enforced by chancery alone. Equity forms a part of our law, says the late chief justice, truly. 1 Dallas, 213.

If it had appeared to such a chancellor, by the pleadings, or other proofs, that the purchase-money had been fully paid to the government by the individual for a tract of land, under the law of 3d of April, 1792; that times of difficulty and danger had intervened, that sums of money had been expended to effect an actual settlement, improvement and residence, which had not been accomplished fully: that by means of an unintentional *mistake* on the part of the State officers, in granting him his patent, (the officers not led to that mistake by any species of fraud or deception on the part of the grantee,) he had been *led into an error, and lulled into a confidence*, that the conditions of the grant had been *legally* complied with, and, therefore, he had remitted in his endeavours therein; would not he think that under all these circumstances, thus combined, equity should interpose and mitigate the rigid law of forfeiture, by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the United States, and peace with the Indian nations, both which render an immediate settlement of the frontiers, in some measure, less necessary than heretofore?

But it is not submitted to us to draw the line of property to these lands, they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated. We are confined to the wager on the matters before us; and on both questions we have given you our dispassionate

1784. sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess, and feel, an ardent desire, that peace and tranquillity should be preserved, to the most remote inhabitants of this commonwealth.

The jury found a general verdict in favour of the Attorney-General, on the feigned issue; and judgment was rendered in these words. "Whereuppn it is considered by the court here, that the said Attorney-General do recover of the said grantees, his damages, costs and charges aforesaid, amounting in the whole to two hundred dollars and six cents, and the court accordingly render judgment thereon for the plaintiff, *subject to the proviso* in the 9th section of the act of assembly, passed the third day of April, 1792.

In the Lessee of *Thomas Buchanan* v. *Adam Meyer*, Westmoreland, November, 1803. before *Yeates and Smith*, justices. (MSS. Reports.)

Ejectment for 400 acres of land, in Buffaloe township Armstrong county, within the jurisdiction of Westmoreland county.

The plaintiff claimed under a warrant for lands across the Allegheny, dated 3d of February 1794. And a survey of 405 acres 112 perches made thereon, 19th of April 1795.

It appeared that no person was settled on the land at the time of the plaintiff's survey. On the 1st of June 1797, a surveyor was employed to trace the lines, but was threatened by defendant, that he would cripple him if he did not desist. He held a gun in his hand, which he cocked, and declared he would shoot any one who would attempt to settle on the lands in question. By these means several persons were intimidated from going on the lands to make a settlement.

It was charged by the court, that there having been no actual settlement anterior to the plaintiff's survey, the plaintiff's title must prevail, unless it has been avoided by his nonperformance of the conditions of settlement, and improvement. But who has prevented this performance? Who expects to derive a benefit from this improper conduct? The answer is, the defendant. If we count the period from which the settlement is to commence, from the 22d of December 1795. the ratification of the treaty at Fort Grenville, the defendant has, within the time allowed for making the settlement, obstructed the plaintiff or his agents, from complying with the law, and according to all our decisions, shall reap no advantage therefrom. If the case was even dubious, the defendant's lawless conduct should postpone him, on principles of general policy and safety. Verdict for the plaintiff, *instanter*.

And, in the Lessee of *Jones* v. *Anderson* and others, the same principle was held, and it was determined, That the adverse possession of an actual settler, within the time allowed to the warrantee to make his settlement, is *ipso facto* a *prevention*—And also, that the entry of an actual settler is not *congeable* on a supposed default, without a vacating warrant or application, which must be taken out before suit brought, otherwise, they cannot be admitted in evidence on the trial. In the supreme court, September term, 1808. (MSS. Reports.) The latter point was decided in the same way, by *Yeates*, J. in *Shippen's* lessee v. *Auchenbach*, at Beaver, September 1806. (MSS. Reports.)

No beneficial consequences were experienced from the proceedings at *Sunbury*, although certain principles were laid down by the court, no one particular title was settled. But every case would, of course, depend upon the facts and circumstances attending it. The object of the act was unfulfilled, law suits were not prevented; nor was the act itself considered in a favourable point of view It could have no operative, or binding force or effect. The *Holland* company being foreigners, had recourse to the courts of the *United States*, and from their ultimate decision there is no appeal. The subject has therefore become more embarrassed; and the great question arising out of the *proviso* in the 9th section of the act of April 1792, has been solemnly decided in the supreme court of the United States, adverse to the sentiments of the legislature and the decisions of our own courts. This work must exhibit every case, with all its features. It has no partial bearings. It is intended for the people, that they may be informed, not only of the existing laws which govern them, as the legislature has written them; but of judicial constructions upon them.

While these suits were depending in the circuit court of the *United States*, the legislature on the 3d of April 1804, passed an act, entitled "An act for ascertaining the right of this state to certain lands lying north and west of the rivers Ohio and Allegheny, and Conewango creek." (Chap. 2503.)

It enacts, "that applications of actual settlers under the act of 3d of April 1792 (*north &c.*) describing particularly the lands applied for, and filed

with the secretary of the Land-Office, vouching such other requisites as provided for by the act of 22d of September, 1794, (which will hereafter be noticed,) shall for two years from and after the passing of this act, entitle the applicant, his heirs and assigns, to all the privileges and benefits, that an original or vacating warrant would entitle them to, and on the trial of all suits brought, or to be brought between warrantees, and actual settlers, concerning lands situate as aforesaid, the actual settler shall be permitted to plead, and make proof of his improvement and residence, as fully, and with equal force and effect, as if such settler had obtained a vacating warrant; but nothing in this act contained shall be construed to impair any contract or agreement, nor to alter the legal or equitable claims of any person or persons to said lands, nor to release said lands from the conditions of settlement, residence, improvement, purchase money and interest, required by the aforesaid act of 3d of April, 1792, nor to the granting of lands heretofore reserved or appropriated by law. 1784.

Sect. 2. Empowers the governor to employ counsel to attend to the interests of the state, in suits commenced, or to be commenced, or which shall be ready for trial at the next April, or any succeeding term, in the circuit court of the United States &c.

The result of this is now to be stated.

In the circuit court, Pennsylvania district. April term, 1805

Huidekoper's lessee v. *Douglass*. 4 Dallas, 392.

Ejectment for a tract of land lying *north* and *west* &c. Plaintiff claimed under the *Holland* company, to whom a patent was issued, upon a warrant and survey. The defendant claimed as an actual settler, under the act of 3d of April, 1792; a great many ejectments were depending on the same facts and principles, and on the trial of another ejectment, at a former term, *Washington*, J. had delivered a charge to the Jury, coinciding, generally, with the construction given by the supreme court of *Pennsylvania*, to the act of April, 1792, from which *judge Peters* dissented. It was therefore determined to submit the questions, upon which the opinions of the judges were opposed, to the supreme court of the *United States*, under the provision made, in case of such a disagreement, by the act of Congress, of the 29th of April, 1802. The questions were accordingly stated, at the preceding October term, in the following form.

"1st. Whether under the act of the legislature of Pennsylvania, passed on the 3d day of April, 1792, entitled "An act for the sale of the vacant lands within this commonwealth" the grantee, by warrant, of a tract of land lying "north and west of the rivers Ohio and Allegheny and Conewango creek, who, by force of arms of the enemies of the *United States*, was prevented from settling and improving the said land, and from residing thereon, from the 10th day of April, 1793, the date of the said warrant, until the first day of January, 1796, but who, during the said period, persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee."

"2d. Whether a warrant for a tract of land, lying *north and west* &c. granted in the year 1793, under and by virtue of the said act of 3d of April, 1792, to a person, who by force of arms of the enemies of the *United States*, was prevented from settling and improving the said land, and from residing thereon, from the date of the said warrant, until the 1st of January, 1796, but who, during the said period, persisted in his endeavours to make such settlement, and residence, vests any, and if any, what title in, or to the said land, unless the said grantee shall, after the said prevention ceases, commence, and within the space of two years thereafter, clear, fence and cultivate, at least two acres for every hundred acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon, for the space of five years next following his first settling of the same, the said grantee being yet in full life."

"3d. Whether a grantee in such warrant as aforesaid, who has failed to make such settlement, as the enacting clause of the said ninth section requires, and who is not within the benefit of the *proviso*, has thereby forfeited his right and title to the said land, until the commonwealth has taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the said land in ejectment, against a person, who, at any time after the two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land, and has ever since been in possession of the same."

After argument, the opinion of the court was delivered by chief justice *Marshall*, in the following manner.

The questions which occurred in this case, in the circuit court of *Pennsylvania*, and on which the opinion of this court is required, grow out of the act passed

1784. by the legislature of that state, entitled "An act for the sale of the vacant lands within this commonwealth."

The 9th section of that act, on which the case principally depends, is in these words "(see it before cited at large.)"

The questions to be considered, relate particularly to the *proviso* of this section; but, to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described herein, shall vest in him.

Two classes of purchasers are contemplated

The one has already performed every condition of the sale, and is about to pay the consideration money; the other pays the consideration money in the first instance, and is, afterwards, to perform the conditions. They are both described in the same sentence, and from each, an actual settlement is required as indispensable to the completion of the title. In describing this actual settlement, it is declared that it shall be made, in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing, or causing a family to reside thereon for the space of five years next following his first settling of the same, if he or she shall so long live."

The manifest impossibility of completing a residence of five years within the space of two years, would lead to an opinion, that the part of the descriptions relative to residence, applied to those only who had performed the condition before the payment of the purchase money, and not to those who were to perform it afterwards. But there are subsequent parts of the act, which will not admit of this construction, and consequently, residence is a condition required from the person who settles under a warrant, as well as from one who intitles himself to a warrant by his settlement.

The law, requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is by changing the participle into the future tense of the verb, and instead of "and residing, or causing a family to reside thereon," reading, and *shall reside*, &c. The effect of this correction of language will be to destroy the repugnancy which exists in the act as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that, in the view of the legislature, the settlement and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words "such actual settlement and residence," which prove that residence is required from the warrantee, prove, also, that settlement and residence, are in contemplation of the law, distinct operations. In the nature of things, and from the usual import of the words, they are, also, distinct. To make a settlement, no more requires a residence of five, than a residence of five hundred years; and, of consequence, it it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms, settlement and residence, being understood, the court will proceed to consider the *proviso*.

That part of the act treats of an actual settler, under which term is intended as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee, who had made an actual settlement in performance of the conditions annexed to his purchase, and if "any grantee in any such original or succeeding warrant," who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced, are brought together in the same sentence, and terms are used appropriated to the situation of each, but not applicable to both. Thus, the idea of "an actual settler;" "prevented from making an actual settlement," and after "being driven therefrom," "persisting in his endeavours" to make it, would be absurd. To apply to each class of purchasers, all parts of the *proviso*, would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is to apply the provisions, distributively, to the discrip-

tion of persons to whom they are adapted, *reddendo singula singulis.* The proviso, then, would read thus, "*Provided*, that if any such actual settler, shall be driven from his settlement, by force of arms of the enemies of the *United States*, or any grantee, in any such original or succeeding warrant, shall by force of arms of the enemies of the *United States*, be prevented from making such actual settlement, and shall persist in his endeavours to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." The two cases are the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavours to make one.

It is perfectly clear, that in each case, the *proviso* substitutes something for the settlement to be made within two years, from the date of the warrant, and for the residence to continue five years, from the commencement of the settlement, both of which were required in the enacting clause. What is that something?

The *proviso* answers, that in case of "an actual settler," it is his being "driven from his settlement, by force of arms of the enemies of the *United States*;" and in case of his being a grantee of a warrant, not having settled, it is his "persisting in his endeavours to make such actual settlement." In neither case is residence, or persisting in his endeavours at residence, required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement, for in the same sentence they say, that the person who comes within the *proviso*, shall hold the land "as if the actual settlement had been made and continued."

It is contended on the part of the defendant, that as the time, during which persistance shall continue, is not prescribed, the person claiming the land, must persist until he shall have effected both his settlement and residence, as required by the enacting clause of the act; that is, that the *proviso* dispenses with the time, and only with the time, during which the condition is to be performed.

But the words are not only inapt for the expression of such an intent; they absolutely contradict it.

If the proviso be read so as to be intelligible, it requires nothing from the actual settler who has been driven from his settlement. He is not to persist in his endeavours at residence, or in other words, to continue his settlement, but is to hold the land. From the warrantee who has been prevented from making a settlement, no endeavours at residence are required. He is to "persist in his endeavours," not to make and to continue such actual settlement, but "to make such actual settlement as aforesaid." And if he does persist in those endeavours, he is to hold the land "as if the actual settlement had been made and continued." The construction of the defendant would make the legislature say, in substance, that if the warrantee shall persist in endeavouring to accomplish a particular object, until he does accomplish it, he should hold the land as if he had accomplished it. But independent of the improbability that the intention to dispense only with the time, in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used, which seem to restrict the time, during which a persistance in endeavours is required. The warrantee is to persist in his endeavours "to make such actual settlement as aforesaid." Now, "such actual settlement as aforesaid," is an actual settlement within two years from the date of the warrant, and as it could only be made within two years, a persistance in endeavouring to make it, could only continue for that time. 1784.

If after being prevented from making an actual settlement, and persisting in endeavours, those endeavours should be successful within the two years, after which the person should be driven off, it is asked what would be his situation?

The answer is a plain one. By persisting he has become an actual settler, and the part of the *proviso* which applies to actual settlers protects him.

If after the two years he should be driven off, he is still protected. The application of external violence dispenses with residence. The court feels itself bound to say so, because the *proviso* contains a substitute, which in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause; and of that substitute, residence forms no part.

In a great variety of forms, and with great strength, it has been argued, that the settlement of the country was the great object of the act; and that the construction of the plaintiff would defeat that object.

That the exclusive object of an act to give lands to settlers, would be the settlement of the country, will be admitted; but that an act to sell lands to set

1784. tlers must have for its exclusive object the settlement of the country, cannot be soreadily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far the two objects might be consulted, or how far the one yielded to the other, is only to be inferred from the words in which the legislative intention has been expressed. How far the legislature may have supposed the peopling of the district in question, to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shewn by their own language. At any rate, if the legislature has used words dispensing with residence, it is not for the court to say they could not intend it, unless there were concomitant expressions, which should explain those words, in a manner different from their ordinary import. There are other considerations in favour of the construction to which the court is inclined.

This is a contract; and although a State is a party, it ought to be construed according to those well established principles which regulate contracts generally.

The State is in the situation of a person, who holds forth to the world, the conditions, on which he is willing to sell his property.

If he should couch his propositions in such ambiguous terms that they might be understood differently: in consequence of which sales were to be made, and the purchase money paid, he would come with an ill grace into court to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity and fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

It being understood that the opinion of the court on the two first questions, has rendered a decision of the third unnecessary, no determination respecting it has been made.

It is directed that the following opinion be certified to the circuit court. 1st, That it is the opinion of this court, that under the act of the legislature of Pennsylvania passed 3d of April, 1792, entitled &c. the grantee, by a warrant, of a tract of land, lying north and west, &c. who by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the 10th day of April, 1793, the date of the said warrant, until the 1st of January, 1796, but who during the said period persisted in his endeavours to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee.

2d, That it is the opinion of this court, that a warrant for a tract of land lying north, &c. granted in the year 1793, under and by virtue of an act of the legislature of Pennsylvania, entitled "An act for the sale of the vacant lands within this commonwealth," to a person who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon from the date of the said warrant, until the 1st of January, 1796; but who, during the said period, persisted in his endeavours to make such settlement and residence, vests in such grantee, a fee simple in said land; although after the said prevention ceased, he did not commence, and, within the space of two years thereafter, clear, fence, and cultivate, at least two acres for every hundred acres contained in his survey for said land, and erect thereon a messuage for the habitation of man, and reside, or cause a family to reside thereon for the space of five years next following his first settling of the same, the said grantee being yet in full life.

Upon this opinion of the supreme court, the cause was again brought before the jury, and after the evidence was closed, and the arguments of counsel, *Washington*, J. delivered the following charge to the jury.

"When this cause was tried before, the counsel for the defendant insisted, that the plaintiff's title was built upon a contract, which he had not complied with, that he was to make a settlement, such as the enacting clause of the 9th section requires, unless prevented from doing so, by the enemies of the United States; in which latter case, he was, not only to prove a persistance in endeavours to make the settlement, during the period of the war; but was to go on to make it, after the prevention ceased. This question was so difficult, as to divide, not only this court, but the courts of this state. The question was adjourned to the supreme court, who have decided, that a warrantee, who from April, 1793, to the 1st of January, 1796, was prevented by the enemies of the United States, from making such settlement as the law required, but, who, during that period, persisted in his endeavours to make such settlement, is entitled to hold his land in fee simple, although after the preven-

tion ceased, he made no attempt to make such settlement. *This we must consider as the* LAW OF THE LAND *and govern our decision by it.*

The questions are,

1st, Was the Holland company, from April, 1793, to Jan'y 1, 1796, prevented from making their settlement? And,

2d, Did they persist in endeavours, during that period, to make it?

What is the legal meaning of prevention, and persistance in endeavours? Were they prevented, and did they persist, within this meaning? The first are questions of law, which the court are to decide; the latter are questions of fact, proper for your determination. What were they prevented from doing, in order to excuse them? The answer is, from clearing, fencing, and cultivating, two acres of land in every hundred acres contained in their warrant, from building a house thereon, fit for the habitation of man, and from residing, or causing a family to reside thereon. To what extent were their endeavours to go? The answer is, to effect these objects. It was not every slight, or temporary danger, which was to excuse them from making such settlement, but such as a prudent man ought to regard. The plaintiffs stipulated to settle as a society of husbandmen, not as a band of soldiers. They were not bound to effect every thing which might be expected from military men, whose profession is to meet, to combat, and to overcome danger. To such men it would be a poor excuse, to say, they were prevented by danger, from the performance of their duty. The husbandman flourishes in the less glorious, but not less honourable walks of life. So far from the legislature expecting, that they were to brave the dangers of a savage enemy, in order to effect their settlements, they are excused from making them, if such dangers exist. But they must persist in their endeavours to make them, that is, they are to persist if the danger is over, which prevented them from making them. For it would be a monstrous absurdity to say, that the danger, which, by preventing them from making the settlements, would excuse them, would not, at the same time, excuse them from endeavours to make them, so long as it existed. It would be a mockery to say, that I should be excused from putting my finger into the blaze of this candle, provided I would persevere in my endeavours to do it, because, by making the endeavours, I could do it, although the consequences would be such as I was excused from incurring. If then the company were prevented from making their settlements, by dangers from a public enemy, which no prudent man would, or ought to encounter, and if they made those endeavours, which the same man would have made to effect the object, they have fully complied with the proviso of the 9th section. 1784.

How, then, are the facts? That a public war between the United States, and the Indian tribes, subsisted from April, 1793, and previous to that period, until late in 1795, is not denied. And, though the great theatre of the war lay far to the north west of the land in dispute, yet it is clearly proved, that this country, during this period, was exposed to the repeated irruptions of the enemy, killing and plundering such of the whites as they met with, in situations where they could not defend themselves. What was the degree of danger produced by those hostile incursions, can only be estimated by the conduct of those who attempted to face it. We find them, sometimes working out in the day time, in the neighbourhood of the forts, and returning within their walls, at night, for protection; sometimes giving up the pursuit in despair, and retiring to the settled parts of the country; then returning to this country, and again abandoning it. We sometimes meet with a few men hardy enough to attempt the cultivation of their lands, as sociating implements of husbandry, with the instruments of war, the character of the husbandman, with that of a soldier; and yet I do not recollect any instance, with this enterprising, daring spirit, a single individual was able to make such a settlement as the law required. You have heard what exertions the Holland company made, you will consider what was the state of that country during the period in question, you will apply the principles laid down by the court, to the evidence in the cause, and then say, whether the title is with the plaintiff or not. Verdict for plaintiff.

But, notwithstanding this decision of the highest tribunal of our country, the controversy still subsists. It has not tended to assuage, but rather to irritate opposition; and the consequences can only be conjectured, unless the wisdom of the legislature should adopt some moderate, conciliatory system, which may draw together contending parties. An object indeed, most devoutly to be wished!

But independent of this great litigated question, it is of no small moment to ascertain precisely, what constitutes a *settlement*, under this law; and very great light is shed upon this

1784. point, in *Balfour's* lessee v. *Meade*, in the circuit court of the United States for the Pennsylvania district, reported in 4 Dallas, 363. The facts were these:

The plaintiff claimed four tracts of land, *north* and *west*, &c. for which he brought this ejectment. His title rested on settlement rights, surveys and warrants. In 1793, he was a surgeon in the army, in garrison at fort *Franklin*. He took some of the soldiers, went out, cut down a few trees, and built up five pens, or cabins, about 10 feet square, and, without putting covers on them, returned back to the fort in six or seven days. In April, 1795, he had these five tracts surveyed in the name of himself, *Elizabeth Balfour*, and three others, each 400 acres. The deputy-surveyor had, upon application of the plaintiff, directed one *Wilson* to make the surveys, but something preventing him from doing it, the plaintiff employed one *Steel* to do it, and upon returning the surveys to *Stokely*, the deputy-surveyor, he prevailed on him to write an authority to *Steel* to make the surveys, which he did, and antedated it, in order to make it appear to precede the surveys. In May, 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration money for all.

In autumn 1794, the defendant, finding no person settled upon these tracts, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again till November, 1795, when he came with his family to reside in one of the cabins, and fixed settlers upon the other tracts. In July, 1795, the plaintiff gave notice to the defendant, that he claimed the tracts in question, that he intended to settle them, and forewarned him to proceed no further with his improvements.

In January, 1796, the defendant *caveated* the plaintiff in form, and the same being tried before the board of property in March, 1800, the caveats were dismissed, and warrants were ordered to issue, but they never did issue, in consequence of doubts afterwards existing respecting the plaintiff's title.

In April, 1796, the plaintiff made engagements with some persons to settle these lands for him; but after they had seen and approved the lands, they declined going on them on hearing of the defendant's claim.

It was in proof by many witnesses, that the war with the *Indians* rendered it dangerous to settle that country, during the years, 1793, 1794, 1795, and that but few attempted before the spring or autumn of 1796.

Washington, justice, after recapitulating the different sections of the act of 1792, observed that the 8th section was intimately connected with the 3d section, and directed the deputy-surveyor to survey and mark the lines of the tract, upon the application of the *settler*; and that such survey had no other validity, than to furnish the particular description, which must accompany the application at the Land-Office for a warrant. That the 4th section, among other regulations, protected the title of an *actual settler*, against a warrant entered with the deputy-surveyor, posterior to such actual settlement.

That the 9th section of the act referred, *exclusively*, to the lands *north* and *west* of the *Ohio* &c. he then recited the 9th section at large, stopping at the *proviso*, (see the section before,) and proceed thus;

Let us now consider this case as if the law had stopped here; a title to the land in controversy, lying *north* and *west* &c. could be acquired in no other manner, than by *actual settlement*, no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or, if not so preceded by actual settlement, the warrant would give no title, unless it were followed by such settlement within two years thereafter.

The question then is, what constitutes such actual settler, within the meaning and intention of this law, as will vest in him an inceptive title so as to authorize the granting to him a warrant; not a *pedis positio*, not the erection of a cabin, the clearing, or even the cultivation, of a field. These acts may deserve the name of *improvements*, but not *settlements*, there must be an occupancy, accompanied with a *bona fide* intention to reside, and live upon the land, either in person, or by that of his tenant, to make it the place of his habitation, not at some distant, day, but at the time, he is improving; for if this intention be only future, either as to his own personal residence, or that of a tenant, then the execution of that intention, by such actual residence, fixes the date; the commencement of the settlement; and the previous improvements will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them may afford evidence of the *quo animo* with which it was done; of the intention to settle; but neither, nor all, will constitute a settlement, if unaccompanied by resi-

dence. Suppose, then, improvements made, the person making them declaring at the time, that they were intended for temporary purposes of convenience, and not with a view to settle and reside; could this be called an actual settlement within the meaning and intention of the legislature? Surely no; but though such acts, against express declarations of the *quo animo*, will not make a settlement, it does not follow that the converse of the proposition will; for, a declaration of an intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement. 1784.

How do these principles apply to the case of the plaintiff? In 1793, he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five *pens* (for, not being covered, they do not deserve the name of cabins,) and in five, six or seven days, having accomplished this work, he returns into the fort, his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing these labours, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins and from inhabiting them? Except the state of general hostility, which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was to erect what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and, consequently, could not have been intended for a present settlement. He was, besides, an officer in the army; and, whilst in that service, he could not settle and reside at his cabin, although the country had been in a perfect state of tranquillity. In short, his whole conduct, both at that time and afterwards; his own statements when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistible that he did not mean, in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right in those lands. It is not pretended even now, nor is it proved by a single witness who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down, for a moment, on land encompassed by danger from a savage enemy? I answer, no: at such a time it was very improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would, also, deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement was in the spring of 1796, long after the actual *bona fide* settlement of the defendant with his family; for I give no credit to the notice from the plaintiff to the defendant in July, 1795, since so far from accompanying it with actual settlement, he speaks of a future settlement, which, however, was never carried into execution. Every thing which I have said with respect to the 400 acres surveyed in the name of *George Balfour*, will apply a *fortiori* against the three other surveys in the name of *Elizabeth Balfour*, &c. who, it it is not pretended, were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law, then, had stopped at the *proviso*, it is clear that the plaintiff never made such a settlement as would intitle him to a warrant. But he excuses himself from having made *such a settlement*, as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the *proviso* to the 9th section of the law, which declares, &c. (see it before.)

Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlements would have been exposed. We know that the treaty at fort *Grenville* was signed on the third of *August*, 1795, and ratified the 22d of *December*, in the same year. Although *Meade* settled with his family in *November* 1795, it is not conclusive proof that there was no danger even then; and, at any rate, it would require some little time and preparation, for those who had been driven off, to return to their settlements; and if the cause turned upon the question, whether the plaintiff had persevered in his exertions to return and make such settlement, as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff to intitle himself to the benefit of the *proviso*, should have had an incipient title at some time or other, and this could

1784. only have been created by actual settlement, preceding the necessity, which obliges him to seek the benefit of the *proviso*, or by warrant.

I do not mean to say, that he must have had such an actual settlement, as this section requires to give a perfect title; for, if he had built a cabin, and commenced his improvement in such manner, as to afford evidence of a *bona fide* intention to reside, and had been forced off by the enemy, at any stage of his labours, persevering, at all proper times afterwards, in endeavours to return, when he might safely do so, he would have been saved by the *proviso*, which was made for his benefit; this he has not done.

Decisions in the supreme court, and in the common pleas, of this state have been cited at the bar, two of which I shall notice for the purpose of pointing out the peculiar mark, which distinguishes them from the present, and to prevent any conclusions from being drawn from what has been said, either to countenance, or impeach, those decisions. The cases I allude to, are, the *Holland* company v. *Coxe*, and the feigned issue tried at Sunbury.

The incipient title, under which the plaintiffs claimed in those cases, were *warrants*, authorized by the 3d section of the law. The incipient title in the present case, is *settlement*. The former was to be completed by settlement, survey and patent. This was to precede the warrant; and for the more distinct explanation of this distinction, it will be important to ascertain what acts will constitute an actual settler to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained who may be an actual settler to demand a warrant, namely, one who has gone upon, and occupied land, with a *bona fide* intention of an actual present residence, although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But actual settlement, intended by the 9th section, consists in clearing, fencing and cultivating, two acres of ground at least, on each one hundred acres, erecting a house thereon, fit for the habitation of man, and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of *improvements*, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the *proviso*, which declares, that "if such *actual settler* shall be prevented from making such *actual settlement*, &c." The plain meaning is, that if a person has once occupied land, with an intention of residing, although he has neither cleared nor fenced any land, and is forced off by the enemies of the *United States*, before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity, which prevented his doing what the law required, and in the manner required; or, if the warrant holder, who, likewise, has an *incipient title*, although he never put his foot upon the land, shall be prevented by the same cause, from making these improvements, &c. he, too, shall be *excused*, if, as is required, also, of the settler, he has persevered in his endeavours to make those improvements, &c.

But what it becomes such a grantee to do, before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys, 1st. Because they are a mere description of the land, which the surveyor is authorized by the 8th section to make, and the applicant for the warrant is directed by the third section, to lodge in the Land-Office, at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and gives notice of the bounds thereof, that others may be able to make adjoining locations, without danger of interference: that is not such a survey as is returnable, so as to lay the foundation of a patent. 2d. It is not authorized by a warrant? 3d. It was not for an actual settlement. 4th. It was not made by an authorized surveyor, if you believe, upon the evidence, that the authority to *Steel* was antedated, and given after the survey was returned. Not the warrant. 1st. Because it was not a warrant of title, but of acceptance. 2d. It is not founded on *settlement*, but *improvement*, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal, valid consequence.

As to the *caveat*; the effect of it was to close the doors of the Land-Office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door; but still the question as to title is open for examination in ejectment; if brought within six months, and the patent will issue to the successful party

The plaintiff, therefore, having failed to shew a title sufficient to enable him

to recover in this action, it is unnecessary to say any thing about the defendant's title; and your verdict ought to be for the defendant. Verdict for defendant, accordingly.

See *Addison's* reports, 335, to 342.

In the case of *Alexander Wright* v. *Brice M'Gehan*, at *Allegheny*, November, 1801, (MSS. Reports.) Action of covenant

The action was brought on an article of agreement dated 8th of March, 1796, whereby the plaintiff had sold all his right and claim to an improvement of 400 acres north and west of the river *Ohio*, adjoining &c. in consideration of $ 125, payable on 1st of May, 1796, and the like sum in one year thereafter: but if the population land company should hold these lands by their warrants, then the consideration money to be returned to the defendant, without interest.

The defendant had paid nò part of the consideration money. To shew that the money was not recoverable, he produced a warrant dated 14th of April, 1792, to *Michael Shubert* for 400 acres north and west of *Ohio*, adjoining land granted to Marshal Spring; and a survey of 400 acres made thereon, on the 13th of March, 1795, by *John Power*, D. S. The leading warrant had issued in the name of *Matthew M'Connell* for 400 acres extending along big Beaver creek, near the falls thereof, and was entered in the books of James Carothers, then deputy surveyor of the district on the 10th of June 1793. *Shubert's* warrant was entered on the same day, and ninety-one warrants intervened between them.

The plaintiff *about* the time of the survey made for *Shubert*, (or one or two days *before* it, as it probably appeared from circumstances, though the particular day was not shown by direct testimony,) erected a cabin about fourteen feet square on the land, covered it in, but without chimney or door in it; and sold his improvement to defendant: but no one had then lived on the land, or cultivated any part of it.

For defendant it was insistcd that the plaintiff had no title to the lands sold, under his fancied improvement: and that want of title, without eviction was a good defence in an action for the price of the land sold. *Addison*, 128.

For the plaintiff it was urged, that under the law of 3d of April, 1792, it was enacted, that applications should contain a *particular description* of the lands applied for, (§3.) and it is provided by the act of 22d of April, 1794, that no warrants except those wherein the land is particularly described, shall in any manner affect the title of the claim of any person having made an *actual improvement*, before such warrant is entered and surveyed in the deputy surveyor's books (§ 2.) and the act of 22d of September, 1794, has the same proviso in favour of improvers, (§ 2.) Here it may fairly be inferred that the house was built before the survey was made for the population company, which was the inception of an actual improvement under the law of April, 1794. It could not be contended that *Shubert's* warrant was descriptive of any particular ground: it depended on the location of ninety-two other warrants, and necessarily must shift its situation, according to the surveys made on the prior warrants. If such warrants must be postponed to improvements, then the title of the plaintiff was preferable to that of the population company: but if the house erected, should be thought not to merit the appellation of an improvement, still the plaintiff is intitled to recover the value of the house. The defendant, after contracting for the land, received the possession, and then purchased of the population company.

By the *Court*, (*Yeates* and *Smith*:) The meaning of the agreement appears clearly on the face of it. If the title of the population company was better than the plaintiffs, the latter was bound to return the consideration, if he had received it: but if the plaintiff had no title, the defendant was not bound to pay. The warrant being indescriptive, would give way to a *bona fide* settlement and improvement, if made previous to the survey, under the *proviso* in the act of 22d of April, 1794, but not to a land-jobbing cabin made without an intention of residence. The improvement meant in this law, can be no other than that described in the act of December 30th, 1786, and this fully appears by the act of 22d of September, 1794. On this point the court expressed the grounds of their opinion fully in *Meade's* lessee v. *Haymaker*.

But it is said, the plaintiff should be allowed for his cabin. Why so? No such provision was made in the article, if the title of the population company was preferable. The effect of a recovery by that company against the defendant, would be, that the judgment would be conclusive evidence against the now plaintiff. At present, the point of title is open for investigation by the present jury: and the court are clearly of opinion, that the want of title in the plaintiff is a good defence in the present suit, though there has been no eviction. Verdict for the defendant.

1784. In the Lessee of *William Clemmins* v. *Philip Gottshall*, and *Robert Johnston*, at *Venango*, October, 1806, in the circuit court, before *Yeates*, J. The case was this:

Ejectment for 400 acres and 131 perches of land in Sugar creek township. It appeared in evidence, that *David Meade*, *William Johnston*, the plaintiff, *William Clemmins* and *Robert Johnston*, entered into a written agreement at *Cussewago*, on the 26th of December, 1794, whereby it was stipulated, that *Meade* should discover unappropriated lands, and make surveys thereon; the other parties were to find all the hands, and provisions for chain carriers, and blazers, and to build good cabins at least 12 feet square, on each tract; and *Meade* was to have one third of the tracts, and the other parties the remainder, to be ascertained by ballot, or lottery; *Meade* to receive twenty shillings for surveying two thirds of the land, for each tract.

In pursuance thereof, in January, 1795, 13 tracts of land were discovered and surveyed, and a cabin was built on the lands in dispute, which served as a place of *rendezvous*. The allotment of the different tracts was made by mutual consent before the several improvements were completed; and the premises in question, with two adjoining tracts, were assigned to *Clemmins*, by the particular desire of the two *Johnston's*. They proceeded to erect their cabins in the spring following, but they deserted their lands and separated, on hearing of the murder of two of the inhabitants by the Indians in June, 1795, at the mouth of little *Conewaut* creek. In the close of the same summer, *Clemmins* came out with another person, and did some work on the two adjoining tracts, but none on that in controversy, and returned in the fall to *Westmoreland* county. In 1795, he sold his interest in the three tracts to one *Patterson*, for 300 dollars. Some of the witnesses testified, that he acknowledged to them to have received part of the purchase money, and obligations for the remainder. *Clemmins* married in April, 1796, and during that spring, came out with *Patterson*, and gave him possession. The latter resided and worked on the tract about three months, when he left it much embarrassed, and never returned, the land lying vacant. During this spring, *Clemmins* improperly obtained the possession of a tract of land above *Meadville*, claimed by one *Magoffin*; but an ejectment having been commenced against him, he quitted the same, and sold to *John Davis*. He afterwards stopped at the improvement of *Richard Vansickel*, known by the name of *Wentworth's* tract, and seized on the possession of it, as vacant; but his goods were thrown out of the cabin. In August, or September, 1796, he passed through *Meadville* with his wife, and two loaded horses, and took possession of the lands in dispute. They again went back to *Meadville* with their horses, and returned to the cabin with other loads. They had their provisions, blankets, and household articles about them, and continued in the cabin a few days, and then returned to Westmoreland county, being in want of fodder for their cattle. The wife also was pregnant, and alleged she could not obtain the necessary assistance in the unsettled state of the country; but he declared his determination to return to the lands. He put a lock on the door of his cabin, and left a number of his household articles therein. In March, or April, 1797, the cabin was consumed by fire, either by accident, or design, and Johnston, one of the defendant's, was then seen employed in cutting house logs near thereto. In June following, *Clemmins* being under an engagement to reap grain seven miles from *Greensburgh*, sent out his wife, and infant child with her father, to take possession of the lands in question. She carried with her a horse loaded with provisions, and bed clothes, and family necessaries, with money to purchase more. She came to the land, and required the possession thereof, but the same was refused to her by *Robert Johnston*, who alleged, she had no house there. She then went with her father to *Meadville*, where she was afterwards joined by her husband. He likewise demanded possession of the premises from *Robert Johnston*, but was denied the same by him. The latter continued in possession for some years, until he sold to *Thomas Russel*, with a covenant to make him a good title. *Russel* afterwards sold to *Gottshall*. *Clemmins* became greatly indebted, and was obliged to leave the country for some time. The present ejectment was brought to June term, 1806, at which time, a house, one end of a barn and spring house were built, and 18 acres of land cleared.

In the course of the trial, a survey was offered in evidence on the part of the plaintiff, made for him on the 11th of February, 1806, by *Samuel Dale*, the deputy-surveyor of the district, under his actual settlement. This was objected to, as the 8th section of the act of 3d of April, 1792, authorizes surveys, in the case of settlers *actually* in possession of the lands at the time of application to the deputy-surveyor

The plaintiff should have applied for an order of the Board of Property, whereon to found his survey.

To this it was answered, that if this construction of the law was correct, no person defrauded of his possession as an actual settler, before he had obtained a survey, could ever receive redress. It is well known, that unless a *caveat* be filed, the Board of Property will not grant an order of survey, in the case of settlements. But the language of the act is in the *past* tense. "The deputy surveyor of the proper district, shall, upon the application of any person who *has* made an actual settlement and improvement, &c. survey and mark out the lines of the tract, &c." Ejectment is a possessory action, and this court has determined, that an official survey must precede the recovery by an actual their settler.

By the Court. The survey must be read in evidence. Whether there was such an actual settlement by the lessor of the plaintiff as would authorize the survey, under all the circumstances of the case, must, in the sequel of the cause come before the court and jury for decision.

After argument by the counsel on both sides, *Yeates*, J observed, that the case presented three several questions for decision: 1st. Whether the lessor of the plaintiff could be considered at any time, as an actual settler? 2dly, Whether he had forfeited such claim? 3dly, Had he been guilty of *laches* in not bringing this suit earlier?

The opinions entertained in the country after the passing of the act of the 3d of April, 1792, as to improvement cabins, were highly erroneous. The great object of the law was to encourage the settlement of the country, and the cultivation of the soil by the hardy sturdy yeomanry. Preference was given to persons who were willing and desirous to settle and improve the lands, north and west of the *Ohio* and *Allegheny;* but it was indispensibly necessary, that they should unite both characters. Hence it results, that the cabins built on the thirteen tracts gave no efficient pre-emption right to the lands thereby intended to be secured, but operated as *scare-crows* to keep off others, who entertained the delusive popular ideas of fancied improvements. A settlement, in its nature, possesses characteristic features of improvement; but the converse of the proposition is not true.

The 9th section of the act of 3d of April, 1792, prescribes the duration of the settlement, the extent of the improvement, and the period within which it shall be made; but it does not define what a settlement is. For this definition, we must recur to the act of December 30th, 1786, which declares, "that by a settlement shall be understood, an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war." It corresponds with the correct idea of what was called an *improvement* before the American Revolution. The *animus residendi* in the first instance, and the *animus revertendi* in the case of evacuating the possession for a temporary purpose, were deemed the essence of a *bona fide* improvement. The girdling of a few trees, or mauling of rails, without unequivocal intentions of residence, and return to the premises, to make it a place of permanent abode, were not dignified with that character. But a man who had erected his cabin, sowed the land, inclosed a field, or made any other preparations, which clearly evinced a full determination to make the place his home, and immediate settlement, might with safety leave the land in order to bring out his family, or to perform other acts of duty or charity; and provided he returned within a reasonable time, his possession was secured to him. If he stayed away an unreasonable time, he would be presumed to have *abandoned* his original intention of settlement; but this, like other presumptions, might be repelled by proof. It would be incumbent on him to account for his long absence in a satisfactory manner. Sickness, or other inevitable accident, on such occasions, have always been considered as sufficient excuses for such delay in returning. 1784.

Patterson appears to have been the first actual settler on the lands in question, he resided and worked on the land near three months: but he abandoned the tract and never returned. In the language of the act of December, 1786, his settlement was not *continued from time to time.*

Clemmins, the lessor of the plaintiff, succeeded to the vacant possession. But to him it has been objected, that he had sold the tract, and received, at least a part of the consideration: and further, that he was pursuing other objects of speculation, in possessing himself of *Magoffin's* and *Wentworth's* tracts, above and below *Meadville.* To this, it is fairly answered, that the claim of *Patterson* was wholly forfeited by his abandonment, and that he, nor any other on

1784. his behalf, never returned to the land. In consequence thereof, any person desirous of settling and improving, might lawfully enter on the possession; and the former possessor being indebted to him for the premises, was a strong equitable circumstance in his favour. No impropriety of conduct as to the two tracts of land about *Meadville*, can invalidate his pretensions to the lands in question. *Subsequent* to these transactions, he resumed the possession of this tract, with his wife, and had no other home. Every thing he possessed in the world was contained within the logs of his cabin. I abominate the practice which has prevailed in this new country, of slipping into the possession of others, who in many instances, have been necessitated to quit their settlements for temporary purposes; and have frequently, during the present circuit, expressed my decided sentiments on that subject. It is absurd in the extreme, to suppose that the legislature, who enacted the law of 3d of April, 1792, ever intended to confine actual settlers within the lines of their 400 acres, as if they were inclosed by the four walls of a prison!

To the jury it belongs to decide, whether, when *Clemmins* took possession of this tract in August or September, 1796, he did not shew "a manifest intention of making it a place of abode, and the means of supporting a family." If they shall be of opinion, from a careful review of all the circumstances, that such was the bent, or settled purpose of his mind at the time, then he must be considered as possessing the incipient right of an actual settler. It is the intention unequivocally shewn, not the extent of the improvement, which stamps the reality of an actual settlement, in the first instance.

If the jury shall determine in favour of the plaintiff upon the first point, they must then decide, whether the claim has been forfeited. They will judge of the ground of his discontinuing the possession in the fall; the want of fodder for his cattle, and the fears of his wife in her pregnancy, on account of the thinness of the settlement; they will also determine whether he absented himself an unreasonable time. *Clemmins* expressed his intentions of returning to different persons, at various times. He left most of his property in the cabin; and he placed a lock on the door. His cabin was burnt early in the spring of 1797, which might have come to his knowledge: when his wife, with her father, demanded possession in June following, her child was but two months old; and he frequently afterwards repeated his demand on *Robert Johnston* before he instituted his ejectment. The presumed abandonment is negatived by all his acts; but the period of his absence for nine months constitutes the chief objection against him. The case seems contradistinguished as between the present parties from common instances of dereliction. Is it consistent with justice, after the agreement of December, 1794, under which the premises were assigned to *Clemmins*, at the instance of *Robert Johnston* and his brother, that the said *Robert* should infer an abandonment of the land without the most cogent proof? This agreement forms a strong part of the plaintiff's case.

Yet if the plaintiff has been guilty of *laches*, whereby innocent persons have been injured, he ought to be postponed. If valuable improvements have been made upon the land, through ignorance of his claim, and monies paid by purchasers for which they have no redress, the poverty of *Clemmins* will not avail him, for not having brought this suit for ten years. But here the claim was fully known to *Robert Johnston*, one of the original parties to the agreement: he made the chief improvements on the land, and is responsible for the goodness of the title. Nor has it appeard in evidence, that either *Russell*, or *Gottshall*, have paid any part of the consideration money. The objection on the ground of *laches* does not seem to hold in the present instance against the plaintiff's recovery.

The jury found a verdict for the plaintiff. (MSS. Reports.)

It was held in the Lessee of *M'Glaughlin* v. *Mayberry*, in the supreme court, September term, 1808. That one cannot be an actual settler on two tracts of land; but that his children, if of sufficient age to reside on and cultivate the land, may be actual settlers. It was also held in that case, that indulgence will be given to a settler, who quits his residence for a temporary purpose, with intention of returning to it; and that the title of a settler does not depend on the extent of his improvement, but on the *animo residendi*, and the possession continued. (MSS. Reports.)

So, in the case of *Wright* v. *Small*, in error, supreme court, September, 1809. (MSS. Reports.) It was held, that warrants under the act of 3d of April, 1792, should contain a special description of the lands; a special entry in the books of the deputy-surveyor, cannot supply the defect thereof; nor is any one bound to take notice of such entry. And, if an improvement is begun with an intent to make an immedi-

ate settlement, and prosecuted with due diligence till a settlement is completed, the title will relate to the first improvement. If delay takes place in the settlement, it lies on the improver to account for it in a reasonable manner.

And, in *Cosby* v. *Brown*, (in error,) it was held, that when an actual settler, who has made some improvements, has been deterred by the violence of a younger settler from completing his settlement, and has for several years neglected to take steps for the recovery of his possession, it is fact for the jury to decide, whether he has not relinquished his settlement. He does not stand in the situation of a person having a legal title, who may bring an ejectment at any time within twenty-one years.

The case was this. The plaintiff claimed the land as an actual settler. He commenced his settlement in the year 1797, erected a small house, cleared a piece of land, sowed an acre and an half of rye, fenced the ground, and went away in the autumn, with an intention to return in the spring, and complete his settlement. In the spring of 1798, he did return; but one *James Cosby*, under whom the defendant entered, had in the mean time taken possession of the cabin, and by the menace of violence, prevented *Brown* from continuing his improvement. Brown left the land, saying that he would not contend with force, but would resort to the law. He returned to *Mifflin* county, his former place of residence, and until the 15th of March, 1805, when the present action was commenced, he took no measures to recover his possession. The *Cosbys* remained constantly on the land from 1798, and made several improvements.

Tilghman, C. J. delivered the opinion of the court.—There is no doubt but the plaintiff commenced a settlement in 1797, and returned to it in the spring of 1798, with a view of completing it. His right was *prior* to the defendant's; and if he had commenced an action soon after being prevented by the defendant, he must have recovered against him. But, although he might have recovered if he had brought suit in a reasonable time, it does not follow that he may recover after a lapse of seven years. The law with respect to actual settlers was laid down by this court, explicitly in the case of *Porter* and *Wright*, plaintiffs in error, v. The Lessee of *Small*, defendant in error. If the settlement once commenced, is not continued without interruption, it lies upon the settler to account for it by some reasonable cause. A liberal allowance is made for a man who has evinced a *bona fide* intention to settle. Danger from an enemy, the death or sickness of the party or his family, the difficulty of procuring provisions, and a variety of other circumstances, are to be taken into consideration. But it must always be remembered, that the title is *imperfect*, till completed by improvement and residence of five years, and that though fairly and legally begun, it may at any time be relinquished. It is no uncommon thing for differences, and even force to take place between settlers on the same tract; but although the prior settler may be in the first instance ill used, and driven off by force, he may not always chuse to pursue his settlement. As long as he is prevented by the apprehension of violence, he stands excused from prosecuting his improvement. And even if he brings no suit, it is possible he may fairly account for it. But I cannot assent to the broad proposition contended for, that a man who is once prevented by violence may retire from the land, and recover in ejectment at any time within twenty-one years Such unreasonable delay may take place, as would justify the younger settler, who had made use of force, in thinking that his adversary had relinquished all idea of settlement; and in that case the law will not suffer the labour and expenses of years to be swept away. The title of a settler under our act of assembly, is of a special nature. Until completed by improvement and residence, it is not to be compared to the case of a person possessed of a perfect legal estate, whose right of entry is not barred by less than twenty-one years of adverse possession. We have been accustomed to leave it to the jury to decide, under the circumstances of each particular case, whether the settler has followed up the commencement of his settlement with reasonable diligence. In the case before us, the court below took it for granted, that the plaintiff was at all events entitled to recover, if he was hindered by the defendant from prosecuting his settlement in the year 1798. In this I think they erred; for it should have been left to the jury to decide, whether under the facts given in evidence, the plaintiff might not fairly be presumed to have relinquished his settlement.

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It has been determined in the circuit court, that a settler cannot support an ejectment without a survey.—Judgment reversed, and *venire de novo* awarded. 2 Binney, 124.

During the progress of this note, two very important acts have passed relative to the lands north and west of the

1784. rivers *Ohio* and *Allegheny* and *Conewango* creek, with which the view of this great controversy will be closed.

The first is entitled "An act to encourage the warranting and patenting of lands north and west of the rivers *Ohio* and *Allegheny* and *Conewango* creek," passed the 1st of March, 1811.

By this act, the secretary of the Land-Office is authorized to issue warrants and patents to all actual settlers, residing north and west of the rivers *Ohio* and *Allegheny* and *Conewango* creek, who have complied with the acts of 1792 and 1794, who may apply within two years after the passing of this act, with such documents as are now required by law to obtain warrants and patents in that part of the state, also a certificate of the deputy-surveyor of the proper district, certifying, that to the best of his knowledge and belief, the lands contained in said survey have not been claimed by any other person, by warrant, or otherwise, and on payment of the usual fees of office, such persons shall receive their warrants and patents, upon executing a mortgage to the governor, for the use of the commonwealth, to secure the payment of the purchase money and interest due, in ten equal annual instalments, and all mortgages executed, in pursuance of this act, shall be for the purchase money and interest only, and shall be filed in the office of the secretary of the Land-Office, and shall be available in law without the recording thereof. And it shall be the duty of the secretary of the Land-Office, before he shall deliver any such patent to be enrolled, to endorse thereon that a mortgage is executed to secure the said payments, specifying the ampunt thereof. *Provided*, that any person who has, or hereafter may, execute a mortgage to secure the payment of the purchase money on lands for the use of the commonwealth, shall not thereby be deprived of the privilege of a freeholder; and such person may pay the whole amount due at any time within the ten years, and the land may be mortgaged by agent or attorney, duly constituted. But no warrant or patent so issued, to any actual settler, shall prejudice, or in any wise affect, or impair the right, interest, or claim, of any person or persons whomsoever in any of the said lands.

§ 2. All surveys made, or hereafter to be made, agreeably to the 8th section of the act of the 3d of April, 1792, and entered in the survey-book of the proper deputy-surveyor, shall be returned into the Surveyor-General's office, by the deputy, at any time after passing this act, on application made to him; and the Surveyor-General shall file the same in his office, after which the lands so surveyed and returned, need not be again surveyed, but the secretary of the Land-Office shall issue warrants of acceptance for the same to the person applying to take his title, agreeably to the provisions of the first section of this act.

§ 3. At any time after passing this act, on the application of any of the settlers who may have filed their applications in the Land-Office, the secretary shall issue a certificate to the state treasurer, authorizing him to receive any sum or sums of money, not less than ten dollars, and upon the receipt being returned to the Land-Office, it shall be entered to the credit of the applicant, although he may not have executed a mortgage so as to entitle him to a warrant or patent.

The second is entitled "An act providing for the settlement of certain disputed titles to lands north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek," passed 20th of March, 1811.

§ 1. Agreements entered into between warrant holders and actual settlers, previously to the settler taking possession, though after the time required by the act of 3d of April, 1792, in such cases, where such settler has made an actual settlement, continued residence and improvement thereon, as described in the 9th section of said act, are ratified and confirmed; but not to affect adverse claimants.

§ 2. Compromises between adverse actual settlers and warrantees prior to the 1st of June, 1813, by which the warrantee releases to the settler his claim to 150 acres of the tract, including the settler's improvements, or where either party shall purchase the claim of the other to such tract, in such case the title of the commonwealth shall cease, and the title be confirmed to the warrantee and settler accordingly.

§ 3. Where any adverse actual settler has made an improvement and residence agreeable to the act of 3d of April, 1792, and has purchased of the warrantee any part of the tract to secure his improvement, in such case, where the warrantee, on or before the 1st of June, 1813, shall release to such settler, his claim to 150 acres, in such case the commonwealth shall cease to have any further claim to such tract.

§ 4. Any actual settler, who, adverse to the warrantee, had commenced an actual settlement, and residence on any tract surveyed on warrant, and resided thereon two years, and in that time

cleared, fenced and cultivated three acres on such tract, and had abandoned his settlement on such tract, at any time before the settlement, residence and improvements required by the 9th section of the act of 3d of April, 1792, were fully and completely made and ended, and who, by himself, or his legal representative, shall return to such tract before the 1st of June, 1813, and settle and reside on the same so long, as with the residence and improvements aforesaid made thereon, shall amount to what is required by said 9th section, such settler, or his representative, so returning and residing as aforesaid, shall be entitled to all the benefits of an actual settler, under this act, and the act of 3d of April, 1792; but should he neglect to return, or fail to recommence said settlement within said time, and perform the conditions herein required, his previous settlement shall be considered abandoned after said 1st of June, 1813; and after said day, the warrantee, or his legal representative, may dispose of the same, in the same manner, and under the same conditions, as lands where no actual settlement was commenced, and on the same conditions, and under the same exceptions as in other cases, will the commonwealth cease to have any further claim to such tract of land.

§ 5 Every actual adverse settler, who has been evicted by the warrantee, by process of law, shall be entitled to all the benefits of an actual settler under this act, and the act of 3d of April, 1792. And upon the warrantee releasing to such settler, or his legal representative, 150 acres of said tract, including his improvements, clear of expense, or, in cases where either party shall purchase the right or claim of the other to such tract, in such case the commonwealth shall cease to have any further claim to said tract, but the title shall be ratified and confirmed to the said settler and warrantee accordingly.

§ 6. Where no actual settlement and residence now exist, on any tract of land surveyed on warrant; and the warrantee, or his legal representative, shall before the 1st of June, 1814, agree with any person to commence a settlement on such tract before said day, and release to such settler his claim to 150 acres of such tract, clear of expense, and such person, or his legal representative, shall commence an actual settlement on the same before said time, and continue a residence thereon for five years next following the first commencement, and, within that time, clear, fence and cultivate at least two acres for every hundred acres in said survey, and erect a house thereon, fit for the habitation of man, in such cases the commonwealth shall cease to have any further claim to said tract, and will confirm and ratify the title to the same. 1784.

§ 7. Where patents, commonly called prevention patents have issued, to said party, or parties, for said land, and he, she, or they, shall request a new patent for the same land, it shall be granted on payment of the usual fees of office, and on delivering up the old patent to the secretary of the Land-Office, that it may be cancelled.

§ 8. In any case of compromise with an actual settler, and where a new warrant of default shall have been issued for the same tract, the purchase money and office fees for the same, shall be repaid by the state treasurer.

§ 9. The provisions of this act shall not be construed to affect any agreement heretofore made between an actual settler who has made the settlement, residence and improvements on a tract of land, and any person who was to procure the title for said settler, and on which tract of land the original warrantee had failed to fulfil the conditions of the 9th section of the act of 3d of April, 1792, but all such contracts shall remain as heretofore, unless an agreement shall take place between all parties concerned before the 1st of June, 1813, or the original grantee, or his legal representative, shall release his claim to the contracting parties; on which release taking place, the state in all such cases will cease to have any further claim to such land, and the titles shall be ratified and confirmed accordingly.

§ 10. The parties to any compromise, shall cause the evidence thereof to be recorded in the proper county, and a certified copy thereof transmitted to the secretary of the Land-Office shall be evidence of such agreement, and the usual proof of settlement and residence being filed in said Land-Office, patents shall thereupon issue agreeable to the provisions in the foregoing sections.

§ 11. Any civil process issued out of any court, or from any alderman or justice, against the Holland land company, Pennsylvania population company, or the North American land company, or other warrant-holders, by the name of the respective companies or warrant-holders, as the case may require, shall be served on the agent, or attorney in fact of such company, &c. in case where attornies or agents are or may be appointed; and on due proof of such service, the same proceedings shall be had, as against other defendants, in like cases.

1784. § 12. Where an actual settler may heretofore have purchased the right of a warrantee to a tract of land north and west, &c. whereon he may have made an actual settlement agreeably to the act of 3d of April, 1792, and shall apply to patent the same, the secretary of the Land-Office shall grant such patent on the usual proof of settlement being made, and a regular chain of title produced from the warrantee, on payment of arrears and office fees. But nothing contained in the foregoing shall be construed to prevent the commonwealth, at any time hereafter from asserting her right in cases of forfeiture under the act of 3d of April, 1792, when the warrant-holders and actual settlers shall fail to embrace the provisions of this act.

It remains briefly to bring into view the various acts which have been passed on the subject of the public lands of the state, since the act of 3d of April, 1792, and not already noticed.

By an act entitled "An act directing the sale of certain islands in the river Susquehanna," passed 6th of March, 1793, (post. chap. 1649,) upon application made by any person to the Land-Office for a warrant of survey for any island in Susquehanna or its branches, so far as such branches have been declared highways, it was made lawful to issue such warrants on certain conditions and restrictions; but no warrant to issue for any islands surveyed and returned to the late proprietaries, prior to the 4th of July, 1776.

§ 2. Applicants to state any improvements on the islands, the nature of them, and when and by whom made. Improvers to have the preference for two years; after which warrants may issue in favour of the first applier; and warrants issuing otherwise, shall be deemed to have issued by surprise, and be void, and the money paid be forfeited to the commonwealth.

§ 3. Caveats may be entered, and decided by the Board of Property in the usual form.

§ 4. The Board of Property, with the approbation of the Governor, shall ascertain the just value of the islands applied for, whether improved or not, having regard to the soil, wood, and distance from the main land, and the advantages to be derived from the same in regard to fisheries; but the lowest price shall not be less than eight dollars by the acre.

§ 5. No warrant to issue for any island, unless the same is susceptible of cultivation, nor unless the whole purchase money shall be paid to the Receiver-General, nor for any quantity less than the whole of any such island; and all sandbars and islands, not susceptible of cultivation, and not surveyed and returned into the Surveyor-General's office, for the use of the late proprietaries, prior to the 4th of July, 1776, shall be and remain common highways forever.

§ 6. Patent to be granted in the usual form, on payment of the full purchase money.

§ 7. Existing rights to any islands, not to be affected by this act.

The following case occurred under this act, at a circuit court, at *Lancaster*, April, 1805, before *Yeates* and *Smith*, justices, Lessee of *George Moore* v. *John Mundorff*. (MSS. Reports.)

Ejectment for a small island in the river *Susquehanna*.

The plaintiff claimed under an application dated 29th of May, 1794, whereupon an order issued to three persons to view it. They reported on the 17th of November following, that the island was susceptible of cultivation, and valued it at £ 4 per acre.

On the 11th of December, 1794, *George Mundorff* entered a *caveat* against the acceptance of *Moore's* survey, alleging that he had a valuable improvement on the island, and ought to have the right of pre-emption.

On the 8th of June, 1797, *Moore* made a second application for the island, asserting it to be then improved, and in his possession: And on the 24th of August, 1802, *John Mundorff*, in behalf of himself, and the other heirs of *George Mundorff*, entered another *caveat*, claiming under an improvement made ten years before, for the purpose of tillage, and asserting that he had many years previously improved the same as a shad fishery, and had applied for a grant of the island, at the time of his entry of the first *caveat*, December 11th, 1794.

On the 13th of December, 1802, the Board of Property decided, that the improvement of *George Mundorff* being earlier than *Moore's*, and the former having never relinquished his claim, but filed his *caveat* in December, 1794, wherein he claimed by virtue of his improvement, which claim being made within the time limited by the act of 6th March, 1793, the *caveat* of *George Mundorff*, and the claim of *George Moore*, were dismissed.

On the same day, *John Mundorff* entered a formal application for the island on behalf of himself and the other heirs of *George Mundorff*; but this application was not produced in evidence, till the trial was nearly closed.

The chief value of the island consisted in its being a proper place to

draw the seine for a shad fishery. *Moore*, in 1795, and 1796, with a party, had cleared away some brushes on the island, and fished there; he had also a fishery on the eastern shore of the river, opposite to the premises:—But it appeared, that *George Mundorff*, who lived as a tenant on an adjacent island, called *Burkholder's*, about 12 perches distant, had in 1779, and in the succeeding years, done work thereon, by digging down the bank as it washed away, and cutting the brush as it grew up, to fit it for a fishery, and had also cleared out the pool, and fished there occasionally with a company who assisted him in the work, and claimed an interest in the fishery. His cattle were driven in and out of the island by his children. In 1790 he had a small pen inclosed of 10 or 12 yards square, in which he cultivated tobacco, and in the three following years, he raised therein Indian corn, turnips and rye, which he afterwards gathered. It was generally known by the name of *Mundorff's* island.

Yeates, J. The right set up to this island on each side, is twofold. Improvement, and application to the Land-Office. As to preparing a pool, and cutting brush to effect a good landing for drawing the seine on an island, it has been objected, that these acts cannot be deemed an improvement, which can confer an equitable interest in the land. The position is correct in general; because the act of 6th March, 1793, "directing the sale of certain islands in the river *Susquehanna*," provides in the 5th section, "that no warrant of survey shall issue for any of the said islands, unless the same is susceptible of cultivation," and therefore the improvements must be made thereon. But the question may at some time be worth considering, whether when the fitness of an island for the landing place of a fishery, constituted its chief value, though a very small part of it may be cultivated, the clearing out a contiguous pool, and removal of the obstructions of brush from the landing, may not be deemed a species of improvement, as it necessarily enhances the value of the soil? We give no opinion on this point, as the case does not need it. If the question shall be determined in the affirmative, then the defendant's claim is several years earlier in point of time than the plaintiff's: If in the negative, they stand on the same footing in this particular, and the plaintiff is bound to shew his superior right, before he can recover; his second application of 1797, calling for his improvement, was misconceived. Old *Mundorff* actually cultivated the soil of the island by raising tobacco, Indian corn, turnips and rye, thereon, for four successive years, undisturbed by any one; his little patch being surrounded by a rough inclosure; and did occasional acts of ownership thereon. These acts cost labour, though not a great deal. 1784.

The only point to be considered here, is, whether the defendant's claim is forfeited, for want of an application to the Land-Office in due time?

The law of 6th of March, 1793, confined the preference to improvers of the *Susquehanna* islands to the term of two years after the passing of the act; after which period the right of pre-emption ceased. This term would have expired on the 6th of March, 1795.

But the act of 22d of September, 1794, (*infra*) which was made five months and thirteen days before the end of the two years, suspended the operation of the former act, as to taking up lands without a settlement and improvement thereon. This suspension was not taken off until the 23d of March, 1802, (*infra*) when an act passed for that purpose, so far as related to the islands in the *Susquehanna*. Add to this last period, five months and thirteen days, and the term of two years is protracted until the 5th of September, 1802, so that if either the first or second *caveat* would be considered as applications within the true meaning of the first law of March, 1793, they both fall within the term of two years. The first *caveat* was supposed by the defendant to be *tantamount* to an application, because he recites it as such in the *caveat* filed after his father's death. It is true no survey could be made on either of the *caveats*, nor could a survey have been made on the application without a warrant; but the *caveats* were assertions of claim, and in my idea were virtually applications for the island; they negative all idea of abandonment, when set up in opposition to an adverse claim, asserting the right to be in the caveators, and persisting in their claim to a right of pre emption. On this matter however, the court were divided in opinion this forenoon. It now appears, that immediately after the decision of the Board of Property, the defendant formally applied at the Land Office for the island, in behalf of himself and the other heirs of his father. While the controversy subsisted before the Board, he was stopped from going on to better his title; and as to the plaintiff, he cannot be said to have forfeited his pretensions for want of an application. I therefore think the plaintiff is not entitled to recover.

1784. *Smith*, J. I feared before the court adjourned this forenoon, there would have been a difference of opinion on the bench. As to the *caveats*, I decidedly am of opinion, they do not amount to applications within the intention of the act of 6th of March, 1793. But on the production of the defendant's application of 13th of December, 1802, for the island in question, I am clear that the plaintiff is not intitled to recover. Verdict for defendant.

On the 22d of April, 1794, an act was passed (post. chap. 1755,) entitled "An act to prevent the receiving any more applications, or issuing any more warrants, except in certain cases, for land within this commonwealth."

It enacts, that, after passing the act, no applications shall be received in the Land-Office, for any unimproved land within that part of this commonwealth, commonly called the new purchase, and the triangular tract upon lake *Erie*.

§ 2. No warrant shall issue after the 15th of June, (1794,) for any land within that part of this commonwealth, commonly called the new purchase, and the triangular tract upon lake *Erie*, except in favour of persons claiming the same by virtue of some settlement and improvement made thereon; and that all applications for lands that may remain on the files of the Land-Office after the said 15th of June, and for which the purchase money shall not have been paid on that day, shall be null and void; provided that applications may be received, and warrants may issue, until the 1st of January, 1795, in favour of any person or persons to whom any balance or balances may be due in the Land-Office, on unsatisfied warrants issued before the 29th of March, 1792, for such quantity of land respectively as may be sufficient to discharge such balance, or balances; *provided*, that nothing in this act shall be so construed, as that warrants, except those wherein the land is particularly described, shall in any manner affect the title of the claim of any person having made an actual improvement before such warrant is entered and surveyed in the deputy-surveyor's books.

By a supplement to this act, passed 22d of September, 1794, (post. chap. 1773,) it is enacted, that from and after the passage of said supplement, no applications shall be received at the Land-Office, for *any lands* within this commonwealth, except for such lands whereon a settlement has been, or hereafter shall be made, grain raised, and a person or persons residing thereon.

§ 2. All applications made since 1st of April, 1784, on the files or books of the Land-Office, for lands within this commonwealth, for which the purchase money has not been paid, shall, from the passing of this supplement, be null and void; *provided*, that all persons shall have the benefits of the act passed March 29th, 1792, entitled "An act to authorize the receiver general, to carry monies received into that office since a given period, for lands sold, and which have not been, nor shall be secured to the purchasers, to the credit of such purchasers, or their assigns, in payments already due, and hereafter to become due to the commonwealth, for the purchase of any lands within the same, "agreeably to the provisions contained in a supplement to said act, passed March 6th, 1793, (ante. page 202-3.) *Provided also*, that nothing herein contained shall be construed to abridge the time for patenting of lands, or in any wise injure the rights of those persons who now hold, or hereafter shall hold lands by virtue of actual settlements made or to be made, under the law of 3d of April, 1792.

By an act passed 23d of March, 1802, (post. chap. 2251,) so much of the above supplement, as prevents or bars the issuing any warrants under the direction of the act for the sale of certain islands in the river *Susquehanna*, is repealed.

The only decided cases which bear upon the foregoing acts, are so connected with laws passed upon another subject, that it is now necessary to bring them into view in this place.

By an act passed 28th of March, 1787, entitled "An act for ascertaining and confirming to certain persons called Connecticut claimants, the lands by them claimed within the county of Luzerne, and for other purposes therein mentioned." (Chap. 1274.) Provision was made for ascertaining and confirming the titles of the *Connecticut* claimants, and for allowing the Pennsylvania claimants an equivalent, at their option, in the old or new purchase. The 9th section of that act, is as follows: "And whereas the late proprietaries, and divers other persons have heretofore acquired titles to parcels of the lands aforesaid, agreeably to the laws and usages of *Pennsylvania*, and who will be deprived thereof by the operation of this act, and as justice requires that compensation be made for the lands of which they shall thus be divested; and as the state is possessed of other lands, in which an equivalent may be rendered to the claimants under *Pennsylvania*, and as it

will be necessary that their claims should be ascertained, by a proper examination, Be it enacted, &c. that all persons having such claims to lands which will be affected by the operation of this act, shall be, and they are hereby required, by themselves, guardians, or other lawful agents, within 12 months from the passing of this act, to present the same to the Board of Property, therein clearly describing those lands, and stating the grounds of their claims, and also adducing the proper proofs, not only of their titles, but of the situations, qualities, and values of the lands so claimed, to enable the Board to judge of the validity of their claims, and of the quantities of vacant lands proper to be granted as equivalents. And for every claim which shall be admitted by said Board, as duly supported, the equivalent by them allowed, may be taken either in the old, or new purchase, at the option of the claimant; and warrants and patents, and all other acts of the public offices relating thereto, shall be performed free of expense. The said Board shall also allow such a quantity of vacant land, to be added to such equivalent, as shall in their judgment be equal to the expenses, which must necessarily be incurred in locating and surveying the same. And that the Board of Property may in every case obtain satisfactory evidence of the quality and value of the land, which shall be claimed as aforesaid, under the proprietary title, they may require the commissioners aforesaid, during their sitting in the said county of Luzerne, to make the necessary inquiries, by the oaths or affirmations of lawful witnesses, to ascertain those points; and it shall be the duty of the said commissioners to enquire and report accordingly."

This act was suspended by an act passed March 29th, 1788, (chap. 1338,) and repealed 1st of April, 1790, (chap. 1414.) In *Vanhorne's* lessee v. *Dorrance*, in the circuit court of the United States, the confirming act was declared to have been unconstitutional and void. 2 Dallas, 304.

Under these circumstances, an act was passed the 9th of March, 1796, (chap. 1866,) entitled "An act to compensate David Meade, and others." Which after reciting, that *David Meade*, and sundry other persons, embraced the provisions of the act of 28th of March, 1787, and performed on their part, all the requisites necessary to their obtaining the benefits of the said law, by attending the state commissioners at *Wyoming*, and procuring their report upon their respective lands, which were lodged with the Board of Property to be acted upon; and it was but just, that the persons complying with the said law, while it was in existence, should be entitled to the benefit of the same; it was enacted, that it shall and may be lawful for the Board of Property, and they are enjoined and required to proceed upon the reports of the commissioners appointed by the act of 28th of March, 1787, which have been filed in the office of the secretary, and ascertain, as nearly as they can, from the documents so placed in the secretary's office, and from such further evidence as they may deem necessary, and which shall be produced to them, what sum or sums ought, on the principles of the aforesaid law, to be allowed to the respective owners, and the Receiver-General shall thereupon deliver a certificate of such sum or sums to the respective owners, and enter a credit in his books for the same, which may be transferred to any person, and passed as credit, *either in taking out new warrants in any part of the state, where vacant land may be found*, or paying arrearages on former grants; *Provided nevertheless*, that the value of the land, for which such certificates are so to be delivered to the aforesaid claimants, shall not be estimated otherwise, than if the same had been made by the Board of Property immediately after the report of the said commissioners, in pursuance of the said before mentioned law; and the claimants to release their respective claims for which they shall receive compensation. 1784.

Lessee of *David Meade* v. *Frederick Haymaker* and *Luke Stephens*, *Allegheny*, October, 1800, before *Yeates* and *Smith*, justices, (MSS. Reports.)

Ejectment for one messuage and 400 acres of land, surveyed on a warrant for *Henry Meade*. The plaintiff claimed under a warrant to *H. M.* dated 17th of March, 1796, for four hundred acres, north, &c. between the outlet of little *Conceaut* lake, and Sandy creek, granted in pursuance of the acts of assembly, passed on the 3d of April, 1792, and 9th of March, 1796.

The warrant was entered with the deputy surveyor of the district on the 28th of May, 1796, and a survey was made thereupon (and seven other warrants) of 401 acres 150 perches by *W. Power* on the 15th of August, 1796, who, on the 17th of the same month, received his surveying fees, 70 dollars.

A certificate of the Receiver-General was also shewn in evidence, dated 7th of October, 1800, that the warrant granted to *H. Meade*, with 18 other war-

1784. rants, was paid by certificate No. 1. issued to the lessor of the plaintiff, agreeably to the act of 9th of March, 1796.

It appeared in evidence, that a survey, corresponding in every particular with that claimed by the plaintiff, had been made for the defendant *Haymaker*, under, and in pursuance of his improvement dated 2d October, 1794. This survey was said to have been made on the 5th of June, 1795, and was returned into the Surveyor-General's office on the 16 h of January, 1798, with a note subjoined thereto, that "*David Meade* claims this survey under his warrant." *Haymaker* lived both before and since 1795, in *Cussewago*, at a distance from these lands. No proof whatever was given, of his having at any time made any improvement on these lands.

Stevens, the other defendant, had a family on the west branch of *Susquehanna*, under the care of one *Jesse Glancey*, his step son. He took lodgings in *Cussewago*, and afterwards settled and improved a farm about two and an half miles distant from these lands, and which he now holds as an actual settler. *Stevens*, to make some compensation to *Glancey*, began a small improvement for him on the lands in question. On the 23d of May, 1796, he found a cabin erected on the ground, 14 feet square, not covered in; he dressed it for covering, sprouted 30 or 40 stumps, deadened about half an acre, and slept there that night, next morning he cut a tree for clap-boards, cut a door in the cabin, and went in quest of provisions. He came back on the 25th of May, split the clap-boards, covered in the cabin, and slept again there. On the succeeding day he returned to *Cussewago*; and on the 2d of June, he worked three days on the lands in controversy, clearing about half an acre, by grubbing, topping, heaping and burning brush wood, and slept there during that period. In the month following he again worked on the land, and cut logs, poles and brush, in order to sow rye, and planted two quarts of potatoes. *Jesse Glancey* crossed the *Ohio*, in the latter end of May, 1797; entered into an agreement with *Haymaker*, and now cultivates the land.

For defendants, it was contended, that the plaintiff's warrant was not authorized by the acts of 3d of April, 1792, or 9th of March, 1796, or any other law. Running warrants are not recognized by the act of 3d of April, 1792. They cannot operate as notice according to the words of the 4th section, "in order that all persons who may apply for lands, may be duly informed thereof." The 3d section directs, "that every application shall contain a particular description of the lands applied for." But this is not the case as to the present warrant, which calls for no specific spot, but generally for lands between the outlet of little *Coneaut* lake, and Sandy creek. The intermediate space between them is a large tract of country. The act of 9th of March, 1796, "to compensate *David Meade* and others," makes no alteration herein, but puts them on the same footing with other citizens! It barely gives them credit for the sums found due to them, either in taking out new warrants, or paying arrearages on former grants; and they must necessarily be considered as subjected to every other regulation, term and condition imposed by existing laws. The warrant on the face of it, expresses no condition of improvement, building a house, or residence for five years. The survey also, under which the plaintiff claims has never been returned into the Surveyor-General's office, as the law requires. It is a mere transcript of the survey made for *Haymaker* on the 5th of June, 1795, and it is highly probable that it was not made by the deputy-surveyor's going on the ground, after the issuing of the warrant. This is peremptorily required by the act of 8th of April, 1785, and by the 9th section thereof, "every survey theretofore made is accounted clandestine, void, and of no effect whatever" It is not made voidable, but, *ipso facto*, a nullity.

Another ground of defence presents itself, under the act of 22d of April, 1794, no warrant shall issue after the 15th June then next for any lands in the new purchase, except in favour of persons claiming the same by virtue of some settlement and improvement. This law is not to be defeated by implication; and considering its provisions as subsisting, it is evident that the lessor of the plaintiff should have made a settlement and improvement, before his warrant could regularly and legally issue.

Besides, the last clause in the act provides, "that no warrants, except those wherein the land is particularly described, shall affect the title, or claim of any person, having made an actual *improvement*, before such warrant is entered and surveyed in the deputy-surveyor's books." The word "settlement," is omitted. Admitting that none but actual settlements are protected by the act of 3d of April, 1792, still as to warrants issued and located after the 15th of June, 1794, they shall not take place of mere improvements. It cannot be denied, that if the plaintiff's

warrant is legal, and describes no certain place, and *Stevens* had begun an improvement for *Glancey*, his step son, who may be considered as one of his family, and had slept at least five nights on the land, consequently the plaintiff is not intitled to recover.

By the Court. Several exceptions, plausible in themselves, having been taken against the plaintiff's right, it becomes the duty of the court to examine them minutely. The public are materially interested in the establishment of certain principles regulating the titles of landed property; on the correct application of those principles to the different cases which may occur, the peace and safety of society must depend.

The act of 9th of March, 1796, "to compensate *David Meade* and others" was grounded on their conformity to the provisions of the law passed on the 28th of March, 1787. "They had performed on their part, all the requisites necessary to their obtaining the benefits of the said law, and it was but just, that the persons complying with the terms of the law aforesaid, while the law was in existence, should be intitled to the benefits of the same." By the 9th section of the former law, the claimants under *Pennsylvania* rights were to be allowed an equivalent for their claims, either in the old or new purchase, at their option; and, "warrants and patents, and all other acts of the public offices relating thereto, were to be performed free of expense." Possessed of these meretorious claims, they are allowed by the law of 9th of March, 1796, to have a credit in the books of the Receiver-General, for the sums justly found due to them, "either in taking out *new warrants*, in *any part of the state*, where vacant land might be found, or paying arrearages on former grants." To effectuate the declared intentions of the legislature, and preserve the stipulated public faith inviolate, these persons must necessarily be intitled to new warrants, notwithstanding the general expressions, in the former acts of 22d of April, 1794, or its supplement of 22d of September, 1794, where the lands were not previously improved. No certificates of judges, or justices, were necessary in the case of other citizens applying for warrants for lands north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek, and therefore were not to be exacted from this class of public creditors; but every condition of improvement, building a house, and five years residence, and every other regulation, were equally binding on them as others.

But it has been objected, that the warrant of *Henry Meade* is indescriptive of any particular place, and wants precision. It is answered, that it is reduced to certainty by the survey. The effect of the loose wording thereof, might have been, that if a subsequent warrant had come to the hands of the deputy-surveyor, specially describing a particular spot between the outlet of little *Coneaut* lake and *Sandy* creek, before a survey had been made on this indeterminate warrant, it would have been postponed thereby. As to the survey not having been returned, it was the fault of the district surveyor, who had received his legal fees, and shall not prejudice the party, in any other case than that of a *shifted* application or warrant. Such have been our uniform decisions. Every presumption is in favour of a draft of survey, duly certified by the proper officer. It is powerful evidence that a survey was fairly, regularly, and legally made, unless it be rebutted by other proof. The security of landed titles rests greatly on this rule, and it would be dangerous in the extreme to shake it. No testimony has been adduced to shew that the survey was not made by the deputy-surveyor going on the ground, and therefore the presumption stands in its favour. 1784.

Much reliance has been placed on the last clause of the law of 22d of April, 1794. It is certainly penned very incorrectly. It might at first be supposed to imply, that warrants particularly descriptive might affect the equitable claims of *previous bona fide improvers* of the same lands; but it will scarcely be contended, that this could have been the real intention of the legislature, considering the different expressions of the public will in a variety of acts, since the revolution. In the preceding part of the section, the words *settlement* and *improvement*, seem ranked as synonymous expressions, though the latter word only is inserted in the close of the law. In fact, an improvement, as defined by the act of 30th of December, 1786, has the same meaning as an actual settlement under the act of 3d of April, 1792, except that the latter points out precisely the extent of it, by clearing two acres for each 100, erecting a messuage, and residing thereon five years. The former law describes an improvement "as an actual personal resident settlement, with a manifest intention of making it a place of abode, and continued from time to time, &c." We are however of opinion, that if a doubt could be supposed to arise under the expressions of the act of the 22d of April, 1794, they are removed by the

1784. supplement thereto, passed at the next sessions, on the 22d of September, which, in several instances, alters and supersedes the provisions of the first act, and secures *settlements* and *improvements* made under the law passed 3d of April, 1792.

How then stand the pretensions of either of the defendants? Though *Haymaker* had a survey made for him, he had no settlement whereon to ground it; and therefore it is a mere nullity, and gives no right whatever.—*Stevens* began to make what is styled an improvement, three days before the plaintiff's warrant was entered with the district surveyor, but he had an actual settlement two and an half miles distant, whereon he resided, and which he now holds as an actual settler. He could not have two resident settlements, two *homes* at the same moment. If he could secure the title of more than one place by actual settlement, wealthy men might do the same thing to any extent, and the poor would be thus prevented from all means of obtaining land, which could never have been intended.

Glancy can derive no claim under either *Haymaker* or *Stevens*. He himself did not cross the *Ohio*, until the latter end of 1797, more than nine months after the survey.

On the whole, therefore, the result is, that the plaintiff has the only right recognized by the law, and we are clearly of opinion he is entitled to recover. Verdict for the plaintiff.

In the Lessee of *John Wilkins*, jun. v. *John Allenton*, at *Allegheny*, November, 1801, before the same judges, (MSS. Reports,) the plaintiff claimed under a warrant in his own name for 400 acres of land, north and west, &c. on French creek, adjoining a survey made for one *Baum*, and including the claim formerly of *John Wentworth*, agreeably to the acts of assembly of 3d of April, 1792, and of the 9th of March, 1796, dated 18th of March, 1796, reciting that he was desirous to settle and improve the said four hundred acres. A survey of 373 acres, 102 perches, was made by *J. Power*, on the 20th of Sept'r, 1797, it being the same tract which was surveyed to *John Wentworth*, on the 27th of March, 1794, on his improvement, dated 3d of April, 1792. A patent issued thereon, dated 17th of July, 1801, to *Wilkins*, which was admitted by the defendant's counsel to be read, though the demise was laid the 1st of Feb'y, 1799, and the ejectment brought to June term, 1800.

The defendant's counsel moved for a nonsuit. The terms of actual settlement prescribed by the 9th section of the act of 3d of April, 1792, are not shewn by the plaintiff to have been complied with. The patent since the ejectment brought cannot dispense with the conditions originally imposed, nor have any effect. It was founded on mistake and misapprehension of the law, and is therefore void. 1 Black. Com. 348. It was decided by the justices of this court here in October, 1800, between *Meade's* lessee and *Haymaker*, that the conditions of actual settlement and residence are equally obligatory under the warrants obtained by *Meade*, as under others. Though the plaintiff claims under a credit given to *David Meade* by the act of 9th March, 1796; yet that law only removed the impediment as to his warrants, created by the acts of 22d of April and 22d of Sept'r, 1794, and operated as a virtual repeal of those acts, as to the necessity of previous improvements to such warrants. On the 14th of March, 1796, the Board of Property estimated the lands of *Meade* at £. 1392, and by the act of the 9th of the same month, he obtained a credit for the same in the books of the Receiver-General, which might be transferred to any person, and passed as credit, either in taking out new warrants in any part of the state, where vacant land might be found, or paying arrearages of former grants. The law passed the house of representatives, obliging him to pay £. 30 per hundred acres, according to the provisions of the 6th section of the act of 21st Dec'r, 1784, for such new warrants as he should obtain: but it received considerable amendments in the senate on the 27th of Feb'y and 5th of March, 1796, and was finally modified and enacted as we find it in our statute book. It will not be pretended, that if he had received his money, he could have further claims against the state; and the legislature could not mean, that the sum passed to his credit, should be more valuable than the same sum in cash, in the hands of other persons; or that *Meade*, and those claiming under him, should experience the benefit of the diminution of price in the lands, and not be subjected to the terms of actual settlement, equally with other citizens. The rate of lands across the rivers *Ohio* and *Allegheny* was lessened, to enable the holders of them to make efficient settlements; and this was the great object contemplated in the law of 3d of April, 1792. It was calculated as a complete system of settlement, which would of itself be carried into execution. The words of the 9th section are, "In defect of such actual settlement and residence, it shall and may be lawful to and for this commonwealth,

to issue new warrants to other *actual settlers*, for the said lands, &c." and of the 10th section, that on the actual settler making default, the commonwealth may grant the same lands, or any part thereof, to *others* by warrants. The variation of phraseology as to the two classes of land holders was certainly intentional. *Other actual settlers* mean persons really on the lands, and the expressions can convey no other idea. The entry of such settlers, therefore, on such lands, whereon default has been made, is congeable; the will of the community is supreme, and has so directed it. Warrant holders cannot pretend that they have more equity than actual settlers: If the latter abandon their settlements, their farms are open to new applications; why should it not be so also in the cases of the former? a base or qualified fee must be determined, whenever the qualification annexed to it is at an end. 2 Black. Com. 109. There is a distinction between a *condition* in deed, and a *limitation*. When the estate is so expressly confined by the words of its creation, that it cannot endure for any longer time than till the contingency happens, upon which the estate is to fail, this is a limitation; and the estate may be defeated thereby, without any entry or claim to avoid it. Ib. 155. The estate here, is at the utmost a chattel interest, which terminated on the default of the warrantee. Ib. 156. The warrant is dated in March, 1796, and no settlement has been shewn under it before the ejectment was brought to June, 1800, more than four years, though it should have been made in two years. On a condition *precedent*, the party has no estate until the condition be performed, even if the condition has become impossible. Ib. 157. 2 Dallas, 317. Co. Lit. 206, b. On a limitation, the estate determines *ipso facto*, without entry. Co. Lit. 214, b.

Moreover the argument *ab inconvenienti* applies forcibly in the present instance. Unless actual settlers are encouraged to seat themselves on the lands of defaulting warrantees, the intentions of the legislature as to forming settlements by way of barriers to the frontiers will be defeated.

The plaintiff's counsel observed, that they had it in their power to prove a settlement under the law, but deemed it unnecessary. The plaintiff was entitled to a transferred credit under *David Meade*; it was resolved in his ejectment against *Haymaker*, that he might take out a warrant without any previous improvement, a term binding on other citizens. Was he not then confessedly in a better plight than others with their cash in hand? The act of 28th of March, 1787, grants an equivalent to the *Pennsylvania* claimants either in the old or new purchase at their option; and warrants and patents, and all other acts of the public offices were to be performed *free of expense*. In these particulars also, they were put in a better situation than others applying for lands. We know nothing of the original bill in the lower house, or of the amendments thereto in the senate, which have been mentioned, and which afterwards were enacted into a law on the 9th of March, 1796. The court have not the journals of either house before them whereon they can judge; but this we *do know*, in the language of the same act, that the *Pennsylvania* claimants "had performed on their part all the requisites necessary to their obtaining the benefits of the said law; and it was but just that the persons complying with the terms of the law while it was in existence, should be entitled to the benefits of the same." The legislature had made a solemn engagement with the persons who had thus surrendered their pretensions for the public peace; and the community were bound by their acts as moral agents. We likewise find that grants were made to the *Washington* and *Pittsburg* academies, exempted from settlement. Why should not *Meade* and those claiming under him, have the same indulgence? 1784.

The sentiments of the court on the subject of settlement on *Meade's* rights were delivered *obiter* in the case of *Haymaker*: the point was not argued, nor was the question directly before the court, and is therefore open to discussion. If the two laws of 1794, had not passed, *Meade* might have obtained vacant lands any where within the state. What we insist on, is, that the law of 9th of March, 1796, was meant as an honest fulfilment of the public plighted faith by the act of 28th of March, 1787, unfettered by the terms of settlement, or any other conditions whatever, unknown at that time.

But it has been said, moreover, that the warrantee never had more than a chattel interest, and right of entry in these lands, though he has paid the full consideration to the state. And it is assumed as a ground of argument, that the estate, such as it was, determined, *ipso facto*, by its limitation.—This is denied, not only on the express words of the law, which prescribes a certain mode of issuing new warrants, vacating the original warrants, but on the authority of the decision of this court, in *Morris's* lessee v. *Neighman* and *Sheiner*, in May, 1799. The warrantee by pay-

1784. ment of his money and receiving possession of the land, obtains an estate on certain conditions; and to take advantage of a condition broken, there must be an actual entry, a stranger cannot enter, but only the grantor or his heirs.

It has also been objected, that there is a difference of expression in the 9th and 10th sections of the act of 3d of April, 1792, as to vacating the interests of warrantees and actual settlers. It will be clearly found, that the former section equally respects both, where defaults have been made as to settlements; and that the latter section is merely confined to the instances of actual settlers not taking out their warrants within ten years after passing the act. Admit an entire equality of equity, between the two classes of land holders, though the warrantees have paid their money into the coffers of the state; why, in the reason and nature of things, should entries on the land, without authority, be allowed in the case of warrantees, and not as to the settlers? The advocates of the pretensions of the latter, will not contend, that in default of the full, complete settlement and residence pointed out by the law, one actual settler may dispossess another of his farm, on pretence of the interest of the latter being determined by its limitation; and that the entry of the latter is congeable! Such a doctrine would produce infinite disorder and confusion. If inconveniences are to be regarded in the exposition of the law, it will certainly be necessary to adopt the rule, that some public authority should determine between the contending parties; that they should not be permitted to judge and decide on their individual claims, and carve out their several remedies at their will and pleasure. No one can doubt that the peace and welfare of the community are intimately interested herein.

By the Court. We expressed our opinions *incidentally* in *Meade's* lessee v. *Haymaker*, that actual settlements were requisite, in the case of warrants issued under the act of March, 1796. The present question was not immediately before the court, but the case naturally led to it We mean not, however, now to give any decided opinion on that point, as we are not possessed of the minutes of the house of representatives, or of the senate, which have been referred to in the argument.

Admitting that the conditions of actual settlement are obligatory on the warrants issued under that act to *David Meade*, and others claiming a credit under him, it is contended, that by the words of the 9th section of the act of 3d of April, 1792, in default of settlement and residence, the commonwealth may issue new warrants to other *actual settlers* for the said lands, &c. and that these expressions imply a right to *settle* on such lands whereon default has been made, previous to such new warrants having been issued. But will not the intention of the legislature be better fulfilled, and all the words of the clause receive their full operation, by construing *actual settlers*, to mean other persons *who are desirous to settle and improve* the lands? If they must of necessity be construed to mean persons *then cultivating* the land, then none but such characters would be intitled to vacating warrants, in exclusion of the rest of mankind, however desirous and ready to make settlements. Besides, if we regard the grammatical construction, and adopt the sense insisted on by the defendant's counsel, then those words must be taken as referring to such *actual residence* and settlement, mentioned two lines before, comprehending fencing, clearing, cultivating, &c. erecting the messuage, &c. and residing thereon five years. Neither of these constructions, it is presumed, will be contended for; the first opposes every ground of that just equality, which ought to prevail amongst the citizens of a free government; the last is *felo de se* of the object endeavoured to be accomplished, and is moreover repugnant to the subsequent words, *and so often as defaults shall be made for the time, and in the manner aforesaid*, &c. which presuppose defaults in new grants. The framers of the law wisely intended, in order to guard against confusion, disorder and uncertainty, that the constituted public authorities of the state, by the medium of the Land-Office, should determine respecting the defaults alleged to have been committed by the first warrantees. The opinion delivered by this court in *Morris's* lessee v. *Neighman* and *Sheiner*, was consonant thereto, and was delivered in direct terms, that no individuals could take advantage of the breach of the condition, unless through the instrumentality of the commonwealth's officers, by granting new warrants in a specified form. This was likewise recognized by the majority of the judges in the late contested case of the *mandamus* between the *Holland* land company and *Tench Coxe*, the secretary of the Land-Office We see no reason at present to recede from the opinion which we have deliberately formed; but are still open to conviction. We feel and know, that the point requires to be finally settled, and that the

peace and safety of the country are involved in an early and mature decision. We therefore invite the defendant's counsel to take a bill of exceptions, move for a new trial, or to consider the question as a point reserved for further discussion. In the mean while, the motion for a nonsuit is denied.

The defendant's counsel then offered to shew in evidence, that *William Gregg* and *John Gregg*, two brothers, seated themselves down on French creek, in this quarter of the country in the year 1789. They continued there that summer, and each designated for himself a tract of land, supposed to contain 400 acres; *William's* claim was up French creek, and *John's* below it. A small cabin was built on *William's* tract, wherein they resided. They then returned into the inhabited parts of the country, and came back in the spring of 1790, built a larger house on *John's* tract, and raised 100 bushels of corn, and 500 bushels of potatoes on the lands that summer: *John Gregg* returned to *Susquehanna* that fall, but his brother *William* continued to reside in the larger cabin, that fall, and the ensuing winter; and was killed by the Indians, on the lands, in the spring of 1791. The defendant afterwards intermarried with the widow of *William Gregg*, and holds the lands in controversy in his right, and under *William M'Adams*, the guardian of her minor children.

This evidence was opposed by the plaintiff's counsel, on the ground of its not proving a settlement recognized by the law. By section sixth, of the law of 13th of March, 1783, no improvement, office right, or claim, under any Indian nation, or the late proprietaries, within the lands appropriated for the redemption of the depreciation certificates, or donations to the officers and soldiers in the continental army, shall be valid, but the same shall be *null* and *void* to all intents and purposes whatsoever Ante. page 64. By the second section of the act of 1st of April, 1784, (ante. page 102) the Land-Office which was shut in 1776, was first opened from the 1st of July, 1784, for obtaining new rights to lands already purchased from the Indians; and the 8th section (ante. page 104) excepts the depreciation and donation lands. The same exception is again made by the act of 21st of December, 1784. (post chapter 1111, § 6.) The law of the 3d of April, 1792 first gave a right of settlement to these lands. The words of the second section are, "the lands north and west of the rivers *Ohio* and *Allegheny* and *Conewango* creek, are hereby offered for sale to persons who *will* cultivate, improve, and settle the same; and the 5th section, which directs, that the deputy-surveyor shall not survey the lands on warrants, that *may have been* actually settled and improved prior to the date of the entry of such warrant with the deputy-surveyor of the district, except for the owner of such settlement and improvement, can only mean lands settled and improved after passing of the act. 1784.

By the Court. The present case interests our feelings; but we must endeavour to find out the true meaning of the law, and adhere to it firmly. The grammatical construction of the act is clear, and puts all the people of the country on an equal footing. The words of the act are in the *future* tense; and the preamble of the act offering encouragement to actual settlers, must naturally refer to those who *shall* settle, and not to those who had theretofore settled. We are bound by the expressions; and, our uniform decisions have been, that proofs of settlement under this law, should be confined to settlements made after it was passed. But if the defendant's counsel are dissatisfied with this opinion, we again invite them to put it in a train to go before another tribunal.

It was then agreed that a verdict should pass for the plaintiff. And when the verdict was pronounced, the plaintiff agreed to convey one moiety of the lands in question, to the minor children of the said *William Gregg*.

Again: On the 19th of February, 1801, an act was passed, (chapter 2174,) entitled, "An act for the relief of *Peter Wikoff*, *Jonathan Bayard Smith*, and others," which recited that those gentlemen and others had received patents from the commonwealth, for certain tracts of land, in pursuance of surveys made before the north line of the state was ascertained; and that these lands had fallen within the state of *New-York*: it therefore enacted, that on their application, the Board of Property should ascertain the amount of payment made by them for such lands, and should certify the same to the Receiver-General, who was thereupon to deliver certificates to them, with interest from the time of payment, and enter a credit, in his book for the same, which might be transferred to any person and passed as credit, either in taking out new warrants in any part of the state, where land may be found, or in payment of arrears of former grants. Certificates were accordingly issued; and on the 6th of September, 1804, new warrants were taken out, and executed upon lands in *M'Kean* county; which warrants had been regularly transferred to *Jonathan Smith*. The surveys were returned and accepted; but at the time the warrants were executed, and up to the present time, no settlement had been made nor grain raised, nor did any person reside, on the lands on which they were laid; and therefore the officers of the Land-Office refused to grant patents.

1784. This gave rise to the case of the *commonwealth* v. *Cochran*, in the supreme court, 2 Binney, 270, which was a motion for a rule upon the defendant, the secretary of the Land-Office, to shew cause why a *mandamus* should not be awarded, commanding him to prepare and deliver patents to *Jonathan Smith*, for the lands so warranted and surveyed.

The objection made by the Attorney-General was principally grounded on the act of 22d of April, 1794, by which the Land-Office was prohibited from issuing warrants for lands within the *new purchase*, where these lands lay, "except in favour of persons claiming the same by virtue of some settlement and improvement being made thereon." And the supplement to that act, passed 22d of September, 1794, by which the office was prohibited from receiving applications for any lands within the commonwealth, except for such lands whereon a settlement had been, or should be thereafter made, grain raised, and a person or persons residing thereon. And as the warrants in this case were laid upon unsettled lands, they came prescisely within the interdiction of those laws, and were not intitled to confirmation by patent. That the law of 1801, was passed while the interdiction was in full force; and unless it operated as a repeal in a certain degree of the laws of 1794, there was no ground for the motion; and it was pressed that it did not operate as such repeal.

Tilghman, C. J. delivered the opinion of the court. The objection to the patents is founded on the acts of 1794. These acts forbade the issuing of warrants, or receiving applications for lands on which no settlement and improvement had been made; and it is contended, that as the warrants in question were laid on unsettled lands, their execution was illegal, and ought not to be confirmed by patents. It appears to us, that this objection is not well founded. Upon a fair construction of the act of 19th of February, 1801, the persons in whose favour that law was made, had a right to take out warrants for their own use for vacant lands in any part of the state; and they were to pay the price, and comply with all the conditions imposed on the purchasers of land in that part of the state, where the lands lay. If they lay west of the *Allegheny* river, they would have to comply with the terms of settlement and improvement required by law to complete a title in that quarter; but, if east of that river, nothing but the usual price in money was required. To give the act of 19th of February, 1801, any other construction, would be to deprive the persons intended to be compensated, of a very material benefit; I mean the benefit of taking out warrants for themselves. They would have been obliged to sell their warrants to settlers, which would have very much reduced their value, or to speak more properly, they might have transferred to settlers their credit on the books of the Receiver-General; but would have had no right to take out warrants themselves, unless they either purchased the right of settlers, or seated themselves on the land intended to be taken up. This never could have been the intent of an act, by which it was designed to make a liberal compensation to persons who had paid money to the state through a mistake of its own officers. The compensation was liberal, because it included interest to the time of issuing the certificates. No interest was allowed on those certificates, because it was supposed that the holders might immediately use them as cash, by taking out new warrants. The opinion of this court is, that the act of 19th of February, 1801, operated as a repeal of all former acts, requiring a settlement *previous* to the issuing of a warrant, so far as concerned warrants to be issued in favour of those persons who obtained credit in the books of the Receiver-General in the manner above mentioned. They therefore allow the motion. Rule granted.

It is necessary, however, further to notice, that by an act passed 1st of April, 1805, entitled "An act for the speedy redemption of certain certificates therein mentioned," (chap. 2587,) it is enacted that it shall be optional with the holders of certain certificates, usually called "Wyoming credits," issued under "an act to compensate *David Meade*, and others," passed 9th of March, 1796, as also the holders of those issued under an act, entitled "An act for the relief of *Peter Wikoff*, &c." passed 19th of February, 1801, to receive from the treasury the amount of said certificates, or any of them, or to apply them in taking out warrants for lands, or in discharge of arrearages on former grants; and the warrantee who may pay the purchase money in certificates of either description, shall be as liable to the payment of fees, and the conditions of settlement and cultivation, as is or may be required of those who pay the purchase money in specie; and no credit shall hereafter be allowed to any person paying for lands with the credits aforesaid, on account of expenses incurred in surveying or locating any

lands; any custom or usage to the contrary notwithstanding.

The fees of the Land-Officers were fixed by an act passed April 20th, 1795, (chapter 1852.) But so much of that act as related to the fees of the Surveyor-General, was repealed, and his fees regulated by an act passed 8th of April, 1799, (chapter 2053.) And on the 29th of March, 1803, an act was passed (chapter 2359) entitled An act authorizing the secretary of the Land-Office, and the Attorney-General, to recover the fees due on warrants and patents remaining in the Land-Office. See the acts of 29th of March, 1809, 4th of April, 1809, and 25th of December, 1809, *infra*.

By an act passed 22d of January, 1802, (chapter 2213,) no caveat or note on survey then on record, or otherwise, either in the office of the Secretary, or in the office of the Surveyor-General, shall continue to bar the issuing of a patent, or patents, to those, or their legal representatives, against whom the same has been entered, during a longer term than two years from passing the act, unless the person entering the caveat, or others holding or claiming the estate, shall within the said term of two years, take out a citation, and prosecute the same to effect.

§ 2. No caveat, note on survey, or writing in nature of a caveat, hereafter to be entered shall continue to bar the issuing of a patent, during a longer period than two years from the entry of such caveat, unless the party interested shall within that term, take out a citation thereon, in order to bring such dispute to a decision, and prosecute the same to effect.

On the 2d of April, 1804, (chapter 2487,) an important act was passed, which was liberally intended to afford an opportunity for purifying many titles from defects arising from frauds committed on the Land-Office. The preamble recites that many persons who held lands under proprietary warrants or locations, have, in order to obtain patents for the same at reduced prices, procured new warrants from the state, on which, in most cases patents have issued, thereby endeavouring to avoid the payment of part of the principal and interest due on their original contracts, and at the same time rendering the titles of those who are purchasers under the minsecure; and it enacts, that on the application of any person holding a warrant for lands within this commonwealth under the authority of the same, on which surveys have been made, or patents issued, and who are also in possession of the title to the same land, or any part thereof, by virtue of a proprietary warrant or location, and who are now desirous of doing justice to the state by patenting their said lands on their old proprietary warrants or locations, the Board of Property shall have power to direct the Receiver-General, on settlement of their said accounts on the said proprietary warrants or locations, to carry to their credit the amount of purchase money and interest paid by them, or those under whom they claim, on their said new warrants. 1784.

This act was to continue in force for three years, and to the end of the next session of the legislature. By the 3d section of an act passed 26th March, 1808, (chapter 2971,) this act is continued in force until the 1st of September, 1809.

By an act passed 4th of April, 1809. The act of 2d of April, 1804, is further continued until the 1st day of April, 1812.

On the 4th of April, 1805, (chapter 2605,) an act was passed entitled "An act to encourage the patenting of lands, and for other purposes." By which the Receiver-General was authorized to settle the accounts of all persons who might apply within three years from the passing the act, who are indebted to the commonwealth for the purchase money of lands, and interest, and who have not received patents; and on the payment of the usual fees of office, such persons were to receive patents upon executing a mortgage to the Governor for the use of the commonwealth, to secure the payment of the aggregate of the arrears of purchase money and interest due, in ten annual instalments, the interest of the whole aggregate sum remaining due to be paid yearly; and all mortgages executed in pursuance of the act, were to be filed in the office of the secretary of the Land-Office, to be available without the recording thereof; the secretary, before delivery of the patent, to endorse thereon, that such mortgage had been executed, &c. And the act to extend the time for patenting lands, which had been for several years annually continued, was further extended for three years.

By the 1st section of an act passed 14th of March, 1808, (chapter 2926,) the provisions of the above act were continued in force until the 1st of September, 1809.

By an act passed the 4th of April, 1809, that part of the act of 4th of April, 1805, relating to the appropriation of the purchase monies received for lands, was partially repealed and suspended until the 1st of September, 1809, from and after which day the said act was declared to be and continue in full force and effect.

The construction of this act was doubtful; and by an act passed 21st of February, 1810, all the provisions of the first section of the act of 4th of April, 1805, were re-enacted and continued until the 1st of November, 1811, and no longer. This act also provided, that any mortgage or mortgages under the said act, might be executed by any duly constituted trustee, or trustees holding lands, or by the guar-

1784. dian or guardians of minors duly appointed, or by executors to whom the sale or disposal of the land to be mortgaged, is given by the last will and testament of their testator, and that patents might be received by them respectively for the use and benefit of those entitled; and any mortgage in pursuance of said act, might be acknowledged before the secretary of the Land-Office, or magistrate authorized to receive the acknowledgment of deeds. It provided also, that mortgages might be executed and acknowledged by attorney duly constituted, and the letter of attorney, being duly acknowledged, shall be filed in the office of the secretary of the Land Office; a copy whereof, and also a copy of any mortgage, duly certified under the seal of said office, is declared to be as sufficient evidence in all cases, as the original.

The mortgagors are permitted, a any time before the days of payment, to pay the whole principal and interest to that time, or a lesser sum than the whole instalments to become due, deducting, in such case, so much interest as would have accrued upon said instalments, if not discharged previously to the time or times when they were respectively made payable, and an acquittance shall be indorsed on the mortgage for such instalment, or instalments, so as aforesaid paid.

By an act passed 30th of March, 1811. all the provisions of the foregoing act of 21st of February, 1810, are continued until the 1st day of January, 1813, and no longer; *Provided*, "that nothing herein contained shall be construed, or so understood, as to entitle any person or persons, or corporate bodies, executors or administrators, on behalf of each minor, to the benefits of this act for any greater quantity than five hundred acres of land held by him, her or them, in his, her or their own right."

Connected with this subject, is the act of the 13th of April, 1807, (chap. 2863, sect. 1,) entitled "An act directing the mode of settling accounts in the Land-Office, and to prevent frauds in obtaining warrants for land."

It enacts,—That the Receiver-General, on the settlement of any account for monies due for lands, within the Indian purchases made in, and prior to the year 1768, to ascertain the amount of principal and interest due at the time of passing this act, upon such account, and upon the aggregate amount so found due, to charge interest, until the amount of the account is discharged: *Provided*, That any person paying to the Receiver-General the amount of money due from him, her or them, on or before the 1st of March, 1808, or otherwise, before said day, complying with the provisions of the act of the 4th of April, 1805, shall be charged interest only upon the principal sum due up to the time of such payment, or of executing a mortgage agreeably to the directions of the said act.

By the second section of the act of 14th of March, 1808, (chap 2926,) the foregoing section was suspended until the 1st of September, 1809. *Provided*, "That nothing herein contained shall be understood to authorize the Receiver General to settle any account of monies due on such land in any other manner than is directed by said act, unless application be made for that purpose before the expiration of the period above limited, but in all cases of application after that period, interest shall be charged upon the aggregate sum from the time of passing the said act." (13th of April, 1807.)

The act of 13th of April, 1807, is further suspended until the 1st of November, 1811, and no longer, by the second section of the act of 21st of Feb'y, 1810, until which time patents may be granted upon paying, or securing by mortgage, the purchase money due, with interest on the principal sum only to the time of such payment, or execution of such mortgage.

The act of 13th of April, 1807, will be in operation after the 1st of Nov'r, 1811, except as to such persons as may be within the act, and proviso thereof, passed the 30th of March, 1811.

The 2d section of the said act of 13th of April, 1807, provides, that before any warrant issues from the Land-Office, for any land within the Indian purchases in and prior to 1768, the person for whose use, and in whose name such warrant is applied for, shall declare upon oath or affirmation, in addition to the usual proof required by the officers of the Land-Office, to be taken and subscribed before some one of the judges of the court of common pleas, or justice of the peace of the county where the lands lie, or before the secretary of the Land-Office, that according to the best knowledge and belief of deponent, no warrant, or other office right, had issued for such land in the name of such deponent, or of any person or persons under whom he claims, and if at any time thereafter, it should appear, that the persons deposing as aforesaid, or any of them, shall knowingly have sworn falsely, such person or persons shall suffer all the pains and penalties of perjury.

By an act passed April 4th, 1805, (chap. 2590,) it is made the duty of all

persons now holding, or that may hereafter hold unexecuted land warrants, to file or enter the same with the surveyors of the proper district within two years after the passing of this act, or within two years after the date of such warrants respectively, and on failure thereof, such warrant or warrants shall not have any force or effect against a warrant of a later date, nor against an actual settler on the lands called for in such unexecuted warrant.

By an act passed 25th of March, 1805, (chap 2560, sect. 1,) the tickets for donation lots, in the easternmost parts of the second donation district, commonly called the struck district, are directed to be taken out of the wheel, to be reserved for and granted to those who may have settled the same, agreeably to the act of 3d of April, 1792. And persons holding donation lands within the bounds thereof, or within the triangle, and releasing his patent to the commonwealth, may, on application to the Land Office, have another unappropriated lot, or lots, of equal quantity, to be patented free of expense.

This act, which was of limited duration, was annually continued until the 1st of April, 1810, and has been permitted to expire.

On the 29th of March, 1809, an act was passed, entitled "An act abolishing the offices of Receiver-General, and Master of the Rolls, and transferring the duties therein performed to other offices, and for other purposes."

§ 1. The offices of Receiver-General and Master of the Rolls were abolished after the 10th of May, 1809.

§ 2. The books, papers and documents, in the Receiver-General's office, and the patent books, records, and documents relating to the titles of lands in the Roll's-Office are directed to be delivered to the secretary of the Land-Office, to be by him deposited in his office; and all the books, papers and other documents in the Roll's-Office, containing the records of, or relative to the enrolment of laws, or other acts of the legislature, to be delivered to the secretary of the commonwealth, to be deposited in his office.

§ 3. After the 10th of May, 1809, the fees on issuing a warrant in all cases to be four dollars, and fifty cents for each and every warrant of survey and acceptance, which shall issue, except as after excepted; and all calculations of the purchase money and interest due on lands sold, or hereafter to be sold by the state, to be made, or caused to be made, by the secretary of the Land-Office, who shall direct the payment of the money by the applicant, together with the price of the warrant, into the state treasury; and the treasurer shall give duplicate receipts for the money paid, one of which shall be deposited with the said secretary of the Land-Office before the warrant shall issue. 1784.

§ 5. After the 10th of May, 1809, the fees on patenting in all cases shall be ten dollars, where fees are receivable, for each patent that shall issue, to be paid to the state treasurer, who shall give duplicate receipts for the same, one of which shall be deposited with the secretary of the Land-Office before the issuing of the patent; the patent to be enrolled without additional fees under the direction of the said secretary, who shall also possess all the powers, and perform all the duties, so far as the same relate to the papers to be deposited in his office, hitherto appertaining to, or directed by law to be performed by the Master of the Rolls.

§ 6. The secretary of the Land-Office monthly to deliver to the Auditor-General all the receipts of the state treasurer, which shall come into his office for monies received at the treasury for lands sold, and fees paid on warrants and patents; and the secretary of the Land-Office, and the Surveyor-General, on their own oaths or affirmations, and the oaths or affirmations of their deputies or clerks, engaged in the receipt of money, shall monthly account to the Auditor-General for all fees hereafter to be received in their offices, which monies they shall pay into the state treasury.

§ 7. The secretary of the commonwealth, the secretary of the Land-Office, and the Surveyor-General, or any two of them, to constitute the Board of Property, with all the powers of the former Board.

§ 8. The secretary of the Land-Office to prepare a seal, to be styled "The Seal of the Land-Office of Pennsylvania," which, after the 10th of May, 1809, shall be applied to all patents, warrants and other papers, authenticated in said office, and all patents and warrants which shall issue thereafter, shall be signed by the said secretary, and the patents attested by his deputy or first clerk.

§ 9. Patents for reserved tracts and town and out-lots, north and west of Ohio, &c. to issue in the same manner, and the powers and duties of the governor respecting them, &c. vested in said secretary.

§ 10. Secretary of the Land-Office and Surveyor-General to be appointed for three years from said 10th day of May.

1784. By a supplement to this act, passed 25th of December, 1809, no fee shall be received in the Surveyor-General's office for filing and directing a warrant, and the whole amount of money to be paid on issuing, filing and directing the same, shall be four dollars and fifty cents.

In all applications for warrants, the applicant, at his election, may pay the interest on the purchase money accrued previously to the date of the warrant, either at the time the purchase money shall be paid, or after the return of survey shall have been made, and before the issuing of the patent.

In all cases of warrants issuing hereafter, where the return of survey shall have been previously made on proprietary locations, and whereon a warrant, commonly called a warrant of acceptance shall issue, the price of said warrant shall be two dollars.

All patent fees paid previously to the new arrangement, the same to be deducted and the patent to issue, on payment of the balance.

The act of March 29th, 1809, not to affect the payment of the surveying fees directed to be paid by certain *Connecticut* settlers. See an act passed April 4th, 1809, a supplement to the act to encourage the patenting of lands.

The following subjects being local and special, will be distinctly considered in the notes to the acts relating them respectively.

Donation lands. An act laying out a town at *Presq'isle*, and for selling the different reserved tracts. An act to prevent intrusions within the counties of *Northampton*, *Northumberland* and *Luzerne*, The *Luzerne* compensating act, and the act to protect the territorial rights of the state.

PART V.

Of Surveys, and Evidence.

The statute of 33 *Edward* 1, statute 6, entitled "An ordinance for measuring of land," is reported by the judges, as extending to Pennsylvania. It begins thus.

"When an acre of land containeth ten perches in length, then it shall be in breadth sixteen perches; when it containeth eleven perches in length, then it shall be in breadth fourteen perches and an half and three quarters of one foot; &c. 160 square perches being the English statute acre; or as it is commonly termed in Pennsylvania, an acre, neat, or strict measure.

But it is to be observed, that the customary acre of *Pennsylvania*, where six acres in the hundred are allowed for roads and highways, &c. by the commonwealth, consists of one hundred and sixty-nine perches and six tenths of a perch, which produce the acre of land, with its usual allowance.

Many of the laws cited in the preceding part of this note, regulate surveys in several respects; and in the cases already noted, many points on that subject will be found. It will not be necessary to repeat them here.

By an act, entitled "An act to prevent trespasses and waste from being committed upon the lands of absent persons, and upon vacant and unappropriated lands," passed the 17th of March, 1780, (chapter 885.) printed in *M'Kean*'s edition, page 331. and limited to nine months, it was enacted (section 4.) that during the continuance of the act, no surveyor or other person, shall presume to measure, survey, or locate, any right or claim to land, unless he be authorized so to do by the special licence of the president or vice-president in council, under the less seal, who, upon due proof of the equity thereof, may grant the same; and every survey, location or appropriation of land, made without such licence be first obtained, and unless a return of the survey thereupon made, shall be made into the office of the secretary of the Supreme Executive Council within six months after the same shall be made, shall be utterly null and void.

§ 5. And in order to correct as far as may be, the mischiefs which have arisen, or may arise to the commonwealth by clandestine surveys and undue appropriations of vacant or waste lands made since the 4th of July, 1776.

§ 6. No survey or appropriation of vacant or unappropriated lands, which has been made within this state since the 4th day of July, 1776, shall be available in law or equity, or shall be considered as vesting any estate in such land, unless the date, and other particulars of the same, together with a clear description of the right or claim upon which it was made, shall be entered in the office of the secretary of the Supreme Executive Council; within the times herein after limited, that is to say, in case such survey has been made in the counties of Bedford, Northumberland or Westmoreland, before the 1st day of January next, and in case such survey has been made in any other county, before the 1st day of November next.

§ 7. Such entry in the office of the said secretary, shall not give any relief or benefit to any person to which he or she was not intitled before the passing of this act.

By an act passed 4th of September, 1793, (chapter 1689,) all returns of surveys, which have been actually executed

since the 4th of July, 1776, by deputy surveyors, whilst they acted under legal appointments, shall be received in the Land-Office, although the said deputies may happen not to be in office, at the time of such return or returns being made; *Provided*, That no returns be admitted, that were made by deputy surveyors who have been more than 9 years out of office. And,

By "an act to authorize the granting of patents on surveys heretofore made and received in the Land-Office," passed the 2d of April, 1811. It shall be lawful for the officers of the Land-Office to issue patents in the usual manner on surveys made, which have been heretofore returned and received by the Surveyor-General, notwithstanding any such survey may contain an excess of more than ten *per cent.* above the number of acres mentioned in the warrants respectively; *Provided*, That no such patent shall be construed to defeat or affect the right or title of any other person or persons which may have accrued by improvement or otherwise to any such excess.

In the Lessee of *Henry Drinker* v. *William Holliday*, jun. *Huntingdon*, May, 1796, before *Shippen* and *Yeates*, justices (MSS. Reports.) The following general doctrine was delivered in charge to the jury.

When a survey has been made, which is supposed to be injurious to another claimant, he ought to file his *caveat*, or institute his suit in a reasonable time, or account satisfactorily for his neglect. Failing herein, he shall suffer for his negligence; and particularly so, where his adversary has proceeded to complete his legal title, or bestowed considerable labour in improvements.

Every survey will be presumed to be made by the consent of the applicant, unless the contrary appears; and where his dissent does appear, he must make an early complaint to the Surveyor-General; or, in his default, to the Board of Property. If he is remiss herein, his negligence will operate strongly against him; and under many circumstances, he will be supposed to have abandoned his objections to the survey.

When a survey has been completed on the ground, a new survey cannot be made without new directions; because the authority of the deputy-surveyor is determined; when such fresh powers have been given, no additional survey shall affect a fair and honest survey prior thereto, though made on a subsequent warrant or location. The intervening right shall be protected. The consequences of squeezing out titles obtained *bona fide*, after the claim of an early warrant has been satisfied, by opening the lines already closed, is highly injurious to society; and the measure is unjust in itself.

It is the duty of a deputy-surveyor to return the survey made by him to the proper office. His default herein shall not be imputed to the person in whose favour the survey has been made. The latter depends on the actual lines on the ground, which in fact constitute the survey; the field notes, draft or return are mere evidences of it. (See *Meade's* lessee v. *Haymaker*, ante. and 2 *Binney*, 12, 13—*infra*.—And see 2 *Binney*, 106. 1784.

These are general rules; like all general rules, they may admit of some exceptions under special circumstances.

So, at *Washington*, October, 1800, before *Yeates* and *Smith*, justices; in the Lessee of *Robert Porter* v. *James Ferguson* and *Abraham Feagly*, in ejectment for 139 acres of land on *Mingo* creek waters, (MSS. Reports.)

The plaintiff claimed under an entry made by *Francis Hull*, of 400 acres on *Monongabela* river, with the *Virginia* commissioners, on the 13th of November, 1779, on which a survey was made by *Nevil* and *Ritchie* of 269 acres 136 perches strict measure, on the 4th of July, 1785. The plaintiff set up another survey of 139 acres made by *Thomas Stokely*, and which he alleged was founded on a warrant of resurvey, or order of the Board of Property, but which were not produced.

The court said, that no benefit could be derived under the latter survey, unless by showing the warrant or order on which it was grounded. A survey having been once made, a new authority became indispensably necessary to justify a second survey. The legal presumption is, that the first survey was made with the full consent of the party, and shall conclude him, unless fraud or improper conduct can justly be ascribed to the deputy-surveyor, and in such case the complaint must be followed up in a reasonable time; his *laches* will otherwise postpone him. These principles have been often laid down, and conduce to the peace and safety of the country; they were delivered particularly in the cases of *Drinker's* lessee v. *Holliday*, and *Holtingshead's* lessee v. *Pollock*, tried at *Huntingdon*, May assises, 1796, and cannot be departed from. The plaintiff suffered a nonsuit.

In the Lessee of *Steele* and wife v. *Finlay*, at *York*, April, 1801, before *Yeates* and *Brackenridge*, Justices, (MSS. Reports.) The court laid it down as a clear rule of law, that if a person obtains a second survey on a warrant which has been once filed, he thereby abandons his first survey, *if the same was not returned into the Surveyor-General's office, before an adverse survey* is made, provided the same was done with his consent or procurement; and every survey shall be presumed to be made with the full consent of the party, unless the contrary appears.

1784. And, in the Lessee of *Hunter* v. *Meason* and *Wells*, *Fayette*, October, 1804, before *Yeates* and *Smith*, J. (MSS. Reports.) The court said, that upon the most precise and descriptive warrant or application, it is the duty of the owner to shew the lands intended thereby, to the surveyor, and to furnish provisions and chain carriers, or pay the expenses thereof. If a survey is made with which he is dissatisfied, he should without delay complain to the Surveyor-General, or Board of Property, and pray for redress; otherwise the survey will conclude him. But it is certainly true, that the deputy-surveyor may execute such warrant or application in his hands, without the personal attendance of the owner, or any one in his behalf. Should he do so, the owner becomes subjected to his acts, as he thereby discharges the office of an agent for his principal, unless there is some fraud in the case. If the surveyor shall refuse to execute the survey on the lands being shewn to him, and an offer to pay the expenses attendant thereon, a complaint should be made in a reasonable time to the Board of Property, who will direct a special order to issue; and the deputy-surveyor will be subjected to a removal from office. These principles are founded in good sense, public convenience, and a regard to the common safety, and are the common law of the country.

Lessee of *Henry Drinker* v. *Samuel Hunter*, Northumberland, October, 1796, before *Yeates* and *Smith*, Justices. (MSS. Reports.)

Where lands have been patented, and the titles thereof are free from suspicion, any subsequent survey of the same lands, under warrants or locations, are merely *void* in themselves unless there are strong circumstances of an antecedent possession in the adverse party, or in the instances of surveys made in consequence of the decision of a court of law, on a question tried between the parties, or order of the Board of Property. The improper practice of some surveyors, in making such surveys, and afterwards omitting to mention the former surveys in their returns, has been the great source of uncertainty of right, litigation and uneasiness, under which *Pennsylvania* has long laboured.

On general principles the party is concluded by the lines of his patent unless special circumstances exist to form an exception to the common rule. Lessee of *Davis* v. *Butterback*, *Franklin*, April, 1797, same judges. (MSS. Reports.)

A survey adopted by the Land-Office though not made by the regular officer, may be read in evidence. Lessee of *Shields* v. *Buchannan*, *Westmoreland*, May, 1797, before *Yeates* and *Smith*, Justices, and Lessee of *Funston* v. *M'Mahon*, *Northumberland*, October, 1797, before *M'Kean*, C. J. and *Yeates*, J (MSS. Reports.)

In the Lessee of *John Yoder* v. *William Flemming*, at Mifflin, May, 1798, before *Shippen* and *Yeates*, Justices, (MSS. Reports.) The only question which occurred, was, whether the pretensions of a party shall be determined by the courses and distances expressed in the return of survey, or by the marked trees and lines actually run?

The court in their charge, observed, that it was almost impossible to doubt on the subject. The natural or artificial boundaries of a survey have uniformly prevailed, and there is absolute certainty when a right line is followed from one marked corner to another; but the best surveying instruments will vary in some small degree. For the sake of public convenience, and individual safety, all the lands comprised within certain marked lines, or by proceeding from marked and known corners, will pass to the grantee in a deed. Any surplus measure, or variation in the courses and distances set out, will not vitiate the instrument. The lines actually run on the ground are the true survey and appropriation of the land contracted for. But the return of survey is only evidence thereof, and shall be controlled by the actual survey. This point has frequently been determined; and particularly in the case of the lessee of *John Walker* v. *Jacob Furry* and *Michael Krehl*, tried at *Nisi Prius*, at *Carlisle*, before *M'Kean*, C. J. on the 26th of November, 1790, where several mistakes had been made in the survey.

As to the time *when* a survey was made, it was held in *Dawson's* lessee v. *Laughlin*, *Allegheny*, May, 1799, before *Yeates* and *Smith*, justices, (MSS. Reports,) that parol proof could not legally be given to ascertain it; but that a copy of the survey was the best evidence of it, which it was always in the power of the party to procure; and great mischiefs would arise from the relaxation of the rule, by receiving unwritten evidence on this head.

With respect to the extension of the lines of a survey; In the Lessee of *Nicholas* and others v. *Holliday*, at *Huntingdon*, May, 1802, before *Yeates* and *Brackenridge*, justices, (MSS. Reports.) Plaintiff claimed under a warrant to *Edward Nicholas*, for 150 acres; and a survey thereon of 199 acres and 17 perches, made 25th of May, 1765, by

Samuel Finlay, who acted under *Richard Tea*, the surveyor of the district. *Finlay* surveyed four other warrants at the same time, amounting in the whole to 1100 acres, but having included only 550 acres, he, in the month of July following, extended the lines of the different surveys in his drafts, by order of *Tea*, who made pretensions to the adjoining lands.

The *Court* said, that the practice had been for surveyors to run and mark the boundaries on the ground, and afterwards calculate their contents. They could then add to, or diminish the quantities surveyed on the closing lines. But if any great mistake had been made, careful surveyors usually went on the ground again, and made new surveys, obliterating their former marks. After a survey was returned into the Surveyor-General's office, the lines could not be extended, without a new warrant or order of survey, their former authority being *functus officio*: but before such return, the surveyor might extend the lines of a survey made by mistake, where no injury resulted to other claimants. And see *Biddle's* lessee v. *Dougal*, to the same effect. 2 Binney 37, and *Evans* v. *Nargong*, ib. 55.

Where a survey has been made on a warrant generally descriptive, and a resurvey is made thereof by order of the Board of Property, whereby part of the old survey is omitted, and new lands added, part whereof have been surveyed under intervening rights, the title cannot prevail as to such omissions, or additions, injurious to other persons. But as to such parts of the land as were comprehended in the old survey, and were not dropped or abandoned by the resurvey, and as to such additions as were not theretofore surveyed under other rights, the title must prevail. *Addleman* v. *Way*, *Huntingdon*, May, 1805, before *Yeates* and *Smith*, Justices, (MSS. Reports.)

It is not essential to the validity of a survey of a body of lands, that the lines of each tract should be marked on the ground. It is sufficient if the surveyor has marked lines enough to identify the particular tracts. But in such case the surveyor is not intitled to the full compensation given by law. *Woods* v. *Ingersol*, 1 Binney, 146.

If a survey has been duly made under legal authority, and the land surveyed remains open to purchasers, a warrant coming *afterwards* to the hands of the deputy, may be applied by him to the survey already made, without running and marking the lines anew So, where the lands to be surveyed are bounded by the lines of other tracts, surveyed before, he need not run those lines over again. Lessee of *M'Rhea* v. *Plummer*, 1 Binney, 227. 1784.

The return of a deputy-surveyor is *prima facie* evidence, but not conclusive, of the truth of the matter returned. It would be a reflection on courts of justice, if, where the party had in truth procured a legal survey to be made, he should be estopped from shewing it, merely because there had formerly been an illegal survey, and the officer had made a mistake in his return. *Faulkner* v. the lessee of *Eddy*, in error, 1 Binney, 188.

A survey made by an assistant deputy-surveyor for himself, is of no validity 'till it is recognized by his principal. *M'Kinzie* v. *Crow*, 2 Binney, 105.

Applications made to deputy-surveyor to make a survey, and what passed thereon, are proper evidence. They are acts done in prosecution of the title, and tend to shew that no *laches* is imputable to the party who took out the warrant, but that he made the proper efforts to complete his title. Such evidence has constantly been received. Were it otherwise, it would scarcely ever be possible to shew fraud, or improper conduct on the part of the deputy-surveyor. *Nesbit's* lessee v. *Titus*, *Huntingdon*, May, 1793, before *M'Kean*, C. J. and *Yeates*, J MSS. Reports.

In the Lessee of *John Hubley* and others v. *Benjamin Chew*, *Northumberland*, October 1796, before *Yeates* and *Smith*, Justices. (MSS. Reports.) The plaintiff claimed under 18 different warrants, dated the 16th of August, 1773, to *Bernard Hubley*, and others; a survey begun by *Jesse Lukens*, on the 7th of September, 1773, (but nothing further done, than running two lines, by reason of the appearance of some Indians,) and the surveys finally completed on the 14th, 15th, 16th, 17th, 18th and 19th of April, 1777, by *Joseph Wallis*, under *Charles Lukens*, deputy-surveyor.

A small memorandum book of field notes of *Jesse Lukens*, was offered in evidence by the plaintiff, and excepted to by defendant, and a witness was adduced, who swore it did not appear to be *Lukens's* hand-writing; but it appearing to have been found amongst the papers of the deputy-surveyor of the district, and that other witnesses believed the notes to be *Lukens's* writing, (though having been first traced out with a black-lead pencil, and afterwards run over with a pen and ink, the usual character of his hand-writing was disguised thereby, and rendered more stiff,) the court directed it should be read in evidence.

The surveys made by *Joseph Wallis*

1784. were also offered in evidence, and opposed in the like manner. On the face thereof they purported to be made on the 14th, 15th, 16th, 17th, 18th and 19th of April, 1777, and were returned in these words, "For Charles Lukens, esq. Joseph Wallis. (D. S.)

Proof was given, that on a hearing between the parties, before the Board of Property, in April, 1793, *Wallis* had admitted that he had surveyed the lands in 1777, but made no returns thereon, and denied that the letters (DS) therein, were his hand-writing: some witnesses deposed, that they did not believe those letters (DS) were his handwriting; and others deposed the contrary.

A special certificate from *Daniel Brodhead, Surveyor-General,* accompanied each survey, in these words: "The above is a true copy of the original remaining in my office, which does not appear to be registered as other returns are in the books kept for that purpose, and the survey appears to have been made at a time when the Land-Office was closed, and no Surveyor-General, or deputy, under the new constitution was appointed."

The plaintiff's counsel admitted, that their surveys were not returned into the Surveyor-General's office 'till after 1781, and it was sworn, that *John Musser* (who, it was agreed, was interested in the lands claimed by the plaintiff,) had delivered them into the office; but the precise time and manner of doing it, did not appear.

It was contended for defendant, that the surveys were made without authority, and could only be considered as mere blank paper.

It was mutually agreed, that deputy-surveyors, before the revolution, were not under oath; but that they gave bond and security for the faithful discharge of their duty; and likewise, that the surveys in question, were not returned into the office of the secretary of the supreme executive council.

The defendant's counsel insisted, that the papers offered, differed from, and were materially distinguished from common returns of surveys. They have been put into the office by one of the parties, and to whom they were delivered, is uncertain; not being registered in the usual book kept for that purpose, they are either impositions on the part of *Wallis,* or an improper use has been made of his drafts.

From the principles and nature of the American Revolution, it is obvious, that all proprietary offices terminated when that great event took place. But on this subject, there can be no possible difficulty. A law of the state has expressly declared, that all appointments by the late governors of *Pennsylvania,* or by acts of assembly, should cease, the trustees of the Loan-Office only excepted.

It probably will be said, that the act for vesting the estates of the late proprietaries of *Pennsylvania* in this commonwealth, asserts, that all titles and claims derived under them, their officers, or others by them duly appointed, *or otherwise,* shall be thereby confirmed and established; with a *proviso,* that the private estates of the proprietaries only, which had been surveyed and returned into the Land-Office, on or before the 4th of July, 1776, should be confirmed to them; and that thereby, a line of distinction is drawn between the property of individuals, and of the late proprietaries, as to the times of surveys of their respective lands. To this, it is answered, that the act only refers to the titles and claims, as they stood on the 4th of July, 1776, and all the interest of the proprietaries at that time in the soil, was thereby vested in the commonwealth. The provision, in a new clause, that the proprietary estates, intended to be secured by the act, were confined to those lands which had not only been surveyed, but returned before that day, strengthens this position.

This construction, moreover, is fortified by the law of 17th of March, 1780, which was made with the express view of guarding against the mischiefs which might arise from clandestine surveys, and undue appropriations of vacant or waste lands, made since 4th of July, 1776, and enacts, that such surveys shall not be available in law or equity, or vest any title in such lands, unless they should be returned, with clear descriptions of the rights or claims upon which they were made, within the periods therein limited. That this has not been done in the present instance, has already been agreed; and consequently the terms of this law fully apply hereto, unless it is otherwise provided for, by some subsequent act of the legislature.

The law for establishing a Land-Office, directs, that all persons intitled in law or equity, to lands within the Indian purchase, by virtue of any grant, warrant or location, before the 10th of December, 1776, may receive patents, on payment of the purchase money, interest and office fees; and where surveys have not been made and returned to the former office, an order of survey and patent may be had on certain conditions, &c. All lands theretofore

surveyed and not returned, shall be returned into the Surveyor-General's office in nine months. No relief is given by this law.

The act of 5th of April, 1782, empowers the Surveyor-General, to receive returns of such surveys, as shall appear to him, to have been *faithfully* and *regularly* made, from the late deputy-surveyors, for such further period, as to him shall seem just and reasonable. The plaintiff, to intitle himself to the benefit of this law, must evince the *regularity* of his survey. The Surveyor-General, by his certificate, has disapproved, and not approved of these returns.

The act of 4th of September, 1793, directs, that all returns of surveys, actually executed since the 4th of July, 1776, by deputy-surveyors, *under legal appointments*, shall be received in the Land-Office, though the deputies may not be in office at the time of the return made; provided they have not been more than nine years out of office.

To intitle a party to the return of surveys contemplated by this law, they must have been actually executed by deputy-surveyors, *whilst* they acted under legal appointments. Now *John Lukens's* power, as Surveyor-General, expired, beyond all question, under the law of 28th of January, 1777; and his deputations must have ceased of course. It is evident, therefore, that *Charles Lukens* could have no power to make a survey of vacant lands, in April, 1777, and that *Joseph Wallis*, who acted under him, could have no greater authority than his principal.

The legislature in their act of 9th of April, 1781, justify and sanction the acts of the proprietary officers, in the granting of lands, up to the 10th of December, 1776, but no further. It is therefore submitted, that these surveys were made without authority, and cannot amount to an appropriation of any lands; and consequently, that they ought not to be received in evidence.

The plaintiff's counsel urged, that at any rate the surveys were evidence, to shew that the persons now suing, prosecuted their claim to lands, which were begun to be surveyed in 1773, and that they never lost sight of their object.

The law of November, 1779, has very general and extensive words. It declares, that, "all and every the rights, titles, estates, claims and demands, which were granted by, or derived from the said proprietaries, their officers, or others by them duly commissioned and appointed, *or otherwise*, or to which any person or persons, other than the said proprietaries, were, or are intitled, either in law or equity, or by virtue of any deed, patent, warrant or survey, of, in or to any part, or portion of the lands comprized and contained within the limits of this state, or by virtue of any location filed in the Land-Office at any time or times before the said 4th of July, 1776, shall be, and they are thereby confirmed, ratified and established forever, &c." 1784.

Now, though the locations must be entered before that day, there are no words which limit the *surveys* to that period. The terms are "by virtue of *any* deed, patent, warrant, or *survey*." The words "*or otherwise*" have some meaning, and can refer to nothing, but to some supposed or implied defect of power in the late proprietary officers. The distinction made between the lands claimed by individuals, and by the late proprietaries, in their private capacities, must strike every reasonable mind. To vest an interest in the latter, surveys must have been made and returned before a certain day, but in the former case, the legislature are wholly silent, and it may fairly be concluded, that any survey made for a private person, previous to the passing of that act, by an officer *de facto*, would be good and valid. The law favours the acts of persons in reputed authority. To reconcile the minds of the people to the measure of taking from the late proprietaries their interest and property in the soil, it became necessary to use strong expressions in the law, thereby securing all the rights and claims of individual citizens. A mortgage made on the 20th of June, 1776, acknowledged the 5th of July, and recorded on the 3d of November, 1776, was held good and valid; and one of the reasons given by the court, was, that all transactions in the Land-Office, and other offices, during the *interregnum*, which were in themselves fair and honest, have uniformly been considered as valid, for the sake of public convenience. 1 Dallas, 436, 438.

The reason why surveys were directed to be returned to the Secretary of the Executive Council, was merely on account of the Land-Office being shut.

The act of 9th of April, 1781, cures the defect in the plaintiff's title in not returning these surveys to this secretary's office. If the surveys were returned in nine months from the passing of that law, it is sufficient. It was not necessary that the surveyors should return the surveys with their own hands. The party interested may well do it for him; this is known to be a customary thing. If the surveys were lodged in the office before the 9th of January,

1784. 1782, there was no occasion for the Surveyor-General to exercise any discretion in the business. His certificate at this time can neither diminish, nor add weight to the surveys. They were found duly returned into his office, and derive authority from that circumstance.

The intention of the legislature, in passing the law of 4th September, 1793, was to ease the citizens of the expenses of new surveys. *Charles Lukens* did act *under a legal appointment: Joseph Wallis* did business under him; and it would be attended with the most pernicious consequences, to lay down the doctrine, that all the acts of deputy-surveyors from the 10th of December, 1776, to 27th of November, 1779, were merely void and of none effect.

The *Court* declared their opinion, that the surveys offered in evidence, did not appear to be executed by a proper officer, *whilst he acted under a legal appointment.* A mode had been provided by the act of assembly of 17th of March, 1780, by which they might have been rendered legitimate; but the directions of that law not having been pursued, by a return into the office of the secretary of the Supreme Executive Council, no succeeding law, that they knew of, cured the defect of proper authority in *Joseph Wallis*, who made the surveys. Consequently, the surveys could not be received in evidence of the appropriation of vacant lands, but only as merely pursuing and continuing the claim of the parties. The court, however, invited the plaintiff's counsel, to require that the point might be reserved for further investigation, which was done accordingly.

The plaintiff then gave evidence of having paid *Joseph Wallis* £. 127 2*s*. 6*d*. by his receipt, bearing date 9th of April, 1778, for surveying sundry tracts of land, and making a draft extraordinary: and a general draft made by *Wallis*, connecting twenty-five surveys together, was offered in evidence, and excepted to.

By the Court. If this paper is offered as evidence of an official survey, we must reject it, to preserve consistency in our opinion: but if it is offered as *written declarations* of *Wallis*, to strengthen, or weaken his assertions before the Board of Property, in the presence of the parties, it may be admitted for those purposes, but no further. It cannot be made use of to establish any independent fact. The court finally declared, independent of the merits, that the plaintiff could not recover; for want of an *official* survey: and the verdict was for the defendant; which was acquiesced in.

Papers found in the office of the deputy-surveyor of the district, and in his hand-writing, may be given in evidence, to impeach his return of survey. But such papers should be treated with due caution, and consideration had of all the attendant circumstances. So ruled, in the Lessee of *Adams* v. *Goodlander* and others, *Northumberland*, May, 1798, before *Shippen* and *Yeates*, Justices. (MSS. Reports.)

Letter of a deputy-surveyor to his assistant, to make a survey, is good *prima facie* evidence, though not proved to have been delivered, and the survey has been made after the death of the deputy-surveyor, but which circumstance the assistant may not have known; but it may be repelled by other proof. The authority of such assistant should not be too nicely scrutinized after a great lapse of time. *Bell's* lessee v. *Levers*, *Northampton*, June 1800. (MSS. Reports.) S. C. 4 Dallas, 210.

And, in the Lessee of *Armstrong* v. *Morgan*, *Huntingdon*, May 1803, before *Yeates* and *Smith*, justices, (MSS. Reports.) The plaintiff's counsel stated, that his claim depended on a written order, signed by *Richard Peters* Esq. directed to Col. *John Armstrong*, to survey to *George Crogan* Esq. 4000 acres on *Aughwick*, *Juniata*, and *Dunning's* creek, in 1761. That the said written order was afterwards burnt in the house of Col. *Armstrong*, in 1763 But the survey so made, was recited in a patent to *James Foley*, for another part of the land, "to have been made by the consent and direction of the proprietaries for *George Croghan*." After shewing which, they offered to prove the contents of the said written order by *parol* evidence: and that the Land-Office had been searched, but no vestiges of the written order could be found. This evidence was objected to.

By the Court. The objection made, goes rather to the operation of the evidence offered, than to its admissibility. The great rule of evidence is, that none shall be admitted which supposes superior evidence behind in the power of the party. If an instrument be lost, after proving that it did once exist, it may be proved by a copy; or if there be none such, by witnesses *viva voce*. The law for necessity admits that, which of all things it most abhors, parol evidence of deeds. Even the copies of records which have been lost, may be given in evidence, though not proved to be true copies. It is admitted that all the official papers of Col. *Armstrong* were burned in 1763, and this order must be presumed to have been amongst them. The Land-Office has been

searched, &c. nothing remains in the plaintiff's power, except the parol evidence offered, which ought to be received, and its operation weighed dispassionately.

For other matters relating to surveys, and titles to lands. See the notes to the limitarion act, *post*.

The reader is further referred to the end of the appendix in the 4th volume, where any additional cases on the subject which may hereafter be decided, will be noticed; and any errors in the preceding notes which may occur to the editor, or be pointed out by others, will be corrected.

It remains only to notice an act of assembly passed, 19th of March, 1804, (chap. 2451,) entitled "An act enjoining certain duties on the Surveyor-General," which enacts, that the Surveyor-General shall be authorized to issue certificates of any entry or entries in the books of accounts heretofore kept by the Surveyor-General, containing entries of the time of bringing into his office any survey or surveys made by his deputies, or any of them, and the charges therein made against them or either of them, as acceptance fees for the same, under the seal of his office, and to receive the usual fee for such certificate, for which he shall account to the commonwealth; and the certificate so issued shall be deemed and admitted as legal evidence in any court within this commonwealth, any law or custom to the contrary notwithstanding. 1784.

There are no books of the nature above described, in the Land-Office, prior to *John Lukens's* time.

CHAPTER MLXXXVIII.

An ACT *confirming an agreement, entered into between this state and the state of Virginia.*

SECT. II. WHEREAS George Bryan, John Ewing and David Rittenhouse were duly appointed commissioners on behalf of this commonwealth, and fully authorized to meet and agree with other commissioners on the part of Virginia, upon the western boundary, and whereas the said George Bryan, John Ewing and David Rittenhouse, in pursuance of the said trust and power, did, on the thirty-first day of August, one thousand seven hundred and seventy-nine, meet certain commissioners on the part of Virginia, to wit, James Madison and Robert Andrews, and an agreement was then entered into, concluded and signed, by and between the said commissioners, on the part of their respective states, by whom they were for the purpose aforesaid delegated, which agreement was, upon the twenty-third day of September, one thousand seven hundred and eighty, unanimously confirmed by this commonwealth, as follows: Resolved, That although the conditions annexed by the legislature of Virginia to the ratification of the boundary line, agreed to by the commissioners of Pennsylvania and Virginia, on the thirty-first of August, one thousand seven hundred and seventy-nine, may tend to countenance some unwarrantable claims which may be made under the state of Virginia, in consequence of pretended purchases or settlements, pending the controversy; yet this state, determining to give to the world the most unequivocal proof of their earnest desire to promote peace and harmony with a sister state, so necessary during this great contest against the common enemy, do agree to the conditions proposed by the state of Virginia, in their resolves of the twenty-third day of June last, to wit, That the agreement made on the thirty-first day of August, one thousand seven hundred and seventy-nine, between James Madison and Recital.