act, and subsequent acts relative to the disposal of the vacant lands within this commonwealth, shall obtain patents for the same, in the usual manner, and the officers of the Land-Office, on the application of any person holding donation lands by patent, within the bounds aforesaid, or within that part usually called the triangle, and the applicant, or applicants aforesaid, releasing his, her or their patent, or patents to the commonwealth, shall have another unappropriated lot or lots of equal quantity; which said lot, or lots shall be patented to the person or persons so releasing, in the usual manner and free of expense.

§ 2. This act, and the foregoing act, (chap. 2276,) of April 2d, 1802, (except the limitation clause of the said last recited act,) were to continue in force until the 1st of April, 1806.

The act of 25th of March, 1805, was annually continued in force, and by the act of 4th of April, 1809, the limitation was further extended until the 1st of April, 1810. Since which period there has been no further extension; and the offices are now closed against any application for donation lands. 1785.

By an act passed 11th of March, 1809, in consequence of a decision of the supreme court in the case of *Thomas Grant*, the brother of an officer who was killed in the service of the United States, during the war, and who was held to be entitled as heir at law under the 5th section of the act of 2d of April, 1802, his brother having died unmarried; no patent was to issue for donation lands, after passing this act, except to the widow or children of any deceased officer or soldier.

## CHAPTER MCXXX.

*An* **ACT** *for incorporating the Presbyterian Church of Falling-Spring, in the county of Franklin.*

Passed 25th of March, 1785.—Private act.—Recorded in Law Book No. II. page 474.

## CHAPTER MCXXXIV.

*An* **ACT** *for the limitation of actions to be brought for the inheritance or possession of real property, or upon penal acts of Assembly.*

SECT. I. **WHEREAS** it is necessary for the quieting of estates, and for the greater security of real property, that provision should be made for the limitation of actions to be brought for any manors, lands, tenements or hereditaments:

SECT. II. *Be it 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, from henceforth, no person or persons whatsoever shall make entry into any manors, lands, tenements or hereditaments, after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seizin or possession of him, her or themselves, his, her or their ancestors or predecessors, nor declare or allege any other seizin or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit, so hereafter to be sued, commenced or brought.

Entry into lands &c. barred, after 21 years after the title accrued.

No seizin or possession shall be alleged beyond 21 years, before any writ of right, or any other real or possessory writ or action, for lands, &c. is sued.

1785.

Fifteen years allowed to persons now having right or title of entry.

SECT. III. *Provided always, and be it further enacted by the authority aforesaid*, That any person or persons now having right, title of entry as aforesaid, and the heir or heirs of such person or persons, may, within fifteen years from this time, enter or commence any action or suit, as he, she or they, or his, her or their ancestors or predecessors, might have done, before the passing of this act.

Proviso in favour of persons incapable of suing.

SECT. IV. *Provided also, and be it further enacted by the authority aforesaid*, That if any person or persons having such right or title be, or shall be at the time such right or title first descended or accrued, within the age of twenty-one years, feme-covert, *non compos mentis*, imprisoned, or beyond the seas, or from and without the United States of America, then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, as he, she or they might have done, before the passing of this act, so as such person or persons, or the heir or heirs of such person or persons, shall, within ten years next after attaining full age, discoverture, soundness of mind, enlargement out of prison, or coming into the said United States, take benefit of or sue for the same, and no time after the said ten years; and in case such person or persons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit, that such person or persons could or might have had, by living until the disabilities should have ceased or been removed; and if any abatement happen in any proceeding or proceedings upon such right or title, such proceeding or proceedings may be renewed and continued, within three years from the time of such abatement, but not afterward.

In what cases.

Persons claiming lands, or pre-emption thereof, from the state, shall not enter and sue, unless there has been seven years quiet possession.

SECT. V. *And be it further enacted by the authority aforesaid*, That no person or persons that now hath or have any claim to the possession of any lands, tenements or hereditaments, or the pre-emption thereof, from the commonwealth, founded upon any prior warrant, whereon no survey hath been made, or in consequence of any prior settlement, improvement or occupation, without other title, shall hereafter enter or bring any action for the recovery thereof, [or his, her or their ancestors or predecessors,] *(n)* unless he, she or they, or his, her or their ancestors or predecessors, have had the quiet and peaceable possession of the same within seven years next before such entry, or bringing such action: *Provided always*, That if any person or persons so claiming as aforesaid hath been forced or driven away from his, her or their possessions, by the savages, or by the terror of them, or any other persons, or by any other means, except by the judicial authority of the state, hath quitted the same, during the late war, then such person or persons, and his, her or their heir or heirs, shall or may, notwithstanding the said seven years be expired, bring his, her or their action, or make his, her or their entry, within five years from the passing of this act.

Proviso, in favour of persons expelled by the enemy.

Limitation of suits or

SECT. VI. *And be it further enacted by the authority aforesaid*, That all actions, suits, bills, indictments or informations, which shall

*(n)* The words between crotchets are inserted in the original law, but are obviously an error in the engrossment *(Note to former edition.)*

be brought for any forfeiture, upon any penal act of Assembly made or to be made, whereby the forfeiture is or shall be limited to the commonwealth only, shall hereafter be brought within two years after the offence was committed, and at no time afterwards; and that all actions, suits, bills or informations, which shall be brought for any forfeiture, upon any penal act of Assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any person or persons that may lawfully sue for the same, within one year next after the offence was committed; and in default of such pursuit, that then the same shall be brought for the commonwealth, any time within one year after that year ended; and if any action, suit, bill, indictment or information, shall be brought after the time so limited, the same shall be void, and where a shorter time is limited by any act of Assembly, the prosecution shall be within that time.

Indictments on penal acts.

SECT. VII. *And be it further enacted by the authority aforesaid*, That no deed, grant, conveyance or assurance, heretofore given by any Sheriff of any of the counties within this state, *bona fide*, and for a valuable consideration, of any lands, tenements or hereditaments whatsoever, where quiet and peaceable possession hath been had of the same for the space of six years, shall be adjudged or taken to be defective, avoided or prejudiced, for not producing in court, upon trial or otherwise, any writ of *fieri facias*, *levari facias*, or *venditioni exponas*, or any returns thereupon, or for want of proof that due and legal notice of the sales of the same was given, or for not having been recorded in the office for recording of deeds.

In what respect Sheriffs deeds shall be good, after six years quiet possession.

(See vol. 1. pa. 66, and 67, for the construction of this sec-

Passed 26th March, 1785.—Recorded in Law Book No. II. page 482. *(o)*

*(o)* For the limitation of actions in personal suits, see vol. 1, page 76, chap. 196, and the notes there subjoined.

By an act passed 12th of March, 1800, (post. chap. 2121,) is enacted, that the provisions and limitations in the third section of the act in the text shall not be a bar to any person or persons, who on the passing of the said act, had any right or title of entry into any lands, tenements or hereditaments, or to the heir, or heirs or assigns of such person or persons, until the expiration of three years from and after the 26th day of March, 1800.

And, by an act passed 11th of March, 1800, (chap. 2118.) The act in the text is repealed, and rendered null and void, and declared to have no force or effect within what is called the seventeen townships, in the county of Luzerne, nor in any case where title is, or has at any time, been claimed under what is called the *Susquehanna* company, or in any way under the state of Connecticut, for any lands or possessions within this commonwealth.

In the case of *Irwin's* lessee, v. *Nichols* and *Swan*, noted for other purposes, ante. page 186, and where the facts are stated, the *Court* said, there was a legal bar to the plaintiff's recovery. The ejectment was brought after the 26th of *March*, 1785. Under the 5th section of the act of that date, it is provided, that "no persons having any claim to the possession of lands, or the pre-emption thereof from the commonwealth, founded on any *prior warrant* whereon no *survey* has been made, or in consequence of any prior settlement, improvement, or occupation, without other title, shall hereafter enter, or bring any action for the recovery thereof, unless they, or their ancestors, or predecessors, have had the quiet and peaceable possession of the same within seven years, next before such entry, or bringing such action." Now, it is evident, that the words "*prior warrant*" include also "a *prior application* or *location*." *Omne majus continet in se minus*. The words of the act expressly mentioning *warrants*, though money may have been paid thereon, must, *a multo fortiori*, be construed to extend to *unexecuted* locations, which are but the bare expressions of wishes to hold lands.

1785. The act is an excellent safeguard to landed possessions, and highly beneficial to the community, and should be construed liberally. Indeed, when there has been *fraud* in the surveyor to whom the location is directed, or where the adversary has *forcibly* and *violently* prevented the making of the survey, the prohibitory terms of the law may not apply, unless there has been a *bona fide* conveyance to a purchaser without notice. But there being no survey in the present case; nor any evidence of fraud, force or threats to prevent a survey being made, the plaintiff was not intitled to recover, and he accordingly suffered a nonsuit.

In *Ewing's* lessee v. *Barton*, it it was said by the court, that the case appeared to be within the limitation act. For although there was a survey on the application, it was not shewn that it was effectuated by the Lessor of the plaintiff, or that he ever attempted to make one; and therefore it should not enure for his benefit. That the survey was adverse to his title; had been returned for Ross, and the legal title now vested in his heirs.

And, in the Lessee of *Samuel Simpson* v. *Williams*, at *Mifflin*, May, 1802, before *Yeates* and *Brackenridge* Justices, (MSS. Reports.) The plaintiff claimed under an application dated 3d of April, 1769, and a survey thereon on the 12th of March, 1775.

It was incontestably proved, that the Lessor of the plaintiff had applied in the secretary's office for the location; but he gave no evidence, either positive or circumstantial, that he paid the surveying fees, procured the survey to be made, or made any attempt to procure one.

The defendant as tenant, of *Christian Miller* and *Samuel Miles*, claimed under the same application, a survey, a warrant of acceptance, a patent thereon, dated 2d of February, 1784. A conveyance from a different *Samuel Simpson* to *Henry Funk* of the premises, in consideration of £. 100, dated 13th May, 1784, and another conveyance from *Funk* to *Christian Miller*, in consideration of £. 106, dated 4th of April, 1792.

It appeared that the lessor of the plaintiff had not claimed these lands till within a few years past; that the survey had been shifted from the lands described in the application, and from presumptive evidence, that it had been directed by the *Simpson* under whom the defendants claimed; and that the premises, which in 1784, would not have sold for more than five shillings an acre would now sell for forty-five shillings.

The court expressed their opinion, that this was a dormant application so far as it respected the plaintiff; that it was barred by the limitation act of 26th of March, 1786, and cited the case of *Ewing's* lessee v. *Barton*, at *Nisi Prius*, at *Sunbury*, May, 1798, as analogous hereto; and that the defendant's title gained additional strength from his landlords being considered as *bona fide* purchaser of the legal estate, for a valuable consideration without notice. Plaintiff nonsuit.

In the Lessee of *Hugh Neilly* v. *Benjamin M'Cormick*, *Allegheny*, May 1799, before *Yeates* and *Smith*, Justices, (MSS. Reports.) The plaintiff claimed 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 twenty-two years before the bringing of this suit.

For the defendant it was contended, that the present 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, § 5.

For the plaintiff it was answered, that an inquisition of forcible entry and detainer had been found many years ago against the defendant, 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. And see 2 Binney, 89.

So, in the Lessee of *Sturgeon* v. *Waugh*, *Dauphin*, October 1799, (MSS. Reports.) It was held, that though there was a decision of the Board of Property to survey the land for the improver, yet if no steps had been taken to pursue it, and get the survey made, it would not amount to such *other* title as would save the limitation.

And, in the Lessee of *Ephraim Wallace*, v. *Thomas Dickey*, *Westmoreland*, November, 1801, before *Yeates* and *Smith*, justices, (MSS. Reports.) It appeared, that the lessor of the plaintiff settled on the lands in question in 1775, and cleared 12 acres, and had 26 acres under fence. He continued living in his cabin with his family, cultivating the land, until he was driven off by the Indians, with other inhabitants, in the fall of 1777. He returned in the following year, and threshed out his grain. On the 23d of February, 1785, he took out a warrant for 300 acres, including his improvement, adjoining lands of *William Dickey*, &c. interest to commence from the 1st of March, 1773. But it did not appear that he had ever applied for a survey to be made on his warrant, nor was any survey made thereon.

*Joseph Irwin*, on the 8th of November, 1784, obtained a warrant for 400 acres including an improvement on the waters of Beaver Dam run, adjoining lands of *David Dickey*, &c. interest to commence from the 1st of March, 1774. A survey of 399 acres 141 perches, was made on this warrant by *John Moore*, deputy-surveyor on the 18th of April, 1786, with a note subjoined thereto, that *Ephraim Wallace* claimed the land under an improvement. Previous thereto, on the 9th of April, 1785, *Irwin* conveyed his right to *George Henry*, in consideration of £. 250. On a *caveat* filed against the survey made under *Irwin's* warrant, the Board of Property decided, on the 5th of March, 1792, that 200 acres of the survey should be returned on the warrant of *Wallace*, and the residue for *Henry*, under the warrant of *Irwin*. No return was made for *Wallace*, nor any application by him made for that purpose. In 1794, *Wallace* put one *Robert White* as a tenant on part of the land, and who continued thereon since, but there had been an adverse possession against him by the present defendant, before this ejectment was brought, for ten years.

Two days before the present jury was sworn, an ejectment came on for trial between the Lessee of *George Henry*, and the said *Robert White*. No evidence of any improvement or settlement was shewn previous to the date of *Irwin's* warrant, and the evidence of a settlement by *Wallace* as above stated, being given; the court were of opinion, that although he had the later warrant, yet his *bona fide* settlement intitled his tenant to a verdict, and the plaintiff in that cause suffered a nonsuit.

The court were clearly of opinion, that the now plaintiff was barred by the act of limitations of 26th of March, 1785. Here was no quiet and peaceable possession under his prior settlement, within seven years next before bringing this action; no survey was had under his warrant, nor any return under the decision of the Board of Property. A case somewhat similar occurred at *Dauphin*, in *Sturgeon's* lessee v. *Waugh*, at *Nisi Prius* in October, 1799, wherein the court expressed the same opinion. Plaintiff nonsuit. 1785.

But the limitation act of 26th of March, 1785, will not bar a recovery on a descriptive warrant, where proper application has been made for a survey, and the party has been prevented therefrom by a *caveat*. So held in *Bell's* lessee v. *Levers* at *Northampton*, June, 1800, before *Skippen*, C. J. and *Yeates*, J. (MSS. Reports.) And the plaintiff had brought his ejectment immediately after the decision of the Board of Property against him, directing the survey to be made for defendant.

What shall be said to be a survey under the 5th section of the limitation act has been much litigated; and in the following case, the court was divided. But though the case, of course, does not settle the point, yet it may be useful and interesting to exhibit the arguments on both sides.

Lessee of James Carothers v. John Carothers, *Cumberland*, May, 1801, before *Yeates* and *Brackenridge*, justices. (MSS. Reports.)

Ejectment for 14 acres, 123 perches of land, in *West Penn'sbro'* township.

The plaintiff claimed under an application dated 9th of March, 1767, for 300 acres of land, in the Barrens of Cumberland valley, joining William Carothers and James Carothers.

In the spring of the same year *Samuel Lyon* assistant of the deputy-surveyor of the district, began to make a survey under the application, beginning at a hickory corner of James Carothers, senr. uncle of the lessor of the plaintiff, and run five courses to a white oak stump. William Carothers, his father, who claimed the lands lying to the eastward, was dissatisfied, and said his other children would be defrauded thereby, and left them in dudgeon. Nothing further was then done. But on the 30th of August, 1770, *William Lyon*, another assistant surveyor, was taken to the ground to complete the survey. He began where the former courses ended at the white oak stump, and run three courses to a black oak, which, if pursued, would have run into the cleared field of James the uncle. He upbraided his nephew therewith, but the latter still insisted on finishing

1785. the survey, and searched for the lines of an old survey, made in the name of William Harkness, and then vested in his father, intending to adjoin the lines thereof. Not being able to discover these lines, the lessor of the plaintiff directed the surveyor to stop, and promised to call on him with the draft of Harknes's survey, in order to complete the survey. He next day paid him 40*s.* the surveying fees, but never called on him again to finish the work; nor was any further attempt made to conclude the business, until in December, 1798, when a survey was perfected by *Samuel Lyon*, under the application, containing 192 acres and 11 perches, which being nearly five years after the ejectment was entered, was of course rejected by the court.

It appeared, that lines running from the white oak stump, or black oak, where the first and second surveys terminated, to the hickory, the place of beginning, would in either case exclude the lands in question. The last course to the black oak, was S. 10 1-2 W. and in order to conclude the disputed part, which lay direct north of the two preceding courses, it would be necessary to conduct the survey by running easterly, northerly and westerly courses, to reach the place of beginning, as was done in 1798, when *nine* new courses were run.

The Lessor of the plaintiff had 15 or 20 acres of cleared land, adjoining the old place of his father some years before he took out his application, the nearest part whereof was about 50 or 60 perches; but the bulk of the improvement, 150 perches distant from the lands in controversy.

The defendant claimed under a warrant to his father James Carothers, sen. for 300 acres, including an improvement, bounded by land of William Carothers, John Davison, John Young, George Davison and William Cochran, in West Pennsbro' township; interest to commence on the first of March, 1770. On the 12th of December, 1785, a survey hereon was made by *Samuel Lyon*, containing 330 acres 7 perches, and a patent was obtained on the 10th of January following.

The settlement began between 1756, and 1762, and in 1770, he cultivated 40 acres of cleared land, and had a large field north of his house; and this house was only 10 or 15 perches from the disputed line.

The court, after the cause was fully argued by counsel, disagreed in opinion, whether the plaintiff was barred by the limitation act of 26th of March, 1785, and expressed their sentiments to the jury in separate charges.

*Brackenridge*, J. in substance, said, that the plaintiff's location was descriptive of the land in dispute, by calling for William and James Carothers. The limitation act was grounded on the inconveniences resulting from pocketed locations; but where the warrant or application has been put into the hands of the surveyor, to be executed, it rebutted all presumption of abandonment; *a multo fortiori*, where a survey had been begun, though imperfect in all particulars. As to the defendant, it was perfect, because it drew a dividing line between his improvements, and the lands in controversy. So, a location calling for natural boundaries, is out of the limitation act. It is true, the lines as run, do not include any space, but it is common to leave an open line, and the running of a few courses more, would complete the survey in the present instance. Here the defendant's uncle prevented the completion of the survey in 1770. The plaintiff made two efforts for this purpose, but was unsuccessful in each. He was in no default, but paid the full surveying fees. He had made prior improvements, and must have intended to include them; and his taking possession is strong evidence of his intentions. Besides the shape and figure of the defendant's survey is very unreasonable, when the prior legal right of the plaintiff came to be considered; and on the whole, he concluded, that the plaintiff was entitled to a verdict.

*Yeates* J. admitted, that the small disputed gore might be described by the plaintiff's location: But the same remark was equally applicable to other lands, adjoining those called for, lying in other directions. It could not be deemed a close, precise application, comparable to one calling for natural boundaries.

The law in question is declared to have been made "for the quieting of estates, and the greater security of real property." Secret orders of survey kept back for years, without any efforts to execute them, were undoubtedly intended to be guarded against. But an application whereon a survey has been begun one year, taken up again in three years, and not perfected for the term of 28 years afterwards, has many serious mischiefs attendant on it. It tends to litigation, and prevents the settlement of the country; for no one can tell what new courses are meditated. Nine courses run, and nine *in fieri* cannot with any propriety be called

a *survey made*, within the expressions or meaning of the legislature. Merely putting a warrant into the hands of the acting surveyor does not obviate the inconvenience intended to be obviated: more is to be done by the applier. It is true, if the surveyor, either through fraud, partiality, or negligence, does not proceed in his work, every thing reasonable being done on the part of the applier; or, if he is prevented by force, or menace, or the *caveat* of the adverse party, it will form an exception to the generality of the words. In this instance, though the father and uncle of the lessor of the plaintiff were dissatisfied with his projected survey, they did not obstruct its completion. The former left him, as the party were going on; and notwithstanding the reproaches of the latter, he was peremptory in concluding the business, and was only stopped from his purpose by the want of *Harkness's* survey. This he engaged to procure, and to call on the surveyor with it, but failed therein. Is not then gross *laches* attributable to him?

It is certain, that the public surveyors do not run the closing line, and no evil arises herefrom; because the notice is general, and the lands comprehended by the survey are accurately ascertained. But the plaintiff had no effective survey made on either day. No definite space was comprehended; he meant to go further a field. A line subtended from the white oak stump, or black oak to the hickory, leaves out the present object of contention. How could it be known to what extent, or in what direction his inclination might lead him?

As to his reducing his application to a certainty by taking possession, he had only cleared over his father's lines: but if it is to be deemed an improvement, he disclaims all equity under it, by not inserting it in his location, if he intended to include his clearing. The uncle's warrant was more correct, though not sufficiently so. One of the witnesses speaks of his settlement made in 1756, another in 1761, or 1762, and the interest on his warrant only commences in 1770, considering the mere improvement rights, the defendant's title appears most preferable. The uncle was actually settled on the land with his family; had actually forty acres of land in cultivation, thirty-one years ago; his dwelling house only a short distance south of the boundary of the lands in dispute, and had a considerable intermediate field then cleared; and, in either view of the case, he was of opinion, that the plaintiff ought not to recover the premises in question. 1785.

The plaintiff suffered a nonsuit.

In the Lessee of Samuel Mobley, Denton Mobley, William Mobley, Robert Cunningham and Margaret his wife, and Susanna Mobley, *v.* Christian Ocker, which was tried at *Huntingdon*, May, 1801, before *Yeates* and *Brackenridge*, Justices, the case was ejectment for 214 acres on clover creek, in *Woodberry* township.

The Lessors of the plaintiff founded their pretensions on an improvement made by their father, *Ezekiel Mobley*, on lands adjoining. He settled on those lands in 1774, or 1775, erected a small house with a garden, cleared 15 or 20 acres, and begun two or three acres for meadow. He claimed the lands from Clover creek, southerly to some marked trees between him and *Michael Cryder*, 363 perches distant. The good land extended easterly from the creek, about 125 perches, to Tussey's mountain. He sold his claim to one tract west of the creek; and also another tract north of his improvements, which fell back to him.

The settlers were driven off by the Indians in 1777, and *Mobley* among the rest. He went to *Maryland*, and there died.

His widow returned to the lands in 1785, with her five children; the eldest about 15, and the youngest about 2 years old; and was assisted by her brother *William Philips*, with corn and provisions. After some time she disposed of the tract north of the improvements which had fallen back to her husband, for the maintenance of her family; and being alarmed about their right to the tract whereon they lived, agreed in behalf of herself and family, with her brother, the said *William Philips*, that if he would secure to them 200 acres, by an office right, he might have the residue for himself. She afterwards received a horse and cow as a further consideration for the improvement claim.

*Philips* accordingly took out warrants, and obtained surveys of 200 acres in the name of *Susanna Mobley*, and 214 acres and 90 perches for himself; which he afterwards patented and sold to defendant for a valuable consideration.—No improvement whatever was made on the lands in dispute, until after the survey was made for *Philips* in 1793.

Before the *parol* evidence was gone into, the defendant's counsel objected, that the plaintiff was barred by the act of limitations of 26th of March, 1785,

1785. sect. 5, there having been no quiet and peaceable possession of the premises within seven years next before bringing the action.

To this it was answered, that the widow had always been in possession of the improved part of the lands, since the inhabitants returned to their settlements; and that if she was deprived of the possession of any part, it arose from the fraud or management of *Philips*, or her mistake in believing that an office right was indispensably necessary to hold the lands.

The court said it was morally impossible to form any judgment, whether there had been an abandonment of the premises, or not, so widely did the counsel differ in their statements, until the evidence was fully heard. The legal objection might afterwards be taken up and decided on.

The plaintiff's counsel then excepted to giving evidence of any contract or sale by the widow respecting the improvement claim. No act which she could do, could affect the rights of the children in their minority, in lands claimed by improvement, and ascertained on one side by a marked line; and for this was cited 2 Dallas, 205. *Duncan's* lessee v. *Walker*.

The Court said improvement rights were equitable claims, which might be fortified by the acts of a widow, during the minority of her children, by pursuing and continuing the first settlement; so, also, might they be abandoned and forfeited by her neglect. Evidence was equally applicable and relevant in both cases. It was impossible to lay down any general rule on the subject. Every case must depend on its own peculiar circumstances. The effect of the evidence must be judged of, after it has been received.

After the evidence had been gone though, the court said, that they discovered nothing unfair or inequitable, in the transaction of *Philips* with the widow. There were many years previous to 1791, when improvement rights were deemed to stand on a precarious footing. While this opinion generally prevailed, there was no impropriety in a widow's securing at least a part of the land claimed; and in this instance, one of the adjoining tracts had been transferred by the improver in his life time, and two others had been disposed of by the widow after his death. The claim went to an unreasonable extent, and 200 acres had been secured to the family.

It was agreed by the court, and all the counsel, on the question being made, that the fifth section of the limitation act of 26th of March, 1785, extended to, and was binding on infants, where there had been no possession of the lands held under the improvement for seven years next before the action brought. The preceding section contains a *proviso* in favour of infancy, coverture, &c. But here it is only in favour of those who have been driven from their possessions by force or terror, &c. and the previous part of the law runs thus, "Unless he, she or they or his, her or their *ancestors*, or *predecessors*, have had the possession, &c." The law is general in its nature, and binds every member of the community "for the quieting of estates, and security of property."

The plaintiff suffered a non-suit. (MSS. Reports.)

To the same effect was the case of the Lessee of *Joshua Clark* v. *George Hackethorn*, (in a case nearly similar,) at *Washington*, November, 1801, before *Yeates* and *Smith*, justices. (MSS. Reports.)

In the Lessee of *James Brice* v. *Richard Curran*, at *Mifflin*, May, 1802, before *Yeates* and *Brackenridge*, justices. (MSS. Reports.) The case was this—

The plaintiff claimed under a warrant to *John Brown*, dated 5th of April, 1788, for 50 acres, including an improvement, bounded, &c. Interest to commence from 1st of March, 1761, and a survey made thereon, by *James Harris*, on the 8th of March, 1796. *Brown* had raised a crop on the land, in 1788, but neither he, nor the persons claiming under him, had any actual subsequent possession. There was an adverse possession when the survey was made, and the surveyor was forbidden to execute the warrant on the lands. The suit was brought to August term, 1800.

Exception was taken by the defendant's counsel, to the shewing of the survey in evidence, on the grounds of the limitation act, passed 26th of March, 1785, sect. 5. It is an act of repose, and highly beneficial, and pursues the statute in *England*, of 21 Jac. 1. c. 16. A warrant gives no title to lands, but only authorizes a survey within six months thereafter. Here there was no survey made within seven years after the date of the warrant, nor any possession antecedent to the commencement of the suit for eleven years. But the act requires the quiet and peaceable possession of the lands within seven years next before the entry, or bring-

ing the action. These words refer equally to warrants and settlements; and after the seven years, the warrant without a survey shall be presumed to be abandoned, in the same manner as a bond shall be presumed at common law to be paid after the lapse of twenty years, unless the legal presumption be repelled by other proof.

The plaintiff's counsel anwered—The words of the fifth section are "No person or persons, that *now* hath, or have any claim to the possession of any lands, or the pre-emption thereof from the commonwealth, upon any warrant whereon no survey hath been made, or in consequence of any prior settlement, improvement, or occupation, without other title, shall hereafter enter, or bring any action for the recovery thereof, *unless*, he, she or they, or his or their ancestors, or predecessors, have had the peaceable and quiet possession of the same, within seven years next before such entry, or bringing such action; with a provision in favour of persons driven away from their possessions by the savages. Now, it is obvious, that the words are confined to claims existing at the passing of the act, and not to future claims, the word *now*, being made use of.

It is also clear, that there are two independent clauses, marked by the disjunctive *or*, referring to claims by warrant, or improvement. The expressions "without further title," refer to improvements alone; those following *unless*, may refer to warrants also. So that it will read thus—A warrant whereon no survey has been made, or an interrupted settlement, may justify an entry, or support an action, provided there has been a quiet and peaceable possession of the lands, within seven years next before such entry or action. The act in no part of it directs, that a survey shall be made on a warrant within seven years after its being issued; or, that in the case of a warrant, accompanied with a survey, it is necessary there should be a possession within seven years before the suit brought. The construction has never obtained, that the survey under a warrant should be made in six months. It would defeat the titles of many valuable estates. Indeed it has often been said from the bench, that so far from warrants not conferring a title to lands, where the full purchase money has been paid, that in the instances of their being specially and exclusively descriptive of certain lands, as of an island encompassed by water, &c. an ejectment might be supported on such a warrant without a survey, and that such case was not within the limitation act. Here there was a warrant subsequent to 26th of March, 1785, and a survey thereon regularly made, in addition to an improvement made many years ago. 1785.

The court directed the survey to be received in evidence, and said the limitation act only referred to warrants issued before the law was enacted: and *Yeates*, J. observed, that he was of opinion that the doctrine of the plaintiff's counsel, was accurate and correct throughout.

But the verdict was for the defendant on the merits.

For the act of limitations to operate as a bar, the possession must be *adverse*. 1 Dallas, 67.

In the case of *Jackson*, lessee of *Hardenberg* and *wife*, and *Hasbrouk* and *wife*, against *Shoonmaker*, in the supreme court of *New-York*, 2 *Johnson's* Reports, 231, 234. The defendant proved, that in 1774, there being a rumour of the plaintiff's claim, that those under whom he held, inclosed the part which they understood was claimed by a *possession fence*, which was made by trees felled, and lapped one upon another, and that this fence had ever been kept up.

The verdict was for the plaintiff, on the circuit, and on motion in the supreme court, to set aside the verdict, as against evidence, and for the misdirection of the judge:

*Kent* C. J. delivered the opinion of the Court; which, so far as respects this point, is as follows.

"The other point in the cause relates to the adverse possession set up by the defendant. The *possession fence*, as it was termed, which was run round the large tract in 1774, I do not consider as an adverse possession, sufficient to toll the right of entry of the true owner, after twenty years. This mode of taking possession, is too loose and equivocal. There must be a real and substantial inclosure, *an actual occupancy*, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title," and the motion for a new trial was denied.

In *Rochell* v. *Holmes*, 2 *Bay's South Carolina* reports, 491. The judges all held, "that title by possession, so as to defeat a grant, or other legal conveyance, is never to be presumed; but must be actually proved and shewn, in order to rebut a prior title, in the same manner, and with the same degree of precision, as plaintiff must shew a clear title in him, before he can recover."