

Sims' Lessee Vs. Irvine

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Court : US Supreme Court

Decided On : 1799

Appeal No. : 3 U.S. 425

Appellant : Sims' Lessee

Respondent : irvine

Judgement :

Sims' Lessee v. Irvine - 3 U.S. 425 (1799)

U.S. Supreme Court Sims' Lessee v. Irvine, 3 U.S. 3 Dall. 425 425 (1799)

Sims' Lessee v. Irvine

3 U.S. (3 Dall.) 425

ERROR TO THE CIRCUIT COURT OF

THE PENNSYLVANIA DISTRICT

SYLLABUS

William Douglas, for services rendered in the war between England and France prior to 1763, acquired a right to 5,000 acres of unappropriated land in America, and assigned the said right to Sims, the plaintiff, who afterwards obtained a

warrant from the State of Virginia under the right and located it on "Montour's Island," and thus acquired a complete equitable title to the same. Montour's Island, by the convention of boundary between Pennsylvania and Virginia, was acknowledged to be a part of the former state. In the articles of the convention between the two states, the rights acquired by individuals from either state were "saved and confirmed." *Held* that by the confirmation, Sims obtained a title as effectual as any patent could have been, the convention having been subsequently ratified by an act of the Legislature of Pennsylvania. The terms in the same must be expounded favorably for those rights, so that titles before substantially good should not, after a change of jurisdiction, be defeated or questioned for formal defects.

In Pennsylvania, payment of the purchase money to the state and a survey of the land give a legal right of entry which is sufficient in ejectment. This having become in Pennsylvania an established legal right, and having incorporated itself as such with property and tenures, must be regarded by the common law courts of the United States in Pennsylvania as a ruling decision.

An ejectment being instituted in the inferior court by the lessee of Sims V. Irvine, the jury found a special verdict, upon which judgment was rendered for the plaintiff, by consent, and this writ of error was brought to settle the title. The parts of the special verdict material to the points in controversy were in substance as follows.

"PLAINTIFF'S TITLE"

"The jury finds that the premises in dispute was called Montour's Island, situated in the River Ohio, on the southeast side, within the original limits of the Virginia charter, granted in 1609, and within the limits of the territorial district in dispute between Virginia and Pennsylvania, for several years prior to 23 Sept. 1780, when those states entered into the following compact relative to their boundaries, as it is inserted in the Journals of the General Assembly of Pennsylvania and afterwards ratified by a law passed 1f April, 1784, 2 vol. 207, Dallas' Edit."

"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 31 August, 1779, 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 its desire to promote peace and harmony with a sister state so necessary during this great contest against the common enemy, does agree to the conditions proposed by the State of Virginia in its resolves of 23 June last, to-wit: "

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"That the agreement made 31 August, 1779, between James Madison and Robert Andrews, Commissioners for the Commonwealth of Virginia, and George Bryan, John Ewing, and David Rittenhouse, Commissioners for the Commonwealth of Pennsylvania, be ratified and finally confirmed, to-wit, that the line commonly called Mason's 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 line 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 the decision of disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under, such persons paying, to the state within whose boundary their lands 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, and where any such purchase or consideration money hath, since the declaration of American independence, been received by either state for lands, which, according to the before recited agreement, shall fall within the territory of the other, the same shall be reciprocally refunded and repaid, and that the inhabitants of the disputed territory, now ceded to the State of Pennsylvania,

shall not, before the 1 December in the present year, be subject to the payment of any tax, nor at any time to the payment of arrears of taxes or impositions heretofore laid by either state."

"And we do hereby accept and fully ratify the said recited condition, and the boundary line formed thereupon."

"Resolved, that the president and council of this state be and they are hereby empowered to appoint two commissioners on the part of this state, in conjunction with commissioners to be appointed by the State of Virginia, to extend the line commonly called Mason's and Dixon's Line, five degrees of longitude from Delaware River, and from the western termination of the line so extended, to run and mark as soon as may be a meridian line to the Ohio River, the remainder of that line to be run as soon as the president and council, taking into their consideration the disposition of the Indians, shall think it prudent. And the president and council are hereby authorized to give to the said commissioners such instructions in the premises as they shall think fit. "

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"The jury finds that William Douglas was a field officer in the service of the King of Great Britain in a regiment raised in the Colony of New Jersey, who continued in service during the war between France and Great Britain, which terminated in 1763, and that the said King gave to him, his heirs and assigns by proclamation a right to 5,000 acres of waste and unappropriated lands in America, the part of the proclamation relating to the gift being expressed in these words: "

" And whereas we are desirous upon all occasions to testify our royal sense and approbation of the conduct and bravery of the officers and soldiers of our armies and to reward the same, we do hereby command and empower our governors of our said three new colonies and other our governors of our several provinces on the continent of North America to grant without fee or reward to such reduced officers as having served in North America during the late war and are actually residing there and shall personally apply for the same the following quantities of

land, subject, at the expiration of ten years, to the same quit-rents as other lands are subject to in the province within which they are granted, as also subject to the same conditions of cultivation and improvement, viz.: "

To every person having the rank of a field officer, 5,000 acres

To every captain, 3,000 acres

To every subaltern of staff officer, 2,000 acres

To every non-commission officer, 200 acres

To every private, 50 acres

" We do likewise authorize and require the governors and commanders in chief of all our said colonies upon the continent of North America to grant the like quantities of land, and upon the same conditions, to such reduced officers of our navy of like rank as served on board our ships of war in North America, at the times of the reduction of Louisoung and Quebec in the late war who shall personally apply to our respective governors, for such grants."

"The jury finds that the said W. Douglas for a valuable consideration assigned on 17 January, 1779, to Charles Sims and his heirs all his right and title to the said bounty of 5,000 acres of land; that C. Sims was born in Virginia before the year 1760; that he was an inhabitant thereof since his birth; that he is the lessor of the plaintiff and a citizen of Virginia; that William Irvine, the defendant below, is a citizen and inhabitant of Pennsylvania; and that the lands mentioned in the declaration exceed the value of \$2,000. "

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The jury found, *in haec verba*, a law of Virginia enacted in May, 1779, entitled

"An act, for adjusting and settling the titles of claimers to unpatented lands under the present, and former government previous to the establishment of the commonwealth's land office,"

the material parts of which law are expressed in the following terms:

"An act for adjusting and settling the titles of claimers to unpatented lands under the present and former government previous to the establishment of the commonwealth's land office."

"I. Whereas the various and vague claims to unpatented lands under the former and present government, previous to the establishment of the commonwealth's land office, may produce tedious and infinite litigation and disputes, and in the meantime purchasers would be discouraged from taking up lands upon the terms lately prescribed by law, whereby the fund to be raised in aid of the taxes for discharging the public debt, would be in a great measure frustrated, and it is just and necessary, as well for the peace of individuals as for the public weal, that some certain rules should be established for settling and determining the rights to such lands and fixing the principles upon which legal and just claimers shall be entitled to sue out grants, to the end that subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety; be it enacted by the general assembly that all surveys of waste and unappropriated land made upon any of the western waters before 1 January, 1778, and upon any of the eastern waters at any time before the end of this present session of assembly, by any county surveyor commissioned by the masters of William and Mary college, acting in conformity to the laws and rules of government then in force, and founded either upon charter, importation rights duly proved and certified according to the ancient usage, as far as relates to indented servants, and other persons not being convicts, upon Treasury rights for money paid the Receiver General duly authenticated upon entries on the western waters, regularly made before 26 October, 1703, or on the eastern waters at any time before the end of this present session of the assembly, with the surveyor of the county for tracts of land not exceeding four hundred acres, according to act of assembly upon any order of council, or entry in the council books, and made during the time in which it shall appear either from the original or any subsequent order, entry, or proceedings in the council books, that such order or entry remained in force, the terms

of which have been complied with, or the time for performing the same unexpired, or upon any warrant from the governor for the time being for military service, in virtue of any proclamation either from the King of Great Britain or any former governor of Virginia, shall be and are hereby declared good and valid; but that all surveys of waste and unpatented lands made by any other person, or upon any other pretense whatsoever, shall be, and are hereby declared null and void, provided that all officers or soldiers, their heirs or assigns, claiming under the late Governor Dinwiddie's proclamation of a bounty in lands to the First Virginia Regiment, and having returned to the secretary's office, surveys made by virtue of a special commission from the president and masters of William and Mary College, shall be entitled to grants thereupon on payment of the common office fees; that all officers and soldiers, their heirs and assigns under proclamation warrants for military service, having located lands by actual surveys made under any such special commission, shall have the benefit of their said locations, by taking out warrants upon such rights, resurveying such lands according to law, and thereafter proceeding according to the rules and regulations of the land office. All and every person or persons, his, her, or their heirs or assigns, claiming lands upon any of the before recited rights, and under surveys made as hereinbefore mentioned, against which no caveat shall have been legally entered, shall upon the plats and certificates of such surveys being returned into the land office, together with the rights, entry, order, warrant or authentic copy thereof upon which they were respectively founded, be entitled to a grant or grants for the same in manner and form herein after directed."

"II. Provided that such surveys and rights be returned to the said office within twelve months next after the end of this present session of assembly, otherwise they shall be and are hereby declared forfeited and void. All persons, their heirs or assigns, claiming lands under the charter and ancient custom of Virginia, upon importation rights as before limited, duly proved, and certified in any court of record before the passing of this act; those claiming under Treasury, rights for money paid the Receiver General duly authenticated, or under proclamation warrants for military service, and not having located and fixed such lands by actual surveys as hereinbefore mentioned, shall be admitted to warrants, entries, and

grants for the same, in manner directed by the act of assembly entitled"

"An act for establishing a land office and ascertaining the terms and manner of granting

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waste and unappropriated lands upon producing to the register of the land office the proper certificates, proofs, or warrants, as the case may be, for their respective rights within the like space of twelve months after the end of this present session of assembly, and not afterwards."

"All certificates of importation rights proved before any court of record according to the ancient custom, and before the end of this present session of assembly, are hereby declared good and valid."

"And all other claims for importation rights not so proved shall be null and void, and where any person before the end of this present session of assembly, hath made a regular entry according to act of assembly, with the county surveyor for any tract of land not exceeding four hundred acres upon any of the eastern waters, which hath not been surveyed or forfeited, according to the laws and rules of government in force at the time of making such entry, the surveyor of the county where such land lies shall after advertising legal notice thereof, proceed to survey the same accordingly, and shall deliver to the proprietor a plat and certificate of survey thereof within three months, and if such person shall fail to attend at the time and place so appointed for making such survey, with chain carriers and a person to mark the lines, or shall fail to deliver such plat and certificate into the Land Office, according to the rules and regulations of the same, together with the auditor's certificate of the treasurer's receipt for the composition money herein after mentioned, and pay the office fees, he or she shall forfeit his or her right and title; but upon performance of these requisitions, shall be entitled to a grant for such tract of land as in other cases."

"III. And be it enacted that all orders of council or entries for land in the council books, except so far as such orders or entries respectively have been carried into

execution by actual surveys in manner hereinbefore mentioned, shall be and they are hereby declared void and of no effect, and except also a certain order of council for a tract of sunken grounds, commonly called the Dismal Swamp, in the southeastern part of this commonwealth, contiguous to the North Carolina line, which said order of council with the proceedings thereon and the claim derived from it, shall hereafter be laid before the general assembly for their further order therein. No claim to land within this commonwealth for military service founded upon the King of Great Britain's proclamation shall hereafter be allowed except a warrant for the same shall have been obtained from the governor of Virginia, during the former government as before mentioned,

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or where such service was performed by an inhabitant of Virginia, or in some regiment or corps actually raised in the same, in either of which cases the claimant making due proof in any court of record, and producing a certificate thereof to the register of the land office within the said time of twelve months, shall be admitted to a warrant, entry, and grant for the same, in the manner hereinbefore mentioned; but nothing herein contained shall be construed or extend to give any person a title to land for service performed in any company or detachment of militia."

The jury found *in haec verba* another law of Virginia enacted also in May, 1779, entitled "An act for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands," the material parts of which law are expressed in the following terms:

"Sec. 3. And be it enacted that upon application of any person, their heirs or assigns, having title to waste or unappropriated lands, either by military rights or Treasury rights and lodging in the land office a certificate thereof, the register of the said office shall grant to such person or persons a printed warrant under his hand and the seal of his office, specifying the quantity of land and the right upon which it is due, authorizing any surveyor duly qualified according to law, to lay off and survey the same, and shall regularly enter and record in the books of his office, all such certificates and the warrants issued thereupon, which warrants

shall be always good and valid until executed by actual survey, or exchanged in the manner hereinafter directed. . . ."

" *Ibid.* Any person holding a land warrant upon any of the before mentioned rights may have the same executed in one or more surveys, and in such case, or where the lands on which any warrant is located shall be insufficient to satisfy such warrant, the party may have the warrant exchanged by the register of the land office for others of the same amount in the whole, but divided as best may answer the purposes of the party, or entitle him to so much land elsewhere as will make good the deficiency. . . ."

" *Ibid.* Every person having a land warrant founded on any of the before mentioned rights and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county, wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely, as that others may be enabled with certainty to locate

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other warrants on the adjacent residuum, which location shall bear date the day on which it shall be made, and shall be entered, by the surveyor, in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries. . . ."

" *Ibid.* No entry or location of land shall be admitted within the county and limits of the Cherokee Indians, or on the northwest side of the Ohio River, or in the lands reserved by act of assembly for any particular nation or tribe of Indians, or on the lands granted by law, to Richard Henderson & Co. or in that tract of country reserved by resolution of the general assembly, for the benefit of the troops serving in the present war, and bounded by . . . , until the further order of the general assembly. . . ."

" *Ibid.* All persons, as well foreigners as others, shall have right to assign or transfer warrants or certificates of survey for lands, and any foreigner purchasing

warrants for lands may locate and have the same surveyed, and after returning a certificate of survey to the land office, shall be allowed the term of 18 months, either to become a citizen or to transfer his right in such certificate of survey to some citizen of this or any other of the United States of America."

The jury found *in haec verba* another law of Virginia, enacted in October, 1779, entitled

"An act for explaining and amending an act entitled 'An act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land office.'"

The law is expressed in the following terms:

"I. Be it enacted by the general assembly that whereas doubts have arisen concerning the manner of proving rights for military service under the proclamation of the King of Great Britain, in the year 1763, whereby great frauds may be committed, be it declared and enacted that no person, his heirs or assigns, other than those who had obtained warrants under the former government shall hereafter be admitted to any warrant for such military service unless he, she, or they produce to the register of the land office within eight months after the passing of this act, a proper certificate of proof made before some court of record within the commonwealth, by the oath of the party claiming, or other satisfactory evidence that such party was *bona fide* an inhabitant of this commonwealth, at the time of passing the said recited act, or that the person having performed such military service, was an officer or soldier in some regiment or corps (other than militia) actually raised in Virginia before the date of the said proclamation, and had continued to serve until the

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same was disbanded, had been discharged on account of wounds or bodily infirmity or had died in the service, distinguishing particularly in what regiment or corps such service had been performed, discharge granted, or death happened, and that the party had never before obtained a warrant or certificate for such

military service, provided that nothing in this act shall be construed in any manner to affect, change, or alter the title of any person under a warrant heretofore issued."

"II. And whereas the time limited in the before-recited act to the commissioners for adjusting and settling the claims to unpatented lands within their respective districts may be too short for that purpose, be it further enacted that all the powers given to the said commissioners by the said recited act shall be continued and remain in force for and during the further term of two months from and after the expiration of the time prescribed by the said act, and no longer. And where it shall appear to the said commissioners that any person, being an inhabitant of their respective districts and entitled to the preemption of certain lands in consideration of an actual settlement, is unable to advance the sum required for the payment of the state price, previous to the issuing of a warrant for surveying such land, the said commissioners shall certify the same to the register of the land office, who shall thereupon issue such preemption warrant to the party entitled thereto, upon twelve months' credit for the purchase money, at the state price, from the date of the warrant. The said register shall keep an exact account of all such warrants issued upon credit, and shall not issue grants upon surveys made thereupon, until certificates are produced to him from the auditors of public accounts of the payment of the purchase money respectively due thereon into the Treasury, and if the same shall not be paid within the said term, the warrant, survey, and title founded thereon shall be void and thereafter any other person may obtain a warrant, entry, and grant for such land in the same manner as for any other waste and unappropriated land, provided that nothing herein contained shall be construed to extend to any person claiming right to the preemption of any land for having built an house or hut, or made any improvements thereon, other than an actual settlement as described in the said recited act. No certificate of right to land for actual settlement or of preemption right shall hereafter be granted by the said commissioners unless the person entitled thereto hath taken the oath of fidelity to this commonwealth or shall take such oath before the said commissioners, which they are hereby empowered and directed to tender and administer, except only in the particular case of the inhabitants of the territory in dispute between this

commonwealth and that of Pennsylvania, who shall be entitled to certificates

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upon taking the oath of fidelity to the United States of America."

"III. And be it further enacted that all persons, their heirs or assigns, claiming lands by virtue of any order of council, upon any of the eastern waters, under actual surveys made by the surveyor of the county in which the land lay, may upon the plats and certificates of such surveyors being returned into the land office, together with the auditor's certificate of the Treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon, obtain grants for the same according to the rules and regulations of the said office, notwithstanding such surveys or claims have not been laid before the Court of Appeals. And all other claims for lands upon surveys made by a county surveyor, duly qualified, under any order of council shall by the respective claimers be laid before the Court of Appeals, at their next sitting, which shall proceed thereupon in the manner directed by the before recited act. Any person claiming right to land surveyed for another before the establishment of the commonwealth's land office may enter a caveat and proceed thereupon in the same manner as is directed by the act of assembly for establishing the said office, and upon recovering judgment shall be entitled to a grant upon the same terms, and under the same conditions, rules, and regulations, as are prescribed by the said act in the case of judgments upon other caveats, upon producing to the register a certificate from the auditors of the Treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon."

"The jury find that the Court of the County of Prince William, in Virginia, issued a certificate in favor of the said Charles Sims in the words following:"

"Prince William Court, 4 April, 1780"

" Charles Sims, Gent., produced to the court a commission from Francis Bernard, Esq., formerly Governor of the Province of New Jersey, with the seal of that province affixed and dated 15 March, 1759, appointing William Douglas, Major of a

regiment of Foot, to be raised in the Province of New Jersey, whereof the honorable Peter Schuyler was Colonel. He also produced the affidavit of the Reverend David Griffith, taken before William Ramsay, Esq., a justice of the peace for the County of Fairfax, the first day of this instant, that William Douglass, commonly called Major Douglass, who formerly resided on Staten Island, did actually serve as an officer in the Corps of Provincials raised by the Province of New Jersey in the late war between Great Britain and France, and a certain George Beardmor, in

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open court, upon his oath faith, that he served as a soldier a campaign with the said Douglass in the late war of Great Britain with France, and hath reason to believe the said Douglass served the time for which the said regiment was raised. The said Charles Sims likewise produced to the court an assignment, endorsed on the back of said Commission, dated 16 January, 1779, signed William Douglass in these words. 'In consideration of the sum of \$100, current money as well as for other good causes of consideration, I William Douglass of the State of New Jersey, do make over, assign, transfer, and convey unto Charles Sims, of the State of Virginia, all my right, title and interest, to the lands which I am entitled to, by virtue of the within commission under the King of Great Britain, and his proclamation issued in the year 1763. Given under my hand and seal, this 16th day of January 1779.' The said Charles Sims made oath that he believed the said William Douglass who made the before assignment, is the same person whom the Reverend David Griffith mentions in his affidavit, and that the said assignment was made to him for a valuable consideration, and that he has never before made any claim nor received any lands in consequence of the before mentioned assignment, and the same is ordered to be certified, and the court doth further certify that the said Charles Sims is, and hath always been from the time of his birth, an inhabitant of this state."

" Teste,"

"Robert Graham, Clk. Court"

"The within is a copy taken from one of the vouchers, upon which a military warrant, No. 915; issued to Charles Sims, 7 April, 1780."

"Wm. Price Re.L.Off."

"July 21, 1796"

"The jury finds that the Register of the Virginia Land Office, on 8 May, 1780, issued to the said Charles Sims, assignee of the said William Douglass one military warrant, in the usual form; that the said Charles Sims delivered the warrant on 30 May, 1780, to the Surveyor of Yohagany County (within which Montour's Island lay) in Virginia, and directed it to be entered and located on several parcels of land, of which Montour's Island aforesaid was one; that the said surveyor did on the same day and year last mentioned, enter and write in his book, kept by him as surveyor, the said warrant on the said parcels of land, and endorsed the said entry and location, on the said original warrant; and that the said two several papers (or minutes) refer to and mean one and the same warrant, though the warrant is dated on 8 May, 1780, and the record in the register of the land office is under date of 7 April, 1780. "

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"The jury find that the Governor of Virginia transmitted in the year 1780, a just and true list of the entries of land made under the authority of Virginia in the disputed territory, to the Executive of Pennsylvania, which list, among others, contained the following item in relation to the military warrant of the said C. Sims:"

""30 May, 1788. Charles Sims, Military, 5,000. Racoon. 30 May, 1780. Charles Sims, Military warrant 3,000. Racoon.""

"The jury find that the said list of entries, included the said entry and location of the lessor of the plaintiffs, and was transmitted to the Land Office of Pennsylvania in the said year 1784, and that upon the said entry of the lessor of the plaintiff with respect to 3,002 acres on Racoon Creek, a survey was made, and a patent, dated 6 January, 1795, had been issued under the authority of Pennsylvania."

"The jury find *in haec verba* another law of Virginia, enacted on 20 June, 1780, at a session which commenced on 1 May preceding, entitled, 'An act for giving further time to obtain warrants upon certificates for preemption rights, and returning certain surveys to the land office, and for other purposes,' the material parts of which law, are expressed in the following terms:"

" Whereas the time fixed by an act entitled 'An act for adjusting and settling the titles of claimers to unpatented lands under the present and former governments previous to the establishment of the commonwealth's land office, for surveying and returning surveys to the land office upon entries made with the surveyor of a county before 26 June, 1779, for lands lying upon the eastern waters, and for returning the plats of legal surveys made upon the western waters under the former government, and exchanging military warrants granted under the royal proclamation of 1763, and not yet executed' will shortly expire, and many persons be thereby deprived of the benefit of such warrants and surveys:"

" Be it therefore enacted that all persons having such warrants shall be allowed until the first day of July, 1781, to exchange such warrants, and that the like time shall be allowed for returning such surveys to the land office, to such who were entitled to land for military service, for which certificates have not yet been obtained."

"IV. And be it further enacted that the further time of eighteen months be given to all persons who may obtain certificates from the said commissioners for preemptions on their obtaining warrants from the register of the land office to

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enter the same with the surveyor of the respective counties in which their claims were adjusted, provided that the Court of Commissioners for the District of the Counties of Monogalia, Yobogania, and Ohio do not use or exercise any jurisdiction respecting claims to lands within the territory in dispute between the States of Virginia and Pennsylvania north of Mason's and Dixon's Line, until such dispute shall be finally adjusted and settled."

"V. And be it further enacted that all surveys upon entries, the execution of all warrants, and the issuing of patents for lands within the said territory shall also be suspended until the said dispute shall have been finally adjusted and settled, but that such suspension shall not be construed in any manner to injure or affect the title of any person claiming such lands. And whereas the business of such commissioners for settling the claims of unpatented lands will be much lessened in the Counties of Monongalia and Yobogania and Ohio, etc."

"VII. And whereas some doubts have arisen upon the construction of the acts, directing the granting warrants for land due for military service under the King of Great Britain's proclamation in the year 1763, it is hereby declared that no officer, his heirs, executors, administrators, or assigns, shall be entitled to a warrant of survey for any other or greater quantity of land than was due to him, her, or them, in virtue of the highest commission or rank in which such officer had served, nor in virtue of more than one such commission for services in different regiments or corps, nor shall any noncommissioned officer or soldier be entitled to a bounty for land under the said proclamation, for his service in more than one regiment or corps."

"VIII. And it is further declared that the register shall not issue to any person or persons whatever, his or their heirs or assigns, a grant for land for more than one service, as above described, nor to those who have received warrants for services since October, 1773, notwithstanding a warrant or warrants may have been heretofore issued, and the land surveyed, unless the claimant shall within six months from the end of this present session of assembly, produce to the said register the auditor's certificate for the payment of the state price of forty pounds per hundred, for the quantity of land in such warrant or warrants, and if such money is not so paid, that then the said warrants or surveys shall be to all intents and purposes void, and that the register may be able to comply with this law, he is hereby directed to make out and keep an alphabetical list of all military warrants issued under the former as well as the present government,

in case of any assignment, making therein the name of the assignor, and the several surveyors with whom military warrants obtained under the former government, have been lodged or located, are directed to transmit to the register in the month of November next, or before that time, a list of all such warrants."

"The jury finds a variety of orders issued by the late Supreme Executive Council of Pennsylvania, and of proceedings entered into by the Board of Property in relation to running the boundary, and to the list of Virginia claims and entries on lands within the disputed territory, etc. a variety of patents issued by Virginia for islands in the Ohio; sundry treaties with the Indians, and sessions made by them, particularly at Fort Stanwix on 5 November, 1768, and on 30 October, 1784, and they find the Constitution and Laws of Virginia respecting the right of purchasing lands occupied by the Indians, but which findings it does not seem necessary to set forth more particularly."

"The jury finds that Presly Nevil and Matthew Ritchie, two deputy surveyors, received from the surveyor general a list of entries made under the authority of Virginia, which said list included the entry for the land in the declaration mentioned; that their commission was dated 4 April, 1785, appointing them deputy surveyors, of all that part of Washington County, lying within the specified boundaries; and that on 13 April 1787, they surveyed Montour's Island, and returned the survey *in haec verba* into the surveyor General's office sometime in March, 1788; the return of the survey setting forth that it was made for Charles Sims, assignee of William Douglas and under the Virginia warrant, entry and location."

"The jury finds that before the year 1779, the Indian tribes, in consequence of hostilities between them and the United States, retired to the northwest side of the Ohio River, having abandoned and relinquished all the lands except on the northwest side of the said Ohio River, and that by various treaties since made with the United States of America, the boundary line of their hunting grounds is very distant from the northwest side of the Ohio River aforesaid."

"The jury finds that according to the practice of Virginia, no money was required to be paid since the passing the said act, entitled"

"An act for giving further time to obtain warrants upon certificates for preemption rights, and returning certain surveys into the land office, and for other purposes, by the holder of a military warrant for lands, except where more than one warrant is issued for the same service. "

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"The jury finds that the defendant William Irvine had actual notice of the claim of the lessor of the plaintiff sometime before 25 December, 1783, which was before the said defendant made any payment of money to Pennsylvania, whose first and only payment was of the sum of 283 13s., 6p., on 18 April, 1787."

II. Defendant's Title

The jury finds a law of Pennsylvania enacted 24 September, 1783, entitled "An act to grant the right of preemption to an island known by the name of Montour's Island in the Ohio River, to Brigadier General William Irvine," which law is expressed in the following terms:

"Sec. I. Whereas Brigadier General William Irvine, during his separate command at Pittsburgh, hath rendered essential service to this state, particularly the frontier settlements thereof, in consideration whereof,"

"Sec. 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 the island, situated in the Ohio River, below Pittsburgh, known by the name of Montour's Island, and every part thereof, be and the same is hereby granted unto the said William Irvine in fee, to have and to hold the same unto him, his heirs and assigns, forever, subject to such purchase money as a future house of assembly may direct."

"Sec. III. And be it further enacted by the authority aforesaid, that the Supreme Executive Council be, and they hereby are, empowered to direct the Surveyor

General of this state, at the proper cost and charge of the said William Irvine, to lay out the said island and cause it to be returned into the office for confirmation."

"Sec. IV. Provided always that nothing in this act shall be taken or deemed to bar any person or persons, their heirs or assigns, who may have obtained any just or lawful right to the said island or any part thereof before the passing of this act."

The jury finds another law of Pennsylvania, enacted on 8 April, 1785, entitled "An act to provide further regulations whereby to secure fair and equal proceedings in the land office, and in the surveying lands," which act contains a section in these words.

"Sec. I. Whereas the time for opening the land office of this state, for the lands contained within the purchase lately made by the commonwealth of the Indian natives of all the residue of waste lands within the charter bounds of Pennsylvania, as the same have been adjusted between this state and the

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State of Virginia, is fixed to be from and after 1 May next, when it is probable that numerous applications will be made to the said land office at the said time, for lands within the bounds of the said late purchase, and the officers of the land office must necessarily be obliged to give preference to some persons, before others whose applications may be made equally early, and thereby great dissatisfaction must arise, unless some provision be made by law to regulate the same. . . ."

"The jury finds that the defendant, on 19 April, 1787, having previously returned a survey into the office of the surveyor General of Pennsylvania, of the lands in the declaration mentioned, obtained a patent for the same in due form, dated 19 April, 1787."

"The jury finds another law of Pennsylvania enacted 26 March 1785, entitled 'An act for the limitation of actions to be brought for the inheritance or possession of real property, or upon penal acts of assembly,' which law contains the following

section:"

" SEC. 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 preemption 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 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."

"And the jury finds the lease, entry, and ouster in the declaration mentioned. And if upon the whole matter. . . . "

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THE CHIEF JUSTICE, on the last day of the term, delivered the opinion of the Court as follows:

MR. CHIEF JUSTICE ELLSWORTH.

It appears that William Douglass for services rendered, acquired under the King's Proclamation of 1763 a right to 5,000 acres of unappropriated land in America, which right he assigned to Charles Sims, the lessor of the plaintiff below. And although by the terms of the proclamation the personal application of Douglass was requisite to obtain a land warrant on the said right, yet the laws of Virginia, passed subsequent to her independence, dispensed with such personal application and made a warrant issuable to the assignee, Sims, he being an

inhabitant of that state on 3 May, 1779. A warrant he accordingly obtained, and the same duly located on Montour's Island, the land in question, which his warrant was more than sufficient to cover, and which, from its description as an island, was perfectly aparted and distinguished from all other land. By which means Sims acquired to the said island a complete equitable title, and one which needed only a patent of confirmation to render it a complete legal title. A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter. The terms therein of "reserve and confirmation" of the "rights" which had been previously acquired under Virginia in the territory thereby relinquished to Pennsylvania must, from the nature of the transaction, be expounded favorably for those rights, and so that titles, before substantially good, should not,

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after a change of jurisdiction, be defeated or questioned for formal defects.

It further appears that Sims, since the said compact and ratification, has, without any laches that would prejudice his claim, obtained a legal survey of the said land under Pennsylvania, in which state payment, or as in this case, consideration passed, and a survey, though unaccompanied by a patent, gives a legal right of entry which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself as such, with property and tenures, it remains a legal right notwithstanding any new distribution of judicial powers, and must be regarded by the common law courts of the United States, in Pennsylvania, as a rule of decision.

The judgment of the circuit court affirmed.

IREDELL, JUSTICE.

Though I concur with the other judges of the Court in affirming the judgment of the circuit court, yet as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly.

In order to do this with the greater distinctness, it is necessary that I should observe upon the nature of this title according to my ideas of it, from its origin to what may be deemed its consummation, at least for the purpose of maintaining this ejectment.

My observations, therefore, will be under the following heads of inquiry:

1st. Whether it sufficiently appears that William Douglas was entitled to a military right, such as it was, under the Proclamation of 1763.

2d. Whether the right of Douglas in case he was so entitled was assignable under the royal government or since.

3d. Whether the lessor of the plaintiff in the ejectment had a title, and if any, of what nature it was under the laws of Virginia.

4th. Whether he had any title subsequent to the compact under the laws of Pennsylvania.

5th. Whether if he had a title, it was such as was sufficient to maintain this ejectment.

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The first question is

1. Whether it sufficiently appears that William Douglas was entitled to a military right, such as it was, under the Proclamation of 1763.

Though the finding be not altogether so correct as it might have been, yet I think it may be fairly inferred that William Douglas had all the requisites to entitle him to a military right under that proclamation, especially as the jury has said generally that

the King gave to him the right in question by that proclamation, which could not have been in fact true had any of the requisites been wanting, and though a general finding inconsistent with a particular one cannot stand, yet I am of opinion a particular finding consistent with a general one may.

The next question is

2. Whether the right of Douglas was assignable under the royal government, or since.

The grant was general to all who were the objects of it, and required only evidence of proper service, and the usual steps towards obtaining a grant under any of the then provinces. The royal faith was pledged that in such a case a grant should issue. It was immaterial at that time in what province the grant was obtained, as all belonged equally to the Crown. The grant was for meritorious services already performed, and therefore it was an interest, though in some degree indefinite in its nature, sanctioned by every principle of moral obligation, and such as the party entitled might, on the most solemn principles of public justice, confidently demand. Upon a large scale, the Crown was certainly a trustee for all those persons to whom its faith was pledged, and therefore, so far as no particular prerogative of the Crown interfered, it was rational to consider it in the light of any other trust. It has been doubtful whether the Crown could in any case be a trustee, so as to be the object of any municipal decision, but the law could never presume (however the fact may be) that the Crown would not faithfully perform any trust belonging to it. The only difference between that and a private trust is that the latter is clearly enforceable by a court of equity; the former perhaps must be left to the conscience of the Crown itself. But this makes no difference in the nature of the interest. If this had been a private trust, it would at least have amounted to what in equity is called a possibility, and it has been long settled that a possibility is assignable in equity for a valuable consideration. I see no reason why that principle cannot apply here. The necessity of a personal application was undoubtedly indispensable under the royal government, but the two things are, in my opinion, perfectly compatible. Suppose such an assignment

had been made, a personal application was still necessary, and very probably for the judicious reasons assigned at the bar; but after the grant, obtained on such personal application, if the interest had been fairly assigned before, the assignee would have been entitled to a conveyance. If none had been made, which would have been an acknowledgment of the fairness of the transaction, chancery only could have been applied to compel a conveyance. The assignor or his heir would then have had to answer on oath, and an examination of all particulars might have been made, after which, if the court had entertained the least doubt of the fairness of the transaction, they would not have ordered a conveyance. This would be a sufficient guard against fraud. But the assignment previous to an actual grant might have been necessary even to save an officer from starving. How hard would have been his condition, if he could have made no immediate use of a bounty of the Crown, expressly intended as a provision for him, but which circumstances might prevent his receiving for years?

Thus the case stood, as I conceive, under the royal government. By the Revolution, the circumstances of it were in some degree changed, but not so as, in my opinion, materially to alter the nature of the title in this respect. The duty of the Crown, substantially, devolved on the several states who became possessed of the territory formerly belonging wholly to the Crown, but as it might be an unreasonable thing to burden any one state with the whole of these provisions, some modification of the title might be expected so as to prevent this injury. This, however, does not seem to afford any reason why it should not remain an assignable interest, subject to the restriction I mentioned before, in case a personal application was still insisted upon, which it was undoubtedly optional in the states to require or not. I therefore am of opinion that the interest still remained assignable, subject only to such regulations as each state might think proper to require.

The next subject of inquiry is

3d. Whether the lessor of the plaintiff in the ejectment had a title, and if any, of what nature it was, under the laws of Virginia?

I confess I have had great difficulty in construing the two Virginia acts of May and October, 1779, and if the latter act had admitted of such a construction that I could, without absurdity or manifest injustice, have confined the words "or assigns" in that act to mean only the heirs or assigns of those specially named in the former, I should undoubtedly have preferred that construction, because in the last act of May, 1779, the Virginia Legislature expressly designated the objects for whom they

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meant to provide, and whatever I might think of that provision (though I am far from thinking it an unjust one), I should deem it unwarranted to extend it to any others by construction of a subsequent law without plain words of extension, unless there was an irresistible implication to authorize it. Such an implication, I think, exists here. The first act specifies the various objects of its provision. 1st. Those who had obtained a warrant from the Governor of Virginia under the former government. 2nd. Where the service was performed by an inhabitant of Virginia. 3rd. Where the service was performed in some regiment or corps actually raised in Virginia. The act of October, 1779, introduces a new provision for some persons or other, *viz.*, a residence in Virginia at the passing of the former act (3 May, 1779), but they expressly except from the operation of this provision those who had obtained warrants under the former government, and those who had performed military service in some regiment or corps actually raised in Virginia, and had served under the circumstances particularly described in the act. They also except persons who had obtained a title under any former warrant. They do not, however, except in any manner one description of persons who were provided for in the former law -- *viz.*, persons who were inhabitants of Virginia and had performed military service in some other than a Virginia regiment or corps -- unless they or some persons claiming under them had previously obtained a warrant for it. But the act affords no indication from which we have a right to infer that the legislature meant to repeal any of the provisions in the former law, and if they did not, then

upon the construction of the council for the plaintiff in error, the provision, as to the persons I have last mentioned, in plain English would stand thus:

"We are willing to reward the services of any of the inhabitants of our own particular state, when under the royal government, by giving full effect to the royal proclamation, by which the faith of the former government was pledged, provided the person, his heirs, or assigns, actually resided in Virginia on 3 May, 1779. But if such person moved out of this state before that day, or died and left heirs or assigns who either never resided in Virginia or did not actually reside there on the auspicious 3 May, 1779, he, she, or they shall receive nothing for such service."

Such a provision would undoubtedly be highly ridiculous, for the grant under the proclamation was for services actually past, services of a highly meritorious nature, the risk of life, and sacrifice of private ease, by entering into the army at a critical period for the defense of their country, and to such persons certainly no additional merit could attach by a

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residence in Virginia on 3 May, 1779. I therefore am compelled, upon principles of respect to the legislature, to abandon this construction; and then there remains no other but to suppose that they meant to provide by implication for a new description of persons (though under negative, informal, and incorrect words), *viz.*, persons who had fairly obtained titles under any military grant, though not of the special description before enumerated, if such person, his heirs, or assigns, actually resided in Virginia on 3 May 1779. Willing, in short, to confirm all fair purchases made by permanent, not occasional, residents in Virginia (of which the residence at that time should be a test) when they might innocently have supposed either that Virginia was bound to provide for all military rights presented or would be disposed upon a large and liberal scale to do so, and had thus laid out their money from a kind of indefinite confidence in the future conduct of their own legislature.

And the word "hereafter" that has been commented upon (in the 3d section of the Act of 3 May, 1779), and the express saving in the Act of October, 1779, of all titles under warrants formerly issued, independent of the saving of titles under warrants from the former government, seem strongly to favor this construction. By construing the act in this manner, though some difficulties yet remain, they are, in my opinion, fewer than upon the other construction, and as they are more consistent with equity, justice, and common sense, I deem it my duty as a judge to support the construction which will tolerate these in preference to one which is attended with greater difficulties and accompanied with absurdity and injustice, especially as that construction will make both acts consistent in their main objects, and the other (without any indication from the apparent meaning of the legislature) would amount to an express repeal of an important provision; and nearly in effect revoke a grant actually made, which, if within the competence of a legislature, is undoubtedly one of the most odious acts of its power, and which nothing but absolute necessity should force us to say they intended.

The title, therefore, so far, under the laws of Virginia, I think was a vested right. But it seems to me now material to inquire whether the title under the laws of Virginia was complete or incomplete. It is admitted that a patent was regularly necessary to complete the title, even had a survey been made, and it is at least doubtful whether a warrant and survey would have given any legal right of possession at all. But in this case, it is contended, a survey was not necessary, for two reasons: 1. because the location of an island was certain, and the whole island would not exceed the quantity he was entitled to;

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2. because no money was to have been paid upon it. These reasons do not satisfy me that a survey was unnecessary. A survey I consider in all instances to be highly useful in order that it may be officially ascertained and officially known not only what land in particular is taken up, but also its exact quantity, so far as it is material to specify it, for the information of the public, from whom the grant is to be obtained, as well as that of any individual who may have interfering claims or pretensions. The private knowledge of a few particular persons who may know the

spot thoroughly is by no means equal to the authentic information which an actual survey, a regular report, and a correct record, can convey, and the instances are so very few where exact information can otherwise be obtained that there is no occasion for the sake of those to make an exception. It would do no good, and might lead to endless difficulties. I think, therefore, the necessity of a survey ought to be deemed general and indispensable, and there being none in this case previous to the compact made with Pennsylvania, the title so far was incomplete.

But I admit, had a survey been unnecessary and had such steps been taken in Virginia as would, of course, have entitled the defendant in error to a patent, then the compact and the act of confirmation in consequence might have been deemed a complete and perfect assurance of it, and as effectual as if a patent had been actually granted before the compact under the laws of Virginia.

With respect to the payment of 40, it is clear to me that as that was meant as full purchase money for land, to which the person who entered had no right before, it never can apply to a case where the grant was for service already performed unless the legislature had wanted both common sense and common honesty. I have not hesitated a moment to reject that construction, the words in no manner requiring it, and easily admitting of the construction given by the counsel for the defendant in error.

The finding in this case, I think, sufficiently establishes a relinquishment of the Indian title previous to the year 1779 so as to authorize an entry and location in the River Ohio at the times the entry and location on behalf of the defendant in error took place without a violation of any duty either to a particular state or to the United States.

I come now to the next head of inquiry,

4. Whether the defendant in error had any title, subsequent to the compact under the laws of Pennsylvania.

I do not consider that this compact, and the act in confirmation of it, immediately converted all inchoate and imperfect rights under Virginia into absolute and perfect

ones under

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Pennsylvania, but that the intention was such as the title was under Virginia it should substantially be under Pennsylvania, in preference to any younger right that might have been obtained in any manner under Pennsylvania. If the manner of proceeding on both sides was the same, then the Virginia claimant had nothing to do but to proceed under the laws of the latter as if his original title had been obtained from Pennsylvania. If the manner of proceeding in both states had been different, then I should have supposed, it would have been proper for Pennsylvania to pass a new law adequate to this new case, that the faith of the state might have been duly observed. But I conceive under both states a survey was indispensable, the same reasons which I have urged on this subject, in considering the case of the Virginia right, applying equally to both states. The survey that was accordingly had under the State of Pennsylvania I think was a valid one notwithstanding the objection as to the bed of the river, for as the law is general (such at least it appears to me) that where two countries, or two counties, border on a navigable river, the middle of the bed of the river is the boundary line, I see nothing in this case to prove it an exception, and consequently the survey appears to have been made by the proper authority. With regard to the objection that in the ninth finding it is stated that the Governor of Virginia transmitted in 1784 a just and true list of entries made under the authority of Virginia in the disputed territory, in which list the island in question is not comprehended, and therefore the verdict impliedly excludes it, I answer, 1st, if the governor had or had not transmitted a perfect list, this could not have deprived any party really entitled of showing a title which had been omitted, either designedly (though that could not be presumed, but I state it as the strongest case) or inadvertently, on the part of the governor, where at least an adverse claimant under Pennsylvania was not prejudiced by such omission, but had early and sufficient notice of the prior right, before he had completed his own. 2d. It may be a true list so far as it goes, but not perfect for want of a complete knowledge of all particulars, some of which might have been omitted to be ascertained in the usual and proper manner. 3d. The

implication in this case cannot have the effect contended for, because the tenth finding refers to that list, as including the entry and location of the defendant in error, and the fourth finding declares that two deputy surveyors under the Surveyor General of Pennsylvania did in 1785 receive from the Surveyor General's office a list of entries made under the authority of Virginia, which list included the entry for the land in the declaration mentioned.

The survey being in my opinion good, though it was subsequent

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to the grant to the plaintiff in error, shall be deemed to relate to the time of taking out the warrant not only in consequence of the compact, which secured all prior rights of Virginia, and the act in confirmation of it, but also on account of the express saving of all prior rights in the grant to the plaintiff in error by the Commonwealth of Pennsylvania, who seem to have guarded with solicitude against any supposed breach of public faith, and therefore it is immaterial to inquire what would have been the case had Pennsylvania expressly violated it. But where a legislature has constitutional authority to pass any law, I can conceive a manifest distinction between right and power -- between the obligation on the part of the legislature, upon principles of morality, to give effect to a solemn compact, and their in fact making a law in violation of it which it is the duty of the courts to obey. The legislature is restricted, indeed, in this particular by the Constitution of the United States, and a treaty of the United States is, by its own authority, *de facto* as well as morally binding while it continues in force, because it shall be the supreme law of the land. But until this Constitution did pass, I should doubt very much whether if the legislature had actually violated the compact, the Court could here set up the compact against the law upon principles which I have stated at large in my argument on the subject of the British debts, and to which I beg leave to refer, as it is now publishing in Mr. Dallas' reports. I say this only incidentally, on account of observations on this subject at the bar, in which I by no means acquiesce.

The warrant and survey being thus by me deemed complete and unexceptionable under the Commonwealth of Pennsylvania, the only remaining inquiry is

5. Whether if the defendant in error had a title, it was such as was sufficient to maintain this ejectment?

Two objections are stated under this head.

1. That the title, such as it is, is only an equitable, not a legal one, and therefore will not maintain an ejectment.

2. That it is not brought within proper time, but is barred by the statute of limitations.

As to the first objection, did this title stand merely as an equitable one, I should strongly incline against it, if not deem it altogether insufficient. It is of infinite moment, in my opinion, that principles of law and equity should not be confounded -- otherwise inextricable confusion will arise, neither will be properly understood, and instead of both being administered with useful guards, which the policy of each system has devised against abuse, an heterogeneous mass of principles, not intended to assort with each other, will be blended together, and the substance

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of justice will soon follow the forms calculated to secure it. I totally reject all the modern cases introduced by Lord Mansfield, and supported by some other judges, but lately, wisely, as I conceive, discountenanced by the present Court of King's Bench, of taking notice of a *cestui que trust* at all in any other right than as holding in fact possession, with the concurrence of the legal trustee. So far, consistent with legal principles, a court may go, but not, as I conceive, one step further, and that it violates the most important principles of the common law to consider a *cestui que trust* as having an iota of legal right against the trustee himself. Whatever excuse a court may have for doing this when the want of a court of equity may urge them to procure substantial justice, by a deviation from legal strictness as to form, I should hesitate long before I should deem myself warranted

in assenting to such a practice when both powers are vested in the very same court but each has different modes of proceeding prescribed to it.

But I think we are relieved from any dilemma of this kind by strong and unequivocal declarations of highly respectable gentlemen of long experience in this state that a warrant and survey, where no money remained to be paid and a patent was only to ascertain that all previous requisites had been complied with, has been uniformly deemed a legal title, as opposed to an equitable one, and has all the consequences as such, even as to dower, which affords a strong presumption in favor of the supposed legal title, for it has been so long held (though I think erroneously at first) that there should be no dower of a trust estate, that perhaps no judge would be warranted in a court of chancery in allowing it. Whether this opinion was originally right or not, yet having been the ground of many titles, it would be improper in the court to shake it. I am not certain, also, but it may properly be considered that the proprietor under a warrant and survey (according to long usage) is at least in the nature of a tenant at will to the public, and as such has a right of possession against all others, except some person having a better right, claiming under the public, which better right does not, for the reasons I have given, exist in this case, in the plaintiff in error. This point, however, I merely intimate, it not being necessary to deliver an opinion upon it.

Another circumstance has occurred to me, which I suggest with diffidence, as it was not spoken to at the bar, that though the compact and confirming act did not render a survey unnecessary, yet when a survey was made, it being a right derived from compact alone, the title ought to stand on that ground alone, and not depend on a patent, which imports a grant by the

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state, at its own discretion, of property of its own, and seems to imply that the state is the sole agent in the conveyance of the title.

With respect to the objection from the statute of limitations, it is sufficient to say that that act, in my mind, clearly contemplates other objects, and neither in its

letter or spirit is to be applied to this new and peculiar case; but admitting that it did, the facts in this case do not come within the provisions of it, there appearing to have been no such laches as the act contemplated to prevent.

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