

later case, and confirmed in the *House of Lords*. In *Litton v. Lady Falkland*, though the codicil had been annexed to the will, yet I should think it not a republication as to the lands. *Hutton v. Simpson*, 2 Ver. 722, shews, that republication depends on the subject matter, not the annexing. This last codicil was therefore a republication, and passed the estate under the general words of the will, if it had not passed before, as I think it had; and all three instruments must be taken together, and make but one will. (Reg. Lib. 1749, B. fol. 547.) (And so declared in R. L.) (2 Wms. 334; Cro. Eliz. 493; 3 Atk. 180; Douglas, 69; Cowp. 158; 3 Brown, Parl. Cas. 101; 1 Vol. 492. In 2 Vern. 625, it was held, that a codicil concerning the personalty, is not a republication so as to pass lands purchased after the making of the will; and in 2 Vol. 626, it was held, that a codicil directing a will to stand, will not extend to a lapsed or adeemed legacy: and in Prec. Chan. 441, a codicil was held no republication of the will, but these were determined on the circumstances of each case, and the intention not sufficiently appearing.)

SAMSUN v. BRAG[G]INGTON, *Rolls*, May 15 [31st], 1750.

A ship pledged abroad by the master for expences, &c., well hypothecated, and the part-owners liable. (Vide Supplement, p. 191, for the circumstances fully, and for the decree, &c.)

A master of a ship having pledged the ship for the expences, &c., laid out upon her abroad, the question was, whether the part-owners were thereby liable; the defendants insisting that, this being a contract abroad, by the civil law, or as received here among merchants, the master has no right farther than to hypothecate the ship, not to make his owners liable.

Against which it was said, that a captain of a ship has a power to charge his owners personally, as if it was money borrowed by the owners, in the same manner as where a debt contracted by a servant will charge the master personally; which personal obligation is not gone by, or inconsistent with, the pledging the ship. *Thomas v. Terry*, Eq. Ab. 139. *Speering v. Degrave*, 2 Ver. 643, and this is on a contract, laid out for the purposes of the ship, and for benefit of the owners.

Sir John Strange, Master of the Rolls, said, that case in Ver. seemed to be a transaction at home: and it was common, that if materials were furnished by tradesmen, they might bring an action against either. All the civil law says, is only on the general power of the master to hypothecate the ship, and make use of it as a [444] fund or credit in a place, where no other could be had. (1 Ves. sen. 154, and the cases there cited.) But there is no case, where the master of the ship being abroad takes up money for necessities, whether that can personally charge the owners, or whether the whole lien is on the ship. This power of hypothecating has nothing to do with, nor is it by virtue of the common law, but from necessity and the law of nations. In general to say, the master cannot bind the owners by any act, is going too far.

*His Honour* took time to consider of it: and afterward (as I was informed) determined, that the ship was well hypothecated, and that the part-owners were liable. (Reg. Lib. 1749, B. fol. 373.)

PENN v. LORD BALTIMORE, May 15, 1750.

[S. G. 1 Wh. & T. L. C. (7th Ed.) 755. See *Ewing v. Orr-Ewing*, 1883, 9 App. Cas. 40, 48; *Commissioners of Inland Revenue v. Angus*, 1889, 23 Q. B. D. 596.]

Specific performance decreed of articles executed in *England* concerning boundaries of two provinces in *America*. (See in *Barclay v. Russell*, 3 Ves. 491, &c., and *Nabob of Arcot v. East India Company*, 1 Ves. jun. 371, 2. 2 Ves. jun. 56; and *Earl Derby v. Duke of Athol*, 1 Ves. sen. 202, and Supplement, p. 111.) Agreement to settle disputes. (See *Cory v. Cory*, 1 Ves. sen. 19. *Taylor v. Rochford*, 2 Ves. sen. 284. *Stapilton v. Stapilton*, 1 Atk. 2. *Frank v. Frank*, 1 Ch. Ca. 85. *Cann v. Cann*, 1 P. W. 723, 727. *Pullen v. Ready*, 2 Atk. 590. *Goilman v. Battinson*, 1 Vern. 48; and *Stockley v. Stockley*, 1 Ves. and B. 23, 30.) Process on a decree for possession of lands. (Vide 1 Ves. sen. 454; and Supplement, p. 194.)

The bill was founded on articles, entered into between the plaintiffs and defendant 10 May 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 June, 2 C. 1, by which

the district, property, and government, of *Maryland* under certain restrictions is granted to defendant's ancestor his heirs and assigns : farther reciting charters or letters patent in 1681, by which the province of *Pensylvania* is granted to Mr. *William Penn* and his heirs ; and stating a title to the plaintiffs derived from *James Duke of York*, to the three lower countries by two feoffments, both bearing date 24 August 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of *Newcastle*, and a line to ascertain the boundaries between *Maryland* and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn ; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December 1733. There was beside a provision in the articles, that if there should be a want of a *Quorum* of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of £5000 to the other party : and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles : what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the *Attorney-General* should be made a party ; who now left it [445] to the court to make a decree, so as not to prejudice the right of the crown.

The first objection for defendant was, that this court has not jurisdiction nor ought to take recognizance of it ; for that the jurisdiction is in the King and council.

Second objection, that if there is not an absolute defect of jurisdiction in this court, yet being a proprietary government and feudary seignior held of the crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries by their own act ; for such agreement to settle boundaries and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do : but supposing they may alien entirely, they cannot alien a parcel, as that is dismembering ; for which there is a rule in the feudal books concerning *Feuda indivisibilia*.

Thirdly, this agreement ought not to be carried into execution by this court ; as it affects the estates, rights and privileges of the planters, tenants and inhabitants within the district, and the tenure and law by which they live, without their consent.

Fourthly, supposing all this answered, yet this agreement is not proper to be established from the general nature and circumstances. First, as it is merely voluntary, and the court never decrees specifically without a consideration. Secondly, as the time for performance is lapsed. Thirdly, that these articles are in nature of submission to arbitration, which cannot be supplied by interposition and act of this court. Fourthly, that defendant was imposed on or surprized in making this agreement. Fifthly, that if there was no imposition or fraud, defendant grossly mistook his original right ; and under that mistake and ignorance, the articles were founded and framed. Sixthly, the agreement in some material parts is so uncertain, that it cannot be decreed with certainty according to the intent of the parties, for that no centre is fixed ; without which it is impossible to make a circle : nor is it sufficiently described, whether it should be a circle with a radius of twelve miles or only a periphery of twelve miles. Seventhly, there is a covenant for mutual conveyances ; whereas the plaintiffs have no estates in the lower counties, so as to make an effectual conveyance to defendant ; and an agreement must be decreed entirely or not at all ; on the plaintiff's own shewing the legal estate and property is in the crown : so that at most they have but an equitable right, in which the crown is trustee ; and then this court cannot decree a con-[446]-veyance. In *Reeve v. Attorney-General*, 1741, lands were devised to a wife, and after her death to be sold, and the money to be divided among the plaintiffs : the testator died without heirs ; so that the legal interest in the estate descended to the crown, but with a trust to be sold. On a bill to have the will established, and to hold against the crown, or the lands sold, *His Lordship* dismissed the bill ; and said, where the crown was trustee, the court has no jurisdiction to decree a conveyance ; but they must go to a petition of right. (See Mitford, 29.) Eighthly, this court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

*Lord Chancellor*. I directed this cause to stand over for judgment. not so much

from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides ; it being for the determination of the right and boundaries of two great provincial governments and three counties ; of a nature worthy the judicature of a *Roman* senate rather than of a single judge : and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a *Roman* senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence ; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court ; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in *specie* ; and more useful in a case of this nature than in most others ; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, *viz.* the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases : provided it is proper in other respects : and the relief sought must prevail, unless sufficient objections are shewn by defendant ; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered : and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die* ; and answering submits to the jurisdiction : much more when there is a proceeding to hearing on the merits, which would be conclusive at common law : yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain, that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council : and it is rightly compared to the cases of the ancient *Commotes* and *Lordships Marches* in *Wales* ; in which if a dispute is between private parties [447] it must be tried in the *Commotes* or *Lordships* ; but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and council ; and the King is to judge, though he might be a party ; this question often arising between the crown and one Lord-Proprietor of a province in *America* : so in the case of the *Marches* it must be determined in the King's court, who is never considered as partial in these cases ; it being the judgment of his judges in *B. R.* and *Chancery*. So where before the King and council, the King is to judge, and is no more to be presumed partial in one case than in the other. This court therefore has no original jurisdiction on the direct question of the original right of the boundaries ; and this bill does not stand in need of that. It is founded on articles executed in *England* under seal for mutual consideration ; which gives jurisdiction to the King's courts both of law and equity, whatever be the subject matter. An action of covenant could be brought in *B. R.* or *C. B.* if either side committed a breach : so might there be for the £5000 penalty without going to the council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction ; and the parties enter into an agreement under hand and seal for performance thereof : A bill must be in this court for a specific performance ; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right ; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right : but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree *in personam* in *England* unless in certain criminal matters ; being restrained therefrom by stat. 16 *Car.* and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement ; and being within the jurisdiction of this

court (4 Inst. 213 ; 1 Ves. sen. 204, 255), which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it. To go a step farther : as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would [448] decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant.

As to the second objection : if it was so, it would be very unfortunate ; for suits and controversies might be for that reason endless ; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they will hold their rights between themselves : and if a proper suit is before the King in council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect also it is properly compared to the case of *Lordships Marches* and to counties *Palatine*. When the *Marches* subsisted, there might be a suit in *B. R.* concerning their boundaries ; and the Lord of each *March* in question need be the only party. If a matter of equity arose, either of the *Lordships Marches* might have sued in equity to settle, because this is the King's court of general jurisdiction as to matters of equity ; and an agreement between the parties relative to these boundaries, if proper in other respects to carry it into a specific performance, is a matter of equity. The court might indeed by reason of their tenure require the *Attorney-General* to be made a party, to know, if he had anything to object ; but then might hold plea of the cause. Suppose, both counties *Palatine* were in subjects hands (as both have been formerly), and subsisted so ; and a question had arisen concerning the boundaries of these two counties *Palatine* ; and the respective Earls *Palatine* had entered into articles concerning these boundaries : this court would have held plea of such articles as well as concerning the boundaries of manors, seigniories, and honours ; for these are honours, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it ; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it savours in some degree of an alienation, why ought it not to be ? There is no occasion to determine that, nor will I ; but it is a new notion, that the Lords proprietors of these provinces may not alien to natural-born subjects. This is no opinion : but the grants themselves are framed so as to be most open to alienation ; being grants to them and their heirs to be held in common *socage* ; not in *capite* of the crown, but as *Windsor Castle* is. What rule of law is there, that lands or a franchise granted to be held in common *socage*, not in *capite*, but as of a particular honour or manor, cannot be aliened without licence ? All the objections concerning *knight's service* or *capite* lands are out of the case, and the act 7 and 8 *Will.* 3, cap. 22, sect. 16, sup-[449]poses, the proprietors may alien to a natural-born subject. The first words of the clause there are, that they and their assigns may be restrained from alienating without licence, which supposes that it was assigned ; and this appears in the case of *Carolina*. As to the not alienating a parcel, the rule cited out of the *Feudists* is not applicable ; those books treating of different tenures ; but I admit, neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted, and thereby bind the crown, of whom they held ; for the tenure and services would still remain on the whole, and the crown might demand the whole services from either. It is therefore something like the case of the office of high constable of *England*, held by tenure of *grand serjeanty* ; which was very extraordinary, to hold the manors by tenure of such an office [1 Inst. 106, 149, 165]. In *Kel.* 170, and *Dy.* 215, the judges reported their opinion to K. H. 8, that the tenure was not extinct by the division, but that the King had a right to insist on the performance of that office from the Duke of *Buckingham* by reason of his moiety : but this exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance that in honours and tenures of this kind, the King cannot be prejudiced by any alienation, division or severance between the parties ; and if material services are reserved on the grant (though here it is by fealty only in lieu of all) the entire services might be exacted from either, not being apportionable. But the settling limits is not a dismembering ; and if a licence to do this was necessary from the crown in law and policy, it sufficiently appears, there was such ; for it appears by orders of council made in 1685 and 1709, the crown has not only recommended, but ordered, this division to be made so far as respects the three lower counties ; as

to which there is no dismembering ; for the dividing line is thereby exactly the same : indeed the circle is not within these orders : but as to that no difficulty can arise.

As to the third objection : the tenure of the planters, &c., remain just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement ; but if they could, care is taken by the agreement to preserve them. The King of *England* is still their sovereign and supreme Lord ; both charters require, the law of the respective provinces should be conformable to the law of *England*, as near as could be. Consider, to what this objection goes ; in lower instances, in the case of manors and honours in *England*, which have different customs and by-laws frequently : yet though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties ; or may be settled by agreement, which this court will decree without making the tenants parties : though in case of fraud, collusion or prejudice to the tenants, they will not be bound : but notwithstanding it is binding on the parties, and to be established as to them. Suppose, two bordering manors had been granted out in tail in recompence [450] of services, the reversion in fee to the crown : in a suit between the lords concerning the boundaries, it is not necessary to make the King or tenants parties to this suit. Indeed the crown would not be bound by that agreement or decree : but it is still binding between the parties. But in this case the same final answer occurs, that does under the other objection ; viz. that if there is no fraud or collusion, it must be presumed to be the true limits being made between parties in an adversary interest ; each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose, either party insisted, there was such a breach of the *proviso* here, as incurred the penalty, and brought *Debt* in *B. R.* for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done) : the court must have relieved against the penalty on performance of the articles ; judging on the terms of the relief, and dispensing with the point of time, the court could not have avoided it. Then how does this case differ ? For it will not be pretended, the King in council would have had plea in that case : it must have come into the King's courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

First it is true, the court never decrees specifically without a consideration : but this is not without consideration ; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet is a mutual consideration on each side (*Note* : So settling disputes, though it afterwards appear that one of the parties had no title, where no fraud. *Stapilton v. Stapilton*, 1 Atk. 2. *Frank v. Frank*, 1 Ch. Ca. 85. *Cann v. Cann*, 1 P. W. 723, 727. *Pullen v. Ready*, 2 Atk. 592. *Goilman v. Battison*, 1 Vern. 48. *Cory v. Cory*, 1 Ves. sen. 19. See 2 Vol. 284) ; and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries.

The objection of the time for performance being lapsed may be answered ; for it is the business of this court to relieve against lapse of time in performance of an agreement ; and especially where the non-performance has not arisen by default of the party seeking to have a specific performance ; as it plainly does not here. (*Note* : Though courts of equity will relieve against lapse of time in various cases, as in *Vernon v. Stephens*, 2 P. W. 66. *Pincke v. Curtis*, 4 Bro. 329. *Fordyce v. Ford*, *ibid.* 494. *Lloyd v. Collett*, *ibid.* 469 ; and 4 Ves. jun. 689, 690 ; and *Gregson v. Riddle*, cited 7 Ves. 268 ; yet they by no means consider lapse of time as wholly immaterial, *Gibson v. Paterson*, 1 Atk. 12, is therefore mis-reported, vide 4 Bro. 497, and *ibid.* 471, note ; 4 Ves. 690, note. See *Seton v. Slade*, 7 Ves. 265.)

Next, these articles are not like submission to arbitration. In those cases generally the time is conditional, so as determination be made by such a day ; here the line and circle are agreed on by distinct, independent, covenants, and that they shall form the boundaries of these tracts of land : this therefore is a particular, certain, specific contract of the parties, that these shall be the boundaries ; nothing left to the judgment of the commissioners, who are merely ministerial to run the line, &c., according to the agreement, and set the marks. Therefore it is not like an award, but is an agreement, which this court will see pursued.

[451] As to any imposition or surprise, the evidence is clearly contrary thereto.

It would be unnecessary to enter into the particulars of that evidence : but it appears, the agreement was originally proposed by defendant himself : he himself produced the map or plan afterward annexed to the articles (vide 1 Ves. sen. 19 ; 2 Ves. sen. 46, 284) : he himself reduced the heads of it into writing, and was very well assisted in making it : and farther that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, *viz.* the defect of evidence on the part of the defendant, which amounts to stronger negative evidence, than if it was by witnesses ; for it was in his own power to have shewn it if otherwise. Then am I to presume, he was imposed on, in a plan too sent to himself by his own agents : as to the plan itself, it was in his own power ; with regard to the original of these minutes of the agreement wrote by himself, though ordered by the court to be produced, they are not produced ; which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

I admit, that, though no imposition or fraud, yet a plain mistake contrary to the intent would be a ground not to decree specific performance. But consider the evidence thereof : the defendant and his ancestors were conversant in this dispute about fifty years before this agreement was entered into, and had all opportunities ; therefore no ignorance, want of information or mistake, are to be presumed : and in cases of this kind after an agreement, and plain mistake contrary to intent of parties not shewn, it is not necessary for the court to resort to the original right of the parties : it is sufficient, if doubtful. To consider the points in dispute, and first upon the defendant's charter ; in which it is insisted, the whole 40th degree of *North* latitude is included ; and if so, that it is to be limited by any recital in the preamble. There is great foundation to say, the computations of latitude at the time of the grant vary much from what they are at present ; and that they were set much lower anciently than what they are now ; as appears by Mr. *Smith's* book, which is of reputation : but I do not rely on that ; for the fact is certainly so. But whatever that was, does it take it in by the description ? It comes to the question, whether the *usque ad* is inclusive or exclusive ; therefore however described, the same question remains. But there is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 40th degree, *viz.* the recital of it, for the plaintiffs say, the information, given to the crown by Lord *Baltimore*, was, that this part was land uncultivated and possessed by barbarians : whereas it was not so, but possessed by *Dutch* and *Swedes* ; and therefore the King was deceived in his grant. There is considerable evidence, that *Dutch* and *Swedes* were settled on the *East* [452] part of that country ; but this is said to be no deceit on the crown ; for though some stragglers were settled there, yet if not recognised by the crown, that is not a settlement. I am of a different opinion ; for in these countries it has been always taken, that that *European* country, which has first set up marks of possession, has gained the right, though not formed into a regular colony ; and that is very reasonable on the arguments on which they proceeded. Then will not that affect the grant ? If the fact was so, that would be as great deceit on the crown in notion of law, as any other matter arising from the information of the party ; because such grants tend to involve this crown in wars and disputes with other nations : nor can there be a greater deceit than a misrepresentation tending to such a consequence ; which would be a ground to repeal the letters patent by *scire facias*. Next consider the dispute on *Penn's* charter, which grants to him all that track of land in *America* from twelve miles distance from *Newcastle*, to the 43d degree of *North* latitude, &c., under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon the charter it is clear by the proof, that the true situation of *Cape Henlopen* is as it is marked in the plan, and not where *Cape Cornelius* is as the defendant insists ; which would leave out great part of what was intended to be included in the grant ; and there is strong evidence of seisin and possession by *Penn* of that spot of *Cape Henlopen*, and all acts of ownership. But the result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. *Senex*, who was a good geographer, says, that the degrees of latitude cannot be computed with the exactness of two or three miles : and another geographer says, that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles ; which is near the whole extent between the two capes. It is therefore doubtful ; and the most proper case for an argument, which being entered into, the parties could not resort back to the original rights between

them ; for if so, no agreements can stand : whereas an agreement, entered into fairly and without surprise, ought to be encouraged by a court of justice.

The objection of uncertainty (see Lord *Walpole* v. Lord *Orford*, 3 Ves. 402) arises principally on the question concerning the circle of twelve miles to be drawn about *Newcastle*, it was insisted on in the answer, and greatly relied on in *America* ; but is the clearest part of the cause. As to the centre, it is said, that *Newcastle* is a long town, and therefore it not being fixed by the articles, it is impossible that the court can decree it ; but there is no difficulty in it : the centre of a circle must be a mathematical point (otherwise it is indefinite) and no town can be so. I take all these sort of expressions and such agreements to imply a negative ; to be a circle at such a distance from *Newcastle*, and in no part to be farther. Then it must be no farther distant from any [453] part of *Newcastle*. Thus to fix a centre, the middle of *Newcastle*, as near as can be computed must be found ; and a circle described round that town ; which is the fairest way ; for otherwise, it might be fourteen miles in some parts of it, if it is a long town. Then what must be the extent of the circle ? It is given up at the bar, though not in the answer. It cannot be twelve miles distant from *Newcastle* unless it has a semidiameter of twelve miles : but there is one argument decisive without entering into nice mathematical questions : the line to be the dividing line, and to be drawn *North* from *Henlopen*, was either to be a tangent or intersecting from that circle, and if the *Radius* was to be of two miles only it would neither touch or intersect it, but go wide. There is no difference as to the place or running of the line from *South* to *North*, though there is as to the cape, from which it is to commence.

As to the seventh head of this objection, it is truly said, that agreements must be decreed entire, or not at all. As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment. I will lay aside the question of *Estoppel* : which is a nice consideration ; for the Duke of *York*, being then in nature of a common person, was in a condition to be estopped by a proper instrument. In 1683 the Duke of *York* takes a new grant from the crown ; and, having granted before, was bound to make further assurance, for the improvements made by *Penn* were a foundation to support a bill in equity for further assurance. The Duke of *York* therefore while a subject was to be considered as a trustee ; why not afterward as a royal trustee ? I will not decree that in this court : nor is it necessary : but it is a notion established in courts of revenue by modern decisions, that the King may be a royal trustee ; and if the person, from whom the King takes by descent, was a trustee, there may be grounds in equity to support that ; and if King *J. 2*, after coming to the crown was a royal trustee, his successors take the legal estate under the same equity ; and it is sufficient for plaintiffs if they have an equitable estate. Then consider this in point of possession of the *Penns* ; the proof of which is very clear : they have been permitted to appoint governors of these lower counties ; which have been approved by the crown according to the statute of King *William*. Indeed all the acts of possession are with *salvo jure* to the crown ; but the evidence for defendants amounts to this : not of a real possession or enjoyment, but of attempts to take possession sometimes by force, sometimes by inciting people to come there ; otherwise why should Lord *Baltimore* grant here for half what he granted in other places ? which shews plainly it was an invitation to get settlers there under their title. Now I am of opinion, that full and actual possession is sufficient title to maintain a suit for settling boundaries : a strict title is never entered into in cases of this kind ; neither ought it. But what ends this point of want of [454] title to convey is, that no part of the lower counties is left to be conveyed by plaintiffs to defendant ; so that nothing being to pass by plaintiffs it is not material whether they have title to convey or not. But now in cases of this kind, of two great territories held of the crown, I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidence of title to lands, or district of lands in *America*, that can be : and so have I thought in all cases since I have served the crown ; for the great beneficial advantages, arising to the crown from settling, &c., is, that the navigation and the commerce of this country is thereby improved. Those persons therefore, who make these settlements, ought to be protected in the possession, as far as law and equity can : and both these proprietors appear to have great merit with regard to the crown and the public ; for these two provinces have been improved in private families to a great degree to the advantage of their mother country : this regards the three lower counties ; the strength of which is vastly on the side of the plaintiffs.

As to the court's not enforcing the execution of their judgment ; if they could not at all, I agree, it would be in vain to make a decree ; and that the court cannot enforce their own decree *in rem*, in the present case : but that is not an objection against making a decree in the cause ; for the strict primary decree in this court as a court of equity is *in personam* (4th Inst. 213 ; 1 Ves. sen. 204, 447), long before it was settled, whether this court could issue to put into possession in a suit of lands in *England* ; which was first begun and settled in the time of *James I.* but ever since done by injunction or writ of *assistant* to the sheriff (*Note* : After service of a writ of execution of a decree for delivery of possession of lands, the court will grant an injunction on a motion of course ; and the writ of assistance to the sheriff is founded on it. See in *Huguenin v. Bazely*, 15 Ves. 180) : but the court cannot to this day as to lands in *Ireland* or the plantations. In Lord *King's* time in the case of *Richardson v. Hamilton, Attorney-General of Pennsylvania*, which was a suit of land and a house in the town of *Philadelphia*, the court made a decree, though it could not be enforced *in rem*. In the case of Lord *Anglesey* of land lying in *Ireland*, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*, but the party being in *England*, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdiction ; and it looks by the order in 1735, as if that was in view ; liberty being thereby given to resort to that board.

This opens a way to that part of the case relating to the crown. The *Attorney-General* acts a very impartial part ; and I shall express in the fullest words, that this decree is entirely without prejudice to any prerogative, right, or interest in the crown. I will go farther ; that, as I do not know how far that interest of the crown may be, I will reserve liberty for either party to apply to [455] this court, if by any act or right of the crown, execution of this shall be obstructed ; for the court is at liberty to suspend its decree, if a difficulty to perform it is shewn : and I will reserve further directions as between the parties as to that matter so *de novo* arising. Judgments have been at law with a *salvo jure* of the crown ; as in *Rastal* and *Coke's* entries in the title of *intrusion* and *quo Warranto* ; which particularly in the cases of lands relating to intrusion, is very analogous to the present.

I am of opinion therefore to decree a specific performance of this agreement without prejudice to any right, &c., of the crown.

Next as to the point of costs : for which must be considered, what passed in *America* and in *England*. As to what passed antecedent to granting the commission, it is very fair on both sides ; all the objection arising from that, is the defence against the performance ; and that there are no grounds for the defence from fraud, imposition or mistake, which are made the heads for it. But in *America* the defendant's commissioners behaved with great chicane in the point they insisted on, as the want of a centre of a circle, and the extent of that circle, *viz.* whether a diameter of two or of twelve miles : the endeavouring to take advantage of one of plaintiffs commissioners coming too late, to make the plaintiffs incur the penalty. It is plain, from the articles, both sides should be answerable for default of their commissioners : the penalty shews the intent ; though I own, this is not that case ; but I do not go on that. The defendant has been misled by his commissioners and agents in *America*, to make their objections his defence ; which brings it nearer to himself ; and though he would not at all have thought of it as from himself (so that I impute nothing in the least dishonourable to him), yet I must take it as his own act ; and then should not do complete justice, if I did not give plaintiffs the costs of this suit to this time, to be taxed, reserving subsequent costs.

*His Lordship*, having directed that the plaintiffs and defendant should quietly hold according to the articles, altered that ; for it would be improper to have a decree in this court for quiet enjoyment of lands in *America* ; which would occasion continual applications to this court for contempts, &c., and that it ought to be the proper jurisdiction. (*Note* : The directions were very special, and may be seen in the Supplement, p. 194, &c.)

Mr. *Solicitor-General* in his argument cited the *Massachusset Bay* company, against the *King*, in 1746, in the council, as to settling boundaries ; where on petition by the plaintiffs to rehear, the committee reported, that there was no instance of rehearing on an [456] appeal ; which would be mischievous, unless on some very particular



circumstances, as new discovery or fraud concealed; and therefore the petition was rejected. (Reg. Lib. 1749, B. fol. 439.)

WEST v. SKIP, *May* 16, 1750.

S. C. 1 Ves. sen. 239, 245.

This now came on upon the point reserved till after the determination of *Ryal v. Rowles* [1 Ves. sen. 348 to 375]: and the question was, whether there was any distinction between this and that case either on the foot of the *Elegit*, taken out by the sisters of *Ralph Harwood* on a judgment confessed by him, against his lease of the brewhouse, &c. (which the sisters insisted, the commissioners of the bankrupt were not intitled to seise and sell under the act of parliament), or on the foot of the officers of excise, whom the sisters had paid off, and insisted, that having paid a debt to the crown, the prerogative of the crown should avail them.

*Lord Chancellor.* The statutes of bankruptcy do certainly not extend to the right of the crown; but as to the partnership debts subsequent to the assignment, the sisters are considered as partners; and the partnership-effects must be applied to pay the partnership-debts, before any other partner can claim any thing out of either for his share or debt. Suppose a subsequent judgment-creditor had taken these effects in execution: it has been determined over and over at *Guildhall*, that one cannot come against these goods, which he had left in the bankrupt's hands, and say, he is a prior judgment-creditor. Then a question will be, whether any thing will be coming after payment of the partnership debts?

But first let the Master inquire, whether, at the time of the judgment confessed by *Ralph Harwood* to his sisters, any sum was due to them, or either of them? what was the consideration of the judgment: and if the master shall find any debt due, then take an account thereof. (Reg. Lib. 1749, B. fol. 519.) (See Supplement, p. 199.)

BAKER v. PAINE, *May* 21, 1750.

Articles of agreement rectified by the minutes. Admission of parol evidence where fraud or surprize.

The plaintiff captain of an *India Ship* (vide 1 Ves. sen. 317), by articles of agreement bargained and sold to defendant, all his *China* ware and merchandise, which he brought home in his last voyage: covenanting that he was the real proprietor, and had a right to sell, and should allow, deduct or pay to defendant, all the customs, duties, allowances and charges, that should be taken out of the said bargained premises. Those allowances amounted in the whole to forty-six and a half *per cent.*, paid to the company on the [457] captain's private trade in respect of warehouse-room, &c., or of the duties to the crown. Two ships having been taken on return home, the goods happened to sell for a much higher price than they had agreed on. The captain brought this bill, for an account of what was due on this contract.

The material question was, whether the plaintiff ought to bear all deductions and allowances, that were to be made, to the extent only of that sum he was to receive on his private contract with defendant; or whether he was to bear it on the whole price the goods should sell for at the company's sale by inch of candle?

Plaintiff's counsel admitted, the articles, as penned, were against him so as to oblige him to pay on the whole sum, but the real contract and intent was, that he should pay the forty-six and a half *per cent.* only on the price he was to receive by his private contract with defendant, who should bear the deduction on the surplus price for which the goods sold, because that was all profit to himself; and it appeared by the minutes and the calculations made by themselves at the time, that this was contrary to the intent, and a mistake by the drawer: which is a head of relief in this court: and to this parol evidence was offered to be read.

Objected to for defendant; for by this means the mere allegation of mistake will let in parol evidence in contradiction to any agreement, and defeat written acts. The presumption is, the whole agreement was comprised in that deed: therefore though the court leans against objections of this kind, which prevent information, yet this would contradict the rule of evidence, always adhered to unless there is fraud in the