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more was necessary; "Therefore, (they say) all the territories, seas, waters and harbours, with their appurtenances, lying, &c. are the right and property of the people of this state, to be held by them in sovereignty. This clause not only adds to the domain already vested, all the seas, waters and harbours; but it also vests the *sovereign command* of the state in the people. It appears to me that the convention (besides the ascertaining the limits of the state) had three objects in view; one was, to secure to the people the absolute sovereignty of the state; another was, to guard against all usurpations of individuals, and to compel them to hold their lands of the state; and the third was, to exclude all but the members of that collective body from holding or enjoying the property of the soil. The latter object is perceived in the expression of the first clause; and I think the convention must have had their eye upon the subject of alienage, a subject familiar to them; and, next to sovereignty, one of the most important in a free state. I am the more convinced of this, when I consider the last saving clause in the section. To what end, I would ask, could they introduce that clause, were it not to let in a certain description of aliens and foreigners; who were excluded in the foregoing part of the section? The very exception proves their exclusion, and shews the sense in which the Convention intended to be understood by, *the property of the soil.*

Next follows the first proviso, in these words, "provided always, that this Declaration of Rights shall not pre-judge any nation or nations of Indians, from enjoying such hunting grounds as may have been, or hereafter shall be secured to them by any former or future legislature of this state." This proviso was thought necessary because the Indians were not considered as of the collective body of the people, and were therefore excluded from enjoying any privileges touching the soil, by the first clause in the section, as were all aliens. The second proviso is in these words, "And provided also, that it shall not be construed so as to prevent the establishment of one or more governments westward of this state, by concert of the legislature." This proviso was thought necessary, because as the limits of the state were fixed by a convention for that and other *extraordinary* purposes; no future legislature, convened for ordinary purposes would possess the power of diminishing the bounds or altering the demarkation by erecting a new state; and they saw that ere long such a thing would probably take place: The extent of territory was very great, and a natural barrier, dividing as it were, the western from the eastern part of the state, would always obstruct that mutual access and free intercourse, so necessary in the same government and within the jurisdiction of the same legislative body. The third and last proviso is in these words, "And provided further, that nothing herein contained, shall affect the titles or possessions of individuals, holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George the third, or his predecessors, or the late Lord Proprietors, or any of them." Here the Convention speaks of individual rights as contradistinguished from sovereign power; and whence the necessity for saving *individual* rights, if it was intended in the body of the section to destroy *public* rights only? The convention, in fact, supposed they had destroyed all rights whether public or private, except those of the people who composed the collective body of their own state. But thinking that justice, policy and the faith and dignity of the state demanded the protection of all individual and strictly private rights which had been lawfully acquired, this proviso was deemed necessary.

To make the common cause, in which the state was then warmly engaged, as popular as possible, was the first care of our infant cabinet: to that end every measure was pursued which tended to fix the wavering; to reform the disaffected, and to bring over as many as possible to our standard. Pursuing this policy, and seeing that a general distruction of individual rights would only serve to irritate an already relentless foe, or add strength to his arms; the Convention thought it expedient to except all individual private rights lawfully acquired. But in doing this I cannot suppose they intended to save such a right as the plaintiff's.

For the better understanding of this proviso, let us divide it into three branches. 1st. It preserves the rights of individuals, holding or claiming under the laws heretofore in force. The meaning of this branch is, that all the lands which had been appropriated by individuals should remain so, and not be made the subject of entry by the new government, and all titles of individuals sanctioned in any manner or degree by former laws, whether by preemption, the act of limitations, or otherwise, should remain totally unaffected, in the same manner as though no such Bill of Rights had been declared. 2dly. It preserves the rights of individuals, holding or claiming under the grants heretofore made by the late King George III, or his predecessors. The sense of this branch appears to be this; that these titles should take their course and be held as valid as they were before the declaration, notwithstanding the person under whom these individuals held or claimed had lost all sovereignty and territorial rights. 3dly. It preserves the rights of individuals, holding or claiming under the late Lords Proprietors or any of them. This branch was added for the same reason that the second was, considering the Lords Proprietors possessed of prerogative power and privileges: and it shews too, that if Lord Granville's rights had been preserved, those holding by grant under him would have been protected by the provisions of the second branch. As to him therefore, this branch would in that case have been useless. And as the expression goes to the Lords Proprietors or *any of them*, as by far the greatest number of grants were issued by the Earl Granville; and as he was, notwithstanding his relinquishment to King George II, called and understood to be a Lord Proprietor; and did in fact possess, not only the right of subinfeudation and of escheat; but many prerogatives and extraordinary privileges, and had regularly kept up his office for granting out the lands in the district, with the reservation of quit rents; I cannot believe that he was intended to be left out of the list of Lords Proprietors. I infer, therefore, that he was not intended as one of those individuals mentioned in the last proviso. This construction, as I conceive, gives meaning and consistency to every part of the section; and a true exposition never permits any part of a statute to be silent, if it can be made to speak.

Again, there are several rules applicable to this section which tend to confirm the construction I have put upon it. It is a rule of construction that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction; and if the words are obscure, they shall, for the same reason be expounded most strongly for the public good; in some cases the letter of an act is restrained by an equitable construction; in others it is enlarged; and in others the construction is contrary to the letter; it is said to be within the meaning because it is within the mischief: And in order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question; did you intend to comprehend this case? then you must give yourself such an answer as you imagine he, being an upright and reasonable man would have done. I would not be understood to express a desire (as I feel none) to strain the rules of construction; because such a desire would be intemperate and the expression of it highly improper; and because I think the present case needs no such subterfuge. On this account, I do not set up the equity of this section against the letter; but if they concur, the equity very much aids the letter. Now, if the question had been put, according to the rule of construction just mentioned, I do believe that every member of the convention would have said, they intended to destroy the rights of this plaintiff. I think so, because it was reasonable and highly proper in itself; and because such has been the general understanding in this state, ever since the Declaration of Rights.

Another rule is, that if a statute be penned in dubious terms, usage is a just rule to construe by; for *jus et norma loquendi* is governed by usage, and the meaning of words spoken or written ought to be allowed as it has constantly been taken to be. As far as there has been any usage in this case, it has favored the construction I have given. These lands have been granted by this state; therefore the legislature thought the plaintiff's rights divested. Many recoveries have been had in Ejectment, upon the evidence of such titles, and no defendant ever thought proper to question the validity of such grants; and the Courts, instead of calling the plaintiff, if he had not made out a title in himself against the whole world, have suffered these recoveries to be had. This is evidence that the Courts and lawyers of this state did not believe that such defence was tenable.

Another rule is this—Great regard ought, in construing a statute, to be paid to the construction, which the sages of law, who lived about the time or soon after it was made, put upon it; because they were the best able to judge of the intention of the makers; and it is a maxim that *contemporanea expositio est fortissima in lege.*

Though there was no exposition given of this bill of rights, soon after it was made, by the courts of this state; yet we know that some of the sages of law who lived at that time, are yet living and that they entertain the opinion that the plaintiff's right was vested in the state by the Bill of Rights; some regard too should be paid to the opinions of the Legislatures upon this subject—particularly as they were composed of the same men, in part, who declared the Bill of Rights. The Legislature, very soon after the constitution was formed opened offices for receiving entries of claims for lands; and declared, that any citizen might enter with the entry-taker of any county within the State (as well within the Earl Granville's district as elsewhere a claim for any lands lying in such county, which had not been granted by the Crown of Great Britain, or the Lords Proprietors of Carolina, or any of them, in fee, before the 4th day of July, 1776, or which had accrued, or should accrue to this State, by treaty or conquest; and that every person or persons, and his or their heirs and assigns, who in the office of the late Earl Granville, or in the late public land office, had heretofore made any entry or entries, or who, since the death of the said Earl Granville had possessed and actually improved any vacant or unappropriated lands for which no just claim by entry in any office should have been made, should be entitled, in preference to all others, to enter and obtain a grant or grants for the same.

The provisions and expressions of this act shew incontestibly, that the legislature considered the plaintiff's right vested in the State by the constitution. And, following up the intention of the bill of rights, saved all private rights from *entry*, but destined those of alien enemies to another fate; because they were not affected by the Bill of Rights, and consequently could not be considered then as vacant or unappropriated lands.

It may be asked, if the legislature supposed the plaintiff's title divested from him by the constitution, which was adopted the 18th of December, 1776, why they made all his ungranted lands on the 4th of July preceding, the subject of entry? The answer is, that the Earl Granville's office had ceased, and his right to grant was at least suspended by the revolution. Any grant, therefore, between the time of suspending his right, and the time of taking it away absolutely, would have been considered as void.

Again, this legislature of which we have been speaking, and several successive ones, undertook to confiscate the lands of many British subjects by name, and generally, all others coming within the description of those, but no where expressed the name of this plaintiff—who, of all others, they would have named if they had intended to include him, or if they had not believed his right was already vested in the State.

These acts shew, that in the opinion of the legislatures, all private rights had been protected, or rather unaffected by the Bill of Rights; but that the right now sued for was not of that description. Experience and a change of circumstances influenced these legislatures to adopt a policy different from that which had been pursued by the convention—they, therefore, declared the estates of a certain description of persons confiscated and forfeited, which until then, it had been the policy of the State to preserve.

Now, I admit, that if a legislature undertakes to legislate upon a supposititious right, which in fact has no existence, the act has no force. It is not the mere opinion of a legislature that a right had previously vested, which makes it so, if there be no words in the act declaratory of the right; and if there are, they only give it existence from that moment: Therefore, I would be understood to mean only that the construction which I have given the Bill of Rights, is that which prevailed soon after it was declared.

It was not contended, in argument, that if the plaintiff was divested by the Bill of Rights, an inquest of office was necessary to vest the title in the State. Indeed there could be no ground for such an argument. But even had there been any ground for it, the entry law was, I think, equivalent to an office found. The reasons that were urged, and with propriety too, against allowing such an effect to the entry acts upon the subject of lands confiscated, lose their force when applied to the lands now in question. There, the lands which were the subject of confiscation and those that were the subject of entry, were, at least considered in argument, different lands. Here, the lands declared to be the property of the State by the Bill of Rights, and those that are made subject to entry, are the same.

I am now to consider the second point made, viz. Whether the plaintiff's right was confiscated.

As my opinion is fixed upon the first point in the cause, very little need be said upon this part of the case. Indeed, a great part of the matter of this point, was anticipated in the last one considered. But I have no doubt of these two facts: 1st, That the several legislatures which passed the confiscation acts, were fully impressed with the belief that the right of this plaintiff was destroyed by the Bill of Rights, and that therefore it was useless to include him in the acts: 2d, That they intended to confiscate, not only those whose names were expressed, but all other British subjects who came within the mischief intended to be remedied. Now as the plaintiff, if he had not been affected by the Bill of Rights, would not have lost his title by the mere opinion of a future legislature that he had so lost it, without some expression in the act, which in itself would create the loss; so, upon the same reasoning *it might be urged*, that if the plaintiff answers the description, and is within the mischief of the confiscation acts, he is included in the general expression, though the legislature had not his case in view. But, whether he was within the mischief or not; or whether the conviction that his case was otherwise provided for, would repel the presumption of his being included because he was within the mischief, which is most probable, it is unnecessary for me to determine. I shall therefore give no opinion upon it. Nor shall I give an opinion upon the matter of an inquest of office; because there was no substantive point made upon it, but considered only as an accessory to the confiscation acts.

And this brings me to the 3d point, namely:—That the plaintiff was disabled by alienage to hold lands.

The British doctrines upon the subject of alienage are these:—They deny the right of expatriation because the subject's allegiance is perpetual and because it is due to the King in his natural capacity; but they admit that such allegiance to every intent but one, may be dissolved. For they hold that allegiance and protection are reciprocal; and that, in the case of the United States, upon the dismemberment of the colonies from the mother country, the *antenati* became aliens to every intent but the capacity of holding lands: And because the principle there held is, that a subject *born* has an inherent right to hold land and that such right shall endure as long as his allegiance and obedience (which to this intent is perpetual) shall continue, no change of place or circumstances can divest him of that right—as was ruled in Calvin's case. But they admit that the *postnati* are aliens to every intent. And indeed, it would be a perfect solecism in our government to say that even the *antenati* are yet subjects of his Britanic Majesty. And to my mind it would be equally absurd to adopt the distinction taken in Calvin's case; for that very case, and many, if not all others upon the same subject, do establish the general principle, that an alien cannot hold land; and that for the best of reasons—reasons which apply with all their rigour against the present plaintiff. Yet they hold that a man whose freedom from and independence of his majesty has been acknowledged; who cannot in any manner be bound to serve him; who is in no way protected by him, but who has been declared out of his protection; and who owes to him, in fact, no faith, allegiance or obedience whatever, may hold land as a subject may do.—And that a subject who, out of the mouth of his master, has relinquished all claim of territory of a dismembered colony, and acknowledged the independence of the citizens thereof, and who but the other day was an alien enemy, and is now completely alien to the newly erected government of such dismembered colony and the citizens thereof, shall nevertheless, hold land as a citizen may do.

The principles of Calvin's case have been frequently attacked in this country, and I think with much reason; but as these principles may be denied, and the motives which induced the resolutions of the court condemned, and still the plaintiff in this case be permitted, to hold, under the 6th article of the treaty of peace, considering him not otherwise divested, I shall leave the case to another and more able executioner.

I shall forbear to give any opinion upon the 6th article of the treaty of peace, because there has been a diversity of opinion upon it among the ablest law characters in the United States; because I entertain much doubt myself; and because it is not necessary in this case.

The last point to be considered is the act of limitations.

I am clearly of opinion that the plaintiff is not barred by this act; but this opinion is only the consequence of that which I delivered on the first point: for had it not been that the plaintiff possessed prerogatives to distinguish him from other individuals, I should have thought that his right was not affected by the Bill of Rights, but that he was barred by the act of limitations. It is therefore by reason of his prerogatives alone, that I think him not included in the act; and not because he parcelled out his lands and others held under him. Considering him as a mere grantee of the king, with the appurtenances common to a fee, I cannot upon principle, distinguish his case from that of another individual, who holds by grant 1000 acres, for instance, of uncultivated and unoccupied land, and has conveyed in fee simple 500 acres thereof to different persons, in small parcels; and in such case, the right to the 500 acres retained, might, no doubt, be barred by the act.

When this act was made, it was the intention of the makers not to include the lords proprietors, as appears very plainly from the preamble and from the scope and design of the act; and, as the king is not bound by an act of Parliament, unless he be named therein by special and particular

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