

WHARTON *et. al.*, *versus* MORRIS *et. al.*

1785.

DEBT upon a bond. Plea, payment, with leave to give the special matter in evidence.

The case was this:—The plaintiffs, copartners; sold to *Pleasants, Shore & Co.* merchants in *Virginia*, a considerable quantity of tobacco in March 1778, when the *Pennsylvania* scale of depreciation, estimates continental money at the rate of five for one. Articles of agreement were executed between the vendors and the purchasers, in which *Pleasants, Shore & Co.* covenanted to procure *Willing, Morris, and Inglis*, merchants of *Philadelphia*, as sureties for the payment of the tobacco; and, accordingly, a bond for that purpose was afterwards executed by those gentlemen, in the penalty of £12,000 on condition to be void, if *Pleasants & Co.* should pay the sum agreed upon (that is £7. per cent.) “on the thirtieth of September 1782 in lawful current money of *Pennsylvania*.” It appeared that *Inglis*, one of the defendants, had offered to pay the value of the tobacco, at the time of the sale, with interest; but this was refused by the plaintiffs; and no payment or tender, being made upon the 30th of September 1782, they brought the present action upon the bond.

The evidence was brief, consisting only of the articles of agreement, the bond, a deposition of the offer made by *Inglis*, and testimony that the usual price of tobacco, during many years preceeding the war, was about 20*s.* per *Cwt.*

Wilcocks, Sergeant, and Lewis, for the plaintiffs, contended, that this transaction was a fair and lawful wager on the part of *Wharton, & Co.* in confidence that the continental money would recover its original value; and that on the other hand they ran a considerable risk; as, if it depreciated, they would have been bound to take it, provided it continued a legal currency. But the act which repealed the tender law destroyed its currency; so that on the 30th September 1782, when the bond became due and payable, the only lawful current money of *Pennsylvania*, was coin, of gold or silver; and that by the terms of the bond ought to be paid.

Gouverneur Morris, Wilson and Ingersol, for the defendants, denied that the transaction was founded in a wager; and contended that the plaintiffs had set up a hard and unconscionable demand: for, they insisted, that the lawful current money, expressed in the bond, meant what was current at the time of its execution; and they declared the readiness of the defendants either to pay at the rate established by the scale of depreciation, or according to the real value of the tobacco, with interest from the date of the sale.

M'KEAN, *Chief Justice* delivered a circumstantial and learned charge to the Jury. He said, that the want of a Court with equitable powers, like those of the Chancery in *England*, had long been felt in *Pennsylvania*. The institution of such a Court, he observed, had once been agitated here; but the houses of Assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of encreasing, by that means, the power and influence

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of the Governor, who claimed it as a right to be Chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty &c. This defect of jurisdiction, has necessarily obliged the Court upon such occasions, to refer the question to the jury, under an equitable and conscientious interpretation of the agreement of the parties; and it is upon that ground, the jury must consider and decide the present cause.

His Honor, having recapitulated the evidence, concluded with the following observations.

The bond is made payable in current money of *Pennsylvania*; but, I would ask, what is the *current money of Pennsylvania*? For my part, I know of none, that can properly be so called, for current and lawful are synonymous. In *Great Britain*, the King by his proclamation may render any species of coin a lawful currency. But here, it can only be done by an act of assembly; and except in the temporary laws for supporting the former emissions of paper-money, there is no pretence that the legislature has ever interfered upon this subject. The expressions in the 2 *sect.* of the act of the 27th *January, 1777*, cannot be construed to make the Spanish milled dollars a legal tender, as they are only mentioned by words of reference; but that which was declared to be a lawful tender, and consequently, became the legal currency of the land, was the money emitted under the authority of Congress.

To that species of money, therefore, the bond must be taken to relate; and the jury will either reduce the penalty to gold or silver, according to the scale of depreciation; or, if they think it more equitable, they will find a verdict for the value of the tobacco, and give the plaintiffs legal interest from the day of sale.

The jury adopted the latter opinion, and found for the plaintiffs with £.3,600 damages and 6d. costs.

WILSON'S *Lessee* versus CAMPBELL.

EJECTMENT.—*Yeates*, for the defendant, when called upon at the trial to confess *Lease, Entry and Ouster*, confessed *Lease, Entry, and Ouster* for *part only* of the tenements laid in the declaration.

This was opposed by *Bradford*, who contended, that the defendant having taken general defence, when he first pleaded, and entered into the common rule, he must now confess *Lease, Entry and Ouster* as to the *whole*; but the plaintiff can recover no more than he proves the defendant to be in possession of. 1 *Ait. Prac.* 317.

BY THE COURT: The defendant must in this case, confess *Lease, Entry, and Ouster* for the whole tenements laid in the declaration*.

COMMON

* This case was determined at N. P. *Carlisle* on the 16 *May, 1785*, before M^r KEAN, Chief Justice, &c.