UNITED STATES *v.* 1960 BAGS of COFFEE. (*a*)

Forfeiture.—Bonâ fide purchaser.

The forfeiture of goods, for violation of the non-intercourse act of March 1st, 1809, takes place upon the commission of the offence, and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid.[1]

THIS was an appeal from the sentence of the Circuit Court for the district of Maryland, which restored a quantity of coffee that had been seized and libelled for violating the non-intercourse act of March 1st, 1809, § 4, 5. (2 U. S. Stat. 529.)

The claimants in the court below alleged, by way of plea, that the coffee was regularly entered and the duties *secured according to law, after [*399 which, they beeame the purchasers for valuable consideration. They also denied that it was imported contrary to law. The United States demurred to that part of the plea which states the purchase, &c., and took issue upon that part of the plea which denies the illegal importation. By the sentence of the district court the demurrer was overruled, and the coffee restored ; which sentence was affirmed in the circuit court, and the United States appealed to this court.

The case was elaborately argued, by the Attorney-General, *Pinkney*, for the United States, and by *Boyd* and *Harper*, for the claimants, at last term, and again at this.

The words of the statute, which create the forfeiture, are : " That whenever any articles, the importation of which is prohibited by this act, shall, after the 20th of May next, be imported, into the United States," all such articles " shall be forfeited."

Pinkney; late Attorney-General, for the United States.—Two objections have been made to the claim of the United States, for this forfeiture. 1. That the right of the United States does not vest, until seizure and condemnation : and 2. That the United States are bound by the act of their officer, in receiving the duties and permitting the goods to be entered.

1. The forfeiture occurs at the moment of committing the offence. The statute says, whenever the act is done, the thing shall be forfeited ; no other time is mentioned. The seizure is the consequence of the forfeiture, not its cause ; the thing is first forfeited, and then seized. The forfeiture immediately follows the offence ; the seizure is merely to ascertain the fact. This is the plain construction, or rather the letter of the statute.

There is a distinction between forfeitures at common *law, and [*400 those accuring under a statute. *United States* v. *Grundy*, 3 Cr. 351. In that case, the Chief Justice said, " Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature ; this must depend upon the construction of the statute." The reason why the court decided, in that

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(*a*) February 15th, 1814. Absent, WASHINGTON, Justice.

[1] S. P. The Mars, *post*, p. 417 ; The Florenzo, 1 Bl. & H. 61 ; Fontaine *v.* Phœnix Ins. Co , 11 Johns. 293 ; Kennedy *v.* Strong, 14 Id. 128.

case, that the right to the ship did not vest in the United States immediately upon taking the false oath, was, that the United States had an alternative, either to take the vessel, or its value, and until the United States had made their election, the right did not vest.

But there are two cases at common law, where the forfeiture relates back to the time of the offence and avoids intermediate alienations—deodand and suicide. So also, in the case of felony and flight. So also, in all cases where the punishment for the offence is the forfeiture of the thing by which the offence was committed, or where the punishment cannot be inflicted on the person. In treason and felony, the forfeiture of personal chattels is not the punishment, but a corollary or consequence of the disability imposed on the person. But in regard to lands, the forfeiture relates to the time of the offence committed. With regard to purchasers, the rule is *caveat emptor*. This is said to be a hard case, but there are other cases equally hard, depending on the same rule. If goods are deposited with a merchant to keep, and he sell them, unless in *market overt* (and we have no *market overt* in this country), the sale is void, and the owner may recover them from the purchaser who bought them, without notice. This too is a hard case, but it is every day's practice.

To show that the forfeiture attaches at the moment of the offence committed, he cited *Wilkins* v. *Despard*, 5 T. R. 112 ; *Roberts* v. *Withered*, 12 Mod. 92, and 1 Salk. 223 ; *Lockyer* v. *Offley*, 1 T. R. 252.

2. As to the second point, he said, it was impossible to contend, that the United States were bound by their officer's ignorance of the fact of the forfeiture, when he received the duties and granted the permit.

*401] *Boyd*, contrà.—The demurrer admits that the coffee was properly entered, that the duties were paid, and that there was a *bonâ fide* sale and transfer of the coffee, for a valuable consideration, before seizure. A forfeiture cannot overreach a *bonâ fide* sale to third person. That this is the rule at the common law, is clearly proved by the very learned and elaborate argument of Judge WINCHESTER in giving his opinion in the case of *The Anthony Mangin* (3 Cranch 356), and the principle has been recognised by this court in the same case (*United States* v. *Grundy*, 3 Cr. 350). A forfeiture by statute is not more operative than a forfeiture at common law. There is no expression in the statute to justify the distinction. The common law says, whenever a man shall commit treason or felony, he shall forfeit his goods and chattels to the king.

Bonâ fide purchasers are favored at common law. *Ex parte Edwards*, 10 Ves. 104 ; 1 East 94, 95 ; 2 Esp. 731 ; 12 Mod. 92 ; 2 Cranch 390 ; 3 Ibid. 356 ; 6 Ibid. 133 ; 5 Bac. Abr. 229. The forfeiture must be followed by seizure and condemnation, before the property can vest in the United States. This principle has been decided by this court, in the St. Domingo cases, where the law being temporary, and having expired, after condemnation in the court below, and before hearing in this court, the property was restored, which could not have been the case, if the property was vested in United States by the commission of the offence. If the title of the United States was complete at the time of the offence, and if the seizure was merely to ascertain the fact, the expiration of the law could not divest that title out of the United States, and this court must have affirmed the sentence of con

demnation. *Yeaton* v. *United States*, 5 Cr. 281. If the United States had not discovered the offence for three years, the act of limitations would have barred their claim. *Adams* v. *Wood*, 2 Cr. 336. If the coffee had been destroyed, the United States could not have recovered the duties, because the goods were not legally imported.

2. The United States are estopped from claiming the property, by the acts of their officer, in granting the permit *and receiving the duties. [*402
The acts of officers are to be favored. 16 Vin. 114, tit. Officers; 17 Ibid. 153. The permit to land the coffee, and the receipt for the duties, are conclusive evidence to all the world, except the illegal importer, that the coffee was lawfully imported. If a claimant encourage the vendee to buy, his claim shall be postponed to that of the purchaser. Sugden on Vendors 480. Acceptance of rent is an admission of title. 18 Vin. 149. So here, acceptance of the duties is an admission of a lawful importation. A purchaser is only bound to use reasonable diligence; he has only to ask whether there be a regular permit to land the goods, and whether the duties have been paid. If the officers were mistaken, and have given evidence of a good title, their mistake ought not to injure an innocent purchaser. 2 Bro. C. C. 389; 5 T. R. 118; 1 Ibid. 260; 3 Cr. 389, 390. The inconveniences of such a rule would be intolerable; the utmost prudence could not prevent a man from loss. In personal chattels, possession is the criterion of title. 13 Ves. 121.

Harper, on the same side.—This is a case of *bonâ fide* purchase, for a valuable consideration, without notice. It is presumed to be without notice, because the contrary does not appear. The only case supposed to be against us is that of *Roberts* v. *Withered*, 5 Mod. 191; 12 Ibid. 92; 1 Salk. 223. That was a case of detinue against the wrongdoer; there was no intervention of a purchaser without notice. The relation of the forfeiture to the time of the offence is never suffered to overreach an innocent purchaser, without notice. Relation is a fiction of law, which is never allowed to do injustice. Where a party not only conceals his claim, but gives out that the title is clear, he shall be postponed. The permit was evidence on which the claimant had a right to rely. No one can take advantage of his own act, to injure another.

As to the common-law doctrine of forfeiture, the *cases of treason [*403
and felony furnish the general rule; the cases of deodand, suicide and flight are exceptions. In treason and felony, the forfeiture is admitted not to relate to the fact committed. In the case of deodand, the exception to the rule is founded on the notoriety of the fact. In the case of suicide, the reason for the exception is, that there is no other mode of punishing the offence, and flight is an admission of the fact, and a withdrawing himself from punishment. Notoriety, confession, and the inability to inflict other punishment, are the grounds of these exceptions to the general rule. In treason and felony, if the goods are sold *bonâ fide*, without notice, the forfeiture relates back only to the conviction. Unimpeached possession is evidence of unimpeached title. This principle applies to forfeitures under a statute, as well as to those at common law. The rule *caveat emptor*, is never applied to secret liens.

Pinkney, in reply.—The letter of the act of congress is plain and express. The forfeiture is the necessary and immediate consequence of the offence.

No other time is mentioned. He did not mean to say, that the title of the United States is consummated, until condemnation. But the forfeiture attaches by the commission of the offence, and overreaches all intermediate acts. This doctrine is necessary for the public good, otherwise the rights of the United States would be defeated by fictitious sales, the fraud of which it would be difficult, perhaps impossible, to detect. The forfeiture of the thing by which the offence is committed, is the punishment itself, not a mere consequence of a disability. It passes to the purchaser *cum onere*. Where legal rights have attached, the rule *caveat emptor* always applies, but never to equitable liens, without notice.

As to real estate, the relation in treason and felony was to the offence committed; why did not the argument *ab inconvenienti* control the rule in that case? Plowd. 260, 290. In the case of deodand; a horse kicks a man: before the man dies, the horse is sold; the man dies, the horse is for-
*404] feited as deodand. *Where is the notoriety? The true reason is, that it is a forfeiture of the offending thing. In felony, nothing but sale in *market overt* can prevent the relation of the forfeiture to the time of the offence. If *felo de se* give himself a mortal wound, and before his death convey his estate, and die, the conveyance is void. So, in the case of flight, after felony. The law looks principally to the thing for punishment. The general rule of the law of England is, that a purchaser of personal goods is not safe, unless he purchased in *market overt*.

If the United States could be estopped by the acts of their officers, the plea is as good in behalf of the illegal importer, as of the innocent purchaser. The purchaser was as much bound to know of the offence as the collector. But the collector had no authority to waive the penalty, and therefore, cannot be presumed to have waived it. If he had even given a release of the forfeiture, it would have been void.

The argument *ab inconvenienti*, is rather an argument *ad misericordiam*. If there be hardship in the case, application should be made to the secretary of the treasury, who has power to relieve.

In the St. Domingo cases, the law had expired, without any provision being made to enforce the penalty in existing cases. After the expiration of the law, the court had no authority to condemn; and the appeal annulled the sentence of the court below.

March 15th, 1814. (Marshall, Ch. J., being absent.) JOHNSON, J., delivered the opinion of the court, as follows:—This case has been argued very elaborately, and has been a long time under consideration. But from the decision which the court has at length come to, its merits are brought within a very limited compass.

We are of opinion, that the question rests altogether on the wording of
*405] the act of congress: by which it is *expressly declared, that the forfeiture shall take place, upon the commission of the offence. If the phraseology were such as, in the opinion of the majority of the court, to admit of doubt, it would then be proper to resort to analogy, and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in which the subject appears to a majority of the court, all assistance derivable from that quarter becomes unnecessary.

It is true, that cases of hardship and even absurdity may be supposed

to grow out of this decision, but on the other hand, if, by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absured will certainly result from it. When hardships shall arise, provision is made by law for affording relief, under authority much more competent to decide on such cases, than this court ever can be. In the eternal struggle that exists between the avarice, enterprise and combinations of individuals, on the one hand, and the power charged with the administration of the laws, on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offence, the seizure, or the condemnation. In this instance, we are of opinion, that the commission of the offence marks the point of time on which the statutory transfer of right takes place.

The decree of the circuit court of Maryland on the demurrer, is, therefore, reversed, and the cause remanded, that the issue in fact may be tried.

STORY, J. (*dissenting.*)—The decree which has just been pronounced by a majority of the court is decisive of the case of *The Mars*, which is now pending in this court, and my decision therein must be reversed. The opinion which I there held, and the reasons which support it, are disclosed on the record, and though the discussion in this court has not increased my confidence in that opinion; nevertheless, as I am not yet satisfied of its incorrectness, and two *of my brethern concur in it, I shall make no [*406
apology for introducing it in this place. It is as follows:

"The present information proceeds for a forfeiture of the brig Mars, upon the allegation that the brig departed from the United States bound to a permitted port, without giving bond pursuant to the act of the 1st of March 1809, ch. 91, § 16. There are other counts in the information which I need not now consider, because it is admitted, there was a forfeiture under the first count, and the answer of the present claimant sets up, as a justification of his title, that he is a *bonâ fide* purchaser, for a valuable consideration, and without notice of the offence; and it is admitted, that this justification is true in point of fact; and that there have been no *laches* either as to the United States, or as to the purchaser.

"The question presented to the court is, whether property, which has become forfeited to the United States, and afterwards, and before seizure, while remaining in the possession of the vendor, is sold to a *bonâ fide* purchaser, for a valuable consideration, without notice, is protected against the claim of the United States?

"This question is peculiarly delicate and interesting, in whatever way it is considered. On the one hand, it strikes at the root of almost all the forfeitures *in rem* which the legislature has provided to guard the revenue laws from abuse; and if the decision be against the United States, it may open a wide field for fraud and colorable transfers, to the encouragement of offenders. On the other hand, if the secret taint of forfeiture be indissolubly attached to the property, so that at any time, and under any circumstances, within the limitations of law, the United States may enforce their rights against innocent purchasers, it is easy to foresee, that great embarrassments will arise to the commercial interests of the country; and no

man, whatever may be his caution or diligence, can guard himself from injury and, perhaps, ruin. Considerations of this nature have pressed heavily upon my mind, and I have, therefore, been solicitous to avoid a discussion involving so much public as well as private importance. I could have *407] wished to have reserved *this question for the consideration of all the judges in the highest tribunal, that in forming my opinion I might have had the light reflected from their minds, and the benefit of their acknowledged learning. The parties have, however, seen fit to pursue another course, and I shall meet the question as my duty requires, without asking for shelter under any authority; though not without extreme diffidence.

"Before I proceed to the principle question, it will be necessary to clear the way, by adverting to some considerations which have grown out of the argument on each side. It should be remembered, that this is not a case where the vendor was out of possession, and, of course, where the law might infer a want of due diligence in the purchaser. To such a case, the maxim *caveat emptor* would certainly apply. Nor is the present a case where the sale was made at the first moment when the property came within the jurisdiction or grasp of the United States; for I should have little doubt that such a hurried sale could hardly be the foundation of a solid title. It is not a case of voluntary gift or collusive transfer, which would probably share the fate of all bounties in fraud or exclusion of public rights. *Jones* v. *Ashurst*, Skin. 357.

"It is admitted, that the sale is *bonâ fide*, for a valuable consideration, and without any express or implied notice. Further, the statute, on which the information is founded, has declared, that the property shall be wholly forfeited, if the offence be committed; but it has not declared, at what time it shall take effect, to what time it shall relate, nor whether it shall be incapable of being purged by subsequent events. The forfeitures under the statute are to be distributed in the same manner as forfeitures under the collection act of 2d March 1799, § 91, by which informers and officers of the customs, as well as the government, may acquire vested interests; and it follows, therefore, that these interests, as to informers and officers of the customs, cannot vest, until their rights are ascertained by seizure or condemnation.

"It has been argued on the part of the United States, that the forfeiture is, by the statute, made absolute, on the commission of the offence, and as it was competent for the legislature to enact such a law, the title cannot be *408] divested *by any subsequent event. That the cases of forfeiture at the common law are not applicable, because they depend upon the qualification annexed to them by the common law, which makes them conditional only, and not absolute forfeitures, whereas, the present statute has annexed no qualification: and in support of this distinction, the opinion of the Chief Justice in the case of the *United States* v. *Grundy*, 3 Cr. 337, has been quoted, where he says (p. 350), 'It has been proved that in all forfeitures accruing at common law, nothing vests in the government, until some legal step shall be taken for the assertion of its right; after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence, but the distinction, taken by the counsel for the United States, between forfeitures at common law and those accruing under a statute, is

certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.'

"I entirely subscribe to the doctrine here stated by the Chief Justice. There can be no doubt, that the legislature may provide that its forfeitures shall take effect differently from the course prescribed by the common law; but the question will always be: Have the legislature so done? If they have not, shall the rules of the common law govern, in the absence of any positive declaration? It should be remembered also, that the Chief Justice is here speaking in a case where the main question before him rested in a considerable degree upon the point whether the legislature had not given an election of remedy, and suspended the vesting of any interest until the determination of that election. But I apprehend, that the words of the Chief Justice by no means imply that when a forfeiture *in rem* is attached to a statute offence, the rules of the common law are, of course, excluded. They do not, in my judgment, import more than the opinion which I have already expressed. Now, in the case at bar, I cannot perceive in the language of the legislature any systematic exclusion of the common law as to forfeitures. They have declared no more than that the *commission of an act [*409
shall induce a forfeiture: and so has the common law; but the question as to the nature and extent of the operation of this forfeiture is nowhere, that I can perceive, touched. This view of the subject leads me to deny another position assumed by the counsel for the United States, viz., that the doctrine of relation has nothing to do with the present controversy. In the progress of this examination, I think, if not already shown, it will sufficiently appear, that the doctrine of relation has a very powerful influence in every essential view of the subject.

"I will now consider the main question, which, perhaps, may be divided into two branches. 1. What is the interest or right which attaches to the government in forfeitures of property, before any act done to vindicate its claims? 2. What is the operation of such act done to vindicate its claims—as to the offenders, and as to strangers?

"1. As to the first point. In all cases at common law, where lands are forfeited for the personal offence of the party, I take the rule to be universally true, that until the offence is ascertained, by conviction and attainder, no title vests in the sovereign. Before that time, the party is entitled to the possession and profits of his lands, and the government have no vested right in them, either to enter or dispose of the estate. 2 Inst. 48; Staundf. P. C. 192. Nay, even after attainder, until office found, the sovereign is considered as having but a possession in law, and an office is necessary to complete a title. Staundf. P. C. 198. The offender, therefore, has, until conviction, full power and authority to alien his lands, and to convey to the purchaser a complete and legal, though defeasible seisin; and unless such conviction follow the offence, the alienation is good against all the world. For, as Bracton says (lib. 2, ch. 13, p. 30), '*ea vero, quæ post feloniam facta sunt, semper valent et tenent nisi fuerit condemnatio subsecuta, et si fuerit subsecuta, non valent.* If this be true, and there seems no reason to doubt [*410
it, *it follows, that the estate of the offender is rightful, that he has

both *jus ad rem*, and *jus in re*: and consequently, that the Crown hath but a mere possibility which in no wise restrains the exercise of ownership over the property. See 4 Bl. Com. 382.

"The same doctrine is also, in general, true, as to like forfeitures of goods and chattels. Bract. lib. 2, ch. 13 ; Co. Litt. 391 *a* ; Staundf. P. C. 193 ; Ibid. 52 ; 2 Inst. 48 ; 2 Hawk. P. C. ch. 49. Nor do the cases of deodand and suicide form any exceptions, for the authorities all concur, that the forfeiture does not vest a property, until the fact is found of record. *Foxley's Case*, 5 Co. 109 ; *Hales* v. *Petit*, Plowd. 260, 262. It has been supposed, that goods waived vested *ipso facto* in the crown, upon waiver ; but on a careful examination of the authorities, it will be found, that the owner retains his full property, until an absolute seizure by the crown. Staundf. Prerog. lib. 3, ch. 25, p. 186 ; Fitz. Abr. Estray 2 ; 21 Edw. IV. 16. For all purposes of alienation and sale, therefore, the property in goods and chattels remains in the owner, notwithstanding the commission of an offence subjecting it to forfeiture ; and consequently, he may convey a good title against every person but the crown, and against the crown also, unless in cases where the anterior relation applies. *Jones* v. *Ashurst*, Skin. 357. I think, therefore, it may be assumed as a settled principle, that in forfeitures for personal offences, before seizure or prosecution, the sovereign has no vested title.

" Can the case be distinguished, where the forfeiture is made to attach to the instrument itself, by means whereof the offence is committed ? It seems to me, that the most favorable cases for the United States, viz., deodands and waifs, conclusively show that no such distinction anciently prevailed, for whatever may be the effect of relation, it is certain, that no property vested in the crown, until seizure or inquisition. I infer, therefore, that no absolute property vested in the United States, in the case at bar, until actual seizure was made, and the decision in the king's bench in *Lockyear* v. *Offley*, 1 T. R. 252, seems to me fully to support the inference. It has, indeed, been supposed by the counsel for the United States, that *Roberts* v. *Withered*, 1 Salk. 223, *12 Mod. 92 ; and *Wilkins* v. *Despard*, 5 T. R. 112, support a contrary doctrine. But on examination, they appear to me to confirm it. In the first, the action, was detinue, for property forfeited under the navigation act of Charles II., and the court held, that the action well lay, because the bringing action amounted to a seizure. In the latter case, there had been an actual seizure made for the forfeiture, and the sole question was, if condemnation were not necessary to divest the property of the owner.

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"If I am right in the view which I have already taken of the subject, there can be little doubt, that the title of the United States, so far as affects third persons, rests mainly on the doctrine of relation ; and that the counsel for the United States must call in the aid of the common law to enforce the present claim. For if no title vests until seizure, there must, at the time of seizure, be a title in the offending party, capable of being divested and of vesting in the United States. But at the time of the present seizure, that title had been transferred to the present claimant, and nothing was left in the vendor capable of transfer.

"2. This leads me to the examination of the second point, viz : What is the operation of the acts done by the sovereign to vindicate his title by for-

feiture? At common law, in case of attainder for treason or felony, the forfeiture of lands relates back to the time of the offence committed, so as to avoid all intermediate changes and conveyances (4 Bl. Com. 481, 487; Co. Litt. 390 *b*; Staundf. P. C. 192); but in general, in like cases, the forfeiture of goods and chattels relates back only to the time of conviction, so that all previous changes and alienations, and even *bonâ fide* gifts, are protected. 4 Bl. Com. 387; Co. Litt. 391; Staundf. P. C. 192; Perk. § 29; Skin. 357. There are some cases in which the relation is carried back to the time of the inquisition made; but unless that of suicide form an exception, there is no case where the relation is pressed beyond the time of the prosecution. According to the decision in Plowden 260, a *felo de se* forfeits all his goods and chattels, from the time of committing the act which occasions the death: and the doctrine seems to be supported by *Rex* v. *Ward*, 1 Lev. 8. The general ground assigned for it, is, that *otherwise the offender would go unpunished, and it is compared to the case of flight after felony. [*412
Now, admitting that this is a solid reason, and a sufficient foundation for a legal adjudication, it may well be doubted, if the doctrine, or the decision in Plowden, required the forfeiture to relate back further than the death of the party.

"The case was that Sir James Hales, the offender was joint-tenant with his wife of a term of years; and the question made was, whether, after inquisition, the forfeiture should not relate back, so as to overreach the right of survivorship which accrued to the wife. Now, one of the judges (Weston) held, that the forfeiture should only have relation to the death, at which time the title of the wife accrued; yet in this concourse of titles, the king's title by prerogative should be preferred (Plowd. 264); and I find that Lord Hale (1 Hale P. C. 414) expresses great doubt, whether, for all purposes, the relation could be carried back to the stroke which occasioned the death. Be this case as it may, it is the only exception to the general doctrine; and *inter apices juris*, a case so unjust as that which robbed an unfortunate woman, not only of the moiety which vested in her by survivorship from her husband, but of the other moiety absolutely vested in her by grant, I am glad to find is a judicial anomaly.

"I have said, that the case of a *felo de se* forms the only exception to the general rule. There are authorities to show, that in case of flight for felony, the forfeiture, after it is found by inquisition, verdict or indictment, relates back to the time of the flight, so as to avoid all mesne acts. *Rex* v. *Wendman*, Cro. Jac. 82. But I think the better opinion, notwithstanding, is, that it relates only to the time of finding the flight. Co. Litt. 390. Staundf. P. C. 192; 5 Co. 109 *b*; Bro. Forfeiture des terres, 119; Ibid. Relation 31. But it has been argued, that admitting the rule, that the forfeiture of goods and chattels, in general, relates back to the time of conviction, yet it is inapplicable to a case, where a specific thing is declared forfeited by law, for in such case the *corpus delicti* attaches to the thing in whose hands soever it may come; and the case of deodand, put by counsel, in Plowden 262, is cited in illustration. 'If my horse strike a man, *and afterwards I sell my horse, and after that the man dies, the horse shall be for- [*413
feited.' I do not find any authority to support this position, although it is cited as law in 1 Hawk. P. C. ch. 26, § 7, and in Terms de la Ley, Deodand. It seems a peculiar case, growing out of the avarice of the church, and the

superstitition of the laity, in ancient times. The distinction seems also countenanced by the court in *Lockyer* v. *Offley*, 1 T. R. 252. The counsel for the plaintiff there argued, that the ship was forfeited, the moment the smuggling was committed, even though she had afterwards come into the hands of a *bonâ fide* purchaser; and Mr. Justice WILLES, in delivering the opinion of the court, in alluding to the argument, that the forfeiture attached the moment the act was done, said, 'it may be so as to some purposes, as to prevent intermediate alienations and incumbrances.' To be sure, this expression carries with it a pretty strong implication; but in the same case, returning to the argument, the same learned judge says, 'I do not know, that it has been ever so decided—it may depend upon circumstances, such as length of possession, *laches* in seizing, or other matters.' And the decision of the court went ultimately upon other grounds. I must, therefore, consider the authority as not fairly extending to this point, and indeed, as rather leaning the other way. On the other hand, the case of lord and villein has been cited from Co. Litt. 118, § 117, to show that even where a right to seize property exists in the lord, it is not perfected by seizure, so as to overreach prior alienations; for until seizure, it is said, that he has neither *jus in re*, nor *jus ad rem*, but a mere possibility. And the conclusion drawn from this example is not materially affected by the consideration that a contrary doctrine prevails in the case of the sovereign (Ibid. § 118), because the reason assigned is perfectly consistent with it; viz., that the property is in the sovereign, before any seizure or office. I do not think much reliance can be placed upon analogies borrowed from the feudal tenures, because they were governed by peculiar and technical niceties, the reasons of which have long since ceased, and perhaps cannot now be well understood. But if the principle of the case put be, that where the absolute property is not vested, before the alienation, a subsequent seizure will not avoid such alienation, if made *bonâ fide*, it is directly applicable to the case at bar.

*414] *"I have already endeavored to show that the absolute property did not vest in the United States until seizure; and I think it would be a bold assertion, that the United States could, before such seizure, have conveyed the property to a purchaser, or have clothed it with a national character. I consider a passage in Lord HALE's treatise on the customs as corroborating the view which I have already taken of this case; he says, 'Though a title of forfeiture be given by the lading or unlading, the custom not being paid, yet the king's title is not complete, till he hath judgment of record, to ascertain his title, for otherwise there would be endless suits and vexations; for it may be ten or twenty years hence, that there might be a pretence of forfeiture now incurred.' Harg. Law Tracts 226. According to Lord HALE, even seizure would not be sufficient to fix the title in the king; but it must be consummated by a judgment of record.

"But the point of difficulty is, to decide whether the United States had not such an inchoate title as, connected with a subsequent seizure, would, by a retroactive effect, defeat the intermediate purchase. Now, it is precisely in this view, that the case of villein may admit an unfavorable distinction; for until seizure, the lord has not even an inchoate title, but a mere possibility. And though the property is, in the like case of the sovereign, said to be in him, without seizure or office, yet, I apprehend, the title

is not consummate, until seizure or office ; for until that time, it could hardly be held, that a purchaser under the villein, or even the villein himself, had a tortious possession and use of the property. The case of villenage, then, even supposing it to apply, does not go *quatuor pedibus* with the present.

"The case of *Attorney-General* v. *Freeman*, Hardr. 101, has also been relied on by the claimant. In that case, the party, after outlawry and before inquisition, made a *bonâ fide* lease of his lands ; and it was held, that the forfeiture did not overreach the title of the purchaser. But I do not think that much reliance can be placed on this case, because it turned on a settled distinction, that until inquisition, the king has no title in the real chattels or freeholds of the outlaw ; but in personal chattels, the title is in the king, without inquisition. *1 Ld. Raym. 305 ; 1 Salk. 395 ; 12 Mod. 176. And the relation does not extend beyond the time of the commencement of the title. The case of *The Anthony Mangin*, 3 Cr. 356 n., before Mr. Justice WINCHESTER, is the only other authority that I recollect, which has been thought materially to bear upon the question. I entertain the most entire respect for the opinions of that truly able and learned judge : and although the decision of that case did not rest upon the present question, it is but justice to acknowledge, that it has thrown great light on the subject, and enabled us all to meet the stress of this cause with more certainty than could otherwise have been done. It was very clearly the opinion of the learned judge, that a seizure did not relate back to the time of forfeiture, so as to overreach an intermediate *bonâ fide* conveyance ; and he has certainly offered cogent reasons in support of that opinion. But after a diligent examination of the authorities cited by him, I am well satisfied, that the point has never been solemnly adjudged, and must now be decided upon principle. [*415

"It seems to be a rule, founded on common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong, but shall be used *ut res magis valeat quam pereat*, 3 Co. 28 *b;* and this rule, so equitable in itself, seems recognised in the common law. 13 Co. 24 ; 2 Vent. 200. And in respect to the doctrine of relation, this rule has been admitted in its fullest extent in civil cases. Bro. Relation, 18 ; 1 Hen. VII. 17 ; Bro. Debt, 139 ; 6 Co. 76 *b;* 3 Ibid. 28 *b*. For it has been repeatedly adjudged, that relations shall never work an injury, 'and shall never be strained to the prejudice of a third person, who is not a privy or a party to the act :' and further, that 'in destruction of a lawful estate vested, the law will never make any fiction.' 3 Co. 29 ; 2 Vent. 200.

"It is true, as we have already seen, that a different rule prevails as to forfeitures of lands, in treason and felony, founded probably on feudal principles, or the barbaric character of the times; yet even as to cases of treason and felony, a striking distinction is admitted in favor of goods and chattels ; and mesne acts, before conviction or inquisition, are suffered to retain their actual validity.

*"Looking to the vast extent of commercial transfers, the favor with which navigation and trade are fostered in modern times, and the extreme difficulty of ascertaining latent defects of title, it seems difficult to resist the impression, that the present is a case which requires the application of the milder rule of the law. If the principle contended for by the government be admitted in its full extent, it will be found very difficult to [*416

bound it. A bale of goods which is once contaminated with a forfeiture, will retain its noxious quality through every successive transfer, even until it has assumed under the hands of the artizan its ultimate application to domestic use: yet such a position would strike us all as monstrous. If we say, that the forfeiture shall cease with the change of the identity of the whole package, as such, still an intrinsic difficulty remains. The object of the government would be completely evaded by the offender, and the innocent purchaser would sink under the pressure of frauds which he could never know, nor by diligence avert.

"On the whole, I have come to the result, not however without much diffidence of my own opinion, that a forfeiture attached to a thing, conveys no property to the government in the thing, until seizure made or suit brought. That previous to that time, the owner has the exclusive right of possession and property, though the government may be considered as having an inchoate title, or possibility. That against the offender or his representatives, upon seizure or suit, the title, by operation of law, relates back to the time of the offence, so as to avoid all mesne acts; but as to a *bonâ fide* purchaser, for valuable consideration, and without notice of the offence, the doctrine of relation does not apply so as to divest his legitimate title.

"Considering, as I do, that this question is of very great importance, I trust, that it will receive the decision of the highest tribunal; and I shall not feel humbled, if upon better examination a different doctrine shall prevail by the judgment of that court. I do, therefore, adjudge and decree, that the decree of the district court in the premises be affirmed."

Decree reversed.

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*417] *The Mars. (*a*)

United States *v.* The Brigantine Mars.

Forfeiture.—Bonâ fide purchaser.

A forfeiture under the 3d section of 28th June 1809, ch. 9, will overreach a *bonâ fide* sale to a purchaser, for a valuable consideration, without notice of the offence.
The Mars, 1 Gallis. 191, reversed.

This was an appeal from the sentence of the Circuit Court of Massachusetts district, which affirmed the sentence of the district court, restoring the brig to the claimants.

An information was filed against the brig Mars, for a breach of the act of 28th of June 1809 (entitled "an act to amend and continue in force certain parts of the act, entitled an act to interdict the commercial intercourse," &c.), in departing from port without having given bond according to the 3d section of the act, which provides, that "if any ship or vessel shall, contrary to the provisions of this section, depart from any port of the United States, without clearance, or without having given bond in the manner above mentioned, such ship or vessel, together with her cargo, shall be wholly forfeited."

The vessel, after her return to the United States, and before seizure, was

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(*a*) March 15th, 1814.