port, and the ship had an alternative destination to a British colony. The voyage is different from that authorized in the original power from Mr. Jademerowsky to Jones; and therefore, such power either never existed, or it is falsified by the evidence, and must be repudiated by the court.

Pinkney, in reply, agreed, that in a suspicious case, restitution could not be demanded upon the original evidence; but this is a case of further proof, and there is no evidence of fraud, or unneutral conduct, to preclude it. The documentary evidence expresses neutral account and risk. By the law of nations, the papers must be supported by the examinations *in præparatorio;* but there is no determination which warrants the position, that the supercargo must swear to anything more than *belief*. He is, in this respect, in the same predicament with the master. In both cases, it is matter, not of positive knowledge, but of inference from the circumstances which *115] *come to his knowledge. The consular certificate is a part of the ship's papers, and, as such, is necessarily a part of the documentary evidence in the cause. The recital of the procuration is said not to be admissible at common law; but this court is now sitting as a court of prize.

March 2d, 1816.—The cause was this day ordered to further proof, on the part of the captors and claimants.

Further proof ordered.

Preston *v.* Browder.

Land law of North Carolina.

The act of assembly of North Carolina, of November 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July 1777. The act of April 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws.

Error to the Circuit Court for the district of East Tennessee. This was an action of ejectment, commenced by the plaintiff in error, in that court.

On the trial of the cause, the plaintiff produced and read in evidence an *116] entry made on the 25th of February *1778, in the name of Ephraim Dunlap, for 400 acres of land in the point between Tennessee and Holston rivers. Also a grant to said Dunlap, issued in virtue of, and fonnded upon, said entry, under the great seal of the state of North Carolina, dated the 29th of July 1793; which grant was duly registered. The plaintiff also produced and read in evidence, a deed of conveyance, with the certificates of probate and registration indorsed, from Dunlap, the grantee, to John Rhea. Also a deed of conveyance from said Rhea to the lessor of the plaintiff.

It was also proved, that the land lies within the boundaries of what was the state of North Carolina, at the time of making said entry, and within the county of Washington; likewise, within the territory ceded by the state of North Carolina to the United States, in 1789, and within the now county of Blount, in the district of East Tennessee; that it lies on the south side of Holston river, and between Big Pigeon and Tennessee river, and west of a line described in the 5th section of the act of the general assembly of North Carolina, passed in April 1778, ch. 3. Also, within the tract of country

secured to the Indians in 1791, by the treaty of Holston, and that the Indian title thereto was relinquished in 1798, by the treaty of Tellico.

The defendant produced and gave in evidence, a grant from the state of Tennessee to himself, made out and authenticated in the manner prescribed by the laws of Tennessee, and dated the 18th of May 1810, which covers and includes the whole of the land in his possession, and for which this suit was brought.

The *plaintiff, by his counsel, moved the court to charge and instruct the jury, "that an entry was actually made with the entry-taker of Washington county, within which the land lay; that the entry was evidence that the consideration-money was paid as required by law; that paying the consideration-money, and making the entry, created a contract between the state of North Carolina and the said Dunlap, which vested a right in him to the land in dispute, and that it was not in the power of the legislature, at a subsequent period, to destroy the right thus vested, or rescind said contract, without the consent of the said Dunlap. That having the same land afterwards surveyed and granted, in the manner prescribed by the laws of North Carolina, vested in the said Dunlap and his heirs, a complete title, both at law and in equity; and that the conveyance from Dunlap to Rhea, and from Rhea to the lessor of the plaintiff, vested a complete legal title in him, and, therefore, he was entitled to a verdict." [*117

Which charge and instruction, the court refused to give to the jury; but on the contrary, charged and instructed them, "that the said entry and grant were both null and void, and vested no title whatever in the said Dunlap, because, at the time of making said entry, and obtaining said grant, the land included therein lay in a part of the country where the laws of North Carolina had not authorized their officers to permit lands to be entered, or to issue grants therefor; and although the entry and grant might have been made in the form required *by law, yet no interest whatever passed from the state of North Carolina to Dunlap thereby, and therefore, they ought to find a verdict for the defendant." A verdict was rendered accordingly, and a judgment pronounced thereon. To which charge and instruction, the plaintiff's counsel excepted, and the cause was brought into this court by writ of error. [*118

Key, for the plaintiff in error.—The question in this cause turns upon the validity of an act of assembly of North Carolina, of April 1778, repealing a former act of November 1777, c. 1, § 3, under which the plaintiff's entry was authorized. It is an *ex post facto* law, which the state is incompetent to pass; its own courts have decided, that a law, depriving a university of its lands, was unconstitutional and void. *Trustees of the University* v. *Foy*, 2 Hayw. 310. This court has determined, that a law in the nature of a convention or contract, cannot be so repealed as to divest rights of property previously acquired under it. *Fletcher* v. *Peck*, 6 Cr. 87. As to the Indian title, the usufruct only of this waste land was reserved to them; and the legislature might grant lands, subject to the extinguishment of their title to the domain of property. This was a mere temporary arrangement, and the title of the natives was extinguished by the treaty of Tellico. There was, therefore, nothing to prevent an entry of lands anywhere within the territorial limits of North Carolina.

*Pickens and *Jones*, contra.—1. The correct mode of ascertaining the nature and effect of the contract (as it has been called) between the state and the plaintiffs, is by a reference to the plain interpretation of the act of 1777, connected with the local history of that period, and the circumstances of the entry. The law provides, that entries may be made in the several counties of the state, of all lands therein, not previously granted, and which shall have accrued to the state by treaty or conquest; most manifestly implying the necessity of a previous extinguishment of the Indian title. By the treaty of the Long Island of Holston, of the 20th of July 1777, art. 5, a boundary between the Indians and the whites is defined; and, by art. 6, the Indians are guarantied against all intrusion. The whole system of local laws establishes a police over the territory in question, with the express view of preventing the natives from being disturbed in the enjoyment of their rights. In 1778, finding that individuals, in the situation of the plaintiff, either wilfully or through mistake, had made entries within the Indian reservation, the legislature passed an act recognising the limits fixed by the treaty of the year preceding, prohibiting future entries, and avoiding those already made within those limits.

2. But, supposing the entry to have been valid as a claim, or right of pre-emption, against other citizens, it was not lawfully consummated by a subsequent survey and patent. Is the entry of such stern, unbending authority, as, by relation back, to dispense with the necessity of subsequent
*120] steps? Certainly not. By the act of 1783, the Indian *boundary was changed, in conformity with the treaty of Hopewell, and the issuing of grants for lands within the reservation was prohibited. The land in question continued by that treaty, and by a subsequent treaty, made in 1791, between the United States and the Cherokees, within the limits of the latter. The survey and grant were made in opposition to all these treaties and laws; and in 1789, North Carolina ceded to the United States this territory, in which the state of Tennessee was erected. In 1791, the treaty of Holston once more guarantied the Indians against intrusion. So that the plaintiff's counsel has to bear up, not only against the municipal laws of the country, but against the most solemn pacts and conventions. *Fletcher* v. *Peck*, 6 Cr. 87.

Key, in reply.—The plaintiff's right, commenced by a valid entry, could never be impaired by subsequent laws and treaties. The primitive Indian title was merely subordinate, and subject to extinction. If, by the payment of the fees upon his entry, the plaintiff acquired an incipient right, under the law then in force, it cannot be affected by any subsequent act. His grant is dated 1793, and a presumption thence arises, that he had complied with all preceding requisites. The cession of 1789 contains a reservation for perfecting titles where entries had been made. The act of 1778 shows, that the former law had allowed and countenanced entries in Washington county;
*121] it is not a declaratory, but a repealing *statute, showing that the first law had not been mistaken nor misconstrued.

Todd, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The question now to be decided by the court is, whether the charge and instructions required by the plaintiff's counsel ought to have been given, and whether the one given was correct?

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.[1] It will be found, by a recurrence to the history of North Carolina, at the time of passing this act, that she had, but a short time before, shaken off her colonial government, and assumed a sovereign independent one of her own choice; that during the colonial system, by instructions and proclamations of the governor, the citizens were restrained and prohibited from extending their settlements to the westward, so as to encroach on lands set apart for the Indian tribes; that these encroachments had produced hostilities; and that, on the 20th of July 1777, a treaty of peace had been concluded at Fort Henry, on Holston river, near the Long Island, between commissioners from the state of North Carolina and the chiefs of that part of the Cherokee nation called the Overhill Indians; and that a boundary between the state and the said Indians was *established. When the legislature of North Carolina were passing the act of November 1777, establishing offices for receiving entries of [*122 claims for lands in the several counties within the state, it is improbable, that the foregoing circumstances were not contemplated by them; and hence must have arisen the restriction in the act, as to lands "which have accrued, or shall accrue, to this state, by treaty or conquest."

If this be not the ground or reason of the provision, it will be difficult to find one on which it can operate. It may be asked, where was the land which was to accrue by treaty or conquest, if not within the chartered limits of that state? If it was in a foreign country, or from a sister state, the restriction was unnecessary, because, in either case, it was not within the limits of any county within that state, and of course, not subject to be entered for. The restriction must apply, then, to lands within the chartered limits of the state, which it contemplated would be acquired, by treaty or conquest, from the Indian tribes, for none other can be imagined. It is not to be presumed, that the legislature intended, so shortly after making the treaty, to violate it, by permitting entries to be made west of the line fixed by the treaty. From the preamble of the act, as well as other parts of it, it is clearly discernable, that the legislature intended "to parcel out their vacant lands to industrious people, for the settlement thereof, and increasing the strength and number of the people of the country, and affording a comfortable and easy subsistence for families." Would these objects be attained, by permitting settlements *encroaching on the lands [*123 lately set apart, by treaty, for the use of the Indian tribes? by provoking hostilities with these tribes, and diminishing the strength of the country by a cruel, unnecessary and unprofitable warfare with them? Surely not. However broad and extensive the words of the act may be, authorizing the entry-takers of any county to receive claims for any lands lying in such county, under certain restrictions, yet, from the whole extent of the act, the legislative intention, to prohibit and restrict entries from being made on lands reserved for Indian tribes, may be discerned. And this construction is fortified and supported by the act of April 1778, passed to amend

[1] Aldridge *v.* Williams, 3 How. 24; United States *v.* Union Pacific Railroad Co., 91 U. S. 79.

and explain the act of November 1777; the 5th section of which expressly forbids the entering or surveying any lands within the Indian hunting-grounds, recognises the western boundary as fixed by the above-mentioned treaty, and declares void all entries and surveys which have been, or shall thereafter be made within the Indian boundary.

It is objected, that the act of April 1778, so far as it relates to entries made before its passage, is unconstitutional and void. If the reasoning in the previous part of this opinion be correct, that objection is not well founded. That reasoning is founded upon the act of 1777, and the history and situation of the country at that time. The act of 1778, is referred to, as a legislative declaration, explaining and amending the act of 1777. It is
*124] argued, that there is no recital in the act of 1778, declaring, that the act of 1777 had been misconstrued *or mistaken by the citizens of the state; or that entries had been made on lands, contrary to the meaning and intention of that act; and that the 5th section is an exercise of legislative will, declaring null and void rights which had been acquired under a previous law. Although the legislature may not have made the recital and declaration in the precise terms mentioned, nor used the most appropriate expressions to communicate their meaning, yet it will be seen, by a careful perusal of the act, that they profess to explain, as well as to amend, the act of 1777.

Upon a full review of all the acts of the legislature of North Carolina, respecting the manner of appropriating their vacant lands, and construing them *in pari materia*, there is a uniform intention manifested, to prohibit and restrict entries from being made on lands included within the Indian boundaries. Therefore, this court unanimously affirms the decision of the circuit court, with costs.

Judgment affirmed.

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*125] *The Astrea.

Prize.—Re-capture.

An enemy's vessel was captured by a privateer, re-captured by another enemy's vessel, and again re-captured by another privateer, and brought in for adjudication. It was held, that the prize vested in the last captor; an interest acquired in war, by possession, is divested by the loss of possession.

Appeal from the Circuit Court for the district of Georgia. This was an enemy's vessel, captured by the privateer Ultor, in sight of Surinam, on the 17th of May 1813; and on the 13th of June 1813, re-captured by an enemy's vessel of war, about two leagues from the coast of Georgia, and on the same day, re-captured by the privateer Midas, and brought into the port of Savannah, for adjudication. The prize was adjudged to the last captors, by the decree of the court below, from which the first captors appealed to this court.

Charlton, for the appellants, contended, that the prize interest vested in the first captors. He argued, that the opinions of eminent civilians, and the practice of the continental nations of Europe, ought to prevail, rather than the decisions of the British courts of prize; which last are founded on
*126] reasons of commercial and naval policy, peculiar to England. Sir William Scott himself admitted, that there is no *general rule. *The*