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Georgia, was her real port of destination. But this examination is unnecessary; for the owners, being American citizens, are equally guilty of trading with the enemy, whether that trade were carried on between a British port and the United States, or between such port and any foreign nation; and in the present case, if the court be correct in the view which it has taken of the evidence, the offence of trading with the enemy was complete, the moment the Rugen sailed from Savannah, with an intention to carry her cargo to Kingston, in Jamaica. Upon the whole, without taking notice of many of the arguments urged by the advocates of the captors, in favor of condemnation, and which are entitled to great consideration, the court is unanimously of opinion, that the decree of the circuit court, rejecting the claim of Mr. Buhring, was correct, and must, in all things, be affirmed.

Sentence affirmed, with costs.

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Title to lottery tickets.—Contract of sale.

R. G. agreed with the managers of a lottery, to take 2500 tickets, giving approved security on the delivery of the tickets, which were specified in a schedule, and deposited in books of 100 tickets each, thirteen of which books were received and paid for by him, and the remaining twelve were superscribed by him, with his name, in his own handwriting, and indorsed by the agent of the managers, "Purchased and to be taken by Robert Gray," and on the envelope covering the whole, "Robert Gray, 12 books;" on the second day's drawing of the lottery, one of the last-designated tickets was drawn a prize of \$20,000, and between the third and fourth day's drawing, R. G. tendered sufficient security, and demanded the last 1200 tickets, and the managers refused to deliver the prize ticket: *Held*, that the property in the tickets changed, when the selection was made and assented to; that they remained in the possession of the vendors, merely as collateral security, and that the vendee was entitled to recover the amount of the prize.

ERROR to the Circuit Court for the county of Alexandria. This was an action of trover, instituted by the defendant in error, against Jonah Thompson, agent for the managers of the Potomac and Shenandoah navigation lotteries, to recover a ticket in the 2d class of said lotteries, against which had been drawn a prize of \$20,000.

On the trial, evidence was offered to prove that the president and managers of the Potomac company had been created a corporation, under that corporate name; that they had been authorized by law to raise the sum of \$300,000 by lotteries, under which authority, they had drawn one class,

*76] *and had arranged and published a scheme of a second class. That the plaintiff below, and one Joseph Milligan, projected another scheme, which they sent in to the president and managers, accompanied by a proposition in writing, in the words and figures following:

"If this scheme is adopted, we engage to take 2500 tickets each, in the 2d class of the P. and S. navigation lottery: provided, the ten-dollar prizes we now hold, and may hereafter receive, deducting 15 per cent., shall be taken in liquidation of our joint bond; and we engage to place in the hands of Mr. Carlton all the funds we receive for new tickets, until it amounts to a sum equal to that which we now owe the company, as fast as we receive them; on the balance, we shall expect the usual credit. It is understood,

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that the discount of 5 per cent. is to be made from the above 5000 tickets; approved security to be given on the delivery of the tickets.

(Signed)

JOSEPH MILLIGAN.
R. GRAY."

It was admitted, that this scheme was approved of and adopted by the president and managers, and their own scheme was abandoned; that the proposition of the plaintiff and Milligan was accepted by them, and became a binding contract between the parties. Evidence was also offered, to prove, that under the contract, a schedule, specifying the numbers of certain tickets, by books containing one hundred *each, to the extent of [**77 2500, selected by the plaintiff, and to be set apart for his use, had been delivered by him, to the former agent of the lottery; that two of the books mentioned in the said schedule having been disposed of, or put out of the reach of the agent, another schedule was handed in by the plaintiff to the defendant, then, and at present, agent, in which two other books, containing the same number of tickets, were substituted, in lieu of the two last mentioned, the schedule, in respect to the others, being the same as the first. That the plaintiff had, at different times, received 13 books, of 100 tickets each, part of those specified in the schedule, and that he had paid for the 13 books, partly in certain promissory notes, received and approved of by the agent, and partly in cash, and had afterwards paid \$108.80, on account of tickets in the 2d class, over and above the said 13 books. On the requisition of the plaintiff, the defendant produced on the trial, a bundle containing twelve books of tickets, of one hundred each (the residue of the numbers specified in the schedule), and amongst others, the ticket in the declaration mentioned. On each of which books, the name of the plaintiff was superscribed, in his own handwriting; and on one of them (not that containing the ticket in the declaration claimed) was indorsed in the defendant's handwriting—"Purchased and to be taken by Robert Gray." And on the envelope covering the whole twelve books in one bundle, was superscribed, in the hand and figures of the defendant, the words and figures following: "Robert Gray, 12 Books."

*Similar proceedings took place as to W. Milligan, to whom only [**78 a part of the tickets selected by him had been delivered.

That the drawing of the lottery was commenced on the 17th day of November 1812, and that, on the 27th of that month, the second day's drawing, a prize of \$20,000 was drawn against the number in the declaration mentioned. The plaintiff also offered evidence, to prove that on the 4th day of December 1812, subsequent to the third, and before the fourth day's drawing, the plaintiff tendered to the defendant a bond for the payment of — dollars, executed by himself and two sureties, who were fully sufficient for that sum, and demanded from him the twelve books of tickets which had been selected and set apart for him. To which the defendant replied, that he was ready to deliver 1200 of any undrawn tickets, but would not deliver the high prize. The drawing of the lottery had been continued only fifteen days. On which, the counsel for the defendant below moved the court to instruct the jury:

1st. That it is not competent for the jury to find, from the evidence so produced as aforesaid, that the twelve books of tickets, including the said

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prize ticket, had been, prior to the commencement of the drawing of the said lottery, appropriated by plaintiff and defendant, to the satisfaction of said contract, and delivered to plaintiff under and in fulfilment of said contract, and deposited by the plaintiff with the defendant, as collateral security for the payment of the purchase-money, until other security should be *79] *given, as was contended and insisted upon by the plaintiff's counsel to the jury; which instruction the court refused to give.

2d. That the facts so given in evidence by the plaintiff as aforesaid, do not import an absolute sale and delivery of the twelve books of tickets, including the prize ticket, but a selection and setting apart of such tickets as were to be delivered to the plaintiff, when he should comply with his contract in giving the stipulated security. Which instruction the court gave, but also directed the jury, that such selection and setting apart as aforesaid, was sufficient delivery to the plaintiff to vest the property of the said tickets in him, upon his giving or tendering approved security, according to the terms of the contract, in a reasonable time thereafter; and that the tender of the security, as before stated, was in reasonable time.

3d. That the selection and laying apart of the twelve books of tickets, as aforesaid, and the said indorsements upon the said books, and upon the envelope of the same, did not vest in the plaintiff the property of said tickets, under the said contract, so as to entitle plaintiff to prizes drawn against those tickets, before any security was given or offered, and whilst said tickets remained in the hands of defendant, awaiting the completion of said contract on the part of the plaintiff in respect of the stipulated security. Which instruction the court gave, but also instructed the jury, "that upon tendering the security, as before stated, if the jury should find such security *80] to be sufficient, such selection and laying *apart of the said tickets did, under the said contract, entitle the plaintiff to all the prizes drawn by such tickets, in the intermediate time between such selection and the tender of security, as aforesaid." To which refusal and several instructions, the defendant excepted, and a verdict and judgment having been rendered for the plaintiff below, the defendant in the circuit court brought the cause into this court by a writ of error.

Jones, for the plaintiff in error.—1. The ticket was at the risk of the vendors, and drawing the prize is equivalent to any physical change in the thing. It was not left in the hands of the vendors, as collateral security, for the pledge of the ticket would have thrown upon the vendors the whole risk of the drawing of these tickets, the essence of their value consisting in the chance. On the contrary, the thing was to remain in the vendors' possession, and as their property, until a condition of the sale had been accomplished. 2. There is a repugnancy between refusing the first instruction and granting the second. The court below admit that the right of property was not complete in *Gray*, until the security stipulated; and that, when given, it would retroactively vest the property. The title was then clearly incomplete. *Hanson v. Meyer*, 6 East 614; *Paine v. Shadbolt*, 1 Camp. 427.

Swann, contrà.—The contract was consummated and binding on both *81] parties. *Gray's* proposition *was accepted, some of the tickets were actually delivered; there was a payment of what may be considered as earnest. The thing sold was specifically designated by the vendors. The

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vendee had the right of property, and the right of possession. All he wanted was the actual possession. The thing sold may be designated in various ways. 2 Black. Com. 447; 1 Salk. 113. Property is transferred by the contract of sale, without delivery, if the article is specifically designated. *Phillemore v. Barry*, 1 Camp. 513; *Hinde v. Whitehouse*, 7 East 558.

Jones, in reply.—There is a distinction between this case and the authorities relied upon by the other side. The question is, whether the contract be executory or executed. It was not executed, by specifying the particular ticket; the security to be given by Gray was a condition which preserved the original executory nature of the contract. Delivery, either actual or symbolical, is essential to a sale; and neither took place here. The cases cited are of contracts self-executory, and where the parties stipulated to waive delivery.

February 27th, 1816. MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:—The question on which the correctness of the opinions given by the circuit court depends, is this: Was the purchase and sale of the twelve books, not delivered, so complete, that the tickets had become the property, and were at the risk of Robert Gray?

*In pursuing this inquiry, it becomes necessary to decide, whether [*_82 the clause respecting security forms a condition *precedent*, on which the sale is made to depend, or a condition *subsequent*, the performance of which may be suspended, until it shall be convenient to the vendee, or required by the vendor. It is apparent, that a contract for the sale of 5000 tickets was one of very considerable interest to the managers of the lottery. This is not only self-evident, from the nature of the transaction, but is also proved by the fact, that they changed the scheme of the lottery for the purpose of securing it. As the time of commencing the drawing must necessarily have depended on the sale of the tickets, it is reasonable to suppose, that in the calculations made on this subject, they must have considered the books selected and set apart for Mr. Gray, either as sold or unsold. The indorsements on the books selected lead strongly to the opinion, that they were considered as sold. If the proposition which forms the basis of the contract be inspected, it will be perceived, that the contract was intended to be entire, not divisible. The scheme of the lottery was changed, not for the purpose of inducing Gray and Milligan to take any number of tickets less than 5000, but on their engaging to take 5000 absolutely; and the clause respecting the security is annexed to the delivery of the tickets. The delivery of some of the books was an execution in part of an entire contract. All the circumstances show, that the obligation of the contract was complete; but the examination of these circumstances *is dispensed with, by the admission on record, [*83 that it "became a binding contract between the parties."

What, then, was this binding contract? That the scheme proposed by Milligan and Gray should be adopted, and certain facilities of payment allowed, on their bond to the company for tickets taken in the first class. That they should, on their part, take 2500 tickets each, in the second class, and that approved security should be given on their delivery. Certainly, Milligan and Gray were absolutely bound to take 2500 tickets each.

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A refusal to do so, would have been a breach of contract, for which they would have been responsible in damages. When the parties proceed one step further; when the vendee, in execution of this contract, selects the number of tickets he has agreed to purchase, and the vendor assents to that selection; when they are separated from the mass of tickets, and those not actually delivered, are set apart and marked as the property of the vendee; what, then, is the state of the contract? It certainly stands as if the selection had been previously made and inserted in the contract itself. An article purchased, in general terms, from many of the same description, if afterwards selected and set apart, with the assent of the parties, as the thing purchased, is as completely identified, and as completely sold, as if it had been selected previous to the sale, and specified in the contract. After this selection, the parties stood in the same relation to these tickets, as if the 25 books, afterwards agreed upon, had been named in the contract as containing the numbers purchased by Gray.

*84] The *contract, then, amounts to this: The managers agree to sell Gray 2500 tickets, which are specified, and he agrees to give approved security for the purchase-money, on the delivery; in the meantime, the tickets remain in possession of the vendors, who proceed to draw the lottery, without having received or required security for the whole number of tickets sold. The stipulation respecting security could not, in such a case, be considered as a condition precedent, on the performance of which the sale depended. Certainly, the managers could have required, and have insisted on this security; but they might waive it, without dissolving the contract. They were, themselves, the judges, whether they would consider the contract of Robert Gray, with the collateral security furnished by the possession of the tickets, as sufficient for their protection; and their conduct shows that they thought it sufficient.

The majority of the court is of opinion, that the property in the tickets changed, when the selection was made and assented to; and that they remained in possession of the vendors, merely as collateral security. Had the tickets been all blanks, Gray was compellable to take them.

Judgment affirmed, with costs.(a)

(a) When commodities are sold by the bulk, for a gross price, the sale is perfect, for it is known with certainty what is sold; but if the price is regulated at the rate of so much for every piece, pound or measure, the sale is not perfect, except only as to so much as is actually counted, weighed or measured; for, till then, it is not known with certainty what is sold. *Coit v. Houston*, 3 Johns. Cas. 254; *Domat*, lib. 1, tit. 2, § 4, art. 7; *Code Napoleon*, liv. 3, tit. 6, ch. 1, art. 1585; *2 *Erskine's Inst.* 480-81. This distinction

*85] is recognised by Pothier, who remarks, that the contract of sale is usually perfected by the agreement as to the price; and that this rule applies, where the sale is of a specific article, for a gross price. *Si id quod venierit appareat quid quale quantumve sit, et pretium, et pure venit; perfecta est emptio.* Lib. 8, *Dig. de peric. et comm. R. vend.* But, if the commodity be of that description of articles, which consist in *quantitate*, and which are sold by the weight, number or measure, the sale is imperfect, until it is weighed, counted or measured. In the first case, the goods sold are at the risk of the vendee, from the moment the contract is made: in the last case, they remain at the risk of the vendor, until they are designated by the act of weighing, counting or measuring. But, in both cases, the contract is so far completed, from the time of its being entered into, as to give the vendee a right of action for the delivery

ANDERSON *v.* LONGDEN.*Action against sureties in official bond.*

Where a bond was given by the agent of an unincorporated joint-stock company, to the directors for the time being, for the faithful performance of his duties, &c., and the directors were appointed annually, and changed, before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees, after they had ceased to be directors.

ERROR from the Circuit Court for the county of Alexandria. This was an action of debt, instituted by the defendants in error (plaintiffs in the circuit court), as directors of the Domestic Manufacture Company of Alexandria, against Robert Anderson (the plaintiff *in error), on a bond [*86 given by him and others, as sureties for John MacLeod, agent of the said company, to the said directors, to recover the amount of money and merchandise which the said agent had received for the use of the company, and for which he had failed to account.

On the 17th of November 1809, a number of persons in Alexandria associated together, and formed a company, for the purpose of encouraging the manufacture and use of domestic merchandise ; they entered into articles for their government, of which the following extracts are all that are material in this case :

“ Art. 2. As soon as the whole, or 1000 shares of the said capital stock, shall have been subscribed for, and the first payment made thereon, a meeting of the stockholders shall be called, by public notice in the Alexandria and Washington newspapers, to meet in the court-house of Alexandria, either in person or by proxy duly authorized, at which meeting the stockholders, either personally or by proxy, shall elect by ballot, seven of their own body, to act as directors of the said company for one year.”

“ Art. 3. The affairs of the said company shall be carried on in the town of Alexandria, under the superintendence and control of the said directors, of whom any four shall form a board or quorum. They shall choose a chairman from among themselves, and in case of vacancy by death, resignation or otherwise, such vacancy shall be immediately filled by themselves from among the stockholders. And the said directors shall in no case whatever contract debts *or engagements, by bill, bond or otherwise, for or on account of, the company, but all dealings under their superintendence [*87 and control aforesaid, shall be for cash or barter, except goods on deposit, which may be sold by the direction of the consignor. The said directors shall also exhibit, at the annual meeting of stockholders, for their inspection, a statement of the affairs of the company for the year preceding.”

“ Art. 4. The directors, when elected, shall proceed, without delay, to appoint an agent, and such other officers as may be requisite, all of whom shall hold their offices during the pleasure of the board, and who shall, before they enter upon their functions, give bond, with sufficient security, to the said directors, and their successors in office, for the faithful discharge of their duties, as prescribed by the board of directors.”

The company having proceeded to elect directors, John MacLeod was

of the thing, on tendering the price, and the vendor an action for the price, on tendering a delivery of the thing sold. *Contrat de Vente*, No. 308. See also 6 East 625.