

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1818.

JACKSON, *ex dem.* THE PEOPLE OF THE STATE OF NEW YORK, *v.*
CLARKE.

Power of alien to hold lands, under the treaty with Great Britain.

G. C., born the colony of New York, went to England in 1738, where he resided until his decease ; and being seized of lands in New York, he, on the 30th of November 1776, in England, devised the same to the defendant and E. C. as tenants in common, and died so seized, on the 10th December 1776 ; the defendant and E. C. having entered and becoming possessed, E. C., on the 3d December 1791, bargained and sold to the defendant all his interest. The defendant and E. C., were both born in England long before the revolution. On the 22d March 1791, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to, within the state, by purchase or descent, in fee-simple, and to sell and dispose of the same, in the same manner as any natural-born citizen might do. The treaty between the United States and Great Britain of 1794, contains the following provision : "Article 9th. It is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions *of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein ; and may grant, sell or devise the same, to whom they please, in like manner as if they were natives, and that neither they, or their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. *Held*, that he was entitled to hold the lands so devised to him by G. C., and transferred to him by E. C.¹

ERROR to the Circuit Court for the district of New York. This was an action of ejectment, commenced in the supreme court of the state of New York, and removed thence into the circuit court of the United States for the New York district, where, in September 1815, a trial was had, and a special verdict found, in the words following, to wit :

At which day, in this same court, at the city of New York, in the New York district, came the parties aforesaid, by their attorneys aforesaid, and the jurors aforesaid being called, also come, who to say the truth of the

¹ See Watson *v.* Donnelly, 28 Barb. 653.

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above contents, being elected, tried and sworn, say, upon their oath, that long before the above-mentioned time when the trespass and ejectment above mentioned are supposed to have been committed, namely, on the tenth day of April 1706, Anne, Queen of England, by letters-patent under the great seal of the then colony of New York, did grant unto Sampson Broughton, and divers other persons in the said letters-patent named, and their heirs, a certain tract of land, situate in the then colony, now state of New York, to have and to hold the same, to them, their heirs and assigns, for *3] ever, as tenants in common, *and not as joint-tenants. And that the lands and tenements, with their appurtenances, specified in the foregoing declaration of the said James Jackson, were part and parcel of the said tract of land granted, as aforesaid, by the said letters-patent.

And the jurors aforesaid, upon their oath aforesaid, further say, that the said Sampson Broughton and the said other persons to whom the said tract of land was granted as aforesaid, by the said letters-patent, being so seised in fee-simple, and possessed of the said tract of land, by virtue of the said letters-patent, did, afterwards, to wit, on the 12th day of April, in the year last aforesaid, by good and sufficient conveyance and assurance in the law, for a valuable consideration, grant, bargain, sell and convey unto George Clarke, now deceased (who was formerly lieutenant-governor of the said colony, and who was then a subject of England, and who remained so until the time of his death), and to his heirs, one equal undivided ninth part of the said tract of land, granted as aforesaid, in and by the said letters-patent, to have and to hold to him, his heirs and assigns for ever.

And the jurors aforesaid, upon their oath aforesaid, further say, that partition of the said tract of land mentioned in the said letters-patent was, afterwards, to wit, in the year last aforesaid, made in due form of law, between the last aforesaid George Clarke, and the other proprietors of the said tract of land mentioned and granted in and by the said letters-patent. And that by virtue of the said partition, the last aforesaid George Clarke became, and was sole seised in fee-simple, and possessed of the lands and tenements, with the appurtenances, specified in the said declaration of the *4] said James Jackson, *and continued to be so seised and possessed thereof, until the time of his death. And that the last aforesaid George Clarke died, so seised and possessed, in the year 1759.

And the jurors aforesaid, upon their oath aforesaid, further say, that George Clarke, who was late secretary of the colony of New York, was the eldest son and heir-at-law of the before mentioned George Clarke, formerly lieutenant-governor as aforesaid. And that upon the death of the said George Clarke, formerly lieutenant-governor as aforesaid, the said George Clarke, late secretary as aforesaid, as son and heir as aforesaid, entered upon, and was seised in fee-simple, and possessed the lands and tenements, with the appurtenances, specified in the said declaration of the said James Jackson. And being so seised and possessed, did, afterwards, to wit, on the 30th day of November 1776, at Hyde, in the county palatine of Chester, in the kingdom of Great Britain, make and publish, in due form of law to pass real estate, his last will and testament, and did thereby devise unto his grand-nephews, the said George Clarke, the defendant in the said declaration named, and Edward Clarke, and to their heirs and assigns, as tenants in common, and not as joint-tenants, the lands and tenements in the said decla-

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ration specified, with the appurtenances. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, afterwards, to wit, on the 10th day of December 1776, at Hyde aforesaid, in the said county palatine of Chester, in the said kingdom of Great Britain, died, so seised and possessed as aforesaid, and without having altered or revoked his said last will and *testament.

And the jurors aforesaid, upon their oath aforesaid, further say, [*_5 that upon the death of the said George Clarke, late secretary as aforesaid, the said George Clarke, the said defendant, and the said Edward Clarke, claiming under the said last will and testament, entered upon and became possessed of, the said lands and tenements, with the appurtenances, in the said declaration specified. And the said George Clarke, the said defendant, and the said Edward Clarke, being actually possessed of the said lands and tenements, with the appurtenances, in the said declaration specified, as under the said last will and testament, the said Edward Clarke, did, afterwards, to wit, on the 23d day of December 1791, by a deed of bargain and sale, duly executed, grant, bargain and sell, for a valuable consideration, to the said George Clarke, the said defendant, and his heirs, one equal moiety of the said lands and tenements, with the appurtenances, in the said declaration specified, and all the estate and interest of the said Edward Clarke, in and to the said lands and tenements last aforesaid, with the appurtenances, to have and to hold the same to the said George Clarke, the said defendant, his heirs and assigns ; by reason whereof, the said George Clarke, the said defendant, entered upon, and became, and was, actually possessed of the said lands and tenements, with the appurtenances, in the said declaration specified, claiming to be seised thereof in fee-simple, and so continued until the entry of the People of the State of New York, hereafter mentioned.

And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, *late secretary as aforesaid, was born in the city of New York, in the late colony, now state of New York, and that [*_6 in the year 1738, he went to that part of Great Britain, called England, and thenceforth continued to live and reside there, on his family estate, until and at the time when he made and published his said last will and testament, and ever after and until and at the time of his death. And the jurors aforesaid, upon their oath aforesaid, further say, that on the 4th day of July, in the year 1776, the late colony of New York, together with the other colonies of Great Britain, in North America, now called the United States of America, declared themselves free and independent States, and that from that day to the first day of September, in the year 1783, the said United States, and the citizens thereof, were at open and public war with the king of Great Britain and his subjects. And the jurors aforesaid, upon their oath aforesaid, further say, that the said George Clarke, the said defendant, was born in England, on the 28th day of April, in the year 1768. And that the said Edward Clarke was born in England, on the 28th day of November, in the year of our Lord 1770. And that the said George Clarke, the said defendant, and the said Edward Clarke, were born British subjects.

And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, late secretary as aforesaid, died without issue, and that at the time of his death, one George Hyde Clarke was his nephew ; and that the said George Hyde Clarke, if he is capable of inheriting the real estate

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of the said *George Clarke, late secretary as aforesaid ; within the state of New York, is the heir-at-law of the said George Clarke, late secretary as aforesaid, and that the said George Hyde Clarke was born in Great Britain, before the 4th day of July, in the year 1776, and hath ever since resided, and still doth reside, in Great Britain, and is still living ; and that no other person than the said George Hyde Clarke, is, or can be, the heir-at-law of the said George Clarke, late secretary as aforesaid ; and that the said George Hyde Clarke is capable of inheriting the real estate of the said George Clarke, late secretary as aforesaid, within the state of New York, unless he is incapable of inheriting such real estate, by reason of his having been born, and having resided in, Great Britain as aforesaid.

And the jurors aforesaid, on their oath aforesaid, further say, that on the 8th day of February, in the year 1791, the said George Clarke, the said defendant, caused to be presented to the legislature of the state of New York, a petition, in the words following, to wit :

To the honorable the senate and assembly of the state of New York, in legislature convened : The petition of George Clarke, humbly sheweth, that your petitioner was born in England, and is great-grandson of George Clarke, formerly lieutenant-governor of New York ; that he resided in the city of New York for about a year preceding the month of October last, with intention, at the end of two years, to have been naturalized under the statute of the United States ; that he was unexpectedly called abroad on important business, but expects to return in the course of the *ensuing summer ;
 *8] and as his naturalization must now be unavoidably suspended, to the great embarrassment of his affairs, your petitioner humbly prays that his name may be inserted in the bill now before the honorable the legislature, to grant a similar privilege of holding lands within this state, notwithstanding the want of naturalization, and your petitioner shall ever pray, &c.

GEORGE CLARKE,

By Goldsb. Banyar and Jas. Duane, his attorneys.

And the jurors aforesaid, upon their oath aforesaid, further say, that on the 22d day of March, in the year 1791, an act was passed by the legislature of the state of New York, in the words following, to wit :

"An act to enable Frangois Christophe Mantel, and the several other persons therein named, to purchase and hold real estates within this state. Be it enacted by the people of the state of New York, represented in senate and assembly, and it is hereby enacted by the authority of the same, that it shall and may be lawful for Frangois Christophe Mautel, Samuel Clows, junior, Samuel Richardet, William Robert O'Hara, Erick Glad, George Turnbull, Thomas Mounsey and Jan Barnhard, respectively, to purchase lands, tenements and hereditaments, within this state, and to have and hold the same to them, respectively, and their respective heirs and assigns for ever, as fully, to all intents and purposes, as any natural-born citizen may or can do, any law, usage or custom to the contrary notwithstanding. And be it
 *9] further enacted by the authority aforesaid, that it *shall and may be lawful for George Clarke, who is great-grandson of George Clarke, formerly lieutenant-governor of New York, to purchase any lands, tenements or hereditaments, within this state, and to have and to hold the same, and all other lands, tenements and hereditaments which he may now be

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entitled to, within this state, by purchase or descent, to him the said George Clarke first above named, his heirs and assigns, to his and their own proper use and behoof for ever, and to sell and dispose of the same, or any part thereof, as fully, to all intents and purposes, as any natural-born citizen may or can do, any law, usage or custom to the contrary notwithstanding."

And the jurors aforesaid, on their oath aforesaid, further say, that the said George Clarke, the said defendant, and the said George Clarke, great-grandson of George Clarke, formerly lieutenant-governor of New York, mentioned in the said act, is one and the same person.

And the jurors aforesaid, on their oath aforesaid, further say, that on the first day of May, in the year 1810, the said George Clarke, the said defendant, was in the actual possession and occupation of the said lands and tenements, in the said declaration specified, with the appurtenances, and that on the day and year last aforesaid, the said People of the State of New York, lessors of the said James Jackson, entered into the said tenements, with the appurtenances, and from thence put out and removed the last aforesaid George Clarke, and were seised therof as the law requires; and being so seised thereof, the said People, on the day and year last aforesaid, demised to the said James Jackson, the *tenements aforesaid, with the appurtenances, to have and to hold to the said James Jackson, and his assigns, from the said first day of May, then last past, until the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended, in the manner in which the said demise is set forth in the said declaration of the said James Jackson. By virtue of which said demise, the said James Jackson entered into the said lands and tenements, with the appurtenances, and was thereof possessed: and he being so possessed thereof, the said George Clarke, the said defendant, afterwards, to wit, on the tenth day of May, in the year last aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, which had been demised to the said James Jackson as aforesaid, and ejected, expelled and amoved the said James Jackson from his said possession, as the said James Jackson hath above complained against the last aforesaid George Clarke.

And the jurors aforesaid, upon their oath aforesaid, further say, that at the time of commencement of this action, the tenements aforesaid, in the said declaration specified, were, and ever since have been, and yet are, of a value exceeding the sum of \$500, exclusive of all costs and expenses. And the jurors aforesaid, on their oath aforesaid, further say, that the said James Jackson, at the time of the commencement of this action, was and yet is a citizen of the state of New York, in the United States of America. And that, at the time of the commencement of this action, the said George Clarke, the said defendant, in the said declaration named, *was and yet is a subject of the king of the united kingdom of Great Britain and Ireland.

But whether, upon the whole matter aforesaid, by the jurors aforesaid, in manner aforesaid found, the said George Clarke, the said defendant, is guilty of the trespass and ejectment above mentioned, the said jurors are entirely ignorant, and pray the advice of the court thereon. And if it shall appear to this court, that the last aforesaid George Clarke, in construction of law, is guilty of the trespass and ejectment above mentioned, then the said jurors

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say, upon their oath, that the last aforesaid George Clarke is guilty of the trespass and ejectment in the said declaration of the said James Jackson, mentioned, in manner and form, as the said James Jackson hath above in his said declaration complained. And they assess the damages which the said James Jackson hath sustained by reason of the said trespass and ejectment, besides his costs and charges by him about his suit in this behalf expended, at six cents, and for his said costs and charges at six cents. And if it shall appear to the court, that the last aforesaid George Clarke is not guilty of the said trespass and ejectment, then the said jurors say, upon their oath, that the last aforesaid George Clark is not guilty thereof, in manner and form as he hath above in his plea alleged.

On the foregoing special verdict, judgment was rendered for the defendant, George Clarke, by the circuit court, to reverse which, this writ of error was brought.

February 5th, 1818. *Champlin*, for the plaintiff in error, made the following points: *1. That secretary George Clarke, at the time of his ^{*12]} death, was an alien enemy, and there being at that time no statute of wills in force in the state New York, the people of the state, at his death, became seised of the premises. *Dawson v. Godfrey*, 4 Cr. 321; *Gardner v. Wade*, 2 Mass. 244; *Campbell v. Hall*, Cowp. 208; *Vattel*, lib. 3, ch. 5, § 7. 2. That secretary George Clarke, being an alien enemy, had no power to make a valid will, or alien his estate in any manner whatever. 5 Bac. Abr. 499, tit. Will, B; 7 Co. 33; 1 Bl. Com. 372. 3. His will being void, and George Hyde Clarke being an alien enemy, took nothing by descent. 4. That after the death of secretary George Clarke, there was no person competent to take the premises by inheritance or devise, whereby the People of the State of New York, at his death, became *ipso facto* possessed thereof, without office found.

D. B. Ogden, contra, was stopped by the court.

MARSHALL, Ch. J., delivered the opinion of the court, that every question arising in the cause had been settled by former decisions.

Judgment affirmed, with costs.(a)

(a) In the case of *McIlvaine v. Coxe's Lessee*, 4 Cr. 209, the court determined, that a person born in the colony of New Jersey, before the declaration of independence, and residing there until 1777, but who then joined the British army, and ever since adhered to the British government, has a right to take lands by descent in the state of ^{*13]} New Jersey. But in **Dawson's Lessee v. Godfrey*, 4 Cr. 321, it was held, that a person, born in England, before the declaration of independence, and who always resided there, and never was in the United States, could not take lands in Maryland by descent. And in the case of *Smith v. State of Maryland*, 4 Cr. 286, it was determined, that by the acts of Maryland, 1780, ch. 45 and 49, the equitable interests of British subjects in lands were confiscated, and vested in the state, without office found, prior to the treaty of peace of 1783, so that the British *cestui que trust* was not protected by the stipulation in that treaty, against future confiscations, nor by the stipulation in the 9th article of the treaty of 1794, securing to British subjects, who then held lands in this country, the right to continue to hold them.

In the supreme court of New York, it has been held, that where a married woman was a subject of Great Britain, before the revolution, and always continued such, but

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her husband resided in this country, both before and after that period, she was entitled to dower out of those lands of which he was seised before the revolution, but not of those of which he was subsequently seised. *Kelly v. Harrison*, 2 Johns. Cas. 29. The same court has also determined, that where a British subject died seised of lands in the state, in 1752, leaving daughters in England, who married British subjects, and neither they nor their wives were citizens of the United States; even if the marriages were subsequent to the revolution, such marriages would not impair the rights of the wives, nor prevent the full enjoyment of the property, according to the laws of the marriage state, especially, after the provision in the 9th article of the treaty of 1794. The court seemed also to think, that where the title to land in the state was acquired by a British subject, prior to the revolution, the right of such British subject, to transmit the same by descent, to an heir *in esse* at the time of the revolution, continued unaltered and impaired; the case of a revolution or division of an empire being an exception to the general rule of law, that an alien cannot take by descent. *Jackson v. Lunn*, 3 Johns. Cas. 109. See also *Jackson v. Wright*, 4 Johns. 75. The treaty of 1794, relates only to lands then *held by British subjects, and not to any after-
acquired lands. *Jackson v. Decker*, 11 Johns. 418, 422. [*14]

In the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cr. 603, and 1 Wheat. 304, it was adjudged, 1st. That an alien enemy may take by purchase, though not by descent; and that, whether the purchase be by grant or by devise. 2d. That the title thus acquired by an alien enemy, is not divested, until office found. 3d. That whether the treaty of peace of 1783, declaring that no future confiscations should be made, protects from forfeiture, under the municipal laws respecting alienage, lands held by British subjects at the time of its ratification, or not, yet that the 9th article of treaty of 1794 completely protected the title of a British devisee, whose estate had not been previously divested by an inquest of office, or some equivalent proceeding.

THE FRIENDSCHAFT : WINN *et al.*, Claimants.

Prize.—Proprietary interest.—Domicil.

Informal and imperfect proceedings in the district court, corrected and explained in the circuit court.

A bill of lading consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence, to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof.

The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated; but even if it were proved, that an enemy master, carrying a cargo chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from further proof.

*The native character does not revert, by the mere return to his native country, of a merchant who is domiciled in a neutral country, at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks, in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country: under these circumstances, the neutral domicil still continues. [*15]

British subjects, resident in Portugal (though entitled to great privileges) do not retain their native character, but acquire that of the country where they reside and carry on their trade.

APPEAL from the Circuit Court for the district of North Carolina. The brig Friendschaft was captured, on a voyage from London to Lisbon, by the privateer Herald, and brought into Cape Fear, in North Carolina, where the vessel and cargo were libelled, in July 1814, as prize of war.

The commercial agent of his royal highness the Prince Regent of Portugal, interposed a claim to several packages, parts of the said cargo, on behalf of the respective owners, whom he averred to be Portuguese subjects, and