ment might be made by the court below, notwithstanding the pendency of the appeal in this court.

Motion denied.(*a*)

United States *v.* Six Packages of Goods: Toler, Claimant.

Entry of goods.—Seizure.

Under the 67th section of the collection act of the 2d of March 1799, c. 128, where goods were entered by an agent of the owner on his behalf, and the entry included only a part of the goods which the *packages contained, and the owner subsequently made a further, or post entry of the residue of the goods; and the packages being opened, several days afterwards, and examined by the collector, in the presence of two merchants, and their contents found to agree with the two entries taken together, but to differ materially from the first entry; *held*, that the collector was not precluded from making a seizure of the goods, after the second entry, for a variance between the contents of the packages and the first entry, and that such seizure must be followed by confiscation, unless it should appear, that such difference proceeded from accident and mistake, and not from an intention to defraud the revenue. [*521

Appeal from the Circuit Court of the Southern District of New York. This was a libel of information filed in the court below against certain goods imported from London in the ship Isabella, at the port of New York, as forfeited under the 67th section of the collection act of the 2d of March 1799, c. 128.

March 12th, 1821. The cause was argued by the *Attorney-General* and *Pinkney*, for the United States; and by *D. B. Ogden* and *Wheaton*, for the claimant.

March 14th. Livingston, Justice, delivered the opinion of the court.—This is a libel under the 67th section of the collection law, passed the 2d of March 1799. This section provides, that it shall be lawful for the collector, naval officer, or other officers of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof, and if, upon examination, they shall be found to agree with *the entries, the officer making such seizure and examination, shall cause the same to be repacked, and delivered to the owner or claimant forthwith; and the expense of such examination shall be paid by the said collector or other officer, and allowed in the settlement of their accounts; but if any of the packages, so examined, shall be found to differ in their contents from the entry, then the goods, wares or merchandise contained in such package or packages, shall be forfeited: provided, that the said forfeiture shall not be incurred, if it shall be made appear to the satisfaction of the collector and naval officer of the district where the same shall happen, if there be a naval officer, and if there be no naval officer, to the satisfaction of the collector, or of the court in which a prosecution for the forfeiture shall be had, that such difference arose from accident or mistake, and not from an intention to defraud the revenue. [*522

These goods being claimed by Hugh K. Toler, of the city of New York, merchant, were condemned by the district court of the United States for the

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(*a*) See new rule of court of the present term, *ante*, Rule 32.

southern district of New York, which sentence being reversed by the circuit court for that district, an appeal from the last sentence has been taken to this court.

Before we examine the facts of the case, or whether they establish a fraud, without which the prosecution under this section cannot be sustained, it will be necessary to dispose of a question of law, which has been made by the counsel for the claimant.

It is conceded on all hands, that on the 3d of November 1810, the six packages which are libelled *were entered at the custom-house, by Thomas Ash, on behalf of the claimant, and that the entry covered only a part of the goods which the packages contained. That two days after, Toler himself completed the entry of the residue of the goods which were in these packages, and which had not been previously entered by Ash. Several days after, the packages were opened and examined by the collector, in presence of two merchants, and their contents were found not to differ, but to agree with the two entries, taken together; but to differ very materially from the first entry made by Ash; upon which, the collector made a seizure of them. On these facts, about which there is no dispute, it is denied, that the collector had any right to seize, inasmuch as, when the inspection took place, there was no difference between the goods found in the packages, and those mentioned in the invoices. It is said, that the collector, if he suspected a fraud, ought to have made a seizure, before the second entry, in which case, the difference which would have existed between the goods on which a duty was secured, and those in the packages, would have justified such an act, but that by waiting until a second entry was made, the fraud, if any committed, was purged. In support of this position, it is said, that the collection law provides for a post-entry of this kind, and that the very oath which is taken, when an entry is made, imposes on the party who makes it, the duty, in case he shall afterwards discover any other goods in a package than those first entered by him, of immediately informing the collector, and making a further entry thereof.

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*524] *This provision, and the form of the oath, suppose no more than that a deficient or defective entry may be made innocently, and under a mistake, without any certain knowledge, at the time, of the contents of the packages entered. For, if the party making any entry, knows, at the time, of other goods, such other goods cannot be entered afterwards, and the oath usual on such occasions cannot be taken, without admitting that a perjury had been committed at the time of the first entry. The court is, therefore, of opinion, that, although the seizure was not made, until after the second entry, the collector had a right to seize for any variance between the contents of the packages, and the first entry, and that such seizure will be valid, and must be followed by sentence of condemnation, unless it shall turn out that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. Whether the case of the claimant be entitled to this favorable interpretation, the court will now proceed to inquire.

A great deal of testimony, which was not produced in the circuit court, and which might easily have been (as all the witnesses resided in the city of New York), has been taken since the appeal; and it is on this testimony,

as well as on that which was there taken, that the sentence of that court must now be reviewed.

It is in proof, and indeed, admitted by the claimant, that a very imperfect entry of the goods contained in these packages was made on Saturday, the 3d day of November 1810, by Thomas Ash, who had been employed by Toler to enter the same; and that *the residue of the goods therein [*525
contained, was not entered by the claimant, until the 5th day of the same month. To escape from the consequences of the first entries not being complete, and to repel the imputation of its originating in fraud, the plaintiff has endeavored to prove that the letter covering the invoices of the goods contained in the second entry, was not received by him, when the first entry was made. To establish this fact, his clerk, Mr. Crane, has been examined as a witness, and admitting that he has told the truth, there would be some reason to believe, that such were the fact; but there are many circumstances which now appear in this cause, which compel us to withhold from Mr. Crane the credit which might otherwise be due to him. The usual course of business, as testified to by several very respectable merchants, stands opposed to his relation, that invoices of only part of the goods contained in those packages, were inclosed in a letter to H. K. Toler & Co., and invoices of the other goods in a letter to J. K. Jaffray, which had been forwarded to that gentleman, at Albany. It appears from all the testimony, that if a package, consigned to one person, contain goods belonging to different persons, it is customary, and some of the witnesses say, indispensable, to send to the consignee of the package, invoices of all the goods which it contains, or to refer, in the main invoice of the consignee, to the invoice of the other goods; and that the withholding such invoices or information, would be considered as strong evidence of an intention to defraud the revenue. Another circumstance which *detracts much from the credit of this [*526
witness, is, that it is more than probable, that at the time of this consignment, a copartnership subsisted between the claimant and the Jaffrays of London. This appears not only from an advertisement of a dissolution of such copartnership, which has been published since the decree of the circuit court, in one of the New York papers, but from other testimony in the cause, and from no contrary proof being furnished by Mr. Toler. Now, if such partnership really existed, which cannot well be disbelieved, it is most extraordinary, indeed, that all the invoices of the goods in that package should not have been sent to the partner residing permanently in the city of New York, but that an invoice of part of them should be transmitted to him, and of another, and of the most valuable part, to a partner who might or might not have reached this country when the Isabella arrived. If merchants, who must be presumed to know how to manage their business, will act in a manner so contrary to the general practice of commercial men, they must expect, and cannot complain, if such deviation from established usage create suspicions unfavorable to the integrity of the particular transaction. It would have added something to the value of the testimony of Mr. Crane, if the name of the merchant at Albany, to whose care the letter for Mr. Jaffray had been transmitted, or if the letter itself, with the post-marks, had been produced. The importance of the testimony of Mr. Ash, as delivered before the circuit court, is much weakened by that of Judge Van [*527
Ness, *who has also been examined since the appeal; for instead of

being simply told at the custom-house, when he asked for a permit, that he must call again, it appears he stated, on his examination in the district court, that when he applied for a permit, on the 3d of November, he was told at the custom-house, that "they wished to examine the goods before they were delivered;" and that although he did not see Mr. Toler until Monday, he communicated to his clerk, Mr. Crane, what had passed, who, doubtless gave the same information to his principal, which will account for the solicitude which he discovered, so early on Monday morning, to enter the goods which had been omitted in the entry of Mr. Ash. There are other circumstances in this case, that are not here noticed, which render the explanation given by Mr. Toler, to say the least, extremely questionable.

The court cannot dismiss this cause, without expressing its surprise, that more than ten years have elapsed since the filing of the libel in the district court. As all the witnesses who have been examined since the appeal, reside in the city in which the cause was tried, they might, and ought, to have been examined in that court, and if their testimony had there been reduced to writing, and used in the circuit court, a final decision might have been had many years ago, and before the insolvencies which it is suggested have happened, and have rendered the further prosecution of these proceedings of little or no importance to the parties.

*528] *The decree of the circuit court is reversed, and the sentence of condemnation pronounced by the district court affirmed.

Brashier *v.* Gratz *et al.*

Specific performance.

The general rule is, that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipuluated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.

But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such a case, a court of equity will leave the parties to their remedy at law.

Part performance will, under some circumstances, induce the court to relieve.

But where a considerable length of time has elasped, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is a want of reciprocity in the obligations of the respective parties, a court of equity will not interfere.[1]

Appeal from the Circuit Court of Kentucky.

This cause was argued by *B. Hardin*, for the appellant, citing 1 Fonbl. Eq. 227; 9 Ves. 415; 2 P. Wms. 243; 4 Bro. C. C. 329, 469, 391; 1 Ves. jr. 221; 1 Atk. 12; and by *Sergeant*, for the respondents, citing Sugd. Vend. 246; 5 Ves. 720, note; 1 Ves. jr. 450; 9 Cranch 456; 8 Ibid. 471.

*529] *March 14th, 1821. Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the

[1] Taylor *v.* Longworth, 14 Pet. 172; Ahl *v.* Johnson, 20 How. 511; Harkness *v.* Underhill, 1 Black 316.