must be "in conformity with it." But this, it is insisted, is not the true construction of the proviso. That "under the law" does not mean, "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

The word *under* has a great variety of meanings. But the sense in which it was used in the proviso is, "subject to the law." We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it. The proviso declares, that the act shall not confer a title, "in opposition to the rights acquired under the laws of the United States." This would seem to be conclusive, as no right can be acquired under a law which is not in pursuance of it. If the New Madrid location was made in violation of the law, it is not perceived how any right could be acquired under it.

The judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

EDMUND B. CALDWELL, SURVIVING PARTNER OF JAMES LYND, JR., AND COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

In this case, the court below instructed the jury, that if the goods were fraudulently entered, it was no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser.

This instruction was right in respect to the sixty-eighth section of the act of 1799 (1 Stat. at L., 677), as the penalty is the forfeiture of the goods *without an alternative of their value*, but wrong as the instruction applies to the sixty-sixth section of the same act,—as the forfeiture under it is either the goods *or their value*.

Under the sixty-eighth section, the forfeiture is the statutory transfer of right to the goods at *the time* the offence is committed. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the *right to them* relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation.[1]

[1] CITED. *The Kate Heron*, 6 Sawy., 110.

But under the sixty-sixth section of the act, in which the forfeiture is the goods *or their value*, the United States have no title in the goods, until an election has been *made either to recover the goods or their value.

Therefore, under that section, any rights in the goods acquired *bonâ fide* by third persons in the meantime are protected.[2]

The claimants prayed the court to instruct the jury, that the United States were not entitled to recover under the first and second counts of the information founded on the fiftieth section, unless the goods were unladen and delivered without permits. The jury was told, in reply,—"If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenues." Whether or not the permits were obtained by fraud or improper means was a point in the cause for the jury to decide, and what the court said upon the prayer was virtually saying to the jury, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying if they thought that there was evidence enough to prove the fact against them.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case was this.

In August, 1839, the attorney of the United States filed an information in the District Court of the United States for the Eastern District of Pennsylvania, against thirty-five remnants of pieces of cloths and cassimere, that had been seized at the store of James Lynd, Jr., & Co.

The information contained thirteen counts.

1. Charged, That the goods were brought from a foreign port into some port or place in the United States, to the attorney of the United States yet unknown, and were unladen and delivered from the vessel in which they had been brought, without any permit or special license from the collector or naval officer or any other competent officer of the customs. Act of 1799, § 50 (1 Stat. at L., 665).

2. Charged, That the goods were brought into the port of New York, and there unladen and delivered without a permit. Act of 1799, § 50 (Id.).

3. That the said goods were found concealed in a certain store in the occupation of William Blackburne & Co., at the port of Philadelphia, the duties on said goods not having been paid or secured to be paid. Act of 1799, § 68 (1 Stat. at L., 677.)

4. That the said goods were, on their importation, entered at the office of the collector of New York; and that on each and every of the entries, an invoice of the goods included in

[2] APPLIED. *Six Hundred tons of Iron ore*, 9 Fed. Rep., 600. FOLLOWED. *United States* v. *Four cases of Castings*, 10 Ben., 373. CITED. *United States* v. *York Street Flax Spinning Co.*, 17 Blatchf., 139.

the entry was produced and left with the collector. That the said goods were not invoiced according to the actual cost thereof at the place of exportation, but were invoiced at a less sum than the actual cost, with design to evade the duties thereupon, or some part thereof. Act of 1799, § 66 (1 Stat. at L., 677).

*368] *5. That entries of the said goods, at the time of their importation, were made at the office of the collector of New York; and that on each of the entries an invoice of the goods, &c., was produced and left with the said collector. That all and each of the said invoices so produced, and all and each of the several packages, in each and every of the said invoices in which the said goods were imported, were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830 (4 Stat. at L., 410.)

6. That entries of the said goods, at the time of their importation, were made at the office of the collector of New York; that on each of the entries an invoice of the goods was produced and left with the collector; that all and each of the said invoices were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830, § 4 (4 Stat. at L., 410).

7. That all and each of the several packages contained in each and every of the entries, and each and every of the invoices so produced, were made up with intent, by a false valuation, to evade and defraud the revenue. Act of 1830, § 4 (4 Stat. at L., 410).

8. Charges that the invoices were made up by a false extension, to evade and defraud the revenue of the United States. Act of 1830 (4 Stat. at L., 410).

9. That the goods, &c., being composed wholly or in part of wool or cotton, were entered, at the times of their importation, at the office of the Collector of New York; that invoices were produced and left with the collector; that all and each of the packages in each and every of the invoices, and each and every of the entries, were made up with intent to evade and defraud the revenue of the United States. Act of 1832 (4 Stat. at L., 593).

10. As amended, the same with the 4th.

11. As amended, the same with the 6th.

12. As amended, the same with the 7th.

13. As amended, the same with the 9th.

To this information the claimants put in three pleas:—

1st. Traversing the several causes of forfeiture alleged.

2d. The second plea, which was to all the counts save the

two first, alleged that claimants, prior to goods being seized, had *bona fide* purchased the goods for full value, without any notice or knowledge of their being liable to seizure or forfeiture, under or by an act of Congress, entitled "An act to regulate the collection of duties on imports and tonnage," from persons having the ostensible ownership of them, and that at the *time of seizure the goods were in no way whatever concealed, within the meaning of any act of Congress. [*369

3d. The third plea alleged that the goods, prior to their seizure, had been duly entered, passed through the custom-house, &c., the duties imposed paid, and the goods thereupon delivered to the importers; that afterwards the several packages, of which these goods formed part, were broken up and divided; that subsequently these goods were at sundry times purchased *bona fide*, and for full value, from persons having the ostensible ownership of same, and without notice or knowledge that they were liable to seizure or forfeiture under any act of Congress for any cause; that no part of the goods had been imported or entered by the claimants; that at the time of seizure they were not in original packages, nor concealed, but openly exposed for sale on the shelves of claimants' store.

To the first of these the United States joined issue.

To the second and third demurred generally, and claimants joined in demurrer.

These two pleas denying every cause of forfeiture except the single one of the goods having been falsely invoiced, it is believed that all the material questions afterwards arising on the trial of the cause are raised by these demurrers; but for greater caution, the same points were again raised on the trial, in the shape of exceptions to the judge's charge and otherwise.

On the trial it appeared that James Lynd, Jr. & Co. kept a wholesale and retail dry goods store in Philadelphia, and were in the habit of purchasing goods from W. Blackburne & Co. and John Taylor, Jr.; that at the time of the seizure, the officer inquired for and took from them at their store, all the goods which had been purchased from Blackburne & Co., or from John Taylor, Jr.; and that the goods seized were at the time distributed among other goods in single pieces and parts of pieces, on the shelves of claimants' store, for sale, without any appearance of concealment whatever. Evidence was, under objections, offered to show that part of the goods seized corresponded in numbers with pieces forming parts of various invoices that had been in 1838 and 1839 fraudulently entered

by Blackburne and Taylor, at prices below their value in England, whence they had been exported.

There was no evidence of any other cause of forfeiture whatever.

For the purpose of fixing the fraud, evidence was likewise given, under similar objections, of other fraudulent invoices made about the same time by Blackburne and Taylor, and likewise of conversations with Blackburne some days before the *seizure, about other invoices and other goods, and the concealment of said other goods from the officers.

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There was no attempt to show that the claimants had any part in this concealment, nor in the making of the false entries; but, on the contrary, it appeared that the goods had been fairly and *bonâ fide* purchased and settled for before the seizure.

The claimants contended, that where goods are imported, entered at the custom-house, duties imposed and paid according to such entry, and a permit and license thereupon granted, under which the goods are delivered to the importer, the original packages subsequently broken, and part of them sold to a *bonâ fide* purchaser without notice, and before the United States had made any election, the goods so sold are not liable to seizure in the hands of such *bonâ fide* holder, though they may have been fraudulently entered by being invoiced below their actual cost, &c.

The attorney of the United States contended, on the contrary, that, from the moment the fraudulent entry was made, the goods became forfeited, and the title of the United States accrued so as to defeat the right of a subsequent *bonâ fide* purchaser without notice, and that when the goods are delivered under a permit obtained under such fraudulent entry, it is as though no permit had been given, and the goods had been delivered without permit.

The counsel for the claimants asked the court to instruct the jury,—

First. That there cannot be a forfeiture of the goods under the fourth section of the act of 1830, nor under the fourteenth section of the act of 1832, unless the information alleges, and the United States have proved, all the special circumstances of the examination and detection of the fraud, under the authority of the collector, in the manner pointed out in said acts of Congress.

On which the court instructed the jury,—This is correct; but there may be a forfeiture under the act of 1799.

Second. That the probable cause mentioned in the seventy-first section of the act of Congress of 1799, chapter 22, refers

to the right of seizure under said act; and the right of seizure depends on the fact, whether, at the time of their being seized, the goods were concealed within the meaning of the sixty-eighth section of said act.

On which the court instructed the jury,—This is not law as applied to this case. The probable cause applies to all cases of seizure for any fraud under any of the revenue laws, and any section of any such law. Whether there was probable *cause for the prosecution does not depend upon whether there was originally ground for the seizure [*371 or not, but upon the proof at the trial in support of the prosecution.

Third. That the term *concealed*, in said sixty-eighth section, applies only to articles intended to be secreted and withdrawn from public view, on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive; which the court answered affirmatively.

Fourth. That if the goods were not so concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, is sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries.

On which the court instructed the jury,—This is not the law. The burden of proof is not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

Fifth. That if the goods seized had been fairly and *bonâ fide* purchased by the claimants, without any knowledge by them of their being liable to seizure on the part of the United States, and were, at the time of the seizure, openly exposed by them for sale in their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto.

On which the court instructed the jury,—This is not the law. If the goods were fraudulently entered, it is no matter in whose possession they were when seized; the forfeiture

took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

Sixth. That even though the goods in question had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof; and that any rights in said goods acquired *bonâ fide* by third *372] *persons in the meantime are protected against the right of forfeiture under this section.

On which the court instructed the jury,—This is not the law. The title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

Seventh. That the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen, and delivered without permits.

On which the court charged,—If the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue.

Eighth. That the burden of proof in this case, under the seventy-first section of the act of 1799, is upon the United States.

On which the court charged,—This is not so; the burden of proof is on the claimants.

The counsel for claimants also asked the court to charge,—

Ninth. That the claimants are not bound to prove the innocence of intent of the importers in making the invoices.

Tenth. The claimants are not bound to prove the actual cost or value of the goods at the place of exportation.

Eleventh. The claimants are not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were appraised at the custom-house.

Twelfth. That the permits, and the delivery of these goods from the custom-house, is a bar in all cases against any forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

Thirteenth. If the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto.

But the court refused so to charge the jury, and further charged,—

That the United States have shown probable cause for this

prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house. That the granting permits, and delivery of these goods from the custom-house, is not a legal bar against forfeiture in all cases, except where the claimants are parties or *privies to the fraud in obtaining [*373
them, or had knowledge of the same. And, as to the thirteenth point, that if the goods were fraudulently entered, no title passed to the claimants.

And thereupon the counsel for the said claimants did then and there except to the aforesaid charge and opinion of the court.

Under these instructions of the court, the jury found a verdict for the United States, under the act of 1799, ch. 22, §§ 50 and 66, as to all the goods contained in the libel, except two pieces of cloths, as to which they found for the claimants. The judgment of the District Court followed the finding of the jury.

Upon the exceptions above stated, the case went up to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court, and a writ of error brought the case up to this court.

It was argued by *Mr. Fallon*, for the plaintiff in error, and by *Mr. Johnson* (Attorney-General), for the United States.

Mr. Fallon, for the plaintiff in error, made the following points:—

1. That the court below erred in not giving judgment in their favor on the demurrers.

2. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods were not, within the meaning of the sixty-eighth section of the act of 1799, concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in the possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, are sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries; and in charging, on the contrary, that this is not the law; the burden of proof is

not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

3. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods seized had been fairly and *bonâ fide* purchased by the claimants, without any knowledge by them of their being liable to seizure on the *374] part of the United States, and were, at the time of the seizure, *openly exposed by them for sale in their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto; and in charging, on the contrary, that this is not the law, and that if the goods were fraudulently entered, it was no matter in whose possession they were when seized; the forfeiture took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

4. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that even though the goods in question had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the United States had no title in the goods until they made their election either to recover the goods themselves or the value thereof; and that any rights in said goods acquired *bonâ fide* by third persons in the meantime are protected against the right of forfeiture under this section; and in charging, on the contrary, that this is not the law, and that the title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

5. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen and delivered without permits; and in charging, on the contrary, that if the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity, and that the United States were entitled to recover, if the goods were imported with a view to defraud the revenue.

6. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the burden of proof in this case, under the seventy-first section of the act of 1799, is

upon the United States; and in charging, on the contrary, that the burden of proof was on the claimants.

7. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the claimants were not bound to prove the innocence of intent of the importers in making the invoices; that the claimants were not bound to prove the actual cost or value of the goods at the place of exportation; that the claimants were not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were appraised at *the custom-house; that the [*375 permits, and the delivery of the goods at the custom-house is a bar in all cases against forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had a knowledge of the same, and that if the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto.

8. That the learned judge erred in charging the jury, that the United States have shown probable cause for this prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house.

9. That the learned judge erred in charging the jury, that the granting permits and delivery of these goods from the custom-house is not a legal bar against forfeiture in all cases, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

10. That the learned judge erred in charging the jury, that, as to the thirteenth point, if the goods were fraudulently entered, no title passed to the claimants.

11. The plaintiff in error further submits, that the case of *Wood* v. *United States*, 16 Pet., 342, in no way rules the present case; that the claimant in that case was the same person who had made the false entry, he having entered them on his own oath as goods of which he was the actual owner. (See page 346.) It is therefore submitted, that the language of the court there applies only to a case where the party making the false entry is himself the claimant, and not to a case like the present, where the goods are claimed by a *bonâ fide* purchaser without notice. (See 16 Pet., 361–365.)

12. That the learned judge erred in admitting in evidence the acts and declarations of John Taylor, Jr., and Wm. Blackburne & Co., tending to show fraud in the entry or conceal-

ment of other goods than those in the invoices of which the goods in question formed part.

In support of these points *Mr. Fallon* made the following observations.

It is contended that, at common law, forfeitures have no relation back to time of the offence (except in cases of suicide, &c.) See 4 Bl. Com., 421; Co. Litt., 390 *b*, 391 *a*; also authorities collected by Mr. Justice Story, in *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 405, 408, 411, 412; and by *Judge Winchester, in *United States* v. *Grundy*, 3 Cranch, 356, 363, in note. And though it may be admitted that Congress may so provide, that the title shall, by reason of the forfeiture, relate so as to vest from the time of the offence committed, such is not the provision of the law under consideration.

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The sixty-sixth section of the act of 1799, (1 Stat. at L., 677,) on which alone this case can be sustained, provides, that, in case of a false invoice of goods, with design to evade the duties thereon, "such goods, or the value thereof, to be recovered of the person making entry, shall be forfeited," showing that it was intended that government should make an election to take either goods or value from the person making entry. They certainly could not take both, and their right to either being precisely equal, neither becomes vested in them till election made. See opinion of the court, construing the fourth section of the act of 1792, (1 Stat. at L., 289,) containing words precisely alike, "the ship or its value, to be recovered of the person making the oath, shall be forfeited." This right of election, it was held by the court, negatived the argument that Congress intended that the title should vest from time of offence committed, and protected a *bonâ fide* purchaser, who bought before election made. In this respect, this case is distinguished from the cases of *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 396, where, in the absence of words giving a right of election, from the fifth section of the act of 1809, (2 Stat. at L., 520,) the title was held to vest from time of offence committed. See p. 398, Id. To the same effect is *Gelston* v. *Hoyt*, 3 Wheat., 311. In confirmation of these views, the court is referred to the 68th section of the act of 1799, (1 Stat. at L., 678,) which imposes heavy penalties on parties to pretended sales; a precaution hardly necessary, if it were not that a *bonâ fide* sale without notice would defeat the recovery by the United States.

It is submitted, that the language of the court in *Wood* v. *United States*, 16 Pet., 365, where it is held that the forfeiture accrues upon making the false invoice, in no way conflicts

with the present argument. In that case the claimant was the very party who had made the false entry, see p. 342, (and indeed had been tried for perjury, see 14 Pet.,) and the argument made by him was, that, the moment the goods passed the custom-house, the goods were safe; the action of the officers of the government in passing the goods was, it was argued, equivalent to a judgment mantling the successful fraud, and that case refused only to the bungling deceiver the protection of *res adjudicata*. It was in reference to such a case that the language *in question was used; [*377 but it is submitted that, even then, the opinion of the court is perfectly reconcilable with the present argument. All that the court decided was, that the "forfeiture," that is, the penalty or right to recover, accrued at once on commission of the offence; but whether that forfeiture should be of "the goods, or of the value thereof," must depend upon the exercise of their right of election, and until that right be exercised, intervening rights are protected.

Also, it is submitted that the fiftieth section of the act of 1799, (1 Stat. at L., 655,) was meant to provide against cases of smuggling in goods at places other than ports of entry, or without passing the custom-house, &c. Such was not this case. There was no evidence, or pretence whatever, of fraud in obtaining the permits. The fraud was in making the false entries or invoices, and frauds of that character are specially provided for by the subsequent sections of the act. It is therefore contended, that, under the evidence, and so far as respects this case, the learned judge erred in charging that, if the permits were obtained by fraud, they are of no effect.

A contrary construction of the act from what is now contended for induced the court erroneously, as is submitted, to permit evidence to be given of frauds on the revenue, committed by the original importers in other importations and in other ways, thus treating the claimant as a *particeps criminum*. It may be admitted that, in cases of conspiracy, fraud, &c., the *quo animo* may be shown by evidence of similar frauds committed by the same parties about the same time. But this rule has never been extended farther. To oblige an innocent purchaser to defend his vendor, or perhaps his more remote vendor, from every imputation of fraud that may be brought against him, though unconnected with the goods bought by him, and of which he could have had no knowledge, would be to impose a hardship so intolerable as to be revolting to every sense of justice; and yet perhaps it is the necessary consequence of the construction now complained of.

On the part of the United States, *Mr. Johnson* (Attorney-General) made the following points:

1. That probable cause was shown for the prosecution, so as to throw the *onus probandi* of innocence on the claimant. *Wood* v. *United States*, 16 Pet., 342; *Taylor* v. *Blackburn*, 3 How., 197; *Buckley* v. *United States*, 4 Id., 251; *Clifton* v. *United States*, Id., 242.

2. That the acts and declarations of John Taylor, Jr., and
*378] William Blackburne & Co., showing fraud in the entries, *invoices, and concealment of other goods than the goods in question, were evidence as tending to show fraud in the entries, invoices, and concealment of the latter goods. Same authorities above cited.

3. That the goods not being invoiced, at the time of their entry, at the actual cost at the place of exportation, but below the said cost, and with the design to evade the duties thereon, the same were at once forfeited to the United States; not only as against the fraudulent importer, but as against a purchaser without notice from such importer. Same authorities as are cited under the first point, and *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 398; *Roberts* v. *Witherhead*, 5 Mod., 193; 12 Mod., 92; 1 Salk., 223; *Lockyer* v. *Offley*, 1 T. R., 252; *Wilkins* v. *Despard*, 5 T. R., 112.

4. That the United States were entitled to recover under the first and second counts of the information, although the goods were unladen and delivered with permits, if these permits were obtained by fraud and improper means; and that they were entitled to recover if the goods were imported with a view to defraud the revenue. *Bottomley* v. *United States*, 1 Story, 146.

5. That the instructions asked below, by the claimant, as to the construction of the fourth section of the act of 1830, and the fourteenth of that of 1832, and the proof which the United States should offer to bring the present case within these sections, were erroneous; but if not, the judge below was right in saying, that, independent of these acts, the United States were entitled to recover under the act of 1799. The same authorities as are cited under the first point.

6. That, admitting that a purchaser for value and without notice could not be affected by a forfeiture under the sixty-sixth section of the act of 1799, yet the judgment below being on the first, second, and fourth counts, is correct, because the first plea of the claimant does not profess to answer the first and second counts; and the second plea, which is to all the counts, is no answer to the first and second counts, and being bad in part, is bad altogether. 7 Cranch, 339; 16 Pet., 357;

4 How., 250; 1 Chit. Pl., 546; *Biggs* v. *Cox*, 7 Dowl. & Ry., 410.

Mr. Justice WAYNE delivered the opinion of the court.

We shall direct the reversal of the judgment of the Circuit Court in this case, on account of three erroneous instructions which were given to the jury. The prayers upon which those instructions were given are the fifth, sixth, and seventh.

*They involve the question, as to the time when the right of forfeiture attaches upon the entry of goods [*379 invoiced at less than their value at the place of exportation, under a statute which declares in such a case, that either the goods, or the value of them, shall be forfeited.

The instructions were given by the learned judge in the court below upon the supposition that they were required by the decision which this court made in *Wood's case*, 16 Pet., 342, particularly upon account of a sentence in the opinion at the three hundred and sixty-fifth page of the volume.

It was supposed to be a repetition in that case of what had been adjudged by the court, in the cases of *The United States* v. 1960 *Bags of Coffee*, and in *The Brigantine Mars*, 8 Cranch, 398, 417. Or that those cases did not permit instructions to be given to the jury as they were asked by the counsel for the claimants, and did permit the court to give the following:—That the title of the United States vested in the goods entered upon an undervalued invoice, at the time the fraud was committed, and the law authorized the United States to seize the goods wherever they might be found.

Neither of the cases mentioned authorizes such a conclusion. There is a sentence in *Wood's case*, from which it may be made, unless it is carefully considered in connection with the last of the paragraph and with the first part of the next. That sentence is,—"But under the sixty-sixth section no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it was ascertained."

The sixty-sixth section of the act to regulate the collection of duties upon imports and tonnage, (1 Stat. at L., 677,) is, "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or

the value thereof, to be recovered from the person making the entry, shall be forfeited."

It cannot be correctly said, when the declaration of forfeiture is disjunctively one or the other, of either the goods or their value, that the forfeiture upon the fraudulent entry necessarily and compulsively comprehends the first, to the exclusion of the value of the goods, which is also said may be a forfeiture—that is, that the goods are forfeited with a *380] right in the government to assert a forfeiture of the value too, where the penalty *for the fraud committed can only be one of them, and not both; or that when this court said in *Wood's case*, speaking of the sixty-sixth section, that "forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," it was not intended to embrace either or both penalties, between which the United States might make its election for the punishment of the fraud.

That such is the meaning of the sentence already cited from *Wood's case* is shown by the court's recognition, in the next, of the alternative forfeiture of the value of the goods, to be recovered of the person making the false entry; and, also, by the use it makes of it, to show that the sixty-sixth section had not been repealed, because no such provision exists in the acts of 1830 or 1832, and no subsequent act covers all the cases provided for by it. The point in discussion in that part of the opinion was, whether the sixty-sixth section of the act of 1799, ch. 22, had been repealed, or whether it was in full force. The court, arguing against the repeal, used the alternative forfeiture in it of the value of the goods, and the want of the same in other acts, to show that it was still in full force; in that way satisfactorily establishing that the words, "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," apply to the entry; not to make the goods a vested forfeiture in the United States, but to show that the right in the United States to either forfeiture is co-existent with the commission of the fraud.

But if the explanation given of that part of *Wood's case* shall not be as satisfactory to others as it is to ourselves, though we think it will be so to all persons, we then say, that the point there in discussion, concerning the sixty-sixth section, is altogether different from that which we are here considering under the same section; and that any declaration concerning it used argumentatively, only to show a difference between it and other statutes in a point of pleading, as is the fact in that part of the opinion, cannot be an applicable authority, much less controlling, when the inquiry under the

same statute is its meaning in respect to the attachment of penalties in it for its violation.

In *Wood's case*, the point in discussion is, that the United States are not entitled to recover under the third count in that information, because the sixty-sixth section of the act of Congress, passed the 2d of March, 1799, entitled "an act to regulate the collection of duties on imports, &c.," was not in force when the goods mentioned in the count were imported.

The point we are now considering, arising under the same *section is, Are goods entered upon an invoice [*381 not according to the value thereof at the place of exportation, with design to evade the duties thereon or any part thereof, *eo instanti* upon the false entry a forfeiture to the United States, so as to avoid an intermediate sale of them to a *bonâ fide* purchaser, or one altogether ignorant of the fraud, and in no way connected with the perpetrator of it, except in buying the goods from him for a fair price? The claimants in this case contended, in the trial in the Circuit Court, that neither under the sixty-sixth nor the sixty-eighth section were the goods, *eo instanti* upon the commission of the fraud, forfeited to the United States, "if the goods seized had been fairly and *bonâ fide* purchased by them, without any knowledge by them of their being liable to seizure, and were, at the time of the seizure, openly exposed by them for sale in their stores, though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto." And, "that though the goods in question had been invoiced at less than actual cost of them at the place of exportation, with design to evade the duties thereon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof. And that any rights in said goods acquired *bonâ fide* by third persons in the meantime are protected against the right of forfeiture under the sixty-sixth section.

The claimants asked that such instructions should be given by the court to the jury. The court refused, but did instruct the jury, "that if the goods were fraudulently entered, it is no matter in whose possession they were when seized, or whether the United States had made an election between the penalties; and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser." This instruction is partly right and partly wrong; right in respect to the sixty-eighth section, as the penalty is the forfeiture of the goods without an alternative of their value; wrong as the instruction applies

to the sixty-sixth section, the forfeiture under it being either the goods or their value.

In the first, the forfeiture is, the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but *the right to them* relates backwards to the time the *382] offence was committed, *so as to avoid all intermediate sales of them between the commission of the offence and condemnation.

So this court said in the case of *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 398. It was said again, in the case of *The United States* v. *Brigantine Mars*, 8 Cranch, 417. Declared again four years afterwards, in *Gelston* v. *Hoyt*, 3 Wheat., 311, in these words:—"The forfeiture must be deemed to attach at the moment the offence is committed," so as to avoid all sales afterwards.

The differences in time when the transfer of right in forfeited goods takes place, under such provisions for forfeiture as are found in the sixty-sixth and sixty-eighth sections of the act of 1799, were fully considered and ruled by this court in *United States* v. *Grundy and Thornburg*, 3 Cranch, 337. It was afterwards noticed and assented to by the Attorney-General of the United States, in his argument in the case of the 1960 *Bags of Coffee*, 8 Cranch, 398; and has always been considered, from the time it was made, as the proper interpretation of a statute providing for a forfeiture for an offence, either of goods *or their value*. No case can be found in our own or the English courts in conflict with it.

We must therefore say, that the instructions given upon the fifth and sixth prayers of the claimants were erroneous.

Our conclusion, also, is, that there was error in the instruction given by the court upon the seventh prayer of the claimants. The prayer is, "that the United States are not entitled to recover, under the *first and second counts* of the information, unless the goods were unladen and delivered without permits." The difference between the first and second counts is, that the allegation in the first is, that the goods were brought into some port or place in the United States *unknown*, unladen and delivered; and in the second, that they were brought into the *port of New York*, and unladen and delivered there; and in both, without any permit or special license from the collector or any other competent officer of the customs.

The response of the court to the prayer is,—"If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue."

The direct and proper response to that prayer ought to have been, that, as the first and second counts were framed upon the fiftieth section of the act of 1799, by which a fine is imposed upon persons unlading and delivering goods without a permit, if the jury should find that the goods in question had been *so unladen by the claimants, then they [*383 were liable to the penalty provided in that section; or if the goods were unladen by them with a permit, the jury could not find a verdict against the claimants upon the first and second counts.[1]

The prayer does not involve, either in terms or inferentially from them, the legal effect or sufficiency of a permit obtained by improper means, or fraud upon the unlading of goods under it; or that the permit under which the goods in question may have been landed had been fraudulently obtained, and the goods landed under it by the claimants. When, then, the jury were told, that a permit obtained by fraud or improper means was of no effect and a nullity, it was virtually saying to them, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying, if they thought that there was evidence enough to prove the fact against them. And the court, by adding, that "the United States are entitled to recover, if *the goods were imported with the view to defraud the revenue*," stated a proposition out of the case; for there was no such count in the information, or any statute of the United States, for the punishment of frauds in the importation of goods, upon which a count could have been framed in the words of the instruction. The instruction was calculated to mislead the jury into a conclusion, that the suit was against the claim-

[1] Where no statute interferes, the court has the power to modify the instructions asked in accordance with what it deems the law to be. *Castle* v. *Bullard*, 23 How., 172, 190; *Pleak* v. *Chambers*, 7 B. Mon. (Ky.), 565, 569; *Horton* v. *Williams*, 21 Minn., 187, 192; *Dodge* v. *Rogers*, 9 Id., 223; even though pertinent and relevant to the case, the court may yet change the form of them. *Pitts* v. *Whitman*, 2 Story, 609, 620; and in case the judge answers points submitted to him by counsel (as in Pennsylvania), the rule is the same. *Patterson* v. *Kountz*, 63 Pa. St., 46; *Groft* v. *Weakland*, 34 Id., 304; *Deaken* v. *Temple*, 41 Id., 234. But after giving the instruction as asked, the judge should not weaken it by language of his own, thus leaving the jury in doubt. *Horton* v. *Williams*, 21 Minn., 187.

ants for a meditated fraud in the importation of the goods in question, which had rendered them liable to be forfeited.

It is not necessary to notice the other prayers asked, refused, and given in this case. It was argued before this court only upon the three already stated, the answers to which we have said are erroneous.

We shall, therefore, remand the cause, with an order for the reversal of the judgment, and for a *venire de novo*, that further proceedings may be had thereon in conformity with this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with *384] directions to enter a disaffirmance of the judgment of the District *Court, and to remand this cause to the said District Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

EDMUND T. H. GIBSON, PLAINTIFF IN ERROR, *v.* BRADFORD B. STEVENS, DEFENDANT.

Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee.[1]

Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.[2]

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[1] CITED. *Hatch* v. *Oil Co.*, 10 Otto, 128; *Leonard* v. *Davis*, 1 Black, 483; *Merchants' &c. Bank* v. *Hibbard*, 48 Mich., 123. S. P. *Trieber* v. *Andrews*, 31 Ark., 163; *Re Batchelder*, 2 Low., 245; *Schoonmaker* v. *Vervalen*, 9 Hun (N. Y.), 138.

[2] DISTINGUISHED. *Adams* v. *Merchants' Nat. Bank*, 9 Biss., 400. FOLLOWED. *Hoyt* v. *Hartford Fire Ins.*