Statement of the case.

with sufficient surety to pay to Sebre Howard and Selah Chamberlain all such sums as may come into the hands of said company, which shall hereafter be found to be rightfully applicable to the payment of their claims, if they shall be established as liens on said road. And the appellants to recover their costs in this court.

ACTION ACCORDINGLY.

UNITED STATES v. STONE.

1. The United States may properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued by itself, ignorantly or in mistake, for lands reserved from sale by law, and a grant of which by patent was therefore void.
2. The southern boundary of Camp Leavenworth is the line as established by the surveyor, McCoy, A. D. 1830, for such extent as it was adopted by the subsequent surveys of Captains Johnson and Hunt, A. D. 1839, 1854, and by the Government of the United States. The Secretary of the Interior, in 1861, transcended his authority when he ordered surveys to be made north of it.
3. The treaty of 30th May, 1860, between the United States and the Delaware Indians, conferred a right to locate grants only on that portion of the Delawares' lands reserved for their "permanent home" by the treaty of 6th May, 1854, and did not authorize their location on that portion of those lands which, by that treaty, were to be sold for their uses.

THE United States, by treaty with the Delaware Indians, in 1818, agreed to provide for them a country to reside in; and in 1829, by supplementary treaty, agreed that the country in the fork of the Kansas and Missouri Rivers, extending "up the Missouri TO Camp Leavenworth," should be conveyed and secured to them as their said home.

A Senate resolution of 29th May, 1830, ratifying this treaty, provided that the President should employ a surveyor to run the lines, to establish certain and notorious landmarks, and to distinguish the boundaries of the granted country, *in the presence of an agent of the Delawares*, and to report to the President his proceedings, with a map; and

that, when the President was satisfied that the proceedings had been concurred in and approved by the agent of the Delawares, *he should also approve of the same by his signature and seal of office, and cause a copy to be filed among the archives of the Government.*

In 1827,—more than two years prior to this supplemental treaty,—Colonel Leavenworth, by orders of the Government, had selected a site for a "permanent cantonment" on the same bank of the Missouri; which site has always since been in the occupancy of the United States as a military post, and is the "Camp Leavenworth" referred to in the supplemental treaty above mentioned. The precise limits or extent of this cantonment, as originally fixed, if any were fixed, did not appear. The region at that time was wild; and the cantonment was one for shelter, rather than for defence.

Pursuant to the Senate resolution, one McCoy, a surveyor, made a survey in the summer of 1830, and made a report also of it, with a plat, in compliance with his instructions. His plat was now produced. In his report, McCoy says: "In the treaty no provision was made for a military *reserve* at Cantonment Leavenworth. It has been thought desirable that a tract of six miles on the Missouri River, and four miles back, should be secured for this object. Accordingly, the survey about the garrison has been made with a view to such a reservation, as will be seen by reference to the plat. *In this arrangement the Delaware chief, to whom the whole was fully explained on the ground, has cordially acquiesced.*"

No copy, however, of this report, with any map approved by the agent of the Delawares, or with the signature and seal of the President as provided for in the Senate resolutions, was found in the War Office. It did not appear that search was made in the State Department. There was, however, a copy without the President's signature or seal of office found in the War Office, and filed among its documents, directed to the Secretary of War.

The next survey of the military tract about Fort Leavenworth was made by Captain A. R. Johnson, in 1839, under orders, and a map of the survey filed in the War Depart-

ment. By this map, the *southern* boundary of the military tract appears as originally fixed by McCoy, in 1830, but the *western* boundary was somewhat changed by taking a natural boundary, instead of a geographical line run by McCoy.

In 1854, the Secretary of War ordered a survey to be made, and a reservation laid off for military purposes at the fort, which survey was made by Captain Hunt; and being approved by the Secretary of War, the land therein set off was directed by the President to be reserved for military purposes. This survey also followed the southern boundary line run by McCoy, in 1830; but Captain Hunt thought it proper to limit this line so as to exclude a part of the land embraced in the original reservation of 1830 and in the survey by Captain Johnson. In his report, Captain Hunt, after stating that the line is run with McCoy's southern boundary, says: "But as the reserve, as formerly laid out, was much larger than I conceived necessary under my instructions, I only went out two and three quarter miles on this line, and thence along the top of 'The Bluffs' as near as I could, to make a good boundary to the Missouri River."

This final survey made a camp of about three miles square; the usual size of our camps.

By treaty of the 6th of May, 1854, the Delaware Indians ceded to the United States all the land in the forks already mentioned, with the exception of a certain part reserved in the treaty,—no part of which reserved portion was north of McCoy's line as limited by Captain Hunt. This *reserved* part was to be still their "permanent home." The treaty provided that the United States would have the ceded country surveyed and offered for sale, and pay the Indians the moneys received therefrom. It provided, also, that, when the Delawares desired it, the President might cause the country reserved for their "permanent home" to be surveyed in the same manner as the ceded country was to be surveyed, and might assign such uniform portions to each person or family as should be designated by the principal men of the tribe.

Statement of the case.

In making the surveys under this treaty of May 6, 1854, the lands between the western line of McCoy's survey of 1830 and the western line of Hunt's survey of 1854 were surveyed, and were afterwards sold, by order of the President, for the benefit of the Delawares. But in those surveys, the western line of Hunt and the southern line of both McCoy and Hunt, as far west as Hunt ran, were accepted as the true lines of the military reservation, and no surveys under the treaty were made therein.

By the next treaty with the Delawares (made May 30, 1860), it was agreed that, in consideration of long and faithful services, certain of their chiefs should "have allotted to each a tract of land," to be selected by themselves, and should receive "a patent in fee therefor from the President of the United States."

The Commissioner of Indian Affairs, in the year 1861, informed the Commissioner of the General Land Office that the Secretary of the Interior had decided that the land lying between the fort and the southern line of McCoy's survey belonged to the Delawares, and had ordered the same to be surveyed. And the chiefs, or one Stone, rather, to whom they had assigned their "floats," having made selections in this strip, and everything having gone through the usual forms, patents passed the great seals, and having been signed by the President, were delivered to the chiefs, or to their agent, and subsequently to Stone, who now held, by deed from them, the estates granted.

The patents all recited the promises of the treaty of 1860 to grant land to the chiefs, and went on to grant the particular tract, "in conformity with the provisions, as above recited, of the aforesaid treaty." In 1862, the Secretary of the Interior decided that the patents had been issued without legal authority, and *he* declared them void and revoked. However, to proceed rightly, the United States filed a bill in the Federal court of Kansas, against the Indian chiefs and Stone, to have them judicially decreed null, and the instruments themselves delivered up for cancellation. The court gave the decree asked for. Appeal here.

Argument in support of the patent.

Messrs. Stinson and Browning, with whom were Messrs. Ewing and Carlisle, for the appellant Stone.

1. The recitals of the patent are conclusive, that the lands were within the class from which the chiefs might select. The language of the treaty of 1860 is, "there shall be allotted" to the grantees, to be selected by themselves, so many acres of land. There are no words of limitation upon this power of selection. It is made the duty of the President to issue patents for the lands so selected. This duty is cast, by the laws of the United States, upon the Commissioner of the General Land Office, under the direction of the President. The selections having been made, it was the duty of the commissioner, of course, either to pass upon them, under the direction of the President, and by procuring the patent to issue, make the allotment complete, or else to refuse to approve and ratify the selection. The interests of the Delawares were under the supervision of the Commissioner of Indian Affairs. These selections were made; they received the approval of the Commisioner of Indian Affairs, and were sanctioned by the President and the Commissioner of the General Land Office, by the issuing the patents.

The principal case in which the jurisdiction of chancery is affirmed to annul patents, at the suit of the sovereign,* is put upon the ground of fraud practised by the patentee. This is believed to be the only ground upon which the courts of chancery have heretofore taken jurisdiction in such cases. Admitting, however, that if the land were within the boundaries of any military reservation, a mere grant of it might be voidable, yet where the Commissioner of the General Land Office and the President declare, as they do here, that *they are acting "in conformity with the provisions of a treaty"* which authorizes grants only of lands *not* in such reservation, then the Government is concluded. It is estopped to say that the land was in a military fort. The discretion of saying what portion of these lands was open to patent, is vested by the

* Attorney-General *v.* Vernon, 2 Reports in Chancery; S. C., 1 Vernon, 277.

Argument in support of the patent.

Government in its officers, and the discretion having been exercised honestly, the decision is conclusive upon the Government. When no wrong is done to an individual, "it is supposed the acts of the executive, within the general scope of its powers and by virtue of law, cannot be removed, though to some extent the letter of the law may not have been followed. There is no court of errors in which executive decisions that do not affect individual rights can be reversed."* Any other doctrine would transfer the decision of every question of boundary and location which might arise in the sale of the public lands from the Land Office to the courts, and reduce letters patent under the great seal from the highest to the lowest grade of evidence of title. While the mere issuing of the patent has been treated by the courts as a purely ministerial act, yet the patent, when issued, becomes conclusive evidence of all the matters essential to the legality of its issue.

2. But, in point of fact, are these lands within the camp? Camp Leavenworth was located, in 1827, upon the public lands of the United States. There was no rule or usage which attached adjacent lands to such a camp. *Mitchell* v. *United States*† will, perhaps, be relied on by the other side as an authority for a limit of three miles. But that curtilage established in that case was founded on a Spanish usage in regard to fortified places, and even then a purchase from or cession by the Indians was necessary.

The authority to appropriate a portion of the public domain, in the vicinity of military posts, to their use, is conceded to the President as an incident to his power to establish such posts; but some actual appropriation is necessary; the establishment of a *camp* does not *proprià vigore* also establish a military reservation about it.‡ However, in this case there is no evidence even of a disposition by the President to have any part of this land; for it was provided by the treaty of 1829, that when the President is satisfied that the boundaries,

* United States *v.* Lytle et al., 5 McLean, 9; Astrom et al. *v.* Hammond, 3 Id. 107.

† 9 Peters, 711; S. C. Id. 52. ‡ Wilcox *v.* Jackson, 13 Id. 498.

as fixed by the surveyor, have been concurred in by such agent, he shall approve the proceedings under his signature and seal of office, and the boundaries so fixed shall be conclusive upon the parties to the treaty. There is no evidence that he ever did approve of anything. The non-production of the required map is rather proof that he did not. Whenever the United States have sought to reserve the right to establish military posts upon lands granted to an Indian tribe, the reservation has been distinctly made in the treaty containing the grant.* In 1832, the United States, by treaty, ceded to the Kickapoo Indians a portion of country immediately north of the reservation of the Delawares; but prescribed the boundaries of the ceded country, so as to exclude a large area northwardly and westwardly, from Camp Leavenworth. This express reservation, in that case, is presumptive evidence that no such reservation was implied or intended in the treaty with the Delawares of 1829.†

The faith and dignity of the Government forbid that any claim should be made on its behalf to the lands in controversy by reason of occupancy and possession. In no case can the United States acquire title by pre-emption. Here the Indians could not sue,—the Government could not be sued. The peculiarly fiduciary relations of the Government to the Indians, and their condition of absolute dependence, would in any event destroy the presumption of a grant which might in other cases arise from such possession unexplained.

Mr. Coffey, special counsel of the United States, contra.

1. This court has settled that the issuing of a patent for public lands is a ministerial act, which must be performed according to law; and that where it has been issued, whether fraudulently or not, *without authority of law*, it is void. The

* 7 Stat. at Large, 15, Art. 3; 17, Art. 4–7, 8; 22, Art. 3; 24, Art. 3; 30, Art. 10; 33 Art. 1, 2; 51, Art. 4; 56, Art. 4; 68, Art. 3; 86, Art. 11; 93, Art. 1; 314, Art. 9.

† Id. 389–391.

doctrine was strongly stated in *The State of Minnesota* v. *Bachelder* at the last term.* And such patents have been repeatedly declared void, both at law and in equity, though, as Marshall, C. J., says, "A court of equity is better adapted to the purpose than a court of law."† *Ladiga* v. *Roland*,‡ where an act of the President, under a special authority by treaty in disposing of Indian lands, was declared void for not conforming to the treaty, is, in principle, not unlike the present case. In *Jackson* v. *Lawton*,§ Kent, C. J., says, that the general rule is, that letters patent can only be avoided in chancery by a writ of *scire facias* sued out on the part of the Government, or by some individual prosecuting in its name; but he admits the equitable remedy also as a true one. He thus speaks: "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. In addition to the remedy by *scire facias*, &c., there is another by bill in the equity side of the Court of Chancery. Such a bill was sustained in the case of the *Attorney-General* v. *Vernon*,‖ to set aside letters patent obtained by fraud, and they were set aside by a decree."

Where the United States is the party injured, as in this case, these principles are equally available for her relief. The patents, it is true, were issued by her officer, but she is not bound by their unauthorized acts. Her officers can bind her only within the scope of their lawful authority.

Plainly, too, the appropriate remedy of the United States, to set aside and cancel patents issued by her officers, without due legal authority, is by bill in equity.

2. The question then remains, What was the southern boundary of the fort? The line we apprehend as run by the surveyor, McCoy. This person made his survey in substantial compliance with the terms of the Senate resolution,

* 1 Wallace, 115.

† Polk *v.* Wendell, 9 Cranch, 98; Hoofnagle *v.* Anderson, 7 Wheaton, 214; Cunningham *v.* Ashley, 14 Howard, 389; Lindsey *v.* Miller, 6 Peters, 674; Brown *v.* Clements, 3 Howard, 667.

‡ 5 Howard, 581. § 10 Johnson, 24. ‖ 1 Vernon, 277.

and with the approval of the agent of the tribe. He reported his proceedings to the Secretary of War, the minister then intrusted with that branch of executive duty; and the map of his survey, taken from the records of the Government, is in evidence. In the absence of specific proof, the formal approval of the President will be presumed, as well because the condition upon which that approval depended was performed, viz., the concurrence of the agent of the Delawares in the survey, as, moreover, because no other survey of the Delaware grant was ever made afterwards, but the tribe took possession and held under that survey without objection for twenty-five years. This long acquiescence by both parties, with actual possession by the Delawares on one side of the lines, and by the United States on the other, must be conclusive.

Its recognition and adoption by the Executive Department is shown by the survey of Johnson in 1839; by the survey of Hunt in 1854; and the subsequent reservation by the President of the land therein embraced for military purposes, and by other evidence in the case. And the fact that the Secretary of the Interior, in 1861, overruling the decision of his predecessors, ordered surveys to be made north of that line, does not weaken the significance of this recognition.

The line was to run up the Missouri "*to*" Camp Leavenworth; but the treaty did not attempt to designate the site of the camp. That was a question of fact to be ascertained and determined by the United States, which had the right as absolute owner to say how far its selected military camp should extend. The proper person to decide that question was the authorized surveyor, who, in the presence and with the sanction of the Indian agent, was marking on the ground the vague boundaries fixed by the treaty. After twenty-five years of acquiescence by both parties in that designation, it must be accepted as an authoritative construction of the treaty, having the force of the treaty itself. The land in question was therefore never a part of the grant to the Delawares.

No law, or even uniform practice, has ever fixed a method by which the limits of a military reservation out of the public lands must be ascertained and marked. Each reservation has been designated in its own way, and some of them, as that of Rock Island, have never been surveyed at all. The survey of the exterior lines of the reservation of Camp Leavenworth by McCoy, has more of legal form and authority, as a designation of the reserve, than that of many others. This court, in *Mitchell et al.* v. *United States*,* directed that where the boundaries of land, ceded by the Indians to the King of Spain, in Florida, for the erection of a fort, could not be ascertained, the adjacent lands, which were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress for military purposes, should be reserved with the fortress for the use of the United States; that if no evidence could be obtained to designate the extent of the adjacent lands which were considered as annexed to the fortress, then so much land should be comprehended in the reservation as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. And if no such military usage could be proved, then it was ordered that the reservation consist of the land embraced within certain lines extending from the point of junction of two rivers *three miles* up both of said rivers.

Attorney-General Butler, who argued the case for the United States, suggests† that the length of three miles was probably selected, because generally considered the extreme distance to which a cannon-shot can be thrown. In an official opinion of his he advises the application of the rule laid down by the court in that decree,‡ in ascertaining the extent of other unsurveyed reservations out of the public lands for military purposes. If the rule be that the reservation should extend three miles around the fort, the line of McCoy, as altered by Johnson and Hunt, has kept within those limits. And whether three miles was fixed by the

* 9 Peters, 761, 762.

† 3 Opinions of the Attorneys-General, 110. ‡ Ib.

supposed length to which a cannon-shot could be thrown or not, it is clear that it was wisely adopted to protect military fortifications from encroachments like that in the present case, which actually, if I may here state a fact, takes part of the necessary buildings of the fort.

3. The treaty of 30th of May, 1860, conferred on the chiefs the right to select their respective portions of land from the body of land reserved to the tribe for its "permanent home" by the treaty of May 6, 1854, and from that body of land only; and, therefore, any selection made, even by themselves in good faith, outside of that permanent home, on the lands granted to the tribe by the supplemental treaty of 1829, and afterwards ceded to the United States in trust for the tribe by the treaty of May 6, 1854, would be unauthorized and void.

Mr. Justice GRIER delivered the opinion of the court.

A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy.

Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

It is contended here, by the counsel of the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the Government,

and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.

The grant to the Delaware Indians in 1829 calls for Camp Leavenworth as a boundary; consequently, the camp and its appurtenances were not included in the grant. What lands properly belonged to this military post, and the proper curtilage necessary for the use and enjoyment of it not being fixed with precision in the general description of the land granted, could be ascertained only by a survey on the ground.

The resolution of the Senate of May 29th, 1830, provides that the President should employ a surveyor "to run the lines, and to establish certain and notorious landmarks accurately and permanently, to distinguish the boundaries of the country granted, in the presence of an agent to be designated by the Delaware nation, the surveyor to make report with a map or draft of the said granted country," &c. The Secretary of War, by the authority of the President, referred the execution of this duty to a surveyor (McCoy), instructing him "to be governed in every particular by the treaty and the resolution of the Senate."

No copy of this report, with the map approved by the agent of the Delawares, and with the signature and seal of the President, as provided for in the Senate resolution, is found in the War Office, and it does not appear that search was made in the State Department. There is, however, a copy found in the War Office, directed to the Secretary of War, and filed among its documents.

This survey was made in the presence of the agent of the Delawares. It marked the usual quantity of about three miles square, as appurtenant to the post and necessary for its use and subsistence, making the lines thereof the boundary of the grant to the Delawares, with the concurrence and consent of the agent of the nation. It was made in the year 1830, and since that time both parties have held pos-

session and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case, notwithstanding the absence or loss of the document required by the resolution of the Senate.

The authority of the President, acting through the Secretary of War and his officers, to have posts and forts established, with a proper quantity of ground appropriated for the use of each reserved from sale, is fully discussed and decided in *Wilcox* v. *Jackson*.

In 1854, a survey was made under orders of the Secretary of War, "including the buildings and improvements, and so much land as may be necessary for military purposes, at Fort Leavenworth." This survey adopted the southern boundary as run by McCoy, and commenced at the same point. It did not include all the land reserved by that survey, but the land now claimed is embraced within its limits. This survey was approved by the President, and the land contained in it formally reserved for military purposes. The survey made of the Delaware lands, under the treaty of 1854, adopted the McCoy line.

The Secretary of the Interior, in 1861, transcended his authority when he attempted to overrule the acts of his predecessors, and ordered surveys to be made north of that line to include the land now in question.

We are of opinion, therefore,

1st. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

2d. That it is within the limits of a reservation legally made by the President for military purposes.

Consequently, the patents issued to the appellant were without authority and void.

Statement of the case.

The question on the construction of the treaty of 1860, as to whether the grants to the chiefs and interpreter were to be located within that portion of these lands which was reserved for their "permanent home," or in that portion which was to be sold for their use, would be also fatal to the claim of appellant. But the decision of the other points in the case make this one only hypothetical, and, as it is a question not likely to ever arise again, we think it unnecessary to vindicate our opinion by arguments.

DECREE AFFIRMED.

THE ANN CAROLINE.

1. The ordinary and settled rule of navigation, that when two vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard side shall give way and pass to the right, does not apply when one is to the windward of the other, and ahead of or above her in a narrow channel, so that an observance of it would probably produce a collision.
2. Stipulators in admiralty, who have entered into stipulations to procure the discharge of a vessel attached under a libel for collision, cannot be made liable for more than the amount assumed in their stipulation as the amount which the offending vessel is worth, with costs as stipulated for.
3. The true damage incurred by a party whose vessel has been sunk by collision being the value of his vessel, that sum (without interest) was given in a proceeding *in rem.*, where the value of the offending vessel was fixed in stipulations that had been entered into to procure her discharge at that identical sum.

THIS was an appeal in admiralty from the decree of the Circuit Court for the Southern District of New York, in a case of collision at sea,—the case being thus:

The owner of the schooner J. C. Wells filed a libel in admiralty in the Southern District of New York against the schooner Ann Caroline, to recover damages for a collision occurring on the eastern shore of the Delaware Bay. The two vessels were beating up the bay of a fine morning in February, 1854, in company with several other vessels, and