sion. The argument, therefore, not being supported by the fact, is inapplicable the case.

The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the district of Columbia, is exempt from the performance of militia duty.

It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.

The judgment is reversed, and the cause remanded for further proceedings.

United States *v.* Grundy and Thornburgh.

Forfeiture.

Under the act of congress of December 31st, 1792, which declares, that if a false oath be taken in order to procure a register for a vessel, the vessel or its value shall be forfeited, the United States have an election to proceed against the vessel as forfeited, or against the person who took the false oath, for its value. But until that election is made, the property of the vessel does not vest in the United States; and the United States cannot maintain an action for money had and received, against the assignees of the person who took the oath, and who had become bankrupt; the assignees having sold the vessel, and received the purchase-money before seizure of the vessel.[1]

Error to the Circuit Court of the United States for the district of Maryland, in an action for money had and received for the use of the United States, by the defendants, as assignees of Aquila Brown, jr., a bankrupt; it being money received by the defendants for the sale of the ship Anthony Mangin, which ship the United States alleged was forfeited to them, by
*338] reason that Brown, in *order to obtain a register for her, as a ship of the United States, had falsely sworn that she was his sole property, when he knew that she was in part owned by an alien.

On the general issue, a verdict was rendered for the defendants, and the plaintiffs took three bills of exception.

1. The first stated that they gave in evidence to the jury, that on the 25th of November 1801, and for several months before and after, Aquila Brown, jr., a citizen of the United States, and Harman Henry Hackman, a subject of the elector of Hanover, were copartners in merchandise, and carried on trade at Baltimore, under the firm of Brown & Hackman, and that Brown, at the same time, carried on trade at Baltimore, on his separate account, under the firm of A. Brown, jr. That before that day, and during the year preceding, the ship Anthony Mangin was built, rigged and equipped, within the United States, for the house of Brown & Hackman, under a contract made for them, and under their authority, and was paid for with

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[1] Caldwell *v.* United States, 8 How. 366. It is otherwise, when no such option is given to the United States, but an absolute forfeiture is declared; in such cases, the forfeiture relates to the commission of the offence, and will override a subsequent sale to a *bonâ fide* purchaser. The Neptune, 3 Wheat. 607; Caldwell *v.* United States, 8 How. 381–2; Henderson's Distilled Spirits, 14 Wall. 44, 56; The Monte Christo, 6 Ben. 148.

their funds, and that, on that day, Brown applied to the collector for a register for that ship, in his own name, and as his sole property, and for that purpose, took and subscribed the usual oath, which contains an asseveration that he then was the true and only owner of that ship, and that no subject or citizen of any foreign prince or state was then, directly or indirectly, interested therein, or in the profits or issues thereof; whereupon, a register was granted to him in the usual form. That afterwards, and after the 28th day of the same November, A. Brown, jr., as well as Brown & Hackman, were declared bankrupts, and their effects severally assigned, the defendants being the assignees of A. Brown, jr. The plaintiffs, in order to prove that the ship, at the time of taking the oath, was the property of the house of Brown & Hackman, and belonged in part to Hackman, an alien, offered Hackman himself as a witness, who objected to be sworn, alleging that he ought not to be compelled to give evidence against his interest. Upon the *voir dire*, he explained his interest thus: that if the plaintiffs should recover in this action, the funds of the estate of Brown would be diminished by the whole amount recovered. That Brown & Hackman had drawn and indorsed bills of exchange to a large *amount, which had come to the hands of the [*339
United States by indorsement, and he believed himself to be liable therefor, in case of failure of the funds of Brown. Whereupon, the court was of opinion, that he was not a competent witness for the plaintiffs.

2. The second bill of exceptions stated (in addition to the facts contained in the first) that the plaintiffs, in order to prove that, at the time of the oath, the ship was the property of Brown & Hackman, offered to swear a witness to prove, that in a book, purporting to be one of the books of account of Brown & Hackman, in the possession of one of the assignees of Hackman, who refused to produce it at the trial, although it was then in his possession, he saw an entry in the handwriting of Hackman, purporting to be made on the 28th of November 1801, charging the freight of the ship, on her then intended voyage, to the debit of Brown, and to the credit of Brown & Hackman. But the court rejected the evidence as inadmissible for that purpose.

3. The third bill of exceptions (in addition to the facts contained in the former bills) stated, that the plaintiffs offered to prove, that at the time of Brown's taking the oath and obtaining the register in his own name, the ship was owned in part by Hackman, an alien, and that Brown knew the fact to be so. That afterwards, and before the bringing of this action, Brown became bankrupt, and his effects were assigned to the defendants. That at the time of his bankruptcy, and of the assignment, the ship was in his possession, and that by virtue of the assignment, the defendants took her into their possession, as part of the estate of Brown, and sold her to a certain Thomas W. Norman, for $18,250, which sum they received, and at the time of trial, had in their possession. The defendants then gave in evidence that, after the sale of the ship to Norman, the United States seized her as forfeited; and libelled her in the district court. That Norman filed his claim, and upon proof and hearing, the judge dismissed the libel. That no action had ever been instituted by the United States against Brown. Whereupon, the attorney for the United States prayed the court to direct the jury, that if they believed the matters *so offered in evidence on the part of the [*340
United States, the United States were entitled to recover, in this action, the said sum of $18,250, which direction the court refused to give; but

instructed the jury, that if they believed, that any of the matters of fact in the oath of Brown alleged, were within his knowledge, and were not true, the said evidence given by the plaintiffs was not sufficient in law to maintain the present action.

Breckenridge, Attorney-General of the United States.—The great question in this cause is, whether the property of the ship Anthony Mangin vested in the United States, upon the commission of the act of forfeiture by Brown, without a sentence of condemnation.

This action is founded on the act of December 31st, 1792, "for registering and recording of ships and vessels." (1 U. S. Stat. 286.) We contend, that under the 4th section of this act, no sentence of condemnation was necessary to vest the property in the United States. This section, after stating the nature of the oath required in order to obtain a register of the ship, says, "And in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered (with costs of suit) of the person by whom such oath shall have been made."

A forfeiture by statute is analogous to a forfeiture at common law. At the common law, by an outlawry, the property of the outlaw immediately vests in the crown without office found. Co. Litt. 128 *b*.

The English court, upon the statute of 12 *Car. II., c.* 18, which creates forfeitures very similar to those of our statute, have decided, that by the act of forfeiture, the property is so completely divested from the owner and vested in the crown, that detinue can be maintained for it. *Roberts* v. *Withered*, 5 Mod. 193; s. c. Comb. 361; 12 Mod. 92; 1 Salk. 223. And Rookby, J., said, "the property is divested out of the owner, by importa-
*341] tion, *but not vested in him that sues, until bringing the action, or seizure." That case has been recognised and made the ground of decision in a late case. *Wilkins* v. *Despard*, 5 T. R. 112. These cases decide, that the right to recover either the specific goods, or their value, does necessarily give to the court the right to determine the question of forfeiture.

If the right of the United States was only inchoate, at the commencement of the suit, the judgment in this case would have completed it, as effectually as a sentence of condemnation. The United States might have proceeded either *in rem*, or for the value of the ship. They might either seize and libel the ship, or sue the person.

In the case of seizure of a ship under the act of August 4th, 1790 (1 U. S. Stat.), there must be a prosecution in conformity with the regulations of the 67th section of that act; and an important question arises, whether we are thereby prevented from proceeding *in personam* for the value of the thing forfeited. We contend, that we may proceed either way; for of what use are the word "or the value thereof," if the recovery must be by seizure and condemnation? The words being in the alternative, leave us that option. In *Roberts* v. *Withered*, it is said, "that though some persons proceed by way of information, upon the forfeitures, yet actions of detinue will

nevertheless lie." 5 Mod. 194. Suppose, the act had declared that the party shall forfeit $1000, would not an action lie for this money?

But admitting that the act of 1790 requires a sentence of condemnation, to vest the right in the United States, we contend, that the 29th section of the act of December 31st, 1792, under which the present action is brought, does not. (1 U. S. Stat. 298.) Although it refers to the act of 1790, it is only for the purpose of designating the courts in which the recovery is to be had; and to the manner of disposing of the forfeiture. It has no reference to the kind of suit, or to the manner of proceeding, to effect the recovery *of the subject. The words of the 29th section are, "that all penalties and forfeitures which may be incurred, for offences against this act, [*342 shall and may be sued for, prosecuted and recovered, in such courts, and be disposed of, in such manner, as any penalties and forfeitures which may be incurred for offences against the act (of 1790) may legally be sued for, prosecuted, recovered and disposed of."

The statute of 12 Car. II. has stronger expressions to show that a sentence of condemnation was necessary to vest the property. Its words are, "under the penalty of forfeiture of ship and goods, one moiety to his majesty, and the other moiety to him or them that shall inform, seize or sue for the same." Our statute is not only silent as to the mode of recovery, whether by information, seizure or suit, but contains the words "or the value thereof" (which the British statute does not), and therefore, recognises any mode of recovery, by which that value can be obtained.

It is not unworthy of remark, that vessels are, by the act of 1790, rendered liable to forfeiture, in three cases, §§ 14, 27, 60, in neither of which is it declared, that "the value thereof" may be recovered. The 67th section, if intended to ascertain the forfeiture of ships by seizure and condemnation only, may operate consistently on that act, but it cannot, where an alternative is given to sue for the value. As we cannot proceed *in rem*, without a seizure, if a transfer or sale secures the property in the transferee or vendee, the law will, in this respect, be defeated.

Admitting that the vendee is safe, the offender is liable to be proceeded against *in personam*, for the value of the property forfeited: If so, his assignees, in case of his bankruptcy, are also; for his creditors have but an equitable lien on his estate in the hands of his assignees; and the United States have a legal right, which, after suit brought, has relation back to the time of the forfeiture.

*With respect to the exceptions to the witnesses, the court, in rejecting the testimony of Hackman, have carried the doctrine further [*343 than it is warranted by any precedent. It was, in fact, deciding that a witness may refuse to give testimony against a defendant, because that defendant is his debtor, and his testimony, by establishing the plaintiff's claim, would diminish the funds out of which the witness's claim might be satisfied. This interest is certainly too remote and contingent to exclude the witness. It may, perhaps, affect his credibility, but not his competency.

The other witness, who was called to prove the entry in the books of Brown & Hackman, was also improperly rejected. After the rejection of Hackman himself, and after proving the book to be in the possession of the opposite party, who refused to produce it, the next best evidence was the

testimony of a person who had seen the entry in the book, in the handwriting of Hackman.

The judgment of the district court upon the libel is no bar to the present action. That judgment was not given on the point of the forfeiture, but upon the ground that the United States could not follow the thing itself into the hands of a *bonâ fide* purchaser, for a valuable consideration without notice. It does not bar the remedy *in personam.*

P. B. Key and *Martin*, contrà.—1. As to the rejection of Hackman, as a witness. He was offered by the United States, to prove that he was an alien, and was interested in the ship, at the time the oath was taken by Brown. The defendant objected, and upon the *voir dire*, he declared himself interested, and objected to answering against his interest.

Key was about to read an authority, when the Chief Justice told him that no authorities would be required on that point. JOHNSON, J., said, he
*344] should *like to see the authority, for his own satisfaction. MARSHALL, Ch. J.—When we said, there was no necessity for authorities, we meant authorities to prove that a man, in a civil case, is not bound to testify against his interest. But this does not preclude the objection, that the facts stated by the witness, as the ground of his interest, did not prove him to be interested. *Key* then cited Peake's Law of Ev. 132.

2. As to the rejection of the witness who was called to prove the entry in the books of Brown & Hackman. There was no proof that it was one of the books of that firm; nor was any notice given to the defendants to produce it. It was not proved to be in the possession of the defendants, but in that of the assignees of Brown & Hackman, who were different persons. The plaintiffs might have had a *subpœna duces tecum.* The ground of the opinion of the court was, that the testimony offered was not the best evidence, as the book itself might have been had.

3. The important question in the cause is, whether, by the act of forfeiture, the property vested in the United States, before condemnation. We admit, that the owner of property may maintain trover against a vendee, claiming under a third person, and disaffirm the sale; or he may affirm the sale, and bring an action for the price. The present action is grounded on the right of property being in the United States, at the time of the sale. The seizure of the vessel was not made by the United States, until after the assignees of Brown had sold and delivered her to a third person.

If the present action is not founded on the right of property, the action should have been debt for the penalty, or a special action on the case, grounded upon the statute, and averring every matter necessary to entitle
*345] the United States to recover. *The right of the United States to the property, depends upon the act of 1792. The 4th section, which declares the forfeiture and penalty, is silent as to the remedy. When the act creating a penalty is silent as to its mode of recovery, the action must be debt, or case on the statute. The only remedy, then, which the United States had, was either by a seizure of the ship, or an action of debt, or special action on the case, for the penalty. But the present is an action for money had and received. It is not grounded on a crime or a *tort.*

The United States have lost their remedy *in rem*, by suffering it to be

sold, without notice. Upon this point, the sentence of the district court, which has been acquiesced under, is conclusive; for it goes upon the ground that the United States had not the right to the thing, at the time of the sale; for if they had, the vendee gained no legal title, and therefore, could not be protected by the want of notice. But he was protected by want of notice; he must, therefore, have gained a legal title, which could be protected. He could gain his legal title only from the assignees, but they could not convey a legal title which was not in them. At the time of sale, therefore, the legal title must have been in the assignees; and as there could not be two legal titles to the same thing, at the same time, in different persons, the title could not be in the United States. This is the consequence which inevitably results from the sentence.

Having lost their remedy against the thing, their only alternative is an action for the penalty against the person who took the false oath. The act provides no substitute for the process *in rem*, but the action against that person; it gives no right of action against the person who may be in possession of the thing. No action for the penalty will lie against Brown's assignees. It is in the nature of a criminal prosecution.

*The act gives the United States an election of one of two remedies, but not of both. They may proceed *in rem*, or *in personam*. [*346
Until their election is made, the thing itself is not forfeited, for they may never choose to proceed against the thing, but may prefer the remedy against the person. They have made their election, by proceeding *in rem*; having failed there, they could not take the other side of the alternative, and sue for its value. The sentence has been submitted to, and is conclusive, until reversed.

Suppose, the libel had been dismissed, because it was not sufficiently proved that Brown had sworn falsely, or that he knew he was swearing falsely, could the United States turn round, and try the same question again, upon an action against Brown for the penalty? Or, after suing Brown for the penalty, and failing to recover judgment against him, could they seize the ship, and try the question over again. A judgment, until reversed, is conclusive as to the subject-matter of it. *Moses* v. *Macferlan*, 2 Burr. 1009.

At common law, a forfeiture does not alter the property, until there is some act done by the party claiming the forfeiture, either *en pais*, or of record. A forfeiture of lands relates back to the time laid in the indictment; but the forfeiture of goods relates to the time of conviction. In both cases, the time must appear of record. Co. Litt. 390 *b*, 391 *a*. In case of *deodand*, nothing is forfeited, until it be found by inquest. So, in the case of *felo de se*, no part of the personal estate is forfeited to the king, before the self-murder is found by inquisition. So, in the cases of flight, and of goods waived. 1 Hawk. P. C. 101, 104.

The case of *Roberts* v. *Withered*, 5 Mod. 193, was decided on the ground that an action of detinue was a process *in rem*, and equivalent to a seizure.

**Harper*, in reply.—1. As to the exclusion of Hackman's testimony. [*347
It may, perhaps, be safely admitted, that if the testimony has an immediate, direct and certain effect upon his interest, a man may be excused from

testifying. But in the present case, it depended upon several contingencies. 1st. Whether Brown's estate would be sufficient to pay the claim of the United States; 2d. Whether Hackman's certificate would bar the United States, a point not yet decided, and upon which legal opinions differ; 3d. Whether the United States would choose to resort to Hackman, until the effects of Brown were exhausted; and 4th. Whether there would be any surplus of Hackman's estate. The authority from Peake 132, is not to the point; for he says, that the testimony must go to establish a debt against himself, before the witness can be excused from giving it. And the case which he cites from Strange 406, shows that it is only a matter of indulgence, and not of right, even in such a case: for although the witness was bail in the action, yet if he was a subscribing witness, the Chief Justice said, he would oblige him to swear.

2. As to the testimony respecting the book. It was proved, that the book was in the hands of the assignee of Hackman, who refused to produce it. We could not issue a *subpœna duces tecum*, because the book was a private document; and it not being in the possession of the defendants we could not compel them to bring it in, under the act of congress. Between a bankrupt and his assignees, there is a perfect privity as to all matters of contract and interest. The book, therefore, must be supposed to be in the hands of Hackman; and as the court refused to compel him to testify, or to produce the book, evidence of its contents was the next best evidence in our power. As to this case, it was as if the book had been lost or destroyed. If a subscribing witness to a bond be out of the reach of the process of the court, you cannot compel him to testify, but you may give evidence of his handwriting.

*348] 3. As to the main question. *The defendants are not sued as assignees. The action is against them in their own right, as having received money to which the United States are entitled. We say, that they have taken property of the United States, and sold it, and we are entitled to the money. The forfeiture of the value is to be recovered of the person who took the oath; but this does not prevent the United States from pursuing such other remedies as they might have had by reason of the forfeiture. If, then, the forfeiture gave the United States the right to the thing, they are entitled to the present remedy.

The question is, at what time did the property vest in the United States by reason of the forfeiture? The case in 5 T. R. refers to, and recognises, the law as decided in *Roberts* v. *Withered*, in 5 Mod. The decision there was, that by the illegal act of the party, the property was divested out of him. The doctrine of abeyance does not exist in any case: it has been laughed out of existence. The property must be somewhere. If it does not vest in a private owner, it goes to the sovereign, or to the government. If divested out of the owner, it goes, *eo instanti*, to the person to whose use it is forfeited. When the forfeiture accrues to a private person, he must do some act to entitle himself. But not so in the case of the king; it vests in him immediately. He is not bound to do any act. In the case of *Roberts qui tam* v. *Withered*, 5 Mod. 193, the right of the informer did not accrue until the action brought; but the whole had gone to the king by the forfeiture. The offence divests the property, but it is not vested in an informer,

until action brought. In the mean time, it is in the king. The informer's right only vests by action.

There is a difference between a forfeiture by statute, and a forfeiture by common law. The common law says, the king shall have it, if he will; but the statute says, it shall absolutely vest in the king. By the statute, the king, speaking by the legislature, has determined his will; he has made his election to have the thing. But the statutory remedy does not take away the common-law remedy: it is cumulative. The United States are not obliged to resort to the statutory remedy.

*But it is said, that the United States had an election, and that no right to the thing vested, until they made their election. We may admit it; but we say, we have elected the present remedy. Admit, that we elected to seize the vessel. It had escaped; it was gone out of our power. It was still an election, and we are now proceeding in an action for its value. The election will relate back. We have the whole three years to make the election. If we pass the three years, the property goes back to the former owner. The value is not to be considered as a penalty, but as a debt. We might have brought *detinue* or *trover* for the ship, instead of an action for the value, or a seizure. [*349

We admit, the sentence cannot be inquired into; but it does not affect the present question. The decision was not on the point of the forfeiture.

February 22d, 1806. MARSHALL, Ch. J., delivered the opinion of the court.—This action is brought to recover money, received by the defendants, for a ship sold by them as the assignees of Aquila Brown, a bankrupt: which ship is considered, in this cause, as having been liable to forfeiture, under the "act for registering and recording ships or vessels." It is founded on the idea, that, at the time of sale, the ship was the property of the United States, in virtue of the act of forfeiture which had been committed, and of the proceedings of the United States in consequence of that act.

It appears, that in 1801, Aquila Brown, jr., then carrying on trade in his own name, in Baltimore, obtained a register for the Anthony Mangin, as his sole property; having first taken the oath which the law requires, to enable him to obtain such register. He afterwards became a bankrupt, and the Anthony Mangin passed, with his other effects, to his assignees, who sold her for the money now claimed by the United States. After *this sale, facts were discovered, inducing the opinion that a certain Harman Henry Hackman, a foreigner, was part-owner of the vessel, a circumstance within the knowledge of Aquila Brown; and upon this ground, she was seized and libelled in the court of admiralty. By the sentence of that court, the libel was adjudged not to be supported, and was dismissed. It is agreed, and is so stated in the reasoning of the judge, which accompanied his opinion, that this sentence was not intended to decide the question of forfeiture; but was founded on the alienation of the vessel, before the forfeiture was claimed. Acquiescing in this decision, the United States brought the present action. At the trial, the judge instructed the jury, that this action was not maintainable, although they should be of opinion, that the fact alleged in the oath, which was taken to obtain the register, was untrue, within the knowledge of the person taking the oath. To this instruction, an [*350

exception was taken; and upon that, among other points, the cause comes into this court.

The words of the act under which the right of the United States accrues are: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made."

The question made at the bar is, whether, by virtue of this act, the absolute property in the ship or vessel vests in the United States, either in fact or in contemplation of law, on the taking of the false oath; or remains in the owners, until the United States shall perform some act, manifesting their election to take the ship and not the value. So far as respects this question, the effect of the sentence in the court of admiralty is put out of the case, for the court has not decided what the effect of that sentence will be.

It has been proved, that in all forfeitures accruing at common law, nothing vests in the government, until *some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence; but the distinction taken by the counsel for the United States, between forfeitures at common law, and those accruing under a statute, is certainly a sound one. Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.

*351]

The cases cited from 5 Mod. and 5 Term Reports, are certainly strong cases. Whether they can be reconciled to the general principles of English law, need not be considered, because the present inquiry respects the construction of an act of congress, containing words which vary essentially from those used in the acts of the British parliament, on which those decisions were made. The question, therefore, does the ship vest absolutely in the United States, so as to make it their property, whether such be the choice of the government or not, or may they elect to reject the ship and proceed for its value? must be decided by the particular words of the act.

The words, taken according to their natural import, certainly indicate, that an alternative is presented to the United States. "There shall be a forfeiture of the ship, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath shall have been made." Had a special action on the case been brought against the person, by whom the oath was made, stating circumstances on which a forfeiture would arise, and averring an election on the part of the United States to claim the value, it would be a very bold use of the power of construction which is placed in a court of justice, to say, that such an action could not be maintained, because the vessel itself was vested in the government, and the value was only given, in the event of the vessel being withdrawn from its grasp.

*In addition to the obvious and natural import of the words used by the legislature, the opinion that an alternative is given to the

*352]

government, derives some strength from the consideration, that the forfeitures are claimed from distinct persons. If the ship be forfeited, she is claimed from all the owners. In an action for the Anthony Mangin, Harman Henry Hackman could not have defended himself, by averring his interest in the vessel, and that only the share of Brown was forfeited; but in an action against Hackman, for the value, the declaration, or information, must have averred that he was the person who took the false oath, and proof that it was taken by his partner, would not have supported that averment. They are, then, distinct forfeitures, claimed from different persons. The ship, from the owners; the value, from the particular owner who has taken the false oath. The United States are entitled to both, or to only one of them. A right to both has not, and certainly cannot, be asserted. If there be a right only to one, the government may elect to take either, but until the election be made, the title to the one is perfectly equal to the title to the other.

It seems to be of the very nature of a right to elect one of two things, that actual ownership is not acquired in either, until it be elected; and if the penalty of an offence be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering, materially, the situation in which that person is placed, to say, that either is vested in him, before he makes that choice. If both are vested in him, it is not an election which to take, but which to reject; it is not a forfeiture of one of two things, but a forfeiture of two things, of which one only can be retained. That the legislature may pass such an act is certain; but that the one under consideration is such an act, is not admitted by the court.

If the property in the vessel was actually vested in the United States, by the commission of the offence, then the judgment of a court, condemning the vessel, *or declaring it to belong to the government, would, in [*353
fact, do nothing more than ascertain that the offence had been committed; it would not vest the thing more completely in the government, in point of right, than it was vested by the commission of the offence. If, notwithstanding the complete ownership of the vessel, which the argument supposes in the government, immediately upon the act of forfeiture, and in virtue of that act, a suit for the value might have been maintained, it would seem to follow, that a judgment, declaring the vessel to be the property of the United States, would not bar an action for the value, provided the benefit of that judgment had not been received by the United States. The real principle on which an action for the value can be maintained, would seem to be, that the ship itself did not belong to the United States in consequence of the false oath, but in consequence of the election to take the ship. If this election be not made, and the government shall elect the value, then the property of the vessel remains in the original owners, and is no obstacle to a suit for the value. But if this opinion be mistaken; if the property in the ship be immediately vested in the government, notwithstanding which the value may be claimed, the court cannot distinctly perceive why the same action might not be maintained, notwithstanding the declaration of a court that the property was in the United States, provided the benefit of their judgment was not obtained. In this view of the case, if the court of admiralty had decreed in favor of the United States, and the Anthony Mangin

had been destroyed, before the benefit of that judgment had been received the person who had taken the false oath might still have been sued for the value. This would never be contended; and yet, if the absolute ownership of the vessel by the United States does not preclude a right to sue for the value, before a judgment be rendered, there is some difficulty in discerning when it will preclude that right. In fact, the idea that one of two things is actually vested in government, by an act to which forfeiture is attached, seems incompatible with the idea of a right to elect which of two things shall vest.

It seems, then, to be the necessary construction of the act of congress *354] that the United States acquired no *property in the Anthony Mangin, until they elected to pursue that part of the alternative given by the statute. Of consequence, the money for which that vessel was sold, was not, at the time, received for the use of the United States; but for the use of the creditors of the bankrupt.

To decide finally on the propriety of supporting the claim of the United States, as made in this action, under that branch of the statute which forfeits the vessel, another question still remains to be investigated. Has the doctrine of relation such an influence upon this case, that an election, subsequent to the sale, shall carry back the title of the United States to the commission of the act of forfeiture, so as, by this fiction of law, to make them the real owners of the vessel at the time of sale, and consequently, of the money for which she was sold?

Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing, which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. To carry back the title to the Anthony Mangin to the act of forfeiture, the title to the Anthony Mangin must have an actual existence. If no such title exists, then the right to elect the vessel is lost, and the statute has not forfeited the money for which she was sold in lieu of her. Suppose, instead of being sold by the defendants, she had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable, by the doctrine of relation, in lieu of the Anthony Mangin? Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

The court will not inquire whether an action on the case, against Grundy & Thornburgh, for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown. But some objections to it may be stated, which deserve consideration. It certainly gives no notice of the nature of the claim, a cir- *355] cumstance *with which, in a case like this, the ordinary rules of justice ought not to dispense. It asserts a claim, founded on a crime yet remaining to be proved, not against the person who has committed that crime, or against him who possesses the thing which is liable for it, but against those who, though the assignees of the effects, are not the assignees of the *torts* committed by the bankrupt. It may change the nature of the defence. The court suggests these difficulties, as probably constituting objections to the action, without deciding on them. The points previously

determined show that it is not maintainable in this case, under that alternative of the statute which subjects the vessel to forfeiture.

It remains to be inquired, whether it can be maintained under the provision which gives a right to sue for the value. Upon this part of the case, no doubt was ever entertained. Not only must the declaration specially set forth the facts on which the right of the United States accrued, and the law which gives their title, but the action must be brought against the person who has committed the offence. Discarding those words which relate to other objects, and reading those only on which the claim to the value is founded, the statute enacts, that "in case any of the matters of fact in the said oath alleged which shall be within the knowledge of the party so swearing, shall not be true, there shall be a forfeiture of the value of the vessel, in respect to which the same shall have been made, to be recovered, with costs of suit, of the person by whom such oath shall have been made." It certainly requires no commentary on these words, to prove that an action for the value can only be supported against the person who has taken the oath.

It being the opinion of the court that this action is not maintainable, under any proof offered by the plaintiffs, it was deemed unnecessary to inquire whether the other exceptions in the record be well or ill founded.

*Without declaring any opinion respecting them, the judgment of the circuit court is affirmed. [*356

Judgment affirmed.(*a*)

(*a*) The opinion of Judge WINCHESTER, in the case of United States *v.* The Anthony Mangin, Norman, claimant, referred to in the argument, was as follows:[1]

The libel is grounded on the statute for enrolling and registering ships and vessels. The proceedings being *in rem*, all the world become parties to the sentence, so far as the right of property is involved; and of course, all persons any wise interested in the property in question are admissible to claim and defend their interests.

The libel states the cause of action, with all the averments necessary to support the affirmative allegation, that a forfeiture has accrued. The only claimant intervening in this cause, is T. W. Norman, who alleges himself to be a purchaser *bonâ fide*, for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase; and under such purchase, *i. e.*, *bonâ fide*, and for valuable consideration, claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits.

On these proceedings, several questions of law have been raised and argued by the counsel; and as the great point in the cause does not appear to have ever received, either in this country or Great Britain, any direct judicial determination, I have, with great diligence, examined into the questions, which, from the breaking the cause, I saw must necessarily be involved in the determination. The opinion which I am now to give, though the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court, upon a new, great and important legal question, and which will probably receive, as it ought, the ultimate judgment of the supreme court.

It is necessary to keep in different views, the questions of fact in issue, the questions of law arising from those facts, and the parties between whom they arise. It is to be distinctly remembered, that A. Brown, whose wilful perjury is alleged to sustain the forfeiture sued for, is no party to this suit; neither are his assignees, in any shape, parties to this suit, to be directly affected by the judgment. Every consideration,

[1] 2 Pet. Adm. 452.

therefore, which would support a prosecution against the actual offender, to recover the penalty of his wilful crime, or which might be alleged against those who stand in his situation, as privies in law *quoad* the forfeiture, must be laid out of the case. The only parties to this case are, the United States and the informant, as libellants, and T. W. Norman, as claimant of the ship.

I think it peculiarly necessary to confine my opinion to the state of facts, and the questions of law applying to the parties in court, because it is not necessary for me to decide, whether the assignees of A. Brown are clothed with any of the essential characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had; and the question *de bonâ fide emptoris*, does arise directly upon Captain Norman's claim, and will determine this case. To that I shall, therefore, immediately proceed.

No seizure was made, nor libel filed against the ship, until after Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration; nor until after he had obtained a new register, in his own name, upon that purchase. It is argued by the libellant's counsel, that Brown was not competent to pass any property to his assignees, nor they, to any purchaser under them, as the forfeiture relates back to vest the property from the time of the false oath, and that the claim of the libellants is paramount to that of the claimant The defendant's counsel argue, in support of his claim, that the relation back to the time of the offence is never admitted, to overreach rights intermediately acquired by third persons.

In commenting upon the case from 1 T. R. 252, when the argument was first opened, Mr. Martin pressed very strongly the *dictum* of Lord KENYON, that if the relation back to the time of an offence was admitted, as to the property, it would, in every case, equally relate to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases for applying the argument *ab inconvenienti*, and as such I was forcibly struck with it, when mentioned. The manner in which Lord KENYON is reported to have made this observation, plainly shows it to be the declaration of a sudden impression, and which, though correct as applied to some special cases, is not so in the latitude reported, either at common law, the civil law, or in equity, supported by policy.

1. At common law, even as to the guilty party, no attainder whatsoever has relation, as to the mesne profits of land, but only from the time of the attainder. 3 Bac. 272; Co. Litt. 290 *b*, 118 *a*.

2. By the civil law, and the rules of equity adopted from that code, a subsequent possessor is not only not in a worse situation than those from whom he derives his possession, but even in cases where the original possessor might be bound to restore profit, a *bonâ fide* possessor is exempt from any such obligation; as in the case of a *bonâ fide* purchaser. *Bonâ fide emptor non dubie percipiendo fructus etiam ex re aliena, interim suos facait, non tantum cos qui diligentia et opera ejus proveniunt, sed omnes; quia quod ad fructus attinet loco domini est.* Zouch, Q. J. C. 213.

3. It would not be equitable or just, in the abstract, to permit a legal owner to lie by, to avail himself of the ignorance of an innocent holder. And the same considerations of policy, which, in England, permit the offender and his family to enjoy the profits of lands forfeited for treason, which is a strong and acknowledged case of relation to the offence, lest the land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offence, or only to the time of conviction.

As this reason against relation does not appear to have the force it carried at first view, we must have recourse, 1st. To the principles of decision in analogous cases; in their application, always having regard (as was justly argued by Mr. Harper, on the motion to produce Brown's examination before the commissioners) "that a relation back shall never be admitted to injure the rights of third persons, nor to protect or favor wrong." And, 2d. To the statute under which the forfeiture is claimed in this case.

The adjudged cases on this subject, are six classes of offences, which incur a forfeit-

ure of real estate (2 Bl. Com. 267); and seventeen which produce a forfeiture of personal property (Ibid. 421). In this numerous classification, the principle which governs each description of cases does not materially differ. I have, therefore, selected only, 1st. The cases of outlawry, and attainder of crimes; and (as illustrative of these cases) 2d. Waived goods; 3d. Relation of executions at common law, and since the statute of Charles; and 4th (as involving the general doctrine of this case, and to explain the case of *Roberts* v. *Withered*, cited by Mr. Harper, from 5 Mod. 193; Salk. 223), a case of villeinage which governed that decision.

1. Attainder, or conviction of crimes and outlawry. Of this description, there are two classes, which are adjudged to have relation to the time of the offence committed, and overreach all intermediate alienations, treason and *felo de se*. The case of treason, in which the forfeiture as to land relates to the time of the offence committed, depends upon feudal principles. As the land could not be aliened by the tenant, voluntarily, it would be preposterous to admit that to be done, through the medium of a crime, which could not be done by a lawful act; and the power to sell, introduced by subsequent statutes, is construed as applying only to lawful alienations. The reason assigned in some books, that it shall relate to the offence, "because the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which, the same books admit, is only affected from the time of the conviction; and the time charged is traversable, even in the case of land, by third persons claiming an interest therein. 5 Bac. Abr. 228; Hale H. P. C. 261, 262; 3 Bac. Abr. 271; Plowd. 488; 8 Co. 170; Hale H. P. C. 264, 270; 3 Inst. 230. It is a proposition universally true, that the forfeiture, upon an attainder of treason, relates but to the conviction, as to chattels, unless the case of the offender killed in resisting, or flight, form an exemption, which may well be doubted. Indeed, says Lord Coke, it hath always been holden, that any one indicted of treason or felony, may *bonâ fide* sell any of his chattels, real or personal. 3 Bac. Abr. 271; Perk. 29; 8 Co. 171; *Jones* v. *Ashurst*, Skin. 357; 4 Com. Dig. Forfeiture, B. 4; 2 Inst. 48.

In the case of a *felo de se*, it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided. 3 Bac. Abr. 272. This is the only case I have ever discovered, in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a drag-net indeed. It may, perhaps, most correctly be considered as a case *sui generis*, and neither for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases. Those who are curious on this subject, will be amused with the argument of Chief Justice Dyer, on the drowning of Sir J. Hales, and will, probably, be as much convinced by the reasoning of the Chief Justice, as by the logic of the grave-digger in Hamlet, to prove that the drowning of Ophelia was *se defendendo*. Plowd. 262.

Outlawry subjects the party to forfeitures, which are well known to depend upon the nature of the suit on which they are prosecuted. Without inquiring when an office is necessary, or may be dispensed with by the crown, I shall mention one case, where, even after an outlawry (of which purchasers might always have notice, as it is a matter of record), a fair purchaser was protected, even against the crown. It is from Hardres 101, *Attorney-General* v. *Freeman*. A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands, among others, were found by inquisition; and this case was pleaded in bar, to bind the king before the inquisition. The court held, that a lease, or other estate made by the party, after outlawry, and before an inquisition taken, will prevent the king's title, if it be made *bonâ fide*, and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made after the inquisition, will take away or discharge the king's title. 5 Bac. Abr. 564; Salk. 395; Carth. 442.

These cases are strong to show the general protection afforded by law to fair purchasers, even where the forfeiture is *in rem*, and the offender is not actually divested of his possession, the necessity of which is directly affirmed in the second description of cases to which I have referred, viz:

2. Waived goods. "As to waived goods, these belong to the king, and are in him without any office, for the property is in nobody. They may belong in like manner to the lord of the manor, by grant, but not by prescription." 5 Bac. Abr. 517; 5 Co. 109. The general principle of these cases is conformable to that quoted by Mr. Harper from 12 Mod. 92, to show that an offence like that charged against Brown, divested the property out of him, and left it, as it were, in abeyance, until suit, which vested the property, by relation, from the act of forfeiture. A position of greater comprehension, or which, as a general one, should embrace the libellant's case, could scarcely be imagined. Waived goods are in the king, without office; that is, even without seizure, the purpose of which, as to legal title to the king, is answered by the office; the property is, as it were, in abeyance; yet this case, so completely applicable in its general principles, contains the strongest possible illustration of the doctrine, that a title by forfeiture, in the case of a personal chattel, begins from suit, seizure or conviction, and has no relation back; for "the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; for the lord's property begins from the seizure." 5 Bac. Abr. 517; Kitchen 82. This case is conclusive against Mr. Hollingsworth's argument, that this question is a question of property only, since it proves that property only begins from the seizure, which cannot be lawfully made to affect an intermediately vested right of a third person.

3. The relation of executions at common law, and since the statute; considering this case as one between the government and the claimant, from analogy to cases of the king's precedency in execution. By the statute of 33 Hen. VIII., c. 9, it is enacted, that if any suit be commenced or taken, or any process awarded for the recovery of any of the king's debts, then the same suit or process shall be preferred before any person or persons. And as to the king's execution of goods, the same relates to the time of awarding thereof, which is the *teste* of the writ; as it was in the case of a common person at common law. 2 Bac. Abr. 734.

Now, to apply this doctrine to the case before the court, and even admitting to this libel the same extent of relation as is admitted at common law upon the king's execution against personal chattels, and as to real and personal by the above recited statute, will it overreach the sale to Captain Norman? It is generally agreed, that an execution executed, though posterior to the time to which the king's extent relates, bars the king's priority; and in the case of Lechmere *v.* Thorowgood, 3 Mod. 236, Comb. 123, it was holden, that if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed, for the property of the goods is changed by the subject's execution. Here, then, we advance one step farther in restricting the doctrine of relation, as it applies to individual interests. It is presumed, that the principles of relation upon executions, since the statute, are too familiar to require any reference to adjudged cases.

The case of *Roberts* v. *Withered*, as reported by Salkeld, and copied by Bacon, is in these words: "By the act of navigation, 12 Car. II., c. 18, certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize or sue for the same." It was adjudged, that, in this case, the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villein distrained; for the bringing of the action vests a property in the plaintiff. When this case was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court than any which occurred in their researches. On a careful examination of that case, I now think, it will be found not to bear on the point now to be decided. In the first place, it may be observed, that the case, as reported, does not afford any ground to presume, that any other person than he who unlawfully imported the goods was interested in that suit; but on the contrary, it is presumable, that it was a suit against the original importer. In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation. And further, it is

to be remarked, that the question in that case, seems to have been only upon the form of action. It was detinue, which is founded on property; and all that that case decides is, that in a case of specific forfeiture, the bringing of a suit vests a property in the plaintiff, sufficient to sustain that form of action; for the case to which it is likened, and on which the decision rests, is express, to show it does not relate to the interests of others; for, says the book, "in this case the subject may bring detinue for such goods; as the lord may have replevin for the goods of his villein," which case, as I will show, goes not only to the form of action, but to the full length of this case. I will read that case. (*Vide* Littleton, § 177, with Lord COKE's comment thereon). So, in this case, the ship was liable to forfeiture, and might have been specifically recovered from Brown, by the government, or any prosecutor under its laws, before a *bonâ fide* alienation by him; but if they have waited until such alienation by him, and a third person has honestly bought and paid for the property, they may be answered in the language of Littleton, "that it shall be adjudged their folly, that they did not enter, when the offender was in possession;" for, according to Lord COKE, before such seizure, they had neither *jus in re*, nor *jus ad rem*, but only a right to sue, which I understood to be Lord COKE's possibility above referred to.

From all these cases and principles, I infer, that the relation of the forfeiture to the time of the offence, in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in case of forfeiture of chattels, the relation is only to the time of conviction; that the forfeiture to which a party is subjected, by statute, of a personal chattel, must be construed with relation to the continuance of his ownership in that chattel, at the time of conviction, and cannot be prosecuted *in rem*, to affect a *bonâ fide* purchaser for a valuable consideration; and this construction, I think not only warranted by the statute on which this suit is founded, and which speaks of a recovery of the value of the ship, but also by sound legal principles. The value can only be recovered against the actual offender, and never from a *bonâ fide* holder; for against the offender, it is the value at the time of the offence; even against a *malâ fide* holder, it is only of the thing, be the value of that thing greater or less. If any holder *bonâ fide* was liable, because of his possession, he would not be the less so, after he had parted with his possession; but he might be made answerable for the value of the thing, in the same manner as if the possession continue with him; but even where he was not strictly a *bonâ fide* holder, the remedy is lost, if his possession is gone. And it is but just, when two remedies are given to punish an offence, one of which shows the plain intent of the legislature, that it shall follow the offender, personally, or in his personal interests, so to construe the other remedies as not to permit them to be extended to involve others who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown, by his false swearing, subjected the ship to forfeiture *de facto*, and that no alienation by him could vest a better title in the vendee than the vendor possessed; and that as he held the ship subject to forfeiture, so any holder under him, or through him, must take subject to that forfeiture, is certainly a strong one. The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true, as a general principle; and the exceptions to its operation are those on which I rely to warrant my construction of the statute in providing for a recovery of the value of the ship, as well as to show that, in some instances, he who has no title at all may yet transfer a valid one to personal chattels. Robbery can give no title to goods, and upon conviction, there is a judgment of restitution, according to the statute, which fixes the remedy against any person in possession at the time of the conviction; and this is by the express provision of positive law. Yet, the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft, before conviction. And if the owner of goods loses them, by a fraud, and not a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them against a person, *e. g.*, a pawnbroker, who has fairly acquired a new right of property in them. If, therefore, he who hath

no title at all, may in some cases, nevertheless, give a legal right, *à fortiori*, he who holds by a title defeasible only within a limited time (for by the statute of limitation, the prosecution, in cases like the present, must be within three years) may transfer a good title to a fair purchaser for a valuable consideration. The language of Blackstone is very emphatic: "the right of proprietors of personal chattels is preserved from being divested, only so far as is consistent with that other necessary policy, that purchasers, *bonâ fide*, in a fair, open and regular manner, should not be afterwards put to difficulties, by reason of the previous knavery of the seller."

The statute provides, that in case of a wilful false oath, in any of the matters required, previous to the obtaining of the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which the same shall have been made, or the value thereof to be recovered," &c. It seems to me, to be the plain and just construction of this statute, that the wilful false swearing does not *ex directo* produce a forfeiture of the ship. The forfeiture is alternative, either of the ship, or the value of the ship, at the election of the government or persons suing; but not of both the ship and the value. If the government had recovered the value from Brown, there would have been an end of proceeding against the ship. And if the offence charged against Brown only produces a specific forfeiture by a subsequent election, the argument is cogent, that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity; and conclusive, that Brown's title was not forfeited *de facto*, but forfeitable only, and therefore, within the principles of the cases of villeinage and waived goods, before relied on by me, and expressly by Blackstone. 2 Com. 421.

Further, the forfeiture is of the ship, or the value. I have construed this clause somewhat differently from all the counsel, and though this circumstance produces doubts of its correctness, yet, as it has weighed with me, and minds of less comprehension may sometimes embrace truths which may escape superior understandings, I think it my duty to mention it. It is this. That the ship is not liable to forfeiture in the hands of any holder, other than the persons false swearing, in any case but where such holder would be liable to a suit for the value. The words, that there shall be a forfeiture of the ship, &c., or of the value thereof, to be recovered, with the costs of suit, of the person by whom such oath or affirmation shall have been made, plainly show the intent of the legislature, that the penalty and punishment should attach to the offender only. "To be recovered of the person," both grammatically and legally, relate to the object to be recovered, to wit, the ship, or the value thereof; and to the person from whom, and from whom only, the one or the other is to be recovered. The guilt of false swearing forfeits only such interests as the offender possessed; for, by the express provision of the 16th section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture; and the words of the statute, which connect the recovery with the forfeiture, in this case, exclude the idea of any recovery from an innocent holder. *Expressio unius est exclusio alterius.*

If the ship is forfeited by the sole act of the false swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers, in public market. Every particular sale would be a particular conversion, and every one through whose hands she may have passed might be sued for the value of the price; but the statute says, that the value shall only be recovered of the offender himself. A party having fairly obtained and fairly lost or departed with his possesion, would not, in such case, be liable for the thing, or its value. 3 Com. Dig. 359; 2 T. R. 750. If not liable, when his possession has honestly ceased, neither can he be made so, when it honestly continues, since his own act cannot vary his responsibility.

Does reason or policy require a different construction? The government prohibits an act, under a penalty against the party offending. They say, we, for this, forfeit the thing in respect to which you have sworn falsely, if it continues in existence, and is yours; but if lost, or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated, if sold, pay the value; if you have fraudulently impaired the thing, pay the value. The one or the other shall be re-

*Marine Insurance Company of Alexandria *v.* John and James H. Tucker.

Marine insurance.—Deviation.—Loss by capture.

If a vessel be insured "at and from Kingston, in Jamaica, to Alexandria," and take in a cargo at Kingston, for Baltimore and Alexandria, and sail with intent to go first to Baltimore, and from thence to Alexandria, and before she arrives at the dividing point, is captured; it is a case of intended deviation only, and not of non-inception of the voyage insured.[1]

It depends upon the particular circumstances of the case, whether, if the vessel be captured and re-captured, the loss shall be determined total or partial.

Error to the Circuit Court of the district of Columbia.

This was an action of covenant, by John and James H. Tucker, on a policy of insurance, dated September 1st, 1801, upon the sloop Eliza, at and from Kingston, in Jamaica, to Alexandria, in Virginia. *The defendants pleaded, 1st. That the vessel never sailed on the voyage insured, and was not prosecuting the voyage insured, at the time of the capture; and 2d. A general performance of the covenants contained in [*358 to *365

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covered of you, of *you*, the guilty party. But this prohibition contains no threat of punishment against an innocent holder. No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender; and the law can never require of a purchaser to examine into the secrets of the heart. It is more the interest and policy of government, to increase its wealth and strength, by the employment of its ships in trade and commerce, than to augment its revenues by forfeitures. It, therefore, wisely protects the interests of fair shipholders from forfeiture for the crimes of others, while it carefully provides for the punishment of fraudulent contraventions of its laws. Protection is not, by this construction, afforded to guilt or fraud; it is only a shield for innocence. The remedy remains, as it ought, against him who committed the offence. Government cannot be deprived of its forfeiture, by any fraudulent alienation. Such a sale would be void. *Jones* v. *Ashurst*, Skin. 357; *Twyne's Case*, 3 Co. 81; 2 Bl. Com. 421.

The possession is, legally, and to effectuate the statutory provision, still in the vendor. Indeed, all the reasoning on this subject is contained in two axioms of the civil law, to which this court may be allowed to refer. *In rem actione tenetur qui dolo desiit possidere.* Zouch, Elem. 197. *Et aliquando, qui feri non debet, factum valet; firmum et probum quod sit bonâ fide, improbatur autem quod sit malâ fide vel dolo.* Ibid. 41. If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interests of commerce, and the security of all shipholders.

I do, therefore, order and decree, that the libel in this case filed shall stand dismissed, and that the ship, &c., be restored to the claimant. But as the case involved questions of great difficulty, upon which eminent counsel have differed in opinion, and judges may differ, and it was proper, in every view of the case, to put those questions in a course of legal adjudication, I shall certify probable cause of seizure, and decree restitution, without costs.

[1] Winter *v.* Delaware Mutual Safety Ins. Co., 30 Penn. St. 334; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241; New York Firemen's Ins. Co., *v.* Lawrence, 14 Id. 46. The principle of this case is, that if there be no change of the *terminus* of the voyage insured, and the vessel actually sail for her intended port of destination, an intention to deviate by calling at an intermediate port for the delivery of cargo, will not avoid the insurance, if the ship be captured before arriving at the point of divergence, so that there is no actual deviation. The same doctrine was held in Winter *v.* Delaware Mutual Safety Ins. Co., *ut supra.*