Syllabus.

The only plausible ground upon which the jurisdiction can be sustained in the case before us is, that the several judgment creditors are proceeding against a common fund, which each is interested to have applied to the payment of his demand. But the same ground for the jurisdiction existed in the case of the seaman, salvors, and owners of cargo for damages. The answer is, that the interest of the judgment creditors in the common fund could not exceed the amount of their several and separate judgments, and if these are under the $2000, the same reason exists for cutting off the appeal as if the suit had been separate and not joint. Indeed, the joinder of parties complainant in the case of creditors' bills is so much a matter of form, that new parties may come in at almost any stage of the proceedings on a proper application; and, under special circumstances, even after decree, if they can show an interest in the common fund. And the party first instituting proceedings may do so on behalf of himself and all other creditors who may come in and assume their share of the costs and expenses.

DISMISSED FOR WANT OF JURISDICTION.

NOTE.—Similar decree made for the same reason in the case of *Field* v. *Bigelow*, and in one branch of *Myers* v. *Fenn*.

UNITED STATES *v.* REPENTIGNY.

1. On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property except so far as it may be secured by treaty.
2. Hence, where on such a conquest, treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

Syllabus.

3. Where a British Canadian subject has conveyed to a citizen of the United States, lands in what are now the United States, which lands such subject holds under a grant made to a French ancestor by the King of France in 1750 before Canada passed to Great Britain under its conquest in 1760, and while it yet was a French province, and embraced that part of what is now the United States containing them, the title is no longer a French, or English, but an American title, held under the laws of the United States, and subject to them.

4. *Semble*. Where Congress authorizes a court to hear a question of title, such as is above described, to which the United States is a party, and in adjudicating it to be governed by the law of nations and of the country from which the title was derived; by principles of natural justice and according to the law of nations and the stipulations of treaties, an objection of mere alienage and consequent incapacity to take or hold, must be regarded as waived.

5. A grant in the nature of a fief and seigniory was made to private individuals by the French government in 1750, of a tract of 214,000 acres at the Saut de St. Marie, in what is now Michigan, but was then called Canada, on condition of improvement and occupancy; one of the objects of the grant having been to afford a refuge for travellers in a region then a wilderness and inhabited by Indians only. In 1760, the region passed by conquest from France to Great Britain, and in 1783 in the same way from Great Britain to the United States. The grantees took possession immediately after the grant, occupying and improving the tract to a certain extent for four years, but no longer. They then came away, leaving there a person who had gone out and been there with them, but who did not claim under them. One of them went away from this continent in 1764, and died in France; apparently abandoning all interests on this continent: his heir (a French subject and in the naval service of France) received and considered in 1790, 1796, and 1804, offers of purchase more or less definite for his half, and in 1800 had made an *acte de notoriété*, or solemn declaration *in perpetuam memoriam rei*, of his claim to the estate; *doing however nothing more*. The other grantee was killed in 1760, and the alienee of his descendants sold, in 1796, the land to British subjects who had been always resident abroad, and who never in any way looked after the land. In 1824 or 1825, forty-two years after the territory within which the lands are situate had come into her possession, the parties in interest by derivation from the original grantees, made a claim to the United States for the land; this having been the first notice which the United States had of any title adverse to her own. In the meantime the United States had, in 1823, built a fort there for the protection and encouragement of settlers; her laws had been extended over it, the Indian title extinguished, the lands surveyed and put on sale, and were now and had been in a large part for years, covered with inhabitants.

Held, that even under an act of Congress which directed an adjudication to be made, among other ways, on principles of natural justice, the claim could not after such a lapse of time, and so considerable a failure to com-

ply with the conditions on which the grant was made, be sustained against the United States.

6. Where a tract on our Northern Lakes, containing over two hundred thousand acres of land, was granted in 1750 by the crown of France as a fief and seigniory, and on condition of improvement and occupancy, and with a view of its being a refuge and protection for travellers against Indians then inhabiting the region,—improvements which, besides a stockade fort, consisted in nothing but the erection of three or four temporary huts for laborers, the clearing of a few acres of land around the fort, planting the same with Indian corn, and the placing upon the tract of seven head of cattle and two horses, are an insufficient compliance with the conditions of improvement and occupancy; there not having been after 1754 (over a century before the commencement of the suit), any possession or occupancy by the grantees, or their descendants, tenants, or assigns, or further improvement.

7. Under the treaty of 1783 with Great Britain, at the close of our revolutionary war, the United States succeeded to all the rights, in that part of old Canada which now forms the State of Michigan, that existed in the King of France prior to its conquest from the French by the British in 1760; and among these rights, with that of dealing with the seigniorial estate of lands granted out as seigniories by the said king, after a forfeiture had occurred for non-fulfilment of the conditions of the fief. And under our system, a legislative act—after forfeiture from non-fulfilment of the seigniorial conditions,—directing the appropriation and possession of the land,—which is equivalent to the "office found" of the common law,—is sufficient to complete its reunion with the public domain.

APPEAL by the United States from a decree of the District Court of the United States decreeing to the representatives of the Chevalier de Repentigny and of Captain Louis De Bonne, a large tract of land at the Saut de St. Marie, under a grant from the French government, in the year 1751. The proceedings and case were thus:

On the 19th April, 1860, the Congress of the United States, at the instance of certain persons, representatives of the Chevalier de Repentigny and of Captain Louis De Bonne, ancient citizens of French Canada, one of whom had died in 1760, and the other in 1786, passed a law authorizing the District Court of the United States for Michigan to examine a claim which these representatives set up to certain land at the Saut de St. Marie in the State of Michigan, under an alleged grant made in the year 1750, by the French government to the said Repentigny and De Bonne.

Statement of the case.

Under this act of Congress, Louise de Repentigny and others, all females, and resident in Guadaloupe, the representatives by descent of the Chevalier de Repentigny, with one Colonel Rotton, the representative by purchase and devise of Captain De Bonne, filed their petition on the 9th January, 1861, in the nature of a bill in equity against the United States in the said District Court of Michigan. The bill set forth a grant, with certain conditions of occupancy, as a fief or seigniory, on the 18th October, 1750, to Repentigny and De Bonne, by the Marquis de la Jonquière, Governor of Canada, then a French province called New France, and by Monsieur Bigot, intendant of the same, of a large tract at the Saut de St. Marie, describing its nature and extent; a subsequent ratification by Louis XV, and the descents and purchases by which it was now vested in the petitioners. It set forth further that the Chevalier de Repentigny had entered upon the fief in October, 1750, and remained there till 1754; had caused clearing to be done there, put cattle on it by himself or his tenants, and had occupied the place as required by the terms of his grant, and that when withdrawing, about the year 1755, had left agents of the grantees in possession, who or whose representatives were still in occupancy of some parts of the tract; that the claim had never been abandoned; though, owing to the domicil of the parties in foreign countries, and occupations in the armies and navies of such countries, and in remote public service, the owners had not been aware of any mode in which their rights could be defined and specifically assured; that they had from the first relied implicitly upon the faith of treaties existent, as they averred, in the case, and upon the justice of the government of the United States to protect their rights and shield them from wrong; and, as respected some of the petitioners, women, descendants of Repentigny, that owing to their helplessness and the helplessness of their ancestors in respect to pecuniary means, they had been utterly unable to come to the United States and assert their rights, but had been obliged to remain absent and to trust to such exertions as their friends had

from time to time voluntarily made in their behalf to recover the said lands.

The answer of the United States denied generally most of the allegations of the bill; asserted more particularly that the claimants were all aliens; that the conditions of the alleged grant had not been fulfilled by the grantees; and that by the laws of ancient Canada the land had become reunited to the king's domain; that the fief had moreover been abandoned and deserted in fact, and stood possessed by the United States, no judicial forfeiture thereof having been, under the circumstances, necessary; that none of the parties in interest had ever complied with any of the acts of Congress, prescribing in what way claimants of lands in that region should indicate their possessions; that thus, in fact, as well as of right, the fief so abandoned and deserted was reunited to the supreme domain, vested in the people of the United States of America; and that the burden and cost of bringing the same into a productive and profitable estate by the general administration, survey, and settlement thereof, by extinguishing the Indian title thereto, by improvements in the way of public works, and otherwise, had ever since, that is to say, for sixty years and upwards, been thrown upon and borne by the United States. And it set up, moreover, that the land was incapable of identification, and the grant void, owing to the vagueness of the description.

The case, as made out by the evidence, was thus:

On the 18th of October, 1750, the Marquis de la Jonquière, Governor of Canada, then a French province, called New France, and Monsieur Bigot, intendant of the same, by instrument,—reciting that the Chevalier de Repentigny and Captain De Bonne, officers of the French army, entertaining the purpose of establishing a *seigniory*, had cast their eyes upon a place called the Saut of St. Marie; that settlements in that place would be most useful, as travellers from the neighboring ports, and those from the western sea, would there find a safe retreat, and by the care and precautions which the petitioners proposed to take, would destroy in

those parts the trade of Indians with the English,—made to the said Captain De Bonne and the said Chevalier de Repentigny a concession at the Saut, in what is the present State of Michigan, of a tract of land, "with six leagues front upon the portage by six leagues in depth, bordering the river which separates the two lakes," to be enjoyed by them, their heirs, and assignees, in perpetuity, by title of fief and seigniory, with the right of fishing and hunting within the whole extent of said concession, upon condition of doing faith and homage at the Castle of St. Louis at Quebec, of which they should hold said lands upon the customary rights and services according to the *coutume de Paris*, followed in that country, &c.; to hold and possess the same by themselves, to cause the same to be held and possessed by their tenants, and to cause all others to desert and give it up; *in default whereof it should be reunited to his majesty's domain*, &c.

The tract contained about 335 square miles, or 214,000 acres.

On the 24th of June, 1751, Louis XV, then King of France, by instrument or *brevet* of ratification, soon after duly registered at Quebec, confirmed the concession.

The instrument of concession orders that the grantees shall enjoy, in perpetuity, the land; and, among other things enjoined are, that they *improve* the said concession, and use and *occupy the same by their tenants; and that in default thereof the same shall be reunited to his majesty's domain.* . . . His majesty ordering that the said concession shall be subject to the conditions above expressed, "without thereby meaning to admit that they had not been stipulated for in the original grant."

A map of the military frontier, on which the tract was marked, was made by the government surveyor, Franquett, in 1752, and returned to the proper office in Paris.

The purposes of the Marquis La Jonquière, the Governor of Canada, in making the grant, and the views of the ministry at home, were set forth in certain contemporary correspondence between the marquis and the ministry, as follows:

THE GOVERNOR OF NEW FRANCE TO THE MINISTER OF MARINE AND THE COLONIES.

QUEBEC, CANADA, October 5th, 1751.

MY LORD: By my letter of the 24th August, of last year, I had the honor to let you know that in order to thwart the movements that the English do not cease to make in order to seduce the Indian nations of the North, I had sent the Sieur Chevalier de Repentigny to the Saut St. Marie, in order to make there an establishment at his own expense; to build there a palisade fort to stop the Indians of the northern posts who go to and from the English; to interrupt the commerce they carry on; stop and prevent the continuation of the "talks," and of the presents which the English send to those nations to corrupt them, to put them entirely in their interests, and inspire them with feelings of hate and aversion for the French.

Moreover, I had in view in that establishment to secure a retreat to the French travellers, especially to those who trade in the northern part, and for that purpose to clear the lands which are proper for the production of Indian corn there, and to subserve thereby the victualling necessary to the people of said post, and even to the needs of the voyagers.

The said Sieur de Repentigny has fulfilled, in all points, the first object of my orders.

[A part of the letter here omitted is given further on, at pages 219–20.]

In regard to the *second* object, the said Sieur de Repentigny has neglected nothing.

I beg of you, my lord, to be well persuaded that I shall spare no pains to render this establishment equally useful to the service of the king and to the accommodation of the travellers.

I am, with a very profound respect, &c.,

LA JONQUIERE.

THE MINISTER OF FOREIGN AFFAIRS, AT PARIS, TO THE MARQUIS DUQUESNE, GOVERNOR-GENERAL OF CANADA.

VERSAILLES, June 16, 1752.

TO MR. LE MARQUIS DUQUESNE:

I answer the letters which Mr. Le Marquis de la Jonquière wrote last year on the subject of the establishment of divers posts

I begin by a general observation.

It is that such sort of establishments ought not to be undertaken but with a great deal of reflection and consideration upon the motives of well-established necessity or sufficient utility. Those who propose them are never short of specious and plausible reasons for their adoption. They always have in view the good of commerce, or the importance of restraining some Indian nation, but the most often it has been proved that they act under private interest. These posts however cost a great deal to the king as well for their establishment as for their keeping, and serve sometimes only to occasion movements and disorders. Thus the king desires not only that you should not bind yourself to any new establishment of that sort except after having well recognized its advantages, but also that you should examine if among those which have been made for some years past there are not some that it will be good to suppress. And his majesty recommends you the greatest attention on that subject.

By one of my despatches, written last year to Mr. de la Jonquière, I intimated to him that I had approved of the construction of a fort at the Saut St. Marie, and the project of cultivating the land there, and raising cattle there. We cannot but approve the dispositions which have been made for the execution of that establishment, *but it must be considered that the cultivation of the lands and the multiplication of cattle must be the principal object of it*, and that trade must be only the accessory of it.

As it can hardly be expected that any other grain than corn will grow there it is necessary, at least for awhile, to stick to it, and not to persevere stubbornly in trying to raise wheat.

The care of cattle at that post ought to precede that of the cultivation of the lands, because in proportion as Detroit and the other posts of the south shall be established, they will furnish abundance of grain to those of the north, which will be able to furnish cattle to them.

I am perfectly, &c., T.

The Sieur de Repentigny went to the place soon after the grant, and fixed himself at a spot where Fort Brady has since stood. He remained here during the years 1751, 1752, 1753, and 1754. What he did there appears best from the contemporary letter of the Marquis de la Jonquière to the

Minister of Marine and the Colonies, already quoted, describing the matter, and from which a part omitted on page 217, is now, as more in order of subject, here given.

As soon as he arrived at Missilimakinac, the chief of the Indians of the Saut St. Marie gave to him four strings of wampum, and begged of him to send them to me, to express to me how sensible they were for the attention I had for them by sending to them the Sieur de Repentigny, whom they had already adopted as their nephew (which is a mark of distinction for an officer amongst the Indians), to signify to them my will in all cases to direct their steps and their actions.

I have given order to said Sieur de Repentigny to answer at "the talk" of that chief by the same number of strings of wampum, and to assure him and his nation of the satisfaction I have at their good dispositions.

The Indians received him at the Saut St. Marie with much joy. He kindled my fire in that village by a neckless, which these Indians received with feelings of thankfulness. He labored first to assure himself of the most suspected of the Indians. The Indian named Cacosagane told him, in confidence, that there was a neckless in the village from the English: the said Sieur de Repentigny succeeded in withdrawing that neckless, which had been in the village for five years, and which had been asked for in vain until now. This neckless was carried into all the Saulteux villages, and others at the south, and at the north of Lake Superior, in order to make all these nations enter into the conspiracy concerted between the English and the Five Nations, after which it was put and remains in deposit at the Saut St. Marie. Fortunately for us, this conspiracy was revealed and had not any consequences. The Sieur de Repentigny has sent me that neckless, with the "talk" of Apacquois Massisague, from village the head of Lac Ontario, to support that neckless, which he gave to the Saulteux of the foot of the rapids of Quinilitanon.

He sent me also "the talk" given by the English in the autumn of 1746 to form this conspiracy. I have the honor to send you inclosed, my lord, a copy of those two "talks," by which you will see to what excesses the English had pushed their malignity for the destruction of the French, and to make themselves masters of our forts. The said Sieur de Repentigny

forbid the Indians of his post to go and winter at Saginaw, which is not little to say, for these nations go thence from there very easily, and in a short time to the English, who load them with presents. These Indians kept the promess which I required from them; they all stayed at Lake Superior, whatever were the inducements the English made to attract them to themselves.

He arrived too late last year at the Saut St. Marie to fortify himself well; however, he secured himself against insults in a sort of fort large enough to receive the traders of Missilimakinac.

The weather was dreadful in September, October, and November. Snow fell one foot deep on the 10th October, which caused him a great delay. He employed his hired men during the whole winter in cutting 1100 pickets, of 15 feet, for his fort, with the doublings, and the timber necessary for the construction of three houses, one of them 30 feet long by 20 feet wide, and the two others 25 feet long, and the same width of the first.

His fort is entirely finished, with the exception of a redoute of oak, which he is to have made 12 feet square, and which shall reach the same distance above the gate of the fort. As soon as this work shall be completed, he will send me the plan of his establishment. His fort is 110 feet square.

As for the cultivation of the lands:

The Sieur de Repentigny had a bull, two bullocks, three cows, two heifers, one horse, and a mare, from Missilimakinac. He could not, on his arrival, make clearing of lands, for the works of his fort had occupied entirely his hired men. Last spring he cleared off all the small trees and bushes within the range of the fort. He has engaged a Frenchman, who married at the Saut St. Mare an Indian woman, to take a farm; they have cleared it up and sowed it, and without a frost they will gather 30 to 35 sacks of corn.

The said Sieur de Repentigny so much feels it his duty to devote himself to the cultivation of these lands, that he has already entered into a bargain for two slaves, whom he will employ to take care of the corn that he will gather upon these lands.

On the 24th April, 1754, Governor Duquesne addressed a letter to the Chevalier "commanding at the Saut St. Marie," in which he says:

"Besides the *private advantage* you will derive from the care you give to the culture of your lands, the court will be very thankful to you, and I exhort you to give yourself entirely to it by the interest I take in you. . . . . Continue to keep me informed of what is passing at your post and the progress of the cultivation of the land, of which I shall make proper use."

So the same Governor writes to Machault, the Colonial Minister, dating from Quebec, 13th October, 1754, saying:

"The Chevalier de Repentigny, who commands at the Saut St. Marie, is busily engaged in the settlement of his post, which is essential for stopping all the Indians who come down from Lake Superior to go to Choueguen (Oswego), but I do not hear it said that this post yields a great revenue."

Repentigny remained at this place till 1755.

In that year, or somewhat before, war broke out between Great Britain and France; the possessions of France in America being one of the matters which Great Britain sought to gain. The British arms were victorious; and peace being concluded in 1760, Canada, which was considered as embracing the land in question, was surrendered to Great Britain.

By the capitulation made at Montreal, September 8th, 1760, it was declared that "the military and civil officers, and all other persons whatsoever, shall preserve the entire peaceable right and possession of their '*biens*' (property), movable and immovable; they shall not be touched, nor the least damage done to them, on any pretence whatsoever, and shall have liberty to keep, let, or sell them, as well to the French as to the English."*

By the preliminary articles of peace between the Kings of Great Britain and France, of November 3d, 1762,† it was agreed,—

* Mr. Bancroft (History of the United States, vol. iv, p. 361), remarks that this capitulation included all Canada, which was said to extend to the crest of land dividing the branches of Erie and Michigan from those of the Miami, the Wabash, and the Illinois Rivers.

† Entick's History, &c., 439, 440.

"That the French inhabitants, or others, who would have been subjects of the Most Christian King in Canada, *may retire in all safety and freedom wherever they please, and may sell their estates, provided it be to his Britannic Majesty's subjects*, and transport their effects, as well as their persons, without being restrained in their emigration under any pretence whatsoever, except debts and criminal prosecutions; the term limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the ratification of the definitive treaty."

The same clause was copied into the definitive treaty of Paris, of 10th of February, 1763, between the same powers.

By these two treaties severally, Canada was ceded and guaranteed to the crown of Great Britain, and thus that power maintained its conquest.

This war and the peace had different results in the personal and family history of De Bonne and De Repentigny. De Bonne was killed in 1760, at the battle of Sillery, during the attempt of the French to recapture Quebec, after its taking by Wolfe in the celebrated battle on the Plains of Abraham. He left an infant son, Pierre, who was born in 1758, and was therefore two years old at the time of his father's death. Pierre remained in the province after its cession to the English, and, thus choosing a British domicil, became a British subject; rising in fact to judicial and other civil honors under the British crown. Having reached manhood, he presented himself, in 1781, "at the Castle of St. Louis, at Quebec, to render faith and homage to his most gracious majesty King George III, as owner of the land of the Saut de Sainte Marie, conceded, in 1750, to his father and to Monsieur de Repentigny, jointly."

In 1796, he sold for £1570 sterling, his interest in the seigniory to James Caldwell, of Albany, who, in 1798, made a deed of quit-claim of the same interest to Arthur Noble, a citizen of Ireland, then residing temporarily in New York. Noble returning to Ireland, by his will, made in 1814, devised the interest to his nephew, John Slacke, of Dublin John Slacke, by his will, dated in 1819, devised it to his wife.

Mrs. Slacke, in 1839, conveyed the same to her son, John Gray Slacke. He, in 1841, devised to Henry Battersby, of Dublin, who, in May, 1861, conveyed to Colonel Rotton, an officer in the British service, and the party in this case to whom by the decree below one-half the land had been adjudged.

So far as respects the moiety of De Bonne. Now as to Repentigny.

About the year 1755, and with the necessities of the crown, Repentigny, whom we left on his seigniory at the Saut de St. Marie, returned to Quebec and entered into the military service of the King of France, in which he remained until the surrender of the French forces, having like De Bonne been engaged in the battle of Sillery, in 1760, for the recapture of Quebec. On coming away from the Saut in 1755, he left there one Jean Baptiste Cadotte, a Frenchman, who had gone out there with him apparently as an attendant, and who had married an Indian woman.

In 1756, at Montreal, he entered into a partnership with De Langy and another person for carrying on the fur trade at the Saut and other posts in that region. The Chevalier "puts in all his merchandise at the said posts." The partnership at all the posts was to last until the spring of 1759, and as to that at the Saut might, at the option of the parties, be continued until the autumn of 1762. The two partners of Repentigny were not to be at liberty to quit their posts.

In 1759, at Montreal, he gave to his wife a general power of attorney to carry on, govern, and transact all his affairs; and under it, in 1761, Madame de Repentigny authorized one Quenel to go to the Saut and the other posts held by the partnership, and receive "the third part of the packages of furs which are at the Saut St. Marie arising from the partnership between, &c.; and those furs which the Sieur Cadotte may have in his hands, as well as other effects of whatever nature they may be, and give receipts, also to take away all that may be due to said Sieur de Repentigny."

In 1762, the British garrison being now in possession of the fort—the country having changed sovereigns—all the

houses at the fort except Cadotte's were burned by the Indians. The furs escaped.

The Chevalier remained in Canada till 1764; that is to say, until Canada had completely ceased to be a French province. The British Governor, Murray, now made to him the most flattering offers of promotion to induce him to stay. "The knowledge which I have of your military talents," he writes from Quebec, March 6th, 1764, "and the esteem I have for yourself, induces me, by every sort of reason, to try to attach you to this country, the country of your birth. Although it has passed under another dominion, it ought to be always dear to you. You are attached to it by too many bonds to be able easily to detach yourself from it." Repentigny preferred, however, to follow the fortunes and standard of his king, and in 1764, as above said, returned to France, leaving Madame de Repentigny, his wife, temporarily behind him, with her power of attorney. Under this power she sold, in April, 1776, to Colonel Christie, a British officer, an estate called La Chenay, which the Chevalier de Repentigny owned, above Montreal, reciting that she was "intending to leave and quit Canada." The deed contained covenants for further assurance, which, in October, 1766, was given by Repentigny himself, now styled "of Paris, in the Kingdom of France." In 1769 he was appointed commandant of troops at the Isle de Re, on the coast of France, where he remained till 1778, in which year he was sent to Guadaloupe, in command of the *Regiment d'Amérique*. He remained at Guadaloupe with his regiment till 1782; a part of it having participated in the operations of the American army in Georgia during the war of Independence. Receiving the rank of brigadier, he returned, in 1782, to France, and having been now forty years in service, and not being willing to retire on half pay, was appointed by the crown, in 1783, Military Governor of Senegal, on the coast of Africa. His health failing him after two winters in that climate, he asked, in the autumn of 1785, for a furlough, and returning to Paris, died there October 9th, 1786.

He left one son, Gaspard, born at Quebec in 1753, who, in

1777, entered the naval service of France, was made lieutenant in 1780, and in that year married in Guadaloupe. He continued in the naval service of France at Guadaloupe, and after having made eleven campaigns at sea, and been engaged in two sea-fights and wounded, died at that place in 1808.

Gaspard had also a son, Camille, born in 1789. He married in Guadaloupe in 1814, died there in 1820, leaving children. These, with grandchildren, male and female, the issue of a deceased child, were parties to the present proceeding, and the persons, along with the representatives of De Bonne, in whose favor the decree appealed from had been made.

As respected the amount of claim made to this estate after the Chevalier left Canada in 1764, to return to France, and as to how far he or his heirs considered it his and their property still, or retained possession by their agent or tenants, the case presented some contradictions of evidence.

On the one hand, ancient witnesses, still resident at the Saut de St. Marie, were produced.

One of them, named Biron, testified that a nephew of Jean Baptiste Cadotte (the Frenchman already mentioned, p. 223, as having gone with Repentigny to the Saut in 1751, and been left there when the Chevalier returned to the army at Quebec) had told him, the witness, that his uncle, old Cadotte, had informed him that there was an officer at the Saut in the times of the French, named Repentigny; that the Saut was a seigniory, including the old fort and a great distance below and above the same; that it belonged to De Bonne; that he (old Cadotte) was not sent here to take charge of the fort, but *got possession* after he came, and commanded the fort; that De Bonne transferred it to some one; he did not know to whom.

A second witness, Gornon, a granddaughter of the same Jean Baptiste Cadotte, testified that she had heard her father or mother say that old J. B. Cadotte, her grandfather, came to the country as a "*voyageur*;" that two French officers, one by the name of Repentigny and the other of De Bonne, came there about the same time; that she had heard her parents

or some others say that the said officers built a fort or post, and that they went away, leaving her grandfather in possession; that her grandfather retained possession till he gave it to her father; that her father went away about the year 1810, leaving her mother in possession.

A third witness, husband of the last one, testified that he had heard his father-in-law, J. B. Cadotte the younger, say that old Cadotte came to the Saut about the same time that a French officer by the name of De Repentigny came there; that they were in some way connected about the fort, which the officer had built, and that after the officer went away old Cadotte took possession and ever afterwards held it until it was taken possession of by his son, J. B. Cadotte the younger, the father-in-law of witness, and after his death by Madame Gornon's mother, the widow of J. B. Cadotte the younger.

Coming, in the next generation, to the son of the Chevalier, it appeared that in the year 1790 an English gentleman had proposed to Gaspard de Repentigny to buy the property, this being, apparently, the first information Gaspard had of it, or, at least, of its value. Gaspard declined to sell. So again, in August, 1796, he was applied to, through an agent of the Mr. Caldwell who had bought De Bonne's half, to sell this other half also, the price offered being $8100. Gaspard replies:

"Escaped from the wreck of Guadaloupe with means which supply the wants of my family, I think you will approve the determination I take of not hastening to sell a tract of land which cannot but acquire value in the future. My title-papers, well proved by his care and the measures that Madame de la Vigne assured me her husband had taken, . . . all put me in the greatest security. The proposition that Mr. Caldwell makes does not seem to me tempting. From what Madame de la Vigne told me, he paid more than $8100 for the portion which he has, and I don't believe that the remaining half is now worth less than that which he bought. Although at a distance from New England, the relations which we have with that country enables us to learn that every day gives value to these lands. I beg you

to continue your cares upon a matter which will terminate sooner or later, and to give me any information you may acquire either as to the value of the lands or the persons who desire to purchase."

So, four years later, that is to say, in the year 1800, this same Gaspard, then residing in the Island of Martinique, made, before two notaries there, what in France and its colonies is known as an *acte de notoriété*, a solemn and recorded declaration of right, intended to keep alive a claim not capable of enjoyment at the moment. This *acte de notoriété* declared the fact, date, nature, and confirmation of the grant by Louis XV; that by various treaties the property was now included in the United States; that the Chevalier de Repentigny had been attached to the marine service of Rochefort, in France, and of Guadaloupe and Martinique, and governor in Africa, &c., and had died in France; that he, Gaspard, was his only heir; "that the remoteness of the place and other circumstances have, until this day, prevented him from having his rights recognized, *but that he desires to exercise them, and that for this he need only establish his heirship.*"

In 1804 the matter of a sale to Caldwell was again brought up, but was not carried through.

In 1825, the original deed of ratification signed by the King of France was presented to Mr. Graham, the Commissioner of the General Land Office, by an agent of the parties in interest, to prevent, as he says, "the issuing of patents" to the claimants at the Saut St. Marie under the act of February 21st, 1823. On the 7th of December, 1826, Mrs. Slacke's caveat was filed in that office, showing the grounds of the claim. On the 15th of the same month, Mr. Cambreling, member from New York, presented to Congress the petition of Mrs. Slacke, praying a recognition of the claim; and this petition continued to be presented from time to time to Congress down to 1841, when the De Repentigny heirs also presented their petition for the same purpose Agents were employed by both the De Bonne and

De Repentigny representatives, at great expense, to obtain a recognition of the claim by Congress, down to the 19th of April, 1860. On that day Congress, referring to their claim under an "alleged grant in 1750," passed a private act, authorizing them to present their case by petition to the District Court for the District of Michigan, and authorizing that court to examine and adjudicate the same.

On the other hand, documents and letters from the Chevalier de Repentigny, produced from the French archives, rather tended to show that he considered himself, when leaving the province of Canada after the conquest, to have abandoned all claim to this grant. As exhibiting not only this fact, but the character of the writer in point of standing, intelligence, and capacity to judge of his concerns (a matter spoken of by the court), full extracts are given. They were thus:

About the year 1773, being then at the Isle de Re, and desiring promotion in rank, he forwarded to the minister of the colonies by that minister's desire, a memoir or statement of facts on which he based his solicitation. It ran thus:

'I entered the service at 13 years of age; I made my debut by a campaign at a thousand leagues from my garrison; I have been for 33 years in the service; sixteen campaigns or expeditions of war; twelve battles, affairs, or hot actions, in four of which I commanded in chief, with success. Two sieges; six years employed with the approbation of the generals in command, and negotiations among different nations of Canada. Such, my lord, are my services. In 1632, my great-great-grandfather went to Canada, with the charge of accompanying families of his province, in order to establish that colony, in which he himself settled. Since that epoch we have furnished to the corps of troops which served there fifty officers of the same name, of which more than one-half has perished in the war; my father augmented the number of them in 1733. My grandfather was the eldest of 23 brothers, all in the service. My son alone remains of that numerous family.

"*The cession of Canada, my native country, has overturned a fortune more than moderate, which I could preserve only by an oath of fidelity to the new master, which was too hard for my heart.*

"The offers of the English ministry made to my eldest brother to retain us in their service are an unequivocal proof of the consideration we enjoyed in Canada, a consideration augmented, and I dare say merited, in the last campaigns.

"In fine, two hundred thousand francs in drafts upon the treasury, a hundred thousand francs in bills of exchange, of which I was bearer, drawn upon the king in 1761, reduced to one hundred thousand francs in 1764, to fifty thousand francs in 1770, by the reduction at 2½ per cent., have just brought me thirty-two thousand five hundred francs last month, by the negotiation that I have made of it, fearing to lose all. *Such are my sacrifices and my misfortunes in abandoning my country.* You made me forget them, my lord; your ministry has given me existence; you have granted me several military favors; my ambition is only to deserve, and be judged worthy of their continuation.

"REPENTIGNY,
"Colonel of the Reg't de l'Amerique."

So in letters on the same subject of his promotion, written, one in January, 1770, and one in April, 1772:

"My claim is based, my lord, upon thirty-one years of services, ending in the month of May next, commenced at about fourteen years of age, upon sixteen campaigns, twelve battles or actions, four in which I commanded in chief with success enough to deserve the confidence and approbation of the generals who employed me.

"I made two sieges, one fight at sea commanding a detachment of 200 men with six officers for Newfoundland in 1762, when the Duke of Choiseul honored me with that command.

"I was taken by a man-of-war (vaisseau) of 74 guns, the Dragon.

"After 30 years of service performed with honor in the colonies, *and the sacrifice of a future more than reasonable in leaving Canada, my native country, I should be able at* 45 *years of age to claim a regiment in the colonies without too much ambition.*"

A letter written from Paris, September 28, 1782, not long before his appointment to the Governorship of Senegal, on the coast of Africa, and in reply, apparently, to one from the

crown offering him retirement on half pay, contained similar expressions.

"The permission which the king gives me to retire implies that I have asked it; but I am very far, my lord, from wishing to profit by it. The word retirement always made me shudder. Two years ago I entered upon my sixth engagement, and I hope you will appeal to the goodness of the king to permit me to continue my services, which may be for a long time useful to his majesty. *If I had not calculated upon dying in the service, I should not have sacrificed more than four-fifths of my fortune, my well-being, that of my family, in abandoning Canada, my country.*

"In fine, my lord, you are just; you would avoid having to censure yourself with having maltreated an old officer, without reproach, who has presented with honor and distinction a career of more than forty years, and with causing him to lose all consideration. Truth is one; it cannot escape your observation."

By the definitive treaty of peace of 1783, between Great Britain and the United States after the war of Independence, Great Britain relinquished all claim to the proprietary and territorial rights of the several United States, repeating the boundaries agreed upon in a provisional treaty of 1782, by which the seigniory was found to be included within the limits of the United States, and fell within those of Virginia.

This tract remained within the acknowledged limits of Virginia, until the final cession of the territory northwest of the Ohio, on the 1st of March, 1784, to the United States.

The region about the Saut de St. Marie remained occupied by Indians chiefly, until 1820, when by treaty between them and the United States, their title was extinguished. After this date the United States caused the whole district to be surveyed, and at the time that the bill below was filed, had sold to private persons who were in possession under patents, 108,000 acres more or less, of the 214,400 originally granted to Repentigny and De Bonne.

In 1805, the legislature of Michigan passed an act allowing foreigners to take and hold lands.

Numerous jurists of high standing in Canada were ex-

amined on both sides, as experts, to prove the nature of a fief and seigniory under the laws, ancient and modern, of Canada, the *coutume de Paris*, &c., and as to whether, under certain royal arrêts of France, one of March 15th, 1732, another of 1711, called the arrêt of Marly, the land originally granted had or had not become united to the king's domain; and how far a judicial proceeding in the nature of an "office found" was necessary to make the reunion effective, supposing that the facts justified one.

The arrêt of 1732 declared that "all owners of unimproved seigniories shall improve them and place their settlers upon them, otherwise the seigniories shall be united, in virtue of this statute, without recourse to any other *statute*," and there seemed to be no doubt that if the proprietors made no improvements, and put no tenants in occupancy (*qui n'ont point de domaine defriche et qui n'y ont point d'habitants*), they could be reunited; though perhaps the testimony left a case like the present not so entirely clear as the other. As to the necessity of some proceeding, Mr. Justice Badgley, of the Superior Court of Canada, and for more than thirty years connected with the profession of the law, testified that under the arrêt of 1711, the proceedings were strictly judicial.

The arrêt of 1732 contained a provision relating apparently to the sale of wooded land, and by which, as the counsel of the United States interpreted it, it was declared that on any attempt to sell such land they should be—

"In like manner reunited—*de pleno jure* . . . in virtue of the present decree, and without there being need of another."	"*Pareillement* reunie de plein droit . . . en vertu du present arrêt, et sans qu'il *en* soit besoin d'autre."

The act of Congress of 1860, authorizing the District Court for Michigan to take cognizance of the case, enacted that in adjudicating the question of the "*validity of the title*" as against the United States, "the court was to be governed" by the laws of nations and of the country from which the title was derived, and also by the principles, so far as they are applicable, which are recognized in the act of Congress approved

the 26th of May, 1824, "enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of the same;" an act which directed that the claims should be heard and determined in conformity with the principles of justice, and according to the laws and ordinances of the government under which the titles originated; also, according to the law of nations and the stipulations of treaties.

The act limited the time of bringing the suit to two years, and provided that "in case of a final decree in favor of the *validity of the grant*, it shall not be construed to affect or in any way impair any adverse sales, claims, or other rights which have been recognized by the United States within the limits of the said claim, or which, under any law of the United States, may have heretofore been brought to the notice of the land commissioners or of the land officers in Michigan, or any of the land granted to the State of Michigan, or occupied by it, for the Saut St. Marie canal, its tow-path and appurtenances, but for the area of any such adverse claims the legal representatives of the said De Bonne and Repentigny shall receive from the Commissioner of the General Land Office warrants authorizing them or their assigns to enter any other lands belonging to the United States, and subject to entry at private sale at one dollar and twenty-five cents per acre."

The court below, as already said, decreed for the petitioners, and the case was now here for review, on appeal by the United States.

Mr. J. M. Howard, for the appellees, representatives of De Bonne and Repentigny:

I. AS TO THE REPENTIGNY MOIETY.

It will be argued on the other side that Repentigny, by abandoning Canada and adhering to his old allegiance, lost, *ipso facto*, all right in this grant.

But, without relying upon treaties, we assert that the articles of capitulation of Montreal secured to him "the entire

peaceable property and possession of his goods, movable and immovable, which were not to be touched—*i. e.*, taken possession of, nor any damage done to them under any pretence whatever."

The subsequent treaties of 1762 and 1763 are both based upon this capitulation; and Great Britain could not, in honor, deprive them of their property. This guarantee of the British crown was in favor of its conquered subjects. It followed the title when Great Britain and the United States settled their boundaries in 1782 and 1783. The right to emigrate within eighteen months was a personal privilege, to prevent the inhabitants becoming British subjects, as they would have done by remaining longer.

Besides, by the laws of war, the conqueror is bound to protect the property of his conquered subjects.*

The common law of England as to alienage did not prevail in Canada, but the French laws of the colony were preserved by the Quebec act of 1774, annexing the region in question to the province of Quebec, to be held at the king's pleasure; by the third section of which all rights of property in land were declared "to remain and be in force and to have effect as if this act had never been made."†

Those French laws allowed aliens to purchase and hold lands during their lifetime; and alienage can only be established upon a judicial proceeding and sentence. De Repentigny was also signior of La Chenay. The crown never disturbed him, and in 1766 he sold the estate to Major Christie, of the British army.

II. AS TO BOTH CLAIMS.

1. *Alienage.*—The answer sets up that Noble, the purchaser from Caldwell of De Bonne's half, and all subsequent owners of that half, are aliens. The same objection would apply to the descendants of Repentigny.

If the fact were as alleged, they all had capacity to take. Independently of the Michigan act of 1805, an alien can

* Johnson *v.* McIntosh, 8 Wheaton, 543.

† British Statutes at Large, vol. xxx, p. 549.

take by purchase or devise and hold till office found; and till then he can sell and convey or devise.*

2. *Non-fulfilment of conditions; Lapse of time; Abandonment; Extinguishment of Indian title; Reunion to the crown; Want of certainty in description, &c.*

The paper title being complete, the petitioners are bound to do no more, as against the United States and under the act of Congress, than to prove that the title, which emanated from New France, was valid.

The terms of the act providing for adjudicating the question of "the *validity of the title*" indicate that the validity of the title is to be tested as it stood at the time of its derivation, by the laws then in force.

But the court is to be governed also by the principles, so far as they are applicable, recognized in the act of 1824. Those "principles" can mean only the provisions of the act and the legal consequences flowing from them. That act did not apply at all to cases where the title was complete and perfect under the foreign government, but only to inchoate or unperfected titles.† But it applied to cases of *concessions*, and plainly embraced the concession in this case, but only the concession. The act of 1860 does not refer to the *ratification*, which was dated in 1751, but only to the "*alleged grant* in 1750," *i. e.*, the concession.

In passing upon the present validity of the title, the court is not allowed to consider whether, since its emanation, anything had occurred to defeat it, such as lapse of time or other matter of defeasance. Congress intended the title should be judged of as of the date of its emanation. Why else would they have subjected it to the test only of the laws of nations and of the country from which it was derived?

The construction which Congress and their commissioners

* Mooers *v.* White, 6 Johnson's Chancery, 365; Fox *v.* Southack, 12 Massachusetts, 149.

† Clarke *v.* Courtney, 5 Peters, 354, 373; United States *v.* Reynes, 9 Howard, 144–147; Glenn *v.* United States, 13 Id. 259; United States *v.* Roselius, 15 Id. 31–35.

have placed upon similar language in other acts of a nature similar to this one of 1860, affords argument in support of our view.

Thus the act of March 26, 1804, for the adjustment of private claims at Detroit, &c.,* gave the commissioners power to decide "according to justice and equity" upon claims depending solely upon "*legal grants.*" They found only six such; and they confirm these six grants for the reason, as they remark in their report,† that they "consider the government right as completely transferred by these grants, and affirm the claims grounded upon them, with reservation of individual rights in contested cases."

The act of 1804 involved no inquiry respecting possession or occupation, and it nowhere appears that the board entertained any such inquiry, but simply the question whether the title was "legal." The ground of confirmation was, that it transferred all the government right. Accordingly, no inquiry was made into the fulfilment of the conditions embodied in the grant, nor into the effect of lapse of time, of non-occupation, of alienage, or any such objection dehors the title-papers by which the title passed to the claimant. And this construction is binding on the government.‡

Could the present claim have been acted upon by them, it is impossible to perceive a reason why it would not have been confirmed, as the six others had been.

It should be noticed that the original brevets of ratification, under which the land was claimed in those cases, imposed certain conditions upon the grantees, feudal in their character, "upon pain of the nullity of these presents." In the ratification in the present case it is "in default thereof the same shall be reunited to his majesty's domains." There can be no difference in meaning and effect.

On the report of the commissioners, Congress, by their act

* 1 Stat. at Large, 277, §§ 3, 4.

† 16 American State Papers, 308, Malcher's Claim; Beaubien's do. 305; N. Gouin's, 341; F. Peltier, 342; Morass, 343; G. Meldrum, 344.

‡ United States v. Arredondo, 6 Peters, 713.

of March 3, 1807,* confirmed these six decisions, and thus made known their views of what was a "legal grant" and what was a decision "according to justice and equity."

So, under the Missouri act of 1824, the petitioner's claim was founded upon some French or Spanish grant, concession, warrant, or order of survey, legally made, and which might have been perfected into a complete title under the former laws; and the act provides that the validity of such title or claim may be inquired into by the court; which, however, had no jurisdiction in cases of complete title. Yet, in *Chouteau's Heirs* v. *United States*,† this court held that the power of the District Court was confined to the "validity of the grant," and would not allow the United States to go back of the warrant of survey to prove that Chouteau had not complied with the government regulations.

If we are right in supposing that it is the validity of the grant as made which is to be judged, then all that can be said about abandonment, escheat, &c., is of no pertinence.

But the United States took as assignee, chargeable with notice of the grant, and liable in justice to recognize whatever Great Britain or Virginia was. They found white persons, descendants of Cadotte and others, in possession of the seigniory. They had no ground to presume that these persons were there without right. Finding them there, they were bound to presume they held, or claimed to hold, under a legal grant from some sovereignty, either British or French, and that the persons in possession held under that grant either as tenants or assignees of the original grantees, to whose grant the possession was referable. Such is the presumption of law.‡

If this be so, with what justice can the United States set up to be the owners by lapse of time?

Again: the act of 1860 saves from the effect of a decree in favor of the validity of the grant three classes of lands, including lands which have been sold, as those which cannot be recovered by the petitioners.

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* 1 Stat. at Large, 347. † 9 Peters, 154. ‡ 4 Kent's Com. 179

Argument for the claimants.

Of course the court has not the means of designating these lands. That duty belongs to the General Land Office, which, having designated them, is required to perform its other duty of issuing warrants for the same area of land. The whole extent of the court's power is to ascertain the representative character of the petitioners and the validity of the title or grant.

Now, had it been the intention of Congress to claim by abandonment and prescription, would they have made this saving? They knew the claim dated back more than a hundred years, for the act speaks of the "alleged grant in 1750;" and they knew, therefore, that no claimant in possession could, by a private suit, be ousted or disturbed by these representatives. All claimants in possession could set up lapse of time successfully against the suit now authorized, and therefore needed no such exception for their protection. Congress knew, also, that if mere non-occupation by the grantees and their representatives afforded the United States a good ground for continuing to hold possession, they themselves were protected by the same state of facts; indeed, if they intended to avail themselves of it, this great lapse of time and non-occupancy was a defence, and the passage of the act was a worse than useless ceremony; for it invited and led parties to undertake a lawsuit which Congress *knew* must fail.

Such could not have been the intention of Congress.

Many of the claims protected by this exception were of very ancient date, and were acted upon by the commissioners under the act of February 21, 1823, as will be seen in the seventh volume of the Report of the Commissioners on the "*Claims at Saut St. Marie*," all founded on occupancy, which, in some instances, was asserted to have commenced nearly a century before the passage of the act.*

Now, look at the posture of the case after proof of the validity of the grant has been made, if the defence of aban-

* See Rep. No. 42, 20th Cong., 1st Sess., Com. Pub. Lands, H. Rep's, p. 451, and particularly the claim of the Messrs. Warren, pp. 463, 464, and the testimony of John Johnston and Michael Cadotte.

donment and prescription by the United States is entertained. The court is well satisfied that the original grant was valid and perfect, giving a complete right of possession and enjoyment "in perpetuity," as the grant expresses it.

But the court proceeds to allow the grant to be defeated by an alleged act of abandonment of indefinite subsequent date, and declares that although thus satisfied, the claimants have lost their once valid title, and are, therefore, not authorized "to receive the warrants."

Is it not clear that, if such a defence is permitted and successfully made out by proof, the question of "the validity of the title" becomes an immaterial question? and that the question of possession is the only true one? Is not the paper title thus treated as of no importance?

It may be said that by the terms "validity of the title" Congress intended the present and not merely the former validity of the title, and that to make out a valid title the proof must show that the ancient formal title has been kept alive and in vigor.

But such is not their language; such was not their policy in the Michigan act of 1804, nor in the Missouri act of 1824.

Advert to historical facts. Virginia, it is known, took actual possession of the Northwest Territory in 1778 and 1779, under Colonel George Rogers Clark. He captured Fort Vincennes in February, 1779, made a prisoner of Hamilton, the British Governor of Detroit, and sent him to Virginia.* The United States have claimed the region as rightful owners since the cession by Virginia, and were in *actual possession* of it from July, 1796, when the British garrison was withdrawn from the fort at the Saut, a *de jure* possession of seventy-six and an actual possession of sixty-four years—using the tract for their own purposes.

The construction contended for implies that possession by the grantees or their representatives was and is essential to this present valid title. But how absurd to enact such a law in their own favor while the United States well knew that

* 1 Marshall's Life of Washington, 284; Allbach's Western Annals, 263-295.

they, and not we, had possession for three-quarters of a century, they using it and selling it in spite of us, the lawful owners.

Besides, the most natural meaning of the expression "validity of the title," is the legal regularity and force of the original title-papers referred to. We say, both in common and legal parlance, that a deed, barred by a statute of limitations or matter *ex post facto*, is not good; but seldom say that it is not valid. The term "valid," as used in the expressions a "valid deed," a "valid bond," a "valid note," a "valid agreement," a "valid contract," refers usually to the effect of the instrument at the time it is made, and not to its effect when destroyed or impaired by subsequent matter.

Is it not inconceivable that Congress, with the full knowledge of all the facts of the case, except as to the validity of the original grant, about which they wished judicial decision, intended to rely upon abandonment and prescription, when not one word is contained in the act indicating such a purpose—a purpose which, as we have said, if sustained by law and fact, utterly defeats us? Did they intend to say to the claimants: "We well knew you had the legal title, but we knew, at the same time, that we held the land, not by grant or cession, but by mere *lapse of time?* Such is our reply, and our only reply, to your legal grant."

It is not easy to conceive of an artifice so little worthy of a government, a plea so wanting in frankness and fair dealing.

Moreover, we deny that there is any law of the United States assuming to give to the government this right to the lands of private owners, growing out of lapse of time. Under the laws of nations there is no prescription as between a government and its subjects, although in municipal codes it is allowed as between private persons for the sake of repose. Ordinarily, it is the sovereign political power that gives the title. How strange would be the anomaly of its retaining the right to use its omnipotent power to turn the grantee out and resume the possession as against his heirs at law.

But, in point of fact, the grantees entered into possession and held and cultivated the tract for several years.

It is an historical fact that from the treaty of Aix-la-Chapelle, in 1748, there had been disturbances of a threatening character between the English and French colonies in America, which ended in the formal war known as the "French" or "Seven Years' War," of which England did not make her declaration until May, 1756, the year after the battle of the Monongahela, under Braddock and the then Colonel Washington.*

The Chevalier de Repentigny was ordered to the Saut St. Marie by Governor La Jonquière in 1750. The purpose of his being sent there was to afford an asylum to the French travellers who were constantly passing from Quebec and Montreal up the Ottawa River, crossing over the portage to Lake Huron, and coasting along its northern shore to the Saut St. Marie, one of the central points for intercourse with the natives, and which had been taken possession of by the French nearly a century before; and thence visiting the missionary and trading-posts on Lake Superior at Point Iroquois, Missipocoton (on the northern shore), Point St. Esprit (now La Pointe), Green Bay, and other places settled by the Jesuits. The time and manner of making these ancient and remote settlements are minutely given in "Les Relations des Jesuites."†

The letter of Governor de la Jonquière of October 5, 1751, is a full admission by the Governor of Canada that the Chevalier had in good faith entered into possession and at *his own expense* built the fort and three houses for the public accommodation, cleared and planted land on the seigniory, and brought there eight head of cattle and two horses.

The receipt of this letter is acknowledged by the minister, and the establishment of that place approved by him, under date June 16, 1752.

Franquet's map bears date the same year, 1752, and would,

* 4 Bancroft's History of the United States, 233; Johnson *v* McIntosh, 8 Wheaton, 543.

† Vols. 1, 2, 3.

perhaps, tend to show that the minister had directed him to make an actual survey of this seigniory and of the fortification on it.

The letters of Governor Duquesne of 24th April, 1754, to the Chevalier de Repentigny, and of the same governor to Machaut, the colonial minister, dated Quebec, 13th October, 1754, are to the same effect as the other correspondence. He was not there simply as an agent of the government. His own "private advantage" in the culture of lands, called "*your* lands," is spoken of in the above-quoted letters as one of the objects for which he went out; it being mentioned also that he was "busily engaged in the settlement of his post."

Thus we have a direct admission from the French government itself that the Chevalier was at the Saut St. Marie from some time in 1749 to October, 1754, engaged in cultivating the fief and building a fort, houses, &c. But the articles of partnership with De Langy and others for the management of the trading-post till 1762, his putting in all his merchandise at said post, the stipulation that his partners were not at liberty to quit the post, the power of attorney to his wife to manage all his business, her authority to Quenel to receive one-third part of all the packages of peltries belonging to her husband at the Saut, and also those which the Sieur Cadotte might have in his hands,—Cadotte being here treated as a mere agent, a tenant, or *employé* of the Chevalier, and it being here shown that the partnership was still in existence under the continuation clause,—all prove that, through his partners and his wife, the Chevalier was in personal possession in the autumn of 1762.

For the further proof of continuation of possession we have the narrative of intelligent travellers, not stated as a part of the case, but very proper to be so stated; certainly proper to be read and relied on by the court.

On the 19th of May, 1762, Alexander Henry, the traveller, as he tells us in his travels,* visited the post and found Cadotte

* See Henry's Travels, p. 57 to 63.

there with his Indian wife and his family. Henry describes the fort, and says he found four houses there, one for the governor, one for the interpreter Cadotte, and the other two used for barracks. The only family was Cadotte's, whose wife was a Chippeway woman. Henry staid with Cadotte during the winter of 1762–63, and he says that during the season a small detachment of troops under command of Lieutenant Jemet arrived to garrison the fort;—he states also that on the 22d of December, 1762, while Cadotte was in possession as interpreter, a fire broke out and consumed all the houses (except Cadotte's), a part of the stockade, all the provisions for the troops, and part of the fish Henry himself had taken.*

During the spring of 1763, Henry was made a prisoner at Michillimackinac, in the "Pontiac War," but was liberated by a friendly Indian, and returning to the Saut in company with Madame Cadotte, found Cadotte there.†

In July, 1765, Henry arrives at the Saut from Michillimackinac with goods for the Indians, and took Cadotte in as partner.‡

When Mr. Alexander McKenzie§ was there in 1787 or 1788, he found there a Canadian trader, receiving, forwarding, and storing goods. Was not this Cadotte?

The evidence of Gornon and his wife, and of Biron, is admissible to show the traditionary existence of the seigniory, and that old Cadotte was the employé of the Chevalier.‖

The letter of La Jonquière to the minister in France, October 5th, 1751, establishes that the Chevalier had "engaged," or employed a Frenchman, whose wife was an Indian woman, to take a piece of land and raise Indian corn. We hear of no other *such* Frenchman, and this statement of Governor Jonquière corroborates the testimony of the three Saut St. Marie witnesses.

In a transaction so ancient this proof of the identity of

* See Henry's Travels, p. 57 to 63. † Id. 164.

‡ Id. 192, 193. § McKenzie's Voyages, 36, 37.

‖ Ellicott *v.* Pearl, 10 Peters, 434; Stockton *v.* Williams, 1 Douglass, Michigan, 571.

old Cadotte with the husband of the Indian woman ought to be considered satisfactory; and if so, it follows that his possession was our possession, and we are entitled to the benefit of it and of that of the grantees or claimants under him. For it is quite manifest that old Cadotte assumed rights which belonged to the grantees, knowing them to be such, if his granddaughter and her husband and Biron are to be believed; for they all testify that he was a voyageur, and obviously but a mere servant of the Chevalier.

Thus the fact of actual possession, improvement, and occupation, by himself, for six years commencing in 1749, is proved by the direct as well as the historical and traditionary evidence; and it was a fulfilment of the *condition subsequent* contained in the ratification, relating to possession.

Authorities show that the "abandonment" must be on the part of the owner a complete renunciation and giving up of the thing, with intent not henceforth to reassert any dominion over it.*

There never was an intention to abandon here on the part of either grantee. This appears from all the actings of the claimants and their ancestors; and the circumstances of their situation excuse their actual occupation after the time that they did actually occupy it.

Both grantees were officers in the French army. The post was very remote and exposed. The French war had been brewing all along the frontier for years, as history shows, rendering occupation difficult and dangerous. Captain De Bonne, one of the grantees, was killed in De Levi's attempt to retake Quebec in 1760. The Chevalier was in the same battle.

De Bonne left his only child and heir at law, then an infant not two years old. By the act of the Provincial Parliament of January 1, 1783, this child did not come of age till 1779, during the Revolutionary war, during all of which he

* Grotius, B. II, ch. 4, § 5, 1–5; § 6, 1–2; § 7, 1–2; § 8, 4; § 9, 1–2, Kluber's Droit des Gens (Paris ed. of 1861), §§ 6, 125, 126, 128; Vattel, B. 2, ch. 11, §§ 144, 145, 146.

was of course an alien enemy of the United States. But he was not indifferent to his rights. Before the close of the war, and on the 13th of February, 1781, he did faith and homage for the tract. That act was strong evidence, not perhaps of title, but against abandonment, and shows clearly an intention not to renounce the claim, and it was, under the circumstances, all De Bonne could do. Its acceptance by the British governor was clear evidence of an official recognition of his title.

The Chevalier was engaged in active service during the French war, and long before its declaration.

In the spring of 1763 the Pontiac war broke out, in which the whole frontier was desolated by the Indians, from Lake Superior to the wilds of Western Pennsylvania and the Mississippi River, and almost all our frontier posts captured. The garrison at Michillimackinac, within forty miles of the Saut St. Marie, was cruelly butchered, at which time there was no white man at that post but old Cadotte, whose wife was an Indian woman.* Parkman† says, that, except the garrison at Detroit, not a British soldier now remained in the region of the Lakes.

These Indian troubles did not cease to agitate the frontier during the whole of the Revolutionary war; nor did they cease with the war. It is well known that the British government, desirous to bring the boundary of Canada down to the river Ohio, as defined by the Quebec act of 1774 for the province of Quebec, persisted in withholding from us the Western posts, and stirring up the savages against us; and that the Indian wars were incessant down to the conclusion of the treaty of Greenville, August 2d, 1795.‡

It would be absurd to require the grantees to have held possession of this remote and exposed point during all this

* See 5 Bancroft's History of the United States, ch. 7; Parkman's History of Pontiac's Conspiracy, chs. 16, 17, 19, 20, 21; Henry's Travels; Allbach's Annals of the West, 161 to 168.

† Page 322.

‡ Allbach, 656, 661; 16 American State Papers, 562, 583; 7 Statutes at Large, 49, for the treaty.

dangerous period. The Indians loved the French. The protection of that government was withdrawn, and from 1763 down to 1796 (the date at which, by the second section of the treaty of commerce of 1794, Great Britain withdrew her troops and surrendered the posts), the place was in the actual possession of the English, whom the Indians disliked. Here was a term of thirty-three years during which it was plainly unsafe to attempt to hold and occupy the tract.

While the Revolutionary war was in progress it was unreasonable to expect young De Bonne, a British subject, or the Chevalier, a French subject, to occupy it.

In 1783, the year of the peace, he was sent off Governor of Senegal on the coast of Africa. He remained there till 1785, when he asked a furlough to return to France for his health. In 1786, he died at Paris. On his leaving Canada for France, in 1764, his wife remained behind, with a general power of attorney executed in 1759. And under this power she acted in 1766.

Gaspard, the son of the Chevalier, from 1786 until his death was in the marine service of France, fighting its battles and being wounded in its cause, yet from 1798 we find him giving his attention to the property, as well as a French sailor in distant parts of the world possibly could do to such a sort of estate. He makes an *acte de notoriété*, a *caveat* and solemn declaration of rights, which should remain *in perpetuam memoriam rei.*

The Saut St. Marie, Michillimackinac, and other feeble settlements on the upper lakes, were unknown, and so remained until Schoolcraft visited them in 1820. He found them merely fur-trading establishments. He says of the Saut, "The dwelling-houses on the north side of the Strait, six or seven in number, belong to the French and English families."

McKenzie,* who visited the Saut between 1787 and 1793, says, that "the village on the south shore, formerly a place of great resort for the inhabitants of Lake Superior, and

* Voyages, p. 28, London ed. of 1812.

consequently of considerable trade, is now dwindled to nothing."

In their memorial to Congress of December, 1811, the principal citizens of Detroit do not even enumerate the Saut as a settlement of Michigan. They say the whole population of the territory then amounted to 4762 souls, of whom four-fifths were French.* There was no means of reaching the Saut from the lower lakes except through immense pathless forests, or by means of bark canoes.

In June, 1812, war broke out between the United States and Great Britain, and continued until December 24th, 1814. The first blow in this war was struck at Mackinac, which at once fell into the enemy's hands; and that point, as well as the Saut, were held by the British troops until they left the country, in 1815. In point of fact, the Saut had been under British authority from the time Jemet, in behalf of British arms, then victorious over France, took possession in 1762, down to 1815. The attention of our own government seems not to have been directed to this remote spot until 1820, when the Secretary of War, Mr. Calhoun, in a letter to Governor Cass, of April 5th, instructed him to acquire a small piece of land from the Indians for military purposes. And there is no historical evidence that the American jurisdiction was exercised there until the organization of the County of Chippeway, in 1827,† the year after the caveat on behalf of De Bonne was filed in the General Land Office, and the memorial of Mrs. Slacke was presented by Mr. Cambreling.

The whole region was an unreclaimed wilderness, and the place inaccessible save by means of canoes, and wholly occupied by the Northwestern Fur Company and their agents. No one then but old Cadotte and his family had any knowledge of the grant to De Bonne and De Repentigny. Such was the condition of the Saut.

The British thus held it in their possession for more than sixty years—wrongfully, from 1783 to 1796 (if they left

* 5 American State Papers, 781. † Territorial Code of 1827, p. 592.

it then, which they did not), and wrongfully from 1814 onward. Did Congress, in passing the act of 1860, intend to avail themselves of this wrongful possession of Great Britain?

It cannot be pretended that the United States were in actual possession longer than from 1796 to 1812 (16 years), and from 1815, the close of the war, down to 1825 (10 years), when the king's grant was presented; making an actual occupancy of only 26 years.

But in this very act the United States limit the claimants to two years for the institution of their suit. Was not this a yielding up of all objection on account of the lapse of time, during which the alleged abandonment and prescription had run?

The fact that the government of the United States has extinguished the Indian title is without weight. It was the duty of the government to extinguish it. Private persons could not treat with the Indians.*

As to non-fulfilment of the condition to improve the fief and cause it to be held and possessed by the tenants of the grantees,—that was a condition subsequent. And it was fulfilled.

We have as we think proved our personal possession till 1754, and that old Cadotte, who was in possession afterwards, was really our agent or tenant. If his heirs or grantees were in court insisting upon their individual claims as against us, they could not be allowed to change, by mere intention and without notice to us, the character of the original possession; and we should be able to insist that that possession was ours; for where the possession is jointly held by the owner and the tenant, the statute of limitations does not begin to run until the tenant's adverse possession has become notorious, precluding all doubt of the character of the holding and all want of knowledge in the owner.†

In point of fact the seigniory has never been vacant. The

* Johnson *v.* McIntosh, 8 Wheaton, 543; United States *v.* Fernandez, 10 Peters, 302.

† Zeller *v.* Eckert, 4 Howard, 295, &c.

original possession under the grant was ours, and the government were bound to take notice of the fact that the grant was made, and bound by the legal presumption that the possession was under and by virtue of it. They could not presume that the white settlers there were mere "squatters" claiming by tortious entry.

We have a right to claim not only that the grantees actually took possession and made improvements, but that all persons subsequently in possession held under them; and that therefore not only the condition of taking possession under the grant but also that of continuing it, has been performed. Thus the title becomes absolute by the performance of the condition.*

In the case of *United States* v. *Arredondo*,† where the grant was a perfect grant conveying the fee of the land, the condition was that the grantee should establish on the land 200 Spanish families, with all the requisites, &c., and should carry this into effect in three years, this court held the condition void by the act of the grantor, Spain, by whom Florida was ceded to the United States within the two years. The Florida treaty of 1820‡ provided that the lands should be confirmed to persons in possession of them. And the court say:

"The law deems every man to be in legal seizin and possession of land to which he has a perfect and complete title. The seizin and possession is coextensive with his right and continues until he is ousted thereof by an actual adverse possession. This is a settled principle of the common law recognized and adopted by this court."

If, in our case, the grantees failed in continuing in possession, they failed because France herself failed to hold possession of the country. Such failures should be excused.§

By the laws of nations the conqueror acquires only the public and political rights belonging to the sovereign whom

* 2 Cruise's Dig. 24. † 6 Peters, 693. ‡ 8 Stat. at Large, 258.

§ United States *v.* Arredondo, 6 Peters, 745; Glenn *v.* United States, 13 Howard, 257.

he opposes. The rights of private property do not pass to him by the conquest, and he is bound to respect and protect them.*

As respects reunion to the king's domain, which the answer alleges under the royal arrêt of 1732 relating to the sale of wooded or timbered lands, and the arrêt of Marly, the decrees never contemplated the reunion of lands cleared, occupied, and stocked, as these were. Independently of which, Judge Badgley, at present perhaps the most learned jurist in the province, tells us that under the arrêt of 1711, the proceedings were strictly judicial. And so Chief Justice Lafontaine, discussing the subject in a printed work,† says:

"I have already stated that under the operation of the different arrêts of retrenchment it seemed to me necessary, to proceed regularly, previously to pronounce the reunion to the crown domain, even when the word *reunion* was not written in the arrêt."

[The learned counsel then, in reply to the allegation of the answer, argued that the grant was abundantly certain and could be located, the Franquet map of 1752, with the description of the grant and ratification, indicating it sufficiently.]

Mr. Stanbery, Attorney-General, and Mr. Alfred Russel, District Attorney for the Eastern District of Michigan, contra:

If the construction of the act of Congress set up by the other side is the true one, that is to say, if the only question which was to be passed upon, was the original validity of the grant, nine-tenths of the discussion have been irrelative; and there neither is nor ever has been any question in the case. It required no courts to settle whether the deed was a genuine one; and the strong attempt to place the matter on such a view concedes away, in fact, the case. It admits that the difficulties, if any other view be taken, are insurmountable.

It is no such question that the act meant that the courts

* Vattel, 574, 575.

† Seigniorial Questions, vol. B, p. 389 a.

should settle. We are not here to resuscitate a dead title, but to inquire whether there is one now existing. We are discussing an actual thing, considering not what *was* a century and a quarter ago, but what *is* at this time. Blackstone,* adopting Coke's definition, tells us, "*Titulus est justa causa possidendi id quod nostrum est.*" And Congress never meant that its courts were to recognize as "a title" that which now is defective in law, defective in equity, defective in moral justice, defective every way, merely because the deed which conveyed it one hundred and sixteen years ago was genuine. We admit that the act of 1824, enabling claimants of lands in Missouri and Arkansas to try the validity of those titles, did not apply to perfect titles; but Congress, by putting this claim, in the act of 1860, under that act, declared this title not to be a perfect one.

The questions, then, of lapse of time, abandonment, nonfulfilment of conditions, extinguishment of Indian titles, reunion to the crown, &c., are most proper to be inquired into.

As to limitations by prescription, the case of *United States* v. *Arredondo* settles that this proceeding is substantially a bill in equity. The petitioners are barred by the rules of equity proper, which are in strict "analogy with the rules of law, whenever any statute has fixed the period of limitation."†

This court has repeatedly held that reasonable diligence is necessary, even if no statute of limitations exists which is applicable.‡

This claim had its origin when George II was King of England, and Louis XV King of France, twenty-six years

* 2 Commentaries, 195.

† Cholmondeley *v.* Clinton, 2 Jacob and Walker, 138–174; Bonny *v.* Ridgard, 1 Cox, 145; Andrew *v.* Wrigley, 4 Brown's Chancery, 138; Smith *v.* Clay, Amblar, 645; Bond *v.* Hopkins, 1 Schoales and Lefroy, 429; Medlicott *v.* O'Donel, 1 Ball and Beatty, 164; Davie *v.* Beardsham, 1 Chancery Cases, 39.

‡ Bowman *v.* Wathen, 1 Howard, 189; McKnight *v.* Taylor, Id. 161; United States *v.* Moore, 12 Id. 222; Maxwell *v.* Kennedy, 8 Id. 210; Piatt *v.* Vattier, 9 Peters, 405.

before the United States took their place in the family of nations; and the reports, English and American, may be searched in vain for an instance of the upholding of a claim of one-half the age of this.

A lapse of forty years and change of value renders a claim stale, though there be no fraud.* And possession which would bar an ejectment will also bar an equitable title.†

Now, De Bonne never had possession at all, and of the Chevalier de Repentigny we never hear again in this region after his improvements were burned in 1762. The British crown took possession in that year.‡

De Bonne rendered homage in 1781, but that was not a substitute for actual seizin, still less for compliance with the conditions subsequent; and at all events it could not enure to the benefit of his co-grantee.

De Bonne's representatives first petitioned Congress in December, 1826. De Repentigny's representatives in May, 1841. No *effectual* proceedings were had by either before Congress until 1860.

Under these circumstances, a possession acquired by the government of the country, existing for a century, and acquiesced in for so many years by those whose interest and duty it was to disturb it, if it had been wrongful, is not now to be *presumed*, in the absence of all proof, to have been wrongfully or illegally, or even irregularly acquired.

Does Cadotte's occupancy affect the case? There is, it appears, partly from public records and ancient printed books of travels, and partly from the depositions of living witnesses, evidence that between 1750 and 1762 the French and English governments, and at a date subsequent to 1762, among others a person named Cadotte, and his descendants, through whom the petitioners do not claim, were seized of the most prominent and important part of the lands; but there is no evidence of Cadotte's being the agent of De Repentigny's descendants, and still less of any privity of title of any kind

* Wagner *v.* Baird, 7 Howard, 234.

† Hunt *v.* Wickliffe, 2 Peters, 201.

‡ Henry's Travels, p. 61.

between De Repentigny and him. It was customary for the French settlers in general to take Indian wives; in fact, their lives were insecure otherwise; and it is almost as likely that Cadotte was *not* the person referred to in the mention of the Frenchman who had married an Indian as that he *was*. Certainly the court cannot so strongly presume that this Frenchman was Cadotte as to give a decree on the strength of it.

1. *The tract was not occupied*, and reverted, by natural law, to the superior domain. The only occupation alleged, and the only effort to comply with the conditions, was on the part of the Chevalier de Repentigny, one of the grantees, and who, it may be added, appears from a very early period to have held his share in severalty.

Yet De Repentigny's was only a temporary, and to some extent a mere *official* occupation. Henry* says that under the French government there was kept a small garrison, commanded by an officer who was called *the Governor*, but was in fact a clerk, who managed the Indian trade on government account.

The letter of October 5th, 1751, from La Jonquière to the Minister of Marine and the Colonies (see it, *supra*, pp. 219–20), shows that Repentigny went more as an ambassador from the French to the Indians than in any other manner. The letter from Versailles of June 16th, 1752, and signed T. (see it, *supra*, pp. 217–19), shows as clearly that settlement on private account was a thing that was specially guarded against by the French crown.

The most liberal interpretation of the case will not warrant the court in assuming more than that from 1751 to 1755, 1100 pickets were got out and a stockade fort built, that some few acres were cultivated and some six or eight head of cattle purchased; while, on the other hand, it is certain that the whole was abandoned by Repentigny in or about 1755, and if our idea of Cadotte's relation to the matter is a true one, has remained so ever since; De Bonne's moiety never having been entered at all.

* Travels, p. 58.

To hold that such improvement of the land, and then ceasing to improve, satisfies the condition of the grant, would effectually render null those considerations of public policy which prompted the grant in the first place.

On the treaty of 1783, between Great Britain and the United States, the land, assuming it to have been once occupied, had then been for twenty-eight years wholly unoccupied, and being thus derelict, an *hereditas jacens*, it passed with the rest of Michigan to the United States. Even if not previously, it then reverted to the public domain of the United States by right of eminent domain *independently of the provisions of the grant.*

2. *It was in form, as well as fact, abandoned.* Certainly so, as respects De Repentigny.

Every owner of property, whether real or personal, *may* abandon it.* The abandonment of a perfect title can, indeed, never be presumed and is proved with difficulty; an imperfect one rests on a different base. The abandonment may be by matter *in pais.*† So, too, the question of whether one has been made may be considered in examining "the validity" of titles.‡

The Chevalier deliberately declined the requirements of the British Governor-General. "He could preserve his property only by an oath of fidelity to his new master, which was *too hard for his heart.*"

His *own* interpretation of the treaty of 1763, therefore was that, if he did not take the oath of allegiance to the King of England, he would absolutely and altogether lose his property, and that he had actually lost it, because he would not take the oath.

He preferred French allegiance and French military service, and does not appear to have even in form become a British subject, or complied with the 4th article of the treaty of 1763 (which was an *enabling* instrument in regard to the

* Kinsman *v.* Loomis, 11 Ohio, 479, and see Taylor *v.* Hampton, 4 McCord, 96, 102.

† United States *v.* Moore, 12 Howard, 222.

‡ United States *v.* Fossatt, 21 Id. 445.

sales it contemplated), by selling his estate to a British subject.

His descendants all trod in his steps. They were by birth and otherwise to all intents and purposes aliens; they were thus, under the laws of Canada, between 1763 and 1783, incapable of devising and taking by devise as well as of inheriting, if not also of *holding*, land.*

3. *It reverted for breach of condition.*

Why did the King of France grant out this principality—335 square miles of territory? He granted much and expected much. The grantees gave no money, they rendered no service. The king's purpose was to found a colony. He contemplated sub-grants. The concessees held by homage. They had from time to time to renew that homage. They were to make a place of refuge for travellers. None of the ends were accomplished, or for more than four years were attempted to be. The substance of the consideration has thus been withheld.

The case of *United States* v. *Arredondo*, relied on by the opposite counsel, only goes so far as to declare a grant discharged of conditions when their performance becomes impossible by the act of the grantor, but that is not the case here; there was no necessity whatever for either De Repentigny or De Bonne or their successors neglecting the performance of the conditions; the true reason appears from the evidence. Repentigny, like a gallant soldier, was not willing to desert his king. It was "too hard for his heart" to swear allegiance to the new master. He deliberately made a sacrifice of his property to his sense of loyalty. As for the alienees of De Bonne, it seems to have been a matter of selfish calculation simply. They calculated that, under the rule of the United States and by the energy and enterprise of its citizens, it would be more profitable for them to wait, as absentees, the development of the resources of the estate.

* Donegani *v.* Donegani, Stuart's Reports (Canada), 460, 605; Pacquet *v.* Gaspard, Id. 143.

Argument against the claim.

The case falls completely within the expressions in *Fremont* v. *United States*,* where it is said that, "if there were any unreasonable delay or want of effort to fulfil the conditions, it may be justly presumed that the claimant . . . . is now endeavoring to resume his ownership after the lands have become enhanced in value under the government of the United States."

And thus—after a century's absence by the grantees from the soil on which they could be sued, a century's repudiation of their duties, a century's abandonment of their rights, and a century's acquiescence in adverse possession, they found a claim for restitution; they now wish to realize the result of the calculations, by which the inaction of some of the parties is sought to be excused, and to reap the fruits of the exertions of others in promoting the settlement, developing the resources, and increasing the value of the property during their absence; exertions to which, though bound before and beyond all persons to contribute most, they have, of all persons, contributed the least.

The intention of De Repentigny to abandon is evident from his documents and letters.

4. *The fief reverted, by feudal law and the custom of Paris.*

The grant, as we have said, was subject strictly to feudal conditions, a class of conditions, as we know, common by the laws of France in the time of Louis XV. They were obviously founded in the nature of such a vast gift. We need not quote authorities to show that by the feudal law,—a law of France as much or more than of England, for the feudal system came to England from France,—the lands would revert for condition broken. The answer against this reversion is:

1st. That by the feudal laws of Canada, no forfeiture could take place under the practice or without the judgment of a peculiar court.

2dly. That this judgment has never been obtained.

* 17 Howard, 555.

3dly. That until it shall be obtained they are entitled to the benefit of the grant of 1751.

The petitioners assume, gratuitously, perhaps, that no legal proceedings were ever taken by the British government to obtain a judicial decree or judgment of reunion or forfeiture; it being to be remarked, that the records on which the proof of this depends were never at any time under the control of the United States.

We do not acknowledge the practice of Canada to be as stated. The fief, we suppose, upon being deserted in 1755, reverted to the crown, *ipso facto*. It would certainly have done so by our own law. In a case quite similar to this, the mere fact of leaving the country and becoming domiciled abroad was held to work forfeiture *ipso facto* without necessity for adjudication of forfeiture.*

But if the formality of a judgment is necessary, the court in adjudicating has power to make this decree of forfeiture and reunion now, and without any substantive suit or pleading in the nature of a cross-bill for the purpose. A judgment of reunion is matter of form, and may be pronounced at the present as well as any past time.

These remarks apply to both moieties. But as we have seen that the Chevalier de Repentigny's half was lost, because, in form and with deliberation, abandoned after the conquest, so another cause operated upon the residue: the arrêt of 1732, whereby any attempt to sell wooded lands, such as these then were, absolutely reunited the fief by operation of law to the superior domain. Thus De Bonne's share in A. D. 1796, and A. D. 1798 upon his and Caldwell's attempts to sell it, stood reunited *pleno jure* (*demeurait réunie de plein droit*), by that sale, without any special judicial decree, previously made, being necessary.

5. [The learned counsel then went into an argument to show that the description was so vague, that the land never having been severed from the royal domain, the grant could not be located.]

* Bowmer *v.* Hicks, 22 Texas, 155.

Opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

The bill in this case was filed in the court below to recover possession of a large tract of land of six leagues square, fronting on the River St. Marie, at the Saut, which connects the waters of Lake Superior with those of Lake Huron, in the State of Michigan. The grant of the land was made on the 18th October, 1750, by the governor and intendant-general of Canada (then called New France), to Louis De Bonne, a captain of infantry, and Count Repentigny, an ensign, in the French army. The complainants derive title under them. It was confirmed by the King of France the next year, on the 24th June, 1751.

The grant was to De Bonne and Repentigny, their heirs and assigns, "in perpetuity by title of feof and seigniory," with all the customary rights belonging to that species of estate. Repentigny went into possession about the date of the grant, at the Saut, having about the same time received an appointment to command the military post established there. He constructed a small stockade fort, and made some improvements in connection with it, such as the clearing of a few acres of land and the erection of huts for the people with him, and continued thus engaged till 1754. When war broke out between France and England he was called away into active military service of the government, and never afterwards returned. De Bonne never took personal possession, or possession of any other character, except that derived from the transient occupation of his co-tenant.

The bill was filed on the 9th January, 1861, one hundred and ten years since the date of the grant.

We will now refer to the act of Congress, passed April 19th, 1860, under which the bill was filed.

It provides that the legal representatives of the original grantees may present their petition to the District Court of the State of Michigan, setting forth the nature of their claim to certain lands at the Saut St. Marie, under an alleged grant in 1750, with evidence in support of it, and praying that the validity of the title may be inquired into, and the court is authorized to examine the same; and, in adjudicating upon

the validity as against the United States, to be governed by the law of nations and of the country from which the title was derived, and also by the principles, so far as they are applicable, which are recognized in the act of Congress of the 26th May, 1824. This act, which was passed to enable claimants to lands situate within the State of Missouri to try their titles before the United States District Court, directed that the claims should be heard and determined in conformity with the principles of justice, and according to the laws and ordinances of the government under which the titles originated; also, according to the law of nations and the stipulations of treaties.

This act of 1860, which authorizes the institution of these proceedings, was passed in pursuance of petitions to Congress by the representatives of the original grantees. The first notice to this government of any claim to the lands on their behalf was in the year 1825 or 1826, some seventy-five years after the date of the grant. Since then the subject has, from time to time, been brought to the attention of Congress, and finally disposed of by the passage of the act in question. The act, as we have seen, refers the claimants to the judiciary for relief, and prescribes the principles which shall govern it in hearing and adjudicating upon the case. They are—

1. The law of nations.
2. The laws of the country from which the title was derived.
3. The principles of justice.
4. The stipulations of treaties.

In the light of these principles, we shall proceed to an examination of the claim; and, first, as to the claim of the representatives of Repentigny. He was a native of Canada, and a captain in the French army at the close of the war, which terminated in the surrender of that province to the British forces, in 1760. His family was among the earliest emigrants to the country after possession had been taken by the King of France, and held high and influential positions in the government. Soon after the execution of the definitive treaty of peace of 1763, the Governor of Canada opened

a correspondence with Repentigny to induce him to remain in the province, and become a subject of Great Britain, promising him protection and advancement in his profession. He was then about thirty-eight years of age. But he declined all the advances made to him, and soon after left the country, by order of his superior officer, to take a command on the Island of Newfoundland, where the Indians were disturbing the settlers, and spent the rest of his life in the military service of France, having risen to the rank of Major-General and Governor of Senegal, on the Island of Goree, and its dependencies. He died in 1786, leaving a son, Gaspard, an officer in the French naval service, from whom the present claimants descended, and who reside in the Island of Guadaloupe. The preliminary treaty of the 3d November, 1762, at the surrender of Canada, provided in the second article, in behalf of his Britannic majesty, that the French inhabitants, or others who would have been subjects of the Most Christian King, in Canada, may retire in all safety and freedom, wherever they please, and may sell their estates, provided it be to his Britannic majesty's subjects, and transport their effects, as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except debts or criminal prosecutions,—the term limited for this emigration being the space of eighteen months, to be computed from the day of the ratification of the definitive treaty. The definitive treaty of the 10th February of 1763 contained a similar article.

The articles of capitulation at Montreal, dated 8th September, 1760, when the Canadas were given up to the British forces, secured to the inhabitants their property movable and immovable; and the proclamation of the king, under date of 7th October, 1763, pledged to his loving subjects of Canada his paternal care for the security of the liberty and property of those who are, or should become, inhabitants thereof. These pledges, both before and after the treaty, were but the recognition of the modern usages of civilized nations which have acquired the force of law, even in the case of an absolute and unqualified conquest of the enemy's

country. But the rule is limited, as in the pledge of the king, in his proclamation to the inhabitants of the conquered territory, to those who remain and become the subjects or citizens of the victorious sovereign,—those who, in the language of Chief Justice Marshall, change their allegiance, and where the relations to their ancient sovereign are dissolved. Speaking of the cession of Florida, he observed: "Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change."*

Another rule of public law, kindred to this one is, that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and, to exercise his sovereign authority over them. Hence the stipulation in the capitulation and treaties of cession providing for the emigration of those inhabitants who desire to adhere to their ancient allegiance, usually fixing a limited period within which to leave the country, and frequently extending to them the privilege, in the meantime, of selling their property, collecting their debts, and carrying with them their effects.

Now, in view of these principles, it is apparent that Repentigny, having refused to continue an inhabitant of Canada, and to become a subject of Great Britain, but, on the contrary, elected to adhere in his allegiance to his native sovereign, and to continue in his service, deprived himself of any protection or security of his property, except so far as it was secured by the treaty. That protection, as we have seen, was limited to the privilege of sale or sales to British subjects, and to carry with him his effects, at any time within eighteen months from its ratification. Whatever property was left unsold was abandoned to the conqueror. Repentigny acted upon this view of his rights. Besides the prop-

* United States v. Percheman, 7 Peters, 51–87.

erty in question, he owned and possessed a seigniory situate above Montreal, on the River St. Lawrence, called La Chenay, which he sold to Colonel Christie, a British officer, and in the deed it is recited that he had a mind to go to France, and therefore, as allowed by the late treaty of peace, was disposed to sell, &c. This was in 1766, although it appears that steps had been taken in respect to the sale at an earlier day. It is evident, also, that he had been engaged in negotiating for the sale of the seigniory in question, as in a memorial of his services presented to the chief of the bureau of the French colonies, he states, under date of 1765, that the establishment,—referring to that at the Saut St. Marie,—was burnt in 1762 by the Indians, at the time his attorney was negotiating at Montreal with the English for the sale of it. And, in 1772, in a communication to the French authorities on the subject of military services and sacrifices, he observes: "I thought that after a lease of thirty years of services, fulfilled with honor in the colonies, and the sacrifice of a fortune more than reasonable, in leaving Canada, my native country, I should be able at forty-five years of age to claim a regiment in the colonies without too much ambition." And again, in answer to an intimation that the king would give him permission to retire, he observes: "If I had not calculated upon dying in the service, I should not have sacrificed more than four-fifths of my fortune, my well-being, and that of my family, in abandoning Canada, my country."

And, further, in a communication to his government, supposed to be about 1773 or 1774, he observed: "The cession of Canada, my country, has overturned a fortune more than moderate, which I could preserve only by an oath of fidelity to the new master, which was too hard for my heart. The offers of the English ministry made to my eldest brother to retain us in their service are unequivocal proofs of the consideration we enjoyed in Canada."

Repentigny was a gentleman of education and high intelligence. He rose to the rank of general in the army, and aspired to that of Marshal of France; was Governor of Sen-

egal and its dependencies, and, as is obvious from his correspondence with his government, comprehended fully the principles of public law which forfeited all his property left unsold at the time he retired from Canada, under the provisions of the treaty.

He died in 1786, twenty-three years after the date of the treaty; and, during all this time, not only set up no claim to this seigniory, but, on the contrary, repeatedly, as we have seen, urged the patriotic sacrifice of it to his government, as a merit for her favorable consideration of himself and family. And we may add that his only son, an officer in the French navy, and who died in 1808, at the age of fifty-five, also never set up any claim or right to it to this government, and the first notice she had of it, so far as the record discloses, was in 1824 or 1825, from the descendants of this son residing in the Island Guadaloupe, and who are the complainants in the suit.

We will now examine the other branch of this case,—the moiety claimed under De Bonne. He was a captain in the French service, and fell in the battle of Sillery, in 1760, under Count de Levi, in an attempt to recapture Quebec. He left a son, P. A. De Bonne, who was then only two years old. The family were inhabitants of Canada, remained after the treaty of 1763, and became subjects of Great Britain. He was of age in 1779, and, in 1781, rendered faith and homage at the Castle of St. Louis, in Quebec, before the governor, as required by one of the conditions of the grant of the seigniory, and which was accepted, and a record made of it. He became an eminent barrister in the lower province of Canada, was attorney-general, and afterwards one of the justices of the King's Bench. In 1796 he sold his interest in the seigniory to James Caldwell, of Albany, New York, a citizen of that State, and conveyed to him the title. In 1798, Caldwell quit-claimed the premises to Arthur Noble, an Irish gentleman and an alien, who resided at the time in the State of New York. He afterwards returned to Ireland, and died in 1813 or 1814, leaving a will, by which he devised all his lands in the United States to his nephew, John Slacke,

a barrister in the city of Dublin. Slacke devised the same, in 1819, to Agnes, his wife, with power to dispose of this and other property as she might think fit, and by sundry deeds and devises, the estate passed to John Rotton, the present claimant, and a lieutenant-colonel in the British army. All of these parties were British subjects and aliens. The territory within which the premises in question are situate, passed from France to England by the treaty of 1763, and from England to the United States by the definitive treaty of 1783, according to the boundaries there agreed upon. And assuming, for the sake of the argument, that the ninth section of the subsequent treaty of 1794 protected the interest of P. A. De Bonne in the seigniory, the question arises, whether the present claimant has established any valid title to it?

The conveyance by De Bonne to Caldwell, a citizen of the United States, passed out of him whatever title he may have had, and vested it in the grantee. It was no longer a French or English, but an American title, held under the laws of the United States, and subject to them. The transmission by deed, devise, or descent, must be according to these laws, and not according to the laws of France or of England. Caldwell held the lands as he held other real property, under the laws of the government within which they were situate, the same as if they had been conveyed to him by a native citizen. The intention of the parties to the treaty was, that the citizens and subjects of each should be quieted in the enjoyment of their estates, in the same manner as if they and their heirs had been native citizens and subjects. And having conveyed to Noble, who, together with those claiming under him, were aliens, the complainant is met with the objection of alienage.

It appears, however, that since 1805 laws have been passed, first, by the legislature of the Territory of Michigan, and afterwards by the State, conferring upon aliens the right to hold lands "by purchase, devise, or descent," which, it is insisted, remove the objection. Whether or not these laws apply to lands claimed by the United States as a part of the

public domain, is a question we shall not enter upon; as we are inclined to think, upon a liberal construction of the act of Congress under which this suit is brought, this objection may be regarded as waived.

We have thus far stated, somewhat in detail, the present state of this branch of the title,—the moiety claimed by Rotton, as derived from De Bonne. And it appears that more than a century has elapsed since the original grant; and, during all this time, there has been but some four years' actual possession or occupation by the grantee or those claiming under him, and that immediately succeeding the grant. The seigniory has been held under and subject to the laws of three governments—thirteen years under the French, twenty under the English, and seventy-seven under the United States. The first notice this government had of the title or claim was in 1824–5, forty-two years since the territory within which the lands are situate came into her possession. In the meantime her laws have been extended over it, the Indian title extinguished, the lands surveyed and put on sale, and are now, and have been for years, covered with inhabitants. As early as 1823, before this claim was presented to the government, as appears from the record, a large part of this tract was possessed and occupied by settlers, and the possession afterwards confirmed by Congress, and a military post established at the Saut for their protection and encouragement in that remote section of the country. If these grantees, their descendants or assignees had fulfilled the conditions of the grant, introduced and established tenants upon the seigniory, and thus occupied and improved the lands, they would have been among these cherished inhabitants, and their titles and possessions alike protected.

The purposes for which this grant was made, and the conditions annexed to it, are specifically stated upon its face. It recites that Repentigny and De Bonne — entertaining the purpose of establishing a seigniory — had cast their eyes upon a place called the Saut St. Marie; that a settlement in that place would be most useful for voyageurs from the

neighboring ports and those from the western sea, who could there find a safe retreat, and by proper precautions, which the petitioners proposed to take, would destroy in those parts the trade of Indians with the English; and (after the words of concession of six leagues in front on the river at the Saut, and six in depth) it provides that the grantees shall hold and possess the same by themselves, and cause the same to be held and possessed by their tenants, and cause all others to desert and give up the land, and "in default thereof the present concession shall be and shall remain null." In the deed of confirmation, by the king, is the following clause: "That they (the grantees) improve the said concession, and use and occupy the same by their tenants. In default thereof the same shall be reunited to his majesty's domain;" and, in a subsequent clause: "His majesty ordering that the said concession shall be subject to the conditions above expressed, without any pretext that they should not have been stipulated in the said concession."

There is a letter in the record from the Governor-General of Canada, under date of October 5, 1771, to the government at Paris, giving the reasons for this concession. He writes: "I had the honor to let you know (by a former letter) that in order to thwart the movements that the English do not cease to make to seduce the Indian nations of the North, I had sent Sr. Chevalier Repentigny to the Saut of St. Marie, to make there an establishment at his own expense, and to build a palisade fort to stop the Indians of the northern posts, who go to and from the English, to intercept the commerce they carry on, and to stop and prevent the talks, and also the presents which the English send these nations to corrupt them and get them in their interests. Moreover, I had in view in that establishment to secure a retreat to the French voyageurs, especially those who trade in the northern parts, and for the purpose to clear the lands which are proper for the production of Indian corn, and to sustain thereby the victualling the people of the said post, and even to the needs of the voyageurs."

And in a letter, by the minister at Paris, to a high official in Canada, he alludes to that of the governor above referred to, and observes, "In one of my despatches last year to the governor, I had intimated to him that I had approved the construction of a fort at the Saut of St. Marie, and the project of cultivating the land there, and raising cattle. We cannot but approve the dispositions which have been made for the execution of that establishment, but it must be considered that the cultivation of the lands, and the multiplication of cattle must be the principal object, and that trade must be only accessory. As it can hardly be expected, he observes, that any other grain than corn will grow there, it is necessary, at least for a while, to stick to it, and not to persevere stubbornly in trying to raise wheat."

The purposes and conditions of the grant are too obvious to require further comment.

It is admitted by the learned and intelligent jurists of Canada, who have been examined as witnesses in this case, that the legal liabilities to seignioral reunion to the royal domain exists in cases of the non-fulfilment of the conditions of settlement, and which is rigorously enforced if there be no cleared lands and no settlers on the seigniory. That the right to resume the grant applies only to unimproved seigniories, to all those that have been neglected, as it respects the establishment of tenants upon the lands, and the consequent absence of cultivation, such as clearing the forests, converting them into fruitful fields, laying out and working public roads, building mills for the convenience of the tenants, and the like.

We agree to this interpretation of the conditions. We cannot, however, assent to the next position taken, namely, that the possession and improvement of Repentigny, during the four years that he occupied the seigniory at the Saut, should be regarded as a fulfilment of this condition. It contained over two hundred thousand acres of land, and the whole of the improvements claimed in his behalf, besides the stockade fort, consisted in the erection of three or four temporary huts for laborers, the clearing of a few acres of land

around the fort, and planting the same with Indian corn. His stock consisted of seven head of cattle and two horses, and, since 1754, over a century before the commencement of this suit, there has been no possession or occupancy by either of the grantees, or their descendants, tenants, or assigns, or further trace of improvements. The primeval forest remained unbroken till settlers entered upon it and established themselves under the protection of the laws, and regulations in pursuance thereof, of the United States.

It is argued, however, that according to the customs and usages of France in respect to these conditions of settlement, that no reunion to the royal domain could be asserted except by a judicial determination; that the king was disabled by his own ordinances from decreeing a reunion. We think, upon the proofs in the record, this may well be doubted, in the case of such prolonged neglect to conform to the conditions of settlement, as in the instance before us. It furnishes cogent, if not, irresistible evidence of the abandonment of the duties and obligations arising out of the conditions of the grant, and consequently of the grant itself; and invites a direct resumption by the sovereign, the lord paramount. Assuming De Bonne's title to have been valid under the treaty of 1794, thirty-one years elapsed before this government had any notice of its existence, and in the meantime neither De Bonne nor those claiming under him had taken any steps in fulfilment of the conditions. They could at least have applied to the government for the privilege of fulfilling the conditions, or to obtain a remission of them.

But we do not intend to put this branch of the case on this ground. The United States succeeded to all the rights to this territory that existed in the King of France, under the treaty of 1783, with Great Britain, at the close of the Revolution. The United States then became the lord paramount of this seigniory, and were thereby invested with the power to deal with the seigniorial estate, the same as the King of France, had it continued under his dominion; and we agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or,

in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.* In the present instance we have seen the laws have been extended over this tract, the lands surveyed, and put on sale, and confirmed to the occupants or purchasers, and, in the meantime, an opportunity given to all settlers and claimants to come in before a board of commissioners and exhibit their claims. This is a legislative equivalent for the reunion by office found.

Upon the whole we are quite satisfied that, consistent with the principles, in the light of which we are directed by the act of Congress to examine into the validity of this title, the complainants have failed to establish it. We have felt justified in applying to the case these principles with reasonable strictness and particularity, as it is nearly, if not wholly, destitute of merit.

Decree of the court below reversed, and case remanded with directions to

DISMISS THE BILL.

CROXALL *v.* SHERERD.

1. As a general thing, any legal conveyance will have the same effect upon an equitable estate that it would have upon the like estate at law; and whatever is true at law of the latter is true in equity of the former. The rule, in Shelley's case, applies alike to equitable and to legal estates; and an equitable estate tail may be barred in the same manner as an estate tail at law.
2. A use limited upon a use is not affected by the statute of uses. The statute executes but the first use. In the conveyance by deed of bargain and

* Fairfax *v.* Hunter, 7 Cranch, 603, 622, 631; Smith *v.* Maryland, 6 Id