DORSHEIMER *v.* UNITED STATES.

The power intrusted by the act of Congress of March 3, 1797, and that of June 3, 1864, as amended in its 179th section by the act of March 3, 1865, to the Secretary of the Treasury to remit penalties, is one for the exercise of his discretion in a matter intrusted to him alone, and admits of no appeal to the Court of Claims or to any other court.

APPEAL from the Court of Claims.

Dorsheimer, collector of internal revenue at Buffalo, New York, and two others, informers in the case, filed a petition in the Court of Claims to recover from the United States one-half of $220,102, which the government received on a compromise with Sturges & Sons, of a prosecution against property of one Rhomberg, a distiller.

The case was this:

The act of June 3, 1864, "to provide internal revenue," enacts, that any distiller who shall fail to make true entry and report of his stills, liquors, &c., shall forfeit all the liquors made, and all the vessels, stills, &c., and personal property on the premises, &c.; and that these may be seized by any collector, and held by him until a decision thereon according to law.* And by its 179th section gives authority to collectors to prosecute for the recovery of fines, penalties, and forfeitures, in the name of the United States; and confers the right to one moiety of them upon "the collector or deputy collector" who shall first "inform of the cause, matter, or thing, whereby such penalty may have been incurred."†

The amendment to this section in the act of March 3, 1865,‡ gives this to any person who shall first inform, and adds, that when "the penalty is paid *without suit, or before judgment*, and a moiety is claimed by any person as informer, the Secretary of the Treasury shall determine whether any claimant is entitled to such moiety, and to whom it shall be paid."

* 13 Stat. at Large, 305. † Ib. 305. ‡ Ib. 483.

Statement of the case.

An early act—one of March 3, 1797*—confers authority on the Secretary of the Treasury to mitigate or remit any fine, forfeiture, or penalty, incurred by any vessel, goods, or wares, by force of the laws for laying, levying, or collecting any duties or taxes, which, *in his* opinion, shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same.

With these acts in force, Rhomberg, a distiller at Dubuque, Iowa, violated the laws by making false returns, and fraudulently withholding taxes to the amount of $195,000. Upon information furnished by Dorsheimer and the two other persons, his liquors, distilling apparatus, grain, and the cattle at the distillery, were seized, and proceedings for their forfeiture instituted in the several districts of New York, Illinois, and Iowa, where the seizures were made.

After the seizure, Sturges & Sons, of Chicago, intervened, asserting that, without the least knowledge of Rhomberg's fraud, they had made very large advances on the property seized. And they paid to the United States $33,946, *on confession, by Rhomberg, that that amount of taxes had been withheld by him.*

The government, however, still holding on to the property seized, and the suits being in existence, Sturges & Sons entered into negotiations with the Commissioner of the Internal Revenue, who accordingly released the spirits seized, and dismissed the proceedings, excepting in Iowa, taking, in place of them, the bond of Sturges & Sons for $275,000, conditioned,

> That, if it should be determined by the commissioner that the said spirits are not subject to the lien of the government for revenue duties, as against the advances made by the said firm, or if the obligors shall pay such sum of money as the commissioner should determine to be due the government for said property seized, then the obligation to be void; it being understood that the obligors are not liable, under the bond, for any penalty which the government may assess against Rhomberg,

* 1 Stat. at Large, 506; made perpetual by act of Feb. 11, 1800; 2 Id. 7.

but only shall be liable for the actual amount of duties found to be unpaid, together with proper costs and charges attending the investigation of the case and seizure of the property.

In the meanwhile the United States continued its prosecution against the distillery, and to prevent the loss which would occur by stopping it, the officers in charge proceeded to use up the raw materials on hand which had been seized, and, in so doing, produced liquors valued at $150,000; the money (about $54,814) required to pay the expenses of so running the distillery, being furnished by Sturges & Sons.

After various negotiations—Rhomberg's fraud standing confessed on the records of the Treasury—the Secretary of the Treasury compromised with Sturges & Sons, thus:

He relinquished to them the distillery and the appurtenances, and also the product of the distillery, namely, the $150,000 worth of liquor, free of tax, and also the moneys received at Dubuque, $54,814; also, the proceeds of the cattle which had been sold, and the liquors seized, with the claim of the United States for forfeiture. The government also surrendered the bond for $275,000, given by Sturges & Sons, and assigned to them a bond given by Rhomberg to the United States. The government, on its part, received $220,102, "which amount the Secretary of the Treasury stated to be composed as follows:"

Deficiency of taxes, ...	$195,102
In lieu of penalties and forfeitures, . .	25,000
	$220,102

This compromise was made in face of a protest of Dorsheimer and his co-informers, against any settlement which should make a distinction between the share to be paid to the government and the share to be paid to them. The secretary professed to make it under the 44th section of the act of 30th June, 1864, which gives him power to "*compromise*" all suits "relating to the internal revenue."

The compromise being made, Dorsheimer and his co-informers claimed from the secretary one-half of the $220,-

102 received. The secretary refused to pay them the half of *that* sum, but was willing to pay them half of the $25,000, this last sum being, as he considered, all that was received in lieu of penalties and forfeiture. Dorsheimer and his co-informers accordingly filed their petition in the Court of Claims, setting forth the facts of the case as above, and claiming the half of the $220,102. The United States demurred, and the demurrer—after argument, in which *The United States* v. *Morris*, reported in 10th Wheaton, 246, was relied on to support it,—being sustained, and the petition dismissed, the case was brought here by the informers on appeal.

Messrs. Dorsheimer and Dick (*with whom was Mr. M. Blair*), *for the appellants:*

Invited by statutes relating to the internal revenue, the petitioners below undertook the services mentioned in this case. They thus became employed by the government, and rights accrued to them for their services. When suit was instituted, it was instituted upon a forfeiture given by law; a forfeiture as from the date of the offence committed; and this forfeiture was a "statutory transfer of right."* The right was to the joint use of the government and the informers, and so continued until the final settlement was made.† The interest of an informer is a matter of contract, and a right of property, though, until decree, but an inchoate right, vests; a right which the government cannot affect.‡ No doubt the secretary may remit, in virtue of pre-existing statutes; but this power, says this court in *The Gray Jacket*,§ "is defined and limited by law." The jurisdiction is a special one, and, if transcended, the secretary's act is void.

The compromise could not be sustained at all on the act

* Caldwell *v.* United States, 8 Howard, 366, 381.

† Jones *v.* Shore, 1 Wheaton, 462.

‡ The King *v.* Amery, 2 Durnford & East, 569; In re Flourney, 1 Georgia State, 606.

§ 5 Wallace, 342; and see McLane *v.* United States, 6 Peters, 404.

of 1797, which gives authority to remit or mitigate only on the ground of innocence. Here the guilt was confessed. And the secretary here made no voluntary or gratuitous surrender of any of the joint rights and claims. On the contrary, he made the most out of them that could be made.

Neither can the secretary, under the power given in the act of 1864 to "compromise," *so* compromise as to destroy the rights of the informers, in the way which he would here seek to do. The secretary stood in the place of the parties interested in the suit, parties who had a joint interest. He had no power, under any proceeding, however named, to divide the interest of the government from that of the officers; nor to settle the controversy upon terms which would make the result of what he did enure to the advantage of one and not of the other. His power extended no further than to agree with the *opposing* claimant, on the division between *him*, such claimant, and the parties represented by the secretary, of the property seized, and what the opposing claimant relinquished belonged to the parties to the suit; belonging to them not *de novo*, but by means of the previously existing title. A compromise is a common end of a suit, well known to the law, and yields fruits which are as thoroughly the avails of the suit as would be those given by a writ of execution. And, indeed, as this mode of terminating these suits is prescribed by the act under consideration, it may be well considered as in the category of process of law for the enforcement of claims under the statute.

The United States v. *Morris** decides nothing more than that the authority to remit the forfeiture is not limited to the period before condemnation or judgment, but that "the authority to remit is limited only by the payment of the money to the collector for distribution." So the court says: "If the government refuse to adopt the informer's acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates." Whence it is inferable that if the government

* 10 Wheaton, 246.

did adopt his acts, and did *not* waive the forfeiture, but, on the contrary, reaped a great benefit from them, that then the informer would be entitled to recover his share of that which the government received by and through the adoption of his acts, and the proceedings upon his information.

In the case now at bar, there was an action instituted by the government upon and as the direct consequence of the collector's proceedings. The only question is whether the money received was the fruit of the action. Clearly it was; for through the proceedings of the collector the government received a large sum; without them it would have received nothing.

The taxes, so called, were not paid by or on behalf of Rhomberg, and no one else was liable for them. No receipt for taxes was given to any one, nor were Rhomberg's interests considered at all in the settlement. The purchasers of the property from him were negotiating with the United States for a confirmation of their title, and asked for and got a sale, transfer, and delivery of the property, clothed with the title which the government had acquired. Sturges & Sons considered the case theirs. Rhomberg was out of the question. The forfeitures by his frauds, standing confessed, had extinguished him.

There is no doubt but that the claimants would have been entitled to the moiety of this sum of $195,102, if the secretary had not called it by the name of taxes. The compromise was simply that the owners paid $220,102, and received back their property, worth $350,000, with a discontinuance of the suit. But the secretary determines within his own mind—*in petto*—that this sum of $220,102 shall be composed of certain elements; a composition wholly imaginary; and that the compromise should consist in his receiving a sum equal to the taxes on a part of the property, and another sum, fixed arbitrarily, which he called the forfeiture. If, after the money had been paid, he had reconsidered his determination, and called the $195,102 forfeiture instead of taxes, the claimants would have been entitled to one-half of this, and the defendant in the other suit would have been

neither injured nor affected; and if, on the contrary, he had reconsidered his determination, and called the $25,000 taxes on some other portion of the property relinquished, the claimants would have been entitled to nothing, and the defendant in the other suit would have been neither benefited nor affected. Now, has the secretary, under a power to "compromise a suit," not only a power to compromise the suit, but an absolute right of distribution over the proceeds? We conceive that the government had a controlling right to abandon the adventure, but we submit that it had no right to remit its partner's share and retain its own.

In conclusion: The claims of the informers are maintained by the general policy of the United States; which is, that whenever the government adopts the acts of the informer, and proceeds upon his discoveries and to his risk, it will share equally with him whatever may be received through his proceedings; a policy which has never been departed from since the establishment of the government, has been clearly indicated by its statutes, and repeatedly maintained by this court.

Mr. Talbot, contra:

The only question is, whether the $195,102 was penalty.

The Secretary of the Treasury states that it was not received as penalty. And beyond the statement of this officer, this court will make no inquiry. That statement will be deemed sufficient to sustain the demurrer.

But if the court look into the admitted case, it corroborates this representation of the secretary.

There was a confessed deficiency of $195,000 taxes, and $33,946 was paid soon after the seizure, upon a confession of so much deficiency of taxes. The bond given by Sturges & Sons was to secure payment of unpaid taxes.

To these statements of fact it is no answer to say even that the action of the secretary was not authorized by law. Whether brought about lawfully or otherwise, the result, namely, the non-payment of the sum of $195,102, or of any part thereof, as penalty, takes away the foundation of this

claim. For this is a claim not for damages, because the Secretary of the Treasury has unlawfully prevented a moiety from accruing to the appellants, but for a moiety which they allege did accrue. Nor does it avail the appellants that what was received ought to have been received as penalty. It is enough in support of the demurrer to show that, in fact, it was not paid and received as penalty.

Further. The act of the secretary in discontinuing these proceedings upon full payment of the taxes withheld, and of $25,000 in lieu of fines and penalties, was within the scope of authority conferred by the 44th section of the act of 1864, to compromise all "suits relating to internal revenue."

Mr. Justice GRIER delivered the opinion of the court, and having quoted the act of March 3d, 1797, and the 179th section of that of June 3d, 1864, as amended in the act of March 3d, 1865, all as already given in the statement of the case,* proceeded as follows:

The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes.

As the great object of the act "to provide internal revenue" is to collect the tax, the Secretary of the Treasury has no power to remit *it*. When the primary object of collecting the tax is obtained, as in the present case, the further infliction of penalties is submitted entirely to the discretion of the secretary. No discretion is given to the courts to act in the case further than to give their judgment; and if the penalties are not mitigated or remitted by the secretary, either before or after judgment, to enforce them by proper process.

The subject has been carefully examined by this court in

* *Supra*, pp. 166–7.

the case of *United States* v. *Morris*,* where it is decided "that the Secretary of the Treasury has authority, under the remission act of March 3d, 1797, to remit a forfeiture or penalty accruing under the revenue laws at any time, *before or after judgment*, for the penalty, until the money is actually paid over to the collector," and that "such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interests of the United States."

The court say that, "It is not denied but that the custom-house officers have an inchoate interest upon the seizure; and it is admitted that this may be defeated by a remission at any time *before* condemnation. If their interest before condemnation is conditional, and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. These officers, although they may be considered parties in interest, are not parties on the record, and it cannot be said with propriety, that they have a vested right in the sense in which the law considers such rights. Their interest is still conditional, and the condemnation only ascertains and determines the fact on which the right is consummated, should no remission take place." The right does not become fixed until the receipt of the money by the collector.

If these well-settled principles be applied to the case before us, its solution is easy.

It was the first duty of the collector to collect the amount of duties or taxes on the property seized. The secretary had no right to mitigate, remit, or compromise that amount. Persons who had advanced money on the property in good faith offer the whole amount of the tax due, and finally agreed to pay the sum of $25,000 to have the penalties remitted. This offer was accepted, and the further prosecution of the suits was consequently ended.

The power intrusted by law to the secretary was not a

* 10 Wheaton, 246, 287.

Statement of the case.

judicial one, but one of *mercy*, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal. Even if we were called upon to review the acts of the secretary, we see no reason to doubt their correctness, or that of the judgment of the Court of Claims in dismissing the case.

DECREE AFFIRMED.

The CHIEF JUSTICE and Mr. Justice NELSON dissented.

SUPERVISORS *v.* ROGERS.

1. The act of February 28th, 1839 (§ 8, 5 Stat. at Large, 322), providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most convenient Circuit Court in the next adjacent State, is not repealed by the act of March 3d, 1863 (12 Stat. at Large, 768), providing that under certain circumstances named in *it*, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time.
2. A court of the United States has power to adopt in a particular case a rule of practice under a State statute; and where a Circuit Court is possessed of a case from another circuit, under the above-mentioned act of 1839, it may adopt the practice of the State in which the Circuit Court from which the case is transferred comes, as fully as could the Circuit Court which had possession of the case originally.

ERROR to the Circuit Court for Northern *Illinois*. The case, which involved two points, being this:

1. An act of Congress of the 28th of February, 1839,* provides, that in all suits in any Circuit Court of the United States, in which it shall appear that both the judges, or the one who is solely competent to try the same, *shall be in any way interested*, or shall have been counsel, or connected with either party so as to render it improper to try the cause, it shall be the duty of such judge, or judges, on the applica-

* § 8, 5 Stat. at Large, 322.