portions—whether they are substantially the same or substantially different—is a question of fact and for the jury."

If the jury in finding for the defendants have erred, the remedy is not in this court.

JUDGMENT AFFIRMED.

GRANT v. UNITED STATES.

1. An "inspection" at the place of shipping instead of at the place of delivery, by the officers of the United States, of supplies which a contractor has agreed to deliver at a distant point, does not pass the property to the United States so as to relieve the contractor from his obligation to deliver at such distant point.
2. Where a contract with the government to furnish to it supplies does not stipulate for an inspection at a place earlier than the place of delivery, it is optional with the contractor whether he will have the goods inspected at such earlier place.
3. Where a delay by the government in making an inspection of supplies, agreed to be made at the place of shipping instead of at the place of delivery, is not the proximate cause of a loss of the supplies afterwards suffered, the loss must be borne by the party in whom the title to the supplies is vested; and, if still in the contractor, by him.
4. This rule applies even where supplies have been seized by the public enemy without any default of the owner.
5. Where the government makes a contract with an individual that he shall furnish *all supplies needed* at a certain post, and afterwards rescinds the contract, the individual cannot recover from the government for a breach of the contract unless he prove that supplies were needed at the post designated.
6. The Court of Claims was not instituted to try cases of mere nominal damages.

APPEAL from the Court of Claims; in which court Grant, for himself, and as assignee of one Taliafero, a former partner, had filed a petition claiming reimbursement and damages from the United States. The case was this:

On the 9th of March, 1860, the Secretary of War, at that time Mr. Floyd, addressed an order to the Quartermaster-General and Commissary-General of Subsistence, granting to the said Taliafero and Grant the privilege of furnishing

and delivering, at certain posts in Arizona, for a period of two years, *all the supplies that might be needed there* for the use of the service, at certain stipulated rates. There was nothing in this order making an inspection necessary elsewhere than at the place of delivery.

On the 29th of July, 1860, the proper officer in Arizona served a requisition on Grant for commissary articles, and the War Department approved the order on the 22d day of September following, with notice that the articles to be purchased would be inspected at Boston or New York.

Some delays took place in regard to the inspection; for the appointment of a proper person to make which, the shipping agents of Grant had made a request on the 20th September, 1862. Major Eaton finally inspected the last of the supplies, certifying that they were contained in strong, sound, full-hooped barrels and well-secured tierces, properly marked with the names of the places to which they were destined, and were of the kind and quality usually provided by the subsistence department. This inspection did not take place until the 3d, 4th, 5th of December, 1860. The Court of Claims found, however, as facts, that the only delay attributable to the United States was a delay in appointing an inspector from the 22d September to the 21st November, 1860; that such delay did not preclude Grant's agents from purchasing the supplies required, and having them ready for inspection; that the supplies inspected by Major Eaton were sold to Grant on the 20th of November, 1860; that the United States were ready to inspect supplies on the 21st of November, 1860, and thereafter, and on that date so notified to Grant's agents; that the inspection was not made at that time, but was postponed at the request of the said agents from the difficulty they had found in procuring a part of the supplies; that these were not then ready for shipment and inspection; that there was no evidence of any notice to the United States to make inspection other than one contained in a letter of the agents to Major Eaton, dated November 22d, 1860.

The supplies thus inspected were immediately afterwards

shipped to Lavacca, and arrived there about the 10th January, 1861. They were here laden on wagons, forty-one wagons in all, but after proceeding a short distance, the train was obliged, owing to want of pasturage at that season of the year, to stop and go into camp and await the growth of grass. A delay was thus incurred of about two months and ten days, when the train again proceeded, and arrived at Rio Honde, where it was captured on the 20th April by the troops of Texas, then in a state of rebellion against the United States.

For the goods, wagons, and teams thus lost, the petitioners claimed reimbursement.

The petition also set forth great loss to the petitioner, asking damages for it, from the fact that while, as alleged, he was in the due execution of his contracts, and actually engaged in the transportation of supplies from Lavacca to Arizona, the United States, of its own wrong, and without any fault or negligence on his part, and without notice to him, and without his agreement or consent, had set aside and rescinded the said contracts. On this part of the case it appeared that in April, 1861, the Assistant Commissary-General had recommended to Mr. Cameron, by this time Secretary of War, that the contracts "be rescinded," and that, from a sense of insecurity, certain of the articles should be forwarded from St. Louis, and that others might be procured in Arizona or Sonora, of those persons who would furnish them at the cheapest rates. The secretary approving the order, the contract was no longer regarded by the United States as valid.

The Court of Claims dismissed the petition, and the claimant appealed.

Mr. C. B. Gooderich, for the appellant:

I. The petitioner submitted to and acted upon the direction to inspect at Boston and New York. That it was competent for the secretary and the petitioner to agree to inspect at those places, and, to that extent, to modify the terms of the original order, there can be no doubt. The petitioner having

acted upon it, *pro tanto*, the government cannot be allowed to say it was not obligatory upon him. The fact, if it were a fact, that the direction of the War Department for the inspection in Boston and New York, was for the benefit of the contractor, cannot destroy his rights under the modification of the contract.

The inspection by Major Eaton, his acceptance thereof, as shown by his certificate, passed the title in and to the goods inspected and marked.

After inspection and marking, the goods remained in the possession of the claimant but for *transportation*. The completion of this was prevented by the public enemy, and consequently the loss must be borne by the government. The capture of the goods by an armed force, in rebellion, acting with intent to subvert the government, under the facts found in the case, is a delivery to the United States of the goods ordered.

The relation of the parties, the purpose of the seizure made by the enemy, the use for which the supplies were intended, taken in connection with the fact that the petitioner, as a contractor with the government, must be regarded as in its service, and was rightfully in the face of the enemy, conduce to show that the capture, in this case, by an armed enemy of the government, stands upon grounds peculiar and distinct from those which may or may not apply to a capture from a contractor under other circumstances.

Upon principle, in all cases in which private property is seized by a public enemy, without any default of the owner, the government is bound to sustain the loss. Vattel* concedes the principle, although he adds, "that no *action lies* against the state for misfortunes of this nature." He denies but the remedy. He says that "the sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it."

II. The rescission of the contract, by Secretary Cameron, without cause shown, and in the absence of any default on

* Law of Nations, p. 403.

the part of the petitioner, entitles him to damages, which are to be determined by an ascertainment of the profits which he would have made if the contract had not been rescinded, or by a consideration of the expenses which the petitioner had incurred in obtaining teams, &c., to enable him to execute his contract.

Mr. Dickey, Assistant Attorney-General, contra, contended:

I. That the claim for the loss of *private property* taken in war by the enemy, could not be sustained on principles of law, and was no such claim as the Court of Claims has jurisdiction to try and allow.

That the inspection of goods of a contractor thousands of miles from the place of delivery, did not vest the property so inspected in the United States.

That the whole claim for the loss by capture rested upon the position, that this resulted, without the fault of claimant, from delays caused by the culpable neglect of the United States to inspect the goods at an earlier day; but that the facts did not sustain the claim.

II. As to the rescission. That assuming that the *order* of Secretary Floyd was a contract, it nowhere appeared that any such supplies were needed after the rescinding of the order. The rescinding of it, therefore, was after the full execution of it, inasmuch as all the supplies needed, &c., had already been furnished, and nothing remained to be done under the order, or if it were a contract, under the contract.

Mr. Justice DAVIS delivered the opinion of the court.

On the theory that the order of the Secretary of War of March 9th, 1860, granting to Taliafero and Grant the privilege of furnishing and delivering, at certain posts in Arizona, for two years, all the supplies that might be needed there for the service, at certain stipulated rates, was a contract, mutually binding on the government and the claimant, the obligations imposed on the parties to it are clearly defined.

It was the duty of the claimant, as well as his exclusive privilege, to furnish all the supplies which were needed for

the use of the service in Arizona, and on the receipt of the goods *there*, the government was bound to pay him for them the prices which were fixed in the order. It is too plain for controversy, that the property did not vest in the United States until it was delivered. To escape the force of this rule at law, it is insisted, as the goods were inspected in New York and pronounced to be of the proper kind and quality, that the title then passed to the United States, and that they only remained in possession of the claimant for transportation, and as he was prevented from delivering them by the public enemy, the loss must be borne by the United States. This position cannot be sustained, for the inspection at New York, on which it is based, did not work a change of title in the property, nor was it in the contemplation of the parties that it should. It did not affect the contract at all. The goods, by a well-known usage of the War Department, had to be inspected somewhere, and as the contract contained nothing on the subject, it was for the advantage of the contractor that they should be inspected before shipment, rather than at the point of delivery. The War Department took upon itself no additional responsibility by inspecting them in New York, instead of Arizona, and this inspection in no wise relieved the claimant from any obligation which he had assumed. He had agreed to deliver the goods in Arizona, and until he did this there was no contract on the part of the government, either express or implied, to pay him for them. All that the certificate of Major Eaton, the inspecting officer, proves, is, that the goods, when presented to him for inspection, were contained in strong, sound, full-hooped barrels and well-secured tierces, properly marked with the names of the places to which they were destined, and were of the kind and quality usually provided by the subsistence department.

But, it is said the capture of the property is chargeable to the delay of the War Department in making the inspection, and in consequence of this, that the government is not only bound to pay for the supplies which were taken possession of by the enemy, but also to reimburse the claimant for the

loss of his wagons and teams. The answer to this is, that the order of the 9th of March, 1860, did not require inspection at Boston or New York, and if the Secretary of War chose to change the order afterwards, by directing that the goods should be inspected at those places, it was optional with the claimant whether or not he would submit to such direction.

But, conceding that the Secretary of War had the right to direct where the goods should be inspected, still he was not required to inspect, until the goods were substantially ready for inspection, and he was notified of the fact; and it is plain, by the finding of the court below, that after such notice and actual readiness, he did not culpably delay the inspection. The evidence shows very clearly, that the difficulty which the agents of the claimant experienced in filling the requisition, was the cause of the delay in inspecting and shipping the goods. If, however, it be admitted that the government was in default in not inspecting sooner, that default had no connection with the subsequent injury suffered by the claimant, and was not the proximate cause of it. In such a case the rule of law applies, that where property is destroyed by accident, the party in whom the title is vested must bear the loss.*

It is insisted that this rule does not apply where private property is seized by the public enemy without any default of the owner, and that in such a case the government is bound to indemnify the sufferers. But the principles of public law do not sanction such a doctrine, and Vattel (page 403) says no action lies against the state for misfortunes of this nature. "They are accidents caused by inevitable necessity, and must be borne by those on whom they happen to fall."

Whether there are equities in this particular case, and if so, whether they require that the claimant should be reimbursed, in whole or in part, for the capture of his property, under the circumstances, are questions that must be addressed

* McConihe v. The New York and Erie Railroad Company, 20 New York, 496.

to Congress, for it is not the province of the judicial department of the government to determine them.

The only remaining point in the case, relates to the rescission by Secretary Cameron of the order of the 9th of March. This proceeding was undoubtedly taken because the supplies needed in Arizona could be either purchased there at cheaper rates, or forwarded more securely from St. Louis. Whether the conduct of the Secretary of War was or was not justifiable, is not a question to be considered in deciding this suit, for the claimant has not shown a state of case on which he could recover if the rescinding order had never been made. The contract entitled him to furnish, at certain prices, all the supplies that might be needed in Arizona until the 20th of March, 1862. To enable him to recover, for a breach of this contract, he should have proved that supplies were needed at the posts in Arizona after the rescinding order was made, and the pecuniary loss he sustained in not being allowed to furnish them. This he has wholly failed to do.

We cannot see that this is a case for even nominal damages; but if it is, the Court of Claims was not instituted to try such a case.

JUDGMENT AFFIRMED.

UNITED STATES *v.* SHOEMAKER.

Prior to the act of June 12th, 1858, providing compensation not exceeding one quarter of *one per cent.* to collectors acting as disbursing agents of the United States in certain cases, such collector, if receiving his general maximum compensation, under the act of March 2d, 1831 (§ 4), and also his special maximum of $400, under the act of May 7th, 1822 (§ 18), could not recover on a *quantum meruit* or otherwise for disbursements made for building a custom-house and marine hospital at the port where he was collector.

ERROR to the Circuit Court for the Eastern District of Michigan.

This suit was brought by the United States on a bond