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still more difficult to understand how the compress company, or the fire insurance companies, could avail themselves of the arrangement, even regarding it as illegal, between the agent of the railroad company and Jones Brothers & Company. They were not parties to it, and they were not affected by it in any way, shape, or form.

There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of such allowance to Jones Brothers & Company, if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.

The principles laid down in *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 145 U. S. 263, fall far short of establishing that the alleged allowance of rebate to Jones Brothers & Company would render the railroad company's bills of lading invalid and defeat the right of the marine insurance companies, who had paid the losses, to subrogation against the railroad company on bills of lading issued to the owners or consignees of the cotton, who are not shown to have known of, or consented to, the railroad company's agent giving such rebates.

We are, therefore, of opinion that the Federal questions presented by the assignments of error were not well taken and are not sustained, and that the judgment of the Supreme Court of the State of Tennessee in all of the cases must be

Affirmed.

CALIFORNIA POWDER WORKS v. DAVIS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 301. Submitted January 8, 1894. — Decided January 22, 1894.

Two parties claiming title to the same land in California, each under a Mexican grant made prior to the treaty of Guadalupe Hidalgo, and each under a patent from the United States, one of them filed a bill in equity against the other in a District Court in San Francisco to quiet

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title. The cause was transferred to the Superior Court for that city and county, and being heard there, it was decreed that the defendant's title was procured by fraud, and the relief sought for was granted. On appeal to the Supreme Court of the State the judgment was affirmed, the court saying that the question of the genuineness of each original grant was a legitimate subject of inquiry, when the issue was made by the pleadings, and that on the evidence in the case the finding against the genuineness of the defendant's grant would not be disturbed on appeal. *Held*, that this ruling presented no Federal question for the consideration of this court.

What is necessary to give this court jurisdiction on writ of error to the highest court of a State again stated.

This court does not deem it necessary to examine the question raised under the practice in California, allowing separate appeals to lie from a judgment and from an order granting or refusing a new trial.

This was a suit in equity brought by Isaac E. Davis, for whom his administrator, Willis E. Davis, was duly substituted, and Henry Cowell, against the California Powder Works in the District Court of the Fifteenth Judicial District of California in and for the city and county of San Francisco, and subsequently transferred to the Superior Court of said city and county, to quiet plaintiffs' title to certain lands in Santa Cruz County, California. Both parties claimed title under patent from the United States; plaintiffs, through Pedro Sainsevain, patentee of the rancho Cañada del Rincon en el Rio San Lorenzo; defendant, through William Boele, patentee of the tract called La Carbonera.

The case having been heard, the Superior Court made special findings of fact, and found as a conclusion of law that the plaintiffs were entitled to a decree according to the prayer of the bill.

From the findings it appeared that Sainsevain's patent was based on a concession of July 10, 1843, the grant being duly approved June 10, 1846; that the archives of the Mexican government contained a full record of the proceedings; that the claim was confirmed January 17, 1854, by the land commissioners of the United States, duly organized under acts of Congress in that behalf, and their decree made final by the dismissal of an appeal therefrom by the District Court of the United States for the District of California; that a survey

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was duly had, and that the patent issued June 4, 1858. As to Bocle's patent, it appeared that the grant to him bore date February 3, 1838; that it was confirmed January 23, 1855, and that a patent subsequently issued, (July 7, 1873,) but it was found that the grant had been falsely antedated, and that it was made in the year 1848; that "there is not and never has been any paper, document, writing, or entry in any book or record in the Mexican archives pertaining to California relating to said alleged grant or concession to said Bocle; nor is the same noted in a book called the Jimeno's Index, nor has said purported grant any map or diseño attached to it, nor is any such map or diseño referred to. And at the said date, the 3d of February, 1838, said Bocle was not a naturalized citizen of Mexico, but was a subject of the Kingdom of Great Britain and Ireland;" that the decree of confirmation by the land commissioners of the alleged grant to Bocle was obtained by fraud, "the said fraud consisting of the fact that no such grant was made to said Bocle for said land, and said paper purporting to be such grant was false, simulated and fabricated, and made after the conquest of California by the United States from the Republic of Mexico, and in or about the year 1848, and was fraudulently imposed upon said board of land commissioners as valid and genuine. And the dismissal of the appeal therefrom to the United States District Court was likewise procured by the same fraud and by the concealment of said facts of the fabrication of said pretended grant from the United States authorities acting in that behalf. And said land commissioners and said authorities were each and all ignorant of any such fraud, and of the fact that said alleged grant was false and simulated, and were misled and deceived by the false allegations of the said Bocle in that behalf."

A decree in plaintiffs' favor having been entered, defendant moved for a new trial, which was denied, and an appeal was thereupon taken to the Supreme Court of California from the order denying said motion, by which that order and the judgment were affirmed.

The Supreme Court of California, (84 California, 617,) among other things, held: "Where both parties to an action to quiet

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title claim the land in dispute under patents confirming Mexican grants, the question of the genuineness of each original grant is a legitimate subject of inquiry in the action, provided such inquiry is admissible under the pleadings; and it may be shown in such case that the grant bearing the oldest date was not made during the term of office of the Mexican governor whose signature it bears, and that it was fraudulently antedated. When the evidence in such action shows that there is no official paper appertaining to an alleged Mexican grant, nor any record or trace thereof, which appears anywhere in the archives of California when a part of Mexican territory, a strong presumption arises against the genuineness of the grant, which can only be overcome by the clearest proof of its genuineness; and when the oral testimony of witnesses, offered in support of such genuineness, is of an inconclusive or suspicious character, a finding against the genuineness of the grant will not be disturbed upon appeal."

Application for a rehearing was made and overruled, and thereupon a petition for the allowance of a writ of error from this court was presented in which it was set forth that petitioner claimed the land in controversy under the treaty of Guadalupe Hidalgo, and under a certain statute of the United States entitled "An act to ascertain and settle private land claims," approved March 3, 1851; that such lands were ceded to the grantor of petitioner by the Republic of Mexico in 1838; that such concession was confirmed by the government of the United States, and a patent therefor issued to the petitioner's grantor under the laws of the United States; that such concession and the patent thereon issued were attacked by the bill in equity alleging that the concession was not actually made until 1848; that on issue joined on that allegation, trial was had and plaintiffs below secured the entry of a judgment that theirs was the better title; that the decision of the Supreme Court of the State of California in the cause, was and is against a title and right claimed by petitioner under the treaty and the statute of the United States, approved March 3, 1851. The writ of error was allowed and the case came on on a motion to dismiss.

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Mr. A. T. Britton, Mr. A. B. Browne, Mr. J. H. McKune, and Mr. W. F. George in support of the motion.

Mr. John Garber, Mr. John H. Boalt, and Mr. Thomas B. Bishop opposing.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. *Eustis v. Bolles*, 150 U. S. 361. It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Bank v. Bollong*, 150 U. S. 85, 88. We cannot find that the title or right referred to in argument was specially set up or claimed prior to its assertion in the petition for the writ of error, which forms no part of the record of the court below. *Clark v. Pennsylvania*, 128 U. S. 395.

But such special claim, if duly made, would have been unavailing, as the judgment rested upon the proposition that the grant under which the plaintiff in error deranged title was simulated, and this was a ground sufficient to sustain it

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involving no Federal question. The parties claimed under separate private land claims, originating, as alleged, under the Republic of Mexico, and separately confirmed, surveyed, and patented by the authorized officers of the United States.

The eighth article of the treaty of Guadalupe Hidalgo, 9 Stat. 922, 929, provided: "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Upon the acquisition of the country, the rights of the inhabitants to their property were retained, and they were entitled by the law of nations to protection in them to the same extent as under the former government, which protection the treaty also secured. As remarked by Mr. Justice Field in *Beard v. Federy*, 3 Wall. 478, 492, "the obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such a manner and on such terms as they might judge expedient. By the act of March 3, 1851, c. 41, they have declared the manner and the terms on which they will discharge this obligation." This act created a special tribunal for the investigation of claims to land and the determination of their validity as respected the United States. 9 Stat. 631, 634. By section fifteen it was enacted: "That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

While the confirmation of these claims might be conclusive as against the United States and those claiming under them, such confirmation and patent could have no effect upon the interests of third persons in respect of grants to them from the former sovereign. The state courts were open for the determination between individuals of the priority or validity

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of conflicting titles under different grants from the same antecedent source, and the issue as to whether one of the two grants was forged or obtained by fraud did not involve the denial of a right or title set up under the treaty or the statute. The treaty extended no protection to a fraudulent claim, nor did proceedings under the statute to which each was respectively not a party or privy determine any such question as between these private parties, neither of whom claimed under the United States by title subsequent, but both of whom claimed under patents based upon Mexican grants. *Lynch v. Bernal*, 9 Wall. 315, 323. The case was the ordinary one of a contest in respect of a forged or fraudulent deed. In *Phillips v. Mound City Association*, 124 U. S. 605, 610, it was ruled that the adjudication by the highest court of a State that certain proceedings before a Mexican tribunal, prior to the treaty of Guadalupe Hidalgo, was insufficient to affect the partition of a tract of land before that time granted by the Mexican government, which grant was confirmed under the act of March 3, 1851, presented no Federal question; and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject-matter of the action, was free to act in the premises." The case is in point and is decisive. *Martin v. Hunter*, 1 Wheat. 304, is not to the contrary, for there the plaintiff claimed under the treaty of 1783, and the state court decided against the title thus set up.

We have not deemed it necessary to examine the question raised under the practice in California allowing separate

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appeals to lie from a judgment and from an order granting or refusing a new trial, and for the purposes of this case have treated the judgment of the Supreme Court, which not only affirmed the order of the Superior Court overruling the motion, but the judgment as well, as the last and final judgment in affirmance of a final decree in equity in the court below.

Writ of error dismissed.

POINTER v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF ARKANSAS.

No. 759. Submitted October 19, 1893. — Decided January 22, 1894.

The provision in Rev. Stat. § 1024, that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated," leaves the court to determine whether, in a given case, a joinder of two or more offences in one indictment is consistent with settled principles of criminal law, and also free to compel the prosecution to elect under which count it will proceed, when it appears from the indictment or from the evidence, that the prisoner may be embarrassed in his defence, if that course be not pursued.

When an indictment contains two counts charging the commission of two murders, committed on the same day, in the same county and district, and with the same kind of instrument, the court is justified in forbearing at the beginning of the trial, and before the disclosure of the facts, to compel an election by the prosecutor between the two charges.

When, in the case of such joinder, it is developed in the course of the trial that the accused was not confounded in his defence by the union of the two offences in the same indictment, and that his substantial rights will not be prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two he will proceed, the court is justified in such refusal.

All the panel of jurors were examined as to their qualifications, and thirty-seven were found not liable to objection for cause. The defendant was