ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the Judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

THE UNITED STATES, APPELLANT, *v.* JOSEPH LAWTON, EXECUTOR OF CHARLES LAWTON, MARTHA POLLARD, HANNAH MARIA KERSHAW, WIFE OF JAMES KERSHAW, ET AL.

A Spanish grant of land in Florida, for six miles square, "at the place called Dunn's lake, upon the river St. John's," is too vague to be confirmed, even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water-power.[1]

The river St. John's meanders so much that it is near Dunn's lake for thirty miles. The survey might therefore commence at any point of this distance with as much propriety as at any other point.

This concession cannot be distinguished from various others which have been brought before this court. The land granted was not severed from the king's domain. It remained a floating grant, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land.

Nor is the grant in this case aided by two surveys, one purporting to have been made in December, 1817, and the other in the spring of 1818. The first must have been fictitious, not actually made upon the ground, but merely upon paper; and the second was too imperfect to be effectual.

Previous to the act of May 26, 1824, Congress alone could act upon these incipient titles. By that act power was given to the court to pass a decree for the land, provided its locality, extent, and boundaries could be found. But, in the present case, this cannot be done.

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[1] An actual survey of an open and floating concession is a necessary ingredient to its validity; and it must also be an authorized survey to sever any land from the public domain;—so decided with reference to the Spanish claims. *Wherry* v. *United States*, 10 Pet., 338; *Smith* v. *United States*, Id., 327; *United States* v. *Forbes*, 15 Id., 180; *Buyck* v. *United States*, Id., 215; *O'Hare* v. *United States*, Id., 297; *United States* v. *Delespine*, Id., 328; *United States* v. *Miranda*, 16 Id., 155; *United States* v. *Hanson*, Id., 198; *United States* v. *Clarke*, Id., 228; *United States* v. *King*, 3 How., 784; *Winter* v. *United States*, Hempst., 344, 383; *Glenn* v. *United States*, Id., 394; s. c., 13 How., 250; *De Villemont* v. *United States*, Hempst., 389.

THIS was an appeal from the Superior Court of East Florida, under the following circumstances.

On the 10th of November, 1817, James Darley presented the following petition to Governor Coppinger.

"To his Excellency the Governor:

"Don James Darley, a native of Great Britain, with the respect due to your Excellency, says, that with the view of setting himself *in this province under the protection of his Catholic Majesty, knowing the very great advantages that would result to the commerce of it from the article of lumber, if machinery for sawing is erected for sawing for the consumption of the province, as well as for exportation; and wishing to dedicate his attention and funds to this object, whenever he may be in possession of the necessary right, he asks and supplicates your Excellency will be pleased to grant to him from this time, in absolute property, six miles square of land, at the place called Dunn's lake, upon the river St. John's, for the purpose aforesaid of establishing said machinery; which favor he hopes to merit from the justice of your Excellency. St. Augustine, Florida, 10th of November, 1817."

*11]

To which the following response was given:—

DECREE.

"*St. Augustine*, 10*th of November*, 1817.

"Taking into consideration the benefit and utility which ought to result to the improvement of this province by what the petitioner proposes, There are granted to him, in absolute property, the six miles square of land which he solicits for said water saw-mill, and that it may be effected let there be issued to him, from the secretary's office, a certified copy of this petition and decree, which will serve him as title in form.

COPPINGER."

On the 21st of December, 1817, George Clarke, the surveyor-general, gave the following certificate of survey, accompanied by a plat.

"I, Don George Clarke, captain of the Northern District of East Florida, and by the government thereof appointed surveyor-general of said province, do certify that I have surveyed and delineated for Santiago Darley a square of six miles of land, equal to twenty-three thousand and four acres, on the west part of Dunn's lake, contiguous to the waters thereof, in its upper part, which lands were granted to him

by the government on the 10th of November of the present year. Said tract is conformable to the following plat, and to the copy thereof, which I keep. Northern District, 21st December, 1817."

On the 22d of May, 1819, the grantee filed his petition to the Superior Court of Florida, praying confirmation.

On the 12th of September, 1829, the District Attorney of the United States, Thomas Douglas, answered the above petition, denied generally the matters and things stated in it, of which he required proof, averred that the grant, if made, was in violation of the laws of Spain, and that the governor had no power to make it; that if made at all, it was made after the 24th of January, 1818, *and antedated; that grants for speculation were contrary to the policy of Spain, [*12 and void; that the grant, if made, was upon the condition that Darley would build a saw-mill, which he had not done; that the grant conferred no right to the soil, but only a right to cut pine-trees for the use of the mill, and averred that Darley was not a subject of the king of Spain at the date of the supposed grant, which circumstance, of itself, rendered the grant null and void.

On the 26th of May, 1830, Congress passed an act, the fourth section of which enacted as follows: —

"That all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of Congress approved 23d May, 1828."

On the 4th of January, 1834, the will of Darley was admitted to probate (he having died at some prior time which the record does not state), and letters testamentary were granted to Charles Lawton as executor.

On the 23d of July, 1834, the claimant's death was suggested, and the cause ordered to proceed in the name of Charles Lawton, executor.

On the 29th of July, 1834, Charles Lawton filed a bill of revivor on behalf of himself and the unknown heirs and devisees of the deceased.

On the 26th of August, 1834, the Attorney of the United States answered the bill of revivor, denying the right of Lawton to revive the suit, either for himself as executor, or on behalf of the unknown heirs and devisees.

On the 16th of June, 1841, a bill of revivor was filed on behalf of Joseph Lawton, executor of Martha Pollard, the widow of Jonathan Pollard, late of England, deceased; of James Kershaw and Hannah Maria Pollard, his wife; of

Robert Mutrie and Sarah Pollard, his wife; of William Pollard and James Pollard, all of England, children of Martha Pollard, and heirs and legatees of James Darley, deceased.

On the 10th of July, 1841, the District Attorney of the United States filed his answer in the nature of a general replication, and on the 17th of July the cause came up for hearing.

On the 13th of September, 1841, the court pronounced a decree, from which the following is an extract.

"Without recapitulating the other proofs in the cause, it is sufficient for the present to say, that the claimants have made out a case, which entitles them to a confirmation of the title of the land granted, *provided* the identity of the land specified in the grant is such as to warrant a decree of confirmation; or, in other words, if *the description of
*13] the land, as contained in the grant, is such that the land intended can be identified, located, and laid down by actual survey, according to the calls and manifest intention of the grant.

"The claimants have put in evidence a survey of a tract of land, made by George J. F. Clarke (formerly the Spanish surveyor-general of East Florida), bearing date the twenty-first day of December, 1817, and which, with the plat accompanying it, purports to be a survey and plat of the land in question. But there are objections to this survey of such a nature as to make it improper that an absolute decree should be made for the land therein described.

"First, it does not follow the calls of the grant, even if they can be followed at all; the grant is for the place called Dunn's lake, 'on the river St. John's.' There is as yet no proof that there is such a place '*on the river St. John's*'; but taking it for granted that there is such a place, which may be found, this survey does not appear to be at that place; it is not '*on the river St. John's*' at all.

"The location, it is true, appears to be on the west side of Dunn's Lake, and 'contiguous to the waters thereof in its upper part.' In the absence of any proof as to the geography of the country, if it should be said that the court should take notice of the maps of the surveyed part of the territory, as published from the land-office, it will be remarked that the maps of the country show that a lake, called Dunn's lake, does connect itself with the St. John's; but it will also appear that a square of six miles, bounded on the east by the upper end of the lake, will not extend to the river St. John's; and if it was the intention of the grant that the lands should lie

'upon the river St. John's,' such a location as is set forth in the plat and survey must of course be rejected.

"Whether the point of junction between the lake and the river is '*the place*' alluded to in the grant, it is not necessary now to determine (nor in fact can that point be determined without further proof); but if it is there, clearly the survey offered is not a survey or plat of the land granted.

"Secondly. The survey and plat are materially defective in other particulars. There is no well-defined corner, or permanent monument, mark, or boundary, which is known and established, or which can be found as a starting-point. The plat shows that the first corner is a stake in the swamp, near the margin of the lake, but whereabouts in the swamp, or how far from the head or the foot of the lake, does not appear; and all the other corners are represented to be stakes, but without marks, and their location entirely undefined; and the survey does not purport that the lines were ever run or marked; and even if it was conceded that *stakes* were set at the four corners of a tract six miles square, in that part of the country, in 1817, it could hardly be supposed that at this time *they would furnish any aid to the person who should attempt to find the tract; but the [*14
court cannot disregard the suggestion which has been repeatedly made in these land cases, with reference to Clarke's surveys, viz.: that they were not made in fact upon the land, but merely delineated on paper, particularly where that suggestion is strengthened by the internal evidence afforded by the survey itself. This plat and survey bill might easily have been made by Mr. Clarke without his ever seeing the land, and in the absence of any proof to show that any one corner, line, or mark, or boundary of this tract is now extant, or can be found, it would be very improper to confirm this survey.

"It must not be overlooked in the decision of these land cases, that although the equity and justice of the claim, or the validity of the grant alleged, is of primary importance, and the first thing to be ascertained, yet the exact location and boundaries of the tract in question are equally important, not only to the United States, but to the claimant; and it was one of the principal objects that the government had in view, in confiding the adjustment of these claims to this court, by the act of 1828 and 1830, that the extent, location, and boundaries of such grants as were found to be valid might be clearly ascertained, and fully and finally adjusted between the claimants and the government, so that the grants found to be valid might, with precision and accuracy, be severed from the remainder of the public domain, and that the

proper officers of the government might know what lands belonged to the United States, and what might and could safely be sold by them.

"This was all-important to the correct operations of the land-office, and of deep concern to the claimants, and by the act of Congress the decree of this court is made final and conclusive upon the parties, unless appealed from. To make a decree, therefore, which merely settles the right of the claimant to a certain quantity of land in a certain neighbourhood, or section of the country, without clearly defining the locality, extent, and boundaries of such land, by proper and known or permanent landmarks and monuments, would seem to be a very incomplete fulfilment of the provisions of the statute, and to fall far short of the objects of the law. The surveys of these grants should be accurate, and defined by permanent corners, and the intersection of the lines of the tract with the lines of the government surveys should be clearly and accurately shown; or where this is not entirely practicable, some one or more of the corners of the tract or grant should be clearly defined by a permanent landmark or monument, and its course and distance from some corner of the public surveys accurately given, so that the lines of the tract may be seen therefrom without any difficulty.

"In this case, it may be that the survey was actually made, and that further proofs may show, that the lines and corners *15] are now to *be found, and that it is clearly within the calls of the grant; but if, on the other hand, it should appear that no survey was made, or that no corners or boundaries can be found, or, being found, that they are not within the calls of the grant, then it is a proper case for a survey before final decree, and one should be made; provided, upon proofs to be made respecting the region of country in which the grant is claimed, 'the place' designated in the grant can be found and identified; but if, on the contrary, it should appear that the place mentioned in the grant cannot be found, and that the description is too indefinite for a survey to be made, that the description lacks identity, or ascertainable locality, then of course the grant must be declared void for want of identity, and the claimants take nothing by their concession. *Forbes's case*, 15 Pet., 184, 185; *Arredondo's case*, 6 Id., 691; *Bucyk's case*, 15 Id., 223.

"With a view, therefore, of enabling the claimants to produce further proofs on these points, and to identify and locate the land claimed by actual survey, or otherwise, the decree must be suspended or postponed, and the cause continued. J. H. Bronson, *Judge*."

On the 13th of November, 1841, the evidence of Mauricio Sanchez, Joseph S. Sanchez, and John M. Fontane was filed, in addition to that of Antonio Alvarez, all of which is as follows: —

Testimony of Antonio Alvarez, a witness produced, sworn, and examined on the part of the claimants.

Witness says, "I am keeper of the public archives of East Florida"; a certificate, with the name of Thomas de Aguilar signed to it, being shown to witness, he says, "this document was transferred to my office by the land-commissioners. It is in the handwriting of Thomas de Aguilar, and is signed by him. The certified copy here produced and filed in this cause (by me certified) is a true copy of this paper. This certificate of Aguilar came into my office in 1829, or early in 1830. This claim of Darley was filed before the board of land-commissioners, 29th November, 1823. The plat and survey, it appears, were filed with the commissioners on that day. I was in the secretary's office here in 1817. The paper which *we* used was from Havana; *we* usually got our paper there; never got American paper that I remember. The inhabitants here were in the habit of using American, or English, or Spanish paper. Paper imported from the United States was common in those days."

Being cross-examined, witness says, the paper on which the Aguilar certificate is written is Spanish paper. The survey is on American paper. Clarke did not do his business in the secretary's office.

Testimony of Mauricio Sanchez, Joseph S. Sanchez, and John *M. Fontane, witnesses produced, sworn, and examined on the part of the claimants. [*16

Mauricio Sanchez, sworn, says, "I know the lake called Dunn's lake; have known it about fourteen years. It is on the east side of the St. John's river, and about fifty miles southwest of St. Augustine. I know of no other lake of that name; it empties into the St. John's. The lake is about fifteen miles long, and about three or four miles wide. I lived on the lake with my uncle, Ramon Sanchez, above six or eight years. This is Dunn's lake on the St. John's."

Cross-examined by United States attorney.

Witness says, "From the river St. John's you go about ten miles through a deep creek to the lake. It is about five miles to Lake George. The St. John's river makes a bend west of this lake, and leaves a deep strip between it and the river St. John's. This strip of land is sometimes called Cows-neck, and sometimes Dunn's lake neck. There is a swamp on the west side of the lake, continuing eight or nine

miles up from the mouth of the outlet. The spots of hard land, and some swamps and sawgrass," &c.

By the court.

"If I had a grant on Dunn's lake, I think I should have it lying on Dunn's lake. The strip, or Cows-neck, is from six to ten miles wide, perhaps more. The outlet of the lake, by the meanders, is about ten miles; in a straight line, perhaps six miles. This outlet is a narrow creek, very deep, sometimes an hundred yards wide, sometimes narrower."

Joseph S. Sanchez, being duly sworn, says: —

"I have known Dunn's lake for fifteen years. I have resided there, and know it well. It empties into the St. John's by a creek called Dunn's creek. The lake is east of the St. John's; it is about five or six miles from the St. John's. The widest part of the strip of land is near the beginning of the creek."

Cross-examined by counsel for the United States.

"I know of no place on the St. John's river called Dunn's lake, except this. The mouth of the outlet in the St. John's is about seven miles above Pilatka. From Hambly's store on the St. John's it is about seven or eight miles across to the lake; above there it is perhaps four or five. Dunn's creek is about twenty or thirty feet wide, and in going up into the lake, you go in a southeasterly direction, about ten miles by the meanders of the creek, and about seven miles in a straight line. The lake is about fifteen miles long, and about three miles wide on an average, and lies nearly north and south. A swamp extends up the lake about half way on the west side. Then there is some swamp, some hammock, and some hard land.

"The average width of the strip of land lying between the lake and river St. John's is about five miles. In some places, more. *The widest part of the strip is at the north end of the lake. From the middle of the west side of the lake, I should think it would be about five and a half miles to the St. John's, and above that, the average width is about five miles between the lake and river St. John's.

*17]

"By Dunn's lake on the river St. John's, I understand, a Dunn's lake on the St. John's. But I know nothing about Dunn's lake."

John M. Fontane, being duly sworn, says: —

"I have seen a survey made for James Darley, by Geo. J. F. Clarke. I received fifty dollars from Darley for Clarke, for making this survey, by an order from Clarke, about 1820. I understood it was for making this survey.

"There is a Dunn's lake which empties into the St. John's.

It is the only one that I know of. I have never been there."

On the same day when this evidence was filed, viz. the 13th of November, 1841, the court passed an order to have the land surveyed. Owing to various impediments, this survey was not made until the 1st of July, 1843, nor returned to the court until the 1st of December, 1843. It was made by James M. Gould, the county surveyor of St. John's county, and upon its presentation was objected to by the counsel for the United States, because it did not conform to the grant, or to the calls of the grant. It was, however, allowed to be received in evidence, subject to the objection of the counsel for the United States, and without prejudice.

On the same day when the survey was returned, viz. the 1st of December, 1843, the counsel for the claimants offered the deposition of James Pellicier, taken under commission, which was read in evidence. The testimony and answers of the witness in this deposition were objected to by the counsel for the United States as being irrelevant and improper, and the whole evidence objected to as being incompetent. The counsel for claimants said, that he offered the deposition to show that there is such a tract of land, and to identify and locate it. The deposition was received, as tending to show that there is such a tract of land, &c., but subject to the objection of the counsel of the United States, as to its relevancy and effect.

The deposition was as follows: —

Interrogatories to be propounded to James Pellicier, a witness in the above-entitled cause, and to be taken before George R. Fairbanks, Esq., clerk, and to be used in evidence on the trial thereof.

First. Were you or not acquainted with James Darley in his lifetime? Where did he reside, previous to the year 1817, and was he or not a Spanish subject?

To the first interrogatory witness answers: —

*"I was acquainted with James Darley in his life- [*18
time. He resided in the city of St. Augustine, previous to the year 1817; he was a merchant at that time; I believe that he was a Spanish subject, and have no doubt of it."

Second. Have you or not any knowledge of a concession of land made by the Spanish government to the said James Darley, on Dunn's lake?

To the second interrogatory he replies: —

"I understood from the said James Darley, at that time, that he had received a grant of land from the Spanish govern-

ment, situated on Dunn's lake. I think I so understood from him about the early part of 1817, or the early part of 1818, I am not sure which. The quantity I think was six miles square, granted for a mill-seat, I think. It was a fact generally known in the neighbourhood where I lived, at Matanzas."

Third. Do you or not know of the survey of a tract of land on Dunn's lake, in favor of James Darley? If you do, say in what year that survey was made, who was the surveyor, and who the chain-carriers? Were you, and who else were, present at this survey; and what was the number of acres to be surveyed, as near as you can recollect?

To the third interrogatory he answers: —

"In the year 1818, I think in the early part, between the middle of March and the middle of April in that year, I was employed by Mr. James Darley in assisting him to make a survey of a tract of land claimed by him on Dunn's lake. Robert McHardy was the surveyor employed. Two black men, one called George Bulger, belonging to Mr. Bulger of St. Augustine, and Peter Survel, a free black mulatto, were the chain-carriers. I sometimes carried the compass, and sometimes the chain, as Mr. McHardy directed me. Mr. Gibson of Charleston, and Mr. Alexander of Charleston, were both present at said survey, and I understand are neither of them living. I cannot recollect the number of acres to be surveyed; I think it was six miles square."

Fourth. State where the surveyor commenced his survey, whether he made any marks, and what marks, and how far the survey extended, and what prevented the surveyor from extending his survey further. State all the particulars, and what marks, if any, you made on the line.

To the fourth interrogatory witness answers: —

"The surveyor commenced his survey on the edge of Dunn's lake, at the south end of Cowen's old field, as it was called by the guide, Peter Survel; we run the line from thence, from three quarters of a mile to a mile and a half, west from the lake, and blazed the trees with one or two chops above the blazes; these marks were made by me. And then, on account of some misunderstanding between Mr. Darley and Mr. McHardy, the surveyor, *the survey was stopped. The misunderstanding arose from Mr. McHardy's wishing to see the order of survey, which Mr. Darley refused to exhibit to him, although he said he had it with him; we then broke up the survey, and went back to Mr. McHardy's, on the Tomoka."

*19]

Fifth. Say if it was the north or south line that McHardy surveyed.

22

To the fifth interrogatory witness replies: —

"The line surveyed by Mr. McHardy was intended for the north line of the tract."

Sixth. Were you or not with James M. Gould, esquire, at the time he made a recent survey of a tract of land as claimed by the heirs of Darley? State whether or not you pointed out the starting-point of this survey; was it the same at which McHardy commenced; did you see any mark there, such as you judged to be the same that was made by McHardy, or not?

To the sixth interrogatory witness replies: —

"I was with James M. Gould, esquire, at the time he made a recent survey of a tract of land as claimed by the heirs of Darley. I showed Mr. James M. Gould the same point at which we had commenced the survey, when I was with Mr. McHardy. I saw and pointed out to Mr. Gould the same marks which I had made when I was with Messrs. Darley and McHardy. I showed him a blazed tree, as the starting-point."

Seventh. Did you or not see other marks? State all the particulars.

To the seventh direct interrogatory witness says: —

"I saw several blazes about the woods, but no other surveyor's marks. I did nothing more than to show them those old marks which I had made."

Eighth. State any other facts within your recollection.

To the eighth and last direct interrogatory witness says: —

"That I do not know any other matter or thing pertinent to, or relating to, the subject-matter of these interrogatories."

JAMES PELLICIER.

Cross-interrogatories to be propounded on behalf of the United States to James Pellicier, a witness for the petitioner in the above-entitled cause.

First. If you say that you know James Darley, please state whether he is now alive or dead, when and where he died, and his age at the time of his death, and your age now.

To the first cross-interrogatory witness replies: —

"I know James Darley. He died in St. Augustine, in the summer of 1832. I do not know of his age at the time he died; he must have been between forty-five and fifty years of age, when he died. I am nearly forty-seven years of age now."

*Second. Where was said James Darley born; was he not born in Scotland, or in some other foreign country? [*20

To the second cross-interrogatory witness answers: —

"I have heard Mr. Darley say that he was born in Eng-

land; have often heard him say that he was of English birth."

Third. If you say that said James Darley was a Spanish subject, state how you know that fact; do you know it of your own knowledge?

To the third cross-interrogatory, witness answers: —

"I have no other knowledge of James Darley being a Spanish subject, than from having so understood from himself, and from the fact of his enjoying liberties and privileges which only Spanish subjects were permitted by the laws of the province to enjoy; he was reputed to be a Spanish subject."

Fourth. If you answer the second direct interrogatory in the affirmative, please state how you obtained such knowledge; was it not from report or hearsay, or the statements of said James Darley himself?

To the fourth cross-interrogatory, witness says: —

"My answer to the second direct interrogatory embraces all my knowledge on the subject, and is as full as I can make it."

Fifth. If you answer the third direct interrogatory in the affirmative, please state how you obtained your knowledge of said survey; was it from report or hearsay, or the statements of the said James Darley himself? Did you assist in making a survey for said James Darley, at Dunn's lake? If you did, state when and who was the surveyor, whether you know this of your own knowledge or from hearsay.

To the fifth cross-interrogatory, witness says: —

"I obtained my knowledge of the survey spoken of, by having been present at, and assisting in making, such survey at Dunn's lake as before spoken of. It was in the early part of 1818; it might have been in the early part of 1817; it strikes me that it was in the early part of 1818. Mr. McHardy I know of my own knowledge was the surveyor."

Sixth. If you state who were the chain-carriers, state whether you know this fact; do you know it of your own knowledge, or only from hearsay, or the statements of said James Darley himself?

To the sixth cross-interrogatory, witness says: —

"I know who were the chain-carriers of my own knowledge, having been present at, and assisting in, the survey."

Seventh. If you state where the said surveyor commenced his survey, or testify as to other matters inquired of in the fourth direct interrogatory, please state how you know that fact; were you present at the making of the said survey?

To the seventh cross-interrogatory, witness answers: —

"I was present at the making of said survey, and know where the *survey commenced from my own knowledge; the other portions of the fourth direct interrogatory are fully answered in the answer to that interrogatory. [*21

Eighth. How old were you at the time when you say the said survey was made? was said James Darley present at the making thereof? who was present? State the names (and age as near as you can recollect) of all the persons who were present.

To the eighth cross-interrogatory, witness says: —

"I was about the age of twenty-one years when that survey was made; the said James Darley was present at the making of said survey, and also a Mr. Gibson, and a Mr. Alexander of Charleston, and the two chain-carriers, and myself, and Mr. McHardy, made up our party. Messrs. Gibson and Alexander took no part in the survey; Mr. Gibson was about twenty-five years of age; Mr. Alexander must have been full fifty years of age, or upwards; George Bulger must have been about forty years of age, and Peter Survel, the other chain-carrier, must have been about thirty years of age; Mr. McHardy was about forty years of age, and Mr. Darley, from thirty to thirty-five years of age, at that time."

Ninth. If you answer the sixth direct interrogatory in the affirmative, please state what marks you pointed out to the said James Gould, Esq., and how you "judged any of said marks to be the same that were made by the said McHardy."

To the ninth cross-interrogatory, witness answers: —

I pointed out to Mr. James M. Gould the blazes, with one or two chops above; I think two chops; I know them to have been the same marks made by me, on occasion of the survey made by McHardy; I judged them to be the same marks, from having made them myself, and from the fact of no other surveyor at that time using the same marks, besides McHardy; these were the marks always made by McHardy in all his surveys.

Tenth. What were said marks? describe them, and also all the other marks that you there saw, particularly; were there any *letters* amongst them? If there were, state what letters.

To the tenth cross-interrogatory, witness answers: —

"Said marks made on said survey were such as I have just described, a blaze with one or two chops about it; I think two chops; we made no other marks, except these blazes and chops. I saw no surveyor's marks other than these, at that time or since; I never saw any letters at or about that place."

Eleventh. Is there any other matter or thing within your knowledge, material or pertinent to the issue in this case; if there is, please to answer the same as fully and particularly as though you were now thereto specially interrogated?

To the eleventh cross-interrogatory, witness answers: —

"There is no other matter or thing within my knowledge, material or pertinent to the issue in this cause."

JAMES PELLICIER.

*22] *The claimants also offered the evidence of James M. Gould, who made the survey, which was as follows: —

"The survey made by me, and now before me, is a correct survey, according to the certificate appended thereto. I took with me the maps from the land-office.

"I found the marks of the government surveys, the sections and township lines; I took with me as a guide Mr. James Pellicier; I found trees marked, running nearly the same as the northerly line of the tract leading from the lake out in the woods; they were old marks; Mr. Pellicier pointed out to me a tree with old marks, and stated that within a hundred yards of that tree was the line of the grant, that is, the beginning corner; could not tell whether the marks on that tree were surveyor's marks or not; Pellicier represented it as a starting-point, or as a tree which he recalled to mind as indicating about where the starting-point was. He did not state to me that it began at a stake; he did not positively point out any tree as the starting-point; he said the tract was south of that tree. I then sought for a line, and found the line spoken of; I did not find the line running from that tree, I found the line I suppose about a hundred yards south from that tree; the marked line of trees continued for half a mile from the lake, until we came to a pond; I found no old marks beyond and westwardly of the pond; my line varies a little from that line; it varies, however, several degrees; that old line was recognized by Mr. Pellicier as the line he had assisted in running; he stated that they were marked with a blaze and two chops, and I found trees marked with a blaze and two chops, which were old marks; I did not look for any other trees marked, after I had found the old line; I saw no other old marked trees; they varied a little from the line I run; it bore a little more northerly than mine; I ran the line I did, because it was the course called for by Geo. J. F. Clarke's survey; the line varied northerly perhaps ten degrees; I ran as I did, moreover, because the order of court directed me as nearly as possible to conform to Clarke's survey."

On the 28th of June, 1844, the court pronounced an opinion and decree, from which the following is an extract.

"It cannot be overlooked, in examining the papers thus far, that the evident intention of the Spanish governor was, that a saw-mill should be erected on the lands thus granted, and that that was the sole and only consideration for the grant; and it is singular that the governor did not, as in all other cases of mill grants, make the building of a mill a condition precedent to the giving of an absolute title; for I believe there is no other case of a mill grant, by the governor of East Florida, where the absolute title was not made to depend upon the building of the mill, unless other considerations entered into the grant; but it seems that for some reasons best *known to himself, Governor Coppinger departed from the usual form, and dispensed with the usual conditions, inserted in such grants, and gave the land in '*absolute property*' to the petitioner, trusting to his good faith to build the mill, which the governor himself sets forth as the sole consideration of the grant. If, therefore, the governor was willing to take that matter upon trust, and to make the grant absolute, and without condition, as it seems he did do, it is not within the province of this court to say that the grant is void, because the condition was not complied with, or the consideration for which it was made was not in fact rendered. [*23

"According to the principles which have heretofore governed this court in the adjudication of these land cases, the proofs seem to be sufficient to warrant a confirmation of the grant, and upon the testimony exhibited I consider the claimants entitled to a decree of confirmation; and after a careful examination of the recent survey, made by James M. Gould, and the testimony connected therewith, I think that the location and boundaries of the tract, as defined in that survey, are according to the calls of the grant; and all things considered, it is, perhaps, as fair and proper a location as can well be made.

"It is manifest that Clarke's survey or location, or that which was pretended to have been made by him (and of which a plat has been given in evidence), could not be found, and I presume for the obvious reason that no survey was in fact ever made by him. The recent survey, therefore, could not follow his old survey, but the courses of the different lines of the tract, adopted by the surveyor recently, are the [same] as Clarke's; and on an inspection of the map of the adjacent country, I think that the location and survey, as made by Gould, not only follows the calls of the grant in all essential

particulars, but corresponds, so far as it can, with Clarke's pretended survey.

"The grant is therefore confirmed, according to the recent survey of Gould, and a decree will be entered accordingly.

"*June 28th*, 1844. J. H. BRONSON, *Judge*."

From this decree the United States appealed.

The cause was argued at the preceding term by *Mr. Mason* (then Attorney-General), for the United States, and by *Mr. Yulee*, for the appellee, and held over to the present term under a *curia*.

Mr. Mason, for the United States, made four points.

1. That the petition should have been dismissed, because, from the neglect or delay of the claimant, it was not prosecuted to a final decision within two years.

2. Because there is no proof in the record that the plaintiffs are the devisees of Darley, the original claimant.

*24] *3. Because the claimant never complied with the condition on which the concession was made, and the United States is not bound, by the laws of nations, the treaty with Spain, or our own laws, to recognize and confirm such an inchoate claim, without a performance of the condition upon which the grant was made.

4. If this obligation exists, the calls of the grant are so indefinite and uncertain, that a location cannot be made agreeably to such calls.

(All this argument is omitted except that upon the fourth point, as the decision of the court rested entirely upon that.)

IV. But if the United States were bound to recognize and confirm the claim without the performance of the condition, and without any *consideration*, the question recurs, Are the calls of the grant so definite and certain that a location can be made under it agreeably to such calls? If they are not, the claim must be rejected.

The grant or concession is for the six miles square of land which the petitioner had solicited. Darley, in his petition, asked for "six miles square of land at the place called Dunn's lake, upon the St. John's river."

There is *no* such place as Dunn's lake upon the St. John's river. The land claimed was not surveyed before the transfer of the province to the United States.

The survey of G. J. F. Clarke purports to have been made on the 21st of December, 1817; but it does not follow the calls of the concession, and is evidently what is called an

office survey, and not an actual survey; and so the court decided.

The one commenced by McHardy was not completed, and for a reason which throws much suspicion over that transaction; viz. because Darley, the grantee, would not show to McHardy, the surveyor, the order of the governor for making the survey, although he said that he had it. See Pellicier's testimony.

McHardy was a private surveyor, and had no right to survey public lands without a *special order*. And the refusal of Darley to show him such an order leads to the presumption, either that he had none, or that Darley had taken Mr. McHardy to the wrong place. This proceeding, therefore, so far from aiding Gould's late location, makes strongly against it.

Dunn's lake is fifteen miles long and three or four wide. It has, therefore, at least thirty-six miles of border. It is not on the St. John's river, but from seven to ten miles distant from it.

On which side should this land be located, — east, west, north, or south? The concession does not show.

The settled doctrine in respect to these Florida grants is, that grants for lands, embracing a wide extent of country, or within a large area of natural or artificial boundaries, and which lands were not surveyed before the 24th January, 1818, and are without such designations as will give a place of beginning for a survey, are not lands withdrawn from the mass of vacant lands ceded to the United *States in the Floridas, and are void as well on that account as for being so uncertain that locality cannot be given to them. [*25

This doctrine was held in *Buyck's case*, 15 Pet., 215, which was for a grant of lands "at Musquito," south and north of said place. Also, in *O'Hara's case*, 15 Pet., 275.

And, again, in *Delespine's case*, 15 Pet., 319. And also in *Forbes's case*, 15 Pet., 182, "which was for a grant of land in the district or bank of the river Nassau."

And, again, in the case of the *United States* v. *Miranda*, 16 Pet., 159, 160, and 161, where all these cases are cited and affirmed.

It is believed, therefore, that this grant is void, for the reasons above stated.

It was not made in such a way as to distinguish it from things of a like kind; nor has the identity of the grant been shown by extraneous evidence. *O'Hara and others* v. *the United States*, 15 Pet., 283.

Mr. Yulee, for the appellees. (All of his argument is also

omitted, except upon the 4th point made by the Attorney-General.)

2. It is next objected by the Attorney-General, that the grant must be rejected for indefiniteness in its location.

It is not half as indefinite as many of the cases of Florida grants confirmed by this court. But the fact that it was located prior to the 24th January, 1818, by Clarke, a public officer, whose province it was to make location of grants, gives it certainty and definiteness of locality, if even the terms of the grant were in themselves indefinite.

The survey adopted by the court below is stated by the court to conform "to the calls of the grant in all essential particulars"; and Gould, the surveyor, states that, as directed by the court, he made the survey "to conform, as nearly as possible, to Clarke's survey."

The testimony of Joseph S. Sanchez, at the time United States marshal of East Florida, and that of Mauricio Sanchez, together with an inspection of the map, will show that there is no difficulty in making the location under the grant. Dunn's lake is a sort of adjunct of the St. John's river, between which lake and the river there lies a strip of land of an average width of about five miles, being in some places six, in others more or less. A location on this strip would be strictly and literally as described in the grant, "at the place called Dunn's lake, on the river St. John's."

The Attorney-General erroneously states Sanchez's testimony, in fixing the lake at from seven to ten miles' distance from the river. One of the Sanchez says it is from six to ten, the other (the best informed) says, "the average width of the strip of land lying between the lake and the river St. John's is about five miles," and the survey of Gould shows that the plat extends from the river on one line to the lake on the opposite.

*26] *It is unnecessary to refer to the authorities cited by the Attorney-General. The local court, familiar with the localities, decides that the survey is conformable with the calls of the grant; the surveyor of the county so also declares; the inspection of the map will confirm their judgment; and no person familiar with the topography of the vicinage will doubt for a moment that the grant is capable of ready location.

Mr. Justice CATRON delivered the opinion of the court.

We are called on to ascertain the correctness of an opinion and decree pronounced by the Superior Court of East Florida, by which there was confirmed to certain claimants, through

James Darley, a tract of land containing 23,040 acres. The only question proposed to be examined regards a location of the land by the decree. Darley solicited the governor of East Florida, in 1817, to grant to him in absolute property six miles square of land, "at the place called Dunn's lake, upon the river St. John's"; and the grant was made as solicited. This is the entire description. The river St. John's is one of the principal waters of East Florida, and a principal object in its geography, and may therefore be judicially noticed, as minor objects have been, in our decisions affecting Spanish claims in the same section of country. The river is of considerable length, and runs through several lakes; there is no place on the river, however, known as Dunn's lake, so far as we are informed, by the proofs or otherwise; but there is a considerable lake, well known as "Dunn's lake," lying near the St. John's; it is proved to lie east of the river, nearly parallel with it, and about five miles from the river on an average. The lake is about fifteen miles long, and three or four miles wide. From the description of the land solicited, it is difficult to say whether the petitioner asked to have it laid off on the river or on the lake, but the purpose for which the grant was made decides the ambiguity of expression. The object was the erection of machinery for the sawing of lumber, and the advancement of commerce in the province, from the article of lumber; and therefore the land was solicited to be laid off on the river, for the purpose of establishing machinery, to be propelled by water power. Giving the most favorable intendment to the locality described in the petition and grant, still we can only say, that the grant was for land on the river, opposite to the lake; and by further indulging a favorable construction, so as to limit the territory referred to within narrower bounds, hold that the survey should be made on that side of the river next the lake, and between the lake and the river. This was obviously the view taken of the matter by the experienced judge of the Superior Court, and in which we concur.

The St. John's river in its general course of northeast makes a large bend to the west, opposite to the upper end of the lake, and there passes through Lake St. George, and by its meanders lies *opposite to each end and one side of Dunn's lake. A copy of the plat filed in the land-office, representing the township surveys of that locality, is in the record as evidence, from which these facts appear; and also, that the St. John's lies opposite Dunn's lake, by its various bends, for a distance of some thirty miles. This is the base line, on which the survey might front. Then, again, [*27

by the Spanish ordinances existing in Florida and governing such surveys, the front on the river could not exceed one-third of the longitudinal extention back; nor does the description of "six miles square" alter the rule prescribed by the general law. *Sibbald's case*, 10 Pet., 313; *United States* v. *Hanson*, 16 Pet., Id., 201. Governed by these rules, and with this extent of territory before it, the Superior Court was called on to identify the land granted, and render a decree. The difficulty lay in finding a point at which to commence the survey; from the face of the grant this could not be done, and therefore the court sought aid from the following additional circumstances. In December, 1817, Geo. Clarke, the surveyor-general of the province, filed a plat and certificate of survey in his office, purporting to have been made of this grant; but no proof was offered to show that any such survey had ever been made by Clarke on the ground, and the Superior Court expressed its apprehensions that the survey was fictitious, as appears by the opinion found in the record; yet, as it might turn out otherwise on search being made on the ground, and as the survey might reasonably conform to the calls of the concession, should landmarks be found, a search and resurvey was ordered, and one was made and returned to the court by Gould, corresponding as near as might be, in the judgment of the surveyor, to the lines laid down on Clarke's plat, at the upper end of Dunn's lake. But no linemarks were found that had been made by Clarke, and his plat and certificate proved to be merely fictitious; his work not extending beyond what he had done on paper. As no aid could be derived from this source to direct the surveyor, Gould, when in the field, he resorted to another; it was this. In the spring of 1818, Darley had employed McHardy, a private surveyor, to lay off the six miles square of land, with the aid of Darley, and where he was present. They commenced at the head of Dunn's lake, and run and marked a line about a mile, and then disagreed as to the propriety of making the survey as proposed by Darley, for what particular reason does not appear. This was all that was ever done in the field previous to the time Gould went on the ground, in July, 1843. Gould took with him Pellicier, who assisted McHardy in marking the line in 1818, for the distance of the mile above spoken of; and finding the marks at that point, Gould commenced the survey on which the decree is founded, and laid off the grant in a square form of six miles to each side, fronting on Dunn's lake, and extending to St. George's lake, through which the river St. John's passes. The survey has no connection with the St. John's

river, further than that *at its southwest corner it reaches, to the extent of about one mile, the margin of Lake St. George. [*28

In the first place, we are of opinion, that the fictitious plat and certificate of Clarke can have no influence in fixing the identity of the land granted; nor, secondly, can any consideration be accorded to the line-marks made by McHardy in 1818; and, therefore, we are compelled to resort to the face of the concession for a description that will identify the land granted. And here, some legal principles interpose themselves for our government; the first of which is, that the powers of the United States courts are conferred by acts of Congress, and cannot extend beyond the powers conferred. Previous to the passing of the act of May 26, 1824, conferring the jurisdiction on the courts to adjudge incipient titles, such as the present is, the political power could alone finally pass on them, and Congress uniformly did so. By that act the courts were invested with the jurisdiction that Congress had previously exercised; but to an extent considerably limited. The governing rules of adjudication, as prescribed, are found in the second section of that act; first, — "The courts shall have full power and authority to hear and determine all questions in said cause relative to the title of the claimant. Second, the extent, *locality*, and boundaries of the said claim," &c. And by the sixth section, on a decree being had, and a copy thereof being served on the surveyor-general of the district, he shall survey the land decreed, for which a patent shall be issued by the President to the claimant. The "locality, extent, and boundaries," the court must find, before it can make an effective decree; and if these cannot be found, no decree can be made for any specific piece or parcel of land. The Superior Court had no power to grant land; nor had it any power to decree an equivalent for land that could not be identified; so this court has at various times held; as in *the cases of Forbes* (15 Pet., 184), *of Buyck* (Id., 223), and in several other cases.[1]

The court, not being enabled, in this instance, to derive any assistance from public acts, beyond the face of the grant, nor authorized to grant an equivalent, has presented to it a territory some thirty miles long, on the margin of the river St. John's, at any one point in which distance the survey might be commenced with equal propriety that it might be at any other point; it follows, that the description, when applied to the facts, is too vague and indefinite for any survey to be

[1] See *United States* v. *DeRodrigues*, 7 Sawy., 636.

made, and that, therefore, the claimants can take nothing under the concession; and that it is our duty to order the decree of the Superior Court of East Florida to be reversed, and the petition to be dismissed.

We would remark, in addition, that this concession in its leading features cannot be distinguished from various others that have heretofore been brought before this court for adjudication, where no specific land was granted, or intended to be granted; but it was left *to the petitioner to have a survey made of the land in the district referred to by the concession, by the surveyor-general of the province, in due form, on the ground, and to cause the plat and certificate of such survey to be recorded, by the surveyor-general, by which additional public act the land granted was severed from the king's domain, but remained part of it until the survey was made and recorded. Until this was done, the warrant was a floating warrant of survey, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land on the petitioner; so this court in effect held in the *case of Wiggins* (14 Pet., 351). From the time that such claims first came before this court, they have not been deemed as coming within the cognizance of the courts of Florida, because the 8th article of the treaty of 1819 did not embrace them; it only provided, "That grants of land made by his Catholic Majesty, or by his lawful authorities, should be ratified and confirmed to the persons in possession of them, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." Actual manual possession has never been required to give title, but such identity must be established as to enable the courts to ascertain with *reasonable* certainty where the land lies; as was held in *Hanson's case* (16 Pet., 196), and others. And this may be shown either from the face of the grant, or by a legal survey made by the surveyor-general in conformity to the grant, during the time he had power to make such surveys.

*29]

ORDER.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the claimants can take nothing under the concession in this case; whereupon, it is now here ordered and decreed by this court, that

the decree of the said Superior Court in this case be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said Superior Court, with directions to dismiss the petition of the claimants.

The United States, Plaintiffs in error, *v.* Gordon D. Boyd and others, Defendants.

The act of Congress, passed on the 24th of April, 1820 (3 Stat. at L., 566), which substituted cash payments in lieu of credit sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government.

*The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was.[1] [*30

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.[2]

An instruction given by the court below, viz., that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government, to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void, — was erroneous.

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[1] This case is a leading case upon the effect of official reports to bind sureties on an official bond. In *Watkins* v. *United States*, 9 Wall, 759, it was held that in a suit on a marshal's bond, the introduction of duly certified transcripts of the adjustment of his accounts, by the accounting officer of the treasury, made a *primâ facie* case for the government. But the sureties, however, cannot disprove the receipt of moneys with which he has charged himself after the execution of his bond. *United States* v. *Girault*, 11 How., 22. Yet, in Nevada, it was held, on a trial against the sureties on the official bond of a State treasurer, to recover for defalcation claimed to have taken place within the period covered by the instrument, that it was competent to show that the defalcation occurred previous to the giving of the bond, and that any testimony tending to support such defence was relevant and pertinent. *State* v. *Rhoades*, 6 Nev., 352. In Missouri it is held to be only *primâ facie* evidence, even though the money was received while the bond was in force. *Nolly* v. *Calloway County Court*, 11 Mo., 447; *State* v. *Smith*, 26 Mo., 226. It would seem that the same is held in Alabama. *Townsend* v. *Everett*, 4 Ala., 607. In New York the reports are held not to be conclusive. *Bissell* v. *Sexton*, 66 N. Y., 55; *Williams* v. *United States*, 1 How., 290; *United States* v. *Eckford*, Id., 250. But in Illinois a contrary doctrine is held. *Morley* v. *Town of Metamora*, 78 Ill., 394; *Roper* v. *Trustees of Sangamon Lodge*, 91 Ill., 518 (as to default before bond given); *Baker* v. *Preston*, 1 Gilm. (Va.), 235; *Supervisors of Washington Co.* v. *Dunn*, 27 Gratt. (Va.), 608 (conclusive after a certain notice given under a statute); the entries are evidence for the sureties, but not conclusive. *Mann* v. *Yazoo City*, 31 Miss., 574. A sheriff's return of the receipt of money has been held conclusive on his sureties. *Bagot* v. *State*, 33 Ind., 262; *Price* v. *Cloud*, 6 Ala., 248; so a justice of the peace. *Modisett* v. *Governor*, 2 Blackf. (Ind.), 135.

[2] Distinguished. *United States* v. *Girault*, 11 How., 22, 30.