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ation whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*833] *THE UNITED STATES, PLAINTIFFS IN ERROR, v. RICHARD KING AND DANIEL W. COXE, DEFENDANTS.

The case of the *United States v. King and Cox* (3 How., 773) reviewed.¹

According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions.

But this practice is not applicable to the courts of the United States. A writ of error in them brings up only questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below.²

Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where a special verdict is found or a case is stated, in neither of which is there any necessity for a bill of exceptions.

Where the court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is closed against it.

Leaving this statement out, there is still enough in the record to enable the court to take cognizance of this case, because the defendants below asserted a legal title to be in themselves by virtue of a grant which severed the land claimed from the royal domain.

The construction of this grant, issued in 1797, by the Baron de Carondelet, to the Marquis de Maison Rouge, is a question of law upon which this court must review the decision of the Circuit Court.³

¹ This case and the previous decision in 3 How., 773, were subsequently relied upon by counsel as affording support to a motion to dismiss the appeal in *Surgett v. Lapice* (8 How., 48), but the court, *per* Catron, J., at page 65, say that this case "was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had claimed an equitable title in that case, it would have been no defence, because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. The whole proceedings were, necessarily, proceedings at law, and could therefore be removed by writ of error only, and not by appeal."

² FOLLOWED. *Boogher v. Insurance Co.*, 13 Otto, 95. CITED. *Prentice et al. v. Zane's Admr.*, 8 How., 486; *Jones et al. v. McMasters*, 20 Id., 22; *Burr v. Des Moines R. R. &c. Co.*, 1 Wall., 103; *Insurance Co. v. Folsom*, 18 Id., 249.

³ CITED. *Arguello et al. v. United States*, 18 How., 550.

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The two grants or contracts of 1797 and 1795 must be construed together.

That of 1797 refers to the one of 1795, and cannot be understood without it. The contract of 1795 was for the benefit of the emigrants, and must have been intended to be shown by Maison Rouge to those persons whom he was inviting to settle upon the land. No personal benefit or compensation to himself individually is provided in it. The object was to promote the policy of the Spanish government, as whose agent Maison Rouge acted, and not as the proprietor of the land.⁴

The contract of 1797 was intended to supply two omissions in that of 1795, namely, to designate with more particularity the place where the settlement was to be made, and to provide for a larger number of families than was mentioned in the original contract.

For both these purposes, a certain tract of land was marked out, and "destined and appropriated" for the uses of the settlement.

The grant of 1797 does not contain the words usually employed in Spanish colonial grants, when there was an intention to sever land from the royal domain and convey it as individual property.⁵

THIS case was formerly before this court, and is reported in 3 How., 773.

Being sent down to the Circuit Court under a mandate from this court, it came up for trial before the Circuit Court in May, 1845, when sundry proceedings took place before that court, which it is not necessary to specify. The result was, a judgment in favor of the United States, from which King and Coxé sued out a writ of error, and brought the case again before this court.

Whilst so pending, this court, on the 16th of February, 1848, passed the following order, which was announced by Mr. Chief Justice Taney.

* "KING AND COXÉ } Supreme Court of the United
v. } States, December Term, 1847. [*834
UNITED STATES. }

"Upon examining the record now before the court, and referring to the points originally in controversy and still remaining undecided, the court are of opinion, that the matters in dispute can be more conveniently and speedily heard, and finally determined, by reinstating the case in this court in the condition in which it stood at December term, 1844, previous to the judgment rendered at that term. and the counsel for the respective parties having, upon the recommendation of the court, consented to reinstate the case in the manner proposed,—

"It is thereupon, with the consent of counsel, as aforesaid, ordered, that the judgment rendered in this court at December term, 1844, and all the proceedings thereon, and subse-

⁴ CITED. *Arguello et al. v. United* 653; *United States v. Turner*, Id., 664; *States*, *supra* (p. 547). *United States v. Coxé et al.*, 17 How.,

⁵ FOLLOWED. *United States v. Philadelphia and New Orleans*, 11 How., 41. CITED. *Dauterive v. United States*, 11 Otto, 705.

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quent thereto, be, and the same are hereby, set aside and vacated, and the case as it stood at the term aforesaid, previous to the said judgment, reinstated. And it is further ordered, that it be placed on the docket of December term, 1848, to be argued at that term on such day as the court may assign,—the United States being, as before, the plaintiffs in error, and King and Coxe the defendants.”

The case was therefore before the court just as it stood prior to the argument of it, as reported in 3 How., 773.

The history of the case is there given, and all the documents upon which the claim of King and Coxe was founded are set forth at large. It is unnecessary, therefore, to repeat them here.

The United States being plaintiffs in error, the argument was opened and concluded by *Mr. Toucey*, (Attorney-General,) who was replied to by *Mr. Coxe* and *Mr. Gilpin*, on behalf of the defendants in error.

All the parts of their arguments are omitted, except those which bear upon the points decided by the court.

The reporter has his own notes of *Mr. Coxe's* argument, but prefers to print the argument of *Mr. Gilpin*, as that gentleman has been kind enough to revise the notes of his argument.

Mr. Toucey, (Attorney-General,) for the plaintiffs in error.

Whether the paper dated 20th June, 1797, signed by the Baron de Carondelet, was a grant to the Marquis de Maison Rouge of a complete title to the thirty square leagues, is the principal question presented upon the record. It is supposed, that, under the Spanish or any other government, if a grant from the sovereign is set up and relied on, it would be necessary to appear, that there was an intention to make such grant. The intention is the principal thing. It is the essence of the act. *It is the disposing will which governs, when expressed. It lies at the foundation of all law and every contract. The rule that the intention must govern is not the property of any one system, but a maxim of universal law. If such an intention to make a grant do not appear, but the direct contrary, the supposition of a grant is absolutely excluded. And if this be the state of the case upon the face of the assumed paper title, the result will be fortified, if it be possible, by the fact, that the practical construction of both parties was in accordance with it. Such is the precise condition of the grant now alleged as a complete title in this court.

It will be necessary to see,—1st, what was agreed to be done, on the part of the Spanish government; 2d, what was actually done, in pursuance of that agreement; and 3d, in what light it was viewed by the parties after it was done, or the practical construction.

First, what was agreed to be done by the Spanish government. This is in the form of a written agreement, clearly expressed, and not liable to misinterpretation, bearing date March 17th, 1795. From this paper it appears there were certain “families who proposed to transport themselves” to Louisiana. The Marquis proposes to bring thirty families, “for the purpose of forming an establishment with them, on the lands bordering upon the Washita.” The government agrees,—1st, to pay two hundred dollars to every family of two laborers, and in proportion; 2d, to furnish them with a guide, and provisions, from New Madrid to Washita; 3d, to pay for transportation of their baggage and implements, not to exceed three thousand pounds for each family; 4th, to give each family of two four hundred arpens of land, ten arpens by forty, and in proportion for a greater number; 5th, to give the same to their European servants with families, after six years. This contract was signed, “that it might come to the knowledge of those families who propose to transport themselves hither.” It proposes to give nothing to any one but the thirty families who are to constitute the establishment and their European servants. It stipulates to give nothing to De Maison Rouge for his services, neither land nor money. There is not a stipulation in it for his benefit. The whole benefit stipulated, including the land promised, is to go to the thirty families composing the establishment. The whole contract was for their benefit. This is the clear, express, unequivocal contract at the outset, and there is no pretence that it was ever modified. The compensation to De Maison Rouge for his services was to be derived elsewhere, if he had any; either from collateral advantages, or through the emigrants, or in some other mode, which does not appear, except in the case of *Alexander Lawrence, [*836 where the Marquis secured the right to take to himself either the money or the land. This was the contract, “for the establishment on the Washita of the thirty families of farmers destined to cultivate wheat,” which was approved by the king, “in all its parts.” Thus, and thus only, it became obligatory upon the Spanish government, and its officers derived their authority to carry it into effect. The effect of it was to constitute the Marquis de Maison Rouge an agent of the Spanish government; it clothed him with authority to

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act in its name; it was his letter of credence to the emigrants who proposed to come; and that was its avowed object, as expressed in the concluding paragraph. When used by the agent in treating with the emigrants, and acted upon by them, it became a complete and perfect contract between the Spanish government on the one hand, and the emigrants on the other, by which they were entitled to demand of the government the stipulated benefits. Thus far, then, there is no intention manifested by the Spanish government to bestow these benefits upon the government agent, or to permit them to be intercepted by him; but the express language of the contract, which received the royal assent, shows the direct contrary in every particular. Having this safe ground at the outset,—certain knowledge of the previous contract, of the land promised to be given, of the persons to whom it was to be given, and of the agency of De Maison Rouge,—it will be difficult to go astray afterwards, in tracing the acts of public functionaries, done in pursuance of this contract, and by virtue of this authority.

The absence of the usual formalities tends strongly to show that here was no grant or concession. There was no petition for a grant to De Maison Rouge. He did not ask for any land. There is no decree or adjudication granting a petition. There is no warrant of location, permit to occupy, or any other formality, giving him possession, with promise of title upon performance of the usual or the stipulated conditions. There was no consideration proceeding from him, moving the government, or that could be supposed to move the government, to grant to him this territory with the colonists upon it. He had introduced no emigrant at his own expense. The government had introduced all the families at its own expense. It had paid their transportation, furnished them with guides and provisions, given them a bounty in money, and promised them and their servants lands in proportion to their numbers. It had even paid the expenses of De Maison Rouge, as appears by the letter of Baron de Carondelet of the 1st of August, 1795, to Filhiol, the commandant of the post. "The journey of M. Maison Rouge has cost more than five hundred dollars."

*837] *But to come to the paper alleged to be a grant to De Maison Rouge. Why should the Spanish government give the whole territory to him? It does appear, upon the face of the instrument, that the government intended a benefit to him. The words are "We destine and appropriate for the establishment of the aforesaid Marquis de Maison Rouge." It is called his establishment by way of distinction.

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Here is no grant in form to him, nor to any other person. The instrument does not name any grantee, nor contain words of grant. All the precedents require both. The instrument begins with the cause of the designation of the land. Because the establishment was nearly complete, it had become desirable to remove, for the future, all doubt respecting other families or new colonists who might come to establish themselves. The lands are expressly designated for the establishment, and the original contract, the king's approval, and the recital in this instrument, all show that the establishment is the colony of thirty families. The fact that the lands comprised in the figurative plan, as it is called, are the identical lands to be given to the emigrants composing this colony, is entirely decisive against the idea of a grant to De Maison Rouge. It was not the intention of the Spanish government to require the colonists to look to him for the title to their lands, but directly to the government, who introduced them, paid their expenses, gave them a bounty in money for coming, and promised to give them their lands upon the condition of inhabiting and cultivating them. The government did not intend to invest him with the title, because that would incapacitate it to perform its contract with the colonists, and with the European servants who should at the end of six years have become heads of families. The original contract, being specifically referred to, is incorporated in this instrument as fully as if recited *verbatim*, and the lands are designated under it, for the purposes set forth in it. There is no escape from the conclusion. The designation of the lands for the colony is expressly made "under the terms stipulated and contracted for" by the Marquis; and the royal order approving of that contract, and authorising it, is expressly referred to by name, description, and date. The effect of this act of the government was merely to prescribe certain limits within which these colonists should receive their lands, when they should become entitled to them, and within which other emigrants should not be permitted to intrude, without the consent of government. That is the effect produced, and it is the only effect produced. It does not come up to the standard of an inchoate title to De Maison Rouge. He had no title at all,—no promise of title to him upon the performance of conditions, *express or implied, imposed by the act [*838 of the parties or by act of law

Having thus shown what the government contracted to do, and what the government had done, and that neither in the one nor the other was there manifested an intention to convey this land to the Marquis de Maison Rouge, but the

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direct contrary, it remains to be seen how the parties regarded it, and what was the practical construction given to this instrument by both of them.

First, the colonial government did not put such a construction upon it as would vest in him the title to the thirty leagues square, and require the colonists to look to him, instead of the government, for their titles. They did not regard the land as his property. The letters of Baron de Carondelet to Filhiol, the commandant of the post, abundantly show this. Subsequent grants in the same tracts, made by the government from time to time, show it also. The inventory made after the death of De Maison Rouge by Filhiol, as commandant, it is admitted by the claimant, did not contain this land. This was in April, 1800, before the secret treaty of San Ildefonso.

Second, the Marquis de Maison Rouge puts no such construction upon this instrument. This is shown by his letters to Filhiol. In that of the 21st of March, 1796, speaking of the claims of a Mr. Morrison, he says,—“Mr. Morrison alleges that M. Miro has promised to him that quantity of land, but he does not say that it was not for him alone, but for the sixteen families and upwards of Americans he was to have brought into the country and settled in the Prairie Chatelleraud. Moreover, he has promised to discover a saline. He has fulfilled none of these conditions. This extent not having been granted to him individually, it still remains in the domain of the king. *He has no more right to claim it than I would have to consider myself as proprietor of the whole extent that has been granted to me, to settle agreeably to my contract with the families that I have announced to the government, and that they know to be in mission for this place.*” Others of the letters are equally explicit. In his will, dated the 26th of August, 1799, which is subsequent to the date of the alleged grant, he declares that he possesses property in Paris, Berry, and Querry, which has been confiscated; he gives a house and land which he had purchased to his maid-servant; and he also mentions the place where he has all the articles necessary to build a saw-mill for cutting plank, and a pump-auger. But there is no mention of this tract of thirty square leagues, which is now claimed as his property. He nominates Louis Bouligny his legatee under a universal title: *839] —“And also the residue and remainder *of my goods, rights, and actions, as well within as out of this province, in case my parents are dead, I constitute and name for my sole and universal heir the aforesaid Louis Bouligny.” The defendants now claim the absolute title to thirty square

leagues of land under this clause of the will, by this description of goods, rights, and actions.

Third, the inventory which was made by the government officer does not include this land. It was made when the agent of the legatee was present, sent from New Orleans to look after the property of the deceased. Filhiol states that he made the inventory "in presence of M. Michael Pommier, charged with a power from M. Louis Boulogny," but there was not any land mentioned in the said inventory.

Mr. Gilpin, for the defendants in error.

Under the decision of this court at the last term, this case is now presented as if the decree and opinion given in January term, 1845, (3 How., 784,) had never been made. The case was then treated as an appeal, presenting for revision all the facts and law. It was, in fact, a petitory action brought here by a writ of error; and, having been tried below without a jury, under the provisions of the Louisiana Code of Practice, (Art. 494, 495,) which are adopted by the act of Congress of the 26th of May, 1824, (4 Stat. at L., 63,) the finding of the court on all matters of fact was conclusive, and not subject to revision. *Parsons v. Armor*, 3 Pet., 414; *Hyde v. Booraem*, 16 Pet., 169, 176; *Minor v. Tillotson*, 2 How., 394.

It appeared, too, on the argument at the last term, that the record before the court in 1845 was extremely imperfect,—not presenting all the evidence which was before the Circuit Court, as required by the Louisiana practice on appeals, (*Thayer v. Littlefield*, 5 Rob. La., 153; *Parkhill v. Locke*, 15 La., 443; *Mitchell v. Jewell*, 10 Mart. (La.), 645; *Davis v. Darcey*, 1 Mart. (La.), 589,) nor correctly exhibiting the character of some of the material evidence which was presented. The depositions on which this court mainly relied, as establishing the certificate of Trudeau to the *plano figurativo* to be antedated and fraudulent, (3 How., 785,) were shown to be *ex parte*, and to have been contradicted by many witnesses whose evidence did not appear in the record.

What we are now to discuss is, therefore, a case presented by a writ of error, founded on an allegation of an erroneous judgment of the Circuit Court of Louisiana on certain points of law apparent on the record.

What was the case before the Circuit Court?

By the treaty of the 30th of April, 1803, § 3, (8 Stat. at *Large, 200,) all the inhabitants of Louisiana, at the [*840 time of cession, were protected in the full enjoyment of their property,—every species of property, real and per-

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sonal, whether held by complete or inchoate titles. *Soulard v. United States*, 4 Pet., 511; *Delassus v. United States*, 9 Pet., 117. The defendant King is in possession of a tract of 4,666 acres on the west bank of the Washita, from which the United States seek to evict him. He has vouched in warranty his grantor, the defendant Coxe, in the mode prescribed by the law of Louisiana. Civil Code, §§ 2476, 2493; Code of Practice, §§ 378, 380, 384. Coxe has answered, and claims to have been the owner under a title derived directly from the Marquis de Maison Rouge, to whom the Spanish government granted, on the 20th of June, 1797, a large tract, which continued to be the property of his devisee at the time of the treaty, and of which the tract in controversy is part. Coxe also asks, by way of reconvention, (Code of Practice, § 375,) that his own title to two thirds of the whole tract granted to Maison Rouge may be confirmed; the other one third being vested, as he alleges, in the heirs of Turner, as set forth in a document describing their respective interests, and marked Schedule A. On the trial, much evidence, documentary and parol, was offered on the part of the defendants to maintain, and on the part of the United States to deny, the validity of the grant to Maison Rouge, and the title of the defendants under it. It was chiefly denied on three grounds; first, that the grant of the 20th of June, 1797, was connected with, or supplementary to, a contract made on the 17th of March, 1795, between the Spanish government and Maison Rouge, for the settlement of emigrant families at Washita, the conditions of which agreement, it was contended, had not been fulfilled by him; secondly, that the land embraced in the grant had never been separated by a survey from the royal domain, the one certified by Trudeau being alleged to be antedated and fraudulent; and, thirdly, that the defendant Coxe had estopped himself from all claim under the grant by accepting a league square, which was patented to him by the United States on the 20th of December, 1842, pursuant to the provisions of the act of Congress of the 29th of April, 1816 (3 Stat. at Large, 328). The Circuit Court dismissed the plea of reconvention, found the grant of the 20th of June, 1797, to be valid, and adjudged the title of the defendants to be good. A full opinion was prepared, filed, and is annexed to the record, setting forth the grounds on which the decree was made.

What error of law in these proceedings appears by the record to have been committed by the court?

*841] No exception was taken at the trial to the opinion of the *court, or to the judgment; bills of exceptions
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were taken, both by the plaintiffs and defendants, to decisions in regard to the admission and rejection of evidence; no other exceptions appear upon the record.

Although the decisions excepted to by the defendants are clearly erroneous, yet it is not now material to inquire into them, as the judgment of the court is in their favor. It would be material so to do, if the decision of this court should be in favor of the plaintiffs, and they entitle the defendants, in that event, to the protection of a *venire de novo*, instead of a final judgment against them, so that they may have the benefit of the evidence of which the decisions excepted to deprived them.

Was there any error in law in the decisions excepted to by the plaintiffs?

The first, fourth, and fifth bills of exceptions have been abandoned by the Attorney-General.

Was there any error in law, in the form or substance of the judgment itself, on a review of which by this court it can be legally reversed?

No exception has been taken to the opinion of the Circuit Court, or any portion of it; there is no agreed case; there is no agreed or reported statement of facts; there is no testimony reduced to writing and sent up by the clerk; there is no certificate that all the evidence received in the Circuit Court is, directly or indirectly, before this court. If, then, there is any error, (beyond those in the bills of exceptions already disposed of,) it must be in the mere terms and language of the decree itself. Now the rules by which this is to be ascertained are incontrovertible. So far as the decree establishes a matter of fact, it is conclusive, and cannot be revised. *Penhallow v. Doane*, 3 Dall., 102; *Wiscart v. Dauchy*, 3 Dall., 327; *Jennings v. Thomas*, 3 Dall., 336; *United States v. Casks of Wine*, 1 Pet., 550; *Parsons v. Bedford*, 3 Pet., 434; *United States v. Eliason*, 16 Pet., 301; *Minor v. Tillotson*, 2 How., 394; *Phillips v. Preston*, 5 How., 289. So far as the decree establishes a matter of law dependent on a certain state of facts, it is conclusive, unless there be a formal exception taken to such decision, with a statement of all the facts necessary to its revision. *Dunlop v. Munroe*, 7 Cranch, 270; *Walton v. United States*, 9 Wheat., 657; *Parsons v. Armor*, 3 Pet., 414; *Carver v. Jackson*, 4 Pet., 80; *Hyde v. Booraem*, 16 Pet., 169, 176; *Phillips v. Preston*, 5 How., 289; Louisiana Code of Practice, §§ 488, 489, 495; *Porter v. Dugat*, 9 Mart. (La.), 92; *Mollew v. Thompson*, 9 Id., 275; *Kimball v. Lopez*, 7 La., 175. It is a presumption of law, that if any state of facts would sustain the decree, such state

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of facts was established in the Circuit Court. *Campbell v. *842 Patterson*, 7 Vt., 89; *Butler v. Despalir*, 12 Mart. (La.), 304; *Mitchell v. White*, 6 Mart. (La.), n. s., 409; *Hill v. Tuzzine*, 1 Id., 599; *Piedbas v. Milne*, 2 Id., 537; *Fitz v. Cauchois*, 2 Id., 265; *Miller v. Whittier*, 6 La., 72; *Love v. Banks*, 3 Id., 481. These rules apply as well to a decree of a court authorized to decide matters of fact, as to the verdict of a jury. *Mayhew v. Thompson*, 6 Wheat., 130; *Livingston v. Story*, 9 Pet., 656; *Reynolds v. Rogers*, 5 Ohio, 172; *Franklin Bank v. Buckingham*, 12 Ohio, 482; *M'Girk v. Chauvin*, 3 Mo., 237. Even if the decree is obscure or defective in form, or contains what is surplusage, yet it is sufficient if it follows the issue, and finds, affirmatively or negatively, the facts contested therein. *Brown v. Chase*, 4 Mass., 436; *Deering v. Halbert*, 2 Litt. (Ky.), 292; *Todd v. Potter*, 1 Day (Conn.), 238; *Shepherd v. Naylor*, 6 Ala., 638; *Keene v. M'Donough*, 8 La., 187.

Examine by these rules, the errors alleged to exist in the terms and language of this decree.

First, it is said that the Circuit Court adjudicated the title to lands for which the United States have not sued. The language of the decree does not warrant this allegation; the dismissal of the plea of reconvention shows, conclusively, that the decree was confined to the lands claimed in the petition of the United States. The introduction of the title of *Maison Rouge* was by the United States, in their petition, wherein they declare it to be a pretended title, under which the defendants set up a claim which they deny. The terms of the decree (even if obscurely expressed) are inconsistent with any other judgment than that of the right of the defendant King to the tract conveyed and warranted to him by Coxe, and so described in Schedule A, which is the land sued for by the United States, and no more.

Secondly, it is said that the Circuit Court erred in adjudicating the instrument of the 20th of June, 1797, to be a grant to *Maison Rouge*. Now, in the first place, it is to be remarked that the Circuit Court do not say this; their decree is, that the grant of land under that instrument, and so held by the defendants, is valid; that their title to the possession of it, as against the United States, is sufficiently established, and that they ought to be quieted in that possession. Such decrees against a claim of the United States, in a similar action, have been sustained by this court even where the defendant has received no formal instrument of grant whatever. *United States v. Fitzgerald*, 15 Pet., 420. They will, in such case, protect an equitable as well as a strictly legal title; they will

not give back to the United States property which has been separated from the royal domain. But besides, if the Circuit Court has *adjudged this instrument to be a valid grant,—a complete title in form,—have they erred, or, [*843 if they have erred, can this court revise such error?

Even if the Circuit Court committed an error, this court cannot revise it. It is a question of fact. If the instrument was signed by the governor,—if it was in the form required by the Spanish law,—if there was a survey ascertaining the land granted,—if the conditions of the grant were performed by the grantee,—then the instrument was a valid grant. All these are questions of fact; they have been adjudged affirmatively by the Circuit Court; they cannot be revised here. If the Circuit Court erred, their error was in no sense an error of law; if any state of facts whatever could establish, in point of law, such a decree as they have made, that state of facts must be presumed to have been proved. In any event, this decision of the Circuit Court is not their judgment on the point at issue; it is merely their reason for the judgment; it is mere surplusage; if omitted entirely, the decree would still have been responsive to the issue.

It is not, then, necessary—it is not even competent—for this court to inquire whether the grant of the 20th of June, 1797, was a valid grant, even if the point were presented by the record, which it is not. But were that point examined, the decree of the Circuit Court would be fully sustained. The power of the governor to make the grant is indisputable; and the language of the grant is, according to the Spanish law, such as to convey an absolute title. *United States v. Arredondo*, 6 Pet., 728; *United States v. Clarke*, 8 Pet., 436. It was located by a survey,—a *plano figurativo*,—made by the surveyor-general. The conditions contained in it were performed, and were formally certified so to have been by the competent Spanish authorities. The objections—the only objections—have been two, both of which are futile. The genuineness of the certificate of the surveyor-general was disputed; this objection has been now but faintly pressed, if not entirely abandoned. It rests on the *ex parte* evidence of McLaughlin, Filhiol, and Pommier, which will not stand the test of examination. The performance of the conditions has been denied by an ingenious argument, which seeks to connect the grant of 1797 with the contract of 1795, though in reality the first was meant to supersede the last,—to take its place. The contract involved the Spanish government in heavy expenditures, and was particularly adverse to the policy of Morales, then becoming all-powerful in the

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civil administration of Louisiana. It was considered by him desirable, especially after the treaty of 1795, to promote *844] large settlements of foreign emigrants, excluding the *Americans, in that part of Louisiana, but, at the same time, to avoid the heavy expenditures and numerous inconveniences of the contract system. Hence the grants to Maison Rouge and Bastrop, in lieu of the previous plan of contracts and payments by the government. To suppose that the former was a continuance of, and not a substitute for, the latter, is not only unsustained by any evidence, but is adverse to the very objects the Spanish government sought to attain.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is one of much interest to the parties concerned, and to the public.

The peculiar practice of Louisiana, which has been adopted in the Circuit Court for that District, has produced some embarrassment in this case. According to the laws of that State, unless one of the parties demurs on trial by jury, the court decides the fact as well as the law; and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the Superior Court, therefore, in the State practice, necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding.

In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other States. And the removal of the case from the Circuit Court to this court is regulated by act of Congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a Circuit Court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the Circuit Court upon questions of fact are as conclusive as if they had been found by the jury.

When this case was tried in the Circuit Court, neither party demanded a jury, and the questions of fact which arose in it were decided by the court. The record transmitted on the writ of error set forth all the evidence, as is usual in

appeals in the State courts; and it appeared that the authenticity of one of the instruments, under which the defendants in error claimed title, was disputed, and the conflicting evidence upon that subject stated in the record. The Circuit Court decided that the paper was authentic, and executed at the time it bore date. This question was fully argued here, as will appear by the *report of the case in 3 [845 How., 773; and the attention of the court not having been drawn to the difference between an appeal in the State practice and the writ of error from this court, it did not, in considering the case, advert to that distinction. And being of opinion that the weight of evidence was against the authority of that instrument, it rejected it as not legally admissible, and, proceeding to decide the case as if it were not before the court, it reversed the judgment which the court below had given in favor of the defendants. Upon reconsideration, however, we were unanimously of opinion, that the decision of the Circuit Court upon this question of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic, and sufficiently proved.¹ And in order that the defendants might have the benefit of the decision in the Circuit Court, the case was reinstated in this court at the last term, to be heard and decided upon the questions of law presented by the record, as it was originally brought up, without prejudice from the former decision of this court.

It has been again argued at the present term; and the case as it appears upon the record is this.

It is a petitory action, brought and proceeded in in the Circuit Court, according to the Louisiana State practice. The suit is brought by the United States against Richard King, one of the defendants in error, for a parcel of land lying in that State, and described in the petition. King answered, admitting that he was in possession of the land, and claiming title to it under a conveyance with warranty from Daniel W. Coxe, the other defendant; and prayed that he might be cited to appear and defend the suit. On the same day, Coxe appeared and answered, and alleged in his defence, that the land sued for was part of a large tract of land which had been granted by the Baron de Carondelet to the Marquis de Maison Rouge, by an instrument of writing, dated June 20th, 1797,

¹ FOLLOWED. *The Abbotsford*, 8 Otto, 442. CITED. *Barreda et al. v. Silsbee et al.*, 21 How., 167.

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which he sets out at large in his answer; and by sundry intermediate conveyances, he deduces a title from Maison Rouge to himself for three fourths of the entire tract. He insists that the instrument of writing executed by the Baron de Carondelet was a complete grant conveying to the Marquis de Maison Rouge an indefeasible title to the land therein mentioned, and that, from the date of the said instrument, it ceased to be a part of the royal domain, and became the private property of the said Maison Rouge. He also avers that this grant was made in consideration of services rendered by *846] Maison Rouge in settling thirty *emigrant families on the Washita River, in Louisiana, under a contract made by him with the Baron de Carondelet, dated March 17, 1795, and approved by the king of Spain on the 14th of July in the same year. And he then proceeds, in his answer, to assume the character of plaintiff in reconvention, and prays that the grant of the 20th of June, 1797, to the Marquis de Maison Rouge may be declared valid, and that he and King may be recognized to be the lawful owners of the parts of the said grant held by them, as described in the answer of King, and in a schedule annexed to his (Coxe's) answer, and that they may be quieted in the ownership and possession of the same, and that the United States may be ordered to desist from treating and considering any part of said grant, as designated in a certain survey by John Dinsmore, referred to particularly in his answer, as public property.

Upon this issue the parties proceeded to take testimony, which is set out in full in the record. A great part of it is immaterial, and much of it relates to questions of fact which were disputed in the Circuit Court. This mode of making up the record, which is borrowed from the State practice, is irregular, and unnecessarily enhances the costs when a case comes up on writ of error. In cases where there is no jury, the facts, as decided by the court, ought regularly to be stated, and inserted in the record, provided the parties cannot agree on a statement. This is most usually done by the court in pronouncing its judgment. In this case, there is a statement by the judge who decided the case, containing his opinion both on the facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot therefore be resorted to as a statement

of the case. And as there is no case stated by consent, it is necessary to examine whether the facts upon which the questions of law arise sufficiently appear in the record to enable this court to take cognizance of the case.

As we have already said, the action brought by the United States is what, in the practice in Louisiana, is called a petitory action, and is in the nature of an ejectment in a court of common law. In a State court where there is no distinction between courts of law and courts of equity, the plaintiff in a petitory action might recover possession, or a defendant defend himself, under an equitable title. But the distinction between *law and equity is recognized everywhere in the juris- [*847 prudence of the United States, and prevails (as this court has repeatedly decided) in the State of Louisiana, as well as in other States. And if these defendants had possessed an equitable title against the United States, as contradistinguished from a legal one, it would have been no defence to this action. But no such title is set up, nor any evidence of it offered.¹ The defendants claim under what they insist is a legal title, derived by the Marquis de Maison Rouge from the Spanish authorities.

Under the treaty with Spain, the United States acquired in sovereignty all the lands in Louisiana which had not before been granted by the Spanish government, and severed as private property from the royal domain. It was incumbent, therefore, upon the defendants, to show that the land in question had been so granted by the Spanish authorities; otherwise the United States were entitled to recover it.

The defendants, in their answer, allege, that it is part of a tract of land that was granted to the Marquis de Maison Rouge by an instrument of writing executed by the Baron de Carondelet in 1797. This instrument refers to the royal order of 1795, and the figurative plan of Trudeau. The defendant Coxe also refers in his answer to these instruments, as containing a part of the evidence of his title; relying upon the paper of 1795 as showing the services which formed the consideration of the instrument upon which he relies as a grant. These instruments were all received by the Circuit Court as authentic and sufficiently proved, and are set forth at large in the record. The question between the United States and the defendants is, whether, according to the Spanish laws at that time in force in the province of Louisiana, the instrument of writing dated in 1797 passed the title to

¹ CITED. *Gilmer v. Poindexter*, 10 How., 267.

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the land described in the figurative plan of Trudeau to the Marquis de Maison Rouge, as his private property.

This is a question of law to be decided by the court. And it is altogether immaterial to that decision to inquire what emigrants were introduced by Maison Rouge, or what authority he exercised within the territory in question, because whatever was done by him is admitted to have been done under and by virtue of the authority derived from the instruments before mentioned; and it depends upon their construction to determine whether it was done as the agent of the government or as owner of the land. His acts cannot alter their construction.

Confusedly, therefore, as this record has been made up, and loaded as it is with irrelevant and unnecessary parol testimony, the facts upon which the question of title arises are *848] as fully *before us as if they had been set forth in the form of a case stated; the disputed question as to the authority of the plan of Trudeau being, so far as this writ of error is concerned, finally settled by the decision of the Circuit Court.

We proceed, then, to examine the question of title, and to inquire whether the land in question was conveyed to the Marquis de Maison Rouge by the Spanish authorities before the cession to the United States.

The paper executed in 1795 is evidently a contract to bring emigrants into the province, and not a grant of land. But as the instrument relied on by the defendants as a grant refers to this, and is founded upon it, it is necessary to examine particularly the stipulations contained in it, in order to ascertain its object, and to see what rights were intended to be conferred in the land destined for the proposed settlement, and to whom they were to be granted.

This agreement states that the Marquis de Maison Rouge, an emigrant Frenchknight, had proposed to bring into the province thirty families, also emigrants, for the purpose of forming an establishment with them on the lands bordering on the Washita River, designed principally for the culture of wheat and the manufacture of flour. And the provincial authorities agreed to pay to every family one hundred dollars for every useful laborer or artificer in it, to furnish guides from New Madrid or New Orleans to the place of destination, to pay the expenses of their transportation from those places, and to grant to each family containing two white persons fit for agriculture ten arpens of land, extending back forty arpens, and increasing in the same proportion to those which should contain a greater number of white cultivators. And

European servants brought by the emigrants, bound to serve six or more years, if they had families, were to be entitled to grants of land, proportioned in the same manner to their numbers, upon the expiration of their term of service.

It will be observed, that this contract contains no stipulation in favor of Maison Rouge. All the engagements on the part of the government are in favor of the emigrants who should accept the conditions. Indeed, it seems to have been no part of the purposes of this agreement to regulate the compensation which he was to receive for his services. Its only object, as appears by the concluding sentence, was to make known the offers made by the Spanish government to those who were disposed to come. It was therefore to be shown by the Marquis to those whom he invited to remove to his establishment, and it does not appear to have been thought necessary, and perhaps was not desirable, that his compensation or his interest in *forming the colony [849 should be made public. That was a matter between him and the Spanish authorities, which doubtless was understood on both sides. And whether it was to be in money, or in a future grant of land, does not appear. Certainly it was not to be in the land on which this establishment was to be formed, because the government was pledged to grant it to the colonists. The provincial authorities, it seems, had not the power, by virtue of their official stations, to enter into this agreement. After it was drawn, it was transmitted to the king of Spain for his approval; and he ratified and confirmed it by a royal order. All that was done under it, therefore, was done under the authority of this special order, and not by virtue of any power which belonged to the provincial officers, in virtue of the offices they held.

It is manifest from this contract, approved as it was by the king, that Spain was at that time particularly anxious to strengthen herself in Louisiana, on the Washita River, by emigrants from Europe. It is a matter of history, that, at that period, the political agitations in France and the neighbouring nations on the continent of Europe induced many to emigrate. These emigrants were, for the most part, persons who were attached to the ancient order of things, or who were alarmed or dissatisfied with the changes which were taking place around them, and consequently were precisely of that character, and imbued with those political feelings, which the Spanish government would prefer in the colonists who settled in the province of Louisiana. The very liberal and unusual terms offered in this contract show its anxiety on the subject. Its evident object was to obtain a body of

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agriculturists from the continent of Europe, who would settle together under one common leader, in whom the government could confide, and form a colony or establishment of themselves. Such a colony, in sufficient numbers to afford some degree of protection against Indian marauders, would, by opening, cultivating, and improving the place of their settlement, create inducements to others of their friends or countrymen to join them, and thus promote the early settlement of that part of the province, which this agreement shows the Spanish government was anxious to accomplish.

The Marquis de Maison Rouge, it seems, from his position as an emigrant French knight, was regarded as a suitable person to be employed in forwarding this policy. What were his peculiar duties is not defined in this agreement; but it appears that he was to make known the offers of the government, and select the colonists, and superintend the settlement and formation of the establishment. It is too plain to be *850] questioned, that, in doing this, he was, by the agreement, to act as the agent of the government, and not as the proprietor of the land.

The contract specifies no particular place on the Washita. It merely provides that it should be on the lands bordering on that river. And the Spanish authorities, in their desire to settle that part of the province,—as these unusual offers so clearly evince,—would naturally be ready to make grants to others. There was danger, therefore, that the unity of the establishment of Maison Rouge might be broken in upon by intervening grants to persons with whom he had no connection, and who, as they did not come under his auspices, might not be disposed to submit to his superintendence, or acknowledge the authority which the Spanish government had conferred on him. The success of his establishment might thus be endangered. There was another omission. He contracted to bring in thirty families. It might well be doubted, under the terms of this agreement, whether the promises of the government extended beyond that number; and others might be deterred from coming, under the impression that they would not reap the like advantages. These omissions were calculated to embarrass the establishment, and retard its success. Indeed, it appears by the figurative plan of Trudeauau, that grants to others had then already been made in the territory there marked out; and it will appear, we think, upon examining the instrument of 1797, that these were the omissions it intended to supply, and the difficulties it intended to remove. It was to carry the plan of 1795 into more perfect execution, not to make a grant to Maison Rouge.

It begins by reciting that the Marquis de Maison Rouge had nearly completed the establishment on the Washita which he was authorized to make by the royal order of 1795, and then assigns, as a reason for executing this instrument, the desire to remove for the future all doubts respecting other families or new colonists that might come to establish themselves. This is the only motive assigned, and therefore was the only object which this paper was intended to accomplish. The doubt had arisen under the contract of 1795, and that doubt did not concern Maison Rouge nor the thirty families which he had contracted to bring, but other families and new colonists that might come to establish themselves. And in order to remove these doubts, it destines and appropriates for the establishment aforesaid the thirty superficial leagues marked in the plan of Trudeau, under the terms and conditions stipulated and contracted for by the said Maison Rouge. That is to say, it appropriates a large tract of country, far beyond the wants of the thirty families, in order to show that there would be room for *the other families or new colonists. It is to be for the exclusive use [*851 of the colony which Maison Rouge was to establish, to prevent the apprehension of disturbance from other persons; and it is declared to be under the same terms and conditions, in order to satisfy those other families, or new colonists, that the liberal provision made for the thirty families would also be extended to them. And the instrument also states that this territory is appropriated for "the establishment aforesaid," that is, for the establishment authorized by the contract of 1795, and not for one to be made under a new contract; and it further states, that it is made by virtue of the powers granted by the king,—evidently referring to the royal order which was before mentioned in this instrument, and showing that the provincial officers who signed it were acting under special authority, and not under their general powers to grant land. Every expression in this instrument indicates that it was executed to remove doubts which might arise under the previous contract, and to carry that plan into full effect. There is not a word or provision in it which implies that there were any doubts about the rights of Maison Rouge under his contract, or that he was to have any other rights under this than were given to him by his former agreement. The land is appropriated for "the establishment aforesaid." In other words, it was to be the same establishment, with the same rights, but with limits more distinctly defined, and the rights of other families and new colonists

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who might unite themselves with the original thirty more clearly recognized.

It is said that the last instrument should be construed by itself, as distinct from the previous contract, and that the contract of 1795 was referred to merely to show the services which were rendered under it by the Marquis de Maison Rouge, as the consideration upon which this grant was made to him. It is a sufficient answer to this argument to say, that the last instrument, in express terms, states that the motive for making it was to remove doubts in the former one as to other families and new colonists, and consequently could not have been designed to be an independent agreement, conferring new rights upon Maison Rouge alone. It in effect negatives the idea, that the first was regarded as a mere consideration; for upon such an interpretation, there would be no doubts to be removed as to the new colonists. They would have no interest in it. There would be the certainty that the services had been rendered by Maison Rouge, and that this instrument intended to reward him. Besides, the last instrument would be unmeaning and unintelligible without referring to the first, and construing them together. It would be *852] impossible without taking the two agreements together, to understand from the last what was meant by the establishment of the Marquis de Maison Rouge, or how it was to be formed, or what were to be the privileges of the new colonists, or what were the conditions contracted for by Maison Rouge. None of these things are specified in the instrument of 1797. It refers for them to the former contract.

But if this instrument is taken by itself, and regarded as independent of the other, it contains no words of grant, none of the words which were employed in the colonial Spanish grants which intended to sever the land from the royal domain, and to convey it as individual private property. It is true that the Spanish colonial grants are in general more summary and brief than common law conveyances. But they are by no means loosely or carelessly expressed; and it must not be supposed that they are ambiguous because they are brief. On the contrary, the intention to convey is always expressed in clear and distinct terms. And these grants, like the patents for land issued by the government in this country, appear to have been prepared by officers of the government well acquainted with the colonial usages and forms. Thus, for example, in the case of Arredondo and Son, reported in 6 Peters, 694, where the grant was for a large tract, upon condition that the parties should at their own expense establish two hundred families upon it, it is expressly stated, that the land was

granted according to the figurative plat, "in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof."

It cannot be supposed that a grant of thirty superficial leagues, far beyond the quantity usually conveyed to an individual, would have been carelessly drawn in new and unusual terms, calculated to create doubts, and that established forms and usages would be disregarded and needlessly departed from. Certainly there is every reason to believe, that, if this land was intended to be conveyed to the Marquis de Maison Rouge, that intention would have been expressed with at least ordinary perspicuity. Yet, among the many cases of Spanish colonial grants which have come before this court, we are not aware of one, great or small, in which a paper in language resembling this has ever before been produced and claimed as a grant.

The note at the foot of this instrument has been relied on to prove that it was intended to be a grant. We think it is not susceptible of that construction, and that its language proves the contrary. The note is a short one, and merely says, that, "in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American on *the lands included in his grant." The lands mentioned in this note are undoubtedly the lands described [853 in the body of the instrument, and his establishment was to be formed on them. The note apprises him, that, in doing so, he must conform to this contract, and not admit any American. There was therefore a preëxisting contract in relation to this settlement, by which the rights of the parties were defined, and by which Maison Rouge was prohibited from admitting or establishing Americans upon this land. The contract referred to is evidently the contract of 1795. We hear of no other. The thirty families which Maison Rouge was to introduce under that agreement were to be emigrants,—Europeans; and he is to conform to this stipulation, in introducing the other families and new colonists, in the thirty superficial leagues marked out on Trudeau's plan. They were not to be Americans. The establishment formed on this land was therefore to be made under the contract of 1795, and the rights of both parties regulated by it. The note in question was appended, because the body of the instrument referred only to the undertakings of the government, and without this note Maison Rouge might have regarded himself as absolved from his agreement as to the character of the additional or new colonists. But how could he be required to conform to his contract, unless the contract spoken of was to be carried

into execution upon this territory? The words, "lands included in his grant," which are used in the note, mean nothing more than the lands set apart and appropriated by this instrument for his establishment; and to give them any other meaning would make this brief note unmeaning and inconsistent with itself. He was not to admit or establish Americans in the territory destined and appropriated for the establishment which he was to form, under the contract of 1795,—that contract requiring this establishment to be formed of emigrants. This appears to be the plain meaning of this note, and we can see nothing in it that will justify a different construction, or give any reason to suppose that a grant was intended to Maison Rouge as his private property.

It is objected, also, that the decision of the Circuit Court, upon the question of title, is not brought here by the writ of error, because no exception was taken to it in the court below. But no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court. It is hardly necessary to refer to authorities on this point; but it may be proper to say, that in *Craig v. The State of Missouri*, 4 Pet., 427, and in another case which we shall presently notice, this court *854] have held, *that, where the Circuit Court decides, as in this case, both the fact and the law, no exception can regularly be taken.¹ Even in a court of common law, an exception is never taken to the judgment of the court upon a case stated, or on a special verdict; yet the judgment is subject to revision in the appellate court. The same rule must prevail where the facts upon which the inferior court decided appear in the record;—like a case stated, the question in the superior court necessarily is, whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record.

Under this view of the subject, which brings the question of right directly before us for decision, it is perhaps hardly necessary to say any thing as to the manner in which the judgment was entered in the Circuit Court. But if the defence of King could have been maintained, yet the language in which the judgment was rendered is open to serious objection. It may have been intended to cover only the land in controversy in the suit against King. But it may well bear the construction of being not only a judgment in favor of King, but also in favor of Coxe, for the large portion of this territory to which he claims title in his answer, and for

¹ CITED. *Weems v. George et al.*, 13 How., 195.

which he became plaintiff in reconvention against the United States under the Louisiana practice. In the opinion before mentioned, which was filed by the judge after the case had been removed by writ of error, he states that he overrules the plea in reconvention because it placed the United States in the attitude of a defendant as to the land thus claimed. This decision is undoubtedly right. But yet in the judgment, as stated in the record, the plea in reconvention is not overruled, and its language would rather seem to imply that it was a judgment against the United States in favor of Coxe for the land claimed by him in reconvention, as well as in favor of King for the land sued for by the United States. If this is the meaning of the judgment, it would be obviously erroneous, even if King had made good his defence. But it is unnecessary to decide what is its legal construction, because, in either view of it, the judgment is erroneous, and must be reversed.

Neither is it necessary to examine in detail the exceptions taken at the trial to the admission of testimony. In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, *the appellate court will reject it, [*855 and proceed to decide the cause as if it was not in the record. This is the rule laid down in the case of *Field et al. v. The United States*, 9 Pet., 202, and is undoubtedly the correct one. It is certainly proper, where evidence supposed not to be legal is received by the court, to enter on the record that it was objected to. But this is done to show that it was not received by consent, and a formal bill of exceptions is not required to bring it to the notice of the superior court. It may, however, be done in that form, if the parties and the court think proper to adopt it; and the objections have been so stated in this case, in conformity, we presume, with the Louisiana practice. But as the material evidence in the case was all legally before the Circuit Court, it would be useless to examine whether errors were committed as to portions of it which are altogether unimportant. And this court being of opinion, for the reasons hereinbefore stated, that this instrument of writing relied on by the defendants did not convey, or intend to convey, the land in question to the Marquis de Maison Rouge, the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to enter

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a judgment for the United States for the land described in their petition.

Mr. Justice McLEAN, Mr. Justice WAYNE, Mr. Justice McKINLEY, and Mr. Justice GRIER dissented from this opinion. Mr. Justice McLEAN and Mr. Justice WAYNE filed opinions in writing, as follows.

Mr. Justice McLEAN.

Had not my brother judges pronounced the above opinion, I should not have supposed there could be any difficulty in determining the character and effect of the grant in question. Being in the minority, I shall only state some of the grounds on which my opinion has been formed.

The validity of the grant depends upon the laws of Spain in 1797, the time it bears date. Those laws were foreign, and are required to be proved. The incorporation of Louisiana into the Union cannot affect this principle. The treaty of cession and the acts of Congress subsequently enacted, recognizing private rights in the ceded territory, only reiterated the well-established principles of the laws of nations. In the language of the act of Congress, we are to look "to the laws and ordinances of the government under which the claim originated."

On the 17th of March, 1795, the Baron de Carondelet, Governor of Louisiana, and others, entered into a contract with the Marquis de Maison Rouge, which was sanctioned by *856] the king of *Spain, to bring into "these provinces thirty families, emigrants, for the purpose of forming an establishment with them on the lands bordering upon the Washita, designed principally for the culture of wheat," &c., on the following conditions:—1st. Two hundred dollars to be paid out of the royal treasury for every family composed of two persons fit for agriculture, &c., four hundred dollars to those having four laborers, and in the same proportion for a less number. 2d. A guide to be furnished them. 3d. Their transportation to be paid, not exceeding three thousand pounds to each family. 4th. Ten arpens of land, extending back forty arpens, for a family of two laborers, and in the same proportion for a greater number. 5th. Other privileges.

The Marquis performed much labor, and consequently incurred much expense, in the fulfilment of the contract. And on the 20th of June, 1797, the Baron de Carondelet and Andres Lopez Armesto executed to the Marquis the following instrument:—"Forasmuch as the Marquis de Maison

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Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families, by the royal order of July 14th, 1795, and desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted to us by the king, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the Surveyor-General, Don Carlos Lareau Trudeau, under the terms and conditions stipulated and contracted by the said Marquis de Maison Rouge," &c.

"Note, that, in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American in the lands included in his grant."

The certificate of the surveyor, Carlos Trudeau, laid down the surveys with precision, stating the superficial total at two hundred and eight thousand three hundred and forty-four superficial arpens, equal to thirty leagues, &c. And the surveyor adds:—"It being well understood that the lands included in the foregoing plats, which are held by titles in form, or by virtue of a fresh decree of commission, are not to compose a part of the thirty degrees; on the contrary, the Marquis of Maison Rouge promises not to injure any of the said occupants, promising to maintain and support them in all their rights, since if it should happen that the said thirty leagues should suffer any diminution of the land occupied, there will be no objection or inconvenience to the said Marquis de Maison Rouge's completing or making up the deficiency in any other place where there are vacant [*857 lands, and to the satisfaction of the concerned."

This survey, being annexed to the patent and referred to in it, constitutes a part of the grant, with the conditions specified.

The error in the argument seems to be in supposing this grant to have been issued in fulfilment of the contract of 1795. The grant was in no way connected with that contract, except as showing the consideration on which the grant was made to the Marquis, and with the express view of relieving the royal treasury, which was often without funds, from the charges imposed by the contract. Charles Tessier, now a judge in Louisiana, was chief clerk in the land-office, and who made out the grant, states, that "Rendon and Morales successively filled the office of intendant, and being charged with the public finances, which were greatly embarrassed for

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want of money, they made difficulties about paying for the families which Maison Rouge introduced and was authorized to introduce, and tried to get rid of farther advances to Maison Rouge." And the witness says the land was not worth so much as the expenses of the government might amount to in the end. And J. Mercier, another witness, confirms the statement of Tessier.

The truth of these statements is sustained by the words of the grant. The royal order of 1795 being referred to, the grant states:—"And desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge," &c. Now it must be observed that the Marquis was the mere agent of the government under the contract of 1795. He was to have no interest in the land, nor did the government, in the contract, propose to pay him for his services. That this enterprise was deemed one of great importance is shown by the gratuity of land and money given by the government to families, and also in agreeing to pay the expense of their transportation. And the government being "desirous to remove for the future all doubts respecting other families or new colonists who may come to establish themselves," &c. These were no part of the families under the first contract, but "other families." So that the families or colonists which should come under the grant were not to come under the contract, but to settle under the grant, having no claim on the government. This relieved the royal treasury from any further embarrassment on account of the contract of 1795, and removed all doubts in regard to such settlers.

*858] *But the land was granted to the Marquis de Maison Rouge, subject only to the terms of the grant and of those specified in the certificate of the surveyor, which were incorporated into the grant. The conditions thus expressed were, that the Marquis should not admit "any American in the lands included in his grant." And he was to protect the rights of those who had a good title to lands within his grant, and should receive other lands in lieu of those thus held. These two conditions constituted the contract referred to, I have no doubt, in the note affixed to the grant. There was, then, no connection between the grant and the contract of 1795, except as the latter showed the meritorious services of the Marquis, which constituted, in part at least, the consideration of the grant.

But was this instrument a grant? Under the common

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law it was not a grant, but it is one under the civil law. If the instrument separates the land from the public domain, and appropriates it to the use of an individual, it is a grant. No words of inheritance or terms of grant are necessary by the civil law. In this grant the words are, "We destine and appropriate conclusively for the establishment of the aforesaid Marquis," &c. Now these terms appropriate the land described "conclusively." Nothing could be more specific than this. It separates the land designated in the plat from the lands in the crown, and no subsequent condition was annexed. He had nearly completed the establishment of the Washita under the contract of 1795, and for these services the grant was made. If the grant had required the Marquis to do certain things, as to settle a number of families, there would be some apparent ground to say, that he, or those claiming under him, must show a performance of the condition. But even in such a case the grant would be good, for the cession of the country by Spain to France, and by France to the United States, within a short time after the grant, would have excused the performance of such a condition. It would be strange indeed if our government should require the performance of a condition which excludes our own citizens from benefits, and gives them to foreigners. This point has been decided in the case of Arredondo.

But the most conclusive answer to this view is, that the grant required no such condition, and that, in this respect, it has no connection with the contract of 1795. That contract, by this grant, was admitted to be nearly completed, and there was no requirement that it should be completed. It was found burdensome to the treasury, and was abandoned. Under that contract, titles were made to the settlers, and not to the Marquis. And the land for the thirty families would have required a small tract in comparison with that covered by the grant.

*This instrument, it is said, does not purport to be a grant. If this be so, those who issued it, and all others who have officially and professionally examined it heretofore, have been strangely mistaken. Charles Tessier, who was a principal clerk in the office of the Spanish government of Louisiana for making grants of land, and who made out this grant, says it "was denominated and considered as a *titulo en forma*, and was such complete and perfect evidence of title as not to require any other to validate or strengthen it." J. Mercier, who was a clerk in the land-office with Tessier, also states that it is a grant. Both of these persons, from their public duties, must have been as well acquainted

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with the forms of titles then used, and indeed better, than any other persons. And this is a matter of fact to be established.

The commissioners appointed by the government to investigate land titles in Louisiana reported, in 1812, "that the instrument under date of the 20th June, 1797, is a patent, or what was usually, in Louisiana, denominated a title in form."

This claim being before the House of Representatives in 1817, a committee reported, that they "are of opinion that it is a legal and formal title, according to the laws and usages of the province of Louisiana." Other reports were made by a committee of the Senate confirmatory of the grant. The confirmation of the claim to a league square, by Congress, was a recognition of the grant. On no other supposition could the act of the 29th of April, 1816, confirming the league square, have been passed.

There can be no question that this grant would have been held valid under the Spanish government, and, both by the treaty of cession, and the laws of nations, it must be held valid by this government. The largeness of the claim can be no objection to it. Tracts as large were given, for services less meritorious than those rendered by the Marquis de Maison Rouge, by the Spanish government. Grants were made, under that government, for services, civil or military, performed or to be performed. And there was no service deemed more meritorious by Spain, except military service, than that of establishing colonies, reducing the country to cultivation, constructing mills, and other improvements. The quantity granted was left generally to the discretion of the governor or other officer who represented his sovereign in making the grant.

If this instrument be a grant which would have been held valid by the Spanish government, then we are bound in good faith so to consider it. And I cannot entertain any doubt that it is a complete grant, and therefore I dissent from the decision of a majority of the court.

*860] *Mr. Justice WAYNE.

Four of us do not concur with the majority of the judges in the judgment given by them in this case.

I will now give my reasons for not doing so, comprehending in what I shall say, as well as I can, those objections which were urged, in our consultations upon the case, by Messrs. Justices McLean, McKinley, and Grier, against the judgment.

Apart from every consideration connected with the intrinsic validity of the grant, and the defendants' title under it, I regard this judgment as unwarranted either by the case pre-

sented on the record, by the conduct and decision of this court in respect to it at the last term, or by the course and argument of counsel which have necessarily resulted from, and been limited by, that decision. Besides, in my view, it does injustice to other parties, now regularly before the court, who were entitled to be heard, according to our rules and practice, before a decision was made which, in effect, decides their rights, and takes what may be their property from them, without a hearing.

On these grounds I dissent from the judgment. But in addition to them, the evidence on the record, imperfect as it may seem to be to others as to the intrinsic merits of the defendants' title,—for that point does not purport to be now presented for our adjudication,—is yet sufficient to satisfy me that the grant to the Marquis de Maison Rouge is, in form and substance, genuine, valid, and complete, conferring upon him, and those who claim under him, a just and perfect title under the treaty by which Louisiana was ceded to the United States.

This suit was a petitory action, brought by the United States in the Circuit Court of Louisiana, in the year 1843, to recover from the defendant, Richard King, a tract of land of 4,606 acres, lying on the west side of the Washita River, in that State. The defendant denied that the United States had any title to the land; and he further prayed, in accordance with the law and practice of Louisiana, that, as he derived his title by purchase from Daniel W. Coxe, who had warranted it, he might be cited as warrantor, and made a party defendant in the suit.

Coxe came in and filed his answer. He also denied that the United States had any title to the land; and he further alleged, that the tract in controversy was part of a large body of land to which his own title was a valid one, derived from the Marquis de Maison Rouge, who was an inhabitant of Louisiana, to whom the Spanish government had granted it in due form, and in whom it was legally vested previous to the treaty of the 30th of April, 1803, which ceded that territory to the United States, and guarantied to the inhabitants the full enjoyment of their property. In his answer, he further put in a plea of *"reconvention," also in accordance with the law and practice of Louisiana, [*861 wherein he asked to be quieted in his own title to the whole grant, against the United States; and he annexed a statement, marked Schedule A, in which the different tracts sold by him since he became the purchaser were particularly set forth, among which was that conveyed to the defendant King, for the recovery of which the suit was brought.

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By the Code of Procedure of Louisiana, (Art. 494, 495,) the mode of proceeding in which must, by the provisions of the act of Congress of the 26th of May, 1824, (4 Stat. at L., 63,) regulate the practice of the courts of the United States in that district, either party is entitled to a trial by jury; but if that mode is not preferred, the issue of fact, as well as of law, is to be tried by the court, the finding of the facts by the court being, in that event, equivalent to the verdict of a jury. This was done in the present case.

In the summer of 1843, the defendant and warrantor, Coxe, being anxious for the termination of the suit, entered into an agreement, which appears on the record, (page 80,) whereby it was stipulated that it should be immediately set down for trial, and he consented to the admission of much documentary evidence, chiefly derived from, or appended to, reports of committees of Congress. Among these documents was a pamphlet published by a person of the name of Girod, who was an adverse claimant to a tract of land alleged to be within the Maison Rouge grant; and also several depositions, annexed to the pamphlet, which purported to have been legally taken in suits that had been instituted many years before against the defendant Coxe. It was also stipulated by the agreement, that bills of exceptions might be taken by either party, not only during the actual trial, but even after the decision, until the record, if there should be a writ of error, was transmitted to this court.

When the trial came on, the plea of reconvention put in by the warrantor was dismissed by the court, "because, under the practice of Louisiana, it is to be regarded in the light of a new suit, and consequently places the government in the attitude of a defendant before the court." (Record, 182.)

In addition to the documentary evidence admitted by the agreement, a number of persons were examined at the bar. Their testimony appears to have been mainly directed to establish the genuineness and authenticity of the grant of Baron Carondelet to Maison Rouge, and of the *plano figurativo* of Trudeau, the surveyor-general, which was annexed to it; to rebut the contrary evidence derived from Girod's pamphlet, and which was supposed to exist in the old depositions printed with it; and to show the complete validity of *862] the grant in question, *so far as it depended on the Spanish laws and the recognized and settled practice of the Spanish government. None of the oral testimony—and there were seven or eight witnesses—was reduced to writing, or appears in any shape or form upon the record.

After a trial, which occupied several days, the Circuit Court found and decreed the grant of the 20th of June, 1797, to be a valid instrument, and adjudged the title under it of the defendant King, and Coxe, his warrantor, to be legal and good to the tract mentioned in the answer of the former, and in Schedule A annexed to that of the latter. This, under the law and practice of Louisiana, was a complete and definite finding by the court of the facts at issue,—equivalent to the verdict of a jury.

No opinion was delivered by the court at the time this decree was given, but one was subsequently prepared and filed, and is annexed to the record. It presents in a cogent and succinct manner, but more in detail, the matters of fact, of which the decree gives the summary result; and shows that they were founded on very full evidence, oral as well as documentary, and especially that the testimony derived from Girod's pamphlet, was, in the opinion of the court, conclusively disposed of by that of "persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth."

No exception was taken on the behalf of the United States to any portion of this opinion, although the agreement gave full power to counsel to do so at any stage of the legal proceedings.

In the progress of the trial, however, five bills of exceptions were taken by the counsel of the United States to the rulings of the court, and three by the defendants. Upon the latter it is unnecessary to express an opinion, as the judgment was in favor of the defendants, further than to remark, that, if it had been otherwise, they might have afforded a sufficient ground for its reversal.

The bills of exceptions on the part of the United States did not embrace any error in the opinion of the court, or in its decision of any legal point arising out of the validity of the grant, or its construction, or the Spanish law or practice in relation to such instruments, but were confined exclusively to the rejection and admission by the court of certain documentary evidence. To each bill of exceptions was annexed, separately and distinctly, the testimony connected with it and necessary to a decision upon it.

A writ of error was issued in behalf of the United States, returnable to this court at December term, 1843. With this writ of error were returned not only the five bills of *exceptions taken by the counsel of the United States, [*863 with the evidence embraced therein, but also the three bills of exceptions taken by the defendant. This, however, formed

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but a small part of the errors of the clerk of the Circuit Court in making up and returning the record. To these bills of exceptions he annexed a great mass of documentary testimony, a large part of which consisted of printed pamphlets, and among them the pamphlet of Girod, with its appendix; but whether all even of the documentary testimony which had been exhibited at the trial was embraced, did not appear; and it is certain that no portion whatever of the parol evidence had been reduced to writing, or was embraced in the record, although the judge had expressly relied upon it as contradicting the allegations in the documentary evidence. It also contained evidence on the part of the defendant, to prove that the grant in question was a valid grant, according to the Spanish laws and practice in regard to such official acts.

On this singular record, the case was argued before this court on the 24th of February, 1845. The opinion of the court (3 How., 773) was against the validity of the grant, the judgment of the Circuit Court was reversed, and the cause was remanded to it "for further proceedings to be had thereon in conformity with the opinion of the court."

In the argument of the case, reference was largely had to the documentary evidence improperly introduced into the record; and the plaintiffs' bills of exceptions, which alone were properly before the court, were scarcely adverted to.

The opinion of the court was put upon the fact, which it considered established by the testimony, that the certificate of Trudeau, or the *plano figurativo*, annexed to the grant, was antedated and fraudulent; and that therefore, if the grant itself was a genuine instrument, it had not "the aid of an authentic survey to ascertain and fix the limits of the land, and to determine its location." This opinion in regard to the genuineness of the certificate of Trudeau was thus expressed:—"After an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent; and we refer to the evidence of Filhiol, McLaughlin, and Pommier, as establishing conclusively that the actual survey, upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor in the paper of 1797 (the alleged grant) was for land in a different place, and higher up the Washita River. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis de Maison Rouge, who died in 1799, but after his death, and at the instance of

*864] Louis Bouligny, who, *according to the laws of Louisiana, was what is there termed the forced heir of the

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Marquis ; and that it was made in anticipation and expectation of the cession of the country to the United States, the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th of April, 1803. We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record."

It will be seen from this opinion, that the judgment of the reversal of this court was not founded upon any error of law presented in the bills of exceptions in the record, nor even upon any facts stated in those bills of exceptions ; but that it was purely a judgment on the facts of the case, different from that which was found by the Circuit Court of Louisiana, sitting without a jury, and found mainly upon the old depositions of three witnesses, which are in the appendix to Girod's printed pamphlet. Neither in the judgment, nor in the opinion of the court, did I concur at that time.

Upon the return of the record, with this opinion, to the Circuit Court of Louisiana, on the 9th of May, 1845, the attorney of the United States moved that the case should be taken up for final decision. The attorney of the defendant, on the other hand, moved for a new trial, and prayed for a jury ; and in an affidavit, it was sternly urged upon the court, that, in the previous trial, the case had been prepared and conducted under the belief of the law being well settled, that, in a petitory action, in which neither party called for a jury, the finding of the facts by the court would be considered by the Supreme Court as equivalent to a special verdict, and would not be reversed, except so far as they might be brought up by bills of exceptions. The affidavit then went on to show, not only that several witnesses, whose testimony was not reduced to writing, had proved the genuineness of the certificate of Trudeau, and his unimpeachable official and private character, but that the very depositions of Filhiol, McLaughlin, and Pommier, from which the Supreme Court took the facts on which it mainly relied, discarding from them the finding of the Circuit Court, were *ex parte*, and had been taken without notice to, or the knowledge of, the claimants under the Marquis of Maison Rouge. The affidavit then alleged that the defendants could again prove before the jury, and corroborate with additional evidence, the facts which had been found by the court upon the former trial.

The Circuit Court overruled the application, and ordered a final judgment to be entered for the United States, and

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*865] against *the defendant, regarding the judgment and opinion of the Supreme Court as a final one against the validity of the grant, and being commanded by its decree to "proceed according to that judgment and opinion." To this judgment a general exception was taken, and the case came again before this court on a writ of error, and was argued at the last term, December 15th, 1847. This argument has not been reported, probably because no formal decree of reversal or affirmance was made. It embraced, however, an elaborate view of the whole course of proceeding which had occurred, and made it apparent, that, in the statement of the merits of the case in the previous opinion of the Supreme Court, great error had been committed in the assertion of facts; and that, in rejecting the finding of the Circuit Court as conclusive evidence of the facts, and in permitting an inquiry into errors of law not made the subject of bills of exceptions, there had been a deviation equally great from the well-settled decisions of this court.

The suit was not, as this court admitted in its decision, "a controversy in a court of equity, but in a court of law; the petitory action brought by the United States in the Circuit Court of Louisiana being in the nature of an action of ejectment." 3 How., 787.

No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record. *Penhallow v. Doane*, 3 Dall., 102; *Wiscart v. Dauchy*, 3 Dall., 327; *Jennings v. Thomas*, 3 Dall., 336; *Talbot v. Seaman*, 1 Cranch, 38; *Faw v. Roberdeau*, 3 Cranch, 177; *Dunlop v. Munroe*, 7 Cranch, 270; *United States v. Casks of Wine*, 1 Pet., 550.

The case of *Parsons v. Bedford*, 3 Pet., 434, was, like the present, a petitory action, instituted in the District Court of Louisiana, and brought for review to this court, on a writ of error and bill of exceptions. It differed in one respect,—the facts were found by a jury. The parol evidence, however, had not been written or entered upon the record, although requested by the plaintiff. That refusal was made the ground of an exception. This court decided that it was no error, not merely because the refusal was not matter of error, but because, "if the evidence were before the court, it would not be competent for them to reverse the judgment for any error in the verdict of the jury."

By the Code of Practice of Louisiana (Art. 494, 495), which, under the act of 24th of May, 1824 (4 Stat. at L., 63),

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is also the law by which the courts of the United States are governed, the decree of the Circuit Court upon the facts *was in all respects equivalent to the verdict of a [*866 jury; and the principle thus established by this court would be equally applicable to it. It was so held in *Parsons v. Armor*, 3 Pet., 425, where the parties had waived the trial by jury, and the case was brought up by writ of error, the court saying it was certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony, as well as the law of the case, to the revision of the court.

In the year 1842, the effect which was to be given to the judgment of the court in Louisiana, asserting a conclusion of facts where a jury had been waived, was deliberately considered in the case of *Hyde v. Booraem*, 16 Pet., 176. It was then conclusively settled by this court, that it had no authority, on a writ of error, to revise the evidence which the Circuit Court had before it, or the interpretation they placed upon it, or the conclusions they drew from it. This court then said,—“That is the province of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. If either party in the court below is dissatisfied with the ruling of the judge on a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions on matters of fact.” In the subsequent case of *Phillips v. Preston*, 5 How., 290, the point was treated as conclusively settled.

It should, then, have been taken in this case as established, that every thing which was matter of fact in this controversy had been fixed beyond question in this court by the judgment of the Circuit Court of Louisiana; and that no portion of the proceedings of that court remained open for revision here, but “such rulings on matters of law as were brought before us by an appropriate exception, in the nature of a bill of exceptions.”

No final opinion to this effect was written by this court for publication in our reports after the argument at the last term. But such opinion was expressed unanimously by us in our consultation. And, in accordance with it, this court ordered, that “the judgment rendered in this case at December term, 1844, (3 How., 788,) and all the proceedings thereon and subsequent thereto, should be set aside and vacated, and the case, as it stood at the term aforesaid previous to the said judgment, reinstated.” Under this last order, the case has been before us at the present term.

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The case has been argued, and in my opinion properly argued, by the counsel for the defendants in error, upon the correctness of the rulings of the Circuit Court on matters of law, *stated in the bills of exceptions taken by the *867] United States, who are the plaintiffs in error.

The judgment of the Circuit Court has established the fact, that the grant made by the Baron de Carondelet, as the governor of Louisiana, on the 20th of June, 1797, to the Marquis de Maison Rouge, was valid under the laws of the French and Spanish governments then prevailing in Louisiana, and consequently continued to be so by the treaty which ceded Louisiana to the United States. It has therefore been properly treated as a question which, under the decisions I have referred to, cannot, upon this record, now properly come before this court.

The validity of the grant must depend upon the genuineness of the instrument itself, and upon its sufficiency to give to the grantee a complete and formal title to the land mentioned in it, pursuant to the laws of Spain at the time it was made. The concurrence of these two facts is essential to the validity of the grant. It is therefore distinctly, but succinctly, affirmed in the judgment of the Circuit Court, and must be taken to be established thereby. From the opinion of the Circuit Court, explaining its reasons for this judgment, it is apparent that both of these points were fully examined, proved, discussed, and decided upon. The assertion that the certificate of Trudeau to the *plano figurativo* has been antedated, or is fraudulent, cannot be maintained. It rests solely upon evidence not worthy of credit, from the circumstances and manner it has been introduced by Girod in his pamphlet, which is shown to have been contradicted, and which, if it were necessary to sift it, would be found to present intrinsic and abundant proof of its own discrepancies and inconsistencies. That the grant is a complete and formal title to the land mentioned in it, pursuant to the laws of Spain, is also conclusively established. It depended on the laws and usages of that government, on the performance of the necessary conditions, and, finally, on the recognition of the grant by the Spanish authorities as the complete and formal investment of the full ownership of the land embraced in it. All these were matters of fact susceptible of proof. That such proof was adduced, and was sufficient, is an inference we are bound to take from the finding of the court, as is shown by its judgment, to which they were necessary. When we turn to the opinion which the Circuit Court has thought proper, though under no obligation to do so, to annex to its judg-

ment, we find such was explicitly the case. On each and every one of these points there was testimony in the Circuit Court. On that testimony that court founded its decision, as a fact, that the grant was a valid and complete one. It says, that the genuineness of the grant is "conclusively *established by the testimony of witnesses who were well acquainted with the signature of the Baron de [868 Carondelet." Of the evidence in Girod's pamphlet, which alone impugned the genuineness of Trudeau's *plano figurativo* annexed to the grant, the court says,—“It is insufficient to counteract the force and effect of testimony emanating from persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth.” Of the performance of the conditions of the grant, the court says, there was “the most conclusive evidence that the conditions thereof, whatever they may have been, have been complied with.” And finally, in regard to the evidence which established it as a complete and formal title, the court says, it is what was usually termed in Louisiana, under the Spanish government, a *titulo en forma*,—a title in form,—as is shown by the testimony of Tessier, who was examined under a commission, and who, as the court observes, was officiating at the time as secretary in the land department. He proved, under oath, that such an instrument was “such complete and perfect evidence of title as not to require any other to validate or strengthen it.”

The validity of the grant was therefore properly regarded as an established fact, not now open to argument, under the order of this court pursuant to which the case is now before us. It has been so treated by the counsel of the defendants in error, without interposition or remark from the court. And therefore, as it is now made to form the principal, if not the sole, basis of the decision just expressed as that of the majority, it is a point upon which, in my opinion, the counsel for the defendants have not had that hearing to which they are entitled, and which is necessary to a proper investigation of this important title. The points raised by the bills of exceptions taken by the United States are before this court on this writ of error, and they have been argued and may be decided. It is otherwise with that of the validity of the grant.

If the only persons to be affected by this decision were the defendants on the record, it seems to me it would be improper to make it under the circumstances I have stated. But it has been brought to the notice of this court, before its judgment has been pronounced, that an act of Congress was passed on the 17th of June, 1844, (5 Stat. at L., 676,) the object of

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which was to bring in the best form, for final adjudication, those long unsettled titles in Louisiana, arising under the governments which existed there before the cession ; and that, under this law, the heirs of Henry Turner, who are claimants under the land grant to the Marquis of Maison Rouge, but to a far larger extent of land than the quantity now in controversy, are at this time *defendants in error in this *869] court, having been brought here by the United States, after having had a decree in their favor in the Circuit Court. These parties, by a formal motion, have asked that our present decision, if the same shall go to affect the validity of the grant, may be postponed until they shall be heard. They have stated, and the fact is so, that the record in their case was filed by the United States only a few days before the argument in the present case, and has only been printed since, so that, without any fault or negligence of their own, they have been unable to avail themselves of the rule of this court which permits parties in subsequent cases involving the same questions to be heard when the case first in order is reached ; that while the question and point of law, so far as regards the validity of the grant, are the same, the evidence necessary to its fair and complete adjudication is much more fully established in their record than in the confused and imperfect one now before us ; and especially, that it presents the testimony of numerous witnesses of the highest and most unimpeachable character, which has never been submitted to this court, directly establishing the authenticity of the documents in question, as well as proving the practice, usages, and laws of the Spanish government in regard to their form and effect. That in their case the facts were not found solely by the court below, but that their record exhibits the verdict of a jury, founded, in addition to other evidence, on the actual inspection of the original documents, which affirms their authenticity and completion, and the perfectness of the title under them. And finally, that if, under these circumstances, a decision shall now be made against the validity of the grant, it will be made on imperfect evidence, while fuller evidence is on the records of this court awaiting its examination, and also in prejudication of the rights of parties coming here under the sanction of an act of Congress, who have not been guilty of any delay in presenting themselves before this court, and who have been precluded from the benefit of the rule before alluded to by no fault of their own. Can we refuse with justice an application, to grant which injures no one, to refuse which may be productive of consequences the most serious, and perhaps irreparable wrong ?

Nor, in my opinion, are these the only considerations which should have induced us to refrain from a hasty decision, with imperfect evidence, on the validity of this grant. Four years ago, we made a decision relying on this same imperfect record, which contained an assertion and statement of facts rested on evidence since acknowledged by us to have been illegal in itself, and which we now know is positively contradicted. If *this grant is fraudulent in its execution, or in effect [870 is such, though genuine, as to give no title to those who claim under it, it is our duty to say so. But that should only be done after the calmest consideration of all the testimony relating to it, whether in the record of this case or in that of any other case on our calendar in which is involved the question of the validity of the grant. We ought not to have forgotten, that, in doing otherwise, we may affect the rights and property of many of our citizens who have not been heard; that we shall controvert the opinions formerly expressed for almost half a century by the board of commissioners who first examined the title, by the officers of the general land-office, by the legislature of Louisiana, by committees of Congress, and by the Circuit Court of the United States,—all of whom, after investigation, have declared this grant to be valid, and which has never been said to be otherwise by any other tribunal than this court, when it gave its now recalled judgment, founded upon the depositions annexed to Girod's pamphlet.

If we examine the judgment of the Circuit Court now under review upon the principles that have been heretofore settled by this court, we shall find no error in the "rulings of the judge in a matter of law brought before this court by an appropriate exception in the nature of a bill of exceptions." *Hyde v. Booraem*, 16 Pet., 176.

In regard to the three bills of exceptions which were taken by the defendants, also in the record, we need not say any thing, because they are not properly before us, and have not been referred to in the argument. But it may not be amiss to remark, that they afford another reason why a final judgment should not now be entered against the defendants, though the decision of a majority of the court may be adverse to them, because they allege the rejection of important testimony in their favor in respect to the validity of the grant, for reasons which, without expressing a conclusive opinion upon them, I may say were strongly and plausibly urged.

Let us now examine the bills of exceptions taken in behalf of the United States, to see whether they present any illegal ruling of the Circuit Court.

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They are five in number, but the first, fourth, and fifth have been properly and candidly conceded by the Attorney-General to be untenable. I am to remark, then, upon the second and third.

The second is an exception to the admission in evidence of a petition of Daniel Clark, the grantor of the defendant, to the Intendant Morales, on the 1st of August, 1803, together with the alleged copy of a certificate, purporting to be signed *871] by Leonard *and Amirez, officers of the royal treasury in Louisiana, on the 5th of August, 1803, in which it was declared, that the Marquis of Maison Rouge had complied virtually with the terms of his contract. The signatures are certified by a notary to be known to him as genuine, and both papers appear to be part of the same "instrument." The genuineness of the signatures was not denied by the Attorney-General. The only ground taken in the argument to sustain the exception was, the insufficiency of the testimony to prove a compliance by Maison Rouge with the conditions of the grant. It is certainly no valid objection to the admission of an authentic document as testimony, that it does not prove all for which the party offering it contends. This may affect its sufficiency, not the legality of its admission. It is a document from the Spanish archives, the authenticity of which was proved, as well as the removal of the records themselves, many years ago, by the Spanish authorities. Its admission is clearly within the rule established in the case of *The United States v. Wiggins*, 14 Pet., 345. The exception is limited to the admission of the evidence, not to the legal effect which has been or may be given to it, and it cannot be doubted that the decision of the Circuit Court to admit it was correct.

The plaintiffs' third bill of exceptions was also an objection to the admission of documentary evidence, namely, the report of the commissioners appointed under the act of the 3d of March, 1807, declaring that the grant to the Marquis Maison Rouge "is a patent, or what in Louisiana was denominated a title in form, transferring to him the title, in as full and ample a manner as lands were usually granted by the Spanish government, subject, however, to the conditions stipulated in his contract with the government." That such a report was made, and that the document in question was a copy of it, was not disputed. Such an official act of the officers of the United States in regard to the title was certainly legal evidence in the chain of proceeding, whatever its bearing and effect upon the validity of the title may be. But, if this were not so, it will be enough to say, to dispose of this exception, that, in

the course of the trial, another copy of this same document was introduced in evidence on the part of the United States.

These are the only exceptions to the judgment of the Circuit Court which were taken at the trial, and which have been brought before this court in this record. Neither can be sustained; nor do the majority of the court, in the opinion read by the chief justice, attempt to sustain them.

What, then, is there in the record, upon which the majority of the court rely to warrant their judgment?

*It has been argued, on the part of the United States, that there are errors apparent on the face of [872 the record, which, though not made the subjects of exception, will be noticed by this court. These errors are said to be in the judgment itself. That judgment is in the following words:—

“The court having maturely considered the law and the evidence in this case, doth now order, adjudge, and decree, that the plaintiffs’ petition be dismissed; and that the grant made by the Baron de Carondelet, as the governor of Louisiana, on the 20th June, 1797, to the Marquis de Maison Rouge, be, and the same is hereby, declared valid; that the said Richard King, defendant, and the said Daniel W. Coxe, the warrantor, be, and they are hereby, declared and recognized to be the lawful owners of the parts of the said grants held by them, as described in the answer of the said Richard King, and in Schedule A, and that they be quieted in the ownership and possession of the same.”

In this judgment, three patent errors are alleged to exist. It is said that it adjudicates the title for lands for which the United States have not sued; that the acceptance, by the defendant Coxe, of a league square, was an extinguishment of his claim to any other portion of the land; and that which was principally argued and urged was, that “the instrument executed by the Baron de Carondelet, on the 20th June, 1797, was not a grant to the Marquis de Maison Rouge.” These errors are alleged to be apparent on the record, independently of any exception embracing them. None such, it is admitted, were taken in the court below, or brought here.

Admitting, for the purposes of this argument, that this court can reverse a judgment for such an irregularity as is said to be in this, in its adjudication of the title for lands for which the United States have not sued, without, however, conceding it as a fact that this court can properly do so, in a case brought to it upon a writ of error, this is not the case for the exercise of such a power.

The court having decreed that the petition of the United States should be dismissed, and that the defendant King should be quieted in the ownership and possession of that land for which the United States sued, is as "definitive a sentence," or judgment, as the court could have given upon the subject-matter of the suit. It put an end to the suit, and absolved the defendant, in the language of the civil law of Spain, from the demand which had been made or sued for. Any thing put with it, growing out of the mode of proceeding in the trial, but separable from that "sentence," so as not to interfere with its execution, is, in the civil law of *873] Spain under which the *judgment was given, one of those divisions or points (*capitulos*) which can be appealed from, and set aside upon the appeal to a superior court, or by the court giving the "sentence," on account of its comprehending a thing not demanded or prayed for. But not so when the defendant has been acquitted and declared free from the demand, unless a right to revoke the sentence has been reserved by the judge (L. 9, tit. 22, p. 3); though it may be reversed upon appeal in a superior court, for meritorious cause, when there has been an error in the judge in acquitting the defendant from the demand for which he was sued. It cannot be denied, that, in this case, the "sentence" or judgment is conformable to the proceedings, so far as it acquits the defendant from the demand of the United States. The *jus in re*, or dominion in the thing sued for by the United States, is for so much land, particularly described in the action, as the mode of proceeding in Louisiana, or the civil law of Spain, in this particular still existing in Louisiana, requires to be done, with a recital—proper enough, and admissible in such actions, but not necessary—of a survey by Dinsmore, without authority of the plaintiffs, under an alleged pretended claim, "called the Maison Rouge claim." The answer of the defendant, after a general denial of all and singular the allegations in the petition, except as they are thereafter specially admitted, is, that "he is the true and lawful owner of the tract of land described in the petition," with a recital of his purchase from Coxe; that he is in possession of the same, and has made valuable improvements; with a prayer that he may be dismissed with costs, and that Coxe, as his warrantor, may be called to appear and defend him in the suit. The issue, then, according to the Louisiana mode of proceeding, or the civil law of Spain, between the United States and King, was certain, positive, and respondent upon the part of King to what the United States sued for, and is no way changed by the intervention of Coxe as his

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warrantor. That makes another issue between Coxe and King, so far as his denial of King's statement of his warranty to him; but it is not a substitute for the first issue between the United States and King, as to the dominion of the land sued for. Coxe, it is true, comes in upon the prayer of King, to defend the suit as his warrantor; not, though, as the court here seems to suppose, exclusively to maintain King's ownership of the land sued for as a part of the Maison Rouge grant; for in this petitory action by the United States, King might have resisted it by any equitable title other than that which was equitable or legal connected with that grant. But King asks that Coxe may be brought in as a party; that, "if this suit should be decided against him, he *may have judgment against the United States and [§874 the said Coxe, for the value of his improvements on the land, and a judgment against Coxe for the purchase-money and interest thereon, from the time of eviction," and costs of suit. In such a case, no error or irregularity in the judgment, in respect to Coxe's answer, can invalidate the finding upon the answer of King, if the latter can be executed upon the thing sued for. In other words, there may be in the civil law of Spain, upon which the rights of the parties in this case exclusively depend, distinct findings in the same judgment, without the error of one of them having the effect to vacate the other; and in that case it often happens that one of the findings in the judgment is made the subject of appeal, and that it is reversed without affecting the other. Now, though this may not be done in our writ of error, what I contend for is, that, if, in a writ of error in a case from Louisiana, a judgment shall have distinct findings, one of them expressly comprehending and adjudging the subject-matter of the suit, we shall separate it from the others which we may think cannot be maintained, and affirm the first, as would be done in the courts of Louisiana, when the subject-matter of rights claimed and denied depends upon the Louisiana law, or upon that law which existed there when the parties to the suit respectively acquired their rights in the subject-matter of the suit.

But further, the language of the judgment, as to the land upon which it is to operate, is explicit. It dismisses the petition of the United States, and quiets the defendant in the possession of precisely that land, in quantity and description, for which the United States sued him. Whether it was or was not the intention of the Circuit Court to adjudicate the title to other lands, in which the defendant King has no interest, but to which his warrantor, Coxe, may have a title, is

of no consequence, for both are so discriminated in the judgment that they cannot be confounded ; and were so, that each might be independent of the other, or, in the language of the civil law of Spain, be firm and valid, from having passed into a thing adjudged (*cosa juzgada*). Besides, such adjudication of a thing not sued for cannot vitiate the judgment for the thing that is sued for in this case ; for, if the former is not valid only because it is for land, as this court says, not sued for, the other part of the judgment in favor of King is valid, it being for the very land which was sued for. The fact that King and Coxe claim dominion of parts of what they say they respectively own, under the same grant, and that the court affirms their rights under it, cannot render that part of the judgment in favor of King less a judgment, because it is for a thing in *contestation ; and, though *875] a part of the Maison Rouge grant, the whole of that grant never was so. It was neither so by the action brought by the United States against King, nor did it become so from the answer of Coxe, though that answer, as well as the answer of King, raised the question of the validity of that grant, for the purpose of having it judicially determined whether or not it gave to King the dominion of the land for which the United States sued him, as a part of the Maison Rouge survey. To so much of that land or survey, and to no more of it, is the judgment in favor of King an affirmation of his ownership, or of Coxe's right of alienation of it to King. A judicial determination in favor of the validity of the grant and survey, for any portion of the latter, is a good reason for the United States, by its proper functionaries, to consider that the land embraced in the survey was private property when Louisiana was ceded, or that it was not a part of the public land intended to be conveyed by the treaty to the United States. But the validity of the grant was not, nor can it be, as the case is in the record, the foundation for a judgment in favor of Coxe for all the land which he claims under it, because the United States had not submitted to the jurisdiction of the court for any such purpose. A "definitive sentence," or judgment, is only valid when it is given against a person subject to the jurisdiction of the judge. (Ll. 12, 15, tit. 22, p. 3.) But the United States did submit itself to the jurisdiction of the court, for the land for which it sued King ; and the judgment acquitting him of that demand is final and conclusive in his favor against the United States, though it may be reversed for error in itself by this court, upon a proper exception, and though the execution of it is suspended by the cognizance which this court is legislatively empowered to take

of that "sentence" or judgment. I say legislatively empowered, for that phrase indicates the extent and boundary of this court's cognizance of a case in error. Until it shall be enlarged by Congress, I must think that the court has exceeded it, in this instance, by making an erroneous "division or point," in a judicial sentence containing two distinct "divisions or points," the foundation for the reversal of both, and that, too, without an exception having been taken in the court below to either of them, to bring one or the other of them up for concurrence in this court. If this court means to claim the power, and to exercise it in the review of a judgment, by a superior court, of an inferior, according to the civil Roman law, or as that law was modified under the Spanish rule in Louisiana, it may be done. But in doing it in this case, I may be allowed to dissent from my brethren, until some better *reasons for the exercise of such power shall be given than I have yet heard. [*876

However, does the language of the judgment necessarily embrace any other land than that which the United States claim in their petition? The inquiry should not alone be, whether the judgment may not bear that construction, but whether or not it does not admit of another, more coincident with the case as it is on the record and appeared to be on the trial, and more in harmony with the duty of the judge who gave it, in respect to the only "definitive sentence" which, under the civil law of Spain as it exists in Louisiana, can be given in a suit for real property where a warrantor appears to defend the respondent to the action in the character of a plaintiff in reconvention. If the judgment will bear such a construction, though the language of it may not obviously show it, we are bound to give that, of which it is susceptible, most favorable to its operative accuracy, or "executive process for a thing adjudged." Now my reading of this judgment is, that the petition of the United States is dismissed, and that King is quieted in the ownership and possession of the quantity of land for which the United States sued him, on account of the court having found the fact of the validity of the Maison Rouge grant, and that the further declaration in the judgment in respect to Coxe's ownership of the other lands in Schedule A, and that he is to be quieted in the enjoyment of them, is but an inference from the court's finding, from the proofs in the case, that the Maison Rouge grant and survey were valid. That it could not have been the intention of the court to be a judicial sentence seems to me certain,—first, because the court had disallowed or dismissed Coxe's plea in reconvention, by which alone his title

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to other lands than that sued for was brought in question, and secondly, because the only judgments which the Louisiana law permits to be given in such a case are the affirmation of his title to the land by decreeing its ownership to his vendee, or the disaffirmation of it, with a sentence against the warrantor for the purchase-money, with interest upon it from the final eviction, and for the value of the improvements and costs. Besides, in all fairness of construction, if we consider the words of the judgment in connection with what, manifestly, the Circuit Court, throughout the trial, thought was the only issue before it, do the words, "that the said Richard King, and the said Daniel W. Coxe, warrantor, be, and they are hereby, declared and recognized to be the lawful owners of the parts of said grant held by them, as described in the answer of the said Richard King and in the Schedule A," imply an adjudication for more land than that for which King had been sued, and of which Coxe had been *877] the owner, as *described in the schedule, before he sold it to King? Of themselves, the words may; but that it was not so meant seems to me to be certain, from the dismissal of the petition of the United States for just the land for which it had sued. I have used this course of argument, however, in respect to the judgment, not so much for the purpose of establishing the correctness of my own construction of it, as to show, that, in this court's review of it, instead of doing as it has done, it should, in accordance with its own well-established rule, have made every reasonable presumption in favor of its correctness. So the court has done in all previous cases where that which was equivocal in a judgment has not interfered with the right to a forced execution upon it of the matter in controversy. And so essential is the propriety and policy, in jurisprudence, of putting an end to further controversy after a judgment rendered, though there may be surplusage in it, that no instance can be found in our books, nor in the English reports, of a judgment set aside, in a court of review, which distinctly finds the issue between the parties, on account of other matter in it, unless upon exceptions taken to the court's ruling of the law in the case applicable to the issue. This I believe to be the only instance to the contrary, and I cannot think it will ever be a precedent for another.

In the case under consideration, the action was instituted by The United States against King, for the recovery of a tract of land in the actual occupation of the defendant. The petition is in the general terms in which such pleadings are usually framed in Louisiana, and avers the invalidity of the

title under which the defendant claims to hold the land, and the paramount legal title of the United States. The answer of the defendant to this petition is equally general in its terms, and asserts, without any specification of details, the validity of his title, and controverts the allegations in the petition. So far the case is perfectly simple, and, being followed by a general judgment for the defendant, so far as that judgment disaffirms the title of the United States and affirms that of the defendant, there is no ground upon which error can be alleged. In such a state of the case, without the intervention of the warrantor, I am warranted in saying, from the decision just read by the chief justice, that the judgment of this court would have been in favor of the judgment of the Circuit Court. The supposed difficulty, however, which the case presents, and which has caused the reversal of the judgment of the Circuit Court, arises from the circumstance, that King not only puts distinctly and simply in issue the question of title between himself and the United States, but he vouches, in warranty, Coxe, from whom he *purchased. King was, by the practice in Louisiana, obliged to do that. Let us for a moment inquire into [*878 the nature of that practice, and what it is meant to accomplish. In my opinion, it has a decisive and hostile bearing against the ground taken by this court, that the judgment of the Circuit Court should be reversed on account of its supposed adjudication of title for more land than the United States sued for.

At common law, as is familiar to all of us, when an action is brought to recover real estate which a defendant holds by purchase from another, accompanied with a covenant of warranty, the defendant may, at his option, elect either to give notice of the pending action to his vendor and warrantor, or to await the result of the suit, and, if judgment passes against him, sue upon his covenant of warranty. In the first case, the warrantor may take upon himself the burden of the defence, if he pleases, or may omit it. In either case, notice of the suit having been given to him, he is bound by the judgment. It is, nevertheless, still necessary that an action upon the warranty should be brought against him to enforce his personal liability. And upon proof that he had notice of the first suit, the judgment against his vendee will be conclusive evidence against him of the breach of his covenant.

If no such notice of the first suit be given to him, he may, in an action on the covenant, controvert the title of the original plaintiff, and require full proof of it to fix his liability. In

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all cases, however, the responsibility of the warrantor is judicially settled in the second suit.

The Louisiana law seeks to accomplish precisely the same results by a speedier process. It permits the defendant to call, in warranty, the party from whom he derives title. The warrantor may forthwith appear in court as a party, and in his own name defend the suit. Notwithstanding this, however, no judgment is entered against him at the suit of the original plaintiff; but in case he shall be adjudged entitled to the property in contestation, a second judgment is entered simultaneously, in favor of the original defendant, against his warrantor.

This subject was fully discussed in this case at our last term; but, as I have remarked before, we have no report either of the argument or the decision. I depend upon my own notes of that argument, and upon those of Mr. Coxe, of counsel in the case, from which I have derived much information. In my view, however, of the Louisiana law and practice, it is clear that the original proceedings and pleadings between the original parties to the suit remain as they were before the intervention of the warrantor, and the defence interposed by the warrantor cannot be made the foundation of any judgment to be rendered in favor of the plaintiff in the original action.

879] ^{}If this view of the matter be correct, in giving judgment in favor of King against the United States, the Circuit Court was necessarily limited to the pleadings between the parties. And so this court regarded the question at the last term; for although Coxe, in the defence interposed by him, sets up a claim to a larger portion of the entire Maison Rouge grant, and although this court, when this case first came before it, considered that the controversy was thus enlarged so as to comprehend this addition to the subject-matter involved, and that Coxe became answerable to a judgment coextensive with his claim, yet we were all satisfied, at the last term, that in this we had, as in other respects, misapprehended the local law, and the majority of the court now—as it ought to have done before, as I then thought—have confined us within our legitimate limits, and restricted the judgment to King alone, and to the property described in the petition. It would seem necessarily to follow, from this view of the case, that, in our consideration of the judgment of the Circuit Court, we ought to be restricted to the matters put in issue by the pleadings between the original parties.

In this aspect of the case, the grounds upon which the pres-
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ent decision is made to rest, in the opinion of the court, are wholly dehors the record.

Be this, however, as it may, this point in the case, so vital in the view taken by the majority of the court, has not been argued by counsel on either side. Nor is it considered distinctly and independently in the opinion of the court. In the absence of both, I am not disposed to pass any definite judgment. It is a point, however, which must be surmounted or avoided to warrant the judgment just given by this court.

But it is said that Coxe's acceptance of a league square was an extinguishment to any other portion of the land, and that there was error because it is not so declared in the judgment. This is certainly a matter dehors the record. Nothing concerning it is either on the face of the judgment or in the bills of exceptions. It is not in any way before this court, by any principle or rule of practice known to this court or any other court having the power to reverse, upon writs of error, the judgments of inferior courts. Some correspondence in regard to it is found, like Girod's pamphlet, in the mass of documents improperly sent up with the record; but we have no means of knowing whether or not it is the whole of the correspondence. I repeat, we cannot consider it by any known rule of judicial proceeding. Suppose it, however, to be before us for examination: can it be contended that the acceptance of this league square by Mr. Coxe was an extinguishment of his claim to the rest of the land in ^{the} grant, if that were otherwise valid, or that it annulled [*880 the conveyance to King made by Coxe long before the patent for the league square? The act of Congress of the 29th of April, 1816, confirmed all claims recognized as complete grants in the report of the commissioners appointed under the act of the 3d of March, 1807, and authorized a patent to be issued therefor; and the Maison Rouge claim had been so recognized and reported; but it was provided that under "no one claim shall any person or persons be entitled, under this act, to more than the quantity contained in a league square." Had no stipulation been made with Mr. Coxe when he received this patent, his right to any further quantity would not, by the language of this law, have been lessened or impaired. It did not, nor was it meant to, impair the quantity assumed by the United States in the treaty of cession of Louisiana, by which all the inhabitants were protected and maintained in the enjoyment of their whole property. And if it had been so meant, I do not think that I venture any thing which will not be acquiesced in by my associates

in this court, when the subject shall be fully examined, in saying, that Congress cannot constitutionally pass an act taking from the inhabitants of Louisiana, or those of any other purchased territory now making a part of the United States, any property guarantied to them, their descendants or assigns, by treaty, so as to exclude them from having their rights to the whole of what they claim judicially ascertained. A treaty is the supreme law of the land, and it limits the legislation of Congress to the fulfilment of all of its provisions, to the fullest extent of them, and not for less or a part of what individuals have a right to claim under it as property, but for the whole. And what that whole may be, where there is a dispute about it between the United States and those claiming, can only, under our system, be judicially ascertained and determined, unless, by the treaty or by the consent of the claimants, some other mode of determining the right has been agreed upon. But if this were not so, in this case there cannot be a doubt; for before Coxe accepted the patent for a league square, he made an inquiry what effect his acceptance would have upon his claim, and he was assured at the general land-office, acting under the instructions of the Attorney-General, that it did not preclude him from seeking the recognition or confirmation of his entire claim by Congress or the courts of the country.

I will now consider, as briefly as I can, the only other error assigned by the majority of the court on this judgment. It is, that the Circuit Court adjudicated the instrument executed by the Baron de Carondelet, on the 20th June, 1797, to be a grant to the Marquis de Maison Rouge. This is surely not *881] an error brought before this court by a proper exception, and more, it is not an error apparent upon the record. It not only is not in any bill of exceptions, but it is not a ruling of the Circuit Court which was at any time formally objected to, directly or indirectly, in the court below. If it is an error, it exists in the language and office of the judgment itself—nowhere else.

Accuratively speaking, this is not the judgment of the Circuit Court upon the issue made and submitted by the pleadings. It is the reason or cause assigned for the judgment. The prayer in the petition of the United States is, that they may “be decreed, by a judgment of this honorable court, to be the true and lawful owners of the aforesaid land and premises.” The judgment responsive to this prayer is, that “King, the defendant, and Coxe, the warrantor, are declared and recognized to be the lawful owners,” and are to be quieted in the ownership and possession of the same. The portion,

therefore, of the decree now excepted to is a reason of the court for rendering such judgment. It is no necessary part of the issue submitted for adjudication, or of the judgment actually given. As a reason of the court, it is mere surplusage, and can be altogether rejected without affecting the validity of the judgment. It is well settled, that, if a judgment be defective in form, yet if it follows and is responsive to the issue, and is substantially right in that respect, neither such defect, nor any surplusage contained in it, is a ground for error. *Moore v. Tracy*, 13 Wend. (N. Y.), 282; *Buckfield v. Gorham*, 6 Mass., 447; *Brown v. Chase*, 4 Mass., 436; *Deering v. Halbert*, 2 Litt. (Ky.), 292; *Todd v. Potter*, 1 Day (Conn.), 238. In Louisiana, in the case of *Keene v. McDonough*, 8 La., 187, it is said, "An erroneous reason, given in a judgment which is correct in itself, is no ground for reversal." In any event, the reasoning of the court on which it either partially or wholly puts its judgment, even if incorrect, can only form the ground of an exception to be submitted to the court below; and if there persisted in, must be made the foundation of a bill of exceptions to be revised by this court. No exception whatever was taken to this portion of the judgment or reasoning of the Circuit Court.

If, however, the declaration, or decree embraced in the judgment, is an essential and necessary part of it, can it be revised by this court? It is the assertion of a fact, depending exclusively upon the performance by the grantee of the conditions of the grant, and upon the laws and usages of Spain, in cases where such instruments were issued and such conditions performed. Whether or not this fact was established is, as I have already shown, a matter belonging to the Circuit Court exclusively to decide. That court had before it the evidence of the performance of the conditions of the grant, and of the laws *and usages of Spain in regard to it. We have not. Nay, more, we are bound to pre-
sume that this judgment was right, so far as it did or could, by any possibility, depend upon a matter of fact. Every matter of fact necessary to sustain it will be presumed to have been proved, and will be taken by this court to have been fully proved in the Circuit Court. This is a principle too well settled, alike by the common law and the law of Louisiana, to need discussion. *Campbell v. Patterson*, 7 Vt., 89; *Butler v. Despalir*, 12 Mart. (La.), 304; *Mitchell v. White*, 6 Mart. (La.), N. S., 409; *Hill v. Tuzzine*, 1 Id., 599; *Piedras v. Milne*, 2 Id., 537, also 265; *Miller v. Whittier*, 6 La., 72; *Love v. Banks*, 3 La., 481.

And in the case of *Carroll v. Peake*, 1 Pet., 18, this court

said, in the absence of proof to the contrary, if any possible state of the case can be imagined, or any amount of testimony supposed, necessary to sustain the opinion of the Circuit Court, this court will assume that such a state of the case existed, and that such evidence was offered on the trial. Whether or not this is a complete "title in form" under the Spanish law, as it existed in 1797, and whether the conditions contained in it (supposing the performance of them to be necessary to its validity) were performed, are purely matters of fact, depending upon evidence which was before the Circuit Court. We ought, and are bound, to presume they were legally and conclusively established by that evidence. If so, the decree and judgment of the Circuit Court were free from error, and should be so affirmed by this tribunal.

I think I may say, that no error assigned, either in the record or by a majority of this court, in behalf of the United States, has been sustained. In my opinion, if the case could be justly decided now, a judgment of affirmance should be entered. I wish sincerely that I could, consistently with what I have felt myself bound to do, close my remarks upon the course pursued by a majority of the court in this case with what I have said. Something remains to be done.

In the opinion expressed by the majority of the court, they have deemed it proper to discuss the validity of the Maison Rouge grant, as if it were not affected in any way by the facts ascertained in the judgment of the court below, and as if in every aspect, whether of fact as to the performance of the condition, or of legal effect according to the law and usages of Spain, its validity was here before us for examination and adjudication. This course I deem at variance with the settled law and practice of this court. But as I regard the grant to be clearly valid, and the opinion now given by the majority of this court against it as of the highest importance to one of the States *of this Union, and to a *883] large portion of its people, I will submit the grounds on which I think that the Circuit Court in Louisiana properly adjudged the grant of the 20th June, 1797, to the Marquis de Maison Rouge, to be valid, legal, and complete.

Under the royal order of the 24th August, 1774, the governor of Louisiana had the amplest powers to grant lands, without limitation as to quantity, and without the necessity of a confirmation by the Spanish government. This power existed undiminished until the royal order of 22d October, 1798, when it was conferred on the Intendant. 2 White's New Recopilacion, 245; *United States v. Arredondo*, 6 Pet., 727; *United States v. Clarke*, 8 Pet., 452.

After the treaty of the 17th October, 1795, between the United States and Spain, by which the latter government relinquished its claim to the territory on the eastern side of the Mississippi north of the 31st degree of latitude, so that the settlements of the United States were rapidly approaching the inhabited portions of Louisiana, it became, even more than had been previously the case, an object of Spanish policy to promote the establishment of colonies of European emigrants on the outposts of Louisiana, and to encourage the cultivation of wheat, so as to supply its inhabitants, and make them independent to the people of the United States for that food. At no period of Spanish colonization was the disposal of the public lands a source of revenue, as ours have been in the United States. Conditions of settlement on the performance of other stipulations were imposed, but in no instance was the payment of money exacted, except in a few cases in Florida, where grants of land were permitted by the king to be made by the Indians to individuals for depredations upon the latter. But money for the king's revenue, or for colonial purposes, was never exacted in payment for lands granted. The land granted was usually limited in quantity, but varied according to the objects for which the grant was made. Several cases determined in this court exhibit the ratification by it of grants made by the Spanish governors of Florida and Louisiana, from a few acres to hundreds of thousands of acres. Every kind of consideration for them is also exhibited. Sometimes the settlement and cultivation by the grantee himself; sometimes by settlers to be introduced by him; at other times, the construction of mills, or the establishment of large grazing farms; again, a reward for military services; sometimes the liquidation and settlement of previously existing contracts. Of all these considerations, and of many others, which were the foundations of grants of land by the Spanish governor, the records of this court afford ample evidence.

*In this state of the country, and under that system of policy, the Spanish governor, Carondelet, made a [*884 contract on the 17th of March, 1795, with the Marquis de Maison Rouge, a French emigrant, then lately arrived in the colony. The object of it was to establish a colony of European immigrants on the Washita River, to cultivate wheat, and to erect mills for manufacturing flour. The Spanish government agreed to pay in money two hundred dollars for every family of two persons, four hundred for those having four laborers, and one hundred for those having one useful laborer. It also agreed to facilitate their passage to the place of settle-

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ment, supply them with provisions, to pay for the transportation of them and their luggage, when they came by sea to New Orleans, and to grant to every family containing two white persons fit for agriculture four hundred arpens of land, and a corresponding proportion for more or less. In the outset, the number of families was limited to thirty.

The contract of March, 1795, was designed to be the beginning of a national policy deemed by the Spanish government, and its representatives in Louisiana, essential to the independence of that province, and to the preservation of other territories of Spain still farther south. The government, therefore, undertook to defray all the expenses of its commencement, knowing that, after the settlement of thirty families in a wilderness, others would be induced to migrate to it, paying their own way, on account of that security which first settlers always give to new lands. The Marquis de Maison Rouge stipulated for nothing to be performed on his part but the introduction of thirty emigrant families into the province. Every other term of the agreement is to be performed by the Spanish government. The inspection of it, at pages 58 and 103 of the record, will show that all the onerous stipulations were on the part of the Spanish authorities, but none of them could in any way, or by any construction of it, result in any pecuniary gain to Maison Rouge. Guides, and provisions, expenses of transportation, and grants of land and money, were to be furnished, given, paid, and made to the emigrants. Not a dollar was to be paid to the Marquis. The contract does not give him an acre of land. Not the smallest benefit from it was to come to him.

The Intendant, Morales, a man of vigorous character, and strict in his administration of the colonial finances, did not approve of the Baron de Carondelet's mode of colonization in his contract with Maison Rouge, on account of the expenditures to which it led; but at the same time he expresses his opinion, that it was the policy of the Spanish government to "have an extensive settlement on the Washita, to protect the possession *of the kingdom of Mexico." But Carondelet's contract with Maison Rouge, for the settlement of the thirty families, had received the royal sanction as early as July, 1795. The burden of it, except so far as the services of the Marquis had aided in its accomplishment, had fallen on the Spanish government. The literal compliance with it had been nearly fulfilled by the settlement of the thirty families, and the importance of the extension of such settlements became more apparent after two years had passed, as Morales acknowledged, than it had been when the policy was first adopted. It was

then that the Baron de Carondelet recollected the unrewarded services of Maison Rouge,—that he was a noble *émigré*, impoverished and driven from France by the Revolution,—and, no doubt, excited by the success of his policy, in his first experiment in colonizing the Washita under the personal agency of the Marquis, determined to extend it, by making a large grant of land to him; which policy he was to carry out on his own account, at his own expense, and for his own benefit. The language of the grant is, “Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795, and desirous to remove, for the future, all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted us by the king, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the surveyor, Don Carlos Lareau Trudeau, under the terms stipulated and contracted for by the said Marquis de Maison Rouge.” This grant was made on the 20th June, 1797, eleven days after the letter of the 9th June from Morales to the Marquis de Maison Rouge, (record, p. 24,) in which the Intendant, after refusing to alter a previous decision concerning the payment of money to some of the Marquis’s emigrants, under the contract of 1795, says,—“I doubt not that your intentions are the best for the interest of my august sovereign; that with this object, besides the convenience of living under his wise laws, you formed your plan, and I cannot disguise my belief, that it would be very useful for Spain to plant an extensive settlement on the Washita, to protect the possession of the kingdom of Mexico; but I cannot admit, with all his reasoning, that your project will be the best and most advantageous to effect that purpose; far from it. I entertain the opinion, that, if the government desire to benefit by the present circumstances, they can accomplish their ends *without great expense.” It may be reasonably concluded, that the extract from the letter of Morales was [*886 in reply to one from Maison Rouge, concerning the contract of 1795. The internal evidence warrants such an inference. And, as it shows a difference of opinion between the Intendant and the Baron de Carondelet concerning the mode of colonization, and the disapproval by the former of the manner in which the latter had carried out that policy in his contract with Maison Rouge,—both of them, however, acknowledging

the wisdom and necessity of such policy, though differing upon whom the expense of it should fall,—we have the motives and the reason for Carondelet's grant to the Marquis. Further, the grant in quantity, two hundred thousand arpens, was not more than enough for five hundred families, at the rate of allowance fixed by the contract of 1795. It could only become valuable to the Marquis by being colonized by him. The general policy on which it was made justifies the extent of the grant, and shows the strong desire of the government to extend and promote the settlement on the Washita, without incurring the expense of the previous arrangement. It was well known, before the contract of 1795 was made with Maison Rouge, and from the execution of it by him, that settlers could not be induced to fix their residences in such a wilderness then, without gratuities of land and money, and their transportation being paid. These were to be borne, therefore, by the Marquis. It is not at all improbable, if his life had been spared to carry out his design, that the cost of it would have left him but a small part of what at first seems, from the magnitude of the grant, to be a principality. Time only has ever repaid the actual cost of colonization; but individual settlers in new countries, when not disturbed by wars, or destroyed by savages, have commonly gathered fruits for themselves and for their posterity. Still, the grant was an inducement for the Marquis to attempt to colonize it. The man who has fallen from a high estate into nothing, seizes upon ventures to regain his elevation, and the greater the risk he may run and overcome, the greater will be his pride at his reëxaltation, or, if of another temper, his thankfulness to Providence for his success.

I cannot help thinking, too, that there is a caution in the terms of the grant, if taken in connection with the contract of 1795, very much in favor of its validity. As that contract did, it guards against the introduction of American settlers, which, under the former, the government had been able to prevent, by making its payments and grants of land only on proof that the families or emigrants had come from Europe. And it not only forbids any interference with the previous *887] settlers within the *grant, who held by "title in form," or by virtue of a fresh commission, but imposes on the Marquis an obligation "to maintain and support them in all of their rights,"—that is, titles made and granted to other persons within the region comprehended in the figurative plan of Trudeau, just as that grant was made to the Marquis, and which, when they were found to exist, the

Marquis was permitted to have land elsewhere, in equal quantities.

Hitherto I have endeavoured to show, in this part of the case,—made so, however, only by the decision of the majority of the court,—that the grant was authentic and genuine, from the internal evidence in it connected with that of the contract of 1795, and from the services of the Marquis in fulfilling that contract, in conformity with the national policy of Spain in respect to settlers on the Washita. But I have done so more for the purpose of showing its reasonableness, and to resist suggestions against it, than with any intention of relying upon it myself, exclusively, as conclusive of the fact of the execution of the grant by Carondelet, with the figurative plan of Trudeau contemporarily annexed; for the execution of the grant is proved by the witness Tessier, just as the law of Louisiana, or the civil law of Spain, required that it should be, for the purpose of verifying, in the trial of a suit, any instrument (*escritura*) upon which a party in it relies for establishment of his right.

An instrument of writing (*escritura*) is every deed that is made by the hand of a public *escribano*, or notary of a corporation, or council (*concejo*), or sealed with the seal of the king, or other authorized "person." L. 1, tit. 18, p. 3. "Hence arise the two kinds which produce full faith and full proof;—one public, made by the *escribano* or notary, with the solemnities prescribed by laws"; "another authentic, which is that sealed by the king, bishops, prelates, and great men of the kingdom." Either of these is, in suits, judicially proved, when such as are distinctively "public" are signed by a "public *escribano*," when it is not wanting in any required solemnity, and when the deed or original is confirmed by the register or protocol, in the *escribano's* records; and when the deed is of that denomination called "authentic,"—from being signed by the king, or an officer authorized by the royal order of the king, special or general,—the proof of such signature, and the instrument having a proper seal, establishes it, without any reference to the protocol of it, in the public archives, when it appears that the protocol, or order for it, has been lost, or is beyond the jurisdiction of the court, so that the conformity between the original and the protocol cannot be ascertained by *the process of the court. It must be recollected, that the deed given to [*888 the party is the original, though taken from the register or protocol; and that, in the law of Louisiana, or civil law of Spain, a copy, or *traslado*, is the transcript from that original.

Now, it is by just such proof as I have mentioned, that the

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grant to the Marquis de Maison Rouge has been established in this case, as an authentic original, proved not by one witness only, but by two, with a positiveness of declaration and knowledge of the fact of the signatures to the grant that cannot be made stronger. Mr. Dubigny, Secretary of State for Louisiana, (pp. 53, 54, of the record,) says, that "he recognizes the signatures 'to the deed' of the aforesaid Baron de Carondelet, and of Don Andres Lopez Armesto, the secretary of the government of Louisiana, as genuine, and of the proper handwriting of these persons respectively; that the said instrument is in the handwriting of Charles Tessier, Esq., of Baton Rouge, who was then first clerk in the secretary's office"; and he "moreover declares, that he had a knowledge thereof about the time it was issued, and that it (the grant) was a maker of public notoriety." This affidavit was made by Mr. Dubigny in 1824, before Galvin Prual, Esq., a justice of the peace for the city of New Orleans. Nineteen years afterwards, on the 22d of May, 1843, Charles Tessier, Esq., the same person mentioned by Mr. Dubigny, is examined in this case, by virtue of a commission for that purpose issued by the Circuit Court, and he says, in answer to the direct interrogatories put to him, repeating the same also to the cross-interrogatories, without deviation or alteration, except in other particulars, showing his forbearance in speaking of the transaction after such a lapse of time,—he says that "he is above sixty-seven years of age; that he was a native of Louisiana; that he was, when the grant was made, principal clerk in the office of the Spanish government for making grants of land; and that he is now the judge of the parish of East Baton Rouge; that the grant marked A is filled up in the handwriting of this deponent, who was chief clerk of the Spanish government of Louisiana at the time, and did the land-office business in filling up grants; that he is familiar with the handwriting of the governor, Baron de Carondelet, and of Don Andres Lopez Armesto, secretary of the government; the deponent has often seen them both write and sign their names; the signatures of Governor Carondelet and Secretary Armesto to the document A are both genuine." What more than the testimony of these two witnesses—both of unquestioned character, each in his life signalized in their community by holding offices of public *trust and *889] confidence—can be wanting, to establish the genuineness of the grant to Maison Rouge? But there is more. Tessier further says, that "he has a personal knowledge of the time when the said grant was made and issued, because he filled it up at the time of its date; his knowledge was

therefore personal, as he performed the service; the grant was not a secret, but of public notoriety; that the grant was denominated and considered a *titulo en firma*, and was such complete and perfect evidence of title as not to require any other to validate or strengthen it; that he was familiar with the operations, forms, usages, and customs of the land department under Governor Carondelet; and that though he, at this distance of time, nearly fifty years since, cannot recollect whether Carlos Trudeau's plan and process verbal was or was not before his eyes when he filled up the body of the grant A, he always obeyed the orders of the Baron de Carondelet, and of the secretary of the government, Don Andres Lopez Armesto, and in this instance, as in others, performed his official duty." He repeats, to another interrogatory, "that at this distance of time, forty-six years, he is unable to say whether he had or had not Trudeau's figurative plan and process verbal before him; but he is certain he performed his duty, either by dictation or written instructions of his superiors, or by seeing the document B (Bren-gier's copy of Trudeau's figurative plan), though he cannot say in which of the three respective modes he acted upon the occasion; there was a general form of ordinary grants, which changed when the grant was special, for certain purposes and under certain conditions, and the governor or secretary then usually dictated or wrote the words of the grant, which was afterwards copied; but he cannot recollect how it was in this instance." And in his answer to the cross-interrogatory, he says that, "in his answers to the interrogatories in chief, he has answered the different questions as well as he could, and endeavoured to discriminate between their opinions and his own personal knowledge of matters."

The proof of the grant, then, is positive, but suspicion is attempted to be thrown upon it by the denial of the fact it recites, that the figurative plan of Trudeau was annexed to it, when it was signed by the governor. And that denial rests upon Tessier's forbearing to state positively that it was before him when he filled up the grant, and upon Girod's pamphlet and the *ex parte* testimony annexed to it. Now, before any suspicion of the grant can arise from Tessier not being able to swear positively to that fact, it must appear that it was in the order of the business of the Spanish land-office, and that it was required by the laws and usages of Spain in Louisiana, that such *figurative plans—which, it must be remembered, are not actual surveys, but descriptions [*890 of natural boundaries in a grant, in conformity with which actual surveys were afterwards to be made—should form a

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part of that muniment of title in the land-office from which the secretary made or filled up the grant, and that it was not sufficient for such a statement to be made of it as there is in the grant in this instance. I will make no assertion upon this point in respect to what was the practice in Louisiana when it was a province of Spain; but Florida land grants and those of Louisiana were made under royal orders of the king of Spain, and I can say, that, in our judicial affirmation in this court of Florida land claims, we have not in any instance called for a figurative plan in any one of them, but have in several of them ordered surveys to be made from the descriptions in the grants. But I may also say, that there is a good reason why the figurative plan of an extended grant should not have been before the secretary who filled it up at the time when he did so, and it is this;—that the figurative plan was a mere delineation of what the grant, by conformable description, gave, and that, as the verification of the delineation by actual survey could only establish the locality of the land, it was not in a condition before that was done for official registry. Under the Spanish law, the survey of the surveyor-general or his authorized deputies was conclusive of the locality of the grant, but the grant itself gave property to the grantee. It was property meant to be protected by the treaty. Though no survey had been made by the Spanish surveyors before the treaty was made, surveys afterwards, in conformity with the grant, have been always deemed sufficient by this court, and where a case has occurred, under a claim of a Spanish grant, where there had been, either before or after the treaty, an imperfect survey, this court, upon being satisfied of the genuineness of the grant, has ordered the survey to be made, to carry out the grant to its originally intended consummation. See the case of *The United States v. Forbes*, 15 Pet.

But how can the contemporary annexation of the figurative plan to the Maison Rouge grant be denied in this case, after the proof of the signatures of the governor and secretary to the grant? Those officers assert in the grant that it was annexed, with limits and boundaries designated by Don Carlos Trudeau. Now, unless these signatures are disproved, or it is proved that the governor, Carondelet, and the secretary, Armesto, had combined to practise a fraud upon their sovereign, by the assertion of a fact in a deed which did not exist, the fact that it was annexed to the grant when it was made cannot be denied. The deed or grant, when proved, is good for all that it contains, whether *it be for what is

*891] granted, or for a fact by which that is to be thereafter

practically ascertained; and neither is deniable but for fraud in the making of the grant. Or the grant may be shown to have been made without authority or contrary to law. Neither fraud nor violation of law is imputed to this grant, and it stands good for all that is asserted in it, against any suspicion of fraud which alleges that the figurative plan of Trudeau had been antedated. But, further still, against such a suspicion, shall no force be given to the declaration of Trudeau himself in such a case? His signature to the figurative plan is proved. He was the surveyor-general, whose duty it was to make for the governor, by his order, such a figurative plan, before the governor could make the grant. A plan is made purporting to be signed by Trudeau, his signature is proved to be genuine, the governor and his secretary recognize it to be such by making a grant according to it; the character of Trudeau for private virtue and official ability and integrity is proved by those who knew him. If all this be not proof positive that the figurative plan had been made and was annexed to the grant contemporarily with its execution, then no proof will suffice, and our rejection of it involves a denial of all truthful character in the three highest functionaries then representing the king of Spain in Louisiana, the Baron de Carondelet, Secretary Armesto, and the Surveyer-General Trudeau. Such is the consequence concerning these men; but I know the majority of this court do not mean it, for if the more subordinate condition of two of them had not imposed upon their contemporaries the conviction that they were uninfected by the corruption which we are too apt to suppose degraded the provincial officers of Spain, the Baron Carondelet lived in his long career of public service to his sovereign, and died in it, unsuspected.

I will not take up further time by making any remarks upon the suggestion, that the grant of June, 1797, was not meant to convey land to the Marquis de Maison Rouge for himself, but was a grant for emigrants, as the contract of 1795 with him was, except to say, that it would indeed be very singular if the two were for the same purpose; that in that of 1795 the government of Spain bore all the burdens of colonization, and in the grant of June 20th, 1797, no provision is made for such a purpose, but they were to be borne by the Marquis de Maison Rouge, an impoverished *émigré* from France, and whose poverty in his humble residence in a wilderness, bought by him for a small price, is proved in the record, and relied upon by this court, as it is shown in his will by his use of the word *bienes* as a reason that such a grant was not made to him. He used that word *bienes*—as

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*892] any other person who had been brought up *under the civil law would have done—as signifying all that a man can own, or which can be property. Besides, however, the difference in regard to the expenses of colonization in the two instruments just mentioned, that they were not meant for the same purpose, without benefit to the Marquis in the last, is very conclusively shown by the fact that they were made by different authorities,—the one by the governor, Carondelet, without operation until it received the approval of the king, because it involved the expenditure of the king's revenue; that of June, 1797, by the governor himself, who, by the royal order, was authorized to make grants of land without the special assent of the king to such grants.

It is true that the language of the grant to the Marquis, after saying that he “is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795,” does recite further, “that, desirous to remove for the future all doubt respecting other families or colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge the thirty superficial leagues marked in the plan annexed to the head of this instrument.” But the extension of colonization implied by it certainly cannot become a fact of a previous contract for that purpose, almost already completed, without the same terms for its enlargement as the king of Spain imposed upon his treasury in the first contract, or other terms expressed and assented to by the Marquis. And I will further say, if this grant, from its terms, can be interpreted to convey land for emigrants, of which the Marquis was only a trustee, that the terms used in it will be equally effective to convey to the Marquis the dominion of the land for himself, if the facts in the case and the reasoning upon them shall preponderate in favor of the latter interpretation. In other words, the suggestion of the court in the opinion, of a conveyance having been intended for colonists, and not for the Marquis, admits, so far as the suggestion conveys the first idea, that the words of the grant are sufficient to convey the land by such an instrument. There can be no objection to the grant, then, on account of a deficiency of formal terms of conveyance. Such services were never required by the civil law of Spain to make a good grant for land. Any words for that purpose are enough, in a grant from which an equitable title can be inferred for the grantee. The suit of the United States against King is in the nature of a writ of ejectment. Inasmuch, however, as

the distinction, so well known in England and in our States in the United States, between courts of equity and courts of common law does not prevail in *Louisiana, what in [*893 England would be recognized as a purely equitable title may serve as well in a court in Louisiana as a perfect legal title, either to maintain the claim of the United States, or as a defence on the part of the defendant against such demand. In the case of *The United States v. Fitzgerald*, 15 Peters, 407, this court recognized what has just been said to be the correct doctrine of the Circuit Court of the United States sitting in Louisiana, and gave judgment for the defendant in a writ of error, upon a right purely equitable, against the strictly legal title of the United States, in a petitory action for the recovery of land.

But let it be admitted, for the sake of the argument, that the instrument of June 20th, 1797, was designed to carry out more extensively the contract of 1795, either for the benefit of the settlers who had been already introduced under that contract, or for other colonists who might thereafter be placed upon the land by the Marquis, I cannot see how the right of the United States to recover in this action is in any way strengthened.

Whether the thirty leagues were assigned to the Marquis for his own use, or in trust for others,—whether he was to be the sole and exclusive proprietor, or was to hold it, as is contended, for the benefit of others,—is a question with which the United States have nothing to do. That is wholly between the Marquis, as holding the legal title, and those who may advance a claim as *cestui que use*.

In either case, the land was severed from the public domain and became a private property. It could not, in either case, pass, by any construction of the treaty, to the United States. They have neither a legal nor equitable title to the land. In order to entitle the United States to a judgment, they must affirmatively aver and prove a title in themselves.

The very pretension that the Marquis received this grant as a trustee for others is as fatal against a recovery by the United States as if the entire legal and equitable title were conceded to be, as in my judgment it is clearly shown to be, vested absolutely and exclusively in the Marquis de Maison Rouge.

I have written much upon this case, I know,—more than I usually permit myself to do in any case; but less would not have shown the judicial history of this, from the beginning of the action to its first appearance in this court, or our judgment and vacated judgment afterwards, and now the course

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which this court has taken upon the writ of error to reverse the judgment of the Circuit Court.

One word more. The mandate upon the decision here made is for the reversal of the judgment given in favor of King for the land for which the United States sued him.

*894] The case will *of course be before the Circuit Court of Louisiana again, when new evidence on both sides may be introduced, or, if that does not exist, for that court to correct the error in its judgment. It cannot do so by any decision of this court upon the bills of exceptions in the record. The reversal is for causes or errors said to be in the judgment. If, then, the Circuit Court shall, in its further trial of this cause, be of the opinion that the evidence proves title to the land in King, I presume that the mandate will be satisfied if it gives a judgment in his favor again for that quantity of land for which the United States has sued, without saying any thing about the validity of the title, or declaring that Mr. Coxe is an owner of any part of the Maison Rouge grant.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to enter judgment for the United States for the land described in the petition.