*Lewis Bissell, Plaintiff in error, v. Mary B. Penrose, Defendant.

In the case of *Stoddard* v. *Chambers*, 2 How., 284, this court decided by implication, and now decides expressly, that a general and unlocated concession, granted by the Spanish governor prior to the transfer of Louisiana, a private survey of which made after the transfer was recognized by the commissioners appointed under the act of 1805, before whom the claim was filed, was so designated and located as to be reserved from sale by virtue of the act of 1811, and consequently no New Madrid certificate could be located upon it.[1]

The act of 1804, forbidding private surveys upon the public lands, was impliedly repealed by the act of 1805, which required claimants to file a plat. The act of 1806 authorized the commissioners to direct such surveys as they might deem necessary, which gave them, thereby, the power to adopt any prior and private surveys which they might deem just and proper, for the purpose of designation and location.

The effect of such private surveys was not to sever the land from the public domain, but merely to indicate the tract which Congress was to act upon at a subsequent period, in case it thought proper to confirm the claim.[2]

The act of 1836 confirmed the claims of assignees who had prosecuted them as claimants, and did not intend to vest the title in the assignor, the original holder. This court has so decided in former cases.[3]

The confirmation by the act of 1836 is equally effectual in favor of the claimant, whether the commissioners recommended that the claim should be confirmed generally, or confirmed "according to the survey." The only difference is, that in the latter case the survey on file is probably conclusive upon the government, and errors cannot be corrected, whilst in the former case they may be.

The second section of the act of 1836 makes no provision for a re-location of an unlocated claim confirmed on the report of the commissioners, and further legislation will be necessary for such cases.

The cases of *Mackay* v. *Dillon*, 4 How., 421, *Les Bois* v. *Bramell*, 4 Id., 449, and *Jourdan* v. *Barrett*, 4 Id., 169, examined and explained.

The mere circumstance that another plat, containing different land, was upon the same sheet of paper which contained the genuine plat, and which was filed in the recorder's office, was not sufficient to invalidate the claim; because the name of the claimant was written upon the face of the one describing the tract claimed, and that was the only one before the commissioners.

This case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

It was one of those land cases which arose from a conflict of title between an old Spanish concession, confirmed under the various acts of Congress upon the subject, and a title derived under a New Madrid grant. All these acts of Congress bearing upon both titles are set forth in the case of

[1] Applied. *Landes* v. *Brant*, 10 How., 374. Followed. *Menard's heirs* v. *Massey*, *ante* *309; *Bryan* v. *Forsyth*, 19 How., 337. Explained. *Carondelet* v. *St. Louis*, 1 Black, 189. Cited. *Morehouse* v. *Phelps*, 21 How., 305; *Massey et al.* v. *Papin*, 24 Id., 364; *Maguire* v. *Tyler*, 8 Wall., 661; *Tyler* v. *Magwire*, 17 Id., 280; *Carpenter* v. *Rannels*, 19 Id., 146; *Snyder* v. *Sickels*, 8 Otto, 212.

[2] See *Fremont* v. *United States*, 17 How., 576.

[3] Approved. *Stanford* v. *Taylor*, 18 How., 412. Followed. *Connoyer* v. *Schaeffer*, 22 Wall., 261–263.

Stoddard v. *Chambers*, reported in 2 How., 284, and the substance of them need not be repeated here. The following is a list of them:—

References to Acts of Congress.

Date.	Land Laws, Sen. Ed., 1838.	U. S. Stat. at L.	Story's Ed. L. U. S.
March 26th, 1804,	Vol. 1, page 112	Vol. 2, page 287	Vol. 2, page 933
March 2d, 1805,	" 1, " 122	" 2, " 324	" 2, " 966
February 28th, 1806,	" 1, " 132	" 2, " 382	" 2, " 986
April 21st, 1806,	" 1, " 138	" 2, " 391	" 2, " 1018
March 3d, 1807,	" 1, " 155	" 2, " 440	" 2, " 1059
March 3d, 1811,	" 1, " 189	" 2, " 620	" 2, " 1193
June 13th, 1812,	" 1, " 216	" 2, " 748	" 2, " 1257
March 3d, 1813,	" 1, " 230	" 2, " 812	" 2, " 1306
August 2d, 1813,	" 1, " 233	" 3, " 86	" 2, " 1384
April 12th, 1814,	" 1, " 242	" 3, " 121	" 2, " 1410
February 17th, 1815,	" 1, " 255	" 3, " 211	" 2, " 1500
April 29th, 1816,	" 1, " 280	" 3, " 328	" 3, " 1604
February 17th, 1818,	" 1, " 293	" 3, " 406	" 3, " 1659
April 9th, 1818,	" 1, " 299	" 3, " 417	" –, " ——
April 26th, 1822,	" 1, " 344	" 3, " 668	" 3, " 1841
May 26th, 1824,	" 1, " 385	" 4, " 52	" 3, " 1959
May 22d, 1826,	" 1, " 419	" –, " ——	" –, " ——
March 2d, 1827,	" 1, " 425	" 4, " 219	" 3, " 2048
May 24th, 1828,	" 1, " 442	" 4, " 298	" 4, " 2135
March 2d, 1831,	" 1, " 488	" 4, " 482	" 4, " 2250
July 9th, 1832,	" 1, " 505	" 4, " 565	" 4, " 2305
March 2d, 1833,	" 1, " 518	" 4, " 661	" 4, " 2359
July 4th, 1836,	" 1, " 557	" 4, " 726	" 4, " 2815

[*318 *It was an action of ejectment brought in the Circuit Court by Mary B. Penrose, the defendant in error, who claimed under the Spanish concession, against Bissell, who claimed under the New Madrid certificate which was located upon the land in controversy in March, 1818. We will first state the title of the plaintiff below, and then that of the defendant.

The petition and concession were as follows, viz.:—

"*The sons of Vasquez, claiming* 800 *arpens each.*

"To Don Carlos Dehault Delassus, Lieutenant-Governor of Upper Louisiana.

"Sir,—Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, all of them sons of Don Benito Vasquez, captain of militia of this town, brevetted by his Catholic Majesty, full of confidence in the generosity and benevolence of the government under which they are born, hope that you will be pleased to take into consideration the unfortunate situation in which they find themselves by the want of means of their family, which has been living for some time in distressing circum

stances, and unable to give them the necessary education; therefore, wishing to procure to themselves, in the course of time, an independent existence, they think of forming an establishment which may one day insure their welfare. They flatter themselves, sir, that the services of their father will assure to them your protection, and the goodness of your heart will lead you to grant their demand; consequently, they supplicate you to grant to each of them eight hundred arpens of land, in superficie, making altogether the quantity of four thousand arpens, which they wish to take in one or several places of the vacant lands of the king's domain. Favor which your petitioners presume to hope from your justice.

"BENITO VASQUEZ,
ANTOINE VASQUEZ,
HYPOLITE VASQUEZ,
JOSEPH VASQUEZ,
PIERRE VASQUEZ.

"*St. Louis, February* 16*th*, 1800."

"*St. Louis of Illinois, February* 17*th*, 1800.

"After seeing the precedent statement, and the laudable motives which animate the petitioners, and considering that their family is one of the most ancient in this country, and worthy of all the benevolence of government, as much for their personal merit as on account of the services [of the] father of the petitioners, I do grant to said petitioners, for
*319] them and their heirs, the land which they solicit, if it [is] not prejudicial to *anybody; and the surveyor, Don Antonio Soulard, shall put the interested party in possession of the quantity of land asked for, in one or two vacant places of the royal domain, after which he shall draw a plat, which he shall deliver to the interested parties, with his certificate, to serve them in obtaining the concession and title in form from the Intendant-General, to whom alone corresponds, by royal order, the distributing and granting all classes of lands of the royal domain.

"CARLOS DEHAULT DELASSUS.

"A true translation.

"JULIUS DE MUN.

"*St. Louis, October* 27, 1832."

On the 11th of February, 1806, Benito Vasquez, the eldest son, assigned his 800 arpens to Rudolph Tillier.

On the 27th of February, 1806, a survey and plat of the land was made by James Mackay, locating it about two miles

northwest of St. Louis, as appeared by the following certificate:—

"I do certify, that the above plat represents 800 arpens of land, French measure, situated in the district of St. Louis, Louisiana Territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant.

"Given under my hand at St. Louis, this 27th day of February, in the year of our Lord 1806.

"JAMES MACKAY.

"Received for record, St. Louis, February 27, 1806.

"ANTOINE SOULARD,

"*Surveyor-General Territory Louisiana.*"

On the 25th of August, 1806, Tillier filed his claim before the first Board of Commissioners. There were two plats filed, covering different tracts of land, both of which plats were upon the same sheet of paper; but upon the face of one of them was written the name of the claimant at full length. This one included the land in controversy, and was the only one considered by the commissioners.

On the 22d of September, 1810, the board decided that this claim "ought not to be confirmed."

On the 3d of October, 1832, this claim was brought before another Board of Commissioners, which, on the 2d of November, 1833, passed the following order:—

"*Saturday, November 2d*, 1833.

"The board met pursuant to adjournment. Present, Lewis F. Linn, A. G. Harrison, F. R. Conway, Commissioners.

*"The sons of Vasquez, each claiming 800 arpens of land under a concession from Charles Dehault Delassus. [*320 See page 17. The board remark, that they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners.

"The board are unanimously of opinion, that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession.

"The board adjourned until to-morrow, at 9 o'clock, A. M.

"L. F. LINN,
F. R. CONWAY,
A. G. HARRISON."

This claim was confirmed by the act of Congress of 4th July, 1836, and again surveyed by the United States surveyor

on the 29th of March, 1842, according to the original survey of Mackay, filed with the claim in 1806. The claim was assigned by Tillier to C. B. Penrose, who conveyed it to Mary B. (the plaintiff below) and Anna H. W. Penrose, on the 20th of February, 1823.

The title of Bissell, the defendant below, was as follows.

The defendant produced and read in evidence,—

1. A certificate issued by the recorder of land titles, No. 164, dated 4th November, 1816, whereby it is certified, that, in conformity to the provisions of an act of Congress of 17th February, 1815, John Brooks, or his legal representatives, is entitled to locate 709 arpens on any of the public lands of the Territory of Missouri, the sale of which is authorized by law.

2. The location and survey thereof, No. 2541, made in March, 1818, which includes the land in controversy.

3. A patent certificate, No. 308, issued by the recorder of land titles, 17th November, 1822, whereby it is certified, that, in pursuance of an act of Congress passed the 17th of February, 1815, a location certificate, No. 164, issued from the office of the recorder, in favor of John Brooks, or his legal representatives, for 709 arpens of land, that a location had been made by the plat of survey, No. 2541, and that the said John Brooks, or his legal representatives, is entitled to a patent for the said tract, containing, according to the location, $603\frac{14}{100}$ acres, in township 45 north, range 7 east.

It was admitted that the title of John Brooks was vested in the defendant below, by mesne conveyances, on the 14th of February, 1824; and it was proved that one Brady, under whom the defendant below acquired title, had his mansion-
*321] house *adjacent to the land in controversy, and occupied a part thereof before the year 1824, and that the same has been ever since occupied; that the defendant Bissell extended his improvements over the whole fifty-five acres as early as 1829 or 1830.

The defendant then asked the following instructions, which the court refused to give, and each of them; to which refusal the defendant by his counsel excepted; which instructions are in the words and figures following:—

Instructions refused.

1. That the land sued for in this action was not reserved from sale by the act of Congress of 3d March, 1811, in consequence of the filing of the claim of Rudolph Tillier, with the concession to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, and other documents, with the recorder of land titles, as given in evidence in this case.

2. That the confirmation by the Board of Commissioners to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, given in evidence in this case, ratified by act of Congress of 4th July, 1836, did not vest any title in the land sued for in this action in the plaintiff.

3. That the plaintiff has shown no title on which she can recover of the defendant the land sued for in this action, or any part thereof.

4. That the plaintiff, if entitled to recover in this action, can recover only the undivided tenth of so much of the land sued for as the defendant was in possession of at the commencement of this suit.

5. If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and, as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks, or his legal representatives.

6. That the confirmation of the claim of Benito Vasquez and others, given in evidence by the plaintiff, being according to the concession, is in itself a rejection of the survey made by Mackay, which has been given in evidence; and under that confirmation there is no authority for a survey upon the land located under the certificate in favor of John Brooks, or his legal representatives.

*7. That the survey given in evidence by plaintiff, of 800 arpens, made by Mackay in 1806, being a mere [*322 private survey made of a part of the public domain, in violation of an act of Congress prohibiting such surveys at that time under severe penalties, is not in law any part of the claim filed before the recorder of land titles, and cannot come in aid thereof, so as to work a reservation from sale, under the act of Congress of 3d March, 1811, of said 800 arpens.

The plaintiff then asked the following instruction, which the court gave; to the giving which the defendant, by his counsel, excepted. Which instruction is as follows:—

Instruction given.

That the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed in conformity to the act of

Congress of the 4th of July, 1836, and which re-survey is numbered 3,061, and was approved by Jos. C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made; and, therefore, the location under said claim is invalid as against the title of said Vasquez, or those claiming through him, to the extent that the two claims cover the same land, and that the land included by both the surveys aforesaid is the land confirmed to Benito Vasquez, or his legal representatives, by the act of Congress of the 4th of July, 1836, and that the confirmation operated as a grant to said Vasquez, or his legal representatives; such being the legal effect of the acts of Congress, records, and title-deeds given in evidence.

And the defendant prays the court to sign and seal this his bill of exceptions, which is done accordingly.

J. CATRON. [L. S.]

Upon this exception the case came up to this court.

It was very elaborately argued by *Mr. Benton* and *Mr. Gamble*, for the plaintiff in error, with whom was *Mr. Geyer*, and by *Mr. Good* and *Mr. Ewing*, for the defendant. It is impossible to do more than state the points raised by the counsel respectively.

Those on behalf of the plaintiff in error were the following:

I. The report of the late Board of Commissioners, ratified by the act of the 4th of July, 1836, is not a confirmation according to either of the plats of survey filed by Rudolph Tillier, under whom the defendant in error claims, nor
*323] of any survey, but *operates as a grant, according to the concession of 4,000 arpens of land, to be located in one or two places of the public domain.

1. The confirmatory act confirms nothing but the concession, the only document mentioned or referred to in the decision, and therefore it cannot be assumed that any survey, or plat of survey, whatever, was adopted. *Mackay* v. *Dillon*, 4 How., 448. It is a public grant, and passes nothing that is not described in terms, or by specific reference to something out of it. *Blake* v. *Doherty*, 5 Wheat., 359; Dyer, 350 *b*, 362 *a*; Cro. Car., 169; 10 Co., 65, 112 *b*; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420.

2. The concession is a floating warrant of survey, conferring no title to any specific land, and a confirmation in terms, according to that concession, does not give it a special location or boundaries. *Forbes's case*, 15 Pet., 184; *Buyck's case*, Id.,

215; *O'Hara's case*, Id., 275; *Delespine's case*, Id., 319, *Miranda's case*, 16 Id., 159, 160; *United States* v. *King*, 3 How., 773; *Mackay* v. *Dillon*, 4 Id., 448.

3. If anything can be resorted to, other than the decision and the concession to which it refers, for the purpose of determining the legal effect of the grant, it must appear by the transcript laid before Congress, and that cannot be contradicted, altered, or varied by oral evidence. 1 Phil. Ev., 218, 423; 3 Stark. Ev., 995–997.

4. The particular survey mentioned in the instruction given at the trial, if in fact executed, was prohibited by law, and is a mere nullity, (*United States* v. *Hanson*, 16 Pet., 196,) and was never recognized by the recorder and commissioners as the foundation of the claim, or as evidence of its location and boundaries.

5. The claim, considered by the recorder and commissioners under the act of 1832, was made by the original grantees, on the concession alone, and the decision by special reference to that claim and concession excludes all other claimants and documents. Co. Lit., 210 *a*, 183 *b*.

6. No plat of survey was transmitted with the transcript, or in any form presented to Congress. The confirmatory act, therefore, can have reference only to the face of the concession, regardless of any survey whatever. *Mackay* v. *Dillon*, 4 How., 448; *McDonogh* v. *Millaudon*, 3 Id., 693.

II. Whatever land is granted or confirmed by the report and act of Congress, is granted or confirmed to the five sons of Vasquez, named in the decision of the commissioners, or their legal representatives, and not to any one of them, and his representatives, in exclusion of all the others.

*1. The concession does not contemplate or authorize a severance of the interest of the grantees, by survey or otherwise, by the act of one of them or his representatives. [*324

2. No survey for any one of the grantees has ever been recognized by the government.

3. Every claim under the concession in severalty was rejected by the first Board of Commissioners, and none such was presented to, taken up, or recognized in any form, under the act of 1832.

4. The decision, as entered in the transcript, and confirmed by Congress, is in terms in favor of all the original grantees, by name, according to the concession, and no one of them can be excluded from the benefit of the grant, or preferred in the location.

III. The defendant in error is not the legal representative

of Benito Vasquez, Jr., or of any of the grantees named in the decision of the commissioners, and acquired no title to the land sued for, by the confirmation.

1. The instrument of writing purporting to be a transfer from Tillier to C. B. Penrose, under which alone she claims, not being a deed, is inoperative as a conveyance of a freehold estate. *Moss* v. *Anderson*, 7 Mo., 337; *McCabe* v. *Hunter's Heirs*, Id., 355.

2. That instrument is, in terms, a mere assignment of the interest of Tillier in the concession and plats of survey, and does not purport to convey lands. No interest in lands passes by a mere assignment of evidences of title. 2 Ohio, 221; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. (Ky.), 429.

3. Taken as an operative conveyance of land, the transfer does not pass an estate of inheritance. *Martin* v. *Long*, 3 Mo., 391.

4. The transfer, if otherwise unexceptionable, at most conveys only such right, title, and interest as the grantee had at the time; the title, if any, afterwards acquired by the confirmation, does not inure to his grantee. *McCracken* v. *Wright*, 14 Johns. (N. Y.), 193; *Jackson* v. *Hubble*, 1 Cow., (N. Y.), 613; *Jackson* v. *Winslow*, 9 Id., 13; *Jackson* v. *Peck*, 4 Wend. (N. Y.), 300; Missouri Stat., Rev. Code, 1825, p. 217; *Landis et al.* v. *Perkins*, 12 Mo.

IV. The instruction given at the trial, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed by survey No. 3061, was reserved from location and sale at the time the location under the New Madrid claim was made," erroneous, because,—

*325] *1. The survey referred to was not only private and unauthorized, but prohibited by positive law, and is of no effect whatever, as fixing the locality and boundaries of the concession, or as the foundation of a claim. *Garcia* v. *Lee*, 12 Pet., 511; *Smith's case*, 10 Id., 327; *Wherry's case*, Id., 338; *Jourdan et al.* v. *Barrett*, 4 How., 169; *Mackay* v. *Dillon*, Id., 448.

2. The plat of a private or forbidden survey is not authorized or required to be filed with the recorder of land titles; and being, in this case, both made and filed contrary to law, is of no effect for any purpose. *Kerns* v. *Swope*, 2 Watts (Pa.), 75; *Heister* v. *Fortner*, 2 Binn. (Pa.), 40; *Dewitt* v. *Moulton*, 5 Shep. (Me.), 418; *Blood* v. *Blood*, 23 Pick. (Mass.), 80; *Summer* v. *Rhodes*, 14 Conn. 135; *Mummey* v. *Johnston*, 3 A. K. Marsh. (Ky.), 220.

3. The concession containing no special location, and the survey being an absolute nullity, no particular tract of land was brought within the proviso of the tenth section of the act of March, 1811.

4. There were two plats of survey filed at the same time, differing from each other, and, nothing appearing on the record to distinguish which of them designates the land claimed, the court was not authorized to elect between them. *Mackay* v. *Dillon*, 4 How., 448.

5. The official survey, No. 3061, has no effect on the question of reservation.

6. What particular land was embraced by the plats originally filed depended upon facts to be proved *aliunde*, and upon which the identity was to be found by the jury, and not by the court or by the act of the surveyor.

7. The reservation of the land included in the survey for Tillier, in 1806, if any there was, ceased before the location, under which the plaintiff in error claims, was made.

V. If it shall be held that the location was made on land within the proviso of the tenth section of the act of 3d March, 1811, and while it was in force, "the legal effect of the acts of Congress, records, and title papers, given in evidence," is not to render the location invalid as against the confirmation by the act of 1836.

1. The location, survey, and patent certificates being in other respects regular, vested in John Brooks, or his legal representatives, a title valid against the United States, which was defeasible only by a confirmation of the conflicting claim during the continuance of the reservation. *Barry* v. *Gamble*, 3 How., 32; *Stoddard* v. *Chambers*, 2 Id., 317; *Polk's Lessee* v. *Wendell*, 5 Wheat., 293; *Baynell* v. *Brodrick*, 13 Pet., 436; **Strother* v. *Lucas*, 6 Id., 763; 12 Id., 410; [*326 *Grignon's Lessee* v. *Astor*, 2 How., 319; *Chouteau* v. *Eckhart*, Id., 376; *Carroll* v. *Safford*, 3 Id., 460; *Levi* v. *Thompson*, 4 Id., 17.

2. The reservation, if any, ceased at least as early as the 26th of May, 1829, and thereby the title under the location became indefeasible, and could not be affected by legislation afterwards. *City of New Orleans* v. *D'Armas*, 9 Pet., 224; *Fletcher* v. *Peck*, 6 Cranch, 87; *Wilkinson* v. *Leland*, 2 Pet., 657.

3. The act of the 9th July, 1832, has no effect whatever on the land or the title under the location. Having no retrospective operation upon any vested interest, it cannot defeat a title indefeasible when it was passed.

4. Neither the claim of Tillier, nor of any other person, to the particular land described in either of the surveys, was presented.

considered, or reported upon, under the act of 1832, and consequently there was no reservation of that land created, revived, or continued by that act.

5. The confirmation by the act of 1836 does not relate to any antecedent period, so as to overreach a title before valid against the United States. *Jackson* v. *Bard*, 4 Johns. (N. Y.), 230; *Heath* v. *Ross*, 12 Id., 140; *Strother* v. *Lucas*, 12 Pet., 410; *Chouteau* v. *Eckhart*, 2 How., 376; *Les Bois* v. *Bramell*, 4 Id., 449.

6. There was no confirmation of the claim of Tillier, or of any other person, for the land described in either of the plats filed in 1806.

7. The confirmation to the five sons of Vasquez, "according to the concession," has no effect whatever upon the land previously located, or the title under the location.

8. The survey No. 3061 is not in conformity with the confirmation, and, to the extent of its interference with the previous location, is void.

VI. The second section of the act of Congress of the 4th July, 1836, confirms the title under the location, survey, and patent certificate, as against any confirmation, notwithstanding any previous reservation of the land from sale.

1. It does not enlarge, but restrains and limits, the operation of the first section, by a condition annexed to the confirmation.

2. Its object is to affirm locations and sales, which, on account of some infirmity, needed, or were supposed to require, legislative aid, not those which, being valid and regular, needed no affirmance. *Jackson* v. *Clark*, 1 Pet., 635.

*327] 3. The defects and irregularities intended to be cured are *common to both locations and sales, and which, if not cured, it was supposed might give priority to the confirmations.

4. The confirmations are in conflict with the titles under locations or sales, only when the lands located or sold are reserved from sale by reason of the filing of the claim confirmed, in due time and according to law.

5. No titles under locations or sales are protected, if none are protected but those made on lands not reserved, which is to render the second section of the act of 4th July, 1836, superfluous and insignificant; for such titles need no legislative aid, as against a confirmation. 8 Co., 274 *c*; *Fletcher* v. *Peck*, 6 Cranch, 87; *City of New Orleans* v. *D'Armas*, 9 Pet., 224.

The counsel for the defendant in error considered the case of *Stoddard* v. *Chambers*, 2 How., 284, as ruling all the points

involved in the present case. Nevertheless, as it had been brought up and argued as new matter not included within the decision of the court in that case, they would consider it as such, and therefore presented the following points:—

The plaintiff in error derives his title by regular transmission under a New Madrid certificate, which was located in March, 1818, on the land in controversy. A "patent certificate" was issued to him on the 17th November, 1822, but no patent. He has had possession since 1829. His rights, if any he be adjudged to have, were conferred by the act of the 17th of February, 1815, known as the New Madrid act. In virtue of this act he was authorized to locate his certificate on any of the public lands of the territory of Missouri, the sale of which was, at the time of such location, authorized by law.

1st. In support of the claim as shown by the defendant in error, we shall rely on the treaty of 1803, in virtue of which the Missouri territory was acquired; the Act of Congress of 2d of March, 1805; the Act of the 15th of February, 1811, ch. 81, § 10; the Act of the 3d of March, 1811, § 10; and also the Act of the 17th of February, 1818; all of which, we shall contend, recognized the validity of the plaintiff's claim, and operated as a reservation thereof from any disposition or sale by the United States prior to the passage of the act of the 26th of May, 1824. We shall cite the opinion of this court in 4 Pet., 512, repeated in 10 Id., 330, and the case of *Strother* v. *Lucas*, 12 Id., 436, to show the nature of the plaintiff's claim, and his right to a recognition and a confirmation of that claim by the United States. We shall rely upon the authority of these cases to show that the claim was, at least, an equitable right, which, under the Spanish government, must have been *perfected;—the United States [*328 are bound by every consideration which could operate upon the government of Spain, to perfect this right.

2d. We shall contend that there has been no forfeiture of this claim, by virtue of the act of the 26th of April, 1804, or that of 1807, or by any act subsequent thereto, and having reference to the same subject; that these acts never were in fact intended to operate as a penalty or forfeiture, but were merely precautionary and provisional. We shall further contend that the position of the plaintiff is not more unfavorable than that of the pre-emptioner, who, although a trespasser upon the public domain, has yet been recognized by the state authorities and by the United States as having a claim in virtue of his pre-emption, which could not be defeated by a New Madrid certificate and location, or even by a patent issued thereon. *Rector* v. *Welch*, 1 Mo., 238. Opinion of

Attorney-General, Wirt, in a letter to the Secretary of the Treasury, dated 27th January, 1821; and the Act of 2d March, 1831, in reference to, and embodying the opinion of the Attorney-General on this subject.

3d. That the effect of the act of the 26th of May, 1824, and the act in revival thereof, passed 24th May, 1828, was not to divest the title of the plaintiff so as to exclude it from the operation of the revival act of the 9th of July, 1832, and that that act must be regarded as a waiver of all penalties and forfeitures, if any such were ever designed by the United States to attach to claims like the one in question. There were hundreds of thousands of acres of land claimed by no higher title than that of a concession and mere order of survey; and yet there is no case of forfeiture on record. Soulard Letter, State Papers, Miscellaneous, Vol. I., p. 405.

4th. That this case differs from *Smith's case*, reported in 10 Pet., 327; also from that of *Mackay*, as reported in *Barry* v. *Gamble*, 3 How., 32; and still further from that of *Les Bois* v. *Bramell*, 4 Id., 456.

The claim of the plaintiff could not be defeated by any act of legislation, without a disregard of the treaty of 1803, and a direct denial of the equitable obligation imposed by the acts of Congress already cited, and which obligation has been repeatedly recognized by the agents of the United States, who, having assumed the trust existing between the government of Spain and the party under whom the plaintiff claims, could not defeat that trust by conditions imposed by them subsequent to the transfer of said trust. Analogies from the law of England will be cited to sustain this view, as also the opinion of this court in the case of *Percheman*, 7 Pet., 90.

*329] *5th. That the act of the 9th of July, 1832, embraced this claim; its existence was thereby recognized, and the right to a confirmation of it clearly implied; that the confirmation by the Board of Commissioners, on the 2d day of November, 1833, and which was approved and made conclusive by the act of the 4th of July, 1836, completes the title of the defendant in error; and that no one claiming the land in question from the United States, by virtue of any sale or grant made by them subsequent to the location and survey by Tillier in 1806, can hold said land as against the legal representatives of the Spanish grantee. Opinion of the court in the case of *Stoddard* v. *Chambers*, 2 How., 284, and the authorities therein cited.

The title of the plaintiff in error cannot, we think, be shown to be entitled to the serious consideration of this court,—

1st. Because the certificate and location in virtue of which

he claims conferred no right: the location was on lands, the sale of which was not at the time authorized by law; and it was therefore absolutely void. Opinions of Attorney-General, Wirt, October 10, 1825; Opinions, &c., Vol. II., p. 25, reference to letters of Secretary Crawford, June 10th, 1818; of Mr. Wirt, October 22, 1828; and of Mr. Butler, Attorney-General, August 8th, 1838. *Stoddard* v. *Chambers*, and the authorities therein cited, 2 How., 284.

2d. The location, having been on lands the sale of which was not authorized by law, was not only void, but could not be revived except by special act of legislation, the same as in the case of a location of a new Madrid certificate upon lands claimed by a pre-emptioner. Letter of Mr. Wirt, Attorney-General, to Secretary Crawford, June 19th, 1820; also, letter from same to same, under date of the 22d June, on the same subject; the Act of April 26, 1822; and also Act of 2d March, 1831.

There was no act of Congress subsequent to the 26th of May, 1829, and before the 9th of July, 1832, giving the plaintiff in error the right to re-locate his certificate; and if there had been, we should not be willing to admit that a location thus made upon the land in question, although protected by a patent, could prevail against the Spanish grant; but there being no such location or patent, we contend that the New Madrid locator, notwithstanding the land in question should be regarded as public land during the interval mentioned, is in no better condition in regard to said land than he was prior to said interval. His location was void in its inception; nothing less than a special act of Congress could revive and make it available. To contend, as we understand the plaintiff in error will, that, *although the New Madrid certificate was originally located on land at the time not [*330
authorized to be sold, yet it became public land in the interval between the 26th of May, 1829, and the 9th of July, 1832, and was therefore subject to his claim, as it were by relation back to 1818, when his claim was first located,—is, we think, an assumption not less unreasonable than it would be to contend that location under a New Madrid certificate on mineral lands or school lands specially reserved from sale at the time, but subsequently authorized to be sold, would be held good, and entitle the party to a patent, even as against the United States. It cannot be supposed that this court would countenance such a doctrine as this; and yet it is not, as we think, less worthy of their serious consideration, than the position assumed in this doctrine of relation so earnestly insisted on by the plaintiff in error.

It will, we presume, be contended, that the confirmation, "according to the concession," shall be construed to mean a confirmation, not of 800 arpens to Benito Vasquez, or his legal representatives, but a confirmation of 4,000 in common to all the brothers. The proceedings from 1806 to 1833, by the Board of Commissioners, and which are in evidence, show conclusively that such was not and could not have been the design of the board who confirmed the claim; but the testimony of Conway, one of the board who confirmed said claim, frees this question from all doubt. His testimony explains what otherwise might admit of dispute. It shows that there was but one plat before the board; they took proof as to that plat; they were satisfied therewith. Its not being referred to in the tabular statement made out by the clerk of the board is likewise satisfactorily explained by the testimony of Conway, one of the commissioners by whom this claim was confirmed. To show the manner of proceeding in this and like cases, we refer to the cases of Gabriel Cerré, 5 American State Papers, 821; St. Gemme Beauvais, Id., 744; Raphael St. Gemme, and others, Id., 745; Thomas Maddin, Id., 747; Joseph Morin, Id., 819; James Williams, Id., 820; Charles Fremon Delauriere and Louis Labeaume, Id., 822; James Richardson, Id., 823; Pierre Detor, Id., 824; Louis Bissonet, Id., 828; Thomas Caulk, Id., 831; Auguste Choteau, Id., 834.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court for the District of Missouri. The case below was an action of ejectment by the plaintiff, (the defendant here,) to recover against the defendant a moiety of a tract of land in the township of St. Louis, and in which she obtained a verdict and judgment.

*331] *The title of the plaintiff was derived from a confirmed Spanish concession, under the act of June 30, 1836; of the defendant, from a location of a New Madrid certificate, under the act of February 17, 1815. Both rest upon acts of Congress; and the question is which has the elder or better title.

We shall, therefore, lay out of view, in proceeding to the examination of the case, a class of cases referred to on the argument, founded on these Spanish claims, which were prosecuted under the act of May 26, 1824, and which underwent very elaborate discussion, both at the bar and by the court. *United States* v. *Arredondo et al.*, 6 Pet., 691; *Soulard and others* v. *United States*, 4 Id., 511; *Smith* v. *The same*, 10 Id., 326; *United States* v. *Clarke*, 8 Id., 436.

That act empowered the District Court, upon which original

jurisdiction was conferred, to hear and determine these claims according to the stipulations of the treaty of 1803, the law of nations, and the laws and ordinances of the Spanish government, and in conformity with the principles of justice.

The inquiry there was not into the legal title; but into the equitable right under the treaty, with a view to a confirmation of these imperfect grants, if entitled to confirmation according to Spanish law, so that the grantee might be clothed with the legal estate.

The inquiry was difficult and embarrassing, on account of the scanty and imperfect materials within the reach of the courts from which to collect Spanish laws and ordinances, as they consisted of royal orders, orders of the local governors, and also of the usages and customs of the provinces, which were not readily accessible to the profession or the courts in this country.

The case before us depends upon the construction of our own acts of Congress, disembarrassed from any inquiries into the origin of these grants, or into the rights and principles upon which they were founded, or which made it the duty of the government under the treaty to acknowledge them. Inquiries of this kind were closed on the confirmation of the grant by the act of 1836. The title then became complete. It became an American, not a Spanish title.

One of the principal questions arising under these acts of Congress, and, indeed, in our judgment, every material question presented here, was either directly or by necessary implication involved in the decision of the case of *Stoddard* v. *Chambers*, heretofore decided by this court and reported in 2 How., 284.

The plaintiff there claimed under a Spanish concession, confirmed by the act of 1836; the defendant, under a location by *virtue of a New Madrid certificate, in [*332 pursuance of the act of 1815. The defendant and those under whom he claimed had been in possession since 1819. The Spanish concession was, like the one before us, general and unlocated, except by a private survey in January, 1806.

The court decided that the plaintiff, deriving title under the confirmed claim, held the better title, on the ground, that in 1816, when the New Madrid certificate was located upon the premises in question, the tract was reserved from sale or private entry by virtue of the tenth section of the act of 1811, and being thus reserved, the location was void; and, further, that it was not within the protection of the second section of the act of 1836, confirming Spanish grants, as the locations there referred to were locations made in pursuance of some

law of the United States; that, in the case before the court, it was made against law.

In the case before us, the Spanish concession was made to the five sons of Benito Vasquez, for eight hundred arpens each, to be laid off in one or two places of the vacant domain. The grant was made February 16, 1800.

The eldest son (Benito) conveyed his interest in the concession to Rodolph Tillier, 11th February, 1806. The latter located it by procuring a private survey, the 27th of the same month.

The time when the claim was filed in the recorder's office at St. Louis, under the act of 1805, does not appear; but it must have been before the 25th of August, 1806, as we find the evidence of the claim presented to the Board of Commissioners on that day. including the grant, the survey, and other proof going to establish it.

The tenth section of the act of 1811 (2 Stat. at L., 665), provided, that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in Louisiana, and filed in his office, for the purpose of being investigated by the commissioners, &c.

The argument against the application of the clause to the claim before us is, that the concession to Vasquez, being general and unlocated, giving a right to the eight hundred arpens in no particular part or parcel of land in the public domain, but in any and every part, and the private survey designating and locating the tract being a nullity, and to be disregarded, the premises in question were not, and could not have been, reserved from sale by the filing of this vagrant claim; and hence were open to location under the New Madrid certificate in 1816, at the date of the entry.

*333] *Now, the Spanish concession to Mordecai Bell, in *Stoddard* v. *Chambers*, under which the plaintiff derived title, was of a similar character; the private survey, therefore, must have been regarded as having designated and located the tract, so far as to give effect and operation to the reservation of it from sale.

It is only upon this ground that the case can be upheld. Otherwise, the location of the New Madrid certificate was made in pursuance of law, and the defendant in under it held the better title. The tract was not covered by any claim, within the contemplation of the act of 1811. To give effect to it, the claim must designate the particular tract.

But if this question were an open one, and to be decided the first time by the court, we should feel ourselves obliged

to re-affirm the same conclusion which we have supposed necesarily involved in the case already mentioned.

The act of 1805, § 4, (2 Stat. at L., 326,) provided, that a plat of the tracts claimed should accompany the written notice of the claim directed to be filed in the office of the recorder.

The act of 20th February, 1806, (2 Stat. at L., 352,) repealed this clause, and extended the powers of the Surveyor-General over the public lands in Louisiana, making it his duty to appoint deputy surveyors, &c., and the commissioners were authorized to direct such surveys of the claims presented, as they might deem necessary for the purpose of their decision, —the survey to be at the expense of the claimant.

The act also declared, that every such survey, as well as every other survey, by whatever authority theretofore made, should be held and considered a private survey only; and that all the tracts of land, the titles to which might be ultimately confirmed by Congress, should, prior to the issuing of the patents, be re-surveyed, if judged necessary, under the authority of the Surveyor-General, at the expense of the parties. Sec. 3.

The act of March 26, 1804, (2 Stat. at L., 283,) forbade settlements on the public lands within the territory of Louisiana; and also surveys, or any and every attempt to survey, or designate boundaries, by marking trees or otherwise, declaring, at the same time, the act an offence punishable by fine or imprisonment. Sec. 14.

The act of 1805, as we have seen, required the claimant to accompany the claim filed with a plat of the tract.

It is apparent, therefore, unless this act operated as a modification, by implication, of the restriction in the act of 1804 in respect to surveys, the benefits under it would be limited to the *single class of claimants, who had happened to procure surveys of their tracts by a Spanish officer prior to the cession under the treaty. Whether it had this effect, or not, is at this day a matter of no particular importance; it is certain, that such was the practical construction given to the act at the time; as we find that numerous surveys of the tracts claimed were made after the passage of the act of 1805, and before that of 1806 dispensing with the plat. This construction was, also, recognized by the government, and the surveys directed to be regarded by the commissioners in their proceedings, as affording a sufficient designation of the tract claimed under the concession. [*334

In the instructions of the Secretary of the Treasury to the board, under date of March 25, 1806, one month after the passage of the act, he observed, (speaking of the authority

conferred on the board to order surveys,) that, as the authority was discretionary, it was presumed they would exercise it only in cases where it would be actually necessary, as it was not intended to vex the claimants with repeated surveys; and that, where they were satisfied that those surveys which had been executed before the receipt of his communication were sufficient to enable them to form a correct decision, they need not order new ones: and the observation, he said, would apply, whether the previous surveys had been executed under the authority of Soulard, or by any other person whatever. (Part 2, Public Land Laws, p. 672.)

Nothing can be more direct and express than these instructions; and the records of the proceedings of the several Boards of Commissioners under the act of 1805, and the acts succeeding it down to that of July 9, 1832, show, that they uniformly acted upon them. These private surveys constitute a part of the evidence of the claim upon which their decision was founded.

They were necessary to give description and locality to two important classes of these Spanish concessions:—1. A grant or order of survey for a given number of arpens, conferring upon the grantee the right to locate it upon any part of the royal domain, at his election; 2. A grant designating some natural object only, such as the head or sources of a river, as the place where the tract should be located. These two classes constituted no inconsiderable portion of the claims filed in the offices of the register and recorder, and afterwards presented before the commissioners. Among the incomplete grants, they probably constituted at least one half of the number. Of the first fifty in the report of the 27th of November, 1833, twenty-eight *are of this description; it is fair to presume the same proportion exists throughout.

*335]

The effect claimed, upon the above view, for these private surveys, was denied on the argument, on the authority of the cases decided under the act of 1824, to which we have already referred; but the distinction will be apparent on an examination of those cases, and a slight attention to the difference in the two modes of proceeding upon these claims.

Under that act, it was held by the court, that, in order to enable the claimant to recover, the land must have been severed from the general domain of the king of Spain prior to the cession of the territory by a grant which gives, either in its terms, or by a reference to some description, locality to the tract; or if the grant was vague, and gave only an authority to locate, the location must have been made by the official surveyor;—that a private survey could have no such effect as

to sever the tract from the public domain under either the Spanish or American government; and that no government ever admitted such effect to be given to private surveys of its warrants, or orders of survey.

In the proceedings before the Board of Commissioners, the object of the private survey is not a severance of the tract from the public domain; nor is this the effect of it; that is done by the confirmation of the grant by the act of Congress, and not before. The object is the selection of the tract by the claimant that he is entitled to locate by virtue of his general grant, by means whereof he is enabled to present his claim in full to the board for their decision. A general grant or order of survey is not simply a vagrant right to the given number of arpens in some part of the public domain; but carries along with it the right, and without which it is valueless, to have it located with metes and bounds, that it may be occupied and enjoyed. In the absence of this description and location, the claimant would be disabled from presenting his full claim under the Spanish concession for adjudication by the board. The act of 1806 providing for private surveys, and the instructions of the Secretary founded thereon, removed every embarrassment of the kind, and were, doubtless, so intended at the time.

The acts of 1832 and of 1836 confirm the above view. The former organized a new Board of Commissioners, and made it their duty to examine all unconfirmed claims to land theretofore filed in the office of the recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey; and also, that, in examining them, they should take into consideration as well the testimony taken before the former *boards upon the claims, as such other testimony as might be admissible under the rules adopted for taking testimony before the previous commissioners. [*336

It should be recollected, that the reports of the previous commissioners upon these unconfirmed claims were before Congress at the time of the passage of this act; and that those reports contained the substance of the evidence in support of each claim, including these private surveys; and with this knowledge, it will be seen, they have made it the duty of the board to take that testimony into their consideration in passing upon them.

Congress have thus virtually recognized these private surveys as competent and proper evidence of the particular tract of land claimed under the grant or concession, carrying out thereby the construction previously given to the act of 1806, and the instructions of the Secretary.

The board are directed to examine all the unconfirmed

claims remaining in the office of the recorder, founded upon these incomplete grants, and orders of survey; and to examine them upon the evidence already furnished by the claimants, and in the possession of the government; and to show that the examinations were conducted in conformity with these directions, we need only turn to the reports of the board, at different times, to the Commissioner of the Land Office, and which were also laid before Congress. It will there be seen that these private surveys are invariably used as a part of the evidence, in each case, where one has been made, for the purpose of giving description and locality to the claim.

The concession before us is embraced in the report of the 27th of November, 1833, as No. 19. It contains the original grant, the private survey of February 27, 1806, together with the evidence of several witnesses produced by Tillier, the assignee and claimant; and among others a witness was called to prove the handwriting of the Governor to the concession, and of Mackay to the plat of the survey.

We have said that the act of 1836 also confirms this view of the case.

The second section of that act provides, that if it shall be found that any tract confirmed, or part thereof, had been previously located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation shall confer no title to such lands in opposition to rights acquired by such location and purchase; but the individual whose claim is confirmed shall be permitted
*337] to locate so much thereof as interferes with such location or *purchase on any unappropriated land of the government within the state.

It will be perceived that the right to re-locate by the Spanish claimant is confined to the case of an interfering location or purchase of the whole or a part of the tract of land confirmed, omitting altogether to make provision for the case of a confirmation of an unlocated concession or order of survey. If the argument, therefore, is well founded, that these surveys are a nullity, and incapable of giving description and locality to the claim, Congress have not yet provided for one half of them under the act of 1836; and further legislation will be necessary to carry into effect their clear intention, as declared in the act of 1832. We cannot think they are chargeable with any such omission or oversight, or that a proper interpretation of their acts leads to such a conclusion; but the contrary.

Our conclusion, therefore, is that the private survey by Mackay in 1806, of the 800 arpens granted to Benito Vasquez

by the Spanish governor, February 17, 1800, of which Tillier was the assignee, and which was filed in the recorder's office under the act of 1805, designated and located the grant so as to give effect and operation to the act of 1811, reserving the premises from sale, which reservation was continued down by subsequent acts to 1829.

It has been argued, that the act of 1836 confirms only the Spanish concession in the abstract, without regard to the plat of survey or claimant, if an assignee of the grant. The act provides, that the decisions in favor of land claimants made by the recorder and the commissioners, under the act of 1832 and the supplemental act of 1833, as entered in the transcript of decisions transmitted by the commissioners to the Commissioner of the Land Office, and by him laid before Congress, be, and the same are hereby, confirmed.

Now, the transcript of these decisions embraced, as required by the act of 1832, the date and quantity of each claim, and the evidence upon which each depended, together with the authority under which it was granted. The claimant was the party who had filed the claim in the office of the recorder, and had prosecuted it before the Board of Commissioners. His name, of course, appeared,—Rudolph Tillier in the case before us. He represented the interest of one of the sons of Benito Vasquez, in quantity eight hundred arpens. There were four other sons, each of whom was entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, together with the conveyance from the original grantee, and, under these circumstances, it is insisted *that, upon the true [*338 construction of the act, the confirmation was in favor of the son, and not of the assignee.

It is certainly difficult to perceive what right or claim the son had, either before the commissioners or Congress, to be confirmed. Having parted with all his interest, he had neither land, nor claim, nor was he a claimant; as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805. By that act, every person claiming lands, &c., by virtue of any incomplete grant, &c., shall deliver to the recorder a notice, &c., of the nature and extent of his claim; and, also, the grant, order of survey, deed, conveyance, or other written evidence of his claim, to be recorded; providing at the same time, in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat; all other conveyances and deeds to be deposited with the recorder; thereby making a distinction between the

two cases, as it respects the derivative title; and, in both, clearly contemplating that the assignee might be a claimant.

This is the view taken of the question in the case of *Strother* v. *Lucas*, on each occasion when it was before this court. (6 Pet., 772; 12 Id., 458.) It was there held that the confirmation was to be deemed to be in favor of the person claiming it. The construction has entered into the usage and practice of the land office, as may be seen by the instructions from that office and the opinion of the Attorney-General on the subject. (2 Land Laws, 747, 752, and 1043.)

As it respects the branch of the argument, that the confirmation was irrespective of the location of the tract by the private survey of Mackay, we refer to the view we have already taken of that question, without any further remark.

It has also been argued, that Tillier put on file in the recorder's office, at the time of giving notice of his claim, two plats of the tract of land he claimed, each embracing different parcels; and that the uncertainty as it respects the parcel claimed under the concession takes the case out of the reservation from sale under the act of 1811.

The case shows that there were two plats protracted upon the same sheet of paper on the files of the office, covering different parcels; and that the name of the claimant was written at full length on the face of one of them; that but one was before the commissioners, and that corresponding to the one on file with his name upon it; that this one includes the premises in question; the other does not.

*339] When this second plat was protracted upon the same sheet *of paper, or how it came on the files of the office, or whether Tillier was in any way connected with it, are matters unexplained at the trial, and left altogether to conjecture. The connection is but an inference from the fact, that it has been found on the same piece of paper on which his was protracted; but, as his was marked, and identified with his name, and that too in connection with his claim to the tract, also on file, we do not perceive that any one could be misled who might resort to the office for the purpose of ascertaining the land thus intended to be appropriated; and as it respects the proceedings before the commissioners, also on the files of the office, none of the objections taken existed in point of fact.

It has been supposed that this case is distinguishable from the case of *Stoddard* v. *Chambers*, on the ground that there the concession was confirmed, in terms, according to the survey. If the view we have taken of these private surveys be correct, the difference at once disappears. But with reference more particularly to the objection, it is to be observed, that in

the report of the commissioners under date of 27th November, 1833, which included one hundred and forty-two claims, of which the present case is one, the form of their decision as expressed, in respect to these imperfect grants, is uniformly in the words here used.

In the report of the board in 1835, in which the confirmation of the claim in *Stoddard* v. *Chambers* is included, a change of persons having taken place in the commission, a different and more particular form of expression was adopted. They, usually, confirmed according to the survey, or according to the possession, or a given number of arpens, as the case might be.

In cases where the report recommends the confirmation of the claim according to the survey, the effect of the confirmation under the act of 1836 is, probably, to conclude the government; so that an error in the private survey cannot be corrected on a re-survey of the tract. When recommended in the general form of the present case, any such error may be corrected, agreeably to the intention of Congress in declaring, as they did, in the act of 1806, that these surveys should be regarded only as private surveys. This is the distinction made at the land office, founded upon the opinion of the Attorney-General; and is, we think, the only one between the two cases.

It was also suggested, on the argument, that the cases of *Mackay* v. *Dillon*, and *Les Bois* v. *Bramell*, (4 How., 421, 449,) contained principles in support of the defence in this case. We have examined them attentively, and find nothing decided there in conflict with the views expressed in this case.

*In the former, the question was between a confirmed Spanish grant and the commons of the city [*340 of St. Louis, under which the defendant held; and which had been, also, confirmed by the act of 1812. There had been a private survey of the commons by Mackay in 1806, and in which he had at the same time marked the boundaries of his own lot. His claim was confirmed under the act of 1836; the claim to the commons, as we have seen, in 1812; the latter, therefore, holding the elder title. But the confirmation of the commons was very special, the act declaring that all the rights, titles, and claims to town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages, including St. Louis, which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages &c.; and making it the duty of the principal deputy surveyor,

as soon as may be, to survey and mark, where the same had not already been done according to law, the out boundary lines of the several towns and villages, so as to include the out lots, common field lots, and commons thereto respectively belonging.

The act of 1831 (4 Stat. at L., 435) has no bearing upon the question of boundary.

The question of boundary being left at large by the very special terms of the act of confirmation, a great deal of evidence was given on the trial for the purpose of ascertaining the limits of these lots, out lots, common field lots, and commons in and adjoining the town. But the court, in submitting the case to the jury, instructed them, virtually, that the boundary and extent of the commons were to be determined by the private survey of Mackay in 1806; an error that was obvious, whether we regard the terms of the act of confirmation, or the nature and effect of the survey; and for which the new trial was granted.

There is nothing in the other case bearing upon the question except that the second instruction given and approved favors the views expressed in the case before us.

The case of *Jourdan* v. *Barrett*, 4 How., 169, was also referred to as bearing upon the question. The case involved the right to back lands on the Mississippi River between front proprietors; and an attempt was made by the defendant to conclude the right by the effect of a private survey, which was properly denied by the court. The case has no application to the present one. No such effect is claimed for the survey, and all that is contended for in respect to it is derived from acts of *Congress, and applies only to the class of cases in question. The effect depends upon the construction of these acts.

*341]

Upon the whole, after the most careful consideration that we have been able to bestow upon the case, the conclusions at which we have arrived are,—

1. That the private survey by Mackay, on the 27th of February, 1806, of the 800 arpens granted to Benito Vasquez, of whom Tillier was the assignee, and which was filed in the recorder's office with his claim, under the act of the 2d March, 1805, designated and located the grant, so as to give effect and operation to the act of 1811, reserving the premises in question from sale.

2. That the title was confirmed to Tillier, the assignee, as claimant, under the act of 1836.

3. That the location of the New Madrid certificate in 1816, under which the defendant holds, was inoperative and void,

as has already been decided in the case of *Stoddard* v. *Chambers*, heretofore referred to.

It follows, therefore, that the plaintiff, deriving title under Tillier, the confirmee, has an elder and better title, as was decided by the court below.

For these reasons, we are of opinion that the judgment of the court should be affirmed.

Mr. Justice McLEAN dissented.

In my judgment, this case is not within the decision of the case of *Stoddard* v. *Chambers*. In that case, the claim was confirmed "to the said Mordecai Bell or his legal representatives, according to the survey." But in this case the claim was confirmed "according to the concession." Now, until a concession is located, it can give no claim to any specific tract of land, and consequently cannot come within the reservation of any of the acts of Congress. And the main question in the case was, whether there was such a survey or designation of this concession as to bring it within the above acts.

The first Board of Commissioners, who acted on this claim in 1806 and in 1810, rejected it. As appears from their record, the concession only was before the board when they finally acted upon the subject. But a new and more favorable board was constituted in 1832, and it appears from their record, that, on the 9th of October in that year, "the sons of Vasquez, Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, claiming 800 arpens each under a concession dated 17th of February, 1800, was presented. Also a plat of survey dated 7th February, 1806, of 800 arpens." "Pascal Cerré, being duly sworn, *saith, that the signature to [*342 the concession is in the handwriting of Delassus; that the signatures to the survey are in the handwritings of Mackay and Antoine Soulard."

On the 2d of November, 1833, the board again met, and their record states that "the sons of Vasquez, each claiming 800 arpens of land under a concession from Charles Dehault Delassus;" and that "they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners." And they "are unanimously of opinion, that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph and Pierre Vasquez, or their legal representatives, according to the concession."

On the 11th of February, 1806, Benito conveyed to Rudolph Tillier his "right, title, and interest, claim and pretension and demand, in and to a certain tract of land not yet located or

surveyed." And Tillier says, "I do hereby assign, transfer, sell, and set over, unto Clement B. Penrose, all my right, title, interest, property, claim, and demand of, in, and to a certain concession purchased of Benito Vasquez and assigned to me on the 11th of February, 1806, and plat of survey made for me, and dated 27th February, 1806, for value received." This assignment bears no date, but it was acknowledged the 31st of October, 1818.

Frederic R. Conway, a witness for plaintiff, testified that he was one of the late Board of Commissioners that confirmed this claim; that the said original survey of Mackay, given in evidence by plaintiff, was the plat that Tillier claimed by, as he understood it; and that no other survey was exhibited to the commissioners, so far as he remembered, connected with this claim; that the survey was not noted in the tabular statement contained in the proceedings of said board, which omission, he thought, was by the mistake of the clerk.

The following certificates of surveys were given in evidence, one by the plaintiff and the other by the defendant:—"I do certify that the above plat represents 800 arpens of land, French measure, situated in the district of St. Louis, Louisiana territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant. Given under my hand at St. Louis, the 27th day of February, 1806. Signed, James Mackay. Received for record, St. Louis, the 27th of February, 1806. Signed, Antoine Soulard, Surveyor-General of Louisiana."

*343] The other certificate is in the same words. These plats and certificates were recorded by the recorder of land titles on the *same page. It was proved that one of these surveys covered the land in controversy, and that the other did not. The name of Tillier was written on one of the plats, but by whom, at what time, and under what circumstances, does not appear. From the loose manner in which the recorder's office and the papers connected with it seem to have been kept, and the ready access to them by all parties, it would be a dangerous principle of evidence, to consider the simple indorsement of a name on a plat as identifying the owner of the land. And especially where the surveyor nowhere states for whom the survey was made.

The court instructed the jury, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed in conformity to the act of Congress of the 4th of July, 1836, and which re-survey is numbered 3061, and was

approved by Joseph C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made, and therefore the location under said claim is invalid, as against the title of said Vasquez," &c.

Among the instructions prayed for by the defendant, which the court refused to give, was the following:—5. "If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and, as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in the defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks or his legal representatives."

The deposition of Conway, one of the commissioners who confirmed this concession, was introduced to supply a defect in the record. He states that the original survey of Mackay, which Tillier claimed by, was before the commissioners, and no other plat, so far as he can remember. Now if this evidence was admissible, it was for the consideration of the jury. It was intended to correct the record, and show that the survey was acted upon by the commissioners, although no entry was made of it by the clerk in the tabular statement. It may well be doubted whether parol evidence was admissible for this purpose, especially after the lapse of some fourteen years. In a *matter involving title to real estate, parol evidence cannot be heard to correct the record which the [*344 commissioners were required to keep, of their proceedings.

As the evidence was heard, and does not appear to have been overruled or withdrawn from the jury, it was their province to act upon it. But by the instruction given, there was nothing left for the jury to decide. They were instructed that the claim of the plaintiff was reserved from location and sale when the New Madrid location was made, and consequently the latter was void. This ruled the whole case.

If the statement of Conway were not admissible, there was no evidence to show that any survey was before the commissioners at the time they confirmed the concession. And it is certain that no entry was made upon their record to show a sanction of any survey. It does appear that a survey of the concession was before the commissioners who rejected the claim in 1806. And it also appears that on the 9th of October, 1832, "a plat of survey dated 7th February, 1806, of 800

arpens, was before the new commissioners." But on the 2d of November, 1833, when the concession was confirmed, no survey appears to have been before them, and they refer to none.

If the two surveys made by Mackay of 800 arpens each, "for the proprietor," were admitted to have been made at the instance of Tillier, it leaves the location of the concession uncertain. Both surveys were executed on the same day, and were recorded on the same page. Under Tillier's right, he could survey only 800 arpens; and if he surveyed two tracts each of that quantity it was a fraud upon the public. Under the acts of Congress no tract of land was reserved as a Spanish claim, which was not surveyed or so specifically designated as to show with reasonable certainty its boundaries. There is nothing on the record or in the parol proof to show which of the plats, if either, was made as the instance of Tillier. Both surveys were made "for the proprietor," and as they bear the same date, it may be presumed they were made for the same person. But whether this be so or not, they present a state of uncertainty which is fatal to the Spanish claim. The mere name of Tillier, on one of the plats, without explanation, is no proof of its identity. An entry on the record to identify the survey would have been sufficient. In the absence of such evidence, the survey made or approved by Joseph C. Brown in 1842 does not supply the defect. He must have acted arbitrarily, or from circumstances which existed at the time he acted. There was nothing to guide him as to the true survey at the time the New Madrid location was made. And that was the *period of time to which the facts must apply, and the reservation of the Spanish claim be shown to have been made. The two surveys then existed and were on the record, and if neither were specially designated as Tillier's claim, there was no location of it within the reservation act. He could not claim both surveys, and as there was nothing on record to guide the New Madrid claimant in his location, he cannot be chargeable with notice.

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Under these circumstances, I think the court erred in its instruction to the jury, that the Spanish claim was reserved from sale, and that the New Madrid location was void. I think, for this error, the judgment should be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel. On con-

sideration 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, affirmed, with costs.

ADAM L. MILLS, PLAINTIFF IN ERROR, *v.* SIMEON STODDARD, A CITIZEN OF INDIANA, CURTIS STODDARD AND DANIEL STODDARD, CITIZENS OF OHIO, JOSEPH BUNNELL AND LUCY BUNNELL, HIS WIFE, CITIZENS OF NEW YORK, JONAS FOSTER AND LAVINIA FOSTER, HIS WIFE, CITIZENS OF OHIO, LUCY HOXIE, A CITIZEN OF NEW YORK, DANIEL MORGAN AND ARVA MORGAN, HIS WIFE, CITIZENS OF NEW YORK, DEFENDANTS IN ERROR.

The decision of this court in the case of *Stoddard et al.* v. *Chambers* (2 How., 285) re-examined and confirmed.

The original petition to the Spanish Governor of Louisiana, upon which the concession was made, stated that he "came over to this side of the M. R. S. with the consent of your predecessors." These letters stand for *Majeste Rive Sud*, and refer to the Mississippi River.

The survey of the concession in 1806 fixed its locality. It is true that the survey was a private one, but it was adopted by the commissioners, who had authority to direct such surveys as they deemed necessary.

The holder of a New Madrid certificate had a right to locate it only on public lands the sale of which was authorized by law. But lands claimed under a Spanish concession, where the claim had been filed according to the acts of Congress, were reserved from sale when the entry under the New Madrid certificate was made, viz., in 1816. Consequently, the entry was void.

The patent for the land covered by the New Madrid certificate was not issued until after Congress had renewed this reservation, viz., in 1832. Therefore, neither the entry nor patent can give a good title.[1]

Had the patent been issued before Congress passed the act of 1832, the result would have been different.[2]

*THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri. [*346

It was an ejectment brought in the Circuit Court by the defendants in error, as heirs of Amos Stoddard to recover 350 arpens of land, which is thus described in the declaration:—

"Being the same tract originally granted by the Spanish government, in the province of Upper Louisiana, to Mordecai Bell, by concession bearing date 29th January, 1800, and being the same tract located and surveyed by the proper officer on or about the first day of January, 1806, and which concession

[1] DISTINGUISHED. *Mackay* v. *Eastley et al.*, 53 Tex. 451–454. FOLLOWED. *Delauriere* v. *Emison*, 15 How., 538.

[2] DISTINGUISHED. *Bryan* v. *Shiron*, 19 Wall., 632, 633.