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. *Eastón*, 19 Wall., 632, 633.

[2] DISTINGUISHED. *Bryan* v. *Shirley et al.*, 53 Tex. 451–454. FOLLOWED. *Delauriere* v. *Emison*, 15 How., 538.

and survey have been duly confirmed by the Congress of the United States to the said Mordecai Bell, or to his legal representatives, according to the said survey, and which tract is the same contained in the survey No. 3026, made by the authority of the United States, under and by virtue of the confirmation aforesaid, and is bounded on the east by the forty-arpen field lot, on the south by a tract called the Mill tract, and on the north and west by lands described as public lands on the survey made as aforesaid on the 1st of January, 1806."

The title of the heirs of Stoddard was particularly set forth in the report of the case of *Stoddard* v. *Chambers*, 2 How., 284, and it need not be repeated. Mills claimed under the same title as Chambers, both deriving their titles from two New Madrid certificates issued to Peltier and Coontz. It was admitted that, at the commencement of the suit, the defendant, Mills, was in possession of a portion of the tract comprehended in the survey of Mackay, made in January, 1806, for Amos Stoddard, being forty acres conveyed to said defendant on the 14th of March, 1836, by Hamilton R. Gamble and wife.

It was also admitted, that the property sued for was worth more than ten thousand dollars; that the plaintiffs claimed in this action four undivided fifths of the land described in the declaration; that the other undivided fifth had been conveyed to Hamilton R. Gamble in fee; and that the whole of the land sued for was embraced in the patent to Peltier.

Some testimony was given on the part of the defendant, with a view of impeaching the title of the plaintiffs, which was not produced in the trial of the cause of *Stoddard* v. *Chambers*, and which evidence it is proper to insert here.

Pascal L. Cerré, a witness for defendant, testified that he came to St. Louis very young from Canada, in the year 1777, returned to Canada, and came back to St. Louis in 1779, and remained there till 1781; that he then went to Canada, and staid there till 1787, when he came to St. Louis, where he
*347] remained till 1791, when he again visited Canada and staid *there till 1794, when he came to St. Louis, where he has remained ever since; that he was well acquainted with Mordecai Bell and his family, his father, mother, brothers, &c., and knew him when he first came to the Spanish country; that said Mordecai Bell resided at Wild Horse Creek, a few miles south of the post of St. Andre, where James Mackay was commandant in Spanish times; it was about two or two and a half miles south of that post where Mordecai Bell lived, and was about forty miles west south-west of St. Louis; that Mordecai Bell never resided at any time nearer St. Louis

than that place, nor did any other of the Bells; that Mordecai Bell lived at that place several years, and then went away; that said Bell was principally employed in hunting, drinking, and playing cards; he led a vagabond sort of a life; that he, Cerré, lived all the time at St. Louis, while Mordecai Bell was at Wild Horse Creek; that he, witness, knew the land occupied by Stokes; and that there was no improvement or cultivation there under Spanish government, nor, until Stokes cultivated it, was there any cultivation; said witness examined said original petition of Mordecai Bell, given in evidence by plaintiffs, and stated that he knew the handwriting of James Mackay well, and that it was, with the signature, except the mark, all in Mackay's handwriting; that he did not know why Stoddard's Mound was so called, but supposes it was because he purchased the land on which it was, and did not know when it was first so called, whether at Stoddard's death; he thinks it was before his death.

The defendant then offered in evidence the deposition of Mordecai Bell, which was objected to by the plaintiffs' counsel;—1st, because of irrelevancy; 2d, if not irrelevant, that it went to impeach a title conveyed by the witness;—which objection was overruled, and the deposition read, which is as follows:—

"Deposition of Mordecai Bell, produced, sworn, and examined at the house of said Bell, at Moreau township in the county of Morgan, and state of Missouri, before me, John Chism, judge of the County Court for the county of Morgan aforesaid, in a certain cause now pending in the Circuit Court of the United States for the District of Missouri, between Simeon Stoddard, Curtis Stoddard, Daniel Stoddard, Anthony Stoddard, William Stoddard, Joseph Bunnell and Lucy Bunnell, Jonas Foster and Lavinia Foster, Lucy Hoxie, Daniel Morgan, and Arva Morgan, plaintiffs, and Adam L. Mills, defendant, on the part of the defendant.

"Mordecai Bell, of lawful age, being produced, sworn, and *examined on the part of the defendant, [*348 deposeth and saith, that he resides in Moreau township, in the county of Morgan and state of Missouri; that he was first married on the 8th day of March, in the year 1802; and that parts of the three winters preceding his marriage, he was hunting in the upper part of this state; that neither in the year 1800, nor any year after, did he petition the Spanish Governor Delassus for any grant of land. That a few years after he was married, Santiago Mackay repeatedly asked deponent to petition the Spanish government for a grant of

land; that some two or three years after deponent was married, Mackay told him that he, deponent, had a head right, and that he, Mackay, wished to change a tract of land for his head right, which he, deponent, did; that he never petitioned the Spanish Governor for any grant of land in or in the neighborhood of the town of St. Louis, nor was there any granted him to the best of his knowledge; that he resided in the counties of St. Louis and Franklin till the year 1819.

his
MORDECAI B BELL."
mark.

Adolph Renard, for defendant, testified that he is a Frenchman, and the French language is his mother tongue; that he has been in the recorder of land titles' office since April, 1837, and more or less in habit of handling papers there, making copies and translations, and that the translation of the said original petition of Mordecai Bell—which translation is given in evidence by defendant—is a correct and faithful translation; that the letters "M. R. S." in said petition he considers as put for "Majeste Rive Sud;" that he, witness, knows nothing of the Spanish laws; that Julius De Mun was a good translator, and understood both French and English. He further stated that he never saw a concession where a commandant of a post recommended a grant of land lying close to St. Louis, the residence of the Lieutenant-Governor.

William Milburne, for defendant, testified that he had been in the surveyor's office from 1816 to 1841, a part of the time as clerk, and the latter part of the time as surveyor-general. He examined the said petition of Mordecai Bell, as translated by Renard, and the concession, and stated that he, as surveyor, should survey said concession on the south bank of the Missouri River, if not otherwise directed; that the post of St. Andre was in what is called Bonhomme Bottom, some thirty miles from St. Louis; that St. Andre was close on the river, and its site has been partially or wholly washed away by the river.

*349] *The plaintiffs, by way of rebutting testimony, gave in evidence the following letter of the Secretary of the Treasury of the United States, produced by Thomas Watson, register of the land office at St. Louis, from the files of his office, dated 10th June, 1818.

"*Treasury Department*, 10*th June*, 1818.

"SIR,—You are requested to instruct the recorder of land titles in the Missouri territory to furnish to the receiver and register of the land district of St. Louis a descriptive list of

the land claims which have been presented and registered under the different acts of Congress for confirming the rights of individuals to lands which have not been confirmed, and that are situate within the said land district, with as little delay as practicable; also, a list of the same kind to the receiver and register of the district of Howard county, of all the land claims within said district which in like manner have not been confirmed. For this service he will be entitled to a reasonable compensation. 'You are also requested [to] direct the register and receiver of those districts, respectively, to withhold from sale all such lands, until otherwise directed.' It may be proper, however, to advise those officers that this act is not to be considered as in any manner countenancing the idea that such claims are considered equitable, or that their being withheld from sale at this time ought to excite an expectation that they will ultimately receive the sanction of Congress. They are withheld from sale because the land claims have been, during the latter end of the late session of Congress, referred to the Secretary of the Treasury, with directions to report to the next session. The receiver and register should be instructed to make the subject of these observations known, for the purpose of preventing speculation on those land claims.

"I have the honor to be your most obedient servant.

(Signed,) WM. H. CRAWFORD.

"JOSIAH MEIGS, ESQ., *C. G. L. O.*"

The plaintiffs likewise read in evidence the proclamation of the President of the United States, dated June, 1823, and published in the summer and fall of 1823, for the sale of the public lands, on the third Monday of November in that year, at St. Louis, which were situate in the township and range in which the land sued for in this action is situate.

The evidence being finished, the counsel for the defendant prayed the court to give the jury the following instructions:—

1. That the survey in 1806, made by Mackay, which has been given in evidence, was made without authority of law, *and is not evidence of the proper location of the order of survey made by the Lieutenant-Governor. [*350

2. That if the jury find from the evidence, that the order of survey made by the Lieutenant-Governor in favor of Mordecai Bell would not embrace any part of the land in dispute, if surveyed according to its terms, then the land in dispute was never reserved from sale, and the patent to Eustache Peltier, or his legal representatives, passed the title to the land described in such patent.

3. The reservation by the act of Congress of 1811, in favor of those claiming under Mordecai Bell, if any such reservation existed, was of the land granted to said Bell, and not of the land surveyed by Mackay.

4. If the jury find, from the evidence, that the land sued for in this action is not a part of the tract of land conveyed by Mordecai Bell to James Mackay, in the deed of said Bell given in evidence, they will find for the defendant.

5. Unless the jury find from the evidence, that Mordecai Bell, or some person claiming under him, filed with the recorder of land titles a notice in writing stating the nature and extent of his claim, and that such notice embraced the land now in dispute, and was filed with the recorder on the first day of July, 1808, or prior thereto, then the land in dispute was not reserved from sale, and the patent to Eustache Peltier, or his legal representatives, conveyed the title to the land described in such patent.

6. That the instructions of the Secretary of the Treasury, read in evidence in this case, and the list of the recorder of land titles of the unconfirmed lands, do not affect any reservation of said land in dispute from sale against the title under the Peltier claim, as distinct from the reservation, if any there be, by act of Congress of March, 1811.

7. That there can be no recovery in this action, unless for land which was granted to Mordecai Bell.

8. If the jury find, from the evidence, that the New Madrid certificate, so called, in favor of Peltier, was located, embracing the land in controversy in this suit, and that in the year eighteen hundred and twenty-seven a patent certificate was issued by the recorder of land titles on such location, they will find for the defendant.

9. That no title to the land in question passed by the deed given in evidence of Mordecai Bell to James Mackay.

Which instructions, except the sixth, the court refused to give, and each of them; to which refusal the defendant, by his counsel, excepted. The court, then, of its own motion, gave the following instruction:—

*351] * The court rejected the instructions presented on the part of the defendant, numbered from one to nine, except the sixth, which was given, and instructed the jury, that the land included in the survey given in evidence, made for Amos Stoddard, on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and therefore both the location and patent are invalid, as against the title of Amos Stoddard, or those claim-

ing through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the act of Congress of July 4th, 1836; and that the confirmation operated as a grant to said Stoddard, or, if he was dead, to his heirs, such being the legal effect of the acts of Congress, records, and title-deeds given in evidence; nor does the evidence of the witnesses introduced in any wise impair the effect of the acts of Congress and title papers.

To the giving of which last-mentioned instruction the defendant, by his counsel, excepted. The defendant then asked the following instructions:—

10. That there is no evidence before the jury that Mordecai Bell, or any person claiming under him, filed with the recorder of land titles such notice of claim according to law as was required in order that the land in question should be considered as reserved from sale.

11. That the plaintiffs are not entitled to recover in this action for any land embraced within the patent to Eustache Peltier, or his legal representatives, which has been given in evidence.

12. That there is no sufficient evidence that notice of the claim of Stoddard, under Mordecai Bell, was filed with the recorder of land titles on or before the 1st day of July, 1808, according to law.

13. If the jury find, from the evidence, that two of the plaintiffs, Anthony Stoddard and William Stoddard, conveyed their interest in the land in question to Henry G. Cotton since this action was brought, then the plaintiffs in this action are not entitled to recover any thing but damages down to the time of such conveyance, and the plaintiffs cannot recover damages for any time prior to the 4th day of July, 1836; and the jury are instructed to find specially the fact of such conveyance by said Anthony and William Stoddard, and its date.

Which the court refused to give, to which refusal the defendant, by his counsel, excepted. The defendant then asked the following instruction, which the court gave, viz.:—

*14. That the plaintiffs cannot recover damages for possession of the premises for any time prior to the 4th of July, 1836. [*352

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

J. CATRON, [SEAL.]
R. W. WELLS. [SEAL.]

Under these instructions the jury found the following verdict:— 361

"We, the jury in the above-entitled cause, find the defendant guilty of the trespass and ejectment alleged in the declaration in the above-entitled cause, as to four fifths, less one sixth and one twelfth, of the following described piece of land, parcel of the land in said declaration described, to wit:— A certain tract or parcel of land, situate, lying, and being in the county of St. Louis, and bounded as follows, beginning at the southeast corner of the location, under a New Madrid certificate issued to Eustache Peltier, or his legal representatives, where the said corner is fixed upon the line of a tract, formerly the Mill tract of Auguste Chouteau, deceased; thence, with the southern line of said location, as the same runs westwardly, seven chains; thence, north fourteen degrees forty-five minutes east, to the Methodist burying-ground; thence, with the south line of the Methodist and Catholic burying-grounds, nine chains and sixty links, to the line of the common field lots; and thence, with the line of the common field lots (having in it an angle), to the place of beginning; being forty acres of land, and is bounded on the south by the land formerly of Auguste Chouteau, called the Mill tract; west by the land of John F. Darby; north by the Methodist and Catholic grave-yards; east by the common field lots of St. Louis. And we further find, that the damages suffered by said plaintiffs, by reason of said trespass and ejectment, to have been twelve hundred dollars. And we further find, that the monthly value of said four fifths, less one sixth and one twelfth, of said described premises, is thirty-one dollars and twenty-five cents."

Upon the above bill of exceptions, the case came up to this court.

It was argued by *Mr. Benton* and *Mr. Gamble*, for the plaintiff in error, and *Mr. Ewing*, for the defendants in error.

The points made by the counsel for the plaintiff in error were the following:—

1. That the Circuit Court erred in instructing the jury that
*353] the confirmation "to Mordecai Bell, or his legal representatives," *operated as a grant to Amos Stoddard, or, if he was dead, to his heirs.

The confirmation is in the alternative,—to Bell, or his legal representatives. Stoddard claimed as purchaser under Bell; the instruction, that the confirmation is a grant to Stoddard, involves the decision by the court of all the questions of law and fact arising upon the conveyances under which Stoddard claimed. *Wear and Hickman* v. *Bryant*, 5 Mo., 164.

2. Bell had no pretence of claim to the land in controversy at the period when the United States took possession of Louisiana, nor had Mackay or Stoddard any such claim prior to the survey in 1806.

3. The survey made by Mackay in 1806 did not, either by itself, or in connection with the concession, give any title to the land in controversy, because,—

1st. It was made, not only without authority of law, but contrary to express act of Congress. Act of 26th March, 1804 (2 Stat. at L., 287); *Smith's case*, 10 Pet., 326; *Wherry's case*, Id., 338; *Jourdan* v. *Barrett*, 4 How., 169; *Mackay* v. *Dillon*, Id., 448.

2d. It was a nullity, because a manifest departure from the concession. 8 Pet., 468; 9 Id., 171; 15 Id., 173.

4. The title now set up by the heirs of Stoddard, under a confirmation by the act of 4th July, 1836, cannot, by relation, overreach the patent to Peltier, issued in July, 1832. *Les Bois* v. *Bramell*, 4 How., 449; *Chouteau* v. *Eckhart*, 2 Id., 344; *Mackay* v. *Dillon*, 7 Mo., 12.

Unless the claimants under the confirmation can show that the Peltier patent is void, they have no shadow of right to maintain this action of ejectment. They attempt to avoid the patent by showing that the land was reserved from sale; and, consequently, from appropriation by a New Madrid claim, at the time when Peltier's location was made, and at the time when the patent issued. They insist, that, by the proviso to the tenth section of the act of 3d March, 1811, the land in controversy was reserved from sale, because their claim to it had been filed, "in due time and according to law," with the recorder of land titles; that this reservation was continued by the act of 17th February, 1818; and although it is admitted that, by the acts of 26th May, 1824, and 24th May, 1828, the reservation was terminated on the 26th of May, 1829, they insist that it was revived by the act of the 9th July, 1832, just seven days prior to the date of the Peltier patent.

It is necessary here to quote the words of the proviso in the act of 1811, upon which so much stress is laid. They are as *follows:—"That until after the decision of [*354 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 the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

In this case the following points are made in relation to the alleged reservation. 363

1. That the proviso in question leaves to the officers, who are to act for the government in selling the public lands, the ascertainment of the facts,—1. That a particular tract has been claimed; 2. That the claim has been filed in due time; 3. That it has been filed according to law.

2. In this case it is insisted that there was no such notice of the nature and extent of the claim filed by the claimant, as was required by the acts of Congress. Acts of 2d March, 1805; 28th February, 1806; 3d March, 1807; *Strother* v. *Lucas*, 6 Pet., 763.

3. That the question whether the law was pursued by the claimant is not determined by the fact that the commissioners acted upon the claim, inasmuch as they acted upon claims illegally filed. *Bird* v. *Montgomery*, 6 Mo., 510.

4. The proviso reserved no land under a floating concession; it sanctioned no survey made in violation of any previous act of Congress; and the recording of a survey, illegally made, could have no effect whatever under this proviso.

The acts of Congress requiring the exhibition and recording of Spanish claims are analogous to registry acts. *Strother* v. *Lucas*, 12 Pet., 510. Recording a document, not required by law to be recorded, gives it no additional legal effect. 5 Shep. (Me.), 418; 23 Pick. (Mass.), 80; 3 A. K. Marsh. (Ky.), 220.

5. Where a claim to a tract of land had been filed and recorded according to law, the proviso only suspended the sale until the decision of Congress upon the report to be made by the commissioners; and this decision was made before the location of Peltier's warrant. See Acts of 13th June, 1812; 12th April, 1814; and 29th April, 1816.

6. The act of 17th February, 1818, did not revive any reservation that had terminated.

If it could be held that there was a reservation of this land from sale, and that such reservation continued to the time of Peltier's location, still it is insisted, that, as between the confirmation to Bell and the location and patent of Peltier, the location and patent are not void.

*355] *The reservation is admitted to have terminated on the 26th of May, 1829, and then Peltier's title was indisputably good.

1. The acts of the officers of the government appropriating the land had been performed. *Bagnell* v. *Broderick*, 13 Pet., 460; *Barry* v. *Gamble*, 3 How., 32.

2. The location of Peltier, thus appropriating the land, was not, as against the government, a mere nullity, but at the utmost was only defeasible by the confirmation of a conflict-

ing claim during the continuance of the reservation. *Stoddard* v. *Chambers*, 2 How., 284; *Carroll* v. *Stafford*, 3 Id., 460.

3. When the adverse claim under Mordecai Bell was, by the act of 26th May, 1824, entirely barred, and the land declared public land, so far as that claim was concerned, the title under the Peltier location became unquestionable, and no subsequent grantee of the land could dispute its validity. *Hoofnagle* v. *Anderson*, 7 Wheat., 212; *Stringer* v. *Young*, 3 Pet., 320; *City of New Orleans* v. *D'Armas*, 9 Id., 224.

The patent issued to Peltier is dated on the 16th of July, 1832, and it was under the laws of the United States the completion of the title. Unless this document is a nullity, the claimants under Bell cannot maintain their action.

It is insisted by them that the act of the 9th of July, 1832, revived the reservation which had terminated in 1829, and that, therefore, a patent could not legally be issued after the passage of that act for the land covered by their claim.

To this I reply, that the act of 9th July, 1832, did not make a reservation from its date, but from the time of the final report of the commissioners, which was long after the patent issued.

Lastly, it is claimed by the plaintiff in error that the effect of the second section of the act of 4th July, 1836, is to protect his title against the confirmation under the first section; and it is insisted,—

1. That this section is designed to protect locations and sales that would be subject to exception, and be liable to be defeated by the confirmations under the first section, but for the protection given by the second section. *Jackson* v. *Clark*, 1 Pet., 635.

2. That a location or sale, made in conformity to the acts of Congress, would have passed the title beyond controversy, as against a confirmation under this act, without the aid of the second section. *Chouteau* v. *Eckhart*, 2 How., 376; *Les Bois* v. *Bramell*, 4 Id., 449.

3. That the very defect supposed to exist in the locations and sales intended to be protected was, that the land was reserved from sale when the locations and sales were made.

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*Mr. *Ewing*, for defendants in error.

This is in effect the case of *Stoddard* v. *Chambers*, reported in 2 How., 284. The suit below was against another defendant residing on the same tract, and the evidence is substantially the same as in the reported case, to which, and to the authorities there cited, and the points of law decided by the court, I beg leave to refer.

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It was held in that case that the location "under any law," saved in the second section of the act of confirmation of July 4th, 1836, must be a location in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs. (p. 317.) And that the location of the New Madrid warrant, being made on lands reserved from sale, was not authorized, but forbidden, by law. The saving was therefore held not to protect the claimant under the warrant. Against this decision I understand it will be urged,—

1st. That the court, to give the saving effect, and thus conform to the intent of the legislature, must apply it to this class of cases, there being no others, as it is said, to which it can apply.

This is a mistake in point of fact. From May 26th, 1829, to July 9th, 1832, there was no reservation of these lands from sale or location; and during part of this time the law allowed the location of New Madrid warrants. The saving would very properly apply to a location made during that time, which, without it, would not prevail against the confirmation, by law, of the elder title.

2d. That the opinion of the bar in Missouri was general in favor of the validity of New Madrid locations upon these reserved lands, and that in faith of such opinions many titles were acquired, which ought not to be disturbed.

This, also, is not correct in point of fact. Some of the ablest members of the bar, whose opinions I have seen, held these locations invalid. Indeed, there was a degree of boldness in the attempt to seize upon these lands by virtue of the New Madrid warrants, and a contempt of legal prohibition, which cannot fail to command our admiration. These New Madrid warrants were a charity; the law forbade their location on lands before they should be surveyed and offered for sale; and it again forbade their location on the lands claimed under Spanish concessions, until those claims should be finally adjusted. This location, with the rest that are in like jeopardy, *357] was made against this double prohibition. (See the letters of Mr. Wirt, *Attorney-General, to Mr. Crawford, of May 11, and June 19, 1820, Gilpin's Collection of Opinions, pp. 263 and 273.)

So far as the government itself was concerned, the wrong was submitted to, and a law was enacted, April 26, 1823, ch. 40, sanctioning locations which had been made before survey. But no law ever did the injustice to sanction these illegal locations on the property claimed under the concessions. Our

legislators were not at first familiar with the laws and policy of Spain, or her mode of making these grants; they were, therefore, long held open for consideration, and the laws sternly forbade the creation, under their authority, of other titles, which might put it out of the power of the government to do what at last might be found to be an act of justice, and a performance of treaty stipulation. This prohibition was distinctly understood, while these New Madrid titles were *in fieri*. See the opinion of Mr. Wirt, Attorney-General, October 10, 1825, (Opinions, &c., Vol. II., p. 25,) refers to letters of Mr. Crawford, June 10, 1818; Mr. Wirt, October 22, 1828; Mr. Butler, Attorney-General, August 8, 1838 (Opinions, &c., Vol. II., p. 1045).

The opinion that titles thus acquired were valid was, as far as I have been able to ascertain, confined to those who were engaged in their acquisition, and their counsel, and to such additional public opinion as interested parties were able to create.

But let the opinion be as extensive as it might, it can avail nothing in this court; it was contrary to plain law and right, and this is the place to correct it.

3d. It is said that an adherence to the decision in the case of *Stoddard* v. *Mills* will disturb many titles; that much property is held under these New Madrid locations, made upon Spanish concessions, which have been since confirmed, while they were thus reserved from location.

I know not how the fact is, as few such cases have come under my notice; but if it be so, it is entitled to no weight with this court. Whether there have been much or little property thus illegally taken, it ought all to be restored to its lawful owners. It was taken by those who knew, at the time, that their acts were illegal, and that they were attempting to seize what the law had reserved for others. They played for a stake, putting up a warrant worth but a trifle against a tract of land of great value. They have lost, and should be compelled to stand the hazard of the die.

4th. It is said, also, that the confirmation of these titles by the act of July 4, 1836, was a mere gift, and ought not to be considered favorably.

I contend, on the contrary, that it was an act of justice done *in execution of a treaty stipulation. Such [*358
is the ground on which it is put by the act of July 9th, 1832, and by the commissioners who examined these claims and recommended them for confirmation. Those who have become familiar with these concessions, and with the early value of such property, the state of the country, and the policy of Spain as to her colonies, are satisfied that *form* was

necessarily and habitually dispensed with; and that, if the United States had not acquired the sovereignty, the class of titles that were sanctioned by the law of confirmation would have become, or been made, valid by the existing government. It was thought, with reason, that independently of treaty stipulation, the inhabitants ought not to suffer in their property by the transfer of the sovereignty to the United States.

On the other hand, the New Madrid warrants were a mere charity.

The particular objections to be urged in this case, and which did not arise out of the evidence, in the case of *Stoddard* v. *Chambers*, I understand, are,—

1st. That certain depositions offered by plaintiffs below were improperly admitted.

The court, on the 4th day of April, 1844, established the following rule, which is still in force :—

"Ordered, that all exceptions to depositions, other than exceptions to the competency or relevancy of the evidence therein contained, shall be in writing, and filed, and notice thereof given a reasonable time before trial, and shall be taken up and disposed of before the jury are sworn in the cause, or the trial commenced; and no exceptions to depositions, other than to the competency or relevancy of the evidence therein contained, shall be allowed on the trial of the cause."

Depositions offered by the plaintiffs below, to prove heirship were objected to for informality in the taking, but admitted by the court under the above rule. The depositions were filed in court in the May term, 1840. They were not objected to on the former trial of the cause, nor until the 31st day of March, 1846, a few days before the cause was again called for trial, when the objections were noted, and notice given to the plaintiffs' counsel. The court held that this notice was not given a "reasonable time before trial," taking into view all the circumstances of the case.

The correctness of this decision seems to me self-evident. It was not "reasonable" to suffer those depositions to remain four years on file without objection, and then take exception
*359] to them for form merely, at such time as would compel a continuance *of the cause, to the great inconvenience of counsel and with expense to the parties, especially as nothing was to be gained by it except this inconvenience and expense.

2d. That the conveyance by two of the plaintiffs of their interest in the land, after action brought, bars the recovery in

ejectment as to all, and that the court erred in not so instructing the jury.

If this were an action of trespass in legal effect, as it is in form, the conveyance by the two plaintiffs would not disturb the case in the slightest degree. The sale of the land is not a release of the action; and if it were, the release must have been specially pleaded, *puis darrein continuance*, or it could not have been given in evidence.

But this action, wronged and mutilated as it is, is still ejectment, and the court will deal with it according to its substance, without regard to the form which it is constrained to assume.

In this action the courts have long done on the trial, and on motion, what, in other real actions, used to be done by summons and severance; that is to say, they have freed the case of parties who ceased to have an interest in its prosecution. This was done here by nonsuiting the plaintiffs who had sold their interest, and striking their names out of the declaration, and taking a verdict in behalf of the other plaintiffs for their remaining interest.

This practice is in strict analogy to that in the action of ejectment, where the nominal plaintiff counts on several demises from tenants in common; and the court on the trial, or even on motion in arrest of judgment, allow the demises of some of the lessors, who have shown no title on the trial, to be stricken from the declaration. *Van Ness* v. *Bank of United States*, 13 Pet., 17.

The court having directed that the names of two of the plaintiffs be stricken out of the declaration, it is not necessary to erase the record. *Lessee of Walden* v. *Craig's Heirs*, 14 Pet., 147. The direction stands for the act.

At common law, the summons and severance was resorted to in all real actions, where one of the parties plaintiff was for any reason unable or unwilling to proceed in the case.

"It lies in waste because the land is to be recovered." 20 Vin. Abr., 51. "It lies in right of ward of land." "In right of ward of body and land." "In detinue of charters, for peradventure he (the plaintiff) is to recover a warrantee by it." "So, generally, in actions real or mixed." 20 Vin., *ubi supra*. "It lies also in *quare impedit*, and a writ of error upon it." *Pipe* v. *Dominam Reginam*, Cro. Eliz., 325.

*In modern practice, the summons and severance is seldom used, but in cases where it has heretofore applied, the court proceed on motion. In the case at bar it would have been very idle to summon and sever, when the parties were all present by their counsel, and ready to sever by nonsuit. [*360

But, be the mode adopted to get clear of the parties who had sold their interest right or wrong, it was for them only, and not for defendants below, to complain of it. The defendants were not injured by any irregularity, if there was any. It would be a reproach upon the law to say, that there was no way in which this could be done; and no one, I think, can devise a better than that which was adopted by the court below. *Chouteau* v. *United States*, 9 Pet., 144, 153; *Hunter* v. *Hemphill*, 6 Mo., 119; *United States* v. *Percheman*, 7 Pet., 90, 91.

To the objection, that the location was a departure from the concession, I answer,—

1st. That it is immaterial if it were so; for, the location having been made, the survey filed with the claim became a part of it. Altogether, it was the claim; and whether good or bad, it was not for a stranger, but for the United States, to determine. This land, then, was claimed; and being so, was reserved from sale by the act of 1811. Finally, the Board of Commissioners, and Congress acting on their report, determined that the land ought to be held according to the survey.

2d. But the location was in pursuance of the concession. The translation of De Mun conveys the true meaning of the petition; that of Renard does not, though it may translate each French word literally into an equivalent English word. Their disagreement is in the translation and explanation of the clause in which Bell represents, "que avec l'agrement de votre predecesseur il se transporter sur cette *rive*, où il a choisi une morceau de terre," &c.

De Mun, a contemporary, resident at the time in Louisiana, translates and explains the passage thus:—"That, with the consent of your predecessor, he came over to this *side* (of the Mississippi), where he selected a piece of land," &c.

Renard translates it, "That he, with the consent of your predecessor, has come over to this *shore*, where he has selected a tract of land," &c.; and by the context, as expounded by counsel, makes it the "shore" of the Missouri, and not of the Mississippi, to which he has come with this assent.

That it was the Mississippi, and not the Missouri, which he crossed with the assent of the Lieutenant-Governor, is certain. The Mississippi bounded the Spanish territory on the east, but the Missouri was entirely within it; he might cross the Missouri at pleasure, without such assent,—not the Missis-

*361] sippi.

*Again, why say, "il se transporter sur *cette rive* où il a choisi," &c., "*rive sud du Missouri?*" Why "*cette rive*" and "*rive sud*," with the addition of *Missouri* in the same

sentence, if both meant the same thing, or if *Missouri* were understood in the first branch of the sentence? But it is very clear from the text itself that they meant different things. De Mun's knowledge of the boundary of Louisiana, and the laws touching immigration, enabled him to explain that difference. "*Cette rive*" means *this side* of the Mississippi. It may be north or south of the Missouri, for his Majesty had domains on both sides of that river; but "R. S. du Missouri," (*rive sud,*) defines the side north or south of that river, on which he prays for a concession. But neither "*cette rive*" nor "*rive sud*" means *shore*, in its most restricted sense,—the water's edge, or the river-bank. Its whole sense, text, and context show, that it was to *this side* of the Missis sippi which he had come, not confining himself to the water's edge; and it was on the *south side* of the Missouri, in an equally large sense, as contradistinguished from the north, that he asked permission to locate the warrant which he prays for.

Indeed, the very fact that initials are used (M. R. S.) shows that the expression occurred frequently, and De Mun, a contemporary, gives its conventional meaning.

Mr. Justice McLEAN delivered the opinion of the court.

The plaintiffs brought an action of ejectment in the Circuit Court, to recover three hundred and fifty arpens of land in the neighborhood of St. Louis, which they claim under a concession made by the Spanish government, in 1800, to Mordecai Bell. Bell conveyed his right to James Mackay on the 20th of May, 1804, and on the 20th of September, 1805, Mackay conveyed the same to Amos Stoddard, the ancestor of the plaintiffs. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as Surveyor-General, the 20th of January, 1806.

On the 29th of June, 1808, the above papers were filed with the recorder of land titles for the district of St. Louis. The claim was duly presented to the Board of Commissioners, under the acts of Congress, and rejected on the 10th of October, 1811; but afterwards, on the 8th of June, 1835, a new board decided that three hundred and fifty arpens of land "ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey on record." On the 4th of July, 1836, an act of Congress was passed, confirming the decision of the commissioners. The land was surveyed as confirmed. The *defendant admitted that he *[362 was in possession of forty acres of the land claimed at the commencement of the suit.

The title of the defendant was founded on an entry made by Peltier of one hundred and sixty acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued on the 16th of July, 1832. Possession has been held of the forty acres claimed by the defendant, and by those under whom he claims, since 1819. This title was conveyed to the defendant.

The township in which this land is situated was surveyed by the United States in 1817, 1818, and 1819, and was examined in 1822. In 1823, the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

This title, with but little variation of facts, was asserted by the plaintiffs, and duly considered by this court, in the case of *Stoddard's Heirs* v. *Chambers*, 2 How., 284. And the court held the title to be valid against that which is now set up by the defendant. In the case of *Barry* v. *Gamble*, 3 How., 53, that decision was sanctioned. But the counsel for the defendant, having brought the same title before us in this case, have requested a re-examination of the points ruled in the case of *Chambers*. We will briefly refer to the points now made, and to the new facts proved, on which this application is founded.

The court instructed the jury, "that the land included in the survey given in evidence, made for Amos Stoddard on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and, therefore, both the location and patent are invalid, as against the title of Amos Stoddard, or those claiming through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the act of Congress of July 4th, 1836," &c.

It is objected that the concession granted to Mordecai Bell should have been located at St. Andre, and not in the vicinity of St. Louis. In his petition to the Lieutenant-Governor of Upper Louisiana, he states, "with the consent of your predecessor, he came over to this side [of the Mississippi], where he has selected a piece of land in his Majesty's domain, on the south side of the Missouri. This being considered, he supplicates you to have the goodness to grant him, at the same place, for the support of his family, three hundred and fifty arpens *of land in superficie." This bears date 21st January, 1800; and on the 29th of the same month the

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Lieutenant-Governor responds,—"In consequence of the information of the commandant of St. Andre, Don Santiago Mackay, I do grant to the petitioner the tract of land of three hundred and fifty arpens in superficie," &c., "in the place indicated."

St. Andre, the place of Bell's residence, is situated on the south side of the Missouri River, about thirty miles from St. Louis. Pascal L. Cerré, a witness, states that Bell resided in the neighborhood of St. Andre several years, and was engaged in hunting, drinking, and playing cards, and led a sort of vagabond life; that his petition, except the mark of the signature of Bell, was in the handwriting of Mackay. And Bell, being sworn as a witness, says he never applied for a concession, nor was there, to his knowledge, any grant made to him. That Mackay told him he had a head right which he, Mackay, wished to obtain, and which the witness exchanged with him for a tract of land near St. Andre.

Instead of the word "(Mississippi)," included in brackets in the petition of Bell, it seems the letters M. R. S. were used, which one of the witnesses considers "as put for Majeste Rive Sud;" and Milburn, a surveyor, says, that he should have surveyed the concession on the south bank of the Missouri River, if not otherwise directed. In opposition to this view, the words of the petitioner are relied on, "that with the consent of your predecessor, he came over to this side of the M. R. S.," which could only have meant the Mississippi River, that river being the eastern limit of Louisiana, which extended far north of the Missouri. That to cross the Missouri River, the "leave of his predecessor" could not have been asked, as it was unnecessary.

Whatever doubts this evidence may have created, as to the location of Bell's concession, had it been laid before the commissioners who acted upon the claim, it is now too late to affect the title under it. In regard to the statement of Bell, his conveyance of the land in controversy to Mackay shows, at least, the inaccuracy of his memory. But the survey of the concession in 1806, as now claimed, which survey was recorded and expressly confirmed by the commissioners on the 8th of June, 1835, is a sufficient answer to the above objection. The survey was a private one, and consequently was of no authority except to designate the locality and extent of the claim, until sanctioned by the commissioners. By the act of the 21st of April, 1806, they were authorized to direct such surveys as they may think necessary for the purpose of deciding on claims presented for their decision; and under this power they had a *right to adopt private surveys [*364

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of claims, if accurately executed. This was in pursuance of the instructions of the Secretary of the Treasury.

The great question in the case is, whether the land in controversy was subject to be appropriated by a New Madrid warrant on the 20th of October, 1826, when Peltier made his location.

Under various acts of Congress up to the 26th of May, 1829, Spanish or French titles which had been duly filed by the recorder of land titles were reserved from sale. Those acts are referred to in the case of *Stoddard* v. *Chambers*. At that period, all claims which had not received the sanction of the government were barred. On the 9th of July, 1832, an act was passed "for the final adjustment of land titles in Missouri," which provided that the recorder of land titles, with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri, which had heretofore been filed in the office of the said recorder, according to law, founded upon any French or Spanish grant, &c., issued prior to the 10th of March, 1804." And they were required to class the claims so as to "state in the first class what claims, in their opinion, should in fact have been confirmed, according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them; and secondly, what claims, in their opinion, are destitute of merit, law, or equity." And after the report, the lands in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made against them; but the second class was declared to be subject to sale as other public lands.

This act reserved from sale, necessarily, all claims which had been duly filed, until the final report of the commissioners; and those which were embraced in the first class, until Congress should reject them. In the case of *Stoddard* v. *Chambers*, the court say, in reference to Peltier's location,—"It was made on land not liable to be thus appropriated, but which was expressly reserved; and this was the case when the patent was issued. Had the entry been made, or the patent been issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid warrant."

The defendants' counsel suppose, that, if the location of the
*365] New Madrid claim was void, the patent, though issued within *the time above stated, could have conveyed no

title. The New Madrid location was void because it interfered with the Spanish title. When that title was barred by the lapse of time, the government, by issuing of a patent, would have sanctioned the New Madrid claim, and no one could have contested it,—as between the government and the claimant no controversy could exist. By the patent, he only acquired what his certificate entitled him to. And the right, thus made complete, could not have been affected by any subsequent act of Congress. The government might have withheld the patent, on the ground that the New Madrid certificate had been improperly located; but that not being done, the patent gave an indisputable title.

It is insisted that the New Madrid location, if made on lands reserved from sale by reason of the Spanish claim, became valid, so soon as the bar was complete against that claim. But this consequence would not seem to follow. If, during the bar, no act was done by the government to confirm the New Madrid claim, nor by the claimant to perfect his title, a removal of the bar would not prejudice any newly acquired right. And this only could prevent the renewal of the reservation by Congress. By such a renewal, a preference was given to the Spanish claim, which was an exercise of legislative discretion. Congress might have excepted from this reservation lands covered by New Madrid locations; but this not having been done, the Spanish claim is revived, and placed on the same footing as before the bar.

It is insisted, that, as Bell's concession was surveyed without authority, it was no notice to Peltier, though recorded. The act of 1806, as before remarked, authorized the commissioners to direct such surveys as they may think necessary to be executed, for the purpose of deciding on claims presented for their decision; but where a private survey had been made, they had the power to adopt it, as was done in this case. And such survey, being placed upon record by the recorder, seems to have been a reasonable notice, within the acts of Congress.

But it is contended, that the proviso in the act of 1836, which confirmed the Spanish and French claims reported by the commissioners, embraces Peltier's New Madrid location. The words of the proviso are, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title on such lands, in opposition to the rights acquired by such location or purchase."

*In the case of *Stoddard* v. *Chambers*, this court held, that "a location under the law of the United States" [*366

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must be "in conformity with it." But this, it is insisted, is not the true construction of the proviso. That "under the law" does not mean, "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

The word *under* has a great variety of meanings. But the sense in which it was used in the proviso is, "subject to the law." We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it. The proviso declares, that the act shall not confer a title, "in opposition to the rights acquired under the laws of the United States." This would seem to be conclusive, as no right can be acquired under a law which is not in pursuance of it. If the New Madrid location was made in violation of the law, it is not perceived how any right could be acquired under it.

The judgment of the Circuit Court is affirmed.

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 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, affirmed, with costs.

EDMUND B. CALDWELL, SURVIVING PARTNER OF JAMES LYND, JR., AND COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

In this case, the court below instructed the jury, that if the goods were fraudulently entered, it was no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser.

This instruction was right in respect to the sixty-eighth section of the act of 1799 (1 Stat. at L., 677), as the penalty is the forfeiture of the goods *without an alternative of their value*, but wrong as the instruction applies to the sixty-sixth section of the same act,—as the forfeiture under it is either the goods *or their value*.

Under the sixty-eighth section, the forfeiture is the statutory transfer of right to the goods at *the time* the offence is committed. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the *right to them* relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation.[1]

[1] CITED. *The Kate Heron*, 6 Sawy., 110.