1st. That the indictment is not fatally defective for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and,

2d. That the acts charged in the said indictment to have been committed by the defendant do constitute an offence within the provisions of the first section of the act of Congress, approved March 3d, 1823, entitled "An act for the punishment of frauds committed on the government of the United States." Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

FRANCIS SURGETT, APELLANT, *v.* PETER M. LAPICE AND EDWARD WHITTLESEY.

Where an "action of jactitation" or "slander of title" was brought in a state court of Louisiana and removed into the Circuit Court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error.[1]

This case distinguished from that of the *United States* v. *King*, 3d and 7th Howard, 773 and 844.

Before the transfer of Louisiana to the United States, the Spanish government was accustomed to grant lands fronting on the Mississippi River, and reserve the lands behind those thus granted for the use of the front proprietors, who had always a right of preëmption to them.

After the transfer, Congress recognized this right of preëmption by several laws.

In 1832, Congress passed an act (4 Stat. at L., 534) giving to the proprietors of any tracts bordering on a river, creek, bayou, or water-course, the right of preference in the purchase of any vacant tract of land adjacent to and back of his own tract, provided that the right of preëmption should not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course, and provided that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the President of the United States for the public sale of the lands in the township.

The last proviso cannot be construed to apply to a township where the lands had already been exposed to sale by order of the President in 1829. The act having been passed in 1832, a compliance with it was impossible, and it must, therefore, be construed as applying prospectively to those lands which had not been exposed to public sale.

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[1] CITED. *Walker* v. *Dreville*, 12 Wall., 442. See *McCollum* v. *Eager*, 2 How., 61; *Minor* v. *Tillotson*, Id., 392; *Brewster* v. *Wakefield*, 22 Id., 118; *Thompson* v. *Railroad Cos.*, 6 Wall., 134.

The first proviso related only to a river, creek, bayou, or water-course which was a navigable stream. The bayou in question was not so, as is shown by the evidence in the case, and also by the fact that the sections of land, as laid out by the public surveyor, cross it. When the surveyor comes to navigable streams, he bounds upon the shore, and makes fractional sections.

In order to bring land within the exception, it must be fit for cultivation, and also border on another river, &c. The circumstances are coupled together, and both must concur, or else the exception does not apply.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

It was a possessory action in the sense of the Code of Practice of that state, originally commenced by Lapice and Whittlesey, in the Ninth District Court of the state of Louisiana, in and for the parish of Concordia, against Surgett, who was a citizen and resident of the state of Mississippi; and at whose request it was removed into the Circuit Court of the United States.

On the 21st of November, 1829, Surgett purchased several lots, from number 28 to number 35 inclusive, in township 5, range 9, east, in the Ouachita district in Louisiana, which lots fronted on the Mississippi River.

On the third Monday of November, 1829, the President of the United States issued a proclamation, offering the public lands in this township for sale.

On the 15th of June, 1832, Congress passed an act (4 Stat. at L., 534), entitled "An act to authorize the inhabitants of the state of Louisiana to enter the back lands." This act provided that every person who, by virtue of any title derived from the United States, owns a tract of land bordering on any river, creek, bayou, or water-course, in the said territory, and not exceeding in depth forty arpens, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpens, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price and on the same terms and conditions as are, or may be, provided by law for the other public lands in the said state, &c., &c. 1. Provided, however, that the right of preemption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course. And every person entitled to the benefit of this section shall, within three years after the date of this act, deliver to the register of the proper land office a notice, in writing, stating the situation and extent of the tract of land he wishes to purchase; and shall also make the payment or payments for the same, at the time and times which are or may be prescribed by law, for the dis-

posal of the other public lands in the said state, at the time of his delivering the notice aforesaid being considered as the date of the purchase. 2. Provided, also, that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as *may be designated [*50 by the President of the United States, for the public sale of the lands in the township in which such claims may be situated, and all claims not so entered shall be liable to be sold as other public lands, &c. And if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, his right of preëmption shall cease and become void; and the land may thereafter be purchased by any other person, in the same manner and on the same terms, as are, or may be, provided by law for the sale of other public lands in the said state.

On the 14th of July, 1834, a part of the land lying back of the lots owned by Surgett was entered at the land office by Whittlesey and one Sparrow, whose interest was afterwards purchased by Lapice.

On the 24th of February, 1835, Congress passed another act (4 Stat. at L., 753), extending the time given by the former act to one year from the 15th of June next.

On the 17th of March, 1836, Whittlesey entered the remaining portion of the lands back of Surgett's lots.

On the 20th of May, 1836, Surgett made application to enter the lands in controversy, which had been taken up by Whittlesey and Sparrow, and by Whittlesey. At the same time, he made a tender of the purchase-money, which was refused by the receiver, in consequence of the following indorsement upon the application by the register:—

"By reference to the official township map, it will be seen that the land called for in the above application is such as is exempted from the right of back concession (so called) by the first proviso of the act under which the applicant claims, which reads, ('meaning the right to the back land,') shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course. Now, from the evidence in this office, the land embraced in the rear of the above lots or fractional sections is fronting on another bayou, and that the same is fit for cultivation, the fact of a part being good land, above or during high-water mark, is on file herewith. Under the circumstances of the case, the land called for in part has been entered by other persons as public land, subject to private entry, and the application is

rejected, so far as the action of this office can decide, subject to the decision of the department."

On the 10th of April, 1840, Lapice and Whittlesey filed a petition in the Ninth District Court of the state of Louisiana, which is known by the laws of that state as an "action of *jactitation," or "slander of title." The petition "shows, that one Francis Surgett, residing in Adams county, in the state of Mississippi, has heretofore, at various times, and on divers occasions, slandered the title of your petitioners to the aforesaid tracts of land, and still continues to do so, by giving out in speeches and otherwise, and public proclaiming, that he the said Surgett is the rightful and true owner of said tracts of land, and not your petitioners; alleging that the said Whittlesey and Sparrow acquired from the United States no legal and valid right thereto, and threatening the said Sparrow and your petitioners with a suit to recover the same; that your petitioners and the said Sparrow, while part owners, have frequently requested said Surgett to desist from the slandering their title, or to bring suit to establish his own title thereto, if any he has; but he has refused, and still refuses, either to desist or to bring suit as requested; that said acts of the said Surgett have damaged your petitioners five hundred dollars."

*51]

The petition then prays, "That, after due proceedings had, the said Surgett be ordered to set forth his title to the tracts of land described in the aforesaid petition, if any he has, and establish it contradictorily with your petitioners; that unless he produces a good title paramount to your petitioners, that judgment be rendered in their favor, quieting them in their title and possession of said land, and that the said Surgett may be forever enjoined from setting up any claim or pretensions to the same; that your petitioners recover five hundred dollars damages against the said Surgett, and the costs of suit to be taxed, and for general relief in the premises, &c."

On the 10th of June, 1841, Surgett, being a citizen and resident of Mississippi, removed the cause to the Circuit Court of the United States for the District of Louisiana.

On the 3d of December, 1841, Surgett filed his answer, in which he denied altogether that the petitioners had any title to the lands, but claimed that the title was in himself. The answer then proceeds thus:—"Respondent pleads in reconvention that he himself is the true and lawful owner of so much of the said lands claimed by the plaintiffs, as are embraced in the aforesaid back concessions claimed by him, and prays that he may be decreed to be the legal owner thereof, that the certificates granted by the commissioners of the land

office to Sparrow and Whittlesey, or either of them, may be avoided and annulled; and that, if patents have already issued in their favor for said lands, the plaintiffs may be decreed to convey all their right, title, and interest, by virtue of said patents, to your respondent; that he may be quieted in his title and possession *thereof, and may recover [*52 judgment against said plaintiffs for the sum of one thousand dollars damages, sustained by him in consequence of their illegal pretensions, and for general relief in the premises."

Under commissions to take testimony, thirteen witnesses were examined, as to the nature and character of the bayou called Mill Bayou, in the rear of Surgett's lots. It is impossible to insert all this evidence.

On the 7th of April, 1845, the Circuit Court passed the following decree:—

"The court, having duly considered the law and the evidence in this case, doth now order, adjudge, and decree, that the plaintiffs Lapice and Whittlesey be quieted in their title to, and possession of, the land set forth and described in their petition, and that the defendant, Francis Surgett, be for ever enjoined from setting up any claims or pretensions to the same. It is further ordered, adjudged, and decreed, that the said defendant do pay the costs of this suit."

From this decree Surgett appealed to this court.

The case was argued by *Mr. Lawrence* and *Mr. Jones*, for the appellant, and *Mr. Brown* and *Mr. Johnson* (Attorney-General), for the appellee.

The points raised by the counsel for the respective parties were the following:—

For the appellant.

1. *As to jurisdiction.*

A motion has been made to dismiss this case for want of jurisdiction, because (it being an action at law, and not a suit or proceeding in equity) it should have been brought here by writ of error and not by appeal.

This was a petitory action originally commenced by the appellees in the State Court of Louisiana, in the manner authorized by the laws of that state, and removed at the instance of the appellant into the Circuit Court of the United States. It is known in the Louisiana Code as an "action of jactitation," or "slander of title," and may be brought by any one having a colorable title to, or possession of, land or other property, against any person claiming title to the same, to compel the latter to establish his title, or else to punish him for the

slander. If the fact of claiming title is denied, and no title is asserted, the trial is upon that issue alone, and would undoubtedly be a trial at law. But if the fact of the supposed slander is admitted, and the defendant sets forth his title, the original
*53] action is at an end; the answer becomes the ground of another *suit; the former defendant becomes the actor, the plaintiff, and the trial becomes one as to the respective titles of the parties to the thing in controversy. And it makes no difference, according to the Louisiana practice, whether the defendant in the suit for slander commences a new suit by petition founded on his title, or whether he does it by his answer in the same suit. In either case, it is in substance a new suit and another trial. *Livingston* v. *Hermann*, 9 Mart. (La.), 656, 700, 722; *Hewit* v. *Seaton et al.*, 14 La., 160; *Millaudon et al* v. *McDonough*, 18 Id., 106; *Proctor* v. *Richardson et al.*, 11 Id., 188.

When, however, the answer is made the groundwork of a new suit in the Circuit Court of the United States, where the distinction between suits at law and suits in equity is established, the character of the suit will be determined by the subject-matter and the general character of the proceedings. If the controversy is one appropriate exclusively to equity jurisdiction, and if the proceedings partake mostly of the character of equity proceedings, the suit is one in equity, so far at least as to entitle it to be brought up to this court by appeal rather than by writ of error. *McCollom* v. *Eager*, 2 How., 61; *Parish* v. *Ellis*, 16 Pet., 454; *Parsons* v. *Bedford et al.*, 3 Pet., 447.

The equity jurisdiction of the courts of the United States is the same in one state as in another and wholly independent of the local law of every state, without distinction.

Accordingly, the extension of a common law remedy to an equitable right, by the local law of any state, does not take away the equitable remedy proper to the courts of the United States. 1 Story Eq., §§ 57, 58; 3 Story on Const., 506, 507, 644, 645, and cases there cited.

The remedies in the courts of the United States must be at common law or in equity, not according to the practice of the state courts, but according to principles of common law or equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson* v. *Campbell*, 3 Wheat., 222.

Being a case which, upon general principles, is a *peculium* of equity, its jurisdiction in the Circuit Courts of the United States was not taken away by a law of Massachusetts giving

the common law courts jurisdiction of the same matter. *United States* v. *Howland*, 4 Wheat., 115.

By parity of reason, in Pennsylvania the legal remedy by ejectment, although extended by state law and practice to equitable titles, cannot be sustained on such title in the Circuit Court of the United States in that state; but the plaintiff *must still show a paramount legal title. *Swayze* [*54
v. *Burke*, 12 Pet., 23. See *Vatier* v. *Hinde*, 7 Id., 274; *Golden* v. *Prince*, 3 Wash. C. C., 313; *Pratt* v. *Northam*, 5 Mason, 95.

All these principles have been extended and applied in their utmost latitude, and with additional illustrations, to Louisiana. See *Livingston* v. *Story*, 9 Pet., 655; S. C., 13 Id., 368; *Ex parte Poultney*, 12 Id., 474; *Ex parte Myra Clarke Whitney*, 13 Id., 404.

And see all these reviewed, and the doctrine reasserted, in *Gaines et ux.* v. *Relf et al.*, 15 Pet., 9; *Gordon* v. *Hobart*, 2 Sumn., 401.

Lastly, this court has decided, in effect, that the United States, in conferring chancery jurisdiction on the courts in Louisiana, have imposed no foreign law on the state, nor introduced any foreign or new principle of jurisprudence. The whole innovation went no further, in that state, than a mere change in the mode of obtaining a judicial end, for which the local law is there supposed to afford an adequate remedy in another form. *Gaines et ux.* v. *Relf*, *Chew*, *et al.*, 2 How., 650.

Although in Louisiana, as in many other of the United States, there are no distinct forums of law and equity, yet an equity jurisprudence (not materially distinguishable, either in its principles, in its practical ends, or in the means of accomplishing its ends, from that which other states have borrowed from the equity system of England) is incorporated with the general jurisprudence of the state, and is administered by the same courts and the same remedies.

Those remedies, in their practical forms, in their processes, and in their reach and effect, (though not precisely conformed in all respects to the rules of equity practice prescribed to the courts of the United States,) are fashioned after the same model as those of the equity side of the English Chancery styled the Forum Romanum; and are quite appropriate to all the most comprehensive heads of equity cognizable in the courts of the United States. Civil Code of Louisiana, Art. 21, 1958 to 1962, recognitions of equity *eo nomine*.

Actions whereby contracts, &c., may be set aside by the active interference of the court, (over and above the universal

right of defence on equitable grounds,) as effectually and extensively as by any form of procedure in any court of equity.

C. Code, Art. 1854 to 1874, 2567 to 2578, 2634 to 2636, Lesion; 2496 to 2518, Redhibition; 1841 to 1843, Nullity resulting from Fraud; 1876, Contracts vitiated by Fraud, &c., may be avoided either by exception or actions.

*55] *Code of Practice, Louisiana, sections treating of Petition and Citation, Art. 170 to 207; of Conservatory Acts, 208, 209; of Sequestration, 269 to 283; of Injunction, 296 to 309; of Appearance and Answer, 316 to 329; of Exceptions, 330 to 346; of Interrogatories, 347 to 356; of Incidental Demands, 362 to 364; of Intervention, 389 to 394; of Parties to Suits, 101; of Amendments, 419 to 440; of Trial which is regularly on hearing before the court and only allowed by jury *sub modo*, 476 to 492 and 493 *et seq.*

1st. The subject-matter of this suit was one of exclusive equity jurisdiction. Surgett had an equitable title to the land in controversy, his opponents had a colorable legal title and possession. In no state, (except Pennsylvania,) where law and equity jurisdictions are distinct, could he stand for one moment in a court of law. His equitable title could be asserted only in a court of equity against the legal title of his adversaries.

2d. The forms of proceeding were more nearly allied to proceedings in chancery than to proceedings at common law. They commence by petition, in which the ground of complaint and relief sought are set forth. The defendant is ruled to answer. The answer admits, denies, or avoids the facts in the petition, or sets forth new matter upon which the defendant may recover if sustained. Interrogatories are filed. The case is heard by the court on the facts and the law, and ends by a decree. See Justice McLean's opinion in *Parsons* v. *Bedford*, 3 Pet., 450.

Now it is not incumbent on us, who appeal from these proceedings, to show that they are perfectly regular chancery proceedings in all their parts. On the contrary, we contend that they are not so, and that, on the principles adopted by this court in *Livingston* v. *Story*, 9 Pet., 632, the decree should be reversed. All that it is incumbent on us to show is, that, whatever these proceedings may be denominated in the Louisiana state practice, and however generally they may be used, they partake sufficiently of the character of chancery proceedings to render an appeal rather than a writ of error proper, the subject-matter being one of equity jurisdiction.

2. *As to the merits.*

On the 21st of November, 1829, Francis Surgett purchased lots 28 to 35 inclusive, in township 5, range 9 east, in the

Ouachita district, Louisiana; said lots fronting on the Mississippi River.

On the 15th of June, 1832, Congress passed an act (4 Stat. at L., 534,) giving to the proprietors of any tracts "bordering on any river, creek, bayou, or water-course" in the territory, *the right of preference in the purchase of [*56 any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpens, French measure, nor in quantity of land that contained in his own tract: "Provided, that the right of preëmption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course." The act required that, to entitle a person to its benefits, he should, within three years from the passage thereof, make application to the register and receiver, and make payment for the land. It also required, that when any public offering of the township for sale should be made under proclamation of the President, the preëmptioner should, at least three weeks prior thereto, give notice of his claim.

On the 24th of February, 1835 (4 Stat. at L., 753), Congress passed an act, extending the time given by the act just cited to the 15th of June, 1836.

Before the expiration of the last mentioned act, to wit, on the 20th of May, 1836, Mr. Surgett made application to enter the lands now in controversy, lying immediately back of his river lots, at the same time making tender of payment therefor; which application and tender were refused, on the ground that the land sought to be entered bordered on a bayou, and was fit for cultivation, was consequently subject to private entry, and had actually been entered by others. By reference to the receiver's receipts, it will be seen that a portion of this land had been entered on the 14th of July, 1834, by Edward Sparrow and Edward Whittlesey, jointly, and the remainder by Edward Whittlesey on the 17th of March, 1836. It also appears from the petition, that P. M. Lapice, one of the appellees, had purchased the interest of Sparrow in the land.

From this state of facts the question arises, whether the lands so entered by Sparrow and Whittlesey were subject to private entry, by reason of their being fit for cultivation and bordering on a "bayou," or whether, on the contrary, Mr. Surgett had not a full right of preëmption to these lands, and his application ought not to have been received.

For the appellant it will be maintained, that the decree below was erroneous, for the following reasons:—

1. Because the evidence contained in the record does not show that the land in controversy bordered on any "river,

creek, bayou, or water-course," within the meaning of the act of Congress, dated 15th June, 1832.

It is especially to be remarked, that most of the witnesses who describe this "bayou" as of any considerable length, depth, or width, speak of it from a single visit in the spring of the year *1828, during a freshet, and give both its width and depth as measured from the embankments that enclose it.

*57]

It is variously described as from 1 to 2½ miles long, 30 to 80 feet wide, and from 7 to 17 feet deep from the embankments. There is not a particle of evidence that it is navigable, or a perennial stream. On the contrary, the evidence shows that for the greater part of the year it is dry; that it is at no time a running stream, except from overflows of the Mississippi, or heavy rains.

This was not a "bayou" within the meaning of the law. In the Roman civil law, it is laid down, that, to constitute a river or running stream, as contradistinguished from torrents and temporary water-courses, the flow of water must be perpetual; though, if a stream which usually runs throughout the year should happen to be dried up during summer, it would not cease to be perennial, any more than a stream which usually flows only during winter would be perennial because of an extraordinary flow during summer. (Dig., lib. 43, tit. 12.)

Again, the act of Congress speaks of a tract of land "bordering" on a river, &c. It is contended that a fair construction of this law does not apply it to any small and insignificant stream which may pass through a tract of land, making no difference either in the figure of the tract or the computation of its area; but that "bordering" on a stream has reference to a stream which makes one of the "confines," outer edges, or exterior limits, of the tract. A "tract of land," as that expression is used in acts of Congress in relation to public lands, means some legal subdivision, bounded by lines run in the mode prescribed for public surveys. So the word "lands," as used in this act of 1832, must mean some legal subdivisions known to the law. If, then, a stream of water should run through such "tract of land" or "lands" without constituting a "border" or limit to the same, it would not be within the act in question. The law of Congress obviously had reference to such bodies of water as controlled the shape of the tract.

Again, the history of this anomalous mode of surveying authorized by the act of 15th June, 1832, its object, and the geographical peculiarities of the state of Louisiana, all show

that the purpose of the act was to deal with something of more importance than mere swamps or drains.

[*58 *2 Whit's Recop., 228, 235, 240, 276, 277, state papers, Public Lands, vol. 3, p. 557. Id. 2, paragraph 2, col. paper 380, memorial of Louisiana.

2. If there were proof in the record derived from the examination of witnesses, it would not be admissible for the purpose of showing that Surgett had not the right to take these tracts as back preëmptions, in view of the fact that the Surveyor-General (to whose discretion it was committed) had laid them out in square sections, had not noted on the official plat the existence of any such body of water as is within the meaning of the law, as he was required to do if any such existed, but had merely indicated by a line the existence of some nameless and insignificent swamp or slough. Act March 3d, 1811, § 2, (2 Stat. at L., 662).

3. Supposing the swamp or slough described in the evidence, and delineated on the plat, to be a "bayou" within the meaning of the act of Congress, still the decree of the Circuit Court was wrong, because some of the tracts in controversy (lots No. 1 and 2 of sec. 61) did not border on this "bayou," taking them even to be entire tracts as they were surveyed and patented. (See plat A.)

But we are not bound to treat them as entire tracts, as they have been surveyed and patented, because the law of the 15th June, 1832, (4 Stat. at L., 534,) itself makes provision for a re-survey of the back lands, in order to enable the front proprietors to avail themselves of the privilege of preëmption. Now if these back lands were re-surveyed, and the front lots extended back in the manner exhibited in plat B, not one of them (except lot 28) could be said to include lands bordering on this "bayou," or through which this bayou runs, unless the bare touching at a single point would exclude the land back of lot 29. As to all the rest, they would be entirely clear of this "bayou."

4. The title which the appellees set up is not good, inasmuch as the original patents to Whittlesey and Sparrow do not cover the land in controversy, there being no such sections, under the laws of the United States, as sections numbered 58, 59, 60, and 61.

The first law, and that which laid the foundation of the land system, was the ordinance of 20th May, 1785. 1 Birchard's Compilation, Land Laws, Opinions, &c., p. 11.

This ordinance pointed out the mode in which the townships should be surveyed, each six miles square; that the plats should be marked by subdivisions of one mile square

containing 640 acres, the lines thereof to be parallel to the external lines of the township, and numbered from 1 to 36, beginning each succeeding range of the lots with the number next to that with which the preceding one concluded; and where a fractional township should be surveyed, the lots protracted thereon should bear the same numbers as if the township had been entire.

*59] *The 2d section of the act of 18th May, 1796, (1 Stat. at L., 467, 468,) prescribes the precise manner in which the sections in townships shall be numbered, beginning with the number one in the northeast section, and proceeding east and west, alternately, through the townships, with progressive numbers, till the thirty-sixth be completed.

The 10th section of the act of 3d March, 1803, (2 Stat. at L., 233,) made it the duty of the surveyor, appointed to survey the lands south of Tennessee, to cause the same to be surveyed, as far as was practicable, into townships, and subdivided in the manner authorized and directed in relation to lands lying northwest of the River Ohio.

The 7th section of the act of 2d March, 1805, (2 Stat. at L., 329,) extends the powers of the surveyor of lands south of Tennessee over the territory of Orleans, and directs him to survey and divide the lands thereof in the same manner, (as near as the nature of the country will admit,) as the lands northwest of the River Ohio.

Thus far the mode of surveying and numbering was uniform and precisely marked out. The section at the northeast corner of every township was to be numbered one, and all the other sections were to be numbered in regular progression from right to left, and left to right, alternately, to the thirty-sixth, which would always and of necessity be the southeast section of the township.

The 2d section of the act of 3d March, 1811, (2 Stat. at L., 662,) authorized a different mode of surveying those lands which lay on rivers, creeks, &c., but did not authorize any change in the other portions of the townships, and such has been the construction of the land office. See 2 Birchard's Comp., 495; *Brown's Lessee* v. *Clements*, 3 How., 650; *Jourdan et al.* v. *Barrett et al.*, 4 Id., 169.

5. As to the objection made by the judge of the Circuit Court, namely, that the act of 1832 was not applicable to lands which had at that time been already offered for sale, it is submitted,—

1st. That the enacting portion of the law is of the most general and comprehensive character.

2d. That the proviso, requiring a notice of claim to be filed

three weeks before offering of the land at public sale, was not intended as an exclusion of lands which had been already offered from the operation of the law, but simply as a facility for ascertaining before any public sale what lands were claimed as back preëmptions, and what were not, so that it could be known beforehand what lands were legally subject to sale and *what were not. This reason not applying to [*60 lands already offered at the date of the act, the proviso requiring three weeks notice did not apply to them. All the preëmption laws contain a similar proviso. Such was the construction of the land office. 2 Birchard's Comp., 573.

The enacting clause applied to all public unappropriated land. The proviso in question was applicable only to such lands as had not been offered.

If this be so, then Mr. Surgett had a right, under the act of 16th June, 1832, at any time prior to the 16th of June, 1835, to file his application to enter the land in controversy.

This right having been extended to the 16th of June, 1836, by the act of 24th of February, 1835 (4 Stat. at L., 753), Mr. Surgett, having made his application on the 20th of May, 1836, was consequently within the time prescribed by law, and his application ought to have been admitted.

Points on the part of the appellees.

1. That this cause involves legal rights, for which a plain and adequate remedy is provided by the ordinary process of the common law.

2. That the character of this action, which is essentially an action at law, is not, and could not be, changed by the laws of Louisiana into a proceeding in equity, in the United States Circuit Court in Louisiana, or in this court.

3. That this cause was tried in the Circuit Court as a court of law, and not according to the forms of a court of equity.

4. And as a consequence of the above propositions, the appellees will contend, that, this being a cause at common law, should have been brought up to this court by writ of error, and not by appeal, and that this appeal should be dismissed.

5. At the trial below, and after it had commenced, the appellant applied for a continuance of the cause, which was refused by the court. To this refusal the appellant excepted. The appellees will contend that the court decided correctly in refusing the continuance, and that such a refusal is not a ground for an exception or appeal.

6. The appellees will contend that the diagram marked B, offered in evidence by the appellant, and mentioned in the second bill of exceptions, was rightly rejected by the court.

7. That there is no error in the opinion of the court in the third bill of exceptions.

8. That the only questions open on this appeal are those raised by the bills of exception.

*61] 9. That the appellant, not having shown that he had any *title to the sections 28, 29, 30, 31, 32, and 33, at the time (to wit, the 26th of May, 1836) when he claimed to purchase the property in dispute from the register of the land office, as back concessions to said sections, and not having shown that he acquired any title to said sections until the 15th of June, 1837, his application was rightly rejected by the register of the land office.

10. That the application of the appellant to purchase the back concessions, being indefinite, and not showing the extent of the land which he claimed to purchase, was not such as is required by law, and was rightly rejected by the register.

11. That the right to purchase back concessions is confined to owners of front tracts which do not exceed forty arpens, French measure, in depth, and the appellant not having shown what is the depth of his front tract, has not established his right to any back concessions.

12. That the register of the land office, having decided against the claim of the appellant, his decision is conclusive, so far, at least, as this case is concerned, or, if not conclusive, is correct.

13. That the appellant did not, at the time of his application, make payment or a legal tender for the back concessions claimed by him.

14. That the land in controversy is fit for cultivation, and borders on the Mill Bayou, which is sufficiently large and deep to drain the adjoining country, and render it fit for cultivation, and that said land therefore cannot be claimed as a back concession.

15. That the land in controversy was offered at public sale, in pursuance of a proclamation of the President, on the third Monday of November, 1829, and was therefore not liable to be claimed as a back concession.

Additional point of the appellees:—

16. A part of the land in question, was purchased by the appellees, or those under whom they claim, on the 14th of July, 1834. They will therefore contend, that they had obtained a vested title thereto at the time of the passage of the act of 24th February, 1835, ch. 24 (4 Stat. at L., 753), which could not be divested by the application of the appellant made on the 20th of May, 1836.

See *Thompson* v. *Schlatter*, 13 La., 119, and Act of 15th

June, 1832, ch. 140 (4 Stat. at L., 534); 2 Birchard's Land Laws, 727.

The appellees will cite the following authorities in support of the first fifteen points made by them.

*On the 1st point. 1 Starkie Sland. (2d Am. ed.), [*62 marginal pages 2 and 191.

On the 2d point. *Livingston* v. *Herman*, 9 Mart. (La.), 713; 2 Cond. R., 40; *Thompson* v. *Schlatter*, 13 La., 119; *McDonogh* v. *Millaudon*, 3 How., 693; *U. S.* v. *King*, 3 Id., 773; Code of Practice of La., p. 8, art. 30, p. 90, art. 374, 10, art. 41 and 43, p. 12, art. 44; *Vidal* v. *Duplantier*, 7 La., p. 45 (8 N. S., 105); *Poultney* v. *Cecil*, 8 La., 422; 7 How., 846; Constitution of U. S., art. 3, § 2, and art. 7 of Amendments; Act of Congress of 24th Sept., 1789, ch. 20, § 16 (1 Stat. at L., 82); Act of 26th May, 1824, ch. 181, § 1 (4 Id., 62); *Parsons* v. *Bedford*, 3 Pet., 433, 446; *Livingston* v. *Story*, 9 Id., 632; *Minor* v. *Tillotson*, 2 How., 392; *Phillips* v. *Preston*, 5 Id., 278, 289.

On the 3d point. Act of 24th Sept., 1789, ch. 20, § 12 (1 Stat. at L., 79); Stat. of 13 Ed. I., ch. 31; 1 Saund. Pl. & Ev., 317 and 318; *Mayhew* v. *Soper*, 10 Gill & J. (Md.), 366; *Phillips* v. *Preston*, 5 How., 278, 289.

On the 4th point. Act of 24th Sept., 1789, ch. 20, § 22 (1 Stat. at L., 84); Act of 3d March, 1803, ch. 93, § 2 (2 Id., 244); San Pedro, 2 Wheat., 132; *Ward* v. *Gregory*, 7 Pet., 633; *Parish* v. *Ellis*, 16 Pet., 451.

On the 5th point. *Sims* v. *Hundley*, 6 How., 1; 2 Chit. Gen. Pr., 572; *Mellish* v. *Richardson*, 9 Bing., 126 (23 E. C. L., 276).

On the 6th point. Act of 18th May, 1796, ch. 29, § 2 (1 Stat. at L., 464); Act of 3d March, 1803, ch. 40, § 10 (2 Id., 244); Act of 3d March, 1831, ch. 116, § 5 (4 Id., 493); 1 Greenl. Ev., 2d ed., §§ 501, 502.

On the 7th point. The acts cited under the 6th point, and 1 Greenl. Ev., §§ 440, 441.

On the 8th point. 38th Rule of Court; *Armstrong* v. *Toler*, 11 Wheat., 277; *Pennock* v. *Dialogue*, 2 Pet., 15; *Carver* v. *Astor*, 4 Id., 1; *ex parte Martha Bradstreet*, 4 Id., 102; *Magniac* v. *Thompson*, 7 Id., 348; *Gregg* v. *Lessee of Sayre and Wife*, 8 Id., 244; Act of 24th April, 1820, § 2; Act of 10th May, 1800, § 7.

On the 9th, 10th, and 11th points. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534).

On the 10th point, also, 9 La., 57.

On the 12th point. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534), and act of 24th Feb., 1835, ch. 24 (4 Id.,

753). The appellants will also rely on the decision of the Secretary of the Treasury affirming the decision of the register of the land office in this case, and will cite the
*63] *decision of the Secretary of the Treasury on the 18th of March, 1839, in the case of Robert Ford and others. *Bagnell* v. *Broderick*, 13 Pet., 450.

On the 13th point. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534).

On the 14th point. Act of 3d March, 1811, ch. 46, §§ 5 and 10 (2 Stat. at L., 663, 665); Act of 15th June, 1832, ch. 140 (4 Id., 534); Act of 24th April, 1820, ch. 51, § 3 (3 Id., 566).

On the 15th point. The same acts referred to in the preceding point, and *Thompson* v. *Schlatter*, 13 La., 119.

17th. The appellees will also contend that the petitory action instituted by the appellant in this case cannot be maintained on the equitable title set up by him. *United States* v. *King*, 7 How., 846; S. C., 3 Id., 773.

Authorities cited by the counsel for the appellants, in reply.

The following acts of Congress were cited in reply to the twelfth point in the brief of the appellees, to show that, in those preëmption laws where the decision of the register and receiver has been treated as conclusive, the power of decision has been *expressly given* to the registers and receivers to determine the fact of occupancy and cultivation, without any appeal from their decision.

Act of 31st March, 1808, § 2 (2 Stat. at L., 480). Act of 29th May, 1830 (4 Id., 420), upon which the language of the court in *Wilcox* v. *Jackson*, 13 Pet., 498, was founded. Act of 22d June, 1838 (5 Id., 251), which was a continuation of the last-cited act. Act of 19th June, 1834 (4 Id., 678); also a continuation of the act of 1830. Act of 4th Sept., 1841, § 11 (5 Id., 456).

In the laws granting back preëmptions in Louisiana, there is *no power of determination* given to the register and receiver.

The Circular issued from the treasury department, June 19th, 1801 (2 Birchard's Comp., 226), will be cited to show that the abstract on page 53 and the extract from the Sales book, page 54, of the record, were required by the instructions from the general land office, and properly offered in evidence.

Also, Commissioner's Instructions to Register, New Orleans, &c., 2 Birchard's Comp., 374. Mr. Haywood to Registers and Receivers, 2 Id., 465. Circular to Registers and Receivers, June 15, 1821 (2 Id., 314). And especially the circular

of 7th June, 1820, under the cash system. (Certified copy from general land office.)

*The letter of Land Commissioner to Registers and Receivers in Louisiana, in relation to the Act of 15th June, 1832, will be referred to. 2 Birchard's Comp., 573. [*64

Reference is also made to the last paragraph of the Circular of 5th September, 1821, (2 Birchard's Comp., 356, to show that the certificates of the register and the receiver's receipts were to bear the same numbers, and were to be issued in all instances in regular numerical order.

Mr. Justice CATRON delivered the opinion of the court.

1. On the facts appearing in the record, a motion was made to dismiss the suit for want of jurisdiction, because it was brought here by appeal, which brings before the revising court all the evidence; whereas, had a writ of error been brought, such parts of the evidence only could have been considered as were presented by bills of exception. This motion has been held up for a length of time, and is now considered with the merits, and the inquiry standing in advance of the merits is, whether the appeal shall be dismissed. The suit was commenced in a state District Court according to a prescribed form of practice in Louisiana, and removed by the defendant from the state court to the Circuit Court of the United States, where the same mode of pleading and practice was necessarily pursued that would have been, had the cause continued in the state court, and been there adjudged; it therefore comes here as an anomalous case.

The proceeding was commenced by Lapice and Whittlesey; they asked to have a cloud removed from their title, which they alleged was embarrassed by a pretended and illegal claim of Surgett to a back concession, of anterior date to their title, and for the same land. Surgett came in, and set forth his claim; it was purely equitable in its character, in the sense of the term "equity," as denominated in the Constitution and acts of Congress; this claim Surgett, (by a petition in his answer,) by way of reconvention, asked to have enforced against Lapice and Whittlesey. He thereby became complainant. The character of Lapice and Whittlesey's title is not in controversy; both sides admit that it is a legal and valid title on its face, and as against the United States indisputable; but Surgett sets up a right of preference to entry of the same land at the time when the entries were made under which Lapice and Whittlesey claim, and the question is, how was the Circuit Court to deal with the matter when an appeal or writ of error was demanded, as the one or the other the

judge was compelled to allow; he was called on for a decree
*65] by *each party, as on bill and cross-bill in an ordinary chancery proceeding, and did decree that Lapice and Whittlesey should be quieted in their title to, and possession of, the land in controversy, and that Surgett should be for ever enjoined from setting up any claim or pretension to the same; and so he might have decreed the other way; and although, by the laws of Louisiana, a jury might have been called in a state court to aid in ascertaining the facts, yet as none was required by the parties in the Circuit Court, and the cause was heard by the court alone, and a decree rendered, we think the mere fact that a state court might employ a jury does not affect the character of the proceedings actually had in the Circuit Court. In other states, juries are frequently employed by the chancellors when hearing causes, as in Kentucky, where it is required by a statute; yet if an ordinary suit in equity was removed from a state court to the Circuit Court (United States), in a district where, by the state statutes, a jury was required to find contested facts; still the Circuit Court would not be required to resort to a jury, nor could it do so. And we take occasion here to say, that, had the Circuit Court submitted the cause to a jury in this instance, we should have deemed it improper, although demanded by either side. Our opinion, therefore, is, that there was litigated in the Circuit Court a mere equitable title, in a form impressed on the proceeding in a state court, and a decree pronounced as a court of equity would have done in a regular course of proceeding in chancery; and that the merits of the cause could only be reviewed on appeal.

But as several cases have been dismissed from this court because they were brought here by appeal instead of a writ of error, it is insisted that this rests on the same grounds of those that have been dismissed, and the case of the *United States* v. *King*, (3 and 7 How., 773 and 844) has been much relied on to show that this cause cannot be brought here by appeal. But that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had claimed an

equitable title in that case, it would have been no defence, *because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. [*66
The whole proceedings were necessarily proceedings at law, and could therefore be removed by writ of error only, and not by appeal. And substantially of the same character were all the cases relied on by counsel to dismiss this appeal; none of them resembled the case before us in any material degree, —certainly not enough to govern it,—and the jurisdiction is consequently sustained.

2. We come in the next place to discuss the merits; and here some general considerations present themselves. On the first settlement of Lower Louisiana, the nature of the country imposed on the governments who successively held it a peculiar policy in granting land to individual proprietors; the Mississippi River overflowed its banks annually, and to overcome this impediment to cultivation, and to reclaim the back lands, heavy embankments had to be thrown up on the sides of the river, so as to keep the water at flood-tide within the channel; and these embankments had to be connected and continuous for a great distance, otherwise the whole country would be submerged; and the king's domain was resorted to as a means of securing the country from overflow, and of reclaiming it to a great extent; and individual proprietors were relied on to do that which, in other countries at all similarly situated, was a great national work; and it is matter of surprise how much the policy accomplished with such feeble and questionable means. The grants were not large, and fronted on the river only to the extent of from two to eight arpens as a general rule, and almost uniformly extended forty arpens back; to these front grants the Spanish government reserved the back lands, to another depth of forty arpens; and although few if any grants were made of back lands in favor of front proprietors, still they were never granted by the Spanish government to any other proprietor, but used for the purpose of obtaining fuel and for pasturage by the front owners, so that, for all practical purposes, they were the beneficial proprietors;—subject to the policy of levees, and of guarded protection to front owners. We took possession of Lower Louisiana in 1804. In 1805, commissioners were appointed, according to an act of Congress, to report on the French and Spanish claims in that section of country, and by the act of April 21st, 1806, it was made a part of their duty "to inquire into the nature and extent of the claims which may arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made," previous to

the transfer of *government, "and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress, at their next ensuing session. And the lands which may be embraced by such report shall not be otherwise disposed of, until a decision of Congress shall have been had thereon."

The commissioners were engaged nearly six years in the various and complicated duties imposed on them, and then reported, that, by the laws and usages of the Spanish government, no front proprietor by his own act could acquire a right to land farther back than the ordinary depth of forty arpens, and although that government invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore they rejected claims for the second depth, as not having passed as private property to the front proprietor under the stipulations of the treaty by which Louisiana was acquired. As by the Spanish policy and usages the front owner had reserved to him a preference to become the purchaser of the second depth, Congress by the fifth section of the act of March 3, 1811, provided that every person who "owns a tract of land bordering on any river, creek, bayou, or water-course," in the territory of Orleans, "and not exceeding in depth forty arpens, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpens, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions, as are, or may be, provided by law for the other public lands in the said territory." And inasmuch as the country had not to any material extent been prepared for sale in the ordinary mode by public surveys, it was made the duty of the principal deputy surveyor of each of the two districts in the Orleans territory, to cause to be surveyed the preference rights claimed under the act; and where, by reason of bends in the river, bayou, creek, or water-course on which a front tract bordered, and where there were similarly situated tracts, so that each claimant could not obtain a quantity equal to his front grant, it was made the duty of the surveyor to divide the vacant land between the several claimants in such manner as to him might appear most equitable. To gratify preëmptions claims secured by the act, no township surveys in advance of an entry were contemplated, as they could not be regarded did they exist; and as the act was limited to three years' duration, *little of the country was likely to be sur

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veyed before the time for making entries expired. By the seventh section of the act of May 11, 1820, the fifth section of the act of March 3, 1811, was renewed, and continued in force until May 11, 1822; and by the act of June 15, 1832, the act of 1811 was again renewed for three years, with some slight amendments; and by the act of February 24, 1835, the time was further extended to June 15, 1836.

The township where the land in dispute is situated was offered for sale, according to the President's proclamation, in November, 1829; and as Surgett first offered to make his entry in 1836, it is insisted that, after the lands in the township were offered at public sale, no entry founded on a preference right was allowable at the land office; and such was the opinion of the court below, and is one of the reasons assigned for rejecting Surgett's claim. The act of 1832 provides, that the claimant shall deliver his notice of claim to the register of the proper land office, stating the extent and situation of the tract he wishes to purchase, and shall make payment; but it has this proviso,—that all notices of claim shall be entered, and the money be paid thereon, at least three weeks before such period as may be designated by the proclamation of the President for the sale of the public lands in the township where such claim may be situated; and all claims not so entered shall be liable to be sold as other public lands. The proviso was an exception to a general law giving a right of entry; it was prospective, having reference to future public sales, and not to lands that had been previously offered, and remained unsold; Surgett could not comply with the condition, nor had it any application to such a case as his claim presents.

The manifest object of Congress was to disembarrass public sales by barring preference rights that would be a cloud on the title of lands thus offered.

The foregoing construction being the one adopted by the departments of public lands soon after the act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the President of the United States.

The court below rejected Surgett's claim to enter the back land on another ground. The acts of Congress securing the preference contain an exception,—"that the right of pre-emption shall not extend so far in depth as to include lands fit for *cultivation bordering on another river, creek, [*69

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bayou, or water-course." And the question is, To what description of water-course did the legislature refer? The enacting clause provides that every person who owns a tract of land "bordering" on any river, creek, bayou, or water-course, shall have the right of pre-emption to the back land. The act of 1811 has been construed, in the department of public lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word "border," both in the enacting clause and in the exception, meant to front on a navigable water-course; that is to say, such waters as are described in the third section of the act of February 20th, 1811, by which Louisiana was authorized to form a state constitution and government, by which act the River Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and for ever free, as well to the inhabitants of the said state, as to other citizens of the United States.

Similar provisions as respects navigable waters are common to other states where there are public lands, and the practice has been uniform to survey and sell the lands "bordering" on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the department of lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and, on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold. The registers and receivers were bound by recorded returns of the surveyors, (as a concluded fact,) to sell according to the surveys, nor could the register and receiver be allowed to hear evidence contradicting the surveys, as to whether the waters included by them were or were not navigable. Subject to this state of the law, Surgett offered (20th May, 1836) to enter the back land to front numbers 28, 29, 30, 31, 32, and 33; making $989\frac{9}{100}$ acres, which lots adjoin, and were included in one patent, together with two other lots, Nos. 34 and 35, also adjoining on the south, to which he did not claim any back land; that is to say, he claimed $989\frac{9}{100}$ acres as a back concession to a patent of $1{,}308\frac{7}{100}$ acres, so as to extend the six lots first named; and if neither the bayou, nor the existence of previous entries, stood in the way, he had a clear right to enter. Sparrow and Whittlesey's entries were in part fractions, not, however, produced by having bordered on a stream, but because they adjoined front lots on the Mississippi

River not surveyed *in squares, but according to the second section of the act of March 3, 1811.

In surveying township number five, the Mill Bayou was entirely disregarded, and the surveys of sections and quarter-sections were made in rectangular figures, and laid down and sold across that water, the channel of which was granted in part to Sparrow and Whittlesey, and in part to others. According to the rules, therefore, by which the register and receiver were governed, they had no right to refuse Surgett's entry for the reason that the land bordered on another navigable stream.

How far the powers of the court below extended to contradict the public surveys and records of the land office, we refrain from discussing in this case, as the parties on the one side and on the other affirmatively appealed to a court of justice to decide the fact, whether the bayou was of the description contemplated by the acts of Congress, and a water-course on which lands could front. It is between two and three miles long, and drains swamps, and a shallow pond, or rather lagoon; its greatest width is from seventy to eighty feet from bank to bank, and the channel in part is some fifteen feet deep from the top of its banks; but at no time of the year has it any claims to be a navigable stream, being nearly dry for a greater portion of the year, having no running water, or any water in it, except stagnant pools; it is an ordinary drain of the Mississippi swamp, and of shallow ponds. Near its mouth, at the Mississippi River, there is a levee,—and so there is one near to the pond, at its farther end from the river; both levees being on lands granted to Surgett. Before the lower levee was constructed, there had been a mill for grinding erected on the bayou, which gave it the name it bears; the flow of water was then from the Mississippi River through this outlet to the swamp, in times when the river was high. But it was never fit for any purpose, as a channel through which commerce could be carried on by water. The ground of defence must therefore fail, that the lands entered by Sparrow and Whittlesey bordered on a bayou, and were within the exception of the act of 1832.

The Circuit Court also held that the back land was proved to be fit for cultivation, and being so, was excepted from the enacting clause giving a preference of entry. The exception is, "that the right of pre-emption shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course." There is no break in the sentence, and we hold that Congress clearly intended to make a single exception, whereas the court below

divided the *clause cited into two exceptions; excluding a preference right, first, if a bayou, &c., intervened; and, secondly, if the land was fit for cultivation, whether there was a navigable water in its rear, or not.

We only deem it necessary on this head to say, that, from 1811 to this time, the general land office has construed the exception as being single, requiring that the back land should border on another navigable stream; and also, that it should be fit for cultivation, before the preference of entry could be denied; and we take occasion here to declare, that, unless this uniform construction for so long a time by the land department was most manifestly wrong, we should not feel ourselves at liberty to disturb it, as, by doing so, titles might be shaken, and confusion produced.

For the reasons stated, it is ordered that the decree of the Circuit Court be reversed, and that the cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court is directed to cause a survey to be made under its supervision, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a survey legally made of said back lands; and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre, for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court, which have already accrued, and such as may hereafter accrue, shall be adjudged by the court

*72] below, on a future hearing, as law and justice may require. And it is further ordered, that in *all mat

ters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall proceed according to the law and equity of the various matters presented, without being restrained by this decree.

Order.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the District of Louisiana, and was argued by counsel. On consideration whereof, it is ordered, that the decree of the Circuit Court be reversed, and that this cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court shall cause a survey to be made under its direction, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a survey legally made of said back lands, and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum, from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court which have already accrued, and such as may hereafter accrue, shall be adjudged by the court below, on a future hearing, as law and justice may require. And it is further ordered, that in all matters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall proceed according to the law and equity of the various matters presented, without being restrained by this decree.