Statement of the case.

NISWANGER v. SAUNDERS.

1. The State of Virginia issued, in 1784, a warrant for a soldier of the Continental establishment, which was entered in her own borders south of the Ohio. The land having been surveyed, a patent issued; everything proceeding in ordinary form. But a part of the tract surveyed having been previously granted away by the State, never came into the soldier's possession or control, nor in any way benefited him—*Held*, in a case where the new entry and survey were free from objection on their face, that the warrants, which called for no specific tracts anywhere, were not so far "satisfied" or "merged" as that a new and effective entry and survey might not be afterwards made in another district open to the soldier, to wit, in the Virginia Military District in Ohio, and which would be protected against any subsequent location by the proviso of the act of March 2, 1807, providing that no location should be made on any tracts of the district which had been previously surveyed.
2. Where a survey of land, under the military rights referred to, is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, a second enterer is met by the statute, and cannot obtrude on the existing survey by a second location. *Saunders* v. *Niswanger* (11 Ohio State, 298), overruled.

SAUNDERS filed a bill in chancery, in the State District Court of Madison County, Ohio, to quiet the title to a tract of land in that commonwealth, in what is called the Virginia Military District, a region north and west of the Ohio, and which, by the act of cession of that territory to the United States and several acts of Congress, was reserved for the Virginia troops upon the Continental establishment of our Revolutionary war. The case was thus: In 1784, in the Book of Entries, kept by the proper officer in the State of Virginia, an entry, No. 70, was made in the name of David Ross & Co., on several military warrants, of one thousand acres of land on the Ohio River, in that part of Virginia then called the Green River Country, and now making Kentucky. The entry was surveyed, the survey returned and recorded; and on the 15th June, 1786, *a patent for one thousand acres of land was issued* by the Governor of Virginia to Ross accordingly; *the warrants themselves having apparently been returned into the land office in Virginia.* The warrants had described no specific tracts, but were addressed to the surveyor, authorizing him

Statement of the case.

"to survey and lay off, in one or more surveys," the quantity "set apart for officers and soldiers of the Commonwealth of Virginia."

It was afterwards ascertained that, in laying off and surveying this one thousand acres, a portion of the land, to wit, six hundred and forty acres of it, had been laid off within the bounds of a well-known body of lands that had been previously granted to Richard Henderson & Co.; and this being the older and better title, Ross *lost, or rather never acquired so much of his promised land;* that is to say, six hundred and forty acres. This fact being ascertained, a memorandum was subsequently made in the Book of Entries, opposite to entry No. 70,

"640 withdrawn, and entered in 197."

In 1790, Congress passed an act by which the soldiers of the Virginia line, on the Continental establishment, were authorized to obtain titles, on warrants issued to them, in what is now the State of *Ohio;* that is to say, in that region northwest of the Ohio River, between the rivers Little Miami and Scioto; and, in 1810, an entry was made in the office of the principal surveyor of the Virginia Military District in *Ohio* of six hundred and forty acres (the exact amount of Ross's patent covered by Henderson's prior grant), upon the *same warrants* upon which the patent issued in Virginia. On this entry a survey was made in 1817, which was returned and recorded; the Surveyor-General of the Virginia Military District within the State of Ohio certifying that the survey was founded on such and such warrants, which he specified by number and warrantee name, and adding, "That said warrants were entered originally in a thousand acre entry, No. 70, in the State of Kentucky, &c., and patented to said David Ross, by the State of Virginia, on the 15th of June, 1786; that said survey No. 70, *i. e.*, six hundred and forty acres of it, is *withdrawn*, by reason of its having been lost by interference with Henderson's grant, and entered and surveyed as above; that *said warrants were never before satisfied;* and that said patent on which this survey is founded is in my possession not satisfied." Thus things remained from 1816

till 1837, when a certain Samuel Saunders, the complainant below, entered a portion, to wit, four hundred and twenty-eight acres of this same land, which had been surveyed to Ross; the entry being surveyed on the day it was made. On the 20th November, 1838, a patent was issued by the United States to this *Saunders*, complainant as above stated, and on the same day another patent to Niswanger, defendant below, in whom had become vested the entry and survey of *Ross*. This patent to Niswanger, following the surveyor's certificate already mentioned, stated the number of each one of the warrants; "the same warrants,"—it went on to recite—"having been formerly located in the District of Kentucky, and patented by the Commonwealth of Virginia to the said David Ross, which has since been lost by interference with a prior claim, to wit, Henderson's grant, and the said warrants *withdrawn* and *re*located in the Virginia Military District of Ohio, upon *which* the said survey is founded."

A principal defence relied on to the bill below, was that even admitting some irregularity here, in the entry and survey of Ross of 1810, &c., yet as the case was one of great equity, and as an entry and survey had actually been made, the land thus entered and surveyed for Ross was protected from any subsequent entry and survey by others, in virtue of the proviso of an act of Congress passed March 2d, 1807, that Saunders's entry was accordingly void. This proviso enacted, "that no locations within the above-mentioned tract [the tract in Ohio] shall, after the passage of this act, be made on tracts of land for which patents had previously issued, *or which had been previously surveyed, and any patent which may nevertheless be obtained for land located, contrary to the provisions of this section, shall be considered as null and void.*" The proviso originally for three years had been subsequently extended.

The case being taken from the court where it originated to the Supreme Court of Ohio, that court, in *Saunders* v. *Niswanger*,* following the reasoning and argument in a case

* 11 Ohio State, 298.

previously decided by it, *Nisewanger* v. *Wallace*,* held that the warrants on which the entry of 1810, in Ohio, was made had been "merged and satisfied" in the previous patent for the 1000 acres in Virginia, and that this being so, they were nullities. The act of the surveyor, the court thought, did not improve the matter. It was a case of want of power in the officer. His authority was limited to a particular subject-matter. He could dispose of lands only upon specified evidence, to wit, a military warrant. Here he had done it on a "patent." The return or renewal of a warrant once surrendered was within the power of the Virginia legislature alone. The surveyor had no power to return or to renew, however equitable a claim for such return or renewal might be. By whom or by what authority the memorandum in the Virginia Entry-book, "640 *withdrawn*, and entered in 197," was made, did not appear. It was not certified as the official act of any officer in Virginia. If made by the surveyor in Ohio, the question of his power was to be settled. Had the entry of 1810 and the subsequent survey been a case of "irregularity" only, or even of "invalidity," the act of Congress of 1807 might cure it; but it was the case of a proceeding wholly void, a proceeding not based on a subsisting warrant at all, and therefore past the healing power of the statute. The court accordingly decreed that all that was done on Ross's warrants in 1810 and afterwards was a nullity, and that the land should go to Saunders or his heirs. On this part of the decision, which held the act of Congress of 1807 no protection, error was taken to this court, under the 25th section of the Judiciary Act of 1789,† which provides that a final judgment or decree in any suit in the highest court of law or equity of a State, where is drawn in question the construction of any clause of a *statute* of the United States, and the decision is *against* the title, right, &c., specially set up or claimed by either party under such statute, may be re-examined, &c., in *this* court.

The question in this court was, therefore,—as one question

* 16 Ohio, 557.

† 1 Stat. at Large, 85.

had been in the Supreme Court of Ohio—whether the entry of 1810 and the survey on it was or was not, under the facts of this case and the operation of the proviso of the act of 1807, to be treated as a nullity.

Mr. Stanberry, by brief, for the appellant: If this case were to be ruled by Ohio decisions and Ohio laws, we should have no standing in this court. But the case arises on a statute of the United States, and the decision below having been against the right set up under it, this court has final authority in the matter. The question rests on precedents here. In *Jackson* v. *Clark*,* an entry was set up by the defendants, on the land in controversy, made July 19, 1796. The plaintiffs attempted to overcome this entry, by showing that two prior entries had been made upon the same warrants, both of which had been patented. There was no evidence of any withdrawal of the two prior entries, or of any surrender or cancellation of the patents. So that the case presented the question of a re-entry on a satisfied warrant, satisfied by prior entries carried into grant without withdrawal or cancellation. The court sanctions the last entry, and holds, that however irregular or unauthorized it may have been, yet the land covered by it was effectually withdrawn from entry by any other locator. Our entry of 1810 stands upon a better foundation than the entry there held valid, for it appears that the 640 acres were "withdrawn" from the Kentucky entry; and that the 640 acres so withdrawn had been lost by interference with a prior claim.

The court below decided the case against us, on the ground that our entry of 1810 and the subsequent survey were nullities, and therefore not within the savings of the proviso. They are nullities, say the court, because warrants under which they were made, were satisfied by the original entry of 1784, and merged in the patent granted on that entry. Now, the first answer to this is, that to the extent of the 640 acres in Henderson's Grant, there was no satisfaction, and

* 1 Peters, 628.

Argument in support of the survey.

no merger. The matter may be plainly put thus: The State of Virginia granted to certain soldiers 1000 acres on warrants, to be satisfied by entry or location upon certain lands which the State then owned on the southwest side of the Ohio River. The warrants did not describe or grant any specific tracts. It happened that in laying off and surveying this 1000 acres, 640 acres were laid off within the bounds of a well-known tract of country called *Henderson's Grant.* Not an acre of land within that grant belonged to Virginia in 1784. It had been, prior to that date, granted by Virginia to Henderson. Besides this, by the very act of Virginia, passed in May, 1799, authorizing entries under military warrants, it was provided, that "no entry or location of land shall be admitted . . . . on the lands granted by law to Richard Henderson & Company;" the lands first taken.

What then was the effect of the entry of this 640 acres within Henderson's Grant? This court* has characterized such an entry as *void.* The language of Mr. Justice Catron, delivering the opinion in that case, is as follows: "If Clark's entry was made, however, on lands reserved from location by the act of 1799, then it is void, because the act did not open the land office for such purpose, nor extend to the excepted lands." In so far, then, as the entry of 1784 covered land in Henderson's Grant, it did not satisfy the warrants. It did not *quoad* the land in Henderson's Grant, pay the debt which Virginia had assumed to pay to her soldiers, for Virginia could only pay her debt or bounty from her own lands, and not out of lands belonging to others. Neither the entry, the survey, nor the patent of this 640 acres gave to Ross any title. The land not belonging to Virginia, could not be touched by the warrants, nor be conveyed or granted by patent. The whole thing was void from beginning to end, and the original right to the 640 acres remained untouched by satisfaction or merger.

In this state of things, upon finding that 640 acres of the entry was in Henderson's Grant, Ross was certainly entitled

* Porterfield *v.* Clark, 2 Howard, 76.

to relief in some form. The case was the case of a contract by vendor to convey, and a surrender of the contract upon a conveyance made and received in good faith, but covering land not intended to be conveyed and belonging to another. Under such a mistake, the contract not having been satisfied or merged in the conveyance—certainly not in a court of equity—our right was to have 640 acres of some other land belonging to Virginia and subject to entry. How then were we to be relieved? There was some course fit to be pursued, and what course more fit than the one that was pursued. Ross appeared before the principal surveyor of the military district, and made proof to the satisfaction of that officer, that 640 acres of the entry of 1784, fell within Henderson's Grant. Thereupon the surveyor allowed him to withdraw or amend the entry of 1784 to the extent of the 640 acres, and to re-enter the same quantity on vacant lands subject to entry in the State of Ohio. This was our entry of 1810, which is called a nullity. It is too late to question the verity of the memorandum that the former entry was "withdrawn." We must take it as established, that the entry of 1810 was made upon warrants never before satisfied.

It has been shown already by the case of *Porterfield* v. *Clark*, that the entry on Henderson, which is the foundation of all this satisfaction and merger, was itself a nullity. When we begin with a void act, it is of no moment how much is done in the way of mere confirmation. The cases in this court go to that extent. In *Stoddard* v. *Chambers*,* it is said: "The issuing of a patent is a ministerial act which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual." At the same time we may concede that the patent was good as to the 360 acres outside of Henderson; for a patent may be good in part and void in part.†

2. The proviso in the act of 1807, was intended to have a

* 2 Howard, 284. See also on this point, Polk's Lessee *v.* Wendell, 9 Cranch, 99; Patterson *v.* Winn, 11 Wheaton, 380.

† Patterson *v.* Jenks, 2 Peters, 216, 235.

curative operation; for no legislation was necessary to secure a valid entry and survey from a subsequent location. It was, therefore, intended to protect and save such entries and surveys as might otherwise be lost. But the range of the proviso was matter of doubt, and whether it should protect *all* surveys, or only such as had some equitable foundation, was soon made a question. Five leading cases in this court have settled all these doubts and fixed the construction. The case first in order of time, was *Taylor* v. *Meyers.** In that case the first survey had been withdrawn before the second location was made. The court held that, after the withdrawal, there was *no* survey upon which the proviso could operate. *Jackson* v. *Clark*,† already noticed, was next in time. In this case an entry and survey had been made on warrants which had been satisfied by prior location, still unwithdrawn and subsisting. The court held that the survey was protected by the proviso, because, although the warrants were satisfied by the first location, yet it was in the power of the locator to withdraw them at any time from the first location, and so make good the second location. Marshall, C. J., says: "If it be conceded that this proviso was not intended for the protection of surveys which were, in themselves, absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity." Again, "A survey made by the proper officer, professing to be made on real warrants, bearing on its face every mark of regularity and validity, presented a barrier to the approach of the locator, which he was not permitted to pass, and which he was not at liberty to examine." In our case, the entry and survey of 1810, were made by the proper officer, professedly on real warrants, and with every mark of regularity. If the entry and survey in *Jackson* v. *Clark* fell within the protection of the proviso, how can ours be excluded? *Lindsey* v. *Miller*‡ comes next. In this case, indeed, it was held that

* 7 Wheaton, 23. † 1 Peters, 636. ‡ 6 Id., 666.

the proviso was not protection for a survey made under a State line warrant. But our entry and survey were not made under State line warrants, nor without semblance of authority; and Ross was guilty of no fraud and was in the lawful pursuit of a valid title. In *Galloway* v. *Finley*,* the next case, the court gave a larger operation to the proviso than had been stated in *Lindsay* v. *Miller*. Mr. Justice Catron, delivering the opinion, says: "It is insisted for the appellant that the section had reference to imperfect and not void titles. The legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent been issued, the government would not have had any title remaining, and a second grant would have been void of course. Something more, undoubtedly, was intended than the protection of defective, yet valid, surveys and patents. This is not denied, but the argument insists only irregularities were intended to be covered. . . . . The statute is general, including by name all grants, not distinguishing between void and valid, and the plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none." The learned judge then refers to *Lindsay* v. *Miller*, and adds, in reference to that case: "But had the claimant been entitled to the satisfaction of his warrant in the military district, in common with others for whom the government held as trustees, the case might have been very different, even had the entry and survey been invalid." *McArthur* v. *Dun*† follows, and affixes the enlarged operation of the proviso as declared in *Galloway* v. *Finley*, and says, an entry and survey in the name of a deceased person, is within the scope of the proviso, notwithstanding such an entry and survey had been repeatedly held to be void.

It was in reference to these decisions that the Supreme Court of Ohio held, in *Stubblefield* v. *Boggs*,‡ "that by the proviso to the act of 1807, re-enacted from time to time, it has withheld from location all lands previously patented or sur-

* 12 Peters, 298. † 7 Howard, 264. ‡ 2 Ohio State Reports, 219.

veyed, whether the entries and surveys are valid or void, and has declared that any patent that may be obtained in virtue of a subsequent location of lands covered by a subsisting survey or patent, shall be null and void. Hence, it is of no consequence, whether the previous entry and survey have any validity or not. Admit that they are void, and that consequently the title both legal and equitable remains in the government, yet the subsequent location is a nullity, because Congress has so declared it."

Mr. Ewing, by brief, contra: The patent recites that the same warrants upon which Ross's entry of 1810 and survey were made, had been previously located in the District of Kentucky, and patented by the Commonwealth of Virginia to said Ross, in trust, &c., and lost by interference with a prior grant to Henderson, and withdrawn and relocated upon the lands in question. The fact, therefore, that the warrants under which the entry and survey were made, had been previously located, surveyed, and patented in Kentucky, is not open to controversy, and the question turns upon the legal effect of the fact. This we claim was to render the warrants *functi officio*, and the entry and survey in question made under color of them, a nullity. But it is a part of the recital of the patent that the entry in Kentucky was *withdrawn*. This recital is legally untrue, being legally impossible after the entry was carried into grant, in such way as to restore vitality to the warrants and admit of their being afterwards located and patented in the Virginia military district, in Ohio. The State of Virginia has ever retained and exercised her sovereignty over the subject of entry, survey, and patent of lands *south* of the Ohio, in satisfaction of warrants for military services, and the warrants in question, according to the laws of that State, were satisfied and withdrawn from the existing claims against her. Virginia has passed no law reviving and setting up warrants in cases where the land patented is lost by interference, or from any other cause. It has never been held, in the courts of that State, that the holder could withdraw and relocate them elsewhere *after sur-*

vey and *before patent.* No one would contend that in that State there could be a revival of the warrants *after patent*, and a consequent relocation. In Kentucky it has been held that there cannot be a withdrawal and relocation *after* survey, even *before* patent.* The language of Chief Justice Marshall in one case,† is striking. He says, "The military warrants to which these questions relate, originate in the land law of Virginia. The question whether a warrant completely executed *by survey* can be withdrawn and so revived by the withdrawal as to be located in another place, has never, so far as I know, been decided in the courts of that State. In Kentucky, where the same law governs, it has been determined that a warrant once carried into survey, with the consent of the owner, cannot be re-entered and surveyed in another place. In Ohio, it has not been understood that the question has been decided."

Do the subsequent acts of Congress confer such right as is claimed? The first that throws any light on this subject is the recital in the first section of the act of August 10, 1790,‡ which is as follows:

"And whereas, the agents for such of the troops of the State of Virginia, who served on the Continental establishment in the army of the United States during the late war, have reported to the executive of said State, that there is not a sufficiency of good land on the southeasterly side of the Ohio River, according to the act of cession from the said State to the United States, and within the limits assigned by the laws of said State, to satisfy the troops for the bounty lands due them in conformity to the said laws; to the intent, therefore, that the *difference* between what has already been *located* for said troops, on the southeasterly side of said river, *and the aggregate of what is due* to the whole of said troops, may be located on the northwesterly side of said river, and between the Scioto and Little Miami Rivers, and stipulated by the said State," &c.

* Taylor *v.* Myers, 7 Wheaton, 23; Withers *v.* Tyler, 2 Marshall, 173; Taylor *v.* Alexander, 3 Id., 501.

† Taylor *v.* Myers, 7 Wheaton, 24.

‡ 1 Stat. at Large, 183.

This recital shows the intent to provide for warrants which had *not* been *located*, not for warrants which had been *located*, *surveyed*, and *patented*. It excludes warrants which have been *located*, leaving the lands in Virginia and the laws of Virginia to provide for and take care of those warrants when lost by interference.

Next is the act of June 9, 1794,* which provides that the person entitled to bounty lands in Ohio, "shall, on *producing the warrant*, or a *certified copy thereof*, *and a certificate under the seal of the office where the said warrants are legally kept*, that the same, or a part thereof, remains *unsatisfied*, and on producing the survey, agreeably to the laws of Virginia, for the tract or tracts to which he or they may be entitled, as aforesaid, to the Secretary of the Department of War, such officer and soldier, his or their heirs or assigns, shall be entitled to and receive a patent for the same," &c. This act excludes all warrants which have been merged in patents.

This party did not produce the warrant. He could not have done it, for the warrants were merged in a patent. Neither did he produce a certified copy, and a certificate under the seal of the office where the warrants were legally kept, that the same, or a part thereof, remained *unsatisfied*. Nor could he have done it. These warrants were legally kept in the office of the Register of Lands in Virginia, and were filed, we know, as *satisfied warrants*.

Next comes an act of May 13, 1800,† the first section of which provides for the issuing of patents on surveys which have been made "*on warrants*" issued from military service; not *on patents* heretofore issued in Virginia on such warrants. The idea carried through the other acts cited is maintained in this. The patent of the United States issues on a survey made upon an *unsatisfied warrant*. The second section provides for interfering claims within the district:

"SEC. 2. That in every case of interfering claims, under military warrants, to lands within the territory *so reserved by the*

* 1 Stat. at Large, 394. † 2 Ib., 80.

State of Virginia, when either party to such claims shall lose, or be evicted from the land, every such party shall have a right, and hereby is authorized, to withdraw his, her, or their warrant, respectively, to the amount of said loss or eviction, and to enter, survey, and patent the same on any vacant land *within the bounds* aforesaid, and in the same manner as other warrants may be entered, surveyed, and patented."

It is limited in its terms to interfering claims under military warrants to "*lands within the territory so reserved;*" not to lands out of said territory. A conflict out of the territory did not fall within the cognizance of the United States; they had nothing to do with it; no jurisdiction over it; no means of ascertaining it. It was a matter for the States in which it occurred to settle in their own way. Consequently Congress has made no provision for it, but has provided for lands within the district for which they held the trust. The right to relocate where the land has been lost by interference is of statutory origin. This statute does not authorize the re-entry where the interference occurred *out of the district.* Such re-entry, therefore, is not *sustained*, but, on the contrary, is impliedly *forbidden* by this statute. You *may* re-enter it if your land is lost by interference *in the district.* You may *not* if lost out of it.

Is it not thus shown that the warrants upon which the Ross entry of 1810, and the subsequent survey and patent were founded were, at the time the entry was made, *functi officio;* satisfied in law and surrendered to the State of Virginia by a previous entry and survey fully carried into grant in the Kentucky district? In legal effect, were they not as effectually satisfied as they would have been if no interference with Henderson's Grant had ever happened, and the lands located in Kentucky remained in the possession and enjoyment of the assignees of Ross?

If this is so, the remaining question is: Was this survey of 1810, and the subsequent survey, predicated—as we assume it was—upon defunct and satisfied warrants, a survey within the meaning of the proviso of the act of 1807, and

one in virtue of which the lands included in it were withdrawn from the unappropriated residue, subject to entry in the district, and the entry and survey of the same lands in behalf of Saunders, rendered void? This question is so fully considered, on both principle and authority, in the opinion of the Supreme Court of the State of Ohio, in the present case, reported among the decisions of 1860, that we deem it unnecessary to do more than to request that reference be had to the Reports.

Mr. Justice CATRON delivered the opinion of the court; and after stating facts, and referring to Ross's entry of 1810, proceeded thus:

This entry was surveyed and the survey recorded in 1817. The entry and survey are regular, and free from objection on their face; they recite the warrants, and the boundaries of the survey are distinctly defined. It is not indicated on the records of the surveyor that the warrants had been merged in the first entry and the Virginia patents, nor that the warrants were absent when the entry and survey were made. In this condition Ross's title stood till 1837, when Samuel Saunders entered four hundred and twenty-eight acres of the land surveyed for Ross. Saunders's entry was surveyed on the same day it was made. On the 20th day of November, 1838, a patent was issued by the United States to Saunders, and on the same day a patent issued to Niswanger, the assignee of Ross's entry and survey. This patent recites the fact that a previous patent had been issued by the Commonwealth of Virginia, founded on warrants, in part, that were withdrawn because of the loss by the interference with Henderson's Grant in the Kentucky district.

A principal defence relied on by the respondents was, that the act of Congress of 1807 withheld the land surveyed for Ross from location by Saunders; that his entry was void, and that the bill should be dismissed for this reason. But the Supreme Court of Ohio held that the act of 1807 was no protection to Ross's survey, and decreed that the land should be conveyed to Saunders's heirs; and on this part of the case

an appeal was prosecuted to this court, under the twenty-fifth section of the Judiciary Act.

The record shows that the act of Congress was drawn in question and relied on as a defence, and that the defence was rejected by the State court.

The act of 1807, which we are called on to construe and apply to the facts coming within our cognizance, gives the further time of three years for making locations of lands in the military district of Ohio, and five years for the return of surveys and warrants to the office of the War Department; and then provides, "That no locations, as aforesaid, within the above-mentioned tract, shall, after the passage of this act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

By subsequent acts of Congress, further time was given to return surveys, so that Ross's survey is not open to objection for not having been made and recorded in time, nor was any objection made in the court below on this ground; but the decree proceeded on the assumption that the warrants on which the entry and survey of Ross purported to be founded, were merged in the previous patent of one thousand acres; and that there were no valid warrants to sustain the survey, which was made without authority, and void; and therefore could claim no protection by virtue of the act of 1807.

Ross's entry and survey were made by the proper officer and in the proper office, purporting to be made on real warrants, and bearing on their face every mark of regularity.

When a survey is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, then a second enterer cannot be heard to adduce such proof, because he is met by the statute, and not allowed to obtrude on the existing survey by a second location. He can obtain no interest in the land to give him a standing in court. The government can justly say to him, "You are a stranger and must stand aside; this

land is withdrawn from location; you cannot be heard." If the grantee, Ross, lost part of his land by Henderson's grant, and his warrants were merged by this misfortune, equity required that Congress should declare his survey to be valid by a curative act. This is the principle governing the decisions in the cases of *Galloway* v. *Finley* (12 Peters, 294), and *McArthur* v. *Dun* (7 Howard, 264), where the entries, surveys, and patents had been made to dead men, and were void of course for want of a grantee; yet this court held that the act of 1807 applied, and that a second entry on the first survey was void. In the case of *Stubblefield* v. *Boggs* (2 Ohio State Reports, 216), the same doctrine is maintained.

We hold that the survey of Ross was protected, and that Saunders's entry, survey, and patent were void, and order that the judgment of the Supreme Court of Ohio be reversed, and that the cause be remanded to that court, to be proceeded with in conformity to this opinion.

REMANDED ACCORDINGLY.

UNITED STATES *v.* HALLECK ET AL.

1. Where a decree of the Board of Commissioners, created under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California, confirming a claim to a tract of land under a Mexican grant, gives the boundaries of the tract to which the claim is confirmed, the survey of the tract made by the Surveyor-General of California must conform to the lines designated in the decree. There must be a reasonable conformity between them, or the survey cannot be sustained.
2. When such decree describes the tract of land, to which the claim is confirmed, with precision, by giving a river on one side and running the other boundaries by courses and distances, a reference at the close of the decree to the original title-papers for a more particular description will not control the description given. The documents to which reference is thus made, can only be resorted to in order to explain any ambiguity in the language of the descriptions given; they cannot be resorted to in order to change the natural import of the language used, when it is not affected by uncertainty.
3. When a decree gives the boundaries of the tract, to which the claim is confirmed, with precision, and has become final by stipulation of the