of the proofs is otherwise, and the bill properly dismissed. The question upon the assignment to Updike is so intimately connected with the transaction we have just examined, the conclusion arrived at in the one must control that in the other.

The principal point made against this assignment is, that the preference in it in favor of Phetteplace & Seagrave for certain debts and liabilities, embrace the outstanding paper which they had purchased, and which was secured by the previous conveyances. But, on looking into the assignment, this interpretation is not warranted. The preference relates to other indebtedness and liabilities.

It is also said that Edward Seagrave embraced in this assignment the purchased outstanding paper which he took up, on giving security to the purchasers. But this was proper, as Merrit & Co., and Harris, who were on the paper, had bound themselves to indemnify Seagrave against it, and were, therefore, still liable upon it; and were to the assigns on the transfer of it to him.

DECREE AFFIRMED.

Mr. Justice MILLER dissented.

UNITED STATES *v.* GOMEZ.

Where the question was, whether a party should be heard on appeal, and the effect of refusal to hear him would have left in full force a decree that the court was "not prepared to sanction," it was *held:*

1. That an order to enter up a decree was not to be taken as the date of a decree entered subsequently "*now for then,*" but that the date was the day of the actual and formal entry.
2. That the object of a citation on appeal being *notice,* no citation was necessary in a case where in point of fact, by agreement of parties, actual and full knowledge by the party appellee of the other side's intention to appeal appeared on the record; and where, moreover, by such a construction as the court was inclined to put on part of the case, the appeal was taken in the same term when the decree was made.
3. That a certificate that a transcript of a record was a "full, true, and correct copy of *all* the proceedings, entries, and files in the District Court

for the Southern District of California, *except* the transcript sent up from the Board of Land Commissioners in the case," was so far good that the party alleging it to be bad was referred, if dissatisfied with the transcript, to his remedy of a suggestion of diminution and motion for *certiorari*.

MOTION to dismiss an appeal from the decision of the District Court for the Southern District of California, as not having been taken in time, that is to say, within five years; as having been made without citation, and as not founded on a properly certified transcript. The case was thus:

Gomez had presented a petition to the board appointed by the act of Congress of March 3d, 1851, to settle private land claims in California, praying for confirmation of a tract called the *Panoche Grande*, and which, he alleged, had been granted to him in 1844 by Governor Micheltorena. The board rejected his claim, and he appealed to the District Court accordingly. The case came on to be heard in that court *June 5th*, 1857, and the record proceeds:

"Whereupon the court being fully advised in the premises, delivered its *opinion*, confirming the claim to the extent called for in the transcript and papers, *three* leagues; and a *decree was ordered to be entered up in conformity to said opinion.*"

This entry is dated *June 5th*, 1857, the same day the cause was heard. On the *7th of January*, 1858, a decree *in extenso* was filed, making the usual recitals of form, describing the land "confirmed" as "*three* leagues, more or less, situate in the county of Monterey, State of California; bounded on the north by lands of Julian Usura, on the south by the hills, on the east by the Valley of the Jularés, and on the west by lands of Francisco Arias." The decree ended thus:

"And it appearing to the court that on the 5th June, A. D. 1857, the lands in this case had been confirmed by the court to the said claimant and appellant, and it having been *omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then.*"

On the *4th of February* of this same year the court "or-

dered that the appellant have leave to *amend the decree filed in the case, by substituting another in its stead.*" Gomez did accordingly, on the day following, to wit, the 5th of February, 1858, procure another decree to be entered in form and *in extenso*. It was much like the former decree, except that it described the tract by name, "*Panoche Grande*," giving the boundaries as before, describing it as containing *four* leagues. This decree ended thus:

"It appearing to this court that heretofore, to wit, on the 5th day of June, 1857, at a regular term of this court, the claim of the appellant in this case had been confirmed by this court, but that it had been omitted by this court to sign the decree of confirmation at the time the same was made: It is therefore further ordered by this court that the same be signed *now as for then.*"

Subsequently to this entry the United States obtained a rule to open the decree and reinstate the case, with leave to take testimony, assigning, as reason, that the decree had been improvidently entered; that new evidence, now discovered, would show the claim to be fraudulent; and that the decree itself had been fraudulently procured. Evidence was accordingly taken tending to show that the District Attorney of the United States himself—one P. Ord—had been a party interested in the claim. The court (Ogier, J.), thereupon, on the 21*st March*, 1861, made this order:

"Whereas it has come to the knowledge of this court that a decree heretofore rendered by this court in this case, was *fraudulently obtained* by misrepresentations of the then district attorney, P. Ord, and other counsel in the case; and it appearing to the satisfaction of the court, from testimony on record in the case, that the then district attorney, counsel for the United States, was, at the time of making said decree, interested in the land claimed in said cause, adversely to the United States, and representing to the court that there was no objection to the confirmation of the claim aforesaid on the part of the United States, a decree was entered without an examination by the court into the merits of said claim, thus deceiving the court and obtaining a decree in his own favor under the false pretence of represent-

ing the interest of the United States. It is therefore *ordered that all proceedings heretofore had in said cause be set aside, and the cause be put on the calendar and set for trial* de novo *according to law.*"

Another judge having afterwards been appointed to the bench of the District Court, a motion was now made to vacate this order of March 21st, just before recited, and on the 4th of August, 1862—June Term of that year—the new judge remarking that he was not surprised that his predecessor, on learning the facts, "should have been indignant and set the whole aside," yet conceiving that after the lapse of a term the court could not alter, change or modify a decree unless to correct some clerical error, "with great reluctance" *vacated* the last order which that said former judge had made, and by which the proceedings had been set aside and the case placed on the calendar for trial *de novo.*

At this same term, on the 25th August, 1862, *on motion in open court*—no citation, however, having been issued—an appeal was allowed the United States to the Supreme Court of the United States "from the *decision* and *decree of this court confirming the claim of the claimant herein;*" and on the 6th October following, the district attorney, by writing filed, reciting that the claimant was "desirous of moving the court to set aside" the order for an appeal, agreed that all proceedings should be stayed till the next term, "so as to give the claimant an opportunity to make such motion." The counsel of the claimant, on the 24th of November following, gave notice that on the opening of the court, on the 1st December, 1862, he would make a motion to vacate the order granting the appeal, and the motion was accordingly heard, and the order for appeal subsequently vacated.

The transcript of the record in the case was certified (under the act of Congress of 6th August, 1861, § 2), by Mr. B. C. Whiting, "United States District Attorney for the Southern District of California," and certified "that the foregoing one hundred and seven pages are a full, true, and correct copy of *all* the proceedings, entries, and files in the District Court of the United States for the Southern District of California,

except the transcript sent up from the late Board of Land Commissioners in the case of *United States* v. *Vincente Gomez*, No. 393, on the docket of the said court, for the claim called '*Panoche Grande.*'"

The motion to dismiss the appeal as already indicated was on three grounds:

1. Because no appeal had been taken until more than five years after the decree had been entered in the case, and not taken within the time therefor, which this court had decided to be the limit.

2. Because there had been no citation to the opposite party.

3. Because what purported to be the transcript was not made and certified according to law, and was defective both for omissions and additions, and contained matters forming no portion of the record.

Messrs. Brady, Gillet, and Eames, in support of the motion:

1. By the Judiciary Act of 1789,* it is enacted, that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of," and by the act of 1803,† that "appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error." In *United States* v. *Pacheco*,‡ it was held, that as the act of Congress of the 3d March, 1851, does not specify the time within which an appeal must be made to the Supreme Court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeal. An appeal, therefore, must be taken within five years from the final decree. The first inquiry, therefore, is, from when does the time begin to run? From the time the decision is pronounced and entered in the minutes, or not from until the day when the decree is formally drawn up, signed, and entered? In *Fleet* v. *Young*,§ the Court of Errors in New York

* 1 Stat. at Large, 84. † 2 Id., 244. ‡ 20 Howard, 261.
§ 11 Wendell, 522; and see Silsbee *v.* Foot, 20 Howard, 295.

held that the time for suing out the writ of error commences from the time of the entry of the rule for judgment, and not from the time of filing the record. The statute of New York is similar to the law of Congress. The chancellor said, in the case cited: "The language of the statute, as contained in the recent revision, is that the writ of error shall be brought within two years after the rendering of the judgment or final determination of the court, and not after," &c. Both the law of Congress and the statute of New York differ from the English statutes as they were when this decision was made. By the English statute, a writ of error could be brought within twenty years after the judgment record signed and filed, and judgment entered; by rule of the House of Lords, an appeal must be brought within five years after the enrolment of the decree. In *Fleet* v. *Young*, the chancellor discusses the difference between the New York statute and the English statute, and also says: "In point of principle, it is not very material whether one construction or the other is adopted, *as the plaintiff in error may himself obtain permission to make up the record, if the adverse party neglects to do it within a reasonable time after the actual rendition of the judgment*,* and it is not necessary to wait for the filing of the record before a writ of error can be sued out. It is sufficient if the judgment be signed and filed at any time before the actual return of the writ of error, although after the return day is past."†

The case of *Lee* v. *Tillotson*, before the Supreme Court of New York,‡ is also in point. That was a motion by the defendant for leave to draw up a statement of facts from the special report made by referees, and to have such statement settled and inserted in the judgment record, to the end that he, the defendant, might bring a writ of error. It was objected that more than two years had elapsed since the decision of the motion to set aside the report, but not since judgment was perfected by filing the record, &c. The court say:

* Jackson *v.* Parker, 2 Caines, 385.

† Arnold *v.* Sandford, 14 Johnson, 417. ‡ 4 Hill, 27.

Argument in support of the motion.

"Although it does not appear upon the papers that a rule for judgment was entered at the next term after the report was made, there can be no doubt that it was done; and, besides, if the rule was never entered, *it would be almost a matter of course to allow it to be done nunc pro tunc.* But we think the question of limitation does not turn on the time of entering the rule for judgment, but on the time when the final determination was made on the motion to set aside the report. The rule for judgment was undoubtedly entered in May Term, 1837, and, if we date from that, the time for bringing a writ of error had expired before the motion for a rehearing was made, which was in May, 1840. The question, then, is whether the limitation dates from the final determination of the court, which was in July, 1840, or from the subsequent filing of the judgment record in January, 1841. The statute provides that 'all writs of error upon any judgment or final determination rendered in any cause, shall be brought within two years after the rendering of such judgment on final determination, and not after.' The judgment on final determination in this cause was rendered in July Term, 1840, when the motion which had been made to set aside the report of the referees was denied. The record which was afterwards filed was not the judgment, but only a written memorial of the judgment which had been previously rendered. The Court of Errors arrived at the same conclusion, on this question, in *Fleet* v. *Young*. It follows, that the time for bringing a writ of error has already expired, and we ought not to put the plaintiff to the expense and ourselves to the inconvenience of settling a case when we see it can do no good."

In the English case of *Smythe* v. *Clay*,* the decree was actually enrolled within five years from the time of bringing the appeal, but more than twenty years after the decree was actually rendered. It seems to have been held that the enrolment of any decree pronounced by the Court of Chancery is deemed as being, by legal relation, the act of the same day on which the decree was pronounced.

Then we have the *nunc pro tunc* clause added, in terms, to the decree, signed, filed, and entered the 5th February, 1858.

* 1 Brown's Parliamentary Cases, 453; Case No. 5 of Appeals.

In *Lee* v. *Tillotson*, supra, it is said such an order would have been a matter of course. The effect of the clause specially inserted is, of course, to make more specially the judgment relate back to the time when the decree should have been entered.

This appeal, therefore, not having been in time, the decree of the District Court must stand. The order of 21st March, 1861—an order made near four years after the date when that which we assert was the decree was rendered—is a nullity; for, as this court has declared,* "no principle is better settled, or of more universal application, than that no court can reverse its own final decrees or judgments for errors of fact or of law, after the term in which they were rendered, unless for clerical mistakes, or reinstate a cause dismissed by mistake."

2. If the appeal had been taken in time it is a nullity, because no citation was taken or served. In *Hogan* v. *Ross*,† this court said, that where no citation had been issued or served, the cause must be dismissed. In *Villabolos* v. *United States*,‡ the court held that an entry of appeal in the clerk's office did not remove the cause; and that where an appeal was not taken in open court at the term at which the decree was rendered, in the absence of a citation signed by the judge allowing it, the appeal was a nullity. At the same term, in *United States* v. *Curry*,§ the rule was iterated.

3. The district attorney has not certified the *whole* record. He certifies that the one hundred and twenty-seven pages are "a full, true, and correct copy of all the proceedings, entries, and files in the District Court for the Southern District of California, *except* the transcript sent up from the late Board of Land Commissioners." This transcript he does not vouch for as a copy of that on the files. Hence the exemplification cannot be relied on. How much may have been omitted, how much added, cannot be ascertained. It must accordingly be rejected *in toto*.

* Ex parte Sibbald *v.* United States, 12 Peters, 488.
† 9 Howard, 602. ‡ 6 Id., 81. § Id., 106.

Messrs. Bates, A. G., and Black, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a petition for the confirmation of a land claim under the act of the third of March, 1851, and the case comes before the court upon the motion of the appellee to dismiss the appeal. Appellee in his petition to the commissioners appointed under that act, asked for the confirmation of a claim to a tract of land, called *Panoche Grande*, of the extent of four square leagues, and alleged as the foundation of the claim that the tract was granted to him in the year 1844, by Governor Manuel Micheltorena. Eighth section of the act requires the claimant to file the documentary evidence of his title with his petition, but the claimant in this case did not comply with that requirement, because, as he alleged, his title-papers were lost, and he gives in detail the circumstances of their loss about the time the military and naval forces of the United States took possession of Monterey. Unable to exhibit his title-papers, he relied upon parol proof to show their existence, loss, and contents. Commissioners rejected the claim, and the claimant appealed to the District Court for the Southern District of California. Cause came on to be heard on the fifth day of June, 1857, and the record states that after argument of counsel the same was submitted to the court for final adjudication. Whereupon, as the record further states, the court being fully advised in the premises, delivered its opinion, confirming the claim to the appellant to the extent called for in the transcript, to wit, three leagues or sitios de ganado mayor, and a decree was ordered to be entered up in conformity to said opinion.

Dismissal of the appeal is claimed upon three principal grounds. First, because more than five years elapsed after the decree was entered before the appeal was claimed and allowed. Secondly, because there is not any citation to the opposite party. Thirdly, because the transcript of the record is incomplete and not duly certified.

I. Appeal to this court was allowed on the twenty-fifth day of August, 1862. Opinion of the court confirming the claim

was delivered on the fifth day of June, 1857, more than five years before the appeal was taken. Claimant assumes that the entry made in the minutes on that day is the final decree, and consequently that the appeal was too late. But the proposition cannot be sustained, as is evident from a moment's inspection of the record. Entry is that a decree was ordered to be entered up in conformity to such opinion. No decree of any kind, however, was drawn up, entered, or filed on that day. On the contrary, the record shows that on the seventh day of January, 1858, a decree was filed in the case, and the decree itself, after referring to the fact that the claim had been confirmed on the fifth day of June, 1857, states, that "having been omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then." Decree, as thus filed, was for three square leagues of land, more or less, situated in the county of Monterey, State of California, and bounded on the north by lands of Julian Ursura, on the south by the hills, on the east by the valley of Tulares, and on the west by lands of Francisco Arias. Donee was not satisfied with the decree, and on the fourth day of February, 1858, obtained leave to amend the same by substituting another in its stead. Pursuant to that leave, on the following day he filed a new decree, enlarging the description of the tract to four square leagues, and the same was entered and signed by the district judge. Argument can add nothing to the force of this statement, as drawn from the record. Plainly there was no decree of any kind in the case until the seventh of January, 1858, and as that was ordered to be amended by substituting another in its stead, the final decree in the case was that of the fifth of February following. Five years, therefore, had not elapsed after the decree was entered before the appeal was taken, and consequently the first ground assumed in the motion cannot be sustained.

II. Want of citation is the second ground of the motion, and on this point also it becomes necessary to examine the record. Final decree was rendered on the fifth day of February, 1858, but on the twenty-first day of March, 1861, the

court entered a decree in the cause that all the proceedings heretofore had in said cause be set aside, and that the cause be put on the calendar and set for trial, *de novo*, according to law. Transcript shows that the order vacating the decree was passed upon the ground that the decree had been fraudulently obtained, it appearing to the satisfaction of the court from the testimony in the case that the district attorney was, at the time of making the decree, interested in the land claimed in the cause adversely to the United States.

Statement of the court also shows that the district attorney represented to the court that there was no objection to the confirmation of the claim, and that a decree was consequently entered without an examination of the merits of the claim, and the charge is that the district attorney deceived the court and obtained a decree in his own favor under the false pretence of representing the interests of the United States. Testimony was taken upon the subject, and the charge as stated was fully proved. Whereupon the court vacated the decree, and ordered the cause to stand for trial. Proceedings in the cause in the meantime took place, in this court, as more fully appears in the case *United States* v. *Gomez*, 23 How., 326, to which particular reference is made for the character of those proceedings. Delay ensued, and in the meantime a new appointment of district judge was made. Application was then made by the claimant to set aside the order vacating the original decree, and at the June Term, 1862, held on the fourth of August, of the same year, the court ordered that the previous order, made and entered on the twenty-first day of March, 1861, setting aside all proceedings had in the cause, and placing the same on the calendar for trial, *de novo*, be and the same is hereby vacated and set aside. United States, on the twenty-fifth day of August, in the same year, took the appeal which is under consideration. Appeal was taken in open court, and at the same term in which the order was passed restoring the original decree, or rather vacating the order of the twenty-first of March, 1861, setting it aside and placing the cause on the calendar for trial. Appeal, it is true, purports to be from the decision and decree of the

court confirming the claim, but it was taken from that decree not only after it had been vacated, but after the decree directing it to be vacated had itself been stricken out, and the original decree had been restored. Admitting that the order restoring the original decree was one of any validity, then indeed no citation was necessary, because the appeal was taken in open court, and might well be regarded as taken at the same term in which the decree was entered. But it is unnecessary to place the decision entirely upon that ground. Granting that the appeal is from the original decree, and that the question is wholly unaffected by the subsequent orders, still it is quite clear that no citation was necessary in this case. Claimant at once signified his intention to move the court to set aside the order granting the appeal, and thereupon it was stipulated and agreed between the parties that all further proceedings should be stayed until the next term of the court. Notice in writing was accordingly given by the claimant that he would submit such a motion at the next term at the opening of the court. He did submit it, and the parties were heard, and the court gave an opinion sustaining the motion. Petition for an injunction was afterwards filed to prevent the appeal, and the parties were heard upon that subject, but the injunction was denied. Object of the citation is notice, and under the circumstances of this case that purpose seems to have been fully answered, and the objection is accordingly overruled.

III. Third ground of the motion is that the transcript is incomplete, and that the same is not duly certified. Second section of the act of the sixth of August, 1861, provides that the District Attorney of the United States of any district in California, may transcribe and certify to the Supreme Court of the United States the records of the District Court of his proper district, in all land cases wherein the United States is a party, upon which appeals have been or may be taken. 12 Stat. at Large, p. 320.

Certificate in this case is certainly made by an officer authorized by law to make it, and we are not able to perceive that it is defective. Remedy of appellee, if the transcript is

incomplete, is a plain one and one of daily use. He should suggest diminution, and ask for a *certiorari*, which is readily granted when applied for in season.

In view of the whole case, our conclusion is that the motion to dismiss the appeal must be overruled. Effect of the motion, if granted, would be to leave the decree below in full force and unreversed, which is a result that at present we are not prepared to sanction. When the cause comes up upon the merits, we shall desire to hear the counsel upon the question whether there is any valid decree in the case, and if not, as to what will be the proper directions to be given in the cause. Those questions are not involved in the motion to dismiss, but they will arise when the merits of the case are examined, and will deserve very careful consideration.

MOTION REFUSED.

HOUGHTON *v.* JONES.

1. This court will refuse to consider objections to the documentary evidence of title produced on the trial of an action of ejectment, unless they are presented in the first instance to the court below, if they are of a kind which might have been there obviated.
2. By the law of California, deeds conveying real property may be read in evidence in any action when verified by certificates of acknowledgment, or proof of their execution by the grantors before a *notary public*.
3. The right to cross-examine a witness is limited to matters stated in his direct examination.

THIS was a writ of error to the Northern District of California; the case being thus:

By the act of Congress of March 3, 1851, "to ascertain and settle the private land claims in the State of California," it is provided, "that each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the commissioners," &c., who are directed to examine into and "*decide upon the validity of the said claim.*" And it is further declared that "all lands, the claims to which shall