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Statement of the case.

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circumstances it is the settled practice of this court to decline to answer. It is necessary that the question should involve a distinct legal point, and that sufficient facts should be set forth to show its bearing upon the rights of the parties.\* In this case all the facts relied upon as operating to ratify should have been set forth. Any point of disagreement between the judges relating to the subject would then have appeared in its proper light and could have been definitely answered. As the question is presented the answer, if given, would be equally general, and, like the question, a mere abstraction, which could subserve no useful purpose in the further progress of the cause.

The answer to the first and second questions certified up will be that, under the circumstances, the statute referred to must be held in this case to be a local act, and not a *general law*.

To the third question, for the reasons stated, no answer will be given.

## ORDER IN CONFORMITY.

[See, on the last point of this case, *supra*, p. 250, *Daniels v. Railroad Company*.—REP.]

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MINING COMPANY v. BOGGS.

1. In a suit to recover mineral lands on the Pacific coast, with the mines therein, an allegation of record, of prior possession of the land for the purpose of taking out the minerals, without an allegation that such possession is had under authority, or by some treaty or statute of the United States, does not give this court jurisdiction to re-examine the case under the 25th section of the Judiciary Act of 1789.
2. Nor has the court jurisdiction where the decision below is that, as a *matter of fact*, no such license exists; the courts of the State, to whose highest court of law and equity the writ of error is sent, having the power, under the constitution of its State, to decide both law and fact upon submission of the case by the parties.

BOGGS, lessee of Frémont, brought a suit in one of the inferior State courts of California against the Merced Mining

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\* Crooker et al. v. Newton, 18 Howard, 581; United States v. The City Bank of Columbus, 19 Id. 385.

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Company, for the possession of certain *mineral lands*, with the *mines therein*, situated in Mariposa County.

The case, according to a frequent practice in the courts just named, was submitted to the court, both as to matters of *fact* and matters of law, without a jury. The recovery was resisted on several grounds. Among them was possession of the land—prior to any claim of the lessor of Boggs—“according to the *usages and regulations* established and in force in the *mining district* within which it was, for the purpose of extracting the gold from the rock;” by which prior possession of the said mineral lands and appropriation of the quartz veins therein, the mining company asserted itself to have acquired a perfect right thereto.

The pleadings nowhere developed more fully than as above the nature of the title thus set up by way of defence; nor indeed did anything else in the record brought here; though as matter of fact it was no doubt, the reporter supposes, meant to be rested on what was a subject of general knowledge; to wit, that the United States had impliedly, and to a greater or less extent, allowed persons to take possession of and to work the mining lands of the Pacific coast, though such persons had no patent for them from it.\* Under an agreement, too, between the attorneys in the case, the defendant had the right to set up in defence any matter which could be the subject of a bill in equity.

The court in which the suit was brought found, as matter of fact, that the premises sued for had been granted by the United States to Boggs's lessor; and that, in virtue of his lease, Boggs became and still was owner of them; that the Mining Company, defendant in the case, was in possession of them, without the consent and against the will of the plaintiff, and was guilty of the trespass alleged.

It found, also, that in May, 1851, prior to the date of the lease to Boggs, the premises were vacant; that the Mining Company entered upon them under one Moffat; but it was not shown that the said Moffat himself had any title; but,

\* See Strong v. Sparrow, *supra*, pp. 99, 100, 104; and the Appendix, No. 1.

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on the contrary, the premises were then the public domain of the United States, except in so far, &c.; that the Mining Company commenced improving the premises for mining purposes in 1851, and had ever since used and occupied them for such purposes, "pursuant to the *mining regulations* prevailing in the district," and had made improvements and expenditures to the extent of more than eight hundred thousand dollars. But the court found, also, that the plaintiff was not estopped from asserting his title, and, on the whole case, found in his favor. Judgment went accordingly for him.

The case then went up to the Supreme Court of the State. That court, in its *opinion* (which was not, however, any part of the record), recapitulating the case, and noting that one ground relied on to defeat the recovery was "a license from the government to enter on the premises and extract the gold,"—thus proceeded:

"If the company has a right to the possession and use of the land as against its true owner, for the purpose of extracting the precious metals, it must be upon the ground that the mineral does not pass with the soil as an incident to it, but belongs either to the United States or to the State of California, and that the defendant has an effectual license to enter on the premises and extract them. . . . .

"Assuming, for the purpose of this case, that the mineral belongs to the United States, has the defendant any such license?

"It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate as applied to the action, or rather want of action, of the government. There is no license, in the legal meaning of that term. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the General Government only by act of Congress. It carries an interest in the land, and arises only from grant. The mineral, whether a distinct possession or otherwise, constitutes part of the realty, as much so as growing timber, and no interest in it can pass except in the



## Argument for the dismissal.

ordinary modes for the disposition of land. It is under the exclusive control of Congress, equally with any other interest which the government possesses in land. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is, that the government has forbore to exercise its rights; *but this forbearance confers no positive right upon the miner which would avail as a protection against the assertion of its claims to the mineral.* The supposed license from the General Government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact, and unwarranted in law."

That court accordingly affirmed the judgment; and the Mining Company brought the case here, considering that it fell within the 25th section of the Judiciary Act of 1789, which gives a right of re-examination in this court in cases where there has been drawn in question, in the highest court or law or equity in a State, "the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity;" which statute, however, also enacts that "no other error shall be assigned or regarded as ground of reversal in any such case as aforesaid than such as appears on *the face of the record, and immediately respecting* the before-mentioned questions of validity or construction, &c."

*Mr. David Dudley Field, representing here the defendant in error*, having moved to dismiss the case, as not within the provision of the statute, and stated fully the grounds of his motion\*—to wit, that it must clearly appear on the record that an *authority* exercised under the United States was distinctly presented—that it "*did arise and was applied*"—and that the decision was against the authority so set up; and

\* Citing *Day v. Gallup*, 2 Wallace, 97; *Towle v. Farney*, 1 Black, 350; *Hoyt v. Sheldon*, Id. 520; *Maxwell v. Newbold*, 18 Howard, 515; and earlier precedents.

## Argument for the jurisdiction.

arguing that a mere forbearance by the government to assert rights was not an "authority" to take the minerals—*Mr. Reverdy Johnson* was heard *contra* :

He contended that, by the laws of Mexico, from which this region came to us, a grant of the mere land did not carry the minerals under it; that the law of England was apparently the same as respected the government, and that this appeared by the *Case of the Mines* reported by Plowden;\* that in the case at bar, the grant by the United States to Boggs's lessor, Frémont, had passed no metals; and that, so far as Frémont was concerned, these still belonged to the United States. He referred to the fact, as well known, that a special system of law had grown up in the mining States, by which possessory claims, though perhaps, in a view purely abstract, trespasses against the United States, had been long impliedly protected and upheld by the National Government, and had recently been even the subject of protection by statute.† This court had also recognized the value of such claims independently of the statute. In *Sparrow v. Strong*‡ the court said it was impossible to shut our eyes to the public history which informs us that, under Territorial and State legislation, and "not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." It was of course under this implied *authority* from the government that the Mining Company rested their case, as to one of its defences, in the court below. The lands were confessedly mineral lands. The suit was for the mines as well as for the lands.

The company asserted, among other things, that they were

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\* Page 310.

† "No possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to such title, shall be affected by the fact that the paramount title to the land on which said mines are, is in the United States; but each case shall be adjudged by the law of possession." (*Act of February 27, 1865, 13 Stat. at Large, 441.*)

‡ *Supra*, 104.

## Opinion of the court.

in prior possession, "according to the *usages* and regulations established and in force in *the mining district, for the purpose of extracting gold from the rock*;" plainly making it to be understood that they were there in the only way in which they could so be there, to wit, under the authority of the United States; whether a permissive authority or one by direct grant, it mattered not. Either was enough to make the party there rightfully. The court below decided against the authority so set up under the United States. The decision was as matter of law; or, to use the court's own language, there was "no license within the *legal meaning* of that term." Nothing short of an act of Congress, the court considered, could constitute a license; that forbearance was all that existed here, and that forbearance was not enough; it alone conferred "no positive right." The decision, therefore, was plainly on law as well as on fact; or on law alone, fact being assumed.

The CHIEF JUSTICE delivered the opinion of the court.

No question is raised by the pleadings, of which this court has jurisdiction upon writs of error to the Supreme Court of California, unless by the allegation of prior possession of this land for the purpose of taking out the minerals. But this allegation does not set up any authority exercised under the United States in taking such possession, nor any treaty or statute of the United States, in virtue of which it was taken. Nor does it anywhere appear from the record that the decision of the State court was against the validity of any such authority, treaty, or statute. The case brought before us is, therefore, wanting in the requirement made essential to our jurisdiction by the 25th section of the Judiciary Act.

If we were at liberty to look into the opinion of the court for the purpose of ascertaining what questions were made on the argument, and decided by the court, we should find that, upon a liberal construction of the stipulations of counsel, the defendants were allowed to insist that they were warranted in their possession of the lands, for the purpose



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Syllabus.

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of extracting the minerals, by a license inferred from the general policy of the State or of the United States, in relation to mines of gold and silver and the lands containing them.

We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court.

However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law.

It is the same case, in principle, as would be made by an allegation in defence to an action of ejectment, of a patent from the United States with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it.

The writ of error must, therefore, be

DISMISSED.

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THE GRANITE STATE.

1. Where the question of fault in a collision lies, on the one hand, between a boat fast at a wharf, out of the track of other vessels, and moored, in all respects of place and signals, or want of them, according to the port regulations of the place, and, on the other, a steamer navigating a channel of sufficient width for her to move and stop at pleasure, the fault, under almost any circumstances, where there is no unusual action of the elements or other superior force driving her to the place of collision, will be held to be with the steamer.

Hence a steamer which, in going in the dark from a broad channel into her dock, runs—though in an effort to avoid other steamers coming out of *their* docks—against a barge moored at a wharf according to the port regulations, is responsible for the collision. Nor is it an excuse that the barge was without masts, lay low, and owing to her color was not