CARPENTIER *v.* MONTGOMERY ET AL.

1. Where a Spanish or Mexican grant of lands in California does not identify the precise tract of land granted, either by description or by reference, the title is an imperfect one, needing the further action of the United States government to make it perfect. Such is the case where one side of the tract is undefined, or one of the exterior boundary lines cannot be located. An authoritative survey is required to demonstrate the particular tract granted.
2. A confirmation of a Spanish or Mexican grant of land in California segregates the land, when surveyed, from the public domain, and invests the confirmee with the legal title. It entitles him to a patent for the land as soon as the requisite survey has been made. No other title, not clothed with equal solemnities, can be set up against the confirmee, or his assigns, in an action of ejectment.
3. But the equitable rights of third persons, under the same title, are not cut off. They will be sustained in a court of equity as against the confirmee and his assigns, who are chargeable with knowledge of the said equities. The position of a confirmee is analogous to that of a patentee under a pre-emption right. Equity will hold him as a trustee for those who have equitable rights in the land, to the extent of their interests.
4. Equitable interests must be sought, not in an action of ejectment, but in an equitable proceeding, where they can be properly investigated with a due regard to the rights of others which may have intervened, such as those of *bonâ fide* purchasers, &c., ignorant of the equities existing between the original parties.

ERROR to the Circuit Court for the District of California.

Carpentier brought suit against Montgomery and a number of other defendants to recover certain lands in their possession, lying on the east side of the bay of San Francisco, and described in the complaint. Answers were put in by the defendants, severally claiming distinct portions of the lands.

On the trial the plaintiff deraigned title under the children of Maria Teodora Peralta, a deceased daughter of Luis Peralta, and proved mesne conveyances from them to the extent of an undivided five and a half ninths of one-ninth of the land in question. But whether the children of Maria Teodora Peralta were entitled to any estate in the lands, upon which the plaintiff could sustain an action of ejectment against the defendants, was the question.

Statement of the case.

Luis Peralta, the father of Maria Teodora, died in August, 1851, in possession of the rancho called San Antonio (of which the premises in question were a part), leaving four sons and four daughters, and several grandchildren by a deceased daughter, the said Maria Teodora. The four sons presented their petition for the confirmation of their claim for the entire rancho to the board of commissioners, organized under the act of Congress of March 3d, 1851, founding their claim upon certain documents establishing their father's right to the rancho, and upon an alleged devise thereof to them. Upon this petition the rancho was confirmed to the said sons in divided parcels, the portion embracing the premises in question being confirmed to Domingo and Vincente Peralta by final decree of this court in December Term, 1856.* No final approved survey, however, took place under the confirmation. The defendants held under the confirmees.

On the trial the plaintiff showed by documentary evidence from the archives, that on 20th June, 1820, Luis Peralta, who was then sergeant of the presidio near San Francisco, and commissioner of the pueblo of San José, presented a petition to Pablo Vincente de Sola, then Governor of California, in which he stated that, "at the distance of eight leagues from the mission of San José, in a northerly or northwesterly course along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro, and from this to a little hill adjoining the sea-beach, in the same direction and along the coast, there may be four or five leagues, more or less (or about), which place and land he asks and solicits may be granted to him that he may establish a rancho, and place thereon all his goods and chattels."

Governor Sola, on the 3d of August, 1820, ordered Captain Luis Antonio de Arguello, commandant of the presidio, to appoint an officer to put Sergeant Peralta "in possession of the lands petitioned for, giving previous notice of it to

* United States v. Peralta, 19 Howard, 343.

the reverend fathers, the missionaries of the missions bordering on said land, *and then place landmarks on the four points of the compass*, that it may be known at all times, the extent of said lands *which have been granted to him.*"

On the 10th, Arguello appointed Lieutenant Martinez to execute this decree.

On the 16th, Father Duran certified, on behalf of the mission of San José, that there was no objection, on the part of that mission, to the grant asked for by Peralta.

On the same day Martinez certified that, having given due notice, he "proceeded to the said place, and in presence of the two witnesses, Nicholas Berreyesa and Juan Miranda, *the boundaries which separate his (Peralta's) land were marked out to him*, to wit: The deep creek called San Leandro, and, at a distance from this (say about five leagues), there are two small mountains (*cerritos*). The first is close to the beach; next to it follows that of San Antonio, serving as boundaries, the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and, at the entrance of the little gulch, there is a rock elevating itself in the form of a monument, and looking towards the north. *On both boundaries were fixed firm landmarks;* and, inasmuch as this individual does not prejudice any of the adjoining neighbors, and by virtue of the authority on me conferred, and in the name of our Catholic Monarch, Senor Don Ferdinand VII (whom God preserve), I put in possession of the said land the above-named Luis Peralta."

This return was signed by him and the witnesses in testimony of the facts.

On the 30th of August Governor Sola, reciting that Father Chabot, of the mission of San Francisco, alleged that Don Ignatio Martinez had not fulfilled his decree of the 3d of August, and that through this fault possession had been given to Peralta of some lands pertaining to said mission, ordered that these should be withdrawn from those which were assigned to Peralta, and remain, as they were before, in favor of the neophytes of said mission.

Statement of the case.

In a paper dated September 14th, 1820, Fathers Chabot and Ordaz, on behalf of the mission, certified that inasmuch as the mission had had possession since the month of November of the previous year, granted by the superior government for agricultural purposes and the feeding of sheep, as far as a rivulet at the distance from the house of the rancho some three and a half to four leagues in the direction of San Josè, there was "no objection to set the boundaries of Sergeant Luis Peralta from that place up to the creek called San Leandro."

On the 16th of September, 1820, Lieutenant Martinez reported that, in the presence of the same witnesses, he had executed the order of the governor of the 30th August, "by appointing to him (Peralta) anew the boundaries at about one and a half league from the hill of San Antonio towards that part of San Leandro serving as the dividing-line, a rivulet (the Temescal) issuing from the mountain or hill-range, which runs down to the beach, where there is a willow grove, fixing in said place the *four* landmarks, which shall be valid, and not those that were designated before on the little mountain of San Antonio."

On the 18th October, 1822, Governor Sola certified that "this day was issued, in favor of Sergeant Luis Peralta, by the governor of this province, the certifying document *for the land which has been granted to him, as appears in this folio, by the writ of possession*, which the lieutenant of his company, Don Ignacio Martinez, gave him agreeably to an order issued him by the government."

The certifying document recited the original petition of Peralta, the reclamation of the fathers of the mission, the appointment of Martinez to give possession, the performance of that order, "by designating the boundaries, about one league and a half from the small hill of San Antonio, towards the part of the San Leandro Creek serving as a dividing-place, a small brook which falls from the mountains or heights running towards the beach, where ends a willow brake, establishing on said land the four landmarks;" and concluded by saying that this document was given "in order

that, in all time to come, it may be attested that this concession to said Sergeant Luis Peralta was made in remuneration of forty years of service in the military career."

On the 14th of October, 1820, Sergeant Peralta addressed a letter to his captain, Arguello, complaining of having been dispossessed of the land which had been assigned to him. In that letter he insisted that he had a right to the land, and declared that he yielded up the possession only because he was compelled to do so. He replied also to the allegations of the fathers, that he did not need so much land, by saying that "five leagues does not seem to me much, in a narrow tract, as you know it is, from the beach to the mountain range," &c. On 23d June, 1821, Captain Arguello transmitted the memorial of Peralta to the governor, gave the history of Peralta's application, insisted upon his right to the land, and stated his claim upon the government for long and meritorious services as a soldier.

On the 15th of May, 1823, Peralta petitioned the governor directly, praying that "the land may be returned" to him, showing that the reverend father of the mission had practiced a fraud to induce the governor to dispossess him, by which he says, "I was deprived of the best land *which had been granted to me.*" He again refuted the charge that the tract was too large, by saying, "though it appears to be large, it is not so, for two reasons—1st, because it is situated on the coast, *and the shore between the beach and the top of the mountains* (*La Sierra*) is too narrow; 2d, because in the space lying from San Leandro to the said cerrito redondo there is a great part of it forming high lands, ravines, and inlets, which are not suitable for the purpose," &c. Upon this petition, on the 30th November, 1823, the following order or decision was made:

"Let the land which by order of my predecessor, Señor Don Pablo Vincente Sola, was taken from this claimant, *after having been granted him and possession given, for that reason be returned to him.* He shall apply with this decree to the judge then commissioned (Lieutenant Martinez) for the said possession, that he

may comply with it. When this be done, he shall annex all the proceedings to the expediente already formed.

"ARGUELLO."

On the 24th December, 1824, Martinez, who was the person formerly commissioned as the judge to deliver the possession, certified that "in compliance with the foregoing superior decree of the superior chief of the province, Captain Don Luis Antonio Arguello, the land which by order of Colonel Don Pablo Vincente de Sola had been taken from Sergeant Luis Peralta, has hereby been returned to him, and he has newly been put in possession of the place called Cerrito de San Antonio and the rivulet which crosses the place to the coast where is a rock looking to the north; said Peralta has received lawful possession in presence of the same witnesses who assisted when the first possession was given to him."

On the 7th of October, 1827, Governor Echandia issued an order requiring every individual in possession of a rancho to make a statement describing the boundaries thereof, annexing thereto the title of his possession and the foundation he may have for such possession.

In pursuance thereof Peralta returned "a description showing the extent of the lands granted me and of which I was placed in possession since the year 1820, to wit: Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José, thence to a small, round mountain called San Antonio, the dividing boundary with my neighbor, Francisco Castro, which space is a little over four leagues long, and as it is the narrowest portion of the coast, it at most contains half a league in breadth, *from the mountain to the sea.*"

On the 11th of February, 1844, Ignacio Peralta, a son of Luis, applied to Governor Micheltorena, on behalf of his father, for a new title, stating that the title-papers had been mislaid, and describing the land as the Rancho San Antonio, situated between the mission of San José and San Pablo

Point, which was granted to his father by Señor Don Pablo Vincente de Sola, and of which he was put in possession by Lieutenant Don Ignacio Martinez by superior order, any other authority being at that time unknown. The new grant to be "to the extent expressed by the document of Governor Sola as plat of survey (design) that accompanies it, including the range of hill up to its summit, and thence to the sea."

The governor referred this petition to Jimeno, then Secretary of State, who reported that the land shown by the plat presented *had been granted twenty-two years previously, and had been occupied by the grantee since* 1819, and that there was no objection whatever to the grant of *a new title.* The governor ordered the title to issue on the 13th of February. An instrument was accordingly drawn, which was found in the archives, declaring that Luis Peralta was "the *owner in fee* of said land, which is bounded as follows, namely: On the southeast by the creek of San Leandro, on the northwest by the creek of Los Cerritos de San Antonio (the small hills of San Antonio), on the southwest by the sea, and on the northeast by the tops of the hill range," and directing that this expediente be submitted to the Departmental Assembly. But this paper was not signed by the governor.

The plaintiff gave also parol testimony tending to prove the following facts:

That by the grant of Sola, and the other documents connected with and preceding that grant, and which had been given in evidence, the natural objects described in the original concession, and in the possession given by Martinez, could be ascertained upon the land, and that the objects called for in the second, and reduced or limited possession ordered and given on the representation of the fathers of the mission of San Francisco, and which was intended to be covered by, and included in, the final grant of Sola, could also be ascertained on the ground.

That the original possession given by Martinez was bounded by the San Leandro Creek on the south, southeast,

Statement of the case.

and east, and the crest of the hills to the gap easterly of the monumental rock looking to the north, mentioned in the act or certificate of possession of Martinez; on the north and northwesterly by the creek of the cerrito of San Antonio, and on the west by the bay of San Francisco.

That the boundaries of the restricted possession were the San Leandro Creek on the south, southeast, and east, the Temescal Creek on the north and northwest, and the bay of San Francisco on the west, and that the possession was reduced to the line of the Temescal Creek.

That the sources of the San Leandro Creek and Temescal Creek spring near each other, with merely a narrow dividing ridge between them, not more than a quarter of a mile from the source of the one to the other, and that they both empty into the bay of San Francisco.

He also introduced the evidence of witnesses tending to prove the delivery of possession of the rancho of San Antonio to Luis Peralta, by Lieutenant Martinez, in 1820, and that possession was formally given, and the boundaries designated by Martinez, in accordance with the description thereof, first herein above set forth.

The plaintiff having rested his case the defendants moved the court to strike out all the evidence introduced by the plaintiff, on the ground that the same did not establish nor tend to establish a right in the plaintiff to a verdict.

The court having heard counsel thereon denied the motion, on the ground that the same was irregular in practice, and an evasion of the rule against nonsuits; but stated that, if the defendants would submit their case without evidence on their part, it would instruct the jury to render a verdict for the defendants, to which the plaintiff excepted.

The defendants thereupon declined to offer any evidence on their part, and the evidence was closed.

And the court thereupon, at the request of the defendants, instructed the jury that the plaintiff had failed to establish a case entitling him to a verdict, and that it was their duty to return a general verdict for the defendants, to which decision and instruction the plaintiff excepted. The jury

thereupon rendered their verdict for the defendants; and judgment having been entered thereon, the plaintiff brought the case here on error.

Messrs. M. Blair and F. A. Dick, for the plaintiff in error, insisted that Luis Peralta's title was a perfect title under the Spanish and Mexican laws, and was protected by the treaty of Guadalupe Hidalgo, and that the confirmation of it, on the application of the sons, could not add to its strength, and could not take away the right of the daughters as co-heirs of their father; and, whether so or not, that the confirmation of the title enured to the benefit of those really entitled under the original grant, their heirs and assigns; and that as no devise from Luis to his sons was exhibited on the trial of this cause, that the plaintiff was entitled to recover under the hereditary right of Maria Teodora's children.

Mr. S. O. Houghton, contra, for the defendants, denied that the title of Luis Peralta was a perfect title; and contended that even if it was, the claim of the daughters could not avail in an action of ejectment against the award of the commissioners in favor of the sons of Luis, which gave them the legal title.

Mr. Justice BRADLEY delivered the opinion of the court.

To show that Luis Peralta's title was a perfect one the plaintiff produced in evidence the documents on which it was founded. They are set out in the bill of exceptions, and are the same that were before this court in the case of *United States* v. *Peralta*,* when the claim was confirmed. In that case the court intimated an opinion that the title was perfect for at least a part of the rancho (embracing a part of the premises now in question), but the point was not material in the case, because the claimants were equally entitled to a confirmation, whether their father's title was perfect or imperfect, legal or equitable; so that the intimation was

* 19 Howard, 343.

nothing but an *obiter dictum* of the judge who delivered the opinion. The title, in some of its aspects, again came before the Supreme Court of California, in 1864, in the case of *Minturn* v. *Brower*,* but, as both parties in that case deemed it their interest to concede the title to be a perfect one, the observations of the court on the subject cannot be regarded as precluding further examination. Such examination, exhaustive in its character, was given in 1870 by the same court on this identical title, and on the very point in question, in the case of *Banks* v. *Moreno*;† and the court, with all the documents before it which have been proven in this case, decided that the title was imperfect. If this were a case depending merely on the local land laws of California, we should be bound by that decision. But as the appellant, in case the title is adjudged a perfect one, invokes the guaranty stipulations of the treaty of Guadaloupe Hidalgo in his favor, independent of any action of the commissioners, the question ceases to be a mere local one, and devolves upon this court the duty of deciding it on its merits. An examination, however, of the reasoning of the Supreme Court of California, in the case last cited, satisfies us of its soundness. The point of the decision is, that the rancho of San Antonio never had any clearly defined boundary on the east. In this we concur with that court. The new claim now made to extend that boundary beyond the crest of the mountain, and to take in the eastern slope on the pretence that the Leandro Creek is the boundary to its ultimate source, is itself conclusive to show the uncertainty with which it has always been invested.

Luis Peralta's occupation of the rancho goes back to 1820. In that year he presented to Governor De Sola his petition for a grant, describing the tract as follows: "At the distance of eight leagues from the mission of San Josè, in a northerly or northwesterly course, along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro, and from this to a little hill adjoining the sea-

* 24 California, 644.

† 39 Id. 233.

beach, in the same direction and along the coast—there may be four or five leagues more or less, or about—which place and land he asks and solicits may be granted to him that he may establish a rancho." Here, certainly, is nothing definite. Supposing the creek, San Leandro, as the point of beginning, and the little hill four or five leagues beyond, as fixed and ascertained points; and suppose the shore of the bay on the west to be meant for the boundary on that side; there is no hint of a boundary on the east. Nor is the quantity specified. Had that been done, perhaps it might have enabled a surveyor to fix a boundary by relation. This is the first and original document on which the title is based—the foundation of all the rest.

Upon this petition, the governor, by an order of August 3d, 1820, directs Captain Arguello to appoint an officer to put Sergeant Luis Peralta in possession of the lands petitioned for, and to "place landmarks on the four points of the compass, that it may be known at all times the extent of said lands which have been granted to him." Lieutenant Martinez being detailed for this service, on the 16th of August, 1820, reports his action as follows: "The boundaries which separate his land were marked to him, to wit: The deep creek called San Leandro, and at a distance from this (say about five leagues), there are two small mountains (*cerritos*). The first is close to the beach; next to it follows that of San Antonio, serving as boundaries, the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and at the entrance of the little gulch there is a rock elevating itself in the form of a monument, and looking towards the north. On both boundaries were fixed firm landmarks. . . I put in possession of the said land the above named Luis Peralta." Here we have, again, the two extremities of the tract along the bay, the creek San Leandro, at one end, and the rivulet that runs by the cerritos, at the other, and nothing more.

Next we have a complaint of the fathers of the San Francisco mission, that Peralta has been put in possession of a

portion of their land at the north end of the tract; the result of which is that Peralta is limited, on the north, to the Temescal Creek, or Willow Grove Creek, about a league and a half south of the cerritos. This occurred in September, 1820.

On the 18th of October an entry was made in the public records to the effect, that "this day was issued in favor of Sergeant Luis Peralta, by the governor of this province, the *certifying document* for the land which has been granted to him, as appears in this folio by the writ of possession, which the lieutenant of his company, Don Ignacio Martinez, gave him agreeably to an order issued by the government." We also have the certifying document itself of the same date, which adds nothing to the definiteness of the description.

Now the grant on which the appellant's counsel relies as conferring perfect title is not the certifying document above referred to, but the previous act of directing possession to be given to Peralta, and the actual delivery of possession to him. It is perfectly manifest that Peralta could not have been put into manual possession of several leagues of land. He could only have been put into possession of a certain part or parts in the name of all; and the exterior boundaries of the tract must have been indicated by language or monuments. But we have no evidence of any description of boundaries, or monuments to designate them, except the bay on one side, and the extreme limits of the tract along the bay. The interior line between those limits is entirely wanting in all the documents thus far presented. The title relied on, therefore, is necessarily imperfect, and requires some authoritative survey to distinguish what was intended to be granted from what remained in the public domain.

If we examine the remaining documents we shall not derive any material aid to help us out of the difficulty.

In October, 1820, Peralta addressed a remonstrance to the governor against the curtailing of his tract on the north. The only expression which this paper contains going to show what the tract was which Peralta supposed was granted to him, are the following: "The reverend father says to the

honorable governor that I do not need the land, and that I occupy a great extent; but I would represent that five leagues does not seem to me much *in a narrow tract, as you know it is, from the beach to the mountain range*, and that not all of it is good, as my lieutenant is aware, for great portions contain hills, creeks, and ravines, not fit for the purpose." This would seem to indicate that the rancho extended from the bay to the *foot* of the mountain.

In 1823, whilst the revolution was in progress, Peralta's captain, Arguello, had become Governor of California, and Peralta renewed his application to have the curtailment of his rancho annulled. He speaks of the tract which he originally applied for, as follows: "Which tract of land, though it appears to be large, is not so, for two reasons: 1st. Because it is situate on the coast, and *the space between the beach and the top of the mountain is too narrow.*" This would indicate the *top* of the mountain as his supposed boundary. The governor promptly made an order that the part which had been taken from him should be restored, and Lieutenant Martinez put him in possession accordingly; but nothing yet appears in the lieutenant's return or elsewhere to identify or fix the eastern boundary of the rancho, much less to fix it beyond the eastern slope of the mountain, as since claimed by the parties.

In 1827 some new regulations made it necessary for every proprietor to make a return of all lands occupied by him, with the titles annexed; and, in December of that year, Peralta made a return accordingly, describing his rancho as follows: "Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José; thence to a small round mountain called San Antonio, the dividing boundary with my neighbor Francisco Castro; which space is a little over four leagues long, and, as it is the narrowest portion of the coast, it at most contains half a league in breadth from the mountain to the sea."

In 1844 Ignacio Peralta, on behalf of his father, whose title-papers he says were mislaid, petitioned the then gover-

nor, Micheltorena, to order the issue of a new title, extending to the top of the range, and accompanies his petition with a diseño, or rough map of the property. The governor ordered a grant to issue, as requested, extending to the top of the hill range, but not to prohibit the inhabitants of the *Contra Costa* from cutting wood for their own use. This order was not signed by the governor, and seems never to have been carried into execution. And this is the last of the documents on which the plaintiff, the now appellant, relied for a perfect title. Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the rancho. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace, or where it did run, is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should be run, in order to separate the rancho from the public domain. But it cannot make that title perfect which was not perfect before.

The Supreme Court of California, in *Banks* v. *Moreno*,* well observed: "The precise point under discussion is, whether or not the title of Peralta, as exhibited by the plaintiff, was a perfect title conveying the fee, and which invested him with absolute dominion over a specific parcel of land without any further action on the part of the United States; or whether, at the time of the cession of California, something remained to be done by the government which was necessary to invest Peralta with a complete legal title to the specific tract.

"In every complete grant conveying a perfect title it is essential that the thing granted be sufficiently described to enable it to be identified. In grants of real estate it is not

* 39 California, 239, 240.

always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well-known name, and the boundaries of the tract known by that name are notorious and well-defined, a grant of the tract by its name would, doubtless, convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises —would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by the aid of the descriptive portions of the grant. But it is equally certain that to constitute a complete and perfect grant to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions—not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed."

We entirely concur in these views; and, therefore hold that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties.

But it is contended that the confirmation of the title enured to the benefit of the parties really interested, both at law and in equity, and not merely to the benefit of the confirmees. This is undoubtedly true so far as the segregation of the lands from the public domain and the extinguishment of the government title or claim of title is concerned; but as it respects the legal estate, the confirmation enures to the confirmees alone. The eighth and ninth sections of the act require the claimant to show not only the original title, but his own title

by deraignment therefrom. Having established these the object of the inquest is attained. It satisfactorily appears that the land does not belong to the government, and the claimant appears to be the person *primâ facie* entitled to the legal title. Hence the thirteenth section goes on to declare that for all claims finally confirmed a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation and a plat or survey of the said land duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same.

This language is utterably irreconcilable with the hypothesis that the legal estate devolves, upon the confirmation, to any other parties than the confirmees. The patent is to be given to them, and the legal title cannot be separated from the patent.

It is true that the fifteenth section of the act declares that the decree of confirmation shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceeding, who might have Spanish or Mexican claims independent of or superior to that presented by the claimant; or the equitable rights of other parties having rightful claims under the title confirmed. The former class could still present their claims without prejudice within the time limited by the statute. The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off. Their equities were reserved. But they must seek them by a proceeding appropriate to their nature and condition. The legal title is vested in the confirmees, or will be when the requisite conditions are performed. It is not in these equitable claimants. They cannot maintain an action of ejectment against the confirmees, or those claiming under them; but must go into equity, where their rights can be properly investigated with a due regard to the rights of others. Had the daughters as well as the sons of Luis

Peralta gone before the commissioners, it is possible that they would have participated in the legal advantages of the confirmation. It may now be inequitable on the part of the sons to withhold from them a due share of their father's estate. But other rights may have grown up in the meantime, rights of *bonâ fide* purchasers and others ignorant of the equities existing between the original parties, which it would be unjust to disturb. These questions can be much better examined in an equitable proceeding than they can be in this action, in which, indeed, they are entirely inadmissible.

This view of the relative position of the parties is supported by the weight of authority. The case of *Wilson* v. *Castro** is directly in point to show the form of proceeding proper for those who claim against the confirmee. In that case the claim was confirmed to the widow, who really had no interest. The brother and sister of the owner, as his heirs at law, brought a suit in equity against the widow, and obtained a decree declaring her to be seized, as trustee, for their use. In *Estrada* v. *Murphy*,† the court says: "A court of equity will control the legal title in his [the confirmee's] hands, so as to protect the just rights of others. But in ejectment the legal title must prevail;" and it decided the case accordingly against the plaintiff in ejectment. In *Banks* v. *Moreno*,‡ the same conclusion was reached. In that case, as in this, the plaintiff claimed under the daughters of Luis Peralta; the defendant under the sons; and it was held that the action did not lie. The same view was taken by this court in *Beard* v. *Federy*,§ and *Townsend* v. *Greeley*.‖ In the last case the court uses this language: "The confirmation only enures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties."

The case is somewhat analogous to that of patents granted upon a pre-emption right for public land. Whilst the patent

* 31 California, 420.
† 19 Id. 272.
‡ 39 Id. 233.
§ 3 Wallace, 478.
‖ 5 Id. 326.

in that case confers the legal title, and admits of no averment to the contrary, the patentee may be subjected in equity to any just claim of a third party, even to the extent of holding the title for his sole use. The grounds of equitable jurisdiction in such cases are stated in the opinion of this court in the recent case of *Johnson* v. *Towsley*.*

The action of ejectment in this case cannot be maintained. The judgment of the Circuit Court is

AFFIRMED.

CHEW *v.* BRUMAGEN.

1 The assignee of a bond and mortgage who by the terms of the assignment holds it as collateral security for the payment of another debt, may under the 111th and 113th sections of the New York Code of Procedure sue, without making his assignor a party to the suit.

2. And if on such a suit, the debtor seek to recoup a certain amount from the mortgage debt, and judgment goes accordingly for less than the amount of the same, the original assignor cannot bring suit for any balance. He is concluded by the former proceeding.

ERROR to the Supreme Court of New Jersey; the case being thus:

The Code of Procedure of the State of New York enacts by its 111th section that:

"Every action must be prosecuted in the name of the *real party in interest*, except as otherwise provided in section 113."

The exception of this 113th section is that:

"An executor or administrator, *a trustee of an express trust*, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

And by the same section:

"A trustee of an express trust within the meaning of this

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* *Supra*, p. 72.