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.

section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

Other sections of the code make provisions which may be referred to. Thus, the 117th enacts that:

"All persons having an interest in the subject-matter of the controversy, may be joined as plaintiffs."

The 118th that:

"Any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

The 119th enacts that:

"Of the parties to the action, those who are united in interest must join as plaintiffs or defendants, but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant."

This Code of Procedure being the law of New York, a certain Walker sold to one Chew a farm in New Jersey, taking Chew's bond for $3500, and a mortgage on the farm sold.

Soon after the bond was given Walker, the obligee, assigned the bond and mortgage to one Wood, as collateral security for the payment of $1700, and afterwards by another instrument of writing declared that the assignee held them as collateral security for the payment of $200 more. Wood, having thus become the assignee, brought suit on the bond in the Supreme Court of New York in 1853, against Chew, the obligor, and joined Walker as a defendant, he having refused to join as plaintiff; but process was not served upon Walker, nor did he appear. After his death, which occurred before the trial, on affidavit of his administratrix that he had died, the court ordered that the action should be continued against her as administratrix, but it did not appear that the order was ever served upon her. Chew, however, pleaded fraud in the sale of the farm, and claimed to recoup the damages he had sustained in consequence of the fraud,

and the case went to trial upon the issue tendered by this plea. On the trial, the jury found for Wood the sum of $2091, for which judgment was given, and which Chew immediately paid.

Pending the suit, however, Wood assigned the bond and mortgage to one Braisted, and, two days after the judgment which had been recovered was paid, Braisted and Walker's administratrix joined in assigning them to a certain Brumagen. A bill was then filed in chancery in New Jersey, at the suit of Brumagen, seeking to foreclose the mortgage, and Chew's administratrix set up in defence the suit in the Supreme Court of New York, the judgment therein and the payment of the judgment; asserting that the debt which the mortgage was given to secure was thereby satisfied, and consequently that the mortgage, which was only a security for the debt, had also been satisfied. But it was decided by the chancellor that the judgment in the Supreme Court of New York was no defence to the bill, beyond the amount actually recovered by Wood and paid to him; that inasmuch as neither Walker nor his administratrix were served with process in that suit, or appeared therein, the assignee was not concluded by the judgment, and the ruling of the chancellor was affirmed in the Court of Errors and Appeals. From that decree the case was brought here.

Mr. J. H. Reynolds, for the plaintiff in error:

The courts below held that the judgment in New York, between Wood and Chew, was inconclusive, because neither Walker nor his legal representative was in fact a party, and because under the law of New York, in order to conclude the rights of Walker or his estate by the judgment, he or his representative should have been brought in as a party. This was error. The expression "*real party in interest*," as used in the code, had long been well known and understood in equity courts, both in England and America, and it meant and intended the party in whom the entire title, whether legal or equitable, was vested, as contradistinguished from a nominal party.

Argument for the obligor.

Assuming then, that the judgment in *Wood* v. *Chew*, was conclusive and binding upon the personal representative of Walker, and his assigns, it merged the entire bond and the mortgage as collateral to it in the judgment, and the payment of the judgment has extinguished the debt. The suit was to recover the entire sum, principal and interest.

Chew, the defendant, set up a defence which as he asserted authorized him to recoup damages by reason of the fraud in the inception of the bond to its entire amount. Upon these issues the case was tried.

By the judgment he was permitted to recoup to an amount less than the whole, and the plaintiff took judgment for the remainder.

Mr. E. T. Green, contra:

The whole effect of the judgment in New York on the bond secured by the mortgage, was simply the reduction, *pro tanto*, of the amount due upon the bond, and Chew's estate has the right to look to the security for the balance.

It is a settled principle that to make a judgment binding and effective, the court must have jurisdiction over both the cause and all the necessary parties thereto, over the parties and things to be affected.*

Who were, then, the necessary parties to this suit in New York upon the bond, so that a judgment obtained there should be binding and conclusive? Wood was interested in the bond to the extent of $1900, it having been assigned to him as collateral security for that amount. Walker was interested in the same bond to the extent of $1600, that being the amount due to him after the satisfaction of the debt for which it was held by Wood as collateral, and Chew was interested in the bond to the extent of $3500, for that was the amount which he had bound himself to pay to Walker. It is apparent, therefore, that Wood, Walker, and Chew were the real parties in interest.

Now, the Code of Procedure of the State of New York requires that all parties in interest must be before the court

* Moulin *v.* Insurance Company, 4 Zabriskie, 222.

to perfect an adjudication. But if the person holding the legal title is the *only* real party in interest under the 111th section—which is in fact the argument of the other side—it was not necessary to enact that "an executor or administrator, or a trustee of an express trust," might sue, without joining those beneficially interested. A "trustee of an express trust," without doubt, has the legal title to a *chose in action*, held for his *cestui que trust*. If so, construing the section as the plaintiff does, he can sue in his own name as the real party in interest, and the 113th section becomes a nullity. So, too, with executors; they have the legal title, but not the beneficial interest. If they could maintain an action in their own name under the 111th section as the "real parties in interest," why enact the 113th section? It would have no other purpose than to confer on them a right and power which they already possessed. To give this construction to the term "real party in interest," must necessarily be violated a plain rule of statutory construction, by depriving an express exception of all meaning and purpose whatever. In fact, the effect of this construction would be to exclude from the operation of the 111th section those who had the "beneficial interest," and to include those only who held the "legal title." And this is absurd.

What, then, was the design contemplated by the 111th section? Evidently to establish a procedure, theretofore unknown to courts of common law, and to assimilate the practice in courts of law with respect to parties, with that which governed in courts of equity.

It would be strange, if one holding a bond as collateral security for one-half its amount, could bring suit upon it in the absence and without the knowledge of the pledgor, and by negligence or collusion, permit a defence to one-half the amount to prevail, on recovering the amount necessary to pay his own claim.

Mr. Justice STRONG delivered the opinion of the court.

Confessedly the judgment must have the same effect given to it in the courts of New Jersey as it has in the State of

New York, by the laws of that State, and either of the parties to it has, under the Constitution of the United States, a right to insist that such shall be its operation.

The question, therefore, is what was its effect in the State of New York?

If, by the assignment to him, Wood, the assignee of the bond and mortgage, was clothed with the legal interest therein, and if when he sued, Walker, the assignor, was not a necessary party to the suit, it is plain the judgment in the suit determined finally the amount of the debt for which the bond was given, and neither Walker nor his administratrix, nor any subsequent assignee of either of them can maintain that the bond was not wholly extinguished in the judgment. They were all represented by Wood, and they can claim only through him. On the other hand, if Walker was a necessary party to the suit, neither he nor those claiming under him by subsequent right can be concluded by the judgment.

By the 111th section of the Code of Procedure in New York, it was enacted that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113." The 113th section enacted thus: "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. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another." Doubtless the object of these provisions was to change the common-law rule that an action must be brought in the name of the party who has the legal right, and to substitute for it the rule in equity, but with considerable enlargement. This is manifest not only in the language of the statute, but in the construction which has been given to it by the courts of New York.

Had there been nothing more than the requirement of the 111th section, that every action must be brought in the name of the real party in interest, it might be that the pre-

cise rule in equity as to parties might have been intended. But this cannot be, in view of the other sections. Thus the 117th enacts that all persons having an interest in the subject-matter *may* be joined as plaintiffs. The 118th enacts that any person *may* be a defendant who has or claims an interest in the controversy adverse to the plaintiffs, or who is a necessary party to a complete determination and settlement of the questions involved therein. The 119th section enacts that those *united in interest* must be joined as plaintiffs or defendants, unless the consent of one who should have been joined as plaintiff cannot be obtained, when he may be made a defendant. The 113th section we have already quoted. That, as we have seen, enables a trustee of an express trust to sue in his own name without joining those who have a beneficial interest. It makes him the representative of the holders of mere equities. Who, then, is a trustee of an express trust within the meaning of the statute? It is plain that the law intended to class among such trustees others than those who, in equity, are regarded as technical trustees. It expressly declares that included among them shall be persons with whom, or in whose name, a contract is made for the benefit of another.

And the judicial decisions of New York have given a liberal interpretation to the description, "trustee of an express trust," in accordance with the apparent intention of the legislature. Thus, in *Cummings* v. *Morris*,* where notes had been assigned to the plaintiff upon his agreement to give to the assignor when the notes should be collected the amount thereof in stock, it was held that the assignee might sue alone, and this though the whole beneficial interest was in the assignor. In *Considerant* v. *Brisbane*,† where a promissory note had been given to the plaintiff, as executive agent of a firm, it was ruled that he might sue in his own name, because he was a trustee of an express trust. In *St. John* v. *The American Life Insurance Company*,‡ the plaintiff was the assignee of two policies of insurance under an agreement

* 25 New York, 625. † 22 Id. 389. ‡ 13 Id. 31

that, if one of the policies was paid, he would pay to the wife of the assignor part of the proceeds thereof, and pay her all he recovered on the other policy. It was held that he could sue alone. *Lewis* v. *Graham*,* was a case where an assignment of property had been made by a debtor in trust for certain creditors, and the assignee was empowered to pay them, returning the balance to the assignor; and it was held that the assignee might bring a suit in his own name, without joining the *cestui que trusts*. In *Slocum* v. *Barry*,† which was an action brought by persons appointed to receive subscriptions for the Troy University against one who had signed a general subscription agreement, it was ruled they were trustees of an express trust, and it was said "no formal or written agreement is necessary to create a trust in money or personal estate. Any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect."‡ A factor, or other mercantile agent, who contracts in his own name in behalf of his principal, is a trustee of an express trust within the meaning of the statute.

These, and other cases which might be cited, show how liberally the term "trustee of an express trust" has been construed in order to preserve, measurably, the common-law rule, that he who has the legal right is the proper plaintiff.

If, now, we turn to the case in hand it will be found not easy to see why, if Wood was not the real party in interest when he sued upon the bond, he was not at least a trustee of an express trust. The assignment of Walker to him, though expressly stated to be for a collateral security, gave him the entire legal interest. It enabled him to employ the entire bond, if necessary, for the payment of the assignor's debt to him. Had the assignment been without reference to the purpose for which it was made, it is not doubted that the assignee would have been the real party in interest, and

* 4 Abbott, 106. † 34 Howard's Practice, 320.

‡ Cummins *v.* Barkalow, 4 Keyes, 514; Reed *v.* Harris, 7 Robertson, 151; Burbank *v.* Beach, 15 Barbour, 326; Brown *v.* Cherry, 38 Howard, 352.

as such entitled to sue without joining the assignor, and this though in fact made as a collateral security. The legal effect of the transfer cannot be different because the purpose of it was expressed. It is to be observed that Walker's assignment was not of part of the bond, making Wood and Walker joint owners, as was the case in *Lewando* v. *Dunham*,* where the agreement was that the assignor should have half the judgment. Walker's rights were not concurrent with those of his assignee. They were subordinate. He had nothing to get until Wood's claim was entirely satisfied. By his assignment he substituted Wood in his place to demand and receive payment of the bond, and agreed to look to Wood for what remained after his notes were satisfied. Surely after the assignment he had no right to demand anything from Chew. How then had he any real interest in the bond? He had an interest in what Wood might collect by virtue of the bond, but that is a different thing from an interest in the bond itself. And Wood, by taking the assignment expressly as a collateral security, undertook to account to his assignor for the property assigned. He became the holder of the legal right under an express trust to hold the beneficial interest or the money collected primarily for himself, and secondarily for his assignor. If faithless to his trust, if he colluded with the obligor in the bond, he was responsible to his *cestui que trust*.

If then, as we think, Wood by the assignment became the trustee of an express trust, neither Walker nor his personal representative was a necessary party to the suit which was brought upon the bond. They were represented by the trustee, and the judgment which he recovered settled finally against them, and all claiming under them as well as against Wood, the amount recoverable. Such, in our opinion, was the legal effect of the judgment in the State of New York. And the plaintiff in error has a constitutional right to have the same effect given to it in the State of New Jersey. The learned court, therefore, erred in decreeing a foreclosure of

* 1 Hilton, 114.

the mortgage. The complainant's bill should have been dismissed.

DECREE REVERSED, and the cause remitted with directions to proceed

IN ACCORDANCE WITH THIS OPINION.

FRENCH v. EDWARDS ET AL.

1. Statutory requirements intended for the guide of officers in the conduct of business devolved upon them and designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But requirements intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, are not directory but mandatory. The power of the officer in such cases is limited by the manner and conditions prescribed for its exercise.
2. The provision of a statute of California, that the sheriff, in selling property upon a judgment recovered by the State against the property for delinquent taxes, shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, was intended for the protection of the taxpayer, and is mandatory upon the officer and not directory merely.
3. The recitals in a deed of a sheriff as to the manner in which he executed a judgment directing the sale of property are evidence against the grantee and parties claiming under him. Accordingly a deed of this officer reciting a sale of property under a judgment for taxes to the highest bidder, when he was authorized by the statute *only* to sell the smallest quantity of the property which any one would take and pay the judgment and costs, was held to be void on its face.
4. A bill of exceptions dated during the term at which the trial was had, though some days after the trial, is sufficient if it show that the exceptions were taken *at* the trial.

ERROR to the Circuit Court of the United States for the District of California.

This was an action for the possession of a tract of land