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

Statement of the case.

situated in the county of Sacramento, in the State of California, "commencing at the corner of Main and Water Streets of the town of Sutter, at the east bank of the Sacramento River; running thence, in a northerly direction, up and along said river one-half of a mile; thence in an easterly direction one mile; thence southerly, at right angles, one-half mile; and thence westerly, at right angles, one mile, to the place of beginning, containing three hundred and twenty acres."

The plaintiff derived his title by deed from a certain R. H. Vance, dated March 1st, 1862. Vance acquired his title through sundry mesne conveyances from John A. Sutter, to whom a grant of land, including the premises in controversy, was made in June, 1841, by the then governor of the Department of California. This grant was, in March, 1852, submitted to investigation under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, and was adjudged valid and confirmed by a decree of the Board of Commissioners created under that act, and by the District Court and the Supreme Court of the United States, to which the decision of the board was carried on appeal. A patent of the United States pursuant to the decree followed to the grantee, bearing date in June, 1866. As this patent took effect by relation as of the day when the proceedings for its acquisition were instituted, in March, 1852, all the title and rights, which it conferred to the premises in controversy, enured to the benefit of the plaintiff claiming under the patentee, although the deed to him was executed before the patent was issued.

The defendants asserted title to the premises under a deed executed by the sheriff of Sacramento County upon a sale on a judgment rendered for unpaid taxes assessed on the property for the year 1864, and the whole case turned upon the validity of this tax deed.

By an act of California, passed in 1861, the district attorneys of the several counties of the State are authorized and required to commence actions for the recovery of taxes assessed upon real property and improvements thereon,

which remain unpaid after a prescribed period.* Such actions are to be brought in the name of the people in the courts having jurisdiction of the amount claimed in the counties where the property is situated, against the parties delinquent, the real property and improvements assessed, and against all owners or claimants of the same, known or unknown. The manner in which process issued in such actions shall be served, actually upon the defendants if found, and constructively upon defendants absent from the county, and upon the real property and improvements, is specially prescribed. The answers which shall be allowed therein are also designated, and all acts required between the assessment of the taxes and the commencement of the actions are declared to be directory merely. Personal judgments are only authorized against defendants, who are actually served with process or who appear in the actions; but judgments can be rendered, upon service of process by posting, against the real estate and improvements for the taxes assessed, severally against each, if they belong to different owners and are separately assessed, and jointly against both if they belong to the same owners.

The act regulating proceedings in civil cases generally in the courts of the State, passed in 1851, and its several amendments, so far as they are not inconsistent with the special provisions of the act of 1861, are made applicable to proceedings under the latter act for the recovery of delinquent taxes, subject to the proviso that the sheriff in selling the property under the judgment "*shall only sell the smallest quantity that any purchaser will take and pay the judgment and all costs.*" By the act of 1851 the sheriff is required to sell property under ordinary judgments to the highest bidder.

A further act of the State, passed in May, 1862, in relation to suits of this character, provides for service of process by publication in a newspaper, as well as by posting, and authorizes the court, in enforcing the lien for taxes, to exer-

* Act to provide revenue for the support of the government of the State, approved May 17th, 1861, § 39, Statutes of California of 1861, p. 432.

Statement of the case.

cise all the powers which pertain to a court of equity in the foreclosure of mortgages, but at the same time it declares, that when the decree of the court contains no special directions as to the mode of selling, "*no more of the property shall be sold than is necessary to pay the judgment and costs.*"*

The judgment under which the sale was made for which the deed in suit was executed to the defendants, was rendered in October, 1865, in an action brought against R. H. Vance, who had transferred his interest to the plaintiff in March, 1862, and against John Doe, Richard Roe, and the real estate in controversy. It found that $113.75 of taxes were due on the property for the year 1864, and for that sum and the taxed costs, $37.65, and accruing costs, it directed that a sale of the property, or so much thereof as might be necessary, should be made in accordance with the statute, and the proceeds applied to pay the judgment and costs.

The deed of the sheriff did not show a compliance in the sale of the property with the requirements of the statutes mentioned. It did not show that the smallest quantity of the property was sold for which a purchaser would pay the judgment and costs, or that any less than the whole property was ever offered to bidders, or that any opportunity was afforded them to take any less than the entire tract and pay the judgment and costs. The recitals of the deed were that the sheriff sold the land described to "the highest bidder," and for "the largest sum bid for said property," language which imported that the entire tract was offered in one body, and that there were more than one bidder, and of course that different sums were bid for it in this form.

The court instructed the jury to find for the defendant; to which instruction the plaintiff excepted. Verdict was rendered on 3d of April, 1867; the bill of exceptions was signed and dated on the following 13th, and judgment on the verdict was entered on the following 26th, the court not having adjourned until after this date.

On error brought by the plaintiff the main question was

* Statutes of 1862, p. 520.

whether the departure of the officer from the requirements of the statutes rendered the sale invalid; a minor one—of practice—being to the bill of exceptions.

Messrs. E. Casserly and D. Lake, in support of the ruling below:

1. The bill of exceptions, not having been tendered and signed at the trial, forms no part of the record, and, therefore, cannot be considered on this writ of error.*

2. The recitals in the sheriff's deed show compliance with the statute. Every presumption is in favor of the deed, which was made as the result of an action at law, and bears no analogy to a conveyance by a tax collector. The "highest bidder" was the man who offered to pay the judgment and costs for the least quantity of land, and "the largest sum bid" was the amount of the judgment and costs in connection with the least quantity of land, in other words, the sum which involved the highest appraisement of the value of the tract purchased.

3. Policy and presumptions are in favor of purchasers under sheriff's deed.†

4. The statute of California is directory as to the mode of executing the writ, especially under the decisions of the Supreme Court of that State.‡

5. The remedy of the judgment debtor for a violation of law by the sheriff in the manner of executing the writ is by application to the court to set aside the sale. The sheriff is also liable in damages.§

* Walton *v.* United States, 9 Wheaton, 657; Ex parte Bradstreet, 4 Peters, 102; Sheppard *v.* Wilson, 6 Howard, 275; Phelps *v.* Mayer, 15 Id. 160.

† 4 Kent, *431, note a (p. 478, ed. 1866), note b, *431. See cases, note 2, *432; Cunningham *v.* Cassidy, 17 New York, 278; Neilson *v.* Neilson, 5 Barbour, 565, 568, 569.

‡ Blood *v.* Light, 38 California, 654; Hunt *v.* Loucks, Ib. 377; see also Jones *v.* Clark, 20 Johnson, *51; Crocker Sheriffs, § 506, referring to §§ 501 to 504 (last edition).

§ Jackson *v.* Sternberg, 20 Johnson, 51; Jackson *v.* Roberts, 7 Wendell, 88; Hooker *v.* Young, 5 Cowan, 269-70; Blood *v.* Light, 38 California, 654; San Francisco *v.* Pixley, 21 Id. 58, 59.

6. Recitals in a sheriff's deed, when not required in law, do not vitiate.*

Mr. S. O. Houghton (a brief of Mr. J. Reynolds being filed), contra, for the plaintiff in error.

Mr. Justice FIELD having stated the case, delivered the opinion of the court, as follows:

There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character 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 when the requisitions prescribed are 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, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.

These positions will be found illustrated in numerous cases scattered through the reports of the courts of England and of this country. They are cited in Sedgwick's Treatise on Statutory and Constitutional Law,† and in Cooley's Treatise on Constitutional Limitations.‡

Tested by them the sale of the sheriff in the case before us cannot be upheld. The provision of the statute, that he

* Jackson *v.* Jones, 9 Cowen, 191–2; Jackson *v.* Streeter, 5 Id. 530; Jackson *v.* Pratt, 10 Johnson, 386; Averill *v.* Wilson, 4 Barbour, 183; Armstrong's Lessee *v.* McCoy, 8 Hammond, 135; Blood *v.* Light, 38 California, 649.

† Pages 368–378.

‡ Chap. iv, pp. 74–78.

shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, is intended for the protection of the taxpayer. It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal. The proceedings in the actions for delinquent taxes are, as against absent or unknown owners, generally *ex parte*, and judgments usually follow upon the production of the delinquent list of the county showing an unpaid tax against the property described. Constructive service of the process in such actions by posting or publication is all that is required to give the court jurisdiction; and the delinquent list certified by the county auditor is made *primâ facie* evidence to prove the assessment upon the property, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. When the owner of the property is absent and no appearance is made for him, this *primâ facie* evidence is conclusive, and judgment follows as a matter of course. From the sale which ensues no redemption is permitted unless made within six months afterwards, except in the case of minors and persons laboring under some legal disability.

It is evident from this brief statement of the character of the proceedings and of the evidence permitted in these actions for delinquent taxes, that the provision in question is of the utmost importance to non-resident or absent taxpayers, and that in many cases it affords the only security they have against a confiscation of their property under the forms of law.

It is plain to us, upon a consideration of the different statutes of California upon this subject, that whilst the legislature of that State intended to prevent by the strictest proceedings the possibility of any property escaping its proportional burden of taxation, it also intended by the provision in question to guard against a wanton sacrifice of the property of the taxpayer.

In the present case, real property situated near the second

city in size of California, and the capital of the State, extending one-half a mile along the river Sacramento, and running back one mile, was sold, according to the recitals of the deed, in one body, for less than one-twentieth of its assessed value. It is hardly credible that a less portion than the whole of this large tract would not have been readily accepted and the judgment and costs, amounting to only one hundred and fifty-five dollars and forty cents, been paid, had any opportunity to take less than the entire tract been afforded to purchasers. Be this, however, as it may, it was incumbent upon the officer to afford such opportunity, and not to offer the whole tract at once to the highest bidder.

By the laws of Georgia, of 1790 and 1791, the collector of taxes in that State was authorized to sell the land of the delinquent only on the deficiency of personal estate, and then only so much thereof as would pay the amount of the taxes due, with costs. In *Stead's Executors* v. *Course*,* which came before this court, it appeared that a sale was made under these laws of an entire tract of four hundred and fifty acres, without specifying the amount of taxes actually due for which the land was liable; and the court said, Mr. Chief Justice Marshall delivering its opinion, that the sale ought to have been of so much of the land as would satisfy the tax in arrear; and if the whole tract was sold when a smaller part would have been sufficient, the collector exceeded his authority; and a plea founded upon the supposed validity of the title conferred by the sale could not be sustained.

By a law of New Hampshire, in force in 1843, it was provided that so much of the delinquent taxpayer's estate should be sold as would pay the taxes and incidental charges. In *Ainsworth* v. *Dean*,† which came before the Supreme Court of that State, it appeared that a fifty-acre lot was offered and sold in one body, and the court held the sale to be void, observing that no regard appeared to have been paid to the provision mentioned in the statute, and that no reason was given why the law was not complied with, "if,

* 4 Cranch, 403.

† 1 Foster, 409.

indeed, any reason could be considered as sufficient." A similar decision was made by the Supreme Court of Maine upon a similar clause in one of the statutes of that State.* And numerous analogous adjudications will be found in the reports.† They all proceed on the principle stated by the Supreme Court of Michigan, that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely."‡

But it is contended that inasmuch as the sale in the present case was had under a decree of a court, the same presumptions must be indulged to sustain the action of the sheriff that would be entertained to uphold ordinary sales made by him under execution; and that he is not to be held to the same strictness in his proceedings that he would be if he had acted without the decree, solely under the statute. And several cases are cited from the reports of the Supreme Court of California, showing that all reasonable presumptions are indulged in support of sales on execution, and that such sales are not rendered invalid by reason of a want of conformity to statutory provisions as to the time, notice, and in some particulars, manner of the sale.§

But the obvious answer to this position is, that here there is no room for presumptions. The officer recites in his deed the manner in which he sold the property, and from the recitals it appears that the sale was made in conformity with directions which the statute, applicable to the case, in effect declares shall not govern sales upon judgments for delinquent taxes. Presumptions are not indulged to sustain irregular proceedings of this character, when the irregularity is manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective. The courses prescribed for the officer in the conduct of sales upon ordi-

* Loomis *v.* Pingree, 43 Maine, 311.

† Blackwell on Tax-titles, xv, p. 286.

‡ Clark *v.* Crane, 5 Michigan, 154.

§ San Francisco *v.* Pixley, 21 California, 58; Blood *v.* Light, 38 Id. 649; Hunt *v.* Loucks, Id. 375.

nary judgments under the act of 1851, and upon judgments for delinquent taxes under the act of 1861, are entirely unlike, and usually lead to different results. The general authority of the officer in judicial sales under the act of 1851, in the exercise of which he has a large discretion, is limited and defined when applied to sales under judgments for delinquent taxes, by the provision declaring that the sheriff in selling the property assessed "shall *only* sell the smallest quantity that any purchaser will take, and pay the judgment and all costs"—language which imports a negative upon a sale in any other way. The fact that in some cases no purchaser at the sale may, perhaps, be willing to take less than the whole property and pay that amount, does not dispense with the duty of the officer to comply with the law.

It is also contended that the recitals in the deed were not required, and therefore do not vitiate the deed, but the cases cited fail to support the position as broadly as here stated. They only show that a defective or erroneous recital of the execution, under which a sheriff has acted, will not vitiate his deed if the execution be sufficiently identified. Every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended. The deed of a sheriff forms no exception to the rule. But it is not essential that the execution, or judgment under which he acted, should be set out in full, or that his proceedings on the sale should be detailed at length. It is sufficient if they be referred to with convenient certainty, and any misdescription not actually misleading the grantee would undoubtedly be considered immaterial. But if the manner in which the power is exercised is recited, it being a proper matter for recital, then the recital is evidence, not against strangers, but against the grantee and parties claiming under him. Thus, if a sheriff should refer in his deed to an execution issued to him, and recite that in obedience to it and the statute in such case provided, he had sold the property to the highest bidder, it would be presumed that he had done his duty in the premises, given the proper advertisement, and

made the sale at public auction in the proper manner. But if he should go farther and recite that he had sold the property, not at public auction, but at a private sale, the deed would be void on its face, the sale by auction being essential to a valid execution of the authority of the sheriff. The vendee, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.*

It is unnecessary to express an opinion whether in any case of a sale on a judgment for taxes under the special provision of the statute of California, any presumption can be indulged that the officer had complied with its directions when the fact does not affirmatively appear. It is sufficient that the recitals in his deed of what he did with respect to the sale under consideration show that these directions were disregarded by him in that case. It may also be added that the return of the officer corresponds with these recitals.

The objection to the bill of exceptions, that it does not purport to have been tendered and signed during the trial, is not tenable. It shows that the exceptions were taken at the trial, and that is sufficient. It is dated during the term, and was in fact filed before the judgment on the verdict was entered.

JUDGMENT REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL.

Mr. Justice MILLER, dissenting.

I do not agree that when the State obtains a judgment on the taxes due her by regular proceedings in the courts, that the sale under that judgment is open to all the rigid rules which apply to tax sales made *ex parte* and without the aid of such judgment. The judgment in this case is not assailed by the court, and the sale under it is a *judicial sale*, and entitled to all the presumptions which the law makes in favor of a purchaser at such a sale.

* Robinson *v.* Hardcastle, 2 Term, 252; Jackson *v.* Robert's Executors, 11 Wendell, 427-435; Den *v.* Morse, 7 Halsted, 331.

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The law of California, while it required the sheriff to offer the smallest portion of the land which any one would take and pay the judgment and costs, undoubtedly contemplated that if no one would take any less than the whole of the land and pay the judgment and costs, that then it should be sold to the highest bidder. If this were not so, the State could not collect the taxes in half the cases, because the right of redemption left no inducement to bidders for a smaller amount than the whole.

It is, therefore, a fair presumption from the recital in the deed, that although the sheriff sold the land to the highest bidder, it was because no one would take less than the whole and pay the taxes and costs. And the recital that is made, as well as that which is omitted, are neither of them necessary to the validity of a deed made in a judicial sale.

RAILROAD COMPANY v. SOUTTER ET AL.

A railroad belonging to an incorporated company, and then under a first and second mortgage, was sold on execution and bought in by certain bondholders, whom the second or junior mortgage was given to secure. These purchasers organized themselves (as they were allowed to do by statute in the State where the road was) into a new corporation, and worked the road themselves, and for their own profit. After a certain time, the mortgagees under the first or senior mortgage pressed their debt to a decree of foreclosure; and to prevent a sale of the road the new corporation paid the mortgage debt. Subsequently to this, and on a creditors' bill, the sale made to the creditors under the second mortgage was set aside as fraudulent and void as against other creditors of the corporation which owned the road originally. *Held*, that no bill in equity would lie by the new corporation against the mortgagees under the first mortgage, to be paid back (as paid under a mistake of fact), what had been thus paid to them by the new corporation, or to be subrogated to their decree of foreclosure.

APPEAL from the Circuit Court for the District of Wisconsin.

The Milwaukee and Minnesota Railroad Company filed a bill in equity, in June, 1859, against Soutter (survivor of