CASE NO.

270

NORTHERN DISTRICT

ISLAND OF SACRAMENTO GRANT

JAMES NOE

CLAIMANT.

LAND CASE 270 ND 185 pgs.

NOV 12 1962

294
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TRANSCRIPT

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PAGE 1

OF THE

PROCEEDINGS

IN CASE

NO. 294.

James Noe CLAIMANT

VS.

THE UNITED STATES, DEFENDANT,

FOR THE PLACE NAMED

"Island of Sacramento."

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Office of the Board of Commissioners,

To ascertain and settle the Private Land Claims

IN THE STATE OF CALIFORNIA.

Be it Remembered, that on this twenty fourth day of July, Anno Domini One Thousand Eight Hundred and Fifty-two, before the Commissioners to ascertain and settle the Private Land Claims in the State of California, sitting as a Board in the City of San Francisco, in the State aforesaid, in the United States of America, the following Proceedings were had, to wit;

The Petition of James Noé, for the Place named "Island of Sacramento" was presented, and ordered to be filed and docketed with No. 294 and is as follows, to wit;

(Vide page 5 of this Transcript.)

Upon which Petition the following subsequent Proceedings were had in their chronological order, to wit;

San Francisco August 3d 1852.

In Case no. 294, James Noé for the "Island of Sacramento," on motion of the Claimant, leave was granted to withdraw the original transfer marked Exhibit C. for the purpose of having the same recorded in the County where the land is situated.

San Francisco August 14 1852.

In the same Case the counsel for the Claimant, R. Rose, filed the original Transfer marked Exhibit C. after having been recorded in the County of Colusi.

San Francisco December 16 1852.

In the same Case the deposition of Robert Elwell, a witness in behalf of the Claimant, taken before Commissioner Harry I. Thornton, was filed;

(Vide page 6 of this Transcript)

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San Francisco January 27 1853.

In the same Case the deposition of Juan B. Alvarado, a witness in behalf of the Claimant, taken before Commissioner Harry I. Thornton, with documents marked H. I. T., A., annexed thereto, was filed;

(Vide page 8 of this Transcript.)

San Francisco February 15 1853.

In the same Case the deposition of Jose Castro, a witness in behalf of the Claimant, taken before Commissioner Harry I. Thornton, was filed;

(Vide page 11 of this Transcript.)

San Francisco February 19 1853.

In the same Case the deposition of Abner Phelps, a witness in behalf of the Claimant, taken before Commissioner Hiland Hall, was filed;

(Vide page 9 of this Transcript)

San Francisco October 3 1853.

Case No. 294 was ordered to the foot of the Docket

San Francisco October 3rd 1854.

Case No. 294, was, on motion of the Counsel for the claimant, with the consent of the U. S. Law Agent, ordered to be placed at the foot of the 2d. Class cases on the Trial Docket.

San Francisco November 14 1854.

Case No. 294, was, on motion of the Counsel for the claimant, with the consent of the U. S. Law Agent, ordered to be placed at the foot of the 3d. class cases on the Trial Docket.

San Francisco December 19 1854.

In the same Case the Counsel for the claimant filed the following Affidavit, to wit;

(Vide page 19 of this Transcript.)

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And the prayer of the petitioner therein having been granted, the Case was continued and ordered to be placed at the foot of the 4th Class cases on the Trial Docket.

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San Francisco January 30' 1855.

Case no. 294 was submitted under the Rule of March 21st 1854.

San Francisco February 6' 1855.

In the same Case Commissioner Alpheus Felch delivered the Opinion of the Board rejecting the claim;

(Vide page 21 of this Transcript.)

And the following order was made, to wit:

(Vide page 24 of this Transcript.)

A.

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representing and sending minute and claims
in the State of California

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Petition

To the Board of Commissioners for ascertaining and settling private land claims in the State of California -

Your Petitioner James Roe of Yolo County in the State of California respectfully represents to Your Honorable board that he claims a certain tract of land called Island of Sacramento containing Two Sitios more or less situated in the County of Yolo in said State of California that he claims the same in fee by virtue of a grant made to Robert Elwell under the authority of the Mexican Government by Juan B Alvarado Governor of California bearing date 15th of March 1841.

Your Petitioner further represents that the said grantee on the 23d day of July 1852 transferred his right in said land to Your petitioner as endorsed in the deed of Conveyance executed by the said R Elwell before A Phelps a Notary Public in this City and hereunto annexed marked Exhibit B.

Your Petitioner presents herewith the original grant of said land in the Spanish language marked "A" together with a translation of the same. Also the original map of the said land and will make further proof of title if required by the Board.

Your petitioner prays your honorable board to take into consideration his claim to said tract of land and decree his title to be valid and confirm the same And your petitioner will ever pray.

James Roe.

Filed in Office July 24 1852
(Signed) Geo Fisher Secy.

Deposition of Robert Elwell.

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San Francisco Dec 16. 1852

On this day before Henry I Thornton Comr came Robert Elwell a witness in behalf of the Claimant James Roe petition No 244. and was duly sworn his evidence being given in English -

The U S Associate Law Agent was present

Questions by Claimant -

Question 1st.

What is your name age & place of residence -

Ans.

My name is Robert Elwell. My age is 54 years & my residence has been for thirty years & is now in California -

Quest 2.

Were you the original grantee of the land claimed by James Roe in this case & if so state whether you are interested in the decision of the claim in any manner.

Ans.

I am the person to whom the land was given and have abandoned for valuable consideration all claim or interest in it to Mr Roe without any recourse in any event & have no interest in its decision.

Question.

Did you or not ever furnish a map or draw of the land claimed?

Ans.

I did furnish a sketch which was supposed sufficient as the place asked for was an Island about three months after the presentation of the petition -

Cross Questions by the Law Agent of U S.

Was any information expected

Cross Questions by the Law Agent of the U.S.

Cross Quest 1.

Was any information or report made to the Governor by any Alcalde or other person in this case.

Ans.

There was no Officer there at the time to refer to it was in the midst of & no formal report ever was made - The Gov himself was made acquainted by me with the place and had himself as he said a knowledge of the place -

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Quest 2.

Did you ever receive a title to this land & if so where is it.

Ans.

I did according to Spanish mode of giving it and that title was transferred by me to the Claimant and is on file in this case.

Question 3.

Did you ever receive Judicial possession of the land!

Ans -

I never did.

Quest 4th.

Did you ever occupy the land

Ans.

I never did -

Examination continued by Claimants.

1st - Why did you not occupy the land.

Ans.

I did not occupy it at the time of the grant because of the danger from the Indians and afterwards the disturbances in the Country prevented it -

In the Cross Examination by Law Agent.

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Quest.

Did not other people settle on land in that Section of the Country since the time of your grant.

Ans.

Yes. particularly since the discovery of gold mines –

Robert Elwell.

W. S Law Agent present –

Sworn to and Subscribed before me this 16th of Dec 1852.

H. I. Thornton Comr. &c

Filed in Office Dec 16. 1852.

(Signed) Geo Fisher Secy.

Deposition of Juan B Alvarado

San Francisco Jany 24. 1853

On this day before Comr Harry I Thornton came Juan B Alvarado a witness in behalf of the Claimant James Roe petition No 294. and was duly sworn his Evidence being interpreted by the Secretary.

The U. S Associate Law Agent was present.

Deposition of Mr Juan B Alvarado in Claim No 294 –

Witness states that the document now hand shown him marked A filed with the petition of James Roe in the Secretary's Office of the Board of Land Commissioners is an Original document & that it was signed by him at the time it purports to be signed when he was Governor of the Department of the Californias & that it was granted in consideration of Many & Valuable services

– in named.

Juan B Alvarado

ment of the Californias & that it was granted in consideration of many & valuable services rendered the Government by the grantee therein named.

Juan B Alvarado.

Service admitted –
R. Crimbon
Asst U. S Law Agent

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Sworn to & subscribed before me this 24th of Jany 1853.
Henry I Thornton
Comr &c.

Filed in Office Jany 24. 1853.
(Signd) Geo Fisher Secy.

Deposition of Abner Phelps

San Francisco Feb 11, 1853.
On this day before Comr Heland Hall came Abner Phelps a witness in behalf of the Claimant James Roe petition No 294 and was duly sworn his evidence being given in English.

The U S Associate Law Agent was present.

Deposition of Abner Phelps in Claim No 294

Witness states that his name is Abner Phelps his age is 21 years & upwards & place of residence San Francisco that he knows the Island in the Sacramento River about fifty miles above the City of Sacramento now claimed by James Roe, that he was on said Island some time in June or July 1851 & saw said Roe there, who pointed out to him a person by the name of Champlain as well as he recollects & said that he was residing there holding possession of said land for him as his tenant, that he also saw a small house

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wit & a quantity of hay cut & in possession of said Champlin. Witness. Also says that he saw several other persons there with whom I had no communication

H Phelps.

Sworn & Subscribed
Before me

Edward Hall Comr

Filed in Office Feb 4. 1853.
(signed)
Geo Fisher Secy.

Deposition of Jose Castro.

San Francisco Feb. 15th 1853.
On this day before Comr Harvey S Thornton came Jose Castro a witness in behalf of the Claimant James Roe petition No 294 and was duly sworn. his testimony being interpreted by the Secretary.
The U. S Associate Law Agent was present.

Deposition of Gen Jose Castro in Claim No 294.
Quest 1st.
What is your name age and place of residence?
Answer.
My name is Jose Castro My age is 44 years & my residence at Monterey.
Quest 2.
How long have you resided in California & what offices did you hold & in what portion of the Country?
Answer.
I was born in California. I was

I was born in California. I was first a Member of the Territorial Deputation afterwards Jefe Politico or Governor of California Prefect & Commandant General of Upper California -

Quest 3.

State if you know what was the Condition of the Section of Country embracing the Valley of the Sacramento as to the hostility of the Indians & the safety of Making Settlements on it above what was called Sutters Fort from 1841 to the Change of Government -

Answer.

The whole of the Region of Country of the Sacramento above Sutters fort or New Helvetia was not in a situation to be settled upon by individual Grantees owing to the hostility of the Indians.

The Government rarely sent any troops or Soldiers to maintain Settlements and only for short times and few in number, during the time from 1841 to the Change of the Government My knowledge of the Condition of the Country is derived from a long residence in the Country & from having filled Offices which enabled me to know it.

Jose Castro.

Q. S Law Agent present -

Sworn to & Subscribed before me this 15th day of May 1853

Geo Fisher

Secy

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Sello tercero Dos Reales:
Habilitado provisionalmte. por la Aduana
maritima del puerto de Monterey en el
Departamento de las Californias para
los años de mil Ocho cientos cuarenta y
mil ocho cientos cuarenta y uno.
Jimeno Antonio Maria Osio.

A.
Petition of Lant

Exhibit marked A to the Depo of L. B. Alvarado in Ct. No. 294

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Monterey Mzo. 15 de 1841. De conformidad con lo que pide la parte que representa y en consideracion á los servicios y meritos manifestados le concedo el terreno que pretende en concepto de que si estara á los informes que sobre el particular deberan pedirse sobre si el terreno ha sido concedido á beneficio de alguna particular pueblo ó corporacion con todo lo demas que sea convnte. luego que acompañe el diseño que dara principio á la formacion del Expedte. Asi yo Lucas B. Alvarado Gobno. de Californias mande y forme Alvarado.

C. S. Gobernador
Roberto Elwell Ciudadano de Este Departamento de la Alta California ante S. E. respetuosamte. hago presente que hace el termino de diez y seis años que soy Residte. en el pais casado con una hija de el y con bastante familia empleando todo mi tiempo en negocios de Comercio mas los diferentes Cambios por Razon de las circunstancias de politica ocurridos en esta Republica me fueron en el caso de abasar mis capitales que parte de ellos fueron suplidos á los diferentes Gobiernos de California como á S. E. mismo le consta hasta verme en el Caso de cumplirme en la Milicia nacional como soldado que por servicios tuve el honor de desempeñar honradamte. á las Ordenes de S. E. mismo que mem

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-daba en Jefe la expedicion del Rio en el año de 1838. Sin escusar por mis servicios un solo paso en virtud de las Ordenes del Gobierno nacional. Mas ahora que S. E despues de haver empleado todos sus esfuerzos en la pacificacion general de estos habitantes se halla à la Cabeza del Gobierno no olvidando de recompensar generosamente à los que le fueron fielmente subordenados, no tan solo por este principio si no que se propuesta al mismo tiempo en dar impulso al Ramo de la decente agricultura del pais apollado en las leyes de colonizacion que lo autorizan tan amplemente para hacer comisiones de tierras por lo Espesado suplico à S. E que se sirva concederme un terreno que se halla en los desiertos de la frontera del norte de Sacramento establicimiento de Don Aug. Rutter distante de Este lugar como 18 leguas. Este terreno es aislado por el Rio del Sacramento que es signalada por un Lomo de su Orilla de Rio ente Este Oeste del mismo Rio devidido en dos hazos conteniendo poco mas ó menos cinco sitios de ganado mayor conforme con el diseño que presentarè tan luego como me lo permiten sus circunstancias.

P. L. A. S. E. pido y suplico que se sirva decretarme esta mi instancia favorablemte en lo que recevire gracias.

Monterey Marzo 10th de 1841

Roberto Elwell

Filed in Office June 24th 1852

Geo: Hosher Deer

Geo: Yoakum Seers

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Third Seal. Two Reals.

Provisionally authorised by the Maritime Custom House of the port of Monterey in the Department of the Californias for the years Eighteen hundred and forty and Eighteen hundred and forty one.

Himno — Antonio Maria Osio —

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"B"

Translation

Monterey March 15th 1841.

Agreeably to what the petitioner asks and in consideration of the services & merits herein mentioned I grant him the land he requests with the understanding that he shall abide by the reports that must be asked for as to whether the land has been granted for the benefit of some private individual Pueblo or Corporation with all the rest that may be deemed convenient so soon as he shall accompany the plot which will have the formation of the expedients (proceedings).

Thus did I Juan B Alvarado

To His Excellency the Governor.

Roberto Cloud a Citizen of this Department of Upper California before Your Excellency respectfully represents, that I have been a resident of this Country for Sixteen years married one of the Natives and have a numerous family having employed all my time in Commercial Affairs but the various changes in the political circumstances which have happened in this Republic have caused a detriment to my capital part of which was furnished to the different Governors of California as Your Excy is aware in so much that I was obliged to enlist in the National Militia as a private which service I fulfilled with honor under the orders of Your

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Governor of the Californias Commend and Sigo Alvarado.

Excellency who commended in Chief the Expedition to the South in the year 1838 without Exacting for my services a single dollar by reason of the Scarcity of funds in the National Exchequer but now that Your Ex.cy after having employed your Efforts in the General pacification of the inhabitants is at the head of Government & not forgetful how to generously recompense those who were your faithful Subordinates Not only acting in this as a principal but in view of the necessity to give impulse to the progress of Agriculture in this Country sufficiently as Your Excy is by the laws of Colonization which so fully authorizes your Ex.cy to make concessions of land. – I would for these reasons request Your Excellency to grant me a parcel of land situated in the least part of the Northern frontier of Sacramento distant about 18 leagues from the Establishment of Don Juan Sutter.

This land is bounded by the Rio Sacramento like an Island and is indicated by a hill on the bank of the river which then divides itself into two arms Easty west. Said land containing Five sitios de ganado Mayor (square leagues) more less agreeably to the plat which I shall present as soon as circumstances shall permit, but to do. Wherefore I ask and beseech Your Excellency to be pleased. deign favorably to my petition in which I shall receive a favor.

Monterey March 10th 1841. Roberto Elwell.

Filed in Office July 24, 1852. (signed) Geo Fisher Secy

I certify the foregoing to be a true and correct translation from the original Spanish on file in this Office in case No 294, Juan Roe. Office of the U S Land Commiss.n in California San Francisco July 24, 1852. Geo Fisher Secy

Seal Recorded in Office of the Recorder of City and County in California San Francisco July 24. 1852. Geo Fisher Recr Seal

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B.

Original Deed From Elmer To Roe

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This Indenture Made the Twenty Third day of July in the year One thousand Eight hundred and fifty two between Robert Elmer of the County and City of San Francisco in the State of California of the first part and James Roe of the County of Yolo in the State of California of the second part witnesseth that the said party of the first part in Consideration of the sum of Three Thousand Five Hundred and Fifty Dollars to me duly paid before the delivery hereof has bargained and sold and by these presents do grant and convey to the said party of the second part his heirs and assigns forever, All that and singular all my right title interest and claim to that certain tract of land granted to me by Juan B Alvarado late Governor of Upper California by grant bearing date at Monterey the 15th day of March 1841 containing Five Sitios more or less described in said grant and accompanying plat as an Island made by the Sacramento River about Eighteen Leagues above John A Sutters Fort Commencing on the Island opposite a Mound Meandering up what is now called the Slough to its intersection with the river Sacramento thence down the river Sacramento now Meandering the said river to the place of beginning for more particular description of which reference is made to the grant and plat above mentioned.

With the appurtenances and all the Estate title and interest of the said party of the first part therein –

And the said party of the first part does hereby covenant and agree with the said party of the second part that at the time of the delivery hereof the said party of the

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first part is the lawful owner of the premises above granted and seized thereof in fee simple absolute and that he will warrant and defend the above granted premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns for ever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Robert Elwell (Seal)

Sealed and delivered
in the presence of

State of California
County of San Francisco } ss.

On this Twenty Third day of July in the Year of our Lord one thousand Eight hundred and fifty two before me came Robert Elwell to me known to be the individual described in and who executed the within instrument acknowledged that he executed the same of his own free act and deed and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my Official seal the day and year first above written.

A Phelps.
Notary Public.

Original Filed in Office July 31. 1852
(Signed)
Geo Fisher Secy

Geo Fisher Secy

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Board of Land Commissioners

Case No 294.

James Roe
vs
United States

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Affidavit of James Roe, comm

I, James Roe claimant in the above entitled cause of lawful age depose and say that Nathan Coombs of Napa in this State is an important witness whose testimony I am advised by my Counsel is important to be taken and used in the trial.

The said Coombs is an active business man engaged in staging. He has been in California and knows well the land claimed by this Affiant in the above cause

Your Affiant has once procured the attendance of the said Coombs here before the Commission to give his testimony but the Employment of the Commissioner and the Law Agent at that time prevented his testimony being taken.

Mr Coombs promised Your Affiant that he would be in the City shortly after and give testimony and your affiant confidently expects him so to do very shortly

Your Affiant is advised that he cannot safely submit his cause without said testimony and therefore prays Your Honorable Board to place said Case No 294 at the foot of the fourth class of cases on Your Hon's Docket.

San Francisco Dec 19. 1854.

James Roe

Filed in Office Dec 11. 1854. (Sgd) Geo Fisher Secy

Subscribed and sworn to before me on this 19th day of December AD 1854.

Peter Dott Commissioner

The United States in and for the Second Circuit

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James Rae
vs
The United States } For the place called the Island of Sacramento in Colusa County containing five square leagues of land.

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Opinion by Comr Fitch.

The land claimed in this case is situated on the Sacramento River and includes the designation of an Island from the circumstance of its being separated from the main land by a slough making out from the river above and joining it again below the premises.

The claimant has given in evidence a deed of the premises made to him by Robert Elwell dated July 23. 1852.

The proof filed in to establish a grant to Elwell consists of his petition to the Governor for a grant dated March 10th 1841 and a marginal decree by Governor Alvarado of the 15th of the same month.

The decree concedes the land but under the condition that the grantee should "abide by the Reports that must be asked for as to whether the land has been granted for the benefit of some private individual pueblo or corporation with all the rest that may be deemed convenient so soon as he shall accompany the plot which will head the formation of the Expediente".

The Map it appears from the deposition of Elwell was furnished but the information which was contemplated by this decree and which implied a further action and decision by the Governor upon official reports of the proper officer in the usual method of proceedings in such cases appears never to

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to have been obtained and no proof on the subject is presented to the Commission -

The petition for the grant and also the marginal decree by the Governor refer to the meritorious services of Colwell as a reason or consideration for making the concession - It is evident however from the terms of the petition that the grant was sought under the Colonization laws and Regulations and with a view to agricultural purposes.

Lands were distributed not sold under these laws, and by the Eighth Article of the Colonization Law of August 18, 1824 and the third and fourth articles of the regulations of November 21, 1828 preference was to be given to persons of private merit and those who had rendered service to their Country.

Such services present a good reason for the exercise of the discretion of the Governor in a petitioners favor and is a proper subject to be brought to his attention and all other things being equal might well influence the mind of the Governor to a favorable consideration of his petition - But it is not contemplated in the law or the Regulations as dispensing with the conditions of inhabitancy or cultivation imposed on a grantee - Where a grant is made under these the conditions attach of course whether specified in the grant or not. They are imposed by the law under which it is issued and which is in legal effect a part of the contract.

On an examination of the documents in this case it is the opinion of the Commission that the concession (if otherwise valid) is a colonization grant and subject to the

is a Colonization grant and subject to the

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Conditions above mentioned.

These terms were never complied with by the grantee, more than ten years elapsed between the date of concession and the sale to the present claimant and during which time the grantee never lived upon or cultivated or in any manner occupied or used the premises –

He had therefore no title which he could transfer to another and his deed gave no right to bar the present claimant to the land –

An adverse decree must therefore be entered in the case.

Rejected.

Filed in Office Feb. 6. 1855.

(signed)

Geo Fisher Secy.

James Rae.

vs

The United States

In this case on hearing the proofs and allegations it is adjudged by the Commission that the claim of the said petitioner is not valid and it is therefore decreed that his application for a confirmation thereof be denied.

Decree.

Alphens Felch

R. Aug Thompson

S. B. Farwell

Commissioners

Filed in Office Feb 6. 1855.

(signed)

Geo Fisher Secy

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It appearing to the satisfaction of the Board that the land hereby adjudicated is situated in the Northern District of California, It is hereby Ordered that two Transcripts of the proceedings and decision in this Case and of the papers and Evidence upon which the same are founded be made out and duly Certified by the Secretary, One of which transcripts shall be filed with the Clerk of the United States District Court for the Northern Judicial District of California and the Other be transmitted to the Attorney General of the United States.

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Office of the Board of Commissioners,

To ascertain and settle the Private Land Claims in the State of California.

I, George Fisher — Secretary to the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, do hereby certify the foregoing Twenty four — pages, numbered from 1 to 24, both inclusive, to contain a true, correct and full Transcript of the Record of the Proceedings and of the Decision of the said Board, of the Documentary Evidence and of the Testimony of the Witnesses, upon which the same is founded, on file in this Office, in Case No. 294 on the Docket of the said Board, wherein James Noe is — the Claimant against the United States, for the place known by the name of Island of Sacramento.

In Testimony Whereof, I hereunto set my hand and affix my private Seal (not having a Seal of Office) at San Francisco, California, this Tenth — day of August A. D. 1855, and of the Independence of the United States of America the ~~seventy~~ eightieth.

Geo: Fisher.

Secy.

U. S. DISTRICT COURT,

Northern District of California.

No. 270 270

THE UNITED STATES,

ND

vs.

James Noe

TRANSCRIPT OF THE RECORD

FROM THE

BOARD OF U. S. LAND COMMISSIONERS,

In Case No. 294

Filed, August 11 1853

J. A. Morrow,

Clerk

Denman & Rice

for Appt.

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Sello Tercero Dos Reales.
Habilitado provisionalmente por la Aduana Maritima del puerto de Monterey en el Departamento de las Californias p.a las Californias, para los años de mil ochocientos cuarenta y mil ochocientos cuarenta y uno.

Himeno. Antonio Maria Osio.

Monterey Marzo 15 de 1841.

De conformidad con lo que pide la parte que representa y en consideracion á los servicios y meritos manifestados le concedo el terreno que pretende en concepto de que se estará á los informes que sobre el particular deberán pedirse sobre si el terreno ha concedido á beneficio de algun particular, pueblo ó corporacion con todo lo demas que sea conveniente luego que acompañe el diseños que da-

E. S. Gobernador —

Roberto Elmelle ciudadano de este Departamento de la Alta California, ante S. E. respetuosamente hago presente que hace el termino de diez y seis años que soy residente en el pais casado con una hija de el y con bastante familia empleando todo mi tiempo en negocios de comercio mas los diferentes cambios por razon de las circunstancias de politica ocurridas en esta republica me pusieron en caso de alzar mis capitales que parte de ellos fueron suplidos á los diferentes Gobernadores de California como á su E. mismo le consta hasta verme en el caso de emplearme en la Milicia Nacional que por servicios tuve el honor de desem=

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rá principio á la formacion del Espediente. Asi yo Juan B. Alvarado Gobernador de California lo mandé y firmé.

Alvarado.

peñar honradamente á las ordenes de S.E. mismo que mandaba en Gefe la Espedicion del Sur en el año de 1838 sin equivir por mis servicios un solo paso en virtud de las escaseces del erario nacional mas ahora que S.E. despues de haber empleado todos sus esfuerzos en la pacificacion general de estos habitantes se halla a la Cabeza del Gobierno no olvidando de recompensar generosamente á los que le fueron fielmente subordinados no tan solo por este principio se no que se es fuera del mismo tiempo en dar impulso al ramo de la haciente agricultura del pais, apollado en las leyes de Colonizacion que le autorizan ampliamente para hacer concisiones de tierras por lo espuesto suplico á S.E. que se sirva concederme un terreno que se halla en los desiertos de la frontera del Norte de Sacramento establecimiento de D. Aug Sutter distante de este lugar como 18 leguas este terreno es aislado por el rio del Sacramento que es signalado por un Lomo de Sur Orilla de rio entre Este Oeste del mismo rio dividido en dos brazos conteniendo poco mas ó menos cinco sitios de ganado mayor conforme con el diseño que presentare tan luego que me lo permitan mis circunstancias y por tanto á S.E. pido y suplico se sirva decretarme esta mi in-

[illegible] favorablemente en lo que recibir gracia.

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stancia favorablemente en lo que ecci-
ciera gracia.

Monterey Marzo 10 de 1841.

Roberto Edwell.

I, Geo. Fisher, Secretary to the U.S. Land Commission to ascertain and settle private land claims in the State of California, hereby certify the foregoing to be a true and correct copy of "Exhibit Marked A to the Deposition of J. B. Alvarado in No. 294, January 27th 1853, H.J.T." except the diseno on the 3d page thereof, which Exhibit is now on file in this Office.

In testimony whereof I have hereunto signed my name and affixed my private seal (not having a seal of office) at the City of San Francisco Cal, this 3d day of May A.D. 1855.

Geo. Fisher.

Sec.

No. 294.

James Noel.

Island of Sacramento.

Certified Copy of
A.
Petition & Grant.

Filed in Office June 24th 1852.
(Signed) Geo. Fisher
Secy.

Exhibit marked A to the deposition of J. B. Alvarado in No. 294, Jan. 27, 1853.
H. I. T.
Geo. Fisher
Secy.

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Fiesta

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Third Deal, Inn Reals.
Provisionally authorized by the Maritime Custom House of the Port of Monterey, in the Department of the Californias, for the year Eighteen hundred and forty and Eighteen hundred & forty one.

Ximeno. Antonio Maria Osio.

Monterey March 15th 1841.

Agreeably to what the petitioner asks, and in consideration of the services and merits herein mentioned, I grant him the land he requests, with the understanding that he shall abide by the rights that must be asked for, as to whether the land has been granted for the benefit of some private individual, Pueblo or corporation, with all the rest that may be deemed convenient, so soon as he shall accompany the plat which will head the formation of the Expediente (proceedings) — Thus did I, Juan B. Alvarado,

To His Excellency the Governor.

Roberto Elwell, a citizen of this department of Upper California before your Excellency respectfully represents, that I have been a resident of this country for eighteen years, married one of the natives, and have a numerous family, having employed all my time in commercial affairs, but the various changes in the political circumstances which have happened in this Republic, has caused a detriment to my capital, part of which was furnished to the different Governors of California as Your Excy. is aware, in so much that I was obliged to enlist in the National Militia as a private, which service I fulfilled with honor under the orders of your Excellency who commanded in chief the expedition to the South in the year 1838, without exacting

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Governor of the Californias, command and sign.
Alvarado.

for my services a single dollar, by reason of the scarcity of funds in the National Exchequer; but now that your Exc.y after having employed your efforts in the general pacification of the inhabitants, is at the head of Government, and not forgetful how to generously recompense those who have your faithful subordinates, not only acting in this as a principle, but in view of the necessity to give impulse to the progress of agriculture in this country, supported as your Exc.y is by the laws of colonization which so fully authorize your Exc.y to make concessions of land. I would for these reasons request your Excellency to grant me a parcel of land situated in the waste part of the Northern frontier of Sacramento, distant about 18 leagues from the establishment of Don Jno. Sutter. This land is bounded by the River Sacramento like an Island, and is indicated by a hill in the bank of the river which river divides itself into two arms East and West; said land containing Five sitios de ganado mayor (square leagues) more or less, agreeably to the plat which I shall present as soon as circumstances shall permit me to do so.

Wherefore I ask and beseach your Excellency to be pleased decree favorably to my petition in which I shall receive a favor.

Monterey March 10th 1841.

Roberto Elwell

exact translation from the Original Spanish on file and on

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I certify the foregoing to be a true and correct translation from the Original Spanish on file in this Office in case No 294. James Noe.

Office of the U. S. Land Commission in California, San Francisco, July 24' 1852.

Geo: Fisher.
Secy.

I, George Fisher, Secretary to the U. S. Land Commission to ascertain and settle private land claims in the State of California, hereby certify that the foregoing is a true and correct copy of an "Original Translation" now on file in this Office.

In testimony whereof I have hereunto subscribed my name officially, at Office in the city of San Francisco, Cal, this Third day of May A. D. 1855.

Geo: Fisher.
Sec.

No 294.

James Noe.

Island of Sacramento.

B.

Translation of A.

Filed in Office July 24 1852.

(Signed) Geo: Fisher.

Secy.

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To the Board of Commissioners for ascertaining and settling private land claims in the State of California.

Your petitioner James Noe of Yolo County, in the State of California, respectfully represents to your Honorable Board that he claims a certain tract of land called Island of Sacramento, containing Five sitios more or less situated in the County of Yolo in said State of California, that he claims the same in fee by virtue of a grant made to Robert Elwell, under the authority of the Mexican Government by Juan B. Alvarado, Governor of California, bearing date 15th of March 1841.

Your petitioner further represents that the said grantee on the 23d day of July 1852, transferred his right in said land to your petitioner, as evidenced in the deed of Conveyance executed by the said R. Elwell before A. Phelps a Notary Public in this City, and herewith annexed marked Exhibit B.

Your petitioner presents herewith the original grant of said land in the Spanish language marked A. together with a translation of the same, also the original map of the said land, and will make further proof of title if required by the board.

Your petitioner prays your Honorable Board to take into consideration his claim to said tract of land and decree his title to be valid, and confirm the same.

And your petitioner will ever pray

James Noe.

Filed in Office July 24 1853.

Geo: Fisher. Secy.

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I, George Fisher, Secretary to the U. S. Board of Land Commissioners to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a full, true and correct copy of a "Petition" in case No 294, James Noe vs The United States for the "Island of Sacramento" now on file in this office.

In testimony whereof I have hereunto subscribed my name officially, at office in the city of San Francisco, Cal, this Third day of May, A. D. 1855.

Geo: Fisher.

Sig.

No 294.

James Noe.

Island of Sacramento.

Petition.

Filed in Office July 24th. 1852.

(Signed) Geo: Fisher.

Secy.

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This Indenture, made the Twenty third day of July, in the year one thousand eight hundred and fifty two, between Robert Elwell of the County and City of San Francisco in the State of California of the first part and James Nye of the County of Yolo in the State of California of the second part, Witnesseth, That the said party of the first part, in consideration of the sum of Three thousand five hundred and fifty dollars to me duly paid before the delivering hereof, has bargained and sold and by these presents does grant and convey to the said party of the second part, his heirs and assigns forever, All and singular my right, title, interest and claim to that certain tract of land granted to me by Juan B. Alvarado late Governor of Upper California by grant bearing date at Monterey the 15th day of March 1844, containing five sitios more or less, described in said grant and accompanying plat as an Island made by the Sacramento River about eighteen leagues above John A. Sutter's Fort, commencing on the Island opposite a mound, meandering up what is now called the Slough to its intersection with the River Sacramento River, thence down the River Sacramento River, meandering the said River to the place of beginning, for more particular description of which reference is made to the grant and plat above mentioned, with the appurtenances, and all the estate, title and interest of the said party of the first part therein. And the said party of the first part, does hereby covenant and agree with the said party of the second part, that at the time of the delivery hereof

the said party of the first part is the lawful owner of the premises above granted and seized thereof in fee simple absolute, and that he will warrant and defend the above granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed & delivered in presence of — Robert Elwell. (seal)

State of California
County of San Francisco } S. S.

On this Twenty third day of July in the year of our Lord one thousand eight hundred and fifty two, before me came Robert Elwell, to me known to be the individual described in and who executed the within instrument, and acknowledged that he executed the same of his own free will and deed, and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my Official seal, the day and year first above written.

A. Phelps.
Notary Public.

(seal)

Colusi County
Recorders Office } Rec'd for Record ofAmes Nee August 12th A. D. 1852 at 9 & 1/2 o'clock A. M. and Recorded fully on pages 256 & 257 of 1st Vol A. of Records.

E. D. Wheatley. Recorder.

C. D. Wheatley. Recorder.

By A. B. Leaing. Deputy.

Filed in Office of Recorder of Yolo County for Record July 30th A. D. 1852 at 7 3/4 o'c. A. M. and recorded on folios 47-48 of Liber "A" of Deeds Records of said County.

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$4.50 - paid - H. Griffith. Recorder.

Filed in Office July 31 1852.

Geo: Fisher.

Secy.

I, George Fisher, Secretary to the U. S. Land Commission &c, hereby certify the foregoing to be a true and correct of a "Transfer" in Case No 294, James Noe vs The United States, for the Island of Sacramento, now on file in this Office.

Witness my hand officially, this Third day of May A. D. 1855.

Geo: Fisher.

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Sec.

No 294.

James Noe.

Island of Sacramento.

6.

Transfer to Noe.

Filed in Office July 31st 1852.
(Signed) Geo: Fisher.
Secy.

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Delivered for Recording in Colusi Co. Augt. 3d. Refiled in Office Augt 14th 1852.
(Signed) Geo: Fisher.
Secy.

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San Francisco, Decr. 16th 1852.

On this day before Harry I. Thornton Comr. came Robert Elwell, a witness in behalf of the claimant James Noe, petition No 294. and was duly sworn, his evidence being given in English.

The U. S. Associate Law Agent was present.

Question by Claimant.

Quest 1st. What is your name, age and place of residence?

Ans. My name is Robert Elwell, my age is 54 years, and my residence has been for thirty years and is now in California.

Quest 2. Were you the original grantee of the land claimed by James Noe his this case, and if so, state whether you are interested in the decision of the claim in any manner.

Ans.

I am the person to whom the land was given, and have abandoned for valuable consideration all claim or interest in it to Mr Noe, without any recourse in any event, & have no interest in its decision.

Question. Did you or not ever furnish a map or diseno of the land claimed?

Ans.

I did furnish a sketch, which was supposed sufficient, as the place asked for was an Island, about three months after the presentation of the petition.

Cross Questions by the Law Agent of U. S. —

Cross Quest 1st. Was any information or report made to the Governor by any Alcalde or other person in this case?
Answ.
There was no officer there at the time to refer to, it was in the midst of Indians, and no formal report was ever made. The Governor himself was made acquainted by me with the place and had himself as he said a knowledge of the place.
Quest 2. Did you ever receive a title to the land and if so, where is it?
Answ.
I did according to Spanish mode of giving it, and that title was transferred by me to the claimant and is on file in this case.
Quest 3d. Did you receive judicial possession of the land?
Ans.
I never did.
Quest 4th. Did you ever occupy the land?
Answ.
No, I never did.

Examination continued by claimant.

1st. Why did you not occupy the land?
Answ.
I did not occupy it at the time of the grant because of the danger from the Indians, and afterwards the disturbances in the country prevented it.

Further Cross - Examination by Loan Agent.

Quest. Did not other people settle on land in that

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other people settle on land in that direction of the country since the time of your grant?

Answ.

Yes, particularly since the discovery of gold mines.

Robt. Elwell.

U. S. Law Agent present.

Sworn to and subscribed before me this 16th. of Dec. 1852.

H. A. Thornton.
Comr.

Filed in Office Dec. 16th 1852.
Geo: Fisher.
Secy.

I, George Fisher, Secretary to the U. S. Land Commission to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true & correct copy of a Deposition, in Case No 294, Samuel Norris vs The United States, for the Island of Sucramento, now on file in this office.

In testimony whereof I have hereunto subscribed my name officially, at office in the city of San Francisco, Cal, this Third day of May A. D. 1855.

Geo. Fisher.
Sec.

No 294

James Noe.

Island of Sacramento.

Deposition of Robert Elwell, taken before Comr. H. S. Thornton.

Filed in Office Dec. 16th 1852

(Signed) Geo: Fisher.
Secy.

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San Francisco, Jany 27th 1853.

On this day before Comr. Harry S. Thornton, came Juan B. Alvarado, a witness in behalf of the claimant James Noe, petition No 294, and was duly sworn, his evidence being interpreted by the Secretary.

The U. S. Associate Law Agent was present.

Deposition of Gov Juan B. Alvarado in claim No 294.

Witness states that the document now here shown him marked A. and filed with the petition of James Noe in the Secretary's Office of the Board of Land Commissioners, is an original document, and that it was signed by him at the time it purports to be signed when he was Governor of the Department of the Californias, and that it was granted in consideration of many and valuable services rendered the government by the grantee therein named.

Juan B. Alvarado.

Service admitted
R. Greenhow
Asso. U. S. Law Agent.

Sworn to and subscribed before me this 27th of Jany 1853.
Harry S. Thornton.
Comr&c

Filed in Office Jany 27th 1853.
Geo: Fisher Secy.

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I, George Fisher, Secretary to the U. S. Board of Land Commissioners to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true and correct copy of a Deposition in case No 294, James Noe vs The United States, for the Island of Sacramento, now on file in this Office.

In testimony whereof I have hereunto subscribed my name officially, at Office in the city of San Francisco, Cal. this Third day of May A. D. 1855.

Geo: Fisher.

Sy.

No 294.

James Noe.

Island of Sacramento.

Deposition of Juan N. Alvarado, taken before Comr. Thornton.

Filed in Office Jany 27. 1853.

Signed/Geo: Fisher.
Secy

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San Francisco Feby 15th 1853.

On this day before Comr. M. S. Thornton, came José Castro, a witness in behalf of the claimant James Noe, petition No 294, and was duly sworn, his evidence being interpreted by the Secretary.

The U. S. Associate Sear Agent was present.

Deposition of Gen. José Castro in claim No 294.

Question 1st. What is your name, age and place of residence?
Answer. My name is José Castro, my age is 44 years and my residence at Monterey.
Ques 2. How long have you resided in California and what offices did you hold and in what portion of the country?
Answer.

I was born in California; I was first a member of the Territorial Deputation, afterwards Jefe Politico or Governor of California, Prefect and Commandant General of Upper California.
Ques 3. State if you know, what was the condition of the section of the country embracing the valley of the Sacramento as to the hostility of the Indians and the safety of making settlements on it above what was called Sutter's Fort from 1841 to the change of Government?
Answer.

The whole of the region of country of the Sacramento above Sutter's Fort or New Helvetia was not in a situation to be settled upon by individual grantees, owing to the

hostility of the Indians. The Government rarely sent any troops or soldiers to maintain settlements, and only for short times and few in number during the time from 1841 to the change of the Government. My knowledge of the condition of the country is derived from a long residence in the country, and from having filled offices which enabled me to know it.

José Castro.

U. S. Land Agent present.

Sworn to and subscribed before me this 15th of Feby 1853.

Harry S. Thornton
Comr &c.

Filed in Office Feby 15th 1853.
Geo: Fisher.
Secy.

I, George Fisher, Secretary to the U. S. Land Commission to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true and correct copy of a Deposition in Case No 294 James Noel vs The United States for the Island of Sacramento, now on file in this office.

In testimony whereof I have hereunto subscribed my name officially, at office in the city of San Francisco, Cal, this Third day of May A. D. 1855.

Geo: Fisher

Sig.

No 294.

James Noe

Island of Sacramento.

Depo. of José Castro
taken before Comr.
Harry I. Thornton—

Filed in Office Feby 15th
1853.
(Signed) Geo: Fisher.
Secy.

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San Francisco Feby 19th 1853.

On this day before Comr. Hiland Hall, came Abner Phelps, a witness in behalf of the claimant James Noe, petition No 294. and was duly sworn, his evidence being given in English.

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The U. S. Associate Law Agent was present.

Deposition of Abner Phelps in claim No 294.

Witness states that his name is Abner Phelps, his age is 21 years and upwards and place of residence at San Francisco, – That he knows the Island in the Sacramento River about fifty miles above the city of Sacramento now claimed by James Noe; That he was on said Island some time in June or July 1851, and saw said Noe there who pointed out to him a person by the name of Champlain, as well as he recollects, and saw that he was residing there holding possession of said land forthem, and as his tenant – That he also saw a small house on it, and a quantity of hay cut, and in possession of said Champlain; witness also says that he saw several other persons there with whom I had no communication.

A. Phelps.

Sworn and subscribed
before me
Hiland Hall.
Comr.

Filed in Office Feby 19 1853.
Geo: Fisher. Secy

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I, George Fisher, Secretary to the U. S. Board of Land Commissioners to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true and correct copy of a Deposition in Case No 294, Sanchez Noe vs The United States, for the Island of Sacramento now on file in this office.

In testimony whereof I have hereunto subscribed my name officially, at office in the city of San Francisco, Cal. this Third day of May A. D. 1855.

Geo: Fisher.

Sec.

No 294.

James Noe.

Island of Sacramento

Depo. of Abner Phelps

taken before Comr

Hiland Hall —

Filed in Office Feby 19th

1853.

(Signed) Geo. Fisher

Secy.

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Board of Land Commissioners.

James Noe
vs
United States.

Case No 294.

I James Noe claimant in the above entitled cause of lawful age depose and say, that Nathan Combs of Napa in this State is an important witness, whose testimony I am advised by my counsel is important to be taken and used on this trial. The said Combs is an active business man engaged in Staging. He has long been in California and knows well the Island claimed by this affiant in the above cause - Your affiant has once procured the attendance of the said Combs here before the Commissioner to give his testimony, but the engagement of the Commissioner and the Land Agent at that time prevented his testimony being taken - Mr Combs promised your affiant that he would be in the city shortly after and give testimony, and your affiant confidently expects him so to do very shortly. Your affiant is advised that he cannot safely submit his case without said testimony and therefore prays Your Honorable Board to place said cause No 294, at the foot of fourth class of cases on your Hon^rs Docket.

San Francisco, Decr 19th 1854.

James Noe.

Subscribed and sworn to
before me on this 19th day
of December, A.D. 1854.

Peter Lott. Commissioner -

Filed in Office Dec 19 1854.
Geo: Fisher.
Secy.

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I George Fisher, Secretary to the U. S. Land Commission to ascertain and settle the private land claims in the State of California, hereby certify, that the foregoing is a true and correct copy of an Affidavit, in Case No 294, Sarah Noe vs The United States for the Island of Sacramento, now on file in this office.

In testimony whereof I have hereunto subscribed my name officially, at office in the city of San Francisco, Cal, this Third day of May A. D. 1855.

Geo: Fisher.

Sec

No ~~294~~.

James Noe.

Island of Sacramento

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Affidavit of

James Noe —

Filed in Office Dec 19th 1854.

(Signed) Geo: Fisher.

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In the District Court of the United States for the Northern District of California

In the Matter of James Noe Claiming the Island of Sacramento it being Claim numbered two Hundred & ninety four before the Board of Land Commissioners

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Notice Is hereby given that it is the intention of the claimant in the above case to prosecute the appeal from the decision therein of the Board of Land Commissioners appointed under the Act of Congress of 3 March 1851 entitled an Act to Ascertain the private Land Claims in California

James Noe
Claimant

To the Clerk of the United States District Court for said Northern district

U. S. District Court
No. 270 Ore

Notice of Appeal in the case No 294 of James Roe claiming the Island of Sacramento.

Notice of Appeal

Filed 18th April 1855. L A Mason Clk

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James Noé
vs
The United States

U. S. Dist Court

The petition of James Noé appellant in the above-entitled cause to the Honorable the United States District Court for the Northern District of California, for a review of the decision therein of the Commissioners to settle the private land claims in the State of California, respectfully states that said appellant is the claimant in said cause and that the United States are defendants in the same; that said cause is a claim for a tract of land lying in the Northern District of California and within the jurisdiction of this Honorable Court, and known as the Island of Sacramento, and more particularly referred to and described in a petition filed by said appellant before said Commissioners for the confirmation to him of said land, which last-mentioned petition will afford full information to this Court in that respect; that after the filing of said petition before said Commissioners and the taking of the depositions of certain witnesses on behalf of said claimant, the said Commissioners rejected the said claim and declared the same invalid.

The said appellant further states that after the rejection of his claim as aforesaid which oc-

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curred in February 1855 he took his appeal therefrom, as will fully appear by his notice for that purpose filed with the Clerk of this Court on the eighteenth day of April 1855. Also that the transcript of the record of said Commissioners in said cause was filed with said Clerk on the eleventh day of August 1855.

The said appellant therefore prays the decision of said Commissioners in said cause be reversed and reversed and the claim to said land confirmed.

Calhoun & Buchanan
James Rice Jr
Attys for Appellant

No 270 —

U. S. Dist Court
ND

James Roe

vs

The United States

Petition for review

Island of Sacramento

Filed August 15th 1855,
by Owens
Deputy —

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Calhoun Benham
James Rice Jr.
attys for Roe

UNITED STATES DISTRICT COURT,
Northern District of California.

James Noe,
— vs —
The United States.

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San Francisco, December 19th. 1853

ON this day, before John. A. Monroe, a Commissioner of the United States for the Northern District of California, duly authorized to administer oaths, &c., &c., came Nathan Coombs, a witness produced on behalf of the Claimant, in Case No. 270, being an appeal from the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, in Case No. 294 on the Docket of the said Board of Commissioners, and was duly sworn and testified as follows — ~~his evidence being interpreted by a sworn interpreter~~

PRESENT: Charles. B. Stroder. Counsel for the Claimant, and the U. S. District Attorney & A. Glassell, Esq.

QUESTION BY 1st Claimants.

What is your name, age, and place of residence.

Answer.

Nathan Coombs, am 30 years of age, reside in Napa County, Cal, and have resided in this State since the year 1843.

2d

Are you acquainted with the Sacramento River and its general character, and topography.

Answer.

I am.

3d

Are you acquainted with the old establishment of Don Augustus Sutter. If yea. please state where it was.

Answer.

I am acquainted with said establishment. It was about one mile or one & one half miles North East of where the City of Sacramento now Stands.

4th –

Are you acquainted with an Island in the Sacramento River, to the Northward of Sutter's old establishment, about 18 leagues, if yea, please describe said island as well as you can, its area,

Answer.

I am acquainted with this island. The lower end of this island is about 30 miles by land from Sutters Fort, and perhaps 40 miles by water. There is a mound on the South west side of the Slough ~~which with the River forms the island~~, on the River, and opposite the lower end of the island. This island is about 20 miles in length from the mound running up the River. The average width of the island is from 2½ to 3 miles.

5th

Are you acquainted with any other island in the Sacramento River above Sutter Fort in the neighborhood of this island of any thing like equal dimensions.

Answer,

There is none other, than the one claimed in this case, that has any thing like the quantity of land, in that neighborhood, and North of Sutters Fort,

6th

How long have you been acquainted with this island,

Answer.

Ever since the year 1843, in the month of June

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7th.

What was the condition of that section of country from the time you first knew it, & afterwards, in respect to Indians.

Answer,

The indians in that neighborhood at the upper end of the island were hostile to the whites.

8th

Please state if there was a rancheria of indians in the neighborhood of this island, if yea, where, also the extent of the indian population thereabouts, and your means, and opportunities of being acquainted therewith.

Answer,

Up or near the head of this island there was a rancheria of indians. From the rancheria spoken of, up to the head of the valley, the indians were very numerous. On the 4th of June 1843, the party with which I was in company from Oregon, had a fight with a large body of Indians, say from 500 to 1000, near the head, and above the island, in which we killed some 18 or thereabouts, and wounded a great many more. The same season Capt Sutter went up to the same place with a party of men, and he also had a fight with the indians.

Cross Examined by N. S. Alty,

Have you any interest direct or indirect in the event of this suit.

Answer,

None whatever,

No. 270 four

U. S. Dist. Court.

James Roe,

— vs —

The United States.

Deposition of Nathan Coombs.

Not paid for

Filed Dec: 19. 1855.
G Chenes
Deputy

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Sworn to before me this 19th day of December 1855.
Nathan Coombs
Benj. Thorne.
C. C. Comm'r

Nathan Coombs

In the District Court of the United States - for the Northern District of California.

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The United States
Appellees
vs
James Noe

The United States by their Attorney deny the validity of the title set out in the petition of the said Appellants: & pray that the decision of the Board of Commissioners be affirmed, and that the said title be decreed to be invalid.

W. Russell
Asst. U.S. Atty.

No. 270 —

U.S. Dist. Court
Texas

The U. States
v
James Noe

Answer

Filed Jan 14. 1856.
G. Thomas
Deputy.

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A. Russell

In the District Court of the United States, for the North^n District of California
On appeal from U.S. Board Land Commissioners

United States
vs
James Noe

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It is consented and agreed between the undersigned, that the testimony of J. B. Alvarado, one of the witnesses heretofore examined in this cause, be further taken before John A Monroe Esq. a Commissioner of this District Court, at his office in the Court House of said Court, in the City of San Francisco on this 21st October, between the hours of 11 A.m and 3 o'clock P.m of said day. – and that the said testimony, when so taken, shall be reported by said Commissioner to the Court, and become part of the testimony in said cause. – San Francisco Oct 21st 1856 – Wm Blanding
US Dist Atty
Jas Rice Jr
Atty for Claimant
Ant – Jas Noe

UNITED STATES DISTRICT COURT,
Northern District of California.

San Francisco, Oct 21st 1856

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ON this day, before Lucius Thomas a Commissioner of the United States for the Northern District of California, duly authorized to administer oaths, &c., &c., came Juan B. Alvarado Claimant a witness produced on behalf of the in Case No. 270, being an appeal from the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, in Case No. 294 on the Docket of the said Board of Commissioners, and was duly sworn and testified as follows — ~~his evidence being interpreted by a sworn interpreter~~

PRESENT: Los Moe Claimant and Jas Rice his Atty & Wm Blanding U. S. Dist Atty

QUESTION BY Claimant.

First. How long were you acquainted with Elwell the petitioner?

Answer About Twenty years.

Question - Are you acquainted with the services and advances made by the Claimant in this case referred to in his petition?

Answer. I am - from 1837 to 1838 Mr. Elwell served in a military capacity under my orders! and I was satisfied he he made advances for the Military

Company in Santa Barbara where he had previously resided. Mr. Elwell never was paid for his Military services and I am satisfied he never took pay for his services, in consideration of which I granted him the land ~~he~~ claimed.

I have been informed by the Commissary of Santa Barbara that Elwell made advances which the Govt. never paid. I knew Elwell personally & he was a Soldier in Capt Graham's company and his services were valuable.

Question - Did you regard the grant to Elwell a good and definitive grant at the time it was made -

Answer I did so consider it. I regarded it and intended it as a final and definitive grant for valuable services and advances - In making the grant I regarded it as vacant land. No one else ever applied to me for the land but the petitioner except Sutter who asked for some lands in that locality vicinity - Elwell afterwards discussed with me concerning the grant with which I was acquainted. If I had been in

power and Elwell had called

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power and Elwell had called on me I would have given him as full and complete a title as I could - I regarded his claim such an one as would have been recognized and acknowledged fully by the Mexican Government, without any further form. I intended to convey a certain Island described in the ~~port.~~ petition

Juan B. Thrasher

Sworn & Subscribed before me this 21st day of Oct. A.D. 1855

Jno A Monroe
U.S. Commiss

No. 270 five

U. S. Dist. Court.

James Noe.

-vs-

The United States.

Deposition of J. Alvarado,

Filed Oct. 21, 1856.

Chevers,
Deputy.

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At a stated Term of the District Court of the United States, in and for the Northern District of California, continued and held in and for said District, at the Court Room of the said Court in the City of San Francisco, on Saturday the fifteenth day of November in the year of Our Lord, One thousand eight hundred and fifty six.

Present: The Honorable Matt. McAllister. Circuit Judge
The Honorable Ogden Hoffman
District Judge.

James Noé Appellant versus: The United States Appellees	Decree No 270. —

No 270 - An appeal from the final decision of the Board of Commissioners to ascertain and settle private Land Claims in the state of California;

This cause came on to be heard, at a stated Term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle

Private Land Claims in the state of California, under an act of Congress approved on the 3d day of March AD 1851, upon the transcript of the proceedings and decision of the said Commissioners, and of the papers and evidence upon which the said decision was founded; and on additional testimony taken before this Court, and it appearing to the satisfaction of the Court, that the said transcript has been duly filed according to law; and Counsel for the respective parties having been heard, It is the opinion of the Court, that the said decision is erroneous - And it is by the Court hereby ordered, adjudged and decreed, that the said decision be, and the same is hereby, in all things reversed, set aside and annulled: And it is further by the Court hereby ordered adjudged and decreed, that the claim of the Appellant is a good and valid claim, and that the said claim be, and the same is hereby Confirmed unto the said Appellant James Noé to the extent of the island mentioned and described in the petition and other papers on file in this Cause.

The island which confirmation is hereby made, is the same which was granted to one Robert Elwell on the 15th day of March

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A.D. 1841, by Juan B. Alvarado Governor of the Californias; is situated in the waste parts of the northern frontier of Sacramento, about Eighteen Leagues above the establishment of Don Jno. Sutter, and is made an island by the Sacramento river, divided into two arms East and West, indicated by a hill on the bank of the river, and containing, by estimation, five square leagues of land, a little more or less, according to the terms of the grant, reference to which, and to the other papers on file in this cause, is hereby made: Provided that the said island does not contain more than Eleven Square Leagues of land — in which case confirmation is hereby made of so much of the said island as may be contained within the said quantity of Eleven Square Leagues, and no more:— Provided that the said quantity of Eleven square leagues of land so confirmed, in case the said island shall contain as much or more than the said quantity of Eleven Square leagues of land, be contained within the said island; but if there be less than the said quantity of Eleven square leagues of land contained within the

said island, then the said claim is confirmed to the extent of such less quantity, and no more.

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Ogden Hoffman Jr
U. S. ~~Dist~~ Judge
M Connellan
Cir Jn

No. 270 —

United States District Court — for the North District of California

---

James Roé, appt.
vers
United States, appee.

Decree No 270

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Filed Nov: 15, 1856.
W. H. Chenis,
Deputy Clerk.

Calhoun & Denham
for Claimant.

Cubery.

The United States
vs
James B. Bolton et al

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An appeal is moved in this case by the District Attorney — The motion is opposed on the ground that the court has no power to grant an appeal after the expiration of the term at which the decree has been rendered — The question raised is important for it is understood that there are several cases in which ~~the U.S. or the claimants have omitted to take an appeal during the term at which decrees were rendered during the last term and in which no appeal was taken during that term~~ —

By the act of 1851 no period is expressly mentioned within which the appeal must be taken —

The language of the 10 § is

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The district Court shall proceed to render judgment &c
"and shall on the application
"of the party against whom
"judgment is rendered grant
"an appeal to the Supreme
"Court"

It is contended that the ~~term~~ word "appeal" ~~means~~ imports by vi termini a proceeding taken se dente curiâ — or during the session of the Court at which the decree appealed from is rendered —

It was early decided by the Supreme Court that the term "appeal" in the Judicial act of 1789 ~~was~~ must be understood in its technical sense expressive of the civil law mode of removing a cause to a higher tribunal and not in its popular sense as descriptive of appellate jurisdiction without regard to the manner in which the cause is transmitted to that jurisdiction

7 Cranch. 108 — ib. 387 — 2 Wheat 248

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The term "appeal" is undoubtedly used in the same sense in the act of 1851 — and denotes the civil law mode of transferring a cause to a superior tribunal for a retrial of the matters facts as well as ~~the~~ of law, as distinguished from a writ of error by which errors in matters of law were alone submitted for revision —

The question then arises whether an "appeal" according to the import of the term as used in the civil law, ~~or~~ ~~such~~ as it used ~~in~~ the ~~practice~~ proceedings of those ~~Chancery & Admiralty Courts of England, or of our own courts,~~ courts in England & the U. S. whose practice is ~~framed~~ ~~and~~ based upon the rules of the civil law, or as used in the acts of Congress necessarily denotes a proceeding to be taken in open Court and during the ~~same~~ term ~~as that~~ at which the decree appealed from is rendered —

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By the Roman law up to the time of Justinian appeals viva voce were allowable on the day the sentence was pronounced

Cod. de Appell. 7. 62. 14
Dig. 49. 1. 2.

A little more time was given for an appeal in writing

According to Ulpian Dig. 49. 1. §11 - two days to one acting in his own cause - three days to one acting in a representative capacity such as tutor curator -

But various impediments or excuses were received to mitigate the rigor of this prescription.

Justinian in his 23d novel cap 1. after alluding to the evils of this short and double period enacts that in all cases a delay of 10 days should be given - to be computed from the reading of the sentence

Such appears to have been the law of Spain though the time was subsequently

restricted

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to five days.

Nov. Recop. lib. 11. tit 20. law 1.

By the practice of the Eccle siastical and Admiralty Courts in England appeals from a definitive sentence may be in the "apud acta" at the time of the sentence, viva voce in presence of the Judge or in scriptis, reduced to writing within 10, (or in the eccle siastical Courts 15) days before a notary —

In Appeals from the High Court of Chancery to the ~~Lords~~ House of Lords the first step is a notice of appeal — the next a petition of appeal which is presented to the Lords and on which a summons issues to the Respondents — These petitions of appeal are by Statute limited to 5 years —

By the ~~Judicial~~ acts ~~of 1789~~ ~~and the acts of 1803~~ of Congress appeals are made

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subject to the same rules ~~as~~ regulations and restrictions as are prescribed by law in cases of writs of error — These rules were decided by the Supreme Court in the case of "The San Pedro" (2 Wheat 132) to be those contained in the 22d & 23 sections of the act of 1789 and they relate to the time within which a writ of error may be brought — and when it shall operate as a supersedeas — the citation to the adverse party — the security &c All these regulations are in the opinion of the Supreme Court applicable to appeals under the act of 1803, and are to be substantially observed. In analogy then to the practice in cases of writs of error a copy of the appeal is served upon the adverse party by lodging it in the Clerk's office and a citation is served upon him ~~as~~ as required by the 22d & 23d §§ of the act of 1789 — ~~As~~ The ~~Su~~ Supreme Court

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have recognised however the practice of taking an appeal in open Court, or entering it during the session of the Court at which the decree appealed from is pronounced — In such case the personal citation is ~~therefore~~ held not to be indispensable (Riley v. Lamar 2 Cranch 344) and perhaps the service of the notice of appeal would be held to unnecessary for the same reason —

It thus appears that although originally appeals ~~were~~ may have been taken in open Court yet by the practice of all the Courts proceeding according to the forms of the civil law the appeal may be taken out of Court in ~~a~~ ~~the~~ different modes prescribed by law or by the rules of ~~the~~ Court. That the time ~~within~~ within they are to be taken in like manner expressly limited — but it in no case refers to the terms of the

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Court pronouncing the decree — the distinction between term time and vacation being so far as I am informed wholly unknown to the civil law — altho' the mode of appealing "in scriptis" or before a notary is not admissible in our practice — yet another mode of effecting the same object by a proceeding out of Court is authorised by statute — and we have seen that in the Ecclesiastical & Admiralty Courts of England that manner of taking appeals is still allowed — There would seem therefore no ground for the idea that an appeal means ex vi termini a proceeding in open Court to be taken of necessity during the term at which the decree is pronounced. Two decisions of Judge Story have been cited by the Counsel for the claimants in support of their ~~views~~ position

Norton v. Rich 3d Mason 442. &

The St. Boat New England 3 Sumn. 495

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It appears to me that those cases corroborate the views above expressed

The Judiciary Act of 1789 directed that appeals from the District Court ~~to the~~ should be taken to the "next Circuit Court" [illegible] provided no mode of taking the appeals — The case was thus for supposed by Judge Story to be untouched by Statute — Whether the provisions of the act of 1803 do not apply to appeals from the District to the Circuit Court as well as ~~the~~ to those from the latter to the Supreme Court may admit of doubt — The provisions of the act of 1803 do not seem to have been brought to the notice of Judge Story — But assuming ~~that~~ the law ~~gen~~ makes no provision whatever on the subject except to allow the naked right of appeal to the next Circuit Court — the case presented to

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Judge ~~Does~~ Story does not materially differ from that submitted to this Court.
If then for the word appeal necessarily imported a proceeding sedente curiâ and viva voce he would have determined that no appeal could be taken in any other manner — But such is not his decision On the contrary he states that the District Courts may ~~allow~~ require the appeals to be taken either sedente curiâ and before an adjournment sine die — or afterwards within a fixed time ~~etc~~ in the Clerk's office

As in the Massachusetts district no rules as to appeals had been established but the uniform course from the earliest period had been to take appeals in open Court before the adjournment — this practice was considered equivalent to a rule and obligatory upon all parties.
The case of the steam boat New England so far as it relates

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to the point in the decision affirms the decision of Rich & Norton and avowedly proceeds on its authority —

It is evident that in these cases the appeals were required to be taken de se dente curiâ and before adjournment solely because the rules of Court or a long continued and uniform practice equivalent to a rule had so provided — and not because the right of appeal conferred by statute is imported such a proceeding and none other.

Had such been Judge Story's construction of the term he would not have admitted the power of the Court to enlarge or abridge the right

The 152d Rule of the District Court for the Southern District of New York ~~by similar~~ affirms the same principle — ~~by~~ that rule provides that appeals may be entered within 10 days from the time of rendering the decree — "a brief notice in writing to the clerk & opposite Proctor

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"that the party appeals in
"the cause shall be a suf
"ficient entry of the appeal
"without any petition to the
"Court for leave to enter the
"same". Under this rule ap
peals ~~have~~ are seen entered in
the Clerks office within the
time limited - but wholly
without regard to the ad
journment of the Court - ~~the~~
~~days~~ & the practice of taking
an appeal in open Court
at any time before its adjournment
has fallen into disuse - if in
deed it be any longer admissible.

I think it clear that the
term "appeal" according to the
practice of all the Courts pro
ceeding according to the forms
of the civil law has no
such meaning as that attri
buted to it in the argument.
But even if this were doubt
ful the question would
still arise whether Congress
intended to use it in the
Act of 1851 in any such limited

and doubtful sense —
Had the intention of Congress been to prescribe ~~the~~ a period shorter than that allowed by the general laws regulating appeals, ~~they~~ some limitation would probably have been fixed as in the acts of 1824 & 1828 — by the first of which 12 mo's and by the 2d, 4 months were allowed —
They would hardly have left the limitation to be inferred from the ~~the~~ use of the word "appeal" in a sense different from that in which it is elsewhere used in legislation — and when the period thus allowed would vary from 6 months to a few moments, ~~according~~ depending upon whether the decree was ~~the~~ rendered at the beginning or the end of the term —
It seems far more probable that Congress used the term as it is known in the acts of Congress — and as importing a proceeding to be taken within

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five years from the date of the decree — such a limitation would no doubt be applied should the case arise, and very possibly the Court in the absence of express regulations on the subject would be authorised to fix by its rules a reasonable period within which the appeal is to be taken — ~~in the same manner~~ as has been done by the District courts sitting in Admiralty in cases of appeal to the Circuit Court which are in like manner unprovided for by statute.

No such rules have however been established by this Court. The practice having been to grant the appeal whenever moved for —

The objection we have considered has only recently been raised and if suffered to prevail would operate as a surprise upon the U. S as well as upon

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claimants who in ignorance of any such implied limitation on the rights of appeal have ~~suffered the term to expire with~~ omitted to move for it before the expiration of the term at which the decree was rendered —

For the reasons above stated we think the objection cannot be sustained —

It may be observed in conclusion that the question presented is in its own nature more fit for the consideration of the superior tribunal to which an appeal is sought than for that of the inferior court from which an appeal is taken — A preliminary motion to dismiss the appeal as irregularly taken may be made before the Supreme Court and the question finally determined — whereas a refusal by this Court to allow the appeal would involve the delay of a mandamus to this Court until the return of which the

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decision of the court would necessarily be deferred.

Nos. 8 1 2 & 270

(11)

U. S. Dist Court

James Noé

vs

The United States

The United States

vs

John Rose et al

Opinion on motion to grant appeal

Filed Nov 4th 1867

Hagenbryne

Deputy

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At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room, in the City of SAN FRANCISCO, on Wednesday the fourth day of November in the year of our Lord one thousand eight hundred and fifty-seven.

Present:

The Honorable OGDEN HOFFMAN, *District Judge.*

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The United States
v
James Roe.

D.C. 270; L.C. 294.

In this case, on application of P. Della Torre Esq, U.S. Attorney, made in open Court, it is ordered by the Court that an appeal in behalf of the United States from the final decision of this Court, rendered in said cause at the June 1856 term, be and the same is hereby granted; and that a certified transcript of the pleadings, evidence, depositions and proceedings in the said cause be sent to the Supreme Court of the United States without delay; and the appellant is ordered to serve the usual citation according to law.

Ogden Hoffman
U.S. Dist Judge

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United States District Court, Northern District of California.

The United States

vs.

James Stone

ORDER.

granting appeal

Filed November 4th 1857

John A. Monroe
CLERK.

By P. Guaglyone
DEPUTY.

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United States District Court
Northern District of California,

James Noé
Appellant,
vs
The United States,
Appellee.

And, now, at this day, comes the Appellant in the above entitled cause by Calhoun Benham his attorney, and, reserving the exception heretofore taken to the order of the Court granting an appeal in said cause after the expiration of the term of the said Court, at which the decree of confirmation was rendered, moves the Court that a cross appeal be granted to the said Appellant in said cause. Whereupon it is ordered by the Court, the District Attorney of the United States for the Northern District of California being present that the cross appeal applied for in said cause be and the same is accordingly granted to the Supreme

Court of the United States
Ogden Hoffman
U.S. Dist. Judge

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No

No

U. S. Dist Court
nor. Dist. of Cal.

James Noé

appellant,

vs

The United States,

Appellees.

Mo. and order of
a cross-appeal

Filed Nov. 10th 1857
Lucien Moreno
Clk

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At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room in the City of SAN FRANCISCO, on Monday the Eleventh day of October in the year of our Lord one thousand eight hundred and fifty-eight

Present:

The Honorable OGDEN HOFFMAN, *District Judge.*

The United States
appellee
vs
James Noe
appellant

No. 270

And now at this day comes the appellant in the above-entitled cause by Calhoun Benham his attorney and reserving the exceptions heretofore taken to the order of the Court granting an appeal in said cause after the expiration of the term of the said Court at which the decree of confirmation was rendered moves the Court that said order of appeal be granted to the said appellant in said cause from so much of the decree therein as limits the said claimants to any quantity of land less than the whole of the island mentioned therein.

Whereupon it is ordered by the Judge of the above-entitled Court sitting in Open Court

No. 270

United States District Court, Northern District of California.

The United States,

vs.

James Noe,

Order granting appeal in behalf of Dft. &c,

Filed Oct. 11th 1858,

W. H. Chevers

Clerk.

Deputy.

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The Dft. by Attorney for the above mentioned time, filed the Petition of Appeal for in Cause, and the Petition is a Cond. of granting the Appeal, at the next Term thereof, authorized Pend. the Hearing in the Supreme Court.

Edwin Hoffman
Atty for Dft.

United States of America
Northern District of California. ss:

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The United States by Pedro Del
la Torre Esquire Attorney
for the United States for the
Northern District of Cali-
fornia will take notice
that they are hereby cited
and admonished through
their officer and attorney
aforesaid to be and appear
at a Supreme Court
of the United States to be
holden in Washington on
the first Monday in December
next pursuant to an order
of appeal granted on the eleventh
day of October A. D. 1858 in
open Court by the District
Judge of the United States Dis-
trict Court in and for the
Northern District of Cal-
ifornia in a certain suit
wherein the United States
are ~~plaintiffs~~ and ~~they are~~
~~defendants~~ James Roe
is Claimant originally in-

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stituted before the U. S. Land Commission in California) to show cause if any there be why the decision in said appeal mentioned should not be corrected and speedy justice should not be done to the ~~parties~~ claimant in that behalf

Witness my hand & seal this ~~thirteenth day~~ eleventh day of October (A. D. 1858) in the year of our Lord one thousand eight hundred and fifty-eight

Ogden Hoffman

U. S. Dist Judge

Service of above citation acknowledged
San Francisco
Octr 11th 1858

P. Della Torre
U. S. Atty.

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U. S. District Court
No. Dist. of California

James Roe
appellant
vs
The United States
appellees

Citation and acknowledgment of service

Filed Oct 11th 1858
H. H. Cheever
Clerk

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District Court of the United States
Northern District of California:

James Noe
Appellant
vs
The United States
Appellee

Know all men by these presents, that we James Noe, Thomas Haggett, of the State of California, are held and firmly bound to the above United States, in the sum of One Hundred Dollars, to be paid to the said United States, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated the 13th day of October A D 1858.

Whereas the above named appellant has prosecuted a cross appeal in the above entitled cause to the Supreme Court of the United States at the City of Washington in the District of Columbia, to alter

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the Decree rendered in the above suit by the District Court of the United States for the Northern District of California -

Now, therefore, the Condition of this obligation is such, that if the above named appellant in the said Cross appeal, shall prosecute his said appeal to effect, and answer all damages and costs if he fails to make his cross appeal as aforesaid good, then this obligation shall be void; otherwise to remain in full force and virtue

Signed, sealed, + delivered in presence of
W. A. Chers. } James Noe
Thomas Haggett

United States of America
Northern District of California } ss

James Noe, Thomas Haggett,
parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is worth the sum

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of one hundred Dollars, over and above all his just debts and liabilities — Adnell Moe

Sworn to and subscribed before me. Oct: 13. 1858.
W. H. Chenev.
N. S. Comm.r

Thomas Haggett

Approved Oct. 13. 1858
Ogden Hoffman
Dist Judge

No. 270 3

U. S. Dist. Court.

The United States.

vs

James Noe.

Appeal Bond.

Filed Oct. 13, 1858.

W. A. Chaves.

Clerk.

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Papers Rec'd from
Maj. Isaac Graham
to be used in the case
No 294. Capt Noe's
Case for an Island
in the Sacramento
River

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(8)

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Si esta la presente orden dispondrá V. reunir la mueblada de ese establecimiento y permitirá que el capitan D.n Jac. Greenhow pueda dar bestias y se reciva de ellas las mismas a que mandará V. poner el fierro de venta y cargar sus valores en la cuenta de gastos generales del gobierno.

Dios y Libertad
Monterey Feb.o 14 de 1838.

Juan B. Alvarado

Sr. encargado de la Adm.on de S.ta Antonio

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By the present order you are directed to order the mules belonging to that establishment to be collected together, from which you will permit Captain Isaac Graham to select and receive ten animales, the same upon which he will order you to place the brand of sale, and charge the value of the same in the account of the general expenses of government.

God & Liberty

Monterey July 14th 1838.

John B. Alvarado

B

Supreme Govt.
of the State

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As soon as you have joined the company of Rifles you will march for Santa Barbara, soliciting, by virtue of this order, such assistance as you may need on the way, and giving notice to the men, that as soon as they march from the jurisdiction of Monterey, each one will be paid by the Government two dollars per day in goods or in money, according to the circumstances.

God and ~~Liberty~~ The Federation
Monterey June 23. 1837

John B. Alvarado

For Captain of
the Company of Rifles.

Gobno Supmo del Estado

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Luego que V. halle reunido la compañia de rifleros marchará para el punto de Sta Barbara prévio p.r esta orden los auxilios necesarios en el transito y advirtiendo á los individuos que desde que marchen de la jurisdiccion de Monterrey será cada uno pagado p.r el gob.no á dos pesos diarios bien en efectos ó en plata segun las circunstancias

Dios y Federacion
Monterrey Junio 29 de 1849.

Juan B. Alvarado

N. Capitan de la Compañia de rifleros

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James Roe, vs. }
United States }

In the U.S. vs Sarkin 18th Howard, the court intimate possession was dispensed with. If so, it can with more justice be so held in this case. See 18. How. p. 563. where the speak of the matter of possession.

In the same case where it seems to have been contended the Claimant should have all the land contracted in his sketch the Supreme Court limit him to eleven leagues not because of the controlling effect of the 12th sec. of Dec. of Mex. Con. 18th Aug. 1824. but because of the aid they derive from that sec. Thus they seem to think that sec. not absolutely binding. 18th How. p. 561.

No particular form of grant or patent was prescribed by the colonization laws. 18. H. 563.

In U.S. vs. Vaca & Pina a map was required to be produced in four months. Claimants were hindered by revolutionary state of the country from furnishing it. It was a condition subsequent.

18th Howard 559

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vs.

The Harvey Birch } Opinion

The libel in this case was filed

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ND

NOTE

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Whereas, heretofore on the Twenty Seventh day of July A.D 1855. a certain contract was entered into (signed, sealed, delivered and recorded in due form of law) between James Noe, of the first party therein and Calhoun Benham and James Rice Jr. of the second party therein by which said contract and the covenants therein contained the one party to the other party, the said Noe for himself his heirs executors administrators and assigns did covenant, in effect, "That in case the lands embraced in said claim or any part thereof" (meaning the lands comprising Sacramento Island, so called supposed to contain some Eleven leagues of land) be confirmed unto the said "Noe" party of the first part hi) "he said Noe" will for himself his executors administrators and assigns convey by deed unto said parties of the second part" (said Benham and Rice) "and their heirs forever all the right title interest and claim of the said party of the first part" (said Noe) "which he has now or may hereafter acquire in and to one fourth of the lands so confirmed unto said party of the first part ("said Noe") Provided always that the said land so to be conveyed to the said parties of the second part" (said Benham and Rice shall be taken from the one end or the other of said tract, as confirmed, as said Noe may elect".

Now therefore know all men by these presents, that we said Benham and Rice jointly and each for himself his heirs executors administrators and assigns co-

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consent agree and covenant to and with the said Noe and his lawful assyns, that he the said Noe may sell dispose of, bargain convey pass over and deed all and any part of three fourths of all said Island of Sacramento together with privileges and appurtenances to any person or persons corporation or corporations, and that we or either of us will make no claim against him his heirs or assigns for any part or parcel of the consideration or considerations he or his lawful assigns may have or receive therefor: Provided always that (in as much as the said Noe hath not designated of what portion of said Island shall come and be established to us said Benham and Rice he the said Noe in all conveyance or conveyances, deed or deeds which he shall hereafter make to any person or persons, he shall at all times make the same subject to the strict conditions set forth in said deed and covenant between him the said Noe and the said Benham & Rice entered into as aforesaid the twenty seventh day of July A.D. 1855 as above recited reference at all times being made to said original contract and covenants for the more perfect understanding of the matters and things therein contained

In testimony whereof we have hereunto set our hands and seals this day of December A.D. 1856

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Case 294. Land Commission
Island of Sacramento
James Noé Claimant

1. Petition of Robert Elwell dated Mar. 10. 1841. at Monterey. U. C.

2 Grant by Juan B. Alvarado to Robert Elwell dated Mar 15. 1841. at Monterey on file in Land Commission Office

3. Deed of transfer and sale by Robert Elwell to James Noé dated July 23. 1852. no witness, but duly acknowledged before Abner Phelps Notary Public at San Francisco July 23. 1852. Recorded in Colusi County Aug 12th 1852. and also in Yolo County July 30th 1852. Original filed in Land Commission Office.

4. Petition of James Noé for confirmation of "Island of Sacramento" filed July 24. 1852

5. Affidavit of Noe relative to absent wit. Nathan Combs.

6. Deposition of Robert Elwell, shews that he is not interested in the result of petition to Land Commission: was original grantee: furnished a sketch (map or diseno) which was supposed sufficient as place asked for was an island about 3. months after presentation of petition to Alvarado: that no information was given or report made to the Governor by any Alcalde or other officer because there was no officer there to refer to and the place was in the midst of Indians and because the Governor was as he said acquainted with the place. and that he

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(the Governor) was made acquainted with the place by the affiant: that the deponent never received judicial possession of the land nor occupied it: that the reason why he did not occupy the land was, the danger from Indians about the time of the grant, and the disturbances in the country afterwards: And that other persons ~~occupied~~ settled on land in that section of the country after the grant and "particularly since the discovery of gold." Law agent present & cross-examining. Dep. taken Dec. 16, 1852

7. Deposition of Juan B. Alvarado taken Jan. 27, 1853. Service upon law agent admitted, shews title papers genuine and to have been executed when Deponent was Governor and at the time they purport; and that the grant was made in consideration of many and valuable services rendered the Gov^t by Elwell the grantee.

8. Deposition of José Castro, born in Cal^a, held offices of: Member Territorial Deputation, Jefe Politico or Governor of Cal^a and Prefect and Comandante General of Cal^a shews that the whole of the region of the country of the Sacramento above Sutter's Fort or New Helvetia was not in a situation to be settled upon by individual grantees owing to the hostility of Indians, and troops to have been rarely sent to maintain settlements and only for short times and few at a time; during interval from 1841 to change of Gov^t. And that his information was obtained in the offices he held which enabled him to obtain it. Taken

(and filed) law agent present Feb 15. 1853.

9. Deposition of Thomas Phelps states that he was on the Island in Sacramento river about fifty miles above Sacramento City in 1851. saw Moe there - saw Champlain there in possession - hay cut - a house - Champlain was Moe's tenant. (Query. Did not Phelps say (or mean) 1852 instead of 1851. Moe not having a deed before 52.?) Law agent present - filed & taken Feb 19th 1853.

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Case 294

Island of Sacramento

James Roe

vs

The United States

Abbreviation of Papers &c &c before Commission

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Denham & Rice

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James Noé
vs
The United States

U. S. District Court

The petition of James Noé appellant in the above-entitled cause to the Honorable the United States District Court for the Northern District of California for a review of the decision therein of the Commissioners to settle the private land claims in the State of California, therein respectfully states, that said appellant is the claimant in said cause and that the United States are defendants; that said ~~claim~~ cause is a claim for a tract of land lying in the Northern District of California and within the jurisdiction of this Honorable Court and known as the Island of Sacramento, and more particularly described in the petition filed by said Noé before said Commissioners for the confirmation to him of said land, which last mentioned petition is hereby referred to for the information of this Court in that behalf: that after the filing of his petition before said Commissioners and the taking of the depositions of certain witnesses on behalf of said Noé the said Commissioners rejected the claim of the said Noé to said land and declared the same invalid.

~~Wherefore the said appellant~~

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Said Noë states that after the said rejection of his said claim which occurred in February 1855 he took his appeal as by his notice for that ~~effect~~ purpose filed in the office of the Clerk of this Court on the eighteenth day of April 1855 will fully appear; also that the transcript of the papers and proceedings of said Commissioners was filed in said Court on the eleventh day of August 1855.

Said Noë prays the decision of said Commissioners in said cause be reversed & his title to said land confirmed.

Calhoun P. Benhard
Atty for Noë

U. S. Dist Court

James Roé
vs 270 ND
The United States

Petition for review

Island of Sacramento

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William Denham
atty for roé

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Seal the First. Eight Dollars.

Provisionally authorized by the Maritime Custom house of the port of Monterey District of the Cal.a for the years 1844 & 1845.

Micheltorena Pablo De La Guerra

L.S. Maritime Custom house Monterey

The Citizen Manuel Micheltorena, Gen.l of Brigade of the Mexican Army, Adjutant Gen.l of the Staff of the same, Governor Commandant Gen.l & Inspector of the Department of Cal.a

L.S. Government of the California

Whereas Don Manuel Jimeno has petitioned for his personal benefit for the tract of land which is unoccupied between the Ranch which has been granted to the Children of Don Thomas O Larkin, the river Sacramento and the uncultivated lands which are on the side of the South entirely in conformity with the showing in the corresponding Plan: the necessary preliminaries and investigations having been gone through with as directed by the laws and regulations on the subject. Exercising the authority in me vested, in the name of the Mexican nation, I have and granted to him the said land subject

2? Does this show denouncement of Doe's grant - denouncement being an exceptional proceeding?

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On the following conditions:

1st He may enclose it without prejudice to roads &c & enjoy it fully & exclusively as he pleases.

2. He shall solicit proper judge to give him juridical possession for the which boundaries shall be marked & his plan taken &c

3. If he contravene these conditions he shall lose his right to the land.

Record ordered.

Given at Monterey 4. Nov. 1844.

(Signed) Manuel Michelorena
(") Fran^co Arce
First Official

Analysis of
Grant to
Thos O. Larkin

This or some other grant of Larkin's is said to interfere with Noe's grant on the north. P.C.

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Benham
atty

A

Departmental Government.

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As soon as you present yourself in the Port of Monterey in command of the Company of Rifles, you will show to the Commandante of that Garrison the present order for the disbanding of the said company, and for the retirement of the individuals composing the same.

You will give them in the name of the Government the most expressive thanks for their good services in behalf of the preservation of order, assuring them, that they will be favored, as they offer themselves, with some vacant lands, of which one mile will be set apart to each one, in order that they may possess them conformably to the laws of colonization.

This favor must be understood not to be prejudiced by any balance of accounts for the short time which they have remained united by order of the Government, which will satisfy religiously their wages due and payable for that time—

You will give them notice, that the Government of Mexico, by the new constitution, offers to the Californians the privilege of being governed in future, by natives or citizens of the country; that this and other various advantages which have resulted to us from that constitution have determined me to adopt it, as I did on the 9th of the present month (del corte); that as well in the South, as in the rest of the Department, it is desired that I should continue to govern it— Obligacion in which I am confirmed and supported by the said constitution; That the whole country is in peace, and that

in order to preserve this with the General Government. a commitee will shortly be sent to Mexico in the Sloop which I have purchased for that purpose.

Your Servant.
Santa Barbara July 12, 1847

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John B. Alvarado

For the captain of the Company
of Rifles. – Isaac Graham

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Santa Barbara March 18th 1837

Capitan Graham

Sir,

I have this day seen the Govr. of Alta California, and he writes me to inform you of the information that he has this day received from the Leeward, thinking that probably if he wrote you in Spanish you would not be able to understand him.

He says that he has recd three Letters — the 1st states that there are 200 Men belonging to Sonora, the second says that there are 200 belonging to Sonora, and 200 Indians, the 3rd states that there are 200 belonging to Sonora, & 200 Americans, these people have come with the intent of taking a part with the Mexicans — and that Dn Jose Castro has written to him to that effect — But El Senr. Don Juan Baptiste Alvarado el Governr. of this state says he does not put implicit belief in these reports but wishes you to be prepared for the Worst. It is stated that they are now laying on the other side of the Red River — He says further that he himself has seen a person from Sonora, and he also states that they are preparing there to come to this country — He has given Ordes to Dn Jose Castro

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to do all that lays in his power to prevent them March up farther ~~from~~ than St Diego. by taking all the Horses and provision ~~the~~ Bringing them to St Barbara — when he has any further information on the subject he will write you immediately and hopes that he can depend on you and your comrades services — Don Juan Baptista Alvarado says he has this day rec^d. a Letter from Larkins. concerning the pay of the Rifle Company — he says that he will enclose and order to the Governor of Monterey to pay all orders that you may have signed as Money due to you and your Company on the service of this Government — He says that he is very much hurt that you or your Brave companions should have rec^d. any annoyance or injury from people under the Government of this State, and hopes that you will for the future look up to him for protection which it is his wish that you should rec^d. from this Government. and hopes that you will at all times command him in any thing that he may be able to do for the Benefit of you and your companions — He says that the people at this place and the Pueblo of Los Angeles will be able

to ~~meet~~ meet all obstacles, and he likewise tells me that he has now some good arms and cannon—

He says that the Bolivar has 7 Rifles and he wishes you to take them on the account of the Government and will enclose you an Order to Mr. Thompson to that effect. He wishes you to hold your self in readiness and he will send you the first News that he receives—

I remain Sir

Yours most truly

J. Mellish

P. S. He desires his respects to you and your Lieutenant Offinger — and all of your Companions—

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Lt. Col.t Capitan Graham
La Nativada

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James Noe
vs
The United States

San Francisco Aug 14/55

To the Hon J. W. Inge
U. S. Dist Atty

Take notice I have this day filed my petition in the U.S. District Court for the review and reversal of the decision of the U.S. Commissioners to settle private land claims in the State of California in said cause — the same being a claim for a tract of land in the Northern District of California

Very respectfully
Your obd't Servt
Calhoun Benham
Atty for Noe

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Elmer Roe
vs.
United States.

In the District Court of the United States for the North District of California

It appears by the title papers produced in this case, that on the 10th May 1841, Robt. Elwell presents a petition to Governor Alvarado for a tract of land on the Sacramento River. The petition set forth, that for 16 years he had been a resident of the Country and had a numerous family. He also stated, that the various political changes in the Country had impaired his capital - part of which had been furnished to the different governors as his Excellency was aware. The petitioner further alludes to his services in the Militia - for which he never received any pay, owing to the scarcity of funds in the National Exchequer. He therefore begs that his Exc'y, not forgetting the duty of generously recompensing the services of faithful subordinates, and also, "the necessity of giving an impulse to the progress of agriculture in the Country", and supported, as he was, by the Colonization Laws which so fully authorize him to make concession of lands, might grant him the tract solicited.

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On the margin of this petition, the Governor writes: "In consideration of the services "and merits herein ~~after~~ mentioned, I "grant him (the petitioner) the lands he "requests, with the understanding that he "shall abide by the reports that must be "asked for as to whether the land has been granted, for the benefit "of some private individual, Pueblo or "corporation, with all the rest that "may be deemed convenient so soon "as he shall accompany the plan "which will lead the formation of "the Expediente."

This petition and marginal decree appear to have remained in the possession of the petitioner, nor was any further steps taken by him to obtain a more formal ~~deeds~~ title. He states however, in his deposition, that a plan was furnished to the Governor, such as was deemed sufficient, but the Expediente which it was to "lead", is not produced from the archives. No efforts, of any kind, appear to have been made by the petitioner, to settle upon & occupy his land, and the title papers seem to have remained in

his possession until 1852, when he

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his possession until 1852, when he sold to the present claimant.

In explanation of his failure to occupy the land, the grantee states that he was prevented from doing so at the time of the grant by the danger from the Indians and afterwards by the disturbances in the country.

José Castro, a native Californian, of some distinction, and who has held the offices of Governor, Prefect and Comandant General of the Territory, deposes, that from 1841 until the change of government, the whole region of country above Sutter's fort or New Helvetia, was not in a situation to be settled upon by individual grantees owing to the hostility of Indians. The Government rarely sent any troops to maintain settlements, and only for short times and few in number, during the time from 1841 to the change of Government."

Nathan Coombes, whose testimony was taken in this Court, and who has resided in the Country since 1843, testifies, that from that year, when he first knew the land, the indians in the neighborhood were hostile to the

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while; that near the head of the island there was a rancheria and the indians were very numerous - that a Company from Oregon, of which he was a member, had a fight with a large body of them, from 500 to 1100 strong and that during the same season Capt. Sutter with a party of men, also, had an engagement with them.

The above comprises all the evidence offered in excuse or explanation of the omission of the grantee to fulfill the conditions of his grant. -

The first question which arises under this state of facts is, - did the marginal decree of the Governor, convey to the petitioner "a present and immediate interest, either legal or equitable, in the land?"

The form of the grant is certainly unusual: the marginal decrees of the Governors were, in ordinary cases, but references for information - and the Expedientes usually contain the petition and decrees, the marginal order of reference, the reports of the officers, and the order

or decree of concession by the Governor

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or decree of Concession by the Governor, the latter generally commencing with the words: "Vista la peticion."

The documents or final title was then made out in conformity with the order of concession. In this were expressed the conditions of the grant, its extent &c and it was delivered to the party interested, as his title deed. A copy, however, was usually attached to the other documents above enumerated, forming the Expediente on file in the Archives. - but the copy was frequently not signed, it being thought sufficient if the title paper delivered to the party was properly authenticated. The title papers were usually signed by the Governor and Secretary. -

The Expediente when thus completed, was transmitted to the Assembly for their action, and if the grant was approved, a certificate of the fact was given to the grantee. -

I have met with no case where these forms were not substantially complied with when grants under the Colonization laws were made. -

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In the Case at Bar, the only document relied on as a grant, is the Order or Decree written on the margin of the petition. No doubtedly the Governor used words of grant: "I grant him the land which he requests;" but the condition or qualification annexed, "that the petitioner should abide by the reports", clearly shows that the Governor did not intend his marginal decree to operate as a definitive concession of the land.

In the Case of Arguello vs. U States, decided at the last Term of the Supreme Court, the Court, in speaking of the Order of Concession in that Case (which was the decree already alluded to, beginning with the words "vista la peticion," and which was certainly a more formal decree than the marginal Order in the present Case) say: "By the 4th S. the Governor being "thus informed, may accede or not "to the petition. This was done in "two ways, sometimes he expressed "his consent by merely writing the "word 'Concedo' at the bottom of the "Expediente, at other times with

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"more formality xx - It is intended merely to show that the Governor has acceded to the request of the applicant, and "as an order for the patent or definitive title to be drawn out for "execution xx - It has none of the "characteristicks of a definitive "grant"

But, the marginal decree in this case, cannot even be regarded as an order for the definitive grant, to be made out. For the Governor clearly intimates that reports are to be received, the Reserve to be furnished and the Expedients to be formed, before the final title issued. The marginal Order must, I think, be taken merely as showing that the Governor has acceded to the petitioner's request and agreed to grant him the land if the reports &c should be favorable -

But it is to be observed, that the information required by the Governor was only as to whether the land was the property of any one else, and the absolute terms of the order itself, as well as the

language of the qualification added to it perhaps justify us in considering it as a positive promise to grant the land to the petitioner in consideration of his prior claim upon the Government, provided it should turn out that the land was vacant. -

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The right thus acquired by the petitioner was an equitable claim upon the Government to have his title perfected, and had he gone on to occupy and settle and improve his land - and had he been found at the acquisition of the Country, in the possession & enjoyment of it, the U S. would have been clearly bound to respect his rights. -

But so far as the evidence discloses, the petitioner never went upon his land during the existence of the former Government. - The cause of this as shown by the evidence were the usual ones, of Indian hostilities and political disturbances. No testimony has been taken to show that the obstacles to a settlement might have been overcome

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Nor has it been made to appear to the Court on behalf of the U S, that any one denounced the land. Compelled as we are, to be governed by the Evidence in each particular, we must accept facts as true which are established by the uncontradicted testimony of unimpeached witnesses.

It would seem clear, then, from the testimony, that from the time of the grant until the American occupation, the settlement of the land was impracticable - The omission to occupy cannot therefore ~~arise~~ raise any presumption of a voluntary abandonment by the Grantee. -

That such a delay would probably not have forfeited the land under the Mexican laws and usages, unless some other person was ready to appropriate the land, & thus carry out the policy of the Government was intimated by the Supreme Court in the Case of Fremont - more especially owned the Grantee be entitled to indulgence where the grant

was "not made merely to carry out
"the Colonization laws but in con
"sideration of previous public
"service."

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The circumstance which suggests
most strongly the idea that the grantee did in truth abandon the thought of profiting by his grant is his omission to make further application for the usual and formal title. I have endeavored correctly to estimate the force which should be given to this consideration. It has seemed to me that it would perhaps be going too far to infer such an intention from the grantee's omission in this particular. As to his acts and declarations from the time of the grant until the conveyance to the present claimant, we are wholly uninformed. Whether he continued to assert his rights to the land, whether those rights were recognized by the Government, we are ignorant. And in the absence of proofs we are perhaps justified in supposing that he considered his right to the land sufficiently secured by the

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title he had received; particularly as the cause which prevented a settlement by him would also deter others from applying for the land.

But admitting that the explanation of the Grantee's delay in this case is sufficient within the rule laid down in ~~the~~ Fremont's case to repel the idea of a voluntary abandonment and consequent forfeiture, it is to be remembered that the grant in this case was not like that to Alvarado, a definitive or final title with conditions subsequent annexed. It was but an inchoate or imperfect grant, and as has been shown cannot be regarded as a grant under the Colonization laws, passing the final title to the land.

The inquiry in this case would therefore seem to be, not as in Fremont's case, whether the omission to perform conditions subsequent had forfeited an Estate vested in the Grantee by a formal & definitive grant, but whether he is in Equity entitled to a completion

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and perfection of the inchoate title or equitable right he received from the former Government.

Under the Mexican Colonization laws, the strongest claim he could urge would be the fact that he had, by settling upon and improving the land given the only consideration for the grant, their laws or policy required.

But in this case he can found his claim upon no such consideration. And tho' he may not be deemed to have voluntarily abandoned his grant, yet he can allege nothing done by him subsequently to it, or on the faith of it, which strengthens his equitable claim, either upon this or the former Government. If then the grant had been solely on consideration of future settlement & occupation it seems to me that it should be rejected.

But, it appears that the petitioner had other claims, not merely on the bounty of the Mexican government.

In his petition he appeals to the

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Governor's knowledge of the fact that he had impaired his capital by furnishing money to different Governors, and that he had faithfully served in the Militia without receiving pay owing to the scarcity of funds in the National Exchequer. He asks for the grant as a recompense for his services as well as because it would be in accordance with the policy of the Colonization laws.

The Governor in acceding to the petition expressly says: that he does so "in consideration of the services and merits herein mentioned". And by the testimony of Alvarado himself, taken in this Court, it appears that the petitioner was actually a creditor of the Government for advances made by him, as well as entitled to its consideration for his patriotic services.

In the Case of Fremont, the Supreme Court say: "Altho' this "cannot be regarded as a money "consideration making the transac"tion a purchase from the Govern"ment, yet it is the acknowledgment

"of a just and equitable claim
"and when the grant was made
"on that consideration, the title
"in a Court of Equity ought to be as
"firm and valid as if it had
"been purchased with money.
"on the same conditions."

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But in that case the consideration alluded to was the "patriotic services" of the petitioner - and they are only referred to in the grant as entitling his application to a "preference over other applications, or favorable consideration

But in the case at bar, the petitioner had not only faithfully served the Country, but appears to have been a creditor for advances made by him, and pay due to him as a soldier -

The observations of the Supreme Court apply therefore with great force to the present case - If then the petitioner can not be deemed to have voluntarily abandoned his grant, it has seemed to me that the Equitable right he acquired on the consideration mentioned ought to be respected and

tioned ought to be respected altho' he has failed to furnish the other considerations of settlement and occupation upon which, in general Mexican Grants were made.

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It can hardly be doubted that, as testified by Alvarado, the former Government would have felt itself bound to perfect a title promised to him by the Governor under such circumstances, and that the grant by the latter of the land, provided it was vacant would, had the petitioner subsequently applied for the formal title have been treated as giving him a right to have it issued. That Equitable ~~title~~ obligation is as binding on the conscience of this as of the former Government. And it has, after much consideration, appeared to me, that the claim should be confirmed.

The Counsel for the claimants has urgently pressed upon the Court, that the grant in this case was not under the Colonization Laws of 1824 and the regulations of 1828, but under the law of ~~1837~~ April 4th 1837 (1 Rockwell p. 627) — But this view cannot

be supported. That law, even if it were ever carried into effect in California merely authorized the Government with the Consent of the Council" to give effect to the Colonization of the lands of the Republic by means of sale or mortgage - "applying the am't to the redemption of the National debt" &c - this evidently confers the authority on the Supreme Government and we accordingly find that a decree was made by the Supreme Government in virtue of the authority conferred by the law of the 4th inst. by which a National Consolidated Stock was created and 100.000.000 acres of land in various departments pledged to secure it - In case of the land so pledged should be sold it was provided that the sale should be at the rate at least of 4 acres to the pound - and the purchase money was to be paid by the purchaser to the Government agents in London to be used by them for the redemption of the Stock -

It is evident that the grant in the case at bar, was not a purchase under this law

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the petition itself expels such an idea, for the petitioner refers to the Colonization Law and their intention and policy as giving authority and furnishing a proper inducement to the grant.

It is clear that this grant was a concession under the Colonization Law, not a sale under the Law of 1833.

The land is described in the petition as situated in the "waste part "of the Sacramento Frontier about 18 "leagues from the establishment of Don. "Aug. Sutter. - The land is bounded "by the Sacramento River over like "an island, and is indicated by "by a hill on the bank of the river, "which there divides itself into two "arms East and West, and contains "five Square Leagues more or less - "agreeably to the plan which I shall "present as soon as circumstances "shall permit me so to do."

The Governor granted the petitioner the land he requested. The design has not been produced altho the grantee testifies that it was furnished.

It appears from the evidence

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that the quantity of land embraced within the limits of the island mentioned by the petitioner is about 18 leagues in extent. But the grant could not by law have been for a greater quantity than 11 leagues, and in a case like this resting entirely on the Equitable right of the petitioner, his claim should clearly be restricted to the quantity of land he asked for, and which the Governor supposed he was granting. More particularly as the "informes" or reports which would have apprised the Governor of the extent of the land were expressly required before the formal title was to be issued, and as the Governor acted when acceding to the petition without official information, but on the representation of the grantee. The petitioner has surely every thing to which he can urge the slightest claim of the Government of the U.S. give him the land to the extent originally asked for by himself.

I think, therefore, that a

a Decree should be entered confirming the Claim to the extent and quantity of 5 Leagues, the land to be surveyed in the form and divisions prescribed by law for surveys in California, and in one entire tract —

If subsequent parts have been made of any of the land embraced within the tract described in the petition, and formal & definite titles issued to the grantees, the merely Equitable Rights of the present claimant, should it cease to me, be subordinated to them. —

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Not signed

No 270.

U.S. Dist. Court

James Roe
vs.
U. States.

Opinion
Nov 15th 1856.

Opinion is no part of a case —
no part of the record.
City of Mobile v. Eslava
16. Pet. S.C.R. p 246.

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James Noé
ads
The U. S

Mo: for leave to take an appeal—

John Rose
ads
The U. S.

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As to enrolling of decree 3 Sumn. 504

Aldrich—

The jurisdiction is special and limited

3d Mason 445

Distinction of "Terms" not contemplated in the act.

Williams— §9. act of 1857—
application to be made by the party agst whom judgment is rendered—
"Appeal" imports a proceeding at the term at which judgment is rendered.

Act of 1803— providing for appeals from Dist to Circuit Courts—
The St. B. N. England 3 Sumn. 478—
" " " p 500
6 Pates 495
3 Hemming & Munf. 253.

The first case was under a statute allowing an "appeal" in a special case — It was not doubted that the appeal must be taken at the Term.

By Act of 1803. the Circuit Court has no power to grant an appeal as a citation must be issued by the Judge

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Nathaniel Hale v. Lenox — 7th Pet. 220

Hutchins vs Kent 18 How

In The U. S. vs Bois doré 8 How.
it was admitted that if the U. S had not been allowed by the act there could be none.

Power to the Court is not power to the Judge —
1. Hemming & Munf. 557.

3 Dallas 321
2 How 332
The State of Rhode Island vs. Mass. 12 Pet. 717

as on considerations of policy

3 How. 624
Under act of 1824 12 mos allowed
" " " 1828 4 mos "
U. S. Cume 6 How. 113
as to "technical" rules

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Benham —

1. The Dist atty claims that the act of 1803 & 1789 apply & that they define appeals — where a mere naked right of appeal reference by implication is made to those laws —

The case of Villalobos — 6th How p. 91
Considerations of policy invoked —

3 Randolph 104
Appeals not matter of right — creatures of statute.

Mandamus proper remedy 1 Paine 452

Della Torre —

We are challenged to point out any authority where appeals under a statute such as this have been granted beyond the term. This is a new statute — no such case has ever arisen — But has ~~the~~ it court ever been decided that under such a statute no appeals after term could be taken.

The argument turns upon the meaning of the word "appeal"

Law dictionary "ad vent"

The idea of "term time" does not enter into the idea of an appeal — In civil law no term

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known
In England – decree ~~da~~ in Chancery dates from actual enrolment.
2 Daniels Ch. Prac. 1620
because there were no terms as at common law

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The act of 1789 as to writs of error prescribes limitations on the right of the writ indefinite —

~~So~~ Dist. Court had Circuit Court jurisdiction — It is strained to say that Congress alluded to the appeals as authorized

Notes of
Argument as
to appeals

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James Roe
vs
The United States

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It appears by the title papers produced in this case that on the 18th May 1841 Robert Elwell presented a petition to Governor Alvarado for a tract of land on the Sacramento River — The petition set forth that for 18 years he had been a resident of the country and had a numerous family — He also states that the various political changes in the country had impaired his capital — part of which had been furnished to the different Governors as his ability was aware — The petitioner further alludes to his patriotic services in the militia — for which he never received any pay owing to the scarcity of funds in the National Exchequer — He therefore begs that his Ex^y not forgetting the duty of generously recompensing the services of faithful subordinates and also "the necessity of "giving an impulse to the "progress of agriculture in the country and supported as he was by the colonization laws which so fully authorised him to make such

cessions of land, might grant him the tract solicited

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On the margin of this petition the Governor writes - "In consideration of the services and merits herein mentioned I grant him (the petitioner) the land he requests with the understanding that he shall abide by the reports that must be asked for as to whether the land has been granted for the benefit of some private individual Pueblo or corporation with all the rest that may be deemed convenient so soon as he shall accompany the plan which will head the formation of the Expediente -

~~So~~ This petition & marginal decree appear to have remained in the possession of the petitioner nor were any further steps taken by him to obtain a more formal title. He states however in his deposition that a plan was furnished to the Governor such as was deemed sufficient but the Expediente which it was to "head" is not produced from the archives -

No efforts of any kind appear to have been made by the peti-

from to settle upon or occupy his land and the title papers seem to have remained in his possession until 1859 when he sold to the present claimant —

~~Over grantee known states~~
In explanation of his failure to occupy the land the grantee states that he was prevented from doing so at the time of the grant by the danger from the Indians, and afterwards by the disturbances in the country.

José Castro a native Californian of some distinction and who has held the offices of Governor, Prefect & Commandant General of the Territory deposes that from 1841 until the change of government the whole region of country above Sutters fort or New Helvetia was not in a situation to be settled upon by individual grantees owing to the hostility of Indians — The Government rarely sent any troops to maintain settlements and only for short times & few in number during the time from 1841 to the change of government.

Nathan Coombs ~~a~~ ~~[illegible]~~ whose deposition was taken in this Court and who has resided in the Country since 1843 testifies that from that year when he first knew the land, the Indians in the neighborhood were hostile to the whites. That near the head of the island there was a rancheria and the Indians were very numerous that ~~a~~ Company from Oregon of which he was a member had a fight with a large body of them from 500 to 1000 strong and that during ~~at~~ the same season Capt Sutter with a party ~~from~~ of men also had an engagement with them.

The above comprises all the evidence offered in excuse of explanation of the delay omission of the grantee to fulfil the conditions of his grant.

The first question that arises under this state of facts is did the marginal decree of the Governor Cooney to the petitioner "a present and immediate legal or equitable interest in the land"

The form of the grant is certainly unusual. The marginal ~~opin~~ of the Governors were in decrees

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ordinary cases but requires for information and the Expedientes usually contain the petition & the decreto the marginal order of reference, the reports of the officers and the ~~final~~ order or decree of concession by the Governor. The latter ~~usually~~ generally commencing with the words "Vista la peticion".

The documento or final title was then made out in conformity with the order of concession. In this were expressed the conditions of the grant, its extent &c and it was delivered to the party interested as his own ~~[illegible]~~ ~~his~~ his title deed — a copy however was usually attached to the other documents on file in the archives enumerated forming the Expediente but the copy was generally not signed; it being thought sufficient ~~that~~ if the ~~grant~~ title paper delivered to the party ~~should be~~ was properly authenticated. The title papers were usually signed by the Governor and Secretary.

~~Such is the [illegible] the ordinary course~~ The Expediente when thus completed was ~~[illegible]~~ transmitted to the Assembly for their action — and if ~~[illegible]~~ the grant was approved a certificate of

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of the fact was given to the grantee. —

I have met with no case of ~~grants~~ where these forms were not substantially complied with when grants under the colonization laws were made —

~~Whether or not the~~

In this case at bar the only document relied on as a grant is the ~~marginal~~ order or decree written on the margin of the petition.

Undoubtedly the Governor uses words of grant "I grant him the land which he requests,"

a

but the condition or qualification annexed "that the petitioner should abide by the reports &c" clearly shows that the Governor did not intend his marginal decree to operate as a definitive concession of the land. In the case of Arguello vs The U. S decided at the last term of the Supreme Court the Court in speaking of the order of confirmation which in that case, (which was the decree already alluded to beginning with the words "vista la peticion" and which was certainly a more formal decree than the marginal order in the present case) say - "By the 4th § the Governor being thus informed may "accede or not" to the petition. This "was done in two ways "sometimes he expressed "his consent by merely wri "ting the word 'concedo' "at the bottom of the expedient "at other times with more "formality" xx It is intended

It is intended

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"merely to show that the
"Governor has acceded to
"the ~~prayer~~ request of the appli
"cant and as an order
"for the patent or definitive
"title to be drawn out for
"execution — xx It has none
"of the characteristics of
"of a definitive grant."

But the marginal ~~order~~ decree
in this case cannot even
be regarded as an order
for the definitive grant to
be made out. For the
Governor ~~expressly mentions~~ clearly intimates
that reports are to be
received ~~and~~ the desiño to be
furnished ~~before~~ and the
expediente to be formed
before the final title issued.
The marginal order must
I think be taken merely
as showing that the Gover
nor has acceded to the
petitioners request and will
agree to grant him the
land if the reports &c
should be favorable.

C

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But it is to be observed that the information required by the Governor was only as to whether the land was ~~subject~~ the property of any one else, and the ~~order~~ absolute terms of the order itself as well as the language of the qualification added to it perhaps justify us in considering it as a positive promise to grant the land to the petitioner in consideration of his just claims upon the Government, provided it should turn out that the land was vacant. ~~and subject to~~

The ~~title~~ right thus acquired by the petitioner was an equitable claim upon the Government to have his title perfected and had he gone on to occupy and ~~still~~ improve his land and ~~so~~ had he ~~found~~ been found at the acquisition of the country in the possession &

d

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and enjoyment of it, the U. S. would have been clearly bound to respect his rights.

But so far as the evidence discloses the petitioner never went upon his land during the existence of the former government. He ~~all~~ ~~His~~. ~~The most that can be said is that he has shown his omission to occupy to have arisen from causes beyond his control and has repelled the presumption that he had voluntarily abandoned his claim~~ ~~grant~~ ~~to which his long delay might otherwise have given rise~~.

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82/
14.35

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10/
1935

20/
2/
1935

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the causes of ~~delay~~ his mission to do so as shown by the evidence were the usual ones of Indian hostilities & political disturbances - No testimony has been taken to show that the ~~difficulties~~ obstacles ~~were~~ to a settlement might ~~not~~ have been overcome nor has it been made to appear to the Court on behalf of the U. S. that any one demanded the land - Compelled as we are to be governed by the evidence in each particular we ~~are~~ must accept facts as ~~they~~ which are established by the uncontradicted testimony of unimpeached witnesses -

~~It follows from the fact~~ would seem clear then from the testimony that from the time of the grant until the American occupation the settlement of the land was impracticable - The omission to occupy cannot then for raise any presumption of a voluntary abandonment by the grantee -

~~If we put~~ That ~~it is~~ ~~a~~ ~~to~~ ~~whether~~ such a delay would probably not have forfeited the land under the Mexican laws and usages ~~we~~ ~~it~~ ~~was intimated by the Supreme Court in~~

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~~the case of Fremont~~, unless some other person was ready to appropriate the lands & thus carry out the policy of the Government — more especially would the grantee be entitled to indulgence where the grant was "not made merely to carry "out the colonization laws but "in consideration of previous pub-"lic services" — was intimated by the supreme Court in the case of Fremont

The circumstance which suggests most strongly the idea that the grantee did in truth abandon all thought of proceeding by his grant is his omission to take any further ~~proceedings~~ application for the usual and formal title. I have endeavored correctly to estimate the force which should be given to this consideration — It has seemed to me that it would perhaps be going too far to infer such an intention from the grantee's omission in this particular — As to his acts and declarations from the time of the grant until the conveyance to the present claimant we are wholly uninformed whether he continued to assert his rights to the land, whether those rights were recognised by the Government we are ignorant — and in the absence of proofs

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we are perhaps justified in supposing that he considered ~~the~~ his right to the land sufficiently secured by the title he had received particularly as the causes which prevented a settlement by him would also deter others from applying for the land —

But ~~it~~ is admitting that the explanation of the grantee delay in this case is sufficient within the rule laid down in Tremonts case to repel the idea of a voluntary abandonment and consequent forfeiture, it is to be remembered that the grant in this case was not like that to Alvarado a definite or final title with conditions subsequent annexed — ~~The grant~~ It was ~~to as to this case~~ was but an inchoate or imperfect grant and as has been shown ~~could~~ can not ~~have~~ then ~~intended~~

i

be regarded as a
~~by the Government~~ ~~to~~ passing
grant under the colonization laws the ~~title~~ final title to the land
The inquiry in this case
would therefore seem to be
not as in Fremont's case
whether the omission to perform
conditions subsequent had forfeited an estate vested in
the grantee by a formal
and definitive grant, but
whether he is in equity
entitled to a completion
and perfection of the incho
ate title or equitable right
he received from the former government.
Under the Mexican colonisa
tion laws the strongest claim
he could urge would be
the fact that he had by
settling upon and ~~occupying~~ improving the
land given the only ~~to~~ con
sideration for the grant, their laws or policy
required.
But in this case he can
~~not~~ ~~not~~ found his claim
upon no such consideration - and tho' he may
not be deemed to have vol

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voluntarily abandoned his ~~claim~~ grant, yet he can allege nothing done by him subsequent to ~~his grant~~ it or on the faith of ~~it~~ which ~~gives him~~ strengthens his equitable claim either upon this or the former Government.

If then this grant had been solely on consideration of future settlement and occupation it seems to me that it should be rejected

But it appears that the petitioner had other claims not merely on the country but on the justice of the Mexican government.

In his petition he appeals to the Governor's knowledge of the fact that he had impaired his capital by furnishing money to ~~his especially under~~ difficult Governors and that he had faithfully served in the militia ~~but~~ without receiving pay owing to the scarcity of funds in the National Exchequer." He

asks for the grant as a
recompense for his services,
as well as because it would be in accor
dance with the policy of
the colonization laws.
The Governor in according
to the petition expressly says
that he does so "in consideration
of the services and
merits herein mentioned" —
In the case of Fremont ~~In the language of the~~ Su
preme Court say "Altho' this can
not be regarded as a money
consideration making the
transaction a purchase
from the Government yet it is
the acknowledgment of
a just and equitable claim
and when the grant was
made on that consideration
the title in a Court of Equi
ty ought to be as firm and
valid as if it had been
purchased with money
on the same conditions.
But in that case the con
sideration alluded to was
the "patriotic services" of the
petitioner and they were only referred ~~alluded~~

and by the terms of the petition as actually taken as this court is appealing for allowance made by Congress as a credit of the government for his patriotic services as well as entitled to its consideration for his patriotic services

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to in his application the grant as entitling ~~him~~ on other applications to a "preference" or favorable consideration.
But in the case at bar the petitioner had not only ~~pro~~ ~~formed~~ faithfully served the country but appears to have been a creditor for advances made by him and pay due to him as a soldier.
The observations of the Supreme Court ~~would~~ ~~therefore seem to~~ apply therefore with great force to the present case.
If then the petitioner can not be deemed to have voluntarily abandoned his grant it has seemed to me that the equitable right he acquired, on the considerations mentioned, ought to be respected altho' he has failed ~~the~~ to furnish the other considerations of settlement & occupation upon which in general Mexican grants were made ~~furnished~~.
It can hardly be doubted

m.

as testified by Alvarado,
that the former government
would have felt ~~themselves~~ itself
bound to perfect a title
promised to him by the
Governor under such circum
stances. and that the grant
~~of~~ the latter ~~by~~ of the land
provided it was bona fide
would, had the petitioner subsequently
applied for the formal title
have been treated as giving him
a right to have it issued.
That equitable obligation
is as binding on the con
science of this as of the
former government, and it
has after much consideration
appeared to me that the
claim should be confirmed.

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N.

We are perhaps justified in supposing that he considered the grant a final one and in the general security & quietude which prevailed may have thought his right to the land sufficiently secure without further effort.

On the whole I have come to the conclusion that the title acquired by the grant ought not to be declared to have been for title under the rule laid down in Clements case.

The counsel for the claimant has unguilty pressed upon the Court that the grant by this case was made not under the colonization laws of 1824 & the regulations of 1828 but under the law of April 4. 1837 (1 Rockwell p. 627). But this view cannot be supported. That law even if it were ever carried into effect in California merely authorizes "the Government with the consent of the Council" to give effect to the colonization of the lands of the Republic by means of sale or mortgage "applying the avails to the redemption of the national debt" &c. This wondrully confuses the authority of the Supreme Government & we accordingly find that a decree was made by the Supreme

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Government in virtue of the authority conferred by the law of the 4th inst by which a ~~redem~~ national consolidated stock was created and 100,000,000 acres of land in various departments pledged to secure it — In case of the land so pledged should be sold it was provided that the sale should be at the rate at least of 4 acres to the pound — and the purchase money was to be paid by the purchaser to Government agents in London to be used by them for the redemption of the stock —

It is evident that the grant in the case at bar was not a purchase under this law. The petition itself repels such an idea for the petitioner refers to the colonization laws and their intention and policy as giving authority

and furnishing a proper inducement to the grant—

~~I think~~ It is clear that this grant was a concession ~~must be sustained if at all~~ under the colonization laws— ~~certainly~~ not a sale under the law of 1837

The land is described in the petition as situated in the "waste part of the Sacramento "frontier about 18 leagues from "the Establishment of Don. Mg. "Fuller. This land is bounded "by the Sacramento river like "an Island and is indicated "by a hill on the bank of "the river which there divides "itself into two arms east & "west and contains 5 ~~sitio~~ "square leagues more or less "agreeably to the plan which "I shall present as soon as "circumstances shall permit me "so to do—

The governor granted the petition the land he requested The diseño has not been produced altho' the ~~petitioner~~ grantee testifies that it was furnished—

It appears from the evidence ~~that~~ no where ~~the~~ quantity of land ~~contained~~ embraced within the limits of the island mentioned by the petition. ~~to~~

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The grant could not however by law have been for a greater quantity of than 11 leagues.
The tract is described in the petition as "bounded by the Sacramento River like an island" and the Governor in his marginal decree grants "the land solicited." The subject of the grant would therefore seem to be the island mentioned — and we think the claim should be confined to the land including within its limits provided that they do not embrace more than the quantity of 11 leagues.
It is stated by Counsel that the quantity of land included in the island is somewhat more than 5 leagues — The petition represents it as 5 leagues more or less." This is perhaps as close an approx

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to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land, formed by the former inhabitants of this country and as the Governor ~~must~~ we think, intended to give the island — as no deception seems to have been practiced upon him the claim should be sustained for the whole land which the petitioner intended to solicit & the governor to grant.

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No. 270.

The United States,

— vs —

James Noe.

Opinion.

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Gobierno
del Departam.to

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Luego q. se presente en el
Pto. de Monterrey, al mando de la Comp.a
de Rifleros, manifestará V. al comand.te
de esa plaza la pres.te orden G.l q. disuelve
la expresada Comp.a ofreciendose á tus q. hacen
los individuos q. la forman. Les dará V.
á nombre del Gobno. las mas expresivas
gracias G.s. sus buenos servicios á favor
de la conservacion del orden, asegurán-
doles q. serán agraciados, como seles ofreció,
con algunas tierras de las q.
seles repartirá una sitio á cada uno
p.a q.e lo poseen conforme á las Leyes de
Colonizacion.

Esta gracia de entenderse sin
perjuicio de sus alcances del corto tiempo
q. han permanecido q. á orden
del Gobierno, quien se satisfará religiosa-
mente sus sueldos vencidos en dho tiempo.

Les impondrá q. el Gobno. de
Mejico, q. la nueva Constitucion ofrece
á los Californios q. sean gobernados en

adelante, q. naturales ó vecinos del país; q. esta y otras varias ventajas q. no resultan de esa constitucion me han escitado á adoptarla como lo hize en q. del corr.te; que tanto el Sur, como lo demas del Departam.to quiere q. yo siga gobernando, obligacion q. me confirma la misma espresada constitucion; q. todo el país está en paz, y q. q.do conservar esta con el Gobno Gral se acercará á él una comision q. delo mandar pronto á Mejico, en la boleta q. compré al efecto.

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Dios Libertad S.ta Barb.a
Julio 12 de 1837

Juan B. Alvarado

S. Capitan de la Comp.a
de Rifleros, D. Isaac Vehom.

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Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims in the State of California.

San Francisco, Aug. 10th 1855.

S. A. Monroe Esq.
Clerk of the U. S. District Court for the
Northern District of California.

Sir;

I herewith transmit you, pursuant to the requirements of the Act of Congress, approved August 31st, 1852, a Transcript of the Record of the Proceedings and of the Decision of this Board, of the Documentary Evidence and of the Testimony of the witnesses upon which the same is founded, in Case No. 294 on the Docket of the said Board, wherein James Noe is the Claimant against the United States, for the place known by the name of "Island of Sacramento."

and request your receipt for the same.

I am, Respectfully,
Your Obt Servant,

Geo: Fisher