

*AUGUSTE CHOUTEAU'S HEIRS v. UNITED STATES.

Missouri land-claims.

A concession of land was made by the lieutenant-governor of Upper Louisiana, at the time when the power of granting lands was vested in the governors of provinces; this power was, in 1799, after the concession, transferred to the intendant-general; and after this transfer, in January 1800, the order of survey of the land was made by the lieutenant-governor. The validity of the order of survey depends on the authority of the lieutenant-governor to make it; the lieutenant-governor was also a sub-delegate, and as such was empowered to make inchoate grants. The grant was confirmed.

The transfer of the power to make concessions of lands belonging to the royal domain of Spain, from the governor-general to the intendant-general, did not affect the power of the sub-delegate, who made this concession. The order in this case is the foundation of title, and is, according to the act of congress on the subject of confirming titles to lands in Missouri, &c., and the general understanding and usages of Louisiana and Missouri, capable of being perfected into a complete title; it is property, capable of being aliened, of being subjected to debts; and is, as such, to be held as sacred and inviolate as other property.

APPEAL from the District Court for the district of Missouri. On the 18th of May 1829, the following petition, with the documents therein referred to, was presented by the appellants to the district court of the United States for the district of Missouri.

"To the Honorable the District Court of the United States for the district of Missouri. The petition of Auguste A. Chouteau, Gabriel Ceré Chouteau, Henry Chouteau, Edward Chouteau, Eulalie Paul and René Paul, husband of said Eulalie, Louise Paul and Gabriel Paul, husband of said Louise, Emilie Smith and Thomas F. Smith, husband of said Emilie, respectfully showeth, that in the year 1799, Auguste A. Chouteau, deceased, late of St. Louis, the father of your petitioners, applied to and obtained permission from the government then existing in Upper Louisiana, to establish a distillery, in or near the town of St. Louis, as will more fully appear by the petition and order thereon, dated the 5th of November 1799, and 3d of January 1800, *which are herewith shown to the court and prayed to be taken as [*138 part of this petition, marked No. 1; that on the 5th day of January 1800, said Auguste Chouteau presented his petition of that date to the lieutenant-governor of the province of Upper Louisiana, praying that a tract of land, containing 1281 arpents, superficial measure of Paris, situated near the town of St. Louis, bounded on the north by a tract granted to Doctor John Watkins, on the south and on the west, by the lands of the third line of concessions, should be granted to the said Auguste Chouteau and his heirs, for the purpose of enabling said Auguste Chouteau to obtain a sufficient supply of fire-wood for the distillery aforesaid; that on the same day, to wit, the 5th of January 1800, the said lieutenant-governor made his decree conformably to the prayer of said petition, whereby said lieutenant-governor directed and ordered that the surveyor of the said province, Don Antonio Soulard, should put the said Auguste Chouteau in possession of the said tract of 1281 arpents, in the place indicated and demanded, to the end that said Auguste Chouteau might afterwards obtain the complete title thereto from the governor-general, all which will appear by said petition and decree, now here produced, marked No. 2, and which petition and decree is prayed to be taken as part of this petition; that afterwards, in obedience to said decree, to wit, on the 3th day of March 1801, the said surveyor, Don

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Antonio Soulard, delivered the possession of said tract to said Auguste, and executed a survey and plat of survey thereof, as will more fully appear by the said plat and certificate of survey, bearing date the 10th of April 1801, now here produced, marked No. 3, and which said plat and certificate were recorded in book A, p. 43, No. 82, in the office of said surveyor, as by reference to the said certificate, and to said record in the office of the surveyor of this district, will appear; that said decrees, so made by said lieutenant-governor, were made in pursuance of the special instruction given by the governor-general of Louisiana, Don Manuel Gayoso De Lemos, to said lieutenant-governor, to favor and forward the aforesaid undertakings of said Auguste Chouteau, as will appear by the letter of said governor-general, addressed to said Auguste Chouteau, under date the 20th of May 1799, in *139] answer to an application made by said Auguste *Chouteau to said governor-general, as will appear by reference to said original letter, herewith exhibited, marked No. 4, and prayed to be taken as part of this petition; that by virtue of said decrees, survey and delivery of possession, said Auguste occupied and enjoyed said tract, so granted, as the lawful proprietor thereof, from the date of said delivery of possession, until the decease of said Auguste Chouteau; that said Auguste, during his life, did, in conformity to the acts of congress in that case made and provided, submit his claim to said tract, derived as aforesaid, to the board of commissioners heretofore created for the settlement and adjudication of French and Spanish land-claims in Upper Louisiana; that said board rejected said claim, on the sole ground, that a tract of a league square having been already confirmed to said Auguste Chouteau, the board had not power, under the law, as it then stood, to confirm to said Chouteau any greater quantity; and your petitioners show that said board, for the purpose, as it is supposed, of testifying their sense of the merits of said claim, did cause to be indorsed on the back of a document therein exhibited to them, the words '*bona fide*,' as will appear, reference being had to said document No. 2, hereinbefore mentioned; your petitioners further show, that said Auguste Chouteau has departed this life, and that previous to his death, he made his last will and testament, in due form of law, whereby he devised to your petitioners the said tract of 1281 arpents, besides other property, to your petitioners and their heirs, as tenants in common. Wherefore, your petitioners pray that said title may be inquired into, and that the same be confirmed, as the same would have been confirmed, had not the sovereignty of said province been transferred to the United States.

(Translation.) No. 1. "To Mr. Charles Debault Delassus, lieutenant-colonel, attached to the regiment of Louisiana, and lieutenant-governor of the upper part of the same province, &c. Auguste Chouteau has the honor to expose, that he wishes to establish, in this town, a manufacture proper to distil the several kinds of grains raised in this dependency, (to) supply the wants of the consumption of the place, of which remote distance to the chief city renders the importation too *expensive to *140] draw from it annually what is necessary for its use. Wherefore, sir, the supplicant, previous to subjecting himself to considerable expenses to form such an establishment, wishes to obtain the honor of your consent, in order that hereafter he may not be subject to any alteration hurtful to his

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interests ; wherefore, the supplicant will acknowledge your goodness, if you grant his request.

AUGUSTE CHOUTEAU."

"St. Louis of Illinois, November 5th, 1799.

"St. Louis of Illinois, January 3d, 1800.

"Considering that the establishment which the supplicant proposes to form will be useful to the public and to commerce, because there does not exist any of this nature, and that he will procure liquors in a greater abundance, and at a less price than those which are imported, and in very little quantity, from New Orleans, we grant the request.

CHARLES DEHAULT DELASSUS. [L. S.]"

(Translation.) No. 2. "To Mr. Charles Dehault Delassus, lieutenant-colonel, attached to the fixed regiment of Louisiana, and lieutenant-governor of the upper part of said province. Auguste Chouteau, merchant, of this town, has the honor to represent, that the lands adjacent to this town being mostly conceded, and timber becoming daily very scarce, he is very much embarrassed in the carrying on of the considerable distillery which you have permitted him to establish, by your decree, dated 5th of November of last year ; consequently, he hopes you will be pleased to assist him in his views, and have the goodness to grant him the concession of one thousand two hundred and eighty-one superficial arpents of this land, situated on the fourth concession in depth of the land adjoining this town ; bounded north by the land of Dr. John Watkins ; south and west, by the lands of the third concession. The supplicant, besides having the intention to establish the said lands, hopes to obtain of your justice the favor which he solicits.

"St. Louis, January 5th, 1800.

AUGUSTE CHOUTEAU."

* "St. Louis of Illinois, January 5th, 1800.

"Being satisfied that the supplicant has sufficient means to make [*141 available, in the terms, of the regulation of the governor-general of this province, the lands which he demands, the surveyor of this Upper Louisiana, Mr. Anthony Soulard, will put him in possession of the one thousand two hundred and eighty-one arpents of land, in the place where he asks it ; and afterwards, the applicant will have to solicit the formal title of concessions of the intendant-general of these provinces, to whom belongs, by order of his M—, the disposing and conceding every kind of vacant lands of the royal domains.

CHARLES DEHAULT DELASSUS."

No. 3. The survey of the land was made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March, and certified on the 10th of April 1801.

(Translation.) No. 4.

"New Orleans, May 20th, 1799.

"My dear friend :—Wishing to testify to you my esteem, by every opportunity, I merely assure you of my esteem, promising you to answer your letter by the boat that just arrived, and which will leave here next week. In my instructions to Mr. Delassus, I recommend him particularly to favor all your undertakings, &c. Adieu : I am in such a hurry that I have but the time to tell you that I am your sincere friend and most humble servant,

MANUEL GAYOSO DE LEMOS."

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The district attorney of the United States filed an answer to the petition, denying the claim of the petitioners, and requiring proof of the same. At the January session of the district court, in the year 1830, a decree was entered against the validity of the title and claim of the petitioners. From this decree, the petitioners prosecuted this appeal.

The case was argued by *White*, for the appellants; and by the *Attorney-General*, for the United States.

*142] *For the appellants, it was contended: 1. That the title presented is a valid Spanish grant, made in conformity to the laws, customs and usages of the Spanish government. 2. That the said title was confirmed by the treaty of cession of Louisiana. 3. That the petitioners are entitled to a decree of confirmation by said treaty, and the proceedings under the same.

White, for the appellants (in this and the following case):—These two cases will be considered together. The one is a grant for a league square, in 1798, before the transfer of the jurisdiction of petitions and claims to land from the military and civil government to the *intendencia*; and the other, subsequent thereto, to the ancestor or the petitioners. They were rejected on the grounds stated in the case of *Delassus*. There is one additional objection to these claims. It is, that *Auguste Chouteau* had obtained another concession, which was sold to *Daniel Clarke*, and confirmed to him. There is nothing in the laws of the Indies, nor in the regulations of *O'Reilly*, nor the ordinance of 1754 and 1786, which forbids more than one concession to an individual. He was entitled to an concession for a cow-pen, to one for agriculture, and one for any useful invention, as was shown in *Clarke's* case. Whether *Auguste Chouteau* was entitled to another concession, however, before or after his sale to *Daniel Clarke*, was a question exclusively for the Spanish authority. It is proved, that the second concession was made. The fact of its having been made by an agent of the crown, whose duty it was to receive such applications, and to adjudicate such questions without appeal or reversal, whilst the province remained under the dominion of Spain; constituted what we call a *res adjudicata*, so far as the American government is concerned.

The other claim granted to furnish wood for a distillery, was made by the lieutenant-governor, as sub-delegate of the intendant. It is not forbidden by the general laws of Spain, nor by the regulations of *Morales*. These latter regulations, it has been shown by documents recently received from Spain, were not approved by the crown. They never had the force of law, and were mere regulations of police, promulgated for a guide to commandants of posts; but changed whenever circumstances required. One of these grants is for agriculture, and another for a manufacturing establishment of an article much in demand in the western country. The governor-general, in a letter to be found in the record, testified his great regard for the petitioner, and his desire to serve him, and to promote his objects.

The grants and concessions for services and gratuities, stand upon a different principle; which, although founded upon an authority as certain and unequivocal as these, will not be discussed here, as neither of these are liable to the objections taken to others rejected by the district court of *Missouri*.

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Referred to, Ordinance of 1798, Laws of Indies; Novissima Recopolacion, tit. Prescript.; Partid. tit. Prescription; Depositions in Commissioners' Report; Depositions on South America; Certified Documents from Spain.

Butler, Attorney-general, argued:—1. The decrees of the lieutenant-governors, relied on by the petitioners, were made in contravention of the laws, ordinances and regulations in force at the times when they respectively bear date, and which continued in force until the treaty of cession, and were, therefore, wholly void; and being so, no valid claim under the treaty or the acts of Congress can be founded thereon. 2. The petitioners did not show, in either case, a title by prescription.

MARSHALL, Ch. J., delivered the opinion of the court.—Auguste A. Chouteau and others, devisees of Auguste Chouteau, presented their petition to the court of the United States for the district of Missouri, praying that their title to 1281 arpents of land, near the town of St. Louis, in the state of Missouri, which they claim under the following circumstances, be confirmed.

The late Auguste Chouteau applied to the then existing governor of Upper Louisiana, for permission to establish a distillery in or near the town of St. Louis; which permission was granted on the 3d of January 1800. He then petitioned for a concession for 1281 superficial arpents of land, to furnish firewood for his distillery; which was granted in the following words:

“St. Louis of Illinois, January 5th, 1800.

“Being satisfied that the applicant has sufficient means to make available in the terms, of the regulation of this province *the lands which he demands, the surveyor of this Upper Louisiana, Mr. Anthony [*143 Soulard, will put him in possession of the one thousand two hundred and eighty-one arpents of land, in the place where he asks it; and afterwards, the applicant will have to solicit the formal title of concessions, of the intendant-general of these provinces, to whom belongs by order of his M—, the disposing and conceding every kind of vacant lands of the royal domains.

CHARLES DEHAULT DELASSUS”

The permission of the governor-general to erect the distillery, is alluded to in the following letter from him to Mr. Delassus.

“New Orleans, May 20th, 1799.

“My dear friend:—Wishing to testify to you my esteem by every opportunity, I merely assure you of my esteem, promising to answer your letter by the boat that just arrived; and which will leave here next week. In my instructions to Mr. Delassus, I recommend him particularly to favor all your undertaking, &c. Adieu: I am in such a hurry that I have but the time to tell you, that I am your sincere friend and most humble servant,

MANUEL GAYOSO DE LEMOS.”

The order of survey was executed on the 10th of April 1801, and the petitioner put into possession, which he retained till his death, having first

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made his last will, in which he devised it to the petitioners, who have taken all the steps required by law, to preserve their claim. The petition prays for a confirmation of the title. The answer of the district-attorney admits nothing, and submits the case to the court on the proof to be made by the petitioners. The erection of the distillery, and the manufacture of spirits to a considerable extent, the apparent motives to the grant, are fully proved.

The distinction between the case of Chouteau and others, and that of Delassus, whose title has been confirmed, consists in this. The concession to Delassus was made by the lieutenant-governor of Upper Louisiana, by direction of the governor-general, at a time when the power of granting *144] land was vested in *the governors of provinces. This power was transferred to the intendant-general, in 1799, after which transfer, in 1800, the order of survey under which Chouteau claimed, was made by the lieutenant-governor. The validity of the order depends on the authority of the lieutenant-governor to make it. Chouteau alleges, in support of this authority, that the lieutenant-governor was also sub-delegate, in which character, he was empowered to grant incomplete titles.

Several documents have been laid before the court, which satisfy us that the lieutenant-governors were, by virtue of their office, sub-delegates. In the record in *Soulard's Case*, which we understand is to be considered as an exhibit in this, a letter from the lieutenant-governor, Delassus, to the surveyor-general, is introduced, in which he recites a letter of Morales, the intendant-general, to him, dated the 1st of December 1802; informing him that in consequence of the death of the assessor, he had closed the tribunal of affairs and causes relating to grants and confirmations of royal lands. The letter adds: "I make this communication, in order that, apprised of this providence, you may not receive, frame or transmit memorials soliciting lands, until further orders." In a letter of the 26th of August 1799, addressed by Morales to Don Carlos Dehault Delassus, in which he notices instructions given by Delassus to Robert McKay, in his character of sub-delegate, he observes, "I must say, that it being contrary to law, that one sub-delegate should transfer his powers to another, the instruction given by you cannot nor ought to have effect; and the more so, as the sub-delegation of the intendency is local." In a certificate given by Don Gilberto Leonard, treasurer of the army, and Don Manuel Gonzalez Armirez, ministers of the royal treasury, &c., of the province of Louisiana, they certify, that in pursuance of a decree of the senior intendant-general *ad interim*, the senior colonel, Charles Dehault Delassus, formerly commandant of the port of New Madrid, and lieutenant-governor of St. Louis of the Illinois, with the sub-delegation of the royal treasury in both situations, &c.

In the claims laid before the commissioners, and confirmed, are several which originated with Delassus, after the power of granting lands was transferred from the governor to the *intendant-general. This very order *145] of survey was executed by the surveyor-general, in 1801. Possession was delivered to Chouteau, which was retained by him during his life; and appears to have remained with his devisees since his death. On this point, the report made by the recorder and commissioners to congress, under the act of the 9th of July 1832, and the 2d of March 1833, cannot be disregarded.

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They speak of the union of the two offices of lieutenant-governor and sub-delegate, as being universally understood and admitted.

Charles Dehault Delassus, lieutenant-governor of Upper Louisiana, whose deposition appears to be annexed to the report of the commissioners, deposes, "that all the lieutenant-governors of Upper Louisiana were, in virtue of their offices as lieutenant-governors, likewise sub-delegates; that the offices of lieutenant-governor and sub-delegate were inseparable." Morales, immediately after the sale of the royal lands had been transferred to his intendency, assigns as one reason for issuing his regulations, "that the commandants, as sub-delegates of the intendency, may be informed of what they ought to observe."

If, as we think must be admitted, Delassus was sub-delegate as well as lieutenant-governor, the transfer of the power of granting lands belonging to the royal domain from the governor to the intendant-general, did not affect his power to give the order of survey on which the title of the petitioners depends. That order is the foundation of title, and is, according to the acts of congress and the general understanding and usage of Louisiana and Missouri, capable of being perfected into a complete title. It is property capable of being alienated, of being subjected to debts, and is as such to be held as sacred and inviolate as other property.

The power of Lieutenant-governor Delassus, in his character of sub-delegate, to make this order of survey, being established, all the principles settled in the preceding cases apply to this. No objection to the claim is perceived, and we think it ought to have been declared valid.

The decree of the district court is reversed and annulled; and this court, proceeding to give such decree as the district court ought to have given, doth declare the claim of the petitioners to the tract of land in their petition mentioned to be valid, and doth confirm their title to the same, according to the boundaries *thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March 1801, a certificate of which appears in the record dated the 10th day of April 1801. [*146

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, this court is of opinion, that the claim of the appellants is valid and ought to be confirmed. Whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled; and this court, proceeding to pronounce such decree as the said district court ought to have given, doth declare the claim of the petitioners to be valid, and doth confirm their title to the tract of land in their petition mentioned, according to the boundaries thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March 1801, a certificate of which appears in the record, dated the 10th day of April 1801.