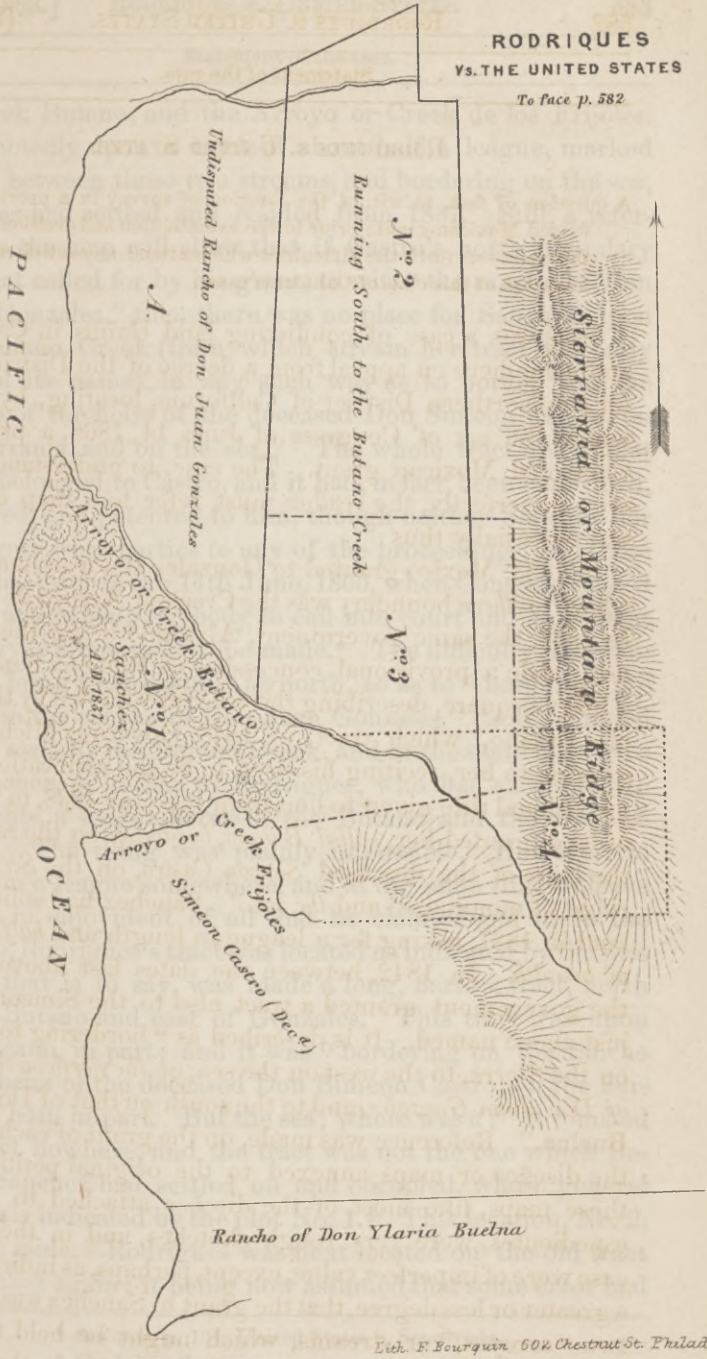
RODRIGUES *v.* UNITED STATES.

A question of fact, to wit, of the location of survey in a previously confirmed Mexican grant; prior to the examination and decision of which, the court sets forth the difficulties which attend any satisfactory determination of this class of California cases.

THIS was a case of conflicting land claims in California, and came here on appeal from a decree of the District Court for the Northern District of California, locating, by survey, under the act of Congress of June 14, 1860, a previously confirmed Mexican grant. The case, to understand which, even imperfectly, the reader must refer to a map opposite, was essentially thus:

In 1833, Mexico granted to Gonzales the tract marked A, whose *southern* boundary was the Creek or Arroyo de Butano. In 1838, the same government, Alvarado being then governor, made a provisional concession to Ramona Sanchez for a league square, describing the tract as "known by the name of 'Butano,' which tract, in 1848, Governor Micheltorena granted to her, reciting his deed to be the ratification of the provisional title given to her, from the year 1838, to the tract of land granted her, *called Butano*, *bordering* on the rancho of the heirs of the deceased *Simeon Castro*, on the *Serrania* (or ridge of mountains) and *the sea*." Sanchez had solicited the land in 1837, asking for a league in length and *half a league in breadth*. In 1842, between the dates last above named, the government granted a tract also to the Simeon Castro just above named. It is described as "bordering to the east on the Sierra, to the west on the sea, on *the north on the rancho of Don Juan Gonzales*, and to the south on that of Don Ylaria Buelna." Reference was made, on the grant of each tract, to the diseños or maps annexed to the original petitions, but these maps, like most of the diseños attached to Mexican espedientes, were very rough sketches, and in the present case were of imperfect value, except, perhaps, as indicating, to a greater or less degree, that the grant to Sanchez was between two "arroyos," or streams, which might be held to correspond with the streams known on better maps as the Arroyo


RODRIQUES
VS. THE UNITED STATES
To face p. 582
PACIFIC
OCEAN
Undisputed Rancho of Don Juan Gonzales
A.
No 2
Running South to the Butano Creek
No 3
Sierra or Mountain Ridge
No 4
Arroyo or Creek Butano
No 1
Sanchez
A.D. 1837
Arroyo or Creek Frijoles
Simeon Castro (Dec.d)
Rancho of Don Ylaria Buelna
Lith. F. Bourquin 604 Chestnut St. Philad.a

or Creek Butano, and the Arroyo or Creek de los Frijoles. Undoubtedly upon a tract of about half a league, marked No. 1, between those two streams, and bordering on the sea, Sanchez had settled and resided from 1837. Still, a reference to the map will show that if Castro's north boundary was that called for by his grant, to wit, "the rancho of Don Juan Gonzales," then there was no place for Sanchez upon the Butano Creek (from which stream her tract obviously derived its name), in any such way as to border "on the rancho of the heirs of the deceased Don Simeon Castro, on the Serrania, and on the sea." The whole tract up to that creek belonged to Castro, and it had, in fact, been confirmed, surveyed, and patented to him, though neither Sanchez nor Rodrigues were parties to any of the proceedings, and these were had prior to the 14th June, 1860, when Congress passed an act authorizing anybody to call into court and to contest any survey afterwards to be made.* The difficulty therefore was to bring Castro's tract *up* north, so as to "border on the north on the rancho of Don Juan Gonzales," itself bounded on the *south* by the Butano Creek, and at the same time give to Sanchez, or rather to Rodrigues, who had succeeded to her rights, a league between the Butano and the tract of Castro. The thing was plainly impossible. However, to give him a league somewhere, and at the same time to leave Castro in enjoyment of all that he claimed and up to the Butano, Rodrigues's tract was located as indicated by the plot No. 2, that is to say, was made a long, narrow tract, north of the Butano and east of Gonzales. This tract was upon the Butano, in part; and it was "bordering on the rancho of the heirs of the deceased Don Simeon Castro, on the Serrania," both in part. But the sea; where was *it?* It touched the tract nowhere, and the tract was not the one which Ramona Sanchez had settled on and occupied, whose general locality is indicated by the plot No. 1.† This location, No. 2, was set aside. Rodrigues was next located on the old tract of Sanchez again; it being now assumed that some error had

* See *ante*, p. 104, United States *v.* Sepulveda.

† Shaded in the map.

taken place in giving Castro's north boundary; and that while this boundary was really a creek, that creek was not the Butano, but another one, to wit, the Frijoles, south of it. It was among the facts of the case that the land granted to Castro had been originally two tracts, with different names, and that for the north one a concession had issued to a certain Bernal, who surrendered his rights to Castro, by whom a final grant for both under one name was obtained. The original papers, moreover, gave some indications, which, compared by modern surveys of the Pacific coast, tended to show that the tract did not go *up* to the Butano, and that the northern boundary of one of the tracts was the Frijoles. But everything was more or less obscure. The representatives of Castro had excepted to this location of Rodrigues on No. 1, contending that all up to the Butano was theirs, and that no one else should be put upon it. Superadded to the difficulties just mentioned there was another, to wit, that admitting Rodrigues to be rightly located between the Butano and the Frijoles, there was not enough land between those two creeks, which were small and did not run far back, to give him much more than half a league of land; whereas the grant called for a whole one. What was to be done, in view of the fact that the Butano and the Frijoles were natural boundaries, having unquestionable owners on the north and south of them respectively, and that on the east was the Sierra, or mountain range, of no use to any one, and of less than none, if she had to take care of it, to a woman like Ramona Sanchez, who in her petition represented herself as a "desamparada mujer," an unprotected woman, who asked for the land, as "*un sitio valdio aproposito pa contener en el su ganado y hacer algunos labores pa subvenir á la mantencion de su familia;*" "a vacant place, adapted to keep my cattle and carry on some husbandry for *the maintenance of my family?*" From what quarter was the deficit to come? A third survey was now made; and assuming that as the tract was only "*bordering on* the Serrania," the Government meant that it should not include any considerable part of it, as it would do if the required half league was located east of the half on the sea,

the surveyor turned the courses round, and forming an "elbow" tract, made up the deficit by a survey upon the south part of No. 2, in the manner meant to be indicated by No. 3, and the *chain* lines upon the map. The south part of No. 2 had, however, been entered on by persons who meant to acquire it from right of pre-emption.

The case was one of obvious difficulty, and Judge Hoffman, the District Judge in California, having examined the whole case with great patience, and with a careful comparison of landmarks, and having stated at length the reasons of his conclusion, finally located the easternmost portion *on* the ridge, as indicated by No. 4, his decree being thus:

"That said survey (the third) be and the same is hereby set *aside and rejected;* and that a new survey of the tract herein confirmed be made as follows, viz.: bounding the tract "on the east by the Sierra; on the west, by the sea; on the south, by the Arroyo de los Frijoles, as far as the same is delineated upon the diseño, and thence by the shortest distance to the Sierra; and on the north by the Arroyo Butano, as far as the same is delineated as a boundary upon the diseño; and thence (crossing that stream) by such line or lines as will include the area of one square league."

From this decree Rodrigues, representing Sanchez, and claiming to have No. 2, or at least No. 3, took the appeal.

Mr. Gillet, for the appellant:

1. Mexico had conveyed to Castro a tract, having Buelna on the south, and extending to Gonzales' ranch on the north, and this tract has been confirmed, surveyed, and patented: consequently it is finally and conclusively located, so far as this court and the United States are concerned. The Government has no land there now to convey.

2. The claimants in this cause are entitled to one square league of land within the outboundaries of the tract described in their grant as confirmed as they may select, which need not touch all of them.

Argument for the appellant.

It was settled in *Fremont* v. *The United States** that Fremont might, "in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract," select the quantity named in the grant anywhere within his outboundaries, which contained about ten times the quantity granted. In *The United States* v. *Fossat*,† the land was ordered to be "located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of this government." Under these decisions Rodrigues has a right to claim his league square in such form as he chooses, within his outer boundaries, three of which only were given; and he cannot be compelled so to locate so as to make him include land granted, confirmed, and patented to another, and subject him to litigation and probable, if not certain loss.

The quantity claimed by him was rightly located under these decisions, by the second survey, which was bounded south by a portion of the Castro grant, and was west of the Serrania, and east of the Gonzales grant; which survey was set aside. Rodrigues was not required to go to the sea, nor to the Serrania, nor to the Castro grant. The north was left open to him indefinitely.

3. It may be questioned, too, whether the decree as finally made was not a nullity. The act of 14th July, 1860, under which the power of the District Courts of California to act in this sort of matter arises, is in these words: "And if, in its opinion, the location and survey are erroneous, it is hereby authorized to set aside and annul the same, or *correct* and *modify* it."‡ The jurisdiction of the court is limited to one of these two acts; and, under the land system of the United States as applied to California, it cannot deprive the party of his right of selecting his location within his "outer boundaries." But in this case the court neither affirmed nor set aside the survey, nor did it *modify* or *correct* it. It decided, in advance, that the Surveyor-General should make

* 17 Howard, 542. † 20 Id., 427. ‡ § 4, 12 Stat. at Large, 34.

a specified survey for one-half of the quantity in an entirely new locality, and not in conformity with the rights of the claimant. Practically it denied the authority of the cases cited above, that the claimant may locate wherever he chooses *within* the "outer boundaries," and seemed to act upon the idea that the location must touch all of them at once.

This appeal by claimants brings up for revision all the orders and proceedings in the District Court in relation to the survey which were made adversely to it. Justice can be done by this court as it sees fit; and it can set aside the last survey and order a new one, or it can restore, as we ask it to do, the second survey, which gave a full league, lapping upon no one, and which was set aside for a third and fourth survey ordered. Or, it may give us No. 2.

Mr. Willes, who filed a brief of Mr. Stow, contra.

Mr. Justice MILLER delivered the opinion of the court.

No class of cases that come before this court are attended with so many and such perplexing difficulties as these locations by survey of confirmed Mexican grants in California. The number of them which we are called upon to decide bears a very heavy disproportion to the other business of the court, and this is unfortunately increasing instead of diminishing. Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what to us appears magnificent quantities. Leagues instead of acres were their units of measurement, and when an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant and was public property. When the grant was made, no surveyor sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region. A sketch, called a diseño, which was rather a map than a plat of the land, was prepared by the

applicant. It gave, in a rude and imperfect manner, the shape and general outline of the land desired, with some of the more prominent natural objects noted on it, and a reference to the adjoining tracts owned by individuals, if there were any, or to such other objects as were supposed to constitute the boundaries. Their ideas of the relation of the points of the compass to the objects on the map were very inaccurate; and as these sketches were made by uneducated herdsmen of cattle, it is easy to imagine how imperfect they were. Yet they are now often the most satisfactory, and sometimes the only evidence by which to locate these claims.

These difficulties have rather been increased than diminished by the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and the course of proceedings adopted under it by the Board of Commissioners and the courts. Before this board every person having a claim derived from the Mexican government appeared, and in his own way and to the best of his ability established his right. The primary object of the act was to ascertain and separate the public domain from that which had become, under the Mexican government, private property; and hence, in every case, the claimant was plaintiff, or actor, and the United States was defendant. But no other private claimant was made a party to the proceeding, and it may well be supposed, and indeed we know it has often happened, that two or three claims for the same land, or parts of the same, were progressing, *pari passu*, in the same court, and the land has been confirmed to each claimant, and probably each has received a patent for it. As if aware of the confusion which must follow such proceedings, the act of 1851 provides expressly that neither the final decree of the Board of Commissioners, or of the District or Supreme Court, or any patent to be issued under that act, shall be conclusive against any one but the claimant and the United States. In some instances the board, or the court, would construe the grant and accompanying espediente, and define the boundaries with particularity. In others, they merely confirmed the grant, without any attempt

at location. And in still other cases, they would partially define the boundaries, and refer to the espediente for that which was left indefinite.

Then came the act of 1860, which attempted to settle these difficulties in the making of the surveys under those decrees, by permitting, or perhaps we should say compelling (for it is yet to be determined whether every one interested is not bound to come in or be barred), all parties interested in the land covered by the survey, to come in and contest it. Are they permitted to contest the decree under which the survey is made? Or are they limited to denying that the survey conforms to the decree? Or can they only contest the matter where the decree has not definitely located the grant? Many such questions as these will arise under this act, and will require great care and reflection to arrive at sound, safe conclusions. In this proceeding new parties come before the court, and often demonstrate that grants have been confirmed, which necessarily conflict; and, upon a question of the location of a survey, we have all the contests renewed which should have been settled in the question of title.

The case before us is an example, containing as many of the perplexities to which we have alluded as can well exist in one case. Its consideration requires an examination of three different claims, which have each, independently of the other, been carried through the Board of Commissioners and courts, and finally confirmed.

The first of these, that of Gonzales, was the oldest in reference to the date of the grant from Mexico, being made in 1833. No party to the present record seeks to disturb its location, and it is only to be considered here as bounding the present claim. It is for three-fourths of a league, bounded by the sea on the west, and the Butano Creek on the south. The next grant in order of time is that to the present claimants, under Ramona Sanchez. She, in 1837, made application for a half league of land, and the governor issued to her a provisional concession for a league in 1838. Of the location of this we will speak hereafter. Next came Simeon Castro, who, in 1842, obtained from the government a grant

of four square leagues, bordering to the east on the Sierra, to the west on the sea, to the north on the rancho of Don Juan Gonzales, and to the south on that of Don Ylaria Buelna.

In the provisional concession of Governor Alvarado, of 19th September, 1838, to Ramona Sanchez, the land is said to be known by the name of Butano, and reference is made to the espediente for its description. This must mean the diseño accompanying her petition. In the final grant to her in 1844, by Micheltorena, which is expressed to be a ratification of the provisional title given her in 1838, it is called the Butano ranch, and is described as bordering on the ranch of the heirs of Simeon Castro, on the Serrania, and on the sea. Now, an examination of the diseño in her espediente, the place of her residence, and her long possession under the grant, with other matters, leave no doubt that if her grant was to bound on the sea she must come between Gonzales and Castro; yet Castro's grant calls for the grant of Gonzales as his northern boundary. This would leave no place for the location of claimant's land, where it seems reasonably certain it was intended to be. How are we to adjust these conflicting claims?

In the first place, we concur with the District Court in holding, that the language of the grant to Castro, which makes his northern boundary the rancho of Gonzales, is a mistake, and that it was only intended to extend north to the Arroyo Frijoles, instead of the Arroyo Butano, which latter is the southern boundary of Gonzales; and that between these two, and bounded by the sea on the west, is the half league petitioned for by Sanchez, constituting the valuable portion of the league granted her by the governor.

It would extend this opinion to an unreasonable length, discussing mere facts and inferences, to go into all the reasons which justify this conclusion. They are stated at length, and with much clearness, in the opinion of Judge Hoffman of the District Court. Among them may be mentioned the fact, that the land granted to Castro originally constituted two independent ranches, for one of which, the most northern,

a grant had been previously issued to one Bernal, but which was surrendered by Castro when he took out a new grant including both ranches. On the diseño accompanying his petition these two are laid down, together with other natural objects, corresponding with a survey of the coast since made, so as to show that the tract did not extend so far north. The diseño attached to the original grant to Bernal, the one that was surrendered, shows also that its northern boundary was the Arroyo Frijoles. The diseño found with the petition of Sanchez shows that her grant must have occupied the space between the Arroyo Butano and Arroyo Frijoles. Now, if the Mexican governor really intended that Castro should join Gonzales on the north, there was no place for the grant to Ramona Sanchez, which, he says, is bounded by the sea on the west, and borders on the lands of the heirs of Castro.

It is objected to this location of the grant that it places it on land which has already been confirmed, surveyed, and patented to the representatives of Castro. The answer to this is, that we are called on in this proceeding to determine where the grant to the present claimant ought rightfully to be located, who was not a party to any of the proceedings by which Castro's claim was confirmed, surveyed, or patented, and is not therefore bound or concluded by either the decree, survey, or patent, as expressly enacted by the fifteenth section of the act of 1851. For Castro's survey was made before the act of 1860, and there was no opportunity for this claimant to contest its location. And lastly, it may be added, that the holder of the Castro claim has made himself a party to the present proceeding, and must be bound by its result; and if the errors of his grant and survey are corrected, so that the boundary of both claims shall be rightfully established, no wrong can accrue either to him or claimant.

It has been strenuously urged that if the original half league petitioned for by Sanchez has been correctly located, that the remainder of the league granted her should be taken out of the surplus of the Gonzales grant, instead of extending the grant eastward to the Sierra for quantity. It is suffi-

cient to say that we see no reason for making the distorted survey which this would require, and encroaching upon settlers who have made pre-emptions, merely that claimant may get better land than he does by extending his grant eastward to the mountains, as his grant seems to demand.

On the whole case, without that full and satisfactory conviction of the entire soundness of the decree below, which is desirable, but which is perhaps unattainable in many of these cases, we see no better course than to

AFFIRM THE DECREE.

POMEROY'S LESSEE *v.* THE STATE BANK OF INDIANA.

1. No "exception" lies to overruling a motion for a new trial, nor for entering judgment.
2. The entries on a judge's minutes, the memoranda of an exception taken, are not themselves bills of exception, but are only evidences of the parties right seasonably to demand a bill of exceptions; memoranda, in fact, for preserving the rights of the party in case the verdict should be against him, and he should desire to have the case reviewed in an appellate tribunal. No exceptions not reduced to writing and sealed by the judge, is a bill of exceptions, properly speaking, and within the rules and practice of the Federal courts. The seal, however, being to the *bill* of exceptions, and not to each particular exception contained in it, it is sufficient if the bill be sealed, as is the practice in the first and second circuits, at its close only.
3. Where an objection is to the ruling of the court, it is indispensable that the ruling should be stated, and that it should also be alleged that the party then and there excepted.
4. This court cannot give judgment as on an agreed statement of facts or case stated, except where facts, and facts only, are stated, If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement. *Burr* v. *The Des Moines Co.* (*ante*, p. 99), affirmed.
5. Where a case is brought here upon a writ of error issued under the 22d section of the Judiciary Act, and there is neither bill of exceptions, agreed statement, nor special verdict brought up, the judgment, generally speaking, will be affirmed; as it was in this case. *Burr* v. *The Des Moines Co.* (*ante*, p. 99), where the case was "dismissed," simply, was special in its circumstances.