as much as three thousand five hundred acres, and the other about two thousand acres.

Besides, in this class of cases, a large discretion must necessarily be left to the surveyor; and while we are not prepared to say that we will not in any case review the exercise of that discretion, we have no hesitation in saying that we do not sit here to determine whether it has been accompanied with the nicest discrimination, or the highest of wisdom.

DECREE AFFIRMED.

WHITE *v.* UNITED STATES.

Where there is no archive evidence of a California grant, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially where, in addition, the *expediente* produced is tainted with suspicions of fraud, the claim must be rejected.

APPEAL from the District Court for the Northern District of California; the following case being presented.

The appellant, White, claimed a tract, or rancho of land, known as *San Antonio*, under a grant alleged to have been made to one Antonio Ortega. The United States, appellees in the suit, claimed it under a grant alleged to have been made by the same authority to a certain Juan Miranda. One question, therefore, was as to the validity of the respective documentary titles thus set up. But this question was complicated by other questions: one of actual occupation, another of agency or representation, and a third of abandonment. Ortega had married the daughter of Miranda, and both Ortega and Miranda had occupied the tract,—Miranda and his family being sometimes in occupation, as Ortega and his wife were at others; and the additional question therefore was, whether Ortega was occupying under Miranda, or Miranda occupying under Ortega,—a question made more difficult to solve by the fact that Ortega and his wife were in hostile relations, leaving it uncertain when *she* was in pos-

session, as she was at times, whether she was occupying under her husband or under her father. In consequence of his domestic difficulty, moreover, Ortega left California in 1843 for Oregon, remaining there till 1847; between which years Miranda got *his* grant: and a question was whether Ortega had *abandoned* the property. Ortega's title was partly of a documentary kind and partly of an equitable sort, and resting on parol evidence. *The documentary title* consisted of a sheet of paper containing:

1. Petition to the governor, Alvarado.
2. A marginal order of reference.
3. An informe; and
4. A decree of concession.

There was also produced a map of the land solicited; though *when* made was a question in the case. The petition was in the name of Ortega, and was dated June 12th, 1840. The marginal order was in the handwriting of and signed by Governor Alvarado, and dated June 20th, 1840; this date, however, being an *altered* one, as hereinafter stated. The informe was signed by M. G. Vallejo, and dated July 30th, 1840. The decree of concession was dated August 10th, 1840, and, translated, in its important parts as follows:

"I grant to Don Antonio Ortega the land petitioned for, with the understanding that in order to obtain the issue of the respective titulo, and to regularly make up the necessary expediente (by which the boundaries should be marked), and the necessary proceedings be taken, he *shall* make a map as required by law, which he shall present without delay, together with this instancia, which shall serve him as security during the further proceedings indicated."

These documents were produced, together with the map, *from the custody of the claimant.* It did not appear that they were at any time on file in the public archives. *The oral testimony* came from a great number of witnesses.

Governor Alvarado, who was twice examined, testified that he executed and delivered this grant to Ortega at the time it bears date; and that some time afterwards, in the last of 1840, or first of 1841, Ortega brought to him the original

expediente and map, and left them with him, and that he kept them for Ortega until about 1848, when he gave them up to him.

As respected the date of the diseño, now produced by the claimants under the title of Ortega, testimony of Alvarado, given on his second one, was as follows; Ortega himself testifying also to the same effect as to the diseño:

"*Question* 23. You have said that Ortega twice presented himself to you in Monterey, in 1840, in relation to this grant; state what papers, if any, he presented to you on the occasion of his first visit, and what papers on the occasion of his second visit.

"*Answer* 23. My recollection is that he brought with him each time the same papers, that is the petition, but the first time without any map; the second time the petition and diseño together. He might have come other times, but I only recollect those two times."

It was at the *second* interview *that the "concession" was given.*

General Vallejo, agent of colonization under the Mexican government, testified that in 1838 or 1839, Ortega applied to him, as was customary, with his petition for permission to settle upon this rancho; that he gave him the permission asked for, and he immediately moved on the rancho, taking with him his father-in-law, Juan Miranda, and his family; that he built a house and corrals,* and stocked the place with horses and cattle; that he (Vallejo) furnished him with stock for that purpose; that Miranda occupied the land *for* Ortega; that Ortega obtained the grant from Governor Alvarado in 1840; that he saw the grant himself; and that he never gave Miranda any license or permission to occupy this rancho, or any portion of it.

Richardson testifies that this rancho was granted to Ortega by Governor Alvarado in the year 1840; that he knew the boundaries of the rancho by seeing the original grant, and having it in his possession; that Miranda occupied the rancho

* By this term is meant an inclosure to shelter horses or other cattle. It is originally a Spanish word; but is given in Worcester's English Dictionary of 1850, as a term of our own language.

under Ortega by virtue of a special contract between Miranda and Ortega; that they *both* told him so.

De la Rosa testified that he wrote Ortega's petition for him, and made the very map now exhibited in the case; that he made it in 1839 or 1840; that he saw the grant, saw it in the house of Ortega on the rancho in question; that Miranda occupied the rancho for Ortega; that Ortega's family lived on it during his absence in Oregon; that Miranda applied for a grant of this land to himself while Ortega was absent in Oregon; he (Rosa) drawing and presenting the petition; that a grant to him was written out in the office of the secretary of state, but was never signed by the governor.

Jacob Leese, alcalde of Sonoma at the time Miranda applied for a grant, testified that he gave him the certificate found in his expediente wholly upon the allegation set forth in his (Miranda's) petition, and from the fact that he (Miranda) lived upon the land. He also says: "But the fact of the former grant (to Ortega) being concealed or contradicted by the petition, I was deceived; and if the grant was obtained from the governor through the deception practised upon the alcalde, that grant would be fraudulently obtained, and would be void."

Father Accolti, a priest, testified that he became acquainted with Ortega in 1845 in Oregon [to which place, as mentioned, Ortega went in 1843, remaining there till 1847 or '8], and at that time Ortega urged him and some other priests and some sisters of Notre Dame to come to California and establish a school, stating that he would give them, together with "that piece of land, half of his stock of cattle on the land." He stated that he had the grant to the rancho from the Mexican government. The offer was made on condition that he would educate his (Ortega's) children. He also testified that the original title-papers in this case, viz., the expediente and map, together with a deed subsequently given by Ortega to Brouillet, were all placed in his possession in December, 1849.

Father Brouillet, another priest, the person just mentioned by Father Accolti, testified that he made an agreement

with Ortega in 1849 to educate his children; and that, in consideration thereof, Ortega made a deed to him of all this rancho, excepting one league. He identified the original deed as the one delivered him by Ortega. He also testified that he was put in possession of this rancho by Ortega, May 1, 1849, in the presence of one Miller and Theodore Miranda, a son of Juan, who was also present as a witness, and acquiesced to the possession given in his presence by Ortega. This possession was given on the rancho, and at the same time the deed from Ortega was delivered to him, as well as the original title-papers of the rancho. He also testified that the title-papers, viz., the expediente and map, are the same which were delivered to him by Ortega, May 1, 1849, on this rancho, in presence of Miller and Theodore Miranda; that before he delivered to Ortega his contract to educate his children, he consulted General M. G. Vallejo as to the validity of Ortega's title, and that Vallejo assured him the title was genuine; that in the same year he took the said Ortega's expediente and map to Monterey, and there showed them to Governor Alvarado; and that Alvarado, at that time, assured him that the said title to Ortega's rancho was genuine; that there was but one question that could be raised in it, which was, that the Departmental Assembly had not acted upon it, but that he did not think that would be any objection in the courts of the United States.

Miller, the person mentioned by Brouillet, confirmed this account of delivery of possession

Bojorques testified that Ortega owned this rancho as early as 1841, was in possession of it in 1839, and had a small house on the creek of San Antonio; that Juan Miranda and his son, Teodoro Miranda, occupied the rancho *for* Ortega; that he obtained his information from Ortega and *both the Mirandas*.

Walker testified that he knew Ortega in Sonoma in 1843; that he told him at that time that he owned this rancho; and that he often heard him talking about his rancho in the presence of others; and he "never heard it denied or contradicted that it was his rancho," and that it was generally

reported to belong to Ortega. He also stated that he went to Oregon in the same company with Ortega; that before leaving Sonoma for Oregon, Ortega went to his rancho and brought stock away from there; and that he saw him driving the stock, and he said he had taken them from the rancho for the purpose of driving them to Oregon; and, when in Oregon, he often heard Ortega say that he intended returning to his rancho of San Antonio and to his family.

In addition to this and other similar testimony, it appeared that the French traveller, *Duflot de Mofras*, who was in California in 1841, in his published *Exploration du Territoire de l'Oregon, des Californies*, &c.,* a work whose general good authority had been recognized by this court,† in giving the names of the owners of ranchos in this region, includes Ortega among them. The passage in De Mofras's book, translated, reads thus:

"At the bottom of the great *anse* of Sansalito, to the north of the tongue of land which divides, and at two leagues to the east of Richardson, one meets with the rancho of the deceased Irishman, Read. . . . Behind the farms of Richardson and of Read, to the north and the west as far as the sea, arise the small ranchos of Las Gallinas, Berry, Garcia, and Ocio, near the Punta de los Reyes, and Bojorques, the nearest to the port of La Bodega. Finally, more to the north and the east, ORTEGA, Martin, Pituluma, the Vallejos, Dorson, and Mackintosh, the most northern establishment of the Mexican territory. Five miles to the north of the rancho of Read, one meets, not far from the shore, with the mission of Saint Raphael. . . . The lands of the mission are excellent. We saw in its gardens superb plants of tobacco, cultivated by a man named ORTEGA."

Ortega, who had at the time of the suit no interest in the result, was himself examined. After testifying positively to having obtained the grant in 1840, he said thus:

"After the making of the decree of Governor Alvarado, and during the same year, I went to Monterey, and applied to Alva-

* Vol. i, 443–445.

† United States *v.* Sutter, 21 Howard, 170.

rado for a full and formal title; but it was during the recess of the Departmental Assembly, and I could not obtain it. *I did not occupy the land in person*, but my father-in-law, Juan Miranda, occupied it for me in the year 1840. Miranda occupied the land by placing his son there, who remained there six years, having a hut there, and he had fifty cows there. I applied to Governor Alvarado, with the paper before mentioned, and presented a map, *and then I went to Oregon*, leaving the papers with the governor.

"My father-in-law occupied the land on my account for the whole six years, *but never paid me anything whatever for the use of it.* I think my father-in-law died in 1845; I went to Oregon in 1843, and was there four years, and he died the year before I returned. I do not know whether Juan Miranda obtained a grant of the land to himself or not. Teodoro Miranda, a son of Juan Miranda, was occupying the land when I returned from Oregon, the same that was occupying it when I went. He continued occupying the land from 1841 to 1848. *I do not know who occupied the land after* 1848. I claimed the land after I came back from Oregon; I went to Alvarado and got the papers for the purpose of establishing my claim. This was *after* the country had been taken by the Americans. I kept the papers about a year, and then delivered them to a French priest by the name of Brouillet; I made a *present* of the land to the priest, in pay for the education of my children for eight years. *I never received judicial possession of the land.* I have no interest in the success of this claim, or the want of it.

"*Question.* Did you ever demand of Teodoro Miranda the possession of the land?

"*Answer.* I did not; I went to his *mother*, who had the control, and demanded *it of her.* She told me the rancho *belonged to her;* that she had a paper from Murphy, and from Leese, the alcalde of Sonoma. I did *nothing afterwards* towards getting the occupancy of the land, but went to Alvarado and got the papers before mentioned."

On the other hand, the Miranda title was thus supported:

The expediente of Miranda. This was found in the archives, duly numbered and entered on Jimeno's Index. It consisted of:

1. A petition of Miranda, dated February 21, 1844.

2. A certificate by Jacob Leese, alcalde of Sonoma, that the land had been occupied several years, and that it did not belong to any pueblo or corporation. Dated February 20, 1844.

3. A report by Jimeno, dated May 2, 1844, that the land had been occupied for four years by the party interested, by cultivation, and by having a house thereon, with all his goods; and that it does not belong to any one in particular.

4. An order that the title issue, signed by the governor, and dated May 30, 1844.

5. A decree of concession, dated October 8, 1844, declaring Juan Miranda owner of the place called Arroyo de San Antonio, and directing the corresponding title to be made out, and entered in the respective book, and the expediente to be sent to the Departmental Assembly for its approval.

6. Two copies of the formal grant or titulo, dated October 8, 1844, but unsigned.

The grant to Miranda, however, was not consummated by delivery of the title-paper, it not having been signed, said the witness, De la Rosa, "on account of the civil disturbances and the breaking out of the revolution about that time;" though Miranda's daughter, the wife of Ortega, swore that her father was taken sick and could not attend to it.

Numerous witnesses were produced to show that Miranda was the reputed owner, and that *he* was in possession for twenty years; positive testimony being adduced that such possession began so far back as 1838. One person swore that he had "put three hundred head of cattle upon it, thirty wild mares, and some tame horses, branding the cattle with his brand, which he had made at the blacksmith's shop." It was incontestable that in an expediente of one Padilla, to whom was granted a tract called the *Roblar de la Miseria*, and adjoining the one in question, the tract granted to Padilla was described as bounded on one side by "land of Don Juan *Miranda;*" and the same designation of ownership was on the accompanying diseño or map. In this case, General Vallejo had certified to the alcalde "that the boundaries bordering are the same as those mentioned

in Padilla's petition." The petition, in that case, was dated November, 1844. In another case, a petition and grant to one Bojorques, for the *Laguna de San Antonio*, the former dated August, 1844, and the latter November, 1845, the rancho San Antonio was described in the same way, as "lands of Juan Miranda;" and the same characterization was found on the map of an adjoining rancho, called *Olimpale.* So, too, it was obvious that the date of the marginal order of Governor Alvarado, on Ortega's petition, had been altered from 1841 to 1840; the ink in which the alteration was made being of a different color from that in which the marginal order was itself written. So it was a fact that, by inspection of the papers themselves, the diseños of Ortega and of Miranda appeared to be transcripts one from the other, and to have been made by the same person and at the same time. The edges of the paper on which they were made so tallied that they made "indentures."

As respected Ortega himself, while it was testified that he was a man whom one never "heard anything against," it appeared that his life had been of a singularly miscellaneous character. He was a Mexican by birth, and born in 1781, being of course about sixty years old at the date of his petition, as he was seventy-two when he was examined in the case. In 1802-3 he was living in New Orleans. Afterwards he took holy orders, and exercised the office of a priest for about three years. He then entered the Mexican army, and served there for about twenty years, rendering, said Governor Alvarado, "many meritorious acts for his country." In 1834–5 he appears to have been "keeper of the keys" at the mission of Sonoma; "mayordomo" of the same.* In 1838 he mar-

* The "obligation of mayordomos," as set forth in certain directions made for them, are of a kind quite peculiar; and though a mention of them is of no great value in this case, it may serve to give a view of the picturesque sort of life common in California before the conquest.

1. To take care of the property under their charge, acting in concert with the reverend padres in the difficult cases.

2. To compel the Indians to assist in the labors of the community, chastising them moderately for faults.

3. To see that the Indians observe the best morality, and frequent church,

ried Maria Francisca Miranda, daughter of the Miranda under whose title the appellees claimed; a handsome woman, greatly younger than himself, who soon fell in love with a man named Salvador. The character of the lady and the nature of the new relations appear in her own testimony, which, in question and answer, was thus:

"*Question.* What is your name, age, and place of residence?

"*Answer.* My name is Francisca Miranda; *I don't know my age;* I live in Petaluma, California.

"*Question.* Are you acquainted with Leonito Antonio Duque de Ortega?

"*Answer.* Yes, I *know* him; I am his wife.

"*Question.* How long has it been since you were married to the said Ortega?

"*Answer. I do not know.* I was married to him a long time before he went to Oregon.

"*Question.* How many times, before your husband abandoned you, did you and he quarrel?

"*Answer.* I never quarrelled with *him.* It was he who did with *me.*

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at the days and hours that have been customary; in which matter the reverend padres will intervene, &c.

To remit to the inspector's office a monthly account of the produce they may collect into the storehouses, of the crops of grain, *liquors,* &c., and of the branding of all kinds of cattle. Said account must be authorized by the reverend padres.

4. To take care that the reverend padres do not want for their necessary aliment, and to furnish them with everything necessary for their personal subsistence, as likewise with servants, which they may request for their domestic service.

5. To provide the ecclesiastical prelates all the assistance which they may stand in need of, when they make their accustomed visits to the missions through which they pass; and, under the strictest responsibility, to receive them in the manner due to their dignity.

6. In missions where the said prelates have their residence, they will have the right to call upon the mayordomos at any hour when they may require them; and said mayordomos are required to present themselves to them every day at a certain hour, to know what they require in their ministerial function.

7. After the mayordomos have for one year given proofs of their activity, honesty, and good conduct, they shall be entitled (in times of little occupation) to have the Indians render them some personal services; but the consent of the Indians must be previously obtained.

"*Question.* Before leaving you, did he not charge you with inconstancy?

"*Answer. He* never accused *me; he* was the guilty one.

"*Question.* Have you been divorced from him or legally separated?

"*Answer.* After his return from Oregon, he charged me before an American, who was represented to me as the Governor of the State of California, with having a man. I appeared with my witnesses; and he appeared, but had no witnesses, and the matter was dropped.

"*Question.* Since your husband abandoned you, have you had any children, and how many?

"*Answer.* Since my husband abandoned me I have had three children, besides the one with which I was *enceinte* when he left.

"*Question.* Since your husband left you and went to Oregon, have you ever lived with him?

"*Answer.* I never have."

In 1841, Ortega kept a little liquor store in Sonoma, cultivating some land, and near the same time "used to be knocking about General Vallejo's (who was Commandant General), as a sort of steward." In 1843 he went to Oregon. "He said he was going to Oregon to remain; that he had reasons for leaving the country, family reasons; he accused his wife of inconstancy to her marriage vows, and said he was never coming back." He took with him "one cow and a couple of horses." In 1845 he set off from Oregon to return to California by sea; but the vessel was wrecked, and after losing everything he had, he "returned to Oregon almost naked." He here stayed with a man named Walker, who "gave him blankets, took care of him, fed, clothed, and sheltered him." During his second stay in Oregon, as appeared by a witness who was "head sawyer in a sawmill there, and kept a boarding-house for the hands," Ortega's occupation was "that of waiting on the house, bringing wood and water;" he paid nothing for his board, the witness "thinking a great deal of him." "He had an Indian boy, who worked all the time for him, to endeavor to get money to return to California." In 1848 "he was started off home

again." In 1849 he was "bell-ringer to the church. . . . I don't know," said one witness, "any occupation he had at that time beside that. He officiated in the church, ringing the bell, attending round there. He was a good deal about General Vallejo's as a sort of steward. He had no property that I know of, except one cow and a couple of horses that were *given to him*, and which he took with him to Oregon."

The court below decided in favor of the Miranda title; assigning among the minor reasons for its opinion the character of Rosa, "as disclosed by his own avowal, that in 1844 he was endeavoring to obtain for Miranda a grant of lands which he knew had already been granted in 1840 to Ortega; or, as established in the case of *Luco et als.* v. *The United States*,* and other cases, in which the unreliability of his statements, and those of several other of the claimant's witnesses, have been judicially declared by the Supreme Court;" referring also to the fact that other ranchos, granted about 1844, as the *Roblar de la Miseria*, *Laguna de San Antonio*, and the *Olimpale*, referred to this tract, one of their boundaries, as "lands of Juan Miranda;" that the alteration of dates in the case was a circumstance not explained; that the preponderance, both of proofs and probabilities, was, that Miranda's possession was not that of a tenant; and that "in 1843, Ortega departed to a foreign country, under circumstances from which an intention to abandon his own might well be inferred." The circumstance of the *maps* in Miranda's petition, though this last was presented in 1844, being apparently made at the same date as the one in Ortega's petition, though alleged to be of an earlier date, and both made by one person, De la Rosa, was adverted to as a circumstance indicating that Ortega's map was possibly made *after* the date when it ought to have been, and was inserted posthumously in his papers.

Messrs. Cushing and Gillet, for the appellants (title of Ortega):

1. Where witnesses are not impeached by the evidence in

* 23 Howard, 543.

the case, and allowed to defend their characters, if attacked, they must be treated as witnesses of good character, and entitled to full credit. What has been said by this court in opinions given in former cases, cannot be referred to in order to discredit them. Such a course is not tolerated in tribunals of justice. This bench has recently settled that question. "The former opinions of the court," says GRIER, J., speaking for the court, "may be referred to on questions of law, but cannot be quoted as evidence of the character of living witnesses."* Certainly witnesses cannot be convicted of perjury as "matter of law."

2. The acts of third persons are not admissible evidence against the claimant to defeat his legal rights. The United States seek to avoid the rights of the claimant by showing that certain persons had asked for or obtained grants of land in the vicinity of those in question, describing the latter as Miranda's. This is not legal evidence for any purpose. Such descriptions cannot affect third persons who had no agency in making them. If admissible, it would merely show that the applicant did not discriminate between ownership and possession, or did not know the relation of landlord and tenant which existed between Ortega and Miranda, or the facts in relation to the ownership.

3. The United States cannot set up a wrongful act of Mexican officers to defeat rights which that government had previously conferred. The rights conferred upon Ortega by the concession were within the lawful powers of the governor. If any governor made a second grant when the first was outstanding, his act was a fraud upon the first, and void. Such a fraudulent and void act is no evidence to prove the first grant had not been made, or that it had ceased to be effective. A party cannot thus make evidence for himself to avoid or do away with his own acts conferring rights upon others. It follows that all the evidence given in this case concerning the Miranda grant is illegal, and cannot be considered as affecting the rights of Ortega.

* United States *v.* Johnson, *ante*, 329.

4. Ortega had such a claim that Mexico, under her laws, usages, and customs, would, on a proper application, have completed and confirmed his title. By the laws of Mexico she gave away her land in large tracts to settlers, those having rendered important military services—within which class Ortega was—being entitled to high consideration. By usage, the formalities to be observed in granting were far from a technical character, and might be varied by the granting officer, and even statute requisites dispensed with, as held in *Fremont* v. *The United States*,* and for the reason that formalities did not enter into or constitute the essence of the matter, and were unimportant. By custom, permission to occupy conferred a right to possession, and such occupation under an expectation of acquiring a full title gave the occupant an equitable claim to be furnished with a legal title. As Mexico gave away her lands, she was liberal in her usages and customs, and as proved in this case, as it has been in others, and under the present circumstances, would have promptly completed the title. The United States are bound, without reference to the change of government and of circumstances, to do now what Mexico would have done. It cannot be questioned that, had Mexico remained the owner, her governor, Alvarado, or any other one, would have completed Ortega's title. That Ortega received permission to occupy the land in question is proved by Vallejo and Rosa. This confers the same rights as are required under incomplete grants by express authority of the Mexican government.†

5. A grant cannot be set aside on mere suspicion. Here, however, not even a case of suspicion has been developed. Not a witness has sworn that Ortega did not present his petition; that Vallejo did not give permission to occupy, and did not sign the report, and Alvarado the grant, or Richardson and De la Rosa did not see the grant, as stated by them respectively. We have the right, then, to assume

* 17 Howard, 561.

† Arguello *v.* United States, 18 Howard, 54; United States *v.* Peralta, 19 Id., 343.

that there was a grant to Ortega, and made at the time stated, which he then had in his possession, because we have proved it, and that proof has not been overcome by conflicting proof. This fact is fixed. It follows that Ortega had a right to possession, conferred by proper authority. It has been suggested that Ortega's map was not made in 1840, when it purported to be, and was copied from Miranda's made in 1844. But why may not Miranda have got his as well from Ortega's?

6. Then, it is proved that Ortega went into possession in 1839 or 1840 by Vallejo, who let him have stock to put upon the land; proved by Rosa, by Richardson, and by Ortega himself. That he claimed to be in possession, by his father-in-law, is also proved by the same, and others. It is proved by Walker that he took stock from there to drive to Oregon. It is proved by Father Brouillet, Miller herein confirming him, that when he sold to and put the former in possession, Theodore Miranda, the only one on the land, raised no objection, thereby admitting Ortega's right to the land and possession. Under these circumstances the possession was, in fact, by Ortega personally, and by Miranda, as his tenant, at first, and by his son afterwards, for him. None of the government witnesses know or swear, as a matter of fact, that Miranda did not occupy for Ortega. They infer otherwise, from what they saw, which is not inconsistent with the supposition that he held under and represented his son-in-law, as sworn to by him and several others. That the possession in law was that of Ortega, and followed the permission given to occupy and the title, cannot be reasonably questioned.

7. It is a presumption of law, when Miranda entered under Ortega, who had a claim of title, that the possession continued under Ortega until the contrary is fully proved. Miranda could not throw off his allegiance as a tenant, and assume control on his own account. This, however, is what he sought to do when he sought to obtain title in the absence of Ortega. The law will not let him do this. He entered as a tenant, and continued as a tenant. Those who

set up the change in the character of the possession must prove it, which in this case has not been done. Having entered under Ortega, the presumption of law, in the absence of clear proof, is that while he continued there, he was a tenant under the owner by whose permission he entered. Hence, the concession or grant and continued occupation are established, and a confirmation must follow.

8. Abandonment of claim to land can only take place where the party in fact intends to and does abandon, which must be manifested by acts of a decided and unequivocal character showing such intention, and which can be in no other manner accounted for. Abandonment is a matter of intention, demonstrated by significant and pertinent acts. There are none such on the part of Ortega in this case. He has not in fact abandoned, nor has he said one word looking to abandonment. Leaving a wife, who was an adulteress, is wholly different from abandoning his lands. The case is that of a man who having put a tenant into possession, and leaving that tenant in occupancy, took a portion of his stock, and went away, but who, while away, was continually talking of his land and stock, and of his intention to return, and who proposed to transfer a portion of both to the clergy, if they would go home with him, and educate his children. He started to return, and was shipwrecked, and as soon as he could procure means, started again, and entered upon his land, and, in presence of his tenant still holding under him, conveyed and delivered possession of all his grant but a league, since conveyed. All this, instead of showing abandonment, disproves it, and establishes the fact that there was none actual or intended, but that he clung to his rights from first to last.

Messrs. Black, Reverdy Johnson, and Wills, contra:

1. The facts show a secret grant of the land in controversy; a grant retained in the private custody of the Governor of California until after the cession of that country to the United States; one of which no public record in the archives of that country was made at the time at which the grant

purports to have been made, or afterwards during the Mexican dominion; one of which the successors of Alvarado and other Mexican officers had no knowledge; one which is first made known to the public by the production of the appropriate evidence of its existence only after the Mexican dominion over that country had ceased; one, in regard to which, during all the antecedent period of time, the land granted had been in the actual and visible occupancy of another, while the alleged grantee himself was absent for the greater part of the intermediate time in Oregon, a foreign country. In view of these facts, we contend:

1st. That archive evidence of the existence of an alleged Mexican grant for lands in California is necessary in order to secure the confirmation of a claim founded on such a grant; and that, without such evidence, neither this claim nor any other can be confirmed by this court, without the previous reversal of a long line of its decisions on that very point.

This proposition is fundamental, and, if true, disposes of the whole case. The foundation of it was laid by this court in the case of *United States* v. *Cambuston*.* The doctrine, in another form, was quite strongly reasserted in the following year, to wit, at December Term, 1857, in *United States* v. *Sutter*.† In *Fuentes* v. *United States*,‡ a direct application of what was announced in *United States* v. *Sutter*, as a test of truth, was made to determine the validity of another grant, and the doctrine was reannounced at the same term in other cases.§ In *United States* v. *Bolton*,‖ we have a yet more pointed application of the doctrine. The claim was rejected. The want of archive evidence to authenticate it, left it without any "legal foundation to rest upon." The language of this court, however, in *United States* v. *Luco*,¶ is so remarkable that it must be quoted as the announcement of a *general*

* 20 Howard, 59. † 21 Id., 175. ‡ 22 Id., 453–4.

§ United States *v.* Teschmaker, 22 Id., 404; Same *v.* Pico, Id., 415; Same *v.* Vallejo, Id., 422. ‖ 23 Id., 350.

¶ Id., 543; and see United States *v.* Castro, 24 Id., 346; Palmer *v.* United States, Id., 125; United States *v.* Knight's Adm., 1 Black, 245.

principle applicable to all California land cases. "In conclusion," says Mr. Justice GRIER, "we must say, that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claimants is false and forged, and that, as an inference or corollary from the facts now brought to our notice, it may be received as a general rule of decision, that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it be found on file among the archives where other and genuine grants of the same year are found; and *that owing to the weakness of memory* with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public record, title of which there is no trace to be found in the public archives." How wise are the rules here laid down, the case before us proves. The claim is supported, as we see, by the testimony of General M. G. Vallejo and De la Rosa, whose bad character and bribeworthy avocations are graphically drawn by this court in the case just named. De la Rosa is the same gentleman who declared in that case, "that the only right way of swearing was by the priest on the Catholic cross." The claim is also supported by the testimony of Ortega, the pretended grantee, another of Vallejo's dependents, who, according to the evidence, exercised at various times the functions of priest and soldier; was keeper of a little liquor store at Sonoma; hanger-on at Vallejo's; at one time mayordomo of the mission of Sonoma; at another, keeper of the keys at the same mission; sometimes a bell-ringer at a church, and sometimes a waiter, a carrier of wood and water in a private house, and a lumberman at a saw-mill in Oregon; during the latter and the greater part of which time, according to the theory of the claimant, he was the owner of four leagues of land in California!

2. While the Ortega title has no record evidence in its favor, it has a mass of such evidence against it.

The Miranda title shows a petition, dated February 21, 1844, alleging *an antecedent possession for four years* of the land solicited; certificates by the alcalde of the district, and by the secretary of state, *that he had occupied it for four years*, and merited the grant; an order that a title be issued; a decree of concession, followed by two copies of the grant, made in pursuance of the decree of concession; and finally an extract from Jimeno's Index, showing that the grant had actually been issued by the governor in favor of Miranda, and that the proper record of the fact had been made in Jimeno's Index, one of the registers of the archives, as required by law.

But this is not all. It appears that Padilla, in 1844, petitioned for a certificate to enable him to obtain a grant for the land known by the name of *Roblar de la Miseria*, and calling for the land of Don Juan Miranda as his boundary on the southeast; that General Vallejo, in 1844, certified to the alcalde that the boundaries of the land solicited by Padilla, as described, were true. The same facts, substantially, also appear in the petition of Bojorques for the grant of the *Laguna de San Antonio*, and with regard to the rancho called *Olimpale*. It is said on the other side, that this is the evidence of third persons, and cannot be used to dispossess Ortega of his property. But it is the same sort of evidence, and far better in quality, than that given us on that same side in the book of Monsieur Duflot de Mofras, the French traveller, who seeks to dispossess Miranda.

3. Admitting the original genuineness of the Ortega title, still, by his removal to Oregon to reside in 1843—at that time a foreign country to Mexico and California—he lost, by the law of Mexico, whatever title he had previously acquired, and the land then became grantable to Miranda, or to any other Mexican citizen. By the colonization law of 1824, it is enacted as follows: "*No one* who, by virtue of this law, shall acquire the ownership of lands, *shall retain them if he shall reside out of the territory of the republic.*"* Now, it is

* Halleck's Report, Appendix No. 4; Jones's Report, p. 34, § 15.

undisputed that Ortega left California in 1843, and resided in Oregon until 1848.

It is not necessary to put this point on the ground of intentional abandonment. But the fact no doubt was, that when Ortega left California, he went abandoning everything he left behind, and intending never to return. The cause of his leaving was a quarrel with his wife, whom he suspected of conjugal infidelity. He separated from her, took all his goods with him—one cow and a couple of horses—and went. He said he was going to Oregon to remain; he said he had reasons for leaving the country, family reasons; he accused his wife of inconstancy to her marriage vows, and *said he was never coming back.* The facts that he was jealous of his wife, and that he left the country for that reason, are not denied. The facts that, years afterwards, he endeavored to return to California, but was prevented for a time by shipwreck, and afterwards did actually return, show only the states of his mind at those times. That, however, is unimportant. The true inquiry is: What was his intention when he first went away? If he went away with the intention of residing permanently abroad, and had any title to the rancho San Antonio previously, he lost it by the express law of Mexico. It is also to be observed in this connection, that it was not until after the removal of Ortega to Oregon that Miranda applied for his grant, even admitting, for the sake of argument, that he had not been occupying the land previously on his own account. Under the law of Mexico, therefore, after that event he had a clear right to ask for a grant of the land to himself.

4. In point of fact, the documentary and other evidence on which this claim is founded is false and fraudulent. The discussion of this question of fact involves a consideration of the oral evidence, in connection with the archive evidence already considered. The alteration of dates is a bad circumstance. The identity in appearance of the two maps, another. Miranda's map cannot have been copied from Ortega's; for the latter, if it had existed, was, according to the case set up, in Alvarado's private custody, and not

accessible to Miranda. The oral evidence, considered separately, presents a distressing conflict of testimony. One class of witnesses swear strongly in favor of the genuineness of the Ortega title-papers; to the fact of the occupancy of the land by Ortega (although he himself swears that he never did occupy it); to the tenancy of Miranda under Ortega, and generally to the validity and *bonâ fides* of that title throughout. Another class of witnesses swear to the occupancy of the land by Miranda, for his own benefit; to his notorious ownership of the land; to the poverty of Ortega; to his abandonment of California, and absence from the country until after its cession to the United States,—in short, to the validity and integrity of the Miranda title.

In this labyrinth of conflicting statements, one leading fact appears to guide us, and that is, while the one class of witnesses seeks by oral evidence not only to create a valid title, in the absence of archive evidence, but contrary to it, the testimony of the other class, on the contrary, is fortified by archive evidence, and is in harmony with it from beginning to end. Supposing the weight of oral evidence on each side to be equal, this fact alone is sufficient to determine the preponderance against the claim in this case.

Mr. Justice SWAYNE delivered the opinion of the court.

The appellant claims the land in controversy under a grant alleged to have been made by the proper Mexican authority to Antonio Ortega. In support of the title the following documentary evidence was introduced:

A petition by Ortega to Governor Alvarado of the 12th of June, 1840.

A reference of the petition, on the 20th of the same month, by the governor to Vallejo for a report.

An informe by Vallejo, of the 20th of July following. A decree by the governor, of the 10th of August, 1840, in which he says:

"I grant to Don Antonio Ortega the land petitioned for, with the understanding that, to expedite the respective title and to regulate the necessary documents, by which he shall mark out

the lines and perform the necessary acts, he shall make a map as required by law, which he will present opportunely. This decree shall be returned to him, that it may serve to him as a security during the other operations indicated."

And lastly, a diseño of the land.

These papers were all produced from the private custody of Ortega.

An expediente of Juan Miranda for the same land is also found in the record. It consists of the following documents:

A petition by him to the alcalde of Sonoma, of the 21st of February, 1844. (It states that he had been in possession four years, under a concession from Vallejo, but that the papers had been lost.)

A certificate from Jacob Leese, that Miranda had been in possession several years, and that the land did not belong to any pueblo or corporation.

An order of the 30th of April, 1844, by Governor Micheltorena, that the secretary of state should report upon the petition.

An informe of May 2d, 1844, by Jimeno, setting forth that Miranda had occupied the land four years "by cultivation and by having a house with all his goods thereon," as appeared by the report of the justice of Sonoma, and advising that the grant be made.

An order by the governor, of the 30th of May, 1844, that the title issue. A diseño of the land.

And two drafts of an instrument, granting the land to Miranda, prepared for the signature of the governor, but not signed.

Ortega was examined as a witness. [His honor here read the testimony of Ortega as given, *ante*, p. 665.] A large mass of testimony from other witnesses was taken by the parties. It would be a waste of time to analyze it, to weigh against each other the parts which are in conflict, or to attempt to explain or reconcile their antagonisms. Such a process could subserve no useful purpose. It will be sufficient to indicate the conclusions at which we have arrived.

The expediente of Miranda was found among the proper archives. It is referred to in Jimeno's Index. The title never passed into a formal grant by the governor, but it is shown that this arose from the illness of Miranda and the disturbed condition of the country. The record is wholly silent as to any objection by the governor or from any other quarter. Ortega testified that he was never personally in possession. It is clearly proved that the possession of Miranda commenced as early as 1838, and continued from that time. The petition of Bojorques in 1844, and the grant to him in 1845; the petition of Padilla in 1844, and the accompanying map, and the diseño of the rancho Olimpale, all refer to the rancho in controversy as "the land of Juan Miranda." These documents show that Miranda was regarded in the neighborhood as the owner, and not as a tenant. We are entirely satisfied, from the evidence found in the record, that he held in his own right and not vicariously for Ortega. The petition of those claiming the title of Miranda was withdrawn from before the Board of Land Commissioners. Why, does not appear. Whatever the cause, its withdrawal cannot lessen the light which the facts relating to it throw upon the merits of the claim of Ortega.

The expediente of Ortega is confronted by strong suspicions of its *bona fides*. There is no trace of it among the proper archives. It does not appear that any paper belonging to it was ever in any public office before the petition in this case was filed by the appellant's intestate. The Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs. Full archive evidence exists in the case of Miranda. Its absence in this case is not satisfactorily accounted for.

Ortega abandoned his wife in 1843, and went to Oregon. He was poor and had been so for years. It does not appear that, from the time of the concession to the period of his departure, he made the slightest effort to consummate his title. He returned in 1847. There is reason to believe that when he left the country he intended finally to abandon his

claim, if he had not done so before, and that such was the understanding of the Mexican authorities.

It appears that the order of reference made by the governor, which is found in the margin of the petition, was originally dated in 1841, and that this date was subsequently changed to 1840 with ink of a different color. A clerical mistake in writing the date originally, by antedating it a year, is unnatural and improbable. As it then stood it was subsequent in date to the report for which it called. It has been suggested that 1841 was the true and proper date, and that the concession was made after the return of Ortega from Oregon, and that it was antedated in 1840,—the writer not observing that the order of reference was dated in 1841,—and that, upon this fact being discovered, the date of the reference was changed to cure the discrepancy. The alteration is unexplained and unaccounted for. The evidence leaves us in the dark as to the time, the motive, and the circumstances.

It seems to be admitted that the diseño of Ortega and that of Miranda were prepared by the same hand and at the same time. Alvarado made the order of reference at Monterey on the 20th of June, 1840, and the order of concession at the same place on the 10th of August, 1840, or 1841. In his last deposition this passage occurs:

"*Question.* You have said that Ortega twice presented himself to you in Monterey, in 1840, in relation to this grant; state what papers, if any, he presented to you on the occasion of his first visit, and what papers on the occasion of his second visit?

"*Answer.* My recollection is that he brought with him each time the same papers—that is, the petition; but the first time without any map; the second time the petition and diseño together. He might have come other times, but I only recollect those two times."

Ortega testified to the same effect as to the diseño.

That both are mistaken upon the subject is shown by the concession. In that instrument, which was given at the second interview between them, Alvarado says: "He" (Ortega) "shall make a map as required by law, which he will

present opportunely." There was, then, no map present at that time. When was it prepared and added to the other papers? It is claimed, on behalf of the United States, that it was made when the diseño of Miranda was prepared in 1844, and came into the hands of Ortega by some means unexplained after his return from Oregon. Upon this subject, as in regard to the altered date of the concession, the evidence is inconclusive and unsatisfactory. The obscurity is increased by the character of some of the leading witnesses who have testified in support of the claim. But the solution of these difficulties is not necessary to the determination of the case. It has been held by this court, in a long and unbroken line of adjudications, that where there is no archive evidence, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially where, in addition, the expediente produced is tainted with suspicions of fraud, the claim must be rejected. We feel no disposition to relax the rule, and it is fatal to the case of the appellant.

DECREE AFFIRMED.

PARKER *v.* PHETTEPLACE ET AL.

A question of fact, arising upon a bill to set aside conveyances as made in fraud of creditors, in which, though the court agreed that "there was ground of suspicion," it gives weight to an answer positively denying the facts and fraud charged; this answer being supported by the positive testimony of a witness, who, though not a defendant in the case, was a principal actor in the transactions charged to be fraudulent. MILLER, J., dissenting.

APPEAL from the Circuit Court for the District of Rhode Island.

The complainants below, appellants here, filed a bill as judgment creditors, to set aside conveyances of the property of one Edward Seagrave, their debtor, and made, as they alleged, to hinder and delay the execution of their judg-