of this case that the land claimed by appellees *has* been confirmed to any other person. The appellees are not represented here by counsel, to affirm or deny that fact stated by the counsel of the government. When the appellant appears by counsel, and makes the point that this court has no jurisdiction of the case, and supports that argument by the statement of a fact which sustains the point, we are certainly at liberty to assume that fact to be true as against the appellant, and dismiss his appeal. But when he asks us to go a step further, and adjudicate on the rights of the appellee, by reversing a decree in his favor, we must have some other evidence of that fact than the statement of the appellant's counsel.

But conceding it to be true for all purposes that the land in question has been confirmed by a decree of the District Court to another party, there is nothing to show whether that decree is prior or subsequent in date to the one now before us; or which claim was first presented to the Board of Commissioners for its action. We might, therefore, be doing the present claimant great injustice in reversing his decree and leaving another claim for the same land to stand affirmed in favor of some other person, while we can by no possibility injure the United States by dismissing an appeal in a case where it is evident that the government has no interest, and which can only be protracting the litigation for the benefit of one individual in his contest with another.

APPEAL DISMISSED.

UNITED STATES *v.* ESTUDILLO.

1. An appeal of a case originating below under the statute of June 14, 1860, relating to surveys of Mexican grants in California, and in which the appellants appear on the record as *The United States*, simply (no intervenors being named), remains within the control of the attorney-general; and a dismissal of the case under the 29th rule of this court is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case, even although it is obvious that below there were some private owners

contesting the case under cover of the government name, and that some such were represented by the same counsel who now profess to represent them here. SWAYNE and DAVIS, JJ., dissenting. TANEY, C. J., and GRIER, J., absent.

2. Where parties are permitted by the District Court under this act to appear and contest the survey and location, the order of the court permitting such appearance and contest should be set forth in the record. Only those persons who, by such order, are made parties contestant, will be heard on appeal. MILLER, SWAYNE, and DAVIS, JJ., dissenting. TANEY, C. J., and GRIER, J., absent.

3. Where, under this act, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the District Court, and its action on the subject is not open to revision on appeal.

AN act of Congress of June 14th, 1860,* authorizes the District Courts of California, on the application of any party interested, to make an order requiring the survey of any private land claims to be returned into court. The order is to be granted on the application of "*any* party" whom the court "shall deem to have such an interest in the survey and location . . . . as to make it just and proper that he should be allowed to take testimony, and to intervene for his interest therein." If the objection to the survey and location is made on the part of the United States, the order to return the survey into court is to be on the motion of the district attorney, founded on sufficient affidavits. "And if the application for such order is made by other parties claiming to be interested in, or that their rights are affected by such survey and location, the court, or the judge, in vacation, shall proceed summarily, on affidavits or otherwise, to inquire into the fact of such interest, and shall, in its discretion, determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the survey, and shall grant or refuse the order."

* 10 Stat. at Large, 33.

But the act provides also, "that all the parties claiming interest, &c., derived from the United States, shall *not be permitted to intervene separately;* but the rights and interests of said parties shall be represented by the District Attorney of the United States, intervening *in the name* of the United States; aided by counsel acting for said parties jointly, if they think proper to employ such counsel." The act also provides that before proceeding to determine the validity of any objection to the location made by the surveyor-general, notice by newspaper publication shall be given to all parties in interest, that objection has been made, and admonishing them to intervene for the protection of their interest.

The present case—another case (*United States* v. *Nunez*), being just like it, and depending upon it—was one of these surveys and locations which had been certified into the District Court for the Northern District of California. The record—a confused sort of document—showed that on the 3d of October, 1860, "the United States Attorney, E. W. Sloan, and *J. B. Williams* appeared for the *United States*," other counsel for the claimant, Estudillo, and R. Simson for a certain Castro, "and on motion, it was ordered that he be allowed five days to make showing of his right to intervene herein, and *no other party appearing*, whereupon it is ordered that *the default of all parties not appearing as aforesaid be and the same is hereby entered.*" Subsequently, to wit, October 31st, 1860, "come the *United States* by *their* attorney, and except to the official survey." Subsequently to this "the petition of Thomas W. Mulford, by *his* attorneys, E. W. Sloan and *J. B. Williams*," set forth that he had an interest in the land claimed, and prayed the court to open the default entered on the preceding 3d, which motion the court, on the 20th of February, 1861, "denied." The case being here by appeal, as the *United States*, *appellant*, and J. J. Estudillo, appellee, Mr. Bates, A. G., in behalf of the United States, and Mr. Laitham for J. B. Estudillo, appellee, signed an agreement at the last vacation that the appeal should be dismissed; and the case was dismissed by the clerk accordingly; this agreement and dismissal purporting to be made under the

29th rule of this court, which provides that when the appellant and appellee in any appeal may, in vacation, by *their* respective attorneys, *who are entered as such upon the record*, sign and file with the clerk an agreement in writing, directing the case to be dismissed, it shall be the duty of the clerk to enter the case dismissed.

Mr. J. B. Williams, of California, he being the same Mr. "J. B. Williams" already mentioned as appearing in the District Court there, now came into court (Mr. Carlisle being of counsel), and presenting himself as attorney of "Thomas W. Mulford and *others*," moved the court "to vacate the stipulation, made under the 29th rule of this court, dismissing the appeal of the United States herein (which stipulation," the motion ran, "was made without their consent, or the consent of their attorney, or the consent of the District Attorney of the United States for the Northern District of California, and was made to their great prejudice and injury as settlers upon the public land of the United States); and that no mandate may issue upon said stipulation, but that the cause may stand to be heard in its order or otherwise as this court may direct; and that the attorney for Mulford and others be allowed to enter his appearance in this court, and be heard in their behalf, in the manner provided by the third section of said act of June 14, 1860."

Mr. J. B. Williams and Mr. Carlisle, in support of the motion: The act of June 14th, 1860, subjects the work of the surveyor-general to the revision of the District Courts, and enables all contestants to file objections, and have the survey examined and corrected if found to be erroneous. By obliging the surveyor-general to give notice, by publication, whenever he has made a survey of any private land claim, and by requiring all parties in interest to appear and intervene, a survey when finally approved is not only conclusive between the United States and the claimant, but is conclusive as to third parties, and the patentee can rely upon his legal title against all the world.

It is clear, from the provisions of the act, that Congress

did not intend to allow each settler the privilege to intervene in his own name, with a separate right of appeal; its intention was to give them those rights *jointly*, and the use of the *name* of the United States. And if they can be heard jointly by their own counsel in the court below, *why not in this court on appeal?* Where does the Attorney-General of the United States find his authority for dismissing an appeal taken by the district attorney in behalf of the settlers? The 29th rule of this court applies only to the appellant and appellee by their attorneys. The attorney-general is *not* the attorney of those claiming under the laws of the United States. He is the attorney of the *United States*—not of the settlers. The appeal was taken *in the name* of the United States, but it was taken in behalf of Mulford and others, appearing jointly, and represented by their counsel. The attorney-general might well refuse to *appear* for the settlers, but he can have no right to dismiss their appeal when they stand ready to prosecute it by their counsel.

Mulford and other settlers on the lands under the laws of the United States, claim that if the confirmed tract be *properly* surveyed and located, they will be gainers. The District Court decided against them. They ask to be heard here by their counsel. If the decision of the District Court had been in their favor, and the claimant had appealed, they would have been compelled to defend themselves as appellees. The attorney-general would not have appeared in their behalf, for his action in dismissing the appeal shows that he would have considered a decision against the survey as unjust. They do not ask the attorney-general now to appear in their behalf, but to let them appear and be heard *by their own counsel*, leaving him to express the views of the United States, as proprietors of *vacant* public land, if he thinks proper.

The right of the attorney-general to dismiss appeals in general, where the United States is the appellant, is not questioned. Where the suit is strictly one between the United States and the claimant, in which neither the alienees of the claimant, nor those claiming under the United States,

nor adjoining proprietors, *can* intervene, the right and duty of the attorney-general to desist from the prosecution of an appeal which only works ruin to the claimant under a genuine and valid title, is clear. But the location and survey of a confirmed claim almost always involves the interests of parties with whom the government has no concern. Here they are *made* to intervene. Does any one doubt if this case stays dismissed, and Mulford were hereafter to bring ejectment, that the record of this case would be used against him?

The right of special counsel—counsel acting for the individual claimants, though appearing to act for the United States—has never been questioned below; where the case is managed almost wholly by them, and where the question whether appeal shall or shall not be taken is left to *their* view of what their interests may suggest. There should be no different rule here, after the parties are brought, at an immense expense, a distance of six thousand miles.

Messrs. Bates, A. G., Black, and Johnson, contra.

Mr. Justice FIELD delivered the opinion of the court.

The appeal in this case was dismissed during the last vacation, by stipulation of the parties, under the twenty-ninth rule. A motion is now made on behalf of one Thomas W. Mulford *and others*, that the stipulation be vacated, the mandate of the court be withheld, and their attorney be allowed to enter his appearance and be heard on their behalf.

The case was brought before the court on appeal from the decree of the District Court of the Northern District of California, approving a survey of a confirmed private land claim, under the act of June 14th, 1860. After the survey was returned into the District Court, a monition was issued to the marshal requiring him to notify all parties having, or claiming to have, any interest in the survey and location of the claim, to appear on a day designated and intervene for the protection of their interests. The only parties who

appeared in pursuance of the notice given by the marshal were the United States, the claimant, and one Castro; and the court ordered the default of all other parties to be entered. Subsequently, Mulford, who now appears in the motion before us, applied to the court to open the default and to allow him to intervene, alleging an interest in a portion of the land embraced by the survey under a patent from the State of California; but his application was denied. The action of the court in this respect is not subject to revision, the opening of the default being a matter resting in its discretion.

The motion is on behalf of Mulford *and others*, but who are included by the term "others" we are not informed by the record. Their names are not given, nor is their interest stated, except in the very general and loose terms with which it is designated in the argument of counsel as that of settlers on the land under the laws of the United States.

The act of 1860 is liberal in the permission it gives for interposing objections to the surveys of confirmed claims made by the Surveyor-General of California; but at the same time it limits with special care the permission to those who are in fact interested in making a contest. It authorizes the return of surveys for examination and adjudication only upon the application of parties who, in the judgment of the court or district judge, have such interest as to make it proper for them to intervene for its protection. It provides that when objections are interposed by the United States, the application shall be made by the district attorney, and be founded on "sufficient affidavits;" and that when application is made by "other parties claiming to be interested in, or that their rights are affected by," the survey and location, there shall be a preliminary examination into the fact of such alleged interest. "The court, or the judge in vacation," says the statute, "shall proceed summarily on affidavits or otherwise to inquire into the fact of such interest, and shall in its discretion determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the

survey, and shall grant or refuse the order to return the survey and location as shall be just."

The proceedings upon this examination, or at least the order of the court or judge thereon, should appear in the record; for we can only know by the order whether the parties have been permitted to contest the survey before the court. When the interest of parties applying is shown and the order is made, those who claim under the United States by "pre-emption, settlement, or other right or title," must intervene, not separately, but collectively, in the name of the United States, and be represented by the district attorney, and any counsel employed by them co-operating with him.

In the present case, it does not appear that any of the precautionary steps required by the act in question were pursued by the nameless "*others*" for whom the present motion is made. No presentation, so far as the record discloses, was made of the interest of any persons against the survey besides those we have named. And it is not permissible for parties to appear in this court and be heard in opposition to the survey approved, who have never participated, or asked to participate, in the proceedings upon the survey in the court below.

These views also dispose of the motion to set aside the dismissal of the appeal in the case of *United States* v. *Nunez*.

The motion in both cases is

DENIED.

Messrs. Justices SWAYNE and DAVIS dissented.

Mr. Justice MILLER.

I concur in the judgment of the court, overruling the motion to set aside the agreement between the attorney-general and the counsel of the claimant, by which it is agreed that this appeal shall be dismissed. But I do not agree to the ground upon which the judgment of the court is based; and as the matter involves the construction of an important provision of the act of June 14, 1860, concerning surveys of Mexican grants in California, I think it of sufficient consequence to justify a statement of my views separately.

That act provides, in its third section, that any party whom the district judge "shall deem to have sufficient interest in the survey and location of a land claim," "shall be allowed to intervene for his interest therein," and that the court, or judge in vacation, shall proceed summarily to determine, in his discretion, whether the applicant has such an interest as entitles him to be heard in opposition to the survey which has been made and reported to the court. The statute then proceeds in the following language: "*Provided, however*, that all parties claiming interests under pre-emption, settlement, or other right or title derived from the United States, shall not be permitted to intervene separately, but the rights and interests of said parties shall be represented by the District Attorney of the United States, intervening in the name of the United States, aided by counsel acting for said parties jointly, if they think proper to employ such counsel."

The motion in this case is made in behalf of persons belonging to the class mentioned in this proviso, who allege that their rights have been sacrificed by the attorney-general in making the agreement to dismiss the appeal. It is overruled on the ground that their names do not appear in the record as having any interest in the case, or as having been represented by the district attorney in the name of the United States, in the proceedings in the District Court. The statute says that persons in their condition must appear by the district attorney, in the name of the United States. They can contest the matter in no other way, and through no other attorney. Yet because they did not appear in their own name, in violation of the statute, it is said they have lost a right, which they would have had, if they could in some way have procured their names to be placed on the record as contestants. When the act says that they can only appear in the name of the United States, I cannot conceive that this court, or the District Court, should hold them to have been guilty of laches, because they did not in some manner evade both the letter and spirit of the law, by procuring their own names to be inserted in the record.

The language of the statute is, that "the rights and in-

terests of said parties shall be represented by the district attorney." It is true he may be *aided* by other counsel, if the parties choose to employ them, but they are *represented* by the district attorney. He is their attorney of record, and they cannot discharge him, or compel him to adopt any other mode of proceeding than what he deems best. He, adhering to the statute, makes his objections to the survey in the name of the United States, and when one of these parties requests him to insert *his* name in the proceedings, the attorney refuses. Has such party any remedy? The law says he *must* be represented by the district attorney, and he has no right to displace him and substitute another. But because he cannot do this, he is deprived of the right to be heard here, or in the court below, according to the opinion of the court in this case.

For myself, if I believed the parties making this motion had any such right, and were really among the persons represented by the district attorney in the court below, I would permit that fact to be shown here by affidavit, or in any other mode which would satisfy the court that it was so. And I think the contrary rule operates as a trap and delusion, by holding that they have an interest, which gives them a right of appeal, but affords them no means of rendering that right effectual.

But I do not believe that persons included in the proviso already quoted have any right of appeal, or any other right of contesting the survey, except as it may be exercised through the law officers of the government, subject to their judgment of what may be their official duty in the premises.

The act divides those who may contest the survey into two classes: those who claim through or under the United States, and those who do not. All who claim through the United States, whether by "*pre-emption*, *settlement*, or any other *right* or *title*," constitute one class, who must appear by her attorney and in her name. The words above italicized, expressive of the nature of the interest derived from the United States, are not mere synonymes, but are cumulative; and when, in addition to the several inchoate rights of set-

tlement and pre-emption, the word title is used, it must mean a patent, or some other legal title, emanating from the United States.

Who constitute the other class? They must be those who claim under rights or grants, more or less perfect, derived from the Mexican government. This class consists of persons having claims, confirmed or otherwise, the location of which would interfere with the survey, which is the subject of contestation.

As to this class of persons, the government has, by its solemn treaty, bound itself to protect their rights. It is therefore eminently proper that they should be permitted to assert their rights in their own name, and by such counsel as they may choose to employ. The statute gives them this privilege, and if the court below has found that such persons had an interest in the contest there, it gives them the additional right of an appeal to this court. But as to the other class, who claim through the United States, it is clear that any right or title which they may have, must have been acquired subject to the final determination and location of the Mexican claims existing when this government became lord of the soil. The government may therefore very well say to them, "You knew when you settled, or made pre-emption, or took a patent, that all just Mexican claims must be first satisfied, and you have made your location subject to this risk. The honor of the United States is concerned to see that no unjust obstacle shall be interposed by her, or those to whom she has made concessions, to the proper settlement and location of those claims. If you choose therefore to appear in the name of the United States, and by her attorney, and make such objections to these surveys as her officers, uninfluenced by personal motives, may deem just and proper under the circumstances, you have that privilege; but you can do it in no other manner, and the right to contest the proceeding and cease from the contest at any stage of it must remain to the government, and to this end it shall be conducted in her name and controlled by her officers."

I think this is the true construction of the statute. I see

no other reason for requiring this class of persons to appear in the name of the United States, and by her attorney, while persons of the other class are at liberty to select their own attorney and appear in their own name.

Besides, it is evident that the framers of the statute did not regard this right of contesting the survey as one so very sacred, since the judge of the District Court can decide on the right in his discretion, in court, or in vacation, summarily, and without appeal.

It is therefore my opinion that it was entirely within the discretion of the attorney-general to dismiss this appeal, if he thought it right to do so, and that this court cannot interfere in his exercise of that discretion; and upon this ground alone I place my concurrence in the action of the court.

ROMERO *v.* UNITED STATES.

1. The Mexican record-books, called "The Toma de Razon," and the "Index of Jimeno," are public records, which this court may consult, though not put in evidence below.
2. Where there is no record evidence of the actual grant under a Mexican title a claim will not be confirmed, even though the parol evidence of a grant is so strong that, independently of the fact that the archives show no grant, the conclusion might be that a grant had issued.

THIS was an appeal from the District Court for the Northern District of California; the case being thus:

On the 28th February, 1853, three brothers, Innocencio, José, and Mariano Romero, presented their petition to the Board of Commissioners, established by the act of Congress of March 3d, 1851, for the settlement of private land claims in California, asking a confirmation of a land title. Their petition averred that Governor Micheltorena, in the year 1844 (no day being mentioned), granted them in full property a rancho in the neighborhood of the rancho of the Señors Moraga, Pacheco, and Will, being a remainder over and above what belongs to those ranchos—the said land being in