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

the County of Contra Costa—and referred for a fuller description of the lands to papers and maps relating to the grant; "copies of some of said papers being herewith filed, and the originals to be produced and proved." The petition said nothing specially about the grant. There was no averment of its loss, and no profert of it as an existing paper; nor did it describe the land otherwise than above, nor mention the quantity. The commissioners entered a decree against the petition, declaring that "it does not appear that any grant was ever issued, ... and no equitable right appears." On appeal to the District Court, new evidence being allowed to be introduced there, the decree of the commissioners was affirmed. A motion was then made and granted to open the case, and allow the claimants to produce further evidence. The decree was accordingly stricken out and the additional evidence heard; after which the court (McAllister and Hoffman, JJ.), affirmed the decision of the commissioners, and adjudged the claim invalid, and rejected it. It was from this decree that the case was now here. The title, as disclosed to this court, was partly documentary and partly that of witnesses.

THE FIRST parcel of documentary evidence was thus:

1. A petition by the brothers Romero, claimants, dated January 18th, 1844, soliciting a tract described as a surplus of the ranchos Moraga, Pacheco, and Will.

2. A marginal order of the same date, that the secretary of state report, "having first taken such steps as he may deem necessary."

3. A decree of the governor that the first alcalde of San José report, summoning Moraga, Pacheco, and Will, occupants of the adjoining ranchos, as above said.

4. Report, February 11, 1844, by the alcalde, that he had confronted the claimants with the owners of the adjoining lands, and they had no objections to the grant; that the tract was claimed by one Francisco Soto six or seven years before, but that he had not cultivated it in any way to gain a right thereto.

5. An unsigned certificate, February 4th, 1844, that it would seem, according to the report just referred to, "that there is no

obstacle to making the grant . . . . if your excellency approves of it."

6. A direction from the governor, without date, but "filed in office February 28th, 1853," that "the judge of the proper district take measurement of the unoccupied land that is claimed, in the presence of the neighbors, and certify the result, so that it be granted to the petitioners."

7. Petition of Romero and the others to the governor, 21st March, 1854, that the governor grant them the land, either provisionally or as he deems best. [The petition stated that the judge had been unable to execute the order for a measurement, for the reason that the owners of the neighboring lands were absent or engaged, and that they inclose the former petition with report of the secretary of state.]

8. Report from Jimeno, 23d March, 1844, thus: "I think that your excellency's order should be carried into effect in regard to the measuring of the land that is claimed; and, as soon as this is accomplished with the least practicable delay, Señor Romero can present himself joined with Señor Soto, who says that he has a right to the same tract. Your excellency's superior discernment will determine what is best."

9. Final decree of the governor, "Let everything be done agreeably to the foregoing report."

A SECOND parcel of documentary evidence followed; the year of the date to papers in this parcel being three years posterior to the year 1844, in which all those just given were dated, and about a year after the conquest of California.

1. A marginal order, 9th April, 1847, from the American alcalde of San José (Burton), ordering that the "interested parties will proceed to take possession of the *mentioned* lands, according to the order of government; and I further order that, in case any bordering land-owner demanding it, a mensuration of his lands be ordered." [N. B. This order was entered on the margin of an old order by Jimeno, secretary of state, dated 23d March, 1844, which the American alcalde *found in the office* after the conquest, directing a survey of the land solicited by Romero. This old order was addressed to the former alcalde.]

2. Petition, May 28th, 1847, from Romero to the same alcalde of San José as follows: "As early as the year 1844 there was

sent an order from the former government to this justice's court, that there should be made a mensuration of the land called Juntas, which we asked for. I, together with my brother, Innocencio Romero, after a previous summons of the bordering landowners, which up to the present time has not been carried out. What we now beg of you is, that you will please, as first magistrate of this justice's court, to make out a report that we be given a testimonial of the reports which in the year '44 were sent to the government, so that *we can be granted* said lands." [N. B. The original of the English words here italicized, "*se nos podra agraciar*," it was testified by an interpreter, did not mean that the land might at that time (1847) be granted, but referred to the past, and meant "*should* be granted to us;" so referring to the contents of the papers made by the alcalde in 1844, and being words descriptive of *those* orders.]

3. Marginal order, same day, that the measurement be proceeded in according to the original direction.

4. Certificate, May 29th, 1847, by the American alcalde, that Pico, the alcalde under the former government, being sworn and questioned on the subject of Romero, regarding the bordering landmarks, declared that Moraga and Pacheco declared that the surplus which does not belong to them might be granted to Romero.

THE PAROL TESTIMONY, which related to a term between the dates—1844 and 1847—of the two classes of documentary evidence (the former date relating to the Mexican rule in California, and the latter that of the United States), consisted, in part, of that of witnesses, who testified to the fact of granting, and in part of others who stated that they had seen the grant: the most important witnesses to this last fact being three professional gentlemen in California.

1. *As to the making and delivery of the grant.*

Innocencio Romero, now having no interest, as he said, and who was twice examined, swore that he received the original title-papers, including the grant, from the governor.

Arce, another witness and principal clerk under the secretary of the government, who drew up Romero's petition for the grant, swore that the governor ordered the title to be made out; that this was done by one of the two clerks, though

he did not remember by which; that it was signed by Governor Micheltorena and Secretary Jimeno in 1844; though whether in spring, summer, autumn, or winter of that year he did not remember; that he saw both of them sign it, and that it was then delivered to Innocencio Romero, one of the grantees, and was "a complete concession in good and legal terms."

Vincente Gomez, a clerk in the government office at the time, swore that he knew of the application, and though he did not see the grant, he "*knew* afterwards that it was issued." When asked to state the means of his knowledge, he replied, "Because I used to take a note of the title in the '*Toma de Razon.*'" When asked again, "Did you take a note of *this* title?" his reply was, "I do not remember distinctly, but I *ought* to have taken it."

Chavis, that he aided Romero in obtaining the grant, introduced him to Arce, went with him to the government office to urge his application, and after it was obtained, saw and looked over the grant, and told the grantee that it was perfectly good,—that it was an absolute grant of land, under the genuine signatures of Micheltorena and Jimeno.

2. *As to the subsequent existence of the title-paper.*

Ramon Briones swore that he saw the title in 1845; that it was produced by Romero in order to convince a neighbor that he had a title; that it was read aloud and had to it the genuine signature of Micheltorena.

Innocencio Romero stated that he being unwell and unable to go himself, he sent the papers to Mr. G. B. Tingley, an attorney at law, in San Francisco, for the purpose of having them submitted to the Land Commission.

Mr. Tingley was himself examined twice. On the first occasion he said in substance as follows:

"In 1850, there was a suit between Peralta, plaintiff, and I. Romero and Garcia, defendants, and on the trial there was read as evidence on the part of defendants a grant from Governor Micheltorena to the three brothers Romero for a tract of land, &c. The grant was on Spanish paper, and was signed by Micheltorena as governor. The signature was genuine as I believe from having

seen his signature many times. The last I saw of the title-papers they were in possession of a lawyer, by name Sanford, partly deranged, and now dead. No paper was safe in his hands. I have never heard of the grant since. I know Sanford had them at the conclusion of the trial. I have had repeated occasions to search for his business papers, and have never been able to find them."

Examined a second time, Mr. Tingley testified in substance, thus:

"I stated in my former examination, and I now say, that I carefully examined the original title-papers in said cause; that the same were a bundle of papers commencing with the original petition, the informe, &c., and ending with an absolute grant of the land. I have recently examined the Spanish documents, being seven in number [the papers in this case], and I say they are not the same papers. I was, at the time of the trial, perfectly familiar with Spanish grants; a large portion of my business was connected with the examination of Spanish titles. I was sufficiently familiar with the Spanish language at that time to read and understand titles to land, and I know that the title of the Romeros was a concession in fee for the sobrante. I examined the papers in the trial in the District Court of Santa Clara County, between Peralta, Garcia, and I. Romero, I being at the time one of the counsel for one of the parties, and also examined the papers at the instance of one Attoza; also for a person, by the name of J. M. Jones. During the trial the title-papers, or what purported to be such, were in court during the whole time, four or five days. During the trial I had them in my hands at least forty times. It was conceded on the trial, by Mr. Sanford and his associate counsel, that the land had been granted to the Romeros, but it was said that the grant was not valid, because the land had been previously granted to Peralta. The genuineness of the titles on both sides was not controverted by either party. Both were admitted to be genuine. The dispute was about the boundaries."

The Hon. J. W. Redmond, an attorney at law, and in 1850–3, county judge of Santa Clara County, after confirming positively the statement of the last witness as to the use of the papers as genuine on the trial, testified as follows:

Statement of the case.

"That he had seen many of the acknowledged signatures of Micheltorena, and was familiar with his handwriting from comparison; that his own principal business was the examination and investigation of Spanish titles; that he was employed in almost every case pertaining to Spanish titles in San José; that he was engaged on one side or the other in nearly every case, except in his own court, where there were lawsuits about Spanish titles; says further, that in 1850, he was employed by one Attoza to search the title of the Romeros to the tract of land which is the subject of this suit; that said Attoza was about to purchase a portion; that he, the deponent, had all the original title-papers of the Romeros in his hands at that time for two weeks, and carefully examined them; that the signature of Micheltorena to said documents was genuine, as the deponent believes from his familiarity with his said signature; that the grant was a grant in fee, in the usual form of Spanish concessions made by Micheltorena, and was on stamped paper; that deponent was perfectly familiar at that time with such Spanish documents; that he had examined very many Spanish titles at Monterey, Santa Cruz, San José, and Martinez, in all of which towns deponent practised.

"The deponent further says that the title constituted a bundle of papers, sewed together, containing a petition by the three brothers Romero for the land, the reports of the alcalde Pico, also by Jimeno; also a diseño or map of the land, and a final concession by Micheltorena, in full and absolute property of the land solicited; that the title was full and complete, with the exception that it lacked the approval of the Departmental Assembly; that the description of the ranch was the sobrante, or all the land lying between the ranches of Welsh, Moraga, and Pacheco, and the surrounding neighbors, and had a Spanish name, which deponent has now forgotten; but deponent says he was upon the land either in the latter part of 1850, or early in 1851; that he had his notes of the grant with him, or the grant itself, at the time he was on the ranch, and knew the land; that it was situated in Contra Costa County, and Garcia was living on the land at that time; and deponent stopped two nights and three days with him at his house.

"The deponent further says that he examined the title in connection with G. B. Tingley, Esq., and the Honorable J. M. Jones, now deceased, who was judge of the District Court of the South-

ern District of California, and who was an excellent Spanish scholar; that all three pronounced the said title to be as valid and genuine a title as any in California, with the exception that it had not been approved by the Departmental Assembly; that it was a full and absolute concession of the land, and that upon the examination he advised Attoza that it was safe to purchase."

Mr. C. B. Strode, whose "principal business, since November, 1850, had been the prosecution of Mexican and Spanish land claims before the United States Land Commission, and in some cases before the United States courts," testified thus:

"In 1850, Mr. Sanford told me he had the Romero grant in his possession. I know the situation of the land by general description and by having been often on it. He showed me a paper for a grant of a sobrante. I was the lawyer of several of the adjoining settlers, and expected to be that of others, which made me feel an interest in the examination of this paper. I had become very familiar with the appearance of Spanish and Mexican grants, and knew, as far as I could know by comparison with others, the handwriting of Jimeno and Micheltorena, and could not, I think, have been deceived as to the genuineness of their signatures, although I never saw either of them write. I know that the signature of Mitcheltorena was to the papers, and I believe also that of Jimeno. I have examined the papers in this case. They are not the papers shown me by Mr. Sanford. My interpreter read the papers carefully to me. They consisted of a good many papers sewn together on the back, and purported to be a full grant for land lying, &c.,—a sobrante described to be of four or five leagues; I believe five."

Due proof was made of search among Sanford's papers in vain for those described by these gentlemen.

With regard to the possession, it appeared that one or other of the Romeros—Innocencio being the chief actor in all parts of the business—went on the property in 1843 or 4, and had occupied it continuously afterwards, building upon and cultivating it.

On the other hand, confessedly no actual grant was produced; the whole case resting upon the documents above-

mentioned, produced, some of them, from the alcalde's office, and some from the claimant's private possession; upon the parol proof of the former existence and later loss of the grant not produced, and upon the possession. The *Toma de Razon*, at one time supposed to be lost, was produced on the hearing in this court, and it showed that there was no record in it of the alleged grant; nor did it appear in the Index of Jimeno. So, Innocencio Romero, though he swore positively, on his first examination, that "the tract was granted to me and my brothers by Governor Micheltorena," and that the "grant" was among the papers sent to counsel in San Francisco, yet on a second examination swore less specifically. On this second examination he said: "These papers consisted of *the title-papers* given to me by the governor. . . . . The papers were loose, without being sewn together. I do not know whether the lawyer sewed the paper together or not." The following were questions and answers in his deposition:

"*Question.* What did the title-papers, so handed to Tingley, consist of?

"*Answer.* The title-papers *pertaining* to the grant given to me by the governor.

"*Question.* What title-papers were given to you by the governor?

"*Answer.* *The title-papers*, with all the different papers usually issued at the government office. I cannot describe the number.

"*Question.* Were there several papers; if so, how many?

"*Answer.* There were several papers, such as the *map*, *petition*, *informe*, and *decrees*.

"*Question.* In what month was it that you say you obtained the grant?

"*Answer.* I cannot say exactly, but I think it was March.

"*Question.* Do you recollect of Soto petitioning for the same land as yourself; if so, was the difference between you and him settled before you obtained your grant, and how was it settled?

"*Answer.* Soto made a petition for the same land I did. The difference was settled before I obtained my grant. Soto and myself were called in the presence of Micheltorena, and as Soto

was already in possession of the rancho San Lorenzo, and as he had petitioned also for the Juntas, Micheltorena told him that he should have the San Lorenzo, and in that case he *would* grant the Juntas to the Romeros; and this was the way the difference was settled, both being satisfied with the governor's decision."

It appeared, also, that on the 15th January, 1847, more than four months before the date of the last certificate, *José* Romero, one of the three brothers, and one Garcia, had appeared before the same American alcalde and certain witnesses, and that Romero conveyed one-half the land to Garcia. "*Que dando hambor sujetos á que si el gobierno lo consede en propiedad y de lo contrario perdera gracia lo mismo q. Romero sin tener accion de clamar el dinero dado;*" or, as translated in the record, "both parties remaining subject to that, *if the government grant it in ownership;* and in a *contrary case*, Garcia will lose equally with Romero without having cause of action to reclaim the money given."

So that same *José* Romero, when now examined, though he swore to having seen the petition, and that a decree to *measure* was obtained, swore also that *he* had not obtained a *grant* of it, "no title at all."

On the other hand again, the same witness testified that he could neither read nor write; that his brother Innocencio had the charge of all the business; that he did not know whether his brother had built a house on the tract or not; that two or three years would pass without his seeing him; that he "heard that a title had issued," but felt no interest in it, because he had sold whatever right he had; and that he knew his brother had not a title, "because I have not seen it."

Mr. Carlisle, for the appellants:

1. The facts establish an equity in the claimants, which ought to be perfected into a legal title. Their petition was received with favor by the governor. The alcalde reported that the adjoining proprietors, the surplus of whose lands was solicited by the Romeros, not only did not object, but were willing that the grant should be made. The secretary

of state concurred in the recommendation, and advised that the lands be measured, in order to ascertain the surplus. The governor assented, and ordered the surplus to be ascertained, "so that it may be granted to the petitioners." An order was then issued to the alcalde to make the measurement. Up to this point in the proceeding it is evident the governor had acceded to the petition. He was willing they should have the land, and delayed the formal concession. What if there were no grant passed in form. The technical rules which we apply in administering law in States upon the eastern part of this continent, and where the English common law prevails, ought not to govern in regard to Mexican titles. Our system has always been administered by intelligent agents, under strict rules of proceeding, and their acts are interpreted by laws abounding in nice distinctions and subtle technicalities. The Mexican system was plain, simple, and well adapted to the habits of the people.

It further appears, that immediately after the 23d of March, 1844, the Romeros, with the authority of the alcalde, entered into possession, and they and their vendees have ever since resided on the land. Their right to the possession was not questioned whilst Mexico continued to exercise dominion; on the contrary, the possession was open, notorious, and evidently *bonâ fide*, under a claim of title which was recognized by all the neighbors or "colindantes," and which neither the rival claimant, Soto, nor the Mexican government, ever attempted to disturb. The expediente, as shown by the proof, consisted of several documents, not fastened together. It may have happened that other documents pertaining to it were lost or destroyed, during the rough usage to which the archives were exposed at the conquest of California.

2. We do not, however, rest on the expediente alone. The proof establishes, beyond a reasonable doubt, the fact that a final grant was issued. It is true, the archives, as now found in the surveyor-general's office, do not show this fact; and we admit that, in the absence of such proof, nothing short of the most satisfactory and convincing evidence should

be deemed sufficient to establish the existence and loss of the paper. But if the most convincing verbal proof can, in *any* case, overcome the presumption against the existence of a grant, arising from the want of archive evidence of it, then we think it may be confidently assumed, that it has been done in this case.

Without speaking of the testimony of Innocencio Romero himself, of Gomez, Arce, Chavis, Briones, and others, we refer specially to that of Mr. Tingley, Mr. Strode, and Judge Raymond. The scrutiny with which these title-papers were examined by these gentlemen, and the character of the examiners themselves, forbid the idea of deception, error, or mistake. They are American witnesses. No individuals in California were more familiar with the form, appearance, and legal effect of California grants than the eminent professional persons above mentioned. Their examinations were not hasty, cursory, or without an object; but deliberate, repeated, and with a serious intent. They had no doubt then, and have not now, of the genuineness of these papers, nor that they constituted as perfect a title to the land as was given by any grant in the department, not approved by the Assembly. More than this, the genuineness of the paper asserted to be a grant was conceded by opposing counsel, in a lawsuit where it was the interest of such counsel to search for and prove a forgery; where a forgery was sure to be detected, and where of course it would have disposed of the whole question at issue. This amounts almost to a judgment in favor of the point here controverted against us.

It is admitted that regularly the records should show that the concession had been made; and absence of such proof unexplained is presumptive evidence against the validity of a claim. But in the most perfect record of titles in the California archives, there would be found but two kinds of evidence of the issuing of a title beyond the point where this expediente terminates: first, a copy of the title attached to the end of the expediente, and secondly, a memorandum of the issuing of the grant in the *Toma de Razon*. It is by no means a universal thing, however—nor indeed a general

thing—in these archives, to find a copy of the grant attached to the expediente, even in the undoubted cases. The proof shows that the expediente in this case consists of loose leaves never to this day even attached together. Would it be astonishing if one of the leaves originally there is lost? In the best-regulated public office it would be strange, if such leaves should, at the end of twenty years, all be found in their place. So, with regard to an entry in the *Toma de Razon.* In some cases, as where a party rests on a legal title only, the want of such entry may be fatal. Decisions are numerous on this point, but it has not been decided that under no conceivable circumstances, can a title be good unless the entry of it be thus made. On the contrary, where equity exists, this want is not important.*

We readily admit that under decisions of this court, a great amount of parol evidence is necessary to supply the place of record evidence of the grant. It will be observed, however, that there is maintained throughout these decisions, a distinction between equitable and legal titles, and the character of the evidence by which they are supported. Under the laws, regulations, and usages of the Mexican government, no record was ever preserved of an *unfinished* expediente. The course of proceedings in making these grants is familiar and easily stated. When the petition was presented, a marginal decree was indorsed upon it, by the governor, referring it to some officer for the proper information. The original paper, with the marginal decree, was usually delivered to the petitioner, that he might procure the proper reports. When the reports were made, all the papers were returned to the governor, who then made his decision. If he denied the application, the expediente, which consisted of the petition, marginal decree, reports, and the governor's final decree, was filed and remained in the secretary's office; but no record was made of the proceedings, and none was required by any law or usage. If the governor acceded to the petition, he usually made a decree of concession, com-

* United States *v.* Alviso, 23 Howard, 318.

mencing with the words, "*vista la peticion*," which was annexed to the expediente, but was not recorded, nor required to be, in any book. On the contrary, the whole expediente was frequently delivered to the claimant, to serve as evidence of his title, until it should be perfected. Usually, however, it remained in the secretary's office until the final grant issued; the issue of which was, generally, though by no means universally, noted briefly in a book called the "*Toma de Razon.*" The *original grant* on stamped paper was then delivered to the claimant, and sometimes a copy of it was annexed to the expediente, and remained in the archives. But an *unfinished* expediente was never made the subject of record. It is not required that the record of such proceedings should be established. That this court does not require it, is manifest from *United States* v. *Alviso*,* already cited by us. In that case there was not only no grant, or decree of concession, but the expediente was produced by the claimant, and was not found in the archives, nor was there any record or note of it in any book. But being satisfied that the petition, and the permission of the governor for the claimant to occupy the land provisionally, were genuine, and the possession having been uninterrupted for a series of years, the court held that these facts established in the claimant an *equitable* title. The case at bar has stronger equities. It is to another class of cases, where the title rested on an alleged *grant*, *not* accompanied with possession, and where neither the grant *nor any trace* of it was found in the archives, that the court has established a stringent rule. Applied as the court has applied it, the rule is proper. For, if the claimant rely on his *legal* title alone, and if his claim be devoid of the equities which arise from the usual preliminary steps to obtain the title, and particularly if it have no support from long possession, honestly acquired and maintained in good faith, then, in order to avoid the frauds which might be perpetrated by simulated and antedated grants, the court rule may well require proof that the grant was recorded according to the

* 23 Howard, 318.

usage of the Mexican government, or in other words, was noted in the "*Toma de Razon*," which was the only book of record. The failure to register is the only omission in the whole proceeding here; and the question is, whether this omission is, of itself, necessarily fatal to the grant, conceding it to have issued, or whether it raises so strong a presumption that the grant never issued, as that it cannot be overcome by parol proof; though we repeat that if there was no grant in form, the claimants have a valid equitable title, which ought to be confirmed.

3. One petition to the Alcalde Burton refers exclusively to the fact of the *measurement*, and is not inconsistent with the existence of a *grant* of the surplus. The grievance complained of by the Romeros, was the failure to measure the land and set apart the surplus. Until this was done, no *boundaries* could be fixed. The object in the petition was to procure this measurement, in order to ascertain the *quantity*, and to establish them. They refer the alcalde to his own records, for evidence of the fact that the governor had, some years before, ordered the measurement to be made, and they simply ask him to carry that order into effect; thus evincing that the petitioners considered themselves owners of the rancho, and entitled to demand the *measurement*.

But the alcalde was still tardy in making the survey; and on the 28th May following, José Romero presented another petition, in which he solicits the alcalde for a testimonial of the reports, which in the year 1844 were sent to the government, "so"—according to a wrong translation—"that we *can* be granted the said lands;" but according to the proper translation, "so that we *should* be granted the said lands," or, "that the said lands *might* be granted to us." The substance of this document is, that he desires from the alcalde copies, from the records in his office, of the reports made in 1844 by his predecessor, Alcalde Pico, to the government, touching the measurement of the land, with a view to the grant which they *then* solicited. At the date of this petition, the American forces were in the military occupation of California. Romero could not have needed the "testimonial"

he solicits, "so that the land *can* be granted to us," as the erroneous translation has it, because the Mexican government was no longer in authority in California, and there was no authority in the American military governor to grant lands. But with the correct translation the sentence is consistent and the meaning obvious.

Yet another document is relied on as decisive of the fact that no grant issued.

In January, 1847, it appears, José Romero, by his deed of that date, conveyed to Garcia one-half his interest in the land; in which deed is this clause: "both parties remaining subject to *that*, if the government grant it in ownership; and in a contrary case Garcia will lose equally with Romero, without having cause to reclaim the money given." But it will be here too remembered, this deed was made while the Americans were in the military occupation of the country, and after the conquest was complete. It was before the treaty of peace, and therefore the ignorant native population were wholly at a loss to decide what was to be the *status* of their titles under the new government. They were uncertain whether they would be recognized at all, and looked with distrust to the future. In selling lands at this period, it was very natural, in the uncertainty which prevailed, that they should stipulate in respect to the contingency of the recognition of the title by the new sovereign. This was manifestly what the parties meant when they inserted the words, "if the government grant it in ownership." They referred to the existing *American* government, and not to the extinguished one of Mexico.

As to the same *José* Romero, one of the original grantees, who testifies that "no grant" issued, and that they only procured the order for the measurement of the land, it is apparent that he is an ignorant and stupid person. He admits that he cannot read or write; that he had no agency whatever in procuring the title; that his brother Innocencio had the sole charge of the business; that he never saw any of the papers, except the order for measurement, and he saw that in the hands of the alcalde; that he lived at a distance

from the land, and but seldom saw his brother; and when asked how he knows the title did not issue, the only reason he gives is, that he had not seen it; but says that his brother ought to know more about it than he does. When analyzed, his testimony amounts to nothing.

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

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a petition for the confirmation of a land claim, under the act of the 3d of March, 1851.

Appellants presented their petition to the commissioners appointed under that act on the twenty-eighth day of February, 1853, claiming title to a certain rancho, situated in Contra Costa County, in that State, and also to certain unoccupied lands adjacent to the same, describing the tract as a sobrante, or overplus beyond what belonged to the neighboring rancheros.

Copies of some of the supposed title-papers were filed at the same time with the petition, and the petitioners stated in the petition that the originals would be produced and proved. Allegation of the petition is that the grant was made by Governor Micheltorena in the year 1844; but there is no profert of the grant in the petition as an existing document, nor does the petition contain any averment of its loss. Commissioners rejected the claim as invalid, upon the ground that no such grant was ever issued by the governor.

Claimants appealed from that decree, and the case was duly removed into the District Court. Further evidence was there introduced, and after a full hearing the decree of the commissioners was affirmed. Motion was then made by the petitioners to open the decree for a rehearing, and for leave to take further testimony, and both branches of the motion were granted by the court. Additional evidence was accordingly introduced, and the parties were again fully heard. Hearing on this last occasion was before the circuit and district judges, sitting in bank, under the sixth section of the act of the second of March, 1855; and after the hearing, the court reaffirmed the former decree rejecting the claim, and

declaring it invalid. Whereupon the petitioners appealed to this court, and now seek to reverse the decree upon the ground that the parol evidence proves the existence and authenticity of the grant, and that the finding of the court in that behalf was and is erroneous.

I. Evidence introduced by the appellants to prove their claim may properly be divided into three classes; and it is important to preserve that classification and keep it constantly in view, in order to appreciate its force and effect, and rightly apply it to the issues involved in the controversy.

First, it consists of certain documents bearing date during the Mexican rule, and which, if authentic, are properly denominated Mexican documents. Secondly, it consists of certain depositions introduced to prove the existence of the alleged grant and its subsequent loss, and that diligent search was made for it without success; and also to prove the contents of the lost document. Thirdly, it consists of certain documents bearing date during the military occupation of the department by the United States, and, of course, after the Mexican rule had ceased.

Appellees insist that no such grant was ever issued by the Governor of California, and the appellants do not pretend that the transcript furnishes any direct record evidence to establish the affirmative of that proposition. They set up no such pretence; but their theory is that the grant, when it was issued, was delivered to the party, and that it was subsequently lost, and they, as before remarked, rely chiefly upon the parol proofs in the case to establish those facts as a foundation to admit secondary evidence of the contents of the grant. But they also contend, in the same connection, that the documents introduced in evidence as Mexican documents, show that the original application for the grant was favorably received by the governor, and consequently that those documents tend strongly to confirm the parol proofs that the grant was actually issued. Counsel for the United States deny that proposition, and insist that the documents, as a whole, show conclusively that the governor never issued any such grant.

Consideration will first be given to the documents bearing date during the Mexican rule, because the title to the land, as claimed by the appellants, was derived from the Mexican government. They are as follows:

1. A petition signed by the claimants, and dated at Monterey, on the eighteenth day of January, 1844, wherein they solicit a grant of a certain tract of land described as the sobrante of three adjacent ranchos.

2. Connected with the petition is a marginal decree of the same date, directing the secretary to report upon the subject, "having first taken such steps as he may deem necessary."

3. Certificate of the secretary, also of the same date, that the governor directs the first alcalde of San José to summon the occupants of the adjacent ranchos and hear their allegation, and make report of his doings.

4. Report of the alcalde, under date of the first of February of the same year, to the effect that the rancheros mentioned and the petitioners had been confronted, and that the former made no objections to the application. But he also reported that it had come to his knowledge that one Francisco Soto, six or seven years before, had claimed the same tract.

5. Four days after that document was filed, the secretary reported to the governor that it would seem, according to that report, that there was no obstacle to the making of the grant.

6. On the twenty-eighth day of the same month, however, the governor entered a decree directing the judge of the proper district to take measurement of the land in presence of the adjacent proprietors, and that he "certify the result, so that it may be granted to the petitioners."

7. Second petition of the claimants, under date of the twenty-first of March, 1844, in which they stated that the judge of San José had never been able to execute the order of survey on account of the absence or engagements of the adjacent proprietors, and asked that the governor would grant the tract to them, provisionally, or in such manner as

he should deem fit. Prior documents, it seems, were in the possession of the claimants at the time of the second application, because they state that they are inclosed with the petition for the action of the governor.

8. Transcript contains no order of reference of the second petition, but the secretary, two days after its date, made a report to the governor expressing the opinion that the former order of survey ought first to be carried into effect, and when the survey should be made, his suggestion was that the prior claimant and the petitioners should be confronted, in order that the governor might be able to "determine what is best."

9. Final decree of the governor is in the words following, to wit: "Let everything be done agreeably to the foregoing report," which concludes the list of documents embraced in the first class. Argument is unnecessary to prove that those documents afford no evidence that a grant or concession of any kind was ever issued by the governor to these claimants. On the contrary, the documents, as a whole, fully show that up to the date of the last-named decree, no such grant had ever been issued. Survey of the tract was first to be made, and the parties supposed to be opposed in interest were then to be summoned and heard, as preliminary conditions to the hearing of the application. Record furnishes no evidence of a reliable character that either of those conditions was ever fulfilled. Evidence to show that the survey was made is entirely wanting. First-named claimant was examined as a witness, and he testified that the pretensions of the prior claimants were overruled and abandoned; but the explanations given by him, in view of the documents in the case, are not satisfactory.

II. Reliance, however, is more especially placed upon the parol proofs, which will next be considered, because they were introduced to prove the existence of a grant issued under the Mexican authority. Claimant's theory on this branch of the case is that the grant, notwithstanding what appears in the last-named decree, was actually issued by the governor in the year 1844, and was delivered to the first-

named petitioner, and that he retained it in his possession for a period of six years; that in 1850 the said petitioner was a party defendant to an ejectment suit then pending in the county court for the county where the land lies, which involved the title to a portion of the tract; that in defending the suit it became necessary to introduce these title-papers, and that being sick and unable to attend at the trial of the cause, he sent the title-papers, including the grant, to be used in that trial, to his attorney, and that the grant was never returned.

Such is the present theory of the claimant, but when the party who had possession of the papers was first examined he testified that he sent the papers to the attorney "for the purpose of having them submitted to the Land Commission," which would make the transaction bear date at a much later period. Deposition of the attorney was also taken, and his account of the matter sustains the present theory of the claimant. First deponent was then re-examined, and in his second deposition his recollection is substantially the same as that of his attorney, but he expressly states that the papers, when sent, were loose sheets, not sewn together, and his account of the transaction shows that he had no very definite idea what the package contained. He was asked what title-papers he sent to his attorney, and his answer was that he sent the title-papers pertaining to the grant given to him by the governor. Whereupon he was asked what title-papers were given to him by the governor, to which the witness replied, in effect, that he could not describe the number of the papers; that he made the petition and got the different papers usually issued at the government office, "such as the map, petition, informe, and decrees."

Responsive to a leading question, he stated that he obtained the grant in the month of March, 1844, but he gave no account of the attending circumstances, except that the pretensions of the prior claimant were settled and overruled by the governor. Another of the claimants was also examined as a witness, but he testified without any qualification that all they obtained from the governor was an order

of survey, that they did not obtain a grant, and that the land was never measured under the order of the survey. Two Mexican officials, Francisco Arce and Vicente P. Gomez, were also examined as witnesses. Arce was principal clerk under the secretary of the governor. He testified that an order was passed directing the grant to issue, and that it was written out by a clerk in the office and signed by the governor and secretary, and delivered to the party, but he could not state which of two persons named wrote it, nor when it was issued, whether in the spring, summer, fall, or winter of the year. No such order as that mentioned is produced, and there is nothing in the record to confirm the statement of witness that any such order was ever made. According to the testimony of the other witness, he also was a clerk in the office of the secretary. His statements are to the effect that he knew the claimants petitioned for the tract, but he admits that he did not see the grant, although he says he afterwards knew that it was issued.

When pressed to explain how he knew the grant was issued if he did not see it, his answer was that he thought he took the "*Toma de Razon*," which undoubtedly is an error, as there is no evidence in the case that the records for that year contain any such entry, or that there is any such entry in the Index of Jimeno. Absence of such proof goes very far to contradict the witness, as it may be presumed if such evidence existed it would have been produced. *United States* v. *Teschmaker*, 22 Howard, 405; *United States* v. *Neleigh*, 1 Black, 298.

Speaking for the whole court, Mr. Justice Nelson said, in the case first named, "The memorandum therefore, at the foot of the grant by Arce, the secretary, 'Note has been made of the decree in the proper book on folio 4,' is untrue. Nor has there been found any approval of the grant by the Departmental Assembly, for those records are extant and found in the Mexican archives." "Those archives," say the court in that case, "are public documents which the court has a right to consult even if not made formal proof in the case."

Attorney of the claimant in the ejectment suit was also

examined, and testified that the grant was among the papers sent to him to be used in that trial, and that the signatures to the document were genuine. Witnesses were also examined who had seen the papers in the hands of the principal claimant, and heard him speak of them as the title-papers in this case, and another class who say they examined them, and still another class who say they read them or heard them read, and became convinced they were genuine. Papers were last seen in the hands of an attorney at law at San José, and the testimony of the claimants tends to show that he was insane. Such is the substance of the parol testimony, except what relates to the search for the document, which need not be more particularly noticed.

III. Congress recognized the existence of war between Mexico and the United States on the thirteenth of May, 1846, and this court has more than once decided that the official functions of the Mexican officers in California ceased as early as the seventh day of July of that year. *United States* v. *Castillero*, 2 Black, 149.

Civil officers in that department, after that date, were such as were appointed by our military commanders. Bearing these facts in mind, we will proceed to the examination of the other documents introduced in evidence.

1. Alcalde of San José, for the year 1847, found in his office an additional order of survey, signed by Jimeno, of the same date as the before-mentioned final order of the governor. Mistaking the nature of his authority, and thinking it to be the same as that of the former governor, the alcalde, on the ninth day of April of that year, passed an order authorizing the claimants to take possession of the land in controversy, premising that if any adjacent landowner demanded it, the tract must be measured.

2. On the twenty-eighth day of May, 1847, one of the claimants addressed a petition to the alcalde of San José, representing that as early as 1844, an order from the former government had been sent to that *Jusgado*, requiring a measurement of the land called *Juntas*, and that such measurement had not been made. Based upon those representations,

his request was that the claimants might be furnished with a testimonial of the report sent at that date to the government, "so that we can be granted said land," and the marginal order entered by the alcalde directs that the land shall be measured according to the original order of the former government. They asked a testimonial of the report sent to the former government, and measures were taken to comply with their request.

3. Former alcalde was designated to collect the information, and on the following day he reported to the alcalde that the adjacent proprietors declared that the surplus of the tract not belonging to them could be granted.

4. Case also shows that nearly four months prior to that report, one of the claimants and Maria Garcia, appeared before the same alcalde to execute a conveyance, in the presence of two assisting witnesses, to confirm a sale by the former to the latter of one-half of the tract, and stipulating in the conveyance that both parties should "remain subject to the final result, if the government grant it in ownership, and if the contrary should be the case, then the grantee should lose equally with the grantor without any right to reclaim the consideration paid."

Both the commissioners and the District Court were of the opinion that these documents establish beyond doubt that the action of the former government in this case terminated with the before-mentioned order of survey, and in that view of the subject we entirely concur. Taken separately, the parol evidence, if competent, might possibly justify a different conclusion, but it is clear that it must be weighed in connection with the documentary evidence, and when so considered the conclusion is irresistible that no grant was ever issued by the governor. Suppose it be conceded, however, that the probative force of the parol testimony is not overcome by the contrary tendency of the written evidence, the concession could not benefit the claimants, because the case is one where there is no record evidence of any kind to prove either the existence or authenticity of the grant. Assuming that state of the case, then, it falls directly within the

class of cases where confirmation has been refused, because there was no record evidence to support the claim. *United States* v. *Cambuston*, 20 How., 59; *United States* v. *Teschmaker*, 22 Id., 392; *Fuentes* v. *United States*, 22 Id., 443; *United States* v. *Osio*, 23 Id., 280; *United States* v. *Bolton*, 23 Id., 341; *Luco et al.* v. *United States*, 23 Id., 515; *Palmer et al.* v. *United States*, 24 Id., 126; *United States* v. *Castro*, 24 Id., 346; *United States* v. *Neleigh*, 1 Black, 298; *United States* v. *Knight*, 1 Id., 229; *United States* v. *Vallejo*, 1 Id., 541; *United States* v. *Galbraith*, 2 Id., 394.

But the present case, in one respect, is much stronger than any one of those which have preceded it. All of the preceding decisions rest upon the ground that there was an entire want of record evidence to support the claim, but in this case the record evidence itself, if there be any, shows that the supposed grant was never issued. Our conclusion, therefore, is, that the decree of the District Court is correct, and it is accordingly

AFFIRMED.

UNITED STATES *v.* WORKMAN ET AL.

The Governor of California had no power, on the 8th June, 1846, either under the colonization law of August 18, 1824, and the regulations of November 21, 1828, nor yet under the despatch of March 10, 1846, from Tornel, Minister of War, nor under the proclamation of Mariano Paredes y Arrilaga, President, *ad interim*, of the Mexican Republic, dated March 13, 1846—these two last made in anticipation of the invasion of California by the forces of the United States—nor under any other authority, to make a valid sale and grant of the mission of San Gabriel in California.

APPEAL by the United States from a decree of the District Court for the Southern District of California, confirming a decision of the Board of Commissioners appointed by the act of March 3, 1851, for the settlement of private land claims in the State just named, by which decision an estate known as the ex-mission of San Gabriel was confirmed to Workman