

Statement of the case.

THE SUTTER CASE.

1. On the 18th of June, 1841, Juan B. Alvarado, then Governor of California, issued to John A. Sutter, for himself and colonists, a grant of land designated as New Helvetia, of the extent of eleven square leagues, as exhibited on the map annexed to the petition for the grant, "without including the lands overflowed by the swellings and currents of the rivers," and bounded as follows: on the north, by *Los Tres Picos* (The Three Summits), and $39^{\circ} 41' 45''$ north latitude; on the east, by the borders [or margins] of the *Rio de las Plumas* (Feather River); on the south by the parallel of $38^{\circ} 49' 32''$ of north latitude; and on the west by the river Sacramento. This grant was adjudged valid and confirmed, and a survey of the eleven leagues was made by a deputy surveyor under instructions of the Surveyor-General of California, locating the land in *two parcels*,—one of two leagues, and the other of nine leagues,—separated from each other several miles, and the latter parcel embracing land situated *on each side* of the Feather River; the location, in both of these particulars, conforming to a survey made previously to the petition of Sutter for the grant. Each parcel was located in a compact form, and in conformity to the lines of the public survey. The District Court, under the act of June 14th, 1860, set this survey aside, and, by its direction, a new survey was made, locating the eleven leagues in thirteen tracts of different dimensions and forms, some of which were separated from each other. In directing the location in this manner, the District Court intended that the several selections, which the grantee himself was considered to have made by settlement, or by lease, or sale, or other acts of ownership, should be adopted, and in the order in which they were made, until the whole quantity of the eleven leagues was exhausted. On appeal, this court "fully appreciating the difficulties and embarrassments that surrounded the case," set aside this latter survey, and directed the District Court to confirm the first survey as the more correct location of the grant.
2. By the terms in the grant "lands overflowed by the swelling and currents of the rivers," were meant *tule* or swamp lands.
3. *Semble*, that in locating land in California, claimed under confirmed Mexican grants, compactness of form and conformity to the lines of the public surveys must be preserved, to the exclusion, if necessary, of selections of the grantee as indicated by his settlement, or by his sale or lease of parcels of the property.
4. *Semble*, also, that land claimed under a confirmed Mexican grant may be located in two parcels, where, from the character of the country, the entire quantity granted cannot be located in one tract.

THIS case, which involved immense interests in California, and questions greatly agitated in a particular portion of that

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State, was an appeal from the decree of the District Court of the United States for the Northern District of the same, approving and confirming the survey and location of a claim to land under a Mexican grant to a certain John A. Sutter; a name abundantly known in the valley of the Sacramento, and which has left traces of some depth in the history of land titles in that region.

Sutter himself, as described by another pen,* was a native of Switzerland, who came to the Department of California about the year 1839; long, of course, before the incorporation of that region with the United States. He was a man of a romantic cast of character, and having naturalized himself as a citizen of Mexico, formed, with the leave of its Government, a settlement near the junction of the Sacramento and American Rivers. In honor of his native country he designated it New Helvetia. The country, at that time, was uninhabited, except by bands of warlike Indians, who made frequent predatory incursions upon the undefended settlements to the south and east of this place. In two or three years after his arrival, Sutter was commissioned by the Governor of California to guard the northern frontier, and to represent the Government in affording security and protection to its inhabitants against the invasion of the Indians and marauding bands of hunters and trappers who occasionally visited the valley for plunder. In the year 1841 he commenced the erection of a fort at New Helvetia at his own expense.† It was surrounded by a high wall, and was defended by cannon. Within this fort there were dwelling-houses for his servants and workmen, and workshops for the manufacture of various articles of necessity. There was a grist-mill, tannery, and distillery attached to the establishment. A number of Indians were domesticated by him, and contributed to cultivate his fields of grain, and to defend the settlement from more savage tribes. He was possessed of several thousands of horses and neat cattle,

* Campbell, J., of this court.

† Designated on the map facing p. 564, as "Estable de Nueva Helvetia."

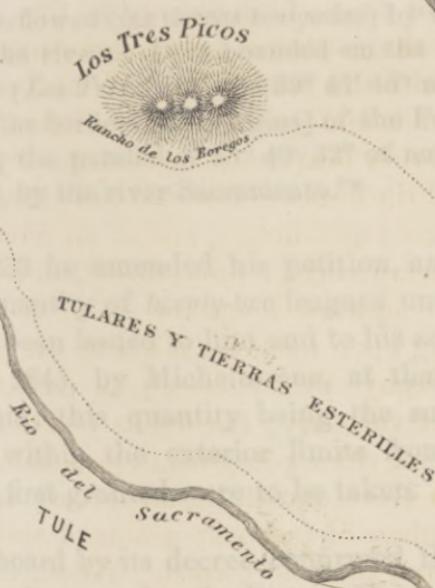
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which were under the care of his servants. There were collected, at different times, from twenty to fifty families; and there were, in the course of years, some hundreds of persons connected with this settlement. He is described as having been hospitable and generous to strangers, and the Governors of California bear testimony to the vigor with which he performed the duties of his civil and military commission. Being a man of schemes, and of an adventurous turn, he sought, after a certain time, to extend his settlements and influence upward along the river; and did so, examining and fixing upon lands for miles up the *Rio de las Plumas*, a large tributary of the Sacramento. His ideas and acts were somewhat visionary; his habits of business not good; and, relying on titles possessed or *to be obtained* and confirmed from the Government, he made very numerous grants to great numbers of persons; grants of vastly more land, as it turned out, than he owned. When, therefore, after the cession of California, our Government acknowledged his right, under Mexican grant, to a *certain quantity* of land,—the *exact location* of which remained to be practically fixed,—the fact that he had made deeds for much more than the quantity admitted as his, raised a great question among his various grantees as to where, exactly, his admitted land was situated. Each wished that which Sutter had granted to *him* to come within the limits, and the Government also had its interests in the location.

The matter, as in mode and form it now came before this court, was thus:

In 1852, Sutter presented to the Board of Commissioners, created by Congress under the act of March 3d, 1851, to ascertain and settle private land claims in California, a petition asking for the confirmation of a claim asserted by him to *eleven* square leagues of land under a grant alleged to have been issued to him on the 18th of June, 1841, by Juan B. Alvarado, then Governor of the Department of California. The grant gave the extent and boundaries of the land thus:

“It is of the extent of eleven square leagues, as exhibited in



"B P L"

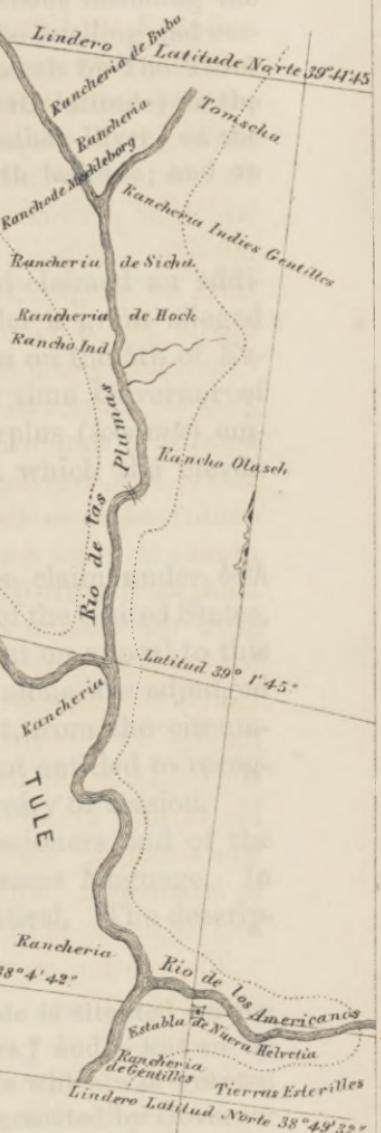
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to face p. 564

2 Wallace

MAPA
de los
TERRENOS PARA LA
COLONIA DE
NUEVA HELVETIA

E. Bourquin Lith. 602 Chestnut St. Philad²



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the sketch annexed to the expediente, without including the lands overflowed (*las tierras senigadas*) by the swelling and current of the rivers. It is bounded on the north by The Three Summits (*Los Tres Picos*) and $39^{\circ} 41' 45''$ north latitude; on the east, by the borders [or margins] of the Feather River; on the south, by the parallel of $38^{\circ} 49' 32''$ of north latitude; and on the west, by the river Sacramento."*

In 1853 he amended his petition, and claimed an additional quantity of *twenty-two* leagues under a grant alleged to have been issued to him and to his son on the 5th of February, 1845, by Micheltorena, at that time Governor of California; this quantity being the surplus (*sobrante*) embraced within the exterior limits from which the eleven leagues first granted were to be taken.

The board by its decree confirmed the claim under *both* grants. On appeal to the District Court of the United States, the decree of the board was affirmed. But on appeal to this court,† the claim under the first grant alone was adjudged valid, it being held that the second grant, from the circumstances under which it was issued, was not entitled to recognition by the United States under the treaty of cession.

The decrees of the Board of Commissioners and of the District Court are substantially in the same language. In the description of the land they are identical. The description is as follows:

"The land of which confirmation is made is situated on the American, Sacramento, and Feather Rivers,‡ and is known by the name of New Helvetia, being the same which was granted to the said John A. Sutter, by grant duly executed by Governor Juan B. Alvarado, on the 18th of June, 1841, and by a grant from

* See map "B. P. L.," *supra*, facing page 564.

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

‡ These are the rivers designated, on the map facing page 564, as Rio de los Americanos, Rio del Sacramento, and Rio de las Plumas. On this map no name is given to the river after the junction of the parts marked as Rio del Sacramento and Rio de las Plumas. It is continued, however, in fact, under the name of the Sacramento.

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Governor Manuel Micheltorena to the said John A. Sutter, and his son, John A. Sutter, Jr., dated February 5th, 1845; the first for eleven square leagues of land, as exhibited on the sketch annexed to the proceedings, and the second for twenty-two square leagues of the *sobrante*, or surplus of land within his rancho, named New Helvetia, as laid down on the map which accompanies the grant; the said land to be located according to the calls of the respective grants, as described and explained in the depositions of John J. Vioget, filed in the case, and within the following limits, to wit: On the south, by a line drawn due east from the Sacramento River, so as to touch the most southerly point of a pond or laguna situated near said river, and about five miles south of the American River, as represented on the map filed in the case, and marked 'B. P. L.' (facing page 564), exhibit to deposition of Juan B. Alvarado, March 15th, 1855, which is also marked on said map *Lindero latitud norte 38° 49' 3"*; on the north by a line drawn due east from Sacramento River to the southern base of the mountains known as the Buttes, and represented on the said map by the name of *Los Tres Picos*; and from thence until it intersects the eastern boundary of the tract, as represented on said map, and described in the grant, and in the depositions of the said Vioget; on the west by the said river Sacramento, and on the east by the margins of Feather River, inclusive. For more particular description, reference to be had to the copies of the grants filed and proved in the case, bearing date the 18th of June, 1841, and the 5th of Februaay, 1845, to the said map marked 'B. P. L.', exhibit to deposition of Juan B. Alvarado, March 15th, 1855, and to the deposition of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case."

The mandate of this court, which, on its decision, was remitted to the District Court, to be there executed, recites the decree appealed from entire, and, after mentioning the argument of the case, proceeds as follows:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that so much of the decree of the said District Court as confirms the claim of John A. Sutter to the eleven square leagues of land situated on the American, Sacramento, and Feather Rivers, known by the name of New Helvetia,

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and which was granted to the said John A. Sutter by Governor Juan B. Alvarado, on the 18th of June, 1841, as set forth and described in said decree, be, and the same is hereby *affirmed*. And it is further ordered, adjudged, and decreed by this court, that the residue of the said decree, in so far as it confirms a grant for *twenty-two* square leagues of land, purporting to have been made to the said John A. Sutter by Governor Manuel Micheltonena, on the 5th of February, 1845, be, and the same is hereby *reversed and annulled*; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein, in conformity to the opinion of this court."

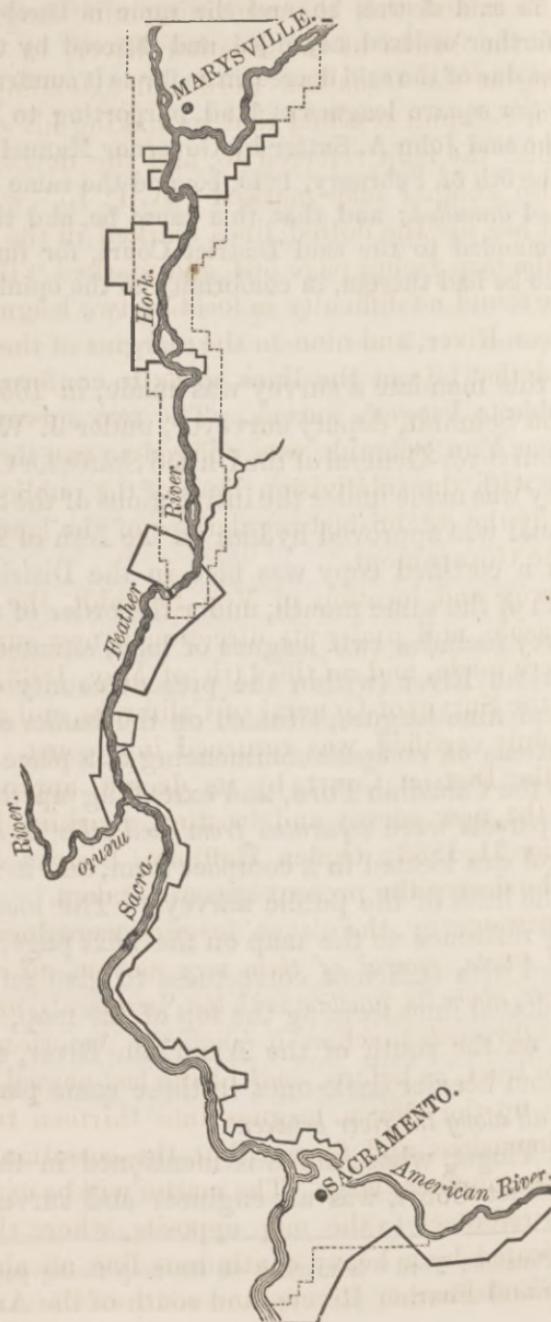
Under this mandate a survey was made, in 1859, by one A. W. Von Schmidt, deputy surveyor, under J. W. Mandeville, the Surveyor-General of the United States for California. The survey was made under the instructions of the Surveyor-General, and was approved by him on the 18th of February, 1860, and a certified copy was filed in the District Court, on the 27th of the same month, under the order of the court. This survey includes two leagues of land, situated *south* of the American River (within the present county of Sacramento), and nine leagues, situated on the banks of *Feather River*, portions *on each side* commencing at a place formerly known as the Canadian Ford, and extending up the river.* The two parcels were *separated from each other several miles*. Each parcel was located in a compact form, and in conformity with the lines of the public surveys. The location will appear by reference to the map on the next page, where it is indicated with sufficient correctness to give an idea, by the light dotted lines forming the top of the map, as to one part, and on the south of the American River, as distinguished from heavier dark ones in those same parts of the map, and *all along the river between*.

John J. Viaget, whose name is mentioned in the decree of the District Court, was an engineer and surveyor, and

* This "Canadian Ford" is marked on the map facing page 564 by a small bar across the river.

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made a survey of the eleven square leagues in 1840 or 1841, and also the map referred to in the grant to Sutter; and in



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his depositions filed in the case he testified that in his survey *two leagues* were located, at the request of Sutter, *south of the American River*, and that the remaining nine leagues were located on the banks of the Feather River, *on each side*, commencing at the Canadian Ford and extending up the river. Von Schmidt testified that in making his survey he had with him the map referred to, and the depositions of Vioget; also another map marked "A. P. L." which, except that it has not the dotted lines marked in the latter, is similar to the map facing page 564, and marked "B. P. L.;" and that he found no difficulty in locating two leagues below the American River, and nine on the margins of the Feather River; and that he ran the lines so as to conform as near as practicable to Vioget's survey. The two surveys varied somewhat, as Von Schmidt was obliged to run the lines in accordance with the subdivision lines of the public surveys presented by the established regulations of the land department of the Government.

This survey and location of Von Schmidt, the District Court set aside, and under its direction a new survey and location were made, and on the 11th of May, 1863, was approved by the Surveyor-General of California, and a plot of the same, duly certified, was returned into court. On the same day the District Court, by its decree, approved and confirmed the new survey and location, marking it, "Approved, May 11, 1863; Ogden Hoffman, District Judge;" and from the decree the present appeal is taken.

By this new survey, the eleven leagues were located *in a long line of tracts, several of them very narrow, all along the Feather River, above its junction with the Sacramento, and on the Sacramento afterwards to where it meets the American River, with a large tract, as before, south of the last-named stream.* This broke up the eleven leagues into thirteen tracts of different dimensions and forms; but the cessation of the continuity was nowhere large. The matter will be explained, perhaps, by reference to the map opposite, where this location is indicated by a heavy continuous line all along the Sacramento and Feather Rivers, and south of the American

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River, as distinguished from the lighter dotted one on the same map, at its top and bottom only.

Sutter, as already mentioned, was a man of undefined ideas, with habits of business not the best. And having made grants of much more land than he had, it was plain that whatever decision was made as to their respective precedence, many persons would be losers, under circumstances of much hardship as respected some of them. The District Court, in directing a location in the manner just mentioned, intended that the several selections which Sutter himself was considered to have made by settlement, or by lease or sale, or other acts of ownership, should be adopted, and in the order in which they were made, until the whole quantity of eleven leagues was exhausted. His Honor, the District Judge, however, after a very able exposition of the grounds of the decree, acknowledged the difficulties of a "most embarrassing case." "With no clear rules of law to guide me, unable to discern accurately what even equity and justice demanded, embarrassed by the careless improvidence which has led Sutter to convey away more land than he even supposed he possessed, and far more than the quantity to which by the unexpected decision of the Supreme Court, he has been restricted, with the external boundaries of the tract vague and undefined, and even the original papers, in some respects, ambiguous and contradictory, I have been compelled," he said, "to content myself with endeavoring to settle the case as fairly as was practicable, under the circumstances, and to renounce the hope of obviating every objection, or avoiding the infliction of much hardship. The case is one rather for the '*arbitrium boni viri*' than the subject of a judicial determination proceeding upon fixed and absolute rules."

Numerous objections were taken in the court below, and were urged in this court, to the survey thus ordered by purchasers under Sutter, and by persons claiming rights by settlement under the United States. The objections were not all consistent with each other. One of the intervenors (Gelston), contended that a greater quantity than the amount

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given, two leagues or more, should have been located *south* of the American River.

The United States not objecting to the location south of the American River, contended that the eleven leagues could not be located in separate and distinct parcels, but should be located in one body, and in a compact form, and, therefore, that the nine leagues should be taken immediately adjoining the other two, and on the north of the American River, or that the two leagues should be selected from land adjoining the nine on Feather River.

The parties claiming an interest in the premises by settlement under the United States, contended that the whole quantity granted should be located between the Sacramento and Feather Rivers, that is to say, in the forks of these rivers, below the Three Buttes, and that the land upon which the city of Sacramento is situated should be excluded from location as *overflowed land*, reserved by the terms of the grant.

Two intervenors (Packard and Woodruff) contended that the survey made by A. W. Von Schmidt, and filed February 27th, 1860, was the correct survey of the eleven leagues.

A vast variety of testimony was taken in the case, and numerous documents of different kinds, including grants by Sutter, up and down the rivers and elsewhere, were offered in evidence,—the whole bearing more or less directly upon the matters in controversy. The printed record contained nine hundred and eighty octavo pages, and there were maps! in number indefinite. It is sufficient for the proper understanding of the opinion of the court to state, generally, that the evidence showed,—the settlement and occupation by Sutter of the land below the American River, as already stated above; the settlement of colonists under Sutter, soon after he obtained his grant on the *east bank* of the Feather River (or as was asserted and contended in the argument, *before*); a subsequent selection and occupation by him of the tract known as Hock Farm, on the *west bank* of the Feather River;* that the whole country embraced within

* The place marked "Rancheria de Hock," on the map B. P. L., facing p. 564; also, the tract "Hock," on map at p. 568.

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the exterior limits of the grant, with the exception of small portions, insufficient to satisfy the eleven leagues granted, is sometimes, every two or three years, overflowed by water, and in many places to the depth of several feet; that the greater part of the tract embraced in the survey made by Von Schmidt, and also in the survey approved by the District Court, is thus sometimes overflowed; that within the exterior limits there are also immense tracts of marsh or *tule* lands, which are covered with water every year during the entire winter, and during the greater part of the summer months, and which were unfit for either cultivation or pasture without draining; and that neither of the surveys mentioned include any portion of those marsh or *tule* lands.

This grant gives the extent and boundaries of the land, as already mentioned, that is to say, as follows:

"It is of the extent of eleven square leagues, as exhibited in the sketch annexed to the expediente, without including the lands overflowed (*las tierras senigadas*) by the swelling and current of the rivers. It is bounded on the north by (los Tres Picos) the Three Summits, and $39^{\circ} 41' 45''$ north latitude; on the east by the borders (or margins) of the Feather River; on the south by the parallel of $38^{\circ} 49' 32''$ of north latitude, and on the west by the river Sacramento."

Alvarado, the governor, who issued the grant, testified that the Spanish words, "*las tierras senigadas*" in the original, which are translated "*the lands overflowed*" in the document in the record, mean *swamp or tule lands overflowed and unfit for cultivation*.

The parallel of latitude (*lindero latitud*) given in the grant as the southern boundary, falls near the junction of the Sacramento and Feather Rivers, as appears by the map. Alvarado testified that he inserted in the grant the degrees of latitude as they were marked on the map. And Vioget testified that he drew the line across the map a few miles below the American River, and marked it as the southern boundary with the latitude designated; but that the observation taken of the latitude was not correct, owing to his

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inability to procure correct instruments, which he mentioned at the time to Sutter.

Of very numerous documents offered in evidence, aside from the petition of Sutter and grant to him, and deeds to numerous under claimants, in nearly every place now the subject of claim, a grant to W. A. Leidesdorf, issued October 8th, 1844, a deed of Sutter to Robinson, Gillespie, and others, dated July 1st, 1850, and a map, made by John Bidwell, in 1844, were, perhaps, among the most important.

The grant to Leidesdorf, made more than three years after the date of the grant to Sutter, cedes land situated on the south bank of the American River, and describes it as "*bounded by the land granted to the colony of Senor Sutter.*"*

The deed of Sutter to Robinson, Gillespie, and others, conveys land described as follows:

"Commencing on the north of the Three Peaks, or what is commonly called Sutter's Buttes, at a point on the east bank of Sacramento River, in latitude $39^{\circ} 41' 45''$; thence running with the parallel of said latitude to the *Rio de las Plumas*, or Feather River; thence down and along the meanders of said Rio de las Plumas, or Feather River, to its junction with Sacramento River; thence up and along the eastern bank of said Sacramento River to the place or point of beginning; and *which said land is embraced in a grant from the Mexican Government, bearing date, Monterey, 18th day of June, eighteen hundred and forty-one.*"

The map made by John Bidwell, so far as it showed the land claimed by Sutter, was copied from the map accompanying the petition of Sutter in the archives of the country.

Mr. Wills, for the United States, appellants: The question before the court is, where shall the eleven leagues of land confirmed to Sutter be located? The question can be answered only by the application of established principles to the facts of the case.

I. The first principle which must be applied is this, that

* See *United States v. Halleck*, 1 Wallace, 440.

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the rights of Sutter's vendees must be determined by the rights of Sutter himself, and the lands confirmed to him located in the same manner as if he were the only party before the court.

II. The second principle which must be applied is, the conclusiveness of the final decree of confirmation, precluding all inquiry into the original merits of the case. This principle was applied by this court in *United States v. Halleck*.*

III. The third principle which must be applied is, that, subject to the previous principles and rules of location, the eleven leagues of land confirmed to Sutter, must be located "according to the laws of the United States;" that is, according to the executive regulations established by the General Land Office for the location of private land claims in California. This is required by one clause of the mandate of the court. It is also required by the doctrine of this court in the first decision of *United States v. Fossat*.†

The regulations require,—

1st. That the location and survey shall be made in a body, and in a compact form, according to the lines of the public surveys.

2d. That in cases of sales by the original grantee, they shall be treated as evidence of an election by him, to that extent, of the location of the claim confirmed; provided compactness of form and conformity to the lines of the public surveys be preserved. These must be preserved, even to the exclusion, if necessary, of any of the sales, for the reason that the original claimants themselves are subject to such regulations for the location of their grants as may be prescribed under the laws of the United States, and their vendees, of course, hold in like manner.

These requirements apply to the location of the Sutter grant, wherever it may be attempted to be located, whether at the upper end, at the lower end, or in the middle of the tract of country indicated by the sketch accompanying the

* 1 Wallace, 455, 456; see also *The Fossat Case, infra*.

† 20 Howard, 427.

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grant. They cannot be fulfilled by any attempt at a detached, or scattered, or long-drawn location of the grant, made in this case, for sixty miles along the river, in a spirit of compromise, partly at the upper end, partly at the lower end, and partly in the middle. The grant must be located in a compact body, *wholly* at whatever point of location may be made necessary by the decree and by the other facts controlling the location. If the location is to include the north end of the tract, then it must begin there, and extend south in a compact body for quantity. If, on the contrary, the location is to include the south end of the tract, then it must begin there and go north in a compact body for quantity.

The survey approved by the District Court violates these regulations in every particular. It is an ingenious attempt to do the impossible.

Mr. Elihu Johnson, for the intervenor and appellant Gelston.

Mr. J. B. Williams, for intervenors and appellants Algier and others.

Mr. Black, for settlers under the United States: The grant and the confirmation were of lands lying *between the Sacramento and the Feather Rivers*, above the forks of those rivers and below the Three Peaks. The limits of the grant are precisely the boundaries of what, as is well known, now makes Sutter County. The claimants under Sutter are confined to those limits.

The decree of the Supreme Court was, that Sutter was entitled only to the eleven leagues granted by Alvarado, and that quantity should be taken within the limits *set forth in his grant and the accompanying map*. The *accompanying map* mentioned in the decree is of course identical with the *accompanying sketch* referred to in the grant. This accompanying sketch is part of the grant itself. No other map or sketch can possibly have any just influence in determining the boundaries of the title.

Sutter, it is true, had a place called his fort, which was

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on the south side of the American River; and there he had workshops and servants, a distillery, mill, tannery, and what not. He cultivated there a large quantity of land, and had many horses and cattle. But he did not ask for a title which would cover the land occupied by him *there*. On the contrary, he had made improvements on the Feather River many miles higher up the valley. He *claimed* all the land in that region, and exercised supreme dominion over it. The Hock Farm was the place he had destined for his future home. He did remove most of his stock there in 1841. For one of these places he needed a title as much as for the other; he had no grant for either. He felt secure of the fort as long as he chose to keep it. But the other land he could not hope to keep without a regular title. He could get a grant for only eleven leagues, and that was less than he wanted up the river. He certainly might have petitioned the governor successfully for eleven leagues on the American River. Perhaps, also, he might lawfully have asked for two different tracts to be conceded by the same grant, one on the American and another up at the Peaks. But *he did not do so*. He asked for only one tract, and that one he said was *situated towards the north*, according to the representation in the sketch, and he was careful to *exclude the land overflowed in winter*. He speaks of it as within New Helvetia. Helvetia is the old name of Switzerland. He was himself a Switzer, a romantic man; a man of great adventure, with vast ideas; a sort of feudal lord. The name of *New Helvetia* does not signify that the land which he wanted lies *at* the fort or near it. On the contrary, he called all the country about the fort *New Helvetia*.

The grant to Sutter is dated the 18th of June, 1841. It does not point to the cultivated and improved lands then occupied by Sutter himself. When the lines come to be specifically described they are given thus: North by the Three Peaks; east by the margins of the Feather River; south by the parallel of $38^{\circ} 49' 32''$ (which runs a little above the mouth of the Feather), and west by the Sacramento River. If the grant is to be followed, the case is too

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clear for controversy. If the grant is to be disregarded, what becomes of the order of this court, that the location shall be made *within the limits set forth in the grant?*

The description given of the location and boundaries of the tract in the petition of Sutter, in the grant to him, and in several deeds executed by him, exclude all land lying south of the American River.

The "margins of the Feather River," as called for on the east, make the *banks* of the Feather the boundary there. "MARGIN" means *edge, rim, border*, not a strip of land. Besides, the margins, whatever they may be, are *excluded*. The land granted goes *to them* and leaves them out, not *over them*, so as to take them in. The banks of the Feather River, on the western side of that stream, are, without doubt, the true eastern limits of the grant. The call for the east boundary would be nonsense if the south line were below the American River.

The south boundary is the parallel of latitude $38^{\circ} 49' 32''$, which runs from the Sacramento to the Feather, about eight hundred yards above their confluence. This parallel of latitude is not only fixed as the southern limit of the grant by the express words which define it as such, but the other parts of the grant show conclusively that the true parallel of $38^{\circ} 49' 32''$ was in the mind of the parties. *It must have been meant by them to put the southern line somewhere above the forks of the rivers*, which are the boundaries east and west. Otherwise, the lines would not inclose any land at all.

A large portion of the land included within this survey is overflowed land. The *overflowed lands* are excluded by the express words of the grant. The city of Sacramento is on ground thus excluded.

Mr. Edwards Woodruff, for intervenors Packard and Woodruff: The survey made by Von Schmidt, deputy surveyor, in 1859, which was approved by the Surveyor-General of California, February 18, 1860, and afterwards set aside by the District Court, was correct, and should be approved.

I. It conforms to the mandate of this court; it embraces

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two leagues of land south of the American River, and nine leagues on the margins of Feather River. In this respect it follows the deposition of Vioget, to which the mandate refers.

II. That the land south of the American River was properly included, follows from the language of the decree both of the District Court and of this court; the evidence showing that Sutter solicited this land in his petition, and that the same was granted to him, is briefly stated in the opinion of the court reported in 21 Howard, 170. Besides this, the grant issued to William A. Leidesdorf by the Mexican Governor of California on the 8th of October, 1844, shows the understanding as to the location of the land granted to Sutter of the highest public officer in California at the time, to whose charge the disposition of the public domain of the republic in the department was intrusted. The tract of land which that grant purports to transfer is situated on the south bank of the American River, and is described as "*bounded by the land granted to the colony of Senor Sutter.*"*

III. That land lying on both banks of the Feather River was also properly included, is manifest on inspection of the decree of the court below, and of the mandate of this court. They describe the eastern boundary of the eleven leagues "as the *margins of the Feather River inclusive.*"

In *Ferris v. Coover*,† the Supreme Court of California, in considering the boundaries of the grant to Sutter, and speaking of the eastern boundary, said :

"The language is peculiar. Feather River is not intended as the boundary, for it would be so designated. It is the *margins* of that river; land extending along the stream. The language was used to indicate the general limit and course of the eastern line. It does not necessarily mean that the eastern line must terminate with the length of the stream, and cease when the Feather River loses itself in the Sacramento."

And, in the same case, commenting upon the case of *McIver's Lessee v. Walker*,‡ the same court said :

* *United States v. Halleck*, 1 Wallace, 440.

‡ 9 Cranch, 173.

† 10 California, 614.

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"The patents called for land *lying on Crow Creek*, describing them by course and distance, and referring to a plat annexed. Neither the lines in the certificate of survey, nor the patents, called for crossing Crow Creek; and, if run according to the course and distance given, would not include the creek or any part of it, or the land in possession of the defendant. But the plat annexed represented Crow Creek as passing *through the tract*, and the plaintiff requested the court to instruct the jury that the lines ought to be run so as to include Crow Creek and the lands in possession of the defendants. The instruction was refused, and the defendants had judgment. The refusal of the instruction was assigned as error, and the Supreme Court, Mr. Chief Justice Marshall delivering the opinion, held that the lines should be so run as to include both sides of the creek, and conform, as near as possible, to the plat annexed to the patents; and the judgment was reversed."*

The Supreme Court of California held, in that case of *Ferris v. Coover*, that Sacramento City and the eastern margin of Feather River were both included within the grant to Sutter.

The early colonists introduced by Sutter, composing the families for whose benefit the grant was, in part, issued, were settled by him all along upon the east bank of Feather River.

IV. The lands which are reserved by the terms of the grant are *tule* or marsh lands. Such is the obvious meaning of the terms used. The Supreme Court of California has had occasion to consider this subject, and in *Cornwall v. Calver* it said :

"The language of the grant was probably intended as a compliance with the terms of the petition, and has, as we conceive, but one meaning, and that is, to exclude lands which are inundated *during the winter*, and does not apply to lands which are occasionally flooded upon a rise of the rivers, either from protracted rains in the winter, or the melting of the snows of the Sierra Nevada in the spring. The whole country within the

* See other cases there quoted and commented on.

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exterior limits of the grant, with the exception of small portions entirely insufficient to meet the quantity specifically granted, is sometimes flooded in this way. The most valuable tracts, both for cultivation and pasturage, are the low lands bordering the streams, over which, every two or three years, the water rests for a few days at a time. It was these lands which, any one in the position of Sutter, at the time he presented his petition to the Government, would naturally have selected, and these lands the survey actually made by Vioget, both on the Sacramento and the Feather Rivers, included. As we read the petition of Sutter, he solicits the eleven leagues, excluding the land which is periodically in the winter inundated, that is, the lands which are regularly inundated during the winter, and refers only to what are known as *tule lands*. No other lands will meet the terms of the petition. These lands are regularly, periodically every winter, inundated. The low lands which are not *tule* lands, are not thus inundated every winter, but only occasionally—often at intervals of three and four years. The *tule* lands remain, too, inundated to a greater or less extent during the entire winter and spring—until the waters of the Sacramento and Feather Rivers subside to their lowest point. The least rise from the first rains of much length in the winter, covers them with water. They are unfit for cultivation without draining. Within the exterior limits of the grant to Sutter, there is an immense tract of these *tule* lands, and it is to them that the reservation applies."

The land upon which the city of Sacramento is built, is sometimes overflowed to the depth of several feet, but the water only remains a few days. The land is not *tule* or marsh land.

V. The *topographical* character and formation of the country included within the description in the grant, and delineated upon the map accompanying the petition, is such that the location of the eleven leagues of land must necessarily be made as by the survey of Von Schmidt, that it is so as to embrace two leagues south of the American River, and the remaining nine leagues upon the margins of the Feather River, or else the whole eleven leagues must be located in one body upon the margins of the Feather River,

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as much upon the one side of said river as upon the other, and above the Canadian Ford. This is matter of common knowledge in California. No other location than the one or the other of the above can be made, so as to meet the requirements of the grant and map (which exclude tule and swamp lands), in consequence of the peculiar character and conformation of that region of country.

Any location of the whole eleven leagues between the Buttes and the Feather and Sacramento Rivers, which is what is asked for by Mr. Black, would be contrary to the express terms, intent and meaning of the grant, because it would necessarily include many thousand acres of tule and swamp land.

VI. All the courts of the State of California and of the United States, which have ever passed upon the grant to Sutter, have held, that it included land south of the American River, and also, on both sides of Feather River. The Board of Land Commissioners, the United States District Court, and this court, have so held. The Supreme Court of the State has so held in numerous cases.* In *Morton v. Folger*, referred to below, the court said:

"Upon the land supposed to be contained within the grant to Sutter, two cities are built; one of them the second in population and wealth of the State; and it is a matter perfectly notorious, that residents of those cities, and occupiers of land lying between them, numbered by thousands, have taken conveyances under Sutter, and expended their money in buildings and other improvements, relying upon the survey and maps of Vioget, as evidence that their property was situated within the limits of the grant."

Mr. Justice NELSON delivered the opinion of the court.

The appeal is from the decree or order of the court confirming a survey and location of the eleven square leagues of land granted to Sutter by Governor Alvarado, on the 18th June, 1841. This grant was confirmed by the Board of

* *Ferris v. Coover*, 10 California, 614; *Cornwall v. Culver*, 16 Id. 426; *Morton v. Folger*, 15 Id. 277; *Seaward v. Malotte*, Id. 306.

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Commissioners to Sutter, together with twenty-two other square leagues granted to him by Governor Micheltorena, on the 5th February, 1845. The Board of Commissioners, in their decree, state that "the land of which confirmation is made is situated on the American, Sacramento, and Feather Rivers, and is known as New Helvetia," and to be located as described and explained in the depositions of John I. Vioget, filed in the cause: "On the south by a line drawn due east from Sacramento River, so as to touch the most southerly point of a pond or laguna situated near said river, and about five miles south of the American River, as represented on the maps filed in the case, marked B. and B. P. L., exhibit to the deposition of Juan B. Alvarado, March 15, 1855, which line is also marked on said map, *Lindero latitud norte 38° 49' 32''*; on the north by a line drawn due east from the Sacramento River to the southern base of the mountains known as the Buttes, and represented on the said map by the name of *Los Tres Picos*; and from thence until it intersects the eastern boundary of the tract, as represented on said map and described in the grant, and in the depositions of said Vioget; on the west by said river Sacramento, and on the east by the margins of the Feather River inclusive." "For a more particular description, reference to be had to the copies of the grants A. and C., to the map marked B., and to the depositions of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case." The United States appealed from this decree to the District Court, in which considerable additional testimony was taken on the title and boundaries; and, after argument, the court affirmed the decree of the Board of Commissioners substantially in the words of that decree. From this decree an appeal was taken to this court, and after argument the decree of the District Court was affirmed as to the grant of eleven square leagues, and reversed as to the twenty-two granted by Micheltorena.

The mandate of this court, sent down to the District Court to be executed, recites the decree of that court *in hæc verba*, and then proceeds: "On consideration whereof, it is now

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ordered, adjudged and decreed by this court, that so much of the decree of the said District Court as confirms the claim of John A. Sutter to the eleven square leagues of land, situated on the American, Sacramento and Feather Rivers, known by the name of New Helvetia, and which was granted to the said John A. Sutter by Governor Juan B. Alvarado, on the 18th of June, 1841, as set forth and described in said decree, be and the same is hereby affirmed," and the residue of the decree, in so far as it confirms the twenty-two square leagues to John A. Sutter by Micheltorena, be reversed, "and that this cause be and the same is hereby remanded to the said District Court for further proceedings to be had therein in conformity to the opinion of this court."

The first survey and location of the eleven leagues, in pursuance of the mandate, was made by A. W. Von Schmidt, in 1859, a deputy surveyor, under the instructions of J. W. Mandeville, th Surveyor-General of the United States. This survey was approved by this officer February 18th, 1860, and a copy filed in the District Court the 27th of the same month, in pursuance of an order of the court. Numerous objections were taken to this survey, by various persons interested in the location of the grant, and a volume of evidence produced before the court impeaching and supporting the correctness of the same; and the court, after argument, and a very full and elaborate examination, set aside the survey, and ordered another to be made by the Surveyor-General, in conformity with the opinion expressed.

This second survey was made and approved by this officer on the 11th May, 1863, and was confirmed by the District Court on the same day. From this decree or order of confirmation the United States, and several intervenors under the act of 1860, have appealed to this court.

The mandate of this court must be looked to for the description of the out-boundaries of the grant to Sutter, within which the eleven square leagues of land are to be located. They are given in the mandate as derived from the calls in the grant, the map B. P. L. annexed to the deposition of

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Juan B. Alvarado, of March 15th, 1855, and the depositions of John J. Vioget. Vioget was a practical engineer and surveyor, and made a survey of the eleven leagues, and also a map of the same in 1840 or 1841, and before the application by Sutter to Alvarado for the grant, and with a view to that application. The map accompanied it, and was referred to in the grant, and annexed to it. There were two depositions of Vioget taken, together with a cross-examination as to each at a different time, which were before the Board of Commissioners, and which are referred to in its decree of confirmation, as well as in the decree of the District Court, and in the mandate of this court, in respect to the location of the grant. According to this survey, two square leagues were located, at the request of Sutter, south of the American River; and the remaining nine were located on each side of the Feather River, extending from what was known as the Canadian Ford on that river up the same.

The survey of Von Schmidt, in 1859, and which was approved by the Surveyor-General, and filed in the District Court the 27th February, 1860, was made substantially in conformity with this survey of Vioget, the map of which is referred to in the grant by Alvarado. Von Schmidt had with him the map B. P. L., and also A. P. L., and the depositions of Vioget; and he found no great difficulty, with these evidences before him of the former survey, in locating the two square leagues below the American River, and the nine on the margins of the Feather River, above the Canadian Ford, extending them up to the northern line, as laid down on the maps. The general outlines, the deputy surveyor states, as respects both parcels, were the same, and that he ran the lines so as to conform to Vioget's survey as near as practicable. They varied some, as it was necessary to run them on subdivision lines, according to the standing instructions of the Land Department.

Mr. Justice Campbell, in delivering the opinion of the court in this case,* when here before, says: "An engineer

* 21 Howard, p. 176.

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and surveyor (Vioget), who prepared maps for the claimant, testifies that, in January, 1841, he made duplicate maps for the claimant of the establishment of New Helvetia, and surveyed eleven leagues at that place; and that in 1843 he traced a copy from one of these, and that copy is produced and filed with the petition. It is a fair conclusion," he observes, "from all the evidence, that these maps of Vioget were presented to the Governor, and form the basis of the grant, and make part of it." The survey here alluded to, we have seen, located two square leagues of the land south of the American River, and the remaining nine on the Feather River. Again, speaking of the error of the line of latitude marked on the map, he says: "But the map shows that the line of the southern boundary is south of New Helvetia, and is so related to natural objects represented on it as to be easily determined. Vioget accounts for the error in the designation of the line by the imperfection of the instruments, and proves that a starting corner was fixed and the line traced on the ground. This is better evidence of the true location of the southern line, and conforms to the probability of the case. Upon the whole evidence," he observes, "we find that the grant and map filed with the petition in 1852, before the Board of Commissioners, have been proved."

An objection has been made, that this tract of eleven square leagues has been located in two separate parcels, two leagues below the American, and nine on the Feather River. One answer is, that the original grant with the map accompanying it, thus located it, and which location, as we have seen, has been confirmed by the decree of this court. In the second place, the grant was made of the tract with general out-boundaries, excluding from it lands overflowed by the swelling and currents of the rivers, in other words, *tule* or swamp. According to the evidence of both Vioget and Von Schmidt, the quantity for agricultural or fast land, to be contained in the grant, could not be obtained within the out-boundaries without making the location in two different parcels. The location, by the survey of Von Schmidt, in the

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two parcels, appears to have been made in as compact a form as was practicable, regard being had to the condition of the grant, to the quantity of land granted, and to the character of the district of country or territory in which it was to be located.

Without pursuing the examination of the case further, we are satisfied that this survey and location by Von Schmidt of the eleven square leagues of land granted to Sutter, is in conformity with the decree and mandate of this court, and should have been accepted and confirmed by the court below. We do not say that it is entirely free from objections, and from our examination of the evidence, we are satisfied that no survey or location of the tract, under the circumstances attending and surrounding the case, could be made that would be free from objection. We refer to the numerous grants made by Sutter of parcels of land, far exceeding the quantity ultimately awarded to him, which, of course, could not be covered by any location that might be made; and also to the case of pre-emption settlers, whose possessions may be included, and would be included, to a greater or less extent, by any possible location consistent with the original decree of confirmation by this court. We fully appreciate the difficulties and embarrassments that surrounded the case upon the evidence in the court below; and the opinions of the learned judge upon the various questions, as they arose, and which appear in the record, furnish abundant evidence of the labor and earnestness with which he endeavored to arrive at right and justice between all parties concerned.

The survey and location, however, which we have felt constrained to adopt, we are inclined to think, will be less disturbing and prejudicial to innocent and *bonâ fide* occupants under grants from Sutter, or on what was supposed to be public lands, than any other that could be made, from the fact that Sutter's possessions, from his first settlement in the country, were south of the American River, and north on the Feather River. These possessions must have been well known to purchasers under him, and also to settlers on what

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they supposed to be public lands; and in addition to this, the early survey by Viaget, which was made the latter part of 1840, or beginning of 1841, must also have been well known to the settlers in that section of country.

THE DECREE of the court below, confirming the survey and location of the eleven square leagues to Sutter, approved by the Surveyor-General, May 11, 1863, and filed in court the same day as recited in the said decree, and marked, "Approved, May 11, 1863, Ogden Hoffman, District Judge," must be REVERSED AND SET ASIDE; and the survey and location of the grant by A. W. Von Schmidt, United States Deputy Surveyor, approved by the Surveyor-General, J. W. Mandeville, February 18th, 1860, and a certified copy filed in the District Court, 27th of the same month, be substituted in its stead; and that the case be remitted to the court below, with directions to confirm this survey as the location of the said grant.

Mr. Justice FIELD did not sit in the case, nor take part in its decision.

UNITED STATES *v.* PACHECO.

1. When the boundaries designated in a decree of the District Court, confirming a claim to land under a Mexican grant in California, embrace a greater tract than the quantity confirmed, the grantees have the right to select the location of this quantity, subject to the restriction that the selection be made in one body and in a compact form; and subject, also, in some instances, to selections made by their previous residence, and by sales or other disposition by them of parcels of the general tract.
2. When the sea or a bay is named as a boundary of land, the line of ordinary high-water mark is intended where the common law prevails. And where a decree confirming a Mexican grant mentions a bay as one of the boundaries of the land confirmed, without any further particulars, the same line will be considered as adopted.

APPEAL from the decree of the District Court of the United States for the Northern District of California, confirming the survey and location of a grant made by the