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Statement of the case.

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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.

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### 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

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Mexican Government of California to Pacheco and another, March 23d, 1844, for three leagues of land, situated on the east side of the Bay of San Francisco.

The decree of the District Court confirming the claim of the grantees under the grant, described the land as "known by the name of *Potrero de los Cerritos*, and bounded on the side of the Mission of San José by the Sanjon de los Alisos (Ravine of the Willows), on the north by the creek of the Alameda (Arroyo de la Alameda), and on the west by the bay, containing about three square leagues." The ravine and the creek here referred to as boundaries connect with each other, and with the bay inclose a tract of greater quantity than the three leagues confirmed. On the side of the bay there is salt or marsh land of about two leagues in extent. The whole of this land is covered by the monthly tides, at the new and full moon, and a part of it is covered by the daily tides.

The decree of the District Court was affirmed on appeal by the Supreme Court. Subsequently, a survey was made of the quantity confirmed, under the act of June 14th, 1860, and approved by the District Court. The survey embraced the greater part of the marsh land which is covered by the monthly tides, and excluded that part or the greater portion of it which is covered by the daily tides. From the decree of approval the United States took the present appeal in the interest of settlers on the upland, and the question before the court was as to the correctness of the survey.

The Government contended that the boundary designated as the bay, should be so run as to include all the marsh land; in other words, that by the bay as a boundary in this case was meant the line of low-water mark; and assuming that the boundaries given in the decree do not close, also contended that a fourth line must be determined by the quantity confirmed, and so drawn as to exactly include it. The respondents insisted that they had the right to locate the quantity granted to them anywhere within the exterior boundaries named in the decree of confirmation, subject only to the condition, that the location be made in one body and

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in a compact form; which condition was followed in the present case.

The grant referred to a map; but that included both marsh land and upland, and did not indicate that one should be taken before the other.

*Mr. Wills, for the United States; Mr. Crane, contra.*

Mr. Justice FIELD delivered the opinion of the court.

The decree of the District Court confirms the claim of the respondents to the extent of three square leagues, and describes the land as bounded, on the side of the Mission of San José, by the Sanjon de los Alisos (or Ravine of the Willows); on the north by the Arroyo de la Alameda (creek of the Alameda); and on the west by the Bay of San Francisco. As the ravine and creek connect with each other, the boundaries given inclose on all sides the tract, from which the three leagues are to be taken. On the side of the bay there are about two leagues of salt or marsh land. The whole of this land is covered by the monthly tides at the new and full moon, and a part of the land is covered by the daily tides. And the objection taken to the survey approved by the District Court, is that it does not include this marsh land as part of the tract confirmed. The objection is made on the supposition that the lines given by the decree do not close; that a fourth line is necessary to complete the boundaries, and that this fourth line must be determined by the quantity confirmed, and so drawn as to include it; and that by the bay as a boundary in this case is meant the line of low-water mark.

The position that the lines given do not close, rests upon a mistake as to the fact, and of course requires no other answer than this statement. Within the boundaries given, the respondents had the right to select the location of the quantity confirmed to them, subject only to the restriction that the selection be made in one body and in a compact form. This right of location, possessed by Mexican grantees when a specific quantity is confirmed lying within exterior

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boundaries embracing a greater quantity, is, in many cases, controlled by their previous residence, or by sales or other disposition made by them of portions of the general tract. The parcels occupied for a residence, or disposed of, are treated as selections already made, from which the parties cannot recede. But in the present case there were no considerations of this kind to control the election of the respondents; and it is not denied that the land embraced by the survey is in one body, and in a compact form.

The position, that by the bay as a boundary is meant, in this case, the line of low-water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails.\* And there is nothing in the language of the decree which requires the adoption of any other rule in the present case.

If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican Government, the result will be equally against the position of the appellants.

The map, to which the grant refers, does not determine the point; it includes both marsh land and upland, and does not indicate that either shall be taken by the grantees before the other. The greater part of the marsh land which is covered by the monthly tides is in fact embraced by the survey, and that part which is excluded, or the greater portion of it, is covered by the daily tides. If the grantees were also entitled to the portion excluded, they could have asserted their right by an appeal from the decree approving the survey. It does not lie with the Government to complain of the decree in this particular.

DECREE AFFIRMED.

\* 3 Kent, 427.