mortgaged all their property, real and personal, and all their franchises. The court held that the rolling stock acquired subsequently to the execution of the mortgage belonged to the mortgagee. The court say, "The object of the act being to give the bondholders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law authorizing the mortgage as to give the bondholders security upon the road itself, as the general subject-matter of the mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged."

In *Phillips* v. *Winslow*, in Kentucky, it was held that, in equity, the rolling stock acquired subsequent to the execution of the mortgage, passed as an accession or fixture.

In Redfield on Railways,* it is said, indeed, that rolling stock is an *accessory*, though not a *fixture*. The distinction is, perhaps, one of words. In the strict technical sense of the word, as used in the old cases, rolling stock is not a *fixture;* but within the reason and philosophy of the modern cases it would seem to be so. If it must not be *called* a fixture, in deference to the old cases, it is yet an *accessory of that sort*, which has every element of one; and to be regarded accordingly, however named.

The conclusion is, that rolling stock, put and used upon a railroad, passes with a conveyance of the road, even without mention or specific description.

THE FOSSAT OR QUICKSILVER MINE CASE.

1. An appeal lies to this court from a decree of the District Court for California, in a proceeding under the act of 14th of June, 1860 (12 Statutes at Large, 33), commonly called the Survey Law.
2. If no appeal from such a decree be taken by the United States, they may appear in this court as appellees, but cannot demand a reversal or change of the decree.
3. If a California land claim has been confirmed by a decree of the District Court under the act of 3d of March, 1851 (9 Statutes at Large, 631), and the decree of confirmation fixing the boundaries of the tract stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects.
4. The Survey Law of 14th of June, 1860, gives the District Court no power to amend or change the decree of confirmation.
5. When the title-papers designate the beginning-place of a straight line, and fix its course by requiring that it shall pass a known and ascertained point to its termination at a mountain, such line cannot be varied by the fact that a rough draft (a Mexican diseño) on which it is

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* Page 576, note.

drawn, was not true at all to scale, and that on it the line strikes two ranges of mountains in such a way as to leave certain unnamed elevations on the draft, which, with more or less plausibility, it was conjectured, but only conjectured, were meant to represent certain peaks in nature well known, more to the east or west than by reference to other objects on the draft they in nature hold.

ABOUT fifteen miles south from the southern end of the Bay of San Francisco, and separated from it by irregular mountain slopes, lies a vale, called the *Cañada de los Capitancillos*, or Valley of the Little Captains.* The northern limit of this valley is an elevation called the Pueblo Hills; hills picturesque enough; with nothing else, however, as yet, specially to mark them. Descending or turning these, the traveller is *in* the vale.

Along the *south* edge of the valley runs a ridge of hills, range of mountains, or *Sierra;* for by each of these terms, as by several others, the elevation might properly *or* improperly be named. A value different from that of the Pueblo Ridge belongs to these. These are filled with cinnabar of unrivalled purity and richness. Here is the ALMADEN MINE; a mine, that with others near it, the Guadalupe, San Antonio, &c., is estimated at $20,000,000,—the gem of quicksilver mines in the New World, perhaps of the entire earth. This range we call the *Mining* Range, or *Mining* Ridge. The opposite map may assist a comprehension.†

Immediately south of, or behind this Mining Range, and detached from it, for the most part, by a steep, narrow,

* According to Mexican traditions, the valley was occupied in early days by two Indians of very diminutive stature, whose bravery, however, was so noted that each was the chief of his tribe. The name of "Little Captains," came from them.

† The reader must be particular to note, that both on this map and on the two more rough topographical sketches given in the case, the ordinary rule of position in regard to maps is reversed. The top of the map as the reader looks at it, or in the cases of the diseños at pp. 654, 656, as he turns the book round to read what is on them, is the south; the bottom north; the right the west, and the left the east. The two rough Mexican diseños were thus originally made; and conforming other maps to them has been found more convenient than to adopt the more usual method. The compass on the sketch at p. 654, shows the thing.

broken, and irregular depression, gorge, or valley, rises a ridge, range, or *Sierra*, different, as it was generally regarded,

SOUTH.

NORTH.

from the other, though by some persons regarded as the main part of the same range. This elevation we designate as the *Azul* Range, or *Azul* Ridge.*

* The portion *between* these two ranges, marked on the map "Ridge," must be distinguished both from the Azul and the Mining Ridge or Range. *It*, as stated directly, is a *low, connecting* ridge.

The *northern* limit of the valley we have said is the Pueblo Hills. The top of these is about 1000 feet above the level of San Francisco Bay, and 400 above the lowest part of the valley immediately south of them.

The Mining Ridge at its greatest elevation rises several hundred feet higher than the Pueblo Hills in front of it, across the valley. The Almaden Peak, one peak of this ridge, at its eastern extremity, is 1500 feet above this level; but the elevations of the ridge generally, as they extend towards the west, diminish in height, and are broken by various depressions, which permit easy access from the valley on the north to the foot of the depression or valley at the base of the Azul Range. The Azul Range, behind, rears *its* head suddenly up, far above the Mining Range before it, to the height of 4000 feet above the level of the sea.

The Mining Range extends from east to west, and parallel with the Azul Range. It runs about five miles. On its slopes, as well on that towards the valley on the north, as on that which makes one side of the ravine upon the south, the best and most permanent grazing of the region is to be found. At its widest place it is more than a mile and a half from base to base, measuring directly through; and it slopes off gradually at both ends. It is connected with the Azul Range by a ridge *four hundred feet* lower than itself, and *twenty-four* hundred lower than the Azul Range. It is a water-shed, on one side of which are the sources of the Capitancillos and on the other those of the Alamitos. The one stream runs between the two ranges, and turns to the north at the western end of the Mining Range. The other flows eastward, and turning the eastern end of the range as the other had done the western, crosses the valley till its course is arrested by the Pueblo Hills. Here, turning its course to run along *their* base, it runs westward till it meets the other stream, and forming with it the Guadalupe River, the two discharge their waters through its channel into San Francisco Bay.

At the place where the Alamitos strikes the Pueblo Hills,

it is joined by a mountain stream called the *Arroyo Seco*,* a point which the reader must observe.

Nearly in the centre of this valley stands a little hill,—*Loma*, as it is called in Spanish,—its side or skirt sloping irregularly by a series of graceful undulations towards the plain; its descending curve thus forming that which it required no great imagination to call a "lap."

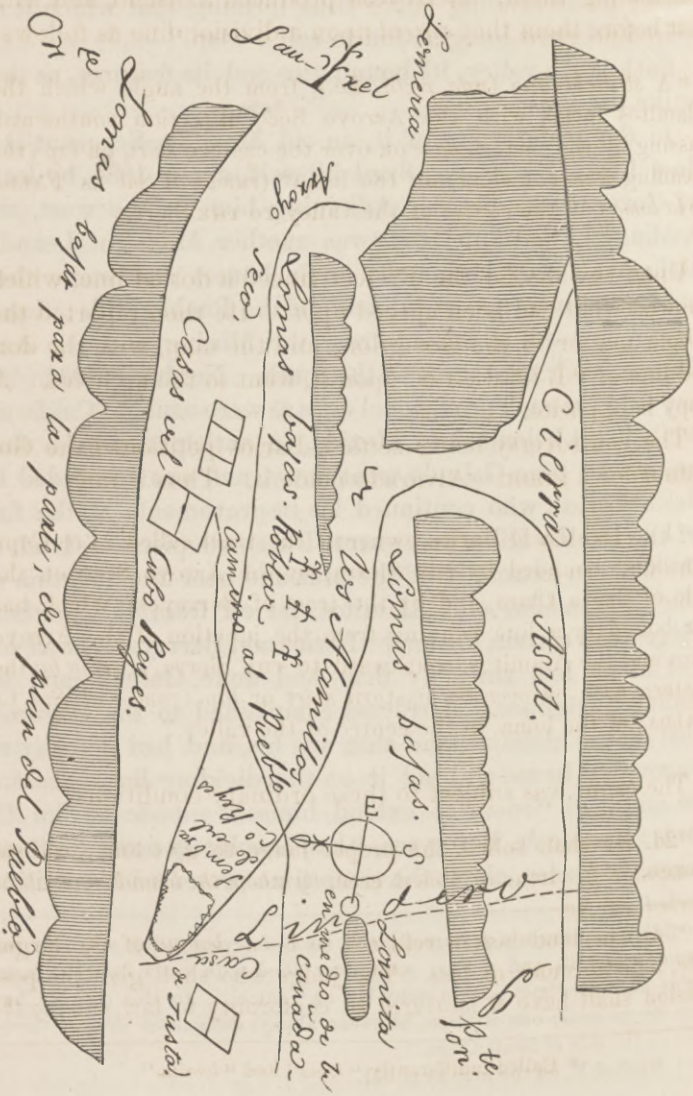
Such is the valley, its boundaries and its features, as they strike the eye.

In the eastern part of it, an old Mexican, Sergeant Don José Reyes Berreyesa, fixed himself, about 1834, by leave of Governor Figueroa. Adjoining him on the west, and holding the western part, was another Mexican, Leandro Galindo. They both built their houses and made their chief improvements at the base of the Pueblo Hills; that is to say, opposite and away from the Mining and the Azul Ranges, their exposures to the south. Neither of them had any title but such provisional ones as were usual in California while it yet belonged to Mexico, in anticipation of a final grant. In time Galindo went away, and was succeeded by Justo Larios, who continued his improvements at the foot of the Pueblo Hills, and granted a small piece of land, at the western extremity of the hills and near the junction of the Capitancillos and Alamitos, far off from the southern ridges, to a certain Foster.† Larios and Berreyesa, however, got along less amicably than had done Galindo and his military neighbor. Berreyesa complained to the Governor that Larios claimed land that was his, and had actually removed his house and set it on the dividing line. Larios, he said, had "room to extend himself outside of the *Cañada;*" while *he*, Berreyesa, "had absolutely nowhere to enlarge." Larios, about the same time presented *his* petition,

* The meaning is a dry creek; this sort of *arroyo* being common in a country of hills and plains; sometimes filled with water from the mountains, and sometimes a mere stony bed or "gulch." In this case we have two *arroyo secos;* one of them, however, always designated as the "*arroyo seco* on the side of Santa Clara."

† Marked F. on the map at p. 651.

complaining of Berreyesa as overbearing, and disposed to be rapacious. The matter disturbed the happy valley, and threatened to become a feud. Governor Alvarado referred



both petitions to the Prefect, the highest judicial officer in his department, and directed him to call the parties before him, to confront them with one another, hear their proofs, and to report the result of his investigation. The Prefect did this. The parties came before him, and he succeeded in conciliating them. Berreyesa produced a diseño, and with that before them they *agreed* upon a division-line as follows:

"A *straight* line (*una recta*, &c.), from the angle which the Alamitos forms with the Arroyo Seco, direction southward, passing by the eastern *base* OR over the eastern *skirt*, OR *lap* (the meaning was not clear), of the loma* (*rumbo al Sul* LA FALDA *de la loma*), in the centre of the valley TO THE Sierra."

Upon this diseño the Prefect traced a dotted line, which showed what had been agreed upon. He then reported the whole matter to the Governor; and the map, with the dotted line or "L-i-n-d-e-r-o" upon it, went to the archives. A copy is opposite.

The controversy being settled, Larios petitioned the Governor for a grant. Alvarado made it. Thus it ran:

"I declare Justo Larios owner of the tract called 'Los Capitancillos,' bounded by THE Sierra, by the Arroyo Seco on the side of Santa Clara, and by the tract of Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and the Alamitos, southward to THE Sierra, *passing by* the eastern *base*, OR *over the* eastern *skirt* or *lap* (*rumbo al Sul* LA FALDA) of the loma, in the centre of the valley."

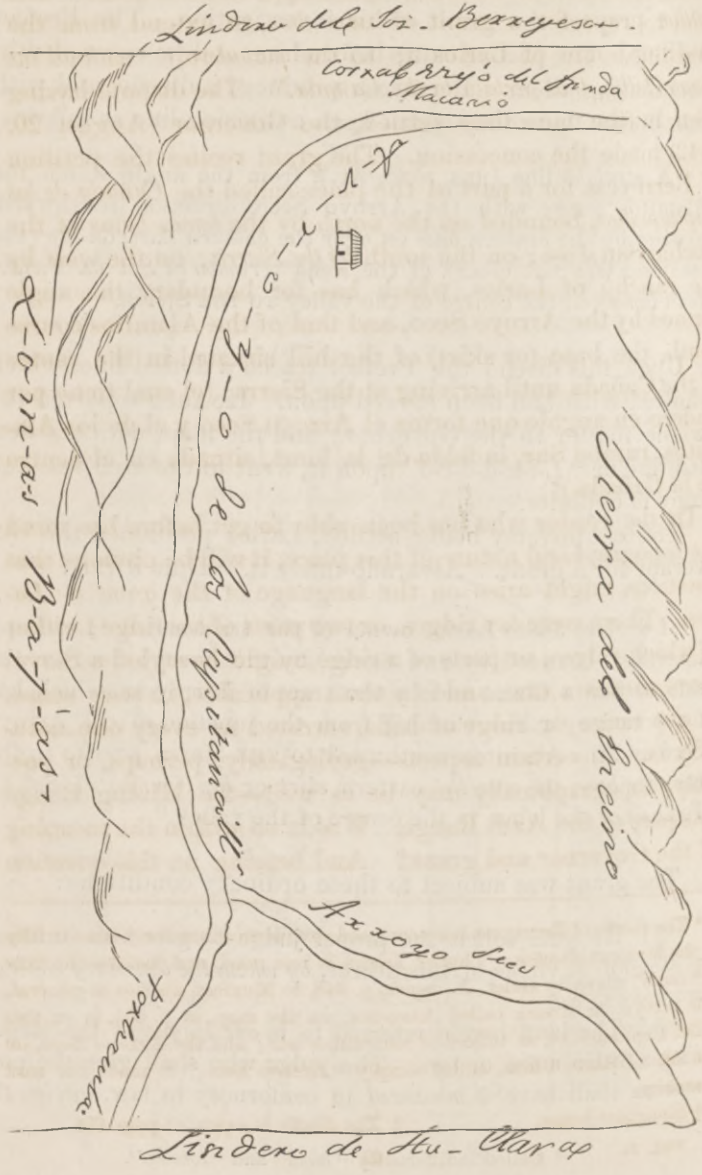
The grant was subject to these ordinary conditions:

"2d. He shall solicit the proper judge to give him juridical possession in virtue of this decree, *by whom the boundary shall be marked out*, &c.

"3d. The land herein referred to is *one league* of the larger size, a little more or less. The judge who shall give the possession shall have *it measured* in conformity to law, *leaving the*

* Called indifferently "*loma*" and "*lomita.*"

surplus which remains to the nation for the purposes which may best suit him."



Statement of the case.

The diseño submitted by Larios appears on the page opposite.*

About this same time Berreyesa applied for a grant. His *petition* prays for a grant of two *sitos*, to extend from the dwelling-house of Larios up to the *matadero*,† "*with all the lomas (hills), that pertain to the Cañada.*" The dispute having been in the meantime settled, the Governor (August 20, 1842) made the concession. The grant recites the petition of Berreyesa for a part of the place called the *Cañada de los Capitancillos*, bounded on the north by the *lomas bajas* of the Pueblo San José; on the south *by the Sierra;* on the west by the rancho of Larios, which has for boundary the angle formed by the Arroyo Seco, and that of the Alamitos course south, the base (or skirt) of the hill situated in the centre of the Cañada until arriving at the Sierra: (el cual tiene por lindero en angulo que forma el Arroyo Seco y el de los Alamitos, rumbo Sur, la falda de la loma, situada en el centro de la Cañada.)‡

To the reader who has been able to get before his mind the topographical nature of this place, it will be obvious that questions might arise on the language of the *grant to Larios.* There were *two* ridges, or two parts of *one* ridge; either of which ridges, or parts of a ridge, might be styled a *Sierra. Sierra* means a saw, and is a term applicable, in *some* sense, to any range or ridge of hills, serrated as every one naturally is. In certain aspects—geologically, perhaps, or possibly, topographically may be as well—the Mining Range was part of the Azul Range. Was it so within the meaning of the Governor and grant? And bearing on this question

* The diseño of Berreyesa is a very good one; better than forty-nine in fifty of the Mexican diseños. That of Larios is less good, and justifies the title of "daub" given by Grier, J., *supra*, p. 448, to Mexican diseños in general. The arroyo, or stream called Alamitos, on the map, at p. 651, is on this called Capitancillos, as indeed it sometimes was; and the Arroyo Seco, on the side of Santa Clara, called simply "Arroyo Seco," is made the west boundary.

† Slaughter-house.

‡ The diseño is *supra*, at page 654.

of philology would come perhaps another like it: "What meant in law the word *Cañada?*" Los Capitancillos was a cañada. But did this mean a valley so pure and simple that no elevation whatever could break its plain? or might it hold the Mining Ridge and let the *vaster* Azul Heights overtop the whole, and leave both plain and mine to insignificance below? These were questions which the United States might have to litigate against Berreyesa and Larios both united.

Then assuming the Mining Ridge to be part of the valley, and the United States to be thus disposed of, there might come another question—a question for Larios and Berreyesa, after disposing of the Government, to litigate between themselves. What did *falda* truly mean? It was a term the very favorite of poetry; and with a sense elegantly answered—answered with truth as well—by our English "lap," or "skirt," or "fold." Was this the sense in which the old Mexican soldier and his lately litigious neighbor understood it, when making peace for themselves, they made one of the greatest lawsuits which the world has seen for others?

Even conceding *falda* to mean the base of the hill, and that the parties had meant to pass *it*, another question might still arise upon the very *lindero* and map which at first seemed so plain as to render question impossible. The line was to pass the base; but did the *diseño* of Berreyesa, on which it was traced, not show that it also meant to pass the Mining Ridge (on this map plainly marked, and bearing the name of *lomas bajas*), so as to leave much its greater part with *him*. In nature could any line drawn from the junction of the creeks south, past the base, do this? Then on his diseño certain elevations were marked, both on the Mining Ridge and on the Azul Ridge behind. One on the Mining Ridge was especially prominent at its eastern end. Were there any known peaks, in nature, on these ridges? If so, could any line drawn as we have mentioned be made and leave them in that relative position where the diseño seemed to place them? The difficulty may be comprehended by any

reader who compares the map at p. 651, a map of the actual related topography, with the diseño of Berreyesa, which gives the parts, but in positions less relatively true.

On these niceties of language—on such constructions of rude drafts—depended, in part, the question, whether this Mine of the Almaden—the glory of the *Cuchilla de la Mina*, or *Cuchilla de la Mina de Luis Chabolla*—should belong to a few citizens or to a whole republic; to the representatives of Justo Larios, to those of "the sergeant Berreyesa," or to the United States as national domain.

The grant was of the valley. The point of departure was confessedly the junction of the creeks Alamitos and Arroyo Seco. A line running "southward" "to the Sierra" *Azul*, ended the rights of the United States in the matter. A line running "southward" at the *base* of the loma, as distinguished from one which should be sustained in its curving folds, ended Berreyesa's also. If, therefore, the line was to be run *to* the Sierra Azul, and *at* the base of the loma, south and straight from the union of the creeks, the mine belonged to Larios, or to whoever might be his fortunate successor.

The questions were worth a controversy.

By 1852, California was a State of the American Union, and three-quarters of the property granted to Larios had become vested in one Fossat; the remaining fourth (which was in the direction of the mission property of Santa Clara, and at the extreme west of the valley) being owned by the Guadalupe Mining Company.* Fossat now presented his petition to the land commissioners appointed by the act of Congress of March 3, 1851, to settle the respective rights of the United States and claimants under the former Government to lands in California, for a confirmation of his claims derived from Larios. The board decided in favor of it, and the United States appealed to the District Court; Berreyesa, however, being no party to the specific proceedings.

* The quarter of a league conveyed to the company, is indicated on the map at page 651, in shade.

That court, saying nothing whatever in its *opinion* on the question of *where* the line meant to be fixed on by Larios and Berreyesa would strike the Azul Range (if prolonged to that extent) as respected the Almaden Mine, and as respected the now known and actual topography, went into an argument to show that it must at least come somewhere *to* that range, and over the Mining Range; in other words, that the west portion of the Mining Range, whatever that portion might be, did not belong to the United States.

The court accordingly decided that the grant was good for the place known as *Los Capitancillos*, bounded and described on the south by the Azul Range, as distinguished from the lower hills or Mining Ridge; on the west (about which there was no question) by Arroyo Seco on the side of Santa Clara. The *decree*, then, went thus as respected the eastern line:

"On the east by a line running from the junction of a certain other rivulet, called *Arroyo Seco*, and the *Arroyo de los Alamitos*, southward to the aforesaid main Sierra, passing by the point or part of the small hill situated in the centre of the Cañada, which is designated in the expedientes and grants of Justo Larios and José Reyes Berreyesa as '*la falda de la loma*,' and crossing the range of hills designated above as the *Cuchilla de la Mina*, or *Cuchilla de la Mina de Luis Chabolla*, and in which are situated the said Guadalupe, San Antonio, and New Almaden Mines, and which is the same range of hills designated '*Lomas Bajas*' on the diseño or map in the aforesaid expediente of José Reyes Berreyesa, the said eastern line herein described being intended to be the same line agreed upon as the line of division between the lands of Justo Larios and José Reyes Berreyesa, as expressed in the respective expedientes and grants of said Justo Larios and José Reyes Berreyesa, and delineated by the dotted line on the said diseño or map in the expediente of José Reyes Berreyesa; in the location of the said line reference to be made to the description thereof in the said expedientes and grants, and the delineation thereof on the said diseño or map in the expediente of José Reyes Berreyesa, which expedientes, grants, and diseño, or map, are on file and in evidence in this case."

The northern boundary of the tract was declared to be that shown in the diseño or map of Larios; which was in effect the stream, marked on his draft as the Arroyo Capitancillos, but on the map styled the Alamitos.

Confirmation was thus made of the *whole* tract granted to Larios, with the exception of the two adjacent parcels thereof lying on the westerly end of said tract, and claimed by the Guadalupe Mining Company. This gave him a tract of about a league and three quarters.

The court in its opinion noted, indeed, that only *three* of the boundaries were designated in the grant, the southern, the western, and the eastern; but inclined to think that the description of the tract by name, as *Los Capitancillos*, a known valley, and the delineation on the diseño of Larios of the two ranges of hills within which it was contained, sufficiently indicated the location of the northern boundary, the mention of which was omitted in the grant; especially as the call was for a league *pocos mas o minas*,—a league more or less.

From this decree the United States appealed to this court.* This court considered that there was more weight in the last point which the court had noted than the court itself gave to it, and reversed that decree; Campbell, J., who gave the opinion, remarking in different parts of it as follows:

"The District Court confirmed the claim of the appellee to land limited by specific boundaries, and ascertained those boundaries, as they exist on the land, with precision. Under this decree the grant to Larios includes *seven thousand five hundred and eighty-eight* $\frac{90}{100}$ *acres*.†

"We concur in the opinion of the Board of Commissioners and of the District Court, that affirms the validity of the grant of the Governor of California to Justo Larios, and the regularity of the conveyances through which the claimant deduces his title."

The court here gave an account of the dispute between Larios and Berreyesa, and of the settlement of it, and went on:

"The Governor granted the land to Larios, to be his property,

* 20 Howard, 413. † About a league and three quarters.—REP.

subject to the approval of the Departmental Assembly, and *to the performance of conditions.**

"The *southern*, *western*, and *eastern* boundaries of the land granted to Larios are *well* defined, and the objects exist by which those limits can be ascertained. There is *no call* in the grant for a *northern* boundary, nor is there any reference to the diseño for any natural object or other descriptive call to ascertain *it*. The grant itself furnishes no other criterion for determining that boundary than *the limitation of the quantity*, as is expressed in the third condition. *This is a controlling condition in the grant.* The delivery of juridical possession, an essential ceremony to perfect the title in the land system of Mexico, was to be accommodated to it. The diseño presented by the donee to the Governor to inform him of his wants represents the quantity to be *one* league, a little more or less. This representation is assumed to be true by the Governor, and *it forms the basis* on which his consent to the petition is yielded.

"He prescribes to the officer to whom he confided the duty of completing the title to measure a specified quantity, leaving the surplus that remains to the nation as preparatory to the delivery of judicial possession to the grantee. The obligation of the United States to this grantee will be fulfilled by the performance of the executive acts which are devolved in the grant on the local authority, and which are declared in the two conditions before cited. We regard these conditions to contain a description of the thing granted, and in connection with the other calls of the grant they enable us to define it. *We reject* the words, 'a little more or less,' *as having no meaning* in a system of location and survey like that of the United States, and that the claim of the grantee is valid for the quantity clearly expressed *If the limitation of the quantity had not been so explicitly declared*, it might have been proper to refer to the petition and the diseño, or to have inquired if the name, Capitancillos, had any significance as connected with the limits of the tract, in order to give effect to the grant. *But there is no necessity for additional inquiries. The grant is not affected with any ambiguity.* The intention of the Government of California is distinctly declared, and there is no rule of law to authorize us to depart from the grant to obtain evidence to contradict, vary, or limit its import.

* Given on page 655.

Statement of the case.

"The grant to Larios is for *one* league of land, to be taken *within the southern, western, and eastern boundaries* designated therein, and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California, by the executive department of this government. The external boundaries designated in the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.

"The decree of the District Court is reversed, and the cause is remanded to that court with directions to *enter a decree conforming to this opinion.*"

The case was again heard below, and on new evidence, tending, most of it, to the subject of the southern boundary. On the 18th of October, 1858, the District Court again gave an opinion, and again made a decree. The opinion was a further argument on the evidence, new and old alike, to show that the Azul Range was the true south boundary,—"the most important, if not the only point discussed," the court says, "on the hearing," and which the court treat as "the question to be determined." Nothing is argued about the eastern boundary. The decree again decreed that the grant was a valid one. Its southern and western boundaries were in substance as already above set forth. The eastern boundary was thus again disposed of.

"The eastern boundary is a straight line commencing at the junction of a certain rivulet, called Arroyo Seco, with the Arroyo de los Alamitos, and thence running southward to the aforesaid main sierra or mountain range, passing by the point or part of the small hill situated in the centre of the Cañada, which is designated in the expedientes and grants of Justo Larios and José Reyes Berreyesa as '*la falda de la loma,*' and crossing the range of hills designated above as the '*Cuchilla de la Mina,*' or '*Cuchilla de la Mina de Luis Chabolla,*' in which are situated the said Guadalupe and New Almaden mines, and which is the same range of hills designated '*Lomas Bajas,*' on the *diseño* or map in the *expediente* of José Reyes Berreyesa on

file in the case, the said eastern line crossing, also, the said Arroyo de los Alamitos and terminating at the base of said main sierra; and the said eastern line herein described, being intended to be the same line agreed upon as the line of division between the lands of Justo Larios and José Reyes Berreyesa, as expressed in the respective expedientes and grants of said Justo Larios and José Reyes Berreyesa, and delineated by the dotted line on the said diseño or map in the expediente of José Reyes Berreyesa; and in the location of said line, reference is to be made to the description thereof in the said expedientes and grants and the delineation thereof on the said diseño or map in the expediente of José Reyes Berreyesa, which expedientes, grants, and diseño or map, are on file and in evidence in this case."

It was ordered that the fourth line should be run so as to include one league only; and the title was confirmed on that basis.

The United States *again* appealed to the Supreme Court;* but a motion was made to dismiss the appeal because the decree below was interlocutory. The court did dismiss the appeal, and in the opinion say as follows:

"The court determined (when the case was here before), 'that a grant under which the plaintiff claimed land in California, was valid for one league, to be taken within the southern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the Government. The external boundaries of the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it; and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.'

"This motion to dismiss the present appeal is resisted, because the inquiries and decrees of the Board of Commissioners for the settlement of Private Land Claims in California, by the Act of 3d of March, 1851, in the first instance, and of the courts of the United States, on appeal, relate only to the question of

* 21 Howard, 445.

the validity of the claim, and by validity is meant its authenticity, legality, and in some cases interpretation, but does not include any question of location, extent, or boundary,—and that the District Court has gone to the full limit of its jurisdiction in the decree under consideration, if it has not already exceeded it."

The court then examining this matter and declaring what the admitted duties of the District Court were, adds:

"But in addition to these questions upon the vitality of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee."

And this court concludes its opinion thus:

"But, after the authenticity of the grant is ascertained in this court, and a reference has been made to the District Court, to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice. It is the opinion of the court that this appeal was improvidently taken and allowed, and must be dismissed; and that the District Court proceed to ascertain the external lines of the land confirmed to the appellee, and enter a final decree of confirmation of that land."

On the filing of this mandate of dismissal, the Surveyor-General of California was ordered to survey the land confirmed in conformity with the decision of the District Court, made 18th October. He made the survey, which was approved by the Surveyor-General, 18th December, 1860, and

filed it, with a map, in the court below, 22d January, 1861. The survey and map, as was testified by the deputy surveyor Hays, and one Conway, a clerk in his office, who assisted in making it, was made in conformity with the decree which they had before them. That survey is indicated on the map, at page 651, by a heavy connected line.

It appeared, also, that Berreyesa had at one time caused a private survey to be made of his tract, and this survey showed that the line lay essentially as marked by this heavy connected line. Another made for the Guadalupe Mining Company located it in the same way. A public survey, made by Surveyor-General Hays, in 1855, located it also thus.

Not long before the above-mentioned order of the District Court was made, Congress passed the act of June 14, 1860,* commonly called the "Survey Act," which authorizes the District Court to allow persons *not parties to the record* to intervene in matters of the survey and location of confirmed private land claims, and to show the true location of the claim. For that purpose they may produce evidence before the court, and on such proof and allegations the court shall render judgment. In regard to appeals, the whole language is simply, "And no appeal shall be allowed from the order or decree as aforesaid of the District Court, unless applied for within six months."

The survey was accordingly ordered into court. It made the Azul Range, as distinguished from the Mining Range, the southern boundary. The *eastern* line was drawn, as the reporter supposes,—for he never saw the plat,—from the junction of the two creeks Seco and Alamitos south, past the *base* of the loma; so leaving the mine on the land of Larios.

Berreyesa, Foster, and others, who had not been parties to any of the immediate previous proceedings, now excepted to it.

Berreyesa excepted because the western boundary of *his* land constituted the eastern of that of Larios, "to wit, a line beginning at the junction of the creeks Alamitos and Seco,

* 12 Stat. at Large, 33.

and running southerly to the main Sierra and Sierra Azul, crossing the *Lomas Bajas in the manner shown by the diseño* of the land granted to said Berreyesa; whereas the survey confirmed in this case locates the eastern line so as to include a tract of land within the exterior lines of the land granted to Berreyesa, and not granted to the said Larios."

Foster excepted because the tract being carried over far to the south, and being confined to *one* league, his small tract was left out. So, on similar grounds, did other parties who subsequently abandoned their exceptions.

The United States, by the District Attorney, entered a formal appearance, but made no objection to the survey at any stage of the hearing, suggested no argument, and offered no evidence against it.

Fossat, who represented Larios, came in to protect the survey, averring that it was right, and should stand.

The District Court,—considering that no decision had ever yet been made by it as to the *eastern* boundary; not understanding, apparently, that any supposed decision with regard to that line had been passed on by the Supreme Court in either of the decisions quoted in the preceding part of this statement; conceiving further, it would seem, that under the new act of 1860 (the "Survey Act," passed *after* the second decision in this court was made), the court below might, on the intervention of Berreyesa, then for the first time heard in this particular cause, determine the eastern line, irrespective of any decree obtained by either party in a proceeding which it considered as a proceeding between himself only and the United States,—proceeded to settle the eastern line; and in some degree, it was argued, to treat all things *de novo*. A great deal of new evidence was taken in regard to this eastern line; evidence bearing also on the southern line. The scope of much of the former was to show entire error of scale in Berreyesa's diseño, and that regulating the eastern line by certain objects, clearly enough indicated on this diseño, *other than the loma*, the line could not be drawn south from the junction of the creeks past the loma to the point where that diseño showed that it meant to

come. The matter will be understood better further on in the case. The result of the whole was that, affirming the Mining Range as the south boundary; that is to say, carrying the tract to the Azul Range, as being the true Sierra, the District Court now made an east line, somewhat such as is exhibited by the light dotted line on the map at p. 651. The line began at the junction of the two creeks, thence ran south to the eastern base of the loma; thence south 55° west to a point where another angle was made; thence south 34° west to the Azul Range. The effect was, that while Larios or his representative got *some* part of the Mining Ridge, the eastern line was made to reach that ridge at a point so far west that the ALMADEN MINE, the great object of contest, and the largest portion of the ridge, fell into the tract of Berreyesa.

From this decree the claimants under Larios appealed to this court. So did Foster. *The United States took no appeal*, and the representatives of Berreyesa, of course, were desirous to maintain the decree.

The whole case was now before this court,—the case as it was presented by all the evidence taken in all the proceedings below. This was the case viewed as an original case.

But on this occasion it was here also, of course, as it might be affected by what had been decided in it on the two different occasions when it was here before on appeal, and when the court had expressed itself, and had given mandates, such as have been previously stated in this report. The effect of the District Court's *own* two decisions on its power to decide further was also to be considered; its power, perhaps, under the Survey Law of 1860, to change the decree of confirmation.

As an original case,—the detached parts in which it presented itself below, and on the three different hearings being brought together, and all presented in sequence,—the matter was essentially thus: the *diseños* of both Larios and Berreyesa, the last with the *L-i-n-d-e-r-o* upon it, being, of course, parts of the case everywhere.

1. *As to the southern boundary:* Witnesses were brought to

show that the ranges were one sierra, and so that the tract did not include any part of the Mining Ridge. Mr. Veach, a geologist, swore thus:

"The Mining Ridge is detached from the main mountain by a stream that runs from east to west, making a sharp hill between the higher mountain and the plain; but *I* look upon this as only a bench-like portion of the mountain, which has been separated from it by the gorge cut down by the stream. The reason why I so consider it is the *gorge*-like character of the valley of the little stream, and the sharpness of the ridge, and the elevation of the bottom of the gorge so considerably above the level of the valley; it is, I should judge, 300 feet above it. From *geological* considerations, also, *I* should consider this ridge clearly and distinctly a portion of the mountain. The ridge does not present the spur-like character which would show its detachment from the mountain, for it runs parallel with the general course of the latter."

Mr. Matheson, engaged in the public surveys of the United States, testified in the same way:

"I do not consider that there is a main sierra separate from any other portion of the sierra. The Mine Ridge is merely a spur, and connected by a ridge with the main sierra. You can travel from the valley *right up* to the highest point of the ridge."

Referring to the diseño of Larios (p. 656), it will be noted that his tract, as there indicated, came *to* a range of hills called *Sierra del Encino* ("range of *the* live-oak," or, less accurately, perhaps, in a grammatical point of view, "live-oak range.")*

Oaks, it was shown, grew everywhere about here. "There are a considerable number of them," said one witness, "on the mountains back of the Mine Ridge, and also on the plains north of it. *There are also a considerable number of them found generally on the northern slope of the ridge*, and presenting a very beautiful green appearance."

* The plural would be *Sierra de los Encinos.*

Then there was on this diseño but one sierra indicated. The tract did not include it by passing over to any other behind it. No second range was marked. No streams of any kind answering to any in nature ran on this diseño at the foot of the range, though streams did, in fact, run at the foot of the Azul Range. At the foot of the Pueblo Hills, where a stream ran, in fact, one ran also on the diseño.

Moreover, the residence of Larios—that in which he had succeeded Galindo—was, like the home of Berreyesa, on the *north* edge of the tract, at the foot of the Pueblo Hills.* Larios was living in this part of the valley. No tract of *one* league, not very irregular in shape, could include the Mining Ridge without excluding nearly all the land along the base of the Pueblo Hills. The maps, moreover, reversed the ordinary law which governs the construction of maps, and make the top represent the south, the bottom the north, the right the west, and the left the east; hence, an inference that the point from which everything was viewed was the north edge of the valley. An experiment showed, also, that the diseños of Berreyesa and of Larios were much the same in size; and taking the two, and putting them edge to edge in the manner of "Indentures,"—fitting the edge which indicated the western side of Berreyesa's tract against that which indicated the eastern side of that of Larios, the Pueblo Hills, as marked on each, being fitted and made the starting-point,—that the *Sierra del Encino* of the draft of Larios ranged itself opposite to the *Lomas Bajas* (the Mining Ridge, undoubtedly) of Berreyesa's, and not against the *Sierra Azul*, so plainly, on the draft of Berreyesa, distinguished from it.†

On the other hand, witnesses showed that, in many re-

* On Berreyesa's diseño, as the reader will see, these hills marked as "Lomas Bajas, para la parte del plan del Pueblo." On that of Larios they are styled simply "L-o-m-a-s B-a-j-a-s."

† From the necessity of getting the whole of both diseños *in* the page, and so of making the scale of Berreyesa small enough to let in the "Cierra Azul," this thing is not so well shown by the two diseños given to the reader. The scale of Berreyesa's is the smaller.

spects, the two ridges might be considered different, and by many were so; that the separation, if sometimes called a gorge or ravine, was as often, or oftener, called a valley. Then one witness, an American, who had lived since about 1835 in California, and near the place, testified that the Mining Ridge had been known by the name of *Cuchilla de la Mina*, and as a thing separate from the Azul Range, often known by the name of *Sierra Santa Cruz*, the former being *connected* with the latter only by a ridge at one place. It was shown also, too, that Larios was quite illiterate, "unable to handle a pen," and that his diseño had been made for him by a friend of his named Rios, from oral description given him at Monterey, away from the land, Rios himself never having been on the land, nor knowing anything about it. He had not, however, drawn that of Berreyesa. The testimony—that of photography included—showed, moreover, and this past any question, that while the elevations hereabouts, and the plain, also, were fruitful in oaks, there was upon the Azul Range one umbrageous oak of venerable years and extraordinary size, standing on a spur of the mountain, projecting boldly from the mass of the range, and presenting so clear an outline to an observer in certain directions as to be visible for fifteen miles; a prominent feature in the landscape. It was testified, in fact, to be so well known to the people of the neighborhood as to have acquired the name of "*Encino Coposo de la Sierra Azul.*" Further, on the diseño of Berreyesa the Mining Ridge was styled *Lomas Bajas*, which means "Low Hills;" and the term Sierra was given to the Azul Range,—"Cierra Azul." Hence, ground for an inference that the term "Sierra," in the parlance of that place and time, had become appropriated to the Azul Range, and that "Lomas Bajas," or Low Hills, was the common title of the Mining Range.

The *L-i-n-d-e-r-o*, it will be observed, crosses the Mining Ridge, and goes to the Azul Mountains, here designated Sierra Azul.

2. *Then as to the eastern boundary.* In favor of the claim

of Larios, there of course was the *L-i-n-d-e-r-o* and its history.

On the other hand, and in favor of Berreyesa and of the line as settled by the decree below, the testimony of Mr. W. J. Lewis, an acute-minded and well-educated surveyor, went to prove that the compass on the diseño of Berreyesa was erroneous to the extent of 45°, the north point being represented that much to the eastward; that the actual position of the loma was much more to the east, and near to the junction of the *Alamitos* and *Seco* than that diseño indicates; that standing at the junction of the creek, and looking south, the range of the Azul did present one peak at the west, Mount Umunhum, higher than any near it; and one peak at the east, Mount Bache, much higher than any near *it*, and higher even than Mount Umunhum.* Two elevations, answering or not answering this character, are presented, it will be seen, on the diseño of Berreyesa. So in nature at the Mine, which is near the eastern end of the Mining Ridge, there is a peak known as the Mine Peak, and from that peak there is a continuous descent to the Alamitos Creek. On the diseño of Berreyesa, at the eastern edge of the *Lomas Bajas*, or Low Hills (meant confessedly to represent the Mining Ridge, in some part, or to some extent), there was or was not, at its east end, such an elevation and descent. Then it was shown by Mr. Lewis—who had spent months here, and made surveys and observations of every natural feature of the region—that while indicating different objects very well, the diseño was drawn without any reference to scale whatever; relative position being wholly misrepresented. The house of Larios, for example, which was in fact thirty feet wide, was made to cover a fifth of the width of the valley, there a mile wide.

Mr. Lewis, accordingly, thought that he could see in the diseño an intent to represent the three peaks, especially the

* Mount Umunhum is 3440 feet above the sea; Mount Bache, 3780 feet, or 350 feet more. The position of Mount Bache is not, from want of space, accurately indicated on the map at p. 651. It is sufficiently so, however, to explain things. In nature it stood more to the east and south.

two former.* *Assuming this to be so*, and comparing the diseño with nature, there would be a great error. In nature, less than one mile in length lay eastward of the division based on the L-i-n-d-e-r-o, and over four and a half miles lay to the westward; whereas, the part of the ridge represented on Berreyesa's diseño as lying to the westward of the line, would be but five-sixths of a mile, and all the rest was east, on Berreyesa's own land. Hence, the loma, or lomita, not being shown in a position true to scale, an inference that Mount Umunhum—an unmistakable object, and the Mining Peak another—should govern the location in preference to the lomita, nearer the starting-point and less definite, *as this surveyor conceived.* The difficulty was that, by the terms of the grant, the line was to be drawn at the *falda de la loma*, which the interests of Larios interpreted "base of the hill." If the line could *cross* the hill, going over its "skirt" or "lap" *to a perfectly ascertained point* at the other side of the valley, a decree fixing the eastern line as Lewis fixed it could be supported. The case as to the meaning of *falda* was thus: one witness being Mr. Hopkins, "keeper of the Spanish archives in the office of the Surveyor of the United States for California, well acquainted with the Spanish language, and in the habit of translating documents;" who had in fact made one translation of this grant.

Q. You have translated the word "*falda*" by the word "skirt;" have you considered well the exact definition of the word "*falda*," and is it exactly expressed by the word used in your translation?

A. I have carefully examined the definition of the word "*falda*," as laid down in the standard lexicons of the Spanish tongue. I have examined the word as used by ancient and modern writers of the Spanish language, and I can think of no word in the English language which more clearly or legitimately

* Mount Bache, as Mr. Lewis supposed, was meant to be designated by the elevation over the letter C in "Cierra;" Mount Umunhum being at the right of the same ridge, and the Mine Peak being over the letter L in "Lomas Bajas."

expresses the meaning than the word "skirt." I arrive at this conclusion from the definitions that I find given to the word in the Spanish lexicons, and from its use by celebrated Spanish writers.

Q. In the sense in which you use the word "skirt," to what part of a hill or *loma* is it to be applied?

A. It is to be applied to the lower or inferior part of the hill or *loma*.

Q. Have you made any translation of the definition of the word "*falda*" given in any lexicon? if yea, please produce that translation.

A. I have made a translation of the definition of the word "*falda*," as laid down in the Royal Dictionary of the Spanish Academy, dedicated to Don Felipe V, and printed at Madrid in the year 1732. Here it is:

"*Falda*. That part of the long dress from the waist down, as the skirt or blouse of women.

"'Queen Mary promptly dismounted, and, raising the edges of her skirt (*falda*) and the sleeves of her dress, drew a hunting-knife from her belt, and with her own hands opened the stag.

"'The great queen was riding on a small ass, with the boy-god (nino dios) in her lap (*falda*).'

"*Falda*. It is very commonly applied to that which drags from the after-part of a dress worn either by a person holding high office, or as a symbol of sorrow by mourners accompanying a funeral.

"'He carried the train (*falda*) of Mary, Queen of Scots, the bride of the Dauphin Francis.'

"*Falda*. By allusion, or metaphorically, is called that part of the hill or mountain which falls or descends from the middle down. LAT. *Montis Radix*.

"'They reached the skirt (*falda*) of a small hill. Naim was a small city situated on the skirt (*falda*) of Mount Hermon.'

"*Perrillo de falda* (lap dog). The small pet dog, so called because women are so much attached to them that they usually keep them in their laps (*faldas*) that they may not hurt themselves.

"'I wager that you do not know why Apelles painted Ceres, the goddess of corn, with a lap dog (*perrillo de faldas*).'"

Q. Please give such examples of the use of the word "*falda*" by Spanish writers as occur to you, and give the translation into English of those passages in which the word is used.

Statement of the case.

A. The following I found some years ago:

The first is from Martin, a Spanish poet.

"Iba congiéndo flores
Y quardándo en la *falda*
Mi ninfa para hacér úna Guirnalda," &c.

The translation of which is:

"My love was gathering flowers, and keeping them in her lap (*falda*) to make a garden."

The second is from Jose de Cadalso, a celebrated Spanish scholar and poet:

"Con pécho humilde y reverente paso
Llegue á la sacra *falda* del Parnaso;
Y como en sueños vi que llamaban
Desde la sacra cumbre, y me alentaban
Ovidio y Taso, a cuyo docto influjo
Mi numen estos versos me produjo."

The translation of which is:

"With humble breast and reverent step I reached the sacred *foot* (*falda*) of Parnassus, and, as in dreams, heard calling me from the sacred summit, Ovid and Tasso, who inspired me, and under whose wise influence my muse produced these verses."

The third is a translation made by Juan de Janrequi, I think in the sixteenth century, from an Italian play. The following is an explanation of these four lines: A romantic young shepherd was very much enamored of a beautiful shepherdess, who, perhaps from a spirit of coquetry, treated him with scorn; the young man took the disappointment so much to heart that he madly threw himself from a neighboring precipice; and the lines of the poet are a description given by an old hermit of the condition and place in which he found the young man:

"Yo me estaba junto a mi cueva, que vecina al valle, y casi al pie del gran collado yace, do forma *falda* su ladera enhiesta."

The translation of which is:

"I was at my cave, which lies near the valley and almost at the foot of the great hill where its steep side forms a (*falda*) *skirt*."

The fourth is from Jovellanos, a poet of the eighteenth century:

"De la Siniestra orrilla un bosque ombrio
Hasta la *falda* del vecino monte
Se extiende; tan ameno y delicioso
Que le hubiera jazgado el gentilisimo
Morada de algun dios, ó a los misterios
De las Silvanas Driadas guadado."

The translation of which is:

"From the left shore shady wood extends as far as the *skirt* of the neighboring mountain, so pleasant and delicious that the pagan world might have devoted it as the dwelling of some God, or to the mysteries of the sylvan Dryads."

The fifth is from a geological report made by Antonio del Castillo, one of the professors in the Mining College of Mexico, in relation to the quicksilver mine of Pedernal, and is as follows:

"La loma del Durazo esta unida por la parte del sur a otros de la misma formacion que ella separadas por hondonadas o bajios de corta estension, y limitadas al oriente por el mismo arroyo que pasa por la *falda* norte de la primera."

The translation of which is:

"The hill of Durazo is united on the part of the south to others of the same formation with it, separated by ravines of short extent, and limited on the east by the same arroyo which flows by the northern skirt of the first."

Cross-examination.

Q. Have you any reason for supposing that the Spanish dictionary mentioned by you—the Royal Dictionary of the Spanish Academy, dedicated to Don Felipe V, and printed at Madrid in the year 1732—is the *identical dictionary from which the native Californians obtained their definition* of the word "*falda*," or any other words in use by them?

A. I have no reason for so supposing.

On the other hand, evidence from other poets, other dictionaries, and other prose writers, tended to prove that if *falda* meant skirt, it meant the edge of the skirt, its extremity as well as its higher folds.

In addition to all this evidence on both sides, of geologists, surveyors, scholars, &c., photography and landscape painting both were largely invoked for the cause of justice; and the judges of this court being unable of course to visit the place, three thousand miles away, which the judge below had actually done, sworn representations, the artists' oaths accompanying their work, were laid before this bench. To exhibit these photographs and landscapes as part of the "case,"

is beyond a reporter's art, as attained to up to this day. The list below, if not giving to the reader an idea of the topography as it existed in nature, will give him some idea of the very special features of the case as it was exhibited in this court, and bring excuse to the reporter if, *without* the reader's having them before him, the narrator has failed to present the "case" in its truest and clearest form; and with those impressions from it which, after all, may have influenced the decision. Here they are, photograph and landscape alike,—the landscapes without their colors:

PHOTOGRAPHS.

Exhibit No. 1, Photographic View, taken near the junction of the two creeks, looking westerly.

Exhibit No. 2, Photographic View, taken one-quarter of a mile below the junction, looking southwesterly.

Exhibit No. 3, Photographic View of the eastern hill of the Lomita, taken near the junction of the two creeks.

Exhibit No. 4, Photographic View, showing part of the valley and Pueblo Hills.

Exhibit No. 5, Photographic View, showing continuation of valley and Pueblo Hills, and part of Mine Ridge.

Exhibit No. 6, Photographic View, taken near the hacienda, looking towards the southwest.

Exhibit No. 7, Photographic View, taken near the hacienda, looking towards the northeast.

LANDSCAPES.

Exhibit No. 1, Landscape View, showing Mine Ridge, a portion of the Pueblo Hills, and the valley between, looking towards the east.

Exhibit No. 2, Landscape View, showing Mine Ridge, a portion of the Pueblo Hills, and the valley between, looking to the west.

Exhibit No. 3, Landscape View, taken from the west bank of the Alamitos, south of the hacienda, looking southerly up the gorge through which the Alamitos flows.

Exhibit No. 4, Landscape View, taken from the same point as No. 3, and looking northerly down the gorge through which the Alamitos flows.

Exhibit No. 5, Landscape View, taken from the east bank of the Alamitos, half a mile above the hacienda, looking up the gorge.

Exhibit No. 6, Landscape View, taken from the south bank of the Arroyo Seco, a short distance above the junction of the two creeks, looking southwesterly.

On this long case the following questions, in effect, now came up for discussion:

1. Did any appeal lie from the "Survey Act?"

2. If so, had the United States, who filed no objections to the survey as made by the Surveyor-General, nor took any appeal below, a right to ask here for a reversal or any modification of the decree?

3. After the two decrees of the District Court itself, and the two decisions made in this court, was the matter of this eastern line open below for such action as was taken on it by the District Court the last time?

4. As an original case and on its merits, what and where were the true east and south boundaries of the tract, the west being settled, and the north run for quantity?

Messrs. Bates, A. G., and Wills, special counsel for the United States, who desired to have the decree reversed, or so modified as to make the Pueblo Hills the north boundary, and to place the league *in* the valley wholly.

I. No appeal lies to any court from the District Court when proceeding under the Survey Act. The act, so far as it grants powers and imposes duties on the District Court, has no reference to the judicial functions of the court as a part of the constitutional judicial system of the United States. All these powers and duties might better in law, and vastly better in fact, be imposed upon some officer, executive and ministerial simply. Congress had no power, under the Constitution, to grant an appeal, if it had wished. The evidence is doubtful that it did wish. The only language used forbids, except under conditions, that which it nowhere grants at all. The only language used is that, "no appeal shall be allowed from the order or decree as aforesaid of the said District Court, unless applied for within six months." Appeals come from implication, if they come at all; and in a matter where the whole subject granted is in derogation of regular judicial functions, the incidents of regular functions are not to be inferred.

II. If an appeal does lie—if the case is properly here—the

United States have a right to come and show the errors of the decree, even though no appeal was taken by *them*. They were parties to the cause in the court below; they are parties here; brought here. No appeal is needed, and if any were needed, it could yet be taken.

III. We are not concluded by either of the decisions of this court so largely quoted in the statement. The decision in the first case was, that the grant was not of the valley as a valley, but of one league in the valley; and that as the valley contained nearly two, the whole of it could not pass. The second was a dismissal of an appeal, because made from an interlocutory, and not from a final, decree. The argument on this point, as also on the effect of the first and second decisions of the District Court itself on its third and last, now appealed from by Fossat, representing Larios, will be enlarged upon by the counsel of Berreyesa, or his representatives, who follow us.

IV. As an original case how stands the law on it?

1. *As to the southern boundary.* The case shows that the ridges are one mountain; the two parts connected with each other by a low ridge running transversely across the valley, if you will call it so—depression *we* style it—which separates them. The testimony of Mr. Veatch is full to this point; that of Mr. Matheson also. Then on the diseño of Larios there is but one ridge; no stream is at its base. On the contrary, the Alamitos* is indicated as coming from *behind* it. It is not enough to say that the diseño is rude or rough. You must show that it is grossly false. Now the Seco on the side of Santa Clara is laid down; the Guadalupe is laid down; the Alamitos is laid down. That is to say, where there are three streams in nature, three streams are put on the diseño meant to represent nature. When, therefore, there are in addition two other places in nature, one with a stream and one without a stream, and you find the diseño representing a place which must be one of them, and may be one just as well as the other, how are you to decide

* Called, on it, the Capitancillos.

which place is meant? In this way only: If a stream is marked on the diseño, then the place which has a stream, in nature, is meant to be designated. If no stream is marked, the other.

The fact that the ridge meant to be designated is called Sierra del Encino, does not counterpoise this argument. If, indeed, there were but one oak in the region—some one oak as much known as Herne's in Windsor Forest—then the Sierra del Encino would be indicative. But oaks grew here on the Mining Ridge as on the other. Nothing can be argued from a nice point of grammar,—the point of singular and plural. Larios was an ignorant man.

Then putting that part of the Larios diseño which represents the east in juxtaposition to that part of the Berreyesa which represents the west, it is a noteworthy fact that the Sierra del Encino in the former corresponds with the Lomas Bajas, or Mining Ridge, of the latter. This is demonstration, for the two grants are twins.

An argument for our view is, moreover, found in the fact that the grant was of the valley alone. Berreyesa, indeed, asked for the valley, "with all the lomas or hills that pertained to it." Larios was less ambitious. His grant says nothing of hills at all, and is for the land called "Los Capitancillos," the name by which the valley was itself familiarly known. The Californians were a primitive and pastoral people. What they most desired were valleys inclosed by hills, so that without fences their cattle could never stray. The mountains themselves were of comparatively little use, if, as we may assume, the valley had pasturage enough. As much valley as possible, and as little mountain as might be, was what Larios wanted and received a grant for. What his representatives claim and get is as much of the mountains as they can, and as little of the valley as possible. Look at the tract as delineated by either the heavy continuous or the light dotted line of the map, at p. 65, and the thing appears. What the purpose of Larios was is obvious by considering where he put his improvements, and where he attempted to sell such provisional rights as he had. This

was at the base of the Pueblo Hills. The controlling force which the position of his house must have in fixing his boundaries is acknowledged by the decrees, and the house is kept in all the locations. But if the location made by the Surveyor-General is retained, as Mr. Black will contend that it must be, who ever saw such a shaped tract in California? The California surveys all go in parallelograms, bodies, and even keep to rectangles as much as practicable. Look at the shape of this tract, as designated by the heavy lines on the map just referred to, and maintain it who can! This court declared when the case was first here, that Larios was to take his land within the three boundaries at his election, under the restrictions established in California. The external or out-boundaries were fixed, but nothing else, and he should have elected rightly.

2. *As respects the eastern line.* This concerns us less. We, indeed, prefer a straight line. We think it clear that the east line, as surveyed originally, is right enough when produced so far only as to give a league *in the valley.* The defence of the eastern necessity of the line we may leave to Mr. Black, accepting his view with the restriction stated,—that it does not pass the Mining Ridge.

Messrs. J. B. Williams and Carlisle, for the representatives of Berreyesa, interested in having the decree confirmed, or left undisturbed.

I. *As to the right of appeal by Fossat.* We are content with the decree as made below. We are content with a dismissal of the case, and a consequent standing of that decree. Herein, and on this first point, therefore, and so far as it aids us, we accept the argument of the counsel who have just concluded.

II. *As respects the right of the United States to ask reversal, they not having appealed.* Our interests and views here coincide with those of Larios, or his representatives. In the defence of the well-founded position, that the United States canot ask a reversal, we may leave our case in the hands of Mr. Black, who follows. In the defence of a good point, no

one will argue more ably. Some other of his positions we shall combat, as not within the category.

III. *How stands the case affected by anything decided here or below? Are we concluded by what that court had done or this one has said?*

When the matter was first before the District Court, the question of the eastern boundary was not considered by it. Its opinion, full on the southern line, says nothing about the other. So far as the case shows, that line was not even in controversy; though it is inferable, perhaps, from the guarded and special language of the *decree*, that a dispute existed in fact. The decree determines the southern boundary, but only designates or describes the eastern line as marked on the diseño of Berreyesa. It said that the L-i-n-d-e-r-o was the boundary between the ranchos. So we say now. The exceptions of Berreyesa are in this same form. But the question remained, *where* did the L-i-n-d-e-r-o touch the Azul Mountain? About that the court said nothing.

The decree was reversed in this court, not on any question of boundary, but because the court below had considered that the whole valley passed as a valley. The case was remanded, with directions "to declare the three external boundaries designated in the grant from the evidence on file, and additional evidence to be taken." On the return of the cause new evidence was taken, and the case again heard. The court, in its second decree, affirmed its former decision with regard to that line, keeping to the language of the grants, and referring to the L-i-n-d-e-r-o again. The decree, as before, had a guarded form. Certainly, it did not declare or show where the L-i-n-d-e-r-o itself would strike the mountains. All that question—the whole question between Larios and Berreyesa—remained just where it was.

From that decree, too, there was an appeal here; but the appeal was simply dismissed as being from a decree not final. No question of merits was decided nor could be.

After being thus remanded, the Survey Act was passed. Berreyesa and others now came in; and a discussion on the eastern line was for the first time in any order.

The court below may or may not have sufficiently explained itself, in its former decree, as respected this eastern line; and by not excluding conclusions, may or may not have guarded sufficiently against the possibility of misapprehension in distant places. Naturally, perhaps, it did not overlay its decree with this sort of matter. But that the court below meant to locate no line specifically but the southern one, and that the eastern one was left upon the basis of the L-i-n-d-e-r-o, whose course remained yet to be settled by survey, will be obvious, we should think, to any one who examines the evidence, the opinion, and the decrees themselves, as taken, delivered, and made at the different times.

Bearing this history of facts in mind, and reading what this court has said by their light, and by its presumable knowledge and recollection of them, we do not conceive that this court has adjudged anything which prevents our considering the case as an original one, though there are, perhaps, expressions in the opinions of a cast somewhat stiff, and slightly difficult to understand, except on a supposition of misapprehension; a matter most natural in so complex and voluminous and novel a kind of case.

Then as an original question:

1. *As to the eastern boundary.* The evidence is that *falda* does not mean base of anything, but does mean the skirt or fold of some waving object. It is a term applied to the person of the other sex, and means often the lap, the loose part of the dress which may be spread out as a lady sits on which an object may lie; but it never means the feet, the shoes. It is a term peculiarly applicable to the graceful curves of this sloping lomita, but philologically inapplicable to its final base. The line we must hold goes over the lomita.

What do we see then in nature and on the diseño? Standing at the junction of the creeks we see in nature, as we look across the valley, the great heights of Mount Umunhum on the west, and the greater heights of Mount Bache on the east. They are the great features of the landscape. The

way in which they raise their lofty heads will be urged as an argument by Mr. Black why the Azul Range, as distinguished from the inferior hills below them, was THE Sierra of the grant. Assuredly they were ever visible over the great landmarks of the valley. The same is true, in a less degree, of the Mining Peak. Now on the diseño of Berreyesa we see the Azul Range plainly delineated. That no one denies. The Mining Range is plainly delineated. That no one denies. On this delineation of the Azul Range we see two elevations just where the lofty peaks should be; and one elevation where the Mining Peak should be. And the L-i-n-d-e-r-o is drawn so as to leave one of those peaks exactly so far to the west, and the others exactly so far to the east. How are you carrying out the purpose of the line when in nature you reverse this whole disposition of the ridge? It may be said, in reply to *us* by counsel who follow us, that the strip *between* Larios and Berreyesa was the only important part of the land; an argument refuted by what we doubt not will be replied to the counsel of the United States, when contending that Larios never had the hills at all; the reply, to wit, that the Mine Ridge had the best pastures of the whole valley, and that *this* was what any occupant of the valley would have especially valued.

The whole argument which we would make is presented in the opinion of the court below. Compelled, as we are, to curtail and mutilate, and so greatly to weaken and injure it, it still expresses our idea. We may abridge it thus:

"The diseño of Berreyesa, which the prefect availed himself of as being the more exact, is drawn with unusual accuracy. On a mere inspection of it the location would seem indisputable. But it unfortunately happened that the draughtsman mistook the true position of the loma situated in the centre of the Cañada, and represented it as situated to the eastward of its real place.

"The question therefore arises, is the direction of this line to be determined by those two calls alone, or should it be controlled by other calls and indications of the diseño of higher dignity, and concerning which a mistake was more improbable.

"It is evident, from the diseño, that the *Cañada de los Capi-*

tancillos was supposed to run in a direction nearly east and west, as the dispute between Larios and Berreyesa only referred to the mode in which the valley should be divided between them. And it was most natural that a line should be adopted dividing the valley in a direction perpendicular to its length. Such a line was accordingly drawn on the diseño, and described in the grants as running towards the south, *i. e.*, nearly at right angles to the general course of the valley.

"The object of Berreyesa was to resist the further encroachments of Larios on lands for which, eight years previously, he (Berreyesa) had obtained a provisional title from Figueroa, while the claim of Larios was derived from a purchase of the house of Galindo, and *he* had, as observed by Berreyesa to the Governor, 'room to extend himself outside of the Cañada,' while the latter 'had absolutely nowhere to enlarge.'

"It is therefore improbable that Larios would have claimed, or Berreyesa assented to, a line which running diagonally in a southeasterly direction across the valley, would take from the latter a large tract of land, not only of the angle of the creek and the *falda*, but also being far to the eastward of Larios' house, and assign to Larios' cattle almost the entire range of the *Lomas Bajas*, expressly solicited by Berreyesa in his petition. It may, at all events, be asserted that had such been the intention of the parties, the universal desire of Californians to bound their ranchos by well-known natural objects would have induced them to fix upon the Alamitos Creek as their common limit, and thus secure a certain and precise boundary nearly coinciding with the imaginary line they are supposed to have adopted.

"The diseño itself affords evidence of the line to which the parties intended to assent. On it the range of the *Lomas Bajas* is distinctly delineated. At the eastern extremity of this range is a hill of greater elevation than the rest, which is turned on the east by the Alamitos. This hill is undoubtedly the Mining Peak or Hill of New Almaden. The Alamitos is represented as issuing through a gorge between it and a mass of hills further to the east, and running across the plain diagonally to the junction with the Seco.

"If on this diseño, the line as claimed by the representatives of Larios, be drawn, it would pass to the eastward of the mining peak, and run in an east-southeast direction, nearly coinciding with the course of the Alamitos. But the line actually marked

by the prefect is different. It is drawn in a nearly southerly direction, and it cuts the range of the *Lomas Bajas* at about one-fifth the entire distance from their western to their eastern extremity, leaving on the left, *i. e.*, on the eastern or Berreyesa side, not only the Mining Hill, but four-fifths of the entire range. Nor does it at all coincide with the course of the Alamitos; but on the contrary, makes with the general course of that stream an angle of perhaps 45°.

"Again, behind or to the south of the *Lomas Bajas*, is represented the range of mountains called *Sierra Azul.* On their western extremity is the peak known as Mount Umunhum; while far to the east, the lofty mountain now called Mount Bache, is distinctly delineated.

"If the line contended for by the claimants be drawn on the diseño, it would run in the direction and over to the eastward of Mount Bache. The line, as drawn by the prefect, strikes the Sierra at a point less than one-sixth of the entire distance between Mounts Umunhum and Bache, leaving five-sixths of the entire range of those hills on the eastern or Berreyesa side.

"It is therefore evident that to treat the call for the *falda*, as determining the course of the entire boundary line, we must sacrifice not only the call for the course of the boundary line as expressed in the grant, but every other indication of the *diseño.* It does not appear that the prefect visited the Cañada before adjusting the dispute. The line was assented to by the parties, who must have been familiar with the natural features of the country. The direction in which their common line should cross the valley—the portions of the disputed tract to be assigned to each—the course of the boundary, whether towards Umunhum, so as to leave the greater part of the *Lomas Bajas* to Berreyesa, or towards Mount Bache, so as to leave nearly the whole range to Justo Larios—whether it was to cross the Alamitos, making a large angle with the general course of that stream, and leaving the gorge through which it debouches into the valley far to the east, or whether it was to run towards the gorge and in a course not far from parallel with that of the Alamitos,—all these have points which we must suppose to have been determined, and on which it is highly improbable that the diseño could have erroneously represented the agreement of the parties.

"The question is not whether the calls for the angle of the

creeks and for the *falda* shall be rejected, for these natural objects were undoubtedly agreed upon as fixing the limits of the two ranchos, but whether we shall allow the subsequent direction of the line to be determined by their relative position, concerning which there was an evident mistake, and give to it, where produced, a course entirely inconsistent with the course specified in the grant, and clearly indicated by natural objects on the diseño.

"If the position of the *falda* was to determine absolutely the course of the boundary beyond, the prefect could hardly have supposed that he had removed all cause of dispute.

"The term 'falda' does not indicate any point on *a hill*, but a part of it. It signifies the slope or *radix montis*. It probably applies, in strictness, only to the lower slope, or that part lying between the plain and a line drawn midway between its slope and its summit, though it seems sometimes to be applied to the entire slope. But giving it the more restricted interpretation, it is insufficient to fix the direction of the line with any certainty. The lomita in question is situated at a comparatively small distance from the angle of the creeks. If the boundary is to be the production of a line drawn from the angle to some point on the *falda*, a variation of the position of the latter of perhaps a few yards will so change the course of the line where produced as to materially alter the dimensions of the tract.

"The boundary, therefore, would still have been left within considerable limits arbitrary and uncertain. If it be said that the point on the *falda* intended to be adopted is shown by the diseño, it may be answered that the diseño also shows, by unmistakable natural objects, the direction of the line, and that its course is to be determined by those indications. Notwithstanding that, the parties erroneously supposed and represented on the diseño that the line so drawn would pass by the eastern base of the hill.

"Compelled, as we are, to resort to the diseño to ascertain the location, we discover the nature of the error into which the parties fell, and discern what was their intention when the line was agreed upon. It was designed to divide the valley between the disputants by a line across or at right angles to its general course. On the north it was to commence at the angle of the creeks. At the south it was to terminate at a point opposite, crossing the *Lomas Bajas* and striking the Sierra at the points

indicated on the diseño. The *falda* of the lomita was also adopted as the western limit of the flat land on the Berreyesa side, and it was supposed erroneously, as now appears, that a straight line could be drawn between the points just mentioned which would cross the eastern base *falda*.

"As that is found to be impossible, it has seemed to me that the call for a straight line should be rejected, and the boundary fixed by drawing a line from the angle of the creeks to the *falda*, and thence across the valley points in the *Lomas Bajas*, and the Sierra, to which the diseño shows it was intended to be drawn."

The court below makes a line not straight. We should ourselves have preferred a straight line *crossing* the loma, as the term *falda*, we think, was used to allow this. The word was used in distinction to the *pie de la loma*, or base of the hill. As in a skirt there is a certain looseness, something wavy, so here the precise place was not designated, except as the diseño of Berreyesa designates it. That renders it certain by showing where it passes through the Mining Ridge. If that diseño be nicely measured, it will be seen that $\frac{82}{100}$ of the whole length lie to the eastward, and $\frac{18}{100}$ to the westward of the L-i-n-d-e-ro. The Mining Ridge having a defined length, the point can be ascertained. However, we have no objection to the line as settled by the court below. It comes to the same result essentially as that we desire.

2. *As to the southern boundary.* Our interests here are identical with those of Larios; and we leave a reply to the Government counsel on this point with counsel who follow.

Mr. Black, with whom was Mr. Cushing, for Fossat, representative of Larios, seeking to reverse the decree, and re-establish the line as run by the Surveyor-General.

I. *The Government doubts and denies the right of any appeal.* When a doubt exists about the right of a citizen to appeal, that doubt is always to be resolved in favor of the right. The right of appeal to the highest judicial tribunal of the country is a sacred right, like that of trial by jury in a common law case, which is never denied upon doubtful

construction. Here it is not even doubtful. One argument is made from the special language of the act as regards appeals. But the appeal is given by implication; and what a statute gives by implication it gives as much as if it gave expressly. The law declares that "no appeal shall be taken, *unless* applied for within six months." Does not that imply that an appeal taken before the expiration of six months is valid and good?* Another argument is, that the duties enjoined by the Survey Act are not judicial at all, but ministerial wholly. Is this clear? The constant, universal, and unhesitating construction given to the law by the District Court, by all the profession in California, by all the counsellors practising in this court, and by this court itself—matters of common knowledge to this court and to the profession—is sufficient to overbalance both arguments; mere doubts, in fact, thrown by the Attorney-General into the other side of the scale.

II. *Can the United States now come here with objections?*

The survey was brought into court under the act of 1860. A monition called on all parties who were interested in it to appear and make objections, if any objections they had. The United States made no objections at all. If the Government had objections to the survey, we had a right to know

* The form of this enactment, it may be noted, presents the same sort of sentence which is seen in the provision of the Constitution of the United States relative to the suspension of the privilege of the writ of habeas corpus. "The privilege, &c., shall not be suspended, *unless* when, in cases of rebellion or invasion, the public safety may require it," &c. The sentence, says Mr. Binney, in commenting on it in a recent fine essay, is elliptical. When the ellipsis is supplied it reads, "The privilege shall not be suspended, unless," &c., *and then it may be suspended.* The clause is a grant of power under the conditions it prescribes. The first member of the sentence prohibits the power in its general or unconditioned state, and the second member reverses the first so far as to authorize it under essential conditions. This is a well-known idiom of our language and of most languages, and is in common use when it is intended to affirm and deny something at the same time in different aspects; and this is such a use as the law takes notice of in the interpretation of statutes. It is the *loquendum ut vulgus*, which is a popular and universal right, and held in respect by the law. (The Privilege of the Writ of Habeas Corpus, Part I, p. 10, and Part III, p. 29.)

them then and in that court, so that if they were true we could obviate them by such a modification of the survey as might seem necessary; so that, if they were false, we might produce evidence to show it; and so that, if the case should ever come into this appellate court, we might have evidence on record which would prove the truth. To change the survey here upon grounds that were concealed from us in the court below, is to condemn the party without a hearing. To hear us in this court upon a record which does not contain the evidence which might have been given in the court below, is no hearing at all. Independent of which it is certain that the Attorney-General has a right to determine whether the Government will proceed. In this case he did determine. He did not proceed; and that concludes the right of the United States.

III. *The question of the lines of this tract is not open as an original question.* It has been settled; settled by the court below, settled by this court, and by both more than once. The decree below stands in full force and unimpeachable by virtue of its own inherent and essential force. Even if the grant had been a floating one, the court decreed that it was for a specific league of which it set out the boundaries. This would end things. When, too, the case was first here, it was declared that the land granted to Larios had boundaries on three sides, which were well defined by objects upon the ground, and that the fourth line was capable of being ascertained as fully as either of the other three by the simple process of a survey. After this all that remains is that we ascertain where those boundaries are. We have but to look at the calls of the grant, and to look at the topography of the place, apply one to the other, and the thing is done. Certainly no intimation dropped from this court on either of the occasions, when the case was here before, that any further judicial act was to be done in the premises. On the contrary, the last opinion says expressly: "The obligations of the United States to this grantee will be performed by the performance of the executive acts which are devolved by the grant on the local authority."

IV. *But how is the matter as an original question?*

1. As to the southern boundary. On this side stands the main Sierra,—the Sierra Azul,—which lifts up its head nearly 4000 feet toward the sky. Of course, this mountain forms the great feature of the landscape. It is visible in every direction for nearly fifty miles. There it stands looming up against the background of the southern sky, and limiting the horizon to every eye that is raised in that direction. Of all natural objects, this is the one least likely to be mistaken for any other. By all distinction it is THE Sierra, if there be more than one Sierra in the case, a matter which we deny; for one ridge is "the Sierra," the other the Lomas Bajas. An attempt has been made to confound the mountain and the low hills together. The only reason ever given for saying that they are one and the same is, that they are connected together by a low ridge running transversely across the valley which divides them.

But does that connection between the hills and the mountain make them one and the same elevation? Such connections between different elevations are so common that it seems to be a law. The Laurel Hill and the Alleghany, two parallel ranges of mountains in Pennsylvania, are connected together by the Negro Mountain Ridge, which runs across the valley between them, and divides the waters of the Monongahela from those of the Alleghany River; but nobody has ever thought that the Laurel Hill and the Alleghany are the same mountain for that reason. The same thing occurs with many mountains.

As it is with elevations of the earth's surface, so it is with bodies of water; they may be connected together without being the same thing. The Atlantic Ocean and the Mediterranean Sea are connected together at the Straits of Gibraltar; but no system of geography teaches us that the island of Sicily is, therefore, an island in the Atlantic. The Golden Gate connects the waters of the Pacific with the Bay of San Francisco; but suppose a county line, or the line of a land grant, calls for the ocean as its terminus, would any surveyor

think he had responded to that call by running to the waters of the bay?

Mr. Veatch, the geologist, himself says that the two ridges and the mountain are "separated," "detached;" and Matheson, the other witness, the surveyor, calls the low hills a "spur, *connected.*" These witnesses use words which are a contradiction of themselves. Connection between two things does not imply identity, but diversity. When a man tells you that two things are one and the same thing, because they are connected by a third thing, he talks that peculiar kind of nonsense which even an intelligent man may talk when he does not know what he is talking about.

Even if it were a misnomer to call this separating space a valley, does that make any difference? The people there understood themselves when they called it so; and for practical purposes it does not matter whether the name was scientifically adjusted to the subject or not. We know what is meant when a person speaks of sunrise and sunset, although it be true, astronomically, that the sun neither rises nor sets. For all the purposes of common life, the whale is called a fish, though natural history tells us that he belongs to another order of animals. If these parties asked for the *Cañada de los Capitancillos*, meaning to include all the land up to the Azul Mountains, and the Governor understood that he was granting all the land to these mountains, it matters not whether, properly, it was all valley land, or all mountain land.

But the fact is that it is a valley, and it is but one valley. It is watered by these two streams, the Alamitos and the Capitancillos, from their sources on each side of the ridge already spoken of, to the point at which they meet and form the Guadalupe River.

Mr. Veatch, a mineralogist, swears that they are geologically one. Does he mean to say that the Sierra Azul is filled with cinnabar? If so, why does the United States make the struggle for the mine? Even if the great range and the small one were one geologically, topographically, and in many other ways, the case of the Government is not helped.

The question is, which or what is the Sierra? Now, Sierra applies only to a range of *mountains;* a mountain chain. Salva, in his Dictionary of the Spanish Academy, defines it, "Prærupti *montes;*" rugged mountains. The term applies specially to a chain of mountain peaks; serrated *heights.* The low hills and the high hills behind may be one body. Still the former may be the "Lomas Bajas," and the latter "the Sierra;" and that is exactly what the diseño of Berreyesa, made at the time of the Larios grant, shows that they were respectively and generally called.

But the counsel of the United States argue that by the *diseño* of Larios the *Sierra del Encino* is delineated on the southern side of the tract, and the Pueblo Hills on the northern; while the *Lomas Bajas* are not laid down at all. What is meant in the nomenclature of that country by the *Sierra del Encino* cannot be a subject of the smallest doubt. The great oak tree on the side of the main elevation proves itself. When Larios called the mountain depicted on his map by the name of *Sierra del Encino*, it was impossible to say that he meant the minor range, which was never called by that name.

But the counsel have "demonstrated" the fact to be otherwise. They take the *diseños* of Larios and Berreyesa, put them together, and by a little pulling and hauling make the *Sierra del Encino*, on one map, nearly fit to *Lomas Bajas* on the other.

Now, if two adjoining tracts of land were both carefully measured by the same person and with the same instruments, and a map of both made upon the same scale, you would expect the different parts to fit one another; but otherwise you would not, and could not, expect any such thing. These two tracts were never measured at all. The maps were made without measurement, by different persons, without concert between them, and without the slightest reference in either to any kind of scale or proportion. The chances that an object delineated upon both would be laid down at places exactly corresponding, do not amount to one in a million.

Then it is said that, in this case, the petition, as well as the grant, was for the valley, and the valley extends to the foot of the low hills; that this is the natural boundary of the valley; and the natural boundary of the valley is the legal boundary of the grant: *ergo*, our limit must be the foot of the low hills, and not the mountain, where we have proved that our line runs. These facts are not true; but assume them to be so, and look at the logic. The proposition means, if it means anything, that the name by which a ranch is called in the grant ought to determine its limits, and not the lines which are expressly given as boundary lines. Let us see how such a rule would work.

All the grants in California, or nearly all, have names. These names are selected arbitrarily, and very often without any regard to the fitness of things. One person calls his *rancho* by Spanish words which signify "a willow grove," because there are willows on a few acres of it at one corner. According to this new doctrine, he can take nothing but the grove, though his lines may include a hundred times as much. Another has a tract that is called "*Los Picos*," because there are several sharp hills in the centre.* Shall he be held to the tops of the hills? Another is named "*Isla de Santa Rosa*," because a river runs through the tract, and in the river is a little island called "Santa Rosa;" but the tract itself is five or six leagues in extent, while the island contains not more than three or four acres. A gentleman known to me is owner of a grant named in the title-papers "*Rio de los Americanos.*" Measuring it by the lines given in the grant, it extends along the bank of the American River four leagues, and has a depth of two leagues. To this he is entitled, if the calls of the grant prevail; but, if the name that the Governor called it by is the only standard, then the bed of the river is all he can take.

The *reductio ad absurdum* is furnished, however, in this very case. The grant issued to Berreyesa is named "*Cañada de los Capitancillos.*" The grant to Larios is for "*Los Capitan-*

* See *supra*, map facing p. 564.

cillos." Berreyesa must, therefore, have the Valley of the Little Captains, while Larios can take nothing but the little captains themselves.

But that which is conclusive on this question of the southern boundary is—

I. That the Mexican Government and both its grantees show clearly what range they meant when they spoke of "the Sierra;" and show, moreover, that they meant the Azul Range, or, as they call it, the "*Cierra* Azul."

II. That they distinctly include the range before it, the Mining Range, as a part of the property owned by the disputants.

The diseño of Berreyesa, in all that concerns the course and termination of the L-i-n-d-e-r-o, was a chart common to Larios, Berreyesa, and the Mexican Government. Now on this the Mining Range is called the Low Hills (Lomas Bajas). The Azul Range is called the *Cierra* Azul! It is the only thing on any map called a Sierra at all. It is "*the* Sierra," therefore, of the case. How irrelative all evidence about geologic or topographic natures in the face of designations given and fixed by the very parties concerned!

Then a reference to the diseño shows that the L-i-n-d-e-r-o is brought over or through the Mining Range *to* the Sierra Azul. This dotted line was meant to divide between Larios and Berreyesa land which, between them, they, and not the Mexican Government, owned. It is absurd to suppose anything else. We must presuppose a grant; whether conditional or other, it matters not. Independently of which the Prefect who drew the line was an agent of the Government. The Governor knew what he did, and ratified his act. And when the line is drawn so as to show that the Mining Range did not belong to the Government, who was interested to claim it if it did, it operates as explanation for every one, and, as respects the Government, for an estoppel also.

2. As to the eastern boundary. I aver that this eastern line, which constitutes one chief subject of dispute, is fixed with a certainty that belongs to no other land boundary in all California. What are the facts? Larios and Berreyesa

lived near to each other, below the foot of the Pueblo Hills, not far from the creek. They cultivated but little land, for the plain reason that they had no land which was fit for cultivation. They lived upon the produce of their flocks, as Job and Abraham and Saul and David. Their wealth consisted in the large flocks of horses and cattle and sheep that roamed over the hills immediately before their residence. Each of them claimed a league of land, but they had no titles which would stand the test of judicial scrutiny. The dividing line between them had never been legally established; they could not prove where it was; neither could assert his right against the other; yet the land that lay between their houses, and upon the hills in front of their houses, was more valuable to them than any other land claimed by either. It was the portion of their land least likely to be given up without a contest. In these circumstances it was the most natural thing in the world that a dispute should arise between them about the division line. Accordingly you find that in the spring of 1842 something like a quarrel did take place. This waked them up to the necessity of having their domains legally defined. Both of them, almost simultaneously, sent in petitions to the Governor, each asking for a grant to himself by the boundary that he claimed. The petitions and the diseños show what was the subject-matter of the controversy. Berreyesa insisted upon a line running directly past the house of Larios, so that Larios could not put his foot out of his own door without becoming a trespasser on the land of Berreyesa. The dispute then was about a narrow strip of land between them, and extending from the Pueblo Hills to the foot of the Sierra. In their circumstances it was worth a struggle.

The history of this line is before us; and it would be one of the strangest events that ever occurred in the history of human affairs if it were true that this line was not, after all, so clearly established as to be indisputable. It ran through a region where natural objects abounded, by which it could be intelligibly described. The parties were perfectly familiar with the whole face of the land. They knew Mount Umun-

hum, the Mine Peak, and every peak—though as yet these reared their heads unnamed by modern names—as I know the fingers on this hand. They desired to define their own boundary with perfect clearness. They invoked the aid of the public authorities to assist them. They were satisfied that they had succeeded. The Prefect who advised them was also convinced that he and they both understood where the line was to be, and so did the Governor. Can it be that they were mistaken? Let us take the description of the line which they agreed upon, and see whether there is any ambiguity about it.

The beginning-point fixed upon is the junction of the two creeks. About that fact there has never been any dispute. What was the course of it? They said it should run from the starting-point *southward.* The legal meaning of "southward" is due south, if there be nothing else to control it. But a natural object was called for, the eastern base of a small hill—loma or lomita—which rises, not far from the forks of the creek, from the midst of the surrounding level land of the valley. The call for a south line and for the eastern base of that hill happen to be precisely consistent. They declared that this south line, running past the eastern base of the hill, should go straight to its terminus without angle, crook, or bend. It remains that we ascertain what the terminus is. Before them, on the course of the south line, lay the green hills upon which their cattle were feeding at that moment; and in the blue distance behind the hills rose the Azul Mountains, barren, rugged, and bare, two thousand feet higher than the hills. To say that they did not know the difference between their own pasture-grounds on the hills and the barren mountain beyond the hills, is sufficiently preposterous. It is still more absurd to suppose that they would voluntarily exclude their pasture from the grants they were asking for, and leave the hills vacant, so that the Governor might grant them the next day to some body else, who would drive their cattle down upon the dusty plain, where every horn and hoof of them would starve in a week.

This description, considered alone, without reference to the map, makes the line too clear for doubt. They did intend to start at the forks of the creek, to run southward past the eastern base of the loma or lomita, and onward by a straight line over the hills to the foot of the main Sierra.

But the Prefect knew very well that a mere verbal description, which reaches the mind only through the ear, is always liable to perversion. He determined, therefore, that he would leave it to no quibbling argument upon the meaning of words; he would submit it to the more faithful sense of sight; it should be an ocular demonstration. He took the map which had been prepared by Berreyesa, and on which every object referred to in the description of the line was carefully, though rudely, laid down and marked in such a manner as to make it certain what was meant by it. There was the *Sierra Azul*, the *lomas bajas*, the *loma*, or *lomita*, and the watercourses, with the name of each object written under or over it. The Prefect took this map and drew across it a dotted line, beginning at the forks of the creek, and going straight past the eastern base of the *lomita*, over the hills to the foot of the mountain. He referred in his report to this map of Berreyesa with the dotted line upon it, and made it a part of his report. It is referred to in both the grants as showing where the true line is.

Every survey, official and unofficial, public and private, has concurred. All agree that the line starts at the spot, is on the course, and terminates at the place where we say it does. No surveyor, with the grants and the diseños in his hand, could fail to find the place of beginning; no one could miss seeing the eastern base of the lomita; nor was it possible for human perversity not to perceive that the terminus of the line was the foot of the great Sierra. The line was marked by monuments which could not and would not be trifled with. The blue mountains, the green hills, and the rolling streams testified to it with a voice which no sophistry could obscure and no perjury could contradict.

On the other side of the question, the principal name that

is used is Mr. Lewis, assisted by some of the pastoral and amatory poets of old Spain. You cannot read the testimony of Mr. Lewis without perceiving that he is a man of considerable ability, and of skill in his profession as a draftsman. He has great talents; great, especially, for confusing that which is plain. He was a professional surveyor; and willing to sell his talents to anybody that would pay the price for them. This man was employed for years in doing everything that a surveyor and a draftsman could do, except going upon the ground, running the line in dispute, and saying whether it was at the right place or the wrong one. For months he has been kept running over the hills, measuring every height and chaining every hollow, and making maps and diagrams of all the ranches for fifteen miles around. At one time you hear of him at the top of Mount Umunhum, four thousand feet up toward the sky. The next thing you know, he is down in some dark hollow, measuring away at something else, but always as far as he can possibly get from the line in dispute. One day he is off ten miles to the east of Berreyesa, and then again he is surveying a rancho somewhere north of the Pueblo Hills, clean out of sight of this region.

But Mr. Lewis is not enough. The poets of Spain come to his aid. Refreshing no doubt it is to find ourselves in the poetic literature of that renowned, romantic land. It will enrich a report and encourage a reader. I shall not, however, go into the profundities of Castilian lore; the more as it is shown that neither Larios, Berreyesa, nor the Prefect probably, had the Spanish dictionary, dedicated to Don Philip V, and printed at Madrid in the year 1732, near them when they settled the L-i-n-d-e-r-o. It is not likely either that they were better acquainted with Martin, Cadalso, or even Jovellanos, charming poets though they all be. Admit that *falda* does mean skirt. What then? What does skirt mean? The great lexicographer of our language, Dr. Johnson, gives us one of its meanings: "Edge, margin, border, *extreme* part." What is the edge or extreme part of a hill but its base? Richardson says:

"SKIRT, from *Scyran*, to cut, to dissolve, to separate. The part where the continuity is separated; a separate part or portion; the edge, the border, the bound or boundary."

Illustrations which he gives are these:

"The water's edge *skirted* with precipices."—*Anson's Voyages.*

"The *skirt* or outer part of the island . . . . is woody."—*Dampier's Voyages.*

"Mighty winds,
To sweep the *skirt* of some far-spreading wood
Of ancient growth."—*Cowper's Task.*

But I am not going into these curiosities of etymology; "the science where consonants signify little, and vowels nothing at all." The question has slightly to do with these. It is a question of intent, nor wholly even of that, but largely one of law.

Assuming the authority of both—of Mr. Lewis and of the pastoral poets—the District Court made the decree we seek to reverse. The opinion has been partially read. The first noticeable thing in it is, that it concedes to us every fact which we have ever asserted with reference to the division line. The court admit that the true beginning of it is at the forks of the creek; that it runs thence southward by the eastern base of the *lomita.* It also admits, that the call of the grant is for a straight line upon that course up to the mountain. Why, then, did it not follow the call as the Surveyor-General had done before, as the court itself had done in former adjudications?

The court say, that when Berreyesa and Larios agreed to that line, they intended it to run, not south, but perpendicularly to the general direction of the valley. I deny this utterly. In their agreement before the Prefect, and in the grants which both afterwards accepted, they declared their intention that it should run south, and not a word is said about perpendicular. But the intention thus expressed by themselves is disregarded, and a different intention imputed to them, without evidence. It is remarkable, too, that the court, after assuming without evidence that their intention was to make a perpendicular line, does not order the line to

be run according to this assumption. It directs the line to be carried southward to the base of the *lomita*, then makes an angle, and runs fifty-four degrees west for a certain distance, where it makes another angle, and then goes thirty-four degrees west of south to the mountain. Neither of these lines is perpendicular to the course of the valley; for certainly the valley cannot have three perpendiculars.

The court below commits another error of fact when it declares that the position of the *lomita* was misunderstood by the parties. If there is one thing in this case more striking than another, it is the remarkable accuracy with which the agreement and the grants defined the relative position of that little hill and the beginning-point of the line.

The court below thinks, and in this it is followed by Mr. Carlisle and Mr. Williams, that it can see in the shape of the Sierra Azul, as drawn upon the diseño of Berreyesa, the different portions of the mountain as existing in nature. The court assumes that certain parts of it, which are larger than other parts of it, are intended for Mount Bache and Mount Umunhum, and proposes that the line shall be run so as to strike the mountain at the place where it terminates on the map of Berreyesa, assuming that it knows where that place is. Now, no one can cast even a careless glance upon the figure which Berreyesa called by the name of Sierra Azul, without seeing that it can bear no sort of resemblance to the natural mountain itself. It was not intended to be a picture of the mountain. If one part is higher or lower than the other it was mere accident. All the reasoning upon which this hypothesis proceeds, is based upon the assumption that the different objects delineated upon the map are laid down in their proper proportions to one another, and that the different parts of the same object are also duly proportioned. Admit that assumption to be false, and the whole argument falls. The assumption *is* false. There is no pretence of proportion about the map. Here is a fact which sets it in a very striking light. The house of Berreyesa is proved to be exactly thirty feet wide, yet it occupies upon the map one-fifth of the space of the whole valley. If the

valley is proportioned to the house, it is only one hundred and fifty feet wide. If you take the valley to be, as it is at that place, nearly a mile wide, and the house to be laid down in proper proportion, then that house covers about two hundred acres of ground; and if it be high in proportion to its width, it is ten times as high as all the pyramids in Egypt, piled upon one another. The same logic that proves this to be Mount Umunhum, and that to be Mount Bache, would have shown with equal certainty that Berreyesa lived in a structure so vast that all the men in America could not have put it up in half a century.

But suppose that one or both of the parties, at the time they made that agreement, had actually believed that a straight line, run upon the course which they agreed to, would strike the mountain at a different place, would that be a reason for setting aside the agreement and disregarding the grants, after the acquiescence of all parties for twenty years? Certainly not. If a surveyor had gone upon the ground, and had run that line, when the grants were not more than a month old, and Larios had said that he was disappointed in the "outcome" of the line he agreed upon, could any officer run it contrary to the grant for that reason? No. The answer would be, "Your agreement has been executed; the grants have been made to you and to your neighbor both,—to you for the land on one side, to him for the land on the other side,—and it is now too late to repent."

But this map of Berreyesa does show conclusively that both he and Larios understood perfectly that the straight line which they bargained for would run where it does run, east of the ridge, and east of the mine. The ridge divides the waters of the Capitancillos from those of the Alamitos. The mine is near that ridge. The Alamitos Creek is laid down on Berreyesa's map. The division line, the line in controversy, as laid down on the diseño itself, runs across the Alamitos Creek, the whole of which is east of the mine, not across the Capitancillos, which is west of it. If the parties were familiar, as everybody admits that they were, with

the ground, then the line must have been intended by them to run very nearly, if not exactly, where it does. This fact, showing the place where they intended to cut the creek, is as conclusive upon the subject as any fact of that nature can be, and is absolutely without contradiction.

To reverse this decree is a legal necessity, and you cannot do that without restoring the division-line to the place where the Surveyor-General located it. There is no other place for it. You cannot find, in all this record, any other description of that line which it is possible for you to follow. If you take the exceptions of the Berreyesa party themselves, you find them describing the Surveyor-General's line as the true one; nor is there a spark of evidence which would justify any court in adopting another.

May it please the court, reverting to the question of the southern line, I have to say that in *it* the honor of the United States is deeply concerned. The land we are claiming never belonged to this Government. It was private property, under a grant made long before our war with Mexico. When the treaty of Guadalupe Hidalgo came to be ratified—at the very moment when Mexico was feeling the sorest pressure that could be applied to her by the force of our armies and the diplomacy of our statesmen—she utterly refused to cede her public property in California, unless upon the express condition that all private titles should be faithfully protected. We made the promise. The gentleman sits on this bench who was then our minister there.* With his own right hand he pledged the sacred honor of this nation that the United States would stand over the grantees of Mexico, and keep them safe in the enjoyment of their property. The pledge was not only that the Government itself would abstain from all disturbance of them, but that every blow aimed at their rights, come from what quarter it might, should be caught upon the broad shield of our blessed Constitution and our equal laws.

* Clifford, J.

It was by this assurance, thus solemnly given, that we won the reluctant consent of Mexico to part with California. It gave us a domain of more than imperial grandeur. Besides the vast extent of that country, it has natural advantages such as no other can boast. Its valleys teem with unbounded fertility, and its mountains are filled with inexhaustible treasures of mineral wealth. The navigable rivers run hundreds of miles into the interior, and the coast is indented with the most capacious harbors in the world. The climate is more healthful than any other on the globe; men can labor longer with less fatigue. The vegetation is more vigorous and the products more abundant; the face of the earth is more varied, and the sky bends over it with a lovelier blue. Everything in it is made upon a scale of magnificence which a man living in such a common-place region as ours can scarcely dream of—

> "Which his eye must see,
> To know how beautiful this world can be."

That was what we gained by the promise to protect men in the situation of Justo Larios, their children, their alienees, and others deriving title through them. It is impossible that, in this nation, they will ever be plundered in the face of such a pledge.

Mr. Justice NELSON delivered the opinion of the court.

This case has already been twice before the court.* It was very ably and elaborately argued at the bar on both occasions, and fully considered by the court. There is very little, if anything, left that is new to be considered or decided upon the present argument.

The main question in contestation in the two preceding arguments, and which has again been ably and elaborately presented, is that involved in the settlement of the southern boundary of the grant, whether or not the foot of the Sierra, the mountain range, or the *Lomas Bajas*, a range of low hills north of it, constituted this southern boundary. The Board

* United States *v.* Fossat, 20 Howard, 413; Same *v.* Same, 21 Id. 445.

of Commissioners adopted the Sierra, and its decree, in this respect, was confirmed by the District Court. On an appeal to this court the same line was fully recognized.

The court, after referring to the lines of the grant to Larios, and to the Sierra, as described in the grant to Berreyesa, the west line of which was a line in common between the two ranches, as agreed upon between the parties previous to the issue of either grant by the Governor, say, "The southern, western, and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which those limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call to ascertain it. The grant itself furnishes no other criterion for determining that boundary than the limitation of quantity, as expressed in the third condition." The decree of the District Court was reversed, for the reason that it confirmed to the claimant a larger quantity of land than was embraced in the grant, and the cause was remitted to that court to enter a decree in conformity with the opinion. As it became necessary to remand the cause for the purpose of locating upon the ground the quantity as limited by the above decision, authority was given to the District Court to fix the boundaries from the evidence on file, and such other evidence as might be produced before it. On filing the mandate in the District Court, the counsel for the United States applied for liberty to furnish further evidence, which application was granted. Several witnesses were examined accordingly, their testimony relating chiefly to the southern boundary of the tract, as described in the grant. The court had suspended the entry of the decree, in pursuance of the mandate, until after this evidence was furnished. The decree was filed and entered October 18, 1858. It reaffirmed the Sierra, or mountain range, as the southern boundary, and directed the line to be so drawn as to include the bottom and low lands along the base of this Sierra, and declared the eastern line to be a straight line commencing at the junction of the Arroyo Seco and the Arroyo de Alamitos, and thence

running southward to the aforesaid Sierra, or mountain range, passing by the eastern point of the small hill situated in the centre of the cañada, which was designated in the grants to Larios and Berreyesa, being the same line agreed upon between them as a division-line, and which is delineated by a dotted line on the diseño or map in the expediente of Berreyesa. It declares also the western boundary to be the Arroyo Seco, which is the continuation of a stream known as the Arroyo Capitancillos, and the northern boundary to be a line or lines located, at the election of the grantee, or his assigns, under the restrictions established for the location and survey of private land claims in California, in such manner that, between the northern, southern, eastern, and western lines, there shall be contained one league of land, and no more.

The decree then fixes the western line of Fossat, which is a line between him and the Guadalupe Mining Company, that owns one-fourth of the league granted to Larios, and confirms to Fossat the remaining three-fourths within the lines above declared.

This decree was appealed from by the United States to this court.* The court dismissed the appeal as prematurely brought, the decree below not being a final decree.

In the opinion dismissing the appeal, it is said, after referring to the case when previously before us,† "The court had determined that the grant under which the plaintiff claimed land in California was valid for one league, to be taken within the southern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, and adds, the District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made. From the decree, in this form, the United States have appealed."

The court then answers the objections taken to the motion

* United States *v.* Fossat, 21 Howard, 445.

† Reported 20 Howard, 413

to dismiss, which were, that the inquiries and decrees of the Board of Land Commissioners and of the District Court could relate only to the question of the validity of the claim, and not to questions of location, extent, and boundary, and that the District Court had gone in its decree to the full limit of its jurisdiction. These objections, after a full consideration of the acts of Congress, of adjudged cases, and of the principles upon which the court was bound to proceed, were overruled; and the court observe that, in addition to the questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim; and that, in affirming a claim to land under the Spanish or Mexican grants to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of these governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm ownership and possession of land of definite boundaries rightfully attach to the grantee. And in closing the opinion, it is observed that, "After the authenticity of the grant is ascertained in this court, and a reference has been made to the District Court to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice."

It will be seen, from this opinion, that the reasons for the conclusion that the decree of the District Court was not a final one, were, that the land granted had not been located on the ground by fixed and definite boundaries. A survey of the tract was indispensable in order to locate the northern boundary. That boundary was not given in the descriptive calls of the grant, and depended upon the limitation of the quantity; and until the survey of the three lines given, namely, the eastern, southern, and western, and the three-fourths of a league of land located within them, the northern

boundary could not be ascertained or fixed. The location of this line was an essential step to be taken on the part of the District Court, in fulfilment of the duty enjoined by the mandate of this court. In the interpretation of that mandate, this court, in its opinion,* observes, "The District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." That had not been done.

On the filing of the mandate of dismissal of the appeal in the District Court, an order was made directing the Surveyor-General to proceed and survey the land confirmed in conformity with the decree as entered in that court, and which, as we have seen, was entered on the 18th October, 1858. That survey was made and is found in the record. It was approved by the Surveyor-General 18th December, 1860, and filed in the court below 22d January, 1861. We have also the testimony of Hays, the deputy surveyor, who surveyed the lines on the ground, and constructed the map; also of Conway, a clerk in the office, who assisted him, and of Mandeville, the Surveyor-General, who approved of the map, showing that the survey and map were made in strict conformity with the boundaries of the tract as given in the decree, of which they had a copy, and followed as their guide.

This survey having been made in conformity with the decree of the District Court, entered in pursuance of our mandate, would, doubtless, have closed this controversy, had it not been for the act of Congress passed 14th June, 1860, after the entry of the decree in the District Court, but before the survey of the tract by the Surveyor-General. The act purports to be an act to regulate the jurisdiction of the District Courts of the United States in California, in regard to the survey and location of confirmed private land claims. It authorizes the court to allow intervenors, not parties to the record, to appear and contest the survey, or in the words

* 21 Howard, 447.

of the act, "to show the true and proper location of the claim," and for that purpose to produce evidence before the court, and directs that, "on the proofs and allegations, the court shall render judgment thereon." Any party dissatisfied with the decision may appeal to this court within the period of six months.

Under this act several parties intervened, and much testimony was furnished to the court in relation to the survey and location of the tract by the Surveyor-General, and which is found in the record, embracing some two hundred and twenty pages. And on the 16th November, 1861, the court entered an order reforming the survey, as to the eastern line. Instead of adopting the eastern line of the survey, which had been located as directed in its decree, and which was a straight line from the point of beginning to the termination at the Sierra (the southern boundary), passing by the eastern point or base of the low hill in the centre of the cañada, the court directed that, from the base of the low hill, the line south should be deflected fifty-five degrees west, until it reached a given point or object, and from thence south thirty-four degrees west till it reached the Sierra, or mountain range. Instead of a straight line for the eastern boundary, three lines were directed to be run, at considerable angles to each other, between the starting-point and the termination. This direction of the court not only reformed the survey of the tract as made by the Surveyor-General, but reformed the decree itself of the court, entered on the 18th October, 1858, in pursuance of which the survey had been made. The court assumed that the survey and location of the tract was not to be governed by the decree, but, on the contrary, that it was open to the court to revise, alter, and change it at discretion, and to require the Surveyor-General to conform his survey and location to any new or amended decree; for, certainly, if it was competent to change this eastern line from that settled in the decree, it was equally competent for it to change every other line or boundary as there described and fixed.

Now, it must be remembered, that this decree of the Dis-

trict Court designating with great exactness this eastern line, with such exactness that the Surveyor-General had no difficulty in its location, was entered in pursuance of, and in accordance with, the mandate of this court, and by which that court was instructed at the time of the dismissal of the appeal, that the three external lines declared in it were in conformity with the opinion of this court; and that the other line—the north line—only, remained to be completed by a survey to be made, and that this line was to be governed by quantity, which quantity had been previously determined.

This radical change, therefore, of the eastern line of the tract, involves something more than a change by the court of its own decree; it is the change of a decree entered in conformity with the mandate of this court. But we do not intend to place any particular stress upon this view, for we hold that it is not competent for the court to depart from its own decree in the exercise of the power conferred by the act of the 14th June, 1860. The duty enjoined is not a rehearing of the decree on its merits, it is to execute it, to fix the lines on the ground in conformity with the decree entered in the case. The decree is not only the foundation of the validity of the grant, but of the proceedings in the survey and location of land confirmed. But, independently of this view, which we regard as conclusive, and even if the question was an open one, this alteration is wholly unsustainable. Indeed, the learned counsel for the appellees did not undertake to sustain it on the argument. The fact was admitted that the line was a straight one between the two termini.

An attempt, however, was made to sustain the termination of the line at the same point on the Sierra, or southern boundary, consistent with the line being run straight from the point of starting. This is sought to be accomplished by disregarding one of the descriptive calls in the line, a natural object, namely, the eastern base of the low hill, an object which must have been visible to the eyes of both Larios and Berreyesa at the time they agreed upon the settlement of the line as their common boundary. But even this departure from the grant will not answer the purpose. There is

still the difficulty of getting at the point of termination at the foot of the Sierra. That point or corner must first be ascertained before a straight line can be extended to it from the junction of the two creeks, the starting-point. The only description in the grant by which this point of termination can be ascertained is by running a line from the junction of the two creeks past the eastern base of the low hill southward to the Sierra. It is the extension of this line, in the manner described, by which this corner on the Sierra is reached and identified. Any one seeking to ascertain it without the use of these means, will find himself without compass or guide.

Now, this corner the learned counsel for the appellees propose to fix arbitrarily or by conjecture, and then by drawing a line from the junction of the two creeks to it, a straight line is obtained, and by this process of ascertaining the corner at the Sierra, it is made easy to select the one reached by the crooked line of the court below. But then, the line, as is admitted, instead of passing by the eastern base of the low hill, would cut it not far from or even west of its centre.

The court below, as is apparent, yielded to this argument, so far as respected the arbitrary selection of the corner at the Sierra, but refused to depart from the call in the line for the eastern point of the low hill. Hence, the crooked line between that point and the termination. The crooked line has the advantage over the straight one of the learned counsel, as it observes one of the principal calls in the grant. Theirs observes none of them except the starting-point.

There are two objections to this view, either of which is fatal.

The first, the point selected at the foot of the Sierra for a corner, is arbitrary and conjectural, and in contradiction to the clear description in the grant. And, second, it disregards one of the principal and most controlling calls in it, the eastern base of the low hill.

Our conclusion upon this branch of the case is, first, that the court erred in departing from the eastern boundary, as

specifically described and fixed in the decree of the 18th October, 1858. And, second, that irrespective of that decree, the line in the survey and location approved by the Surveyor-General, 18th December, 1860, is the true eastern line of the land confirmed.

The only party that appealed from this order or decree of the District Court, in respect to the survey and location, as appears from the record, is the present claimant. He insists upon the correctness of the first survey by the Surveyor-General, and that the alteration by the court of the eastern line, and consequently of the other lines made necessary by this change, are erroneous.

The United States did not appeal. They are, however, a party to the record as appellees, and appeared by counsel on the argument in this court, and took objections to the survey and location, mainly on the ground that the proceedings under the act of 1860 were not judicial, but purely executive and ministerial, and, as a consequence, that the appeal from the order or decree of the District Court, regulating the survey and location, ought not to be entertained; that the courts could only determine the validity of the grant, leaving its survey and location to the Executive Department of the Government. In other words, that the act of 1860 was unconstitutional and void. We need only refer to the opinion of this court, in the present case, the second time it was before us, as presenting a conclusive refutation of these several positions. The fundamental error in the argument is, in assuming that the survey and location of the land confirmed are not peoceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment; as much so as the execution of any other judgment or decree rendered by the court.

This power has been exercised by the court ever since the

Spanish and French land claims were placed under its jurisdiction, as may be seen by the cases referred to in the opinion of the court in this case, when last before us,* and in many others to be found in the reports. The powers of the Surveyor-General under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before.

The first act of Congress, March 2d, 1805,† amended March 3d, 1806, establishing a Board of Commissioners to settle private French and Spanish land claims, under the Louisiana treaty, provided for a survey of the confirmed tract by the Surveyor-General, under the direction of the commissioners.

And the act of 26th March, 1824, the first act which placed these land claims under the jurisdiction of the United States District Courts, provided that a copy of the decree of the confirmed claim should be delivered to the Surveyor-General, and that he should cause the land specified in the decree to be surveyed, and which survey, being presented to the Commissioner of the Land Office by the claimant, entitled him to a patent. Under this act and other similar acts, the cases referred to in 21 Howard arose, and in which this court entertained appeals from decrees in the District Courts upon the survey and location of confirmed claims. The 13th section of the act of 1851 corresponds substantially with the above provision of the act of 1824. It makes it the duty of the Surveyor-General to cause all confirmed claims to be accurately surveyed, and provides that the claimant, on presenting a copy of the decree of confirmation and a plat of survey to the General Land Office, a patent shall issue. It also confers upon this officer the powers of the registers and receivers, under the 5th section of the act of March 3d, 1831,‡ which relates simply to the case of interfering confirmed claims.

* 21 Howard, 445.

† 2 Stat. at Large, p. 441; §§ 6, 7.

‡ 4 Stat. at Large, 494.

The duty of the Surveyor-General, under all these acts, is to survey and locate the confirmed tract, in conformity with the decree. It is the only guide which is furnished to him; and one of the first instructions from the Land Office is as follows: "In the survey of finally confirmed claims you must be strictly governed by the decree of confirmation; and when the terms of such decree are specific, they must be exactly observed in fixing the locality of and surveying the claim." This instruction was given under the act of 1851, and in relation to the private land claims of California; and it was in accordance with this instruction that the survey of the present claim was made and approved by the Surveyor-General, 20th December, 1860, and filed in the court below 22d January following, and which was reformed by the court by the alteration of the eastern line, as already explained. Those who are desirous of putting the Land Office above the decrees of the courts, should at least be satisfied with this instruction of the department, if not with the decrees.

It has been argued, that the lines of the tract, as given in the *grant*, were out-boundaries, like the case of Fremont and others which have been before the court, and embraced a larger area of land than the one square league, and that the survey and location should not have been controlled by these lines as specific boundaries.

The first answer to this objection is, admitting it to be true, it can have no influence upon the judgment to be given by this court. These lines have been adjudicated and settled, and incorporated in the decree of the District Court, and which decree was entered in pursuance of the mandate of this court, and no appeal has been taken from that decree. It is said, however, that the decree was not in conformity with the mandate. If so, the party aggrieved should have appealed, and this court would have corrected the error. This is common learning, and needs no authority.

The error, it would seem, was not discovered until the survey; but this affords no reason for violating established law. The more natural conclusion, we think, is that the

omission to appeal was the result of a conviction the decree was right. It was entered after much testimony taken in respect to it, and full argument on behalf of the very parties who now set up this pretext.

The second answer to the objection is, that the lines in the grant are not out-boundaries in the sense of the cases referred to.

This court said, when the case was first before it, "The southern, western, and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which these limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call to ascertain it. The grant furnishes no other criterion for determining that boundary than the limitation of the quantity as expressed in the third condition." And the same opinion is substantially expressed by the court when before it the second time. The court say: "The District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." It should be remembered this was said of the decree now in question, which was then before the court. The observations were made in express reference to it.

But, independently of this, and looking at the question as an original one, there can be no reasonable doubt about it. The eastern line was in dispute between the two adjoining rancheros (Larios and Berreyesa), and which was carried before the public authorities for settlement, and there finally adjusted by the agreement of the parties. A line could hardly be made more specific. A boundary settled and fixed after litigation by the adjoining owners. The western boundary is a well-known natural object, the Arroyo Seco—a creek. The southern, the Sierra, or mountain range; and no boundary on the north. The grant was of quantity, and of necessity this boundary must be determined by the limitation of that quantity between the lines given.

It is true, in the second condition of the grant it is said, the judge who shall give possession of the land shall have it measured in conformity to law, leaving the *sobrante*, the surplus, to the nation. But this is a formal condition, to be found, for abundant caution, in every Mexican grant. There is no *sobrante* here, nor could the judge have measured the grant according to the law or ordinance in a way to have any. Aside, therefore, from the lines being fixed and specific according to the opinion of this court, and of the decree of the court below in pursuance of it, there could be no reasonable doubt upon the question, if an original one.

Much has been said on the argument in respect to the first locations and residences of the claimants on the low lands outside of this northern boundary, and as to the duty of the court to so locate this boundary as to include these possessions. But the answer to these suggestions is obvious. At the time these claimants took possession of the tract, they supposed they were entitled to a larger quantity of land than one league,—nearly two leagues,—which would have carried this line over and beyond these possessions. But this court cut down the quantity to one league, and hence these possessions are, with the exception of the old house of Larios, necessarily excluded. It is also said that sales were made to third persons in the valley outside of the line, and that their title should be protected. But they are not complaining of the survey or location as made in pursuance of the decree. Some of them appeared before the District Court, and filed objections to it, but have since withdrawn and abandoned them. We do not refer to these objections as entitled to any particular weight or importance, but because the explanations are at hand, for we place the decision of the case upon the ground that the boundaries of the tract have been settled by the final decree of a court of competent jurisdiction, and until that decision is got rid of, there is an end of the controversy.

OUR CONCLUSION is that the order or decree of the court below, of the 16th November, 1861, which set aside the sur-

vey of the tract approved by the Surveyor-General, 18th December, 1860, and which order or decree was directed to be filed *nunc pro tunc*, as of the 31st October, 1861, and, also, the order or decree of the 16th November, 1861, confirming the new survey, which was filed in court by the Surveyor-General on 11th of that month, be reversed and annulled, and that the cause be remitted to the court below, with directions to that court to enter a decree confirming the survey of the Surveyor-General, approved 18th December, 1860, and filed in court 22d January following.

The only objection that can be made to this survey is, that the tract is not located in a compact body. A comparatively small strip or tongue of land is extended from the main body along the eastern line north to the junction of the two creeks, with a view to reach the starting-point of the description in the grant. This was unnecessary, as we have seen, for the cutting down of the quantity to a league necessarily carried the north line further south than originally supposed. This northern line might have been closed with the eastern direct, instead of adopting the divergence north to the junction of the two creeks. But the quantity of land embraced in this strip is unimportant, is of no interest to any one except the Government, and scarcely any to it, as, if corrected, an equal quantity must be taken to make out the quantity in the grant from some other part of the public lands. Besides, the Government has not appealed.

To remit the case with directions that a new survey be made in conformity with the decree, and for the purpose of correcting this small error, would occasion delay and expense, and benefit no one.

The truth is, since the determination that the southern boundary of the tract was the Sierra, and not the Lomas Bajas, and that the eastern was a straight line, its direction southward to be controlled by the eastern base of the low hills, there is nothing left of this controversy worth contending for—scarcely merit enough to make it respectable.

DECREE REVERSED and the cause remitted, with directions

to enter a decree confirming the survey approved by Surveyor-General, 18th December, 1860.

Mr. Justice CLIFFORD dissenting.

I concur in the opinion that the true division-line between the rancho of Justo Larios and that of José Reyes Berreyesa is a straight line, and consequently that the decree in question should be reversed, but I dissent altogether from the directions given to the court below and from the reasons assigned in support of those directions. Some brief reference to the title-papers and to the facts and circumstances of the case is indispensable in order to a clear understanding of the nature of the controversy and of the grounds of my dissent from the views expressed in the opinion pronounced in behalf of a majority of the court.

I. Appellant, in his original petition to the commissioners appointed under the act of the 3d of March, 1851, prayed for the confirmation of his title to an undivided interest of three-fourths in a certain tract of land lying in the County of Santa Clara, in the State of California, and known as the Cañada de los Capitancillos, which, as he alleged, was contained within certain natural boundaries. When he presented the petition, he filed with it copies of the expediente and of the original grant under which he claimed, and his representation was that he held the title to the tract through certain mesne conveyances therein mentioned and described. Referring to the expediente, it will be seen that it consists of the petition of Justo Larios, the original donee of the tract, addressed to the Governor, together with the diseño and the usual marginal decree and the concession or *vista la peticion* and the titulo or original grant. Provisional grant of the land it seems had been made at some early period by the Ayuntamiento of the Pueblo of San José Guadalupe to one Leandro Galindo, who built a house on the premises and lived there for many years prior to the grant of Justo Larios, or to any application by him for the same. House of the occupant was north of the highway and pretty close to the southern base of the Pueblo Hills. Ori-

ginal claimant, Justo Larios, in his petition to the Governor, dated at Monterey, on the sixteenth day of June, 1842, represented that he had purchased from the owner of the house all the right he had to the land by virtue of that provisional concession. Such provisional concessions, it is known, were often made, and that it frequently became necessary for a subsequent applicant for a grant of the same tract to purchase the improvements made by the occupant as a means of facilitating his own application. Petitioner describes the tract as a place known by the name of the Cañada de los Capitancillos, and states that the limits of said tract are from the boundaries of Santa Clara to the corral, called the corral of the deceased Macario. Decree of concession recites that Justo Larios is the owner in full property of a part of the land called Cañada de los Capitancillos, bounded by the Sierra, by the Arroyo Seco, on the side of Santa Clara, and by the rancho of the citizen José Reyes Berreyesa, which has for boundary a line commencing at the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, thence southward to the Sierra, passing the eastern base of the small hill situated in the centre of the cañada.

II. Attention to the description given of the cañada, as contained in the concession, will show, especially when it is taken in connection with the language of the petition, that all of the boundaries of that part not previously granted are either expressly given, or so clearly indicated, as to amount to the same thing, and to leave no room for doubt as to the intention of the granting power. All will agree, I suppose, that the course of the Arroyo Seco, on the side of the church property called Santa Clara, was well known. Properties of that description were usually well defined, and there is not the slightest pretence of evidence in the case to show that this line was ever in dispute. West line of the tract is, therefore, fixed beyond peradventure. East line of it, as agreed on all sides, is the west line of the rancho of José Reyes Berreyesa. Controversy arose at one time between the original proprietors of those ranchos as to that division-line;

but it was duly settled by competent authority. Nothing need be added upon that subject, as I agree that the line should be a straight one, as assumed in the opinion of the court; but I insist that it commences at the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, and runs south to the Sierra, wherever that may be. Beginning is at the angle formed by the junction of those two Arroyos, and that angle, as all must agree, is north of the house built by Leandro Galindo, and close to the base of the Pueblo Hills, on the northern side of the cañada. Larios purchased that house and the adjacent improvements, and was living in the house when he presented his petition to the Governor, and when the grant was made. He asked for the valley, alleging that he had occupied it "since the year 1836;" and it was part of the valley which was granted to him, as will presently more fully appear. Rancho of José Reyes Berreyesa lies east of this tract, and of course the west line of that rancho is the east line of the claim under consideration. Grant to José Reyes Berreyesa is the elder grant, and as the tract in question is bounded on that rancho, it is both proper and necessary to refer to the title-papers in that case, and to look at the actual location of that grant upon the land, to aid in the solution of the present controversy. Grantee, in that case, became possessed of a part of the same cañada or valley, in the year 1834, under a grant from Governor Figueroa, and he continued to occupy it with his family until 1842, and perhaps later. During that year he complained to the Governor that his neighbor, Justo Larios, had disturbed his possessions, and prayed that there might be granted to him two sitios of the valley, extending from the house of Justo Larios to the matadero or slaughter-house, erected by him at the easterly end of the valley, "with all the hills that belong to the cañada." Commissioners confirmed his claim for one league, and on appeal the decree was confirmed by the District Court. Appeal was thereupon taken to this court, and this court held that the concession and titulo described a parcel of land included within natural boundaries, but that the conditions of the grant con-

fined it to a single league in quantity, and affirmed the decree of the District Court, ordering "the land to be located according to the description, and *within the boundaries* set out in the original grant, and delineated on the map contained in the expediente."*

III. All, or nearly all, the improvements made by the claimant in that case also were north of the *camino* or highway, and close to the Pueblo Hills on the northern side of the valley. He built two houses, and they were and are both situated nearly as far north as the angle formed by the junction of the before-mentioned arroyos. Northern boundary of the cañada, therefore, was evidently understood by the grantees of both these ranchos to be, what it is in truth and faith, the southern base of the Pueblo Hills. Southern boundary of the cañada is described as the Sierra, and much effort is expended in the attempt to prove that by the word Sierra is meant the Sierra Azul, or the main Sierra. Be that as it may, still, in my view of the case, the opinion of the court is clearly founded in error.

But I deny that the cañada, or valley, as described in the title-papers, and as understood either by the respective petitioners, or by the granting power, extended southwardly beyond what are called the Lomas Bajas, or low hills. Those hills, or certain portions of them, are seventeen hundred feet above the level of the Bay of San Francisco, and might well have been regarded by the petitioners and the Governor as the northern base of the main Sierra. Evidence shows that there is no table-land between those hills and the main Sierra, which is called the Sierra Azul, and that they are only separated from the higher range by a narrow, broken, irregular gorge, which forms the bed of the Arroyo de los Capitancillos, through which tumble the waters of that stream on their way from their source in the highlands to the southern skirt of the valley below, which takes its name from the name of the arroyo by which it is watered. Party then interested asked for the *sobrante* of the cañada lying

* United States *v.* Heirs of Berreyesa, 23 Howard, 499.

between the Arroyo Seco, on the side of Santa Clara, and the rancho of José Reyes Berreyesa; but the Governor refused to make the grant in that form, but limited it to one *sitio de ganada mayor*, or to one league of a larger size.

IV. Application was for the *sobrante* of the cañada; but if the quantity of the table-land was insufficient to meet the requirement of the grant, then there would be some show of reason for giving the document a more liberal interpretation, so as to include within the boundaries the quantity granted. No such difficulty, however, arises in the case, because, in any view taken of the subject, the quantity included within the out-boundaries is more than double the quantity to which the claimant is entitled.

Stripped of all side issues, therefore, the only question is, whether the grant which was for the lands of the valley shall be located there or upon the mountain, which is the southern boundary of the valley where the land lies for which the petitioner asked when he made his application to the Governor.

V. Suppose it were otherwise, and that the main Sierra, or Sierra Azul, is really the southern boundary of the valley, still I maintain that the directions given to the court below to enter a decree confirming the survey of the twentieth of December, 1860, are plainly and clearly erroneous. Operation of those directions, when they are carried into effect, will be to locate the principal portion of the claim upon the *Lomas Bajas*, and to exclude all the table lands except the narrow strip called in the opinion of the court a tongue, which is more than a mile in length, and only from twenty to thirty rods in width, and borders on the west line of the adjacent rancho. Survey apparently was commenced at the main Sierra on the line of the rancho of José Reyes Berreyesa, and runs northwardly on that line entirely across the valley to the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, whereas it should have been commenced at the angle formed by those two arroyos, and run north for quantity, so as to have included the valley for which the petitioner asked when he applied to the Go-

vernor for the grant. Having determined to commence south and run north for quantity, it became necessary to make that narrow strip or tongue, else one of two things would follow which must be avoided. Either the tract would not include the house of the claimant, or it would exceed the quantity of one league if it included the quicksilver mine. Apparently it was a *sine quâ non* that it should include the mine, and it was doubtless thought desirable that it should also include the house of the claimant, because it must have been known that the usages and customs of the country required it in the location of such grants.

Besides the recital of the concession is, that the rancho of José Reyes Berreyesa has for boundary a line commencing at the angle of the two arroyos before mentioned, and it may be that it was thought proper to have some regard to that recital. But it would not do to take more than a narrow strip of the valley, because if more was taken, either the mine must be excluded or the quantity would be too great, and hence all the residue of the table lands must be excluded. Boundaries in the grant are the same as those given in the concession, and consequently are subject to the same observations. Second condition of the grant is, that the donee shall solicit the proper judge to give him juridical possession in virtue of the decree, by whom *the boundaries shall be measured out;* and he shall put on the boundaries, in addition to the landmarks, some fruit trees or useful forest trees. Third condition describes the land as one league of the larger size, and the requirement is that the judge who shall give the possession shall have the land measured in conformity to law, leaving the surplus which remained to the nation. Land commissioners confirmed the claim for one league, but on appeal taken by the claimant to the District Court that decree was reversed, and a decree entered confirming the claim as one for the whole tract with specific boundaries. Whereupon an appeal was taken to this court, and this court reversed that decree, and decided that the claim was for one league of land, to be taken within the southern, western, and eastern boundaries designated therein,

and which was to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California, by the Executive department of the Government. Plainly this court then decided that the grant in this case was not one by specific boundaries, but was a grant by quantity, to wit, for one league of land. And the court go on to say that the external boundaries designated in the grant may be declared by the District Court from the evidence on file, and from such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee. Nothing can be plainer, I think, than the fact that it was the out-boundaries of the cañada that this court authorized the District Court to declare. Decree of the District Court then under revision declared the grant to be one of specific boundaries, and assumed to fix them, but this court reversed that decree and declared that the grant was not one of specific boundaries, but a grant for one league of land, and expressly declared that it was to be taken within the three boundaries named, and was to be located at the election of the grantee or his assigns, *under the restrictions established for the location and survey of private land claims in California, by the Executive department of the Government.**

VI. Where there are no guides in the title-papers, and the claimant has made no improvement, nor done any act, as by sale of a part, or otherwise, to influence the decision as to the location, the regulations of the Executive department, as a general rule, allow the claimant an election as to the location within the external or out-boundaries of the tract or place described within the grant, subject to the qualification that he must take the land in a compact form, and as far as practicable, leave the residue in the same condition. But where the title-papers furnish a guide, or where he has built a house, or made other improvements on the claim, or where he has sold a part of his claim, very different rules

* United States *v.* Fossat, 20 Howard, 427.

prevail. Locations under such circumstances are made to conform as near as may be to the intent of the granting power as indicated in the title-papers; always, however, subject to the qualification that it must include the improvements of the claimant, and, as far as is consistent with the public interest, be made to conform to the parts conveyed, so that the location may be in one body, and leave the public lands in the same condition. Reference undoubtedly was made by the court to these rules, when it is said that the location must be made under the restrictions established by the Executive department of the Government. These suggestions are sufficient, I think, to demonstrate beyond cavil, that the boundaries mentioned in the opinion of the court in that case, were the external boundaries, and that it was those boundaries which were to be fixed by the District Court, and not the specific boundaries of the claim, else there would have been nothing to which the restrictions established by the Executive department of the Government could be applied. Taking this view of the opinion in that case, it is clear and consistent, and if it had been followed the case would have been free from all embarrassment. Grant of claimant was declared to be a grant by quantity, to be located within certain out-boundaries, three of which were already ascertained, and it was left to the District Court to ascertain the fourth from the evidence on file, and such other evidence as might be taken by the parties, but the survey and location were to be made under the rules and regulations of the land department. Mandate of this court was that the decree of the District Court should be reversed, and that the cause be remanded with directions to enter a decree in the case in conformity to the opinion of this court. Opinion of this court was, as before stated, that an interest equal to three-fourths of the land granted should be confirmed to the claimant, and that the District Court should ascertain the northern boundary of the cañada, and when that was done, that the land department should make the survey and location. Cause was remanded; but the District Court, instead of following the mandate of this court, on the

eighteenth of October, 1858, entered a decree defining the specific boundaries of the claim.

VII. Appeal was taken to this court by the United States, but this court dismissed the appeal, holding that it was improvidently taken, and remanded the case for further proceedings to be had therein, in conformity to the opinion of this court. Decision in effect was that this court had no jurisdiction of the case, and hence the opinion of the court upon any matter connected with the merits of the controversy can hardly be regarded as authority; but it is not necessary to decide that point, as the court, in express terms, reaffirm what had been decided in the first case. Both decisions of this court in this case, therefore, show that the grant is one by quantity, to be located within the boundaries of the cañada, and I entertain no manner of doubt that such is the true construction of the grant. Such a claim should be surveyed and located under the rules and regulations of the Executive department, whether it be made by the Land Office or by the courts. Location as decided in the opinion of the court in this case will be in violation of every one of those rules and regulations, and will also be diametrically opposed to the opinions of this court in the two cases to which reference has already been made. These propositions, as it seems to me, are not refuted in the opinion just pronounced, even if they are not impliedly admitted; but the suggestion is that the District Court, in the decree of the eighteenth of October, 1858, decided that the grant was one with specific boundaries, and proceeded to fix them in the decree, and that the decree then entered is in full force and unreversed, and that inasmuch as the appeal taken by the United States was dismissed and no new appeal was taken, the decree is binding on this court, although it was contrary to the mandate of this court given in the same cause. Considering the peculiar nature of the jurisdiction in this class of cases, I cannot admit that doctrine. Proceedings in this class of cases are very different from the proceedings in suits at common law. Where the grant is of a tract by specific boundaries, there would be some force in the argument, because in

that class of cases it is incumbent upon the court not only to determine the question of confirmation, but also, if it be decided to confirm the claim, to determine the boundaries of the grant as a part of the original adjudication.

VIII. Such, however, is not the rule, and never was where the claim is what is called a floating claim, or where the grant is one by quantity, to be located within certain outboundaries, embracing a larger tract than the grant. All the courts have to do in such cases is to decide the question of confirmation, and leave the location to the Executive department of the Government. Attention, however, is called to the act of the fourteenth of June, 1860; but the answer to that reference is, that the provisions of that act have nothing to do with the decree of the District Court, entered on the eighteenth of October, 1858, nearly two years before the act was passed. Opinion of the court undertakes to vindicate the directions given in the cause, not upon the ground that the provisions of that act apply in the case, but upon the ground that the prior decree of the District Court had the effect to determine the controversy, and really that no further survey and location are necessary. Questions of this magnitude cannot be evaded, and ought not to be under any circumstances. Having given the subject all the consideration in my power, I am of the opinion that all that part of the decree of the District Court, rendered on the eighteenth of October, 1858, which attempts and professes to fix the boundaries of the claim in this case, was *coram non judice*, and utterly void. Reluctant as I am to differ from the majority of the court on this occasion, still I have much satisfaction in reaching that conclusion; because, if twenty millions of property must pass from the United States to those who have no pretence of title to it, I am not willing to cast the blame of such a monstrous result upon the office of the Attorney-General, or to place my decision in such a cause upon a mere technicality. Patient and thorough investigation has convinced me that the title to the quicksilver mine is in the United States, and it shall never pass into other hands by my vote while that convic-

tion remains, although I may stand alone. If this great wrong must be done, I would that it could have been done upon some other ground; for it seems that, in the opinion of the court, the case has been pending six years since it was finally and conclusively decided, which is an anomaly, perhaps, never before witnessed in a judicial tribunal. In my view of the case, the decree of the court should be reversed, and the cause remanded, with directions to order a new survey under the rules and regulations of the Executive department of the Government.

LOWBER *v.* BANGS.

A stipulation in a charter-party that the chartered vessel, then in distant seas, would proceed from one port named (where it was expected that she would be) to another port named (where the charterer meant to load her), "*with all possible despatch*," is a warranty that she will so proceed; and goes to the root of the contract. It is not a representation simply that she will so proceed, but a condition precedent to a right of recovery. Accordingly, if a vessel go to a port out of the direct course, the charterer may throw up the charter-party.

Ex. gr. A vessel, while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, which is out of the direct course between Melbourne and Calcutta, and did not arrive at Calcutta either directly or as soon as the parties had contemplated. The defendants refused to load; and upon suit to recover damages for a breach of the charter-party, it was held that the charterers might rightly claim to be discharged.

BANGS & SON being owners of the ship Mary Bangs, then at sea, on her passage from New York to Melbourne, chartered her at Boston, on the 4th June, 1858, to Lowber, who was there, for a voyage from Calcutta to Philadelphia, &c. The charter-party contained the following clauses:

"Ship to proceed from Melbourne to Calcutta *with all possible despatch*. It is understood that the 'Mary Bangs' is now on her