SERRANO v. UNITED STATES.

Long-continued and undisturbed possession of land in California, whilst that country belonged to Spain or Mexico, under a simple permission to occupy it from a priest of an adjoining mission, or a local military commander, did not create an equitable claim to the land against either of the governments of those countries; nor is a claim based upon such possession entitled to confirmation by the tribunals of the United States under the act of Congress of March 3d, 1851.

THIS was a proceeding, under the act of March 3d, 1851, for the confirmation of a claim to a tract of land in California known as the rancho of "Temescal," of four square leagues in extent. The petition to the board of land commissioners asked for the confirmation on two grounds:

1st. By virtue of an alleged grant of the premises by the authorities of the King of Spain to Leandro Serrano, the testator of the claimants; and

2d. By virtue of long-continued and uninterrupted possession of the premises.

The proof negatived the existence of a grant, but showed that Serrano had received the written permission of the priest of the mission of San Luis Rey (to which mission the land originally belonged), or of the military commander of San Diego, to occupy the premises, and that under such permission he took possession of them, and occupied them, or a portion of them, from about 1818 or 1819, until his death, which occurred in 1852.

The present claim was presented by his executrix (the widow), and his executor.

The deceased Serrano, made some improvements on the premises, consisting principally of two or three adobe houses, and he had a vineyard and fruit orchard. He had also several acres under cultivation, and was the owner of cattle, horses, and sheep, in large numbers, which roamed over and grazed on the hills and in the valleys surrounding his residence, to the extent of the four leagues claimed by him.

His possession was continuous and undisputed until the cession of the country to the United States.

The land commission rejected the claim, but the District Court, on appeal, reversed the action of the board, and by its decree adjudged the claim valid, and confirmed it to the extent of four leagues. From this decree the United States appealed to this court.

Mr. Stanbery, A. G., and Mr. Wills, for the United States:

I. *There is no archive evidence of the existence of a grant by Spain or Mexico to Serrano.*

There is no petition, no diseño, no informe, no concession, no titulo, no confirmation by the departmental assembly, and no act of juridical possession. In short, there is not a single link in the ordinary chain of title for grants of land in California by the Spanish or Mexican governments, either before or after the passage of the colonization law of 1824 and the regulations of 1828.

The claim must, therefore, be rejected, on the authority of a long line of cases.*

II. *Serrano's possession did not originate and continue under such circumstances as to bind the faith of Spain or Mexico, or to create an equity against the United States.*

According to his own statement, these lands were originally occupied by the mission San Luis Rey, of which Serrano was the mayor-domo. The priest of that mission permitted him to settle on and occupy a portion of the lands claimed by it. Now, it is well settled that the mission had no title, and consequently could give no binding title or possession.†

According to his own statement, he was allowed to continue his possession by the military commandante. Military

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* See, among the more recent, Romero v. United States, 1 Wallace, 721; White v. United States, Id. 660; Pico v. United States, 2 Id. 281.

† United States v. Ritchie, 17 Howard, 525, 540; United States v. Cruz Cervantes, 18 Id. 553; Nobili v. Redman, 6 California, 325.

commandantes had no authority to make grants, except in *pueblos.*

Messrs. J. Hartman and Cornelius Cole, contra, for the respondents:

The positions taken for the claimants are, that Serrano, having entered in good faith under what he believed and may be presumed to have been competent authority, and having continued to occupy and improve the land under the governments of Spain and Mexico until the acquisition of this country by the United States and till this time, a period of about forty-eight years, has acquired thereby a title by prescription against this government as the successor of the former ones; and if this position be untenable, that the facts of the case present an equitable title, which should be confirmed.

I. The Spanish law of prescription is laid down in *Escriche.**

Attention need be directed only to those provisions which declare a possession of twenty years, without title but in good faith, induced by the acts of others with the knowledge of the proprietor, to be good as a prescription even against the absent, and ten years against the present; and continuous possession of thirty years, *however acquired*, without suit brought against it, to constitute a prescription, even if it were acquired by violence or robbery; good faith not being exacted in a prescription of thirty years.†

By the Spanish law prescription of forty years is good against the king.

In the Recopilacion,‡ will be found a royal decree, which, after reciting that persons hold cities, towns, and villages without title, and that it is doubted whether the same could be acquired against the crown, ordained,

* Vol. ii, pages 741–2, tit. Prescripcion de Dominio.

† Siete Partidas, title xxix, L. 18, 19; see Moreau & Carlton's translation, vol i, pages 382–3; Feb Mejicano, vol. i, lib. 2, cap. 2, § 41 to 45.

‡ L. 1, B. 4, title 16.

"That immemorial possession, proved in the manner and under the conditions required by the law of Toro,* be sufficient to acquire against us and our successors any cities, towns, use, jurisdiction, civil or criminal, and thing or part thereof annexed or belonging thereto, provided the time of said prescription be not interrupted by our command, naturally or civilly."

The law of Toro, above referred to as defining the conditions on which property is acquired by prescription, is as follows:

"The time in which things are prescribed is comprehended under two kinds of prescription, immemorial and temporal; the first is proved by witnesses of good fame and character, who depose to having seen the person in possession of the thing or property for forty years, and having heard their ancestors say they never saw or heard anything to the contrary."†

In *Landry* v. *Martin*,‡ the Supreme Court of Louisiana decided that the Spanish government recognized verbal as well as written grants to lands; and that after a long possession, for nearly half a century, a written grant, if necessary, would be presumed.

In *Barclay* v. *Howell's Lessee*,§ this court held that an uninterrupted possession for thirty years would authorize the presumption of a grant. "Indeed, under peculiar circumstances," they say, "a grant has been presumed from a possession of less than the number of years required to bar the action of ejectment by the statute of limitation." It seems that the common law rule (that the presumption derived from possession is that the possessor owns absolutely), is applicable to possession before the introduction of the common law.‖

* Which is law 1, title 7, b. 5, of the Recopilacion.

† White's Recop., 1 vol. 95; see Lewis *v.* San Antonio, 7 Texas, 288, where the above law is cited.

‡ 15 Louisiana, 1.

§ 6 Peters, 498.

‖ Herndon *v.* Casiano, 7 Texas, 322; New Orleans *v.* United States, 10 Peters, 734.

In *United States* v. *Castro*,* where the grant was not produced, but the claimant had occupied the land for twenty years, the court says:

"An occupation so long-continued and notorious, with a claim of ownership so universally recognized, might of itself be deemed sufficient evidence of ownership."

Serrano undoubtedly always believed he was lawfully in possession, and had a right to the possession; and that belief was induced and fully justified by the acts of the Mexican authorities for a long course of years.

It is difficult, if not impossible at this day, to ascertain exactly what discretionary authority was vested, by the governors under the Spanish regime, in the priests of the mission, and the military commandantes in remote and thinly settled districts. Rockwell, in his Spanish and Mexican Law,† gives us some "instructions of the viceroy (dated Mexico, August 17th, 1773), to be observed by the commandante appointed to the new establishments of San Diego and Monterey."

Among them were:

"*Article* 12*th*. With the desire to establish population more speedily in the new establishments, I, for the present, grant the commandante the power to designate the common lands, and also even to distribute lands in private to such Indians as may most dedicate themselves to agriculture and the breeding of cattle; for having property of their own, the love of it will cause them to radicate themselves more firmly; but the commandante must bear in mind that it is very desirable not to allow them to live dispersed, each one on the lands given to them, but that they must necessarily have their house or habitation in the town or mission where they have been established or settled.

"*Article* 13*th*. I grant the same faculty to the commandante with respect to distributing lands to the other founders (*pobladores*), according to their merits and means of labor. They also

* 1 Hoffman, 125.

† 444 Appendix, No. 1; see Halleck's Report, California Correspondence, 119, where also these instructions are to be found.

living in the town and not dispersed, declaring that in the practice of what is prescribed in this article and in the preceding twelfth, he must act in every respect in conformity with the provisions made in the collection of the laws respecting newly acquired countries and towns (*reducciones y poblaciones*), granting legal titles for the owner's protection, without exacting any remuneration for it, for the act of possession."

Here is authority conferred upon the commandante, whose successor, at San Diego, placed Serrano in possession, for the distribution and granting of lands, with full discretion as to quantity, outside of the towns and missions; for it provides that the grantees shall not live dispersed on the lands granted, but in the towns and missions, for mutual defence.

The commandantes sometimes acted as the informing officers, when there was no civil officer in the vicinity, and grants were made upon their informations; and in pueblos, at least, they had full power to put parties in possession of land.

Similar functions were exercised by the priests, and they could give permission to occupy. It is not assuming anything to say that Serrano entered into possession lawfully, and not as a trespasser.

At common law the general rule with regard to prescriptive claims is, that every such claim is good, if by possibility it might have had a legal commencement,* and for upwards of twenty years' enjoyment of an easement, or *profit a prendre*, a grant, or, as Lord Kenyon is reported to have said, even a hundred grants, will be presumed, even against the crown, if by possibility they could legally have been made.† In *Parker* v. *Baldwin*,‡ Lord Ellenborough recognizes the right to presume a grant after twenty years, and asserts the practice of the courts to do so. And this doctrine has been repeatedly affirmed in our own country.§

The law will presume anything which would make the

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* Lord Pelham *v.* Pickersgill, 1 Term, 667.

† Roe *v.* Ireland, 11 East, 284. ‡ Id. 490.

§ Gayetty *v.* Bethune, 14 Massachusetts, 49; Kirk *v.* Smith, 9 Wheaton, 241; Rowland *v.* Wolf, Bailey, 56; Hogg *v.* Gill, 1 McMullan, 329.

ancient appropriation good, for whatever may commence by grant is good by prescription.

This court has passed upon the validity of permission to occupy lands where no grant had ever issued. It did so in the case of *Berdugo et al.* v. *United States*, for the San Rafael rancho, and in that of *Yorba et al.* v. *United States*, for the rancho of Santana, in both of which the claims were confirmed and appeals dismissed. The court has also uniformly held that the term "grants" in a treaty comprehends not only those which are made in form, but also any concession, warrant, or permission to survey, possess, or settle, whether evidenced by writing or parole, or presumed from possession,* and that in the term "laws," is included custom and usage, when once settled, though of recent date.†

II. The equities of this case are sufficient to sustain the claim for a decree of confirmation. In *Mitchel* v. *United States*,‡ this court, in referring to the Florida cases, uses this language:

"Another objection is of a more general nature, that the grantees did not acquire a legal title to the land in question. But it must be remembered that the acts of Congress submit these claims to our adjudication as a court of equity, and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate, and inceptive titles, as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable. Whether, therefore, the title in the present case can partake of the one case or the other, it remains only for us to inquire whether that of the petitioner is such, in our opinion, that he has, either by the law of nations, the stipulations of any treaty, the laws, usages, and customs of Spain, or the province in which the land is situated, the acts of Congress and the proceedings under them, or a treaty, acquired a right which would

* Strother *v.* Lucas, 12 Peters, 436.

† Renner *v.* Bank, 9 Wheaton, 585.

‡ 9 Peters, 733; see, also, the opinion of the court in Strother *v.* Lucas, 12 Peters, 446, for a full discussion of the equity jurisdiction over inceptive titles.

have been valid if the territory had remained under the dominion of Spain."

The same construction has been placed upon the rights of claimants, under the act of Congress by which this case is brought within the jurisdiction of this court. In *United States* v. *Alviso*,* where the claimant had only taken the preliminary steps for the acquisition of title, and had obtained, pending his application, a mere permission to occupy, under which he had occupied the land since 1840, had improved and cultivated it, and his family had resided on it, the court says:

"The claimant appears to have been a citizen of the department, and no objection was made or suggested why he should not have been a colonist of that portion of the public domain he has solicited; no imputation has been made against the integrity of his documentary evidence, and no suspicion exists unfavorable to the *bona fides* of his habitation, or the continuity of his possession and claim. He has been recognized as the proprietor of this land since 1840."

The documentary evidence referred to in that case, consisted only of the petition and permission to occupy; of no legal effect as a grant, but showing the *bona fides* of his occupancy, and the knowledge and assent of the authorities, which, coupled with his continuous possession, gave him, in the opinion of the court, an equitable title which they felt bound to recognize.

In *United States* v. *Wilson*,† where the claim rested upon a general order of Governor Alvarado, in 1842, to the alcalde of the mission of Obispo, to distribute the mission lands among the resident Indians, according to the merits of each, under which order the alcalde made a general distribution, giving to one Romualdo much more than to the others, upon a special order of the governor, in reward for meritorious services, Romualdo having lived on the land for many years, the court says:

* 23 Howard, 318. † 1 Black, 267.

"The title seems to be in conformity with the practice and usages of the Mexican Government. . . . In the present instance the possession and cultivation were of considerable duration, and the distribution was intended to be permanent, and as a home for the occupant. The claim appears to be an honest one, unaccompanied by suspicion, and under the circumstances, we think, was properly confirmed."

The decision of the court does not recognize the order of Alvarado as competent to convey title, but as merely creating an equity recognized by Mexican usages, which, coupled with a long possession and cultivation, constituted "an honest claim," which the court did not feel it could disregard.

Mr. Justice DAVIS delivered the opinion of the court.

The court below confirmed the claim of the appellees to the rancho known as "Temescal," embracing five leagues, and situated in the county of San Bernardino.

It is insisted by the United States that this judgment was wrong, because Leandro Serrano, under whom the appellees claim, had no title, legal or equitable, to the land in controversy.

It can serve no useful purpose to review the voluminous testimony in the record, for there is no substantial difference in it on any point material to the decision of the cause, and hardly any portion of it but what can be readily reconciled. It is clear that Serrano occupied a portion of the property which was confirmed to his widow and heirs continuously, from 1818 or 1819 until his death, which occurred in 1852. The improvements on the place consisted of two or three adobe houses, a small vineyard and fruit orchard, and a few acres in actual cultivation. At different periods of his occupancy he was the owner of cattle, sheep, and horses, which subsisted on the uninclosed valleys and hills that surrounded his residence. That his possession and occupation were undisturbed and undisputed during the whole period of Mexican sovereignty in California until our acquisition of the country, is fully established. It is not so easy to determine

the extent of his possession, but in the view we take of the case, the question is unimportant.

The petition presented to the board of land commissioners asked for the confirmation of this claim on two grounds,—first, because a provisional grant was made; and, second, by virtue of long-continued and uninterrupted possession. The proof not only negatives the existence of a grant, but clearly shows that Serrano occupied the premises by a written permission from the priest of the mission, or the commandante of San Diego, or from both conjointly. The only witness who pretends ever to have seen a paper concerning a grant was Villia, an ignorant man, unable to write, with very little knowledge of reading, and who, on being shown some writing, in order to test his ability to read, was unable to tell what it was. It is impossible to escape the conclusion that this witness was mistaken, without discrediting all the remaining evidence, including the repeated declarations of Serrano that he had no title. Villia evidently saw a paper in the hands of Serrano in relation to this land, but it was not a title of concession by Governor Sala, but the written permission to occupy given by the commandante and priest. The archives of the country are totally silent on the subject of this pretended grant, and there is no record evidence even of an application for a grant, which exists in ordinary cases. If Serrano even thought he had such a grant, why did he reply to Wilson (who was his friend and relative by marriage), on being advised of the necessity of perfecting his title, if he had any, "that he had no title, but had been living on the place ever since the settlement of California, and everybody respected his claim."

It is apparent, from the testimony produced by the claimants, without considering that offered by the United States, that the grant was a fiction, and that Serrano occupied by a written permission given to him by the priest, and perhaps by the commandante. It is equally certain that this permission was the paper sent by him to Governor Echandea for the purpose of obtaining from him a title. Under the government of Spain, in California, the commandante or priest

had no authority to grant lands, or to make contracts that could bind the Spanish government to grant them. The governors of the country only had this power. If Serrano had an imperfect grant, it would show that he was in possession, claiming title, but a possession under a simple permission to occupy could not raise even an equity against the government.*

It is clear, therefore, that there was nothing done which estopped the Spanish government from denying Serrano's title, and his bare possession did not bind the Mexican government, during its dominion in California, from 1823 to 1846, not to deny it. The colonization laws of Mexico were exceedingly liberal, and yet they were never invoked by Serrano to aid him in getting a title.

If, then, Spain and Mexico never granted this land, or contracted to grant it, or were under obligations to grant it, the claim has surely no validity as against the United States.

But it is insisted that if the legal title fails, yet the notorious and long-continued possession establishes an equitable one.

The actual possession in this case was limited to a very small quantity of ground; but, conceding that it embraced five leagues, no equities attached to it, considering the manner in which it was obtained and continued. There is no adverse holding here, but the possession was a permissive one, and consistent with the proprietary interest of Spain and Mexico; and the fact that those governments did not terminate the possession, which was a mere tenancy at will, cannot create an equity entitled to confirmation. Serrano held under a license to occupy, and that license could be revoked at any time. The failure to revoke it cannot change the original character of the possession into an adverse one. If Serrano had entered into possession under a claim of right, and had title-papers, though imperfect, he might say that the length of his possession entitled him to the favorable consideration of the court. Not so, however, where he had

* Peralta case, 19 Howard, 343; United States v. Clarke, 8 Peters, 436.

no interest in the land, never applied for any, either to Spain or Mexico, and was content with a permission to occupy it for the purposes of pasturage.

The judgment of the court below is reversed, and the case remanded to the District Court of California, with directions to enter an order

DISMISSING THE PETITION.

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

LICENSE TAX CASES.

UNITED STATES *v.* VASSAR.
" *v.* SCHUREMAN.
" *v.* GREEN.
" *v.* BEATTY.
" *v.* SHELLY.
" *v.* BOWEN.
" *v.* SWAIN.
" *v.* CRAFT.
" *v.* CRAFT.

1. Licenses under the act of June 30, 1864, "to provide internal revenue to support the government, &c." (13 Stat. at Large, 223), and the amendatory acts, conveyed to the licensee no authority to carry on the licensed business within a State.
2. The requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without license is only a mode of enforcing the payment of such taxes.
3. The provisions of the act of Congress requiring such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy.
4. The provisions in the act of July 13, 1866, "to reduce internal taxation, &c." (14 Stat. at Large, 93), for the imposing of special taxes, in lieu of requiring payment for licenses, removes whatever ambiguity existed in the previous laws, and are in harmony with the Constitution and public policy
5. The recognition by the acts of Congress of the power and right of the