

Syllabus.

rule in those courts where it is adopted at all, and it is rejected wholly in many, is that a juror cannot be permitted to impeach his verdict, but that he is never refused to sustain it. And this only applies to proceedings to set aside that verdict, and not to cases where the question of what was actually decided may arise in another proceeding.

On the whole, I am of opinion that there was but one question in the case, and that was whether the former verdict and judgment were based on the same contract counted on in the present suit, and that the evidence which went to the jury had a tendency to establish that fact, and the evidence rejected by the court had no tendency to disprove it.

DE HARO v. UNITED STATES.

1. In 1844, persons in California petitioned the Mexican governor of that province for a grant of certain described land, situated in the vicinity of the Mission of San Francisco. The petition was referred to the secretary of state, who reported that the land was unoccupied, but that inasmuch as "common lands" (ejidos) were to be assigned to the said mission, he was of opinion that in the meanwhile the petitioners might occupy the land solicited under a provisional license. The governor thereupon made a decree, declaring the petitioners "empowered to occupy provisionally" the land, and directing a proper document to be issued to them, and a registry made of it. An instrument was accordingly issued to the petitioners, signed by the governor and attested by the secretary of state, by which the governor, in virtue of the authority vested in him, and in the name of the Mexican nation, granted "to them the occupation" of the land, subject to the measurement to be made of common lands for the establishment of San Francisco, with conditions against alienation, and for the occupation of the land within a year, and for forfeiture in case the conditions were not complied with. On this case:

Held, That the decree of the governor constituted only a naked license to occupy the land provisionally; and that the instrument issued pursuant to the decree did not pass any title to or interest in the land; that this license was a personal privilege of the parties, and upon their death did not extend to their heirs; that a claim for land, resting upon a license of this character, is not entitled to confirmation under the act of Congress of March 3, 1851.

Statement of the case.

2. The term *titulo*, in the Spanish language, only means the instrument which is given as evidence of the right, interest, or estate conferred; it does not indicate the measure of such right, interest, or estate; hence it applies equally to papers which convey title in the usual acceptation of the term, and to those which confer a mere right of occupancy.

APPEAL from the District Court for the Northern District of California, in a claim for land, now of immense value, originally presented to the board of land commissioners established by the act of March 3, 1851. The case was thus:

In April, 1844, Ramon and Francisco de Haro presented a petition to the Mexican governor of the province of California for a grant of a tract of land, called the "*Potrero of San Francisco*," situated near the mission of that name. The petitioners were minors, and their petition was accompanied with the consent of their father that they might present it, and also his application to the local alcalde for information as to the condition of the land solicited, and the alcalde's reply thereto. The petition and accompanying papers were referred to the secretary of state for his report thereon. The secretary reported that the land was unoccupied; but, for reasons stated, he was of opinion that a provisional license to occupy it should be given to the petitioners. A decree was accordingly made pursuant to this suggestion, and was followed by the issue and delivery to the petitioners of a formal document, ceding to them the occupation provisionally, subject to certain conditions. The following is a translation of the several papers mentioned:

[*Petition for the Grant.*]

EXCELLENT SENOR GOVERNOR OF BOTH CALIFORNIAS:

We, Francisco de Haro and Ramon de Haro, in the name of our family, Mexican citizens by birth, and residents of the ex-Mission of San Francisco de Asis, represent to your Excellency, with due submission, that inasmuch as we have to remove the share of cattle appertaining to our deceased mother out of the rancho of the deceased José Antonio Sanchez, and as we have in view to tame them, we entreat your Excellency to grant to us in the exercise of your Excellency's powers, a *small parcel of land called Potrero de San Francisco, &c.*, because there is no

Statement of the case.

competent person to do it, according to the annexed sketch that we submit to your Excellency; and as said parcel of land can be inclosed, we intend to place on it the tamed cattle, because of the small extent of the location occupied at present by the cattle of our father, who has given us due permission to petition, as we are under the parental power and control. Therefore, we entreat your Excellency to grant us this benefit, whereby we shall receive favor and grace. We swear not to proceed moved by malice, &c. This memorial has not been written on paper of the corresponding stamp, there not being any here.

RAMON DE HARO,
FRANCISCO DE HARO.

SAN FRANCISCO, April 12, 1844.

[*Consent of the Father of the Petitioners.*]

I, the undersigned, grant by the present document, to my sons, Francisco and Ramon de Haro, the corresponding assent enabling them (because they are minors) to solicit the Superior Government of the Department the grant of the Potrero of the ex-Mission of San Francisco de Asis, at present lying unoccupied, and represented in the sketch accompanying the petition.

The said Potrero being intended to be (if it should please the Superior authority to grant it) for the benefit of their other brothers as well as themselves, and to answer due ends I give them this document in the aforementioned ex-Mission of San Francisco de Asis, on the 12th day of April, 1844.

FRANCISCO DE HARO.

[*Application of the Father of the Petitioners to the local Alcalde for Information as to the Condition of the land solicited.*]

TO THE HONORABLE THE ALCALDE OF FIRST NOMINATION OF SAN FRANCISCO:

I, Francisco de Haro, a resident of this jurisdiction, in the name of my sons, Francisco and Ramon, formally appear and say that my sons aforementioned have received my assent to solicit of the Superior Government of the Department the grant of the Potrero that lies opposite the ex-Mission of San Francisco de Asis, which stands unoccupied, and the inclosures of which

Statement of the case.

are thrown down, and lying on the ground; and inasmuch as I wish to remove the obstacles that may obstruct the speedy despatch of said petition, and since it must be referred thence to this place for report and information, and I want to obviate this delay, I therefore apply to you, in order that you be pleased to report as you may think convenient, in the subject of my solicitation.

Therefore, I entreat you to proceed in this matter according to right, and to direct this memorial, written on common paper, there not being here any of the corresponding stamped. Thus I swear, &c.

FRANCISCO DE HARO.

SAN FRANCISCO, April 13th, 1844

[*Reply of the local Alcalde to the Application for Information.*]

SAN FRANCISCO DE ASIS, April 13th, 1844.

In consideration of the reasons presented by the party who solicits, I proceed to report about the location in request, declaring that up to this day *there are no claimants of any kind, and it is not occupied by any community or private individual.*

G. HINKLEY.

[*Order of Governor referring Petition and accompanying Papers to the Secretary of State to report thereon.*]

MONTEREY, April 29th, 1844.

Let the secretary of state report on the same, and take the necessary information.

MICHELTORENA.

[*The Report of the Secretary.*]

MONTEREY, April 29th, 1844.

EXCELLENT SENOR GOVERNOR:

The Mission of San Francisco no longer holds property of any kind, and consequently the Potrero (or inclosed place for keeping horses) in request is lying unoccupied, as the soliciting parties show by means of a report proceeding from the respective judge; and inasmuch as there are to be assigned to said establishment, its

Statement of the case.

corporation or common land (*ejidos**), I am of opinion that *in the meanwhile* the parties might occupy the plot of land, by virtue of a *provisional license* of your Excellency, because no prejudice is caused *thereby* to the community, to any private individual. Your Excellency's own decision will doubtless be the most proper one.

MANUEL JIMENO.

MONTEREY, April 30th, 1844.

In conformity.

MICHELTORENA.

[*The Decree of the Governor upon the Petition and Secretary's Report.*]

MONTEREY, April 30th, 1844.

After examining the petition at the head of this proceeding, *the preceding reports*, and whatever else was thought to the purpose, *in conformity with the laws and regulations on the subject*, I declare Francisco and Ramon de Haro *empowered to occupy provisionally* the piece of land called Potrero de San Francisco, to the extent of half a square league, the boundaries to be the extremities of the mouth of the Potrero, and the range of hillocks or highlands environing it. *Let the corresponding patent be issued ; let it be duly entered, and let this information be communicated to the person in charge of said establishment.*

[*The Document issued by the Governor, and delivered to the Petitioners pursuant to the above decree.*]

MANUEL MICHELTORENA, GENERAL OF BRIGADE IN THE MEXICAN ARMY, ADJUTANT-GENERAL OF THE STAFF OF THE SAME, COMMANDANT-GENERAL, GOVERNOR AND INSPECTOR OF THE DEPARTMENT OF CALIFORNIA :

Whereas, Francisco and Ramon de Haro have solicited the grant of the Potrero de San Francisco, so called, from the mouth of the estuaries, together with the high land surrounding it, all the necessary investigations having been made according as the laws and regulations in the matter prescribed, by virtue of the authority in me vested, I have thought proper, in the name of the Mexican nation, *to grant to them the occupation of the afore-*

* The word is elsewhere translated as "places for common resort," or "pleasure grounds."—REP.

Statement of the case.

mentioned Potrero, subject to the mensuration to be made of the corporation or common lands (*ejidos*) for the establishment of San Francisco, and under the following conditions:*

1st. *They shall have no power, under any consideration, to sell or alienate it to the detriment of any of the proprietors of the establishment of San Francisco.*

2d. *They shall not obstruct the paths, roads, and servitudes, using it for culture and cattle they intend to introduce on it, but within a year at the most it must be occupied.*

3d. *The parcel of land to which reference is made is of half a square league, and if they should transgress any of these conditions, they shall lose their right to this provisional grant, which is delivered to the parties concerned for their security, and other ends.*

Given in Monterey, on the first day of May, 1844.

MANUEL MICHELTORENA.

MANUEL JIMENO.

Under the last document the De Haros went into possession of the land, and occupied it for the pasturage of horses and cattle until their death, which occurred in May, 1846.† The land was inclosed on three sides by water, and a wall had been erected by the priests of the mission on the fourth side. This wall had gone to ruin, and the De Haros, after obtaining their concession, repaired it. The land was not a fertile tract, and was only fit for pasturage. The father of the De Haros succeeded to whatever interest they possessed in the property at their death, and he occupied the land afterwards in a similar manner; that is, for the pasturage of horses and cattle, until his death, which took place in 1849. His successors in interest were his children, six girls and one son, all minors at the time. From these children the property passed into the hands of numerous American citizens, for whose benefit, after our conquest, the claim was

* This translation of the document is given in the record; elsewhere the translation of the last four lines of the first paragraph is given as follows:

"I have determined to permit the Messrs. De Haro to occupy the before-mentioned pasture-ground, subjecting themselves to the limits that shall be prescribed to the establishment of San Francisco."

† They were killed by the Americans during our war with Mexico.

Statement of the case.

presented for confirmation to the board of land commissioners, established by the act of March, 1851, to settle private land-claims in California.

When the claim was pending before the land commissioners, two papers additional to those set out at pages 600-604 were produced and given in evidence; one of them purporting to be a grant in fee simple of the land to the De Haros, signed by Governor Micheltorena, bearing date May 24, 1844, and the other purporting to be a grant of a similar nature, signed by the same officer September 18, 1844. The signature to both was genuine, but it was added after the cession of the country to the United States. The instruments were antedated, but by whom they were prepared was not shown.

The commission confirmed the claim, rejecting the paper of May 24, 1844, as a forgery or antedated, but relying upon the paper of September 18, 1844, though not without grave doubts as to its genuineness.

On appeal to the District Court additional proof as to the second paper was taken, and its real character exposed; and it, as well as the first paper, was formally abandoned by the counsel of the claimants, and the claim for confirmation was based solely on the provisional license and the proofs showing an occupation under it.

The clause which usually appears in Mexican grants of land in California, namely, that the party shall lose his right to the *land* in case he violates the conditions attached, was altered in the document of May 1, 1844, issued to the De Haros by the governor, to the words, "he shall lose his right to this *provisional concession*" in case he violates the conditions.

The document was mentioned in the list of grants made by the secretary of state, Jimeno, known as Jimeno's Index, and is noted in the record *Toma de Razon*. The entry in this last book was as follows:

"226. Don Francisco and Ramon Haro, on the 1st May 1844.

Argument in support of the claim.

“Title (titulo) delivered to them of the tract named El Potrero, in extent of one half league square.”

The District Court rejected the claim, holding that the right conferred by the document in question was a *mere license* to occupy the premises until the ejidos, or common lands, should be measured.

In distinguishing the case from some others cited, the court, in its opinion, said :

“*In this case the permission is given to occupy only until an assignment of the land to the pueblo is effected.* The governor not only indicates no willingness or intention to grant, but, in obedience to Jimeno’s suggestion, he refuses to grant, and *ex industria* limits the concession to the permission to occupy land not then used by the Mission.”

From the decree of that court the case was now here on the appeal of the claimants.

Messrs. M. Blair, F. A. Dick, J. B. Felton, W. M. Stewart, W. M. Evarts, J. S. Black, and T. J. Coffey, for the appellants :

Before proceeding to argue this case, it is our duty to inform the court that there appear in the transcript of the record several documents which are *antedated*,—not forged, in the proper signification of the word, since the *signatures* of the persons purporting to have signed are *genuine*,—and many depositions which, to-day, we know are full of untruths. Happily, the false is easily separated from the true; and it is clear from the transcript that neither the *original grantees* nor any one claiming through them are in any degree to be blamed for the attempts which have been made to impose upon the court. The original grantees, from whom the claimants derive title, Ramon and Francisco de Haro, were killed by the Americans in the war of 1846, which led to the annexation of California to the United States; long before there could have been any motive for forgery or perjury in connection with this title. Their

Argument in support of the claim.

father, who was their heir, died in 1849; long prior to any litigation relative to California land-titles. His successors in interest were six minor girls and one minor son. From these latter heirs the estate has passed into the hands of numerous American citizens of California, who, until a recent period, shared in the prevailing ignorance of Spanish laws and customs.

Almost every one who has heard of California knows something of the history of the frauds which were practised after lands, formerly unsalable, were rendered by American enterprise, and the wonderful growth of that coast, as valuable as those which, in the Atlantic States, have been cultivated and improved for ages. Such frauds were, in many instances, perpetrated by the very officers who, under Mexico, were intrusted with the duty of granting lands; and the identity of signature, the character of the signer, and the utter confusion which prevailed in the archives of the former government, rendered it easy to impose spurious antedated documents, not only on purchasers, but on the bar and the judiciary. Witnesses of California birth for years obtained a livelihood by the fabrication of documents in the Spanish idiom, and attempting to maintain them as genuine by perjury; and it was not until Mr. Stanton, lately Attorney-General of the United States, visited that coast, and, supported by the aid and power of the Federal government, brought his great professional force and accomplishments to the work of collating the various sources of evidence, and of arranging them on principles of legal science, that it has been *possible*, by even the most careful examination of witnesses and the most laborious research of counsel, to guard the courts against being imposed upon by fraudulent and spurious land-claims.

In the case at bar the claimants were *imposed* upon by two forged grants and an antedated certificate of juridical possession. When they discovered their true character they openly abandoned them, and themselves announced the frauds and imposition. That it was not for want of diligence upon the part of these claimants that they did not at

Argument in support of the claim.

first discover the real character of those documents, and the evidence given in support thereof, is evident from the fact that the judges of the land commission, assisted, as they were, by a special law agent, and with all the lights which at that time could be furnished by the archives in the possession of the commission, founded their decision confirming the claim of the petitioners upon one of the forged documents; and it was naturally not a difficult task to impose upon the present claimants, not one of whom could, by any possibility, have known the true state of the case. It would be unnecessary to make this preliminary statement to a California court, or to persons intimately acquainted with the local history of that State. Such a tribunal would see, on reading the transcript, that the claimants, in presenting these spurious documents, were the victims, and not the accomplices, of a fraud. On this remote Atlantic coast, where much of the history of that region has the aspect of the fabulous, the explanation is necessary for ordinary readers of the reports, and will be pardoned by all.

In here presenting the case, the claimants do not invoke the doctrine now settled, that where that which is genuine in the grant can be distinguished from that which is fraudulent, the genuine part will be upheld, and the false rejected. Denouncing the spurious wholly, they present documents of unquestionable genuineness, and ask to have their rights determined by those; and, as matter of right and justice, that they shall not be prejudiced by skilful frauds practised upon them; frauds which have heretofore deceived the most cautious and able of the bar, and even the courts themselves.

The documents on which we rely are all given in the statement of the case.

I. We might rest upon the opinion of the District Court, which decided this case. The court states that there can be no doubt of the genuineness of all these documents. It further states that the petitioners repaired the old wall which had been erected around this tract by the priests; that they placed their cattle and horses thereon, which were regularly

Argument in support of the claim.

attended by their herdsman and themselves, who resided at the Mission. In construing the provisional grant in this case, the court states *that it is a permission given [to the grantees] to occupy until an assignment of the land to the pueblo is effected.* The court has decided, then, that in 1844 the proper authorities of Mexico granted the occupation of certain lands to the persons under whom claimants derive title, *until such time as those lands should be measured and set off as a part of the ejidos of the establishment of San Francisco*, and subject to certain conditions.

It is not pretended that those lands ever have been measured off as part of the ejidos of that establishment. It is now certain and conceded that they never can be. No condition of the grant has been violated. The authority of the governor to make such a grant is conceded. Now, this case admitted, how can a conditional grant, made by a government, to occupy certain lands until a certain event happens, and as long as designated conditions are complied with, be determined except in one of two ways: 1st, either by the happening of the event; or, 2d, by the non-fulfilment of some one of the conditions? The district judge has decided this case upon the point that the grant is not a grant in fee, but that it is simply the grant of a right to possess or occupy. The opinion does not discuss at all the point which is the only one in this case, and which is this: Conceding that the Mexican authorities granted to the De Haros only a right to possess and occupy this land, is not this right to possess and occupy still subsisting so long as the event limiting that right has not happened, and the conditions for the violation of which that right was to be forfeited, have all been complied with?

We say that it is; and that, until such event happens, or the conditions are violated, such a grant vests in a grantee an estate;—whether called an estate in fee, or a lease, or a license, makes no difference.

II. Turning from the opinion of the judge to the facts, we find that in April, 1844, the youths De Haro, Mexicans by birth, petitioned the governor of the Californias for a

Argument in support of the claim.

small piece of land, for the purpose of placing thereon tame cattle. The alcalde of San Francisco at the same time reported that there were no claimants for that land, and that it was not occupied by any community or private individual. The case shows that it was a small, barren neck of land, extending into the Bay of San Francisco, so worthless that nobody but two boys, just starting in life, ever thought of reducing it to ownership, at a time when the most fertile lands of California could be had by the league for the mere asking, and the government was grateful to the person who would take and occupy them. It was the duty of the governor, under the colonization law of Mexico, to grant the request of these petitioners, if there were no valid legal objections. The governor of California was bound to carry out the colonization laws in their true spirit, and to make grants of vacant lands to those persons who showed themselves within their purview; and the right which he had to grant lands under those laws, was not a right which he could exercise or not at his caprice. Under the Mexican system, the petitioner for vacant lands, who complied in all respects with the colonization law, had a legal right to a grant as much as a pre-emptioner under the American law has a right to a patent. Governor Micheltorena, recognizing this right on the part of the petitioners, refers the matter to the secretary of state, for the purpose of ascertaining if any reasons there were why the De Haros should not receive a full title in fee to this land, as they had asked. For it is evident from this that, if the secretary of state had found no objection to the issue of a full, unconditional title, the governor would have granted the De Haros this land absolutely.

And now analyze the objection which the secretary of state did find to the making of an absolute grant. How far would it naturally act upon the mind of the governor, and to what extent would it naturally make him limit, qualify, or modify his grant to the petitioners? The secretary reports, in the first place, that the land "is lying *unoccupied*, as the solicit ng parties show by means of a report proceeding

Argument in support of the claim.

from the respective [proper] judge." Now, the proper judge, Hinekley, had certified that by unoccupied he meant "that up to this day there are no claimants of any kind, and it is not occupied by any community or private individual." So that we have the case of a small piece of land, *unoccupied*, and *unclaimed*. But the secretary goes on to state, in substance, that it is possible that the Mission of San Francisco may want these lands as ejidos. He does not say that they will not select other lands as ejidos; nor does he pretend that these lands were fit to be ejidos, as they were not; but he says that a possibility depending on two contingencies, exists. Those contingencies were, first, whether any lands should ever be assigned to the said establishment; second, whether, if any lands ever were assigned to that establishment these would be the lands selected. This bare possibility of this future contingent event was the sole objection found by the proper authority to the full compliance with the prayer of the petitioners.

The secretary evidently thought that the prayer of the petition should be complied with so far as it could be, subject to this objection. And he says that he is of opinion "that in the meanwhile the parties might occupy the plot of land by virtue of a provisional license." What do these words in the "*meanwhile*" signify, unless that until these identical lands are assigned to the said establishment the parties may remain in undisturbed possession of that land, and that there is no reason for disturbing them in possession until that contingency happens?

The secretary continues, "because no prejudice is [would be] caused thereby to the community or to any private individual."

Take, now, the objection of the secretary to the full granting of this land with his recommendation to the governor, and is it not clear that the secretary said, in substance, to the governor: "These are vacant and unclaimed lands; but there is a possibility that a certain public corporation may at some day require them for public purposes. Were it not for this possibility, I would recommend that a grant in fee

Argument in support of the claim.

absolute be made to the petitioners. But, as this possibility exists, I do recommend you to grant the lands, subject only to the possibility of this contingency happening." In other words, is it not clear that the single objection found by the secretary, to the absolute granting of this land, should be the single limit or restriction which he recommended should be put upon the grant?

III. Analyze this provisional grant, license, lease, or permission to occupy. Did the governor, in consequence of this bare possibility of an event, which probably never would happen, reject the prayer of the De Haros, and refuse to give them any title at all? or did he grant the request of the petitioners to the extent that this objection permitted him? He complied with the prayer of the petitioners, so far as he could consistently with this objection and this possibility. In the first place, he commences his decree, which precedes the title, and in accordance with which the title issues, by stating, that he makes it after examining,—in view of the petition of the parties,—the reports that were made, and whatever else was necessary to be considered, in conformity with the laws and regulations on the subject. So that whatever relief he granted, was granted in compliance with the petition, the reports, and the colonization laws. That petition was for the fee absolutely. The reports were that the fee could be granted absolutely were it not for the existence of a bare possibility that the public might at some future day want these lands for ejidos. The laws and regulations on the subject, in conformity with which this decree was made, prescribed that unclaimed and vacant lands ought to be granted for just such purposes as this land was asked for, and that is, for the purpose of raising stock—the chief employment of the nation, as the cattle raised was its chief product. The petition, the reports, and the laws, are all made a part of this decree by incorporation, and this decree must be read by their light. Now, is it to be supposed that either the governor or the secretary thought that these lands should forever be taken out of the market and excluded from the beneficial purposes of agriculture and commerce,

Argument in support of the claim.

simply because they might by possibility be afterwards wanted for a use for which they were then not necessary at all; a possibility so remote that it did not suggest itself to the chief officer of the Pueblo of San Francisco, as is shown by the fact that he makes no mention of it in his report? The corporation in question had not yet selected any ejidos, nor was it by any means certain that it ever would. As a matter of fact, it never did. Even if it did select ejidos, it was almost an impossibility that it should select these particular lands; hardly possible, we say, that this rocky, barren, bleak tongue of land, which could under no circumstances have had any value but for the marvellous developments of later years, could have been selected by a corporation as the ejidos; the exit, the breathing-places, the places for common resort, the outskirts for the convenience of its population, a population, as is historically known, that did not exceed, at the time of the American occupation, three hundred souls—that population residing, too, an average distance of three miles from the contingent, possible ejidos.

Continuing our analysis of the decree of the governor, he says:

“I declare Francisco and Ramon de Haro empowered to occupy provisionally the piece of land called Potrero de San Francisco.”

Now, what does the word “*provisional*,” in connection with *occupation*, mean? The word *provisional* evidently means conditional—an occupation depending on something that is *foreseen* (*pro-visorius*) as a possibility; and what condition or possibility has been foreseen, excepting the possibility of the measurement of these ejidos? Why should the word “*provisional*” be used in this connection at all, unless something had been foreseen as a possibility which was to limit and bound the right of occupation granted by this decree? The decree then proceeds as follows, using the language of the translation in the record:

“Let the corresponding patent be issued; let it be duly en-

Argument in support of the claim.

tered, and let this information be communicated to the person in charge of said establishment."

The translation should be as follows :

" Let the corresponding title issue, and let registry be made of the same, and let a communication be directed to the person in charge of said establishment."

We would here call attention to both of the words, "corresponding" and "title." The word "corresponding" means corresponding with the views hereinbefore expressed; that is to say, corresponding with the petition, the reports thereupon, and the colonization laws; in other words, a title corresponding with the facts, that a petition asks for the land in fee, reports that declare that the land is vacant and unclaimed, but possibly may be wanted for future public uses, and with colonization laws prescribing that lands vacant and unclaimed, shall be given to any Mexican citizen who will use them for ordinary industrial purposes. A title corresponding with all these facts is to issue. What is a title if it is not an evidence or an assurance of an estate in lands? This title issues directly from the government. It is made under certain solemn laws framed for the encouragement of settlement and immigration. Is it not absurd to suppose that a solemn title like this can issue from a government, clothed with all the formalities of law, and yet convey no interest or estate? The decree continues: "*Let registry be made of the same,*" the correct translation of the terms used; that is, let this title which issues be recorded in the archives of the government. For what purpose should a title which conveys no title or interest be recorded in the archives of the government? What information would be imparted to any one by a registry, setting forth that a title had issued on a certain day, which title had conveyed no interest or estate in the lands therein described? The Mexican archives were kept for the purpose of carrying out the colonization laws. The province of these archives was to inform the world that certain lands had already been granted, and by consequence

Argument in support of the claim.

were no longer open to settlement, and no longer subject to the disposition of the government. But can a reason be assigned why the government should insist on registering a title which conveyed no rights, and which is not a title in any sense of the word, when, according to the theory of the opposite side, the lands would still be open to settlement, and subject to be granted to any person who should ask for them?

The next clause in the decree is:

“Let a communication be directed to the person in charge of such establishment.”

A communication to what effect? Evidently that a title to this land has been issued, and has been recorded in government archives, which title corresponded to a certain petition praying for the absolute fee of this land, and to reports of the proper authorities to the effect that there was no objection to the granting the fee of this land, provided such grants were made subject to being defeated in case these lands should be measured off as ejidos of a certain corporation, and corresponding with certain laws declaring it to be the policy of the nation that lands situated precisely as these confessedly were, should be granted to such citizens as would put them to their proper uses.

The grant was issued in accordance with this decree. Observe the official language in which Micheltorena speaks of himself:

“Manuel Micheltorena, General of Brigade in the Mexican Army, Adjutant-General of the staff of the same, Commandant-General, Governor, and Inspector of the Department of California.—”

This is the language of an officer who is about to act in his official capacity, and to exercise powers conferred upon him by the nation. As an inducement to the grant, the governor sets forth the petition already analyzed, the taking of the necessary proceedings and investigation according to the colonization laws, and then continues:

Argument in support of the claim.

“By virtue of the authority in me vested, I have thought proper, in the name of the Mexican nation, to *grant* to them the occupation of the aforementioned potrero, subject to the mensuration (measurement) to be made of the corporation or common lands (ejidos) for the establishment of San Francisco, and under the following conditions—”

Here a concession of something is made in the name of the Mexican nation. Some rights were conferred. What were the rights thus conferred? Plainly the rights to occupy the potrero.

How long was that occupation to continue, and subject to what conditions? In what manner could the rights be lost? The grant goes on to tell: In case these lands should be measured off as the ejidos of San Francisco, these rights would be determined or diminished by their own limitation. No other bound or limit to that right of occupation, excepting this possibility, that these lands would be required for a public purpose, can be found. But there are certain conditions attached to this grant to be performed by the grantees, a violation of which conditions will impose upon them the penalty of losing the rights conferred by this instrument. Rights, therefore, were conferred by this instrument—rights which could be forfeited, provided certain conditions were not complied with, and rights which could not be forfeited, that is, could not be taken away from the grantees so long as these conditions were complied with.

Now, these conditions are, in the first place, that the grantees shall not, by any title, sell or alienate the property to the prejudice of any property the establishment of San Francisco may have. In other words, the title was a title that might be sold, provided that the sale or alienation should not prevent the establishment of San Francisco claiming the lands at some future time, in case it wanted them as ejidos. This meaning which we have given to this condition will perhaps be disputed, and it is not necessary for our argument to insist on the meaning which we have given it, excepting by way of its illustration. The original

Argument in support of the claim.

language is somewhat vague. Translated literally, the words of this condition mean, we submit, this :

“They shall not, by no title, sell it nor alienate it without prejudicing some property which the establishment of San Francisco may have.”

Opposite counsel may contend that this is an absolute restriction on the right to sell or alienate. But if this had been the purpose of the grantor he would have stopped after the words “alienate it;” for the words “without prejudicing some property which the establishment of San Francisco may have;” would have been evidently superfluous. The language “without prejudicing some property which the establishment of San Francisco may have,” plainly contains the reasons why any restriction whatever is put on the right to alienate. And this reason would be entirely satisfied by giving to the grantees the right to sell or alienate, provided their vendees should hold the land subject to the same right of the measurement of the ejidos to which it was subjected in the hands of the original grantees. But, conceding that this was a restriction on the right to sell or alienate, when would such restriction cease? Obviously as soon as it became impossible that any rights could ever exist to be injured.

The second condition is as follows :

“They shall not obstruct the paths, roads, and servitudes, using it for culture and cattle they intend to introduce on it; but within a year, at the most, it must be occupied.”

Is it not evident that this language is applicable to a long-continuing estate—something that the grantees will be entitled to, even though they let eleven months and twenty-nine days pass without availing themselves of it? This condition is incompatible with the idea of an estate determinable at the caprice of the grantor; and does it not become absurd when used in a grant which, according to the ideas of opposite counsel, conveys no rights at all?

The third article in the grant provides, that if the grantees

Argument in support of the claim.

violate the conditions, they will lose their right to this provisional concession, which is delivered to the interested parties for their security and other ends. How could a title be *security* to them, unless it proved on its face that rights were thereby conveyed; that if they violate these conditions they will lose their rights to this provisional concession? What possible meaning can be given to a provision like this on the theory of opposing counsel that either this grant conveyed no rights, or else that the rights which it did convey were revocable at the will of the grantor? Is it not absurd to speak of losing rights in consequence of the violation of conditions, when there are no rights to lose; when, even if the conditions are complied with, there are no rights to retain?

We have before said, that the object of recording Mexican grants was to show to the world what lands, by having been granted, were no longer open to settlement and the operation of the colonization laws. Jimeno himself, the secretary, who suggested this possibility of this land being wanted as ejidos, as the only reason why they should not be absolutely granted, kept an official index, the object of which is clearly indicated by its title. It was called an "Index of the Lands Adjudicated, and Persons to whom they have been Conceded;" and all concessions of lands were regularly numbered in this index in the order in which they were granted. Now, in this index, in its regular order, this concession is inserted, under its proper number, in the same manner in which any concession under the colonization law was. Still further: in the official book called the "Toma de Razon," a book in which were set down the concession of lands adjudicated by the Mexican government, this grant was regularly recorded as a full grant of the land.

IV. If the concession did not confer upon the De Haros the right to occupy until this condition happened, what other construction can be given to the instrument? Only that of a license determinable at will. Supposing that to be the construction, by what right? when? how? has that license been revoked? The government of Mexico did not

Argument in support of the claim.

revoke it. On the contrary, the evidence shows that the heirs of the original claimants were in undisputed possession of their tract of land at the time of the treaty of Guadalupe Hidalgo, and the right to revoke such license, if it ever existed, passed to the United States, to be exercised, if at all, by the legislature, and not by the judiciary. For, even conceding this right to be revocable at the will of the government, that will must be expressed, and cannot be implied. And how can it be argued that the courts of the United States have been clothed with the power to exercise it?

Congress, by two successive acts (the act of July 4, 1864,* ratifying certain ordinances of the city, and the act of March 8, 1866†), so far from revoking any permission to occupy, has granted *these* lands to the persons who had the *right* of occupancy. What stronger right of occupation can there be than one resting upon an unrevoked license of the highest department of the government—the source of all titles?

But we do not concede that the instrument under which we claim conferred only a license, revocable at the will of the grantor. On the contrary, we assert that such a construction would be incompatible with the history of the grant, with its language, conditions, and evident meaning, with the circumstances of the country, and of the inhabitants thereof, at the time it was made. It is matter of common knowledge, that when this grant was issued, California was a sparsely settled country, without fences, with no obstruction to prevent the herds and flocks from roaming in an untamed state over its whole surface. All the inhabitants without grants might be said to be tenants-at-will of the government lands, and the government officers would have had no more thought of disturbing them in the possession of the ungranted portions, than our government now thinks of expelling pre-emptors from the public lands. Certainly it would never have occurred to any Mexican citizen to ask, nor to any governor to grant, a right to use lands for so long as the governor should so will. Even in the most

* 13 Stat at Large, 333, § 5.

† 14 Ib. 4

Argument in support of the claim.

populous countries it would hardly suggest itself to any private person to put a license to occupy land in writing, provided such license were revocable at will. Such a license would naturally be granted by word of mouth or by occupation without objection. But here, in the case of a private individual granting the right to use the most valuable property at *his own* pleasure, it would be an evident absurdity to put such license in the form of a solemn document, clothe it with legal formalities, give notice thereof to the world by registration, that he has done what simply allowed another to use his estate until he chooses to put him off, it may be, the next hour; for a power of revocation at will gives no fixed time to the licensee.

But if, on the other hand, it be admitted that this is something more than a license to occupy at will, what other limit or restriction on the right of occupancy can be stated than the one we have suggested, namely, the selection, measurement, and appropriation of these lands as the ejidos of San Francisco? Clearly, none other can be obtained from the grant itself. Suppose that Congress should grant a certain island to A. and his heirs, until it should be required as a site for a light-house, would it not be a grant of that island, subject to the title being defeated by the proper department of the government selecting it for a light-house; in other words, a grant on condition subsequent? And if, by any convulsion of nature, it should be rendered impossible that such island should be ever selected for a light-house site, would not the title, as against all the world, become absolute in the grantees? What difference would it make if the language in which such a grant were expressed was, "The land is granted," or "permission to use and occupy the land is granted," or "a license is given to use and occupy the land?" Would not the law, which construes words so as to get at the real intent of the party using the same, see that the grantor intended to give the grantee all the beneficial rights of property in the subject of the grant, determinable in a possible event?

The admeasurement, selection, and assignment of ejidos

Argument in support of the claim.

was a part of the incidents of establishing a pueblo peculiar to Spanish and Mexican countries, a system quite at variance with the manners, customs, and laws of Americans. It is certain Congress has not decided, and will not decide, that the lands petitioned for by the De Haros may be set apart as ejidos; and because the object of the reservation, or rather, the right to assign them as ejidos, can never be exercised, are we to be told we thereby have not the right to occupy?

V. We pass now to the questions:

1st. Has the event taken place on the happening of which these rights of occupancy were, by the term of the grant, to cease?

2d. Has that event become impossible? If so, when and in what manner?

As to the first query, we might rest upon the fact that the government has not shown affirmatively that any such event has happened; for, it is incumbent on one who asserts that an estate is divested by the happening of a condition subsequent, to show affirmatively that such event has happened, which causes the estate to cease. But the case shows that these lands were never measured off as ejidos to the establishment of San Francisco, and that they were occupied by the heirs of the De Haros up to the cession of California to the United States, and even up to the present time.

To the second question we answer, that it became impossible for such event to happen the moment California was ceded to the United States, for the reason that *then*, with the change of proprietorship of the territory, the objects and purposes of the reservation, and the system of measuring ejidos, ceased.

We go farther, and assert that, whereas, under the Mexican system, in pastoral countries it was deemed of paramount interest to the public that ejidos, or pleasure lands, should be reserved for public use, under the American system the demands of commerce require that lands in the vicinity of a seaport be appropriated to private business and held in private proprietorship. Recognizing this policy, the Congress of the United States has twice enacted that the

Opinion of the court.

lands forming the peninsula on which San Francisco now stands, all of which, under Mexico, might possibly have become ejidos, should be granted in fee to the individuals, who, as against all but the United States, had the right to occupy the same to the extent of the actual right of occupation. These acts recognize and establish the proposition that these lands can never be used as ejidos. Indeed, by such legislation, Congress has deprived itself of the power to provide for the selection and assignment thereof as ejidos; and if these lands were now to be offered to the city of San Francisco, to be used as ejidos, the corporate powers would doubtless decline to accept them with that restriction; for, while they would be useless for the common purposes of the inhabitants of that city, the necessities of commerce demand that they shall be owned by individuals, and devoted to the use of trade, manufactures, &c.

[The learned counsel then made other points not necessary, in view of the grounds of the opinion, to be presented.]

Messrs. Stanbery, A. G., Carlisle, Wills, and Cushing, argued the case very fully, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The case, on account of the large pecuniary value of the land in controversy, has elicited great interest. We have been aided by oral and written arguments of rare ability, and the question of pueblo and mission rights, and the powers of the Mexican governors of California over them, has been much pressed upon our attention.

The construction, however, which we give to the *espediente*, conceded to be genuine, and on which the plaintiffs must recover, if at all, supersedes the necessity of discussing the remaining questions, which in any other aspect of the case, it would be important to do.

In order to ascertain the proper effect of the *espediente* as an entire thing, it is necessary to analyze all its parts. And with this analysis, the meaning of it, in our opinion, cannot be mistaken. The petition presented by Francisco

Opinion of the court.

and Ramon de Haro, residents of the ex-mission of San Francisco, to Governor Micheltorena, asks for the *grant* of the potrero, for the purpose of pasturing cattle inherited from their mother, which they were desirous of taming, and had to remove out of the rancho where they then were. The assent of their father was necessary to enable them to solicit the grant, as they were minors, and it was given.

According to the custom of the country, this petition was referred to the secretary of the department to ascertain what was the true state of facts, and report to the governor. The informe, as it is called, or official report of Jimeno, who was then secretary, as it was approved by the governor, and formed the basis of his action, is of material assistance in arriving at the true nature of the right which was subsequently conceded. It is in these words, addressed to the governor: "The mission of San Francisco has no longer any property, and consequently the potrero which is petitioned for is lying unoccupied, as the soliciting parties show by means of a report proceeding from the respective judge; and inasmuch as there are to be assigned to said establishment, its corporation or common lands, I am of opinion, that, in the meanwhile, the parties might occupy the plot of land, by virtue of a provisional license of your excellency, because no prejudice is caused thereby to the community (or) to any private individual."

The significant fact appearing on the face of this document, is, that it ignores the very matter for which the De Haros petitioned. They solicited a grant of the land pertaining to the potrero, but Jimeno, among the most intelligent of Mexican officials, knew, if the mission was secularized, there would remain an incipient pueblo, which might embrace for its common lands, the piece of ground asked for; and, therefore, reported that the grant of it could not be safely conceded, as it might prejudice the rights of the community. But, as the inclosure was vacant, no harm could result to the public, or any private individual, by its temporary occupancy, and as the petitioners wanted very

Opinion of the court.

much a place to pasture the cattle, which had fallen to them in right of their deceased mother, he recommended that they be permitted to occupy it, temporarily, and for their security, the governor should issue to them a provisional license. The report was evidently predicated on the belief that the grant of the land would interfere with the rights of the mission or pueblo; but in the meantime, as they were not ascertained, there could be no reasonable objection to the De Haros having the permissive occupation of the tract. It nowhere appears an interest in the land was in any event to be conceded, nor were any promises held out to the De Haros, if the potrero should prove to be outside of the common lands, a title in fee, or any less title should be assured to them. Jimeno recommended nothing more than a provisional license, enabling the parties to occupy the land for the occasion. The question arises, was Micheltorena's decision in conformity with Jimeno's recommendation? The material part of the order or decree of the governor, and which was extended on the same day of the approval of the report, is as follows: "I declare Francisco and Ramon de Haro, empowered to occupy provisionally the piece of land called Potrero de San Francisco to the extent of half a square league." "*Librese el correspondiente despacho*"—"let the corresponding order or despatch be delivered; let it be duly entered, and let this information be communicated to the person in charge of said establishment." It is very clear that this decree conforms to the recommendations of the report, and that Micheltorena did not intend to confer any greater powers on the De Haros than Jimeno advised.

There are no words used indicating an intention to give a title, or to vary from the position taken in the informe. The document to be issued, is one corresponding to the right conferred, which was to occupy provisionally the potrero. And the despatch which did issue for the protection of the parties, conformed to the terms of the decree, as will sufficiently appear by an examination of its essential provisions "I have determined," says the governor, "to permit the Messrs. De Haro to occupy the beforementioned pasture

Opinion of the court.

ground, subjecting themselves to the limits that shall be prescribed to the establishment of San Francisco."

If language has any meaning, Micheltorena, intended by this instrument to give nothing more than the power to occupy, and even this power was made expressly subject to the paramount claim of the establishment of San Francisco. To *permit* pasture-ground to be occupied, excludes all idea that a grant of the land was contemplated. There are, absolutely, no words indicating an intention to make a future grant on the happening of any event whatever. But the *lespach* goes further, and forbids the De Haros to sell or alien it, or do any act prejudicial to the property of the establishment, on penalty "of losing their right to this provisional concession." The prohibition against sale and alienation, by necessary intendment, refers to the right of occupancy, for no other right was to be conceded, and this right was to cease, if the fundamental conditions attached to "the provisional concession," delivered to the De Haros for their protection, were violated. If they were to lose their right to the land, as is contended, why were the words appropriate to a concession of the land, which an inspection of the original document shows were written in it, stricken out, and the phrase "they shall lose their right to this provisional concession," substituted in their stead? It is clear enough, that Jimeno, who was in the habit of writing grants for land, inadvertently pursued the usual form for such grants, but recovering himself, wrote the words appropriate to confer a license to occupy, which he had recommended and the governor approved.

It surely cannot need more evidence to demonstrate that the Mexican officials intended the *espediente* to be what it is, a mere license to occupy, not permanently, but "in the meantime," until the *ejidos* were measured. It is impossible to divest the mind of the conviction, that Micheltorena and Jimeno, either believed they had not the power to grant the *potrero*, or, if they had, the circumstances of the mission forbade its exercise, and conceded a permissive occupation, not of right, but by way of grace and favor.

Opinion of the court.

But, it is said, the occupation thus permitted could ripen into a grant in fee, or some lesser estate, in case the potrero was not included within the admeasurement of the ejidos. Not so, however, for there are in the title-papers no words granting the tract of land, either absolutely or on condition, provisionally or otherwise; nor any words by which any estate or interest in it can be raised by implication. The power conferred, resembles a grant in no particular, but is a bare, naked license, and to be governed by the rules of law applicable to such a power.

But, the authority of the "Toma de Razon" is invoked to bolster up the claim of title, because in the entry of this case, the word "titulo" is used.

It is proper to remark that the nature and effect of an espediente, when it is clearly ascertainable, from contemporaneous and official construction, cannot be defeated by an entry in the Toma de Razon. The office of the Toma de Razon is to support, not destroy the espediente. In this case, however, the entry did not mistake the character of the transaction, for the Spanish word "titulo" does not indicate the measure of the right, interest, or estate of the party. "It means," according to Spanish authority,* "the cause in virtue of which anything is possessed, and the instrument by which the right is accredited," and in Spain and Mexico there are a class of titles (titulos), not translatable of property. Therefore, Jimeno did not err in characterizing the instrument given to the De Haros as a "titulo," for the word "titulo" is a *nomen generalissimum*, to be applied as well to title-papers, which convey title, in the usual acceptation of the term, as to those which confer a mere right of occupancy. And the claimants can derive no help from the use of the word "concession," for a distinguished Spanish scholar (Escriche), gives this definition of it: "Whatsoever is granted as favor or reward, as the privileges granted by the prince." As a matter of favor, Micheltorena conceded to the De Haros, the privilege of temporarily occupying the

* Escriche.

Opinion of the court.

potrero in question. There was no contract to do more, nor the semblance of one.

Without pursuing the subject further, we are satisfied, from a careful examination of this Mexican record, that the only thing conferred, or intended to be conferred, on the De Haros, was a provisional or temporary license of occupation, which the governor was willing should be in writing, instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to a consideration of the law on the subject of licenses. If the license in question has been terminated, there is an end to this case, and it is wholly unnecessary to consider the other questions which have been discussed at the bar.

There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376.* We are not aware of any difference between the civil and common law on this subject.

Testing this case by these rules of law, is not the license

* Or in the last edition (4th), p. 736, notes to *Prince v. Case* and *Rerick v. Kern*.—REF.

Opinion of the court.

given by Micheltorena ended? The De Haros died in 1846, while the Mexican government owned California, and with their death the license terminated. As long as they were in full life they had a valid authority to enter upon the potrero and pasture their cattle, but, as the privilege was a personal one, it ceased when they died, and did not extend to their heirs. The continued possession by the father, and those under him, estops no one—certainly not a sovereign power like Mexico or the United States. The representatives of the De Haros could, doubtless, lawfully enter upon the potrero in order to remove the property left there, but their authority extended no further.

It is argued, the license was to last until the ejidos were measured, and therefore is not determinable until that event occurs. This argument has no force, unless it was the intention of Micheltorena to give some interest in the land to the De Haros when the ejidos were assigned, if they did not embrace the potrero; but we have seen that he had no such intention. He promised nothing; he did not say what he would do or not do when the common lands were measured, but told the De Haros, meanwhile, until they are measured, you can occupy the potrero for a pasture-ground for your cattle. This was not a contract on consideration that they and their heirs should have the right of occupancy until the happening of this event. It might never happen; and what was intended as a mere license would be thus converted into a grant. Micheltorena could have lawfully ousted the De Haros from the possession at any time before their death, because the privilege conferred was at all times within his control, and liable to be countermanded.

The De Haros, so to speak, were tenants-at-will, and held at the sufferance of the Mexican authorities. They could not have been deceived as to the nature of the right conferred, for they repaired to Monterey to get the land in full property, and returned to San Francisco with only a provisional license to pasture their cattle on it. The term provisional excludes the idea of permanency; it means something temporary and for the occasion.

Opinion of the court.

It may be true that Micheltorena, when he conceded to the De Haros the privilege of pasturing cattle on the potrero, did not intend to revoke it, if the conditions were observed, until the ejidos were measured, and that it was so understood by them; but this can, in no aspect of the case, alter the relations of the parties to this suit. It was a personal privilege conceded to the De Haros alone, and with their death it ceased. The license itself not only contains no words extending it beyond the lives of the parties, but all the circumstances of the case exclude the idea that the governor intended to pass any interest descendible to heirs.

If this is so, this claim, if presented to the Mexican government, would have been rejected, and is, therefore, not entitled to confirmation, under the act of Congress, against the United States.

In concluding this opinion, we are sorry to have to state that this record is not a clean one. It is tainted with fraud and forgery. When this claim was originally pressed for confirmation, it was on title-papers conveying a grant of the land, which are now withdrawn as being forgeries. If the expediente on which the claim is now rested carried the title to the property, why substitute forged grants? A crime is never committed without an adequate motive, and it is clear that, in the opinion of the party who did it, the genuine expediente fell short of a concession of the potrero in full property.

We are gratified, on a consideration of the evidence, to learn that the young De Haros, during the short period they occupied the potrero, did not mistake the nature of the power conferred on them. They did not add to the value of the land by improvements, and left nothing on it but what could be easily removed and made available to their heirs.

DECREE AFFIRMED.

Mr. Justice FIELD dissented.