49TH CONGRESS, 1st Session. } SENATE. { EX. DOC. No. 128.

LETTER

FROM

THE ACTING SECRETARY OF THE INTERIOR,

TRANSMITTING,

In pursuance of law, a report of the surveyor-general of New Mexico on the land claim called Cañada de Cochiti, No. 135.

APRIL 21, 1886.—Referred to the Committee on Private Land Claims and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, April 19, 1886.

SIR: Referring to Department letter of December 11, 1880, I have the honor to transmit herewith, pursuant to the requirement of the eighth section of the act of July 22, 1854 (10 Stats., 308), a supplemental report of the surveyor-general of New Mexico on the alleged private land claim designated as Cañada de Cochiti, No. 135.

Very respectfully,

H. L. MULDROW,
Acting Secretary.

The PRESIDENT OF THE SENATE PRO TEMPORE.

UNITED STATES SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex., February 27, 1886.

In the matter of the private land claim known as the Cañada de Cochiti Grant, J. P. and J. G. Whitney, claimants. File No. 95. Reported No. 135.

This claim was filed in the surveyor-general's office in July, 1882, and is founded upon an alleged grant to Antonio Lucero, dated August 2, 1728, by Bustamente, then civil and military governor of New Mexico. The tract claimed is "a piece of land upon the mesa of Cochiti, to plant thereon and on said piece of land to cultivate ten fanegas of wheat and two of corn, and to pasture my small stock and horse herd;" and bounded "on the north side by the old pueblo of Cochiti, and on the east by the Del Norte River, and on the south by lands of the natives of said pueblo, and on the west by the Jemez Mountain." On the 25th of August, 1883, Mr. Atkinson, then surveyor-general of this Territory, gave his opinion in the case, denying the validity of the grant as bounded, but approving the claim for such of the land as had been in the actual and bona fide possession of the heirs of Lucero. On the 19th day of February, 1885, Mr. Pullen, the successor in office of Mr. Atkinson, issued instructions to his deputies for the survey of the grant in accordance with the boundary calls recited, and in disregard of the opinion of Mr. Atkinson as to its restricted approval. These instructions were submitted to the Commissioner of the General Land Office, who approved them, and thus practically overruled the decision of Mr. Atkinson, which he had no right to do. Mr. Pullen thereupon proceeded to survey the entire tract, and forwarded to the General Land Office the report of his proceedings, against

which a protest was filed by sundry interested parties, on the strength of which the case has been returned to me for re-examination and report. I have given due notice of these proceedings to the claimants and offered them the opportunity to file any additional papers or proofs.

The first, and perhaps the only question to be considered is the validity of the grant, for, if none was made, the question of survey is disposed of. In support of their title the claimants file what purports to be a certified copy of the original grant papers. In the petition of the grantee the lands are described as already recited, but there is no description of them in the decree of the governor making the grant. The alcalde is directed to examine the land, "citing the natives of said pueblos and others who may live adjoining, and there being any opposition, to cease; and there being no obstacle, and it being without prejudice to any third party having a better right, the grant is made to him," &c. It also declares that "he shall settle the same within the time the royal ordinances prescribe. * * * And said possession being given, he will return the original, so as to furnish him a duplicate." The alcalde's report does not show that he notified the Indians or any one else of the decree of the governor, nor are the lands described, but only referred to as "the lands expressed and mentioned in this grant." No evidence of its existence is found in the archives of the Mexican Government, but a portion of what is claimed to be the original petition is presented, of which the concluding part and the signature of the person executing it are wanting. The papers claimed to be original bear the same date as that of the grant, and the records of this office show that Bustamente was then governor of the Territory. I fully agree with Mr. Atkinson that the copy of the purported original grant papers is not so authenticated as to be receivable in evidence. It is alleged to have been made by Juan Antonio Cabesa de Baca on the 30th of December, 1817, and although there is evidence tending to show that the signature of said Baca attached to said copy is genuine, and that he was an alcalde in the early part of the present century, I am not aware of any law or authority empowering him to authenticate any such document. Mr. Atkinson cites provisions of the Spanish law to show that he had no such power, to which I add the language of the Supreme Court of the United States in the case of United States *v.* Castro *et al.*, 24 How., 346: "Whenever, therefore, a party claims title to lands in California under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence. But in order to maintain a title by secondary evidence the claimant must show to the satisfaction of the court (1) that the grant was obtained and made in the manner required, at some former time, and recorded in the proper public office; (2) that the papers in that office, or some of them, have been lost or destroyed; and (3) he must support this proof by showing that within a reasonable time after the grant was made there was a judicial survey of the land, and actual possession by him, by acts of ownership exercised over it."

As regards the other document relied upon by the claimants, purporting to be from the record of proceedings before the alcalde, Antonio de Armenta, in 1785, it is not authenticated in any manner, and no attempt was made to prove the signature or show its authenticity. Of course it cannot be received in evidence.

In the case of United States *v.* Sutter, 21 Howard, 170, it is said: "In every well regulated government the deeds of its officers, conveying parts of the public domain, are registered or enrolled, to furnish permanent evidence to its grantees of the origin of their title. An exemplification of such a record is admissible as evidence of the same dignity as the grant itself." However carelessly the public records of this Territory were kept in its early history, it was certainly in the power of the claimants to produce some evidence implying an official recognition of this grant. It is said that the original papers were copied in 1817 by Antonio Cabesa de Baca, and that he was then an alcalde; and the evidence shows that the records kept by him are still in existence. But they were not produced, nor is there anything to show that any effort was made to do so, The same may be said of the proceedings claimed to have been had before Antonio de Armenta in 1785. In the case of The United States *v.* Polack *et al.*, 1 Hoffman's Land Cases, 284, it is said:

"The best, if not the only, tests of the genuineness of an alleged grant are to be found in the record evidence contained in the archives, and in the fact that the land has been occupied under a notorious claim of title recognized by the former Government."

But the validity of the grant is still more questionable when considered in the light of other facts, which I proceed to notice. The grantee petitioned for "a piece of land to plant thereon, and on said piece of land to cultivate ten fanegas of wheat and two of corn, and to pasture my small stock and horse herd." This is all he asked, and it is not to be presumed that the grant covered any more. The area of the land thus prayed for, according to a careful calculation I have caused to be made, would only be about 32 acres of tillable land, and pasture enough for the "small stock and horse herd" of the grantee. But it is now claimed that the governor of New Mexico answered his petition by granting 104,554 acres, or a little more than 163 square miles.

This is what the present claimants ask me to believe, and it is simply preposterous. It sets common sense completely at defiance. *It is as improbable that a nation would* thus throw away its public domain as that an individual would recklessly give away his private fortune. But it is insisted that the boundaries of the grant cover this large area, and that they are to govern. To this I reply that if it were true that the alleged boundaries clearly and unequivocally cover so large an area it would powerfully strengthen the suspicion of the forgery of the papers relied on as evidence of title, because the petition and the grant must be judged together, and it is not fair to assume that the governor of this province was ignorant of his duties or reckless of his obligations. But the witnesses are not agreed as to the boundaries of the grant. There is a difference of opinion as to the location of the Jemez Mountains, which is claimed to be the western boundary. Some of the witnesses fix the point as the summit of the main range, west of the pueblo of Jemez, while others state that all the mountains in the vicinity of Cochiti are known as the Jemez Mountains, although they have other local names. The evidence further shows that between the Rio del Norte, the eastern boundary, and the main range of the Jemez Mountains are numerous smaller mountains. Where a natural object in a boundary has a particular name, and the same name is given to other natural objects lying beyond, the nearest object must be accepted as the true one, in the absence of special reasons for going beyond it. The Supreme Court of the United States, in the case Leavenworth, Lawrence and Galveston Railroad Company *v.* United States, lays of down the rule that "if they (the words of a grant) admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor." (92 U. S., 740.)

The only evidence as to the boundaries that seems to have been taken by the surveyors in the field consists of three affidavits that were filled out upon blanks furnished the surveyors, upon which the questions were printed and some of the answers. They purport to be sworn to before one of the contractors, and the jurats are signed "Jacob F. Laderer, U. S. Deputy Surveyor." I know of no law authorizing deputy surveyors to administer oaths, and evidence such as this is unworthy of consideration in the location of boundary lines. On February 6, 1884, the Commissioner of the General Land Office held that a deputy mineral surveyor could not act as a notary public in a case in which he made the survey, and in doing so, said: "To combine such duties with those of surveyor in the same case, I cannot but consider contrary to good policy." (See 11, Copp's Land Owner, 261.) As a sample, I give the answers of each of the three witnesses to this question: "Do you know the location of the Jemez Mountains, which form the west boundary call of said grant, and if so, where is it situated?"—Answer. "Yes; they are about 25 miles west of the Rio Grande, and west of the Jemez River." Answer. "Yes; they are about 30 miles west of the Rio Grande." Answer. "Yes; they are more than 20 miles west of the Rio Grande." How such statements could enable the surveyors to locate the western boundary line it is not easy to imagine; yet it is all I find among the papers as having been taken by the deputy surveyors on the subject. The *ex parte* affidavits of three Indians, residents of the pueblo of Cochiti, taken before the surveyor-general on the 8th of April, 1885, are not more satisfactory.

The title asserted in this case encounters a difficulty quite as serious in the fact that at the date of the grant the laws of Spain prohibited the granting of large tracts of land in fee for pasturage. Only the mere usufruct of such tracts was granted, which constituted no more than a tenancy at will or a life estate. On this subject Mr. Atkinson cites the language of the court in the case of McMullen *v.* Hodge, 5 Texas Reports, p. 62:

"We may, however, be permitted to remark that the concession of a large extent of land for the purposes of pasturage and the raising of cattle was unknown to the Spanish law. * * * It may well be doubted whether large grants of public land were ever authorized in any case by the laws of Spain." (*Ibid.*, p. 86.) "The concession of land for pasture of cattle constitutes no more than the usufruct of it." (2 White's Recop. 267.) I refer to other authorities cited by Mr. Atkinson in his opinion, to which I add the following extract from a communication of the governor of Florida to the King of Spain, in November, 1818:

"The concession of a great extent of land for the rearing and pasture of cattle constitutes no more than the usufruct of it for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation upon which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if it was held on rent."

Now, it is wholly improbable that this tract, covering an area of from five to six miles in width and from twenty-five to thirty miles in length, was granted in fee in 1728, in contravention of the express laws of Spain; and especially so in view of the fact that the grantee only asked for a very small tract for actual cultivation, and pasture for his "small stock and horse herd." It is not to be presumed that the Spanish authorities disregarded the laws under which they acted, but that they obeyed them.

The claimants in this case encounter still another difficulty in the fact that since the date of this grant sundry grants have been made of portions of the lands composing it. In the years 1788 and 1798 the Cañon de San Diego grants were made, Reported No. 25; in 1742, the Ramon Vigil grant, Reported No. 38; in 1768, the Nerio Antonio Montoya grant, Reported No. 118; and in 1780, the Los Frijoles grant, Reported No. 133. All these, in whole or in part, were carved out of the tract claimed in this case, and they cover a very large proportion of it. These grants were made by the same authority upon which the claimants rely in the case under consideration, and they make it evident that the Spanish Government did not recognize the existence of any prior grant in making them. Mr. Harrison, the Assistant Commissioner of the General Land Office, in his instructions to Surveyor-General Pullen, says:

"The claim of Lucero has priority in point of time over the claims enumerated as having been carved out of it, and should be surveyed according to the boundary calls in the grant, leaving the final disposal of title to Congress."

But the title to the grant according to its boundary calls was to be determined, in the first instance, by the surveyor-general, and it having been decided by him adversely, the Assistant Commissioner had no right to order its survey, nor had he any right to deal with the question of the priority of the Lucero grant over subsequent ones. That involved the validity of the grant, with which he had no authority to deal. The question before Mr. Atkinson, and the question now to be determined, is the validity of the grant to Lucero, and not whether it shall prevail over subsequent grants of the same land. It is whether the validity of the prior grant can be accepted, in view of the fact that subsequent grants of the same land were made by the Spanish authorities. It is certainly not to be presumed that these authorities would have undertaken to grant lands that had already been disposed of; and it follows clearly that instead of the recognition of this unproved and doubtful grant by subsequent acts of the Spanish Government, it is repudiated and disproved by such acts. Most certainly that Government would never have stultified itself by confirming it.

Only one other question remains to be considered. Mr. Atkinson, while rejecting the title to the grant as bounded, approves the claim to the extent of the lands actually occupied and reduced to personal possession of Lucero and his heirs, without conflict with other claimants. In this I differ with him. He hesitates in giving this opinion, referring to the facilities of claimants in producing parole testimony of almost any character, and which experience in the adjudication of such claims has shown to be utterly unreliable in many instances. In the matter of land titles, perjury and subornation of perjury have become frightfully common in New Mexico and other Territories, and this is abundantly verified by the records of the General Land Office. The settlement of land titles by oral testimony, where witnesses ignorant of the sanctity of an oath, or reckless of its obligation, can readily be found, is a proceeding which can only be defended in rare cases, and where every effort has been made to procure documentary proof, which has not been done in this case. I agree with Mr. Atkinson that where the parol proofs of long possession are strong, the character of the witnesses beyond suspicion, and their evidence corroborated by extraneous facts and circumstances, it is the duty of this Government to confirm the claim. But I disagree with him in holding the present claim to be of this character. The long possession by the heirs of Lucero of portions of the land is not denied, but the character of the witnesses is not entirely beyond suspicion. Their evidence upon material points is conflicting, and it is not corroborated by "extraneous facts and circumstances." The possession of portions of the land may have been uninterrupted, but it can scarcely be said to have been sanctioned by the Spanish Government. The grants already referred to of large portions of the land now claimed, made since the date of the alleged grant to Lucero, certainly do not show any recognition of the rightfulness of the possession relied on, but imply the contrary. Mere possession, without color of title, confers no right by prescription against the Spanish Crown. It must be connected with facts and circumstances on the strength of which a grant may be presumed, but no such facts and circumstances exist in this case. In the case of Nieto *v.* Carpenter, 21 Cal., 456, the court states: "The ordinary requirements of prescription, according to the Spanish law, are four: (1) just title, (2) good faith, (3) continued possession, (4) the time fixed by law." "Just title" is defined to be a colorable title. In Doran and Wilson *v.* Central Pacific Railroad, 24 Cal. 246, it is said, "No presumption of a grant will arise as against the United States, but the legislative grants, or the letters patent, or something that is made by law their equivalent, must be produced." "Prescription or adverse user cannot mature into a title as against the United States." Mathews *v.* Ferrea *et al.*, 45 Cal., 51.

Mr. Hall, in his recent work (1885) on Mexican law, in section 56, says: "It is held in Mexico that prescription does not run against the sovereign, under the Roman or Spanish law, where no title is shown. The law of prescription is based on a title and possession in good faith at the time possession was first taken." These authorities are deemed sufficient on this subject, and according to them the claimants have no title to any portion of the land asked for. The testimony already taken, and

that which Mr. Atkinson proposed to take, touching the possession of the land by the descendants of Lucero, is wholly unimportant, because the case must be disposed of on the grounds I have stated. I only add, that my conclusions are fortified by the well-settled legal rules which govern the interpretation of these Spanish claims. Grants are not to be presumed, but must be established by proof. What is not granted expressly, or necessarily implied, is withheld. Every grant must be construed strictly against the grantee, and if doubts arise, they are to be solved in the interest of the Government. If rights claimed under the Government are set up against it, they must be so clearly defined that there can be no question as to its purpose to confer them.

Applying these principles to the case before me, I cannot hesitate in reaching the conclusion I have stated. It may work hardship to the claimants, who are presumed to have bought this claim in good faith, and whose purposes I have no doubt are honorable; but I am obliged to rest my opinion solely upon the facts and law of the case as I understand them. I believe the whole of the tract claimed should be restored to the public domain, and I therefore recommend the rejection of this claim by Congress.

Copies of this supplementary opinion in triplicate are forwarded, as required, for transmission to Congress, as part of the papers in the case.

GEORGE W. JULIAN,
Surveyor-General.

UNITED STATES SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex., March 19, 1886.

The foregoing pages contain a full, true, and correct transcript of the original on file in this office in private land claim, file No. 95, reported No. 135, in the name of Antonio Lucero, for the Cañada de Cochiti tract.

In witness whereof I have hereunto subscribed my name and caused the official seal of this office to be affixed, at the city of Santa Fé, this 19th day of March, A. D. 1886.

[SEAL.] GEORGE W. JULIAN,
U. S. Surveyor-General for New Mexico.