

UNITED STATES v. ALVISU.

{Cal. Law J. & Lit. Rev. 56.}

District Court, N. D. California. Oct. 27, 1862.¹

MEXICAN LAND GRANT—OBJECTIONS TO
SURVEY—DISENO.

[When it plainly appears that it was the intention of the draughtsman of the diseno fixing the location of the land that the north and south lines should run at right angles to a range of hills forming the eastern boundary, but that, under the mistaken impression that such range ran due north and south, he ran these lines due east and west, it is proper to alter the running of such lines so as to keep them at right angles to the range.]

{This was a claim by Jose Maria Alvisu (or Alviso) for the rancho of Milpitas, one square ⁷⁷⁸ league in Santa Clara county, granted September 28, 1835, by Jose Castro to Jose Maria Alvisu. Claim filed March 30, 1852. Confirmed by the commission March 14, 1833, and on appeal by the district court March 3, 1856. Case unreported. It is now heard upon objections to confirmation of survey.]

HOFFMAN, District Judge. On the 28th September, Jose Maria Alvisu obtained from the governor a grant of a tract of land called "Milpitas," described in the first part of his title papers as of the extent of one league from north to south, and one-half a league from east to west, and in the fourth condition as one league in latitude and one-half a league in longitude, as shown by the map, &c. On the 2d October, 1835, another title paper was issued to him, by which there was granted an additional half league in width, by a league in length, lying on the west of the half league first granted, making in all one square league of land. No boundaries whatever were mentioned in the title papers. We are therefore necessarily referred to the diseno to ascertain the

location of the land. The diseno shows a tract of land bounded on the east by a range of hills, near the base of which, towards the north, is the house of Higuera, and towards the south, the houses of Alvisu, who had, at the time he applied for a grant, been residing on the land for a considerable period, by permission of the authorities of the pueblo. The western boundary is an estero and brook not named on the diseno, but ascertained and admitted to be the Arroyo de la Penitencia. On the north the tract is bounded by a line drawn near a large tree, at which, on the first diseno presented, it stopped; but on the second, made after the augmentation was obtained, it is produced to the west across the Peniteneia, so as to include the additional half league granted to Alvisu. On the south a similar line is drawn, marked "Lindero al Sur," or southern boundary. It commences at a grove marked "Montecito," and is drawn at right angles to the course of the hills, striking the latter a short distance to the south of the point where an arroyo issues from them. This arroyo, though named on the map the "Arroyo del Finado Martinez," is identified with the Milpitas creek. The distance between these lines, as shown by the scale, is 5,000 varas, or one league. And it is evident from the terms of the grant, that they were intended to be drawn so as to give to the tract that length. The distance from the hills to the Peniteneia is only about 3,000 varas; but as an additional half league was granted, and the northern boundary produced across or to the west of that creek, there seems to be no reason why it may not be crossed to obtain the requisite quantity.

Shortly after this grant was issued, complaint was made by Higuera, Alvisu's neighbor on the north, that a portion of his land was included in the diseno of the latter. The dispute was finally settled by the adoption of an agreed line drawn considerably to the south of the line delineated on the diseno. This boundary

is not now in controversy. The only dispute relates to the southern boundary. In the official survey, this line has been run from the Montecito due east to the hills, striking the latter more than a mile and a half to the south of the point where the Milpitas issues from them. The quantity thus included in the official survey exceeds one square league by nearly 400 acres—notwithstanding that the survey does not extend to the west of the Penitencia. The line was no doubt adopted in obedience to the indication of the diseno, which shows by the compass marks that the southern boundary was intended to run east and west. But I think it plain that this indication or call should not be received as controlling. It is evident that the draughtsman of the diseno supposed that the range of hills ran due north and south, and he has so laid them, down on his map. As the tract was to have the extension of one league from north to south, he has bounded it by lines running east and west, but he meant that those lines should run at right angles to the course of the hills. As, then, the range of hills is found to run to the west of north and to the east of south, the obvious intention of the diseno is satisfied by making a corresponding deflection in the course of the side lines, so as to preserve their perpendicularity to the mountain range which formed the eastern boundary of the tract.

Again: the southern boundary line is represented as striking the hills at right angles to, and at the distance of about fifteen chains to the south of the point where the Milpitas issues from them, but if run due east from the Montecito, as in the official survey, it will form with the hills an acute angle, and will strike them more than a mile and a half to the southward of the Milpitas. If, however, a line be run from the Montecito at right angles to the course of the hills, it will strike within a very few chains of the point indicated on the diseno as the easterly termination of the southern boundary.

It will, however, in one respect fail to conform to the diseno, for it will cross the Milpitas twice, leaving a portion of that stream to the south and a portion to the north of it; whereas the diseno represents that line as drawn wholly to the south of the Milpitas. But the points of beginning and of termination of this line will very accurately conform to the indications of the diseno, for it will strike the hills, as before stated, at or near the point represented; and it starts at the Montecito at about the distance shown on the diseno from the point where the Milpitas loses itself in the plain. It is not probable that it was intended accurately to delineate the course of the Milpitas. That stream is represented on the diseno as making 779 a considerable bend to the north, shortly after leaving the hills, whereas it in fact makes a much more marked bend to the south. At least such is its present course, as shown on the topographical map of Stratton.

A number of witnesses were examined to prove the boundaries of the land actually occupied by Alvisu, and by Berreyesa, his neighbor on the south, and their declarations as to the dividing line between them. This testimony is, as usual, unreliable and conflicting. On the one side it is asserted that Alvisu's possession extends far to the south of the Milpitas, and that he gave rodeos south of the house of the Berreyesa, who, it is stated, was allowed by Alvisu to build upon his land. This last statement is on its face extremely improbable. On the other hand, it is testified that the Milpitas creek was recognized by both as the boundary between them. This, again, is improbable, for the Milpitas creek is nowhere mentioned as a boundary, and the diseno shows that the line inscribed "Lindero al Sur," was drawn to the south of it. The only safe guide we can adopt in locating the tract, is the representation on the diseno; and if that be consulted, there does not appear to be much room for controversy. I think that the southern line should be

drawn from the centre of the Montecito, at right angles to the general course of the hills. The quantity of one square league may then be completed by increasing the width of the tract towards the east so as to embrace a portion of the foot-hills, or towards the west by crossing the Penitencia, at the election of the claimants. An order to that effect will be entered.

{NOTE. An appeal from the decree confirming the survey was taken by the claimant to the supreme court. The appeal was dismissed for want of citation 5 Wall. (72 U. S.) 824. It was subsequently reinstated. 6 Wall. (73 U. S.) 457. Upon the hearing on the merits the decree of the district court was affirmed. 8 Wall. (75 U. S.) 337.}

¹ [Affirmed in 8 Wall. (75 U. S.) 337.]

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