

Case No. 15,363.
[1 Cal. Law J. 387.]

UNITED STATES v. HIGNERA.

District Court, S. D. New York.

June 24, 1862.

MEXICAN LAND GRANTS—OBJECTIONS TO SURVEY—EVIDENCE.

[Claim of the heirs of Jose Hignera. On rehearing of objections to official survey.]

The official survey having been brought into court on objections filed by the claimants, the cause was at the last term heard, and a decree entered approving the survey. [Case No. 15,362.] A rehearing having been granted, the cause has been reargued and submitted for decision.

BY THE COURT. I have attentively considered all that is urged in the brief of the counsel for the claimants, but have failed to perceive any reason to doubt the correctness of my former opinion. It is urged in the brief referred to that the survey approved by the court is not in accordance with the decree of the board. The decree is as follows: "Beginning at the back side of the principal house on said rancho, standing at the foot of the hill, and running thence northwardly to a lone tree on the top of the sierra (which tree is known as a land-mark), thence east along the sierra to the line of the land known as the rancho of José Maria Alvisu thence southerly along the west line of said Alvisu's rancho till it intersects the Arroyo de la Penitencia, thence up said arroyo to an estuary, and from this point to the place of beginning."

It is evident that, in this description, the courses of the lines have been mistaken.

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From the back of the house to the lone tree the course is not north, but very nearly east; the line along the sierra is south, and the line of the rancho of Alvisu is west. The description in the decree was evidently taken from the deposition of Dona Carmen Cibrian de Bernal, who has fallen into the same error. The lone tree mentioned is obviously the tree represented on the diseilo, and also on the map of the pueblo lands of San Jose. It is referred to by nearly all the witnesses as a noted land-mark, and is described by Mrs. Bernal as visible from Hignera's house on the plain. There can be no doubt as to the identity of this tree. It stands in a nearly due east direction from the house. It is clear that the second line was intended to be run at right angles to the first. It is described as running "east along the sierra to the line of Alvisu." But the direction of the sierra is north and south, and the rancho of Alvisu lies immediately to the south of that of Hignera. If, therefore, the second line be run "east," as the decree directs, it will not be at right angles to the first line, which terminates at the lone tree, but will be the production of it; nor will it run "along the sierra," but across it; nor can it reach the line of Alvisu. It is clear that "south" should be substituted for "east" in the description of this line. The same error occurs in the description of the third line. It is described as running "southerly along the line of Alvisu's rancho till it intersects the Arroyo de la Penitencia;" but the line of Alvisu is west from the sierra to the Penitencia. On a southerly course the Penitencia could not be reached. The true course of the line described, and which, having been settled at an early period by agreement between Hignera and Alvisu, is not disputed, is from east to west.

Correcting, then, this obvious error in the courses of the lines described in the decree, it would seem that it describes the limits of the tract intended to be confirmed with entire precision.

It is suggested in the brief of the counsel for the claimants that the lone tree known as a land-mark, mentioned in the decree of the board, is not the lone tree visible from the plain and identified by the witnesses. But there seems to be no foundation for this idea. The only lone tree spoken of by the witnesses is that on the first range of hills. It is evidently the one referred to by Mrs. Bernal as visible from Hignera's house. It is represented on the map of the pueblo lands of San Jose as forming the boundary mark on the northeastern corner of the extensive tract claimed by that pueblo. It is not pretended that any lone tree, known as a land-mark, is found on the range of hills beyond the Calaveras valley, nor is the survey contended for by the claimants bounded by any such tree. On the contrary, it runs to a rock called the "Piedra Azul," not mentioned in the grant, diseno, or decree. It is incontestable that the tree referred to in the decree is that spoken of by almost all the witnesses, and especially by Mrs. Bernal, on whose deposition so much reliance is placed by the counsel for the claimants.

But it is, said that the board evidently intended to include the Calaveras valley in the tract, and to designate some other tree than that spoken of by the witnesses, because the northern line is described as extending to a lone tree "on the top of the sierra," and the eastern line as running thence "along the sierra,"—the term "sierra," it is said, plainly referring to the range of hills beyond the Calaveras valley. It seems to have been forgotten that Dona Carmen herself describes the lone tree in the chemisal precisely in the language of the decree, viz. As on the "top of the sierra"; and this tree, she says, was visible from the plain. Several witnesses have testified that the first range of hills was always called "cerros," and never "sierra." But a conclusive answer to this testimony is found in the fact that, in the diseno of the adjoining rancho of Alvisu, the same range of hills, with the houses of Hignera and Alvisu at its foot, is unmistakably delineated and described "Sierra Alta."

That the tree spoken of by Dona Carmen was the one situated on the first range of hills is impliedly admitted by the counsel for the claimants, for he contends that Mrs. Bernal testifies that the line ran past this tree to the sierra on the other side of the Calaveras valley. As the language of the decree is almost an exact transcript of that used by Mrs. Bernal, in her deposition, it is impossible to suppose that the board did not refer to the same tree as that mentioned by her, especially as no other lone tree, known as a land-mark, is spoken of by any of the witnesses.

It is clear, then, from the terms of the decree, that the line could not have been intended to be ran past or beyond the tree in the same direction. The course of the first line is described as "north to the tree," and the second line is to be run "thence east, along the sierra, to the line of Alvisu." The direction by compass is erroneously given, as has already been explained, but the intention obviously is to draw the second line at right angles to the first. It could not have been meant to be merely the production of the first. For, in that case, it would not run along the sierra; nor could it ever reach the line of Alvisu.

I confess myself unable to perceive how, after ascertaining the lone tree mentioned in the decree of the board, the survey can be made under that decree in any other manner than by running from the tree south, along the sierra on which it is situated, to the line of Alvisu. This decree was obtained by the claimants. It has been accepted by them as final. It defines the boundaries of the tract with great precision; and it would seem unreasonable

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to permit them now, in a proceeding to ascertain the correctness of a survey under that decree, to disregard it entirely, and to establish new boundaries, by which the extent of the tract will be more than doubled.

But it is said that the deposition of Mrs. Bernal, on which the decree was evidently founded, shows that the northerly line was continued past the tree, and beyond the valley of the Calaveras. The answer already given to this suggestion would seem to be sufficient, viz. that the board clearly adopted the tree as a corner, and not as an object in the line of the northern boundary. But, on referring to the deposition of Dona Carmen, it is by no means apparent that the line described by her is that contended for by the counsel. She states that Hignera pointed out to her his boundaries. That the line run from the back of the house to the lone tree; from that tree to the other side of the Calaveras; and from beyond the Calaveras, by the rear of Alvisu's house, to the Arroyo de la Penitencia; thence to an estuary, and thence to the point of beginning. It appears that in the first range of hills is a noted peak, of a conical shape, known as the "Cerro de la Calabera," or de las Calaberas. If, from the tree the line be run, as directed in the decree, along the sierra to the line of Alvisu, it will pass not far from this peak. I think it most probable that this "Cerro de las Calaberas," and not the valley, was referred to by the witness. If she meant that the line was to continue in the same direction from the tree across the valley of Das Calaveras, to the sierra beyond, she wholly fails to indicate the eastern boundary of the tract; and yet it is evident that she meant to describe boundaries which would enclose it on all sides. "From beyond the Calaveras," she says, "the line continues down by the rear of Alvisu's house to the Penitencia." But this line is parallel, or nearly so, to the line from Hignera's house to the tree; and if the line which extended beyond the Calaveras is this latter line produced, it is evident that no eastern boundary whatever is mentioned.

It seems clear to me that, the witness, like the board, intended to describe a line running from the tree to Alvisu's line; and thence along that line to the Penitencia, forming, as she says, a tract somewhat like a parallelogram. That such was her meaning is apparent from her answer to the fourth cross interrogatory. When asked to state particularly each land-mark of the boundaries forming the ranchos, she says: "From the tree I have mentioned, all along the top of the sierra;" precisely as described in the decree. She does not say: "From the tree across the sierra, on which it is situated, across the valley of the Calaveras to the sierra on the opposite side."

The report by Peralta of the judicial measurement made by him, under the order of Sola, has been referred to as showing that Hignera's possession extended across the Calaveras valley. Admitting the view taken by counsel with regard to that measurement to be correct, and that Peralta laid off a tract 1,200 varas wide, by 7,450 varas in length, it is highly improbable that the lines were run in the directions stated by him; that is, 7,450 varas from east to west, and 1,200 varas from north to south. The place to be

measured was, as Peralta declares, "Dos Tularcitos." The Tularcitos is a narrow valley, running nearly northwest and southeast. Its width is not far from 1,200 varas, while its length, as shown on Stratton's topographical map, is considerably more than a league. It would seem, therefore, that this must have been the place measured off by Peralta. It is in the highest degree improbable that, under the name of Tularcitos, he intended to give possession of a long and narrow tract, running nearly at right angles to the little valley known as the "Tularcitos," with no natural boundaries on any side, and running over the hills and across another valley a distance of nearly a league and a half; while its width was less than one-fourth of a league. The fact that Peralta says he measured 7,450 varas from west to east only proves that he fell into the same error as that committed by the draughtsman of Hignera's diseno, by many of the witnesses, and even by the board itself.

But, if Peralta measured from the point of beginning 1,400 varas to the northwest, and 6,050 to the southeast, we can understand the origin of the dispute between Hignera and Alvisu, and which, at the governors suggestion, was amicably arranged by the adoption of an agreed line; whereas, if the tract of Tularcitos was measured by Peralta from west to east 7,450 varas, by only 1,200 varas in width, it could not have encroached on the limits of Alvisu.

It is unnecessary to recapitulate the various reasons presented in the former opinion of this court for the conclusion that the narrow valley represented on the diseno is not the valley of the Calaveras. The most important is the fact that the lone tree is represented as situated on the east and not on the west side of the valley,—clearly indicating the valley to be on the west of the range on which the lone tree stands.

It is strenuously urged by the counsel for the claimant that the court, in seeking to reconcile the indications of the diseno, has assumed, without proof, that the Tularcitos of the diseno is not intended to indicate the valley of that name. It was not supposed by the court that the place called "Tularcitos," which was measured off to Hignera, and where he built his houses, was any other than the long and narrow valley heretofore described. But from the representation of the diseno of a small square inscribed "Vina," near which the word "Tularcitos" Is written, without any apparent attempt to indicate a

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valley, it was supposed that the spot intended was probably that marked "Tularcitos" on Stratton's map, where tulares are in fact found, and which corresponds, in its relative position, with regard to the houses of Alvisu and Hignera, and other objects represented on the diseno, much more nearly to the place inscribed "Tularcitos" than does the valley to which that name belonged.

In the petition of Hignera for a ratification of the Sola grant, and for an augmento, he says that he has obtained a grant for "the place called 'Tularcitos,' and also the possession, and, wishing to procure the approbation and ratification of the same, together with the augmento, as represented in the map annexed," etc. The possession obtained by him was, as we have seen, of a tract 7,450 varas long by 1,200 wide, and this was known as the place called "Tularcitos." The augmento desired was to be on the plain towards the bay, and the map represented both tracts. It is highly improbable that he should not even have attempted to represent on his diseno the valley of Tularcitos, which had been measured off to him, and in which he resided, but contented himself with writing the word "Tularcitos" at a place where the diseno affords no indication of the existence of a valley, and which appears to be part of the hills. On the map of the lands of San Jose, which embraces a very large region of country, the small valley of the Tularcitos is distinctly delineated. It is hardly conceivable that its owner, who resided in it should have wholly neglected to represent it on a diseno on which he professed to indicate the land he solicited. But it would be quite natural for him to inscribe with the name "Tularcitos" the patch of tulares which Stratton's map shows is found in nearly the exact position of the "Tularcitos" of the diseno. If this view be correct, the valley to the east of the place marked "Tularcitos" is evidently the Tularcitos valley which had been granted to Hignera, and which, in size and relative position, it represents with some accuracy,—the "chemisal," or lone tree, being found on its eastern side, and the word "Cala-bera," indicating the cerro of that name, also situated on its eastern side. But if this valley be intended to represent the Calaveras valley, the diseno is almost in this respect as inaccurate as it is in its representation of the Tularcitos valley, by a small square figure marked "Vina," near which the word "Tularcitos" is written.

It is said that a stream is represented on the diseno as flowing through the valley, but it seems to me that the line of the base of the hills, and not a stream, is intended to be indicated; and the brook which flows through the Calaveras valley flows through its centre, and not at the base of the hills beyond it, as the diseno represents, if the line in question be intended to indicate a brook. The diseno represents the valley as closed in by the hills towards the north. But the Calaveras valley receives towards the north the considerable stream called the "Calaveras River," of a much larger size than the brook which flows through the valley, but which is wholly omitted on the diseno; and yet, if the survey contended for by the claimant be adopted, and the Piedra Azul taken as the northeastern

corner, this stream must be crossed, and a considerable portion of it included within the tract.

I shall refer but to one other consideration in support of the view I have taken. It is admitted that the augmento solicited was towards the plain. The right, if any, to the Calaveras valley, must have been derived under the first grant of Tularcitos by governor Sola. The report, or informe, of Louis Peralta, shows that the land solicited by Hignera was within the domain of the pueblo, but that it might be granted. The boundaries of the land claimed by the pueblo are distinctly delineated on the map so often referred to. They embrace the Tularcitos valley, but not that of the Calaveras. The boundary line is drawn from the lone tree south, along the crest of the first range of hills; while the "Plan de Calaveras" is represented as lying beyond it.

If, then, the Calaveras valley composed the larger portion of the Tularcitos grant, the report of Louis Peralta, by whom the possession was given, the order to Peralta to make the petition known to the authorities of the pueblo, that their objections might be heard, were all founded on error; for almost all the tract was without the limits of the pueblo. It seems far more reasonable to suppose that the governor and officers of the pueblo knew where the tract solicited by Hignera was situated, and that the place called "Tularcitos" was in fact within the limits of the pueblo. The subsequent augmento could not have been intended to enlarge the boundaries towards the east, for it is clearly proven that the extension asked for was towards the bay.

On the best consideration I have been able to give to this case, I am satisfied that the opinion heretofore delivered was correct, and that the official survey should be approved.

{The decree confirming the survey was affirmed, on appeal of claimants, by the supreme court. 5 Wall. (72 U. S.) 827.}