

Case No. 16,633. UNITED STATES V. WALKINSHAW.  
[Cal. Law J. & Lit Rev. 126.]

District Court, N. D. California.

1863.

MEXICAN LAND GRANT—DETERMINATION OF BOUNDARIES—ORDER OF GOVERNOR.

[The order of the governor directing the title to issue to the petitioner is not controlling in the determination of boundaries when it appears that on the following day a decree of concession was made, accurately defining the rights of the petitioner, and the formal title was issued and accented by him, declaring its boundaries with unmistakable precision.]

[This was a claim by Robert Walkinshaw for Posolmi, including El Posito de las Animas, in Santa Clara county, granted February 15, 1844, by Juan B. Alvarado and Manuel Micheltoarena to Lope Yñigo. The claim was filed March 23, 1852, and confirmed by the commission November 20, 1855, and the appeal was dismissed February 16, 1857.]

HOFFMAN, District Judge. The land confirmed in this case is a tract called "Posolmi," which, by order of Governor Micheltoarena, had been excepted out of a larger tract previously granted to Francisco Estrada. It appears from the expediente that, on the 10th June, 1843, Yñigo, an emancipated Indian, of Santa Clara, presented a petition to the governor, setting forth that there had been granted to him the land known as "Posita de las Animas," or "Ojo de Caballo," according to the map which he presented, and that he had been in possession of the same since 1839. He further alleged that his papers had been delivered to one Ignacia Alvisu, by whom they had been retained; that, after repeatedly demanding his papers from Alvisu, without success, he had applied a second time to the government, which again gave him documents to establish his ownership to the land; that Alvisu took these documents under pretense of acquainting himself with their contents, but had never returned them; that, in the meantime, Estrada had obtained a grant for the "Pastoria," without excepting his (Yñigo's) land. He, therefore, prayed that reports might be required from the mission of Santa Clara, where some documents must exist relative to his title and that of Estrada. On the first of October following Yñigo renewed his petition, claiming the land in dispute, "of which he had been in peaceable possession," as he averred, repeating his charges against Alvisu, and complaining that Estrada was attempting to dispossess him. On this petition, the minister of Santa Clara made a voluminous report, in which the statements, of Yñigo are sustained and his rights recognized. On the 14th of February the governor-made a decree as follows: "Let the title be issued to Yñigo, recognizing, in absolute and perpetual ownership, his imprescriptible right to the occupation of himself and predecessors, from the 'aguage,' or running water, contiguous to his house, as far as the land where his house is situated and his small sowing ground worked." On the following day, February 15th, 1844, the governor made the usual decree

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of concession, declaring the native Indian of Santa Clara owner of the tract of land named "Posolmi," "bounded by the sausal on the south, by the estero on the north, by his house, and by the spring (ojo de agua) named 'Posita de las Animas.'" On the same day the formal title was issued. It describes the land as bounded "by the Posita de las Animas, and including that spring—the other boundaries being as far as

where there is now built a house of wood—bind from this point to the estero towards the north, and to the sausal on the south. Colindante con la Posita de las Animas quedando este inclusiveal serreno: tiendo los demas linderos hasta donde actualmente fabricada una casa de madera y desde este punta hasta el estero por la parte del norte y hasta el sausal por la parte del sur.” The fourth condition describes the land as that which is designated on the respective diseno. On the same day the governor made an endorsement upon the expediente of Estrada as follows: “By decree of the departmental government of the Californias, it was this day resolved that to the Indian of Santa Clara named ‘Yñigo’ should be extended the concession for the land which he occupies, the boundaries being from his house as far as the first spring named ‘Las Animas,’ inclusive, and from the sausal to the estero, and for due proof thereof it is noted on this title.” The rights of Yñigo having thus been recognized and defined, the governor, on the 23d of February made an order on his second petition of October 1, 1843, as follows: “As there has been issued by this government to the interested party a title to the land in dispute, giving to him the part which is believed to be just, or, more properly speaking, declaring his prior rights, as appears by decrees on the expediente of Yñigo and of Estrada, let these originals be returned to the party,” etc.

From these documents it is apparent that the rights of Yñigo to a certain tract were recognized as prior and superior to those of Estrada, and that they were intended to be secured to him in the most formal and solemn manner. But it is also plain that his pretensions were not admitted to their full extent. This is evident from the last order of the governor, on the petition of October 1, 1843, in which he states that there has already been issued to the party interested a title for the land in dispute, “giving him that part which is believed to be just.” But it is still more manifest from an inspection of the diseno. On this document the boundaries as delineated by Yñigo embraced a tract extending a considerable distance to the west of the posita, and across the road to the south of the sausal. On the margin is a note stating the dimensions of the tract to be one and a quarter leagues in length, by three-quarters of a league in breadth. Within the exterior limits thus asked for by Yñigo, lines are drawn, evidently intended to indicate the tract actually conceded. These lines are on the two sides drawn north and south, passing by the posita and the house, respectively, while the northern boundary is evidently the estero, and the southern a line drawn at some distance north of the road from one of the side lines to the other. The note of the grant made on its date by Jimeno in the Toma de Razon also proves that the grant was not intended to embrace the whole league, poco mas ó menos, solicited. For it states that there was issued to Yñigo a title for Posolmi, in extension one-half of a square league, a little more or less.

It is contended on the part of the claimants that the order of the governor of February 14th, directing the title to issue, is the controlling document in the case, and should govern

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in the determination of boundaries. It may be admitted that if no further proceedings had been had—if by negligence or accident the formal title had not been issued in obedience to the governor's order, or if it had been lost and its contents could not be proved, the formal recognition by the governor of the rights of the Indian, contained in this order, would have been sufficient, if followed by a continuous occupation and possession under a notorious and undisputed claim of ownership, to create an equity which the United States would be bound to respect.

But in this case not only the decree of concession is made on the following day and in obedience to the governor's order, in which the rights of the petitioner are accurately defined, but the formal title is issued and accepted by him, declaring his boundaries with unmistakable precision. It is to these documents and to the endorsements on the Estrada expediente that the governor in his order on the petition of October 1, refers, as "declaring the prior rights" of Yñigo. If, then, there were any contradiction between the description of the land contained in the order for the title and that embodied in the decree of concession, the formal title, and the endorsement on the Estrada expediente, it is plain that these last should control. But in truth there is no such contradiction. The order describes the land as extending from the "aguage near his house," (admitted to be the posita) to "where his house is situated and his small sowing field worked"—this last evidently referring to the house of wood on the eastern side of the tract. The order thus determines only the width of the tract; while the length is not defined. On referring to the diseno we find two houses represented,—one on the west, near the spring, and on the western boundary, and the other on the eastern boundary. The decree of concession mentions the same boundaries, and adds to them the sausal for a southern, and the estero for a northern, boundary. Its language is: "Bounded by the sausal on the south, by the estero on the north, and by the spring called 'La Posita,'" There can be no doubt that these last were intended to be the eastern and western limits of the tract They precisely correspond with the indications of the diseno and with the language of the preliminary order. The formal title is not less explicit. It describes the land as bounded by and including the posita; "the other boundaries being as far as where

there is now built a house of wood, and from this point to the estero on the north, and to the sausal on the south.”

The fourth condition states the land to be that marked on the diseno; where, as has been so often mentioned, the same boundaries are indicated. These boundaries are again repeated in the endorsement on the Estrada expediente, though not in the same order. They are described as “from his house as far as the first spring, named ‘Las Animas,’ inclusive, and from the sausal to the estero.” These descriptions indicate the tract granted to Yñigo so plainly that it is surprising that any doubt could have been entertained on the subject. They are the spring on the west, the house on the east, both inclusive, the estero on the north, and the sausal on the south. The positions and identity of the spring and the house are not disputed. It only remains, therefore, to ascertain the position of the “sausal,” or willow thicket, which with the bay on the north will enclose the whole tract.

An attempt, however, is made to extend the limits of the tract not only far to the eastward of the house and the boundary line drawn on the diseno from the Camino Real, by the house, to the bay, but even beyond, as it would seem, the extreme eastern limits of the whole tract represented on the diseno. This claim is founded on the attempted identification of a lone oak tree, situated about two miles to the east of the house, with a tree marked “Yuque Laka,” represented on the diseno as standing to the north of the house, and near the bay. The testimony by which it is sought to establish that the lone tree in question was known at the time of the grant as the “Yuque Laka” is, even if considered independently of the map, inconclusive and unsatisfactory. But the map shows that whether the lone tree of the claimants was or was not known as Yuque Laka, it could not have been the Yuque Laka of the diseno. The diseno, though rude, is much more accurate than usual. The two roads, the “Camino Real” and the “Camino del Desecho,” are laid down upon it with considerable correctness. The road running from the former of these to Yñigo’s house is also represented, and the courses of all of them, as shown by the compass marks on the diseno, very nearly conform to their actual magnetic courses as shown on the topographical map of Lyman. The road from the Camino Real to the house is evidently adopted as a boundary—and the line is produced in the same direction to the bay, so as to complete the eastern boundary of the tract. The general direction of the line is nearly due north, and to the right of it, and at a very inconsiderable distance from it and from the bay, a tree marked “Yuque Laka” is represented on the diseno. This tree thus stands nearly due north from the house, and close to a north and south line run from the junction of the road to the house with the Camino Real to the bay. But the lone tree of the claimant stands far out in the plain, and in a direction from; the house to the south of east. If adopted as a boundary, the width of the tract will be more than doubled, while the eastern boundary will be a line drawn from the tree to the bay, two miles to

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the east of a line drawn from the house to the bay, as called for by the explicit language of the grant.

In all the documents connected with this title, from the first order for its issuance-down to the grant itself, the spring on one-side and the house on the other are mentioned as the limits of the grant. The boundaries marked on the diseno are in exact conformity with these calls, and the side lines are drawn north and south, passing close to, and so as to include, those objects.

I am unable to perceive on what grounds I can ignore these explicit calls and unmistakable indications, and assign for the eastern boundary of the tract a line drawn parallel to the line from the house to the bay, two miles to the east of it.

It is further contended that the "sausal" called for in the grant is a sausal to the south-east of the house, and near to the present residence of the intervenor, Murphy. Indeed, it would seem from the testimony of some of the witnesses that the grant is considered to extend from the lone tree westwardly along the sausal, thence southwardly to the upper road, or Camino del Desecho, thence up an arroyo to the spring, and thence to the bay. But these boundaries neither conform to those originally solicited by Yñigo, or to those actually assigned him by the governor. The lone tree to the eastward is not represented on the map, even if it were possible to give it its true position without enlarging the diseno towards the east. The western boundary, as asked for by Yñigo, is a north and a south line, drawn, not along the arroyo and thence to the spring, but at a considerable distance to the west of both, leaving the spring in about the middle of the tract. The southern boundary is the upper road, and the eastern boundary is a curved line running from the upper road, crossing the lower road, and, after making a bend to-the eastward, running in a general northerly direction to the bay, passing some distance to the east of the house. But the boundaries adopted by the governor "for the part believed to be just" are, as we have seen, the spring on the west the house on the east, and the sausal on the south. Neither the upper or lower road is mentioned as a southern boundary, but a line is drawn across the tract from the western to the eastern boundaries, evidently intended to indicate the southern limit of the land conceded. This line is to the north of, and

nearly parallel with, the lower road. That the sausal south-east of Yñigo's house, and near Murphy's is not the sausal referred to in the grant, is I think, very plainly shown by the diseno. The sausal near Murphy's is represented on the map, but is outside of even the limits originally solicited by Yñigo. The eastern boundary, as asked for by him, is a line commencing at the Camino del Desecho, or upper road, at a point a little eastward of the brook which crosses it, running thence northerly to the lower road, thence, for a short distance, nearly parallel with the lower road, until it reaches a sausal, where it curves to the north, and, excluding the sausal, continues in a northerly direction to the bay. On comparing this delineation with the topographical map of Lyman, the course of the boundary is at once and unmistakably discerned. The point on the upper road, near the brook from which it starts, its direction thence northerly, towards the house of Yñigo, until it reaches the lower road, its deflection thence to the east, and the sausal near which it runs, where it resumes its northerly direction, can all be identified with great certainty. That sausal is the one now claimed as the southern boundary of the grant. But if it be, as cannot, I think, be doubted, the sausal represented on the diseno as lying to the eastward of the eastern boundary line asked for by Yñigo, it evidently cannot be the sausal intended to be the southern boundary of the smaller tract to which the governor saw fit to restrict the applicant. But, extending nearly the whole distance from the western to the eastern boundary lines, and a little to the south of a line drawn from the house to the spring, is a sausal either now existing or traceable by the stumps of the trees, which, it appears to me, must have been the sausal referred to in the grant. A line drawn along it, from east to west, does not very considerably depart, at least in its position relative to the lower road, from the transverse boundary line of the diseno, and this line affords a natural and convenient boundary for the tract delineated on the diseno, i. e., a rectangular piece of ground, bounded on the sides by north and south lines drawn next the spring and the house, respectively, and on the north by the bay. This line has been adopted by the surveyor general after careful examination of the ground, aided by testimony of witnesses.

I confess myself unable to see how, if the calls of the grant and the indications of the diseno are to be respected, any other southern boundary can be adopted, while the explicit calls for the spring and the house as the western and eastern limits, and the unmistakable delineation of the boundaries on the map fix the other lines with great precision. In the face of indications so clear, oral testimony as to the boundaries claimed by Yñigo, or by his son, or described by the mission priest, or admitted by Castro, the successor in interest of Estrada, or as to situation of some of Yñigo's sown fields, becomes unimportant. For, even if we could repose entire faith in the accuracy of memory and integrity of the witnesses, it would be insufficient to justify us in departing from the express calls of the grant and the manifest indications of the diseno. My opinion, therefore, is that the official survey should be approved.