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Letter from the Secretary of the Interior, transmitting a letter from the Commissioner of the General Land Office, of December 5, 1883, inclosing a supplemental report from the Surveyor-General of New Mexico, on the private land claim known as the Petaca grant, No. 105

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L E T T E R

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

A letter from the Commissioner of the General Land Office, of December 5, 1883, inclosing a supplemental report from the surveyor-general of New Mexico, on the private land claim known as the Petaca grant, No. 105.

JANUARY 10, 1884.—Referred to the Committee on Private Land Claims and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, January 9, 1884.

SIR: On the 2d March, 1876, this Department submitted to the President of the Senate *pro tempore* the report of the surveyor-general of New Mexico on the private land claim known as the Petaca grant, No. 105.

I have now the honor to transmit herewith a supplemental report by said surveyor-general on the same private land claim, together with letter of the Commissioner of the General Land Office, of the 5th ultimo, transmitting the report to me.

Very respectfully,

H. M. TELLER,
Secretary.

THE PRESIDENT OF THE SENATE PRO TEMPORE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 5, 1883.

SIR: I have the honor to transmit herewith, for submission to Congress, a supplemental report in duplicate of the surveyor-general for New Mexico, relative to the private land claim known as the Petaca grant; José Julian Martinez *et al.*, claimants.

The surveyor-general's first report under the eighth section of the act of Congress of July 22, 1854 (10 Stat., p. 309), in this case, was transmitted to the Department March 1, 1876, and is printed in S. Ex. Doc. 31, Forty-fourth Congress, first session.

I am, sir, very respectfully, your obedient servant,
N. C. McFARLAND,
Commissioner.

Hon. H. M. TELLER,
Secretary of the Interior.

SANTA FÉ, N. MEX., July 28, 1883.

DEAR SIR: Having become a part owner of what is known as the "Petaca grant," which is reported as No. 105 in the list of Mexican private land claims in the Territory of New Mexico, the title to which was recommended to Congress for confirmation by your predecessor, Hon. James K. Proudfit, to be vested in nine persons who were placed in possession of small tracts situated on Petaca Creek within the grant, I beg leave to call your attention to said recommendation with a view to determining whether a mistake was not made by the then surveyor-general in recommending that the title to the whole grant be vested in the said nine persons, instead of the three persons who made application for the grant, and were directed to be placed in possession by the civil and military governor of New Mexico.

I will further state that, before making a purchase of the Petaca grant, I employed, Hon. L. Bradford Prince, late chief justice of New Mexico, to make an examination of the title. In his report to me he says:

"The above proceedings (alluding to the application for the grant and decree), I believe, vested a good title to the whole of said grant, except the specific small tracts, of which other of the 36 named in the list were placed in actual possession, in the three applicants, José Julian Martinez, Antonio Martinez, and Francisco Antonio Atencio."

I therefore respectfully request that you examine the original application for the grant, the report thereon, and the final decree of the governor, with a view of determining whether your predecessor made a mistake or not.

If it is found that a mistake has been made, I respectfully request that you report all the facts in the case to the proper authorities in Washington, in order that the grant may be confirmed by Congress to the persons who are entitled to the same, their legal heirs and representatives.

Very respectfully,

S. S. FARWELL.

Hon. H. M. ATKINSON,
Surveyor General of New Mexico.

JOSÉ JULIAN MARTINEZ ET AL. }
vs. }
THE UNITED STATES. }

In the matter of the application of Hon. S. S. Farwell for a review and modification of the decision of James K. Proudfit, a former surveyor-general for the Territory of New Mexico, in the case of José Julian Martinez et al. vs. the United States, in private land claim reported No. 105, the Petaca grant.

The claim was filed February 12, 1875, and decision rendered February 20, 1875, affirming the validity of the grant, and recommending that it be "confirmed to José Julian Martinez, and others named in the act of possession."

I question whether the right to review the acts of my predecessor exists, except in instances where the case is remanded back by Congress for rehearing or review, but as that body has the final action and decision in these cases, with entire discretionary power to make grants, or confirm those made by the Spanish and Mexican Governments, it is presumed that if error exists in the record of the case, there could be no objection to pointing out to Congress such error, in order that its action may conform to the requirements and obligations of the treaty of Guadalupe Hidalgo, and the rights of persons thereunder.

In this instance the record shows that the original petition for the concession, addressed to the ayuntamiento, dated January 29, 1836, was in the following language: "I, José Julian Martinez, resident of this jurisdiction, appear before your honor, and, together with my father, Antonio Martinez, Francisco Antonio Atencio, and the sons of the latter, with all submission," &c.

Under date of February 22, 1836, the ayuntamiento recommended that the grant be made "to the new applicants, observing that this ayuntamiento also believe that the children of Francisco Antonio Atencio should not become a party in the said possession, as they are minors subject to paternal control."

Under date of the 25th of February, 1836, Governor Albino Perez states that, having seen the action of the ayuntamiento of Ojo Caliente, of date 22d instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right therein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof, in the required form, and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession," &c.

The parties who petitioned for the grant were José Julian Martinez, Antonio Martinez, Francisco Antonio Atencio, and the sons of the latter, although the sons, being minors, were excepted as grantees, leaving José Julian Martinez, and his associates, Antonio Martinez and Francisco Antonio Atencio, as the applicants for the concession, and the sole grantees under the decree of Governor Perez. No other parties were applying, and none others could have been referred to by the governor in his decree as the intended beneficiaries under the decree than José Julian Martinez and his associates, Antonio Martinez and Francisco Antonio Atencio, in whom alone the legal and equitable title to this grant vested.

It appears that the alcalde placed a number of other parties in possession of small tracts within the general limits of the grant, which act could not constitute such other parties co-grantees or beneficiaries under the grant, nor were the three persons named in the concession trustees for such persons. It was the duty of the alcalde to execute the order of the governor in letter and spirit. He could neither inject new grantees into the decree, or alter in any manner the terms of the concession.

It was a custom in those days, on account of the danger existing from hostile Indians in some localities, for persons receiving concessions to take with them for protection or assistance as herders employés to whom they gave small parcels of land to cultivate, and to which they may have acquired a prescriptive right as against the grantees, but such persons held no interest in the general commons of the grant, and were not beneficiaries thereunder. The authority to alienate the public domain at that period was vested in the governor of the Territory, and the alcalde was restricted in his authority as to who could properly be placed in juridical possession, and the only discretionary power given him in this instance was to designate the boundaries, and even that power was not usually conferred. The courts have universally held that an alcalde is restricted by the granting decree, both as to the extent of the tract and the number of grantees.

In the case of *Dodge v. Perez et al.*, C. C. Dist. California (see Sawyer's C. C. R., vol. 2, p. 645), where the juridical possession manifestly extended far beyond the limits indicated by the language of the grant, the court says: "The magistrate (*i. e.*, the alcalde) had no authority to include in the possession lands not within the exterior boundaries of the grant. He was authorized to measure off and segregate within the exterior boundaries indicated the *lands granted, not to grant other lands.*"

In the case of the *United States v. Guadalupe Castro et al.*, C. C. of California, Justice Field, in delivering the opinion of the court, August 24, 1868, says: "The record of the proceeding of the justice (alcalde) shows that he passed beyond this (the boundary named in the grant) boundary, and not only included in his measurement a much larger quantity than that granted to Castro, but also a portion of the land granted to Amesti. This he had no authority to do. His authority was limited to the measurement of the *specific quantity granted, and the delivery of its possession.* His departure from this course vitiated the whole proceeding."

The rule that the alcalde is confined to the granting decree is well established, and he could neither enlarge nor diminish the area of the tract granted, nor could he add to or reduce the number of grantees, as the sole authority to make concessions was vested in the governor, which authority could not be delegated by him to another.

It may be laid down as a rule that a grant, in order to be valid, must be to a corporation, or some person certain named (in the grant document), or in his own right, or as trustee. (See Washburn on Real Property, vol. 3, pp. 236 to 238 incl.; Jackson v. Cary, 8 Johns. N. Y. Reports; Hornbeck v. Westbrook, 9 Johns. N. Y. Reports; Thomas v. Marshfield, 10 Pick., 367, 368.)

Grant to John A. Sutter for himself and colonists, held to be a grant to Sutter alone, the colonists not being named specifically in the petition or granting decree. 10 California, p. 569. 13 California, p. 477. Title vests solely in grantee named. *Frique v. Hopkins*, N. S., 214.

A grant made to the petitioner who sets forth in his petition that he desires the tract for himself and a number of families, and does not give the names of the families, held to be a grant to the petitioner alone. (1st Hoffman's Reports, p. 126.)

A conveyance to S. L. & Company would vest the legal title in S. L. individually. (3d Washburn, p. 241; Moreau v. Saffirano, 3 Snead, 595.)

The rule as to deeds (same in case of all grants) is that they must contain the names of the grantor and grantee. (2d Brock C. C., 156; 19 Vt., 613; 12 Mass., 447; 14 Mo., 420; 13 Ohio, 120; 14 Peters, 322.)

In case of José and Sisto Berreyesa, where the petition set forth that they were married and had children, and also a considerable number of cattle and horses, and needed land on which to place them; and also in a second petition setting forth that their families were very large, and included their parents, children, and brothers, and more than one hundred Indians besides, whom it was necessary to maintain, and for these reasons prayed for a larger grant, the grant was thereupon made to the petitioners for their personal benefit, and that of their parents, brothers, and families; held that it was a grant to José and Sisto Berreyesa alone, and that the parents,

children, brothers, and Indians were referred to only as inducements for enlarging the bounty of the Government to the petitioners, and not as distinct and additional beneficiaries; that the recitals in the grant did not control the course of the title, but only the inducements for the grants, and the title vested in the two Berreyesas or grantees named, exempt from any trust in favor of any one else. (*Vide Berreyesa v. Schultz*; *Schultz v. Beasley*, 21st Cal. Reports, p. 513; *Nieto v. Carpenter*, 21 Cal., 455.)

It is clear that the alcalde exceeded his authority in placing a number of parties in possession who were not grantees, or who could not claim a beneficiary interest under the concession, and the surveyor-general erred in his recommendation that the claim be confirmed to those placed in possession, and while such recommendation, and a confirmation by Congress according to his report, would not permanently affect the rights of the real beneficiaries of the grant under the treaty stipulations, which are paramount to the law of Congress, yet it would have the effect to cloud the title, and put the real parties in interest to the expense of obtaining through the courts a proper recognition of their rights under the treaty of Guadalupe Hidalgo. On the record in the case, it is my opinion that the legal and equitable title to this grant was vested in José Julian Martinez, Antonio Martinez, and Francisco Antonio Atencio, as the sole grantees, and recommend that the same be confirmed to them, as the grant is undoubtedly valid.

Respectfully submitted.

HENRY M. ATKINSON,
Surveyor-General.

U. S. SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex., August 1, 1883.

SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex., August 15, 1883.

I hereby certify that the foregoing is a true and correct copy of the petition of S. S. Farwell, and my decision thereunder, in the matter of the Petaca grant, reported number 105, as appears from the records of this office. Witness my hand and official seal.

[SEAL.]

HENRY M. ATKINSON,
Surveyor-General.

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