Santa Fe Weekly Gazette.

Independent in all things—Neutral in nothing.'

W. W. H. DAVIS, Editor

SATURDAY, MARCH 3, 1855

LOCAL ITEMS.

Opinion of Judge Brocchus.

We publish in our paper, this week, in English, the able opinion of Judge Brocchus lately delivered in the Supreme court of the Territory, in the case of Pino vs. Hatch. The questions involved in this case are of great importance to a large number of our citizens, and the opinion, we doubt not, will be read with much interest, being a clear and able exposition of the matters in controversy. There are a large number of land titles in the Territory, in which the same questions are involved, and any legal decision, touching their validity, will be received with deep interest by our people. The Surveyor General comes clothed with authority to examine all such claims where there is a dispute between individuals and the U. S., with directions to refer them to the government at Washington: but all cases between individuals must be decided by our courts. We commend this opinion to the careful perusal of our readers.

Arrival of the southern mail.

The southern mail arrived in Santa Fe Tuesday evening the 27th ult., being brought by Mr. Cooper on a mule. There two or three screws loose in the southern mail arrangements, and we hope the Post Master General will have them looked after.

Departure of the Independence mail.

The mail, for Independence Mo. left Santa Fe Thursday the first of March, with two passengers, Don Manuel Alvarez and Mr. Joseph Mercure.

Opinion of Judge Brocchus, delivered in the Supreme Court of the United States, for the Territory of New Mexico, in the case of Justo Pino and others vs. Alexander Hatch, upon the validity of a grant of land made by the Political Chief of the Province of New Mexico, before the cession of the Territory to the U. S.

I coincide with the reasoning of the opinion which has been read, on a majority of the points discussed; and I concur, fully, in the judgment of the court, on all the points involved, so far as it reverses the ruling of the court below, and remands the cause for a new trial.

I regret, however, that I have to feel it my duty to deliver a separate opinion on the most important question involved in the case. I allude to the grant, or deed, offered by the plaintiffs, in the court below, as evidence to maintain their action, and by the court excluded from the jury; as complained of in the third bill of exceptions.

In deciding that the court below erred in refusing to allow that grant to go to the jury, it seems proper that some reasons should be assigned, showing that the grant, when it shall be brought to the consideration of the jury, in the new trial, is to have some force and effect; and, to indicate the principles which ought to govern the construction thereof, when it shall come to be considered, as evidence, in the court below. I have to regret that, in this view of the duty of this tribunal, I stand unsupported by the other members of the court.

This grant appears to have been executed by Don Bartolome Baca, as Supreme Political Chief of the Province of New Mexico, under the Supreme National government of the Republic of Mexico, with the consent of the national deputation of the province. It comes before us, as it was before the court below, as a duly authenticated copy of the original, bearing the appearance of genuineness, and seeming to have been executed in due accordance with the forms, ceremonies and solemnities of law.

This document of concession, grants to Don Juan E. Pino, a certain extensive tract of land lying within the Territory of New Mexico, the metes and bounds whereof are therein described—embracing, as is alleged, the ranch occupied by Alexander Hatch, for the possession of which this action of ejectment was instituted in the court below.

The plaintiffs in the original cause are the lawful heirs of the grantee, Don Juan E. Pino, and, in the action of ejectment, offered this grant as evidence of their right to recover possession. The said grant having been rejected, by the court below, the plaintiffs have brought the question of its validity to this appellate tribunal. The question is one of a very delicate and important character; and, in view of the importance of the principles involved, the extent of property depending upon the result of this cause, and the effect which the final adjudication of this question must have upon the real estate of a large portion of the people of this Territory, it is natural that I should experience some regret, in differing from a majority of the court, in the opinion which I entertain in reference to this most interesting and important branch of the case.

In the investigation of the character of the grant in question, and in the application thereof to this case, we must inquire, has it emanated from a proper source? Is it duly authenticated? What is its legitimate force and effect; and, is it such a grant as should command the protection of the courts of the country?

It is an indisputed and admitted fact that Don Bartolome Baca, the grantor, was, at the time of the making of the said grant, the duly authorised Political Chief of this, the then province of the Republic of Mexico; to whose wisdom and care, under the advice of the provincial deputation, was confided the government and the interests of this province.

It is before us, upon the record, that the grantee, Don Juan E. Pino, on the sixth day of December, 1823, petitioned the said political chief for a grant of the tract of land described in the document of concession;—the petitioner setting forth, in the petition, the uses and purposes to which he desired to appropriate the tract of land for which he petitioned. Those uses were the cultivation of the soil, the pasturing of flocks, the promotion and encouragement of industrial pursuits, and, in general, such purposes as looked to the settlement of the uninhabited portions of the province, the enhancement of the value of the soil, the development of the resources of the country, and the promotion of the public good.

It further appears that the said petition was referred, by the said Political Chief, Don Bartolome Baca, to the provincial deputation of the province, for their advice and consent—it seeming, thereby, to have been the duty of the said provincial deputation to counsel and advise with the said political chief, in relation to the propriety and wisdom of making such grants.

It further appears, that the said provincial deputation, having duly considered the matters set forth in the petition thus referred to them, gave their agreement and assent to the concession of the lands petitioned for, and, that then, and not until then, the said political chief, in the name of the supreme national government, made to the petitioner, Don Juan E. Pino, a grant of the tract of land for which he petitioned, and for the purposes for which the said grant was sought.

It has already been remarked that the grantor, Don Bartolome Baca, was the undisputed and admitted political chief of the province of New Mexico, at the time of the making of such grant. He held that office under the Republic of Mexico, and it was in that capacity that he made, to Don Juan E. Pino, the grant in question. It is to be presumed that all of his official acts were legitimate, and in conformity to the will or law of the sovereign power under which he exercised his authority. Such must be the rational and legal presumption, until it be shown that he transcended his powers or acted in violation of laws bearing upon the subject.

The presumption, that he acted within the legitimate scope of his authority, in making the grant, derives strength from the circumstances attending the concession of the land, from the incipiency to the consummation of the grant.

In the first place, let us look at the petition of the party seeking the grant. It is apparent from the form of the petition, the consideration therein set forth, and the motives by which it was obviously incited, that the petitioner acted under the full conviction that he was applying to the true and lawful authority for the desired grant. The reference of the petition, by the political chief, to the provincial deputation, indicates that the said functionary was disposed, like a faithful public officer, to proceed with due deliberation, care and wisdom, in the discharge of a delicate and important public duty. The deliberations of the provincial deputation, and their final assent to the concession of the land, in conformity to the prayer of the petitioner; the acceptance of the task devolved upon them by the reference of the petition to their investigation, deliberation, and counsel; and their response, in advising the political chief to make the solicited grant, indicate that they were acting in conformity to law, and that the political chief, with whom they thus counselled and advised, acted in pursuance of legal authority, in referring the case to their consideration, and in ultimately making the concession.

The presumption in favor of the legality of the act of making the grant, derives additional strength from the considerations which moved the grantor thereunto. In doing the act, he seems to have been influenced by motives that looked to the public weal;—such as the population of the unsettled portions of the province; the cultivation of the soil; the enhancement of the value of adjacent lands, belonging to the public domain; the developement of the resources of the country, and other benefits to the general interest of the province, which would legitimately flow from a settlement of the uninhabited portions of the Territory, and a spread of industrial pursuits. It is apparent that the considerations which moved the grantor, in making the grant, were founded in a desire to stimulate the dormant energies, and develope the latent resources, of the country. In this he seems to have acted the part of a faithful public officer, looking not only to the welfare of the province over which he presided, but also to the interest and aggrandizement of the Supreme National government, under whose authority he held his office, and in whose name he executed the grant.

These considerations go strongly to support the presumption that Don Bartolome Baca, as political chief of the province, made this grant by virtue of authority in him duly invested by the Supreme National government of Mexico. This presumption is favored by the declaration, in the document of concession, that he made the grant by virtue of the faculty to him conferred, and in the name of the Supreme National government.

This grant appears, from the record, to have been made in the year 1823; twenty five years before the Republic of Mexico parted with the right of soil and her political authority over this Territory, wherein the land in question lies, and where the grant thereof was made.

This act, of granting this land, was, of course, a public proceeding. The record thereof passed to the archives of the government; and it is to be presumed and admitted, that such official functions, when exercised by the high public authorities of the provincial government, were not unknown to the Supreme National authority. It is not to be supposed that a nation would establish, within its own domains a provincial or subordinate government, appoint officers thereto, and devolve upon them the responsible duty of managing the affairs and superintending the interests of that subordinate government, without taking cognizance of the important public acts of its functionaries.

It appears, then, that the Supreme National government of Mexico acquiesced in the act of its subordinate authorities, in this province, in making the grant of land here in question, for the lapse of about twenty five years. We are to construe the silence of the supreme authority in reference to the public acts of its subordinate authorities, into an affirmation or approval of those acts. It has not been shown that the Supreme National government did any act, passed any law, or issued any edict, disavowing grants made in this manner, and by these authorities. It does not appear that any thing has been done by the national government of Mexico, tending to indicate that she disapproved of such proceedings; but, on the contrary, those functionaries were permitted, for years, to go on, uninterruptedly, in the exercise of such powers. By virtue thereof, countless tracts of land are now possessed by the inhabitants of this Territory, who will tremble in their homes, hitherto deemed permanent and secure, when they shall have learned from the intimation of this court, by how frail a tenure, in the opinion of this tribunal, they hold their possessions. The purposes for which such grants, as the one in question, were made, being such as look to the welfare of the province, the developement of its resources, and consequently to the interest and greatness of the Supreme government, give encouragement and strength to the idea of presumed acquiescence on the part of the superior power.

After the lapse of nearly twenty five years from the period of this grant, this Territory passed from the ownership of Mexico into that of the United States; and, in the transition from the jurisdiction and authority of the old government, to those of the new, the plaintiffs brought with them this grant, which had been respected and maintained, inviolate, for nearly a quarter of a century. And they now ask us, if we will not recognize, as lawful and valid, an act from a high official source, which, for so long a period, had the unreserved acquiescence of their former sovereign.

The Supreme court of the United States, in the case of the United States vs. Arredondo and others, 7 Peters 691; recognize the principle as to all public grants of land, or acts of public officers, in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, that the public acts of public officers purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but a legitimate authority previously given, or subsequently ratified, which is equivalent. In that case it is said, if "it were not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the "public domain, did it by order and consent of "the government in whose name the acts were "done, the confusion and uncertainty of titles "and possessions would be infinite." The same case, page 728 says, "the grants of colonial go"nors, before the revolution, have always been, "and yet are taken as plenary evidence of the "grant itself, as well as authority to dispose of "the public lands. Its actual exercise, without "any evidence of desavowal, revocation, or de"nial by the King, and his consequent acquies"cence, and presumed ratification, are sufficient "proof, in the absence of any to the contrary "(subsequent to the grant) of the royal assent "to the exercise of his prerogative by his local "governors. This or no other court can require "proof that there exists in every government a "power to dispose of its property; in the ab"sence of any elsewhere, we are bound to pre"sume and consider that it exists in the officers "or tribunal who exercises it, by making "grants, and that it is fully evidenced by oc"cupation, enjoyment, and transfers of proper"ty, had and made under them, without dis"turbance by any superior power, respected by "all co-ordinate and inferior officers and tribu"nals throughout the state, colony, or province "where it lies."

The government of the United States, in all the special legislation which it has had in reference to grants, by the former sovereign, of portions of the domain over which she has subsequently acquired authority and jurisdiction, has always recognized the principle here insisted upon; and, in the same case, (United States vs, Arredondo and others,) the Supreme court of the United States say, in allusion to such legislation by Congress, that, "in their whole le"gislation on the subject (which has all been "examined) there has not been found a solita"ry law, which directs that the authority on "which a grant has been made under the Span"ish government should be filed by a claimant—"recorded by a public officer, or submitted to "any tribunal appointed to adjudicate its vali"dity and the title it imparted:—Congress has "been content that the rights of the United Sta"tes should be surrendered and confirmed, by "patent to the claimant, under a grant purport"ing to have emanated under all the official "forms and sanctions of the local government. "This is deemed evidence of their having been "issued by lawful, proper, and legitimate au"thority, when unimpeached by proof to the "contrary." In the same case, the court say, "The judicial history of the landed controver"sies, under the land laws of Virginia and North "Carolina, as construed and acted on within "those States, and in those where the land ce"ded by the States to the United States lie, and "Pennsylvania, whose land tenures are very si"milar in substance, in all which the origin of "titles is in general, vague inceptive equity; "will show the universal rule, that the acts of "public officers, in disposing of public land, by "color or claim of public authority, are evi"dence thereof until the contrary appears, by "the showing of those who oppose the title set "up under it, and deny the power by which it "professed to be granted. Without the recog"nition of this principle, there would be no sa"fety in title papers, and no security for the en"joyment of property under them. It is true "that a grant made without authority, is void "under all governments—2 Cranch 99; 5 Wheat"ton 303—but, in all, the question is, on whom "the law throws the burden of proof, of its ex"istence, or non-existence. A grant is void un"less the grantor has the power to make it; but "it is not void because the grantee does not "prove or produce it. The law supplies this "proof by legal presumption, arising from the "full, legal and complete execution of the offi"cial grant, under all the solemnities known or "proved to exist, or to be required by the law "of the country where it is made and the land "is situated."

The grant, in this case, comes before us, with all the appearances of having been executed in conformity to the solemnities and sanctions of law. In that respect it stands unimpeached.

In view of the foregoing reasoning, and authorities cited, it is clear to my mind, that this grant must be respected as having emanated from a lawful source;—such as would be recognized by Congress, in legislation upon the subject, and of which the courts cannot be regardless. If the authority by which the grant was made, is to be viewed as legitimate and binding, let us inquire what is the character and extent of the rights thereby vested in the grantee.

It is obvious that the designs of the grantor was to give to the grantee not a mere possessory, but a permanent right, to the land granted. This intention is evinced and indubitably indicated, by the instructions or requirements of the document of concession, wherein the grantor says, "I have thought proper to grant, "in the name of the Supreme National govern"ment, to Don Juan E. Pino, and by this do"cument of concession, the sito which he soli"cits,— on the River Gallinas which shall "be called Hacienda de San Juan Bautista "del Ojito de las Gallinas, with the known bo"undaries, on the north the land marks of the "sito of Don Antonio Ortiz, and the mesa of "the Aguage de la Yegua, on the South the "River Pecos, on the east the Mesa of Pajari"to, on the west the points of the mesa Chupai"nas, in which fixed points he shall place for"mal and well constructed land marks, to that, "in all time, the dividing lines of the lands "which have been granted to him may be re"cognized, in order that, in conformity with "the laws now in force, or that may be in force, "he may enjoy them for himself and his legiti"mate heirs."

It is not, however, necessary in view of the bearing which this grant should have had in the court below, in the action of ejectment, to determine whether the effect of the grant was to vest in the grantee a title in full property to the land therein embraced or only the right to settle and possess. That the grant was sufficient to vest in the grantee the right to settle and possess, there can be no rational doubt; and there can be no more reason for uncertainty and doubt as to the quantity of land, or the extent of the tract over which the right of the grantee was carried. This right of possession was to the whole of the lands within the boundaries laid down and described in the grant. The possession of a part of the tract was, in legal contemplation, a possession of the whole, to the effect that all other persons entering thereon, without a higher and better right, derived from public authority, from the grantee himself, or those holding under the grant, would be there as mere trespassers.

It appears, from the evidence, that the grantee did take possession of the tract of land by the erection of buildings and actual occupancy of the same. His right of possession thereby became perfected; and it was by virtue of that right, that the action of ejectment was brought in the court below.

Is the right thus acquired such as the courts of our country should protect? It is a humane and just principle of the law of nations that, even in conquest, private and individual rights of property are not disturbed in the passage of the conquered country from the old to the new sovereign. "The conqueror seizes on the possession of the State, the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war; and the conquest only subjects them to a new master." Vattel's Law of Nations, B 3, chap. 13, Sect. 200. The Supreme court of the United States, in the case of United States vs: Percheman, 7 Peters Rep., 86, say, "It may not "be unworthy of remark, that it is very unusu"al even in cases of conquest, for the conquer"or to do more than to displace the sovereign "and assume dominion over the country The "modern usage of nations, which has become "law, would be violated, that sense of justice "and of right which is acknowledged and felt "by the whole civilized world, would be outra"ged if private property should be generally "confiscated and private rights annulled. The "people change their allegiance; their relation "to their ancient sovereign is dissolved; but "their relations to each other, and their rights "of property, remain undisturbed. If this be "the modern rule, even in cases of conquest, "who can doubt its application to the case of "amicable cession of Territory?" But, independent of this general principle, it is expressly stipulated, between the United States of America and the Mexican Republic, in the Treaty of Guadalupe Hidalgo, article 10, That, "all grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico." By the same treaty it is also stipulated that, "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to move at any time to the Mexican Republic, retaining the property which they possess in said territories, or disposing thereof, and removing the proceeds wherever they please." Ib. Sec. 8.

The term property here, is to be taken in the most general and liberal sense, as applying to lands as well as to moveable possessions. By the word property, as applied to lands, is comprehended every species of title, inchoate or perfect, embracing all those rights which lie in contract; those which are executory as well as those which are executed. In this respect the relations of the inhabitants to the government are not changed. Smith v. the U. S. 10 Peters Rep., 326.

The scrupulous care and fidelity which our government intended to maintain in regard to the rights of property of the inhabitants of this Territory, is further evinced by the duty assigned to the Surveyor General of the Territory, in the law creating that office; wherein it is made the duty of that officer, to ascertain the origin, nature, character and extent of all claims to lands, under the laws, usages and customs of Spain and Mexico, and to make a full report, on all such claims as originated before the cession of the Territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same, under the laws, usages and customs of the country before its cession to the United States; Statutes at Large 1853—1854, sheet acts, page 309.

It thus evidently appears, by the treaty stipulations between the United States and the Republic of Mexico, and by the subsequent legislation of Congress, that all rights of property, of every description, appertaining to the citizens or inhabitants of the Territory, previous to its cession to the United States, were to be sacredly respected and inviolably maintained. Thus do whatever rights were acquired by the plaintiffs in this suit, by virtue of the grant of the Political Chief of this province, stand securely panoplied against all invasion; and, although Congress has thought proper to make itself the judge of the validity of such grants, it is the duty of the courts of the Territory to give, to the parties claiming under them, such protection as the law and equity of their respective claims demand, until their rights shall have been finally determined by the government of the U. S.

Without deciding whether the grant in question, in this case, gave to the grantee a title in full property to the tract of land therein described, it is unquestionable that it invested him with a right of possession to the whole tract, which could not be defeated by any but the lawful authority, in the annulment or disavowal of the grant. In the absence of any evidence of the annulment, revocation or disavowal of the act, by the Supreme National government of Mexico, it must stand as evidence of the right of possession of those claiming under, or by virtue of the grant.

The action of ejectment is purely a possessory remedy:—its whole object is to put the party claiming possession, into the enjoyment thereof. A judgment in ejectment is a recovery of the possession, without prejudice to the right, however it may afterwards appear, even between the parties. Adams on ejectment, 32; city of Cincinnati vs. The Lessee of White, 6 Peters Reports, 431.

Such was the character of the action in the court below. The plaintiffs sought to recover possession, and offered this grant as evidence of their right of recovery. The grant distinctly defines, by prominent and enduring natural objects, the metes and bounds of the tract of land which it purports to convey. These objects still exist; and are as distinctly marked now, as they were at the time at which they were mentioned in the deed of concession; so that there can be no doubt as to the precise boundaries within which the grant lies. It was proved on the trial, as appears from the evidence on record, that the ranch occupied by the defendant, Alexander Hatch, was within those metes and bounds. If the grant is worth any thing more than a blank sheet of paper, as an instrument tending to clothe the plaintiffs with a possessory right,—if it is sufficient to give them a right of possession to one foot of the land, it is ample for the purpose of giving possession to the whole, and sufficient to maintain the action of ejectment against all other persons, entering thereon, who cannot show a better right. The defendant in the court below, did not prove, or attempt to prove, a better right; and, in the absence of such proof, this grant, (had it been permitted to go to the jury) aided by the other testimony adduced on behalf of the plaintiffs, should have enabled them to recover.
