BRIEF

ON

Land Grants in Arizona.

BRIEF ON LAND GRANTS IN ARIZONA.

The Rancho San Ignacio del Babocomari, comprising eight leagues of land, is situated within the limits of the territory ceded by the Republic of Mexico to the United States, under the Gadsden Treaty.

In the year 1827, Ignacio and Eulalia Elias, citizens of Mexico, and residents of Sonora and Sinaloa, made a formal denouncement or declaration for the land, which was vacant at that time and not within the border leagues.

In 1830, Sonora and Sinaloa became separate States.

The State of Sonora and Sinaloa, by Act, No. 30, May 20th, 1825, and by succeeding Acts, whose provisions are condensed in Sections 3, 4, 5, 6 and 7, Chapter IX of the Organic Law of State No. 26, July 11th, 1834, made regulations for the sale of vacant public lands to bona fide occupants. These Acts were passed in pursuance of the right of the States to dispose of the public lands within their borders; which right was recognized and sanctioned by the Act of August 4th, 1824, and by the National Colonization Law of August 18th, 1824, and by the continued acquiescence of the general government.

Under this Act of May 20th, 1825, the Treasurer General of Sonora, in which State the land was situated, issued title to said Ignacio and Eulalia Elias, on the 30th day of December, 1832.

The following is a portion of said Act.

"ART. 17. The Surveyors will be the alcaldes of the "town, within the jurisdiction of which are located the "lands that are to be denounced. But they shall be first "thereunto authorized by the Treasurer General.

"ART. 18. For this purpose the interested parties shall "present themselves directly to the Treasurer General, who, "upon their petition, shall make the necessary orders.

"ART. 19. The Treasurer, as the immediate officer hav-"ing charge of the revenues, shall sell the lands and give "titles.

"ART. 20. The fiscal will be perpetually the administrator of the revenues of the Capital.

"ART. 21. To no person who is a new settler shall there be given more than four sitios.

"ART. 22. To those who by reason of the abundance of their stock should need more, even though they should be old stockraisers, the Treasurer General shall concede what they may need.

"ART. 23. The Treasurer General shall endeavor by all means in his power, to ascertain the truth in relation to the matter, before making the concession referred to in the foregoing articles, the interested parties not being permitted to take any part in these proceedings for carrying out this object.

"ART. 24. No person shall be able to obtain a place for his stock without first proving to the satisfaction of the Treasurer General, that he has sufficient to stock the place.

"ART. 25. The Treasurer General, for the purpose of ascertaining this fact, may order testimony to be taken in relation thereto.

"ART. 26. For the valuation of the land, the alcalde surveyors shall appoint persons who are not friends of the interested parties, who, after having undertaken the obligation, shall proceed to value the land, taking into consideration its quality and other circumstances, so as to estimate justly the value of the same.

"ART. 27. Those who possess lands, which, although they have been registered and surveyed, titles therefore have not been issued, shall present themselves before the Treasurer General, setting forth in writing the reasons why the titles have not been issued, and also stating the judge who measured them, and the amount which they have paid by way of expenses.

"ART. 28. The Treasurer General, for this purpose, shall appoint the time which he may deem proper, and, after he has collected all the information in relation to the matter, he shall report to the government that it take such measures as may be deemed proper for the interests of the public treasury.

"ART. 29. The Treasurer General shall prescribe the methods and give the necessary instructions to the Sur-

"veyor, so that the measurements may be legally and ex-
"actly made.

"ART. 30. It shall be the duty of the owners of the
"lands to place on the boundaries of the same, monuments
"of lime and stone, as is ordered by repeated laws, as soon
"as he shall receive possession of the lands, and if within
"three month's reckoning from the day on which the sur-
"vey was completed, this shall not be done, the owner or
"grantee shall be fined twenty-five dollars, which shall be
"demanded by the judge-surveyor, and shall be paid into
"the treasury, and besides he shall order monuments to
"be constructed at the cost of the interested parties.

"ART. 31. Those who may have obtained decrees for
"the registry of lands in accordance with the foregoing
"orders, shall be guaranteed under this law.

"ART. 32. The military tax stands abolished, and also
"the percentage which was collected by the former gov-
"ernment.

"Tuerto, May 20, 1825."

Coleccion de los Decretos, etc., Estado de Occidente, Desde 12 *Setiembre*, 1824, *hasta* 31 *Octubre*, 1825.

The grant is among the archives, and recorded in the "Toma del Razon" (book of records) at Ures, the present capital of said State.

The grantees have fully performed all the conditions required by the laws of Sonora, and contained in the grant.

I.

The State of Sonora had full authority to make the grant.

The United States of Mexico was a "popular representative and federal republic."

Constitution of U. S. Mex., Art. 4.

1 White's Recopilacion, 375

modeled "in imitation of the U. S. of the North."

1 White's Recopilacion 382

"giving each people the right of selecting for itself laws an-
"alogous to its customs, locality and other contingencies."

1 White's Recopilacion, 383.

The State of Sonora and Sinaloa was a "free, independent and sovereign" member of the federation.

Constitutive Act., Art. 6 and 7,
1 White's Recopilacion, 375.
Const. Mex., Art. 5.
1 White's Recopilacion, 388.

An Act, called the "Constitutive Act," was adopted by the nation, January 31, 1824, preparatory to the forming of a constitution.

It sets forth the powers of the general government, determines the form of the state governments and provides for the organization of provisional governments for the different states.

The Constitution adopted in pursuance of said Act, amplifies and enlarges the provisions of the Constitutive Act, and defines the boundaries betweeu the powers and functions of the States, and those of the nation.

Neither in the Constitutive Act nor in the Constitution is there to be found any claim by the nation to the ownership or control of the vacaut lands lying within the states, On the contrary, all the states in their original constitutions claim the ownership of the lands within their respective borders.

See Const. Texas and Coahuila, Art. 10.
Const. State of Mexico, Art. 10.
Const. Nueva Leon, Arts. 2, 3, and 4.
Const. Puebla, Art. 14.
Const. San Luis Potosi, Arts. 2 and 5.
Const. Michoacan, Arts. 2, 3 and 4.
Const. Chihuahua, Art. 36, Sec. 2 and 7.

See also Const. of State of Sonora. Which said constitutions were according to law, opportunely sent to the general government for revision and confirmation, and were approved of and confirmed by the general government

As a matter of history, the claim of the States to the ownership of the lands within their borders, has been recognized ever since the establishment of the Republic, so far as the disposition of those lands was concerned. Although this right of the States to the absolute ownership of the land may have been called in question by arbitrary decrees of Santa Anna and others; yet in every case, the controversy was finally settled in favor of the State.

A power which had been relinquished, could not be resumed at the pleasure of the federal authorities.

Republic vs. Thorne, 3 Texas, 509.

A right or exemption once granted by proclamation, could not be annulled by a subsequent.

Mitchell vs. U. S. 9 Peters, 562.

Cowp. 213.

But so far as this case is concerned, it is immaterial whether the title was in the State or Nation. If in the State, the State could dispose of that title without any action of the general government; but if the title was in the general government, the States could dispose of the lands with the sanction and direction of that government.

On the 4th of August 1824, the Congress of Mexico passed a declaratory act, in which was defined the revenues and property which were claimed by the general government, leaving all other property and revenues to be claimed, held and enjoyed by the several states.

This Act did not claim for the general government, as revenues, the proceeds of the sales of the public lands in the States, but conceded such revenues to the States. It cannot be contended that this was an omission, from the fact that the same Act claimed the proceeds of the sales of the lands in the territories, as the revenue of the general government, showing that their attention was called to this source of revenue, and that they recognized the lands in the States as the property of the States.

The following is the full text of said Act:

"Classification of Revenues.

"The Sovereign General Constituent Congress of the "United States of Mexico have seen proper to decree as "follows:

1. "There pertains to the general revenues of the fed- "eration, the duties of importation and exportation, es- "tablished or which shall be established, of every denom- "ination, in the ports and on the frontier of the republic.

2. "The duty of fifteen per cent, which is collected in "the ports, and on the frontier, upon foreign goods which "are introduced into the interiors and which, in conse- "quence of this tax shall be exempt from *alcabala*.

3. "The duty on tobacco and gunpowder.

4. "The *alcabala* which is imposed upon tobacco in the "districts where it is raised.

5. "The revenue of the post-offices.

6. "That of lotteries.

7. "That of salt mines.

8. "That of the territories of the federation.

9. "The national property in which are included those "of the inquisition, and the temporalities and all other "properties which belong to the public treasury.

10. "There shall rest in the disposal of the federal gov- "ernment, the buildings, offices and lands thereto annexed, "which pertain or have pertained to the general revenues, "and those which have been built at the expense of two "or more provinces.

11. "The revenues which are not included in the fore- "going articles belong to the states.

12. "The debts and credits in relation to the revenues "consigned to the states, are chargeable to the general "account.

13. "In the Peninsula of Yucatan there shall not be in- "cluded in the general revenues, the export duties upon "products of the country, nor shall an internal duty be "imposed.

14. "There shall be distributed to the states of the fed- "eration, the sum of $3,136,875.00, which it is estimated "they require for general expenses.

15. "The distribution shall be made now, and in the "meanwhile an estimate shall be made as to the proper "proportion, in the following terms:

ESTADO DEL OCCIDENTE, $53,125.

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16. "The states shall deliver every month or fifteen "days, reckoning from the day on which the revenues are "received, the contingent which belongs to the time which "is past; it resting in the discretion of the government to "choose either of these two terms, and even to prolong "the time, if the particular circumstances of the states "should require.

17. "On the first of September next, there shall be de- "livered to the states their respective revenues and offices, "making out the balance sheet for the liquidation of the "account.

18. "When the states shall present exact reports of their "riches and population, the present distribution shall be "rectified, returning to some that have paid too much, and "collecting from others that have paid too little.

19. "The government shall take such measures as may "most effectually conduce to the collection of the internal "revenues with all the speed possible, and shall dispose of "the matters in such a manner that the interior custom "houses shall collect the *alcabala* on foreign goods which are "in the custom house, or on the road; the custom houses "making the proper distinction in making these collections.

"20 Domestic products shall not pay more than one "*alcabala* in the state in which they are consumed.

"21. Wherefore, if *alcabala* shall have been collected "on national goods, and afterwards the goods should be "taken to another state, the *alcabala* paid shall be returned.

"22. For the first year, abatement shall be made of one "third of the contingent which the states have to pay to "the general government."

This Act was a recognition at least of the claim of the States to the ownership of the lands within their borders.

But the Mexican Congress did not stop there. Fourteen days later, and on the 18th of the same month, an Act was passed by the General Congress to provide for the colonization and disposition of the public lands in the states and territories. By the third article of this Act the legislatures of the several states were directed, as soon as possible, to make laws and regulations for the colonization of the public or waste lands within their borders, without restriction or limitation, except to prevent foreigners locating on the border within the limit of twenty frontier leagues.

The tenth article provided that the states should provide lands for military persons, who had received a promise of lands from the supreme executive power.

These two sections fully empowered the states, first, to dispose of the public lands of the states to settlers and colonists, and to grant them to soldiers in compliance with the promise made by the general government.

The sixteenth section of the same Act declared, that the general government, in conformity with the principles established in that law, would proceed to the colonization of the territories of the Republic.

National Colonization Law.

"The supreme executive power, provisionally appointed "by the general sovereign Constituent Congress—to all "who shall see and understand these presents; know ye— "that the said Congress has decreed as follows:

"ART. 1. The Mexican nation offers to foreigners, who "come to establish themselves within its territory, security "for their persons and property, provided they subject "themselves to the laws of the country.

"ART. 2. This law comprehends those lands of the "nation, not the property of individuals, corporations or "towns which can be colonized.

"ART. 3. For this purpose, the legislatures of all the "states will, as soon as possible, form colonization laws "or regulations for their respective states, conforming "themselves in all things to the constitutional act, general "constitution, and the regulations established in this law.

"ART. 4. There cannot be colonized any lands, within "twenty leagues of the limits of any foreign nation, nor "comprehended within ten leagues of the coasts, without "the previous approbation of the general supreme execu- "tive power.

"ART. 5. If for the defence and security of the nation, "the federal government should deem it necessary to use "any portion of these lands, for the construction of ware- "houses, arsenals, or other public edifices, they can do so "with the approbation of the general congress, or in its "recess, of the council of government.

"ART. 6. Until after four years from the publication of "this law, there shall not be imposed any tax whatever, "on the entrance of foreigners who come to establish "themselves for the first time in the nation.

"ART. 7. Until after the year 1840, the general con- "gress shall not prohibit the entrance of any foreigner as "a colonist, unless imperious circumstances should re- "quire it, with respect to the individuals of a particular "nation.

"ART. 8. The government, without prejudicing the ob- "jects of this law, shall take such precautionary measures "as it may deem expedient for the security of the confed- "eration, as respects the foreigners who come to colonize.

"ART. 9. A preference shall be given in the distribu-

"tion of lands to Mexican citizens, and no other distinction "shall be made in regard to them, except that which is "founded on individual merit, or services rendered the "country, or under equal circumstances a residence in the "place where the lands to be distributed are situated.

"ART. 10. The military, who in virtue of the offer made "on the 27th March, 1821, have a right to lands, shall be "attended to by the states; in conformity with the di- "plomas which are issued to that effect by the supreme "executive power.

"ART. 11. If in virtue of the decree alluded to in the "last article, and taking into view the probabilities of life, "the supreme executive power should deem it expedient "to alienate any portion of land in favor of any officer, "whether civil or military, of the federation, it can do so "from the vacant lands of the territories.

"ART. 12. It shall not be permitted to unite in the same "hands with the right of property more than one league "square of land, suitable for irrigation, four square leagues "in superficies of arable land, without the facilities of irri- "gation, and six square leagues in superficies of grazing "land.

"ART. 13. The new colonists shall not transfer their "property in *mort main* (*manos muertos*).

"ART. 14. This law guarantees the contracts which the "empresarios make with the families which they bring at "their own expense, provided they are not contrary to the "laws.

"ART. 15. No person, who, by virtue of this law, ac- "quires a title to lands, shall hold them if he is domi- "ciliated out of the limits of the republic.

"ART. 16. The government in conformity with the pro- "visions established in this law, will proceed to colonize "the territories of the republic.

"MEXICO, 18th August, 1824."

From the time of the passage of this law, until the present, the states have disposed of the lands within their borders, and all titles acquired subsequently to that date, have been acquired from the states. It will be perceived that it is entirely immaterial whether the states made the grants in their own right or by virtue of the foregoing law. No act of the general government can be found disposing

of the lands in the states, and no edict or arbitrary order of any usurper, interfering with the rights of the states to control these lands, has ever been carried into effect. On the contrary, the general government has contented itself with the disposition of the lands in the territories.

On the 20th of November, 1828, the Mexican Congress passed an Act making regulations for the colonization of the territories.

The idea that the public lands within the states was the property of the states, undoubtedly was suggested by the plan adopted in forming the government of the United States. The original thirteen states owned the lands within their borders and disposed of them without any action on the part of the United States.

The Mexican government, when it required lands in the states, purchased the same from the states, precisely in the same manner as the United States has done always, when they required land belonging to the states.

On the 6th of April, 1830, the Mexican government desired a portion of the public lands in the frontier states for the purpose of colonization by foreigners, and appointed a commission to visit those states and contract with the legislatures for the purchase of the same.

The third article of said Act is as follows:

"The government shall appoint one or more commis-
"sioners, whose duty it shall be to visit the colonies of
"the Frontier States; to contract with the legislatures of
"said states, for the purchase by the nation of lands suit-
"able for the establishment of new colonies of Mexicans
"and foreigners," etc., etc.

And even when the general government wanted public lands of the states for the purpose of fortifications and arsenals, they indemnified the states for the same, as shown by the fourth article of the same act, which reads as follows:

"The executive is empowered to take possession of such
"lands as may be suitable for fortifications and arsenals,
"and for new colonies, indemnifying the state in which
"such lands are situated, by a deduction from the debt
"due by such state to the federation."

The right of the several states of Mexico to dispose of the public lands, is not a new question in the United States. Nearly all of the land titles of Texas held at the time of

the acqnisition of that conntry, were state grants; and the qnestion of the right of the states to make snch grants, has been uniformly npheld by the conrts.

From 1825 to 1852, the legislature of the State of Sonora contipued to form laws, rnles and regnlations for the granting of the waste or pnblic lands within its borders; copies of which, (said laws, rnles and regnlations) were always sent, together with all other acts of said legislature, to the general congress and the snpreme national government, for its action or revision therenpon; and the general government never disapproved of, or annnlled any of the said laws, regnlations or rnles of said State, relative to the measnring, granting and sale of the same therennder by the said state, althongh the said general government well knew that the said legislatnre wonld continne to form snch laws, rnles and regnlations, and dispose, therennder, of the waste pnblic lands within the borders of said state.

In fact the said state, in common with the other states, continued to grant, sell and give title to the waste or pnblic lands without being again qnestioned by the general government, until 1853.

The Republic of Texas vs. Thorne, 3, Texas, 499, is a leading case npon the snbject of grants made by the states of Mexico, wherein the whole question is elaborately reviewed and the power of the states to dispose of the pnblic lands fnlly snstained. The syllabns of that case, is as follows:

"After the passage of the National Colonization law of "18th Angnst, 1824, the states of the Mexican Confedera- "tion possessed the property in the soil and had alone the "power, by direct agency of appropriating lands to individ- "nals. The approbation and consent of the snpreme fed- "eral executive of Mexico, is necessary to snpport a title for "lands within the border leagnes."

In Chambers vs. Fiske, 22 Texas, 504, the Conrt held valid a grant made by Texas to a jndge, for salary, of more than eleven leagnes, the qnantity limited in the colonization law; on the gronnd, that Texas, while a state of the republic of Mexico, had a right to dispose of the vacant pnblic lands, independent of the colonization laws, and that the state had power to grant the pnblic lands as a matter of right with or without the consent of the general government. The laws of Mexico are also elaborately reviewed in this case.

The validity of grants made by the States of Mexico, in pursuance of the colonization law of August 18th, 1824, has never been questioned either in the United States or in Mexico. It is true that in revolutionary times, arbitrary laws were passed, affecting the rights of the States to dispose of the public lands, but these same laws, fully recognized grants that had already been made in pursuance of the colonization laws.

The Act of the Mexican Congress of April 24th, 1835, has been referred to, to show that the general government claimed the right to interfere with the disposition of the public lands in the States, but an examination of that Act, will furnish conclusive evidence of the validity of grants made in pursuance of the colonization laws previous to its date. The first section of the Act reads as follows:

"The decree of the legislature of Coahuila and Texas, of "the 14th of March, of the present year (1835), is contra- "ry in its first and second articles, to the law of the 18th of "August, 1824, consequently the alienations made in pur- "suance of said decrees, are void and of no effect."

This Act, so far from annulling previous grants, recognizes their validity when made in pursuance of the colonization law, in unequivocal language.

The decree of Santa Anna is referred to, with apparent confidence by the opponents of these grants, as affecting the titles to lands granted by the States.

We say that the decree was in violation of the constitution, and void. In the first place, according to article 45 paragraph 4 of the Mexican Constitution, Congress could not pass retroactive laws. In the second place, according to article 45, paragraph 6 of said constitution, said Congress could not arrogate to itself or delegate to others, by way of extraordinary faculties, two or the three powers—legislative, executive, and judicial; and by article 46, any law passed in contravention of said article 45, is declared to be null. In the third place, the Mexican Congress on the 16th of October 1856, decreed as follows:

"1. The decrees of November 25th, 1853, and July 7th, "1854, are null.

"2. Don Antonio Lopez de Santa Anna and the minis- "ters who approved of and assisted in their publication, "are responsible in their properties and persons for the

"damages and injuries which may have been occasioned "thereby."

It will be perceived that the Mexican Congress did not repeal the said decree, but declared them void, *ab initio*, and held Santa Anna and his ministers responsible in damages for having made and published such decrees.

But if the decree of 1853 had been valid, it does not include in its language grants made by the states in pursuance of the colonization laws.

The second article of the decree provides that "The sales, "cessions, or any other claims or alienations of said vacant "lands, which may have been made without the express "sanction of the general powers, in the form prescribed by "law, are null and void."

The sale of the lands in question, as we have already shown, were made by the states with the express order and sanction of the general powers in the form prescribed by law, and are therefore not affected by this decree. The law expressly authorized the states to form laws for the disposal of the public lands; and the decree, by its terms, excludes from its operation, sales made by the states in pursuance of the colonization laws.

II.

Has the grant been duly recorded in the "Archives of Mexico," within the meaning of the Gadsden Treaty.

Article VI of the treaty provides that, "No grants of "lands within the territory ceded by the first article of this "treaty * * * * * will * * * be respected or "be considered obligatory, which have not been located "and duly recorded in the archives of Mexico."

Did the parties to the treaty intend that no grants should be respected or considered obligatory, except those which had been recorded in the federal archives; or is it sufficient that a grant had been recorded in accordance with the law of the state in which it was made?

If the former, then no grant made by the State of Sonora, although giving perfect title, and duly recorded in the archives of that State, would be obligatory, since there never was any law, state or national, requiring land grants to be recorded elsewhere than in the state archives.

The archives of state grants are not required to be found at the City of Mexico.

The manifest object of this provision in the treaty, was to prevent the recurrence of the disgraceful frauds which had been perpetrated in California,—forgery of title papers, floating grants, etc.

The term "archive," signifies public records. This term as applied to the records of land titles in the Mexican and Spanish provinces, was well understood in the United States at the time this treaty was made, and included the records of land titles wherever kept. The archives or records for lands in Florida, previous to the cession of that country to the United States, were kept at St. Augustine; and they are constantly spoken of in the courts of the United States, as the archives of Spain. The local records in California are called Mexican archives by the Supreme Court, (U. S.,) through all their decisions.

In the case of Luco vs U. S., 23. How. 534, for example, the court says, referring to these records, "The archives "of the Mexican government furnishes not the slightest "trace of any such grant, although all the other grants "made in the same year and month are carefully recorded "and registered, and the expedientes found on file."

Similar language is used all through the cases. The records kept in California were called the archives of the Mexican government.

The treaty must be construed according to the common acceptation of the term "Archives of Mexico," which was understood at that time to mean and did mean the archives in each particular locality of Mexico where land titles by law were required to be recorded.

Any other construction would not only be in violation of the common and universally accepted use of the term "Archives of Mexico," but would contemplate a general confiscation of all titles to the lands in the ceded territory.

In conclusion, there are no disputed facts in this case. The records at Ures, the capital of Sonora have been examined, the title papers are found on file, and the proper record is found in the Toma del Razon, the record book in which all grants are recorded.

This was the only place where grants in the ceded territory could have been recorded, and their record at that place fully complies with the requirements of the treaty.

WM. M. STEWART.
GEO. E. HILL HOWARD.