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R. 183250.

RSC Postoffice Building,

Denver, Colorado, June 29, 1921.

The Attorney General,

Washington, D. C.

Tejon Indians.

United States v. Title Guarantee and Trust Co., a Corporation, Security Trust and Savings Bank, a Corporation, Harry Chandler, G. P. Grant, H. H. Sherman and E. P. Clark.

Sir:

This case presents features of such interest and importance, both legally and extra-legally, that, in view of the changes of personnel in your office, it seems desirable to call your attention to its status and possibilities. The accumulated case compendium, evidentiary matter and legal memoranda in this office are very voluminous and nothing but the briefest epitome can be attempted here.

1. The Facts.

From time immemorial the Tejon Indians have occupied a tract called the Tejon which includes the extreme southeast end of the San Joaquin Valley, Kern County, California, and extends into the mountains adjoining. As early as the arrival of the first American pioneers they were found subsisting not only by hunting and fishing, and by gathering the natural produce of the soil, but also by irrigating and cultivating small tracts of land. They were then an very peaceful, industrious and agricultural Indians, living in some [illegible] permanent settlements and [illegible]

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and possessing, under the doctrine repeatedly announced by the United States Supreme Court, the ordinary Indian title of occupancy and possession of the land actually inhabited or used by them.

In 1843, while California still formed part of Mexico, two Mexicans, Aguirre and del Valle, applied for and in 1845 obtained a grant of a large tract, including this territory. This grant contains a specific condition that the grantees shall not interfere with the cultivation or other advantages of the resident Indians, and no such interference was attempted by the original owners. After California passed under the sovereignty of the United States in 1848, this grant was confirmed by the Board of Commissioners for settling land claims, by the United States District Court and by the Supreme Court.

In 1851, a treaty was negotiated with this tribe by commissioners delegated by Congress for the purpose, whereby, in consideration of the confirmation of certain lands to them for their exclusive occupancy and the performance of other conditions by the United States, they agreed to surrender the remainder of their territory; but this treaty was never ratified by the Senate and no treaty or agreement of any sort was ever consummated with these Indians.

Shortly afterwards the Mexican grantees sold the grant, which through various mesne conveyances finally came into the hands of the Title Insurance and Trust Company, the present holder of the fee title. The Security Trust and Savings Bank Att'y Gen'l.3.

in a mortgage and Chandler, Grant, Sherman, Clark, and perhaps others have some beneficial interest, the exact nature of which is unknown to us. It must be an important interest since they and their agents have actual possession and control of El Tejon Rancho, comprising nearly 100,000 acres and including the Indian land which forms the subject matter of the suit. These men also control adjacent properties aggregating probably 200,000 acres, which are held and operated in conjunction with El Tejon Rancho. They are among the largest and wealthiest land owners in Southern California.

For many years the Indians remained unmolested in their possession and indeed about 1852 and for some time thereafter were encouraged to extend and intensify their cultivation by Lieutenant E. F. Beale, who designed to establish a reservation including their territory until he discovered that the land had already passed into private ownership, by the grant above mentioned. Thereupon, he purchased it himself and for a long time thereafter it seems that the Indians retained their possession undisturbed. Beginning at some time not exactly known, but perhaps about 1880, however, the then owners commenced a policy of restriction and repression which has been continued and intensified down to the present time. The Indians have been gradually driven or pressed back until now a remnant of the tribe occupy and cultivate only some 65 acres of their original holdings; most of their cultivated fields have been thrown into the cattle range; their use of water for irrigation has been Atty Gen'l.

restricted or denied; Unoccupied houses have been pulled down or burned (it is believed that at least one occupied house was deliberately destroyed by fire during the temporary absence of the family); They have been prevented from repairing their huts even when they had material collected for the purpose; They have been denied the right to keep cows to furnish milk for their children, and apparently are permitted to retain their present precarious foothold at all only because they are needed as cowboys and laborers on the ranch. A small portion of their pay is withheld under the name of rent in order to prevent the accrual of a title by adverse possession under California Law. Until the present year they have had no school facilities for their children and only one of the band is able to speak a little English.

Their condition of practical peonage excited the indignation of various persons interested in Indian rights, including some of the residents of Bakersfield, the nearest place of importance. The Catholic Church which exercised jurisdiction over these Indians in the days of the California missions and whose connection with them has never entirely ceased renewed its interest in the situation and sermons were preached from both Catholic and Protestant pulpits against conditions prevailing on the ranch. Representations were made to the Indian Office which, after confirming the facts above recited by preliminary investigation, referred the matter to the Department of Justice with a request to bring suit if justified. Since then a Special Agent visited.

inquiry into the facts and law has been carried on, from time to time in intervals of other work, by Mr. Truesdell and other Special Assistants, including the writer.

It was difficult to ascertain many of the facts determinative of the legal status of the Indians, since it was necessary to go back to 1843, when the country was unmapped and record evidence almost non-existent. In the Spring of 1920, however, we felt sure enough of our ground to approach Mr. Chandler, the Managing Director of the Tejon Ranch Syndicate, in an effort to procure in any reasonable form a secure establishment of the Indians upon some definite tract of land, including, if possible, their present habitat, which is not only their ancestral home, but is well wooded and watered and in many ways desirable for this purpose. Nothing, however, could be accomplished in the way of a compromise, either by personal interviews or correspondence and, all other means having been tried in vain, suit was brought in December, 1920.

The salient facts of this case in their legal relations will be found set forth with as much precision and conciseness as possible in the complaint, a perusal of which is invited.

2. The Law:

The writer has examined all discoverable decisions of the Supreme Court of the United States bearing on this situation, and has compiled a memorandum of about 100 pages summarizing them in order. He has not yet had opportunity to systematize or index all of the deductions which may properly be drawn from these decisions, but believes that the following principles are correct and maintainable.

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(a) These Indians have an original right and title of occupancy and possession prior to the right or title of Spain, Mexico or the United States, which can be extinguished only by the Sovereign, and which until so extinguished is as sacred as the Sovereign title or the fee title.

(b) This Indian title is not extinguished by a mere grant in fee by the Sovereign.

(c) It is extinguished only by express words or acts indicating that purpose, of which there have been none in this case; and in the history of the United States has been abrogated usually by treaty and always on some terms of compensation to the Indians.

(d) This Indian title of occupancy and possession was recognized by Mexican law which in this respect was practically identical with the law of the United States. The Tejon Indians held that title to the lands described in the complaint at the time of the treaty of Guadalupe Hidalgo, and by that treaty the United States undertook to respect it.

(e) This Indian title was further fortified in the instant case by the provision in the Mexican grant above mentioned forbidding the grantees to interfere with their cultivation or advantages.

The above statements of law are unquestionable and would clearly establish the Indians' right to a secure and unqualified possession and use undisturbed by the aggressions of the present Atty Gen'l.

owners were it not for the case of Barker v. Harvey, 181 U.S. 481, in which the Supreme Court held that Indians in a somewhat similar situation lost their title by failure to present it for confirmation to the Board of Commissioners appointed by the Act of 1851 to adjust land claims in California. This decision has been the subject of careful study by members of this office who have unanimously concluded that it is not only distinguishable in fact from the circumstances of this case, but that it is absolutely inconsistent with numerous other decisions by the same Court, both earlier and later, as well as with the present disposition and line of thought of the Court as now constituted; that there is excellent chance that when the case at bar reaches the Supreme Court Barker v. Harvey will be distinguished or, if necessary, reversed, and that the highest and most forceful considerations of ordinary justice and fair treatment require that a determined effort be made to this end.

A few of the reasons for this opinion follow:

(1) The grants discussed in Barker v. Harvey either did not contain the protective clause already referred to, or where they did show anything of the sort the premises had admittedly been abandoned by the Indians. In the case at bar there has been no abandonment. The Indians have been driven from part of their territory against their will and by superior force under which circumstances as shown by other Supreme Court decisions their possessory title remains unaffected.

(2) Summarizing of the foregoing [illegible] also supported by Supreme Court [illegible] the following propositions, [illegible] Supreme Court decisions apply:

[illegible]

The purpose of the Act of 1851 was merely to obtain a decision on the validity of private land claims in order to enable the Government to distinguish the public domain from the land which had already been separated from the public domain by Mexico. Jurisdiction of the Board of Commissioners was limited to deciding on the validity of the claim prior to its location and survey by the United States Surveyor General.

(h) The United States patent given to a successful claimant before the Board of Commissioners is conclusive only between the United States and the claimant and does not affect third persons.

(i) The Indians, having a title prior in time and superior in both moral and legal right to that of Spain, Mexico or the United States, which yet amounts to a species of easement only, are third persons unaffected by proceedings before the Board.

(j) The Act of 1851 did not contemplate that helpless Indians, possessing the merest rudiments of civilization, unable to understand the English language and totally unaware of the existence of the Act, should be obliged to appear before the Board in order to set up and maintain their title of occupancy and possession. This is shown by the terms of the Act itself.

(k) If they had appeared the Board had no jurisdiction to pass on the title of occupancy and possession being of the nature above described. Its jurisdiction was to decide whether or not the land belonged to the claimant or the United States. It might belong to either and still be charged with the Indian title. The foregoing is noticed and approved in the opinion of the Board in this very case.

(l) A decision of the Board in favor of the grant claimant was necessarily followed by the issuance of a United States patent to him, but no such patent has ever been or under the laws of the United States, then or now could be issued for a title of the nature of the Indian title.

(m) The words "public domain" used in the Act do not necessarily mean the same thing as "public lands".

(n) Land may be and often has been considered and treated as public land of the United States although admittedly subject to the Indian title of occupancy and possession.

(o) In view of the ignorant, dependent and helpless state of the Indians, statutes and treaties are invariably construed liberally in their favor. The only exception discovered to this rule is the case of Barker v. Harvey.

(p) The Indians are further protected in their possession by the California Act of 1850, later adopted by Congress in the Act of 1891 as a safeguard, which it was made the duty of the Attorney General to maintain.

The foregoing enumeration of principles and arguments is far from complete, but since authority for all of the above statements may be found in Supreme Court decisions, the conclusion must be that ample ground exists, both in law and justice, for carrying this case to the Supreme Court despite the existence of the Barker v. Harvey decision.

Emphasis is laid on the fact that the trial Court might feel itself bound by Barker v. Harvey, and that no adverse Att'y Gen'l-8.

decision below should be accepted as ending this case. In event of defeat below the case unquestionably should be carried to the Court of last resort.

3. Future handling of the case:

Attorneys for defendants, O'Melveny, Milliken and Tuttle, a leading firm in Los Angeles, filed a motion to dismiss in the nature of a demurrer based entirely on the Barker v. Harvey decision as shown by the memorandum of points and authorities which, under the local rule, they were obliged to file along with the motion.

It should not be overlooked that before the motion is argued the same rule requires plaintiff to file a memorandum of points and authorities.

The case is pending in the Northern Division of the Southern District of California and would normally be heard at Fresno, but arrangements can readily be made with the other side to have the motion argued at Los Angeles when mutually convenient.

While recently in California in connection with this and other cases, I had a number of interviews with Mr. Tuttle, who is in personal charge for defendants. Recognizing that only the Supreme Court could satisfactorily determine the questions involved, he proposed that a merely formal defense against the motion to dismiss should be made by the Government, in which event the Court would probably follow the obvious lead of Barker v. Harvey and sustain the motion. In the resulting appeal, the questions of law alone would be presented to Att'y Gen'l-10.

the Supreme Court. This was mainly for the reason that a complete investigation of the facts and collection of evidence promised to be very lengthy and costly and might, it was thought, be avoided by both sides in case the Supreme Court determined the law adversely to the Government. It was thought that if the Government presented its case fully on the motion along the lines indicated above, including the distinguishing of Barker v. Harvey from the instant case, the trial Court might think that the questions were too complex to be decided on the pleadings alone and might better be deferred until the facts were fully developed in evidence. On March 25, 1931, I reported this proposition to you, asking for your instructions thereon. On April 20, 1931, after considering the proposition further and discussing it with Mr. Truesdell I wrote you again setting up the reasons for and against it, and recommending its acceptance.

Receiving no reply to either of these letters, on June 5, 1931, I wrote you a third letter asking to be instructed whether to accept or reject this proposal. This letter also has remained unanswered. I respectfully submit that a decision on this point should be made and the case, which has thus been delayed, should proceed immediately on whatever line is thought more advantageous.

There is still another feature to be mentioned. When Mr. Truesdell and I approached Mr. Chandler in an attempt to procure an amicable settlement, the latter, who seemed indifferent Att'y Gen'l.

to the situation of the Indians and who appeared to regard our application merely as an annoyance, asked us to defer suit until he should have the chance to use his personal influence at Washington in some unspecified way. We told him that facts and law had been considered, that the Interior Department had laid the matter before the Department of Justice stating that the condition of the Indians was unsatisfactory and asking that suit be brought if it were thought maintainable; that the latter Department, after careful consideration, had so decided, and that indeed it was not only the general but the specific duty of the Attorney General under the Act of 1891 to protect these Indians.

The foregoing facts are mentioned lest new members of the Department, unfamiliar with the previous history of the case, should be misled by representations of any sort as to the situation which may be made by any of the defendants.

Finally, the case is in every way a meritorious one. The condition of these Indians is a reproach to our civilization. They are opposed to an aggregation of the wealthiest and most influential capitalists in Southern California and have no hope or succours except through the intervention of the United States.

It may be noted that propositions have heretofore been made to solve the difficulty by removing them to some other place, but there are no suitable public lands available anywhere in the vicinity, and personal inspection of the [illegible] Att'y Gen'l-18.

River Reservation, to which it was once proposed to move them, shows that despite its large acreage, the arable land is hardly adequate to the needs of its present occupants. The tract which it is the purpose of the suit to secure for the band is in a remote corner of the Tejon Ranch where the presence of the Indians can in no way be an annoyance or detriment to their neighbors, and as above pointed out, is in every way suitable and desirable for their maintenance. It is earnestly hoped that this suit will be pushed to a conclusion along the lines carefully considered and above briefly indicated.

Respectfully,

George A. H. Fraser,
Special Assistant to the
Attorney General.

[redacted]

Atty Gen'Ltr