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V. H. ✓

IN THE

Court of Appeals, District of Columbia 8

No. 4298

THE PUEBLO OF SANTA ROSA, *Appellant,*

vs.

ALBERT B. FALL, Secretary of the Interior, and
WILLIAM SPRY, Commissioner of the General Land
Office, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

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ALBERT B. FALL, Secretary of the Interior, and
WILLIAM SPRY, Commissioner of the General Land
Office, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

Statement of the Case.

For a clear understanding of the situation appellant's statement of the case needs to be supplemented.

The gist of the complaint is that plaintiff, from time immemorial, has been a municipality with the recognized name of "Pueblo of Santa Rosa" and with enumerated powers such as regularly belong to

a fully organized municipal corporation; that from time immemorial it has occupied a definite tract of land with well marked boundaries; that under Spanish and Mexican law it became, and now is, the absolute owner of said tract with complete and perfect title thereto; but that defendants are treating said land as public land of the United States and should be enjoined from so doing. No grant is pleaded and the alleged title depends upon the general law of Spain and Mexico.

Defendants first attacked this by a motion to dismiss in the nature of a demurrer, the substantial ground of which was that plaintiff had no right or capacity to sue. The case, developed to this extent only, then passed through this court to the Supreme Court of the United States, which upheld plaintiff's right to sue and sent the case back for trial on the merits. The right of plaintiff to sue and the right of defendants to answer were the only points determined, and the Supreme Court said:

“In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the 6th Article of the Gadsden Treaty, but no decision on either point is intended. Both involve questions not covered by the briefs or the discussion at the bar, and are left open to investigation and decision in the further progress of the cause.”

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 114.

It is important to bear in mind that nothing was before either appellate court except complaint and motion, and that all the facts pleaded were assumed to be true. The former opinion of this court (46 App. Cas. D. C. 411), necessarily based on assumed facts only, therefore becomes irrelevant here where the facts proved will be found not only inconsistent with those pleaded, but completely contradictory thereof. And further, the Supreme Court by providing that the question whether "plaintiff's claim was valid in its entirety under the Spanish and Mexican laws" is "left open to investigation and decision in the further progress of the cause", clears the way for a decision on the real facts and the law applicable thereto, unprejudiced by anything heretofore based on imaginary facts.

The case being thus sent back to the trial court without prejudice, defendants filed their answer generally and specifically denying the essential allegations of the complaint and affirmatively setting forth in effect that the Papago Indians are a primitive, ignorant and semi-nomadic people, totally different from the Pueblo Indians of New Mexico both in civilization and land tenure; that there is no such entity as "the Pueblo of Santa Rosa", but that "Santa Rosa" is a name applied to a large district of indefinite extent wherein lie various scattered villages, no one of which was called Santa Rosa until very recently, and no one of which has or had any municipal existence, character or organization; that neither the alleged Santa Rosa nor any Papago village has or ever had fee title to the land it occu-

ped and that the Indian right, if any, is that of occupancy merely and belongs to the whole tribe (which of course is not suing or assuming to sue) and not to any village or other subdivision of it; that for a long time prior to the institution of the suit the Government made appropriations and created reservations for the Papagos, and otherwise treated them as tribal Indians under guardianship; that the boundaries of the tract claimed in the complaint are incapable of accurate ascertainment; that this area, considered as a recognized or ascertainable tract owned or claimed or occupied by any Papago village, is a mere myth; that the description of said tract as found in the complaint is taken from one of sixteen deeds, executed in 1880 by various Papago chiefs to one Hunter, trustee, recorded from 33 to 38 years later, and purporting to convey to said Hunter a half interest in this and other land aggregating 2,600,000 acres; and that Hunter, in 1911, sold three-quarters of his half interest to one Martin of Los Angeles, *the latter binding himself to segregate the lands from the public domain, and then to partition them between Hunter, or his successor, and the Indians, "all proceedings to be instituted in the name of the Indian inhabitants of the respective villages named in the deeds"*. A copy of the relevant deed is attached as an exhibit and shows that the grantor, Luis, assumed to represent "the village or Pueblo of Santa Rosa" and other enumerated villages (Tr. pp. 22-23).

Not satisfied with this intimation that the suit was colorable merely and that the real and only plaintiff

was Martin acting under said agreement with Hunter, and masquerading under the name of “Pueblo of Santa Rosa”, defendants, following the wide permission, or rather requirement, of Equity Rule 29, joined a separate defense which, while reiterating that no such entity as the Pueblo of Santa Rosa existed, further averred that none of the villages or communities in the Santa Rosa district, nor any of the Indian inhabitants thereof, had authorized this suit, or knew of its existence until long after it was brought, nor had ratified or approved the acts of attorneys in bringing or prosecuting it—in other words, that the attorneys before the court had no authority to represent their alleged client (Tr. pp. 22, 23).

This usurpation of authority by counsel, therefore, was squarely presented in the answer.

At the time of filing the answer, however (Tr. pp. 22, 23), defendants, hoping to save the time and expense of a trial, separately filed a motion to dismiss presenting the same question of lack of authority and based on that ground alone, but setting up the facts more fully. It was therein shown that while the case was in the Supreme Court of the United States on appeal, the Solicitor General for the first time learned that the suit was unauthorized by the Indians; that thereupon he asked counsel for their authority to appear and in response was furnished by them with a copy of an alleged power of attorney of even date with the above mentioned Luis deed (Dec. 8, 1880) and from the same grantor on behalf of the same villages to the same Hunter, with substitution from Hunter to one Cates, at that time one of the attor-

neys of record for the alleged plaintiff. This power purported to authorize Hunter to sue for various enumerated purposes. The motion then avers, in the same way as the answer, the absence of authority from or ratification by any of the Papago villages or their inhabitants, and urges that the power of attorney is void for many designated reasons apparent on its face or otherwise shown (Tr. pp. 33-35). Copies of the alleged power, substitution and letter of transmittal were appended (Tr. pp. 36-40). The motion was supported by 32 affidavits (Tr. pp. 40-78), some from government agents, but the majority from Papago Indians living in the Santa Rosa region, which showed that after exhaustive search and inquiry on the ground no one could be found who had authorized the suit, or who knew the lawyers who brought it, or who had even heard of its existence until long after it was instituted, or until the government agents brought word of it; and that if any authority to sue had been given, affiants were in a position to know and would certainly have known of it. One affiant, Konorone, was an ancient chief, resident at Kiacheemuck, the village which is now, and since about 1916 or 1917 has been, called Santa Rosa (Tr. pp. 74, 78), who swore that he was a contemporary of Luis (grantor in the Hunter deed and donor of the power of attorney), and had been a leader in his village since young manhood; that nothing of importance had ever been done there without discussion in council, and that not only had he and his people never heard of the suit until the government officials told them, but that no matter connected with the sale or transfer of any of the

Indian land had ever been discussed in council during his lifetime (Tr. pp. 74, 75). This chief was somewhere between 36 and 41 years of age at the time of the alleged transaction between Luis and Hunter, and being already a leading man would certainly have known of it had it actually taken place under authority of the chief and the community, in which way alone it could be legal according to Indian custom.

Proof of the death of Hunter, donee of the power, before the institution of the suit, was filed later but before argument on the motion (Tr. pp. 84-87).

To rebut the above mentioned 32 affidavits plaintiff filed two, by W. T. Day and C. B. Guittard (Tr. pp. 79-84). Inserted without explanation as they are, they might be thought to form part of defendants' set of affidavits, but such is not the case. They were procured and filed by counsel for the alleged plaintiff.

The court will observe that the basis of this second motion to dismiss is absolutely distinct from that of the first. The first motion questioned the right of the Indians to sue; the second, admitted that right, *but urged that the Indians were not in fact suing*, but that interlopers, without legal authority, had invented an Indian plaintiff and brought suit in its name, totally without the knowledge or acquiescence of the Papagos.

The motion was argued, but the court reserved decision until the final hearing of the cause. His main reason appears in the following passages from his memorandum opinion:

“The case is one which, it seems to the court, calls for a complete judicial investigation and a final determination, * * * and it would be unfortunate if it were now to go off on a question of a want of authority to institute the present proceeding. * * * The defendants have answered the bill of complaint and a final hearing can be had in which all contested matters, or such of them as the court may consider necessary for a just determination of the case, can be adjudicated. If this course is taken it will not deprive the defendants of the right to press the grounds set up in support of the pending motion, and it will be in harmony with the directions of the Supreme Court in sending the case back to this court.” (Tr. pp. 87-89.)

This was on April 15, 1921, and both sides then proceeded to take testimony on the Papago Reservations in Arizona, and elsewhere. This testimony covered everything set up in the answer, including the question whether the Papagos had authorized the suit or had known of its institution or had later ratified it or were in sympathy with it, as counsel's letter transmitting the Luis power of attorney to the Solicitor General had stated (Tr. p. 36). Some of the persons who had made the above mentioned affidavits, and many others, were now examined and cross examined as witnesses on the matters covered by the affidavits, and much else. In due course a trial was had at Washington beginning November 7, 1922, and lasting six weeks, at which all the instruments above mentioned were put in evidence along with a mass of other testimony. On May 22, 1924, the court dismissed the bill, filing an opinion found in the transcript at pages 90-100.

This court will note in reading the transcript that all matters put in issue by the complaint and answer, including the absence of authority to counsel to bring the alleged plaintiff into court, were inextricably interwoven in the testimony, finally presenting to the trial court one broad question—whether the suit as presented by the evidence was meritorious and should be maintained. An element of this was the proof, made beyond controversy, that counsel had no authority from the alleged Pueblo or any Papago Indian whatever, but represented a hidden plaintiff, a land speculator in Los Angeles, suing under cover of an Indian name in the hope of removing the protecting hand of the Government from the tribe, and thereby clearing the way for the acquisition by him of half of its territory.

It was now open to the court to sustain, if he wished, the motion to dismiss, but to do so would have been to dispose of the case on a technical ground alone, and there was far more in it than this. The history and status of the Papago Indians, the primitive organization of their communities, their title or lack of title to land under Spain, Mexico and the United States, their own tribal customs relating to land ownership, their ignorance and simplicity and resulting incompetence to contract or otherwise deal with the whites, the fiction of a “Pueblo of Santa Rosa”, the imaginary tract of land supposed to be claimed by it, the impossibility of identifying its alleged boundaries, the true standing of the dis-united villages in the Santa Rosa valley—all these things were interlaced in the evidence with an ac-

count of a meeting at Tucson in 1880, when eight chiefs of Papago villages appeared to give to Hunter 16 or 17 deeds, of which the so-called Santa Rosa deed is one, covering in all nearly half of the Gadsden Purchase, each of which deeds was accompanied by a power of attorney similar to the Luis power above mentioned; and also with the history of the dealings of Hunter with Martin 30 or 40 years later and of Martin with his attorneys, all culminating in the present suit brought on the strength of the Luis power of 1880, without the knowledge or consent of any Indian. The Tucson meeting and its sequels will be considered later.

The point here is that the court, viewing the situation as a whole, overruled the motion, *as a motion, but upheld the same defense as raised in the answer.* It treated the whole case made by complaint, both defenses of the answer and evidence taken thereon, as one. It says so in plain language:

“It is clear, in the opinion of the court, that the grounds of the motion and the opposition thereto were sufficiently developed in the trial of the case on the merits to admit of a determination of the questions raised thereby *in the conclusion which the court has reached on the whole case as presented by the pleadings and evidence, and which are the basis of its decision,* and that *therefore* the motion to dismiss should be overruled.” (Tr. p. 91.)

This is followed up in the decree itself, which states that the cause came on for final hearing

“upon the pleadings, evidence and exhibits, and also upon the motion of the defendants, accompanied by exhibits and affidavits, filed herein June 9, 1919, to dismiss the bill of complaint”

The decree then proceeds to overrule “the aforesaid motion”, i. e., the motion as originally presented with its exhibits and affidavits (Tr. p. 100). The reason was that its grounds were embodied in the answer and had now been supported by testimony instead of affidavits. Its facts had become a substantial part of the main case and were so treated by the court.

But the court, although overruling the motion, sustained the defense of lack of authority of plaintiff’s attorneys. A great part of the opinion deals with the Hunter-Martin transaction, and the court’s first conclusion states in plain language

“That it is established by the evidence that there was no authority from the plaintiff Pueblo or its Indian inhabitants to institute or maintain the suit.” (Tr. p. 99.)

The court having thus completely upheld defendants’ contention on this point, it would have been a perfectly futile thing to encumber the record by exception or to take a cross appeal, as appellant claims should have been done, merely because it had overruled, when presented by motion and affidavits, the very contention which it proceeded to sustain when presented by answer and evidence. *Lex non cogit ad vana seu inutilia.*

The court's second conclusion (Tr. p. 100) is in effect that even if counsel were correct in urging that the nominal plaintiff is a Pueblo owning land as communal property for the use of its inhabitants, it had no power, under the law of any sovereignty concerned, or under any of its own customs as testified to, to make the Luis deed or power of attorney with the purpose of partitioning this community land between Hunter and the Indians. The two findings are in substance,

First, that the Indians in fact gave no authority for the suit, and

Second, that they could not legally have given authority for a suit of the kind which the court from the evidence saw this suit to be.

The decree of dismissal is on the merits (Tr. p. 100) and therefore, of course, appellees may urge any ground for sustaining it besides those set forth in the court's opinion.

Ridings v. Johnson, 128 U. S. 212, 218.

U. S. v. American Ry. Express Co., 265 U. S. 425, 435.

In so doing, the main facts supporting each contention will be referred to, but the evidence is too lengthy to permit of a complete summary, and we rely for an affirmance not only on the points now to be separately presented, but on the general impression of the equity of the case which the court will receive from a perusal of the transcript as a whole.

The main questions, as shown on the face of the record, are:

1. Were counsel for plaintiff empowered to represent their alleged client?
2. Does the case as a whole justify the relief sought, or any relief?

It was not only unnecessary for defendants to take a cross appeal, but it would have been erroneous to do so.

Under the facts just stated, if the trial court made any mistake in its method of formulating its conclusions, which we deny, it was a mistake in form and not of substance, and will be disregarded.

U. S. Comp. Stat. Supp. 1919, Sec. 1246, reads in part:

“On the hearing of any appeal, certiorari, or writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

Aside from statute, this court has repeatedly announced the same rule.

“A court would look to the substance, the necessary effect and operation of the order, rather than to its formal recital merely.”

Moore v. Heany, 34 App. D. C., 31, 39.

“To determine what the decision is from which an appeal is prosecuted, the court will look to its substance, its necessary legal effect and operation, rather than to its mere form.”

Cosper v. Gold, 36 App. D. C., 302, 306.

In re Selden, 36 App. D. C., 428, 431.

Aufiero v. Ewing, 44 App. D. C., 328, 331.

The substance of opinion and decree in this behalf is that plaintiff's attorneys have no authority to appear. Whether this conclusion should be expressed by sustaining a motion in which the point was raised, or a defense in the answer, wherein the same point was equally raised, is immaterial. The form of decision “did not affect the substantial rights of the parties”.

But we go further. There was no justification for a cross appeal, because *defendants had been granted all the relief they sought*. They could not expect that both the motion to dismiss and the defense on the same ground should be sustained. The bill was dismissed on the merits, which was all that defendants asked, and the court's opinion showed that in that dismissal the contention of lack of authority of plaintiff's attorneys was sustained as part of the merits. There was nothing for defendants to appeal from.

“The first judgment of the Circuit Court granted to the defendant all the relief it sought. It dismissed the action on its merits, and it is only those aggrieved by a judgment or decree that can maintain a writ of error or an appeal to reverse it, or to review any proceedings upon which it is based. (Citing cases.) * * * One may not maintain a writ of error or an appeal

from a judgment or decree which is so favorable to him that it secures for him all the relief he seeks.”

Guarantee Co. v. Insurance Co., (C. C. A., 8th Ct.), 124 Fed. 170, 172, 173.

Cook v. Foley, 152 Fed. 41, 48.

Rogers v. Penobscot Mining Co., 154 Fed. 606, 609.

Midland Valley R. R. Co. v. Fulgham, 181 Fed. 91, 95.

In the case first above cited, the court gives a lengthy discussion, with reasons for this rule.

On page 79 of their brief, appellant's counsel announce that they will not urge assignments of error Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 18, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 48 and 52, which refer to the lack of authority of counsel, and to portions of the testimony and of the trial court's opinion relating to the Hunter-Martin transactions, for the reason that appellees took no cross appeal. In so doing, counsel are merely hiding their heads in the sand. They can, if they wish, abstain from discussing their own assignments of error, but they cannot thereby cut off appellees' right to do so. This right exists quite apart from the question of a cross appeal.

Parties not taking a cross appeal “may be heard in support of the decree and in opposition to every assignment of error *filed* by the appellant”.

The Stephen Morgan, 94 U. S. 599.

Mount Pleasant v. Beckwith, 100 U. S. 514, 527.

Landram v. Jordan, 203 U. S. 56, 62.

Philadelphia Casualty Co. v. Fechheimer, (C. C. A., 6th Ct.), 220 Fed. 401, 418.

“Appellee may, without taking a cross appeal, urge in support of a decree *any matter appearing in the record*, although his argument may involve an attack upon the reasoning of the lower Court and an insistence upon matter overlooked or ignored by it.”

U. S. v. American Railway Express Co., 265
U. S. 425, 435.

No cross appeal, therefore, is necessary to justify appellees in discussing matters which appellant has deliberately laid before this court by its filed assignment. We will, therefore, first address ourselves to the bold and unwarranted assumption by Martin of authority to bring this suit, which evidently made the strongest impression on the trial court.

Counsel for plaintiff have no authority to represent their alleged client. No Papago community and no individual Papago authorized or ratified this suit. They have repudiated it and petitioned the Court to dismiss it.

In this regard it would be relevant to show that the alleged plaintiff Pueblo has no actual existence in fact or in law, but this will be demonstrated later in another connection. What we will first establish is

(a) That no Indians in the Santa Rosa Valley or anywhere in the Papago country sanctioned or approved of the suit, and that when their desires regarding it were inquired into they petitioned for its dismissal.

(b) That the Luis power of attorney of 1880, on which counsel rely for their authority, is worthless.

It now becomes necessary to select the salient facts from the mass of testimony bearing on this topic.

As early as 1874 a bitter controversy raged between the Right Reverend J. B. Salpointe, Roman Catholic Bishop of Tucson, Arizona, and the local Indian Agents, R. A. Wilbur and Charles Hudson (Tr. pp. 226-229). This involved such questions as a requisition by the Bishop on the Papagos for land and a request that they pay tithes to the church; a demand by the Bishop upon the agent that the latter submit his books and accounts to him for inspection, and the assertion of a claim of title to the land occupied by the San Xavier Church and schoolhouse. (San Xavier is a place about 9 miles from Tucson where a Papago reservation was created in 1874, and where the Catholic Church had long maintained a mission.) Charges were made that the Bishop was attempting to assume plenary authority over the Indians; that his influence over them was great, and that they looked upon him "with fear and trembling lest he will make them slaves" (Tr. p. 228).

There is no evidence of the developments of this feud during the next few years, but in December, 1880, "the year the railroad came to Tucson" (Tr. p. 351), a meeting was held at the house of Bishop Salpointe at which were present the Bishop himself for a short time; Robert F. Hunter of Washington, D. C., claiming to represent the Catholic Missionary Society; Santiago Ainsa, Notary Public; several residents of Tucson as witnesses; a Mexican interpreter,

Teodora Troiel, and a number of Papagos unidentified, unless by the signatures to the deeds and powers presently to be mentioned, with the exception of one Ascencion Rios, chief of San Xavier (Tr. p. 285). It is possible that there was another such meeting at Tucson or San Xavier, but this, along with many of the facts, is obscure on account of the death, before testimony was taken, of all the participants except Santiago Ainsa. There is much dispute in the evidence as to the capacity and character of the interpreter, Teodora Troiel, some of plaintiff's witnesses upholding both, while defendants' witnesses say that she was illiterate, a trouble breeder, and with a bad reputation both for chastity and for truth and veracity (Ainsa, Tr. pp. 295-6; de Berger, pp. 298-9-300; Aragon, pp. 380-1; Castillo, p. 382; Fernando, pp. 383-4; Moss, p. 387). More important still, three of her Papago neighbors and two whites testified that *she could not talk Papago* (de Berger, Tr. p. 299; Aragon, p. 381; Castillo, pp. 382-3; Fernando, p. 383; Moss, pp. 386-7). This is contradicted by plaintiff, but it is undisputed that she neither spoke nor understood English (Ainsa, Tr. p. 286; Castillo, p. 383). The conflicting statements as to her knowledge of Papago suggest the probability that she commanded a few words only of that language, just as those of the Papagos who spoke Spanish at all, possessed only a few elementary words with which they could procure the simple necessities of life. The evidence on this latter point is so unanimous that citations are unnecessary. It is certain that these Papagos could not carry on a conversation in Spanish (Ainsa,

Tr. p. 285), and none of them spoke or understood English (p. 285).

The events at this meeting at Tucson and the impression produced on the only survivor are graphically set forth in the testimony of said Ainsa (Tr. pp. 276-298), to which we specially invite the court's attention. The leading figure among the Indians was the pushing Con Quien, or Coon Can, some times called in Spanish Jose Maria Ochoa, self-styled head chief of the Papagos. Letters from Indian Agent Wheeler (Tr. pp. 169-170) describe him as a troublesome, presumptuous and conceited half-wit; that he was ever head chief of the tribe is repeatedly denied by many of the Papagos themselves (Jose X. Pablo, Tr. pp. 306-7; Blain, pp. 315-6; Bailey, pp. 321-2; Marcos, p. 333; Wilson, pp. 341, 343; Cachora, p. 344; Sam Pablo, p. 346; Lopez, p. 347; Ignacio, p. 358; Paoli, p. 361; Kisto, p. 363; Castro, p. 370; Jose Juan, p. 371; Luciano, p. 372; Barnebe Lopez, pp. 377, 379; Aragon, p. 380; Castillo, p. 382; Norris, pp. 393-4; Santeo, p. 399). Undoubtedly he was a man influential by virtue of his loud self-assertion, who arrogated to himself an authority to which he had no right, and to whom the weaker members of the tribe deferred, while the more forceful repudiated him.

At this meeting 17 deeds were given by various Indians to Robert F. Hunter, Trustee, which conveyed an undivided half interest in described tracts, supposed to represent the territory belonging to each village excepting the fields then cultivated (Tr. pp. 278-284).

An analysis of these deeds shows that Con Quien signed nine of the 17 as sole grantor, assuming, or being made by the managers of the puppet show to appear to assume, authority to act in lieu of eight absent chiefs. It also shows that he joined as co-grantor in six of the remaining eight deeds. The final deed in the series is a curiosity. The same Con Quien, using his Spanish name of Ochoa, professes to convey an undivided half interest in *all the Papago lands of Arizona*, comprising practically everything south of the Gila River, west of the Santa Cruz River, north of the Mexican line, and as far west as the junction of the Gila and Colorado Rivers, including 25,000 square miles of territory. In other words, the absolute ownership and right of conveyance formerly the prerogative of the King of Spain alone, had passed to a single tribal Indian!

Among these deeds was one from "Luis, Captain of the village of Pueblo of Santa Rosa, in the Territory of Arizona, for himself and the inhabitants of said village and the villages of Aitij, Semilla-Quemada and Chaquima", from which the description of the tract claimed in the complaint is taken almost verbatim (Tr. pp. 3-4, 278-9).

Each of these deeds was accompanied by a power of attorney to the same Hunter made by the grantor in the corresponding deed. The power from Luis (Tr. pp. 282-284) is that whereon counsel rest their claim of right to maintain this suit.

When these deeds and powers were given, no interpretation was made thereof to the Indians so far as

the notary knew (Tr. pp. 277-8, 286); no reading or explanation of the acknowledgment was made (Tr. pp. 286-7); notary and Indians alike acted at the request and under the influence of the Bishop (Tr. pp. 277, 285, 297). One fact or impression after another, showing the primitive ignorance of the Indians and their lack of intelligent knowledge or consent, is given by Ainsa, culminating in the statement that "I don't believe the Indians did know anything it contained" (Tr. p. 297). Ainsa, who was also a lawyer with much experience of Papagos, supports this conclusion by stating a fact, later brought out repeatedly by the Papagos themselves, that their theory of land ownership is that the tribe as a whole owns the land and that one man does not (Tr. pp. 297-8). These deeds violated that theory.

An examination of some of the original instruments also shows them to be suspicious on their face, looking as if the alleged grantor did not even participate to the extent of making his mark (Tr. pp. 293-4-5). On one of them Bishop Salpointe signed as a witness and later erased his signature (Tr. p. 281).

It must be remembered that the deeds and powers are written in English and that the interpreter knew no English. Who interpreted them to her in Spanish, if they ever were interpreted, is not known. It is impossible that an ignorant woman, with little or no knowledge of Papago, could intelligently interpret to still more ignorant Indians speaking Papago only, or at best the merest smattering of Spanish, and totally ignorant of white men's laws, forms and procedure, deeds and powers couched in the most formal

and technical English, including such ideas as delegation, substitution and irrevocability because coupled with an interest. The ideas, terms and results involved in these instruments were entirely outside of the range of experience or understanding of the Indians, who yet were made to seem to donate to a white man for nothing, or for some purely conjectural advantage, half of their most cherished possession, indeed their only wealth. It would be a credulous person indeed who could believe that the apparent grantors had the slightest intelligent idea of what they were cajoled into doing.

Next in order of the facts is a significant intimation that at least one Indian participant shortly afterwards became suspicious of the real nature of the transaction and its possible outcome. On May 3, 1882, Ascencion Rios, chief of San Xavier, who had signed one of the Hunter deeds and powers (Tr. pp. 281, 290) in a petition to the Secretary of the Interior writes "still we pray God and you to be free of all dealings with the French Roman Catholic Bishop and Priests of Tucson, who have done us, and tried to do us, much harm" (Tr. p. 230).

About the same time Ainsa, evidently filled with the doubts which he expressed in his testimony forty years later, volunteered information of the whole transaction to the Surveyor General of Arizona (Tr. p. 242).

We next encounter the highly significant episode of the disputed mineral entry for the Santa Tomas mine, set forth in the transcript at pages 230-244.

This application, at the request of Hunter, was suspended to permit examination by the Surveyor General of "the evidence of a Spanish or Mexican grant for pueblo or village purposes" in favor of the Papago Indians and conflicting with the mineral entry (Tr. p. 230). At the same time, Hunter, signing himself attorney or counsel for Papagos, applied for a similar examination of a like alleged title to sixteen named Papago villages (Tr. p. 235). The Surveyor General at once *questioned the authority of Hunter to represent the Papagos*, pointing out that neither they, nor the Indian Agent, had given him any intimation that they had an attorney. He expressed complete readiness to conduct the proposed investigation if only Hunter would *either produce the chiefs concerned in person or their Indian agent*, and have them advise that they constituted Hunter their attorney, or else produce a letter from the Agent or the Commissioner of Indian Affairs or the Secretary of the Interior to the effect that Hunter was actually recognized as attorney for the Papagos (Tr. p. 238). Hunter persistently eluded this reasonable requirement, urging that he should be recognized by the Surveyor General first, because the files of the Commissioner showed that he appeared as Papago attorney against the Santa Tomas mine application (Tr. pp. 234, 237), and second, because he was a practicing attorney at law and therefore no evidence of his right to represent his alleged clients should be demanded (Tr. p. 239). The Surveyor General insisted on his requirements; Hunter never complied or attempted to comply with them; and after a discussion lasting from March, 1881, to Sep-

tember, 1882, the patent to the Santa Tomas mine was issued (Tr. p. 244).

Yet all this time Hunter's pockets were stuffed with powers of attorney with the ink hardly dry thereon, purporting to emanate from the very chiefs and villages in whose behalf he now wished to appear, and empowering him to do the very things that he now desired to do. What conclusion is possible but that he did not dare to have an impartial official confront him with these deluded Indians and explain to them the real meaning and effect of the instruments they had been deceived into signing?

In 1903 Hunter presented to the Secretary of the Interior a letter and argument urging the title of the Papago Indians in exactly the same way in which it is presented in this suit. The Secretary declined to entertain the claim, noting a possible lack of authority in Hunter, and expressing the view that the alleged title was one of occupancy merely (Tr. pp. 244-246).

The next development occurred in 1910 when a man named Brown, a distant connection of Hunter, and who had evidently become interested in the money-raising possibilities of the Hunter deeds, visited the Papago country with a set of new powers of attorney confirmatory of those of 1880, and providing a scheme of partition of the land between Hunter and the Papagos. He attempted at first personally, and later through Hugh Norris, a prominent Papago, to secure the signature of the appropriate chiefs thereto and *offered Norris \$100 for each sig-*

nature so procured. (Tr. pp. 142, 337, 382, 390, 394-5, 397-8). Apart from the ethics of this attempt, we ask the court to note the implied lack of confidence in the validity of the old powers and deeds.

Next in order comes the contract with exhibit, really two contracts, between Hunter and Robert F. Martin of Los Angeles (Tr. pp. 246-250), which we request the court to read carefully. Of these the important one is the contract of May 17, 1911, whereby Hunter sold to Martin three-fourths of the undivided half interest conveyed to Hunter by the first ten deeds of 1880, including that of Santa Rosa, with an option to acquire the other one-fourth interest, all for various considerations running up to a possible sum of \$250,000. Martin obligated himself to take the necessary legal steps first to *segregate these tracts from the public domain of the United States*, and then to partition them between himself or Hunter and the Indians, expressly agreeing that "*all proceedings for the segregation of said respective tracts of land from the public domain of the United States are to be instituted and conducted in the name of the Indian inhabitants of the said respective villages or pueblos*" (Tr. p. 249).

The Luis deed ran to Hunter, *Trustee*, and Hunter signed this contract as trustee (Tr. pp. 249, 278). There is no evidence showing for whom or what he was trustee. He himself and his executrix evidently regarded the trusteeship as a fiction, as is shown by the distribution in his will of the actual and expected proceeds of the above Martin contract among his heirs, and by the report of the executrix showing the

application of the money thus actually received to the support of two of said heirs (Tr. pp. 251-2).

On May 31, 1911, Hunter executed a substitution of the powers of 1880, including the Luis power, to Alton B. Cates (Tr. pp. 38-9, 97, 215, 251) of the firm of Cates & Robinson, which signed the complaint as attorneys for plaintiff (Tr. p. 9). *This was more than 31 years after the original power was executed* (Tr. p. 98).

Long prior to these dealings, and about 1890, Luis, apparent donor of the power, had died (Tr. pp. 97, 252-3, 360, 371). Hunter died February 19, 1912 (Tr. p. 85), and Alton B. Cates died November 23, 1920 (Tr. p. 252). Thus *the donor of the alleged power died before anything was attempted under it; the donee died before this suit was brought; and the substitute donee died while the suit was in the Supreme Court of the District after having been sent back from the Supreme Court of the United States, and long prior to the trial on the merits.*

The Santa Rosa deed of 1880 was recorded in Pima and Pinal Counties, Arizona, on June 2nd and June 8th, 1914, *nearly thirty-four years after its alleged execution* (Tr. pp. 95, 280). The other deeds were similarly recorded at dates varying from thirty-four to thirty-nine years after their execution. The county seat of Pima County is Tucson, and it is very significant that this recording took place only after such lapse of time that ascertainment of the authenticity of the deeds and the circumstances of their execution became next to impossible on account of

the death of nearly all the participants. The usual prompt recording of a deed or power would inevitably have started inquiry at a time when the apparent grantors were living and the truth could easily be found.

On May 18, 1914, Rounds, Hatch, Dillingham & Debevoise, lawyers of New York, who later appeared for the alleged plaintiff in this suit (Tr. pp. 9, 93, 214) wrote a letter to the Secretary of the Interior with enclosed petition, making claims on behalf of alleged Papago communities in Arizona identical with those urged in the complaint. One of those communities was "Santa Rosa". In this letter they alluded to "*our client, R. M. Martin, Esq., of Los Angeles, Cal., who has a large interest in the tracts of land in question under a contract with Col. Hunter*" (Tr. pp. 250-1).

The scheme whereby Martin, after his contract with Hunter, proceeded to advertise and sell chances, for \$1,000 each, in the possible proceeds of the contemplated litigation (Tr. pp. 257, 270, 389) is probably not sufficiently relevant to the issues of this case to be worth describing, except insofar as it makes clear that any Papago lands acquired if the issue was successful were to be conveyed in 2,000-acre tracts to purchasers of such chances, or so-called "units", and thus permanently lost to the Papagos.

The suit was filed January 28, 1915, and took its course to the Supreme Court and back. While it was in the Supreme Court the Solicitor General, becom-

ing satisfied from the investigations of the Indian Service presently to be described, that the Papagos in the Santa Rosa region had not employed counsel and were ignorant of the existence of the suit until informed by government representatives, inquired of the Rounds firm just mentioned by what authority they assumed to represent the so-called Pueblo of Santa Rosa. That firm, on January 9th, 1919, replied, stating that their authority rested on the Luis power of 1880 with substitution of 1911 to Cates, and also alleging that "we are advised that the inhabitants of Santa Rosa are cognizant of the fact that the suit is pending and are in sympathy with the result sought to be obtained" (Tr. pp. 36, 214). The answer and motion to dismiss, both denying authority of counsel, followed in due course (Tr. pp. 23, 33-40).

The limits of this brief permit only a most inadequate statement of the indefatigable efforts of the Indian Service and others to ascertain whether or not the Santa Rosa Indians had, formally or informally, authorized the suit. Meetings were held, committees of inquiry appointed and investigators, official and private, Indian and white, combed the reservation from end to end for several years, with the result that not a single Papago was found who had ever heard of the doings of 1880, or of the suit itself until after its institution, or of the attorneys who brought it. No Indian had approved or ratified it after it was brought, and over 90% of the Indians of the Santa Rosa district petitioned for its dismissal.

Thackery, an Indian Agent of nearly 20 years' standing, held a council meeting at Kiacheemuck about 1914 or 1915, at which some 30 or 35 residents of the Santa Rosa region were present, and inquired, among other things, whether anything was known about a suit then instituted or contemplated. Although one or two present had heard mention some years before of a proposed suit, evidently from Martin's representatives, none had given any authority for it or knew anything more about it. During the next three or four years Thackery supplemented this with personal inquiry over the reservation as to the suit and the Hunter deeds and powers, with the same result (Tr. p. 403).

Bowie, during the years 1918 and 1919, conducted an extensive and intensive canvass of the whole Papago country. A council was called at Sells (Indian Oasis) attended by some 90 old Indians from all over the reservation. The whole transaction of 1880 and the pendency of the present suit was explained with great care, but no Indian was found who had heard of the meeting at Tucson, or of the deeds and powers, or who had authorized the suit, or assumed to employ attorneys, or who knew of its existence unless or until informed by government agents. He held a second council meeting at Kiacheemuck (now Santa Rosa) and a third at Florence, where a number of the Santa Rosa Indians were working, and thereafter personally canvassed the entire reservation, visiting practically every village, with special attention to those in the Santa Rosa district, and inquiring what knowledge, if any, the Indians had of

the present suit or of the deeds and powers of 1880. Among the Indians interviewed who disclaimed knowledge of deeds, powers or councils to authorize them, was the old chief Pablo, who was supposed to have signed the Tesota deed (Tr. p. 261); the brother of the chief Julian, supposed to have signed another of the deeds (Tr. p. 261); the son and wife of Con Quien himself (Tr. p. 261); and the nephew of Luis who, himself, was for years a leading man at Achi. Parenthetically, Ramon Cachora who was a grown man in 1880 and son-in-law of Miguel, chief of Tecolote, one of the apparent grantors of 1880 (Tr. p. 280) had never heard of the affair from Miguel (Tr. p. 344). He had often talked to the same Pablo, but had never heard of the transaction from him (Tr. p. 344). The exhaustive nature of Bowie's search makes it impossible to conceive that any instigation or approval of the present suit by the Indians could have escaped discovery (Tr. pp. 255-8, 260, 329, 335-6).

Superintendent McCormick, during the five years from 1917 to 1922, in his constant journeying over the reservation made the same inquiries everywhere with the same result (Tr. p. 336).

Santeo, the Indian Labor Agent and missionary, whose duties called him to every part of the Papago country, made similar search from 1913 to 1922 with the same result (Tr. pp. 399, 400). Oblasser, the Catholic missionary, who, also, in his capacity as census taker, visited every place where a Papago could be found, made earnest efforts for years along the same line, but found nothing (Tr. p. 329).

A committee of six Indians from different parts of the reservation appointed at the Sells meeting of 1918 to make similar inquiries among their own people could learn nothing (Tr. pp. 335-6).

Various intelligent Indian volunteers in different places also inquired into the matter with the same result (Tr. p. 385).

A mass of deposition testimony, given mainly by Papago Indians on the reservation and covering pages 301 to 410 of the transcript, shows the same thing. No one had heard of the meeting at Tucson or of the deeds and powers until very recently. All were positive that no council meetings were held in the villages concerned to authorize any such extraordinary transaction. No one had authorized this suit and no one approved of it. Indeed, many of the Indians on cross examination by plaintiff voluntarily said that they were willing to leave their interests in charge of the United States (Geronimo, Tr. p. 313; Sam Pablo, p. 347; Moreno, p. 386; See also McCormick, p. 340) or stated affirmatively that they did not want any suit (Tr. pp. 318, 404, 410).

A specially significant fact in this regard is the petition signed by 181 out of 195 adult males of the four villages designated by plaintiff as constituting the "Pueblo of Santa Rosa". This was signed at a series of council meetings in 1922 and stated, among other relevant matters, "No one of us ever knew about this suit until after it was brought; no one asked any one to bring it or gave any one the right to bring it; no one of us approves this suit or wants

it to go on. We respectfully ask the court that this suit, which we do not want and with which we have nothing to do, be dismissed'' (Tr. pp. 404-5, 407-8).

In spite of the difficulty of proving a negative, we submit that we have absolutely established lack of knowledge by the Indians of the Tucson meeting or of the present suit, with the exception of an insignificant few who may have obtained some slight inkling of the latter through Martin's representatives. Of approval thereof or authority to counsel there is not a trace.

One development of the above inquiry was that no chief ever did anything of importance affecting the community without calling a council, sometimes of the elders, sometimes of the whole village, to learn their will. This was universal and without exception, yet the exhaustive search above mentioned discovered not a single Indian, either in the Santa Rosa region or in any of the other villages supposed to have given deeds, who had ever attended or heard of a council meeting to authorize the sale of Indian land or the institution of a suit, such as the deeds and powers of 1880 implied. It is beyond the bounds of possibility that such a series of council meetings, or any one such meeting, could have been held without the knowledge, personal or hearsay, of many or all of the witnesses examined.

This same fact has another aspect. By an equal volume of unanimous testimony it was shown that without such council a chief was powerless to do anything of importance, and that even with its consent,

according to many witnesses, a chief could not sell the lands around his village or authorize a white man to bring suit regarding Indian land. Sale of land by any Papago community or individual was entirely unknown within the memory of any living witness or in the tradition of the tribe. It was similarly shown that the Papagos are deeply attached to their land, and that a proposition to sell any part of it, or to litigate regarding it, would be anxiously considered, carefully deliberated and widely talked about everywhere among them. It is perfectly clear that if the chiefs named were actually present at Tucson at all, which is more than doubtful, they had no authority from the tribe or from their respective villages to sign deeds and powers. For this reason alone, therefore, their acts would be totally null and void. It is impossible to give a full set of transcript references supporting the above, because evidence to that effect was given *by every Indian witness examined*. A few specimens, however, are found at pages 304, 312, 315, 317, 318, 319-20, 323, 333, 336, 341, 342, 343, 345, 349, 350, 351, 357, 363, 369, 372, 375, 378, 382, 393, 399.

One conclusion from all the foregoing is that most of the supposed signers of the Tucson deeds and powers, including Luis, were not present at all, but that their names were signed and their marks made by someone else. Here it is worth noting that Luciano, Captain in 1880 of Ak-Chin, only two or three miles away from Luis' village, after stating that he and the neighboring chiefs "listened to each other", says that he knew Bishop Salpointe but that "I

never went in with other captains of other villages to see Bishop Salpointe; I never heard of any captains going in there to see him—I never knew of any of them going to see him” (Tr. p. 373).

It is certain that none present at the meeting, probably not even Con Quien, had the slightest idea of what they were doing or of the effect of the instruments signed in their names. It is proved absolutely, and without contradiction, that none of them had a vestige of authority to sign any such instruments. That authority rested in the people, not the chief, and had neither been asked for nor conferred. It is proved incontrovertibly that the real and only plaintiff is Martin, acting in pursuance of his agreement to segregate these lands from the public domain and then take half of them, that counsel are employed by him, and by him alone, and that the Indians neither authorized nor assented to the suit and have affirmatively repudiated it. All these objections were raised in proper form as soon as the Department of Justice, through the investigation above described, became satisfied of the facts.

Hatfield v. King, 184 U. S. 162, 166-7-8.

It is a rule of law that

“After a party whom an attorney professes to represent has denied his authority, the burden of showing authority is on the attorney.” 6 C. J. 636, and cases cited.

The burden of proving their authority has, therefore, fallen on opposing counsel; but even if it had been on appellees all the above facts completely disprove such authority.

The authority of counsel must stand or fall with the power of attorney of December 8, 1880. Apart from it they have no vestige of right to appear. If that power is unauthorized or void, the suit is unauthorized and must be dismissed.

**The power of attorney of December 8, 1880,
from Luis to Hunter is void.**

1. It is void for lack of intelligent consent of the apparent grantor. The facts above recited bearing on the Tucson meeting show that the entire transaction was vitiated either by fraud or mistake.

2. It is void because the apparent grantor, Luis, did not act by authority of the council or councils of the village or villages he professed to represent, such council, of course, not being similar to a modern town council, but meaning the community speaking its combined will (Tr. pp. 401-2). The necessity for, and the non-existence of, such authorization have been conclusively proved.

It is true that the power describes Luis as

“Duly empowered to make, enter upon and execute contracts, and to do other legal acts to bind and obligate the inhabitants of said village of Santa Rosa.” (Tr. p. 282.)

But, clearly, this is a recital not of a resolution of the inhabitants authorizing the execution of this power but of a general authority *supposed by the draftsman of the power* to reside in Luis by virtue of his chieftainship. This is also shown by the use of the royal “we” and other plural pronouns through-

out to describe this Indian chief, who is not only designated as “we, Luis”, but appoints Hunter “our true and lawful attorney”, speaks of lands “the title of which is vested in us” and mentions “claims and demands which we may have”. The whole thing is an assumption of the draftsman, who evidently considered Luis a petty monarch with authority inherent in his chieftainship.

Not only, however, is there no rule or presumption of law that the chief of an Indian village is the sole governing body and can make his single act the act of the community, but, on the contrary, the evidence shows such assumption to be entirely unwarranted and the authority of the Papago chiefs to be exceedingly limited. Over and over again the Papago witnesses testify that a chief could do nothing of importance affecting the rights of his village without the consent of the body of inhabitants, *and that this was necessary each time that any important matter arose*. The idea that the villagers of any Papago community gave such a thing as a general authority to any chief to execute powers of attorney is absurd in itself, as well as flatly contradicted by the evidence.

Further, the burden of proof is on plaintiff, both as a general rule and especially under the extraordinary circumstances here involved, to prove the authority of Luis to execute this power.

In *Andover v. Grafton*, 7 N. H. 298, 302, where a selectman signed a note obligating the town, signing his name “for the selectmen of Grafton”, the court says:

“The authority of the selectmen to bind the town by contract being limited authority, it would be necessary for the holder *to prove*, notwithstanding it purports to be for value, *that it was given by the selectmen acting within the scope of their authority*, as he cannot otherwise show them agents for the purpose.”

Proof of authority to act is not made by an assertion in the power that such authority exists. A power is not a good power merely because it says on its face that it is good; and, in any event, the assertion of a general right to make powers is worthless as against the proof that special authority from the community was necessary for each important act.

Under the evidence, unless plaintiff showed definite and specific authority from the council or the inhabitants to make this particular contract, the chief had no power to make it and it was void. Not only, however, has plaintiff failed to do this, but the evidence to the contrary is overwhelming.

This defect goes to the merits and, we submit, is *absolutely fatal to the power*.

3. The power is void because it is not executed by or in the name of the alleged corporate entity.

The complaint alleges that

“the plaintiff, the Pueblo of Santa Rosa is and from time immemorial has been a town *known by the common name of Pueblo of Santa Rosa*”,
(Tr. pp. 1-2)

and further that it has at all times claimed and exercised

“the right to have a common name, to-wit: The Pueblo of Santa Rosa” (Tr. p. 2)

with many other enumerated rights and powers, including

“the right and power to contract and otherwise *act as an entity* by resolutions passed in common councils composed of its adult male inhabitants”, and “the right and power to sue and be sued as an entity”, (Tr. p. 2)

with much more to the same effect. Plaintiff’s title, therefore, and its right to sue with reference to its alleged communal property must stand or fall upon the theory that it is a corporate entity, officially known by and acting under a definite corporate name. The power, however, is not executed by or in the name of the Pueblo of Santa Rosa, but by Luis alone. It commences:

“Know all men by these presents, that we, Luis, Captain of the village of Santa Rosa in the territory of Arizona, for himself and the inhabitants of said village and the villages of Aitij, Semilla-Quimade and Chaquima.”

It appoints Hunter

“our true and lawful attorney to represent and prosecute in our name or the names of said inhabitants of said village”,

and it concludes:

“In testimony whereof I have hereunto set my hand and affixed the official seal this 8th day of December, A. D. 1880, at San Xavier del Bac, Arizona.

(his)
(X) LUIS (SEAL).” (Tr. pp. 282-3.)
(mark)

The “official seal” mentioned is only a scroll seal made with a pen.

Authority, however, is clear to the effect that a power or contract not made and signed by and in the name of the corporation is void even though it be made and signed by some official professing to act on behalf of the municipality.

A contract was signed by one Doyle, Mayor of Providence, with the words “on behalf of the City of Providence” after his signature. The court will note that this is exactly equivalent to the wording of the power here, except that in the latter the words “for himself and the inhabitants of said village” come at the beginning instead of the end of the instrument. The court said:

“The contract in the case at bar is under seal and the cases are numerous which hold that a deed or contract under seal made by an agent does not bind the principal *unless it is made in the name of the principal*, and that it is not enough for the agent to declare in the instrument that he makes it as the agent of his principal and to add to his signature words expressive of the same thing.”

Referring to the words “on behalf of the City of Providence”, the Court says:

“These words indicate that the City is beneficially interested, but they do not make it a party or entitle it to sue as a party to the contract.”

City of Providence v. Miller, 11 R. I. 272, 275
277.

Eleven cases are cited in support of the first proposition. To the same effect are:

Nichols v. Balmear, 36 App. Cas. 352, 357.

Fullman v. West Brookfield, 9 Allen, 1.

This principle must be considered as conclusively established and its application makes the power in question void.

4. The power is void for uncertainty (a) as to the ownership, interests or titles which it is intended to cover; (b) as to the identity of the lands on which it is to operate.

(a) The power, in which Luis professes to act for himself and the inhabitants of four enumerated villages, “citizens of the United States”, and in which he is said to be empowered “to bind and obligate *the inhabitants* of the said village of Santa Rosa”, appoints an attorney in fact to prosecute “in our name or the names of *the said inhabitants* of said village” matters connected with the recognition of “*our title, claims and demands * * ** to and for certain grants or tracts of land situate in the said territory, the title to which is vested *in us or in said inhabitants*” (Tr. pp. 282-3).

In paragraph VI of the complaint, it is stated that

“at the time of the making of said treaties said Pueblo of Santa Rosa was the absolute owner with complete, perfect and indefeasible title to the land herein described against all governments and individuals and all the world *except such rights as pertain to the inhabitants of said Pueblo as members thereof*”. (Tr. p. 5.)

The complaint thus recognizes the distinction between the municipal title which is the one now sued for and the title of the inhabitants as individuals. Authority to bring this suit is based on a power which plaintiff construes to be from the municipality and to justify suit for the municipal title. Leaving out of consideration what we, nevertheless, believe to be a substantial objection, viz: that the language of the power distinctly indicates that Luis was acting not for the municipality as a separate entity, but for the individual inhabitants of it and with respect to whatever title or titles they individually had, a fact emphasized by the use of the words "citizens of the United States", we submit that it is impossible to tell whether the power is intended to affect the aggregate or corporate title, or the title of the individual inhabitants. We go further and say that it shows no intention of affecting the *municipal* title at all. The only title affected is that "which is vested in us or said inhabitants", and the power leaves it entirely open as to whether its subject matter is the title vested in "us"; that is, Luis, or in "said inhabitants". The passage from the complaint above quoted recognizes what the evidence has abundantly established, that the inhabitants of the community had separate titles. The only titles on which the power bears under its own language are these separate titles or else the title vested in Luis, and it leaves it entirely uncertain as to which is intended. The draftsman of the power probably thought that Luis, by virtue of his chieftainship, had some sort of title to all the land occupied by the inhabitants of

the village or villages. But this is absolutely refuted by the evidence and it would be absurd to suppose that the hundreds of separate individuals had given Luis authority to grant a power covering their separate fields. In any event, however, it is left entirely uncertain whether the title with which the attorney was to deal was Luis' title or the title of the individual inhabitants. And either of these alternatives is very different from a grant of power to deal with a communal title.

(b) An obvious and fatal objection to this power is that the lands on which it is to operate cannot be identified from it or from any reference in it. It covers merely "*certain grants or tracts of land situate in the said territory, the title to which is vested in us or said inhabitants*" (Tr. p. 283).

The complaint attempts to describe a tract of land in Pima County, Arizona, alleging it to belong in fee to the Pueblo of Santa Rosa. This tract, however, is not in any way covered or identified in or by the power. No one can say with certainty that it is necessarily meant or included. It needs no argument to show that "*certain grants or tracts of land*" might lie anywhere in the former Territory of Arizona and that it is impossible to identify them certainly or at all. Giving the word "*certain*" its ordinary meaning, the language refers to some grants or tracts and not others, and it is, therefore, not only impossible to say whether or not the tract described in the complaint is included in the power, but it is similarly impossible to say whether any specific tract is so included.

Nor is this uncertainty cured by the next paragraph in the power reading:

“and which said grants or tracts of lands may in whole or in part have been held, claimed, granted, conveyed or otherwise disposed of by the United States as a part of the public domain or have been so treated or regarded by any other persons or parties whomsoever”.

This amounts to nothing more than to say “certain grants or tracts which the United States or anyone has considered or treated as part of the public domain”. And since the United States of course regarded the whole Gadsden Purchase as *prima facie* part of the public domain unless and until prior private titles were proved, hence these certain grants or tracts might lie anywhere therein.

Also, it is left in doubt whether “certain grants or tracts” had been *granted* by the United States or merely held or claimed by it; and, finally, there is no proof what lands in the Gadsden Purchase the United States had granted up to December, 1880, much less that up to that time it had granted the tract described in the complaint. If it claimed that tract as public domain, it equally claimed the entire Papago country.

This passage, therefore, does nothing to clear up this glaring uncertainty in the power. Leaving out of consideration the testimony that no village or combination of villages in the Santa Rosa region ever claimed to own as such any definite tract of land, and ignoring the uncertainty whether the sub-

ject matter of the power was intended to be “grants” or merely ungranted “tracts”, we are left entirely at sea as to what lands the attorney was expected to deal with.

“A pretended power of attorney is worthless unless it contains a sufficient description of the agent and of the *property or subject with which he is to deal*, and of the acts which he is to do.”

Cyc., Vol. 31, p. 1229.

“The identification may sufficiently appear by reference to an external standard and need not be in terms expressed. Thus, a reference to deeds conveying the same property may be sufficient. But it will be found that the *description of the land*, when the subject matter of the contract, *must appear in the contract itself or from some reference in the contract to external matters by which it can be identified by extrinsic evidence. The description cannot be altogether supplied by parol.* The writing must be a guide to find the land,—*must contain sufficient particulars to point out and distinguish the tract from any other.*”

Johnson v. Fecht, 185 Mo. 335; 83 S. W. 1077.

Where a power authorized the attorney to dispose of “my lot” without further identification, the Court said:

“We think the paper is *worthless for any purpose.* A power of attorney, in order to authorize the sale of real property *must contain some description of the property to be sold.*”

Stafford v. Lick, 13 Cal. 240.

Similar in principle are:

Teagarden v. Patten, 48 Tex. Civ. App. 571;
107 S. W. 909, 912.

Lumbard v. Aldrich, 8 N. H. 31, 34, 35.

Johnson v. Fecht, 94 Mo. App. 605; 68 S. W.
615, 620.

The case at bar is stronger than any of those cited. The power does not mention grants which might possibly be identified by the production of the instruments, but speaks of tracts as well; it does not speak of a single grant or tract, but of several "grants or tracts". Not satisfied with this degree of ambiguity, it says "certain grants or tracts", apparently including some and excluding others, and, finally, as though to make the bewilderment complete, it says that the title to these "certain grants or tracts" "is vested in us (Luis) or said inhabitants", thus leaving it uncertain whether Luis or the inhabitants own the title. We submit that the inevitable conclusion is that for this reason alone the power is worthless, null and void.

5. The power is void because it was not exercised within a reasonable time.

For obvious reasons the rule has been laid down that a power of attorney must be exercised within a reasonable time, depending in each instance on the facts of the individual case as a guide to the intention of the parties and to a determination of what constitutes a reasonable time. This power was given in 1880 and the suit brought in 1915, 35 years later.

It is impossible reasonably to suppose that the donor did not expect that the power should be speedily exercised; still less, that his purpose was to extend its validity for so extraordinary a period.

“It is the settled rule that the duration of a power depends upon the intention of the grantor as shown by its terms, by the purposes he had in view and by the surrounding circumstances. 31 Cyc. 1051.”

Milwee v. Waddleton (C. C. A. 9th Ct.), 233 Fed. 989, 991.

In this case a power of attorney 26 years old was held obsolete.

The same rule is laid down in Marquam v. Ray, 65 Ore. 41; 131 Pac. 523, where the lapse of ten years was held to invalidate the power.

In the case at bar the power was intended to operate upon lands

“which may in whole or in part have been held, claimed, *granted, conveyed or otherwise disposed of* by the United States as a part of its public domain, or have been so treated or regarded by other persons or parties whomsoever”.

Further, the attorney was empowered to take action

“*in order to recover from the United States or its grantees or any other persons or parties whomsoever possession of any and all of said lands that may have been conveyed by the United States by patent or otherwise, or that may be held, claimed or possessed by the United States or by other persons or parties in any manner whatsoever*”. (Tr. p. 283.)

It thus appears that the attorney was expected to act with regard to land which had already been granted to private persons by the United States, land which was actually in the possession of such grantees or other persons whether claiming under the United States or not, and land claimed by the United States as part of the public domain, and therefore subject at any time to grant. Unquestionably a power involving such purposes contemplated and required immediate action, since patented titles, possessory titles and adverse titles arising under the previous sovereignties might otherwise ripen into perfection through lapse of time. Unless the power was exercised with all reasonable speed, adverse possession would become a defense at law, and laches a defense in equity. It is therefore absurd to imagine that any such period of inaction as 35 years was in the mind of the donor or that he would have considered making the donee his agent if he had expected inactivity for 35 years. Tested, therefore, by the rule of the above cases, this lapse of time was entirely inconsistent with the surrounding circumstances and the obvious intention of the grantor. The power when exercised was therefore obsolete and void.

6. The power is void on account of the death of the donor, the donee and the substitute donee.

It will be noted that all the foregoing objections are independent of each other and independent of what follows, and that the sustaining of any one of them extinguishes the power quite apart from the questions raised by the death of all the parties thereto.

Taking up the latter question, however, we note that Luis died about 1890, Hunter in 1912, and Cates in 1920. Counsel orally urged that the death of Luis is unimportant because the power is a corporate power. We have already indicated that it does not profess to be a corporate power, but that it is on its face an individual power given by one arrogating to himself the right, *during his lifetime*, to act as a despot with absolute power to dispose of the lands belonging to the inhabitants of his community. Of course there is no presumption that a Papago chief had any such extraordinary authority and the proof is conclusive against it, showing him to have been a functionary of very limited powers. However, it is not worth while to discuss this feature since Hunter, the attorney in fact, died before the suit was brought, and this revoked the power of the substitute agent, by whom the present attorneys were appointed, if, indeed, their appointment did not solely emanate from Robert M. Martin.

That a power of attorney is revoked by the death of the donor is elementary.

Hunt v. Rousmanier, 8 Wheat. 174, 202;

Pac. Bank v. Hannah, 97 Fed. 72, and cases cited.

A power is equally revoked by the death of the donee, and the death of the donee acts as a revocation of the authority of the attorney in fact substituted by him under a power of substitution.

“The same principle (of revocation by death) applies *a fortiori* to the death of the agent, for it then becomes practically impossible for him to execute the power either in his own name or in the name of his principal. * * * The death of the agent extinguishes the power of the substitute; for the agent is accountable to the principal for the acts of his substitute since he is appointed by and in place of the agent; and the appointment is therefore naturally withdrawn by the death of the appointer.”

Story, Agency, 6th Ed., Sec. 490.

The foregoing is supported by many cases of which the following are directly in point:

Lehigh Coal Co. v. Mohr, 83 Pa. St. 228; 24 Am. Reps. 161;

Peries v. Aycinena, 3 Watts & S., 64, 78, 79;

Watt v. Watt, 2 Barb. Ch. 371;

21 Rul. Cas. Law, p. 888.

Upon the death of Hunter, before this suit was brought, therefore, the authority of Cates immediately ceased.

The necessary revocation by the death of Hunter is emphasized by the large personal discretion given to him in the power. Especially the right to compromise and settle any and all claims relating to the lands and to receive in lieu thereof “a money equivalent therefor, *the amount to be satisfactory to our said attorney and to be by him determined*” (Tr. p. 283). This sort of power, authorizing the exercise of a high degree of personal discretion is above all

others the sort which is revoked by the death of the agent.

Thomas-Bonner Co. v. Hooven Co., 284 Fed. 377, 389, 390.

It should also be noticed that the power, in spite of its broad terms, *does not authorize the attorney in fact to employ attorneys at law*. Hunter was himself an attorney at law and so was Cates. Both of these facts are in evidence. The obvious purpose of the power was that Hunter in his dual capacity of attorney in fact and attorney at law should carry on any necessary litigation and use his discretion in compromising it and in determining the amount of the compromise settlement. A like authority might conceivably rest in Cates so long as Hunter lived. But neither of them is empowered to employ attorneys. Further, the personal discretion to determine compromised amounts could not possibly be delegated, and therefore, with the death of both Hunter and Cates, every vestige of authority for the employment of present counsel terminated. No rule is more familiar than that powers of attorney are to be strictly construed and are not to be extended beyond their precise language. Taking these facts in connection with the absence of any express authority for the appointment of attorneys at law and the high degree of personal discretion involved, it is obvious that the power neither sanctions nor contemplates the employment of sub-agents beyond the original substitution of Cates for Hunter.

But, quite apart from this, and even if Hunter or Cates had had the right to employ attorneys, the

death of Hunter on March 25, 1912, revoked whatever right Cates acquired by the substitution of May 31, 1911. The power was extinguished.

As against this, plaintiff at the trial urged two things,—that Cates was employed merely as an attorney at law to conduct the necessary legal proceedings, and that the death of one who employs an attorney for a third party does not cancel the attorney's employment.

The first contention is absolutely negatived by the language of the substitution whereby Cates is appointed "to do, perform and execute every act and thing which I might or could do as the attorney in fact and substitute of the said persons hereinabove named and described" (Tr. p. 215).

The second proposition as stated by counsel embodies the preposterous idea that attorneys at law; that is, sub-agents, engaged by a substitute attorney in fact, retain their appointment after the authority of their appointer is revoked.

That the agency of an attorney at law for his client is terminated by the client's death is elementary.

Eagleton, etc. Co. v. Mfg. Co., 2 Fed. 774, 779
(affirmed 111 U. S. 490);

Butler v. Gorley, 146 U. S. 303, 310;

Farrand v. Employment Co., 86 Fed. 393;

Gleason v. Dodd, 45 Mass. 333, 341;

Kelley v. Riley, 106 Mass. 339.

Even if it be true in general that where an attorney is engaged by an agent *on behalf of his principal*, the attorney is the attorney of the principal and not of the agent, this is subject to a qualification thus expressed:

“But where one who is retained as an attorney or who undertakes to perform an act which requires an attorney himself engages an attorney to perform the act, the latter is but a sub-agent and the relation of attorney and client does not exist between him and the original employer.”

6 Corpus Juris, Attorney and Client, p. 631.

Hoover v. Wise, 91 U. S. 308;

Milligan v. Fertilizer Co., 89 Ala. 322, 7 So. 650;

Hoover v. Greenbaum, 61 N. Y. 305;

Bradstreet v. Everson, 72 Pa. St. 124;

Lewis v. Peck, 10 Ala. 142;

Matter of Redmond, 66 N. Y. Supplement 782.

The high degree of confidence reposed by the power in Hunter's personal discretion emphasizes the necessary application of this principle. Even if he might employ attorneys as sub-agents *for himself* or even if Cates might do the like, the personal discretion could be exercised only by Hunter or possibly Cates and, therefore, the attorneys at law employed by Cates necessarily remained the attorneys of Cates and not of Luis. This distinction is shown by the very case on which counsel relied to establish the continuance of their authority, viz: Barrett v. Towne, 196 Mass. 487, 13 L. R. A. N. S. 643.

There a man made a contract with a firm of attorneys to defend a brother who was accused of crime and this contract was held to survive his death and to be enforceable against his estate. In reaching this decision the Court says:

“But, as no act was required to be done either by the testator himself or in his name, a complete performance (by the attorneys) was possible, without any direction or intervention on his part.”

The Court will notice that, in view of the personal discretion reposed in Hunter to compromise claims for a money equivalent to be determined by him, the above passage completely differentiates the Barrett case from the case at bar. Again:

“He (the decedent) *did not intend to assume the power of control either by himself or by a substitute* over the proceedings at any stage. The alleged conspirators, while thus receiving the benefit of his aid, *were left absolutely free to conduct their own case from beginning to end as they deemed best.*”

In the case at bar Hunter or Cates would be obliged under the power to assume control in the matter just mentioned, and the Indians were very far from being left absolutely free to conduct their own case as they deemed best. On the contrary, the entire control of proceedings was given Hunter by the power.

Similarly, in the Jeffreys case, 110 U. S. 305, an administrator made a contract with attorneys to bring suit on an insurance policy with full power

to compromise the claim. They were to receive a portion of the proceeds as compensation. They brought suit, obtained a judgment, and then compromised and satisfied it for less than its face. The administrator having meanwhile died, his successor sued to set aside the satisfaction on the ground that the death of his predecessor revoked the authority of the attorneys. The power of these attorneys to compromise under the contract was held not to have been revoked by the death of the first administrator.

In *Walker v. Walker*, 135 U. S. 339, the Court, distinguishing the *Jeffreys* case, states this to have been the point of the decision.

In the case at bar, however, *the attorneys at law could make no compromise without the exercise of the personal discretion of Hunter or his successor, Cates, in whom alone such discretion was reposed.*

Both of these decisions are ordinary examples of the general rule of law that contracts are presumed to bind the executors or representatives of the parties—that the personal representative is bound to complete the decedent's contract (*Chamberlain v. Dunlop*, 21 Am. St. Rep. 811, Note). They have no application here where the question is what becomes of the authority of a sub-agent appointed by a substitute attorney in fact when the authority of the latter is extinguished by the death of the original attorney in fact.

“We think it very clear that an authority to an attorney to commence and prosecute a suit is revoked by the death of the constituent.”

Gleason v. Dodd, 45 Mass. 333, 341.

Whatever power Cates received flowed from Hunter and whatever power counsel received flowed from Cates. It is inconceivable that counsel's authority could survive the extinction of the power by the death of donor, donee and substitute donee, both on general principles and especially here on account of the large personal discretion resting in the donee and in the absence of any interest in the subject matter of the power vested in counsel, on which theory alone (presently to be examined) the power could have been kept alive in the hands of Hunter or Cates after the death of Luis.

7. The power is not saved from avoidance by the alleged facts that it is given for a consideration, irrevocable, and coupled with an interest.

(a) The statement or the fact, if it was a fact, that the power was given for a *valuable consideration* and was irrevocable does not in itself protect it as against the death of the parties.

“But a power of attorney, although irrevocable by the party and although founded upon a valuable consideration or given as a security is, nevertheless, as we shall presently see, revoked by the death of the party unless it be coupled with an interest.”

Story Agcy., 9th Ed., Sec. 477.

Clark and Skyles Agcy., pp. 395, 429, 430.

Norton v. Sjolseth, 43 Wash. 427;

Hunt v. Rousmanier, 8 Wheat. 174, 202.

Staroske v. Pub. Co., 235 Mo. 67;

“The use of the word ‘irrevocable’ confers no greater or more extended authority upon the agent than an ordinary power of attorney.”

21 Rul. Cas. Law, p. 887;

Blackstone v. Buttermore, 53 Pa. St. 266.

Walker v. Dennison, 86 Ill. 142;

McGregor v. Gardner, 14 Ia. 326;

Weaver v. Richards, 144 Mich. 395; 108 N. W. 382;

Frink v. Roe, 70 Cal. 296; 11 Pac. 820;

Buffalo Co. v. Strong, 91 Minn. 84; 97 N. W. 575.

To the same effect see:

2 Corpus Juris, p. 547, citing many cases.

In other words, the statement in a power that it is given for a consideration does not protect it without proof of the consideration, nor, in any event, does it keep it alive after the death of the parties, although it might make it irrevocable during their lifetime. Also, the mere statement that a power is irrevocable because coupled with an interest is not enough. A power cannot be made good merely by a recital in it that it is good. It is, therefore, necessary to examine the essential nature of the power to see whether the alleged interest is such as to make it irrevocable as against the death of the donor and the donee, for it must be remembered that, as above shown, a power, by reason of a consideration or an interest, may be irrevocable during the lifetime of the parties, although it will, *ipso facto*, be revoked by their death.

The only interest suggested to keep this power alive is the half interest in certain lands granted by Luis' deed to Hunter, Trustee. This, however, is insufficient to preserve the power for several reasons.

(b) The interest is not conveyed in such a manner, nor is the agent so completely substituted for the principal as to authorize the agent to act in his own name.

This is a technical objection, but thoroughly well supported.

The leading case, followed to the present time, on the subject of powers coupled with an interest, is *Hunt v. Rousmanier's Executors*, 8 Wheat. 174. In arriving at the distinction between an interest in the thing itself which is the subject matter of the power, or an interest in that which is to be produced by the exercise of the power, the former making the power irrevocable as against death, the latter not preserving it, the Court states: "the substantial basis of its opinion" as follows (p. 204):

"But, as the interest or estate passes with the power and vests in the person by whom the power is to be exercised, *such person acts in his own name*. The estate being in him, passes from him by a conveyance *in his own name*. He is no longer a substitute acting in the place and name of another, *but is a principal acting in his own name*, in pursuance of powers which limit his estate. The legal reason which limits power to the life of the person giving it exists no longer and the rule (of revocation by death) ceases with the reason on which it is founded."

Here we have one essential feature of a power not revoked by death. It must be a power so complete that the attorney can dispose of the principal's estate and can do so in his own (the attorney's) name. The principal's estate is his for the purposes of the power.

Similarly, in discussing what interest will prevent revocation by death:

“It must be an interest in the subject matter of the agency itself *and which may be executed in the name of the agent.*”

Clark & Skyles, *Agcy.*, Sec. 185-c, p. 435.

The same thing is also stated as follows:

“The substantial ground and the real reason of the rule (of irrevocability by death), as it is stated by Chief Justice Marshall, are found not merely in the fact that the agent has an interest or estate, but in the fact *that he has such an estate or interest that he may execute the power in his own name and right* and as his own act.
* * * While the present conception continues this requirement must probably be deemed an indispensable part of it.”

Mechem Agency, 2nd Ed., Sec. 658.

Sulphur Mines Co. v. Thompson, 93 Va. 293,
25 S. E. 232.

To the same effect, see:

2 *Corpus Juris*, *Agency*, pp. 531-2, citing a great number of cases.

In the case at bar, however, the attorney or his substitute, was forced by the terms of the power

itself to act in the name of the donor and not in the name of the attorney or substitute. The attorney is empowered "to represent and prosecute in our names or the names of the said inhabitants of said village."

Under the rule just cited, therefore, whatever interest the attorney may have had the power *expressly guards against making him a principal with authority to act in his own name*, and thereby shows that the limited authority conferred is necessarily extinguished by death.

(c) A condition of the survival of a power coupled with an interest as against death is that the survival of the power is necessary for the protection of the agent's interest.

This applies, for example, where the power has been granted to the agent as security for something owing him. Not that this would necessarily save the power. It did not in the Rousmanier case. But without it the power cannot survive.

Mechem, Agency, 2nd Ed., Sec. 655, says that the exception to the rule of revocability by death is

"based on the fact that in the given case the agent is not simply an agent,—perhaps properly speaking not an agent at all,—but a person having some interest of his own in the subject matter of the agency for the protection of which an authority like the one conferred which shall survive the death of the principal is an essential element".

In *Todd v. Superior Court*, 181 Cal. 406; 184 Pac. 684, an exceedingly sweeping power of attorney had

been given to collect the donor's share in an estate, to institute proceedings for partition of the realty thereof, litigate in every necessary way, and compromise claims. In it was a power of substitution, a consideration was recited, the power was stated to be coupled with an interest and it conveyed to the attorney in fact as such an interest the entire estate concerned. The attorney in fact executed the power of substitution by appointing an attorney at law who appeared on behalf of the estate. Thereafter, however, the donor gave another power revoking the foregoing and appointing another attorney. This was held to be within her right, the court deciding that the interest conveyed by the first power was not such as to make it irrevocable, and saying:

“It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself apart from the proceeds *that if the power were revoked, he would be deprived of a substantial right.* In other words, the relation of the attorney in fact to the subject matter *must be such that a revocation of the power would be inequitable.*”

The Court will observe that this was a revocation by a living donor. Revocation by death under the authorities above given and for obvious reasons is more necessary and efficacious.

To the same effect see:

Donner v. Norton, 16 Cal. 436.

In the case at bar the only interest suggested as keeping the power alive is that granted by the Luis deed to Hunter, trustee. The proof has shown repudiation of the trusteeship by Hunter and his executrix. In either event, however, whether Hunter was trustee or whether his interest was individual, he did not need the power of attorney to enable him to protect that interest. If his title was individual, he could sue to maintain it without the help of any power authorizing him to act on behalf of the Indians. If, however, he held the half interest as a trustee for the Indians, which is the only alternative suggested, he could similarly sue by virtue of his trustee title without the help of any power authorizing him to protect the Indian title. Here, as indeed in all points, the Todd case is precisely parallel since the court held that the conveyance in the power to the attorney was in reality a conveyance in trust to collect and pay over the proceeds to the donor, minus his own costs and fees.

Similarly, after Hunter's death the inheritors of his individual interest, or the substitute trustee, if there was a trust, did not need the continued life of the power to protect either the Hunter interest or the trust estate. Still less, after the death of Hunter would Cates be deprived of any right by the extinction of the power since he had no interest of any kind in its subject matter.

This point is substantial and goes to the merits.

(d) Cates, the substitute attorney, has not and never had any interest in the subject matter of the

power, so that the alleged fact that the power was coupled with an interest in Hunter could not keep it alive in Cates after Hunter's death.

At Hunter's death, his individual interest, if any, passed to his heirs; his trusteeship, if any, became vacant and remained in suspense until some court should appoint a successor. In neither event did his interest, whatever it was, pass to Cates. Hunter did have a deed to "Hunter, trustee", but Cates had no interest whatever to support the power. A power coupled with the right sort of interest survives the death of the donor, but this is to protect the interest of the donee in the subject matter. When the donee dies, his death revokes the authority of the substitute donee unless the latter had an interest to be protected. Here there is no proof whatever that he had. The exercise of the power by him, therefore, in engaging attorneys was totally unauthorized.

(e) The deed which is claimed to have conveyed an interest to Hunter is itself void and the interest therefore fails.

The deed from Luis, in order to give the requisite interest, would have to be the deed of the Indian community conveying the community title. The proof has abundantly shown that there was no community title, and further that if the deed was actually made with the intelligent consent of Luis, which is more than doubtful, it was made without authority from the council or the villagers; that, in fact, the community knew nothing about it. It was, therefore, void. A similar defect in the power of attorney it-

self has been discussed above, and all that was said there is equally relevant to the lack of authority for the deed itself. This goes to the merits, and is fatal.

(f) The alleged interest was illegal and insufficient to support the power because the Indians concerned were wards of the United States and could convey no title to land without the consent of the Government.

The proof has shown in much detail that the Papagos are tribal Indians. A long series of Indian agents exercised control over them from 1858 to the present time. Reservations have been created for them beginning with 1874, and a great variety of steps have been taken for their benefit by sinking wells, building schools, furnishing a hospital and in a variety of other ways. Congress has made repeated appropriations for their assistance. Both the executive and the legislative branches of the Government have, therefore, determined that the Papagos are tribal Indians and wards. This construction is conclusive upon the courts.

U. S. v. Holliday, 3 Wall. 407, 419;

Tiger v. Investment Co., 221 U. S. 288, 311,
315;

U. S. v. Sandoval, 231 U. S. 28, 47;

U. S. v. Nice, 241 U. S. 591, 598.

It may be noted incidentally that the Pueblo Indians of New Mexico, a race of higher culture and more complete organization than the Papagos, with whom, however, attorneys have attempted to identify them, have been, in spite of their admitted fee title

to the lands they occupy, held wards of the United States and subject to governmental control in the Sandoval case, *supra*.

Now inability to alienate lands is a primary consequence of Indian wardship. In fact, the Indian is a ward largely because he is incapable of conserving his property, and therefore lack of power to alienate land is deduced from the very nature of his situation and status and from the Government's general policy with regard to it. This has been repeatedly held.

“Undoubtedly the right of the Indian nations or tribes to their lands within the United States was a right of possession and occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title *could not be conveyed by the Indians to any one but the United States* without the consent of the United States.”

Jones v. Meehan, 175 U. S. 1, 8,

citing seven cases from the Supreme Court of the United States.

The court points out that in Johnson v. McIntosh, 8 Wheat. 543, grants of land *made by the chiefs of Indian tribes to private individuals* conveyed no title which could be recognized in the courts of the United States. Similarly, in U. S. v. Kagama, 118 U. S. 375, 381, the court, after recognizing the Indian possessory title, says:

“But, they (the government), asserted an ultimate title in the land itself by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of

this paramount authority. * * * The United States recognized no right *in private persons* or in other nations to make such a purchase by treaty or otherwise.”

Even if plaintiff had proved a fee title in the Pueblo of Santa Rosa, which it has signally failed to do, the same principle would apply. A white infant may hold a fee title but he has no power to convey it, nor has any collection of people all *non sui juris*. Indians in pupillage could not convey a fee even if they had it.

In *Jones v. Meehan*, it was held that the Indians in question could convey, but this was by reason of the provisions of a treaty whereby land was granted in fee by the United States to a member of an Indian tribe. In the absence of such special enactment the rule is as above stated and the deed in question is void and conveys no interest to support the power.

(g) The alleged interest was illegal and the deed of Luis void by virtue of the Act of March 3, 1871, 16 Stat. L. 570, R. S. Sec. 2103; U. S. Comp. Stat., Sec. 4087.

Section 3 of this Act reads in part as follows:

“No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value in present or in prospective, or for the granting or procuring of any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to,

annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States unless such contract or agreement be executed and approved as follows:”

The statute then provides many essentials of the contents and execution of such agreements, none of which are present in this power, including execution before a judge of a court of record, approval by the Secretary of the Interior and the Commissioner of Indian Affairs, with the requirement that the agreement shall have a fixed, limited time to run distinctly stated therein.

Taking deed and power together, it is clearly contemplated that Hunter was to compromise claims against the Indian land for a money equivalent, and that since half of that land had been conveyed to him, he would be entitled to retain half of the compromise amount in return for his services in maintaining the Indian title. Here we have an agreement for the delivery of money, or other thing of value, to Hunter, in return for services to the Indians relative to their land.

Section 3 also provides that all contracts or agreements made in violation thereof shall be null and void, and such is necessarily the status of deed and power.

It is true that the agreement is not made with a tribe, but, according to the plaintiff's contention, it is made with a municipal entity forming part of a

tribe and would, by analogy of *Franklin v. Lynch*, 233 U. S. 269, 271 (to be discussed under the next heading) be invalid since, if the tribe could not legally make such an agreement except in the prescribed way, still less could a subdivision of the tribe.

If, on the other hand, the best that can be claimed for this power is that it is made by an individual Indian or Indians, he or they, in order to make it comply with the Act, must needs be a citizen or citizens of the United States. But neither Luis nor the other inhabitants of the Santa Rosa villages were citizens of the United States under the Gadsden Treaty even though they may have been citizens of Mexico. Article V of that treaty (7 Fed. Stat. Ann., p. 705) makes the provisions of Article 9 of the Treaty of Guadalupe Hidalgo in this regard applicable to the inhabitants of the Gadsden Purchase. Article 9 provides that

“the Mexicans who in the territories aforesaid shall not preserve the character of citizens of the Mexican Republic * * * shall be incorporated into the Union of the United States *and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution*”.

7 Fed. Stat. Ann., p. 698.

Here is a clear statement that Mexican citizens did not by virtue of the treaty become citizens of the United States, but might become such only after Congress had taken affirmative action. There is no presence of such action here.

It may be noted that the Indian citizenship, or lack thereof, is material only as to the application of this Act. In general, citizenship does not affect the disability of the Indians to dispose of land or the right of Congress to control such disposal.

Tiger v. Western Investment Co., 221 U. S. 286, 310-11-12-13, 315-16.

(h) The deed of Luis was void and the alleged interest created thereby illegal under the Act of June 30, 1834, Chap. 161, Sec. 12; 4 Stat. L. 730; R. S. 2116; U. S. Comp. Stat., Sec. 4100.

Jones v. Meehan, 175 U. S. 1, 9, 10, 12, describes a series of Acts of Congress beginning in 1790 and providing that no sale of land by Indians should be valid unless made by and in accordance with a treaty entered into under the authority of the United States. These enactments culminated in the Act above cited, which reads in part as follows:

“No purchase, grant, lease or other conveyance of lands or any title or claim thereto from any Indian nation or tribe of Indians shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the constitution.”

In connection with this must be considered the Act of March 3, 1871, Chap. 120, Sec. 1; 18 Stat. L. 566; R. S. Sec. 2079; U. S. Comp. Stat. Sec. 4034, reading in part:

“No nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty.”

The Act of 1834, therefore, invalidated conveyances of land by Indians unless made by treaty and the Act of 1871 announced that no more treaties would be made. The effect of the two was, therefore, to prevent any conveyances after 1871 by Indians unless in pursuance of a prior treaty or by specific authority of Congress.

Various decisions construing the Act of 1834 are:

U. S. v. Berrigan, 2 Alaska 442;

Tuttle v. Moore (Ind. Ter. 1901), 64 S. W. 585;

Coey v. Law, 36 Wash. 10; 77 Pac. 1077;

18 Op. Atty. Gen. 235, 237.

The Act by its terms invalidated conveyances made by Indian tribes only, but this was interpreted to mean that where the tribe could not sell the individual could not sell.

“The Revised Statutes, Section 2116, declare that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor a vendible interest in any tract.”

Franklin v. Lynch, 233 U. S. 269, 271.

It will be remembered that the deed was made “by and between Luis, Captain of the village or Pueblo of Santa Rosa * * * for himself and the inhabitants of said village” and three other villages (Tr. p. 278). That the statute covers this situation is also shown by Jones v. Meehan, 175 U. S. 1, 12, where the court, after quoting the Act of 1834, says:

“The declaration contained in this Act of the invalidity of purchases and leases ‘from any nation or tribe of Indians’ might include *a purchase or lease from any Indian acting by authority derived from his tribe only.* (Citing cases.)”

If tribal authority was insufficient much less would village authority suffice. As already stated, the Jones case upholds alienation by Indians who had, by virtue of a treaty with the United States, received tracts in individual property, but denies the right to alienate under any other circumstances.

Since, therefore, the attempted conveyance to Hunter, trustee, was illegal, it follows that he acquired no interest in the land described in the complaint. There is not even an attempt to show that the agent whom he appointed in his stead acquired any interest.

We close this topic by citing *Williams v. White* (C. C. A., 8th Ct.), 218 Fed. 797, where a member of one of the Five Civilized Tribes had given a sweeping power of attorney to a white man to bring suits at law and do many things, mentioning a valuable consideration, alleging that the power was irrevocable and conveying an interest in fee simple in the land concerned to the attorney in fact. The court says (p. 799):

“It is quite apparent that the instruments contained much which is contrary to the letter and spirit of the Acts of Congress. *Though following the ordinary form of power of attorney by a person sui juris, they attempt to put aside the Government’s guardianship, to take from the*

Indian, its ward, the possession of his property and to deprive him of all voice in its disposition. They have even attempted to make their power irrevocable without their consent as though they had an interest in the estate itself. The allotment of tribal lands in severalty and the restraints on alienation and incumbrance were intended by Congress to instill into the Indians habits of thrift and industry and a sense of independence and to protect them in the meantime from improvident contracts. To uphold the instruments as framed would clearly frustrate the objects of the legislation, which should not be narrowly or shrewdly construed. The plaintiffs evidently intended to go the whole length if the instruments were not attacked, and if attacked, then as far as they could."

The statutes mentioned were those specifically referring to the Choctaw Tribe, but the language is equally applicable to the statutes for the protection of Indians just quoted and to the general policy of the Government to treat them as wards for their protection against designing whites.

We do not see how a power of attorney could be more completely discredited, and, without recapitulation, confidently urge that attorneys professing to represent plaintiff are totally without authority to do so, either by virtue of the power of attorney or otherwise, and that dismissal on that ground was inevitable.

But the decree of dismissal can equally and independently rest on many other matters developed by pleadings and evidence. Plaintiff failed to prove essentials of its case; defendants proved facts de-

structive of plaintiff's theory. We will present some of these things with as much brevity as the unusual contents of the case permit, summarizing the relevant testimony, and incidentally answering the contentions of appellant's brief.

This suit is brought in the name of an alleged municipal entity, but the proof fails to show a municipal entity or corporate entity or unit of any kind.

What the proof does show is:

(a) That at the time the suit was brought there was no single community known as Santa Rosa, but that there was an uncertain number of scattered Indian villages in the Santa Rosa valley differently enumerated by different witnesses and loosely known, for convenience only, as the Santa Rosa villages.

(b) That neither these villages, nor any group or set of them, constituted a unit of any kind but that they were all distinct and independent of each other.

(c) That no such term as the "Pueblo of Santa Rosa" was ever known or used in the vicinity; and that it was not until about 1917 that any one village came to be known as Santa Rosa. The name was then identified with Kiacheemuck, which became important at that time on account of the location of a government school and well there.

(d) That the alleged plaintiff cannot be identified; in fact, that the entity as pleaded in the complaint is imaginary.

The complaint avers in many ways that plaintiff is a town or town community or village with the common name of Pueblo of Santa Rosa, and the right of perpetual succession, with elected officials and common councils, with the right to pass resolutions, make contracts, sue and be sued as an entity, and maintain a permanent organization; and that it is "an entity in fact and in law and a juridical person entitled to sue as such" (Tr. pp. 1-3). The whole theory of plaintiff's case is that it is an identifiable corporate unit, suing as one artificial person under a common or corporate name. The first essential, therefore, is that plaintiff prove its corporate existence, its corporate unity and its corporate designation.

The proof, however, instead of showing a single unit, simple or composite, shows an *uncertain number of Indian village units, several miles apart and entirely independent of each other, and fails to identify the alleged plaintiff with any one or more of them.* Instead of showing the single and definite municipal organization pleaded, it shows merely the slight and crude government by chief and council common to all American Indians, and shows this as existing in each of these units separately. Instead of proving a corporate name, recognized as designating a corporate unit, it shows that the name "Pueblo of Santa Rosa" is non-existent and that the term "Santa Rosa" is merely a geographical name applied to a district of undefined limits containing a number of independent Indian communities, loosely called the Santa Rosa villages only because they lie within this district.

In other words, the alleged plaintiff is not a unit, simple or composite, is not an entity, natural or artificial, is unidentifiable, and indeed, is imaginary. It cannot, therefore, maintain this suit.

“An action cannot be maintained in a name as plaintiff which is neither that of a natural person nor of such an artificial person as is recognized by law as capable of suing. A proceeding commenced in such a name, there being no plaintiff, is not an action but a mere nullity, and may be dismissed at any time. * * * While the parties to an action may be either natural or artificial, they must be real and not fictitious.” 15 Enc. Plead. & Prac. 476, and cases cited.

We are not disputing the right of the Papagos to sue in proper form to defend whatever land titles they may have. An individual, or a group, might bring such a suit on behalf of all similarly situated. Our point is that such a suit cannot be maintained by an *imaginary plaintiff* unidentified with any existing community and shown to be a mere *geographical name*.

“There is a very material difference between the lack of legal entity and the lack of capacity to sue. In the latter case the defect does not go to the merits. * * * But if there is a lack of legal entity the whole action fails. If an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record, and therefore no action before the court.”

30 Cyc. Parties, p. 27.

Western etc. R. R. Co. v. Dalton Marble Works,
122 Ga. 774; 50 S. E. 978.

Mexican Mill v. Mining Co., 4 Nev. 40, 44;
97 Am. Dec. 510.

Steamboat Pembinaw v. Wilson, 11 Iowa 479.

Let us examine the proof in this regard.

Plaintiff's first witness, Bonillas, stated that 39 years ago he was once at a place called Santa Rosa. He remembered but *one small village*, did not know its Indian name, and could not identify it with any existing village (Tr. p. 118). He said the Papagos were "pueblo Indians" only in the general sense of Indians living in villages, but corrected this by saying: "I did not mean they were Indians living in pueblos instead of ranches,—they live in small places where they have their homes", etc., and stated that he intended no comparison between these Indians and the Pueblo Indians of New Mexico (p. 119). He says that "pueblo" *does not mean any sort of community*, but is a "town or village of a small number of houses" (p. 119).

Plaintiff's witness, McKay, says he knows "a *district* in the Papago country known as the Pueblo of Santa Rosa" (Tr. p. 130), a statement inconsistent with Bonillas' definition of "pueblo", but when asked from whom he ever heard the expression "Pueblo of Santa Rosa", says that certain chiefs went yearly "to Santa Rosa village" and called it "the Santa Rosa" (Tr. p. 133). When asked which of the three or four villages opposite the Santa Rosa Mountains was called Santa Rosa, he said that there was only one village there that he knew of, but all along the valley there were little ranches and each

of them had a Papago name (p. 133). He did not know whether Anegam was included in Santa Rosa, but states that the latter was *one village and not a group of several villages* (p. 133), although all the Indians living “on the rancherias in the *Santa Rosa country or district*” were called “Santa Rosa Indians” (p. 137). This witness also fails to identify Santa Rosa with any one of the group of villages.

Plaintiff’s witness, McMullen, says that there were three or four Indian villages not far apart “in the *vicinity* commonly spoken of as Santa Rosa”, but fails to identify the one which he called Santa Rosa (Tr. p. 153).

Plaintiff’s witness, Day, when asked what he meant by Santa Rosa, said: “Santa Rosa includes *all the little villages in the valley*. They are called Santa Rosa villages” (Tr. p. 145). Asked to name them, he mentions Akchin, Achi, Cueva and Anegam, omitting Kiacheemuck, and later declining to say that it was “the Santa Rosa village” (p. 145). When directly asked whether any one of these villages is now called Santa Rosa, he says: “I don’t consider that one of these villages is called Santa Rosa. It is all called Santa Rosa. *There is a district called Santa Rosa*” (p. 145). “When the Papagos are talking among themselves they use the Papago names of these different villages. They very seldom use the term Santa Rosa” (p. 145). He also speaks of the “Santa Rosa district or villages” (p. 140), indicating a geographic name for a vicinity or district and not a pueblo. He gives the distance from the farthest North to the farthest South of the Santa

Rosa villages as from eight to ten miles, and the distance from East to West as from five to six miles (p. 145). He says that each village has its chief, and that the different villages have chiefs and councils (p. 146).

The court will note that this witness flatly contradicts those who said that Santa Rosa is one village.

Chiago, whose testimony was offered by plaintiff, says that the Papagos would sometimes speak of Kiacheemuck as Santa Rosa; that by that term they meant "all these little villages around here" (Tr. p. 159).

A great number of Papago witnesses testified that, among themselves, they used only the Indian names of the several villages, but used the term "Santa Rosa" when speaking to Mexicans, to designate the locality in a general way (Tr. pp. 159, 160, 301-2, 347, 359, 361, 373, 375, 388, 392). Pablo and Norris say "Santa Rosa" is not applied to any one village or place (pp. 301, 302, 392). Ignacio did not know what was meant by the Santa Rosa villages (p. 359).

Defendants' witness, Herndon, says that the name "Santa Rosa" was "applied to a large section of country in this district beginning with Santa Rosa Range over on the other side of the Comobabi Mountains, including all of this section for a good many miles around" (Tr. p. 352); that none of the villages known as Kiacheemuck, Achi, Akchin or Anegam was called Santa Rosa; that prior to this suit *he had never heard of the Pueblo of Santa Rosa*; that the Papagos, using the term Santa Rosa in speaking to

non-Indians, used it as referring to the *section of country* just mentioned (p. 352). His testimony further shows the term to apply to an extensive strip of country of indefinite limits (pp. 354-5, 356).

Defendants' witness, Oblasser, said that the Santa Rosa group of villages included Kiacheemuck, Achi, Kivibo and Iloitak, all within a circle with a radius of about two miles centering on the Government's school at Kiacheemuck (Tr. pp. 324-5). He definitely states that Akchin and Anegam are not in this group (p. 324); that when the Indians use the term Santa Rosa, it is "an accommodation term for *most any village in the valley*" (p. 325). He speaks of the word "rancheria" as being applied to these Papago villages, saying from his Mexican experience, that the word "pueblo" is not given to Indian villages. Later he enlarges on the meaning of Santa Rosa, saying that it is sometimes applied to the whole country, or the whole northern desert (p. 331).

Defendants' witness, Bowie, gives the Santa Rosa villages as Kiacheemuck, Achi, Akchin, Makumavais and Quewa. Anegam, he states, is not one of this group (Tr. p. 258). In common parlance the Indians of the first group are referred to as the Santa Rosa Indians and inhabit *a district called the Santa Rosa district*, but the villages named have no common government (p. 262).

The deed given by Luis to Robert F. Hunter, Trustee, of December 8, 1880, from which the description of the tract claimed in the complaint for the so-called Pueblo of Santa Rosa is taken, is made

by "Luis, Captain of the village or pueblo of Santa Rosa * * * for himself and the inhabitants of said village and the villages of Aitij, Semilla-Quimade and Chaquiwa" (Tr. p. 278).

Plaintiff's counsel in open court stated its theory to be that Kiacheemuck, Achi, Anegam and Akchin constituted Santa Rosa (pp. 161, 166).

Some of the earlier Indian agents used the name Santa Rosa in an enumeration of Papago communities, but never in such a way as to render possible an identification of it with any existing village or villages, and generally leaving it entirely open as to whether they meant one village, or a group of villages, or a stretch of territory.

Sam Pablo, a Papago, 60 years old, who had lived all his life at Kiacheemuck, says that he does not know of the four villages selected by plaintiff being spoken of as the Santa Rosa villages, although the Mexicans call them Santa Rosa because they don't know the Indian names (Tr. p. 347).

Plaintiff's Exhibit 12A, being a map attached to the United States Census of 1890, shows a place or region called "Santa Rosa", but *far removed from the locality here in question* and mentioned nowhere else in the testimony (Tr. p. 187). A comparison of this map with the Indian Service map of 1915 (Tr. p. 328) shows the former to be incomplete, full of errors, and absolutely worthless.

The foregoing, while it does not profess to be a complete statement of the confused and contradictory

testimony regarding the identity of the alleged plaintiff, yet sets forth, we believe, all its important features.

Of course there is now a place, viz: Kiacheemuck, known and shown on official maps as "Santa Rosa", but this identification practically coincides with the construction of the Government's school and well there about 1917 (pp. 302, 339, 392). This does not help plaintiff, since it has at no time claimed that the Santa Rosa mentioned in the complaint is Kiacheemuck. The map attached to Oblasser's deposition (p. 328) and the deeds attached to Ainsa's deposition also show that at the time Luis, as Captain of the village of *Santa Rosa* and three other villages, gave the deed from which the description in the complaint is taken, a *separate deed* was given for the land around the village of "Kakachemouk" by Jose Maria Ochoa (p. 281), a fact which thickens the cloud of doubt as to what Santa Rosa means, because, according to plaintiff's theory, this village is *one of the group constituting "Santa Rosa"*.

We submit that from all the evidence the court cannot tell whether "Santa Rosa" is (a) a village, (b) a group of villages, or (c) a region or district. *All three statements are made by plaintiff's own witnesses.* If the court should think it is a single village, it is impossible to tell (prior to 1917) which village it is. If the court should think it is a group, it is impossible to tell what villages form it. Day names one set including Akchin and Anegam but omitting Kiacheemuck (p. 145); Oblasser, another,

excluding Akchin and Anegam and including Kiacheemuck (p. 324); Bowie includes Akchin and excludes Anegam (p. 258). Each names another village or two not mentioned by the other witnesses; and the names in the Luis deed do not correspond with the testimony of any one on either side (p. 278). The preponderance of evidence is that "Santa Rosa" is a general name for a region or district wherein lie all of said villages, and others. McKay, McMullen and Day, while talking of a village or villages, all fall back on the terms "district" or "vicinity" (pp. 130, 137, 145, 153); Herndon, Bowie and Oblasser do the same (pp. 262, 331, 352). No one attempts to define the limits of the district except in the most indefinite way.

In other words, counsel have totally failed to identify the nominal plaintiff. They have shown a geographical name, but we defy anyone to point out an entity to which that name with certainty applies.

The second element of this topic, viz: that the four villages claimed by plaintiff to constitute the so-called pueblo are not a *corporate unit*, nor a *unit of any kind*, may be briefly disposed of, since the evidence in that regard is as consistent and unanimous as the evidence on the first point is contradictory (to say nothing of the uniform testimony of all the Papagos from every part of the country, and that of defendants' expert witnesses, Thackery and Bowie, that *each Papago village* has, and, according to their system, has always had, *its own little organization of chief and council*). The evidence of the Papago inhabitants of Anegam, Achi, Kiacheemuck and Akchin

is consistently to the effect that each of the villages is separate from the others, and that each has always had its own chief and council. Time and space forbid even a summary of this evidence, but reference is made to the depositions of Jose X. Pablo (Tr. p. 302); Sam Pablo, pp. 345, 346; Jose Lopez, pp. 347, 348; Andres, pp. 348-9; Joaquin, p. 349; Jose Lopez, II, p. 351; Jose Ignacio, p. 357; Jose Kisto, pp. 363, 365; Jose Castro, p. 370; Jose Petaro, p. 387; Antonio Lopez, p. 391; Hugh Norris, p. 393. The only qualification of the foregoing was made by Jose Pablo, who speaks of the people of all the villages getting together to discuss important matters (pp. 159, 162). This, however, is contradicted by Jose Petaro (p. 387), and Antonio Lopez (p. 391), while Jose Pablo himself says that each chief presided over his own village only (p. 159), and, in answer to an attempt to make him say that the four villages chosen by plaintiff were practically one settlement, says, "they believe they are a little different villages" (p. 161). Even if he were right, as against the two who contradict him, in saying that joint meetings were sometimes held, as, for example, to arrange for common action against the Apaches, such fact would no more be proof that the four villages constituted one entity than would be the fact that the City Councils of four modern and contiguous municipalities met to decide whether they should all make contracts with a power company to furnish electricity to the four communities. That there was neither unity nor certainty in this regard in 1865, see Tr. p. 168.

The failure to show that the four villages selected by plaintiff as the "Pueblo of Santa Rosa" *are not in any sense an entity* is vital and we are anxious that the brevity of our discussion of it should not lead the court to underrate its importance. The discussion is brief solely because the evidence is unanimous, except for the insignificant qualification just mentioned.

Upon the third element, viz: the degree of organization or civilization of any of the villages in the Santa Rosa District, there was a similar agreement among all witnesses, which renders specific references to the testimony unnecessary. The four villages selected by plaintiff, lying from half a mile to two or three miles from each other, consist of scattered huts, constructed, until very recent years, of grass or cactus ribs plastered with clay, being, according to plaintiff's witness, McKay, "a sort of very temporary building" (p. 135). These huts or groups of huts are separated from each other sometimes by crudely cultivated fields, sometimes by stretches of desert, so that each village is scattered over a square mile or so of land. There is no regularity in the location of the huts, or groups, in any of the villages; there are no streets or plaza. Each village has its own Indian chief, whose office is sometimes hereditary, and sometimes is conferred, not by election in any formal sense, but by the acquiescence of the inhabitants or by choice of the elders. The chief, whose authority is of an indefinite and advisory nature only, is assisted by what (for lack of a better name), is called a council, not consisting, however, of any definite

body of men, but either of a few of the elders or of a meeting of all the adult males. The elders present at one meeting are not necessarily the same as those present at another, nor is there any uniformity in the personnel of the mass meetings. This organization is practically the same as that of all the North American Indians, certainly no higher. The facts relating to village government are perhaps best shown in the deposition of Thackery, a witness of 28 years' experience among Indians in almost all the Western States (Tr. pp. 401-2-3), but his statements are supported by practically all defendants' witnesses (pp. 319, 329, 346, 351, 353, 354, 370, 387, 393, 399).

Defendants have denied plaintiff's corporate name, unity and municipal existence. Counsel, therefore, must prove these three things. They have not proved any one of them. The "Pueblo of Santa Rosa" is a term invented by Hunter or by counsel. No one had heard it before this suit. "Santa Rosa" is unidentifiable. As a legal designation it has exactly as much certainty as the expression "the Middle West". It is a name without substance and no decree can be made in favor of a name. The choice by counsel of four villages as composing the alleged pueblo, apparently by reason of accidental propinquity, not only contradicts the distinct allegation of one village in the complaint, but totally fails, by reason of the clashing of testimony, and the overwhelming proof that each village is distinct and independent of the others. There is no corporate unit. The elaborate municipal system and powers pleaded in the complaint sink in the slight and primitive organization of all North American Indians. The failure of proof is complete.

A few illustrative authorities in addition to those already cited are:

- White v. Road District, 9 Iowa 202.
- Barbour v. Albany Lodge, 73 Ga. 474.
- Thurmond v. Baptist Church, 110 Ga. 816.
- Mutual Ins. Co. v. Presbyterian Church, 111 Ga. 678.
- Anderson v. Brumby, Mayor, 115 Ga. 649.
- Wynn v. Knights of Pythias, 115 Ga. 798.
- 14 C. J. 307.
- 28 Cyc. Municipal Corp. 120.

The New Mexico statute creating certain Pueblos corporations with power to sue does not cure the foregoing defects.

This law reads in part as follows:

“That the inhabitants within the Territory of New Mexico known by the name of the Pueblo Indians, and living in towns or villages built on lands *granted to such Indians by the laws of Spain or Mexico* and conceding to such inhabitants certain lands and privileges *to be used for the common benefit*, are severally hereby created and constituted bodies politic and corporate, and shall be known in law by the name of the ‘Pueblo de _____’, and by that name they and their successors shall have perpetual succession”

with right to sue or defend with regard to their lands.

N. M. Stat. 1915, Sec. 2784.

The Supreme Court, when this case was before it, stated that by virtue of this statute the alleged plaintiff was a corporation with the right to sue. Then, however, it was considering the case as pleaded, not the case as proved. Its words applied to the single definite organized municipality described in the complaint, with full title to a specific tract of land. Such corporate unit fell within the language of the Act. The uncertain shadow presented by the proof does not.

Second, this statute was part of the Kearney Code, passed in December, 1847, *six years before the Gadsden Purchase was made*. Despite the later application of the New Mexico Statutes to Arizona this fact shows that the law never contemplated the Papagos at all, because they were not inhabitants of New Mexico when it was passed.

Third, it is thoroughly well understood by everyone in the slightest degree conversant with western Indians that the Pueblo Indians of New Mexico are an exceedingly distinct and well recognized tribe with unusual dwellings and a high state of organization, presenting a conspicuous contrast to any other Indians, and therefore called pueblo, i. e., village Indians, *par excellence*.

Fourth, the only Indians described in the Act are those who have lands granted by the laws of Spain or Mexico. The Pueblo Indians of New Mexico had such grants (U. S. v. Joseph, 94 U. S. 614, 618; U. S. v. Sandoval, 231 U. S. 28, 39). There is no pretense of a grant in the case at bar.

Fifth, the grants which helped to define the Pueblo Indians contemplated by the Act were "to be used for the common benefit". This exactly fits the Pueblo Indians of New Mexico who, the Sandoval case says, hold their lands in "communal fee simple ownership". In the case at bar the proof not only shows no grant, but *no communal lands whatsoever*. The only land ownership among the Papagos is the ownership of the whole country by the whole tribe, or the ownership of small fields by individual Indians. This will be demonstrated later.

Any one of the foregoing objections is sufficient to show that the Kearney Code has no application here.

Appellant's brief, pages 91, 98, 101, 107, et seq., attempts to identify the general Papago situation and title with those of the Pueblo or village Indians of the present New Mexico, citing early cases and reports. All this is fallacious. Quite apart from the higher civilization and organization of the Pueblo Indians, the differences are fundamental.

Among the Pueblos, the pueblo or village is the unit, and has been so far as history goes back. Among the Papagos, the tribe is the unit. This is accurately reflected in their ideas of land ownership. Among the Pueblos, the village claims it; among the Papagos, the tribe, or the individual Indian.

But the most vital distinction is that the Pueblo villages have *definite Spanish grants, dating about 1689, confirmed by Congress in 1858 (11 Stat. 374) and patented in 1864.*

United States v. Joseph, 94 U. S. 614, 618.

United States v. Sandoval, 231 U. S. 28, 39.

These grants were known to exist when the Kearney Code was adopted, and it is exactly to those Pueblos *whose community claims had thus definitely been recognized and confirmed by Spain, and to those alone*, that that Code applied. The difference in title status between recognition and no recognition, grant and no grant, is emphatic. It is the logical sequel of the Spanish laws, presently to be examined, under which an Indian settlement could become a legal entity only by governmental action, which was regularly evidenced by a formal land grant.

In the face of this essential difference appellant's argument that the Papagos have title because the Pueblos have title is not only worthless but recoils on appellant's head. If the Papagos had village titles, how does it happen that none of them were evidenced by grants or confirmed by Congress as the Pueblo titles were?

Appellant calls attention to a report of 1861 by the Surveyor General of New Mexico (Brief pp. 99, 100) naming all the Indian pueblos (i. e., villages) in New Mexico, including 11 Papago villages. This report is not in the transcript and we have not been able to find it elsewhere, and therefore are unable to comment on its other features, but the part quoted by appellant is enough to show that out of a list of 48 villages, Pueblo and Papago, *no titles were recognized by Congress except those of the Pueblo Indian villages which had definite grants*. The reports of the Surveyor General were the basis on which Congress acted, so that either he did not recommend confirmation of any Papago claim, or, if he did, Con-

gress rejected it. We have, therefore, an executive or a legislative disapproval of the present claim.

The early New Mexico cases quoted by appellant refer entirely to the Pueblos with their granted and patented fee titles and are, therefore, quite irrelevant here. Also, these cases were discredited later, as was, in part, the Joseph case, *supra*. They formed the basis of the Sandoval decision in the trial court (198 Fed. 539) and were in effect reversed, as was the trial court, in

United States v. Sandoval, 231 U. S. 28,

where the Joseph case was also disapproved. The Supreme Court said that these earlier decisions were based on misinformation as to the status and civilization of the Pueblo Indians, whose persons and property it held to be still under governmental control.

As to the Taxpayers' Case, 12 N. M. 139, Congress promptly reversed it by enacting that the Pueblo lands were exempt from taxation as those of tribal Indians (33 Stat. 1069). A similar provision was embodied in the New Mexico Enabling Act of 1912.

The attempted analogy between Pueblo and Papago status and titles is, therefore, worse than useless.

It is hardly worth while to quote the testimony of the most intelligent and best educated of the Papago witnesses, who said "The Papagos have never called themselves Pueblo Indians", and again, "I never heard the Papagos call themselves Pueblos; I never heard them call themselves village Indians" (Tr. pp. 302, 307).

The proof fails to show the existence of Santa Rosa as a pueblo, or its continuous existence as an entity of any sort, in Spanish or Mexican times, when alone it could have acquired the land title claimed.

There is no pretense that "Santa Rosa", whatever it is, acquired, or could have acquired, title to the land claimed after it came under the sovereignty of the United States. It, therefore, acquired its title, if ever, under Spain or Mexico. *In order to do so, however, it must at the least have been such an entity as could hold title, involving, of course, not merely a momentary or casual existence, but a reasonable permanence and continuity as a community.*

Now, the sole and only indication of the existence of "Santa Rosa" prior to the Gadsden Purchase of 1853, is found in a passage from Velasco, dated 1850, reading:

"The rancherias, which have made themselves known as the most stable of the Papagos, in the part East of the road to Alta California, are the following:" (Tr. p. 197),

mentioning Santa Rosa and Tecolote, with eight others none of which is identifiable with any existing Papago community in the United States. (Tecolote, as will be later shown, has almost vanished.)

It will be noticed that this authority distinguished "*the Papagos of the Gila River*", and their rancherias, which are said to be permanent, *from the desert Papagos on "the road to Alta California"*, among

whom a *rancheria* called Santa Rosa is said to have existed. A glance at any map of Arizona will show that the Gila River is about 70 miles from the locality with which this suit is concerned (Tr. p. 210).

No attempt is made to identify the Santa Rosa *rancheria* mentioned by Velasco with any existing community or communities; nor is there any indication as to where it lay in 1850.

We first observe that Velasco distinguished a pueblo from a *rancheria*. The "Santa Rosa" of 1850 was the latter.

Bandelier, whose authority Dr. Fewkes describes as the highest (Tr. p. 217), says:

"The term 'rancheria', which is always applied to the settlements of these people, implies a group of frail constructions or huts." (Tr. p. 211.)

The early diarists, Kino and Mange, the historian Bancroft, the historians and ethnologists, Lumholtz, Curtis, and others repeatedly describe the Papago communities, in both ancient and modern times, as *rancherias*, viz: casual groups of huts, not organized into a town entity. (Tr. pp. 190, 191, 194, 197, 201, 202, 203, 206, 208, 209, 218, 219, 220, 221, 225.) The word "pueblo", in its popular sense of any sort of village, is sometimes, although more rarely, used, but it must be noticed that Bandelier (pp. 194-6) when he speaks of pueblos is referring not to the Papagos, but to the Pueblo Indians of New Mexico. He distinguishes their pueblos and those of the Pimas and Maricopas in Arizona from the Papago *rancherias*.

Defendants' witness, Garza-Aldape (Appendix, p. 182), says:

“A *rancheria* is a small rural community, which has no entity or jurisdiction.”

This is practically admitted by plaintiff's witness, Bonillas (Tr. p. 119).

He adds that up to 1853, it did not designate a legally recognized municipality. Defendants' witness, Vera-Estanol (Tr. p. 412) says that up to 1853 no communities in Mexico less organized than a *pueblo* were recognized as legal entities. As above noted, plaintiff's authority, Velasco, clearly recognizes the same distinction. Garza-Aldape and Vera-Estanol both testify that “*pueblo*”, in its legal sense, as applied to Indian communities, means *those recognized by the government as legal entities*. This is contradicted by plaintiff's theorist, Obregon.

If, however, this simple and reasonable distinction (to be more fully discussed under a later head), is correct, the existence of a *rancheria* called “Santa Rosa” in 1850, shows something less than a legal entity, and something which, therefore, could not hold title to land at all, much less the fee title. Since there is no Indian corporate entity other than or less than a *pueblo*, we have no showing of any entity at all prior to 1853.

But, we do not need to stand on this. In the second place, and apart from all the foregoing, we are still left *without the slightest trace of the existence of “Santa Rosa” prior to 1850*. Did it exist under the sovereignty of Spain? Nobody knows. How long

had it existed under Mexico? Nobody knows. Allowing plaintiff all the license involved in the astonishing theory of Obregon, as to Indian village identity and ownership of land, the proof falls far short even of his requirements. What sort of community was it that he said was a pueblo, or rancheria, or a legal entity, capable of owning land, or acquiring land by prescription, etc.? It was one

“having a permanent location from immemorial times and using lands in and near the village from immemorial times for agriculture and grazing, apportioning the lands to individual villagers for use in agriculture and for dwellings, and devoting the grazing lands for the common use of the villagers”. (Appellant’s Brief, p. 140.)

Also, a community of Indians, a term which he thinks includes both pueblos and rancherias,

“means all kinds of groups of Indians which have something for a common purpose; something which is not separate as belonging to the individuals as such, but which belongs to the community in the right meaning of that word”. (Appellant’s Brief, p. 143.)

It needs this, according to him, to constitute an Indian communal entity.

Now, there is not a trace of evidence of the existence of Santa Rosa from immemorial times or of its having a permanent location from immemorial times. Such proof as there is of the situation prior to 1853 is entirely to the contrary. The maps of padres Kino, Venegas and Font, while showing Tucson, San Xavier del Bac, and two or three other places still existing, nowhere show Santa Rosa (Tr. pp. 218, 220, 222).

Bancroft's maps (Defts'. Exs. 8-a and 11-a, at the end of the Transcript), showing Arizona missions from Kino's time down to 1846—and these would be the places of real permanence—show Tucson and San Xavier, but no Santa Rosa. An "Ati" is shown, but it is in the modern Sonora, far south of the Mexican line, and of the locality involved.

The attempt to identify San Francisco de Adid, or Ati, or Atison, "a Pima village", with the modern Papago village of Achi, or Akchin, is, of course, mere guess work, undeserving of serious discussion, and counsel very properly omit it from their brief. It is significant that the Bureau of Ethnology Handbook describes it as a *Pima* village and makes no attempt to identify it with any existing village (Tr. p. 205).

The extracts from Bancroft, comprising most of pp. 217-224 of the transcript, show a state of affairs in Sonora up to 1850 highly inconsistent either with settled and permanent communities, or with Spanish or Mexican cognizance of the locality in question at all.

Again, the Papagos are semi-nomadic. They "roamed over rather than resided in the Western corner of Arizona". (Bandelier, Tr. p. 225.) "From the nature of their country they could hardly be called village Indians." They were "much more unsettled than either the Nebomes or the Arizonian Pimas". They were shunned and feared "as nearly all roaming Indians are by sedentary tribes". "The Seris and Papagos are the only ones to whom this designation (sedentary) cannot be properly applied."

(Bandelier, Tr. p. 224.) “The larger part of the Papagos are semi-nomadic.” (Curtis, Tr. p. 226.)

Tecolote, formerly one of the principal villages, and mentioned by Velasco, has almost disappeared (Tr. p. 315). Jose Castro mentions another vanished village, Quitac (p. 371). Oblasser mentioned the abandoned village of Santan (p. 329). Louis Blain mentions another, Comoah (p. 315). Hardly any of the places found on the maps of Kino, Venegas and Font have survived.

Such proof as there is, therefore, all tends to show that even their largest and most stable villages are not permanent, and plaintiff has totally failed to show a trace of “Santa Rosa” before 1850. Neither immemorial existence nor permanent location is proved, and certainly these things were necessary to constitute an entity under the former sovereignties.

As a subordinate point in the same connection, we note that Obregon’s description of the requisites of a land owning Indian unit prior to 1853 are not only not shown to have been present in the “Santa Rosa” of 1850, but are totally lacking in any Papago village in the Santa Rosa region today. The unanimous testimony of the Papagos themselves has conclusively shown that the lands *are not apportioned by the community to individual villagers*, but that each villager of his own volition takes up land wherever he pleases without asking anyone’s consent; that the grazing lands are *not devoted by the community to the common use of the villagers*, but may be used equally by them and by any other member of the

Papago tribe, and that there is no theory of communal ownership whatever among these Indians. The uncontradicted testimony was that the only ownership claimed by them was of *the entire Papago country by the entire Papago people, and of individual fields by individual Indians*. So far as the present affords any indication of the past, therefore, plaintiff's idea of an Indian communal entity prior to 1853 is again refuted.

To sum up, the theory of the case is of a corporate entity *capable, as an entity, of acquiring title to land; the immemorial existence of said entity through Mexican and Spanish times; the immemorial occupancy of a definite tract by it; and the consequent acquisition of fee title to that tract under the general laws of Mexico and Spain*. No regular grant is claimed. The proof, however, first shows a rancheria, i. e., a loose agglomeration of people, not a corporate entity at all, and not capable of holding title as an entity. Next, instead of showing immemorial antiquity, it shows existence only as far back as 1850, three years prior to the Gadsden Purchase. Before that time the length of existence of the rancheria, or its location in the same place, is purely conjectural. The proof falls far short of appellant's own test above quoted of permanent location from immemorial times. Finally, the proof affirmatively shows that the lands occupied by a Papago village of any sort were not held in common by the village at all. *The only community title was in the tribe as a whole*. The other essentials above named will be considered later, but the failure of proof just described is, in itself, fatal to appellant's case.

The proof fails to show possession by plaintiff of any definite tract of land nowadays; and fails to show that plaintiff, as an entity, now owns or possesses any land whatever.

This is a different thing from the failure to identify the boundaries of the tract claimed in the complaint, which will be considered later.

There is no pretense that plaintiff had a grant and there is no archive or record showing of a bounded tract of any kind. The contention is that plaintiff has acquired title to certain land, either by adverse possession against the Crown, or by arbitrary presumption of a lost grant of such land or by virtue of the laws of Spain recognizing a fee title in Indian communities to the extent of their possession. Obviously, as a preliminary to a decree for plaintiff under any of these theories, *definite proof of the extent of plaintiff's present occupancy and possession must be made.* The decree would have to describe the land thus segregated from the public domain with such accuracy that defendants would know exactly how much land and what land was withdrawn from their jurisdiction. We submit that no such proof has been made.

First, as shown already, no one can tell what the Pueblo of Santa Rosa is, or what it includes. The evidence is hopelessly contradictory. If it is one village, there is no proof whatever of the extent of the land possessions of Achi, or Iloitek, or Chaquima, or any of the other hamlets. Or, if the extent of occu-

pancy of each village could be individually shown, who is to say which combination of them constitutes the alleged pueblo? This fact alone would render identification of the land supposed to be *possessed* by the alleged pueblo impossible.

The actual limits of the lands occupied by any one or more of these villages are left entirely unsettled. Supposing for the moment that some combination of these villages constitutes a corporate entity, it might be argued that it possessed the fields cultivated by its inhabitants and the ground on which their houses stood. But what else? The cultivated fields are exempted from the operation of the Hunter deeds, so that this land is not enough to satisfy Mr. Martin and his vendees. Does this imagined entity possess the extensive stretches of desert between the houses and between the fields? And does it possess the desert beyond the farthest fields? And, if so, how far?

Plaintiff's witness, Day, estimates the greatest distance North and South of the Santa Rosa group to be from 8 to 10 miles, and the greatest distance from East to West, 5 or 8 miles (Tr. p. 145). A similar estimate by Bowie gives 5 miles by 5 miles (Tr. p. 271). Which is correct? Oblasser says that the villages in the Santa Rosa group "are in a circle centering on where the Government school is at the present time, approximately two miles" (Tr. p. 329). Of course he is speaking of a different combination as constituting Santa Rosa, but this discrepancy is inherent in all the testimony. He also states that scattering fields of the people of the Santa Rosa

group extend about 18 miles South of the Government school, although most of them are within a circle of 2 miles (Tr. pp. 328-9). Does the imaginary entity we are considering possess the desert as far as the farthest fields farmed by any of its inhabitants, or only as far as the nearest fields? Who can tell?

Each of these valley villages has a mountain or dry-season village at a distance varying from 10 or 12 to 25 miles away (Tr. p. 302). Do they *possess* all the land in between the two sets of villages or not? No one can tell.

The agricultural land on the reservation is about 16,000 acres and the grazing land 2,703,514 acres (McCormick, Tr. p. 338). The proportion in the Santa Rosa Valley may be supposed to be similar. The only way in which the Santa Rosa villagers could possess anything outside of their small fields is by grazing cattle. Now, even if the limits to which the cattle of any of the Santa Rosa villagers graze were fixed by the evidence—and they are not—such testimony as there is as to those limits is absolutely worthless *because the possession is not shown to be exclusive. These grazing lands are used by the cattle of any and all villages.*

“The cattle roam at will and they are mixed in with the cattle of other villages. They just roam around the country.” (Juan Marcos, p. 333.)

“How about the cattle,—do they roam where they please, or are there any boundaries? A. They roam everywhere. They are mixed up with all of the villages, and that is why they have

their round-up, to get them and bring them back.” (Ramon Cachora, p. 343.)

“They (the cattle) range at will, and are mixed up.” (Andreas, p. 348.)

“Do they (the cattle) mix with the cattle of other villages? A. Yes, sir, they mix.” (Sam Pablo, p. 345.)

When counsel attempted cross examination, the following occurred:

“The people of each village, as a rule, stay within a reasonable distance of their own village for the purpose of farming and running their livestock, do they not? A. No, it is not that way; because the stock can graze at will wherever they want to, and there is no dispute. No one claims any certain grazing land. * * * And you try in a general way to keep your stock as near your own village and where you live as possible, do you not? A. No, it is not that way. The only reason for the round-up is, when we round up we fix the crop of calves and then we let them go. Q. But you bring your cattle back during the round-up to places near the village? A. Yes, we turn them loose any place.” (Chico Bailey, p. 321.)

“Does any Papago village that you know of have any boundary line between its land and the land of any other village? A. No. Q. Can the cattle of anyone roam where they please, or must they stay within certain limits? A. They roam everywhere. Q. Was all this the same in the old days? A. Yes, it has been that way long ago.” (Jose Pablo, p. 160.)

Testimony to exactly the same effect will be found in the depositions of Hugh Norris (p. 393); Jose

X. Pablo (p. 303); Petaro (p. 388); Jose Lopez (p. 347); Jose Ignacio (p. 373); Pablo Comobabi (p. 375); Barnabe Lopez (p. 379); and Andreas Castillo (p. 383).

Speaking of pasturing stock as evidence of possession, the Supreme Court says:

“In order to make it of any particular weight, it should be shown to have been *exclusive, and that no other person pastured or had the same right to pasture upon these lands*. The proceedings in the case * * * indicate the lands to have been held in common and to have been subject to pasturage by the Indians and other residents of that neighborhood. Under such circumstances, it should be made to appear that the rights of Lucero and his descendants were exclusive in that particular. In addition to this, however, it is a fact, so notorious that we may take judicial notice of it, that mere pasturage upon these Western lands is very slight evidence of possession.”

Whitney v. U. S., 167 U. S. 529, 546.

To exactly the same effect are

Bergere v. U. S., 168 U. S. 66, 79, 80;

U. S. v. Teschmaker, 22 How. 392, 403.

Under this authoritative rule, therefore, the proof of possession of the grazing land completely fails. As to the possession of the cultivated fields and land occupied by houses by the so-called pueblo, the proof fails on account of uncertainty as to what the pueblo consists of, and what fields or what houses are to be included.

Relevant, of course, in this connection is the total denial (presently to be discussed) by the Papagos themselves of any claim to *communal* ownership or possession by any village.

Cases later to be cited in discussing plaintiff's failure to prove its alleged boundaries will also be found relevant under this head.

The proof fails to show a scintilla of evidence as to the extent or boundaries or exclusiveness of possession by plaintiff of any tract whatever under Spain or Mexico.

This defect is even more striking than the last one. Under Spain or Mexico alone could plaintiff have acquired title to the land claimed, whether by operation of general law recognizing an original ownership in fee, or by adverse possession, or by a modern presumption that a grant had been made by one of those sovereignties and subsequently lost. But, under any of these theories, we must have "proof of an adverse, exclusive and uninterrupted possession". (U. S. v. Chaves, 159 U. S. 452.) And, of course, proof of the boundaries of such possession. Now, the only mention of Santa Rosa under either of the previous Governments is the statement by Velasco that in 1850 it was a rancheria on the road to Alta California.

But, where was it? Was it where it is now, or at some distance away? How long had it existed under Mexico in its then location? Did it exist there or

anywhere in Spanish days? What did it consist of under Spain or Mexico,—one community or several? How large was it then,—did it have 1,000 people, or 500, or 100? *What extent of ground did it cover with its houses and fields? How many cattle or horses did it have then, and how widely did they range?* This is relevant in view of the testimony that, even within the recollection of living witnesses, stock had greatly increased in numbers among the Papagos because the Apaches had ceased to raid and water was more plentiful (Tr. pp. 302, 319, 347, 348, 399, etc.).

No one of these questions can be answered; and there is not the faintest shadow of proof of the extent of the possession at the only time when, under plaintiff's theory, possession could have implied or resulted in title.

Even Obregon admitted, when asked as to proof of possession, in defining the title of an Indian pueblo to land, that

“The law required a description of the land.
* * * And the evidence in the case should show that the land they have described was just the land corresponding to this description.”
(Original testimony, p. 803; Appendix, p. 207.)

There was needed

“a demonstration of the act of possession. The Indians had to show,—had to prove, that they had possessed that land”. (p. 811; Appendix p. 208.)

“I should ask the privilege, first, to see the facts; to show how they had possessed; whether

they had possessed; to what extent they had possessed; whether this was immemorially a town, or whether it was a town that was there, and then other land was given that was not theirs.” (p. 816; Appendix p. 209.)

“I should offer witnesses to prove the fact of possession; the facts which could be construed as acts of possession * * * I would prove the boundaries exactly * * * as exact, of course, as I could * * *. Q. And you would have to prove the exact extent of the territory occupied? A. Yes, sir.” (p. 825; Appendix p. 209.)

Such proof is obviously necessary under any system of law; it is totally lacking here.

It is not worth while to point out a similar absence of testimony as to whether the possession in 1850 was *adverse*; or whether it was uninterrupted. *The limits, the duration, the continuity, and the adverse nature of the possession claimed are equally left without proof, and these defects are absolutely fatal to plaintiff's case.*

The proof fails to show the boundaries of the tract claimed with sufficient precision to admit of its identification.

The theory of the complaint is of ownership in fee of a definite tract described by monuments and distances. The reasonable conclusion from the evidence, however, is that they define a purely imaginary area representing the guess of the draftsman of the Luis deed as to the quantity of land which the four villages there mentioned (not the four villages now

claimed to form Santa Rosa) might be supposed to occupy. No one ever heard of it as a tract until this suit. The evidence shows that this area can no more be ascertained than can the limits of Indian possession claimed by plaintiff.

We concede that the northeast corner, Kabitque, probably means Kavitch, or Santa Rosa Peak. Coming to the next monument, Okama, or Okomo, we find a hopeless conflict of testimony. Plaintiff's witness, McKay, says that it is in the North Comobabi Mountains, about 25 miles south and east from the Santa Rosa Mountain and on the edge of the Santa Rosa Valley. "It is a mountain with an Indian or two living there." (Tr. p. 134.) Plaintiff's witness, Day said that it was probably the same as Oximo, "a place Northeast of Cababi * * * just two or three houses at the foot of the mountains East of Cababi village". Asked whether it was a mountain or a village, he says, "just a village". (Tr. p. 144.) He later says:

"I never heard of it until we went to inquire where Okomo was, and no one knew, and they said they knew where Oximo was, and *we concluded it was the same place.*" (Tr. p. 149.)

Plaintiff's witness, Ben Johnson, a Papago Indian, 43 years old, who had lived at Cababi all his life, had never heard of a place called Oximo (pp. 408, 410). Jose Luciano, 60 years old, who had lived at Anegam all his life, had never heard of Oximo (p. 373). Hugh Norris had never heard of a place called Okomo or Oximo. The nearest sounding name was a range of mountains called by the Indians Unukam, about 14

or 15 miles South of Santa Rosa Mountain, a kind of round range, about 7 or 8 miles in diameter (p. 392). Father Oblasser mentions the same Unukam, describing it as a group about 8 miles square, and approximately 16 miles South of the Santa Rosa Mountain. Twenty-four miles South of that Mountain would reach to the South Comobabis, outside of the Santa Rosa Valley (p. 325).

It is hardly worth while to discuss this. The identification of Okomo with Oximo is a guess, and the name is unknown to Papagos living all their life in that vicinity. It is left open as to whether it is a mountain or a village. The identification with Unukam is also conjectural, and the discrepancy between the 24 miles called for by the description and the 14 to 16 miles is very great. Besides, McKay's chosen spot was 25 miles South of Santa Rosa. Again, if Unukam be the monument, it is 8 miles in each direction, or about 64 square miles, so that the identification of any point in this area as the monument would be merely guesswork.

The Southwest corner is called Mescalero. McKay says: "That is what we used to call the White Mountains, I believe, close to Poso Blanco." Asked on cross examination: "Q. But you could not be certain about it", he answers, "Oh, no." After stating that Mescalero means a place where they make mescal, he states that he never knew of mescal being manufactured there, and that "there is no mescal growing around there" (pp. 130, 134). Day, when asked whether he knew of a place called Mescalero, said:

“No, sir, there is no place there now known by that name, but one old fellow told me that there was a place where they used to roast mescal roots, *and it might have been named for that*, and I would judge that was four or five miles southwest of Brownell.” (p. 144.)

“Some old fellow said that they used to make mescal over there but no one ever heard of it.
* * * The Indian told me that he knew they used to pick mescal over there, and *we assumed* that it was called Mescalero for that reason.
Q. You do not identify the spot, do you? A. No, sir.” (p. 150.)

Hugh Norris had not heard of Mescalero, but says there is a place near Poso Blanco where there is evidence of the former roasting of mescal roots (pp. 392, 394). Oblasser had no knowledge of it (p. 325). It will be noticed that, in addition to the general indefiniteness of this description, its identification rests on a conjecture that Mascalero was either at the place where mescal roots were roasted or where they were gathered, and plaintiff's own testimony shows that there is no place now by that name.

As to the Northwest corner, Sierra Cabeza, there is hopeless contradiction. McKay identifies it with Table Top Mountain, which he says is from 15 to 30 miles North from the White Mountains (p. 134). Day says that it is called in Spanish Cabezon, which he announces to be synonymous with Sierra Cabeza. He also identifies this with Table Top (p. 145), and plaintiff thoroughly committed itself to the theory that this mountain was its Northwest corner, although situated about 40 miles from the vicinity of White Mountain. (Oblasser, pp. 331-2.) The testimony,

however, made it very clear that it is not a Sierra or range, but an isolated mountain, while Cabezon in Spanish signifies "Big Head", which is quite an appropriate name for Table Top, but is a very different thing from a Sierra. Oblasser's testimony, however (pp. 332-3) shows that, while Table Top is an isolated mountain, there is in the Vekol Range, which is a Sierra, a mountain known by the Papagos as Black Head (also described by Jose Ignacio, p. 359), very distinctly like a human head, and that this mountain is a conspicuous object looking from Santa Rosa. Plaintiff's attempt to induce this witness to identify Table Top with Sierra Cabeza, as being the head of the range, was a complete failure, the witness testifying that Sierra Cabeza in English would mean "Head Range", and that anyone in the least familiar with the topography would know that Table Top was not a part of the range running Northerly, West of Santa Rosa. This Black Head Mountain is about 10 miles south of Table Top (p. 332). In view of the foregoing, it would be the merest guess to say whether Sierra Cabeza means Table Top or Black Head Mountain. It is clear that there is no place now known by that name, and that the identification with either of these mountains would be conjectural.

The result of all this is that no surveyor could, with even reasonable certainty, delimit this tract upon the ground. A selection of any but the first point would rest, not upon ascertained facts, but upon guesswork.

This is emphasized by the map attached to Oblasser's deposition as defendants' exhibit 1, along with

the evidence relating to it, which will repay careful examination (Tr. pp. 326-328). The following facts may be specially noted:

If the distances given in the Luis deed and in the complaint are followed, the boundaries will not close.

If the monuments given by plaintiff's witnesses are used, as nearly as they can be guessed at, the figure produced bears no resemblance whatsoever to the approximate parallelogram contemplated by the description. As shown in green on said map, it is almost a triangle.

Two of the other tracts, deeded in 1880, conflict with and strikingly overlap the Santa Rosa tract, viz: the Anegam tract, outlined in blue and numbered 4 on the map, and the Quajate tract, also outlined in blue and numbered 5.

Anegam gives a deed separate from the Santa Rosa deed, although, according to plaintiff, it is part of the Santa Rosa corporate entity.

Two of the deeds of 1880, those of Bajio and Cababi, separate the mountain homes of Indians of the Santa Rosa district from their valley homes.

The Santa Rosa tract, as outlined, leaves out the mountain villages of Silynarki and Sikuhimat, belonging to the same Indians.

And finally there is a separate deed from Kakachemouk, now Santa Rosa, to a tract lying entirely within the tract deeded by "Santa Rosa" and bearing no relation whatever to the monuments or distances of the latter tract. This is an approximate parallelo-

gram shown in red on the map with the modern Santa Rosa near its center. The confusion created by all the foregoing is utter and complete.

The Martin interests, in selling shares in their anticipated Papago acquisitions, used a map which shows an area entirely different from that mentioned in the complaint or that sketched on the Oblasser map. This Martin map, although introduced in evidence, has not been reproduced in the transcript, but some idea of the discrepancy can be obtained from the testimony of Martin's agent, Guittard (Tr. pp. 389, 390).

Plaintiff laid some emphasis on the conjectural outline of the tract found on the map attached to the statement of January 25, 1919, signed by the Commissioner of Indian Affairs, and inserted without explanation in the Government's brief when this case was in the Supreme Court of the United States. It needs only a glance at the statement, however, to show that all that was attempted was to give the Court a rough idea of what the case was about, and how much land was involved. No attempt was made to identify the monuments, but the starting point was guessed at, and from this assumed point, the draftsman followed the distances given in the complaint, without attempting to find the monuments. (Tr. pp. 187-9, 198-9.)

As against the ownership of this, or any other tract, by any Papago village or villages, must also be borne in mind the mass of entirely uncontradicted testimony that *no Papago village or combination of*

villages lays claim to any definite tract of land; that the land belongs to the whole tribe, except that individual fields are owned by families or heads of families. As to this Hugh Norris says:

“Did you ever hear, as far back as your recollection goes, of any Papago village claiming any definite tract of land? A. No, sir. Q. As far back as you can remember, have these three or four villages that we have been talking about claimed any definite tract of land? A. They have not. Q. As far back as you can remember, has any Papago village claimed to have a boundary line between it and any other Papago village? A. No, sir.” (Tr. p. 392.)

Jose X. Pablo, after the description of the tract as given in the complaint was read, was asked:

“Within your recollection has any one of the Papago villages claimed to own that tract? A. No, sir. Q. Has the entire group of the Papago villages that you have mentioned in the Santa Rosa vicinity claimed to own that tract? A. No, sir. Q. Did you ever hear of that as a definite tract before this suit was started? A. I never did. Q. Has any Papago village that you know of claimed to own any definite tract of land as against any other Papago village? A. No, sir. Q. Has any Papago village ever said that the land on this side of some line belongs to us and the land on the other side belongs to some other community? A. No, sir.” (Tr. p. 303.)

“You testified on cross examination that the Papagos claimed the land around their Summer and Winter villages. Do you mean that the whole village claims to own the land around it

or that the different families own the fields they cultivate? A. The different families claim the land they cultivate. No village claims the land.” (Tr. p. 311.)

Testimony to the same effect was given by Chiago (p. 158); Jose Pablo (p. 160); Oblasser (p. 331); John Wilson (p. 341); Ramon Cachora (p. 343); Sam Pablo (pp. 345, 346); Jose Lopez (p. 347); Joaquin (p. 349); Jose Luciano (p. 373); Barnabe Lopez (p. 379); Jose Petaro (p. 387), and others.

It also appears from plaintiff’s witness, Day, that the dignified municipality pleaded in the complaint was unaware of the extent of its own territory. Asked as to whether any villages claimed a definite boundary, he says:

“Well, Santa Rosa set their boundary over to Table Top Mountain, but they don’t know the other boundaries.” (Tr. p. 147.)

The Supreme Court has frequently spoken on the subject of indefinite descriptions, stating that boundaries must admit of exact identification; that, if they are vague, the claim cannot be sustained unless they have been fixed by actual survey and proof of seizin; that even a survey will not be sustained if it merely represents the arbitrary conclusion of the surveyor; that the Courts are not called upon to speculate as to uncertain boundaries, and that doubts are to be solved in favor of the United States.

Perhaps the leading case is *Sena v. U. S.*, 189 U. S. 233, where the Court, after stating that some boundaries sworn to “are so uncertain as to afford little

guide to a surveyor in attempting to locate the tract" (p. 237), says:

"The evidence of possession subsequent to the grant does not afford much aid in fixing the boundaries since the land, like most of that in Spanish-American territory, *was not of a kind admitting of a well-defined actual and adverse possession such as that of cultivated land.* * * *

When the boundaries themselves are indefinite, the possession of a house is of no value in fixing the boundaries. *A grant too indefinite to be located and never fixed by any survey is void as against the United States.* As was observed in *U. S. v. Delespine*, of a Spanish grant in Florida, 15 Pet. 319, 335, 'the public domain cannot be granted by the courts'. They may locate the boundaries fixed by a grant, *but the boundaries must be so fixed as to admit of a survey.*"

Citing:

U. S. v. Miranda, 16 Pet. 153, 160;

U. S. v. King, 3 How. 773;

Villobos v. U. S., 10 How. 541;

Arivaca, etc. Co. v. U. S., 184 U. S. 649, 652.

On page 239, the court continues:

"Grants of this description, as of all others, *must be construed favorably to the Government*, and the grantee is bound to show not only the grant itself, but that the boundaries were fixed with reasonable certainty." (Citing cases.)

The *King* case, *supra* (p. 785), says that

"if the description was vague and indefinite, as in the case before us, and there was no official survey to give it a certain location, it could

create no right of private property in any particular parcel of land which could be maintained in a court of justice”.

The Arivaca case, *supra* (pp. 652-3), states that the court is not obligated to speculate on the subject nor to accept arbitrary conclusions even of a surveyor. To the same effect, see:

Lecompte v. U. S., 11 How. 114, 126;

Chouteau v. Moloney, 16 How. 203, 228, 233;

Denise v. Ruggles, 16 How. 242;

Carpentier v. Montgomery, 13 Wall. 480, 493-4;

Scull v. U. S., 98 U. S. 410, 419, 421-4;

Mobile, etc. Co. v. Mobile, 187 U. S. 479, 489.

While many of the above cases refer to actual grants, their doctrine as to certainty of identification must obviously apply, *a fortiori*, to possessory titles. In the latter class, the necessity of an exact showing of the limits of possession is obviously indispensable.

As against the rule as to vague boundaries not surveyed, appellant says (Brief p. 125):

“Claims or grants derived from any foreign country or government are taken out of the rule by the statute which says that no such grant shall ‘be deemed incomplete for the want of a survey or patent when the land granted may be ascertained without a survey or patent’.”

12 U. S. Stat. L. p. 410.

This is a serious error, undoubtedly due to oversight. Quoting only enough of the statute to show its true meaning, we find:

“that all claims or grants of land in any of the States or Territories of the United States *derived from any foreign country or government* shall be surveyed under the direction of the proper officers of the government of the United States, upon the application of the parties claiming or owning the same” at the expense of said parties; “but nothing in the law requiring the executive officers to survey land *claimed or granted under any laws of the United States*, shall be construed either to authorize such officers to pass upon the validity of the titles granted by or under such laws, or to give any greater effect to the surveys made by them than to make such surveys *prima facie* evidence of the true location of the land claimed or granted, *nor shall any such grant* be deemed incomplete for the want of a survey or patent when the land granted may be ascertained without a survey or patent”.

The passage quoted by appellant, therefore, refers to land “claimed or granted under any laws of the United States”. It does not refer to claims or grants “derived from any foreign country or government”. The part of the Act relating to foreign claims or grants is separated by a semicolon from that relating to domestic claims or grants. The statute has no bearing here at all, except to show that if the Papagos had any land claim they might have had it surveyed on application. They had no claim and made no application.

Plaintiff's claim is defeated by Article VI of the Gadsden Treaty.

This article, after stating that "no grants of land within the territory ceded by the first article of this treaty", dated later than September 25, 1853, will be considered valid, or recognized, continues:

"Or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico."

7 Fed. Stat. Ann. p. 705; 10 Stat. L. 1031.

The treaty was concluded and signed December 30, 1853, and proclaimed by the President of the United States June 30, 1854.

It is noteworthy that the Supreme Court, when this case was previously before it, of its own motion called attention to the possible application of this article, saying:

"In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said *that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty*, but no decision on either point is intended. Both involved questions not covered by the briefs or the discussion at the bar, and are *left open to investigation or decision in the further progress of the cause.*"

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 114.

In making this voluntary reference to the Gadsden Treaty, the court had before it a complaint which said that the land claimed by plaintiff was

“granted and conceded to said Indian pueblo by the laws and customs of the Indians antedating the Spanish discovery of America, *and also by the laws of Spain and Mexico * * ** to whom, as constituting said pueblo, said laws and customs conceded certain privileges and lands to be used for the common benefit of the town and its inhabitants”. (Tr. p. 2.)

Paragraph IV of the Complaint also states that Spain

“at all times recognized and in no instance disputed the ownership of said lands * * * and by repeated royal orders and decrees”

recognized the Indians as vassals of the Spanish Crown, entitled to the protection of their property rights,

“and recognized and confirmed the ownership of plaintiff in said lands”, and that Mexico “recognized and never disputed the ownership of the land herein described” (p. 4).

This language, while doubtless sufficient to admit proof of a formal grant, strongly suggests a claim of title under general laws, such as the evidence subsequently showed plaintiff's claim to be. It is significant, therefore, that the Supreme Court of its own motion, thought it worth while to call attention to Article VI of the treaty.

The court will take judicial notice of the historical facts intervening between the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Treaty. The Commission created by the Act of 1851, for adjudicating land claims in California, had been in session for two years, and the multitude of cases presented to it disclosed that large areas of what had appeared *prima facie* to be unoccupied public domain were claimed partly under complete and formal grants and partly under inchoate grants or concessions apparently conferring on claimants some equitable right short of the legal title. Great difficulty developed in determining the boundaries of some of these grants because there were no surveys, or inadequate ones, and many of the alleged grants were attacked by the United States on the ground of fraud. Doubtless, also, both the legislative and the executive departments had in the five years between the two treaties become to some extent educated in the laws of Spain and Mexico, and had learned that no Spanish or Mexican titles were good without express governmental action and recognition, followed by the setting apart and identification of a definite tract of land.

Unquestionably, the sixth article of the Gadsden Treaty was drafted in order to lessen these difficulties, and to protect the United States against fraudulent and indefinite claims, or claims based on possession merely, or upon any sort of right which had not received the formal sanction of the previous government. In other words, it was exactly designed to meet and defeat the sort of claim here presented.

The fifth article of the Gadsden Treaty, adopted, for the protection of pre-existing rights, the eighth and ninth articles of the Treaty of Guadalupe Hidalgo, which are very sweeping in their language. All pre-existing property rights, even though inchoate or informal, would, therefore, have been entitled to recognition had it not been for Article VI, which definitely states that none of them shall be obligatory which have not been "*located and duly recorded*". Not satisfied with this, it says that they shall not be "*respected*" either. Having learned, as above stated, that under Mexican law no property right was valid against the Government unless evidenced by formal action and record, the treaty makers used the word "grant", showing their understanding that, as against the United States, nothing short of a grant was entitled to consideration.

The only alternative to this is appellant's apparent idea that, since the treaty uses the word "grant", it intended to offer no obstacle to the allowance of informal, possessory or unconfirmed titles.

We submit that this is strongly inconsistent with the history of the times, the evils which Article VI was intended to prevent, and with the obvious limitation which that article imposes on the result of the adoption of Articles VIII and IX of the treaty of 1848. It is absurd to suppose that the United States, while refusing to recognize formal written titles, unless located on the ground and recorded in the archives, yet intended to admit any and every sort of loose or indefinite claim resting on no paper title or governmental act whatever.

The language of Section VI suggests that such claims might be submitted to Congress and, if found meritorious, confirmed as an act of grace. They cannot, however, be recognized by the courts.

No decisions interpreting this exact point have been found.

It should be noticed, however, that in many cases arising prior to 1853, Mexican grants had *uniformly been disallowed* by the Supreme Court if it did not appear that they had been

“deposited and recorded in the proper public office among the public archives of the Republic”.

Berreysea v. U. S., 154 U. S. 623;

Citing:

U. S. v. Cambuston, 20 How. 59, 64;

U. S. v. Castro, 24 How. 346, 349;

U. S. v. Knight, 1 Black, 227, 251;

Peralta v. U. S., 3 Wall. 437, 440.

Speaking of a Mexican grant, the court also says:

“Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. *It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption.*”

Fuentes v. U. S., 22 How. 443, 454.

In the Castro case, *supra* (p. 349), it is said:

“The grants of portions of the public domain in Mexico, the mode of obtaining them, and the

officers by whom they were to be issued, and the conditions to be annexed to them, were with *great precision regulated by law.* * * * It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the Republic.”

On page 350 the same case says that, to maintain a title by secondary evidence, the claimant must show,

- (1) that the grant was legally made and recorded;
- (2) that the record has been lost or destroyed, and

- (3) “He must support this proof by showing that within a reasonable time after the grant was made there was a judicial survey of the land and actual possession by him by acts of ownership exercised over it.”

After stating that without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, the court continues:

“We find nothing in the history of *Mexican jurisprudence* or Mexican grants which would justify this Court in supporting a Mexican title made out by such testimony only, or by *secondary evidence* of any kind short of that above stated.”

In the Peralta case, *supra*, the court says (p. 440):

“The Mexican nation *attached a great deal of form* to the disposition of its lands and required many things to be done before the proceedings

could ripen into a grant. But the important fact to be noticed is that *a record was required to be kept of whatever was done.* This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy *what portions of the public lands had been alienated. The record was the grant and without it the title was not divested.*”

(It will be noticed that all the above, to which much more might be added from other decisions, is exactly in line with our contention that plaintiff has neither legal existence nor title unless recognized as a pueblo by Spain or Mexico, with record evidence of such recognition, followed by the designation and marking out on the ground of the land given it as such pueblo. This matter will be taken up and supported by Supreme Court decisions later.) The entire drift of Supreme Court opinions is that, even under the treaty of 1848, with its exceedingly wide recognition of pre-existing titles of the loosest sort, regard must be had to the well-known insistence upon form characteristic of the Spanish and Mexican governments, and that loose pretensions to large and indefinite areas of land should not be sustained without archive evidence, as well as exact proof of possession and survey. Since this was true prior to the Gadsden Treaty, a stricter rule was necessarily enforced thereafter, and courts are precluded from recognizing pretended titles which have neither been “located” by definite demarcation on the ground, nor recorded in the archives by at least a minute, showing the recognition of plaintiff as a community. It cannot be said, even under appellant’s theory, that if it were a

community recognized as a land holder under the laws of Spain, no official entry of that fact could or would be made; indeed, such entry would be indispensable as proof of the existence of the entity, and the passage from Pallares, quoted on page 124 of appellant's brief, after stating that the Judge-Commissary determined by oral evidence that land was in the possession of Indians, and left it as their property, continues:

“The fact being noted in a report which the Commissary made to the Government. This appears in Law 18, Title 12, of the R. de Indias, and we can be sure of the practical observance of the law by the instruction of the viceroy of Peru”, etc.

Here is certainly a record of some sort. The case of *U. S. v. Pendell*, 185 U. S. 189, does not support plaintiff's contention that “the recording will be conclusively presumed from possession”. There witnesses testified that they had not only seen the muniments of title, but had seen them on file in the archives, and that both documents and archives had been lost or destroyed in the war (pp. 193-4). This was proved at a judicial inquiry before a Mexican judge and the record of the proceedings showed that the claimant was placed in actual possession of the land described before the judge and witnesses (p. 195). The lower court held that

“there have been very few claims passed upon long possession more satisfactorily made out in our minds than is made out by the evidence in this case” (p. 197).

Under these circumstances the Supreme Court says (p. 199):

“Where the *exclusive character* of the possession is so long, so uninterrupted, and so *satisfactorily made out* as in this case, and *where other proof exists of the actual making of a grant of some kind of the land in controversy, the papers constituting such grant having been among the archives of Mexico*, although the papers themselves have been destroyed, we think a case is made out showing not only that a grant had been made, but that it was duly located and recorded.”

This is very far from sustaining plaintiff's statement.

The extent of the land holdings of the community must be defined, both for its own protection against the aggressions of others and for the information of the Government as to what land was excepted from the public domain. This, however, has not been done, and, since Article VI requires both location on the ground and record in the archives, plaintiff fails in both respects. We submit that this is absolutely fatal to its case.

In addition to the lack of authority of counsel, we have now submitted six contentions all going to failure of plaintiff's proof. Each is independent of all the others; all are independent of what follows. If any one of them is sound, as we believe them all to be, plaintiff's case must fail no matter what theory of law is applied. The facts to support recovery under any theory are wanting.

At the trial, however, a great deal of effort was directed toward ascertaining the status of the alleged plaintiff under the laws of Spain and Mexico, both as to legal entity and the possibility of land ownership. We are perfectly willing to meet counsel on this ground, although the facts already shown make it unnecessary. Appellant's case will equally be found wanting under this test.

Under the laws of Spain and Mexico, plaintiff could not be a legal entity capable of owning land without recognition as such by the Government. No such recognition is shown.

The Spanish and Mexican theory of land tenure and of Indian rights thereunder is, in barest outline, as follows:

Upon the conquest, the lands of Mexico, whether occupied by Indians or not, became the individual property of the King of Spain, partly by virtue of the Papal Bull, and still more by right of discovery and seizure. It followed that no private land title could thereafter exist unless it emanated from the Crown. This, of course, required some affirmative act of recognition by the King or his delegates. The sale of these Crown lands constituted a valuable source of revenue; they were, therefore, a treasury asset, and for that, as well as other reasons, were imprescriptible. The original Indian inhabitants were treated not only as persons *non sui juris*, but as inferior beings. They were parceled out among the Spaniards to perform forced labor for their masters (encomiendas). They were removed from their

original homes and concentrated in villages (reducciones) at the royal pleasure for convenience in governing and Christianizing them, and were subject to all sorts of restrictions not applied to Spaniards. (It is noteworthy that the Visitador-General of Spain twice recommended that the Papagos themselves should be transplanted from their original homes to other places; Tr. p. 223.) Some of these disabilities were later modified but "the disposition first announced, that of direct vassalage, remained a fixed dogma of Spanish-American law". (Tr. p. 225.) And the above system and status, although theoretically ended by Mexican independence, yet, in fact, persisted long after that time. Since, however, Indians were numerous and Spaniards few, and, since the land and mines could be effectively developed and revenue produced only by Indian labor, the home government, as a matter of policy, was sedulous to preserve the Indians, prevent them from revolting and keep them reasonably satisfied. Hence, the King issued a large number of decrees forbidding molestation of them by private persons, and requiring that they be given or left with enough land for their support, with much more of similar import. *None of these enactments was self operative.* Title accrued only when a specific grant was made to an individual or when an Indian village was created or officially recognized as a community and an allotment of land made for its use. The above decrees ordered that *the fact of Indian possession should be respected and that grants should be made where necessary, but conferred no permanent right or immunity as against the Crown, nor conveyed title from the Crown.*

When Mexico gained its independence, Indians became citizens, *sui juris*, and could obtain land titles under the colonization laws like anyone else; but their limited rights to the soil, as previously existing, were in no way enlarged. Under both governments the Indian right, *unless created or supported by official act*, was possessory only and defeasible at the will of King or State. *Under both governments formal recognition by the authorities was necessary before an Indian village acquired the status of a municipal entity, or entity of any kind.* It also had to have a church, and a slight, but definite municipal organization. *It was also necessary that a definite tract of land should be designated and measured off as the communal property.* Without these things there was no entity and no title. *Even with these things no municipal entity, Spanish or Indian, ever acquired the fee title or any title that was not still subject to the control of the Government.*

As against this, appellant's theory seems to be that Aztec titles, existing at the time of the conquest, were acknowledged by Spain and confirmed by the general enactments for Indian protection above noticed; and that, by virtue thereof, an Indian village of immemorial existence and permanency *ipso facto* had fee title to the land it occupied, even if it consisted of no more than two families, and had no governmental recognition whatsoever.

It would be a sufficient answer to say that appellant here does not meet even its own requirements, since there is not a particle of proof that the alleged pueblo existed at all or possessed any land whatever

in Spanish days. There is no proof as to how long it existed in Mexican times, nor what land it then possessed, even if it were possible to identify plaintiff with the "Santa Rosa" of 1850.

However, we proceed with all possible brevity to show that appellant's theory of law is itself unfounded.

1. *The land of the new world upon the conquest was held to be the sole and absolute property in fee of the King of Spain.*

This was partly due to the bull of Pope Alexander VI (Hall, Mexican Law, Secs. 1, 2), but the real source of title was the discovery and conquest of America.

"While the different nations of Europe respected the rights of the natives as occupants, *they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grants subject only to the Indian right of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery.*"

Johnson v. McIntosh, 8 Wheat. 543, 574.

“Although the conquest be made by subjects of their own motion and at their own expense, the provinces, lands, towns and *real property belong to the crown.*”

Solorzano, *Politica Indiana*, Book 1, Chap. 9, Sec. 16.

“The justice and legitimacy of the *supreme dominion* established by the Spanish Kings *over lands inhabited by Indians* at the time of their discovery may be based upon the fact that, when discovered, the Indians were so barbarous and uncivilized that they hardly deserved the name of men and were, therefore, in need of someone to govern, protect, educate and civilize them and render them capable of receiving the Christian faith and religion.”

Ibid. Sec. 19.

Since we will have occasion to cite this authority again, we append the following:

“The great authority on the laws of the Indies is Pereyra y Solorzano, Jurisconsult, who was a public attorney and judge in the Indies, and a member of the Council of the Indies.”

Walton, *Civil Law in Spain and Spanish America*, p. 521.

Solorzano is also quoted as an authority in White's *New Recopilacion*, Vol. 1, pp. 367-372; Vol. 2, p. 103, and by the Supreme Court in *Chouteau v. Maloney*, 16 How. 203, 237, 239.

A striking announcement of the same doctrine is found in Book 4, Title 12, Law 14, of the laws of the Indies quoted in 2 White Recop., p. 52, and commencing:

“Whereas, we have fully inherited the dominion of the Indies; and whereas the waste lands and soil which were not granted by the Kings our predecessors, or by ourselves, in our name, belong to our patrimony and royal crown, it is expedient that all the land which is held without justice and true title be restored as belonging to us”, etc.

This law will be more fully examined later on, and is discussed by Garza-Aldape (Appendix, p. 185).

Much more to the same effect might be added, as, for example, Solorzano, Pol. Ind. Book 1, Chap. 9, Secs. 14, 20, 25-32; Book 11, Chap. 10, Sec. 1; also Wistana Luis Orozco, Legislacion y Jurisprudencia Sobre Terrenos Baldios, mentioned as authority by Aldape, who says (Vol. 2, p. 765) referring to the Royal Cedula of November 10, 1591:

“The royal cedula cited established the legal principle that all the conquered lands belonged in full dominion to the royal crown of Spain,—an arbitrary disposal which deprived, with the solemnity of a royal decree, the ancient inhabitants of the country of the legitimate property rights and titles they enjoyed over the soil.”

Again, after quoting the law of November 20, 1578, and that found in Book 4, Title 12, Law 14, of the Recopilacion, partly quoted above, he says:

“In the Spanish legislation, we find the compiled laws (Title 12, Book 7, Novissima Recopilacion) * * * in which is found clearly expressed the supreme and original lordship of the State over the Spanish soil.”

2. *The necessary result of the foregoing is that after the conquest no private land titles could exist unless they emanated from the Crown.*

It is true that the fact of Indian possession remained, but it was a possession by grace and tolerance. In flat contradiction to appellant's theory that the pre-existing Indian rights or titles persisted, Orozco says (Vol. 2, p. 767):

“This validity was never recognized in the case of the titles issued by the native authority of Anahuac (Mexico), as is easy to understand, considering the nature of the conquest, as well as the context of the royal cedula transmitted to Cortez through the medium of the viceroy, Don Antonio Mendoza, issued at Madrid on the 2nd of October, 1525.”

To the same effect see,

Orozco, Vol. 2, p. 902;

Francisco de la Maza, *Codigo de Colonizacion y Terrenos Baldios*, p. 6.

Again,

“We find that our royal Kings hold this right in the Indies; wherefore, *with the exception of such lands as he may have graciously granted to cities, towns, villages, other communities, or private persons*, all the rest, and especially all that is uncultivated, does and should belong to his crown and dominion, to be held as despotically and absolutely as we know they were held by the Montezumas in New Spain, by the Incas in Peru, and by the Caciques in other parts of the Indies.”

Solorzano, *Pol. Ind.*, Book 6, Chap. 12, Par. 3.
Ibid., Book 2, Chap. 24, Secs. 41, 42.

It is unnecessary to accumulate Spanish authorities to this effect, because the principle that titles in Mexico could exist only by royal grant, and that such grants were made without regard to Indian occupancy, is authoritatively established by our Supreme Court.

3. *Supreme Court decisions holding that Indians had an occupancy right only, and that Spain could and would convey land in the occupancy of Indians, authoritatively prove both of the preceding points.*

The leading case of *Johnson v. McIntosh*, 8 Wheat. 543, 573-4, 586, 590, 602, has already been cited. The Court's attention is respectfully called to the whole decision, especially to the pages above designated.

In *Marsh v. Brooks*, 14 How. 513, 521, speaking of Spanish usage in Louisiana, it is said:

“The Indians were kept quiet and at peace with Spanish subjects by kind treatment, and due precautions which did not allow obtrusion on lands claimed by them without written permits from the governor, *but that such permits were usual cannot be doubted.*”

Later, in speaking of a cession from Indian tribes to the United States of a stretch of territory, the Court says:

“Within which cession lay a great mass of Spanish orders of survey and grants in regard to which this country has been legislating and adjudicating for nearly fifty years without any one ever supposing that such concessions were affected by the loose Indian pretensions set up to the country at a time when the concessions

were made; *pretensions that the Spanish government notoriously disregarded, further than a cautious policy required*" (p. 522).

Quotations might be multiplied indefinitely. The following cases fully establish our position:

Cherokee Nation v. Georgia, 5 Pet. 1, 17, 47;

U. S. v. Fernandez, 10 Pet. 303-4;

U. S. v. Rogers, 4 How. 567, 571-2;

U. S. v. Cervantes, 59 U. S. 553;

U. S. v. Cook, 86 U. S. 591, 593;

Beecher v. Wetherby, 95 U. S. 517, 525;

U. S. v. Kagama, 118 U. S. 375, 381;

Buttz v. Northern Pacific R. R., 119 U. S. 55,
66-7-8;

Spalding v. Chandler, 160 U. S. 394, 402-3.

Appellant cites numerous Spanish laws for the protection of Indians in their possessions. These are merely an expression of the "cautious policy" mentioned in *Marsh v. Brooks*, *supra*, and amount to *nothing more than a preservation of the occupancy fact or right only*. Time does not permit the examination of them in detail, but the closer the scrutiny the Court is able to give them, the more convinced will it be that this is their purpose and limit. This also is authoritatively shown by the above Supreme Court decisions, which coincide with, and doubtless in part follow, various Spanish and Mexican enactments showing Indian occupancy to be subject to the control and disposition of the government. For example:

(a) The decree found in 2 White, Recop. p. 48 (Recop. de las Indias, Book 4, Tit. 7, Law 23), where the King, while requiring all possible forbearance on the part of Spaniards making settlements among Indians, says:

“And, if, nevertheless, they do withhold their consent, the settlers * * * shall proceed to make their settlements without taking anything that may belong to the Indians, and without doing them any greater damage than necessary for the protection of the settlers and to remove obstacles to the settlement.”

Clearly, the settlers could not establish their community or town without, to some extent, dislodging the Indians, and the King, by this law, delegates to such settlers a portion of his right to extinguish the Indian possession.

(b) The Royal Ordinance found in 2 White Recop., pp. 70, 72, for the promotion of the cultivation of cochineal, flax and hemp, provides for a distribution of lands among Indians, and says:

“For my royal pleasure is that all said natives may own a competent amount of real property, and that the lands which shall be distributed for the aforesaid objects * * * may belong to these individuals to whom they shall have been *allotted*, whether they be Indians or belong to other classes, together with the necessary right of property; *retaining always the right reserved to my royal crown and to the public dominions respectively.*”

If any of the allottees fail to improve the lands,

“The same shall be taken from them (which I command to be done without mercy) and granted to others who shall fulfill the conditions” (p. 71).

This enactment, like many others, instructs the Viceroy to make grants to Indians in proper cases, and doubtless many such grants were made. It also shows that even the grant to Indians was conditional. Without a grant, there was nothing but a general rule of protection of Indian occupancy.

(c) The circular of instructions issued by President Juarez of Mexico in 1867 (Hall’s Mexican Law, Secs. 645-649) requiring that, when public lands are adjudicated, care must be taken to avoid injury to third parties, states that

“such injury does not exist, strictly speaking, in respect to the lands which are in possession of the Indians when they lack their respective title given by competent authority”.

Its requirement that the Indians appear and solicit title to the lands they possess,

“under the conception that said title be issued to them gratis, the property being thus legitimized which might otherwise be claimed”,

although referring to the situation created by the disamortization law of 1856, whereby Indian pueblos theretofore officially recognized were extinguished and the property escheated to the State, yet expresses the general idea of Mexican law, disallowing any

right of Indian possession not based on formal title. (Estanol, Tr. pp. 415, 416, 419, 420; Garza-Aldape, Appendix, pp. 191, 196.)

(d) An assertion of the same principle was made by the Commission which in 1815 examined the famous Opelousas County claims in Louisiana. Appellant's exact contention that the Indian title was the best of all titles because the original property of the soil was in them and that it was held sacred by Spain after the conquest, was there urged, but the Commission decided that Spain "recognized no title in them (the Indians) independently of that derived from the Crown—a mere right of occupancy at the will of our government". (P. 252.)

2 White Recop., pp. 247-255.

Similarly as to titles in California after the treaty of 1848, "all lands in California *not included within the limits of grants*, made in conformity to law and prior to July 7, 1846, formed a part of the public domain of Mexico".

Halleck's Report on California Land Titles,
p. 15.

As to the settlement of agricultural Indians, "they have a *right of occupancy* in the land which they need and use".

Ibid., p. 113.

4. *The status of Indians as serfs and the practice of removing them to and concentrating them in settlements at the Government's pleasure are inconsistent with a recognition of independent land ownership, or any higher right than a possession subject to the control of the Government.*

This is a collateral matter, and, in view of the abundance of direct authority will not be dwelt on.

“The Indians, after the conquest, were at first slaves; they paid a capitation tax to the crown and their labor was entirely at the service of their lord. This system was modified from time to time, but all the changes carried into effect down to the revolution did not release them from their state of vassalage. They still continued liable in a greater or less degree to the performance of compulsory labor under the orders of persons against whom they had no protection.”

Walton, *Civil Law in Spain and Spanish America*, pp. 521-2.

“The nature of the Indian is such that he is neither to be allowed complete freedom, nor is he to be condemned to complete servitude.”

Solorzano, *Pol. Ind.*, Book 2, Chap. 6, Sec. 45.

Notwithstanding the theoretical equality of Indians with other Mexican citizens after Mexican independence, they were still liable to forced labor. One of the regulations of Governor Figueroa of California dated August 9, 1834, says:

“Article 16. The emancipated Indians will be obliged to assist at the indispensable common labor, which, in the opinion of the governor, may be adjudged necessary for the cultivation of the vineyards”, etc.

“Article 18. They (the Indians) cannot sell, burden or alienate under any pretext the lands which may be given them. Neither can they sell their cattle. Whatever contracts may be made against these orders shall be of no value. The Government will reclaim the property *as belonging to the nation*, and purchasers shall lose their money.”

Halleck, California Land Titles, p. 44.

The regulations of Governor Alvarado, dated March 1, 1840, empowered the mayordomos,

“Article 6. To compel the Indians to assist in the labors of the community, chastising them moderately for the faults they may commit.”

Ibid., p. 52.

There is much more to the same effect in these and similar governmental regulations in California.

As already noted, there was no doubt in the minds of the Spanish authorities of their right to remove the Papagos from their lands and locate them elsewhere, and the Visitador-General twice so suggested. (Tr. p. 223.)

As to reducciones, whereby Indians were concentrated into towns, we find “laws were provided for the *founding* of Indian pueblos or designating the customs they were to have, and limits and privileges”. After citing the law on the subject, “It provides that the Indians shall be reduced to pueblos, and that they should not live separated in the mountains, depriving themselves of all spiritual and temporal benefits.” (Hall, Mex. Law, Sec. 154, et seq.)

The reducciones were the first examples of establishment or recognition of Indian pueblos as entities. They were the first Indian pueblos in the technical sense of the term, namely, a village recognized by the Government as a municipal entity, and not a mere collection of houses. Later, other Indian villages besides the compulsory settlements called reducciones were recognized, organized and given allotments of land. In both cases, however, it is clear that a certain definite although slight organization, was required.

“We order that in each town and reduccion, there shall be an Indian Magistrate (alcalde) of said reduccion, and if it exceeds eighty houses, two alcaldes and two councilmen (regidores); likewise Indians * * * all of whom are to be elected annually in the presence of the curates, as is customary in Spain and Indian towns.” (Recop. de las Indias, Book 6, Tit. 3, Law 15.)

“The only jurisdiction which the Indian magistrate shall have shall be to examine, arrest and take delinquents to the prison of the Spanish town in the District.” (Ibid. Law 16.)

A vast number of other regulations, far too numerous to mention, were also made to govern reducciones.

Since the Christianization of the Indians was considered of primary importance, a church was essential to the existence of a recognized Indian pueblo (Recop. de las Indias, Book 6, Tit. 3, Law 4), and the church was the center from which measurement of the fundo legal (townsite) and the ejidos (commons) was made. (Hall, Mex. Law, Secs. 162, 153.)

There is no shadow of proof of the existence of alcaldes or regidores in any Papago community, either in ancient or modern times, nor of annual elections, nor of a church until very recently, nor of a fundo legal, nor of ejidos.

It thus appears that the Indians could be shifted at the pleasure of the State unless and until their community had been recognized as a pueblo and a definite grant of land made. Without such recognition, they had nothing but an insecure occupancy. When so recognized and endowed, a definite municipal and religious organization was effected. There is not a vestige of proof either of recognition, grant, or organization in the case of any Papago village.

5. *Formal creation and recognition of an Indian community by the authorities was necessary before it became a legal entity, followed by an allotment of land to it proportionate to its size and needs.*

(a) Appellant's theory to the contrary, of course is preposterous. It is absurd to suppose that Spain and Mexico, with their formal ideas of government, permitted the existence of an unknown but large number of *corporate entities, each owning an indefinite area of land*, without accurate knowledge as to which Indian settlements these were, or how many they were, or how much land they possessed. Not only would this be totally at variance with the most elementary ideas of a municipality as an agency and subdivision of government, ideas which Spain fully understood and recognized, but it would also make it impossible to tell at any time how much land was

in private ownership and how much was public domain.

(b) Under appellant's theory, Spain would have relinquished from the very start a great proportion of the fruits of the conquest, and would have abandoned, without compensation, much of one of its principal sources of revenue, viz.: the sale of land.

(c) The testimony of Estanol and Aldape on this point is clear and unanimous. Both of these men are lawyers of long experience and high distinction, and familiar with the examination of titles. Estanol was acquainted with titles of Indian pueblos in Sonora. (Tr. pp. 416, 420.) Each had been Secretary of the Interior in Mexico. It is impossible to take time even to summarize their evidence further than to say that Estanol stated that the word "pueblo" has in Spanish both a common and a technical meaning, the first signifying any city, town or village, and the second applied to an Indian community or town accepted by the Government as a legal entity. This required an official act without which the village was simply an aggregation of individuals without any legal status. Without formal official recognition, an Indian village in Sonora up to 1853 had no land title whatever, and could acquire none, because it had no legal entity, and even when recognized as an entity, governmental action was necessary to give it an allotment of land, with very much more to the same effect. All this was confirmed by Aldape. See especially Tr. pp. 412-416, 419, 421, and Appendix to this brief, *passim*.

It should be noted that the two meanings of "pueblo" are recognized by the Supreme Court when, after stating that there was a pueblo of some kind in Mexican days at San Francisco, it says:

"We say a pueblo *of some kind*, for the term, which answers generally to the English word 'town' may designate a collection of individuals residing at a particular place, a settlement, or a village, or may be applied to a regular, organized municipality."

Grisar v. McDowell, 73 U. S. 363, 372-3.

The court was here probably speaking of a pueblo of Mexicans, but the passage shows that a distinction between the common and technical meaning of the word, as testified to by our two Mexican experts, was a matter of judicial cognizance.

We need not rely on expert testimony, however, because in U. S. v. Santa Fe, 165 U. S. 675, 688, the Court says:

"It may well also be implied from the provisions in the Recopilacion that the rights of the town to hold land for public purposes was *required to be evidenced by grant* from the viceroy or governor, and that such grant, when made, required confirmation by the Crown."

This was said of a Spanish community, but in U. S. v. Pico, 72 U. S. 536, 540, the Court, speaking of an Indian pueblo, said:

"A pueblo *once formed and officially recognized* became entitled under the laws of Mexico to the use of certain lands for its benefit and the benefit of its inhabitants, and the lands were, *upon petition, set apart and assigned to it by the government.*"

We call special attention to these two cases, the first of which denies a pueblo claim resting on general law, without a grant; while the second, which is the only case found, unless the Faxon case, *infra*, expressly dealing with an Indian pueblo, shows the need of official recognition for the legal existence of a pueblo, and the need of petition and location before it became legally entitled even to the use of land.

(d) All the foregoing is conclusively settled by the Supreme Court in

U. S. v. Pico, 72 U. S. 536, 540;

U. S. v. Cervantes, 18 How. 553, 555;

Grisar v. McDowell, 73 U. S. 363, 372-3;

U. S. v. Santa Fe, 165 U. S. 675, 688, 707-8-9, 713;

U. S. v. Sandoval, 167 U. S. 278, 296-7-8;

Rio Arriba Co. v. U. S., 167 U. S. 298, 307;

Townsend v. Greeley, 72 U. S. 326, 336;

Faxon v. U. S., 171 U. S. 244, 258;

U. S. v. Sandoval, 231 U. S. 28, 45;

Harrison v. Ulrichs, 39 Fed. 654, 663.

We mention, without discussion, two matters which are relevant to all stages of this controversy. The first is that the laws of Spain relative to the recognition and creation of Indian pueblos were carried over without change into the jurisprudence of Mexico, and remained in force until after 1853 (Estanol, Tr. pp. 411-12; Garza-Aldape, Appendix pp. 181-2). A general statement as to the retention of all laws of the

pre-existing sovereignty is also found in Rockwell, Spanish and Mexican Law, pp. 17-18.

The other point is that, in any case of doubt as to the validity of land titles, the presumption was in favor of the government, just as is the case under our law.

“There is another right belonging and reserved to our kings and sovereign lords by virtue of the supreme power which they have over their realms, namely the right to all public lands, fields, pastures, rivers and waters. * * * When in any litigation question arises as to property in, or the right to, or the possession of, any of these things, *the King's right to the same is to be presumed as against all private persons who cannot incontinently show proper titles of ownership.*”

Solorzano, Pol. Ind., Book 6, Chap. 12, Sec. 17.

6. *Even after the formal creation of a pueblo and the allotment of land to it, neither Spanish nor Indian pueblos acquired the fee title.*

“The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign and never in the pueblo as a corporate body.”

U. S. v. Sandoval, 167 U. S. 278, 297.

“The disposition of the lands assigned was subject at all times to the control of the government of the country.”

U. S. v. Pico, 72 U. S. 536, 540.

Townsend v. Greeley, 72 U. S. 326, 336-7.

Faxon v. U. S., 171 U. S. 244, 259.

The same principle is enunciated in many of the other cases cited in the list preceding.

The result of all the foregoing is that plaintiff, having no governmental recognition, was not an entity, could not own land, and of course had no land assigned to it at the only time when it could have acquired entity or title.

Plaintiff did not obtain and could not have obtained title by prescription against any sovereignty involved.

Of course no prescription runs against the United States, and, therefore, the only possible prescriptive title here would be against Spain or Mexico. At the trial, the court pointed out the inconsistency of an adverse prescriptive claim with the claim of recognition of immemorial possession by general Spanish law discussed under the last head. Ignoring this, however, we find:

1. On the facts, plaintiff gained no prescriptive title because it is not an identifiable entity now, is not identified with any entity existing in Spanish or Mexican times, and, as demonstrated under the last head, not being shown to have been a legal entity under Spain or Mexico, could not obtain anything by prescription. (Tr. pp. 413, 414; Appendix, p. 187.)

2. There has been no proof of the beginning or ending of any period of adverse possession against either sovereignty.

3. There has been no proof of the limits or boundaries of any tract of land possessed adversely.

4. There has been no proof that any possession by plaintiff was adverse. Not only was plaintiff's own theory inconsistent with this, but all the cases from our own Supreme Court cited under the last head show that, although the absolute dominion and complete ownership of the soil passed upon the conquest to the Spanish King, the possession of the Indians was protected as a matter of royal favor and policy. Their possession, therefore, was permissive and by license, and could never have been adverse. An illustration is found in the case of *Serrano v. U. S.*, 72 U. S. 451, 461, where a claim of possessory right against Spain and Mexico, originating in a license of some sort, was denied.

“There is no adverse holding here, but the possession was a permissive one, and consistent with the proprietary interest of Spain and Mexico; and the fact that those governments did not terminate the possession, which was a mere tenancy at will, cannot create an equity entitled to confirmation. * * * If Serrano entered into possession under a claim of right *and had title papers, though imperfect*, he might say that the length of his possession entitled him to the favorable consideration of the Court”, etc.

Here again plaintiff's case absolutely breaks down on the facts, no matter what theory of law be applied. Discussion of the law of Spain and Mexico as to prescription against the sovereign or of the case of *Carino v. Philippine Government*, 212 U. S. 449, relied on by appellant, therefore becomes academic. For the sake of completeness, however, we will briefly outline the law of the two earlier sovereignties in this regard.

5. Requisites of prescription under Spanish law are found in 1 White Recop., pages 91, 93, 346, 347, and 2 White Recop., pages 83, 86. There are three principal ones. The first is "title of acquisition", that is to say, that the thing be held by purchase, gift, inheritance, or other of the *contracts* that transfer dominion. (1 White, p. 346.) This is elsewhere described as "just title", which is said to be "one of those by reason of which dominion is acquired, as purchase, gift, inheritance, etc." (1 White, p. 91; 2 White, pp. 52, 83.) In other words, as a preliminary to prescription there must be a *showing of title sufficient to transfer ownership*, roughly corresponding to our expression "color of title". Prescription cannot rest on naked possession or squatter's right. (Aldape, Appendix, pp. 188, 197.)

No "just title", or color of title, is shown, or so much as claimed by appellant.

The second requisite is "capacity of the person who prescribes". Before a community could prescribe it obviously must be a legal entity, of which there is no proof here.

The third requisite is "capacity of the thing prescribed". Under Spain, and in Mexico up to 1863, public land was imprescriptible. Among the exceptions from prescription under Spain are "tributes and royal rights". (1 White, p. 93.) Also, after stating that the seignory of towns and civil and criminal jurisdiction may be acquired by prescription, the author continues, "but not that which the Kings possess by their preeminence and prerogative. nor taxes, nor tributes, etc." (2 White, p. 86.)

The showing heretofore made of the nature of the King's title to the land of the new world clearly brings that land within the scope of these expressions. Further, all this land was a treasury asset, and the sale of it was looked to as source of revenue. Repeated enactments show this. See 2 White, pp. 53, 62-67, for specimens. Under no system of law is prescription permitted against the treasury. (Appendix, pp. 186, 189.)

Finally, the imprescriptibility of crown land, or, under Mexico, public domain, is conclusively shown by the Mexican law of July 22, 1863, Article 27 of which reads in part:

“The provisions of the ancient laws which declare public lands imprescriptible are repealed from this date.”

Hall, Mex. Law, Sec. 639.

In commenting on this statute, Hall observes (Sec. 612):

“An important point or right is conceded by the government in this law, *which did not exist before*; and that is the right of holding against the government by prescription, or what is known in the United States and England as limitation. * * * Prior to this law prescription did not run against the sovereign in Mexico.”

The above authentic construction by Mexico itself of the pre-existing law is, we submit, final.

We may observe in passing that grazing and mountain land, comprising the great bulk of that in controversy here, was expressly made common property

in the Indies. See Recop., Book 4, Title 17, Law 5; 2 White, p. 56, reading in part: "We have ordained that pastures, mountains and waters shall be common in the Indies." And, after reciting that some persons had taken exclusive possession of tracts of this sort of land, continues:

"We command that all pastures, mountains and waters in the provinces of the Indies be common to all the inhabitants thereof, present and to come."

The law ends thus:

"And this shall be observed *wherever there shall be no title or authority from ourselves*, by which a different disposition should be made."

This makes the imprescriptibility of land such as that in question doubly certain.

Appellant therefore fails to meet any one of the three requisites of prescription.

6. Apart from all the foregoing, the cedula of October 15, 1754, found in 2 White, pp. 62-67, supplies another complete bar to plaintiff's claim. One of its two purposes was to secure a scrutiny of all outstanding titles and a definite segregation of private property from public domain. Paragraph III requires an exhibition of all titles before designated officers. Paragraph IV provides that in the case of those not having "warrants" or deeds, but showing a possession commencing before 1700, "their proof of long possession shall be held as a title by prescription". Paragraph VI states that, where lands

have not been surveyed or valued, confirmation shall be withheld until this is done. Paragraph VII provides that if the possessors do not present their titles within the fixed time "the royal lands occupied without title shall be adjudged to be the property of the King".

It thus appears that the following things were essential: (a) presentation of the title claimed within a fixed time; (b) proof of a grant or paper title of some sort, or, in the absence of that, proof of long possession prior to 1700 (no matter how long the possession, it had to be *proved*); (c) proof that the lands had been surveyed and valued. In the absence of compliance with these requirements, the land was forfeited to the King. Even pre-existing prescriptive titles, therefore, were extinguished by this decree unless complied with. It is needless to say that there is no proof that plaintiff complied with it, and, as heretofore shown, in every controversy as to land between King and subject, *the presumption was in favor of the King*. Also, Aldape explains that the language regarding long possession does not mean that those who never had had a paper title could obtain one under this decree, but that the construction of paragraph IV, in connection with the rest of the decree, shows that it refers to those who had had paper titles, but had lost the documents. (Appendix, pp. 188, 197.)

It is suggested that paragraph II, relating to Indians probably means to require respect so far as possible for their actual possessions and for the

usufructuary right of towns to whom grants had been made.

Plaintiff attempted at the trial to avoid the destructive effect of this cedula by asserting that it did not apply to Indians at all, but this was conclusively negated by the subsequent decree quoted (Appendix, p. 189), expressly mentioning Indian pueblos among those required to come in and present their usufructuary rights for scrutiny. It will be observed that even if appellant's astonishing theory of corporate entity in these Indian pueblos without governmental recognition were correct, any rights they had would have been extinguished by non-compliance with this decree, and no proof of such compliance has been made.

7. All the foregoing makes it unnecessary to examine with any minuteness the case of *Carino v. Philippine Government*, 212 U. S. 449, so much relied on by appellant. We will merely tabulate a few matters distinguishing it from the case at bar.

(a) A possessory title was there advanced by an individual, not by an alleged corporation shown by the proof to have no corporate entity.

(b) He had already twice applied to the Spanish Government for the issuance of a title which had been held in abeyance until lands designed for a sanatorium had been set apart.

(c) The lands in question had been registered to plaintiff under the mortgage law after the United States acquired the islands.

(d) The court nowhere denies the correctness of our theory of the Crown's ownership of the fee as against the Indians, but says that, even assuming it, plaintiff's case does not necessarily fail under the facts there presented.

(e) The case was decided for plaintiff on the theory that the United States had not by its legislation indicated a purpose to insist on its strict rights as successor to the King of Spain (pp. 457-8).

(f) Land in the Philippines is said to have been acquired by the United States with a different purpose from that governing the acquisition of land in America. In the latter case the purpose was to occupy and exploit the land. The Philippines were acquired rather with an altruistic design, to hold the land for the benefit of their inhabitants until the latter could become self-governing (p. 458).

(g) The decision is largely based on the Act of July 1, 1902, expressing the purpose of the United States in taking over the Philippines, which is considered to express a different idea, as to Indian rights than that embodied in the ancient Spanish law (p. 460).

(h) The decision is further based on a modern Spanish statute of June 25, 1880, local to the Philippines, "providing that for all legal effects those who have been in possession for certain times shall be deemed the owners" (p. 461).

(i) That the basis of the decision is the Act of Congress of 1902, and the Spanish Act of 1880 is

stressed on page 463, by stating that the rights of the applicant present a difficult problem under Spanish law, and by then stating that for that reason attention has been called to the effect of the change of sovereignty, and the Act of Congress “establishing the fundamental principles now to be observed”.

The result is that the Carino case is absolutely differentiated from the case at bar, and furnishes no support to plaintiff's contentions.

All the foregoing discussion of prescription is really unnecessary because, whatever theory of law is applied, appellant's case breaks down on the facts.

Appellant's case cannot be sustained by a presumption of a lost grant.

The fact that a land claimant has no written nor record title of his claim is, of course, in itself the poorest possible evidence that he ever did have such title. Written or record title is the rule, not the exception, and where one cannot produce such title, or make proof that he once had it, the natural presumption is that his possession had no lawful origin. The presumption of lost grant is not, as appellant seems to think, an ordinary one, or one readily to be allowed. It is an exceptional presumption, made only as a last resort, to sustain a claim of title which has everything in its favor except a written instrument. Hence the rule:

1. *A presumption of lost grant is allowed only when the existing situation cannot reasonably be explained in any other way.*

In Ricard v. Williams, 7 Wheat. 59, 108, the court, speaking of presumption of grants, said, through Mr. Justice Story:

“They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant.”

This rule is recognized by all the cases relied on by appellant, where presumptions of a grant were allowed on account of an accumulation of positive evidence of their probable existence. Thus, in Fletcher v. Fuller, 120 U. S. 534, 550, a deed is presumed where the situation and the conduct of the parties “can be explained satisfactorily only upon the hypothesis of its existence”.

U. S. v. Chaves, 175 U. S. 509, 521, cites the passage quoted from the Ricard case.

Now, we are dealing here with a community of tribal Indians. The fact, if it were such, that such Indians had long remained in occupation of their present habitat would be perfectly natural, and entirely consistent with the conclusion that they were and always had been in possession *under nothing more than their*

Indian occupancy title. Appellant has cited a number of laws showing that Spain adopted a policy of non-interference with such title. This policy to a considerable extent was followed by Mexico and has always been observed by the United States to such extent as public interest permitted. There is, therefore, no need of any presumption whatever to explain the existing situation. In the language of the Ricard case, "all the circumstances are perfectly consistent with the non-existence of a grant". Therefore, according to the same case, the presumption cannot fairly arise.

Again, one of the elements of the presumption is, as said in *Fletcher v. Fuller*, 120 U. S. 551, that the right, "if not founded upon a lawful origin, would, in the usual course of things, be resisted by the parties interested". Here there is not and never has been any reason why any government concerned should have resisted or interfered with the Indian possession because that possession has never been considered adverse to or by any of said governments. It has always been a permissive possession. Nothing is more natural or common from the time of the Spanish conquest down to the present than to find tribal Indians living in their old territory unmolested by any government. That possession is not one which "might and naturally would have been prevented by the persons interested if it had not had a lawful origin". (*Fletcher case*, p. 552). The only reason for the presumption, therefore, fails. We submit that this point alone is fatal to its consideration here.

2. *The presumption is never sustained upon the mere proof of possession without confirmatory evidence.*

Appellant's cases are so lengthy that only a brief showing under this head is possible. For example, in *U. S. v. Chaves*, 159 U. S. 452, it was proved or conceded that a written grant made by the Mexican government had been seen and read by several citizens, and that a considerable portion of the archives where such grant would naturally be recorded had been lost; also, that claimants had been judicially put in possession of a definite tract in 1833, and had remained in possession. There seems to have been hardly any opposing testimony (pp. 459-463). The presumption was here used only by way of confirmation, and the court qualifies its opinion on that topic by saying:

“Lapse of time, *accompanied by acts done, or other circumstances*, may warrant the jury in presuming a grant or title by record.”

In the other *Chaves* case, 175 U. S. 509, a Mexican grant was definitely proved, and the presumption was invoked to supply a missing deed from the Mexican grantee to the occupant. There was, however, archive evidence of the missing conveyance, and of several confirmatory deeds (pp. 510, 515). A continuous possession of over 100 years was established (p. 520).

In *U. S. v. Santa Fe*, 165 U. S. 675, 691, where a claim was made under the general laws of Spain, and it was urged that there was probably a lost grant, the court says:

“As the rights which the city asserts are devoid of every element of proof tending to show a possession coupled with claim of title, but *rest upon the mere assumption of a right asserted to have arisen by operation of law hundreds of years ago*, of course there is no room for the application of a presumption of an actual grant within the doctrine declared in *U. S. v. Chaves*, 159 U. S. 452.”

This statement would apply equally to the other Chaves case. Obviously, the court considered that possession alone, without any evidence implying that a grant had probably been made and lost, is not enough. This is confirmed by language found on page 688, emphasizing the fact that towns acquired territory only by grants.

In *U. S. v. Pendell*, 185 U. S. 189, the evidence showed that a grant was made, and the grantee placed in legal possession of the land, along with a continuous possession from 1790. Witnesses also testified that they had seen the original documents constituting the grant, and had also seen them on file in the archives, and evidence to that effect was perpetuated by legal proceedings. Proof was also made of the destruction of the archives (pp. 192-195). The court calls attention to the existence of proof in both the Chaves cases of a grant or other governmental action, and that *judgment was not based on mere possession without any showing of written title* (pp. 199-201), and says that the presumption of lost grant will lie

“where the exclusive character of the possession is so long, so uninterrupted and so satisfactorily made out as in this case, and *where other proof exists of the actual making of a grant of some kind of the lands in controversy*” (p. 199).

Disapproving of such presumption upon mere proof of naked possession, it bases its decision upon the conclusion that “the evidence of possession was sufficient *in connection with the other evidence referred to*” (p. 202). This case is strongly adverse to plaintiff’s contention.

Where much parol evidence was introduced to support an incomplete grant on the theory that the formal granting papers were lost, the court says:

“Suppose it be conceded that the probative force of the parol testimony is not overcome by the contrary tendency of the written evidence, the concession could not benefit the claimant, because *the case is one where there is no record evidence of any kind to prove either the existence or the authenticity of the grant*. Assuming that state of the case then, it falls directly within the class of cases where confirmation has been refused, because there was no record evidence to support the claims.” (Citing twelve cases.)

Romero v. U. S., 1 Wall. 721, 744.

The most recent case discovered is to the same effect.

Mobile Transportation Co. v. Mobile, 187 U. S. 479, 489.

3. *Not only plaintiff's main theory but all the actual proof is adverse to the presumption of a grant.*

Plaintiff's witness, Bonillas, after testifying to experience with Mexican grants in Arizona, says:

“Q. Then in Arizona you did not have in this part of the country what were called community or town grants? A. Not that I know of.” (Tr. p. 124.)

Again, plaintiff's principal contention, supported by Obregon, was that Indian villages held fee title by virtue of the general laws of Spain. According to this they never needed a grant and never had one. It cannot, therefore, be presumed that a grant was made and lost.

“‘Where the origin of the claim of title is known there will be no presumption of a lost grant.’ *Clafin v. Boston & Albany R. R. Co.*, 157 Mass. 499; 32 N. E. 659; 20 L. R. A. 638. And the presumption cannot arise ‘where the claim is of such a nature as is at variance with the supposition of a grant’. *Ricard v. Williams*, supra, 7 Wheat. p. 108; 5 L. ed. 398.”

Oregon, etc. Co. v. Grubissich (C. C. A. 9th Ct.), 206 Fed. 577, 584.

Both the facts and the legal theory of plaintiff's claim are clearly at variance with the supposition of a grant.

4. *The situation in the Papago part of Arizona, as described by Bancroft and Bandelier, makes the idea of a grant to an unorganized and unrecognized Indian village an absurdity.*

The evidence shows that the first formal exploration, of which any record has survived, was made in 1697 (p. 218); that, after Father Kino's death in 1711, for more than 20 years no Spaniard is known to have entered Arizona (p. 219); that Indian revolts occurred and demoralization ensued between 1750 and 1767 (pp. 219, 220); that there was no Spanish occupation at all beyond a narrow part of the Santa Cruz Valley, and even there only two missions with a few visitas (pp. 220-1); that a certain degree of prosperity, beginning in 1790, disappeared entirely by 1822, and that all establishments, other than the military posts, were practically abandoned (p. 222); that, between 1842 and 1845, there is no indication that any Mexican settlements existed except at Tucson and Tubac, while the Papagos were in revolt until pardoned in 1843; that there was a constant diminution of the population and Mexican civilization had almost entirely vanished before 1853 (pp. 222-3). Both Spaniards and Mexicans had all they could do to maintain themselves against hostile Indians, among whom the Papagos were from time to time classed, except when there was joint action against the common foe, the Apache. The visitador-general, as heretofore shown, twice recommended the removal of the Papagos. The names given on the maps of Kino and others did not designate prosperous Spanish missions and settlements, but merely Indian

rancherias (pp. 220-1). The Papago villages “were but hamlets compared with those of their Southern brethren”. “They could scarcely be called village Indians.” They “were shunned and feared”. They “roamed over rather than resided in the Southwestern corner of Arizona”. (Tr. pp. 224-5.) All these things repel the presumption of a grant to a village of such people, and indeed render the idea fantastic.

5. The Papagos make no claim to a grant, and their theory of land tenure is inconsistent with a grant to a community.

This statement is abundantly supported by the evidence hereinabove considered. The Papagos claim, of course, as do all Indians, that they own the land on which they live, but, as repeatedly shown, the claim is that the tribe owns the whole country, and the only individual ownership is that of cultivated fields by the heads of families.

“It is not the possession alone, but the possession accompanied with the claim of the fee that gives this effect.”

Ricard v. Williams, 7 Wheat. 59, 105.

No Papago community claims as a community to own the land which it occupies.

In addition to all the foregoing, it goes without saying that no presumption of lost grant could be indulged because there is no proof of an identifiable plaintiff to make a grant to, and no proof of possession, ancient or modern, of any defined tract to which a grant could attach.

Miscellaneous Comments.

1. *Defendants are not disregarding Papago rights.* Counsel to make out any case at all would have to prove that defendants had in fact destroyed, or were threatening in some way to destroy, whatever title the Indians had, which, as all the proof shows, could only be that of tribal occupancy of a portion of the public domain. The only substantial attempt to make such proof was by the introduction of a Land Office map of 1920 (Tr. p. 138) designating non-irrigable lands under the Enlarged Homestead Act, the assumed inference being that all the Papago lands shown in red thereon as non-irrigable were open to homesteaders. The legend on the map alone disproves this, showing that the map "includes patented and entered, as well as vacant land". In other words, it showed all non-irrigable land, leaving the homesteader to find out from the Land Office what parts of it were still open to entry. Further, plaintiff's witness, by whom the map was introduced, completely destroyed this inference by saying

"This land (the Papago land) as shown must have been withdrawn, *as it is now made a reservation*. That which is not in the reservation is open for entry, *provided it is not settled on by an Indian*. This rule always applied to every homestead entry. They have to state that it is not occupied by an Indian, whether in the reservation or otherwise. If so occupied it cannot be entered." (Tr. p. 138.)

This is fully confirmed by Baldwin, who testified that the Department of the Interior follows today

the instructions of 1887, and permits no entries upon land “in the possession and occupation and use of Indian inhabitants, or covered by their homes and improvements”. This means “any occupation or any use” (Tr. pp. 271-4).

This policy has been directly announced at least four times by the Department of the Interior (3 L. D. 371; 6 L. D. 341; 30 L. D. 125; 32 L. D. 382), and is the settled law of that Department.

There is no showing that defendants have disregarded their own rule; the showing is entirely to the contrary. They have treated this land as public land of the United States subject to the right of Indian occupancy *wherever the land is in fact so occupied*.

The deposition of Clotts, Supervising Engineer, Indian Irrigation Service, recounting in detail the protection and help given the Papagos by the United States, was excluded by the trial court and is not reproduced in the transcript. The reports of many Indian Agents in evidence, however, show that the Papago situation was in the mind of the Government from very early times. The statutes and Executive Orders sufficiently tell the rest of the story. Appropriations for Arizona Indians or Indians of Arizona and New Mexico “to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life”, and for general expenses of Indian administration in those territories or states were made in successive years from 1864 to the present time. They started with \$20,000, and for a long

series of years, beginning about 1909, have been \$330,000 annually. In 1921, the general Indian appropriation was made for Arizona separately in the sum of \$190,000, which has been continued since. It seems unnecessary to give a complete set of references. Some of the earlier and some of the later are:

- 13 Stat. 161, 180, 541, 559;
- 14 Stat. 255, 279, 512;
- 15 Stat. 198, 219;
- 16 Stat. 13, 36, 335, 357, 544, 566;
- 17 Stat. 165, 186, 438;
- 35 Stat. 75, 786;
- 36 Stat. 272, 1062;
- 41 Stat. 1232.

In 1912 an appropriation of \$5,000 was made for the "development of water supply for domestic and stock purposes and for irrigation for *nomadic* Papago Indians in Pima County, Arizona", with another appropriation of the same amount for an investigation looking toward the enlargement of irrigation and development of a water supply among the Papagos (37 Stat. 522). Similar appropriations were made in 1913 and 1914 (38 Stat. 85, 587). In 1914, \$50,000 was appropriated for Papago schools (38 Stat. 584), and in 1914, 1916, 1917 and 1918, \$20,000 each year was appropriated for pumping plants, tanks, water supply, etc. for eight Papago villages (39 Stat. 130, 974; 40 Stat. 568). In 1918, \$10,000 was appropriated for a fence along the boundary between the main Papago reservation and Mexico (40 Stat. 569). In

1919, \$52,000 was appropriated for maintaining the existing waterworks and constructing new wells, etc. at seven more villages (41 Stat. 10). In 1920, provision was made for water plants at five other villages by an appropriation of \$52,000 (41 Stat. 416). In 1921, \$20,000 was appropriated for the operation and maintenance of existing pumping plants (41 Stat. 1232), which appropriation has been continued or enlarged since (42 Stat. 566, 1188).

Between 1874 and 1912 seven reservations were created for the Papagos by Executive Orders (Tr. p. 20), and in 1916 a vast reservation of about 2,800,000 acres was set apart. In 1917, this was reduced to 2,443,000 acres, by taking out a strip from east to west through the center. This was done on petition of the Arizona Legislature and other bodies because the reservation, before diminution, stretched clear across the inhabited portion of Pima County, and it was desired to leave a passage for persons and cattle without trespassing on Indian land. This large reservation was made on the petition of the Papagos themselves *and now covers most of the Papago country* (Tr. pp. 304, 308). Almost all of the Indian occupancy is, therefore, protected by the reservations and the small part (if any) lying within the withdrawn strip is protected by the general law announced and followed by the Department of the Interior to grant no titles to public lands in Indian occupancy. Once more, this suit is seen to be without basis.

2. *Episode of the Arizona Southern Railroad Company.* In 1882, Congress granted a 200-foot right of way through the San Xavier reservation, established in 1874, to this company, providing that the consent of the Indians should be obtained and compensation paid according to an estimate to be made by the Secretary of the Interior. All this was done. Section 2 of this Act reads:

“That whenever such right of way shall cease to be used for the purposes of the said railroad company, *the same shall revert to the United States.*” (22 Stat. 299.)

We have thus a direct legislative construction of the situation before us, and an announcement that the fee title to the land was in the United States. Yet this was San Xavier, the oldest mission and earliest seat of Spanish civilization in Arizona. *A fortiori* the same is true of the desert land to the southwest occupied by those whom Congress, in 1912, 1913 and 1914, expressly describes as the “*nomadic Papago Indians in Pima County, Arizona*” (37 Stat. 522; 38 Stat. 85, 587).

3. *The Indian opposition to this suit is voluntary.* Counsel intimate that the Indians were coerced into supporting defendants, and that counsel were prevented from interviewing them. They also complain that the Indians were told that the purpose of this suit was to take away half their lands. The latter statement is correct, and we submit that in view of Martin’s agreement, first, to segregate the Papago land from the public domain, and then to divide it between himself and the Indians, this description of the aim of the litigation is exactly true.

The former statement is entirely wrong. The operations of Martin's agent, Guittard, on the reservation continued from 1911 to 1922, covering from a few days to a few weeks each time, and on one occasion as much as 5 or 6 months. He gave his version of the purpose of the suit to the Indians and there was no refusal by them to give information until 1919 or 1920 (Tr. pp. 388-9). Here was eight years' unrestricted opportunity to learn the facts and circulate his propaganda. After suit was brought, however, and the Government learned of the deeds and powers of 1880, and of Brown's offer of \$100 apiece for confirmatory Indian signatures (Tr. p. 395), the Indians were warned to be on their guard and to bring or send interviewers to the Superintendent, or to do their talking in the presence of some Government official. In view of the above disclosures this was a wise and necessary precaution for the protection of the ignorant and unwary (Tr. p. 337). Further, on the trip through the reservation, at which all the Indian depositions were taken, the Government voluntarily gave transportation to one of plaintiff's attorneys, who had exactly as much opportunity as defendants' counsel to interview witnesses, with the sole difference that he would have had to do so in the presence of the Superintendent. If this was not enough leeway, considering that he was attempting to make defendants' witnesses his own, he could have procured the issuance of subpoenas through a designated notary and could have examined witnesses privately at his leisure. The fact that the Indians were not overawed by the Government's representatives is so clear from the nature of their testimony that discussion is unnecessary.

4. *Alleged errors in the admission of testimony.* Appellant (Brief, pp. 126-131) urges that the Hunter-Martin contracts (Tr. pp. 246-250), the admissions made by Martin to Bowies (Tr. pp. 265, 270-1), and the Papago petition introduced by Thackery (Tr. pp. 404-5-6-7-8) are irrelevant and incompetent. Equity regards substance and not form, and would indeed be blind and impotent if it could not brush aside the screen and discover the real essence and purpose of the case, viz: that the real and only plaintiff is Martin, bringing suit in the name of the Indians under his express contract so to do, for the purpose of segregating the Indian land from the public domain, and then helping himself to half of it.

Thus the Supreme Court refers to

“Courts of equity which, unrestrained by the technicality, *could look past the nominal parties to the real ones.*”

Miles v. Caldwell, 2 Wall. 35, 40.

“That court (of equity) looks beyond the terms of the instrument to the *real transaction.*
* * * As the equity upon which the court acts in such cases arises from the real character of the transaction *any evidence, written or oral, tending to show this is admissible.* * * * The rule does not forbid *an inquiry into the object of the parties in executing and receiving the instrument.*”

Peugh v. Davis, 96 U. S. 332, 336.

Brick v. Brick, 98 U. S. 514, 516.

Cabrera v. Bank, 214 U. S. 224, 230-1.

The Hunter-Martin contracts were, therefore, clearly admissible, and since Martin was shown to be the real party in interest, his conversations with Bowie were competent, both as admissions and as disclosing the true nature of the cloaked transaction.

The Papago petition to the court was also properly admitted.

Letters to an attorney from his alleged client are admissible, both to prove and to disprove his authority.

Henderson v. Eckern, 115 Minn. 410, 413;

Buhl etc. Co. v. Cronan, 59 Ore. 242, 246.

If the Papagos had written a joint letter to counsel repudiating their authority it would, therefore, have been admissible. Surely it is proper to write a similar letter, or forward a similar petition to the court itself, and it would have been contrary to common sense to refuse to take cognizance of it. It was necessary in some way to bring to the court's notice the repudiation of counsel and suit by 195 adult males of the four villages chosen by counsel as constituting "Santa Rosa". It was physically impossible to take the depositions of all of them, or even of a majority. The only possible course was to have them set forth their wishes in writing for presentation to the court, and to have the man through whom this was done testify to the facts and introduce the petition as part of his testimony. The results of similar investigations as to the Papago information and desires were repeatedly given elsewhere in the case, and usually without objection.

It is not worth while to discuss the point, however, because the lack of counsel's authority was otherwise established. To say nothing of the 32 affidavits filed in support of the motion to dismiss, 31 Indian witnesses, many of them from the Santa Rosa Valley, testified to the same effect as the petition. They knew nothing of the suit until informed by Government agents. They had inquired far and near among their fellows and found them similarly ignorant. No one expressed approval of it. Counsel knew that their authority was questioned before all this testimony was taken on the reservation and made some slight attempts to obtain approval of the suit from the Government witnesses. Without exception these efforts failed. It was open to counsel to call in any and all Indians on the reservation as their own witnesses and uphold their own authority if they could. They called one only, Ben Johnson, who testified that neither he nor any of 20 other Indians wanted the suit (Tr. pp. 409-410). There is no pretense that any of the Indians employed counsel and since their lack of approval of the present suit is established by a mass of testimony the admission of the petition, if erroneous, would be harmless.

5. *The trial court's second reason for dismissal.* This was in effect that, assuming plaintiff to be a town or pueblo owning the lands in suit as communal property for the general use and benefit, it had no power to deed half of such property to an individual or to authorize him to institute a suit, the real and ultimate purpose of which was to obtain for himself clear title to half of said land (Tr. p.

100). This is obviously correct, and in itself an adequate ground of dismissal. If Santa Rosa had been a pueblo and had obtained title as such, its title would have been held in trust for the common benefit. The Supreme Court has repeatedly announced that such was the nature of the pueblo titles under Spain and Mexico.

“It was not an indefeasible estate; ownership of the lands in the pueblo could not, in strictness, be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation and to use the remainder for commons, for pasture lands or as a source of revenue, or for other public purposes. This right of disposition and use was in all particulars subject to the control of the government of the country. * * * These lands were not assigned to the pueblos in absolute property but *were to be held in trust for the benefit of their inhabitants.*”

Rio Arriba Co. v. U. S., 167 U. S. 298, 307.

Townsend v. Greeley, 72 U. S. 326, 336-7.

U. S. v. Pico, 72 U. S. 536, 540.

U. S. v. Santa Fe, 165 U. S. 675, 708, 713.

U. S. v. Sandoval, 167 U. S. 278, 296-7.

The assumed title being thus held in trust for the inhabitants and the attempted transfer being made under the laws of the United States, the case falls under the ban of a familiar principle thus expressed:

“This case, we think, falls within the well settled rule of law that a municipal corporation has no implied power or authority to convey away

for private purposes property dedicated to or held by it for the public use.”

Murray v. Allegheny (C. C. A. 3rd Cir.), 136 Fed. 57, 60.

Dist. of Columbia v. Cropley, 23 App. Cas. 232, 248.

Meriwether v. Garrett, 102 U. S. 472, 513.

Lake Co. etc. Co. v. Walsh, 160 Ind. 32.

The attempted conveyance, therefore, was a breach of trust and *ultra vires* of the assumed corporation, and since the deed and the power to sue are inseparable, and the attempted exercise of the power is shown to be a step toward effectuating the illegal deed, the suit, along with the whole transaction, falls to the ground. The matter is too obvious to need discussion.

This suit is subject to dismissal on account of failure to substitute Secretary Work for Secretary Fall as a party defendant.

This suit was brought January 28, 1915, against Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office as parties defendant (Tr. p. 1). The complaint showed that these defendants were sued in their official capacity only (Tr. pp. 3, 5, 9). On June 19, 1920, upon a suggestion that said Lane had resigned as Secretary of the Interior, that he had been made defendant solely in his official capacity, and that John Barton Payne had been appointed in his place, an order was entered substituting Payne, as Secretary of the Interior, as defendant in place of

Lane (Tr. p. 78). On February 24, 1922, upon the suggestion that Payne's term as Secretary had expired, and that Albert B. Fall had been appointed in his place, and also that the term of Clay Tallman as Commissioner of the General Land Office had expired, and that William S. Spry had been appointed in his place, it was ordered that said Fall and said Spry, both in their official capacities, be substituted as defendants in place of Payne and Tallman (Tr. p. 89).

On March 5, 1923, the resignation of said Albert B. Fall as Secretary of the Interior took effect, and Hubert Work, the present Secretary, duly appointed and qualified, took his place. William Spry (not William S. Spry) remained and still remains Commissioner of the General Land Office. *No substitution of Work as defendant in place of Fall was made*, and the parties defendant, are, and ever since Feb. 24, 1922, have been Albert B. Fall and William S. Spry, both in their alleged official capacities.

1. The court will take judicial notice of the date of Mr. Fall's resignation and of Mr. Work's accession to the position of Secretary of the Interior.

In Davidson v. Payne, 289 Fed. 69, the Circuit Court of Appeals of the 8th Circuit took judicial notice of the date of resignation of John Barton Payne as agent designated for purposes of suit under the Transportation Act of 1920.

Apparently the Supreme Court did the like in
Payne v. Industrial Board, 258 U. S. 613;
Le Crone v. McAdoo, 253 U. S. 217, 219.

In *Perovich v. Perry*, 167 Fed. 789, 791, the Circuit Court of Appeals of the 9th Circuit took judicial notice that on a certain date Charles J. Bonaparte was Attorney General, noting that "the incumbencies of the more important and notorious offices are judicially noticed".

In *Muir v. R. R. Co.*, 247 Fed. 888, 893, the court took judicial notice of the Presidential proclamation, with date, taking possession of the railroads, saying in the course of its opinion:

"As all know, Mr. McAdoo was then and is now Secretary of the Treasury."

Other cases in which Federal Courts have taken judicial notice of dates or of executive actions of various sorts are:

Kennett v. Chambers, 14 How. 38, 46-7;

Jones v. U. S., 137 U. S. 202, 214;

Oetjen v. Leather Co., 246 U. S. 297, 301;

Dillon v. Gloss, 256 U. S. 368, 376;

Wallace v. U. S., 257 U. S. 541, 546;

Givens v. Zerbst, 255 U. S. 11;

Benton, etc. Co. v. Coal Co. (C. C. A. 6th Ct.),
271 Fed. 216;

The Kaiser Wilhelm II (C. A. A. 3rd Ct.), 246
Fed. 786.

2. No substitution of the new Secretary having been made within 12 months after Mr. Fall's resignation, the suit cannot be carried on against the Commissioner alone, and necessarily abates.

In 1897, in the case of Warner Valley Stock Co. v. Smith, 165 U. S. 28, a bill was filed to enjoin the Secretary of the Interior and Commissioner of the General Land Office from exercising jurisdiction over certain lands and disturbing plaintiff's possession thereof. After a decree for defendants below, and while the case was in the Supreme Court on appeal, the defendant Secretary of the Interior resigned. It was held that as to him the suit necessarily abated (pp. 31, 33); that it could not be maintained against the Commissioner alone (pp. 33-35); that the bill could not be amended by making the succeeding Secretary of the Interior defendant (p. 35); and that the suit must necessarily be dismissed. This case is almost identical with the case at bar. The principle, however, was not new. Leading cases to the same effect were:

The Secretary v. McGarrahan, 9 Wall. 298, 313;
U. S. v. Boutwell, 17 Wall. 604.

The Smith case was followed by U. S. v. Butterworth, 169 U. S. 600, to the same effect, and no doubt as a result of the foregoing came the Act of Feb. 8, 1899 (30 Stat. 822; U. S. Comp. Stat. Sec. 1594) which provides in effect that a suit against a Department head or other Government officer in his official capacity shall not abate by reason of his death, retirement or resignation, but that the court may allow the substitution of his successor "on motion or supplemental petition filed at any time within 12 months thereafter".

After this Act a like question came before the court in *LeCrone v. McAdoo*, 253 U. S. 217, 219. The court said:

“We cannot consider that question, or the other arguments upon the merits of the case, because Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months, which is the limit for such substitution fixed by the Act of February 8, 1899, C. 121, 30 Stat. 822.”

The same rule was stated and followed in

Gnerich v. Rutter, 265 U. S. 388, 391-2-3;

Webster v. Fall, Secretary of the Interior, 266 U. S. 507.

The *Gnerich* case, following the *Smith* case, *supra*, also holds that a suit against a prohibition director could not be maintained without making party defendant the Commissioner of Internal Revenue, whose agent and subordinate the director is, just as the Commissioner of the General Land Office is an agent and subordinate of the Secretary of the Interior.

Apart from all other considerations, therefore, this suit must be dismissed.

The suit must be dismissed because the United States is an indispensable party, but cannot be sued without its consent, which has not been given.

When the cause first came before this court and the Supreme Court, the above question did not arise because, the facts pleaded being necessarily admitted, it followed that the fee title was in plaintiff and that the United States had no interest therein. Under the proof, however, it has been established that the Papago country is claimed by the United States as public land, subject only to Indian occupancy where such occupancy actually exists. Defendants have no interest whatever in the land, except that which flows from the claim that it is public land of the United States. The only effect of a decree against them would be to find and determine the rights of the United States, which is now seen to be the real defendant. The question whether the United States is really a party is tested by the effect of the judgment or decree. A decree for plaintiff would decide that 460,000 acres of land claimed by the United States as public land is not the property of the United States at all. The United States, therefore, is an indispensable party because its interests are vitally affected. But it cannot be sued without its consent and has not so consented. Therefore, the suit must be dismissed. This has been repeatedly decided. A few of the cases most nearly in point are:

- Oregon v. Hitchcock, 202 U. S. 60, 69, 70;
- Naganab v. Hitchcock, 202 U. S. 473, 475-6;
- Louisiana v. Garfield, 211 U. S. 70, 75, 77-8;
- New Mexico v. Lane, 243 U. S. 52, 57-8;
- Morrison v. Work, 266 U. S. 481, 485-6.

The general equities are with appellees.

A court of equity will consider the effect of a decree for either party as tested by general principles of justice. An attempt has been made to represent the Government as the despoiler of the Papagos or as designing to despoil them. The very opposite is true. The Papago status is exactly the same as that of all Indians, inhabiting territory acquired from earlier sovereignties, who did not have grants from those sovereignties. The land occupied is public domain, subject to the Indian right of occupancy. This occupancy is protected by the series of decisions and regulations above outlined, and no one has attempted to violate it. On the contrary, the assistance and protection given by the Government has grown with the years until almost the entire Papago country, even that over which they only occasionally roam, is now in reservations. Any part not so included is protected if in the possession of an Indian. Wells, schools, agency buildings and a fully equipped hospital have been constructed and maintained, along with an irrigation system at San Xavier. Between 1909 and 1914 an attempt was made to apply the allotment law and give each Papago land in severalty, but this was abandoned after it was seen that the desert nature of the country made it valuable for stock raising rather than agriculture. The old system whereby the cattle of the tribe roamed and grazed where they willed was found to give better returns; and stockmen have since been appointed to assist the Indians in the development of a stock industry, with most gratifying results. The Gov-

ernment has been a diligent protector of this tribe, and a heavy responsibility would rest on anyone who should undertake to change the present situation.

On the other hand, a decree for appellant would be the first step toward the spoliation of these Indians, to the extent of half the land they occupy, in favor of Robert M. Martin of Los Angeles. Since this is a test suit only, it involves not merely the 720 square miles directly in controversy, but the entire 2,600,000 acres covered by the first ten Hunter deeds. Appellant has asserted that the entire Papago country is needed for the support of the Papagos, and yet is striving to deprive them of half of it. A decree for appellant would be the harbinger of ruin and disaster to thousands of simple and worthy people.

The length of this brief forbids recapitulation of the numerous reasons for affirmance—both technical and substantial. Appellant's case has been completely shattered. The decree below is supported by the reasons given by the trial court and by many others. It is just and should be affirmed. In the interest of making an end of litigation, we urge that the court rest its decision on one or more of the grounds which will insure a complete and final disposal of this controversy.

Respectfully submitted,

GEORGE A. H. FRASER,

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*Special Assistants to the Attorney General,
Attorneys for Appellees.*

APPENDIX.

The law of Spain, which in Indian matters remained practically unchanged during Mexican sovereignty up to 1853, applied to the territory in controversy when it became part of the United States under the Gadsden Purchase. It is, therefore, regarded as domestic and not foreign law and is the subject of judicial notice in American courts (*Fremont v. U. S.*, 17 How. 541). Since, however, the principles and details of this law were not in fact known to the trial court, both sides produced witnesses to elucidate it. The testimony of two of these, Ygnacio Bonillas, on behalf of plaintiff, and Jorge Vera Estanol, on behalf of defendants, was taken by deposition without objection on the score that it was not properly evidentiary and is, therefore, incorporated as evidence in the transcript, pp. 115, 410. The other two experts appeared in person at the trial, where the court was willing to hear them, but declined to receive their remarks as evidence, although they were examined in open court by question and answer in the ordinary way. These were Toribio Esquivel Obregon on behalf of plaintiff, and Manuel Garza-Aldape on behalf of defendants (*Tr.* pp. 216, 274). Appellant having incorporated in its brief a portion of Obregon's testimony, appellees append for the information of the court a summary of portions of that of Garza-Aldape, and of the cross examination of Obregon. Both are too lengthy to permit of complete reproduction.

MANUEL GARZA-ALDAPE.

Qualifications:

Spanish speaking native of Mexico; admitted to practice law in all courts of that Republic. Graduate of National School of Jurisprudence in 1893; practicing continuously in Mexico from 1893 to 1913; member of the National Congress of Mexico for ten years; Minister of Revenue and Gobernacion, corresponding more or less to the United States Department of the Interior, and occupant of other official positions, under the Huerta regime. Law practice in Mexico dealt a great deal with land titles; for last eight years advising on Latin-American matters in office of Curtis, Mallet-Prevost and Colt, New York City, a firm with offices or correspondents in every Latin-American country.

In my study and practice of law, I acquired knowledge of the laws governing the right or title of Indian villages in Mexico to the land they lived on, covering the law of Spain prior to Mexican independence and the Mexican law thereafter. Up to very recently the laws of Spain were in force in Federal matters relating to the creation, organization and legal essentials of pueblos among the Indians.

The word "pueblo" has two meanings. In a general sense it means people. Applied to Indian communities, it also has a technical meaning, viz.: a pueblo duly established or recognized by the authorities. In the technical sense the word "pueblo" never designated a municipality of Spaniards. Their communities were called ciudades, villas and lugares,

meaning cities, villages and places. Up to 1853 in Mexico the technical name of a municipality of Indians was "pueblo", but that word in its ordinary non-legal sense might be applied either to an Indian or a Spanish village. A "rancheria" is a small rural community which has no entity or jurisdiction. Up to 1853 in Mexico, that word was never used to designate a legally recognized municipality.

Up to 1853, in order that an Indian community in Sonora might become a pueblo in the legal sense of the word, it was necessary to have an act by the proper authorities, the audiencia or governors, authorizing its foundation. After Mexican independence, the laws governing the organization of Indian villages were the same old laws. Mexico made no change in the laws of Spain that had previously governed the creation of Indian pueblos, but after Mexican independence, the National Congress or the State Congress made the foundation. The fact that a number of Indians had always lived together in a certain place did not make the Indian community a legal entity under the laws of Spain or Mexico. It was necessary, in addition, to have an act founding the town and creating the legal entity. This might be the voluntary act of the Government or the result of an application by the Indians. The general practice of Spain was to center these Indians in towns to Christianize them. If there was no governmental act such as I have described, a community of Indians that had always lived in the same place had no legal status, and up to 1853 no smaller or less organized community than a pueblo was recognized as a legal entity among Indians. The Indian pueblo was a very

rudimentary governmental agency with an alcalde and regidores (councilmen) with jurisdiction over small police matters. Graver police matters or things requiring higher discretion than police matters were out of their jurisdiction, and they went to the Spanish authority.

If a community of Indians in Sonora had been living in the same place from time immemorial but without formal official recognition, such as I have mentioned, I don't see that it had any right or title to the land it occupied. Mere possession under the Spanish law did not ripen into title. There was no recognition by the government of Spain or Mexico of any right of occupancy in the Indians of a village because the elementary theory was that all the lands of Mexico belonged to the King. There were only two ways in which said lands could be divested from the Crown. One was a sale or grant by the King or his representatives. The other was "composition", which is a sort of settlement between the King and the possessors of lands with a paper title, by which they might pay for and acquire said lands.

Up to 1853 the fee title to lands given to an Indian community for the common use of the occupants was in the King, the pueblo having only the use and enjoyment. After the pueblo was recognized, its lands were of two kinds, "fundo legal" and "ejidos". The former was given for the purpose of distribution among the inhabitants for housing purposes. The latter were given for pasturage or other common use. The fee title of both kinds of land remained in the King, but the inhabitants would acquire fee title to

the lands and lots of the fundo legal, provided they built houses and remained on the land for four years. The ejidos could never be distributed. They were given for the common use of the people. If, however, the Indian village had not been recognized by the government at all, its status would not be apparent. The Indians would have nothing except a mere tenure of possession. If the pueblo had been recognized and established by the government, I think its usufructuary title was still subject to governmental control or disposition, but I do not remember any law which expressly decides that point. In the case of a village which had not been recognized by the government and merely had possession of the lands, the fee title belongs to the government which has all the rights. Several laws were enacted to allow them to hold title to such possessory lands if they did so and so; otherwise they would be expelled.

If an Indian pueblo was recognized or created as such by the government, a record would be made by giving it a charter which was kept in the archives of the Council of the Indies, and after the independence of Mexico, in the archives of the States. If a question arose as to whether an Indian community was a pueblo or not, the evidence produced to settle that question would be the charter.

Neither an Indian pueblo, nor anyone else, could acquire title by prescription against the government to the lands it occupied up to a very recent date. In 1863, a law was enacted in Mexico vacating the old laws which forbade prescription of the lands belonging to the State.

When Book 4, Title 12, Law 14 of the Recopilacion orders that the title of those who hold by a just prescription shall be confirmed, the term "just prescription" is a technical term in Spanish law. This law must be construed along with Law 17 of the same book and title, which shows that prescription is based on a defective title along with possession. The original provision was that prescription could not run against the Indians or the Royal Treasury.

The passage in the same law 14 reading "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown" is an express statement of the law in regard to the lands of Mexico. It says specially that all lands belong to the crown except those which have been granted by the King or his predecessors. It states that all land belongs to him and the only way in which ownership thereof can be acquired is by a grant from him. The same law further says: "After distributing among the Indians whatever they may justly hold, to cultivate and raise cattle, confirming to them what they now hold, and granting what they may want besides, all the remaining land may be reserved to us clear of any incumbrance for the purpose of being given as rewards or disposed of according to our pleasure." That says that Indians might be given lands but a grant is always necessary to acquire something from the Crown. This law and several others contain provisions to protect and favor the Indians. The expression "confirming them in what they have" shows that it is necessary to have

an act of confirmation. If there is no such confirmation or gift the Indians under the laws of Spain or Mexico had no title because it was impossible that there should be at the same time two owners of the same thing. This Act was not self-operative. It recognized a superior claim and conferred upon the proper representatives of the King the authority to make a grant to bodies of Indians who were thus given this preferential position. If no such appropriate proceeding were taken whereby a grant would issue, the Act itself commanded no title. In the passage from Chap. 11, p. 91, Vol. 1 of White's *New Recopilacion* reading "To constitute prescription, good faith, just title and capacity of the thing for the purpose and of the person who prescribes are necessary; as also is continued or uninterrupted possession for a determinate time", the expression "just title" means some title which is sufficient to transfer ownership like a sale, contract or agreement, and is possibly in a manner the same as color of title in American law. The "just title" is one which is not sufficient in itself. As to the requisite of "capacity of the thing for the purpose", the royal domain of Spain or the public lands of Mexico could not be acquired by prescription up to 1863. The passage above quoted is a statement of the underlying general law of prescription in Spain. It is applicable to individuals, but it was not possible to get the lands of the crown from the King by prescription because crown lands were not competent to pass by prescription. In 1863 a law was passed in Mexico allowing prescription against the government.

The passage quoted mentions as another essential for prescription "capacity of the person who prescribes". A community of Indians which had not been formally recognized as a pueblo by the government would not have the capacity to prescribe under that law because it had no legal entity. The article on prescription from Febrero Novisimo found at page 346, Vol. 1, White's New Recopilacion, requires, "1.—title of acquisition; that is to say that the thing be held by purchase, gift, inheritance, or other of the contracts that transfer dominion; 2.—good faith; 3.—continued possession; 4.—the time prescribed by law; 5.—capacity of the person who prescribed, and of the thing prescribed." "Title of acquisition" means "just title" which I have explained already. This is an explanation of the same law. The Royal Cedula of 1754 (2 White's Recop. 62-67) had several purposes. One was to make a general inquiry in regard to titles in Mexico, and it established the rule that all lands held in possession with titles prior to 1700, but without confirmation, would be held good if the titles were presented to be annotated. The main purpose was to make a general inquiry so that all lands not possessed with good title might revert to the crown. Titles up to 1700 were confirmed very easily. After 1700 titles were to be presented so that the lands if not surveyed might be surveyed and these titles might be compounded by paying certain fees to the Crown. The purpose was to secure a scrutiny of all outstanding titles and to recover the lands which were held without legal title, but at the same time several ways were provided to make such titles effective. The words "warrants or writings" in

paragraph 4 might better be translated "titles or instruments". Where it says in the second division of the same paragraph "If persons have not warrants their proof of long possession shall be held as a title by prescription", this does not at all mean everyone who has been in possession of any land because the paragraph says that, it appearing by the titles of instruments that may be presented or by any other means, that they are in possession of such Crown lands by virtue of a sale or composition made by delegates, if they had such composition before the year 1700 they ought to have title which should be one of composition. The second part provides that when they present the paper title it is sufficient for any defect that may be cured. But if they have lost the paper title, then they can prove that they had such possession and such title and then the lands may be compounded. If anyone claiming a prescriptive title did not appear and prove it as required within the time fixed by paragraph 6, the law says that he lost his rights. In order to obtain a title based on prescription under this law, it was necessary to have a title coming from a sale or composition and possession of the land for a certain time and it was also necessary to appear before the official in order that such title might be noted, and if the paper title had been lost, to prove its existence and the fact of the possession. If this was not done, the result under paragraph 7 was that the possessor should be warned that upon failure to comply, the lands should become part of the royal patrimony in order to be sold to others, even though they were cultivated or with buildings on them.

In reply to the statement made in argument that this decree did not apply to Indians at all, I produce the work entitled "Legislacion y Jurisprudencia sobre Terrenos Baldios", by Wistana Luis Orozco. This is a compilation of laws relating to Crown lands made "with the official authorization of the Mexican Government in 1895". On p. 131 appears a law of February 15, 1765, reading (witness here read the enactment which recounted previous published warnings to those failing to comply with the Cedula of 1754 and ordered a last peremptory publication, prescribing the method of making it). The law then continues: "All possessors who have not already presented their titles, as well as all *Indian pueblos*, which have only the enjoyment of the land granted to them, shall be ordered to appear in person or by attorney" (within specified periods), "* * *. They must be warned that if they fail now to comply with this last and peremptory command, they will be dispossessed of their lands, although they may have them with legitimate title, and that such land shall be sold on the account of His Majesty."

Article 27 of the Mexican Law of 1863, as translated in Hall's Mexican Law, p. 178, reads: "The provisions of the ancient laws which declare public lands imprescriptible are repealed from this date." The ancient laws referred to are those of Spain about which I have been testifying, and when it says that the ancient laws declared public lands imprescriptible, that means that they were so considered up to 1863.

The charter given to an Indian pueblo recognized by the Government might or might not assign a spe-

cific tract of land, but the law determines what kind of land may be given, viz.: a fundo legal—in the form of a square, or ejidos (commons) with the boundaries marked. The proceeding was to make a survey, calling in the neighbors in order to ascertain the boundaries of others and fix the pueblo boundaries with the consent of the neighbors. The Spaniards in the new world did not respect the Indian rights of possession very much because the law was enacted to protect the Indians against the Spaniards who were taking the land they had possessed or the land they had by law from the Crown.

Book 4, Title 7, Law 23, of the Recopilacion, translated in Vol. 2, p. 48 of White, relating to Spaniards making settlements among the natives reads in part: "Should the natives attempt to oppose the settlement, they shall be given to understand that the intention in forming it is to teach them to know God and his holy law * * * and not to do them any harm or take from them their settlements * * *. If, notwithstanding, they do withhold their consent, the settlers shall proceed to make their settlement without taking anything that may belong to the Indians and without doing them any greater damage than shall be necessary for the protection of the settlers and to remove obstacles to the settlement." This law says clearly that the Spaniards should proceed to make the settlement as mildly as possible, to have the Indians at peace and contented, and to get their consent, and if not, that they make the settlement nevertheless, but try not to arouse the feelings of the Indians against them. The numerous laws in the Recopilacion for the protection of Indians requiring

them to be left in possession of their lands; providing that lands should be granted to Spaniards in such manner as not to prejudice the Indians; that the Indians should be left in possession of the lands that belong to them, etc., absolutely do not recognize land titles in the Indians. They were mostly of a political nature and the statement is that they were always ready to give the Indians not title to their lands, but lands for the common enjoyment; but the law itself did not operate to give title. The native Indians had no title which was not subject to disposal of the Crown unless they had received some sort of grant, and I don't believe there is anything contrary to that idea in all these laws for Indian protection. It is absolutely clear to my mind that it was absolutely impossible to give title to any land without a grant of the Crown, and that is more clear after the Royal Order of 1754. The Proclamation or circular of President Juarez issued September 30, 1867, has great official weight. It is a rule of construction. After stating that when public lands are adjudicated and title issued care must be taken to avoid injury to third parties, it continues: "And, although such injury does not exist strictly speaking in respect to the lands which are in possession of the Indians when they lack their respective title given by competent authority, notwithstanding, the rule has been carried out by reason of equity and public interest", etc. This paragraph states the exact doctrine I have already stated, that the Indians have no title, and if not, they have no right to the possession of the lands themselves. It says that it requires a title given by competent authority, but, nevertheless, they being

here, they want to respect them, and give them title which they have not. It also means that unless the Indians have title given by competent authority the lands they are on would be given to others without legal wrong. The passage near the end of the same circular requiring notice to the Indians "who may appear immediately to solicit the respective titles to lands which they are in possession of, even when no one disputes them, under the conception that such title shall be issued to them gratis, the title being thus legitimized which otherwise might be claimed" means, among other things, that unless they had the title by grant, they had no title which the Government need respect. There is no difference between the principles set forth by this circular and the law of Mexico as to Indian rights up to 1853. The fact that Indians were made citizens and placed on an equality with other Mexicans at the time of the independence refers to political and civil classification and did not affect land titles in any way.

Book 6, Title 3, Law 15 of the Recopilacion, when it refers to pueblos means municipalities of Indians recognized by the government, and Laws 16 and 18 of the same title refer to the jurisdiction of the alcaldes in such Indian towns. There is no possibility to speak about an Indian pueblo if it is not recognized by the Government, and wherever you find the word in the Recopilacion with allusion to the Indians, it means that sort of pueblo.

In Book 4, Title 12, Law 19, where it says that communities of Indians shall be admitted to composition in preference to other persons, etc., it means

that communities which possess lands without title can be so admitted. I have already said that the Indian towns have not the fee title, but only the enjoyment of the lands in common, but this special title can be compounded. This is a way by which Indian communities not officially recognized may obtain a title (witness corrects the foregoing statement) I misunderstood the question. My idea was, Indians who have a title which is not perfect. If they had been recognized by the viceroys, but without royal confirmation, this was a way to perfect the municipality. It might also refer to Indians who have ownership in common, having acquired a tract of land without dividing it. They could apply for composition like any individual owner.

The Spanish or Mexican idea of the rights of Indians occupying land from time immemorial does not correspond with the United States law as to the occupancy or possession title of Indians. The only way in which a right can be acquired to land is by grant from the Crown or its successors. The occupancy or possession title of Indians was not recognized in Spain or Mexico.

Book 1, Title 2, Law 5 of the Siete Partidas does not support the idea that the right to be a corporation could be acquired in Spain or Mexico by immemorial prescription. It refers to the way in which a custom or unwritten law may be established and, after first defining "pueblo" in the sense of a group of people, says that if such a group or a majority of it have for a specified period done anything by way of custom and two decisions applying to said custom

have been rendered in council without objection and the custom is consistent with right, reason, etc., such custom can be made obligatory as a law. Under Spanish or Mexican law, a community could not acquire municipal entity without some act of the government.

The statement made by counsel in argument that there were two kinds of Indian communities, those which existed before the Spaniards came, and the new reducciones, that the organized pueblo of Indians referred to the second class only, and that the old, immemorial villages were considered municipal entities without any governmental action, is not correct under the laws of Spain and Mexico. The further statement that the Papal Bull which gave title to the King made the grant conditional upon the King caring for the Indians and leaving them undisturbed in their possession was never recognized by said laws, which expressly say that all the lands belong to the King without making any exception at all.

Cross Examination.

There were villages or groups of Indians not reduced to pueblos as a fact, but they have no legal standing under the Mexican law. There is no law which makes the definition or distinction that communities of Indians always mean officially recognized communities, but the general laws themselves show that clearly. In support of the proposition that all the land in America belonged to the King and could not be divested except by grant or composition, I also refer to the Royal Cedula of November 1, 1591, reading in part: "I order you that you make that

all lands which every person may have or possess in this province without legitimate titles may be vested duly to him. Examine said titles for that purpose, because all is mine and all belong to me." This was reproduced in Law 14, Title 12, Book 4, which commences: "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown." Where the same law reserves everything necessary for the inhabited villages and towns, granting to the Indians that which they need, confirming them in that which they now have, and giving them, in addition, that which is necessary, this refers to any rights they may have apart from mere possession. Possession as a fact, not as a right, cannot come under the provisions of this law. If Indians had possession with certain rights or titles, they should be protected. If they did not have them, they had absolutely to obtain lands from the crown which was ready to give those lands to them. If the Indians had grants, although imperfect and not confirmed, they might have rights which should be confirmed. The law says give the Indians lands for their labors or for what they need, but that is not an actual gift. It is a promise. Until this is done there is no basis for any right. It also says that as to what they have, we must proceed to an act of confirmation and if this is fulfilled, they may have it. These limitations and as well the requirement to give them in addition what may be necessary all require an act and confirmation. All these things mean grants. A confirmation is nothing but a grant,

because the King may allow them any claim they have against a particular piece of land. Such confirmation would be in the form of a paper or grant.

Composition presupposes previous title, and mere possession is not a matter of composition. A man may have possession of a thing, but no matter how long he has it he has no right to it, but he may have a thing with a right to acquire it, and then it is called possession. Indians could acquire property individually or as pueblos, and individuals who acquired and held land in common could compound that like any other individuals, and the expression communities of Indians means either a recognized pueblo or an unrecognized group possessing lands in common. I have examined several titles in Indian communities of that kind. Such a group of so-called owners has no entity.

It is impossible to think of any village or community or Indian pueblo without license from the King for the organization. (Witness reads from the Ordenanzas on Lands and Waters, p. 102, an authority referring especially to Mexico, and published in 1856.) It is impossible to think of the founding of a town without royal license.

The Juarez circular of 1867 states what the disposition of the Mexican Government was in regard to Indians at that time. It was the owner of the lands which had not been granted or acquired by private persons, so the owner says to the Indians: "Although you have not title, I am ready to give you one." That was a letter of instruction by an Executive Department and was sound if the President or his Minister understood the law aright.

The Spanish Kings tried to protect the Indians in every way, but the Spaniards who came to America did not care much for the protection of the Indians, and that was precisely why these laws were enacted.

As to the proposition that the ejidos were devoted to the common use of the inhabitants and could not be converted into a fee title, I quote the official *Codigo de Colonizacion y Terrenos*, by Francisco L. Maza, p. 21. This collection shows Royal Cedula No. 23 of May 20, 1611, making a grant to an Indian pueblo and containing these words: "I call these lands crown lands because they are given for the common use of all the inhabitants of the pueblo and because the ownership in said properties was subject to the King, and the use of them was granted to the subjects; and because said lands are to be held in common they cannot be sold or pledged."

"Just title" means prescription under color of title, and the occupancy of a particular piece of land for 40 years without paper title could not result in title under the old Spanish law.

I think the Juarez Circular of 1867 is analogous to a circular of instructions issued by the General Land Office of this country expressing the construction that office places on the law. It says that the Indians who have mere tenancy, no matter for how long a time, have not title and they need to have one, and the Government is ready to give them one. That circular did not in any way alter the general view of Mexican law up to 1863. (Original Transcript of Testimony, pp. 370-449.)

CROSS EXAMINATION OF PLAINTIFF'S WITNESS, OBREGON.

The bulk of Obregon's testimony on cross examination amounted to an adherence to views expressed by him on direct examination in the face of passages called to his attention from the statutes and decrees of Spain and Mexico, from Spanish commentaries, from Mexican authorities, from Hall's Mexican Law, and from the Supreme Court of the United States, all to the contrary effect. The length of this cross examination which covers nearly 100 pages makes it impossible to reproduce it here; and indeed such reproduction is unnecessary because the more important of the authorities used are quoted or cited in appellees' brief, so that this court can form its own opinion of their meaning and weight.

A few passages from the cross examination are given as specimens.

After Obregon had stated, in opposition to Hall's Mexican Law, Sec. 2, that the right of Spain to the lands of the new world rested not on discovery and conquest, but on the Papal Bull, occurred the following:

“Q. Do you deny that the power of Spain in the new world was in part founded on conquest?

“A. That is the theory of all writers, that it was derived from the Papal Bull.

“Q. I call your attention to the case of Johnson v. McIntosh, 1 Pet. p. 574, in the Supreme Court of the United States as follows: ‘Spain did not rest her title solely on the grant of the

Pope. Her discussions respecting boundary with France, with Great Britain and with the United States all show that she placed it on the rights given by discovery.' Do you claim that the Supreme Court of this country is wrong in making that statement?

"A. Oh, no. I can't claim that. I am not saying that. I can merely say this; that the Supreme Court may have taken the opinion of other writers I have mentioned", etc. (Original Transcript of Testimony. pp. 731-2.)

Witness' attention being called to Book 1, Chap. 9, Par. 16 of Solorzano's Laws of the Indies reading: "Although the conquest be made by subjects, of their own motion and at their own expense, the provinces, lands, towns, and real property belong to the crown", he testified:

"A. Yes, I see the paragraph is as you say. This is merely one of the many cases in which the King repeats what the Papal Bull provides, that all the lands of America belong to him.

"Q. Yes?

"A. That is not in conflict with the limitations that the King himself puts, in many and repeated laws made, of his powers.

"Q. You mean the *general laws for the protection of Indian possession* that you have referred to?

"A. Yes, sir." (Or. Tr. p. 733.)

Witness being asked to consider Book 4, Tit. 12, Law 14 of the Recopilacion reading: "Whereas we have fully inherited the dominion of the Indies, and whereas the national land and soil which were not

granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown”, the following occurred: ‘

“Q. Now, is not the natural meaning of that that the King asserts full and unqualified ownership of all land that he has not granted?

“A. If you read up to that point, that is true; but if you go on reading, you can find something else in that same law.

“Q. We will go on presently. The law goes on to say, ‘It is expedient that all the land which is held without just and true title should be restored as belonging to us’ and so on, and further, ‘to be granted to the villages and councils already settled * * * and after distributing among the Indians whatever they may justly want, to cultivate, sow, and raise cattle, confirming to them what they now hold and granting what they may want besides, all the remaining land may be reserved to us clear of any incumbrance, for the purpose of being given as rewards or disposed of according to our pleasure’. Now, ‘for distributing among the Indians’. Does not that contemplate some act or grant of distribution?

“A. Oh, certainly.

“Q. Yes, and it implies that the crown has the right to grant or distribute land among the Indians.

“A. Yes, what belongs to the crown. And it has also this expression, ‘confirming the Indians in what they now hold’.

“Q. Precisely, and the King asserts the right to give confirmation of what the Indians have.

“A. Yes, because he from the beginning asserted his right or power to dispose of the lands

which the Indians possessed.” (Or. Tr. pp. 739-740.)

Notice, also, the following:

“Q. Is it not true that the titles issued by the Indian government or Mexican Aztecs were ignored by the conquerors and later by the crown?

“A. Absolutely not.

“Q. I call your attention to Volume 2, page 767 of Orozco’s work on ‘Legislacion y Jurisprudencia sobre Terrenos Baldios’ by Wistana Luis Orozco, on page 767, and ask you whether, according to Orozco, those earlier titles were not ignored by the Spanish crown.”

Witness answered by disparaging the authority of Orozco, after which the examination continued:

“Q. I ask you if it is authority for whatever it may be worth, and if this authority for whatever it may be worth does not support what I have just said, that the Aztecs’ titles were ignored by the Spanish conquerors?

“A. Yes, that is what Orozco says. That is against the law.” (Or. Tr. pp. 744-5.)

Another specimen follows:

“Q. Is this statement from the Supreme Court of the United States in *Chouteau v. Moloney*, 16 How. 203, correct? ‘The Indians within the Spanish dominions, whether Christianized or not, were considered in a state of tutelage.’

“A. Not as soon as they showed some learning * * *, so as soon as they showed culture the tutelage was taken from them.

“Q. As a general rule, does not the same authority speak correctly when it says, ‘The In-

dians are considered as persons under legal disability' and 'speaks of their having guardians'?

"A. In the way I have said,—*in the way of property*, but not in the other." (Or. Tr. p. 752.)

Another passage follows:

"Q. You mean that he (the King) never at any time by conquest or otherwise obtained title to the lands that Indians were in possession of. Is that correct?

"A. No. As I said in the beginning, the King by the Papal Bull had all the land except what was necessary to accomplish that obligation of Christianizing the Indians. According to the deputation given by the Kings themselves.

"Q. What I want to find out is, did the crown by the conquest and the Bull acquire the entire domain of Mexico, or was there a part of it that was never obtained at all?

"A. It may be that your question is a little nice and delicate for this reason; the crown or the King was considered a sovereign; *there was no limitation to his power at all but the limitation that he made himself* according to his construction of the Papal Bull. Now, to say I am the owner of all the land, I shall consider it my duty not to take the land of the Indians. The land that the Indians possess I do not take, because if I do take it I do not comply with the obligation that was imposed on me. Now, that is a fact. The construction of that fact, whether that thing was a title or not in the land, which in modern times you may deduct for your own conception of those ideas. That was the fact; that was the construction of the King." (Or. Tr. p. 764.)

The following passage is characteristic:

“Q. They (the Indians) did not have to have any grant at all according to this theory.

“A. No, they did not, and in the opinion of Pallardes, the Indians did not have to have any grant because their title was prior to the title of the King.

“Q. And absolutely unimpaired by the conquest?

“A. That is the theory of the Kings themselves.”

“Q. I call your attention to the case of *Harrison v. Ulrichs*, 39 Fed. 654, where Mr. Justice Field says, ‘Some formal proceedings were necessary under the Spanish government to pass title to any portion of the public domain out of the crown to the subject. * * * Mere possession of any portion of the public domain under an instrument which did not purport to transfer the property did not create under the Spanish law a title in the possessor which would enable him to own the property against the Crown.’ Do you agree with that?

“A. No, I don’t, and I would not wonder that the Supreme Court was misled in this case by the opinion of many Mexican writers, or some of the Mexican writers who had been prejudiced according to what I said yesterday in propaganda against Spain at the time of the Revolution for independence. * * *

“Q. There are many authors and authorities whose belief is in opposition to this theory, are there not?

“A. I don’t know of many who are real historians and lawyers.

“Q. Perhaps you would not consider them authorities if they disagreed with you.

“A. Perhaps not if they disagreed with me.”
(Or. Tr. pp. 766-7.)

Here is another specimen:

“Q. I call your attention to a case in the United States Supreme Court entitled U. S. v. Arredondo, 6 Pet. 691, where it appears that the Spanish Government in 1816 made a grant of land in Florida outright in fee to a Spaniard and the United States disputed the title on the ground that the land at the time of the grant was in Indian occupancy. In view of that decision, do you think you are correct in saying that the government of Spain never made a grant of land in Indian occupancy?

“A. According to your statement, the Court of the United States is of that opinion, because the Court expresses the opinion that the land was in Indian occupancy and Spain had no right to grant that land.

“Q. Yes, exactly. And the United States was defeated in the suit.

“A. Defeated in the suit?

“Q. The United States was defeated in the suit and the grant was held good.” (Or. Tr. p. 770.)

As to the Juarez circular of 1867, this witness admits that it is a construction of the law by the Executive Department (Or. Tr. p. 774).

Here is another specimen:

“Q. Did you say yesterday that every Indian community became a municipal entity without any act of the government?

“A. Yes, I believe I said that.

“Q. Did it need to have no organization at all in order to be a municipal entity?”

After making a distinction between a political entity or municipality and a civil entity involving the ownership or possession of land, witness replied:

“Now, a town could be an entity; that is to say, a town, no matter how poor and how small it was, was an entity to possess lands, because *whenever the King granted to these groups of people the right to possess land or own land by implication the King gave those people the power to defend that land,*—to defend their rights and by that I construe that that is an entity; not because the law mentions the word entity * * *

“Q. So that a half dozen Indian houses would constitute a municipal entity under your theory so far as land holdings go.

“A. Yes, because there was a common mind, a common purpose, a community. * * *

“Q. How small a group of Indian houses would constitute a municipal entity in your opinion?

“A. There is no limit—wherever and whenever there is a community.

“Q. Two houses?

“A. Maybe, why not?

“Q. One house?

“A. No, not one house.” (Or. Tr. pp. 777-9.)

Later, witness at request of counsel translated a passage from p. 1007 of Orozco's work above referred to, as follows:

“Taking ground or standing on the transcribed texts above, we make and establish this principle, the vacant lands in the Republic of Mexico are not subject to prescription.” (Or. Tr. p. 785.)

The word translated “vacant lands” is “baldios”, and, after lengthy discussion, witness made this admission:

“It is not correct when I say ‘vacant’. Really the proper word for that is public land.

“Q. Land owned by the Government?

“A. Yes, land owned by the Government.

Witness then upon request translated from page 1013 of the same work in part as follows:

“Besides the other reasons that we have given to fix the right sense of the same it is necessary to take into consideration Law 9, Title 8, of the New Recopilacion that we have previously referred to, *which declared absolutely imprescriptible land belonging to the crown and other property belonging to the royal treasury.*” (Or. Tr. p. 787.)

Light is thrown on Obregon’s theory by the following:

“Q. Your idea then is that everything above the grade of pueblo would require governmental action; everything higher than that needed governmental recognition, but a pueblo did not. Is my statement correct?

“A. Yes, sir.” (Or. Tr. p. 792.)

Later witness sustained a lengthy cross examination by the court, from which some passages are appended.

“Q. Besides the existence of two or more families (to constitute a pueblo) was there anything else required as a matter of identification, for instance, a name?

“A. Yes, sir, I think that a name was required.” (Or. Tr. pp. 800, 801.)

* * * * *

“Q. But what I wanted to get at was if anything at all was required to be shown as to this occupation (of the land claimed), and if so what—not how liberal the investigators might be, but what was the law?

“A. The law required a description of the land. A description of the land was naturally the basis for a decision of the Judge. And the evidence in the case should show that the land they have described was just the land corresponding to this description.

“Q. That they should conform substantially?

“A. Yes, sir.

“Q. So that there must be some sort of an identifying description?

“A. Yes, sir.” (Or. Tr. p. 803.)

The court then pressed the witness to state whether he had ever passed on a title derived from a pueblo of the sort described by witness, viz: a pueblo without formal governmental recognition, organization or grant of charter or land. Final issue of this line of questions was as follows:

“Q. I would like you to dismiss that from your mind for the moment. I want to find out whether you yourself have ever had occasion to pass on a title to a tract of land that had come from one of these pueblos.

“A. No, your Honor, because there is no title. You cannot find title. The title was a matter of fact. They were possessing that land; they were continuing to possess that land.” (Or. Tr. p. 806.)

Witness further admitted that so far as sovereignty, governmental control and operation were concerned, “they (such pueblos) were as completely subject to the law as were the Spanish groups and the Mexican groups” (p. 807).

The court still further pursued the witness on the question of ascertaining under his theory the dividing line between crown lands and lands occupied by Indians. The witness finally admitted that there was necessary

“A. a demonstration of the act of possession. The Indians had to show—had to prove that they had possessed that land.” (Or. Tr. p. 811.)

Continuing his examination along this line, the court inquired how witness would determine whether a title coming from one of these pueblos was or was not good if consulted by a client who wished to buy a tract of land or lend money on a mortgage on it. Witness first described the modern procedure, viz: A search to see if the title was recorded in the Registry of Property, second, to see if the land was described by boundaries, and, third, to see if the seller “shows also the way in which he acquired it”. If there were no records, witness would advise application to a court for a citation to all neighbors to convene and survey the land to show the limits of possession (Or. Tr. p. 812). As to his opinion, if asked

by an intending purchaser of such a title originating in Mexico prior to 1853, he answered:

“If I was consulted at that time about the title of those Indians and their right to mortgage and sell their land, I would say the whole depends—I cannot tell you whether those Indians had title or not * * * I should ask the privilege first to see the facts; to show how they had possessed; whether they had possessed; to what extent they had possessed; whether this was immemorially a town, or whether it was a town that was there, and then other land was given that was not theirs. And then you can decide whether land is or is not theirs.” (Or. Tr. p. 816.)

Further along this line, and still in answer to the court, we find the following:

“Q. You are not able, just now at any rate, to point to a case where a pueblo having no other character than an entity for the purpose of holding title to land has disposed of it or any part of it?

“A. Not now; I cannot recall any specific cases.” (Or. Tr. p. 822.)

Later, being further asked as to the necessary requirements to prove title in such pueblo, the following occurred:

“Q. You would prove the boundaries exactly, would you not?

“A. I would prove the boundaries exactly
* * *

“Q. And you would have to prove the exact extent of the territory occupied?

“A. Yes, sir.” (Or. Tr. p. 825.)

OCT 28 1925

Henry H. Wallace
CLERK

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1925.

No. 4298.

THE PUEBLO OF SANTA ROSA, *Appellant*,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND WIL-
LIAM SPRY, COMMISSIONER OF THE GENERAL LAND
OFFICE, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

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IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1925.

No. 4298.

THE PUEBLO OF SANTA ROSA, *Appellant*,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal duly perfected (Rec. p. 101), from only so much of the final decree (Rec. p. 100) of the Supreme Court of the District of Columbia, in equity, dated October 3, 1924, which finally dismissed the bill

of the plaintiff, appellant here, upon the merits, with costs in favor of the defendants, appellees in this court. The cause was heard on final hearing upon the pleadings, evidence and exhibits, "*and also upon the motion of the defendants, accompanied by exhibits, and affidavits, filed herein June 9, 1919, to dismiss the bill of complaint.*" The first paragraph of the final decree overrules this motion of the defendants, and the defendants, appellees here, took no appeal therefrom. (Rec. p. 100.)

Upon the rendition of the final decree on October 3, 1924, the plaintiff (appellant) noted an appeal to this court (Rec. p. 100), but on October 20, 1924, within time, Justice Siddons, who heard the cause, signed an order, on motion of the plaintiff, to which counsel for defendants entered "no objection" thereon, amending the notation of the plaintiff's appeal "so that such appeal by the plaintiff shall be deemed and considered as having been taken in open court from only so much of said decree which provides for the final dismissal of the plaintiff's bill of complaint with costs in favor of the defendants against the plaintiff, the court being advised by counsel for plaintiff that plaintiff is not appealing from the provisions of paragraph Numbered 1 of said decree which overrules the defendants' motion to dismiss plaintiff's bill of complaint," and the amount of the bond is fixed. (Rec. p. 111.)

This suit by the appellant prays, substantially, that the defendants (appellees) be enjoined and restrained from illegal encroachments upon the appellant's land. (Prayers, Bill, Rec. p. 9.) The original bill of complaint was filed January 28, 1915, in the Supreme Court of the District of Columbia, (Rec. pp. 1-10) which defendants moved to dismiss (Rec. pp. 11-12)

on February 20, 1915. The trial court (Justice Sidons) granted the motion and entered a decree on April 25, 1916 (Rec. p. 22) dismissing the bill on the ground set forth in his opinion (Rec. pp. 12-21) that the suit cannot be maintained. The plaintiff appealed to this court, and on April 27, 1917, this court reversed that decree and remanded the cause with directions to enter a decree in favor of the plaintiff as prayed in the bill. (*Pueblo of Santa Rosa vs. Lane*, 46 App. D. C. 411, 47 Washington Law Reporter, 374.)

Thereupon, the defendants appealed to the Supreme Court of the United States, and that court, while fully sustaining the decision of this court in holding that the plaintiff is entitled to become a suitor for the purpose of enforcing or defending its property interests and that the decision of this court correctly held that the trial court committed error in sustaining defendants' motion to dismiss the bill of complaint, the Supreme Court held that this court ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants; and further held that the defendants were entitled to an opportunity to answer to the merits, just as if their motion to dismiss had been overruled in the court of first instance. Accordingly, the decrees of this court and of the trial court were reversed, with directions to overrule the motion to dismiss, to afford defendants an opportunity to answer the bill, and to grant an order restraining the defendants from in anywise offering, listing, or disposing of any of the lands in question pending the final decree, and to take such further proceedings as may be appropriate and not inconsistent with that opinion. (*Lane, etc. vs. Pueblo of Santa Rosa*, 249 U. S. 110, 114.)

After the remand of this case to the trial court, the defendants (appellees) on June 9, 1919, filed another motion to dismiss this cause, this time upon the ground, viz., "for lack of authority on the part of the attorneys of record for the alleged plaintiff to represent their alleged client or to maintain this suit" (Rec. pp. 33-87). On the same date, June 9, 1919, the defendants (appellees) filed their answer to the bill, denying the allegations thereof (Rec. pp. 22-33). On April 15, 1921, the trial court (Justice Siddons) entered an order postponing the decision on the above motion to dismiss (filed June 9, 1919) until the final hearing of the cause. (Rec. p. 89.) A memorandum opinion of the trial court was filed. (Rec. pp. 87-89.) When the cause was finally heard, defendants' motion of June 9, 1919, was overruled (Rec. p. 100), and defendants having elected not to appeal therefrom that part of the decree has become final.

At the conclusion of the testimony in chief of the plaintiff, the defendants moved the court that this case be dismissed upon twelve grounds, the first being "that the alleged plaintiff has not shown facts sufficient to sustain the cause of action set forth in the complaint, or sufficient to constitute a cause of action in equity against these defendants." (Rec. p. 213.) Denied; no exception taken. (Rec. p. 213.) Thereupon, the defendants introduced their testimony and evidence. (Rec. pp. 214-421.) And thereupon counsel for the respective parties each announced his case closed. (Rec. p. 421.) The defendants did not renew the above mentioned motion at the conclusion of all of the evidence. By proceeding to introduce testimony in their own behalf, the defendants waived their further right to press this motion. *Washington Utilities Co. vs. Wadley*, 44 App. D. C. 176, 180, citing *McCabe*

& S. Constr. Co. vs. Wilson, 209 U. S. 275; Main vs. Aukam, 4 App. D. C. 51; Nelson vs. U. S., 28 App. D. C. 32.

The trial court filed an opinion "on merits and upon motion to dismiss." (Rec. pp. 90-100.)

The substance of all of the testimony, and the exhibits set forth in the statement of the evidence, approved by consent of counsel, and settled and signed by the trial court, are contained in the Record at pages 114-422.

From only that part of the final decree dismissing the bill of complaint, plaintiff appealed (Rec. pp. 100, 111), and filed assignment of errors. (Rec. pp. 101-110.)

The law of the case has been established by the decision of the Court of Appeals of the District of Columbia, reported in 46 App. 411, as follows:

1. Title respected by treaty obligations is peculiarly sacred. It rests not only on the pledge of protection by the new sovereignty, but upon a solemn guaranty to the old sovereignty that existing personal and property rights shall remain undisturbed.

2. The lands in which the Indian pueblos of Arizona have had a communal right of property since time immemorial, and title to which was confirmed in them by the Guadalupe Hidalgo and Gadsden treaties, are not subject to entry or listing for entry and sale as part of the public domain of the United States, and Congress never having legislated in respect to the property rights of the pueblos in such lands, the administrative officers of the government have no authority to interfere in any respect with such rights.

3. An Indian, though a ward of the government, may possess title to lands.

4. The Indian pueblo of Santa Rosa, in Pima county, Arizona, is a corporation with power to sue and be sued as such, under the Kearney Statute, constituting the Pueblo Indians of New Mexico bodies politic and corporate (Laws of Mexico, 1851-2); the act of the first legislature of New Mexico continuing in force all territorial laws theretofore in force (id. 1852); the Act of Congress of August 4, 1854 (10 Stat. at L. 575, chap. 245), incorporating within the territory of New Mexico the land acquired under the Gadsden Treaty, subject to the laws of that territory, and the Act of Congress of February 24, 1863 (12 Stat. at L. 664, chap. 56), creating the Territory of Arizona and continuing in force and extending to that Territory the legislative enactments of New Mexico.

5. A suit by an Indian pueblo to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from wrongfully undertaking in their official capacity to open its lands to sale, entry, and settlement as public lands of the United States, is not a suit against the United States to control the discretionary functions of its officials, where it appears that the defendants are acting totally without their jurisdiction.

6. A suit by an Indian pueblo of Arizona to enjoin the Commissioner of the General Land Office and the Secretary of the Interior from opening its land to entry, sale, and settlement as public land of the United States, is not barred because it failed to assert its title before the Land Commission created by the Act of Congress of July 22, 1854 (10 Stat. at L. 308 chap. 103) whose jurisdiction was limited to claims based on Mexican land grants within the limits of California, or the court of private land claims created by the Act of Congress of March 3, 1891 (26 Stat. at L. 854, chap. 539), which left it optional with claimants of land in certain territories, including Arizona, under

Mexican grants, to assert title before that tribunal, without penalty or forfeiture for failure to do so.

7. Quaere, as to the extent of the power of Congress to control the title of an Indian Pueblo to lands in which it has had communal rights since time immemorial, or to abolish its corporate existence.

Mr. Justice Van Orsdel delivered the opinion of the Court:

This is a suit in equity brought in the Supreme Court of the District of Columbia by plaintiff, the Pueblo of Santa Rosa, to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from undertaking in their official capacity to open its lands to sale, entry and settlement as public lands of the United States.

It is averred in the bill that plaintiff is, and from time immemorial has been, a town known by the common name of pueblo of Santa Rosa, composed of civilized, sedentary, agricultural and pastoral inhabitants who are Pueblo Indians, and have been known as such, residing in permanent houses in a village of permanent location, built upon lands described in the bill, which are situated within the County of Pima, in the State of Arizona, which lands, it is averred, were granted and conceded to said pueblo "by the laws and customs of the Indians antedating the Spanish discovery of America and also by the laws of Spain and Mexico." These lands are part of the territory ceded to the United States by the Gadsden Treaty. It is also averred that the inhabitants of this pueblo have from time immemorial lived in communal life, and have governed themselves and their community accordingly, with definite laws and customs having the force of law which have always been obeyed by the inhabitants, and that at stated intervals they assemble in common council composed of the adult male inhabitants of

the pueblo and legislate on matters concerning the pueblo and its inhabitants by rules and decisions having the force of law.

It is also averred that "the laws and customs of the Indians and also the laws of Spain and of Mexico at all times conceded to the plaintiff, and the plaintiff claims and exercises, and from time immemorial has claimed and exercised (1) the right to have a common name, to-wit, the pueblo of Santa Rosa, and (2) the right and power to take, hold, manage, control, and dispose of real and personal property, including the land upon which said village is situated and the surrounding lands, and (3) the right and power to contract and otherwise act as an entity by resolutions passed in common councils composed of its adult male inhabitants, and through its officers and representatives, in all matters concerning its interest, property and affairs, and (4) the right and power to have perpetual succession, and (5) the right and power to sue and be sued as an entity and to appear and act as such before courts and governmental authorities, and (6) the right and power to maintain a permanent town organization and government, and to make at common councils of its inhabitants, rules and laws binding upon the pueblo and its inhabitants, and to be controlled and managed by its inhabitants acting together according to law and according to rules so made, and to elect and keep in office captains, alcaldes and other town officers exercising much power and jurisdiction over said pueblo and its property and inhabitants for their common benefit and for the maintenance of order, the preservation of its property, the promotion of its interests and the conduct of its affairs. By reason of the facts above mentioned the plaintiff is and from time immemorial has been, under the laws of Spain and Mexico and of the United States, an entity in fact and in law and a juridical person entitled to sue as such."

It is also averred that the plaintiff occupies the same position and status as the Pueblo Indian towns of Mexico existing at the time of the Spanish discovery of America, and that "Spain during all the period of its sovereignty over the territory including the land herein described at all times recognized and in no instance disputed the ownership of said lands by the pueblo of Santa Rosa and by repeated royal orders and decrees, recognized the Papago Indians and the inhabitants of said pueblo as free vassals of the Spanish crown, entitled to all the protection in their property rights which was accorded to Spanish subjects, and recognized and confirmed the ownership of plaintiff in said lands;" that, after the establishment of its sovereignty, Mexico recognized plaintiff's ownership of the land described, and during the period of Mexican sovereignty the inhabitants of the pueblo of Santa Rosa were recognized as Mexican citizens enjoying property rights and other rights accorded to citizens of Mexico; that "at the time of the acquisition from Mexico by the United States of sovereignty over the territory comprising said land and at the time of the making of said treaties the said pueblo of Santa Rosa was the absolute owner with complete, perfect and indefeasible title to the land herein described against all governments and individuals and all the world, except such rights as pertained to inhabitants of said pueblo as members thereof, and since said change of sovereignty this perfect title and ownership has continued to exist and now exists. The inhabitants of said pueblo of Santa Rosa ever since said change of sovereignty have been and now are actually in possession, use and occupation of all of said lands except in so far as recently they have been wrongfully disturbed in said use and occupation by trespassers without color or right or title;" and that, "by the terms of the treaties

hereinabove mentioned, the ownership of its lands by said pueblo of Santa Rosa was forever guaranteed and secured to it by the United States."

It is also averred that in 1909 the then Secretary of the Interior designated plaintiff's lands as subject to entry under the Enlarged Homestead Act of February 19, 1909; that in 1914 plaintiff petitioned defendant Secretary setting forth its grievances, and prayed that he and his agents "should abstain from listing for entry or sale as part of the public domain of the United States any part of said parcel of land belonging to the plaintiff and from recommending the issuance of any patents covering any part of said land and from surveying or making allotment surveys within the boundaries thereof." The Secretary on June 11, 1914, replied, denying plaintiff relief, "stating among other things that if the tenure of the holding of the Indians is not by grant emanating from the Government of Spain or Mexico, it is not such a property right as was provided for and protected by the treaty, and that the mere possession of the land as Indian country with the right of use, did not prevent it from passing under the dominion of the United States as public land, whatever the obligation of the United States to the Indians might be and that no claim was presented by the Indians with reference to the lands in question to the Surveyor General of Arizona under the act of July 15, 1870, and that by the act of March 3, 1891, a Court of Private Land Claims was created for the adjudication of all private land claims in Arizona and that no claim appeared to have been presented to said court by the Indians, although it is provided by sec. 12 of said act that any claim not presented to such court within two years from the date of the act shall be deemed to be abandoned and shall be forever barred and that said court having expired by limitation of law on June 30, 1904, any claim

that the Indians may have, can now be confirmed only by an act of Congress."

The prayer in broad terms is that defendants be restrained from treating the land as part of the public domain and exercising authority over it as such.

Defendants moved to dismiss the bill on the grounds that plaintiff is incapable of bringing or maintaining this suit, because not a body corporate; that it does not own the lands, but merely occupies them by sufferance as part of the public domain ceded to the United States by the Republic of Mexico as part of the Gadsden Purchase; that this, therefore, is a suit against the United States, and that the bill seeks to control the discretionary action of defendants.

From the decree sustaining the motion to dismiss this appeal was taken.

The history and character of the Papago Indians may be gathered from a reference to certain public documents. In 1865 the first superintendent of Indians for Arizona states that "the early Spanish explorer found the Papagos here in 1540, and ruined houses of grand proportions attest their occupancy for thousands of years before the Spaniards came." Ex. Doc., 2d Sess., 38th Cong., Vol. 5 Rep. Sec. of Int., p. 296.

In 1856 the Indian Commissioner in a report to Congress said: "The Pueblo Indians maintain their character as peaceable, industrious communities. Some of them have lost the title-papers for grants of land obtained by them from Spain and Mexico. In such cases their agent has taken testimony in their behalf. They deserve the fostering care of the Government, and Congress will no doubt confirm their titles. About five thousand Indians are embraced within the Gadsden Purchase. They are mostly Pueblos, and reside in six different villages. They have houses and flocks, and raise wheat and other products of

the soil." Rep. Sec. of Int., Sen. Doc. 3rd Sess., 34th Cong., Vol. 2.

In the report of the Commissioner of Indian Affairs of 1856, at page 183, the following statement appears: "A large portion of this acquisition to our Indian population consists of Pueblos situated near Tucson * * * They reside in permanent villages, have comfortable houses built of adobe, have flocks and herds around them and rely upon the cultivation of the soil for subsistence—raising wheat, corn, cotton, and other vegetables. They are divided into six pueblos, or villages, but whether or not they hold their lands under grants from the former governments of their country, I am not informed; but presume they do, as they have been permanently settled for a great number of years."

M. C. Davidson, Indian Agent, at page 131 of the Report on Indian Affairs for 1865, said: "The status of the Papagos with respect to the soil ought to be determined in a way that no injustice will be done to them. The Mexican laws based upon the laws of the Indians promulgated by the kings of Spain, recognized the Indians as subjects or citizens, and in most cases confirmed to them wherever they resided in fixed communities, the titles to the lands where they lived. The Spaniards never made treaties with the Indians, nor extinguished the titles to the land, nor did they in any way recognize them as independent nations. Those who now, by the transfer of the political sovereignty of the country, find themselves upon American soil and surrounded by Americans, look for at least a measure of recognition of their rights equal to that which they enjoyed under the despotic Government of Spain. In my opinion, we must regard them as American citizens and under certain conditions entitled to all their privileges." Rep. Sec. of Int., 1865, p. 299, Ex. Doc., 39th Cong., Vol. 2.

It is conceded, as indeed it must be from a study of Spanish and Mexican history, that plaintiff pueblo has continuously occupied the Valley of Santa Rosa from time immemorial. This logically brings us to a consideration of its legal status. We find that, under both Spanish and Mexican laws, extending from the Spanish invasion down to the cession to the United States, all Indian pueblos were accorded large legal and political privileges, with the power of having municipal self-governments and of choosing local officers with due relation to their responsibility to the public, and the power to hold property and to appear in court and sue and defend on their own behalf. Each pueblo held title to its land in common, and in general its political and legal status was that of a juridical entity. Indeed, after the Mexican succession, they were elevated to citizenship and civil rights. Hall's Mexican Laws, sec. 161.

The laws of the Indies, which were begun by decree of Charles V in 1543, and extended by subsequent decrees of the Spanish kings, contain much in recognition of the right of Indian pueblos to their lands in Mexico. In Book IV, Title 12, Law 14 (1578), it is said: "Because we have wholly succeeded to the lordship of the Indies and because the public lands not granted away by the kings, our predecessors, or by us, in our opinion belong to our patrimony and royal crown, it is suitable that all the land which is held in possession without just and true titles shall be restored to us as it belongs to us so that reserving before everything that which to us or our viceroys, courts, or governors may appear necessary for plazas, commons, public lands, pastures and territory of the inhabited villages and towns in view of their present condition as well as of the future and their possible expansion, and granting to the Indians that of which they **may** reasonably have need for working the land

and making their crops and for their education, confirming them in that which they now have and giving to them in addition that which is necessary, all the rest of the lands may remain and be free and unencumbered to be disposed of according to our will. Wherefore we order and direct the viceroys and presidents of the pretorial courts that when it appears proper to them they shall announce a suitable limit of time in order that those in possession may exhibit before them and the officers of their courts which may name the titles of the lands, plantations, farms, stock farms, protecting those who are in possession with good title and guaranties or with just prescription and they shall return and restore to us the remaining land to be disposed of according to our will."

Further quotation from the same laws confirm the Indians in respect to their titles. "We order that the sale, cultivation and adjustment of lands shall be made with such precautions that to the Indians shall be left the lands which may belong to them, not only as individuals, but also as communities." Book 4, Title 12, Law 18 (1642). "No one shall be allowed to enter into a composition of lands unless he has possessed them for ten years, even though he may allege that he has so possessed them because this pretext alone must not be sufficient, and the communities of Indians shall be admitted to composition in preference to the other particular persons; granting to them every convenience." Book IV, Title 12 Law 19 (1646). "It is just that the Indians shall have time to work their properties and those of the community and that the viceroys and governors shall proclaim that which may be necessary, to the end that they can come to their farms." Book 4, Title 1, Law 23 (1609).

By the Laws of the Indies, comprehensive provision was made, not only confirming title to lands held by the Indians individually and in common, but establishing regulations for their better gov-

ernment and especially for the protection of their property rights with ample provision for access to the courts.

By a royal decree of October 15, 1754, respecting public lands which forms the basis of many Mexican titles, the following instructions were promulgated: "The judges and officers in whom is delegated the jurisdiction over the same and composition of Crown lands shall act with leniency, forbearance and moderation, with verbal and not judicial process, in questions of lands possessed by Indians, and of other lands which they (Indians) may need, especially for their work, cultivation and stock raising; since in regard to lands of communities and those granted to their pueblos for pastures and common lands, nothing new must be done, maintaining them in possession thereof and restoring to them those that have been taken from them and giving them more land as the exigencies of the population require, and using no rigor in regard to those held by the Spaniards and people of other castes, keeping in mind the provision of Laws 14, 15, 17, 18 and 19, title 12, Book 4, of the Compilation of the Indies." The decree also provided that, in the absence of title papers, "it shall be sufficient to prove ancient possession as a title by just prescription." 1 *Legislacion Mexicana*, Mexico, 1876, pp. 13, 14.

The failure to aver the present existence of title in plaintiff pueblo by deed or other writing it is not controlling, since its inhabitants have occupied and used the lands in question from time immemorial and their title had been expressly recognized and confirmed by the Spanish and Mexican governments. Referring to the character and validity of the title of the Indian pueblos within the territory ceded by Mexico, the court, in *United States v. Pico*, 5 Wall., 536, 540, 18 L. ed. 695, 696, said: "The existence of the pueblo and the assignment to it of the land in question

by the officers of the Mexican Government are fully established by the documentary evidence in the case. The objection of the appellants is founded upon the absence of any transfer of the title to the pueblo by deed or other writing. But such transfer was not essential, nor was it usual. A pueblo once formed and officially recognized became entitled, under the laws of Mexico, to the use of certain lands, for its benefit and the benefit of its inhabitants, and the lands, upon petition, set apart and assigned to it by the government. No other evidence of title than such assignment was required, nor was any other given."

That the inhabitants of the pueblo of Santa Rosa were citizens of Mexico at the time of the cession to the United States seems to be indisputably established. The question of the status of Indian citizenship in Mexico prior to the cession is exhaustively reviewed in the case of *United States v. Ritchie*, 17 How., 525, 15 L. ed 236. The court, speaking of the power of Indians under the Government of Mexico to take and hold property, said: "In answer to the first objection, we are referred to the plan of Iguala, adopted by the revolutionary government of Mexico, 24th February, 1821, a short time previous to the subversion of the Spanish power in that country, in which it is declared that 'all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues'; and that, 'the person and 'property of every citizen will be respected and protected by the government.' * * * The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the

European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the plan of Iguala, and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the Declaration of Independence of the United States, of 1776, to invest all those persons with these privileges residing in the country at the time, and who adhered to the interest of the colonies. 3 Pet., 99, 121 * * * But as a race, 99, 121, 7 L. ed. 617, 625. 3 Pet., 99, 121, 7 L. ed. 617, 625 * * * But as a race, we think it impossible to deny, that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privileges belonging to it, between this and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government.”

Concluding, as we must, that the inhabitants of the pueblo of Santa Rosa were citizens of of the Pueblo of Santa Rosa were citizens of Mexico and possessed of a valid communal title in the lands embraced therein, we come to a consideration of the effect, if any, the transfer of sovereignty to the United States had upon those rights. By Article IX of the Treaty of Guadalupe Hidalgo, it was provided that “The Mexicans who, in the territories aforesaid shall not preserve the character of citizens of the Mexican Republic * * * shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime shall be maintained and protected in the

free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." (9 Stat. at L. 930.)

The Gadsden Treaty, under which the pueblo of Santa Rosa and its inhabitants passed from the sovereignty of Mexico to the United States, provides; "Art. 5. All the provisions of the eighth and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth." (10 Stat. at L. 1035.)

It may be suggested that the foregoing treaty provisions are merely declaratory of the general principles of international law, preserving, in case of change of sovereignty by cession, all the personal and property rights of the inhabitants of the ceded territory. Whatever rights were secured to plaintiff by Mexico prior to cession passed and are granted protection by the new sovereignty. Title respected by treaty obligations is peculiarly sacred. It rests not only on the pledge of protection by the new sovereignty, but upon a solemn guaranty to the old sovereignty that existing personal and property rights shall remain undisturbed. "The rights of private property, so far from having been impaired by the change of sovereignty and jurisdiction, were fully secured by the law of nations, as well as by treaty stipulation." *Newhall v. Sanger*, 92 U. S., 761, 763, 23 L. ed. 769, 770.

It will be observed that the treaty of Guadalupe Hidalgo protected all persons, corporations, and communities in their rights of property. This included pueblos which, by law and custom, had become vested with interest in lands under the former government. It expressly provided for

the protection of the rights of the inhabitants of the ceded territory in their persons and property, and there is nothing from which the inference can be adduced that any distinction was intended with reference to property claimed by towns under the Mexican Government. "By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. These laws and ordinances provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land. It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture-lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country." *Townsend v. Greely*, 5 Wall., 326, 336, 18 L. ed. 547, 549.

It logically follows that there existed, and still exists, in these pueblos a communal right of property which, at most, could only be controlled by specific act of the government itself. It is inconceivable, however, that this controlling power of the government should extend beyond the exercise

of the functions of guardianship, for their title to the lands antedates the sovereignty of the United States, and is expressly protected and confirmed by treaty. By no rule of sovereign prerogative existing in our form of constitutional government could these people be divested of their lands without due compensation. Congress has never legislated in respect of the property rights of plaintiff pueblo. Until it does, its administrative officers are without authority to interfere in any respect with those rights.

It will not do to say that authority exists under the general legislation of Congress with respect to the Indians and the Indian country. It has never been the policy to so treat the Indian pueblos which came to us with the cession from Mexico. The title to most of them has been confirmed by Congress under a policy entirely foreign to that adopted in dealing with the savage, nomadic Indian tribes. The laws of Spain, and later of Mexico, made no distinction between the Papago Indian pueblos and those within the present limits of the state of New Mexico which have been confirmed in their rights which were recognized by this Government to have been acquired long prior to the transfer of sovereignty from Mexico to the United States.

It follows that by the obligations of the treaty of cession, we stipulated not only to protect these former citizens of Mexico in their persons and property, but to accord to them the same treatment with respect thereto as has been accorded them under the former sovereignty. To deprive them now of their lands would be to deprive them of property rights of which they have been vested from time immemorial, and which were recognized as such both by Spain and Mexico, and so recognized by this Government in respect of numerous other Indian pueblos similarly situated.

It is no argument that because recently Con-

gress has made certain provisions looking to the exercise of limited guardianship over these people that the administrative officers of the Government may, upon the theory that they are wards of the Government, treat their lands as public domain and open them to settlement. There is nothing inconsistent with the theory that an Indian, though a ward of the Government, may possess title to lands. The acts of guardianship in this instance place no power in the administrative officers of the Government to interfere in any manner with the property of the ward, further than to manage and control it for the benefit of the ward. "As before indicated, by a uniform course of action, beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them can not be said to be arbitrary but must be regarded as both authorized and controlling." *United States v. Sandoval*, 231 U. S. 28, 47, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1.

Even assuming that general acts of Congress relating to the guardianship of the Indians might apply to plaintiff pueblo, it would still hardly be contended that power exists in the officers of the Government to arbitrarily divest them of their lands. Even the savage, nomadic tribes of American Indians, with whom the ancient Mexican Pueblo Indians seem to have little or no racial connection, have been held to possess such a title or interest in their lands as could only be divested by treaty or act of Congress, and then only upon due compensation. No treaty or act of Congress exists or ever has existed, touching the status of

these Indians in respect to their title to the lands possessed, used, and occupied by them from time immemorial.

While in the Sandoval case, the court distinguished the decision in *United States v. Joseph*, 94 U. S. 614, 24 L. ed. 295, we assume it related only to the question under consideration of the power of Congress to prohibit the introduction of intoxicating liquor into an Indian pueblo, holding it to be Indian country. This, we conceive, detracts nothing from the authority of the *Joseph* decision as fixing the distinction between the titles to lands held by Pueblo Indians and those occupied by the nomadic tribes. On this point Mr. Justice Miller, speaking for the court, said: "Turning our attention to the tenure by which these communities (Pueblo Indians) hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government. It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make settlement on the lands occupied by an Indian tribe. The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the Government of Spain before the Mexican Revolution,—a title which was fully recognized by the Mexican Government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

But it is urged that plaintiff pueblo is not a

corporation, and, therefore, not entitled to maintain this action. Passing over much interesting history tending to establish its corporate entity by immemorial prescription, we think it is a corporation under the laws of the State of Arizona. When General Kearney was military governor of New Mexico, a statute entitled "An Act to Enable Pueblo Indians to Bring and Defend Actions" was passed, in which it was provided "That the inhabitants within the Territory of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages, built on lands granted to such Indians by the laws of Spain or Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted, bodies politic and corporate, and shall be known in law by the name of the 'Pueblo de——,' (naming it), and by that name, they and their successors shall have perpetual succession; sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas and matters whatsoever, proper to recover, protect, reclaim, demand, or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied, or claimed contrary to law by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual." Laws of New Mexico, 1851-1852.

In 1850 New Mexico was created a territory (9 Stats. at L., 446), by which general legislative authority was vested in the territorial legislature. The first legislature enacted "That all laws that have previously been in force in this territory that are not repugnant to, or inconsistent with, the Constitution of the United States, the organic law

of the territory, or any act passed at the present session of the legislative assembly, shall be and continue in force, except in Kearney's Code the law concerning registers of land." Laws of New Mexico of 1852.

This brought the Kearney Act forward into the laws of New Mexico. The Papago Indian lands here in question were included in the Gadsden Purchase of 1854, and Congress, by act of August 4, 1854 (10 Stats. at L., 575, chap. 245), enacted "That, until otherwise provided by law, the territory acquired under the later treaty with Mexico, commonly known as the Gadsden Treaty, be, and the same is hereby incorporated within the territory of 'New Mexico,' subject to all the laws of said last named territory."

By the act of Congress of February 24, 1863 (12 Stats. at L., 664, chap. 56), the territory of Arizona was created out of the territory formerly embraced within New Mexico. The act continued in force the act creating the territory of New Mexico, "together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this Act," which "are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation." We have been unable to find anything in the constitution or laws of Arizona repealing or in any manner affecting the corporate statute of Indian pueblos as fixed by the Kearney statute. The validity of the Kearney Act 176, 15 L. ed. 891.

Nor is this a suit against the United States to control the discretionary functions of its officials. This is not public domain of the United States in that it comes within the general acts of Congress imposing upon the Secretary of the Interior general supervisory control over the public lands. It is an Indian pueblo of the class of the New Mexican pueblos in which the Govern-

ment has recognized and confirmed title existing at the date of cession and protected by the treaty. Indeed, the only act of Congress that has been called to our attention affecting directly the title of Papago lands was in effect a recognition of their title. The act of 1882 (22 Stats. at L. 299, chap 394), granted a right of way to the Arizona Southern Railroad Company across the Papago Reservation, but specifically provided "That the consent of the Indians occupying said reservation be first obtained, and such compensation as may be fixed by the Secretary of the Interior be paid to him by the said railroad company, to be expended by him for the benefit of the said Indians." The Act is significant of guardianship, but negatives any disposition on the part of the Government to assert ownership. No question of the boundary is here involved, since the boundaries set forth in the bill are concededly correct under the admission of the motion to dismiss. Hence, defendant officers are acting totally without their jurisdiction. In such cases the courts will not hesitate to interfere. *Gauthier v. Morrison*, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384; *Lane v. Wade*, 234 U. S., 525, 58 L. ed. 1440, 34 Sup. Ct. Rep. 965.

We come now to the claim of counsel for the Government that plaintiff is barred by its failure to assert its title before the Court of Private Land Claims or before the land Commission created by the act of Congress of July 22, 1854 (10 Stats. at L., 308, chap. 103). The act of 1854 was limited to Mexican land grants within the limits of California. It contained a provision for the absolute forfeiture to the United States of lands claimed if the grantee failed to present his claim to the commission before a specified date. This forfeiture provision was held valid and enforceable. *Botiller v. Dominguez*, 130 U. S., 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; *Barker v. Harvey*, 181 U. S., 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690. But this

law has no present application, since the lands in question are not situated in California, and hence were not within the jurisdiction of the commission.

The act of March 3, 1891 (26 Stats. at L., 854), creating the Court of Private Land Claims provided, among other things:

“Sec. 6. That it shall and may be lawful for any person or persons or corporation or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court,” etc.

“Sec. 8. That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for, other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location and boundaries, in the same manner and with the same powers as in other cases in this act mentioned.”

It will be observed that it was left optional with persons claiming complete title to come into the Court of Private Land Claims. No penalty or forfeiture was imposed upon such claimant for failure to submit himself to the jurisdiction of the court. In *Ainsa v. New Mexico & Arizona Railroad*, 175 U. S., 76, 44 L. ed. 78, 20 Sup. Ct. Rep. 28, it was held that Mexican or Spanish grants complete at the time of cession were confirmed by the treaty itself, and needed no confirmation by Congress. The reason for making the presentation of completed claims optional was stated in *Richardson v. Ainsa*, 218 U. S., 289, 54 L. ed. 1044, 31 Sup Ct. Rep. 23, as follows: "But the considerations mentioned in the case cited (*Botiller v. Dominguez*) did not prevent the United States in the Act of March 3, 1891, from leaving the holders of perfected titles free not to present them to the court, as they were required to do in earlier statutes. The good faith of the United States was pledged to respect the Mexican titles. It recognized in the act of 1891 that holders of such titles need not go into the Land Claims Court to get them confirmed and we should be slow to suppose that it meant to make a doubt in the department of Justice as to the validity of a perfect title a ground for cutting down what otherwise it was bound to protect and did by the statute leave intact."

With this distinction before us, it is clear that plaintiff lost nothing by failure to assert its title before the Land Claims Court. Whatever title plaintiff has, it acquired long prior to the cession from Mexico. Its status was in no respect affected by the change of sovereignty. Nor, as we have observed, has it been changed by act of Congress. Its communal pueblo or village title was as little subject to impairment by change of sovereignty as that of a private individual Spanish or Mexican grantee. The court below laid stress upon

the principle that plaintiff, being a pueblo or village, a mere agency of the Government, it lay within the sovereign power at any time to put an end to its political character or existence. But this is an assumption without a premise. No such thing has been attempted; and, so long as the pueblo continues, its property rights remain subject to protection by the laws of the land, with a duty of enforcement resting upon the courts. Indeed, its peculiar origin, antedating every national sovereignty under which it has existed, may well distinguish it from the ordinary municipality, with authority to exercise only those limited powers conferred by the express terms of a corporate charter, granted by the State. It is more in the nature of a corporation by immemorial prescription recognized by the State but exercising governmental functions of its own, independent of any express statutory regulations prescribed by the State.

It is unnecessary, however, to consider the more difficult question of the extent of the power of Congress to control plaintiff's title or abolish its corporate existence by legislative enactment since it has not been attempted. The Land Department fell into error in placing the Papagos in the same classification with the original nomadic North American Indian tribes and attempting to apply to their property the general law affecting Indian lands and property. We find plaintiff, at the time of the cession from Mexico, to be a pueblo of the same legal status as the New Mexican pueblos whose title was recognized and confirmed in fee simple by the act of Congress of December 22, 1858 (11 Stats. at L., 374, chap. 5). It follows, therefore, that, whatever power Congress may have to control plaintiff's land, so such power has been asserted, and this power cannot be assumed by the Land Department to the extent of opening the land to settlement and disposing of mineral rights therein.

The decree is reversed with costs, and the cause is remanded with directions to enter a decree restraining defendants from offering for entry or listing for entry or sale as part of the public domain of the United States any of said lands under any land or mineral law of the United States, and requiring, in so far as lies within their power or control, the correction of the records of the Land Department to prevent in as large degree as possible any further infringement upon the property rights of plaintiff.

Reversed and remanded.”

And the decision of Supreme Court of the United States reported 249 U. S. 110, follows:

Mr. Justice Van Devanter delivered the opinion of the court:

“This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States. The lands include the site of the pueblo of Santa Rosa and the surrounding territory, comprise some 460,000 acres, and are within the region acquired from Mexico under what is known as the Gadsden Treaty, 10 Stat. 1031. The suit is brought by the pueblo of Santa Rosa, and its right to the relief sought is based on two allegations, which are elaborated in the bill; one, that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question; and the other, that in disregard of its title, the defendants are threatening and proceeding to offer, list, and dispose of these lands as public lands of the United States. In the court of first instance the bill was challenged by

a motion to dismiss, in the nature of a demurrer, and the motion was sustained. In the Court of Appeals the case made by the allegations in the bill was held to be one entitling the plaintiff to the relief sought, and the decree of dismissal was reversed, with a direction that a permanent injunction be awarded, 46 App. D. C. 411. The latter decision is challenged here on two grounds: one, that the plaintiff is not a legal entity and has no capacity to maintain the suit; and the other, that, in any event, the defendants should not be subjected to a permanent injunction without acceding them an opportunity to answer the bill.

The plaintiff is an Indian town whose inhabitants are a simple and uninformed people, measurably civilized and industrious, living in substantial houses, and engaged in agricultural and pastoral pursuits. Its existence, practically as it is today, can be traced back through the period of Mexican rule into that of the Spanish Kings. It was known then, as now, as the pueblo of Santa Rosa, and its inhabitants were known then, as now, as Pueblo Indians. During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School Dis. v. Wood*, 13 Mass. 193, 198; *Cooley*, Const. Lim. 7th ed. p. 276; 1 Dill. Mun. Corp. 5th ed. Secs. 50, 64, 65. But our decision need not be put on that ground, for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the territory of New Mexico and subjected it to "all the laws" of that territory. Act August 4, 1854, chap. 245, 10 Stat. at L. 575. One of those laws provided that the inhabitants of any Indian pueblo

having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such land. *Laws New Mex. 1851-52*, pp. 176 and 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the territory of Arizona, for the act by which this was done extended to that territory all legislative enactments of the territory of New Mexico. Act February 24, 1863, chap. 56, 12 Stat. 664. The fact that Arizona has since become a state does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. Co. v. Atchison T. & S. Co.* 112 U. S. 414.

The case of *Cherokee Nation v. Georgia*, 5 Pet. 1, on which the defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution, and therefore entitled to maintain an original suit in this court against the state of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit. This was all that was decided.

The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Cer-

tainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which *Lone Wolf v. Hitchcock*, 187 U. S. 553, is an illustration.

In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the 6th article of the Gadsden Treaty, but no decision on either point is intended. Both involve questions not covered by the briefs or the discussion at the bar, and are left open to investigation and decision in the further progress of the cause.

Of course, the Court of Appeals ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants. They were entitled to an opportunity to answer to the merits, just as if their motion to dismiss had been overruled in the court of first instance. By the direction given they were denied such an opportunity, and this was a plain and prejudicial error.

Our conclusion is that the decrees of both courts below should be reversed and the cause remanded to the court of first instance with directions to overrule the motion to dismiss, to afford the de-

defendants an opportunity to answer the bill, to grant an order restraining them from in anywise offering, listing or disposing of any of the lands in question pending the final decree, and to take such further proceedings as may be appropriate and not inconsistent with this opinion.

Decree reversed.”

Therefore, the appellant will refer to the part of the record and bill of complaint which bear upon the merits. In view of the language of the law of the case and the fact that the decree appealed from is against the appellant upon the merits, judgment for costs ordered, the question of the appellant's capacity to sue, and the authority of counsel are disposed of.

The allegations of the complaint are set out in the opinion of this court above quoted. The complaint also recites that said land is valuable and plaintiff's intention to proceed with due diligence to enforce its rights as owner; also that damage at law will be inadequate and prays for injunction, etc. The answer (Rec. pp. 22-33) denies most of the allegations of the bill and alleges (Rec. p. 23):

1st. That the alleged plaintiff, the so-called Pueblo of Santa Rosa, has not now nor ever has had any existence as a Pueblo and that neither the Indian inhabitants of the scattered villages in the Santa Rosa Valley in Pima County, Arizona, nor the said villages or communities therein nor any one thereof has any corporate or quasi-corporate existence, organization of entity, nor do they constitute a pueblo or corporate entity acting under a common name or as a unit with alcaldes and council, or other governing body.

2nd. The inhabitants of Santa Rosa Valley are Papago Indians, ignorant, illiterate and wholly

unfamiliar with legal forms or procedure, and have no definite organization nor generally recognized chief or council or other governing body, but each Indian village is what is known as in Spanish as "rancheria" and in the Mexican law and language as a "temporale," a small aggregation of persons living in the same neighborhood without definite organization or systematized communal entity, usually defined as a hamlet of huts or group of Indian huts while the Indians term these summer rancherías, Ooitak, meaning fields.

3rd. That said scattered villages or communities in said valley have not now nor ever had as a corporate entity and none of them now has or ever had such corporate entity, title to any land in said valley.

4th. That these villages or communities in the said valley have not nor has any one or more of them authorized the institution or maintenance of this suit by the attorneys of record who profess to represent the said alleged plaintiff, nor ratified or approved the acts of the said attorneys in bringing or prosecuting the same.

5th. Neither the said villages or communities nor the individual Indians therein had any knowledge whatsoever of the institution or pendency of this suit until long after the same had been brought nor until they were informed by representatives of the Indian Bureau, and the institution and maintenance thereof by said attorneys were and are wholly unauthorized by the said villages or any of them, or by the Indians inhabiting said region.

As a further answer defendants aver (Rec. p. 23):

1st. That said Indian inhabitants of Santa Rosa Valley are of Pima stock and are entirely distinct in language and culture from the Pueblo Indians in New Mexico, but live and have always lived in scattered communities or villages or Ooitak fields.

Said Indians have never had a common name of Pueblo of Santa Rosa or any other common name to designate them as a definite organization or communal entity with definite organization, with political, civic or property rights. The Papago Indians are in a limited sense an agricultural and pastoral people, known by their kinsmen, the Pimas, as desert people while the Pimas inhabit the Gila River section, although neither are known as Pueblo Indians. The Pueblo Indians of New Mexico have always had a definite organization, defined form of government, with alcaldes, generals, captains, councils, regularly selected and definitely organized, while the Papago Indians while governing themselves in accordance with certain laws and customs relating to matters mainly of religion or superstition have always had only a very loose organization and no fixed system of law, and the selection of their chiefs is casual and unsystematic, and their entire communal life loose and indefinite.

The said Indians inhabiting the Santa Rosa Valley have no common name save the tribal name of Papago Indians and the term Santa Rosa is an indefinite one used by the white people to designate all of the Indians who occupy scattered rancherias or villages in the Santa Rosa Valley, the said Indians of the Santa Rosa Valley have not now or ever had the right and power to take and dispose of real property nor the right to act as an entity, nor have they ever maintained a town organization or government, nor do said Indians nor the villages in said Valley of Santa Rosa constitute an entity in fact or in law or a juristic person. (Rec. p. 24.)

There are numerous scattered villages in the Santa Rosa Valley, and mountains surrounding same, inhabited by the Papago Indians. Among these is the village of Kuarshi or Kuarchi, also called Archi, perhaps the oldest settlement in said valley, and being formerly the largest rancheria

in the Papago country. In the village of Kuarchi there are now only about six or eight families occupying groups of huts similar to those described by Lumboltz in "New Trails in Mexico" (1912) page 7, as follows (Rec. p. 24):

The dwellings here, rectangular in shape, are usually adobe huts or light sheds made of sunflower stalks placed upright, three or four sahuaro ribs, which are tied horizontally, binding these together. The walls are usually plastered both inside and out with mud mixed with straw; the uprights are forked poles of mezquite and the same kind of a pole always stands in the middle of the house to support the roof. The rafters, too, are of mezquite, the roof consisting besides of a layer of coarse grass called sacaton and another of wheat straw, on top of which is placed mud. The roof is slightly raised in the middle in order that the rain may more easily run off; the floor is earthen. Huts made of upright ocotillo sticks, but otherwise similar, are also seen. A window is rarely found in the houses. Generally there is attached to the house a shed called in Spanish "jacal," a light roof resting on four or six forked upright poles, which furnishes a grateful shade. Here the cooking is done, and here the family is usually found sitting. The dwellings in the rest of the Papaguera are of a similar type, real adobe houses being seldom met with. The dome-shaped grass huts of the natives are also not uncommon in the interior districts of southern Arizona. (Defts.' Ans. Rec. p. 25.)

Another of these scattered villages of the Santa Rosa Valley is the village of Anegam, three miles north of Kuarchi, which is a distinct community of about 44 family groups of huts and 267 inhabitants. Ak-Chin is another village containing 25 family groups of huts and a population of 123. It is located about five miles southwest of Kuarchi, Qewwa or Kvivo, meaning "Low Down" or

“Below” is another name for Kuarchi. Ki-achie-muck, meaning “burned cactus seed” is another village located between Kuarchi and Ak-Chin, being inhabited by 310 Indians divided into sixty family groups of huts, and is now the largest rancheria in the Santa Rosa valley. (Defts.’ Ans. Rec. p. 25.)

The defendants deny that any one of these villages in the Santa Rosa Valley is known by the common name of Pueblo or Santa Rosa. The term Santa Rosa is of Spanish origin, and is indiscriminately applied to a stretch of country of indefinite limits embracing the above mentioned villages and certain mountain settlements not herein named. (Defts.’ Ans. Rec. p. 25.)

These scattered villages are all composed of huts such as hereinbefore described, and these huts are utterly different in architecture and character from the compact, thick walled and substantial buildings of the Pueblo Indians, from one to seven stories in height and which style of architecture and high grade of culture gave to the latter Indians the name of Pueblo Indians. (Defts.’ Ans. Rec. p. 25.)

In the village of Anegam there is a deep well sunk by the government for the benefit of the Indians. In the village of Kiachiemuck, the government has sunk a deep well and built a day school for the Papago Indians. All of the Indians of the Santa Rosa Valley are under the control and supervision of the Papago Agency, now located at Sells, formerly Indian Oasis, which is the center of the Papago country, where new buildings have been erected and occupied consisting of cottages, offices, barns and warehouses, and where the government maintains for the aid and assistance of these Indians a physician, farmer and a stockman and other employes. Contracts and plans are now in process of completion for the erection of a hospital for which purpose the sum of \$15,000 has

been allotted and \$10,000 has been appropriated by Congress by the Act of May 25, 1918, for the purpose of fencing this Reservation where it touches the Mexican Border. There has been annually appropriated by Congress since 1914, \$20,000 for the improvement and sinking of wells for Papago villages in this Reservation. This Indian agency was formerly quartered near the San Xavier Mission. (Defts.' Ans. Rec. p. 25.)

The defendants, therefore, deny that the alleged plaintiff is and from time immemorial has been the town or Pueblo of Santa Rosa and except as herein set out, deny all of the other material allegations of Paragraph I of the amended bill of complaint. (Defts.' Ans. Rec. pp. 25-26.)

II. Defendants admit the allegations in Paragraph II of the said amended bill of complaint. (Defts.' Ans. Rec. p. 26.)

III. Defendants deny that for more than 300 years prior to the bringing of this action the alleged Pueblo of Santa Rosa has owned, possessed and occupied the tract or parcel of land in Pima County, Arizona, described in said amended bill of complaint, but allege the description of said land in said bill of complaint is taken from a pretended deed purported to be executed by one Luis on behalf of the inhabitants of certain villages in the Santa Rosa Valley, a copy of which is filed herewith as Exhibit "A" (Copy on Rec. p. 278), and is prayed to be read as a part of this answer. This said pretended deed is one of sixteen such instruments in writing, each being dated in December, 1880, in all of which one Robert F. Hunter, Trustee, is the grantee, but for whom the said pretended grantee is trustee does not appear, while in each of said deeds a certain alleged chief of some Papago village or villages is named as grantor. In the said pretended deed purporting to be a conveyance on behalf of the village of Santa Rosa, the instrument purports to be "made by and be-

tween Luis, Captain of the Village or pueblo of Santa Rosa, in the Territory of Arizona, for himself and the inhabitants of said village and the villages of Aitij, Semilla-Quimade and Chaquiwa, of the first part, and Robert F. Hunter, Trustee, of Washington, District of Columbia, of the second part." The description of the land attempted to be conveyed in the said deed is practically identical with the description of the land set out in the bill of complaint herein. Ten of these pretended deeds, including the alleged deed from said Luis, were filed for record June 2, 1914, and the remaining six in March 1919, from 33 to 38 years after their purported execution, and said deeds purport to convey to the said Hunter one-half interest in more than 2,600,000 acres of land (4,071 square miles) in Pima and Pinal Counties, Arizona. The said Hunter, Trustee, by agreements with one Robert M. Martin of Los Angeles, California, dated March 17, and May 17, 1911, purported to sell to the said Martin three-fourths of the one-half interest "vested" in said Hunter, Trustee, covered by the said ten pretended deeds filed for record June 2, 1914, the said Martin binding himself to take steps for securing a partition of the said land, all proceedings to be instituted in the name of the Indian inhabitants of the respective villages named in the deeds. (Defts.' Ans. Rec. p. 26.)

The defendants further deny that the said villages in the Santa Rosa Valley or the said Indian inhabitants of the Santa Rosa Valley ever had, or claim to have had, any title to any tract or parcel of land therein and aver that the said Indians have claimed and exercised over lands in the Santa Rosa Valley merely the ordinary Indian right of occupancy, use and possession. The said boundaries, as alleged in said bill of complaint, are indefinite, uncertain and incapable of being accurately ascertained, and the defendants deny that such boundaries have from time immemorial been

definitely fixed and recognized or marked by natural monuments. Defendants further deny that any village or villages of Papago Indians in this region have asserted ownership to any definite tract or tracts of land therein and that the said tract of land, alleged to be owned, and occupied and set apart in any manner for any one village or villages of Indians, is wholly a myth. The Papago Indians have never claimed nor has there been assigned to them by Spain, Mexico or the United States any title to any lands save the ordinary Indian title of occupancy and right of possession which the Papago Indians have exercised over the Papago Indian country without division among the villages or other divisions of such tribe. Except as herein set out, defendants deny every allegation of Paragraph III of the amended bill of complaint. (Defts' Ans., Rec. pp. 26-7.)

IV. The defendants deny that Spain during the period of its sovereignty over the territory recognized the ownership of said lands by the alleged Pueblo of Santa Rosa by royal orders, decrees or otherwise and aver that the country wherein the Santa Rosa Valley lies was practically or entirely unknown to Spain, and that Spain in no instance recognized in the Papago tribe, or any subdivision of that tribe, any other title than the ordinary Indian title of possession and use.

And the defendants further deny that Mexico after the establishment of its sovereignty, recognized and never disputed the ownership of the lands in the Santa Rosa Valley by the said alleged Pueblo of Santa Rosa or any village or community in the Santa Rosa region. Defendants are not informed as to whether or not the Santa Rosa Indians were recognized citizens of Mexico during its sovereignty, but aver that the same is not material nor is it material as to whether or not Spain and Mexico recognized distinctions between savage Indians and peaceable Indians living within their borders and except as herein set out, they deny

every allegation of Paragraph IV of the bill of complaint. (Defts' Ans., Rec. p. 27.)

V. The defendants admit that the Santa Rosa Valley is situate within the boundaries of the territory ceded by Mexico to the United States by what is known as the Gadsden Purchase, and admit that under the terms of the treaty known as the Treaty of Guadalupe Hidalgo, all property rights of the Mexican citizens were agreed to be respected by the United States, subject, however, to the qualifications set forth in Article VI of the Gadsen Treaty and the second paragraph of the protocol to the said Treaty of Guadalupe Hidalgo, as well as to the other terms of said treaties, but the defendants deny that by the terms of said treaties, or otherwise, the Papago Indians or the inhabitants of the alleged Pueblo of Santa Rosa pretended to become or actually became citizens of the United States, but in this connection the defendants aver that the citizenship of the Papago Indians is immaterial herein. Otherwise than as herein set out, the defendants deny every allegation of Paragraph V of said bill. (Defts' Ans., Rec. p. 27.)

VI. The defendants deny that at the time of the Gadsden Purchase or at the time of the acquisition from Mexico by the United States of Sovereignty over the territory comprising land in the Santa Rosa Valley or at any time the so-called Pueblo of Santa Rosa or any village or community in the Santa Rosa region or any Papago village whatever was the absolute owner of a complete, definite, indefeasible title to the land herein in controversy or was owner of said land or any land, but aver that all of said lands in controversy herein were then and ever since have been and are now part of the public domain of the United States, subject only to such Indian rights of occupancy and use as have been or are now actually exercised, except in so far as the United States in the exercise of its sovereignty and in the adminis-

tration of its laws for the protection of the said Papago Indians has created Indian reservations, as hereinafter set forth, or has disposed of portions of said lands to individuals.

Otherwise than as herein set forth, the defendants deny every allegation of Paragraph VI of said bill. (Defts' Ans., Rec. pp. 27-8.)

VII. While the description of the lands in controversy in said amended bill of complaint is indefinite, uncertain and incapable of being accurately ascertained, the defendants deny that they have offered and are now offering for entry as part of the public domain lands partly included in said description, but in this behalf aver that by Executive Order 2300, dated January 14, 1916, as modified by Executive Order 2524, dated February 1, 1917, a large area of land, to-wit, approximately 2,443,000 acres, was withdrawn from sale or entry and made a Reservation for the Papago Indians including those in the Santa Rosa region, within which said area is included, so far as can be determined from the description given in said amended bill of complaint, practically all of the land therein described. Within said reservation is also embraced about 2,000,000 acres of land covered by the aforesaid sixteen pretended deeds to Hunter, Trustee. (Defts' Ans. Rec. p. 28.)

There have been various reservations in this region created by executive order for Papago Indians as follows: San Xavier Reservation created by President Grant, July 1, 1874 (70,080 acres); Gila Bond Reservation by President Arthur, December 12, 1882, about one township, this has been modified to 10,231 acres); San Miguel, by President Taft, June 16, 1911; Indian Oasis, by President Taft, June 16, 1911; Cockleburr, by President Taft, May 28, 1912, (34,560 acres); Ah-Chin or Maricopa by President Taft May 28, 1912, (22,400 acres); Baboquivari, by President Taft, December 5, 1912 (this reservation embraced the Indian Oasis and 4,000 acres Fresno

Wells); and the aforesaid reservation created by Executive Order of January 14, 1916, of approximately 2,800,000 acres, which, as modified by Executive Order of February 1, 1917, is reduced to 2,443,000 acres but still includes the San Miguel, Indian Oasis, Cockleburr, Ah-Chin and Baboquivari reservations. (Defts' Ans., Rec. p. 28.)

The defendants aver, (Rec. p. 28) that the matter of creating a comprehensive reservation in the Papago country for the Papago Indians had long prior to the Executive Order of January 14, 1916, been under the investigation and consideration by the Interior Department and to that end surveys of the Papago country were commenced early in 1911, and continued until December, 1912. Based upon the facts submitted by the engineers in their reports together with information given by the Special Agents of the Indian Office, that office recommended the creation of the reservations made by President Taft in 1911 and 1912. This survey work was resumed in February, 1914, and was continued and concluded by Herbert V. Clotts, Assistant Engineer, the result of his work being incorporated in a comprehensive report dated June 30, 1915, on file in the Interior Department. On February 6, 1914, a joint report was submitted to the Interior Department by Frank A. Thackery, Superintendent of the Pima Reservation, and H. J. McQuigg, Superintendent of the Papago Reservation, fully describing the conditions existing in the Papago country and recommending the creation of a large reservation for the Papago Indians in Pima, Pinal and Maricopa Counties, Arizona, filing with their report, dated January, 1914, a map showing the outlines of the proposed reservation. On September 4, 1914, Inspector J. H. Fleming was directed to proceed to Arizona for the purpose of investigating and reporting upon the question of creating the proposed reservation and his report fully concurred in the recommendation made by the Superintendents of the Pima and

Papago Agencies. After further investigation and reports, the Secretary of the Interior on January 13, 1916, recommended to the President the creation of this reservation. (Defts' Ans., Rec. p. 29.)

As before set out herein, this reservation contains 2,443,000 acres which it is believed is ample to meet the needs of the Papago Indians who now number about 6,000, and who have now under cultivation about 10,000 acres, with cattle estimated at about 20,000 to 25,000 and horses about 3,000. (Defts.' Ans. Rec. p. 29.)

The defendants, therefore, deny that the acts of these defendants complained of would throw a cloud upon any title in the alleged plaintiff to the land aforesaid or are contrary to the rights of any village Indians, or any Papago Indians in the Santa Rosa Valley, but aver that by virtue of the duty imposed upon him the defendant Secretary of the Interior and the Commissioner of Indian Affairs have in every way sought to protect and preserve the rights of these Papago Indians from the encroachment of all persons, and especially from the attempt of persons to unlawfully secure vast tracts of the public domain, now within the reservation created for the Papago Indians. Except as herein set out, they further deny each and every allegation of Paragraph VII of the amended bill of complaint. (Defts.' Ans. Rec. p. 29.)

VIII. Under the Act of June 20, 1910, for the admission of New Mexico and Arizona as States of the Union, certain lands of the public domain were granted to the State of Arizona to be selected under the direction and subject to the approval of the Secretary of the Interior, and the defendants admit that under said law, the State of Arizona made application for the survey of certain lands in said State and embracing lands in said Santa Rosa Valley, but the defendants deny that the alleged plaintiff owned any of said land or any of the lands advertised by the defendants in the State

of Arizona as open to settlers, but aver that by the said executive orders hereinbefore set out there have been reserved from selection by the State of Arizona and from entry under the homestead laws of the United States 2,443,000 acres of land which have been set apart as a reservation for the Papago Indians of Arizona embracing most (Rec. p. 29) of the lands set out in said amended bill of complaint, and all the various Papago villages hereinbefore set out. (Defts.' Ans. Rec. p. 30.)

Except as herein set out, the defendants deny every allegation of Paragraph VIII of said amended complaint.

IX. The files of the Indian Office show that on or about May 29, 1914, there was received a petition from the attorneys in this case addressed to the Secretary of the Interior purporting to be on behalf of certain Papago Indian villages named therein requesting the survey and withdrawal from entry of certain tracts of land alleged to be owned by these villages, but no description of these lands was given in this petition. However, these defendants admit that on or about June 11, 1914, the Secretary of the Interior made answer to said petition substantially as set forth in Paragraph IX of said amended complaint, and in this behalf aver that no grant emanating from the government of Spain or Mexico was ever made to any village or community of Papago Indians in the Santa Rosa region or to any Papago Indians or located or recorded in the Archives of Mexico as provided in Art. VI of the so-called Gadsden Treaty; that all of the lands in controversy herein when acquired from Mexico passed under the dominion of the United States as public lands of the United States; that no right, title or interest exists or ever has existed in any Papago Indian or community of Indians in or to any of the lands in controversy herein other than the ordinary Indian right of occupancy and possession subject to the sovereign rights of the United States. Except

as herein stated, the defendants deny every allegation of Paragraph IX of said amended complaint. (Defts.' Ans. Rec. p. 30.)

X. The defendants are not advised as to the truth or falsity of the allegations of Paragraph X of said amended complaint, and, therefore, neither deny nor affirm the same.

XI. The defendants admit the allegations of Paragraph XI of said bill and deny each and every allegation in Paragraph XII thereof." (Defts.' Ans. Rec. p. 30.)

The answer prays for dismissal and for costs.

The cause came on for final hearing on November 7, 1922, before Mr. Justice Siddons. (Rec. p. 114.) The case involves the question whether, as contended by the appellees, the land described in the bill is part of the government domain and open to entry, or whether it is the property of the appellant and not open to entry under the enlarged homestead act, or subject to disposal to others than the appellant through the General Land Office of the United States.

The evidence and pleading show encroachment and a denial of title to said lands in appellant. Many months were consumed in the Papago country and other parts of Arizona as well as California and New Mexico, taking the depositions of witnesses on behalf of both parties to the record by stipulation of counsel. (Rec. pp. 114, 115, 126, 139, 151, 153, 154, 156, 159, 276, 298, 301, 311, 315, 319, 323.) Attorneys for appellant were prevented by the defendants' agents from freely interviewing the Papago Indians as prospective witnesses for plaintiff (Rec. pp. 143, 150-329-337-367-389); therefor, plaintiff has depended solely upon the testimony of others.

On January 14, 1916, a year after the suit was com-

menced, a reservation amounting to 2,443,000 acres was created by executive order upon the recommendation of the defendants, covering the land described in the complaint. (Rec. p. 28.) Thereafter, to-wit, February 1, 1917, by executive order, 520,000 acres were withdrawn from said reservation, and these facts, together with the facts that the Government has expended money for the benefit of the Papago Indians are a part of the defense. (Rec. p. 28.)

STATEMENT OF FACTS.

It has been conceded by defendants that the Pueblo Indians of New Mexico hold title to their lands in fee simple and much testimony has been taken by the plaintiff to show that the plaintiff is a similar people to the extent that plaintiff's title was as good at the time of the Gadsden Treaty of 1854 as the New Mexico Pueblos were at the time of the Hidalgo Treaty of 1848. The defendants have introduced evidence with a view of disproving this issue.

PAPAGOS ARE SEDENTARY, AGRICULTURAL AND PEACEFUL PEOPLE.

Each of the 30 Papago Indians testifying for defendant testified that they had lived all their lives in the place where they were now residing, or had lived there more than 15 years, and that their ancestors had lived there before them and had comfortable homes; that they and their ancestors had engaged in stock-raising and agriculture as vocations. Plaintiff will base its statement on this evidence, and, in this statement of facts, maintain that the evidence shows plaintiff to have been a sedentary, agricultural people from time immemorial. (Rec. pp. 116-128-129-131-132-136-139-158-

160-164-165-173-192-197-203-208. They were the same as New Mexico Pueblos (Rec. p. 196.) Defendants stipulated them to be friendly and industrious (Rec. p. 192.) (Also see Rec. pp. 196-197-203-208.)

APPELLANT IS THE PUEBLO OF SANTA ROSA.

(Rec. pp. 116-119-123-126-129-133-145-151-152) (It is found on Defendant's Exhibit "I" at page 328) (Rec. pp. 153-155-159-161-162-163-164-166-167-171- 173 - 187 - 191-192-193-197-198-199-200-203-210-212-252- 258 - 260 - 298-305-310-324-362-383-392-505.)

THE TITLE TO THE LANDS AND SIMILAR INDIAN TITLES WERE RECOGNIZED BY SPAIN AND MEXICO, AS WELL AS THE UNITED STATES.

(Rec. pp. 120-135-149-162-168-171-194-195-198-200-203-204-297-301-303-304-318-319-336-353-393-504.)

Possession is admitted in Paragraph 3 of the Answer. (Rec. p. 27.)

THE PAPAGOS HAD A HEAD CHIEF.

(Rec. pp. 131-135-139-140-145-146-166-171- 178 - 208 - 233-236-241-242-407.)

THE CORNERS OR MONUMENTS OF THE TRACT DESCRIBED ARE KNOWN AS KABITQUE, MESCALERO, SIERRA CABEZA, AND OKOMO.

Kabitque is identified in the evidence as the north-east corner, or Santa Rosa Mountain, Exhibit I-a. (Rec. pp. 328-130-140-144-259-325-392-396.)

Okomo is identified in the evidence as the southeast corner in the Commombabi Mountains. (Rec. pp. 130-134-144-325.)

Mescalera is identified as the southwest corner. It would imply a place where mescal was made some time. It is sometimes referred to as White Mountains. (Rec. pp. 130-134-325-396.)

Sierra Cabeza is identified as the northwest corner. There is sufficient evidence in the record establishing this place to be Table Top Mountain. (Rec. pp. 130-134-345-326.)

Defendants have introduced evidence to establish this monument to be in the Vekal. Exhibit I-a (Rec. p. 328) shows the Vekal Mountains. (Rec. pp. 303-332-333-346-347.)

With the exception of the contention in the identification of Sierra Cabeza, the boundaries are well established. In fact, this is conceded by defendants in Plaintiff's Exhibit 18 found in the printed record following page 198, where, in reference to the boundaries, language by Cato Sells, Commissioner of Indian Affairs, (Rec. p. 187) is found as follows:

“The data shown on the attached map * * * has been compiled from the best data obtainable from the records of this office, the records of the Chief Irrigation Engineer's office of this service, and is based on actual surveys and examinations in the field * * *” (Rec. insert between pages 198 and 199.)

Names Santa Rosa Village, and says:

“It has been prepared from the best data obtainable, and is believed sufficiently accurate to locate, with approximate definiteness, the claim

presented in their behalf.” (Page 2, Rec. insert between pages 198 and 199.)

Witness Bonaventure Oblasser the Catholic priest, who testified as a witness for defendant, testified as follows:

“I have followed the description according to the monuments given in the complaint.” (Rec. middle page 326.)

Jose Pablo, a most active witness for defendants (Rec. p. 301) recognized the tract when it was referred to, by testifying that no particular village claimed the tract (Rec. p. 303.) **THE WHITE PEOPLE, AND PARTICULARLY THE DEPARTMENT OF THE GOVERNMENT OVER WHICH THE DEFENDANTS ACT, BEGAN TO ENCROACH UPON THE LANDS OF DEFENDANTS AT AN EARLY DATE.** (Rec. pp. 117-122-138-164-165-169-175-212-340-356-378.)

Plaintiff became worried over its land and title in 1857. (Rec. pp. 164-140.)

The land claimed by plaintiff was opened to entry under the Enlarged Homestead Act of February 1909. (Rec. pp. 137-138 Plaintiff's Exhibit A following p. 138.)

THIS SUIT IS TO PROTECT AGAINST SUCH ENCROACHMENTS AND THE ENCROACHMENT WHICH FOLLOWED BY THE DECLARATION OF AN INDIAN RESERVATION BY EXECUTIVE PROCLAMATION. (U. S. Supreme Court decision, this brief, pp. 29-33.)

DEFENDANTS AT ALL TIMES REPRESENTED TO THE INDIANS, AND PARTICULARLY TO THE WITNESSES, THAT THE PAGOS NOW HAVE THE TITLE TO THE LANDS

INVOLVED IN THIS SUIT, AND THAT THIS SUIT, WAS FOR THE PURPOSE OF TAKING THEIR LANDS FROM THEM. (Rec. pp. 257-266-270 - 307 - 309-313-318-335-336-342-346-350-359-362-364-385-391-396.)

Mr. Bowie, supervisor for the Indian Bureau of the Papagos, testified (Rec. p. 255) on this subject as follows:

“Q. You simply told them (the Indians) that this was a suit to take away half their lands * * *”
(Rec. p. 266.)

“A. That was one thing I told them * * *
I wanted to impress them with that fact. (Rec. p. 266.)

Witness McCormick (Rec. p. 335), the Indian agent of the Papagos, advised the Indians that if they won the suit, it would result in the Indians losing one-half their lands. (Rec. p. 336.)

The same witness, in talking to the Indians, referred to the land in question as their (the Indians' land. (Rec. p. 257).

The Indian witness Moreno (Rec. pp. 384-386) testified that he thought that the making of the reservation by the government gave the Papagos title to their lands. (Rec. p. 386.)

He also testified that if a suit should be started in court to try the case and render a judgment protecting their rights, the Indians would want it. (Rec. p. 386.) The Indian witness Barnebe Lopez gave the same testimony. (Rec. 379.)

Defendants at all times acted without regard to the interests of the plaintiff inhabitants and coerced them into signing affidavits against their interest, and for-

bade them to make affidavits that would be to their interest. (Rec. pp. 143-144.)

FROM THE TIME THE GOVERNMENT FIRST APPOINTED AN INDIAN AGENT, THE INDIAN DEPARTMENT OF DEFENDANTS ATTEMPTED TO DISRUPT THE GOVERNMENT AND PUEBLO ORGANIZATION OF PLAINTIFF. (Rec. pp. 116-120-169-170-313-314-315-330-342-374.)

THE INDIAN AGENT SUCCEEDED TO THE POWER OF CON QUIEN, THE HEAD CHIEF. (Rec. pp. 313-314-315.)

THE INHABITANTS OF PLAINTIFF WERE ORDERED BY THE AGENT OF DEFENDANTS NOT TO CONFER WITH THE ATTORNEYS FOR PLAINTIFF. (Rec. pp. 143-367-337-143-150-329-364-365-366-367-368-389.)

The attorneys for defendants approved this action of defendants. (Rec. pp. 364-365-366-367-368.)

The witness Day, who had no interest in the litigation, and who had compiled a dictionary in the Papago language (Rec. p. 143), confirmed the attitude of defendants. (Rec. p. 150.)

For the convenience of the court, appellant's statement of facts submitted to the Supreme Court of the United States is reproduced herein, except that such statement is modified to come within the issues remaining. The materials from which the statement is compiled, are facts of which the court will take judicial knowledge, although practically all of the same matter is introduced in the record. It reads, in part, as follows:

The Locality.

Papagueria is a so-called desert country, without rivers or transportation, lying along the border of

Mexico. It is the last corner of appellant's land, and the land and its inhabitants have been practically forgotten by our people and our government until within a few years.

Some of the land is public domain, but large parts are owned and occupied, and have been since Aztec times, by about 20 pueblos of civilized Indians.

Plaintiff is one of those pueblos, which to save itself and its Indians from illegal encroachments of private individuals and government officers—in these days when all the cheap public land has gone—brings this injunction suit.

THE HISTORY AND CHARACTER OF THE PAGO PUEBLO INDIANS AND THEIR PUEBLOS AS SHOWN BY THE AUTHORITIES.

In 1915, Hon. Cato Sells, the Indian Commissioner, in his address at the Lake Mohonk Conference (printed in the 33rd Annual Report of the Lake Mohonk Conference) said:

“I presume you know something of the Papagos.
 * * * I have recently visited them. They live in Southern Arizona on the border of Mexico in the driest desert of the United States. It has been their home for more than two hundred years. No branch of the Caucasian race could survive under the conditions existing there. The Papagos have successfully contended against tremendous obstacles. The possession of their lands is now seriously threatened by the invasion of the Mexican cattlemen and others. The Papagos are sending up a Macedonian cry for help and we should promptly go to their rescue. The Papago Indians are in all respects deserving of our best efforts. They have been industrious and self-reliant. It is their proud boast that no Papago Indian has

ever shed the blood of a white man. The citizens of Arizona are very friendly to them, and this is especially true of Governor Hunt. Nothing affecting any tribe of Indians has aroused my sympathy more, and I want to assure you that the best efforts of which I am capable will be extended to permanently establish these Indians in the Papago country."

In 1912, Carl Lumholtz, a keen and experienced observer, in his "New Trails in Mexico" the last and best account of the Southwest country, says (Rec. pp 189-190):

"It has been the good fortune of the Papagos to live in a country which the white man has not as yet found it profitable to exploit by cattle raising or still less by dry farming. Therefore they have so far been left alone in their native country * * *. The Papagos are above medium height, rather dark in color, and of splendid physique. The women are inclined to be stout. They are a peaceful but at the same time a courageous people and show much intelligence. They are hospitable, as becomes a desert people. * * * The Papagos are by no means badly off as a rule and they manage to make a good living where, so far, the white man's efforts have failed. Their herds adapting themselves to the arid conditions, are increasing and making the Indians prosperous and comfortable." (Rec. p. 190.)

In 1913, the following proofs were made before a sub-committee of Congress, either by testimony of Mr. Schenck, for many years connected with Indian affairs and now or recently Superintendent of Irrigation for the Indian Bureau or from formal statements and reports prepared by the Indian Bureau and read

into the record. See public documents published in 1913 under the title "Indian Appropriation Bill; Hearings before a Sub-Committee of the Committee on Indian Affairs," etc.

"The (Papago) Indians are very industrious farmers so far as their ability will permit," (p. 52.) They are an industrious people and have done remarkably well under adverse conditions," (p. 303). They subsist on the stock that they raise and they have sometimes small primitive systems of irrigation and do farming. * * * They have developed a good many varieties of beans. * * * This improvement in plant life shows their interest in agriculture. The University of Arizona is studying their problems, and thinks that we can learn something about dry farming from the Indians. * * * They have their own houses. * * * They are built sometimes of adobe brick but more frequently they use the brush mats plastered on both sides, quite sanitary houses. * * * Usually the children are clean and as well clothed as you can expect under these conditions" (p. 305). "They are a bright and energetic people for Indians. Their principal source of revenue is that of stock raising. * * * These Indians have had practically no aid from the government and have been a peaceful and in-offensive tribe at all times and are almost wholly self-supporting at present" (pp. 322-323).

In 1872, General Francis A. Walker, Commissioner of Indian Affairs, gave an official description of the Papagos, (Rec. p. 192) which the Secretary of the Interior approved and forwarded to the President. He said (Exec. Docts., 3d Sess., 42d Congress, Report of Sec'y of Int. p. 445):

“These Indians, numbering about 5,000, are of the same class, in some respects, as the pueblos in New Mexico, living in villages, cultivating the soil, and raising stock for a support. * * * These Indians have no treaty relations with the United States and receive no assistance from the government.” (Rec. p. 192.)

In 1869, J. Ross Browne, in “Adventures in the Apache County” (New York, Harper & Bros.), said (page 110 ff.):

“In 1860, they sold 400,000 pounds of wheat—all the mail company would purchase. They had more, and furnished the government and private teamsters all that was necessary for transportation from Fort Yuma to Tucson. * * * . In 1862, they sold to the government over a million pounds of wheat, included in which was a portion of the previous year’s crop, returned to them by the Texans. They furnished pinole, chickens, green peas, green corn, pumpkins, and melons for the entire California column, supporting nearly a thousand men for many months * * * .

“As far back as our knowledge of the Papagos extends they have been a peaceable, industrious, and friendly race. They live here, as they lived two centuries ago, by cultivating the low grounds, in the vicinity, which they make wonderfully productive by a system of irrigation.”

In 1869, William A. Bell, in “New Trails in North America” (London, Chapman & Hall) p. 159, said:

“As a race they (the Papagos) are the finest specimens of men, physically, I have ever seen. * * * The most interesting point * * * is their mode of life * * * . They own flocks and herds in considerable quantities, and they keep large droves of horses, or rather ponies. * * *

They have become the greatest traders, and the most industrious people to be found in the country."

In 1868, Col. Roger Jones, Assistant Inspector General, reported on the Indians in Arizona and Southern California as follows: (See report of Commissioner of Indian Affairs, 1869, at page 220.)

"They are industrious, support themselves by cultivation, and manufacture of mats and pottery, in which they are well skilled. * * *

"Of late years this industrious tribe has been entirely ignored by the Indian Department, and it is not known that any reservation has been designated for them."

In 1865, Agent M. C. Davidson, said, at page 131 of the Report on Indian Affairs for 1865 (Report of Sec'y of Int., 1865, p. 299, Exec. Doct. 39th Congress, Vol. 2) [Rec. p. 167]

"The Papagos were originally from the same stock as the Pimos and Maricopas. These tribes speak a common language, which is conceded to be the ancient Aztec tongue. * * * The Papagos represent that portion of the original people who, while occupying the ancient seats * * * embraced the Christian faith. * * * The Papagos are probably descended from the most ancient occupants of the continent of whom we have any knowledge; their traditions reach back to a high antiquity, circumstantial as to details through obscure as to dates. Their unwritten chronicles embrace the epochs of the creation of man, the occurrence of a universal deluge, and the coming of the Spaniards. * * * Until the last named event, their fathers were governed and

guided by the great Montezuma, who is clothed, according to their dim traditions, with the attributes of a demigod, as well as those of a law-giver, and terrestrial king. The status of the Papagos with respect to the soil ought to be determined in a way that no injustice will be done to them. The Mexican laws, based upon the laws of the Indians promulgated by the Kings of Spain, recognized the Indians as subjects or citizens, and in most cases confirmed to them, wherever they resided in fixed communities, the titles to the lands where they lived. The Spaniards never made treaties with the Indians, nor extinguished their title to the land, nor did they in any way recognize them as independent (Rec. p. 167) nations. Those (Rec. p. 168) who now, by the transfer of the political sovereignty of the country, find themselves upon American soil, and surrounded by Americans, look for at least a measure of recognition of their rights equal to that which they enjoyed under the despotic government of Spain.

“In my opinion, we must regard them as American citizens, and under certain conditions entitled to all the privileges. * * *

“If we inquire into their characteristics as a people, we shall find that they are agriculturists to an extent sufficient to supply their simple wants. At times they have produced a surplus for their less fortunate white neighbors. As warriors and soldiers, they have for ages maintained their position against the hostile Apaches. As Christians, they have for two hundred years remained the humble but faithful disciples of the church. * * * The conduct of their maidens, wives, and mothers have always been beyond reproach.”

The report names the Papago pueblos, including Santa Rosa.

In 1863, the first Superintendent of Indians for Ari-

zona, Charles D. Poston (known as the Father of Arizona) filed with the Secretary of the Interior, a report (Rec. pp. 165-6) on Indian affairs in that section, speaking from his personal knowledge. Concerning the Papagos, he said (Rec. p. 166):

“The Papagos inhabit that triangular space of arid land bounded by the Santa Cruz, Gila and Colorado Rivers, and the Mexican boundary line. The first and principal village is at San Xavier del Bac, a church erected by the Jesuits in 1698, and here they have lived and planted and watched their flocks and herds ever since. * * * They raise corn, wheat, barley, beans, peas, melons and pumpkins, and are expert in the manufacture of pottery and willow ware. In harvest time they spread all over the country as reapers and gleaners, returning with their wages of grain for winter. * * * They have horses, cattle, sheep, poultry and a great number of dogs. As these Indians were found in possession of the soil they cultivate and have maintained themselves there continuously ever since, it would seem equitable that their rights should be recognized by the government of the United States. * * * The Papagos within our jurisdiction live in 18 different villages and are estimated as follows:

San Xavier del Bac	500
Mesquit	500
Fresnal	250
Poso Blanca	300
Cumero	500
Alcade	250
Sonoita	500
Cahuabia	350
Chuba	250
Tecolota	500
Mariz	250

Sou Saida	250
Santa Rosa	400
Periqua	400
Cojota	500
Quejotoa	500
Poso Verde	350
Quoto Vaquita	250
	6,800

(Rec. p. 166)

Mr. Poston's Report for 1865 (Exec. Docts., 2d Congress, Vol. V, Report of Sec'y of Int., p. 296), says:

“The early Spanish explorer found the Papagos here in 1540, and ruined houses of grand proportions attest their occupancy for thousands of years before the Spaniards came.”

In 1856, the Indian Commissioner reported as follows (Report of Sec'y of Int.—Senate 3d Sess., 34th Cong., Vol 2):

“The Pueblo Indians maintain their character as peaceable, industrious communities. Some of them have lost the title-papers for the grants of land obtained by them from Spain and Mexico. In such cases their agent has taken testimony in their behalf. They deserve the fostering care of the government, and Congress will no doubt confirm their titles. About five thousand Indians are embraced within the Gadsden purchase. They are mostly Pueblos and reside in six different villages. They have houses and flocks and raise wheat and other products of the soil.” (p. 566.)

In 1856, the Governor of New Mexico reported on the Pueblo Indians within the territory acquired by the Gadsden Purchase and now included in Arizona, being

the Papago Pueblos. He says (Report of Commissioner of Indian Affairs, 1856, p. 183):

“A large portion of this accession to our Indian population consists of pueblos, situated near Tucson. * * * They reside in permanent villages, have comfortable houses built of adobe, have flocks and herds around them and rely upon the cultivation of the soil for subsistence—raising wheat, corn, cotton, and other vegetables. They are divided into six pueblos, or villages, but whether or not they hold their lands under grants from the former Governments of their country, I am not informed; but presume they do, as they have been permanently settled for a great number of years.”

In 1855, Major Emory, (Rec. p. 185) as United States Boundary Commissioner, was examining and surveying the territory of the Gadsden purchase (including the territory now in question) before it came into the actual possession of the United States and his account of the promises made officially by him to the Indians is interesting and important, for it shows that in taking over this land the United States Government knew that the Papago pueblos were land owners and not papuers. Major Emory calls the Indians “Pimas,” which is a name often applied to the Papagos, but there is no doubt from the names and the context that the Papagos are referred to. Major Emory said (Mexican Boundary Survey, Vol. I, Part I, p. 94.—H. R. Executive Documents No. 135, 34th Congress, First Session, 1857) (Transcript Record pp. 185-6.)

“The most considerable and interesting settlement in the new territory is composed of a con-

federacy of semi-civilized Indians, the Pimos, and Coco Maricopas, * * * I became acquainted with these people in 1846, and in another work eulogized their advanced state of civilization, their proficiency in agriculture and the art of war, and their morality. While in Los Angeles * * * a delegation consisting of the chiefs and head men, visited my camp nearly 200 miles distant from their homes, to consult as to the effect upon them and their interests of the Treaty with Mexico, by which they were transferred to the jurisdiction of the United States. I give below a copy of the statement made at the meeting, where it will be seen that I said all in my power to silence their apprehensions. They have undoubtedly a just claim to their lands, and if dispossessed will make a war on the frontier of a very serious character.

“I hope the subject will soon attract the attention of Congress as it has done that of the Executive, and that some legislation will be effected securing these people in their rights. They have always been kind and hospitable to emigrants passing from the old United States to California, supplying them freely and at moderate prices, with wheat, corn, melons and cotton blankets of their own manufacture. (Rec. p. 186.)

“Camp at Los Nogales, June 29, 1855. Capt. Antonio Azul, Head Chief of the Pimos; Capt. Francisco Luke, Coco Maricopa Chief; Capt. Maila, Coco Maricopa Chief, Capt. Shalan, a Chief of Gila Pimos; Capt. Ojo de Burro, War Chief of Pimos; Capt. La. Baca de Queja, a Chief of Gila Pimos; Capt. Jose Victoriano Lucas, Head Chief of San Xavier Pimos; Capt. Jose Antonio, Chief of San Xavier Pimos, have this day visited my camp for the purpose of ascertaining in what manner the cession of the territory under the treaty with Mexico will affect their rights and interests. I have informed them that, by the terms of the treaty, all the rights that they possessed under

Mexico are guaranteed to them by the United States; a title to lands that was good under the Mexican Government is good under the United States Government. I informed them that in the course of five or ten months, perhaps sooner, the authorities of the United States would come into the ceded territory and relieve the Mexican authorities; until that time they must obey the Mexican authorities, and co-operate with them, as they have done heretofore, in defending the territory against the savage Apaches. I have examined the testimonials given by numerous American emigrants to Azul and his captains bearing testimony to the kindness and hospitality of himself, and the Pimos and Coco Maricopa Indians generally. I can myself bear testimony to the truth of these statements. I therefore call upon all good American citizens to respect the authority of Azul and his chiefs.

(Signed) W. H. EMORY,
U. S. Commissioner,
Major, U. S. A. (Rec. p. 186)

In 1762, the Jesuits had twenty-nine missions, consisting of seventy-three Indian pueblos, of which several were located in the province which afterwards became Arizona and later the Franciscan priests visited Tubac, Tucson and other pueblos of the Papagos at stated times. (See "Soldiers of the Cross-Notes on the Ecclesiastical History of New Mexico, Arizona and Colorado" (1898), by J. B. Salpointe, formerly Archbishop of Santa Fe, pp. 134 and 181.)

In 1540-42, Viceroy Mendoza ordered an expedition to visit northwestern Mexico, and Padre Castenader who accompanied the expedition shows that the Papagos at that time occupied the same territory in the same way as at present. He says:

“It is sufficient to say that the people of the Gila River are agricultural, cultivating maize, beans, pumpkins (melons), and cotton. They depend exclusively upon agriculture for their subsistence dwelling in villages built of mud (adobe).”

THE PUEBLO OF SANTA ROSA, ACCORDING TO AUTHORITIES.

This pueblo has from time immemorial occupied the valley of Santa Rosa and it is frequently mentioned in the books and records. Thus the United States Surveyor General's report for 1861 includes Santa Rosa in the list of pueblos as “one of the Papago pueblos”; and in his testimony before the Congressional Committee in 1913, Mr. Schenck, Superintendent of Irrigation for the Indian Bureau, mentions Santa Rosa as one of the places “where the villages have been established for a long time and where it is known that the Indians constantly make their homes” and as being one of the largest of the villages (see Public Document entitled “Indian Appropriation Bill; Hearings before a Sub-Committee of the Committee on Indian Affairs,” etc., 1913).

Santa Rosa is described in the “Hand Book of American Indians,” Part 2, page 460, and it is shown under that name on the various maps with its subordinate villages and wells.

Lumholtz in his “New Trails in Mexico” (pp. 90, 109) described the village, giving its native name and saying that it is the largest summer rancheria of the Papago tribe and that the houses are scattered over an area of nearly two miles square and that the Papagos in this village are less spoiled by contact with civilization than in any other part of their country.

The territory in question is considered sacred. The "Hand Book of American Indians," Part 2, page 460, says that the adjacent mountain of Santa Rosa is "a sacred place in Pima and Papago mythology"; and in his report to the Commissioner of Indian Affairs in 1865, Special Agent Davidson wrote as follows, showing clearly the ancient and permanent character of the village:

"The sacred mountain and village of Santa Rosa is a mecca to the Papagos. According to the ancient legend, after the Great Spirit had formed the earth and all living things, excepting man, he came down to visit his work. Alighting near Santa Rosa, he made a hole in the ground and re-ascended to the skies taking with him a piece of clay, being the same material with which the Indians to this day make their pottery. From the heavens he dropped the clay into the hole already prepared, and from that orifice sprung forth Montezuma, who assisted in the creation of the Papagos and all other Indian races in order." (See Report of Commissioner of Indian Affairs, Executive Document 1248, 1865 to 1866, Vol, 2, p. 299, 1st Session, 39th Congress.)

The valley of Santa Rosa and the pueblo land in that valley are desert lands; Mr. Schenck in his report above cited mentions Santa Rosa as one of the eight villages that need water, and it is natural that the largest Papago pueblo should occupy and use for its herds, summer and winter, a territory, amounting as shown by the bill of complaint, to about 400,000 acres. This is not a large acreage for desert land for a large pueblo. The New Mexican pueblo land is vastly fertile, and yet the government created for the

Zuni pueblo in New Mexico a reservation which with the pueblo lands gives the Zuni pueblo the use of more than 215,000 acres; and in the case of the Arizona Hopis, desert pueblo Indians whose conditions are similar to the Papagos, the government has set aside 2,472,320 acres for the use of only 2,300 Hopis. (See "Handbook of American Indians," Part 2, p. 374; Part 1, p. 560.)

THE LEGAL STATUS OF THE PAPAGO INDIANS AND THEIR PUEBLOS.

Under the Spanish and Mexican laws and at the time of the cession the pueblos of the Papagos (as well as all Indian pueblos) were recognized as judicial entities; they were fully organized to conduct their own affairs and to bear their responsibility toward the public; they were regulated and privileged by law, and they had power by law to appear in court and to hold property; and the laws granted and confirmed to them the lands which they occupied and the right to protect those lands in court. Each pueblo held its title as a legal entity.

The Indians themselves were free vassals of the King and had large personal rights and the right to sue.

Under the Mexican rule the Indians were made citizens and put upon an absolute equality with the Spaniards, and their pueblos and the pueblo property were free from restrictions.

All this appears from the following quotations which were taken for the most part from the famous "Laws of the Indies" which were begun by decree of Charles V. in 1543 and extended by subsequent de-

crees of the Spanish Kings until they constituted one of the best codes of law ever promulgated. This code of laws comprehended all the laws of Spain with regard to Spanish America and it determined the personal rights and property rights and political rights of both Spaniards and Indians in America. We translate and quote from the last edition of the "Laws of the Indies" which was published in Madrid in 1889 but there has been no material change in the text for one hundred years. The keynote of this beneficent code was struck by the original decree as published in 1543, showing that the Indians were made free and that their laws and customs were continued and that they were allowed to sue.

We translate from a facsimile of the original published in London in 1893:

"And because our chief intention and will has always been and is the preservation and increase of the Indians and that they be instructed and taught in the matters of our holy Catholic faith and be well treated as free persons and our vassals as they are, etc.

"The audiencias (courts) must not allow that in suits between Indians or in ordinary proceedings at law, any dilatory measures, as is wont to happen, through the malice of some advocate and solicitor, but that they be determined by strictly observing their customs, unless they be manifestly unjust and that the said courts take care that this be observed by the other, inferior judges."

Laws of Indies—Book IV, Title 12, Law 14 (1578):

"Because we have wholly succeeded to the lordship of the Indies and because the public lands not

granted away by kings, our predecessors, or by us in our opinion belong to our patrimony and royal crown, it is suitable that all the land which is held in possession without just and true titles shall be restored to us as it belongs to us so that, reserving before everything that which to us or our viceroys, courts, or governors may appear necessary for plazas, commons, public lands, pastures and territory of the inhabited villages and towns in view of their present condition as well as of the future and their possible expansion, and granting to the Indians that of which they may reasonably have need for working the land and making their crops and for their education, confirming them in that which they now have and giving to them in addition that which is necessary, all the rest of the lands may remain and be free and unencumbered to be disposed of according to our will. Wherefore we order and direct the viceroys and president of the pretorial courts that when it appears proper to them they shall announce a suitable limit of time in order that those in possession may exhibit before them and the officers of their courts which may name the title of the lands, plantations, farms, stock farms, protecting those who are in possession with good title and guaranties or with just prescription and they shall return and restore to us the remaining land to be disposed of according to our will."

Laws of Indies—IV, 12, 18 (1642):

"We order that the sale, cultivation and adjustment of lands shall be made with such precautions that to the Indians shall be left the lands which may belong to them, not only as individuals, but also as communities, and the waters and streams and the lands in which may have been made aqueducts or any other improvements by

which the lands have been fertilized by their personal industry; these shall be reserved in the first place and in no case shall they be sold or alienated; and the Judges which may be sent shall satisfy the Indians which are found upon the lands and shall leave the lands to each one of the old tributaries, reservados and Indian headmen, governors, absent ones and communities."

Laws of Indies—IV, 12, 19 (1646):

"No one shall be allowed to enter into a composition of lands unless he has possessed them for ten years, even though he may allege that he has so possessed them, because this pretext alone must not be sufficient, and the communities of Indians shall be admitted to composition in preference to the other particular person, granting to them every convenience."

Laws of Indies—IV, 1, 23, (1609):

"It is just that the Indians shall have time to work their properties and those of the community and that the viceroys and governors shall proclaim that which may be necessary, to the end that they can come to their farms," etc.

Laws of Indies—VI, 1, 30:

"Those of whom Indians have been granted cannot succeed to the lands and hereditaments which may be left vacant by reason of the death of the Indians granted without heir or successors, and to those lands and hereditaments shall succeed the Pueblos where they resided up to the amount which may reasonably be necessary for the payment and alleviation of the tributes which

were imposed upon them and something more, and the others which may remain shall be applied to our royal patrimony.”

Laws of Indies—V, 3, 6 (1618):

“In all the Pueblos which have more than one hundred Indians there must be two or three signers and each new Pueblo a sacristan, etc.”

Laws of Indies—VI, 3, 15:

“We order that in every Pueblo and new Pueblo there must be an Indian alcalde of that place, and if there are more than 80 houses, two alcaldes and two councilmen, also Indians, and although the Pueblos may be very great, there shall not be more than two alcaldes and four councilmen, and if there should be less than 80 Indians and should amount to 40, no more than one alcalde and one councilman must be chosen on New Years, others, as is practiced in the Spanish and Indian Pueblos in the presence of curates.”

Laws of Indies—VI, 3, 16, 18:

“The Indian alcaldes of the new pueblos shall have jurisdiction solely to inquire, arrest and take the delinquents to the prison of the Spanish pueblo of that district; but they can punish with a day in prison and 6 or 8 strokes, the Indian who fails at mass on the day of Fiesta or gets drunk or commits any other similar fault, and if he should be very drunk he must be punished with more rigor; but leaving to the headmen that which may be punished by compelling his Indians to labor. The government of the pueblo shall be in charge of said alcaldes and councilmen in all respects.”

Laws of Indies—VI, 3, 29:

“We order that in the Pueblos of Indians there shall be no proprietary officers or officials other than those permitted by the government of each province and because it is ordered that where it may be absolutely necessary the officers or constable and scriveners shall be sold, our will and intention is that these shall be sold only (under) condition that the scriveners be loyal and hold the title of notary as is directed by the general laws.”

Laws of Indies—VI, 4, 1 (1619):

“Having understood that certain excesses and disorders are committed in the administration of the common property and mortgages of the Indians, we have found it necessary to remedy this according to the difference of time and occasion under which the different orders were made; and because the matter is of so great importance that it requires special mention, we order our viceroys, presidents, judges and officials to give particular obedience and execution as we charge it upon them that in the community treasury shall enter all the common property of the Indians and the instruments and guaranties. In the community treasury must enter all the property which the body and collection of Indians of each pueblo may have, etc.”

Laws of Indies—VI, 4, 3 (1619)—provides that nothing shall go into the community treasury “which does not belong to the Indians in common” and anything else which is put in the community treasury shall ipso jure be forfeited and become the property “of the community.”

Id. VI, 4, 4—provides that everything coming from this property (the community property) shall be put in a strong box.

Id. VI, 4, 5—directs the officials to ascertain the money in the community treasury which apparently is suitable in quantity and to cause it to be invested in new and safe mortgages “applying to each community that which is bought with this income and rents or making the pro rata provided by the foregoing law, but if possible distinct investments must be made so that each community may have that which belongs to it.

Id. VI, 4, 6—provides that if an Indian mortgage is redeemed, the amount can be combined with money of another community or other communities and each contributing community shall have a pro rata share as shown by the books of account, which must be credited to each of the communities clearly and distinctly.

Id. VI, 4, 9—provides that books of account are to be kept in each community treasury in which shall be entered the “necessary and common expenses of the communities to which they belong.” An account must be kept of the mortgages and of the community to which each mortgage belongs. In another book, “must be made an inventory and statement as clear and complete as possible of the Indians’ Pueblos and communities which hold a part of these mortgages, expressing the amount of rents which belongs to each one and upon what goods it is imposed, etc.

Laws of Indies—VI, 4, 10:

“We especially desire and offer that the property of the community shall not be taken by fraud or withdrawn from the Indians and in no case with knowledge or without knowledge, extraordinary or incidental, shall money be taken from their treasuries in small or great quantities by reason

of loans, even though it may be agreed to return it immediately to them, not even for payment of guards, or for the benefit of public servants, nor for any other necessities which are or may be called public since no necessity can be more universal or privileged than that of the Indians to whom this property belongs * * *.”

Laws of Indies—VI, 4, 22 (1619):

“The fiscal (district attorney) of the audiencias (high courts) must act in causes bearing upon mortgages and community goods as he thinks best, being their defender and advocate in everything which there may be, demands, requests, responses, acceptances and other judicial proceedings of every kind, completing everything as he may be obliged so that the legal proceedings must proceed under his direction, and this is in accordance with that which has been enjoined upon all fiscals for the protection and defense of the Indians and their goods * * *.”

Id. 4, 24—provides for accounting for “everything which belongs to the communities.”

Laws of Indies—VI, 4, 33, (1621):

“We direct the viceroys and judges of mortgages that every year they cause the Indian councilmen to send them a statement and balance of the amount of the community goods received and of the state of all those treasuries in their districts in order that the councilmen may be most careful and remedy the losses which are necessary and the district attorney must see to it that this is done.”

Laws of Indies—VI, 7, 2 (1558) directs that the courts must hear and decide the claims of Indian headmen and shall restore to the headmen the powers and jurisdiction and rights and rents of which they have been unjustly deprived and “they shall do the same if any pueblo may have been despoiled of the right which they had to choose headmen.”

Royal Decree of Instructions Regarding Public Lands, of October 15, 1754, one of the most important Spanish-American Laws ever passed, as it is the basis of very many Mexican titles (1 Legislacion Mexicana, Mexico, 1876, pages 13, 14) :

“The judges and officers in whom is delegated the jurisdiction over the sale and composition of crown lands shall act with lenity, forbearance and moderation, with verbal and no judicial process, in questions of lands possessed by Indians, and of other lands which they (Indians) may need, especially for their work, cultivation and stock raising; since in regard to lands of communities and those granted to their pueblos for pastures and common lands, nothing new must be done, maintaining them in possession thereof and restoring to them those that have been taken from them and giving them more land as the exigencies of the population require, and using no rigor in regard to those held by the Spaniards and people of other castes, keeping in mind the provisions of Laws 14, 15, 17, 18 and 19, Title XII, Book IV, of the Compilation of the Indies.”

The decree further provides that lands sold or compromised, whether the persons in possession do or do not have deeds, shall be left in the quiet possession of their possessors, with proper notes on their title

deeds, etc., and that when there are no title papers, "it shall be sufficient to prove ancient possession as a title by just prescription."

Royal Cedula of June 4, 1687 (1 Legislacion Mexicana, page-I) says :

"It has been considered that it will be convenient to order that to the pueblos of the Indians which need lands for living and to sow, shall be given," whatever lands they may need, with the greatest liberality.

THE MEXICAN LAWS AFTER THE SEPARATION.

These laws gave great freedom to the Indians and their pueblos. See quotations under our Point III below.

TREATIES OF CESSION.

The treaty of Guadalupe Hidalgo, as changed by the Senate, contained the following paragraph IX:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

There was a protocol between our Government and the Mexican representative as follows :

“1st. The American Government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIIrd article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political and religious, which would have been possessed by the inhabitants of the ceded territories if the IXth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

“2nd. The American Government by suppressing the Xth article of the treaty of Guadalupe Hidalgo did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

“Conformably to the law of the United States legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836.”

The treaty as changed and explained by the protocol was ratified by Mexico and ratifications exchanged on May 30, 1848.

The Gadsden Treaty, ratified on June 30, 1854, contains the following :

“Article V. All the provisions of the eighth and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth.”

These treaties were merely declaratory of the principles of international law, which provide that in case of cession all the personal and property rights of the inhabitants continue, and appellant's rights are not at all confined to the words of the treaties.

HISTORY SINCE 1853

This has been a history of neglect. Nothing was done for the Papagos before 1874, when the San Xavier reservation, ten miles square, was set apart by the President, and in all these years they have persuaded only about 500 Papagos to come on the reservation—and this is not strange, for they cannot live upon it except as beggars or as day laborers for white men.

In all these sixty years before the institution of this suit there has been no congressional action whatever covering the Santa Rosa land, or indeed covering any of the Papago land, except that beginning in 1912 Congress has passed one or two small appropriations for the development of a water supply for domestic and stock purposes and for irrigation. The Government argues that Congress has great power over all Indian lands and rights; it has no such power over pueblo land, and even if it had, it is enough to say that Congress has not exercised any such power, and neither

the chief executive nor other government officials have any such power without congressional action.

During these sixty years there has been constant private encroachment by miners and men who have stolen water and squatted on land. The Government has not protected the Papagos.

During all this time the Papago Pueblos have maintained themselves and their village organization and their civilization without disturbing others and without decrease of their numbers. They have held their own and have advanced—no thanks to the white men.

OUR CLAIM

Our claim and theory are that our Indian Pueblo is a corporation; that as such it owns the entire tract occupied by the Pueblo and its inhabitants; that it is a juridical entity having a right of recourse to the courts and that the courts can and will protect its rights and title.

THE AGGRESSIONS OF THE DEFENDANTS

The appellant complains that the appellees, without warrant of law and without any discretionary power or right, are threatening illegal acts subversive of appellant's rights, and must be enjoined. These are set out in paragraphs VII and VIII of the complaint. (Rec. pp. 5-6.) The answer of appellees, Paragraph VII (Rec. p. 28) attempts to justify the acts of appellees by setting forth that reservations have been established by executive proclamations (Rec. p. 29), and a denial of ownership in the appellant, Paragraph VIII (Rec. 29).

THE CLAIM AND THEORY OF THE APPELLEES

As we understand it, the appellees contend that the Santa Rosa Indians have as against the Indian Commissioner and the Secretary of the Interior absolutely no right of property or person—no right to appear in any court, and if they can appear, no right which can be protected by any court—only a right (?) to stay on their lands at the sufferance of the Government and to beg Congress for charity.

ASSIGNMENT OF ERRORS

Counsel for appellant are of the opinion that the trial court's opinion (Rec. p. 90), is inconsistent with the final decree in that the final decree overrules (Rec. p. 100) the motion to dismiss and awards a decree against the appellant upon the merits with costs. If the appellant's attorneys had no authority, judgment for costs could not have been entered against their client. In view of the fact that appellees have not appealed from the final decree overruling their motion to dismiss the case, appellant will not urge the assignment of errors as follows:

Numbers one, two, three, four, five, six, eleven, twelve, thirteen, eighteen, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-six, forty-eight, fifty-two (Rec. p. 101), but rely on the following:

Assignment No. 7. The court erred in holding that the ultimate object, if any, of the plaintiff of effecting a partition of the lands in suit was material as affecting the right of the plaintiff to have a decree adjudging that plaintiff is entitled to the equitable injunctive

relief as prayed in plaintiff's bill of complaint. (Rec. p. 102.)

Assignment No. 8. The court erred in holding that

“throughout the contract of May 17, 1911, between Hunter and Martin, that Martin is to undertake, among other things, to have the land in suit segregated from the public domain of the United States, apparently a recognition that the lands were within the public domain of the United States, although the bill in this case proceeds upon the claim that these lands are not and never were a part of the public domain.” (Rec. p. 102.)

Assignment No. 9. The court erred in holding that the terms and provisions of the contract between Hunter and Martin, to which the plaintiff was not a party, bound the plaintiff, or that such contract did or could affect the plaintiff's right to the injunctive relief prayed in its bill of complaint. (Rec. p. 102.)

Assignment No. 10. The court erred in dismissing the bill of complaint, and denying the relief sought thereby, because of the finding by the court that

“it is clear that before partition of the lands could be effectively accomplished between the Indians and the Hunter interests, the hands of the defendants upon the lands in question must first be removed and they and their successors in office perpetually restrained and enjoined from interfering thereafter with the same, and there can be no reasonable doubt that this suit was and is intended to clear the way for such partition.” (Rec. p. 102.)

Assignment No. 14. The court erred in not granting the relief prayed in the bill of complaint because in the opinion of the trial court the plaintiff intends to partition the lands in suit in the event the plaintiff shall obtain the injunctive relief prayed in the bill. (Rec. pp. 102-3.)

Assignment No. 15. The court erred in holding and deciding that the plaintiff was not entitled to a decree awarding to the plaintiff the injunctive relief as prayed for in plaintiff's bill of complaint, even if the ultimate object of the plaintiff was to effect a partition of the lands in suit between the plaintiff or of its Indian inhabitants on the one part and of Hunter or his heirs or assigns on the other. (Rec. p. 103.)

Assignment No. 16. The court erred in holding and deciding that the plaintiff did not possess under any law, Spanish, Mexican or United States, or by any custom, usage or tradition, the power to clothe Hunter, a lawyer, with power to bring any kind of a suit or action in its, the plaintiff's name, or in the name of its Indian inhabitants, or both, if the ultimate object of such suit was to effect a partition of the lands in suit between the plaintiff or its Indian inhabitants on the one part and of Hunter or his heirs or assigns on the other. (Rec. p. 103.)

Assignment No. 17. The court erred in holding and deciding by reason of the ultimate object of the plaintiff to effect a partition of the lands in suit, that that disentitles the plaintiff to the injunctive relief prayed in plaintiff's bill of complaint brought for the protection of plaintiff's interests in the lands in suit. (Rec. p. 103.)

Assignment No. 19. The court erred in admitting in evidence two certified copies of alleged contracts between Robert F. Hunter and R. M. Martin, dated, respectively, March 17, 1911, and May 17, 1911, over objections and exceptions by plaintiff. (Rec. p. 103.)

Assignment No. 20. The court erred in holding and deciding that any provision in the contract between Hunter and Martin, dated May 17, 1911, was "apparently a recognition that the lands in suit were within the public domain of the United States," and further erred in holding that such construction of said contract was binding upon the plaintiff in this suit. (Rec. p. 103.)

Assignment No. 21. The court erred in holding and deciding that the proper construction of the contract between Hunter and Martin, dated May 17, 1911, is

"to have the land in suit segregated from the public domain of the United States, * * * apparently a recognition that the lands were within the public domain of the United States,"

is in such conflict with the allegations of the bill of complaint as binds the plaintiff and disentitles the plaintiff to the injunctive relief prayed in its bill of complaint. (Rec. p. 103.)

Assignment No. 22. The court erred in not holding and deciding that upon all of the evidence in this case the plaintiff had fully proven the essential allegations of its Bill of Complaint and was entitled to the relief as prayed in its said Bill. (Rec. p. 103.)

Assignment No. 23. The court erred in holding and deciding in effect that under the Gadsden Treaty and the Treaty of Guadalupe Hidalgo the plaintiff did not have the power to clothe Hunter, a lawyer, with power to institute and maintain this suit in the plaintiff's name for a decree for the injunctive relief prayed in the Bill to protect the plaintiff's rights and interests in the lands in suit. (Rec. pp. 103-4.)

Assignment No. 24. The court erred in not holding that the plaintiff was a Pueblo, a legal entity, with capacity to maintain its Bill of Complaint in this suit to protect the plaintiff's rights and interests in the lands in suit, guaranteed to the plaintiff by the provisions of the Gadsden Treaty (10 Stat. at L. 1031) and the Treaty of Guadalupe Hidalgo between the United States and the Republic of Mexico. (Rec. p. 104.)

Assignment No. 25. The court erred in not holding and deciding that upon the evidence the plaintiff had proven that the fee title to the land in suit was in the plaintiff. (Rec. p. 104.)

Assignment No. 26. The court erred in not holding and deciding that the monuments and boundaries to the tracts of lands described in the bill of complaint were fully proven by the evidence with sufficient certainty to identify said lands to enable and authorize the court to enter its decree in favor of the plaintiff as owner of said tract of lands and to award plaintiff the injunctive relief prayed in the bill. (Rec. p. 104.)

Assignment No. 27. The court erred in not holding and deciding that by the plaintiff's evidence it is suffi-

ciently proven that the plaintiff is the owner in fee and is in possession of the lands in suit. (Rec. p. 104.)

Assignment No. 28. The court erred in neglecting and failing to follow the decisions of the Supreme Court of the United States in *Lane vs. Pueblo of Santa Rosa*, reported in 249 U. S. 110, and in *Pueblo of Santa Rosa vs. Lane*, reported in 46 App. Cas. D. C. 411. (Rec. p. 104.)

Assignment No. 29. The court erred in entering a decree dismissing plaintiff's bill of complaint, upon the whole record. (Rec. p. 104.)

Assignment No. 30. The court erred in entering the decree dismissing plaintiff's Bill of Complaint, thereby depriving plaintiff of its property and its property rights without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States. (Rec. p. 104.)

Assignment No. 31. The court erred in holding and deciding that the private lands of the plaintiff, as described in the Bill of Complaint, were within the public domain, which said holding and decision take plaintiff's said lands for public use, without just compensation, in violation of the Fifth Amendment to the Constitution of the United States. (Rec. p. 104.)

Assignment No. 32. That in and by the dismissal of the Bill of Complaint, the plaintiff is deprived of its property and property rights as guaranteed by the Fifth Amendment to the Constitution of the United States, which provides that no one shall be deprived

of property without due process of law, or private property cannot be taken for public use, without just compensation. (Rec. p. 104.)

Assignment No. 33. The court, in dismissing plaintiff's Bill of Complaint, erred in failing and refusing to grant to the plaintiff its equitable rights acquired under the Gadsden Treaty (10 Statutes at Large 1031) and laws enacted by Congress of the United States in connection therewith, which said ruling of the court was in violation of Clause 2 of Article VI of the Constitution of the United States. (Rec. p. 104.)

Assignment No. 34. The court erred in refusing and declining to grant to plaintiff the relief prayed in its Bill of Complaint, the right to such relief having been acquired by the plaintiff under the Gadsden Treaty (10 Statutes at Large 1031) and laws enacted by Congress of the United States in connection therewith, said ruling of the court being in violation of Clause 2 of Article VI of the Constitution of the United States. (Rec. p. 105.)

Assignment No. 45. The court erred in sustaining defendant's objection to the question asked of the witness W. T. Day, which elicited that part of his answer as follows (Rec. p. 150): "In the early days the Mexican People transacted their business in very much the same way as the Indians." (Rec. p. 106.)

Assignment No. 47. The court erred in not granting plaintiff's motion to strike out all matters relative to Mr. Hunter's contract with Mr. Martin with reference to the sale of the units by Mr. Martin. (Rec. pp. 257, 106.)

Assignment No. 49. The court erred in overruling the plaintiff's objection to the question asked by defendants of the witness W. L. Bowie, as hereinafter set forth. The witness W. L. Bowie (Rec. p. 265):

"In the course of my investigation I interviewed Robert M. Martin on two occasions about the present suit.

Q. Did you inquire who it was that employed the attorneys representing the so-called plaintiff?

A. Yes, that came out during the course of our conversation.

Q. Who did he say employed them? (Objection and exception.)

A. He said that he (Martin) had employed at first an attorney in Seattle, whose name I have forgotten, to give him a report before he purchased the three-fourths interest from Hunter; that following that, he had employed Cates and Robinson of Los Angeles, that firm having been almost exclusively on the case for a year, I believe, he told me, for investigation work, and that he had employed the firm of Rounds, Hatch, Dillingham & Debevoise to represent him in the courts of the District of Columbia and the U. S. Supreme Court, on a retainer; that he, himself, had paid a retainer.

"Whereupon the plaintiff moved that the last answer be stricken as hearsay. Motion overruled—exception noted." (Rec. p. 107.)

Assignment No. 50. The court erred in not granting plaintiff's motion, immediately above set forth, to strike out the answer of the witness W. L. Bowie that Martin employed attorneys. (Rec., pp. 265; 107.)

Assignment No. 51. The court erred in overruling plaintiff's objection to the following questions asked

by defendants on re-direct of the witness W. L. Bowie. (Rec., pp. 270; 107.)

“Q. In the conversation with Mr. Martin that you testified to yesterday, did he inform you what he had done, or what course he had taken with regard to the interest he had acquired from Hunter and the Hunter deeds?”

“To which question plaintiff objected on the ground irrelevant, immaterial and hearsay; objection overruled; exception noted.”

“A. Yes, he did.

“Q. What did he tell you?”

To which question plaintiff objected on the grounds that it did not tend to prove any of the issues in the case and is entirely and purely hearsay; objection overruled.

“A. He told me that he considered that he owned a three-fourths interest in the undivided one-half interest which he purchased from Mr. Hunter in those 10 tracts; that it was an individual ownership. That he had formed a syndicate, taking 1,000 units as a basis; had given 500 units, so to speak, to the Papagos.”

Assignment No. 53. The court erred in overruling plaintiff's objection to the question asked by defendants of their witness Frank A. Thackery, and in overruling plaintiff's motion to strike, hereinafter set forth (Rec., pp. 404; 108; 109-110).

Q. Did you take any steps to embody his desire of the present day inhabitants of that vicinity that the suit end and not go on, in written form? (Rec. p. 404.)

Mr. Kleindienst: We object to this on the grounds that it is hearsay—not the best evidence. Let this objection precede the previous question and we move that the answer be stricken.

Objection and motion overruled; exception noted. (Rec. p. 404.)

A. Yes, sir.

Q. Please state just what you did.

A. I had a petition prepared covering the matters stated, including a request for dismissal, and after having it carefully interpreted and explained to these people, they signed it.

Q. State whether any threat, or promise or pressure of any sort was offered or brought to bear upon them or any of them to induce them to sign this petition?

A. No, sir, there was none.

Q. Was the petition itself interpreted in the hearing of these Indians?

A. I don't understand Papago, but it was given to the interpreter in each case and I know from his mentioning various words in English through the petition, that he had read it to all of them who signed. It took a considerable length of time in each case, both preceding and following the reading of the petition. There was in almost every case quite an extended discussion and talk regarding it before they signed. (Petition produced (Rec. pp. 109-110; 407.) The petition (Rec. p. 407) contained 181 or 182 signatures. The census of Achi, Akchin, Anegam and Kiacheemuck, which last-named village is marked on the census as Santa Rosa, shows a population of 195 males, over 21 years old. The petition contains a few women. I started out to let the adult women sign the petition also and afterwards, to avoid making such a cumbersome document, I decided just to take the matter up with the adult matters. The women, according to Papago custom take no part in the councils or agreements or such matters. In addition to the Indians to sign at meetings, quite a few signed who were not asked by me. Where my name appears as a witness opposite a signature, all signed in my presence. (Rec. p. 405.)

Assignment No. 54. The court erred in admitting in evidence a petition known as Defendants' Exhibit 6a (Rec., pp. 405; 109) the signatures to which defendants' witness Frank A. Thackery, special supervisor in the Indian Service of the Interior Department, testified he obtained, reciting that the signatories ask the court to dismiss this suit, to which plaintiff objected on the grounds that the document (Rec. p. 407) is a self-serving document of the defendants, and is incompetent, immaterial and irrelevant, and it appears to be a document without date and it is not the best evidence of what it purports to show, which objection was overruled and an exception noted. (Rec. pp. 405; 109.) Plaintiff also moved to strike the said petition (Rec. p. 407) as not competent as testimony or evidence in the case, as not upon any issue properly raised in the case, and upon the further ground that no opportunity has been given counsel for plaintiff to take up this matter with any of the signers or cross-examine them on it; motion denied; exception noted. (Rec. p. 405.)

ARGUMENT

Appellant will group the foregoing assignments of error into three groups as follows:

GROUP "A" shall relate to assignments numbered twenty-two, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four.

GROUP "B" shall relate to assignments numbered seven, eight, nine, ten, fourteen, fifteen, sixteen, seventeen, nineteen, twenty, twenty-one, twenty-three.

GROUP "C" shall relate to the assignments numbered, forty-five, forty-seven, forty-nine, fifty, fifty-one, fifty-three and fifty-four.

BRIEF OF THE ARGUMENT

I.

The Pueblo of Santa Rosa has title to this land.

- Hamilton on Mexican Law, page 132.
 2 White Recopilacion, page 562.
 Sanchez v. Gonzales, 11 Martin (La.).
 Laws of the Indies, L-4, T-12, L-15.
 12 Manresa Commentaries, 830.
 Siete Partidas, Book 3, Title 29, Law 7.
 8 Alcubilla Diccionario, 839.
 United States v. Santa Fe, 165 U. S. 675, 710.
 Crespín v. United States, 168 U. S., 208, 218.
 United States v. Lucero, 1 N. M., 422, at page 466.
 Hall's Laws of Mexico, Section 159.
 Extra Census Bulletin, 1893, page 9.
 United States v. Chavez, 175 U. S., 509, 520.
 United States v. Chaves, 169 U. S., 452, 464.
 United States v. Devereux, 90 Fed. 182, 186 (C. C. A.)
 Oaksmith v. Johnston, 92 U. S., 343.
 United States v. Pendell, 185 U. S., 189.
 Fletcher v. Fuller, 120 U. S., 534.
 Penny v. Coke Company, 318 Fed., 769 (C. C. A.).
 10 U. S. Statutes at Large, 308.
 Merryman v. Bourne, 9 Wall, 592.
 U. S. Revised Statutes, Section 2126.
 Felix v. Patrick, 56 Fed., 457, 461; S. C. 145 U. S. 317.
 United States v. Joseph, 94 U. S., 614.
 19 Land Office Decisions, 326.
 United States v. Sandoval, 231 U. S., 28, 48.
 Carino v. Insular Government of the Philippine
 Islands, 212 U. S., 449.
 Watts, etc., Company v. Union, etc.,
 39 U. S. S. Court Reporter 1, 248 U. S. 9.

II.

THE CHARACTER AND TITLES OF THE PAPAGOS AND THEIR PUEBLOS, INCLUDING SANTA ROSA, ARE ESTABLISHED BY CERTAIN INTERESTING AND IMPORTANT CASES IN THE NEW MEXICAN TERRITORIAL COURTS, WHICH, ALTHOUGH DECIDED WITH REGARD TO NEW MEXICAN PUEBLOS, APPLY EQUALLY TO THE SIMILAR PAPAGO PUEBLOS.

United States v. Lucero, 1 N. M., 422.

United States v. Varela, 1 N. M., 593.

United States v. Joseph, 94 U. S., 614, 618.

The Territory of New Mexico v. Delinquent Tax-payers, 12 N. M., 139.

III.

THE PUEBLO INDIANS WERE CITIZENS OF MEXICO AT THE TIME OF THE CESSION, AND HAVING ELECTED TO REMAIN IN THE UNITED STATES, THEY ARE NOW, UNDER THE TREATY, CITIZENS OF THE UNITED STATES.

“Mexico”, by Brantz Mayer, 1854, page 128.

Reynold’s Spanish and Mexican Land Laws, 282.

United States v. Ritchie, 17 How., 525, 541.

United States v. Joseph, 94 U. S., 614.

United States v. Lucero, 1 N. M., 422, 425.

IV.

THE PAPAGOS ARE DIFFERENT IN EVERY RESPECT FROM THE NORTH AMERICAN TRIBES AND SIMILAR TO THE CIVILIZED NORTH AMERICAN PUEBLO INDIANS.

Statutes of New Mexico of January 10, 1853;
Pamphlet, page 29.

United States v. Joseph, 94 U. S., 614.
 United States v. Sandoval, 231 U. S., 28.
 Jaeger v. United States and the Yuma Indians,
 29 Court of Claims, 172.

V.

ORIGINAL INDIAN TITLES ARE GOOD AND
 ARTICLE VI OF THE GADSDEN TREATY HAS
 NO APPLICATION FOR THE REASON THAT
 SAID TITLES ANTEDATE THE TIME OF WRIT-
 TEN GRANT AND ARE GOOD BY PRESCRIP-
 TION.

Pallares Legislacion, pages 26, 27.
 United States v. Pendell, 185 U. S. 189.

VI.

PLAINTIFF IS NOT AFFECTED BY THE OLD
 RULE REGARDING GRANTS WITH VAGUE
 BOUNDARIES, NOT SURVEYED AND PATENTED

Ely's Admr. v. U. S., 171 U. S. 220.
 Arivaca v. United States, 184 U. S. 649, 653.
 12 U. S. Statutes at Large, 410.
 Carino v. Philippine Gov't, 212 U. S. 449.
 Reavis v. Franza, 215 U. S. 16.

VII.

THE HUNTER-MARTIN CONTRACTS ARE NOT
 MATERIAL TO THE ISSUES.

Santa Rosa v. Lane, 249 U. S. 110.
 33 C. J. 1152.
 New Orleans v. Citizens Bank, 167 U. S. 371.
 Reynolds v. Stockton, 140 U. S. 254.
 Cushman v. Warren, etc., 220 Fed. 857.

VIII.

THE RECORD RELATION TO STATEMENTS OF MARTIN TESTIFIED TO BY BOWIE WAS HEARSAY AND SHOULD NOT HAVE BEEN RECEIVED.

IX.

THIS COURT IN EXERCISE OF ITS APPELLATE JURISDICTION MAY CONSIDER THE RECORD AND MAKE FINAL DISPOSITION OF THE CASE.

GROUP "A"

POINT I.

The Pueblo of Santa Rosa has title to this land.

We have shown above that it has power to hold title. We shall show here that it does hold title on one or both of two theories.

1. IT HAS TITLE BECAUSE THE SPANISH LAWS AND DECREES, SUCH AS THOSE WHICH WE HAVE QUOTED ABOVE, HAVE RECOGNIZED ITS IMMEMORIAL TITLE, COMING FROM AZTEC TIMES, OR HAS GRANTED TITLE TO IT.

2. QUITE APART FROM THOSE SPANISH LAWS AND DECREES, THE PUEBLO OF SANTA ROSA HAS TITLE BY PRESCRIPTION UNDER THE SPANISH LAW, OR, WHAT AMOUNTS TO THE SAME THING, BY PRESUMPTION OF LOST GRANT UNDER OUR LAW.

(a) It had at the time of the cession and now has perfect title by prescription under the Spanish law by reason of immemorial possession.

All the facts necessary for adverse possession under our law and prescription under the Spanish law

were present; actual, notorious permanent and exclusive possession under claim of ownership, within definite boundaries, from time immemorial. These facts are clearly alleged in the complaint and have been established by the evidence. (See Statement of Facts this Brief.)

By the laws of Spain and Mexico, prescription ran against the Kings and immemorial possession, and indeed possession for forty years gave a perfect title even as against the state.

Royal Instructions of 1754 (see Hamilton on Mexican Law, p. 132) provided that title coming from the King should be registered and that from those who had no written titles should be required a sworn declaration of local possession which "should suffice as a just title by prescription." This decree was of great importance and has been the basis of judicial decisions regarding Mexican titles down to the present time, and it makes it very clear that a title by prescription is good as against the state.

The law to this effect was also definitely declared by the "Royal Decree Concerning Crown Lands" in the Colonies, of July 16, 1819 (2 White Recopilacion, 562), which provided with regard to crown lands that "in the absence of other title a just prescription, that is, a possession of forty years duly approved according to law shall be admitted and respected." This decree was recognized in 168 U. S., 208, 218. It was the law of the Papago land from 1819 until 1864, when the Howell Code of Arizona was passed, for as is shown above, the Kearney Code continued in force all Mexican laws except as expressly repealed, and these laws thus remained in force until Arizona was separated and until the Howell Code was passed.

Quite apart from this decree, prescription always

ran against the state in the Spanish colonies, as was held in a strong opinion in *Sanchez v. Gonzalles*, 11 *Martin (La.)*, 207, citing the old laws of the Indies. The following authorities are to the same effect:

Laws of the Indies, L-4, T-12, L-15.
 12 *Manresa Commentaries*, 830.
Siete Partidas, Book 3, Title 29, Law 7.
 8 *Alcubilla Diccionario*, 839.

The Supreme Court recognizes that prescription runs against the state under the Spanish law and that titles based thereon are good.

U. S. v. Santa Fe, 165 U. S. 675, 710.
Crespin v. U. S. 168 U. S., 208, 218.

With regard to one at least of the New Mexico Pueblos, which received confirmatory grants from Congress, and whose titles have been repeatedly upheld, there was no written title, but only a title by immemorial possession, and this prescriptive title was upheld by the Court in *U. S. v. Lucero*, 1 N. M., p. 422, at page 466, where the Court held that such a prescriptive title was the best kind of a title and needed no grant or confirmation from the Mexican authorities. It has been held repeatedly that the Congressional confirmation was not the grant of a new title but only a quitclaim to a Pueblo which already had full right under the Mexican law.

This is undoubtedly the theory on which Hall in his *Mexican Law* bases his statement (Sec. 159):

“It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of pueblos or ranchos, that the Indians are entitled, in equity

and good conscience, and even according to the strict rigor of the laws, to all the lands they have or have had in actual possession for cultivation, pasture, or habitation, when such domain can be ascertained to have had any tolerably well defined boundaries.”

It is significant that the executive branch of our government has clearly recognized this principle of Indian pueblo ownership and the fact of Indian pueblo titles is a closely similar case, that is, the case of the Moqui or Hopi Indians of Arizona. In a report of the pueblos of the Moqui Indians, published as an extra census bulletin in 1893, the action of our government is stated as follows at page 9:

“The Moqui Indians lived upon lands in Arizona which they were permitted to occupy by the Spanish and Mexican powers, but which became grants by reason of town occupation for a long period. The grants are not yet defined, but were tacitly recognized by President Arthur in his proclamation of December 16, 1882, when he threw about them the protection of a reservation to keep off white people and the Navajos. The Indians are citizens of the United States under the treaty of Guadalupe Hidalgo. Sixteen of the Pueblos of New Mexico own their lands in fee and the inhabitants of all are citizens of the United States. The allotment of the lands of the Moqui Pueblos compelling the holders to reside upon them, would abolish the villages and pueblos, disperse these Indians, and make them dependents.”

(b) By a somewhat similar reasoning, our Courts reached the same result by holding that where there has been long continued possession even as against the state, the Courts will presume that a grant existed and has been lost.

U. S. v. Chavez, 175 U. S. 509, 520, holding that

“Upon a long and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory in which they are situated, to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment in favor of the possessor, in the absence of rebutting circumstances.” (See headnote.)

“Thus, also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi*; yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment accompanied by the usual acts of ownership. 1 Greenleaf Ev., Sec. 45.”

“The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, Best’s Principles of Evidence, Sec. 366, and was, therefore, a feature of the Mexican law at the time of the cession.”

U. S. v. Chaves, 159 U. S. 452, 464.

“It is the general rule of American law that a grant will be presumed upon proof of an adverse exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a presumption *juris et de jure* whenever by possibility a right may be acquired in any manner known to the law.”

To the same effect are the following cases :

U. S. v. Devereux, 90 Fed., 182, 186 (C. C. A.)

Oaksmith v. Johnston, 92 U. S., 343.

U. S. v. Pendell, 185 U. S., 189.

Fletcher v. Fuller, 120 U. S. 534.

Penny v. Coke Company, 138 Fed. 769 (C. C. A.)

That this presumption of lost grant is considered by Congress and is fully recognized by the government officials as applying to Pueblo land is shown by the words of the Commissioner of the General Land Office, who under date of February 17, 1881, wrote a letter of instruction to the Register and Receiver of the Land Office in Arizona, as follows:

“As a matter of fact, Congress has never confirmed any claim that has been presented to the surveyor general, unless a grant from the former government was established, except in the case of a city or town found to be in existence when the United States took possession of the territory, when a grant was presumed.

3. BY LEGISLATIVE AND EXECUTIVE ACTION THE UNITED STATES HAS RECOGNIZED THAT THE NEW MEXICAN AND ARIZONA PUEBLOS HAVE TITLE AND THAT THE PAPAGO PUEBLOS ARE LIKE THE NEW MEXICAN.

By the Act of July 22, 1854 (10 U. S. Statutes at Large, 308), the surveyor general was directed to make a full report regarding land claims under the laws, usages and customs of Spain and Mexico, “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; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos respectively and the nature of their titles to the land.''

This statute was passed before the addition of the Gadsden territory to New Mexico and accordingly the reports and subsequent action did not include the Papago land.

But in the surveyor general's report for 1861, he reports on all the pueblos in the enlarged New Mexico, including the Papago land, and he gives a list of forty-eight pueblos which include the nineteen New Mexican pueblos whose grants were confirmed in 1858 by Congress, and also eleven Papago pueblos, including the Pueblo of Santa Rosa as No. 46. There is no distinction in his list or in his report between Papago pueblos and the New Mexican pueblos, consisting of composite houses and having their grants confirmed by Congress—and this was right, for their never was any legal or practical distinction. All stood on the same footing under the Spanish Laws and at the time of the session all had their rights equally preserved by treaty, and it is of no consequence that nineteen New Mexican pueblos asserted their titles before the surveyor general (one at least showing merely a title by immemorial possession, *U. S. v. Lucero*, 1 N. M. 422), while on the other hand the Papago pueblos were ignored in their desert corner and rested quietly on their rights.

That part of the surveyor's list which comprised the Papago pueblos is as follows:

No.	Name of Pueblo	1860 Population	Personal Estate	Remarks
21	San Xavier	170	\$6,325	Papago Pueblo 9 mi. south of Tucson Old Jesuit Mission.
39	Cumaro			
40	Tecolate			
41	Charco			
42	Pirigua			
43	Ocaboa	*3,500	*125,000	
44	Cojate			
45	Coco			
46	Santa Rosa			
47	Cahhavi			
48	Llano			

* Estimated.

The words "Papago Pueblos" are printed in as shown above.

The above list is prefaced by the following: "Statement showing respectively the names of all the Indian pueblos in New Mexico, with their localities, population, wealth, etc., and the times when their land claims were confirmed by Congress and when surveyed and the areas thereof."

This report is of much importance as showing that the Papagos, including the inhabitants of Santa Rosa were recognized by the government at the time as Pueblo Indians.

4. THE RIGHTS OF THE PUEBLO OF SANTA ROSA WERE FULLY PRESERVED NOT ONLY BY THE TREATY PROVISIONS ABOVE QUOTED, BUT ALSO BY THE PRINCIPLES OF INTERNATIONAL LAW.

Merryman v. Bourne, 9 Wall., 592.

U. S. v. Chaves, 159 U. S. 452, 464.

5. THE PRESUMPTION OF TITLE IS IN FAVOR OF THE PLAINTIFF IN THIS CASE.

The possession of the plaintiff is not disputed and the presumption arises under U. S. R. S., Section 2126, as follows:

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.”

Felix v. Patrick, 36 Fed., 461 (affirmed 145 U. S., 317), held that this section recognized the right of Indians to sue.

6. THE COURTS HAVE REPEATEDLY RECOGNIZED THAT THE NEW MEXICAN PUEBLOS HAVE TITLE, AND BY INFERENCE, THAT THE SIMILAR PAPAGO PUEBLOS HAVE TITLE.

The language of the *Joseph* case, 94 U. S., 614, is strong to this effect, and in this respect the decision has always been approved. The New Mexican cases cited under Point IV below, are of the same effect.

This has been the consistent holding of the Attorney-General's office and of the Department of Interior. See letter of Acting Secretary to Commissioner of Indian Affairs, June 30, 1894, quoting Attorney-General's opinion, showing that the New Mexican pueblos had a title which was not subject to control of the government. (19 Decisions of the Department of the Interior relating to Public Lands, page 326.)

7. THE COMMUNAL TITLE OF INDIAN PUEBLOS, SUCH AS THAT CLAIMED BY THE PLAINTIFF, IS WELL KNOWN TO AND RECOGNIZED BY THE AMERICAN LAW AS WELL AS THE SPANISH LAW.

That it is recognized by the Spanish law is shown by the quotations from the Laws of the Indies above; the title of the Indian pueblos and Indian communities was repeatedly recognized, expressly and by implication.

As to the American courts, it is sufficient to cite the recent case of *United States v. Sandoval*, 231 U. S. 28, where there came in question the communal title of a New Mexican pueblo, a title which, although expressly confirmed by the United States Government, is of the same fundamental character as that claimed by the plaintiff. This court recognized that the Indians of each pueblo have a fee simple title to the pueblo lands, and that "it is a communal title, no individual owning any separate tract; in other words, the lands are public lands of the pueblo." (P. 48.)

The principles of law upon which the plaintiff's title is based are established by the case of *Carino* against Insular Government of the Philippine Islands, 212 U. S., 449.

This case arose with regard to Philippine aborigines, much lower in the scale of civilization and development and institutions than are the civilized and agricultural Papago pueblos; and the principles laid down with regard to the Igorrotes apply more strongly to the Papagos. The case was well considered and most of the propositions above mentioned are sufficiently established by the decision.

1. Under the Spanish law prescription ran against

the state in favor of the aborigines. The case cites for this proposition Laws of the Indies Book 4, Title 12, Law 14, mentioned above, and also the Royal Cedula of October 15, 1754 (cited above) which the court translates as follows: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription;" and concludes (p. 461):

"As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Phillipines in regard to lands over which Spain had only a paper sovereignty."

2. The Spanish law recognizes the title of the aborigines to land "irrespective of any royal grant." The Supreme Court said, in the Carino case, *supra*, pages 459-460:

"We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat. * * * It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this if there is doubt or ambiguity in the Spanish law we ought to give the applicant the benefit of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is

unnecessary to decide. If, in a tacit way it was assumed that the wild tribes of the Phillipines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one 'for the benefit of the inhabitants thereof.'

"If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by the law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Phillipines into trespassers or even into tenants at will."

3. In territories acquired by treaty from Spain (such as the Phillipines) the Supreme Court recognizes the aboriginal and immemorial titles of the natives (members of a "savage tribe that was never brought under the civil or military government of the Spanish crown," p. 458). The plaintiff was an Igorot who, with his ancestors had held the lands as owners for more than fifty years and as far back as the findings go, living upon it and maintaining fences sufficient for cattle, and cultivating part and using part for pasturing cattle; and they had held the land in "accordance with Igorot custom." "No document of title, however, had issued from the Spanish crown" although he had repeatedly made application for one (p. 456). The Court presumes that "when as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership" it was so held before the Spanish conquest and was never public land; and it says that the decrees and laws "indicate pretty

clearly that the natives were recognized as owning some land irrespective of any royal grant" (p. 460). Accordingly, although both Spain and the United States had refused to grant or confirm the plaintiff's title, the Supreme Court held that:

"Upon a consideration of the whole case, we are of opinion that the law and justice require that the applicant should be granted what he seeks (the registration of his immemorial aboriginal title) and should not be deprived of what by the practice and belief of those among whom he lives, was his property, through a refined interpretation of an almost forgotten law of Spain" (p. 463).

The Court mentions Laws of the Indies, Book 4, Title 12, Law 14 (above quoted), and says:

"The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books."

4. As regards aboriginal titles, there is a fundamental difference between territory originally acquired or settled, and territory acquired from Spain by Treaty.

"The acquisition of the Phillipines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Phillipines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal admin-

istration of the Islands is to do justice to the natives, not to exploit their country for private gain" (p. 458).

The wording of the treaty of Guadalupe Hidalgo and the circumstances of the case show that the same arguments apply in our case and that the purchase of Southern Arizona from Spain was similar in purpose and in effect on title to the purchase of the Philippines from Spain.

5. In a case like ours "every presumption is and ought to be against the government" and "certainly in a case like this, if there is doubt or ambiguity in the Spanish Law, we ought to give the applicant the benefit of the doubt" (p. 460).

It appears from the Century Dictionary that the Igorots are much less civilized than the Papagos, and if the former are not to be classed with the wild North American Indians, certainly the Papagos can not be so classed.

"Igorrotes 1. A member of one of the tribes, speaking the Igorrote language, including the Igorrotes proper, the Buriks and the Busaos.

2. In a generalized sense a member of one of the uncivilized tribes of North Luzon, until recently known as head hunters; also rarely used to designate those of Central Luzon and Mindanao.

3. In local Philippine usage, a savage, a pagan native."

We submit that the Carino case, *supra*, is conclusive as to all questions of native title which arise in our case.

POINT II.

The character and titles of the Papagos and their Pueblos, including Santa Rosa, are established by certain interesting and important cases in the New Mexican Territorial courts, which, although decided with regard to New Mexican Pueblos, apply equally to the similar Papago Pueblos.

We take the liberty of quoting rather fully from these cases because of their weight and importance.

United States v. Lucero, 1. N. M., 422.

This was a prosecution for a violation of the Non-Intercourse Act of 1834. It was held that the Pueblo Indians of New Mexico did not come within the provisions of this act because they were not tribal Indians. Their characteristics, history, tenure of their lands and political status are carefully examined by the court in this case. In the course of its opinion the court said:

(p. 427). "The theory promulgated by some, and believed by many, that the Spanish adventurers found the Pueblo Indians of New Mexico a wild, savage and barbarous race; that they conquered them and reduced them to subjection, placed them in villages, and taught them the arts of civilized life, is a pure and unadulterated fiction and contradicted by the uniform history of the Spanish adventures for over two hundred years. They found the Pueblo Indians, on their advent into New Mexico, a peaceful, quiet and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil. Their villages are described, their locality mentioned, their habits and pursuits

delineated, and we learn that the old palace, not one hundred feet from where we are now holding court, was built upon the site of one of their ancient towns. That the Spanish placed them under subjection, treated them with cruelty, but planted the Catholic religion among them, and an improved civilization, is true; but they found them civilized, peaceful and kind, and on that account they became an easy victim of their cupidity and despotic rule. This condition of domineering on the part of the Spaniards and meek obedience on the part of the Pueblo Indians continued until 1670, when Pueblo Indians rebelled against their Spanish masters and expelled them all from New Mexico. It was not until 1688 that the Spaniards obtained sufficient force to conquer, subdue and chastise them. At the date of 1689, and within a few years subsequent, was executed to the various Pueblos of New Mexico their title to their lands. The Spaniards acknowledged their title to the land on which they were residing, and had resided, time whereof the memory of man runneth not to the contrary, and a written agreement was executed and delivered to them; and so long as the Spanish rule was continued in America these titles were respected. Upon the establishment of the independence of Mexico from old Spain, these titles continued to be respected, and the government of the United States in the treaty of Guadalupe Hidalgo pledged her faith as a nation to maintain and respect them. When the Republic of Mexico was compelled by the chances of unsuccessful war to part with a portion of her territory and people, she threw around them by treaty all the safeguards to their civil, religious and political rights arising out of honor among men and faith among nations.

* * * * *

(p. 429). "Let us now pass to the consideration of the status of the Indian Pueblo of Cochiti and

its people as to the Republic of Mexico, and the title by which they held their land at the date of said treaty in 1848, when they passed out of the sovereignty of the Republic of Mexico, and came under the sovereignty of the United States. Were the Pueblo Indians of New Mexico, at the date of the treaty of Guadalupe Hidalgo, citizens of the Republic of Mexico, and as such entitled to all the protection and benefit of all articles in said treaty, made for the protection of the Mexicans?

* * * * *

(p. 430). "The Indians, as they were called, of Mexico, on account of their numbers, their courage, their patriotism, rendered easy the overthrow of the unjust, arbitrary and partial rule of the viceroys of Spain, and they established upon its ruins the empire of Iturbide, their successful leader. The Spanish scholar will not fail to remember that when Spanish law books and Spanish legislators speak of Indians they mean that civilized race of people who live in towns and cultivate the soil, and are often mentioned as Naturales and Pueblos, natives of the towns, and as Indios del pueblos, Indians of the towns; and for the other distinct and separate class of Indians whose daily occupation was war, robbery and theft carried on against the Pueblo Indians, as well as the Spaniards, the term savages (salvajes) or barbarous Indians (Indos barbaros) was the expression used.

* * * * *

(p. 431). "When the term Indian is used in our acts of Congress it means that savage and roaming race of red men given to war and the chase for a living, and wholly ignorant of the pursuits of civilized man, for the simple reason that when those laws had been enacted, no such class of Indians as the Pueblo Indians of New Mexico existed within the existing limits of the United States.

“Neither the Spanish crown, its viceroys in the new world, nor the Mexican Republic ever legislated for the savage class of Indians.

* * * * *

(p. 432). “It will thus be seen that the Indian race of Mexico, and that portion, and a vast portion, of the inhabitants to whom that term was properly applicable, were recognized as citizens of the Republic of Mexico, in all her plans of government and acts of solemn obligation putting into practical operation that plan.

* * * * *

(p. 434). “The Pueblo Indians of New Mexico thus being, at the date of the treaty of Guadalupe Hidalgo, Mexican citizens, they were, by the sixth article of that treaty, made citizens of the United States, in as much as not one of them elected ‘to retain title and rights of Mexican citizens, but acquired under that treaty those of citizens of the United States.’

* * * * *

“The title of the Pueblo of Cochiti was founded in first discovery and occupancy, time whereof the memory of man runneth not to the contrary. The Pueblo of Cochiti needed nothing from the King of Spain or his viceroys, nothing from the Republic of Mexico or the treaty of Guadalupe Hidalgo, or acts of the American Congress, to add to the validity of a title to land occupied and cultivated for three hundred years. * * * It has been repeatedly decided by the Supreme Court that a perfect title under the laws of Spain at the time of the change of sovereignty needed no sanction from the legislative or judicial departments of the country. See *United States v. Wiggins*, 14 Pet., 334; *United States v. Kingsley*, 12 Id., 476; *Chouteau v. Eckhart*, 2 How., 348.

“The right of property in the Pueblo of Cochiti to the lands granted to them in 1689 was not affected in any manner by the change of sover-

eignty, as has been repeatedly settled by the Supreme Court, in *United States v. Percheman*, 7 Pet., 51; *American Insurance Company v. Canter*, 1 Id., 511; *Strother v. Lucas*, 12 Id., 410.

“It will be thus seen that the title of Cochiti was a perfect title, capable of being asserted in any court.”

United States v. Valera, 1 N. M., 593.

This was a suit for a penalty under the Non-Inter-course Act of 1834. The Court determined that the legislation directed against settling on Indian lands did not apply to the Pueblo Indians. The Court said (p. 598):

“Pueblo, as defined in the Spanish language, signifies inhabited town or village, and in the plural is used to designate either towns or the inhabitants of towns. As applied to these Indian communities it is significantly descriptive of a race and their habitations, which plainly distinguishes them from the nomadic tribes in their habits; as thus applied it has a popular and well defined signification in New Mexico. In construing the language of the declaration, is it not proper to apply that signification?

“It is claimed that the term ‘Indian tribe,’ without other qualifying words, in its ordinary acceptation, signifies a tribe between whom and the general government subsist all the relations I have pointed out, which exists between the government and the tribes occupying what in the statute is technically designated as ‘Indian country.’ Would it not be just as consistent to claim that a Pueblo tribe of Indians of a Pueblo, in the ordinary acceptation of that phrase, signifies a community living in permanent habitations, constituting a town, subsisting by their own industry in

the cultivation of the soil and other branches of husbandry, and carrying on trade and general intercourse with the people of the territory, precisely as do the inhabitants of any Spanish or Mexican town? These are certainly among the distinguishing characteristics of Pueblos as commonly understood among the people of New Mexico. To communities with habits such as these, of long standing, I apprehend the courts would meet with grave embarrassments in attempting to apply the penal non-intercourse laws of the United States, in like manner as to nomadic tribes of the 'Indian country.' "

The judgment in this case was affirmed in United States v. Joseph, 94 U. S., 614, 618, where the court said:

"Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government. * * * It is this fixed claim of cominon which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe. * * * The pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution, a title which was fully recognized by the Mexican government, and pro-

tected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States.”

The Territory of New Mexico v. Delinquent Taxpayers, 12 New Mexico, 139. In this case the question of the taxability of the Pueblo Indians in New Mexico was before the Court. The Court determined that the Pueblo Indians were citizens of the United States, held title to their lands with full power of alienation, and that the lands of the Indian Pueblos in New Mexico are taxable. The Court said:

“The single question presented by this record is as to whether the lands of the Pueblo Indians are taxable.

“It would be an inviting task to trace the history of these people since the advent of the Spanish conquerors; but, as this Court has, in a very interesting opinion, dealt with this subject, we content ourselves with reference thereto. U. S. v. Lucero, 1 N. Mex. 422.

“They were found a peaceful, industrious and civilized people, living in towns (pueblos) and followed agricultural and pastoral pursuits. In 1689, and within a few years subsequent, the Spanish government granted them their lands. So long as they remained under the Spanish rule certain restrictions were placed upon the alienation of their property. Hall’s Mexican Law, Sec. 169. They seem to have been considered by the Spanish as wards of the government and entitled to special privileges and protection.

“But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those engaged in that struggle for independence, this Aztec race far outnumbered

bered the Mexicans and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new government they should take a prominent, if not a leading part, and that they should be placed upon an equal footing as to all civil and political rights. And so we find that the revolutionary government of Mexico, February 24, 1821, a short time before the subversion of Spanish power, adopted what is known as 'The Plan of Iguala' (Iguala was the place of the revolutionary army headquarters), in which it is declared that: 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with the right to be employed in any post, according to their merit and virtues;' and that: 'The person and property of every citizen will be respected and protected by the government.' 1 Ordenes y Decretos, by Galvin, page 3; U. S. v. Ritchie, 17 How. (U. S.), 524, 538; U. S. v. Lucero, supra.

"The same principles were reaffirmed in the Treaty of Cordova, of August 24, 1821. 1 Ordens y Decretos, by Galvin, page 6, and in the Declaration of Independence of October 6, 1821. Id., page 8.

* * * * *

"We had then, at the date of the Treaty of Guadalupe Hidalgo, whereby we acquire this territory, a people possessed of all the powers, privileges and immunities of any other citizens of Mexico, and they came to us so endowed as much as any other class of citizens. This, necessarily, and independent of the provisions of the Treaty of Guadalupe Hidalgo, which so carefully guards the civil rights of all Mexican citizens within the ceded territory, carried with it the right to take, hold and dispose of their property.

* * * * *

“The Supreme Court of the United States in *United States v. Joseph*, 94 U. S., 618, in passing upon the nature of the title of these Indians, says:

“The Pueblo Indians, on the contrary, hold their lands by right superior to the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the Treaty of Guadalupe Hidalgo, by which this country and the allegiance of the inhabitants were transferred to the United States.’

* * * * *

“It is a matter of history, gathered by the writer from conversations with early residents of the country, that these people were, after the Treaty of Guadalupe Hidalgo and down to the organization of the territory, and perhaps down to the act of 1854, supra, regarded by the people as citizens, and as possessed of all the rights of the same. They are reported to have participated in elections, and held office in Pena Blanca and other places in the territory. They sat as grand and petit jurors in the same country of Bernalillo, while Judge H. S. Johnson presided over the same, at one term of court at least.

“We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their lands with full power of alienation, and are, as such, subject to taxation.”

POINT III

The Pueblo Indians were citizens of Mexico at the time of the cession, and having elected to remain in the United States, they are now, under the treaty, citizens of the United States.

That all Indians were made full citizens of Mexico

after the separation from Spain is beyond question.

Plan of Iguala ("Mexico," by Brantz Mayer, former Secretary of the Legation to Mexico, 1854, p. 128.)

ARTICLE XI

"All the inhabitants are citizens and equal and the door of advancement is open to virtue and merit."

The first Mexican Congress which adopted the Plan of Iguala passed the following statute on February 24, 1822 (Decrees and Orders of the first Mexican Congress):

"The sovereign Congress decrees the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin, in the four quarters of the earth."

The Mexican decree of May 18, 1847 (Reynold's Spanish and Mexican Land Laws, 282), as to constitutional reformation, provided:

ARTICLE I.

"Every Mexican by birth or naturalization who has attained the age of twenty years, who has an honest means of living and who has not been sentenced in legal prosecution to any infamous penalty is a citizen of the United States of Mexico."

U. S. v. Ritchie, 17 How., 525, 541, held that the Indians were Mexican citizens at the time of the Gadsden Purchase.

“These solemn declarations of the political power of the (Mexican) government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.

“The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and the right to hold land.” (Head Note.)

U. S. v. Joseph, 94 U. S., 614, held that the Pueblo Indians had from the Mexican government full recognition “of all their civil rights, including that of voting and holding office.”

The treaty provisions quoted above prove that all Mexican citizens who elected to stay in the United States should become American citizens, and it must accordingly be that the Papago Indians are now American citizens—and the following case is authority for that proposition, for although decided with reference to New Mexican Pueblo Indians, there can be no distinction.

U. S. v. Lucero (on appeal to the Supreme Court of New Mexico), 1 N. M., 422, 425.

POINT IV

The Papagos are different in every respect from the North American tribes and similar to the civilized North American Pueblo Indians.

The Government's argument is based on the proposition that the Papagos are like the North American Indians, and that the law can recognize no distinction. But the difference is fundamental and has been and must be recognized by the Court.

PAPAGO PUEBLO
INDIANS

Living by agriculture and cattle raising, sedentary and permanent within permanent village boundaries.

Peaceful, Industrious, frugal and moral.

Loyal to Spanish government and law-abiding.

Civilized.

Living in organized and permanent villages with annual elections and local village name.

Living in permanent, substantial houses with valuable improvements, including deep wells made by themselves.

Mixing and trading freely with whites.

Self-governed under local laws.

Claiming and exercising rights of ownership over real property, by cultivating, improving and using for pasturage within certain and permanent boundaries.

NORTH AMERICAN
TRIBAL INDIANS

Roving within extensive national boundaries.

Warlike, lazy, cruel and blood-thirsty.

Hostile, treacherous and unloyal.

Uncivilized.

Living in loose, wandering and shifting tribes, with no name except for the tribe or nation.

Living in tents.

Living in isolation.

Incapable of self-government.

Making no use of real property except for hunting.

Exclusively occupying real property so as to establish title by prescription.	Not occupying real property in a legal sense.
Holding title to real property by decree or grant of Spanish government, preservation by treaty and paramount to title of United States.	Holding no title or right of occupancy from any government, but only im-memorial occupancy subject to whites' rights of discovery and conquest.
Having the power to convey good title as repeatedly held by our courts.	Having no power whatever to convey good title as is held by our courts.
Protected in personal property and political rights by the Mexican treaties.	Entirely unprotected by Mexican treaties.
Called by the Spaniards "indios de pueblo."	Called by the Spaniards "indios barbaros."

The local statutes have recognized the distinction as they must. The territorial statute of New Mexico of January 10, 1853 (Pamphlet, p. 29), prohibited selling of liquor to Indians, but provided that "Pueblo Indians living among us are not included in the word 'Indians,' and the New Mexican law of July 12, 1851, provided for the enforcement of the United States Non-intercourse Laws with 'savage Indian tribes,' The Arizona territorial statute of December 15, 1868, prohibited selling arms to Indians, but provided that the act should not apply to Pimas, Maricopas, Papagos and tame Apaches."

The usage at the time classed the Papagos together with the New Mexican pueblos as Pueblo Indians.

These distinctions are recognized by the cases.

Under "Point III" above, quoted from the New Mexican territorial decisions showing the broad distinction between Pueblo Indians and the wild Indians, and these distinctions were recognized by the Supreme Court in

U. S. v. Joseph, 94 U. S. 614,

which shows the peaceful and civilized character of the Pueblos and says that in 1834 "there was no such Indians as these in the United States unless it be one or two reservations or tribes such as the Senecas or Oneidas of New York."

"When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government.

"The Pueblo Indians, if indeed they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recog-

nized as exempt from our laws, whether within or without the limits of an organized State or Territory, and in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

“Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the Act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government.

“It is this fixed claim of cominon which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe.

“The Pueblo Indians, on the contrary hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States.”

Our adversaries attempt to weaken the force of the Joseph case, but this is impossible. That case was a decision which was based upon the fundamental difference between Pueblo Indians and the Northern tribal Indians and although the statute under consid-

eration is not now in question, nevertheless the same differences which determined the construction and application of that statute are vitally important in this case. The Sandoval case (231 U. S. 28) is in no way inconsistent with either the decision or the language of the Joseph case, except that in the latter case this court considers that some of the statements regarding Pueblo Indians in the Joseph case are at variance with later data—and even as to that it is apparent that the attorney for Sandoval did not attempt to put before the court fully the character of the Indians, leaving the court to the one-sided view given by the quotations read by the government. The case came up on demurrer so that there was no testimony regarding their character.

Moreover the Sandoval case itself shows that there are broad and important distinctions between the Pueblo Indians and tribal Indians; and indeed many of the differences above stated are fully justified by the Sandoval case.

That case was regarding the extent of police power over pueblos and the court founded its decision very largely upon the theory that long continued executive and congressional action justified the police power; there is no such congressional or executive action with regard to Santa Rosa.

Jaeger v. U. S. & The Yuma Indians, 29 Court of Claims, 172, is another case decided upon the distinction between the tribal Indians and Indians like the New Mexican Pueblos; under the Depredation Statute the plaintiff tried to get compensation for damages caused by the Yumas and because of the character of the Yumas, being the same as the New Mexican Pueblos, it was held that the statute did not apply to the Yumas.

POINT V.

THE PLAINTIFF'S TITLE IS COMPLETE AND PROTECTED BY THE GADSDEN TREATY NOTWITHSTANDING PARAGRAPH VI OF THAT TREATY.

The Treaty says :

“Nor will any grants made previously be respected or be considered obligatory which have not been located and duly recorded in the archives of Mexico.”

(a) The village titles were complete and perfect without grant or record.

Pallares *Legislacion Federal Complementaria del Derecho Civil Mexicano* (Mexico, 1897), conceded by the government's witness to be a book of authority so far as Pallares Commentary is concerned, says at pages XXVI and XXVII of the commentary :

“It has been believed by companies marking out lands that the possession of the Indians needed concrete written titles, derived from the Crown, to justify rights thereto; but the truth is that these Pueblos had older and more sacred titles. Long before the conquest the Pueblos de Indios existed, possessing in common the lands which they cultivated, returning to their Monarch certain services and dues. This property increased so that everything which was conceded to the Pueblos according to the laws of the Indies, whether founded theretofore or reduced, was confirmed by everything which existed in the Code so many times cited. And for this reason a famous jurisconsult, to whom I owe especial recognition

for scientific assistance, Lic. Prisciliano Diaz Gonzales, stated in a learned work published in 'El Nacional' on November 17, 1885, the following:

'From that time on there was private property for the Indians. No formal titles were issued to them; the Judge-commissary looked over the lands, and if they were possessed by Indians, which he determined by verbal evidence, and summarily, he left as their property; the fact being noted in the report which the commissary made to the Government. This appears in Law 18, Title 12 of the R. de Indias, and we can be sure of the practical observance of the law by the instruction of the Viceroy of Peru, Juan Garcia de Mendoza, which escalona, inserted in his "Gazoflacio," Book II, Part 2a, Chap. 18, pp. 212 and 213, and by the provisions in Art. 2 of the Royal Cedula of Oct. 15, 1774. Since the Indians had no titles nor any evidence of their property other than possession verbally recognized by the commissaries, they could not demand a title issued by the Spanish authorities.' "

(b) If it were a question of grant, it is "located"; the village is and immemorially has been in possession of the ground.

(c) Even if its title could be "recorded in the archives of Mexico" (which we do not believe) the recording will be conclusively presumed from possession.

United States v. Pendell, 185 U. S. 189.

POINT VI.

THE PLAINTIFF'S TITLE IS NOT AFFECTED BY THE OLD RULE REGARDING GRANTS WITH VAGUE BOUNDARIES NOT SURVEYED AND PATENTED.

(a) Ours is no question of a grant.

(b) The rule does not apply "if location had been made and there were facts enough to nail it to the ground and determine its true boundaries."

Ely case, 171 U. S. 220.

Arivaca v. United States, 184 U. S. 649, 653.

(c) In any event claims or grants derived from any foreign country or government are taking out of the rule by the statute which says that no such grant shall "be deemed incomplete for the want of a survey or patent when the land granted may be ascertained without a survey or patent."

12 U. S. Statutes at Large, 410 (Chap. 90 of Laws of 1869).

(d) That this rule has no application to titles based on prescription or immemorial possession as shown in

Carino v. Phillipine Government, 212 U. S. 449.

Reavis v. Franza, 215 U. S. 16.

GROUP B.

POINT VII.

THE HUNTER-MARTIN CONTRACTS ARE NOT MATERIAL TO THE ISSUES.

When this suit was filed, a motion to dismiss was sustained by the trial court. An appeal was taken to the Court of Appeals, and from there to the Supreme Court of the United States, which ordered that the trial court overrule the motion to dismiss. When the mandate reached the court of the first instance that court overruled the motion to dismiss and allowed another motion to be filed, which motion had for its grounds allegations that the attorneys had no authority to represent the plaintiff, and, while the second motion to dismiss was overruled, the trial court, in fact, considered it almost to the exclusion of anything else in the case. (Rec. pp. 90-100.) That court dismissed the bill of complaint "upon the merits."

Certain of the assignments of error are based upon the presumption that the court considered some of the things that entered into the motion to dismiss in reaching his conclusion to dismiss the bill upon the merits. These assignments of error are numbered as follows: 7, 8, 9, 10, 14, 15, 16, 17, 19, 20, 21 and 23, and, in substance, allege errors of the court in holding: That the ultimate object of this suit was to partition the community land; that the language of the complaint and certain contracts that these lands "be segregated from the public domain" were admissions by plaintiff that they belonged to the United States; that because of a contract not in issue between men named Hunter and Martin, plaintiff was not entitled to the

relief prayed for in the complaint; that plaintiff had no power to employ an attorney; that the court admitted in evidence copies of the contract between Hunter and Martin dated March 17, 1911, and May 17, 1911.

If the trial court considered that the question of the authority of the attorneys to represent the Pueblo of Santa Rosa, which was attempted to be raised again in Paragraph 5 of defendant's answer (Rec. p. 23), the court was in error upon this. C. J. 635; Gage v. Mell, 124 Fed. 371; Bonnifield v. Thorp, 71 Fed. 924.

The object of this suit is not the partition of the land sued for. It is to enjoin the administrative officers of the United States from treating this land as part of the public domain. There was nothing in issue in this case but this. That is the law of the case. The Supreme Court (249 U. S. 110), in answering a similar question, said:

“Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the land, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership.”

It is true that, simultaneously with the filing of the answer in this case, defendant filed another motion to dismiss, and, therefore, filled the record with testimony that was pertinent and relevant to only the issues raised by the motion to dismiss. The trial court, having overruled this motion to dismiss, it should not have been considered in deciding the case upon the merits. The court below evidently did not consider this testimony in reaching the conclusion upon which it entered the decree deciding the case against plaintiff

upon the merits. In the court's opinion (Rec. p. 91) it is stated:

“It is clear, in the opinion of the court, that the grounds of the motion and the opposition thereto were sufficiently developed in the trial of the case on the merits to admit a determination of the questions raised thereby in the conclusion which the court has reached on the whole case as presented by the pleadings and evidence, and which is the basis of its decision.”

It has not been quite clear to us whether the court intended, by this language, that the case had been decided on the merits by a consideration of the evidence tending to prove the issues raised by the complaint and answer, or whether the basis of the court's opinion was the evidence introduced by the respective parties on the issues raised by the motion. However, we must assume that it was the former, as the latter course, in view of the fact that the motion to dismiss was overruled, was, and is so clearly erroneous and prejudicial that we could not presume the court would do such a thing. However, it is apparent, from the language, that the court below was influenced by the testimony given on the motion to dismiss, and it is to this that we have assigned the above specified errors.

“A judgment or decree upon the issues not made by the pleadings is, at the least, erroneous, and may be set aside or reversed in a proper proceeding for that purpose.” 33 C. J. 1152; *New Orleans v. Citizens Bank*, 167 U. S. 371; *Reynolds v. Stockton*, 140 U. S. 254; *Cushman v. Warren Scharf Asphalt Paving Co.*, 220 Fed. 857.

The difficulty in this case was that the motion to dismiss was pending all the time from the date of filing the answer to the date of final decree, and both parties were constantly submitting evidence on both the issues on the motion and as made up on the pleadings. In other words, both cases were tried and argued simultaneously, but the court was not justified in considering testimony relevant to only the issues raised in the motion as testimony on the merits of the case.

“Parties may, under some circumstances, broaden the issues by consent or acquiescence, to such extent that the court would consider the pleadings amended to conform to the proof. But the court would not be justified in taking that attitude in this case, for the reason that any testimony taken on the issues on the motion to dismiss would be presumed to have been intended for that motion only, and not with reference to the merits of the case.”

Reference is made in the opinion of the court below that (Rec. p. 98):

“It is noted that, throughout the contract of May 17, 1911, between Hunter and Martin, that Martin is to undertake, among other things, to have the lands in suit *segregated from the public domain of the United States*, apparently a recognition that the lands were within the public domain of the United States, although the bill in this case proceeds upon the claim that these lands are not, and never were, a part of the public domain.”

It is a sufficient answer to this to call the court's attention to the fact that neither Hunter nor Martin

is a party to the cause, and, if either were, this is merely a quibble, for the government has assumed control of these lands and has been treating them as part of the public domain, and the entire matter at issue in this case is to prevent the government from treating these lands as part of the public domain.

The court below decided (Rec. p. 100):

“That plaintiff * * * did not possess the power * * * to clothe Hunter with power to bring any kind of a suit or action in its name or in the name of its Indian inhabitants, or both, having the ultimate object of effecting a partition of land between plaintiff Pueblo or its Indian inhabitants of the one part, and Hunter, or his heirs or assignees, on the other.”

This ruling of the court evidently influenced the court in its decree, notwithstanding the fact that the decree overruled (Rec. p. 100) the motion which raised this point, and dismissed the bill upon the merits.

Again quoting from the Supreme Court's decision in Pueblo of Santa Rosa v. Lane, 249 U. S. 110, we find the following:

“Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a unit we entertain no doubt. The existing ownership is not an obstacle, as it is shown by repeated decisions of this court.”

GROUP C.

POINT VIII.

The trial court permitted the witness Bowie (Assignment of Errors, 49-50-51, Rec. pp. 107-8) to testify relative to conversation with R. M. Martin, not a party to the suit. If this conversation was admissible on the theory that Martin was agent for plaintiff, there is nothing in the statements that are material. If he is not agent the conversation is purely hearsay and should have been excluded upon plaintiff's objection.

The defendants took testimony by deposition in Los Angeles, California, and could have taken the testimony of R. M. Martin direct if defendants' attorney thought such testimony would be material to the issue.

The trial court permitted the witness Thackeray to testify relative to the circulation of the petition and introduction of Exhibit "6a" (Rec. pp. 407-8; Assignment of Errors 53-54; Rec. pp. 108-9). This petition was obtained while the attorneys for plaintiff were waiting at Santa Rosa and other places under representation from the defendants' agent that they were endeavoring to find witnesses (Rec. pp. 406-7), and some of the Indians who signed the petition were thereafter examined and this fact was not made known to the plaintiff's attorney until several days later and the attorneys for both sides were eighty miles away from Santa Rosa. It was hearsay and immaterial and not proper evidence for any purpose. The plaintiff was never given any opportunity to cross-examine the alleged signers, although they testified by deposition, and it should not have been permitted to be introduced and considered by the court.

POINT IX.

This court, in the exercise of its appellate jurisdiction, has power to make such disposition of this case as justice may at this time require.

Watts, Watts and Company, Limited, v. Unione Austriaca Di Navigazione, etc., 248 U. S. 9, 21.

LASTLY

On all grounds the decision should be for the Indians.

They are worthy people, deserving well of their country. Commissioner Sells knows them well and speaks for them. In his address at a conference held in San Francisco in August, 1915, as appears from a pamphlet sent out by the Indian Bureau, he said:

“For a long time I have desired to visit the Indians of the Southwest that I might closely study their problems. I have spent the last several weeks among the Apaches, Pimas, Papagos, and the Indians along the Colorado River. About a week of this time was given to the Papago country. For many reasons I am convinced that the Papago Indians are among the most deserving of any people I have ever known. **THEIR HOME FOR MORE THAN TWO HUNDRED YEARS HAS BEEN IN THE DRIEST DESERT OF THE UNITED STATES. NO BRANCH OF THE CAUCASIAN RACE COULD EXIST UNDER SUCH CONDITIONS, AND I DOUBT IF THERE IS ANOTHER INDIAN TRIBE THAT WOULD DO SO.** Under these circumstances they have demonstrated that the genius of necessity works out wonderful things. **THE PAPAGOS HAVE MADE THEIR STRUGGLE**

UNASSISTED, AND THEIR ACCOMPLISHMENTS IN VIEW OF THEIR TREMENDOUS OBSTACLES ARE MARVELOUS. Altogether they are entitled to more kindly consideration than they have received, and it is my firm purpose to show the Papagos that we are willing to help those who have so valiantly helped themselves.”

To recognize the Indians' community and titles is only fair. A decision for the plaintiff will show the Indians that our nation has fairly fulfilled its obligations—its moral obligation toward the aboriginal owners and rulers of Papagueria, who have done no wrong to the United States and who have come under the power of the United States through no act of theirs—its treaty obligations under the treaties with Mexico, whereby the United States agreed with Mexico for the benefit of these people to respect their rights and property—its obligation to carry out the promises made to them by Major Emory in 1847, as shown by our quotation from his report—and its moral obligation of gratitude to a people who have always been peaceful and inoffensive, and who, whenever need was, left their fields and flocks and fought for the protection of our citizens against the Apaches.

To recognize the Indians' community and titles is the sensible thing to do. As Commissioner Sells says, these Indians can handle this desert country better than anyone else—much better than the United States Government ever can or will do. They have been studying this job for hundreds of years and they have learned it well; both as a reward for the past and as a prudent thing for the future, they should be confirmed in their ownership of their desert land and

then we should help them, if we can, to do their work better. Their own history proves that their own management of the country is successful, and the experience of the New Mexican Pueblos proves that if they own their land and are protected by legislation from the whites, their future will be happy.

To recognize the Indians' community and titles is the best possible thing for the Indians. It will insure the preservation, progress and welfare of the Papago Pueblos, and if, on the other hand, their titles are not recognized and the Indians and their country are turned over to the government, their progressive pauperization, degradation and extermination is certain. Commissioner Sells says that no Caucasian race could have lived in this desert, and no Caucasian government is wise enough to do as well for these desert Indians as they can do for themselves.

To recognize their land titles, including their mineral rights, and their water rights, is to effectively and forever protect the Indians against the encroachment of the whites, assuming that Congress casts about them proper restriction to prevent whites from taking advantage of their ignorance.

To recognize their land titles is to protect the self-respect of the Indians and maintain them as free and self-supporting men; and on this basis a policy of education and intelligent help will make desert Papagueria a prosperous section of our country and will give to the Papago Indians a prosperous and happy future. Any other policy whatever, whether it be the old reservation policy or the policy of breaking up the tribal relations and allotting scraps of land to the Indians individually, will certainly be a failure and a crime against these inoffensive aborigines. Neither

an individual nor a Pueblo can progress without self-respect and self-respect cannot be preserved unless men are free and self-supporting; the idea of developing men and citizens and communities by treating them like slaves or children or paupers or dependents has been proved to be, and must necessarily be, absolutely hopeless and impossible.

To recognize their titles is to preserve and develop the simple but entirely adequate civilization of these aboriginal people. It is a civilization which has grown up on the soil, which is appropriate for the situation, which serves the needs of the people themselves and which is fine and worthy in many ways. To destroy this civilization with the heavy hands of government is to do the people a great wrong, for it is bred in their bone and is a part of their lives; and there is no need to destroy it. In our hours of national self-examination we blame ourselves because all of our Indian policies have been failures, whereas the Canadians on the one side and the Spanish on the other, instead of degrading their aboriginal peoples, have preserved and developed them. But the whole difference lies simply in this: Spain and Canada have respected the Indians' laws and customs and character and titles, whereas we, except in the case of the Pueblo Indians, have insisted on destroying everything Indian and trying to replace it with what is English, a method both cruel and wholly unsuccessful.

Recognition of the Indians' titles is in conformance with the sound and approved policy of the friends of the Indians. A judgment for the Pueblo of Santa Rosa will put the Papago Indians in the position in which the government and the friends of the Indians are trying to put all Indians—that is, in the position

of self-respecting and self-supporting land owners. It is hard to explain how Secretary Works, an able and enlightened man, can bring himself to oppose the claims of the Indians in this suit. Apparently he is trying by this suit to have it declared that the Indians are paupers so that by the grace of Congress and as a result of influence brought to bear on Congress by the friends of the Indians, the Papagos may afterward be put back in the very situation in which they have been for hundreds of years; apparently the government is trying to take away their lands for the purpose (we hope) of giving the land back to them.

No one could improve on Commissioner Sells' statement in his Report for 1915 to the Secretary of the Interior, p. 7:

“Being thoroughly convinced that their material and industrial prosperity is more closely attached to their landed interests, the development of agriculture and stock raising has been given an impetus never before undertaken. * * * Poverty or dependence on others saps the energies of any man. The Indian is no exception, and I have placed the greatest work of this office on his material advancement. As his herds increase and his lands produce the Indian becomes better prepared to assimilate the knowledge which comes from the study of books. Love of home and domestic happiness follow as a natural consequence.”

This is the parting of the ways for the Papago Pueblo Indians. This Court must decide whether they shall follow the course of the wild Indians which leads to pauperism and degradation. The defendants, government officials, with the best intentions in the world,

are attempting to destroy the rights allowed to the Indians by the Spaniards and by the treaties—rights which have been their salvation for the last sixty years, and rights which will leave them free and independent for the future—and to assert and exercise rights which they have never claimed against the Papagos and which the law does not give them. If 520,000 acres of the reservation can be taken the first year after its creation, the balance can be taken next year.

We respectfully submit that the decree of the Court below should be reversed, with costs, and with directions to enter a decree in favor of the appellant in conformity to the prayers of the bill.

Respectfully submitted,

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APPENDIX.

SENOR TORIBIO ESQUIVAL OBREGON (Rec. p. 274) GIVES COUNSEL TO THE COURT ON MEXICAN LAW RELATIVE TO THE CASE AT BAR; THIS COUNSEL WAS RECEIVED DURING THE COURSE OF THE TRIAL, BUT THE WITNESS WAS NOT UNDER OATH, AND THE INFORMATION THERE GIVEN WAS RECEIVED AS JUDICIAL KNOWLEDGE.

(Reproduced in narrative form.)

My full name is Toribio Esquivel Obregon; I am a practicing lawyer and have been practicing in New York for nine years. Before that time I practiced in several of the states of Mexico and in Mexico City, where I now have an office, and have had same for three years. I practiced law in the Republic of Mexico twenty-five (25) years, and was admitted in 1888.

I attended a private school in my home town; then to the college of the state of my home town; then studied law in the National School of Jurisprudence in Mexico City where I took a degree. My preparatory studies were six years and six years of professional studies. The course to begin practicing law is twelve years. I now have the degree that corresponds to doctor in law.

In Mexico I engaged in general practice, but principally in matters of civil, constitutional and commercial law. I had clients like the power and electric companies and many of the mining companies in Guanajuato. On many occasions in my practice I had to deal with Indian pueblos; around my own town and also around Mexico City and in the State of Michoacan. I had occasion to become familiar with Indians and

Indian pueblos, and had occasion to investigate the titles and organizations.

I have written a book dealing, among other things, with the Indian system of government under the Spanish rule, the name of which is "Influences of Spain and the United States upon Mexico." One of the sections of that book refers to the government of the Indians during and before the Spanish régime and compares that régime with the ruling and system of the United States to deal with those Indians; also a story of the history of the law in relation to the land ownership in Mexico. In connection with this book I have written another dealing with Latin-American Commercial Law, a comparative study of the commercial law of Latin-American countries which is now the text book in Columbia University, New York University, Georgetown University and Yale University that I know of. I have also written several articles and also reviews. I was appointed an honorary member of the Scientific Congress in Washington in 1916, and was asked to lecture on Mexico in a series of lectures in Platt University and presided over the meetings of those series of lectures on the Mexican Group. I am also an honorary member of the Spanish Royal Academy of Jurisprudence.

In Mexico I held the official position of Secretary of the Treasury under Huerta's administration.

In New York my practice has been in the line of teaching law in Columbia University and in New York University, and also lawyer for Latin America, preparing papers and searching titles regarding Mexican law.

I have had occasion to study in Spain; I was there four months, at the time I was preparing my book

“The Influence of Spain and the United States upon Mexico.” In Saville there was a building known as the Archives of Indians and all the papers relating to America and Indians of Spain are in that building. I spent all my time trying to familiarize myself with the catalogs, archives and papers.

(I would like to ask you the following question; Assuming that before 1853 there was an Indian village in Mexico, having a simple organization, but without any specific charter or official recognition; having a permanent location from immemorial times, and using lands in and near the village from immemorial times for agriculture and grazing purposes, apportioning the lands to individual villages for use in agriculture and for dwelling, and devoting the grazing lands for the common use of the villagers. My question is—

(“Q. Was such a village a pueblo?)

A. Of course it was.”

It was a pueblo in every sense. It was an Indian community. It was a legal entity and capable of owning lands, suing and being sued. It was capable of possessing lands in the true sense of possessor. It was capable of acquiring lands by prescription and it owned lands so used, even though it had no specific grant or confirmation from governmental authorities. No such grant ever was necessary for a pueblo to be considered as such.

The meaning of the word “pueblo” has a general application; it has a general meaning; not a technical meaning at all. The law of the Indies has no definition for the word “pueblo”. The law dictionaries have no definition of the word “pueblo”. The only

dictionary in which you can find the word "pueblo" is the dictionary of the Royal Academy, or any dictionary of the Spanish language, as compared with technical dictionaries. On the other hand, you have in the laws of the Indies, and in the laws of Spain, before the discovery or conquest of the Indies the word "pueblo," the word as used in the broad meaning, just in the same meaning as the dictionary of the Royal Academy in the present day defines it, as a gathering of people; a small settlement; that is the sole meaning of "pueblo," whether Spaniards in America or an Indian settlement, makes no difference. The word "pueblo" applies to a settlement whatever it was, the nature of the people living in that settlement, providing it was a small settlement. The Pueblo was created by the fact of the occupation, the people living there for common purpose as a community, by their own volition in many cases. That was the situation in my own home town. In the beginning it was a Spanish pueblo without any grant, without any charter. Then as they had no jurisdiction,—the word "pueblo" says—they had been convinced, whenever they arrested a criminal, they had to send that prisoner to the nearest city. Then they asked for a charter, and the viceroy, who after that time had the privilege of issuing charters, issued another decree for a second division, or delegate to go there, and if there were 50 families settled, then the town should be called Cuidade, if there were less than 50 families the town should be called Villa. When the man, or the delegate came—(I have the proceedings in my library), he found there were no more than 50 families, and therefore the town was entitled to be a Villa, which was a lot in the hierarchy of the natives.

I have never before heard that the word "pueblo" has a technical meaning, as meaning an Indian village that has been especially recognized as a pueblo. No such definition of that kind appears in any book. No such law or decree that I know of gives credence to that technical sense but the reverse is true. The fact that the Partidas defined "pueblo as any gathering of people and the fact that the Laws of the Indies use indiscriminately the word "pueblo for a Spanish settlement, or for a small Indian settlement, that makes no difference. On the other hand, you have Indian villas, and Indian ciudades also. So it depends on the grade, the higher you go in political entity. That is all. Pueblo means the mere fact of a settlement with a steady community, that is all.

Official recognition would come in the way of transferring a pueblo, villa or ciudad. When I speak of the grading in the Partidas I refer to Law 1, Book 2, Law 5, a proper translation of which is as follows:

"A pueblo is the name given to a community of people of every kind of the country where they are gathered together and if for ten or twenty years they have badly done anything by way of custom, the laws of the land knowing it, and not objecting, and approving, the pueblo, whatever it is, or the greater part of it, can do that thing, and it must be held and protected by custom."

A rancheria, in the Laws of the Indies, there is a title in the Laws of the Indies, Title 25, of Book 4, of the Laws of the Indies, referring to rancheria. That whole title is devoted to the regulations of a rancheria. The word "rancheria" was used as equivalent to pueblo, and it meant a pueblo in the meaning of that

title of the law, and it means pueblo also in the work of the missionaries. Whenever the missionaries found a pueblo and gathering of people, a settlement of Indians, they called it a rancheria. And they call it rancheria in Mexico, in present times, any settlement—a small settlement—that is a rancheria, and is equivalent to a small pueblo. A rancheria does not have to have any official recognition. It is controlled as a pueblo. It may be that the government has, in some cases, the organization of a rancheria, but that is not because the rancheria needed official recognition to be founded and organized at the direction and order of the government. It was made entirely in a different way. The government had to recognize the fact that there was a community, and such a community would have legal entity.

“Community of Indians” means all kinds of groups of Indians which have something for a common purpose; something which is not separate as belonging to the individuals as such, but which belong to the community in the right meaning of that word; in the English meaning of the word “community.” That is what is meant by “Community of Indians.”

A community of Indians was a pueblo of Indians; a legal entity with power to own lands; to sue and be sued, and to acquire title by prescription.

Community of Indians and joint ownership of individuals have an entirely different meaning. The Indians never could conceive of ownership in the way a European mind may consider it. Ownership for the Roman, or the Spaniard or for the Frenchman is something which means individual ownership, according to the Roman traditions. The Indians did not come to that point of development about ownership.

They considered ownership as something which they could own and possess merely as a community; not as individuals. When you say co-ownership, you mean ownership,—you mean conflicting interests, of different persons, who by some accident may possess something in common. But there is no community if there is a mere accidental occupation or interests which may be conflicting. It may be you do not like the people with whom you are. It may be you do not have any common purpose with those people, and, therefore, you can at any time apply for subdivision, because the land does not belong to you. That ownership comes from the Roman system of law, while this community has a different conception of the law. The only ones, the Spaniards and Indians were given titles, sometimes as occupants, or they had a certain privilege upon a certain tract of land given by their own men before the conquest. But those interests did not apply precisely to the individual, but to the individuals in that town, to pay him tribute to work for him.

The Indians had the idea of ownership of land by the community, or group, clearly in their minds, and it is now clearly in their minds. The “community of Indians” as used in the Laws of the Indies did not mean at all joint ownership by the group.

What the Spanish Kings had paramount in their minds was to have the Indians converted to the Christian religion. That was their principal purpose; their principal obligation,—to convert the Indians to Christianity, and in order to do that, they realized from the very beginning that it was necessary to do two things. One was not to create bad feelings among the Indians by taking their property, so they made it a constant rule, never changed in the whole period

of the Spanish régime, to keep the property that the Indians possessed,—that the Indians had, in the way they had it, free and safe forever, and the order was not to disturb them in the order they had in their community; in their relations; in their policy. That was one of the ways that they considered necessary to preserve the good-will and the peace among the Indians, and in that way to convert the Indians to the Christian religion, so they specifically confirmed the laws and decrees and the laws and customs of the Indians without any limit except that they should not be in conflict with the Christian principles of civilization.

It is true that in the first edition of the Laws of the Indies, published in 1542, the King directs that in suits concerning the Indians, the courts shall observe their usages and customs, unless they do manifest injustice. The laws and customs were the laws and customs of the Indians existing at the time of the conquest.

My source of knowledge prior to the conquest of 1520 was very reliable. We have a report made by one of the Chief Justices of Spain, Zurita is the name of that chief justice, who wrote a special book on the system of land in Europe, and the ownership of the Indians before the conquest. It was published in the 16th century, which is after the conquest. His materials were his fresh information, of what he saw of the many cases that were brought to his cognizance as a judge to decide those cases. And also, he was ordered by the King to prepare that book. And, therefore, his information is entirely correct and satisfactory.

The Aztecs had records. But you could hardly ex-

pect them to have such records as you have in the Supreme Court.

Another source is Sahagun. He was a friar, who came just after the conquest, and he wrote a very interesting book, of one of the main sources of the history of those times. And he also mentioned the system of land ownership in America of the Aztecs, and he coincides in every respect with Zurita.

I treat this matter in my book.

I believe an Indian pueblo, even though not officially recognized was a legal entity, for the reason that in the first place, the King of Spain considered himself in some ways the successor in the sovereignty to those people of the old Aztec monarchs, and according to the way the King found the pueblo to exist in many places, he did not want to disturb them, but to leave them in possession of whatever they had. Now, the King, in many laws that I might cite for you,—the King considers that the Indians, when they have some settlement, were entitled to possess and own the land. When the King said that all that they possessed should belong to them and should be respected, that shows that the King was giving a title to the community. The King was giving a right. Now as the King was giving a right, he naturally, by implication gave also the right to protect that property; the right to sue and be sued on account of that property; otherwise the right would never have existed.

Now, the King gave those pueblos that with the understanding that they had no official recognition, as in most cases they had none. The King considered that even before the Indians were settled,—even when they were hunting tribes, they owned certain lands and the King ordered that those Indians be settled. The

Spanish settlers were ordered not to take the lands which belonged to them before they came to any settlement. So that means that the great value,—the common idea that they had of the communal land was reserved for them and was respected by the King and given to them by the King, and, therefore, they had the right to protect it in some way. On the other hand, as I said before, the King always ordered the viceroys, under the presidents and governors to keep the customs, rites and everything that the Indians had before the conquest and not disturb them. On the other hand, if the Indians had possessed that land for a certain period of time, then they have acquired the ownership of that land by prescription, independent of any written title, consideration to charter or paper of any kind. They could possess, in the right proper meaning of the word “possess,” the only meaning that we have in our Spanish language of “possess” or “possession.” The Spanish laws, even without recognition, gave to the Pueblos or recognized in the pueblos and communities certain entity powers given by the Spanish laws and decrees, and may be divided into two parts: one was what refers to ownership of the land as you call it; to the civil rights, as we call them. And the other to their matters of political rights. That is to say, any matters of jurisdiction, any matters of courts or customs in relation to the interior administration of the town, the King merely says, “Let the Indian continue with their regulation and their government insofar as they do not conflict with Christian civilization.” In regard to ownership (civil rights) the King, by allowing them to continue in the possession of the property they had before the conquest, gave them naturally the legal entity necessary to defend

that right. The King appointed defenders of the Indians as that was the title, in every phase in which the Indians or the Indian towns were disturbed in their possession; to defend them in the courts. So that shows that they had a representative which represented the community and naturally that means legal entity. You will not find the words "legal entity" in the Laws of the Indies, but you find "Communal" and that is legal entity.

The Spanish decrees gave to these Indian communities the right to hold lands and personal property also, and the right to have a community treasury; to make investments on behalf of the community; to mortgage; be represented in court, and to take land and other property by escheat from one of the villages. By the granting of these powers in effect the groups were made entities, and that is the real meaning of the word "entity" as far as I can understand it.

The phrase "communal title" or "communal tender" or "communal land holding" has been used several times in this case, means, under the old régime, a kind of an ownership which belongs to the community, as compared with an ownership of property belonging to individuals.

Insofar as I know, from my personal experience and knowledge, there is always in those Indian communities, no matter how primitive, a group of peasants, or perhaps a peasant only, who has power to assign to a certain tract of land. I refer in this to the way tradition has been kept, because the Spanish law, which is in force now in Mexico, is not that way, so that is how the Spanish law has been strong enough to keep the laws that way, notwithstanding the laws of Mexico which prohibit that.

This peasant, or group of peasants, assign the property or tract of land to the individual to maintain or support his family. Some times the individual is not fit enough to cultivate land, and they separate him from that land and give him another, because he shows himself unworthy of that land. Sometimes when one of the peasants of the community dies the land is given to another. They use a certain discretion, and a certain form in dividing his land, because no one of the community considers himself to have an individual right except the privilege of having a tract of that land assigned to him for cultivation. The same thing is true with the grazing land; they graze the cattle in common, and one does not have his own grazing land. This situation is communal land holding from the Indian point of view.

My third reason for considering that the Indian community was an entity was that after a certain period of time they acquire by prescription the right to exercise those acts and functions as a custom. These rights are given by the Partidas, Title 1, book 2, Law 5, and other authors.

I never heard of a charter from some governmental official being required to make an Indian community a pueblo. I never heard of a charter to an Indian Pueblo as distinguished from an Indian villa, or Indian ciudad. I can positively say I never saw anything in regard to charters to pueblos of Indians in my study in the Hall of Indian Records in Saville, and my study and observation in the Hall of Records was sufficient to show me that no such charters were entered.

The law concerning the titles of Indian pueblos, whether officially recognized or not gave them a fee

simple title to the lands they used, not merely a tenancy or usufruct.

You cannot find the word "usufruct" with reference to the Indian towns in any of the laws of the Indies. The usufruct is not applied to the ownership of pueblos and the idea that the unrecognized pueblos, at least, only had a tenancy is entirely against the whole principles of possession, which is very clear and has been well defined by prominent authority according to that principle of possession, or doctrine of possession, you require only two things—that is tradition I am talking of, coming from the Roman law, which is now prevailing, up to this time, which has been the subject matter of stories from German, Spanish and French authors. I could quote many of them as the most prominent jurists of the present time, and they always considered that possession means two things: One they call in Latin corpus; and the other which is called also in Latin terms animus. Corpus and animus are necessary to have possession. And no more than corpus and animus are necessary to have possession. By corpus is meant the actual holding. But actual holding by itself is not possession, because an insane man can hold things; a sleeping man can hold something. That is not possession. That is a mere matter of corpus, without animus. By animus is meant a purchase, and the animus divides the purchase into two kinds; animus domini, and animus detendi. Animus domini is as the owner; that means as the owner. The pueblo dueno,—as the owner, or as animus detendi, or in the Spanish sense *brecualio*. These are the two facts in possession; that is in the way of the owner, and pueblo, in the name of another. Whenever a man is in possession of something, he must have either one of

the two, possess in his own name, or in the name of another; otherwise he is not in possession. The very idea of mere possession without meaning in the name of another or in his own name is strange to our law. There is no such possession. Only animals can have that kind of possession. That is not possession; the animal cannot possess, because he has no mind. Law 3, Title 30, Partidas 3; Law 6, Title 30, Partidas 3.

“Q. Then the Indian villages, whether officially recognized or not, had true possession in every sense, of the land that it was actually using?”

A. If they were human beings they should have possession in their own name, or in the name of another. You cannot escape that conclusion.

Q. And it was either possession in their own names or in the name of another?

A. In their own. They never possessed that in the name of the King of Spain; they didn't know him.

Q. Then the fee title that you have mentioned of the Indian villages came sometimes by specific grant, and sometimes without specific grant?

A. Most of the time without any specific grant;”

Because the King merely recognized them as old holdings and possessions, by constantly telling the viceroys and presidents and governors of the people in authority to respect and not to take that land. The land in Mexico was divided originally into two sections: One is the realingos, and the other the Indian property—the Indian land. That was all. From the very beginning that was the division made by Queen Isabella after the signing of the Papal Bull giving the Kings of Spain the right in the American colonies. That was the possession. And then they constantly maintained the distinction between the

property of the King and the property of the Indians. The property of the King was subject to composition, to settlement and to sale. The King used to sell the land or to compose to make settlements with the possessors of that land; while the property of the Indians was not subject to sale; was not subject to composition; was not subject to any form of disposition except when the law provided a way for the community to dispose of the land. That was for the community to do that. When the Royal cedula of October 15, 1754, was made, regarding which much has been said, was with regard to the realingos and not the Indian lands. The Indian lands had nothing to do with the cedula.

The recognition by the kings by orders I have spoken of are the various laws and decrees embodied in the Laws of the Indies. When the Indian villages were founded by the officials of Spain, then this was a new organization without any property, without any land, and the king always provided that they should be given a tract of land which was called the fundo legal, and the ejidos. That was only when a new village was founded or perhaps if a pueblo grew so that it needed additional land, the king always provided whatever they needed.

The King of Spain found it a little difficult to convert the Indians when they were scattered all over the country, as hunting tribes without even the foundations of civilization, and in order to have them gathered in some place in order to teach them religion, and what we now call civics, it was necessary to bring them to some place to stay and live there and to have Christians teaching them, not only the fundamentals of religion but also the beginnings, the fundamentals of the civil law—of organization; of what a court

meant, and of what an alcalde meant; something of that kind. The purpose, therefore, of this reduction, as here called in the Spanish term, was merely to create new settlements; to bring the Indians which were widely scattered in the country, to settlements, and these new settlements were Indian pueblos.

These reducciones mentioned as receiving grants of land would in many cases be reducciones, but many of the villages were old villages and not reducciones. I have never known, never saw specific grants to old villages.

I have studied Indian titles more or less under the Spanish law prevailing before Mexican independence and prescription did run against the royal ownership of lands. My reason for this statement is quotations of all of the laws of the Indies and the law of the 15th of October, 1754, even that law mentions prescription among the means of acquiring possession, and in order to acquire by prescription the only thing that you need to have is something showing that it is *animus domini*,—to possess something as owner,—that means title. And that possession added to the actual having or holding that thing leads to prescription after a certain period of time, no matter how came that possession, by a purchase, by a gift, by inheritance, or by forcing that possession. As a gift it prescribes 50 years possession. Citation for that authority, Law 21, Title 29, Partida 3.

The decree just mentioned in which the King himself mentions prescription among one of the ways of acquiring ownership; he also says there that whenever there is no title the King does not say whether the title has been lost. That is not the wording of the law. The wording of the law is that whenever there is

no title you do not need to prove that you have lost the title; the only thing you need to prove is that you have possession; that you have had possession twenty or fifty years depending upon the circumstances. There was no necessity for any kind of an instrument or title of any kind, there was no such thing. It is derived from the law I have just mentioned. Of course, not very many are misled by the use of the word "title." The law says it is necessary to have title in order to acquire by prescription, but what you mean to understand by "title" is the distinction that I have just mentioned; a title by way of owner, or *titilo petucario*.

Now, if you possess with a title as owner, that is to say, in your own name, then that is the title that the law requires. If you possess in the name of another, then it is not a title for prescription. You may possess among many things and you do not prescribe, because you do not possess for your own account, in your own name or on your own behalf; you possess in the name of another person, therefore, that title does not lead to prescription for you, that leads to a prescription for the person in whose name you possess.

So, possession in the proper meaning of the word always leads to prescription after a certain period of time. The word given as title is good faith. You may have good title and bad faith in the same thing. And the law makes very clear the distinction between good faith and good title. If you possess in your own name a title, even though the possession is *corpus*, the thing has no good faith. That means he needs a longer period of time to acquire by prescription.

"Just title" as appearing in the laws is a necessary element of prescription. It does not mean an in-

strument, or title or a paper title of any kind. The word "just" comes from Jus in Latin, and that means law. That is, law that is sufficient to acquire title by prescription. Law 27, Title 12, Book 4, of the Laws of the Indies, which was referred to by Senor Garza-Aldape, containing the phrase "titilo viciso". In the sense that this phrase is used, we may say that there are two periods in the evolution of this title: One period is ten years after that the possession, no matter if it is in the beginning the title was vicious, you may acquire that land by composition, that is to say, by paying something to the King; after 30 years' possession you acquire title not by paying anything to the King but by mere prescription. Before ten years the viciousness of your title was taken into consideration, and you are not needed to make composition. And, of course, the possession of the Indian Villages was such possession as would result in prescription, because there were two elements of possession, corpus and animus.

The title of the Indian villages was never subject to destruction by the Kings or the royal officers according to the laws of the Spanish, enacted by the King himself and to my knowledge I have never known of a case either mentioned in the laws or otherwise where the King did destroy the title, so to speak, to an old Indian village.

The mere fact that the King gave the pueblos—the Indian pueblos the right to possess, the King gave the legal entity, because the words "legal entity" is not found in the Laws of the Indies. Instead of having a general term meaning legal entity, the King, as the Roman law does, makes a term of this legal entity.

The sort of title given to Ferdinand and Isabella by

the papal bull of 1493, according to the ideas of the middle ages—there were two ways of acquiring what you may now call sovereignty; one by conquest or by the force of arms, and the other by a grant of the Pope, who was considered sovereign of sovereigns, and in that way the Pope gave, for instance, the sovereign island of England to Henry the Second of England; then he made use of that power in many cases in favor of the King of Portugal. Now, in the contention between the King of Portugal and the King of Spain, they came to the Pope to decide their contention of which of the two kings was correct in trying to get a conquest of the land in America. They came to him as the sovereign which had the power to decide that question. The Pope without any hesitation, considering himself, that he had the power to decide that question, gave the title to the King of Spain, to that part of America, which had been occupied, or the part which is west of the line established by the Pope, and he gave that title on condition, as you may in American terms, for the consideration of having the King bind himself to convert the Indians to the Christian religion on the penalties that in those times were considered very effective, but perhaps now they would not. But in those times you see, constantly the King would bind himself, and consider by that, he did not save his soul if they did not essentially fulfill the promise. That was given by the King of Spain to Columbus and to later sovereigns.

Solorzan is, as we say, erudite. He is a compiler of opinions and principles prevailing in his times, with reference to the policies of the King in America and in that respect is a great authority because you will find their laws of the topics, theoretical, philoso-

phical and political topics discussed at length, giving in all cases a great number of cases to support his conclusions. The title of the book being translated is "The Laws of the Indies," published about the seventeenth century. In Volume 1, Book 2, Chapter 24, Paragraph 19, page 345 he says:

"Alexander the Sixth accorded not merely administration, but also domini title to the new world to the Catholic Council, with the burden that they should take care of the conversion of the Indians."

At page 350:

"That the Roman Pope wishes to grant full and complete ownership and jurisdiction of those Indians of the new world and to infidels living in them to the Catholic Council, under the burden and conditions that they should show labor in preaching and propagating the Christian faith and religion among them."

That is authority among the authors who were discussing this point. There were authors who considered that the right of kings was not accomplished. But later they came to the conclusion that the right of the King was right under the papal bull. That was true of Pallardes Legislacion Federal, and this compilation made by the students refers as the basis of the power of the King to the papal bull. The commentary of the first part of this book is by one of the highest legal authorities in Mexico. He was my teacher in the National School of Jurisprudence, and I think the teacher of Mr. Garza-Aldape.

Referring now to the law much discussed in this case,

Laws of the Indies, Book 4, Title 12, Law 12, we find among the directions to the officers in America the words "The dividing or assigning to the Indians that which they may properly find necessary for working and raising their cattle, confirming them in that which they now have and giving them anew whatever may be necessary." That is a confirmation. It is an actual confirmation.

One of the many of a series of acts of the King of Spain in which he recognized the property of the Indians as entirely different—as entirely out of his power. That law has present effect, and not only effective in case some Indian village should come and ask for a title or confirmation.

Whenever an authority came across an Indian possessing something, he was precluded from entering into that possession because of the order made by the King. He could not do anything respecting that property.

Another law to show how, in the mind of the King, the property of the Indians was something entirely different from his own, that is to say from the Crown property, is Law 20, Title 12, Book 4, which also refers to that same point. It makes clear that distinction between the property of the Indians and the property of the King, because the law provides that whenever the viceroys or presidents or governors have given any grant of land to any person in their district or jurisdiction, when the grant has not been confirmed by the King, the land should be given over to the King and the grant nullified. But if it developed that the land belonged to the Indians, and not to the King, the land should be returned to the Indians.

There is another law that when an Indian dies with-

out leaving any heir the King orders that his property should be divided into two parts: one should be given to the Crown—to the Pueblo in which the Indian resided, and the other should be given back to his royal patrimony, showing very clearly that the land before the death of that Indian did not belong to that Royal crown.

The law up to 1863 in Mexico has been referred to, which I think starts out by saying “That the laws which prevent prescription against the crown are hereby repealed,” we say in Mexico that there is no worse enemy of the Indians than another Indian.

The first case in Mexico in which a law was enacted requiring the council, or permitting the Indian to pledge his title under the penalty of losing them, which naturally produced a great objection among the Indians, was made by Juarez—that is the law of 1863, after the Independence. He thought this law was that Spain had dispossessed the Indians and that was the prejudice prevailing at the time Juarez enacted that law. He said, “We will repeal all these laws which prevent prescription as means of acquiring title. There were no such ancient laws. I have never found any such giving right by prescription against the King.”

The circular of 1867 issued by Juarez, in which he orders that the Indian villages must come in and make proof of their titles and get confirmation, which otherwise, they could not claim, was just as I have said, that was a law that really was not a law. It was merely a circular. That is to say, a mere interpretation of the law, a mere construction of the law. Juarez had no legislative power at that time, and not until 1867, so he could not make a law. So really it had no legal effect.

The only limits to the amount of land that the officials were authorized to grant, either to an Indian village or to an Indian village which needed more land, was the necessity of the town or pueblo.

There are many pueblos that have not a church. The Ordinance of the Intendence of December 4, 1786, found in Recopilacion Sumaria by Bolena, Mexico, 1787, is a very important law, because that was an innovation of the whole system of colonization of Spain in Mexico, a reorganization of the Spanish law in the 18th century. It was a royal ordinance, having the force of law. At Section 28, it reads: "With the object of regulating uniformly the government, management and distribution of all properties arbitrios of the cities and towns of Spaniards, and of the common goods of the Pueblos, Indians of this empire, I commit exclusively the inspection of both the one and the other to the Supreme Treasury Council."

And Section 44: " * * * In like manner rules similar to those which are hereinbefore set forth with regard to the said municipal council, which the council is to establish in the chief towns of full-blooded Indians is indicated in Article 12, which looks towards the management of lands and other goods of the communities, and those of the other towns of their cognizance. * * * making it proper by document or notice, wherever filed, that it was in the personal presence of such officials of the Indian republics."

This is merely a consistent provision of the King of Spain, which merely repeated what he had always ordered. That is to say, that the pueblos of his domain would have some kind of ordinance of regulations, and that it would be advisable to organize them, as far as it was possible, and by doing so the King

naturally referred to all the pueblos of his domain, without any distinction whether they had an organization or whether they had none; whether they had a very primitive organization, or whether they had a very highly civilized organization; or whether they had an official recognition, or not, they were called pueblos and communities, and no distinction is made whatsoever.

In political matters it would be fair to say that by that royal decree there is a recognition of all existing Indian communities in the sense of fitting them into the government's system of inspection and regulation.

Now, among many persons who were ordered by the King to gather the Indians in towns, there were not only the viceroys, presidents and governors, but also the Bishop and Curates, and the missionaries were also delegates and were asked by the Kings to help in the gathering of those Indians and settling them into a pueblo. So you read the history of the works of the missionaries, and they used to come to Nayarit, and to Northern Mexico, and they came to the northern part of Mexico, and they reported to their principal, saying, I met with this pueblo; I met with this larger pueblo; or perhaps they would say, I met with this rancherio, which is another way of saying pueblo. And then by that effect—if you call that recognition—but that was a very wide or broad conception of the word “recognition.”

Real Patronato means the delegation made by the Pope upon the King of Spain for church matters; for instance, the King of Spain had the power to use curates or Bishops or archbishops, or canons. And the King also had power to collect tithes, or to collect any other duties imposed or laid by the church, and he

took that by concession of the King, or by concession of the Pope. That was called real patronato, which gave the King power to handle the church, and the priests were considered mere agents of the crown, wherever they were.

There are many citations of the law showing where the priest and the bishops and the clergy were made agents of the crown.

Laws of the Indies, Book 6, Title 3, Law 2, and also Law 3, makes the clergy to some extent governmental agents. In this law referred to, that power given to the priests and the bishops and the men of the church to settle these Indians, and in getting these Indians into settlements—they were governmental agents. The church was one of the branches of the government, not only in that respect; the church had some jurisdiction to decide legal cases; to decide all questions relating to priests or pay or religion, or whenever they had delegated civil authority, they also could take cognizance of cases in those little villages of Indians.

Take such missionaries as Father Kino, he certainly had a connection with the church, he needed to have an authority from the government to go and preach the religion of the Roman Catholic faith. In his diary he had mentioned Father Visitor that came through the country from time to time. Father Visitor was an agent or delegate of the government. The system of the missions was merely this: Before the Indians were capable of understanding the methods of the laws of Spain, the missionaries were sent there to settle them in towns whenever they were not in towns or pueblos, and to teach them religion and the beginnings or fundamentals of the civil law. When they

had completed this part of their purpose, they turned the pueblos over to the civil authorities—to the political authorities. In the meantime, these visitors were advisors—special representatives of the King; they were public officials; no church could be made without order from the King or from the Spanish government, because that was a state function at that time.

The law heretofore referred to regarding the death of an Indian in a pueblo is Law 30, Title 1, Book 6, where it is provided that the estate of the dead Indian should be divided between the pueblo in which he resided on the one part and the royal patrimony on the other part, that shows very distinctly that the property of the Indian did not belong to the royal patrimony.

At the conclusion of the foregoing set forth in narrative form, by Toribio Esquivel Obregon, he answered many questions for Mr. Fraser, of counsel for the defendants, and it is possible that he would like to utilize some parts of this testimony as an appendix to his brief.

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Henry N. Hodges
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IN THE

Court of Appeals of the District of Columbia

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Appeal from the Supreme Court of the District of
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*Memorandum of Authorities by Appellant on Right to
Attack Authority of Counsel.*

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APPELLEES MAY NOT IN THIS COURT QUESTION
AUTHORITY OF COUNSEL.

Seventy-two pages of the brief for Appellees are taken up with a discussion of a matter that is no longer in this case, to wit: the authority of counsel to represent the plaintiff.

The question of authority of counsel cannot by any stretch of the imagination become a part of the "merits of a case."

The determination of the authority of counsel is between different parties and is tried in an entirely different manner than issues of a case are tried.

As a matter of fact, the question of the authority of counsel was legally waived when the original motion to dismiss, in the nature of a demurrer, to the bill of complaint was filed in this case in 1915.

In Vol. 6 C. J., at page 635, the rule is stated as follows:

"The authority of an attorney to represent his alleged client cannot ordinarily be questioned at the trial,"

citing cases from Alabama, Indiana, Kentucky, Maine, Michigan, New Hampshire, New York, North Carolina, Texas, Vermont, and Virginia.

Or, in an appellate court, citing *Williams vs. Butler*, 35 Ill., 544; *Noble vs. State Bank*, 3 A. K. Marsh, (Ky.), 262; *Bogardus vs. Livingston*, 2 Hilt. (N. Y.), 236; *Shroudenbeck vs. Phoenix Fire Insurance Co.*, 15 Wis., 632. Such an objection should be made promptly. *Williams vs. Uncompahgre Canal Co.*, 13 Colorado, 469; *Kissick vs. Hunter*, 184 Pa., 174; *Mix vs. People*, 116 Ill., 265 (holding that delay of two years was fatal); *Mason vs. Stewart*, 6 La. Ann., 736 (several years' delay held fatal); *O'Flynn vs. Eagle*, 7 Mich., 306 (holding that delay from May to October was fatal); preferably at the term at which appearance is first made; otherwise the adverse party waives the want of authority and consents to the appearance of the attorney. *State vs. Harris*, 14 N. Dak., 501; *Herrell vs. Prince William County*, 113 Va., 594.

By admitting service of papers on a motion for a new trial by an attorney for defendant without objection, and by serving papers in plaintiff's behalf on such attorney, the objection that the attorney is not the attorney of record is waived. *Smith vs. Smith*, 145 Cal., 615.

The application for plaintiff's attorney to show authority should be made before a plea is filed. *Rouillier vs. Schuster Co.*, 212 Fed., 348; *Doe vs. Abbott*, 152 Ala., 243, 246; *Reece vs. Reece*, 66 N. C., 377; *Campbell vs. Galbreath*, 5 Watts (Pa.), 423; *Mercier vs. Mercier*, 5 Dall (Pa.), 142.

Pleading the general issue seems to be a waiver of all objections to authority. *Lucas vs. Georgia Bank*, 2 Stew. (Ala.), 147.

See also authority contained in 2 Enc. Pl. & Pr., 680.

This question was fully discussed in the Virginia Law Review of May, 1921, where some of the above authorities were cited, the author concluding from the cases that the matter of questioning the authority of an attorney for plaintiff could not be raised in the answer or in the plea, and also cites *Bonnifield vs. Thorp*, 71 Fed., 924, 927. page 631

In the case of *Gage vs. Bell*, 124 Fed., 371, it is stated on page 379, as follows:

“Necessarily it is the practice in all courts to treat the attorney appearing for a litigant as duly authorized thereto by that litigant. The authority to appear must exist, to be sure, but it is conclusively presumed, or assumed rather, by the court, unless it is formally and by a special proceeding known to the practice called in question. 3 Enc. L. (2d Ed.), 349; *Id.*, 375. The defendant cannot by answer or plea set up want of authority in the plaintiff's attorney,

but he must make a rule upon him to show his authority, supported by affidavit as to the facts. *Martin vs. Walker*, Abb. Adm., 579, Fed. Cas. No. 9170; *Howe vs. Anderson* (Ky.), 14 S. W., 216; *Hill vs. Mendenhall*, 21 Wall., 453. The reasons for this rule are well illustrated by this case. The courts could not conveniently do the business of litigation if either litigant could capriciously embody in his pleadings the collateral matter of the authority of the attorneys, respectively, to appear and file their pleadings. Every litigation would degenerate into a preliminary inquiry about the attorney's dealings with his client." * * *

See also the following cases in point:

Indiana, etc., Ry. Co., *vs. Maddy*, 103 Ind., 200; Louisville, etc., R. Co., *vs. Newsome*, 13 Ky. L. Rep., 174; *Upham vs. Bradley*, 17 Me., 423; *Norberg vs. Heineman*, 59 Mich., 210; *Manchester Bank vs. Fellows*, 28 N. H., 302; *People vs. Lamb*, 85 Hun (N. Y.), 171; *Rowland vs. Gardner*, 69 N. C., 53; *Spaulding vs. Swift*, 18 Vt., 214, 218; *Knowlton vs. Plantation No. 4*, 14 Me., 20; *Low vs. Settle*, 22 W. Va., 387; *Rogers vs. Crommelin*, 20 Fed. Cas. No. 12,009; *Mix vs. People*, 116 Ill., 265, 268, 272.

This matter is entirely on the same principle as where jurisdiction of the person in some instance is questioned after general appearance has been made and it has always been held that the objection comes too late. *Sisson Guaranty Company of W. Va. vs. Garrettson*, Vol. 44, Washington Law Reporter, page 313 (S. C. D. C.); *McAdoo vs. Ormes*, 47 App. Cas. D. C., 364, 372 (Opinion by Mr. Justice Van Orsdel); affirmed, 252 U. S., 469.

The motion to dismiss, filed June 9, 1919, was nearly four and one-half years after the bill of com-

plaint had been filed in the case, and after a motion in the nature of demurrer to the complaint had been filed and the trial court had exercised jurisdiction and rendered a decree, from which an appeal had been taken to the Court of Appeals of the District of Columbia, and after an appeal had been taken from the latter court to the Supreme Court of the United States and after the Supreme Court had entered its decree.

When this case came on for final hearing November 7, 1922, in the Supreme Court of the District of Columbia, there was a dual trial. A motion to dismiss had been filed upon the ground that counsel for plaintiff had not shown authority to bring the action for plaintiff. In orderly procedure, that motion should have been first disposed of, if entertained at all, at that late date. The court elected, however, to hear testimony on both that branch of the subject and on the merits simultaneously and reserved decision on the motion until after all the testimony on the merits had been concluded. In an opinion which appellees have attempted to construe as an opinion on the merits of the case the court practically confined itself to a determination of whether counsel for plaintiff did have authority to represent it. Notwithstanding the court seemed to indicate throughout its opinion that counsel did not have such authority, it overruled the motion to dismiss on that ground and determined the issues on the merits in favor of the defendants.

The decree is in two distinct parts. Paragraph 1 overrules the motion to dismiss for want of authority of counsel. Paragraph 2 dismisses the case upon the merits, *with costs in favor of the defendants*.

Plaintiff appealed from the decree of the court as

set forth in the second paragraph thereof and so notified counsel for defendants that it was limiting its appeal to that part of the decree only (Tr., 111).

The defendants did not appeal from any portion of the decree but are now seeking in their brief to revive the question of alleged lack of authority of counsel to represent plaintiff. They give a great deal of space in their brief to a discussion of the opinion of the court below, but the opinion of the court below is by the rules of this court merely made a part of the record in order to give, we presume, the Court of Appeals an idea of what the court below had in mind in rendering a decree. It is no part of a decree. It cannot be discussed either as an error or in anyway that would tend to a reversal of the decree. It can, of course, have no effect as an assignment of error.

On page 14 of appellees' brief, the whole theory is set forth in the following paragraph which we quote:

“But we go further. There was no justification for a cross appeal, because *defendants had been granted all the relief they sought*. They could not expect that both the motion to dismiss and the defense on the same ground should be sustained. The bill was dismissed on the merits, which was all that defendants asked, and the court's opinion showed that in that dismissal the contention of lack of authority of plaintiff's attorneys was sustained as part of the merits.”

This position of counsel for appellees is most fallacious. A motion to dismiss for lack of authority of counsel can be made, it is true, but a defense on the merits cannot be made on that ground. The parties are different. The motion to dismiss for lack of authority of counsel in reality affects counsel only. The

plaintiff itself could supply other counsel and remain in court or re-file its action by other counsel. In other words, the question of the authority of counsel cannot in any manner enter into the merits of the case. It is as distinct as another case would be.

Appellees not having elected to appeal or cross appeal from that portion of the decree overruling the motion to dismiss for lack of authority cannot now raise that question in any manner, shape or form.

Where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the Appellate Court or can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken. In other words, a party who does not take out a writ of error, can be heard to complain of any adverse rulings in the court below.

The William Bagaley, 5 Wall., 377; The Quickstep, 9 Wall., 665; The Maria Martin, 12 Wall., 31; The Mary Ford, 3 Dall, 188; Mackall vs. Mackall, 135 U. S., 167; The Des Moines, 154 U. S., 584; U. S. vs. Blackfeather, 155 U. S., 180; The Cattahoochee, 173 U. S., 540; Malarin vs. U. S., 1 Wall., 282, 287; Harrison vs. Nixon, 9 Pet., 483; Canter vs. American Insurance Co., 3 Pet., 307; Stratton vs. Jarvis, 8 Pet., 4; Buckingham vs. McLean, 13 How., 150; Compton vs. Jesup, 167 U. S., 1; Southern Pacific R. Co. vs. U. S., 168 U. S., 1; Bolles vs. Outing Co., 175 U. S., 262.

An appeal brings up for review only that which was decided adversely to appellant. Chittenden vs. Brewster, 2 Wall., 191; The Steven Morgan, 94 U. S., 599; Loudon vs. Taxing District, 104 U. S., 771, 774.

Counsel for Appellees contend that in view of the

fact that Appellant assigned errors to the action of the trial court in failing to find that counsel had authority to represent plaintiff, this gives them the right to rebut the questions raised by such assignments. We very much doubt this in view of the fact that the amended note of appeal especially eliminates all those questions. Certainly, counsel is not authorized to discuss those questions as part of the case on the merits, but may only discuss those questions for the purpose of sustaining the court below in its decree on the motion to dismiss. If counsel desires to do that, we can see no particular reason why we should object, but we do insist that counsel has no right to attempt to do in this court what was attempted in the court below, to wit: to make the question of authority of counsel for plaintiff a question on the merits of the case.

We believe that this case well illustrates the vice of the courts permitting the question of authority of counsel to be raised at all as a plea to the merits because it does confuse the court and does tend to draw the court away from the real merits of the case. There is no doubt at all that the court below was greatly confused in trying the two issues together.

The attempt to confuse this court by injecting into the case here the matters contained in their motion to dismiss in the court below is most inequitable. In a matter which vitally concerns the prosperity and future and even the life of these Indians, it is an attempt to throttle this suit without a determination upon the merits, to deprive the Indians of their "day in court." To take away from them the benefit of the Supreme Court decision which should be the charter of their liberties and the basis of their pros-

perity, and which if this suit is prosecuted to a successful conclusion and not otherwise will put them on the sound basis of the New Mexico Pueblos.

The character of the fight made by the government for the last ten years and the contentions pressed by the government and the history of other Indians not protected by communal titles as with the New Mexican Pueblos, prove that if this suit is stifled no other similar suit will be permitted; that the organization of the Indians already crumbling will be destroyed; that the policy of misrepresentation and oppression will be carried out to its logical conclusion; that the Indians will be reduced to the pauper conditions of the ordinary reservation Indians and that in time and in a very short time, powerful interests will deprive the Indians even of their reservation and that they will be scattered and will be found working in the gangs upon the railroads and other public works.

The government has never since this suit was commenced permitted the Indians' attorneys to consult freely with the Indians, and in fact when the case came on for trial in the taking of testimony refused the attorneys any right of consultation with the Indians and warned the Indians against talking to their attorneys. It was iterated and reiterated to the Indians that the only purpose of this suit if the Indians won, was to take away half their lands. The Indians were led to believe that they had absolute title to all these lands and that appears in the testimony of practically all of them, whereas, as a matter of fact, it is merely a reservation by proclamation and since the proclamation has been made other proclamations have been issued at various times taking away parts of this land. If history repeats itself in this case

it is only a matter of time until even the reservation of this land will be swept away and the Indians be left to drift whither they may to obtain a living.

Respectfully submitted,

REID, HERVEY & IDEN,

HIBBARD & KLEINDIENST,

LEVI H. DAVID,

Attorneys for Appellant.

W. C. REID,

Of Albuquerque, N. Mex.,

LOUIS KLEINDIENST,

Of Los Angeles, Calif.,

Of Counsel.

COMPLETION OF ROAD FROM TUCSON TO AJO VIA
INDIAN OASIS, ARIZ.

MAY 10, 1926.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. HAYDEN, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 3122]

The Committee on Indian Affairs, to whom was referred the bill (S. 3122) for completion of the road from Tucson to Ajo via Indian Oasis, Ariz., having considered the same, report thereon with a recommendation that it do pass with the following amendment:

Amend on page 1, line 11, by inserting after the word "department" the words "or the county of Pima, Arizona."

The following report from the Secretary of the Interior recommends the enactment of the bill, which also has the indorsement of the Director of the Bureau of the Budget:

DEPARTMENT OF THE INTERIOR,

Washington, March 9, 1926.

HON. J. W. HARRELD,

Chairman Committee on Indian Affairs,

United States Senate.

MY DEAR SENATOR HARRELD: This will refer further to your letter of February 16 transmitting for report and recommendation a copy of S. 3122, proposing to authorize an appropriation of \$125,000 for the construction of that part of the Tucson-Ajo Road across the Papago Indian Reservation, Ariz.

The act of February 14, 1920 (41 Stat. 417), directed the Secretary of the Interior to make an investigation and submit a report to Congress as to the necessity for this road with his recommendation as to how much of the cost thereof should be paid by the United States. In conformity therewith a report was submitted to Congress by this department on December 6, 1920, stating that the estimated cost of that part of the road on the reservation was approximately \$432,600, for which, however, it was stated that no appropriation would be necessary, as it was the intention at that time that the road would be built by the State without expense to the Federal Government. An appropriation of \$15,000 was recommended for the construction of a connecting link between the Sells Agency and the main highway, the original route of which would have taken it 10 miles north of the agency; but no such appropriation was ever made.

Owing to lack of funds the State was unable to provide the money for this road, and therefore the county has built it up to the reservation boundary on

both sides, at an expenditure of approximately \$300,000. However, owing to its limited resources and the fact that so large a part of the county is taken up by untaxed Indian land, the county can not construct that part of the road across the reservation.

Tucson, with an estimated population of 26,733, is the county seat of Pima County, which has an estimated population of 41,299. Ajo is located about 125 miles slightly northwest of Tucson and has an estimated population of 3,050. It is the most important Indian community in Pima County, owing to the copper mines, and pays over 50 per cent of the county taxes.

The Papago Indian Reservation lies between Tucson and Ajo and extends from the Mexican boundary to the northern edge of Pima County except a small strip to the north which is the only way of crossing the county outside the reservation. This northern route, however, is impracticable owing to the extremely rough nature of the country and the great distance involved. The Indian population of the reservation is approximately 4,731. The Indians do their trading at Tucson and Ajo, where they find a ready market for anything they have to sell. Under present conditions it is almost impossible to travel from interior points on the reservation either to Tucson or Ajo during the rainy season. The inspector who made the investigation which was the basis of the report to Congress stated that fully 90 per cent of those he met on the road were Indians hauling wood and driving cattle to market. The Indians also raise considerable wheat, which they have difficulty in transporting to market, owing to the poor condition of the road which in places is really little more than a trail. A large number of the Indians find work at both Tucson and Ajo, especially the latter place in the copper mines, where they earn remunerative wages.

From the standpoint of the community generally it is stated that this is one of the most important and necessary roads in Pima County and that eventually it will form a link in the transcontinental highway to California.

If this appropriation is made, it is the intention to construct the road directly through the agency. This will obviate the necessity of a connecting link and be a matter of great convenience to the Government and the Indians, as it will facilitate the transportation of freight and supplies from Tucson, the railroad station, to the agency.

The matter of constructing this road entirely from Government funds apportioned to the State of Arizona under the Federal highway act has been given consideration; but unfortunately it developed that the road is not a part of the State's approved 7 per cent system and can not be added thereto under present conditions; hence it is not eligible for Federal aid under the highway act.

For the reasons set forth above and owing to the great need of this road from the standpoint of both the Indians and the whites, it is recommended that S. 3122 be enacted into law. However, provision should be made for the maintenance and upkeep of the road by the State without expense to the Federal Government by the addition of the following language after the word "Arizona" in line 10:

"Provided, That before any money is spent hereunder the State of Arizona, through its highway department, shall agree in writing to maintain said road without expense to the United States."

H. R. 8520 is identical with S. 3122. A similar report has been made on H. R. 8520, which the Director of the Bureau of the Budget advises is not in conflict with the President's financial program.

Very truly yours,

HUBERT WORK.

PAPAGO INDIANS ASK FOR ROAD

That prompt passage of this legislation is greatly desired by the Papago Indians is shown by a letter, which is as follows:

INDIAN OASIS, ARIZ.,
March 19, 1926.

HON. CARL HAYDEN.

DEAR SIR: We are writing you to ask that Congress help us to get a good road across our reservation. We speak for about 4,000 Papago Indians, who need this help so that they can haul wood and other things from their reservation to Tucson and Ajo. We are not asking the Government to build an automobile road, as we have no machines. We very badly need the road

to freight our supplies from Tucson and to take our produce from here. Most all of the wood supply for Tucson comes from our Papago Reservation. It takes three days to drive to town with our horses and a load of wood. We rest one day there and buy what we can and then it takes three days to come home.

The road has been built 40 miles west from Tucson and 40 miles east from Ajo, but 60 miles between the two ends of it inside of our reservation has not been built, and that is the part that we need the most. The Papagos are very poor Indians. If we had the money we would be glad to pay for this road. We have only had a reservation for about 10 years. We have the land but our tribe has no money. Our reservation, as all the State of Arizona, has been stricken with a very severe drought for five years. Last year was worse than ever. We lost 60 per cent of our cattle from starvation and lack of water. Therefore we are left flat broke. We were glad when the President made this reservation for us, and now we would like to have a road across it.

The Papagos have always been good Indians. We have always been friends with the white people. We only had wars with the Apaches and helped the white people to fight them. It has cost the Government much money for soldiers to fight other Indians, but no money was ever spent fighting the Papagos because we have always been peaceful. We think that the Government should help good Indians like us by finishing the road across our reservation.

We do not have a chief or a council for the whole Papago Tribe, but we are the chiefs of our villages, and we speak for our people when we sign this letter asking Congress to help build a good road across our reservation.

ALVINO JOAQUIN,

Chief of Big Field Village.

NARCHO FELIX,

Chief of Cowlic Village.

MATIAS HENDRICKS,

Chief of Vamori Village.

JOSE MARIE,

Chief of San Rafael Village.

JOSE SELVICA,

Chief of Hesoses Well.

BENITO SEGONA,

Chief of Tapaway Village.

JUAN FRANCISCO,

Chief of Little Village.

RICHARD HENDRICKS,

President Papago Good Government League.

SAMUEL CACHORA,

Chief San Miguel Village.

JOSE JUAN (his x mark) OCHOA.

FELOMENO (his x mark) LOPEZ.

BARNABE (his x mark) LOPEZ.

HUGH NORRIS, *Sells, Ariz.*

JOSE X. PABLO.

ROSWELL MANUEL,

Vice President of Good Government League.

PIMA COUNTY WILL MAINTAIN THE ROAD

The bill provides that the road shall be maintained without expense to the United States, and the county of Pima, Ariz., has assumed that burden as shown by the following resolution unani- mously adopted by its board of supervisors:

(Excerpt from the minutes of the board of supervisors, Pima County, Ariz., February 24, 1926)

Upon motion by Roemer, seconded by Compton, all members present voting "Yes," the following resolution was adopted:

Whereas Congressman Carl Hayden, of Arizona, has introduced a bill in Congress asking for an appropriation of \$125,000, to be used in the construc-

tion of the uncompleted section of the highway between Tucson, Ariz., and Ajo, Ariz., across the Papago Indian Reservation in Pima County, Ariz.; and

Whereas it has come to the attention of the board of supervisors of Pima County that there has been some concern expressed as to whether or not the county would maintain the said road in the event of its construction; Now, therefore,

Be it resolved, That Pima County assumes the duty of maintaining said road as a part of the highway system of said Pima County; and

Be it further resolved, That a sum of money sufficient to maintain said contemplated section of road in as good a condition as the other completed section of the said Tucson-Ajo Road is now maintained, be appropriated for the fiscal year following the completion of said section of road, and for every fiscal year thereafter.

TUCSON, ARIZ., February 24, 1926.

I, H. R. Batterton, clerk of the board of supervisors of Pima County, Ariz., do hereby certify that the foregoing is a true and correct excerpt from the minutes of the board of supervisors on February 24, 1926.

[SEAL.]

H. R. BATTERTON.

The total area of Pima County is 6,083,200 acres, of which over one-third, or 2,347,080, is nontaxable because of the creation of the Papago Indian Reservation. The white taxpayers of that county have heretofore expended over a half million dollars for the construction of 75 miles of the Tucson-Ajo Road, leaving about 62 miles to be completed within the Indian reservation. The details of the county expenditures are shown in the following letter.

TUCSON, ARIZ., March 15, 1926.

HON. CARL HAYDEN,

Congressman from Arizona, Washington, D. C.

SIR: At the request of Mr. Oscar Cole, Pima County supervisor at Ajo, Ariz., I quote you the following amounts expended on the Tucson-Ajo Road.

The expenditures have been from two bond issues—one for \$300,000 about the year 1916, of which approximately \$175,000 was spent on the Tucson-Ajo Road; and another bond issue in 1919 for \$1,500,000, of which \$389,349.34 was spent on the Tucson-Ajo Road. These amounts were distributed as follows:

First section: Tucson west to Robles Ranch, 24 miles.....	\$175,000.00
Second section: Robles Ranch west to Roadside mine, 12 miles.....	113,014.43
Third section: Ajo east toward Tucson, 39 miles.....	276,334.91
Total.....	564,349.34

In addition to this we now have work under way going west from the Roadside mine toward Ajo on a new appropriation of \$40,000.

Respectfully submitted.

BRUCE B. ELLIS, *County Engineer.*

COST OF THE APACHE INDIAN WARS

In their letter of March 19, 1926, the Papago chiefs state that "it has cost the Government much money to fight other Indians, but no money was ever spent fighting the Papagos, because we have always been peaceful." In corroboration of that statement the following correspondence with the Quartermaster General of the Army, which shows that the estimated cost of the Apache Indian wars in Arizona was \$42,182,445, is submitted as a part of this report:

WASHINGTON, D. C., April 1, 1924.

Maj. Gen. W. H. HART,

Quartermaster General of the Army, Washington, D. C.

MY DEAR SIR: Referring to our conversation over the telephone, I shall be greatly obliged if you will cause an investigation to be made to determine the

approximate cost of the military operations which were necessary in order to subdue the Apache Indians in Arizona.

The period when the Apaches were a serious menace to Americans in Arizona was from July 1, 1858, to June 30, 1886. The Civil War period, from June 30, 1861, to July 1, 1865, should be omitted, because the California Volunteers and other troops stationed in Arizona were not there primarily on account of the Indians, although the Apaches were on the warpath during all of that time.

I inclose herewith a statement that I have received from The Adjutant General showing the number of troops that were stationed in Arizona during the periods referred to. I recently saw a reference to the annual report of Gen. E. O. C. Ord for 1869, in which he, in substance, stated that he had 2,200 men under him in Arizona at an annual cost to the Government of \$3,000,000.

In his memoirs Gen. Nelson A. Miles says:

"After the cessation of hostilities in 1886 the expenses of the Department of Arizona were reduced at the rate of over a million dollars per annum. The troops belonging to the Department of Texas and California were returned to their respective stations, and over 400 enlisted scouts were discharged."

Any information that you can furnish me relative to this matter will be greatly appreciated.

Yours very respectfully,

CARL HAYDEN, M. C.,
Arizona.

WASHINGTON, D. C., April 9, 1924.

Hon. CARL HAYDEN,

House of Representatives, Washington, D. C.

MY DEAR MR. HAYDEN: Referring to our telephone conversations and your letter of the 1st instant regarding the approximate cost of the military operations which were necessary to subdue the Apache Indians in Arizona, you are advised that an exhaustive search has been made of available records in an attempt to find the information desired. This search has not resulted in developing any specific or concrete figures such as you desire; however, sufficient data has been found upon which to make an estimate. This estimate is based on the personnel reported by The Adjutant General as stationed in Arizona, the average number in each year being used as a basis, and is as follows:

1858-----	\$413,749.56	1875-----	\$1,376,940.74
1859-----	536,094.86	1876-----	1,742,864.41
1860-----	413,749.56	1877-----	1,569,356.53
1861 (6 months)-----	325,658.93	1878-----	1,441,460.15
1866-----	1,294,635.72	1879-----	1,603,835.66
1867-----	2,356,815.37	1880-----	1,646,100.40
1868-----	2,405,753.49	1881-----	1,457,021.30
1869-----	2,800,595.14	1882-----	1,805,149.29
1870-----	2,382,396.66	1883-----	2,240,031.22
1871-----	2,074,308.95	1884-----	2,354,590.91
1872-----	2,177,746.34	1885-----	2,434,671.47
1873-----	1,970,871.56	1886 (6 months)-----	1,488,163.74
1874-----	1,871,883.09		

As stated, the above is an estimate but is believed to be fairly accurate. Exact figures can not be furnished without researches consuming a considerable length of time and embracing all the old records of the bureaus of the War Department for the years in question.

During the Indian wars practically four-fifths of the Army was west of the Mississippi River and all of the troops in that section were construed as either in the Indian country or so near as to be incident to its control or observation. The estimates given cover only troops in Arizona. A prolonged and detailed study to be accurate would necessarily have to take into consideration the foregoing factor as well as others, such as losses of supplies, transportation, housing, and rationing Apache prisoners, and other indirect expenses proportionately chargeable to operations in Arizona.

It is hoped that these figures may be of some assistance and regretted they can not be made more definite and specific.

Very truly yours,

W. H. HART,
The Quartermaster General.

PAPAGOS ALWAYS FRIENDLY TO WHITE PEOPLE

There are also included in this report a number of historical references to show that the Papago Indians have always been a peace-loving and friendly people. The first white man to visit them was Eusebio Francisco Kino, a Jesuit priest and pioneer missionary among the Indians. The following account of one of his journeys through the Papago country, when he traveled over practically the same route as that of the road authorized to be constructed in this bill, is taken from a book entitled "Kino's Historical Memoir of Pimaria Alta," translated from the original manuscript by H. E. Bolton. During this entrada Kino was accompanied by the father visitor, Antonio Leal, Father Francisco Gonzalbo, Lieut. Juan Matheo Manje, and two soldiers of the *Compania Volante*.

On the 4th of November, 1699, we returned from San Agustin to San Xavier del Bac, where they gave us four sick little ones to baptize. Traveling westward on the 5th, 6th, and 7th, after 28 leagues' journey, and having passed by various rancherias, all of very friendly and very docile people, we arrived at the rancheria of San Seraphin del Actum (the modern Akchin). There came to welcome us more than 20 justices who had assembled, and about 20 boys, who received us on their knees, with crosses in their hands, that they might give them to the father visitor; and afterwards we were welcomed by more than 400 men and many women drawn up in a very long line with their little ones already baptized two years before. They comprised about 1,200 souls. In the afternoon we passed on to San Francisco del Adid (in the Santa Rosa Valley), where we were received by 200 men and about 800 souls. All were much pleased to hear the word of God; and at night there was formed a circle of 25 governors.

On the 8th, having left friendly messages and some little gifts for the people of the north, the Apacheria, the Moquis, etc., we set out from San Francisco, and, turning somewhat to the south, after 12 leagues' journey we arrived at Nuestra Sonora de la Merced del Batqui (probably Mesquite Charcos, called Vatejki by the Papagos) where we found more than 800 souls, who had assembled to receive us with the same kindness as those preceding.

In a book written by Padre Jose Ortega, published in Barcelona, Spain, in 1754, entitled "Apostolicos Afanes de la Compania de Jesus," which is an account of the labors of the Jesuits in Mexico, is found the following account of the travels of Padre Kino in the Papago country.

This apostolic man going this road found more than 30 rancherias, part small and part large, in all more than 4,000 souls, people not only gentle, but also affable, generous, and liberal, since in addition to grain they regaled him with fruits of the earth, particularly pitahayas, which flourish in the greatest abundance, and with hares and rabbits, which they had hunted. They showed a great joy for his coming. According to the custom of other parts, they received them with many crosses and arches, erected by large trechos, and even with dances which day and night they celebrated, and with many little ones which they offered to him for baptism, they gave signs of a remarkable joy which the visit of the father missionary caused to them. One of the rancherias they called San Francisco, and another 2 leagues farther on San Serafin, and another Del Merced, and another San Rafael.

The following translation from a book entitled "Teatro Americano," a description of the Provinces of New Spain by D. Joseph Antonio de Villa Senor y Sanchez, published in the city of Mexico about 1748, refers to the friendliness of the Papago Indians:

In the month of October, 1744, there was solicited by apostolic zeal of the Jesuit missionaries, the expedition to explore the Moqui Provinces, and al-

though it was not attained, by the said motives, at least there were discovered and entered some of the lands until then only penetrated, because of Padre Jacob Sedelmair, a Jesuit missionary, having gone from Tubutama, and crossed through the great lands of the Pimas Altos, called Papabotas (Papagos), among whom, on account of having many Christians among the pagans, there are tractable and domestic people. They live in dry and sterile lands, without more water than that which gathers in some short acequias or cisterns. Among them are some Christians, but the greater part of them are gentiles; they have as well the excellent quality to be enemies of the Apaches, and very friendly to the Spaniards.

The "Rudo Ensayo," which is a classic among Spanish writings concerning the ancient Spanish Province of Sonora, was written about 1761 by Juan Mentig, a Jesuit father, who at that time had lived 11 years in the vicinity of the Papago Indians. The necessity for a road through the Papago country, or Papagueria, as the Spaniards called it, was recognized in that early day, as is shown by the following quotation:

The only mission established in the year 1751, sometime about May, in San Miguel of Ssonoitah (now called Sonoita), nearly 50 leagues northwest of Caborca, suffered great scarcity of water; and for this reason it has been impossible to gather together the Papagos or Papapootam, as they are called. The Pimas who live in these deserts support themselves by eating the seeds of the zacate, herbs, wild fruits, and even mice and rabbits for the same reason. It is not so bad at Tucson, Santa Catherina at Baigatz, etc., as far as the Gila River; so that a road might easily be opened, thus gaining ground each year in order to convert souls and extend the Christian faith, and at the same time the dominions of His Majesty the King.

Lieut. Sylvester Mowry, of the United States Army, in a memoir of the proposed Territory of Arizona, written in 1857, says:

The labors of the Jesuits to civilize the Indians are still evident in the mission Indians, the Papagos and Pimas, who live in villages, cultivate crops of corn and wheat, and who in the Christian and human elements of good faith and charity are, to say the least, in no way inferior to the Mexicans. After the massacre of four of Crabbe's unfortunate party near Sonoita by the Mexicans, the Papagos Indians buried carefully the bodies to which Mexican inhumanity had denied this last charitable office.

In a speech delivered in the House of Representatives on March 2, 1865, by Hon. Charles D. Poston, the first Delegate to Congress from the Territory of Arizona, the following statements were made:

The Papagos are a branch of the great Pima Tribe, speaking the same language and having the same manners and customs, modified by civilization. The Papagos all live south of the Gila River in that arid triangle known as the western part of the Gadsen Purchase. Their lot is cast in an ungrateful soil; but the softness of the climate reconciles them to their location, and contentment is their happiness. The fruit of the *cereus giganteus* furnishes them with bread and molasses; they plant in the rainy season, raise cattle, hunt, and labor in the harvest fields. The family relations of the Papagos are conducted with morality and their women are examples of chastity and industry.

In 1877 Hiram C. Hodge published a book entitled, "Arizona as it is; or, The Coming Country," which contains the following references to the Papago Indians:

The Papagoes live on a reservation south of Tucson which contain 70,400 acres of land. Their villages are near the old and noted mission church of San Xavier, 12 miles south from Tucson and in the Santa Cruz Valley. They are nominally Catholics, and have been under the care of the Roman Catholic priesthood most of the time for nearly or quite three centuries. They are self-supporting, and have been so as far back as their history is known; have a

good supply of horses, mules, and cattle, and raise considerable produce of various kinds.

Like the Pimas, they have been friendly to our people ever since the United States acquired their country, and both have ever been ready to assist in fighting the Apaches, and at times have done good service.

PAPAGO INDIANS DESCRIBED BY LUMHOLTZ

Carl Lumholtz, the famous Norwegian explorer, has given an account of his travels in 1909-10 in northwestern Sonora and southwestern Arizona, in a book entitled "New Trails in Mexico," from which the following extracts have been taken:

The Papago Indians of to-day, the principal natives of the desert, live in Arizona to the west and southwest of Tucson, as far as the Growler Mountains in the west, the Gila River in the north, and the range of Baboquivari in the east. They occupy much the same land as they did when first discovered in the seventeenth century by the Spaniards. The region was early named Papaguera, or, in its greater extension, Pimeria Alta. It is part of the great region called the Sonora Desert.

They are a Pima tribe and speak the same language as the Pima Indians with some variations of dialect. Their number reaches perhaps 4,500, of whom not over 700 live in Mexico. The name Papago is usually interpreted as meaning "bean people." Their tribal name as employed by themselves is *Ootam*, which means "the people." They call the Pima Indians *Akimuri Ootam*, "river people," referring appropriately to their habitat on the Gila River. The Pima call the Papago *Toono Ootam*, "desert people."

The greater part of the tribe never could be induced to live in pueblos, or villages, which was always the policy of the Spanish missionary. In spite of the efforts of the Jesuits and Franciscans, the Papagos are still living in their rancherias as of old, half nomadic in habit, resorting in the winter to the sierras where water is more plentiful and where their cattle, horses, mules, and donkeys find good grazing ground. In the summer they move to the broad, flat valleys to devote themselves to agriculture, which is made possible by the aid of the showers that fall in July and August. They do not usually pursue irrigation beyond the diverting of rain water into ditches. In the summer they raise maize, beans, watermelons, and squashes, and in the winter, when infrequent light showers usually may be depended upon, peas, barley, and lentils may be planted, all on a small scale, according to Indian habits. Wheat, which is grown in November and harvested in May, is now the most important crop.

By scooping up the earth they make dams in which rain water is stored for household use as well as for their domestic animals. This is especially the case at the summer rancherias. Of late years they have also taken to the digging of wells. Thus the Papagos, though sedentary Indians, have distinct habitations for summer and winter. The aboriginal name for the summer rancherias is *oositak*, fields, called by the Mexicans temporales. The winter rancherias are called *kihim*, where there are houses (*ki*), and these might be called villages. In some cases the summer rancherias seem to be considered the more important habitations, and medicine lodges are found at both.

As implacable enemies of the Apaches, the Papagos were of some assistance to the early missionaries in helping the presidios to fight their savage foes, and they have several times, says J. F. Valasco, presented the Government with ears and scalps of Apaches they had killed. Their innate enmity to the Apaches later gained them the favor of the Americans, who received their valuable assistance in campaigns against these marauders.

The Papagos are above medium height, rather dark in color, and of splendid physique. The women are inclined to be stout. They are a peaceful but at the same time courageous people and show much intelligence. They are hospitable, as becomes a desert people, and if food is being prepared in the house when a stranger comes, some of it is offered to him, be he Indian, Mexican, or American.

THE PREHISTORIC PAPAGO

W J McGee, of the Bureau of Ethnology, made the following statements which were printed in an account of the selection of the site for the desert botanical laboratory of the Carnegie Institution near Tucson, Ariz., published in 1903:

It is of interest to note that the prehistoric Papago was a farmer, and derives his designation from this fact. The characteristic crop plant, was the native bean, called *pah* or, in the plural, *papah*; and the same term was applied to the tribe by neighboring peoples. The Spaniards slightly corrupted the appellation, pronouncing it Papaho (the final vowel feeble and obscure), and spelling it, with some emphasis of the aspirate, Papago; the Americans retained this orthography, but pretty effectually concealed the original form of the tribal name by adopting the pronunciation indicated by their own orthoepy. The tribesmen themselves long ago accepted the name by which they were known among other tribes, adding the descriptive term *a atam*—literally, Beansmen, i. e., Bean-people.

You will be interested in noting also that the local tribesmen were among the earliest and most successful agricultural experimentalists of the Western Hemisphere. They are desert folk par excellence, and entered into the distinctive solidarity of desert life to a unique degree; they secured the Sonoran plains for chance water holes as well as more permanent waters, carrying religiously hoarded seeds; they chased rainstorms seen from commanding peaks for scores if not hundreds of miles; and wherever they found standing or running water, or even damp soil, they planted their seeds, guarded and cultivated the growing plants with infinite patience, and after carefully harvesting the crop planted some of the finest seeds as oblations and preserved others against the ensuing season, so that the crop plants were both distributed and improved from year to year.

PRESENT CONDITIONS ON PAPAGO RESERVATION

The following memorandum furnished by T. F. McCormick, superintendent of the Papago Indian Reservation, summarizes present conditions:

1. Indian population on Papago Indian Reservation, 5,000.
2. Sixteen thousand acres under cultivation.
 - a. Dry farming: Yield depends entirely upon rain.
 3. Production.
 - a. One hundred thousand bushels wheat.
 - b. Thirty thousand head cattle.
 - c. Truck garden: Beans, melons, pumpkins, squash, corn, cane.

Favorable weather conditions as to rain produces two annual crops, of which the surplus is marketed in Ajo and Tucson.

4. The fuel supply for Pima County is furnished to a large extent by Indians from the Papago Reservation, which is their only means of livelihood during seasons of drought, and carting is much hampered by present road conditions to market points.

5. Supplies for Government Indian agency must be trucked in.

6. On the reservation is located the Government experiment station, large Indian reservation agency, 13 Indian day schools, 20 Government pumping plants, 7 stores.

CONCLUSION

Present road across the Indian reservation greatly handicaps the Indian in developing his country, he being hampered in disposing of surplus crops and of fuel supply.

The road conditions make freight rates of commodities freighted into the reservation excessively high; this is an economic waste to the Government and people living on the reservation.

An improved highway over the Indian reservation would be of inestimable benefit to the Indian and would also prove an impetus to development agriculturally—mining, etc.—on the reservation.

Mr. Malcolm McDowell, a member and secretary of the Board of Indian Commissioners, has written the following letter in support of the bill:

UNITED STATES DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
Washington, March 27, 1926.

DEAR MR. HAYDEN: In April of last year I was on the Papago Reservation in southern Arizona and held a conference with 109 of the Papago Indians. Every village was represented. Among the several matters discussed was the need of improving the reservation road which connects with the improved county highways to Tucson on the east and Ajo on the west.

The Indians asked me to do what I could to have Congress appropriate funds to improve the reservation road. I promised to do so. For that reason I am writing you in regard to the bill authorizing an appropriation for a road through the reserve.

I became interested in this matter some years ago when I saw the Indian teams painfully toiling over the rough reservation road, taking firewood to Tucson and Ajo. You perhaps know that these Indians cut and sell a good deal of firewood. I am informed that the annual income from this source of revenue amounts to \$45,000 and more. Obviously, these Indians could sell much more wood if their road was improved, for they could shorten the time required to make round trips.

These Papagos are among the very best of the American Indians—a fine self-supporting, upstanding people. They take advantage of every drop of the infrequent rainfalls to cultivate their little patches of farm lands, and they were making good progress in cattle raising when the severe droughts in that section killed the grass, with the result that they lost a great deal of their livestock.

I have been on most of the Indian reservations, and I know of no road project on any other reserve which seems to offer more practical good to the Indians themselves than this one does. There certainly is great need for a much better road through the Papago Reservation than the present one. I am adding this view of the situation to the request of the Indians entirely as an individual for this matter has never been presented officially to our board.

Sincerely yours,

MALCOLM McDOWELL,
Member Board of Indian Commissioners.

HON. CARL HAYDEN,
U. S. House of Representatives, Washington, D. C.

MINERAL LANDS NOT RESERVED

The Papago Indian Reservation as it now exists in Pima County, Ariz., comprises 2,347,080 acres of land and was created by the President in the usual manner, except that it is the only instance in the United States where the mineral lands remain subject to disposition under the mining laws. The text of the Executive order is as follows, omitting a description of the lands:

Executive orders, dated June 16, 1911, December 5, 1912, and January 14, 1916, withdrawing certain lands in Arizona for the benefit of the Papago Indians, be, and the same hereby are, revoked, and, exclusive of a tribal right to the minerals therein contained, all surveyed land and all unsurveyed land which, by protraction of the regular system of public land surveys from the township corner at the intersection of the Gila and Salt River meridian with the third standard parallel south, would fall within the townships and ranges listed below be, and the same hereby are, withdrawn and set apart as a reservation for the benefit of the Papago Indians in Arizona: * * *

(Description of townships and sections reserved)

The foregoing reservation is hereby created with the understanding that all mineral lands within the reservation which have been or which may be shown

to be such and subject to exploration, location, and entry under the existing mining laws of the United States and the rules and regulations of the Secretary of the Interior applying thereto, shall continue to be subject to such exploration, location, and entry notwithstanding the creation of this reservation; and town sites, necessary in connection with the development of the mineral resources of the reservation, may be located within the reservation under such rules and regulations as the Secretary of the Interior may prescribe, and patented under the provisions of the town site laws of the United States: *Provided*, That nothing herein contained shall affect any existing legal right of any person to any of the lands herein described.

That part of Executive order of May 28, 1912, withdrawing certain areas for use of the Chur-Chaw, Cocklebur, and Tat-murl-ma-kot bands or villages of Papago Indians be, and the same hereby is, revoked.

WOODROW WILSON.

THE WHITE HOUSE,
1 February, 1917.

ENACTMENT OF THE BILL RECOMMENDED

The completion of this road is needed for the advancement and civilization of the Papago Indians, but they have no tribal funds from which to pay for its construction. The appropriation is not made reimbursable because there is no known or probable means whereby the tribe can repay the same. The Papagos live in a desert country which would not support one-tenth as many white people and it would be unreasonable to expect them to repay the cost by requiring the payment of money from their scanty income. Only the surface of the reservation has been set aside for their use so that there is no prospect of any tribal income from minerals.

The road when completed will connect Tucson, the principal city of southern Arizona, with the town of Ajo. In the copper mines and reduction works at Ajo about 850 men are employed at the present time, of which about 150 are Papago Indians. The object of the bill is to authorize an appropriation to provide funds for the construction of about 62 miles of dirt road wholly within the Papago Reservation at an average cost of about \$2,000 per mile. The road will be maintained free of expense to the United States and can be surfaced at some future time without further direct appropriations by Congress on behalf of the Indians.

The Papago Indians from time immemorial have been friends of the white people, and therefore have an especial claim to consideration by the Federal Government. For this and other reasons set forth in this report your committee urges the enactment of this legislation.

The bill, as amended, reads as follows:

AN ACT For completion of the road from Tucson to Ajo via Indian Oasis, Ariz.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$125,000 or so much thereof as may be necessary, to be expended, under the direction of the Secretary of the Interior, for the improvement and construction of the uncompleted part of the road from Tucson to Ajo via Indian Oasis, within the Papago Indian Reservation, Arizona: *Provided*, That before any money is spent hereunder the State of Arizona through its highway department or the county of Pima, Arizona, shall agree in writing to maintain said road without expense to the United States.