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THE
LAND COURT ACT

AND
Proposed Amendments.



Argument By

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TUCSON, ARIZONA.

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TO THE JUDICIARY COMMITTEE
HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C.

I am informed that a bill has been referred to your committee amending the so-called Land Court Bill, so as to provide that the settlers upon lands within the limits of Grants found by the Court to be valid shall be confirmed in their possession, and the Grant owners be permitted to take other lands in lieu thereof.

I desire on behalf of the settlers in Arizona to present for the consideration of your Committee some views upon the equities of the case.

I urge first, that the owners of these grants have no legal rights whatever. That whatever rights they have rest in equity. To enforce these equities they must appeal, as they have done, to Congress for legislation.

That Congress in its wisdom has the power, and is in duty bound to adjudicate these equities, and by legislation fix the terms and conditions upon which they may enforce their rights.

In doing so Congress should invoke and enforce the maxim of equity that he who seeks equity must do equity.

That they have no legal rights I refer first to the treaty.

The territory in which claims are made in Arizona are all of them within the limits of the "Gadsden Purchase." Art. VI of that treaty (The Pub. Dom. 1883 p 137) provides that "No grants of land * * * will be respected or be considered as obligatory which have not been lo-

cated and duly recorded in the archives of Mexico." This article does not appear in the treaty of Guadalupe Hidalgo, but the Articles VIII and IX of the latter, are by reference made part of the former treaty.

These Articles (Pub. Dom. p. 128 and 129) declare that the property of Mexicans not established there shall be inviolably respected. The present owners, their heirs and all Mexicans who may acquire said property by contract shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States. Art. IX provides that Mexicans until Congress shall provide for their incorporation into the Union shall be maintained and protected in the enjoyment of their liberty, property, etc.

These stipulations were between the two Sovereigns—The United States and Mexico.

The obligation is upon the United States, to perform its stipulations. A Sovereign may or may not perform its treaty stipulations. Individuals may or may not perform their contracts, though they be liable for damages for the breach. It is no violation of good morals or of law to fail to perform if the DAMNUM be paid.

There are classes of contracts which a court of equity will enforce specifically. But I know of no way a nation can be forced to specific performance except by war.

It is no new thing in the history of nations that to perform treaty stipulations would destroy a people.

A treaty of alliance offensive and defensive might plunge a people into a disastrous war when a wise statesman would be bound to refuse to perform. Hence, it has been conceded that claims to real estate in territory acquired from a foreign nation must be ascertained, declared and determined in such manner as Congress by law shall provide.

In pursuance of the provisions of the eighth Article of the Treaty of Guadalupe Hidalgo, Congress passed an Act (9 Stat. p. 631) to ascertain and settle the private land claims in California: created a commission to inquire into these claims, and enacted a series of Acts amendatory thereto (Pub. Dom. 1883 p. 378).

By this Act all claimants were required to present their claims before said Commissioners with their evidence.

Many cases were heard and appeals prosecuted and decided, some in the Supreme Court of the United States, where the numerous questions affecting the claim were considered.

There was an opinion, however, among many lawyers that there were certain titles to land acquired before the acquisition of the territory that need not be presented. That the titles were perfect titles, and could be enforced in the Courts by virtue of the treaty outside the requirements of the Act of Congress and in disregard of the same.

That evidence of title to land derived under Mexican laws prior to the acquisition of the territory, was by the treaty competent evidence of title which the Courts must admit as evidence of title to maintain ejectment, where there had been no ouster. In other words that it was a good paper title without regard to any act of Congress.

This view prevailed in California and was there so held by the Courts. The question finally reached the Supreme Court of the United States. (*Botiller vs. Dominguez* 130 U. S.)

This was an action of ejectment. Plaintiff's title was a grant alleged to have been made by the Government of Mexico to plaintiff's ancestor and assignors in 1834. No claim had ever been presented to the Board of Commissioners under Act of 1851. Defendants prior to the commencement of the action had settled upon and occupied

and improved the land and were in possession thereof with the intention of holding the same as pre-emption or homestead settlers claiming the same to be public lands of the United States. They were competent and proper persons to make pre-emption or homestead claims and the lands were within the limits of the Rancho Las Virgenes.

The Courts of California rendered judgment for plaintiff holding that it was a "perfect" title and that it was not necessary to present such a claim under the Act of 1851.

The decision of the Supreme Court of California was reversed.

The Act of 1851 provided among other things that all lands the claims to which were not presented within two years shall be deemed, held, and considered as a part of the public domain. It was urged first that the statute was invalid as violating the protection to property guaranteed by the treaty and in conflict with the rights of property under the Constitution of the United States, and second, that the Statute was not intended to apply to titles complete and perfected prior to the session, but to such as were imperfect, inchoate and equitable in their character, without being a strict legal title.

As to the first proposition it was held that the Court is bound to follow the statutes of its own government. If the treaty was violated by the Act it was a matter of international concern which the two states must determine by treaty or otherwise as may be. "This Court in a class of cases like the present has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States as a sovereign power chooses to disregard."

As to the second proposition, it was held that the statute includes all claims to lands of

whatever kind or nature.

This is the last expression of the Court of last resort, and the law is now settled. That case, and cases cited, lay down the doctrine that in acquiring territory from a foreign state, the sovereign acquires the fee. That it is "a transfer of political dominion and of the proprietary interest in this land."

In this case the grant of the fee and the proprietary interest in the land, was made, with a treaty obligation, to protect private property. Before the sovereign will part with the fee, which is the legal title, to one who invokes the equities found in the treaty obligation of the sovereign, Congress must provide by law how these equities shall be ascertained, and may say upon what terms.

The patent of the United States alone passes the legal title to these claimants, and the United States may by law say upon what terms the patent shall be granted.

Until the United States grants the fee the lands are part of the public domain; the proprietary interest in which was acquired from Mexico by the United States.

It seems to be demonstrated that these claims are mere equities which the owners petition the United States to recognize and by grant (i. e. patent) confer the legal title (i. e. the fee) to the claimants.

That this has been the legislative construction is evidenced by a long line of Statutes enacted with reference to territory acquired by treaty.

As is found in legislation as to Florida, Louisiana and territory acquired from Mexico.

The present Land Court Act imposes terms and conditions. One limits a grant to eleven leagues. Another protects settlers who hold patents from the United States. If the

United States may protect the rights of holders of patents and compel the owners of grants to take other lands in lieu it may do so as to BONA FIDE settlers who have made valuable homes with a view to entry upon lands apparently a part of the public domain. The former condition was put in because Congress determined that equity required the grant owner to concede that equity.

I hope to show that settlers without patents have as high grounds of equity as those to whom patents have been issued.

Then on the same ground Congress should protect them and impose equitable terms as to them upon the grant owners.

By the 8th Sec. of the Act of July 22nd, 1854, (10 Stat. p. 309), (The Pub. Dom. in 1883 p. 394) it was made the duty of the surveyor general of New Mexico "To ascertain the origin, nature, character and extent of all claims to land under the laws, usages and customs of Spain and Mexico." He was to make full report to the Secretary of the Interior "To be laid before Congress for final action."

Until final action all lands covered thereby to be reserved from sale. By the Act of July 15th, 1870, (16 Stat. at Large p. 304) the above duties were imposed upon the Surveyor General of Arizona in exact terms, except one most important omission, viz: the reservation of the lands claimed from sale by the Government. Hence, no authority was given any officer of the Government to reserve any lands in Arizona on account of any private land claim.

So far as lands embraced within the Gadsden Purchase are concerned by this Act Congress declared its determination to treat the lands as part of the public domain until final action by Congress on each claim. At least Congress re-

fused to authorize any lands withdrawn pending final action by Congress.

Again by the Gadsden Treaty no grants were to be respected or considered as obligatory which have not been "located and recorded in the archives of Mexico." Considering this clause of the treaty, with the Act of 1870, it appears that Congress determined to treat all lands embraced therein as part of the public domain until the fact was found by final action by Congress that the particular tract claimed had been located and recorded, etc. By this treaty, here was a fact to be determined, before any grant could be considered. What is meant by the word "located" in the treaty has not been judicially decided. It is the Latin root *loco*, place.

Webster defines it "To select, survey and settle the bounds of a particular tract of land or to designate a portion of land by limits." I insist it means "occupied" or "possessed."

At least it should be construed to mean such a visible designation on the ground as would put any one on notice of a claim.

Locate, "The ground staked out," *Waldron vs. Marcier*, 82 Ills. 550.

So in *Abbott vs. R. R. Co.*, (Mass.) 15 N. E. Rep. 100.

"The line designated," *R. R. Co. vs. Jones* 2 *Caldw.* (Tenn.) 595.

As to a park it means "to lay out," "to improve," *Foster vs. Park Comm'rs* 113 *Mass.* 337.

Theological Seminary vs. People, 101 Ills. 581.

Maule vs. Plank Road 6 *How. Pr.* (New York 38.)

Until these lands were designated there was nothing to indicate that they were not a part of the public domain, and anyone desiring to settle with a view to entry would be justified in as-

suming that any land with no evidence of location was part of the public domain upon which he had the right to enter, make improvements, establish a home and be protected under the land laws. More than that, he was protected by the treaty in the clause which said that no claims not located should be considered obligatory upon the United States to consider. He was not a wrong-doer or trespasser. He went in under color of right.

If the grants are legal titles the owner can maintain ejection on their paper title; against ejection the settlers can plead limitations and the plea would cut off the plaintiff as to all the settlers whose rights are sought to be protected by the Bills before the Committee.

On the other hand, the grant claimants insist that limitations cannot be pleaded against them until the Government gives them a patent. They are in a dilemma: If they have legal titles limitation is a good defense at law. If limitation does not begin to run until patents are issued to them then Congress in providing how their rights shall be determined and patents be issued may and should in the Act fix that limitation as against their equities which could be urged against a legal title. If Congress do not, then their equitable title is far better than legal title.

These bills in effect ask Congress to enact a limitation as the condition upon which the legal title shall pass to these claimants. Not to do so, is manifest injustice. See *Chaves vs Whitney* (N. M.) 16 x Pacific Reporter p. 608. *Tameling vs U. S.* 93 U. S. 644.

Congress will take notice of all facts a court would and of many others.

As said in *Tameling case SUPRA*: "The duty of providing the mode of securing those rights and fulfilling the obligations which the treaty imposed, was within the appropriate province of the politi-

cal department of the government.”

This department is not bound by the rules of evidence established by the courts.

The XI Article Guadalupe Treaty describes the territory as in a wild state “Occupied by savage tribes.” It is a well known fact that whatever of order the Viceroy of Spain had established over this territory was lost by the withdrawal of force at the beginning of the revolution in Mexico in 1818.

The struggles of rival factions in the Republic one against another, and of all these against presuming dynasties, had prevented the re-establishment of order.

The territory was practically abandoned so far as any national force was concerned, and was terrorized by Apache raiders. A few adventurous spirits lived a precarious life near the villages of friendly Indians.

The war of the United States with Mexico increased the disorder. Life and property were unprotected. In such conditions large tracts of land in a wilderness could have no value.

At the time of the cession in 1849 and 1853 it is notorious that these claims were worthless, and they continued to be for many years thereafter. The United States did but little before our late war, and that little was lost during the struggle.

The most of these claims were sold after that war for a song. At last, attracted by discoveries of the precious metals, miners and prospectors flocked to the country. Herds of cattle followed quickly and pioneer settlers then began to establish themselves.

There was nothing to mark the limits of these claims to any particular tract of land. They were not “located.” Apparently it was unsurveyed public domain upon which citizens had the

right to settle. The Army of the United States at enormous expense waged war upon hostile tribes. Blood and treasure were poured out to establish order. Thousands of the pioneers perished at the hands of savage assassins. With the most untiring labor the desert was attacked. Not a head of cabbage could be grown without artificial irrigation. Irrigating ditches were constructed here and there in the valleys. Fields were cleared and fenced. Houses built. Widows often completed the work begun by murdered husbands.

The mountains thronged with those who delve for gold and silver. These were fed by the hand of the husbandman.

The owners of these grants took no hand in this struggle. They lived far away in splendid cities. Some have sat in the United States Senate. Senators are interested in over 300,000 acres in Arizona. Who they may be can easily be ascertained by looking over the votes in the Senate on the Amendments to the Land Court Bill during the last Congress. Cabinet officers and other distinguished statesmen are found in the list. During all this time, not a word of protest or objection was made to these settlers. They have witnessed their struggles against hardship and danger.

Without these amendments, all they have done will be swept away to increase the wealth of these claimants who have contributed not a drop of blood; not an hour of labor or a dollar of money to these results. If ever there was a case where equitable estoppel should be enforced here is the case.

The "unearned increment," incident to the LEGAL title to property, so forcibly denied by great economists, Congress should not permit to those who come to Congress to secure equitable relief, but should be reserved to the government or to

the people. To give them other contiguous lands in place of these improved lands is equitable. They should not complain. The work and investments of these settlers has added an enormous value to the lands claimed, and the lands to be so given in lieu as well. The claimants will reap a rich harvest even then and they should not be permitted more. Congress has done more for them than the treaty has guaranteed. Congress, it is true, may grant away all the public lands, but in doing it Congress should see that injustice be not done.

These grants are feudal and contrary to free institutions. They belong to the times when courtiers basked in Princes' smiles and lands and serfs were their reward. Every intendment should be urged against them. Every construction insisted upon to limit, and every equity searched out to curtail. In no case should Congress be the hand to swing the sword of destruction to aid them.

On the border line between Arizona and Mexico, where the railroad crosses, is a thriving city; built of stone and brick and iron. There are over 250 votes cast there, and a population of about 2000 people there reside.

It is upon a private grant, or land claim. No monuments mark its boundaries. The people have laid out streets and marked the boundaries of lots, and buy and sell without title. All this has been done under the eyes of the claimant.

If this grant is held to be valid all will be swept into his coffers. The aggregate of assessed property in Pima County, Arizona is over four millions of dollars, and of this amount between one-fourth and one-third is assessed upon the lands and improvements of these settlers. Not far from the same amount is so assessed in Cochise County, and more in Maricopa and Pinal Counties. Not more than five per cent of the whole is protected

by the clause of the Land Court Act protecting those who hold patents.

I conclude therefore that it is within the powers of Congress, as shown by precedent; that it is equitable and just and not a violation of treaty obligations to amend the Land Court Act by providing that all BONA FIDE settlers upon lands found to be within the limits of a grant found to be valid, shall be permitted to retain their possessions with a view to entry under the land laws, whether they hold patents or not, and that the owners of the grants be permitted to select other contiguous lands, not occupied, in lieu of the same.

It is an easy matter of detail to provide how this shall be done.

Sub-division third of Sec. 13 of the Land Court Act provides "But no such mine shall be worked on any property confirmed under this Act without the consent of the owner of such property until specially authorized by an Act of Congress hereafter passed." I am advised that this is one of the Senate amendments spoken of. It is a provision to legalize blackmail. The moment the Land Court confirms a grant every mine within its boundaries must shut down at once, and await action by Congress, unless he buys the consent of the grant owner to work it. Tens of thousands of dollars' worth of work may have been done, all must stop; machinery stand idle; workmen be discharged; loss that cannot be estimated be incurred by this infamous provision. Yet it is well known that neither Spain nor Mexico ever granted the precious metals. They cannot be granted here except by Congress.

I appeal to Congress to strike out this clause from that Act. It should in addition be amended by providing that the ground and the right to use water located as mill-sites under the mining laws upon which quartz mills have been

erected, shall not be included by confirming a grant.

Section 8 of the Act provides, that any person claiming lands under a title "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 said Court."

This provision leaves the whole question open with all its vexations to continue indefinitely and destroys whatever of good there is in the Act. If the Act has virtue it lies in the fact that it terminates the vexed questions, and puts to rest the disputed titles. As was said in report April 20, 1890 Com. P. L. Claims "The long delay has led to complications and bloody conflicts between claimants and settlers the longer continuance of which, should, if possible be avoided."

The most, if not all the private land claims in Arizona are by the owners thought to be of this class. They should be forced to present their claims to the Court.

The Boutiller case SUPRA puts them upon the same footing as other claims, and the law should do the same. True, the Act provides that the Attorney General may attack a grant. If he do not the claimants and settlers are left where they are to continue the endless controversy. I am advised that some of the claimants have determined not to apply under the Act, preferring rather to vex the people, than to have their rights settled.

Sec. 8. Should be amended by striking out the words "have the right" (but shall not be bound)" so as to read shall apply to said Court.

I have pointed out a few of the vices of this Act. It was hasty, ill-considered legislation, made particularly vicious by amendments in the Senate, solely in the interest of claimants to lands.

Proceedings under it should be stopped by failure to appropriate for the expense of this most infamous tribunal, until the Act be amended so as to compel a speedy and final termination of the disputes.

I have made these suggestions upon the invitation of Hon. M. A. Smith, Delegate from Arizona.

Respectfully, submitted;
WILLIAM H. BARNES.

TUCSON, ARIZONA, February 12, 1882.