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# The Law of Public Lands

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Thesis.

The Law Of Public Lands.

By

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Master Of Law.

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## The Law Of Public Lands.

The generous provisions made by Congress, as to the settlement and improvement of the public lands of the United States, have well served their purpose. That vast tract of land, formally known as the Great American Desert, has become the home of thousands of settlers; and is to-day, the great source of our agricultural supply.

It is provided by the Constitution of the United States: "that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States". (U.S. Cons. Art. IV., Sec. 5.) Under this section of the Constitution, Congress has passed many acts relating to and providing for the settlement of the public lands. The most important are:- The Homestead Act, The Pre-emption Act and The Timber Culture Act. These are the most important, because they are the most general in their application, and control the disposition of the greater part of our public lands.

After a brief outline of the foregoing acts, attention will be given to the litigated questions, which have arisen under the several acts mentioned; and to the rules

of law applicable thereto and which form an important factor of the jurisprudence of the Western States.

#### The Pre-emption Act.

The object of the pre-emption law is to give preference to actual settlers. The U.S.Rev.Statutes provide in substance as follows: that a head of a family, or a person twenty-one years of age and a citizen, or who has filed an application to become a citizen; may make application before a register, that he is the head of a family or is twenty-one years of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit. In proving his claim he must prove, (1) that he has never before taken advantage of a pre-emption right, (2) that he is not the owner of 320 acres of land in any state or territory, (3) and that he has not entered on the land for the purpose of speculation. Upon such proof and by the payment of the minimum price of such land, (\$1.25 per acre) he shall be entitled to a patent.

#### The Homestead Act.

The requirements of this act, as to the qualification of

person and mode of making entry, are the same as in the Pre-emption Act. In the method of securing a patent, however, there is a difference. The homesteader in "proving up" his claim, must show, (1) that his entry is made for the purpose of actual settlement and cultivation, (2) that he has been in possession five years. From the required five years a period of military service may be deducted, but not to reduce the period of actual possession less than one year. On proof of the facts, and on the payment of the fees required by law a patent will be granted.

The homesteader may acquire title in six months by "commutation", that is, he is allowed a patent on proof of six months possession and by payment of \$1.25 per acre, for 1/2 sec., in addition he is required to make oath, that he intends to permanently occupy the land.

#### The Timber Culture Act.

The requirements of this act as to persons, are the same as in the foregoing. the object of this act as it is entitled, is : "to encourage the growth of timber," and it is further provided that any head of a family or

a person of the age of twenty-one years of age &c. who shall plant, protect, and keep in a healthy growing condition, for eight years, forty acres of timber, the trees not being more than twelve feet apart each way, on any quarter section of the public land', or in a like proportion on any legal subdivision thereof, shall be entitled to a patent therefor, at the expiration of eight years on making proof of the facts. This act as amended by the act of June 14th., 1878., lessens the requirements as to the number of acres to be plowed and planted to trees. This amendment requires five acres to be broken yearly for four years, and commencing with the second year, the land previously broken shall be planted to trees. At the end of eight years on making proof of the facts, a patent will be granted. The statute must be strictly complied with, if it is not, the settler has failed to comply with the act and the land is open to another. ( U.S.V. Shinn, 14 Fed. Rep., 452. )

The liberal provisions of the statutes allow the settler to reap the benefits of each of the foregoing acts, which prescribe the method of acquiring title to the public land. The practice is (1) to pre-empt a claim, (2) to Homestead, and (3) to take a tree claim, so called under the

' 'Timber Culture Act!'

The cases and general rules hereinafter set forth are, unless otherwise stated, applicable to each of the foregoing acts.

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It is well settled that land not subject to pre-emption entry, is not subject homestead entry; and a patent issued on a homestead entry of land on which there are situated known salines or mines is void. (U.S. Vs. Reed 28 Fed. Rep. 482., McLaughlin Vs. U.S. 107 U.S. Reps. 526.) The rule appears to be: that if the land is worth more for agriculture than for mining, it is not mineral land. (U. S. Vs. Reed, supra.) And that such a patent is void, (Morton Vs. Nebraska 21 wall., 672.) and a suit in equity can be maintained by the United States to cancel the same. (McLaughlin Vs. U.S. supra, s/c/ 2 Supt. Ct. Rep. 802.)

The nature and extent of the deposit of precious metals which will make a tract of land "mineral", or constitute a mine thereon, within the meaning of the statute has not been judicially determined. The Land Department appears to have adopted a rule, as above stated; that if the land is worth more for agriculture than for mining, it is not mineral land. Although it may contain



some measure of gold or silver.

The case of *The U.S. Vs. Reed*, (Supra), presents a nice application of this rule. This case involved a question in regard to a tract of land situated on Jacksonville Creek, near Jacksonville, Oregon. The land in question had been well known and prospected by miners for thirty-five years, but it was considered as worked out, although evidence was produced to show that if more water could be supplied it would be valuable as mineral land. Reed the defendant had a large area under cultivation, and a large small fruit orchard set out. His business was that of a farmer and not a miner. The Court said:

"the statute does not reserve any lands from entry as a homestead, simply because some one is foolish and visionary enough to claim or work some portion of it as mineral ground, without any reference to the fact of whether there are any paying mines on it or not.

Nothing short of known mines on the land, capable under ordinary circumstances of being worked at a profit, as compared with any gain or benefit that may be deprived therefrom when entered under the homestead law, is sufficient to prevent such entry. Here mineral prospect

or hope, however pleasing or suspicious shall not keep the land from the plow or the prying hook, and it is well that it does not." The holding of the court is apparent from the language used.

It is a fundamental principle underlying the land system of the country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry. (Johnson Vs. Towsley 13 Wall., 88.) Therefore when land offered at public sale at \$2.50 per acre, is afterwards ordered to be sold at \$1.25, a private entry at \$1.25 is invalid if made before it is offered at public sale at the reduced rate. (Eldred Vs. Sexton 19 Wall. 189.) By "entry" is meant, "that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country". (Chotard Vs. Pope 12 Wheat., 586. Payment is always indispensable to perfect title and secure a certificate. (Matthews Vs. Zane 7 Wheat., 164 - 205.)

When a settler makes a valid homestead entry, and continues to reside on and improve the land entered, in compliance with the land laws; he has the exclusive

right to its possession and use, and also acquires equities in the land itself which increase from the time entry is made until the complete title is earned.

(Furlington R.R.Co.Vs.Johnson 16 Pac.Rep.125.)

A person entering a homestead acquires a vested right therein at the expiration of five years from the entry, and may sell and convey the same precisely as if the patent had been issued.(Newkirk Vs.Marshall, 10 Pac.Rep. 571.) But no estate vests in the homesteader or Pre-emptor until he has complied with the required conditions.

(Coleman Vs.McKormick 37 Minn.179). Under the rule in Newkirk Vs.Marshall(Supra),Sec.4, of the Homestead Act, which provides: "that no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent," was construed, as not to prevent the settler from making a valid mortgage on the land after receiving his certificate of entry, but before he receives a patent.(Poggan Vs.Reid 20 Pac.Rep.425). These cases hold in obedience to the rule given in the case of The Union Mill Co.Vs.Danberg; 2 Sawyer, 450.), That "the patent when issued, relates back to the date

of the patentee's entry, which is the inception of his title''.

A settler on the public lands under the Homestead Act, must reside on and cultivate the same for five consecutive years before he is entitled to a certificate, unless he has a period of military service to offset. (U.S. Rev. Stat. Sec. 2291) In the mean time the legal title to the land, and the timber thereon, is in the United States, and the occupant is not entitled to cut or remove any timber therefrom, except as allowed by Sec. 4 of the Act of June 3rd., 1878, which provides in effect, that "any agriculturist on the public lands; a homesteader or pre-empter, shall not cut or remove therefrom except in the ordinary course of preparation of his farm for tillage. The manifest meaning of which is, that the timber shall not be cut for the sake of the timber, but for the improvement of the land; and this, that the cutting and tillage shall not be far apart. As the court in the U.S. Vs. Ball (51 Fed. Rep. 669) says: "the plow must follow the axe. (U.S. Vs. Williams 18 Fed. Rep. 175.) The term timber as used in the Statutes applies only to live growing trees of a useful class. (U.S. Vs. Stores 13 Fed. R. 884.) While it is lawful for a settler to cut timber for the purpose of cultivation, he may sell any surplus over

what he needs for his improvements. (The Timber Cases 11 Fed. Rep. 81). As to the measure or damages in such cases see, U. S. Vs. Williams (18 Fed. R. 475), and U. S. Vs. Heilner (26 Fed. R. 80).

The rule is: "(1) when the defendant is a willful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense. (2) When the defendant is an unententional or mistaken trespasser, the value at the time of the conversion, less the amount which such trespasser has added to its value" (Wooden Ware Co. Vs. U. S., 106 U. S. 432.)

As to the contract between the United States and the settler, the United States is regarded as any other vendor of real property, and the settler prior to the issue of his certificate, as a vendee in possession under an uncompleted contract of purchase. The same rule applies as in this state, as where a person goes into possession of real property under a contract of purchase, and abandons or fails to comply with the same, he is liable in trespass for the profits of the land and for waste committed thereon during his occupancy. (Smith Vs. Stewart & Johns Rep. 46.,) Bancroft Vs. Wardwell, 15 JR. 487.)

But when a conveyance has been made to the vendee in pursuance of the contract of sale, or he has become entitled by reason of a compliance with the terms of such contract, to receive one; his right in and to the land relates back to the entry under the contract. Under this rule the court in Stark Vs. Stores (6 Wall. 518). Holds 'The right to a patent as to the government is equivalent to one issued', and the case of St. Onge Vs. Day 18 Pac. 278 it is held: that one who files a pre-emption claim upon government, and afterwards proves up, and gets the receiver's receipt; is vested with title thereto, which title relates back to the date of filing, from which time he can recover against a person using or trespassing upon said land.

A mortgage executed before the right to a patent is perfected is void, but it is otherwise after the right is perfected; that is a compliance with the statute under the several acts. (Webster V s. Bowman 25 Fed. Rep. 889).

Cheney Vs. White 5 Neb. 261.

An agreement to convey the land before the right to a patent is perfected, that is, before final proof by a homesteader or pre-empter, is in violation of law and void and cannot be enforced at law or in equity.

(Shorman Vs. Eakin 1 S.W. 559.. Onkes Vs. Heaton 44 Iowa 116, Thompson Vs. Coakum 10 Pac. Rep. 199). An apparent exception to this rule, may be seen in the case of Sweeny Vs. Darling 46 (Iowa) N.W. 1068. In that case the plaintiff and defendant occupied, and improved adjoining claims on public lands before the government survey. They went together to the land office to enter their claims under the homestead law, when it was discovered that all the land occupied by both had to be homesteaded by one person. It was then agreed that the defendant should enter the whole tract, and when he procured a patent, he should convey plaintiff's claim to him. It was held: that the agreement may be enforced, although the homestead ~~act~~ requires that the entry shall be for the exclusive use of the person in whose name it is made, and that transfers made before the patent issues, shall be void, (Sweeny Vs. Darling (Iowa) 46 N.W. 1068). And in Robinson Vs. Jones (Neb. 27 N.W. 280) a contrary rule is given although applied to a different state of facts. The Court said: "a party cannot enter public lands under the pre-emption laws in trust for the use and benefit of another, and the court will not decree that an entry

so made, or that the title so acquired by the pre-empter from the government, will inure to the benefit of any other person'.

It is held in Kansas, that a mechanics lien will not attach to the land before the claimant is entitled to a patent (Kansas Lumber Co. Vs. Jones 32 Kan. 195.) But a grantee of a mortgagor who has taken the land, agreeing to pay the mortgage debt, is esopped from showing that the mortgage was void under the pre-emption laws. (Green Vs. Houston 22 Kan. 35.)

The land described in the certificate of entry becomes the property of the pre-empter, he has the equitable title thereto, and a right to the legal title as soon as the patent can issue in due course; and he can dispose of the same and pass his interest therein as if the purchase had been made from a private person. (N.P.R.R. Co. Vs. Thrall Co. 115 U.S. 600., Smith Vs. Ewing 23 Fed. Rep. 741).

The land is taxable as if owned in fee-simple absolute by the pre-empter; as soon as the certificate of purchase has issued. (Carrol Vs. Safford 3 How. U.S. 471).

The land descends as realty before issue of the patent, Carrol Vs. Safford, and is subject to dower. (8 Fed. Rep. 740)



But it cannot be assessed for taxation until all claims of the United States, such as fees for survey &c., have been satisfied; because if the land is assessable at all, the purchaser at a tax sale would take it free from all prior claims of the United States (N.P.R.R.Co.Vs.ThrallCo. 115 U.S.600, R.R.Co.U.S.22 Wall. 444).

After final entry and payment, the certificate holder may lawfully sell and convey the land to the same effect as if the patent had issued; and the patent when issued will inure to the benefit of the grantee. (Myers Vs. Croft 13 Wall.291., Cady Vs.Eigmev 54 Iowa 615.)

The land ceases at final entry to be the property of the United States; it is taken thereby from the public lands and is no longer subject to sale by the government; the government the holding the legal title only in trust for the holder of the certificate, (P.C.Min.Co.Vs.Pargo 16 Fed.Rep.348). The certificate is, so far as the acquisition of title is concerned, equivalent to a patent. (Simon Vs.Ogle 105 U.S.271). And a subsequent patent, granted to other than the certificate holder conveys no title, and therefor the certificate will prevail against a subsequent patent, in an action of ejectment brought

by the patentee. (McLane Vs. Bovee 35 Ws. 27., Beill Vs. Stiles 35 Ill. 505., Cady Vs. Eighmey 54 Iowa 615.) In terms it may be said: a final certificate of entry and purchase can no more be cancelled than a patent. (Beill Vs. Stiles Supra., Cornelius Vs. Kessel 58 Wis. 237., Jude Vs. Randall 29 N.W. Reps. 589).

#### The Land Department.

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The Jurisdiction of the Land Department may be stated as follows: the title to the public lands is in the United States, and Congress is given full power to dispose of the lands, and to make all needful rules and regulations respecting the same. (Sec. 3., Art. 4., U.S. Cons.) A land department has been created by Congress, and rules prescribed for the disposal of the public lands, and to the officers of that department the duty of selling and disposing of them is committed. They can only sell or dispose of these lands, in the manner prescribed by Congress. In disposing of them there are doubtless many mistakes made, but the matter is in the hands of the land department until the patent is issued; and the mistakes may be corrected by officers of that department.

The entry of a person made without authority, is rightfully set aside by the commissioner, and the effect of a duplicate receipt as evidence of title is thereby destroyed. It being within the scope of the duties of a commissioner to make such corrections and to cancel such entry. And such an act is presumed, in the absence of evidence to the contrary, to have been done in accordance with the rules governing such actions and upon sufficient evidence. Where the rights of the parties may be further contested, an appeal lies from the commissioner's decision to the Secretary of the Interior. But this jurisdiction ceases on the issue of the patent. (Harkness Vs. Underhill 1 Black. 316-325., Judd Vs. Randall 29 N.W. 587., Wilson V. Fine 40 Fed. Rep. 52.)

As the right to a patent is equivalent to a patent, (Myers Vs. Croft 13 Wall. 29) and that right accrues as soon as the certificate is issued in due form, in favor of a homesteader or pre-empter, for land subject to entry by statute; such certificate cannot be cancelled by the land department for alleged fraud in obtaining it; in such cases the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under

like circumstances. Due process of law is necessary therefore, to revoke a certificate of purchase. (Smith Vs. Ewing 27 Fed. Rep. 741.,)

In the case of The U. S. Vs. Minor 5 Sup. Ct. Rep. 836 lately decided by the Supreme Court, it is said: that when a person obtains a patent by fraud and perjury; "it is enough to hold that it conveys the legal title, and it would be going quite to far to say that it cannot be assailed by a proceeding in Equity, and set aside as void, if the fraud is proved and there are no innocent holders for value". This is in obedience to the common law rule, that when a party obtains a conveyance of real property by fraud practiced upon the grantor; and he conveys the same to a third person, who buys in good faith and for a valuable consideration, the latter will hold the property purged of the fraud. (Fletcher Vs. Peck 6 Cranch 133#. , Somes Vs. Brewer 2 Pick 18#.)

It was held in the early cases that the legal title remains in the United States until the issue of the patent, and that the patent would prevail against a certificate. (Gibson Vs. Chouteau 15 Wall. 98). But this was overruled in Simmons Vs. Wagner 101 U. S. 260).

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