No. 12433

Supreme Court of Illinois

Walker

---

vs.

Hedrick

State of Illinois

McLean Circuit Court Set

Heas before Hone David Davis Judge of the McLean Circuit Court at the Court House in the City of Bloomington on the 11th day of April 1857

At a Circuit Court held in and for said County on the 11th day of April 1857. The Complainants John R. Smith and James C. Walker by their attorneys filed in said Court their Bill in Chancery against Jacob Hedrick in the words & figures following to wit

State of Illinois

McLean Circuit Court } Chancery Sitting March Term 1857

John R Smith & James C. Walker humbly Complaining would most respectfully show unto your honorable Court that On the 29th day of November A.D. 1833 Complainant Walker entered at the United States Land Office at Danville Illinois (in which district the land lay) the South East quarter of Section (33) Thirty three in Township (22) twenty two north of rang (3) three east of the third principal meridean containg One hundred & Sixty Acres Situated in said County of McLean and State of Illinois and obtained at the date of

[12433-1]

said purchase a Certificate of purchase to said land as will appear from a Certificate of Register herewith filed and made part ~~of this Bill~~ hereof And that on the 22nd day of ~~January~~ February A.D. 1836 Complainant Walker Conveyed by Deed to his Co Complainant Smith one undivided half of the said land which said Deed is here with filed and made part hereof Complainants would further show that said land and all of said Section thirty three (33) Township (22) Twenty two range (3) three east is within less than six miles of the line of the Illinois Central Railroad and is one of the Sections reserved to the United States alternate to other Sections granted to the State of Illinois by the act of Congress September 20th 1850 granting lands to the States of Illinois, Mississippi & Alabama in aid of the Construction of a Railroad from Chicago in the State of Illinois to Mobile in the State of Alabama— Complainants would further show that the final allotments of the lands to the said Railroad was made by the General Land office of the United States previous to the 4th day of June

A D 1853 – Complainants would further
Show that on the 27th day of November
A D 1836 One Jacob Hedrick Obtained from
the Officers of the United States land
office at Springfield Illinois (the Land office
at Danville having been removed thereto
by proclamation of the President of the
United States) a Certificate of purchase
of said land as a preemptor by virtue
of a Settlement made as a preemptor
on said land on the 1st day of
November 1835 under a Supposed right
under the act of Congress of September
4th 1841 – Complainants would further
Show that the said Hedrick has Obtain-
ed a patent to said land by virtue
of his said preemption Settlement and
Certificate of purchase – Complainants
aver that said Hedrick now holds
the legal title to said land by virtue
of said entry and patent thereon in
trust for Complainants who are the
owners thereof in equity Complainants
Show that said Hedrick is thus in
possession of said Land reaping the profits
of the same and that Complainants
are without remedy at Law – Wherefore
they invoke the aid of Chancery and
pray that said Hedrick be made

[1243-2]

Defendant hereto and Cited to appear and answer this Bill and upon the final hearing hereof for a decree ~~to put~~ that said Hedricks release and Convey the legal title to said land to Complainants and for process to put the Complainants into possession of said land and for a decree quieting the title of Complainants to said land or for general relief in the premises and as in duty bound &c

Lord Williams & Walker
Complts Solicts

And at a Court ~~held~~ began and held as aforesaid on the 11th day of April 1857 the said Defendant Jacob Hedrick by his attorneys filed a demurrer to said Bill which Demurrer is in letters and figures following to Wit

State of Illinois
In Lasalle circuit Court March Term 1857

Jacob Hedrick Ds In Chancery
Atty
vs
John R. Smith
James C. Walker

And the said defendant by Gridley & Wickizer and Stewart his attorneys Comes and defends the wrong and ~~and~~ injury when &c and

Says that the said Bill and the matters and things therein contained in manner and form as ~~xx~~ above ~~written~~ stated and setforth are not sufficient in law or equity for the said Complainants to have or maintain there aforesaid action against the said defendants and he said defendant is not bound by law or Equity to answer the same and this he is ready to verify Wherefore by reason of the insufficiency of the said bill in this behalf the said defendant pray for a decree that the said bill be dismissed and he hence discharged with ~~the~~ his Costs

Gridley & Wickizer
Stewart & Edwards
for Defts

And thereupon the said Complainants by their attorneys ~~for~~ produced and filed their Joinder ~~and~~ in demurrer which Joinder is in the words & figures following to wit,

State of Illinois
McLean Circuit Court March Term 1857

John K. Smith — In Chancery
James C. Walker
vs
Jacob Aldrich

And the said Complainants say that the said bill and the matters and

things therein Contained in manner and form above Stated and Set forth are Sufficient in law and equity to the Said Complainants to have and Maintain their aforesaid action against the Said defendant and the Said Complainants are ready to prove and verify the Same as the Court here Shall direct and award— Wherefore inasmuch as the Said defendant has not answered the Said bill nor hitherto in any manner denied the Same the Said Complainants pray for a final decree as in the Said Original Bill is prayed for

Lord Williams & Walker
Compts Solrs

And afterwards to wit on the 11th day of April 1837 at a Court begun and held as aforesaid a decree was rendered in Said Case which decree is in the words and figures following to wit

John R Smith & James C Walker Complainants
vs
Jacob Hedrick Defendant

This day Came the Complainants and file their Said Bill and the

said defendant enters his appearance herein and files his demurrer to said bill of Complainants and the said Complainants file their Joinder in demurrer— Whereupon it was agreed by the parties in open Court that pro forma said demurrer should be sustained and a decree entered dismissing said bill It is therefore Ordered adjudged and decreed by the Court that the said demurrer of defendant be and hereby is sustained and the said Complainants abideing by their said demurrer it is further Ordered adjudged and decreed that said bill of Complainants be and the same is hereby dismissed From which decree Complainants pray an appeal which is allowed upon their filing bond without security within ninety days

It is further agreed by the parties that said Case shall be submitted to said Supreme Court at its April Term 1857 and that if said demurrer is overruled this Cause shall be remanded for further proceedings

D. Davis

12433-4

complainants filed an appeal bond which is in the words and figurs following to wit

Know all men by these presents that we James B Walker and John R Smith of the County of McLean and State of Illinois are held and firmly bound unto Jacob Hedrick in the penal Sum of One hundred Dollars for the payment of which well and truly to be made we and each of us bind Ourselves Our heirs executors and administrators Jointly and Severly and firmly by these presents Sealed with Our Seals and date at Bloomington this 11th day of April Anno Domini One thousand eight hundred and fifty Seven - The Condition of the above Obligation is Such that Whereas Jacob Hedrick did on the 11th day Of April 1857 in the Circuit Court within and for the County Of McLean and State Of Illinois Obtain a decree against the above bounden ~~Jacob Hedrick~~ James B Walker & John R Smith that their Bill in Chancery be dismissed pro forma from which decree the said James B Walker

and John R Smith has prayed for and Obtained an appeal to the Supreme Court of said State Now if the said James L Walker and John R Smith Shall duly prosecute said appeal and Shall moreover pay the amount of the Costs against them the said Smith and Walker in Case the said decree Shall be affirmed in the said Supreme Court then the above Obligation to be null and void Otherwise to remain in full force and virtue

L. L. Walker [seal]

John R Smith [seal]

State of Illinois }
McLean County } ss.

I William McCullough Clerk of Circuit Court in and for said County do hereby Certify that the foregoing is a Correct and complete Copy of the Record in the above entitled Cause = In Testimony whereof I have hereunto set my hand and affixed the Seal of said Court this 11th Day of April A.D. 1857=

Wm McCullough Clk.
by his Deputy = Hudson Burr =

[12433-5]

Received of James C. Walker
Two $^{00}/_{100}$ Dollars fees for this Transcript =
Wm. McCullough Clk
by W. W. Bunn D. Clk

State of Illinois } In June Term
Supreme Court } A. D. 1857

James C. Walker — Appellants
John R. Smith
v
Jacob Hedrick — Defendant

Appeal from decree of McLean Circuit Court April 1857

The appellants assign for Error herein that the Circuit Court erred to their prejudice by its decree at April Term 1857 in sustaining the defendants demurrer to the Complainants Bill and by dismissing said Bill — and in not overruling said demurrer & sustaining said Bill in Chancery

2nd Said decree is erroneous in every respect and should be reversed

Mr Lee pone they pray
for a renewal of said
decree

Lord Williams & Walker
att'ys at law.

Jacob Heinrich } Appellee
ads
Walter Smith } Appellant

Appellee joins in issue and says there is no
error

Gordon & Nichols
Att'ys for Appellee

S12433-4

104

James C. Walker
& John K. Smith
vs
Jacob Hedrick

File d April 17. 1857
L. Leland
Cl K.

(Copy.

Department of the Interior
January 20th 1854.

Sir:

I have examined and considered the questions submitted in your letter of the 5th instant in relation to certain preemption Claims in the Fortwayne Indiana District, the validity of which is contested by Mr W. S. Ewing, and have to state, that in my opinion, the lands in question are subject to preemption under the Act of September 4th 1841. —

Your decision to that effect is therefore affirmed, and the papers are herewith returned for proper action in the Case.

Very Respectfully
Your Obt Servt
Robt. McClelland
Secy. of Interior

Hon. John Wilson
Comr. Genl Land Office.

[12433-8]

(Copy)

General Land Office
Janry 6. 1857.

Hon Robt McClelland
Secry of the Interior.

Sir.

In October 1832 this office decided that the United States reserved Sections along the line of the Illinois Central Rail Road, after they had been exposed to public sale, were open to preemption. — [See accompanying extract from a letter from Commissioner Wilson, to the District Officer at Dixon, under date 19th October 1832.]

This ruling has obtained in the Office from time up to the present Moment, and many Claims have been allowed and much correspondence had in view and under authority of the same. —

An Appeal, however, is now taken from the same, to the Department by J. C. Walker, of Bloomington Illinois, as will be seen from his letter of the 4th ult. which I have the honor to submit herewith.

In examining the subject with a view of determining the point raised and submitted, the attention of the Department is respectfully asked to a communication from this office, under date 9th April 1849. submitting the views of the then (Commissioner Young) on the question, whether the "Alternate reserved "Sections of Public Land along the Canal connecting the Waters of Lake Erie, with those of the "Wabash, were subject to preemption under the law "of 1841." it being contended on the part of those alleging fraud in certain Entries by preemption of these lands, that the Character of the Lands included them from Entry, under the law of 1841. being "reserved &c. —

By the act of 2d March 1853. Vol 4. Statutes at Large page 236. there was granted

to the State of Indiana, for Canal purposes, a quantity of land equal to five sections in width on each side of said Canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the General Land Office.

Prior, however, to the passage of the Law of 1827 a large portion of the lands, within the sections falling to the United States, for Canal purposes, had been sold or otherwise disposed of by the Government, and Congress in Consequence, subsequently, by a law passed 29th May 1830. Statutes at large, Vol 4. page 416, allowed the State to make up the deficiency (29,528.76/100 acres) from the Alternate sections reserved to the United States.

This was forthwith done, and a public sale immediately thereafter, ordered and held of the residue of the Government sections, - and the sale appears to have been regarded by the Land Office as releasing all the lands originally reserved from that reservation, the object thereof having been fully accomplished, and sales or Entries of said land, progressed from that time forward.

The question was subsequently raised by Mr W. J. Ewing and others, as herein adverted to, whether these lands, having been once reserved for Canal Purposes, did not come under the inhibition of the law of 1841, and were therefore not subject to its provisions. But Commissioner Young did not regard the objection as having any weight, and very properly met it, by remarking "that it would be an anomalous course of action on the part of the Office, to determine that a tract of land might be bought at private sale but that when a person, who had made improvements on it, desired to secure those

improvements under the preemption law, to deny him that privilege, upon the ground that it was reserved land, and therefore exempted from preemption. A position not tenable upon the assumption first made that it could be sold at private entry. "If reserved it could not be sold, or disposed of "in any way under existing laws, which did not "specially authorize such disposition of it"—

No action appears to have been taken by your predecessor on this Report of Mr Commissioner Young and upon your taking Charge of the Department, this with other unsettled cases, from this Bureau then upon your files, was returned for re-examination and Report, as to the facts and points involved.

Such examination having been made, the papers in the case, were again submitted to the Department by Mr Commissioner Wilson, in letter bearing date 5th January 1854. (Copy herewith), and on the 20th of that Month, you advised this office, that you had "examined and considered the questions "submitted" in the letter referred to of 5th January, "in relation to Certain preemption Claims in the "Fort Wayne Indiana District, the validity of "which is contested by W. S. Ewing, and have to "state that in my (your) opinion, the lands in "question are subject to Preemption under the "act of Sept. 4th 1841. Your decision to that effect "is therefore affirmed"

The two Classes of Cases, those Contested by Mr Ewing, and the Claims now before the Department, on the appeal of Walker would seem to be analagous, or rather the reason for the allowance of the One, would Certainly in my opinion Call for or require a recognition of the other.

With much Respect &c. Thos A Hendricks Com.

[12433-10]

(Copy)

General Land Office
October 19th 1852

Reg. & Recr.
at Dixon. Ill.

Gentlemen.

A letter has been received at this office from Allen Dement Esq, desiring information may be furnished either to himself or you in reference to certain points connected with the sale or disposition of land belonging to the United States, within the limits of the late Reservation for the Central Rail Road.

The points are. 1st. Whether the lands in the six Mile limits are subject, subsequent to the late public sale, to the operation of any other preemption law than that of the 2d August last:- 2d. If so, when does such right attach.- immediately after the land was offered at the public sale, or not until after the close of the said public sale: 3d Whether a Conditional Entry or purchase cannot be made of land to which a claim under act of 2d August last, has been filed, to become absolute, in the event of the preemption Claimant failing or neglecting to establish his right:- and 4th If such Conditional purchase can be made whether a land Warrant could not be received in part payment, the excess arising from the double minimum being paid in Specie.-

To the first point I reply, that the odd numbered sections within the six mile limits, after having been offered at public sale, are not subject to the operation of the Act of 2d August last.- the fact of the offering showing that no notice had been given as required by that law, and consequently a forfeiture of whatever right under it, which may have previously existed; but it is the opinion and decision of this office, that said lands so offered, are subject to the operation of the

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general preemption law of 4th September 1841, except as to the Minimum price, like any other public land. –

× × × × × × ×

Respectfully
Your obt Servt
John Wilson
Commissioner

Signed

(Copy)

General Land Office
January 8th 1884

Hon. Robt. McClelland
Secy. of the Interior.

Sir

I have the honor to return herewith the papers in the case of W.S. Ewing, and others, originally submitted to the Department for advice or instructions in letter of 9th April 1849, and sent back to this office with your letter of 26th July last. -

The main point or question then arising, and really the only one to be determined by the Department, was, whether the Alternate reserved Sections of Public lands along the Canal Connecting the waters of Lake Erie with those of the Wabash, were subject to preemption under the law of 1841. it being contended on the part of those alleging fraud in these entries, that the Character of the lands precluded them from Entry under the law of 1841 - being reserved lands &c.

This office does not regard the said Act of 1841 as making reservations of any land, but only excluding from its operation, such lands as are therein particularly described, and the opinion was expressed, that the tracts in question, were not included in that Class of lands designated "as reserved to the United States alternate "to other sections granted to any of the States, for the "Construction of any Canal, Railroad, or other Public "Use improvement," inasmuch as they were not so reserved, "at the date of the law of 1841. but had "been by proper authority released from that reservation "more than eleven years before, and after selection "had been made under the Act of 29th May 1830. "the Concluding Part of which, if not in positive "terms, plainly indicated the period when "such former Reservation should Cease". -

[124334]

Since the reference of this Case, I find from the Arguments submitted, that an additional point has been raised, in relation to the operation of the 3d Sec. of the Act of 26th May 1824. in reserving for future disposal all those sections, through which the said Canal, as authorized by said Act of 1824 should pass.

As the Reservation and grant of the right of way under the law, was by the 2d Section thereof wholly dependent, on the performance of certain conditions specified therein, and was to be "void and of none effect" in the event of any failure in those Conditions, and as none of them were performed, but the grant for said Canal adjusted and determined by the provisions of the subsequent law of 2 March 1827. this office did not regard the reservation first referred to as offering any obstacle to the disposal of such of the Alternate Sections as might fall to the United States, under the operation of the latter law, that, that being in its judgement such subsequent legislation on the subject as justified the presumption, that it was the only existing law, in reference to the land affected by this Canal, with the execution of which this office was Charged, the former one being inoperative from the failure or neglect to comply with the terms upon which its vitality existed.

Accompanying the papers will be found an Argument in the Case, which has been filed within the last few days, by the Hon. John Pettit of Indiana.

With great Respect
Your Obt Servt
John Wilson
Commissioner

Signed

J. D. Catow &
O. C. Skinner
Justices &c

General Land Office
16th July 1857.

Gentlemen,

I have received your letter of the 13th ult: calling my attention to the conflicting entries, by James C. Walker & Jacob Hendrix, of the S½ Sec 33, T 22 N. R 3 E, late Danville, now Springfield district, and asking for information in reference to their respective claims or rights and to be furnished with any suggestions or Official Opinions, bearing upon the same &c &c. – In reply, you are informed, that the land in controversy, is a portion of an U. S. reserved section within the six mile limits, Illinois Central Railroad, the minimum price therefor, being fixed by law, at $2 30/100 per acre – the entry by Walker, being one at ordinary private sale, & that by Hendrix, in virtue of the provisions of the preemption law of 4th September 1841. It was urged as against the validity of the latter, that the land being a part of a "reserved" section, was not open to preemption.

[12433-13]

The General Land Office having however, as far back as in 1852, examined with much care, the question or objection thus raised, and the then Commissioner having decided, that the lands in question, were open to preemption - and the reasons for the decision appearing to my mind, to have much force - I did not hesitate as to the course which it seemed proper for the Office to take, under the circumstances - which was, to continue to carry out the ruling thus obtaining, by which it had been governed for such a length of time, and under which many claims had been recognized. The lands were "reserved" for a specific purpose; and after the adjustment of the Railroad Grant, were put up at public sale, as other public lands - the only difference being, that a minimum of $2.50, instead of $1.25, was affixed to them by law.

The object of the law, in withdrawing them for the time being, from the map of the public domain,

having been fully accomplished, and the Character of the lands not having been changed, by such withdrawal,- and by their subsequent exposure to public sale, the lands in question becoming subject to private entry- it would certainly be, in the Opinion of this Office, difficuelt to find any good reason, why such lands should not be open to settlement with a view to preemption.

An appeal having been taken by Mr Walker, to the Department, from the decision of this Office, our views were fully expreped, in a letter to the Secretary under date 6th Jan. 1857, a copy of which letter, I enclose for your information, together with copies of the other Communications from this Office & the Department therein referred to. The Secretary affirmed the decision made by the Land Office, as you will perceive from his letter of 2d March 1857- copy also herewith.

In conclusion I would remark, that you are laboring under a misapprehension in regard to the fact of a Patent having been issued on the

[12433-47]

Hendrix Certificate of entry- It has not been done- Nor has the claim been reached yet in its order for examination on its merits- the appeal to the Department having been taken on the Abstract question, whether such lands were open to preemption.

Very Respectfully
Your Obt. Servt.

Thos A Hendrick
Commissioner

(Copy)

Department of the Interior
March 2d 1887.

Sir:

I herewith return the letter of Jas. C. Walker of the 4th December last, upon which your Report of the 6 of January following was based, also the papers which accompanied yours of the 9th of the latter month on the question of the right of preemption attaching to the alternate sections of the United States, along the line of the Illinois Central Rail Road, after the land in question had been offered at Public Sale, and became subject to private Entry.

Your decision in favor of the right in such Cases is hereby affirmed.

Respectfully
Your Obt Servt
(Signed) R. M. Clelland
Secretary

To
Hon Wm A Hendricks
Commissioner of the
General Land Office.

[12433-15]

(Copy)

General Land Office
April 9th 1849.

Hon.
T. Ewing
Secretary of the Interior.

Sir:

I have the honor to return herewith, the letter of W. L. Ewing Esq. to you dated the 3d Inst. and in reply to your request endorsed thereon, for the facts connected with the subject matter of that Communication, I have to report; That on the 22d of June 1848. a letter was addressed by this Office to the Hon. Wm Rockhill containing not only a reply to one from him of the 17th of the same month, but also a response to a verbal inquiry made by him after the said letter was received, in relation to the subject matter now under Consideration; a copy of that portion of said letter Marked A. is herewith transmitted. On the 14th July 1848. a letter on this subject was addressed to this Office by the Register and Receiver at Port Wayne to which a reply was given on the 7th August following that letter and copy of the reply marked respectively B & C. are herewith transmitted. To the Call for information Contained in the latter Communication the Register and Receiver responded on the 21st August 1848. enclosing two lists of the alleged suspended land, and the other land which had been so offered, see letter herewith Marked D. — On the 3d August 1848. the Register addressed this Office in reference to certain declarations, under the act of 4th September 1841. which had been presented for portions of this land, asking advice in relation thereto, to which letter a reply was given on the 18th of that Month; that letter and a Copy of said reply Marked respectively E. & F. are herewith transmitted —

The Correspondence in relation to this

L[illegible]33-20

Matter. prior to that contained in the two last letters, had been conducted by a different Clerk than the one to whom the Register's letter of the 3d Augt was referred and by whom the reply of the 18th of that month was prepared, but with a perfect similarity of views on the part of both, as to the Condition of the land; and this fact is only adverted to, in order to show why a call in letter of the 18th August was made for information asked for in letter of the 7th August, and why in the Register's reply to the former, of the 16th Sept. reference is made to the joint letter of the Register & Receiver of the 21st August, being the response to the latter of said letters dated the 7th of said month; the Register's letters of the 16th September, and a Copy of the response of this office of the 5th of October 1848. marked, respectively. C & D. are herewith transmitted.

By the act of 2d March 1827. [Chap. 352 part. 1. Laws Instructions and opinions] there is granted to the State of Indiana for Canal Purposes," a quantity of land "equal to one half of five sections in width on each "side of said Canal, and reserving each alternate sec"tion, to the United States, to be selected by the Commissioner "of the General Land Office &c." This Canal from its Commencement in Section 9. T24. R3W. to the boundary lines between the States of Ohio and Indiana, extended through about 105. tiers of sections, and the selection made for the State was by taking each alternate tier of said sections five sections deep on each side of the Canal (of the lands then surveyed, and to which the Indian title had been extinguished) leaving the other alternate tiers to the United States.

The selection so made was contained in an abstract, particularly describing the land embraced thereby, and the approval of President Jackson was given thereto on the 5th of January 1830.—

& portions of said sections had been offered at public sale prior to the passage of the act of 2d March 1827, and had of course been subject to private entry up to the date of said act and a large portion of the land within the sections falling to the state having been previously sold at private sale, and and granted to individuals, under the treaty by which said lands were acquired, Congress on the 29th May 1830. (Chap 396 Part 1. Laws. Instructions and opinions) passed an act granting to the State of Indiana the quantity of 29528 78/100 acres, in lieu of a like quantity within the limits of sections above referred to, which the last by reason of said prior sales & grants. This additional land, was, according to that law, to be selected from the alternate sections reserved to the United States, and were to be reported to the proper Land Offices "before the reserved sections should be offered at public sale". The state had in fact already made selections to the above amount, and of the character mentioned prior to the passage of said act of 29th May 1830. so that the business under it was immediately arranged and the office enabled speedily to prepare the rest for public sale. —

On the 18th June 1830 the President issued his proclamation for the public sale, on the 3d Monday of October 1830 of the remainder of these reserved sections within the district of Fort Wayne, which had been surveyed and the Indian title thereto extinguished, except those through which the canal actually runs, and those situated in T 32. Ranges 14 & 15. (the former being excepted in the said proclamation and the two latter townships which were in part cut by the strip of five sections, on the North of the Canal, not having been included in said Proclamation, but in the subsequent one of 19th July 1832) which sale was however postponed (on 30th August 1830) to the 3d Monday in November 1830.

This appears to have been regarded by this office, as releasing all the land originally

SJ2433-21

reserved from that reservation, the object thereof having been fully accomplished and the minimum price never having been increased by Congress, so as to render it different in character from the mass of public land; and sales of said land progressed from that time forward of the land so offered at public sale, as well as of that which had prior to the year 1827. been so offered. —

Within the bounds of this strip of five sections in width on each side of said Canal was embraced Certain Miami Reservations and parts of others, the title to which was not extinguished at the passage of the Act of 2d March 1827. but which was effected by the Treaties ratified on the 22d of December 1837. 8th Feby 1839. and 7th June 1841 respectively, and to which Land so embraced in the whole of said Reservations. Congress by Act of 3d Augt 1846. (Chap. 77 - Acts 1st Session 29th Congress) affixed a minimum at $2.00 per acre, and by Act of 8th Augt 1846. (Chap. 78. Acts Same Session) attached the land so acquired to certain districts therein named, which had not theretofore been so attached.

The Original grant to the State was regarded as including so much of these Miami Reservations as should fall within her alternate tiers, and after the Indian title was extinguished and these Reserves surveyed, so much thereof as fell within said alternate tiers, and which were not embraced by special grants under the treaty by which such title was extinguished, was confirmed to the State. For the quantity of lands within said alternate tiers so encumbered, amounting to 214.219 $\frac{44}{100}$ acres. the State Claimed the right to Certain other tracts, which she had selected, amounting to 69 883 acres, as an equivalent to said 214 219 $\frac{44}{100}$ acres. she having had the respective tracts in both amounts valued by her authorities.

These selections were repudiated by this office, as totally unauthorized by law, and the matter to rested until the passage of the Act of 29th Aug 1842. (Chap. 262. Acts of 2d Sess. 27th Congress) whereauthority was given to the State to locate the said quantity of 24 219 14/100 acres, "upon any of the unsold public lands "in the State of Indiana not subject to the right of pre-emption". This was done and the business closed in 1844.— Of the lands so originally embraced in these reserved alternate sections in the District of Fort Wayne, and without the bounds of the Miami Reservations above referred to, amounting in the aggregate to about 40,000 acres, the whole would appear to have been sold and otherwise disposed of, except the few sections and parts of sections, referred to in the lists enclosed by the Land Officers, in their letter of 21st Aug 1848. and embracing in the aggregate not quite 3000 acres.—

The portion thereof which had been offered, at public Sale, was regarded as improperly withheld from sale, and instructions were given to restore such tracts to private entry after public Notice for thirty days had been given to that effect, in accordance with the general regulations of this office in that respect, and for the isolated unoffered tracts authority existed to offer the same at public Sale, without the necessity of a Proclamation by the President, by virtue of the 5th Section of the Act of 3d Aug. 1846. and orders were given to offer said tracts. A Copy of the letter to them of the 23d January 1849, and the result of such offering, as shown by their Report of the 13th March 1849. is given in the papers Marked J. K.

Mr Ewing appears to regard these lands as reserved by the act of 4th September 1841. and only from the Operation of that law.—

This office does not regard that act

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as making any reservation of any lands, but only excluding from its operation such lands as is therein particularly described, and in reference to that class of lands embraced in the description "no sections of land "reserved to the United States, alternate to other sections " granted to any of the States for the Construction of any "Canal, Rail Road, or other public improvement." the land in question is not regarded as included in said Class, because it was not so reserved at the date of the law of 1841, but had by proper authority been released from that reservation, more than eleven years before, and after selections had been made under the act of 29th May 1830. the concluding part of which, if not in positive terms, plainly indicates the period, when such former Reservation should cease. —

If the reservation originally made, is good as to the portion remaining unsold when this subject was brought to the notice of the Office in 1846, then the reservation, extended equally to the whole 400 000 acres, and the sales made from year to year of this land are all illegal, not only as to that offered prior to 1829 and sold at private entry under that offering, but also to the portions offered in Nov. 1830. and Oct. 1832, under the Presidents proclamation, and sold at such public sales, or subsequent thereto at private Entry. The whole was reserved originally by the act of 1827. and the clear when the object of the reservation had been subserved, extended to the whole and not to a part only, and as the Preemption law of 1841. extends to offered as well as unoffered land, it would have been regarded as an anomalous course of action on the part of this Office, to have determined that a tract of this land might be bought at private sale for $1,25 per acre, but that when a person who had made improvements on it, desired to secure

those improvements, under the preemption law, to have denied that privilege, upon the ground that it was reserved land, and therefore exempted from preemption, a position not tenable, upon the assumption first made that it could be sold at private entry. If reserved it could not be sold or disposed of in any way under existing laws, which did not specially authorize such disposition of it.

The particular land in question was, as it appears from the letters of the Land Officers, withheld from sale, for a considerable period. That which had been offered, for causes not known to this office, nor it is presumed by the present officers, that which had not been offered, was necessarily exempt from private entry because not so offered. The unauthorized acts of the land officers in reference to the first class of lands and the unoffered character of the second class, could not operate to deprive any man of his right of preemption under the law, and the difficulty in regard to the whole subject, would no doubt have long since been removed, had the attention of this office been directed to the matter.

Since the attention was so directed justice has been endeavored to be meted out to all, by not permitting private Entries of any of said lands heretofore offered and so suspended or withheld, until public notice to that effect was given, and with regard to the isolated tracts not previously offered, they have after due notice publicly given, been offered at public sale, except a few tracts claimed by preemption, thus affording all an opportunity of purchasing said lands. It will be perceived from the report of said public sale, that for the tracts so offered at public sale, there were no bidders.

[12433-23]

those not so offered it is presumed were entered prior to the offering, by preemption, as they had been claimed by preemption, the return of sales for March last, have not yet been received, and I am therefore unable to state positively that such sales were made.

With Much Respect
Your Obt Servt
Signed, Richd M. Young
Commissioner

STATE OF ILLINOIS, IN SUPREME COURT,

THIRD GRAND DIVISION AT OTTAWA, APRIL TERM, 1857.

JOHN R. SMITH,
JAMES C. WALKER, } APPELLANTS.

vs.

JACOB HEDRICK. } APPELLEE.

An Appeal from a Decree in Equity of the McLean Circuit Court.

BRIEF OF APPELLANTS.

The question involved, is: Was the land in controversy at the date of the settlement of Hedrick, subject to the right of pre-emption under the laws of the United States? The Commissioner of the General Land Office has decided that it was. We cont nd that it was not; and to sustain our views of the law, the following argument is respectfully submitted:

The decision of the Com of the General Land Office is *not final*, but leaves the matter open for the decision of the Courts, see Wilcox *vs.* Jackson, 13th Peters, p. 498; U. S. *vs.* Gear, 3d Howard, 120, Brown's Lesse *vs.* Clements, 3d Howard, 650. In the first case named, page 511 and 512, the Court say, "Even assuming that the "decision of the Register and Receiver in the absence of fraud, would "be conclusive as to the facts of the applicant then being in posses- "sion, and his cultivation during the preceding year, because these "questions are directly submitted to th m: *yet if they undertake to "grant pre-emptions on land in which the law declares they shall not be "granted, then they are acting upon a subject matter clearly not within "their jurisdiction, as much so as if a Court whose jurisdiction was de- "clared not to extend beyond a given sum should attempt to take cogni- "zance of a case beyond that sum.*"

In the last case quoted, 3d Howard, 668, the Court use the following language: "This is one of the results of the mistaken and ille- "gal acts of the ministerial officers of the government, which as al- "ready shown, *can neither benefit one party, nor prejudice the rights of "the other.*"

802 Ills McLean

12433-46

Act Cong 1830 1. & 1841 — Sect 10
2 Purple p 1331 — p 1340 Sect 10
" " 1348. 1341 —
" "

The question then involved, is purely one of law, and its solution rests in a sound interpretation of the various acts of Congress, and of the policy of the general government in regard to the public lands.— The right to pre-empt lands is in derogation of common right, and if it exist at all must have its foundation in positive law. We find upon examination of the legislation of Congress upon the public lands, that they have exercised a liberal policy, and one that has been frequently and very justly commended, towards the hardy pioneers of civilization in our western wilds, who have abandoned the comforts and security of a home in an old settled country, for the privations, hardships and dangers of a wilderness, to procure the land that they were unable to obtain in the homes of their childhood, by allowing to such the right to pre-empt at the ordinary minimum *one hundred and sixty acres which they occupied as a home, and had made valuable by their labor.*

We will now proceed to examine in detail the various general pre-emption laws of Congress, and see if the defendant in this case can bring his claim to the land in controversy within the provisions of any one of them. The first general pre-emption law passed May 29th, 1830. That gave to all persons who occupied public lands prior to the passage of the act, and who had cultivated the same in the year 1829, the privilege of pre-empting 160 acres including his homestead, &c., but expressly reserved from the act, all lands that had been reserved for the use of the United States or any of the States; but as the defendant in this case, having made his pretended settlement in 1855, can claim nothing under this act, it may be dismissed without at present giving it any further consideration. A supplement to the act of 1830 was passed April 5th, 1832, extending the benefits of the first act six months after the date of the passage of the supplemental act. Another supplemental act to that of 1830, was passed July 14th, 1832, extending the benefits of the act to one year after the survey of the land was made by the general government, provided the land was not brought into market before the expiration of said year. Two other acts were passed supplemental to the act of 1830, one March 2d, 1833, the other June 19th, 1834. The first extending the benefit of the act of 1830 one year; the second extending it two years. The next act of any importance is the act of June 22d, 1838; by this the act of 1830 is revived and continued in force for two years from the passage of the act. It will be observed that by this act, *all reserved lands*, and specially among other exemptions, "sections alternate to other sections granted to the use of any canal, rail road, or other public improvement," are withheld from the privilege of pre-emption. There was a supplement to this last act passed June 1st, 1840, but having no bearing upon the point in controversy. The first general pre-emption law was passed Sept 4th, 1841.— It is under this act with the several amendments thereto, that the defendant must show his right to pre-empt the land in question, if he had any such right, as all the previous acts had expired by limitation. The 10th section of the act of Sept. 4th, 1841, after giving the general privilege of pre-emption, proceeds to exempt certain lands from the operation of the act, and among others, provides that "no sections "of land reserved to the U. States, alternate to other sections granted

"to any of the States for the construction of any canal, rail road, or "other public improvement shall be liable to entry under and by vir- "tue of the provisions of this act." An act supplemental to this last act was passed August 2d, 1852, by which the privilege of pre-emption was extended "to each and every person *now an actual settler and "occupant, and who on the 20th day of September, A. D.* 1850, *had "made such actual settlement and improvement* as would have entitled "him to the right of pre-emption under the act of Sept. 4th, 1841, "on any tract of land now owned by the United States and situated "within the limits reserved from sale by order of the government, be- "cause of the grant of alternate sections to the States of Illinois, Mis- "sissippi and Alabama in aid of the construction of the Chicago & Mobile Rail Road and its branches."—U. S. Statute at large,—p. 27. The act of Sept. 4th, 1841, was further amended by the act of March 3d, 1853; this amendment extends the pre-emption laws over the reserved alternate sections along the lines of rail roads wherever public lands had been granted by acts of Congress, but the same act itself provides "that no person shall be entitled to the benefit of this act "who has not settled and improved, or shall settle and improve such "lands prior to the final allotment of the alternate sections to such "rail roads by the General Land Office."

The above is a synopsis of all the general pre-emption laws passed by Congress, but the last three were all the laws upon the subject in force at the time of the pretended settlement of defendant upon the land in controversy. It would seem to us that the simple statement of the question would be sufficient without any further argument; and to argue in support of our views of the case, seems like an attempt by argument to demonstrate an axiomatic truth; but as the Commissioner of the General Land Office has decided adversely to our claim, and able counsel have been found willing to argue in support of his decision, we will proceed to give our reasons for the position we assume in the premises. We then say in the first place, that the only pre-emption law in force at the time of the defendant's pretended settlement, in language plain and unmistakable, expressly forbids the defendant's entry as a pre-emptor. The same prohibition existed in all the general pre-emption laws previous to the present, from 1830 up to the present time; and although many pre-emption cases found their way under the acts of 1830 and 1841 into the courts, and many were determined in the Supreme Court of the United States, we have been unable to find (after what we deem to be a very extended search into the authorities) that the interpretation we have given to the proviso in both acts, excluding from the privilege of pre-emption the alternate reserved sections, was ever questioned, until the decision of the Commissioner of the General Land Office above alluded to. All acts in *pari materia* are to be taken together as if they were one law—Talbot *vs.* Seeman, 1st Cranch—25; and if the right was never claimed under the act of 1830, how can it be claimed under the act of 1841? Besides the absence of all such claim under the act of 1830 and 1841, up to 1855, when the claim was first made, is a strong argument that cotemporaneous construction was in our favor. "Where a law is plain "and unambiguous, whether it be expressed in general or limited terms,

"the legislature should be intended to mean what they have plain'y ex-
"pressed, and consequently no room is left for construction."—U.S. *vs.* Fisher, 2d Cranch—386–399. It would seem to us that the application of this very reasonable rule would at once decide this case in our favor; but if we are to resort to other rules of construction, our case is not thereby in the least weakened, but if possible strengthened We might invoke in our aid the rule that "great regard ought in construeing a statute to be paid to the construction which the sages of the law who lived about the time or soon after its passage, put upon it, because they are the best able to judge of the intention of the makers; and it is a maxim, that contemporaneous *expositio est fortissima in lege.*—Wilkinson *vs.* Leland, 2d Peters, 692 and the authorities generally. This rule specially applies to any one whose duty it was to apply the law. We find that the various Commissioners of the General Land Office, up to the fall of 1855, uniformly decided that the reserved sections were not subject to the pre-emption laws. We may here with propriety quote the language of Commissioner Wilson in his official report to the 2d session of the 32nd Congress, of November 29th, 1852. Speaking of pre-emptions, he says: "In fact every means within "the power of this office has been applied to carry out the liberal "views of Congress towards this meritorious class of our citizens, "notwithstanding which many cases of great hardship have occur-"red, in consequence of some of the restrictions in the act of 1841, "*which are so plain and positive as to leave this office no discretion.*— "One of these is, that pre-emption rights shall not attach to any sec-"tion of land reserved to the United States, alternate to other sections "granted to any of the States for the construction of any canal, rail "road, or other public improvement: this inhibition should also be "removed, and pre-emptions granted to all such lands, at the in-"creased minimum."—See message and accompanying documents, 1852–3.—House doc., p. 67. This shows very plainly what was the interpretation put upon the act by the the department, up to the date of this report—some 11 years after the passage of the act. "The construction given to a statute soon after its passage, cannot be altered at a very distant period."—Graham's appeal, 1st Dallas, 136. We might here invoke the aid of another well settled rule in the construction of statutes, viz. "If it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, this will amount to a Legislative declaration of its meaning, and will govern the construction of the first statute."—Morris *vs.* Mellin, 6 Barn & C., 454. 7th do 99.

We see by the act of Congress of March 3d, 1853, what meaning they attached to the act of 1841. The act of March 3d, 1853, was passed at the same session to which Commissioner Wilson made the report from which we have quoted above, and was passed at his suggestion, and to remedy the alleged evil, so far as future grants were concerned. It will be seen upon a full examination of the said report of Com. Wilson, that he recommends the policy of granting lands in aid of the construction of rail roads; and in addition, recommends that the restriction of the act of 1841, excluding the reserved sections from pre-emption be, in future grants removed. And upon this rec-

ommendation Congress passed the act of March 3d, 1853, thereby approving of the construction that Commissioner had given to the act of 1841. But the appellee cannot claim anything under the act of March 3d, 1853, as that expressly provides that no person shall be entitled to the benefit of said act, unless they had settled upon the land prior to the final allotment of the alternate sections to the rail road. This is language plain and unmistakable, and we have heretofore shown that the final allotment of the alternate sections was made in 1852, previous to the passage of the act of March 3d, 1853, so that it could not by any possibility apply to the land in controversy, and was intended only to apply to grants that were not complete at the date of the act. But the appellee certainly can claim nothing under it, as his pretended settlement was not made until 1855. The same construction given to the act of 1841, by Com'r Wilson, and the same construction we have given above, to the act of 1853, was given to both of said acts by Com'r Hendricks in his report of Oct. 30th, 1855, made to the first session of the 34th Congress. See message and accompanying doc's, 1855–6, part 1st, page 157. He there says: "United States reserved sections are not liable to entry under the pre-"emption act of Sept. 4th, 1841, but by the act of March 3d, 1853, "such sections are subject to the pre-emption settlement and entry at "the minimum fixed by law for their sale, *provided the settlement and "improvement on which the claim is based be made prior to the final allot-"ment of the alternate sections to such rail road by the General Land "Office*. It has been decided by this office that these sections, after "they have been exposed to public sale, again become subject to pre-"emption at the minimum fixed price." With the latter part of the Commissioner's opinion just quoted, we respectfully beg leave to differ, as we can see no foundation for the same either in law or equity, but on the contrary we can see that it is plainly and palpably in violation of positive statute, himself being the expounder of the law, and by what method of ratiocination the Commissioner arrived at the conclusion that the lands became subject to pre-emption by being *again* exposed to public sale, we cannot divine. But he goes on to say, on the same page of the said report: "It is proposed to amend the act of 1853, so as to render such sections liable to pre-emption, as well when the settlement was made after, as before the allotment, that is, at any time after the withdrawal of the lands for rail road purposes, and before the public sale." It seems to us that the Honorable Commissioner was asking Congress to do an unnecessary act, if his construction of the law, "that they were subject to pre-emption after being again offered for sale" was correct, and his own recommendation shows that his construction of the law was plainly and palpably erroneous, but lest great weight be allowed to his interpretation in this controversy owing to the high source whence it emanates, we will now proceed to argue the question, and see if the conclusion of the Commissioner is sustained either by the law or reason of the case.

First, the statute plainly and clearly negatives the construction of the Commissioner, and says said land shall not be subject to pre-emption, unless the settlement is made before the final allotment. To argue in favor or aid of such a positive statute seems almost ridiculous,

but the highly respe table ministerial source of the opposite doctrine, must be our excuse. We confess ourselves wholly at a loss to know how the Commissioner arrived at his conclusion, as he does not in his report or anywhere else that we have been able to find, deign to assign a reason. If it be upon the ground that all lands subject to private entry are subject to pre-emption, he is certainly in error, as there is a marked distinction drawn by the Supreme Court of the United States, in the case of Wilcox *vs* Jackson, 13 Pet., 513. The court, speaking of the act of Congress by virtue of which all the lands in the district (in which the land then in controversy was situated) were ordered to be sold, with certain exceptions named in the act, within no one of which exceptions the land in that case was embraced,—use the following forcible language: "In the first place, we do not consider the law as applying at all to the case. That has relation to a "sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right "of pre-emption *and governed by different laws*. The very act of 19th "June, 1834, under which this claim is made, was passed but one "week before the one of which we are now speaking, thus showing that "the provisions of the one were not intended to have any effect upon "the subject matter upon which the other operated. But we go further and say that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus "appropriated becomes severed from the mass of public lands; and "that no subsequent law, or proclamation, or sale, would be construed "to embrace it, or to operate upon it, although no reservation were "made of it."

The doctrine here advanced was reaffirmed with emphasis in the U. States *vs* Gear, 3d Howard, 120; and may *we* not say with equal propriety, that when land has been once reserved from *pre-emption*, nothing short of positive law will again make it subject thereto. We find that all the legislation of Congress upon the subject of pre-emptions, since the act of 1841, has studiously and in language so plain that it admits of no other construction, declared, that land situated as the land in question was, at the date of the defendant's pretended settlement, *shall not be pre-empted.*

In addition to all this legislative construction, we have the uniform decisions of all the Commissioners of the General Land Office, and the sages of the law, for the first 25 years after the establishment of the pre-emption system, to-wit: from 1830 to 1855, and we have also all the decisions of the Supreme Court of the United States—the court of last resort, in all analagous cases, decidedly in our favor; and applying all the well established rules of interpretation applicable to statutes, adopted by the sages of the law, and the highest courts of judicature only strengthens our positions; and we might perhaps in the conclusion of this argument with great propriety, to some extent examine what has been the settled policy of the federal government, with regard to the public domain. This was all originally ceded to the confederation by the several States, to hold in trust for the payment of the then existing debt, and to raise a revenue for the purposes of government, in order to lessen the taxes either direct or indirect, on the

people of the several States to support the general government. We may here quote with great propriety the language of C. J. Marshall in Jackson *vs.* Clark, 1st Peters, 365. He there says :

"The Government of the United States then received this territory "in trust not only for the Virginia troops on the continental estab- "lishment, but also for the use and benefit of the members of the con- "federation : and this trust is to be executed *by a faithful and bona fide* "*disposition of the land for that purpose.*" See this whole case.

We find that this very just policy has never been departed from ; it was argued in support of the act of 1841, by its ablest advocates, that to grant the privilege of pre-emption to wild and unsettled lands of the territories, would encourage their settlement, and bring them sooner into market ; and that thereby the government, besides rewarding the hardy pioneer, as we stated in the outset of this argument, would make a profit by the early sale at increased prices of the lands no pre-empted ; and we see that the prediction has been abundantly verified by the facts, and the beneficiaries of the trust—the States at large have been pecuniarily benefited by the policy ; and again in the initiation of the policy of granting alternate sections to the States, for the purpose of aiding in the construction of great public improvements, it was argued in answer to the doubtful policy and constitutionality of the measure, that it was the most politic way of executing the great trust of the general government in regard to the public lands, as the States at large would be greatly benefited by the increased revenue that would arise from the speedy sale, and *at prices greatly enhanced above the increased minimum* of the reserved sections, that they should be sold at public auction, and that they could be, and should be, sold at much above the increased minimum ; and experience has abundantly proved the soundness of this policy. But let it not be forgotten that the class of persons claiming a right to pre-empt the public lands, in which the appellee is embraced, is not the hardy pioneer tempting the dangers of an untried wilderness, as was contemplated by the pre-emption laws generally. Surely, the appellee settling in the year 1855 in the immediate vicinity of the Ill. Central R. R., in the midst of a teeming and highly refined population, in a country unrivalled, even in this age of rail roads, for its facilities for trade and travel, can with small grace claim that he is one of the "hardy pioneers" contemplated by pre-emption laws. Hence he comes into court entitled to no favor, but such as a sound construction of the law entitles him to.

We here close this argument already extended beyond what may seem to be a reasonable length, confidently expecting a decision of the court in our favor.

CORD, WILLIAMS & WALKER,

Bloomington, Ill., April 13, 1857. *Counsel for Appellants.*

Wickiser for [illegible] bks
2 Story Eq Juris 602
2 Green Dig 1550
13 Ill R 190
3 Scam R Isaac Steele

104
Walker
vs
Welrick

Filed Apr 23 1857
D Leland
Clerk

104

James C. Walker

vs

Jacob Hedrick

104

1857

12433