Wm. Porter

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D. J. SCHNEBLY, EDITOR. | "Westward the Star of Empire takes its way." | [J. FLEMING & T. F. Mc[illegible]

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Legal Opinion.

OREGON CITY, Dec. 25, 1850.

Mr. Editor—I have been requested to prepare for publication a legal opinion embracing answers to the following questions, involving a construction of the operation of a portion of the 4th section of the Act of Congress of Sept. 27, 1850, entitled "An Act to create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands."

1st. What is the meaning of the words "settlers or occupants" as contained in the 4th section of the above entitled act?

2d. Whether the words "and who shall have resided upon and cultivated the same for four consecutive years" &c., requires an *actual* residence on the land, as indispensable to entitle the claimant to demand a patent?

3rd. Whether a claimant whose dwelling is not on the land, but who improves and cultivates by the application of his personal *labor*, or by that of his hired men, or a member of his family, can demand a patent under the said 4th section?

4th. And if the second question be answered in the negative, and the third be answered in the affirmative, whether the law of landlord and tenant is applicable to a case where the first settler rented his improvements to another, and in such a case whether the landlord or the tenant may demand the title?

The language of the Oregon Land Bill of Sept. 27, is almost precisely similar to that used in all our pre-emption laws.—Those gentlemen Messrs. Bright of Indiana, and Dodge of Iowa, remarked upon in the debate of the Senate on the bill.—The 1st section of the pre-emption act of May 29, 1830, entitled "An Act to grant pre-emption rights to settlers on the public lands," enacted "That every *settler or occupant* of the public lands, prior to the passage of this act, *who is now in possession, and cultivated* any part thereof in the year one thousand eight hundred and twenty-nine, shall be, and he is hereby authorized to enter, with the register of the land office in the district in which such lands may lie, by legal sub-divisions, any number of acres, not more than one hundred and sixty," &c.

The 1st section of the pre-emption act of June 19, 1834, entitled "An Act to revive the act entitled 'An Act to grant pre-emption rights to settlers on the public lands,' approved May twenty-nine, one thousand eight hundred and thirty;" provides "That every *settler or occupant* of the public lands, prior to the passage of this act, *who is now in possession*, and cultivated any part thereof, in the year one thousand eight hundred and thirty, three shall be entitled to all the benefits and privileges provided by the act entitled "An Act to grant pre-emption rights to settlers on the public lands," approved, &c.

In an opinion of the Attorney General of the United States, under date of April 8, 1837, it was decided that the Act of Congress approved on the 19th June 1834, revived, also therewith, the Act of Congress approved on the 14th of July 1832, entitled, "An Act supplemental to the Act granting the right of pre-emption to settlers on the public lands, approved the 29th day of May, eighteen hundred and thirty;" the language of which is in part as follows:

"*Be it enacted*, &c. That all the *occupants and settlers* upon public lands of the United States, who are entitled to a pre-emption in accordance to the provisions of the Act of Congress approved the twenty-ninth day of May eighteen hundred and thirty, and who have not been, or shall not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale on account of a disputed boundary between any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as are prescribed in said act," &c.

The 4th section of the Oregon Land Bill of Sept 27, 1850, enacts "That there shall be, and hereby is granted to every *settler or occupant* of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen or who shall make such declaration on or before the first day of December, eighteen hundred and fifty, and who shall have *resided upon and cultivated* the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one half section" &c.

A little attention will show that there is a very striking similarity in these extracts made from the Acts of May 29, 1830, June 19, 1834, and Sept. 27, 1850. But these laws are alike in other respects—as first: They all render null and void all contracts for transferring the claim previous to the issuing of the patents,—second: They all provide for the reservation of mineral lands,—third: They all require proof of "*settlement and improvement*,"—fourth: They all provide that no person shall have the benefit of the act more than once,—and fifth: They are all intended by a munificent government to benefit the settlers of new countries.—But they are also alike in many other respects.

I have thus shown the similarity of these laws, with a view to proving that for all the purposes of an application to the law of Sept. 27, 1850, of principles well settled under the three statutes of earlier date, that they are all Acts in *pari materia* and to be considered as one law.

Statutes ought not to be construed according to the letter, but so as to conform to the intention of the framers. Where there are conflicting decisions upon the construction of a statute, the officer whose duty it is to interpret them, must refer to that which ought to be the source of all such decisions, that is, the words of the statute itself. (*per Lord Ellenborough*. 16. *East*, 122.) But in cases of doubtful construction, statutes are to be moulded according to reason, convenience and the best use. (*Hob.* 346. *Plowd.* 109. 3 Co. 7.) Statutes in *pari materia* are to be considered as one law; and for all the purposes of answers to the foregoing questions, the Acts of May 29, 1830, June 19, 1834, and Sept. 27, 1850, are such. The laws upon the subject of the public lands are all in *pari materia*, and are all to be construed together; and an insulated act is not to be construed strictly upon its own letter; but as having relation to the general system, and to be expounded according to the meaning of Congress, to be collected from the language of the particular law, as compared with the whole system, and from the reason and nature of the case; (*opinion of the Attorney General, Wm. Wirt*, Dec. 31, 1826.) and the well established construction of the same or similar words contained in like statutes.

With these general principles taken for granted, I proceed to answer the questions in their order.

1st. What is the meaning of the words "*settler or occupant*" as contained in the 4th section of the Act of Sept. 27, 1850.

The principal and effective words of the act of May 29. 1830, are "*settler or occupant, who is now in possession, and cultivated*," &c. Those of July 14, 1832, are "*occupants and settlers upon public lands*" &c. Those of June 19, 1834, are "*settler or occupant of the public lands*," &c., "*who is now in possession, and cultivated any part thereof*," &c. Those of the act of Sept. 27, 1850, are "*settler or occupant*" &c., "*who shall have resided upon and cultivated the same for four consecutive years*," &c.

When the words of a law are capable of two or more different senses, what has been spoken or written by the same law maker, upon some other occasion, is a circumstance which may assist in the explanation of the words which in themselves leave his meaning doubtful. But whenever we refer to the language of a law maker on one occasion, as a means of interpreting language used by him at another time, it is necessary to show that the writing, and what we so allege, have some connexion with one another. The origin of what has been spoken or written by the law maker, upon some other occasion, makes it a circumstance of the law in question, they had both the same origin, and are connected with one another by coming from the same source. The acts of Congress now the subject of comparison with a view to the meaning of so much of the act of Sept 27, 1850, as is contemplated by the questions propounded to me. All have their origin in a desire of the general government to confer special favors upon the early settlers of new countries, by enabling them to acquire a title to a portion of the public lands upon easy terms. By the common rule of construction, all statutes upon the same subject, or in *pari materia*, are considered as making one system of law, and must be construed in reference to each other. The Attorney General of the United States in his opinion of Dec. 31, 1836, already cited, has declared that all laws upon the subject of public lands are in *pari materia*, and that no one of these acts is to be construed strictly upon its own letter.

In doubtful statutes, it is reasonable to presume, that the same law making power is always in the same mind where nothing appears to the contrary; that whatever was his design at one time, the same is likewise his design at another time, where no sufficient reason can be produced to prove an alteration of it. An example of this alteration in the mind of the Legislator is found in the 10th section of the act of Sept. 4, 1841. The principal effective words of this act are "*a settlement in person on the public lands*," &c., and "*who shall inhabit and improve the same*." But similar words which taken by themselves, conveyed the idea of not only cultivation but of an actual and personal residence on the land cultivated, and no where else, had been used in the acts of 1830 and 1832, and 1834. These acts were construed by the Com. of the General Land office, and by the Attorney General, as not really requiring an actual residence on the land. This was probably in accordance with the intention of Congress when they passed these acts. But the intention of that body was not the same when it passed the act of 1841. To express this intention therefore, they expressly declare that "*no person who shall quit or abandon his residence on his own land to reside on the public lands* [illegible] *or territory, shall acquire any right of pre-emption under this act*." This express manifestation of the will of Congress was necessary, because the principal and effective words of the act of 1841 being in some degree similar to those found in the acts of 1830, 1832 and 1834, without a clear manifestation of intention to the contrary, the presumption might have been that the sense in which they used the words "a settlement in person on the public lands," &c., and "who shall inhabit and improve the same," &c., was that which the Attorney General and the Commissioner of the General Land office had, in the discharge of their official duties, applied to somewhat similar words in the other acts.

If in reading the work of an author, whether ancient or modern, we meet with a passage which is of doubtful meaning, we usually make him, if we can, a commentator upon himself, by comparing this with some other passage in his writings. And whatever we find to have been his meaning, where he speaks plainly, we conclude to have been likewise his meaning where he speaks doubtfully. Adopting this well settled rule of construction, and keeping in mind that the acts of 1830, 1832, 1834, and 1850 are in *pari materia*, we cannot long be in doubt as to the meaning of the words "settler or occupant" as they occur in the 4th section of the act of Sept. 27, 1850. The act of 1830, is entitled "An Act to grant pre-emption rights to settlers *on* the public lands," not *of* the public lands. The act 1832, was an act entitled "An act supplemental to an act granting the right of pre-emption to settlers *on* the public lands," &c. The act of 1834 was an act entitled "An act to revive the act entitled 'An act to grant pre-emption rights to settlers *on* the public lands." The first enacting clause of the act of 1830, like that of 1834 and 1850, commences with the phrase, "every settler or occupant of the public lands."—The Secretary of the Treasury, Hon. Levi Woodbury, submitted the following question, under the acts of 1830 and 1834, to the Hon. B. F. Butler, Attorney General of the United States:—"Whether individuals residing *without* the land district, or in a *distant* part of the State, and claiming pre-emption in virtue of the occupancy and cultivation of others, placed on the public lands as *tenants*, are entitled to pre-emption in any case?"

The Attorney General in reply [illegible] 29, 1837, says [illegible] and those only, as "*settlers or occupants*," within the meaning of the law, who either—

"1. Personally cultivate and reside on the public lands; or

"2. Personally cultivate, use, and manage, the public lands."

"In other words, I regard the words "settler" and "occupant," as used synonymously; and I think it necessary, in order to constitute either a "settler" or "occupant" within the meaning of the law, that the party shall have a direct *personal* connexion with the land claimed by him."

"Residence or inhabitancy on the land, in addition to cultivation, is the highest degree of such personal connexion of which the subject is susceptible; but I have not supposed that *actual residence or inhabitancy* on the land was indispensable. A single man, by personal labor, may make an improvement on a particular quarter section, and reduce it to cultivation; but although he may board and lodge elsewhere, such a person, in my opinion, may well be regarded as a *settler* and *occupant* of the public lands. So, too, may the head of a family, *whose dwelling is not on the public land*, but who actually improves and cultivates a tract of public land by the application of his personal labor, and the labor of his family, or by the application of the labor of his family alone, under his immediate personal direction.—In his *family*, I mean to include domestic servants and hired men, and where slavery is authorized, slaves."

"So far as regards the labor of all such persons, I think that when applied to the improvement and cultivation of the public lands, it should be deemed the labor of the head of the family, and that he is entitled, for all the purposes of the pre-emption laws, to the benefit of the maxim "*qui facit per alium, facit per se*."

The above opinion of the Attorney General, who was the authorized interpreter of the law, furnishes an answer to the first question as to who are "settlers or occupants" within the meaning of all our land laws containing these words. It produced a corresponding practice under these laws, because the opinion of the Attorney General was an authentic and authoritative interpretation of them. This being the sense in which the words "settler or occupant" were used by those who made the laws of 1830, 1832 and 1834, is conclusive evidence to show in what sense the same words were used in the Oregon Land Bill by those who made it, and who had the best opportunity of knowing the true sense.

It will be observed, that under this decision, an actual or personal residence on the land is not necessary to constitute a claimant a "settler or occupant," of the public lands;" but," in the language of the Attorney General, "with cultivation, is in the highest degree evidence of personal connexion." Another, and lower degree, however, would be where a man sends his son to cultivate. Another degree of such evidence would be where he sends a hired man to do it. Another degree would be where he places a tenant upon the land.

But this question was made in another case. An officer of the army of the United States, who in 1833–34 was in actual service at Chicago, claimed a quarter section of land in the vicinity of that post, under the pre-emption law of the 19th of June, 1834. The law having been complied with in other respects, the question was submitted to Attorney General B. F. Butler, whether under such circumstances, the officer could be considered a "settler or occupant," within the meaning of the law. To this question he replied, January 19, 1839, that "As the law embraces "every settler or occupant of the public lands," and contains nothing to exclude persons of any profession, I do not see any sufficient legal ground for rejecting the claim."

Again, the Commissioner of the General Land office, in a letter to the Register and Receiver at Tiffin, Ohio, under date of April 19th, 1839, says:—"Occupancy, in law, is thus defined: Where a man finds a piece of land which no other possesses, and enters upon the same, this gains a property, and has a title by occupancy." An *occupant* is he that *occupies or takes possession*, or that has possession." "What is possession?" This is used in the act as the synonyme of occupancy, and is thus defined: the having, holding of property—occupancy. Actual residence, therefore, is not deemed essential to a person's thus possessing and holding lands," under the act of May 29, 1830, which uses the words "settler or occupant."

The second question to which I am desired to give an answer is the following:

Whether the words "and who shall have resided upon and cultivated the same for four years," &c., requires an actual residence on the land as indispensable to entitle the claimant to demand a patent?

I understand the object of the inquiry to be, to know whether the claimant is required to reside in person on the estate.

I regard the principles of the foregoing opinions of the Attorney General as answering the question in the negative. But as the subject is not without its difficulties, and as much property may depend upon a proper understanding of the import [illegible], I shall examine the subject more at large, and cite such authorities, and offer such reasons in addition to the foregoing, as have inclined me to the opinion that the words do not require a personal residence.

The word settle, from which is derived the word "settler," as used in the 4th section of the act of Sept. 27, 1850, is generally used as the synonyme of reside, from which is derived the word "resided" in the same section. *Set*, (from the Latin *sedeo*), means to put or place, to cause to rest, to fix in any situation.

Settle, (from *set*) to place in a permanent condition after wandering or fluctuation.

Settler, one who places in a permanent condition, &c., after wandering or fluctuation.

Reside, from the Latin *resideo, resido, re* and *sedeo*, to sit, to settle.

These definitions are strictly correct, and they show that the word "settler" is the synonyme of "resident," or at least very nearly so. I say very nearly so, because although a resident is a settler, yet a settler is not in *every* sense a resident, although he is so in many of the forms of speech in which that word is used.

The principle and effective words now under consideration are "every settler or occupant of the public lands, who shall have resided upon and cultivated the same four consecutive years." These words then, of the 4th section of the act of Sept. 27, 1850, if the foregoing definitions are correct, mean "every settler or occupant of the public lands, who shall have settled upon and cultivated the same four consecutive years" &c.

The 7th section of the act provides,—"That within twelve months after the surveys have been made, or where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act, shall prove to the satisfaction of the Surveyor General, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been *commenced*, specifying the time of commencement, and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late Provisional Government or not, shall prove in like manner, by two disinterested witnesses, the fact of *continued* residence and cultivation required by the fourth section of this act," &c. Now, if the words *settlement* and *residence* are used synonymously in this act, as I believe I have shown them to be, then the object of the foregoing provision of the 7th section was

1st. To require the claimant within twelve months after the survey has been made, or where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, to prove that the settlement and cultivation had been commenced. The proof of settlement was to show that the land in question was the particular tract claimed. To render that certain which was before uncertain—to use the language of the definition of the word settle, it was "to place in a permanent condition (the question as to which was his land claim), after wandering or fluctuation;" and the claimant then becomes a settler, or one who places in a permanent condition (the question as to what particular tract he claims) after wandering or fluctuation," or what had been sometimes in doubt or was unknown. The claimant was also required to show, not only that he had made a settlement, but he was [illegible] to prove the commencement of cultivation. This was done, probably, because cultivation was deemed to be among the best evidence of the claimant being a *bona fide* "settler or occupant."

The commencement of the settlement and cultivation being established, the 7th section further provides that at any time after four years from the date of such commencement, the claimant "shall prove in like manner, by two disinterested witnesses the fact of continued residence (used synonymously with settlement) and cultivation."

Residence here is used as the synonyme of settlement. And the object of the whole provision was to require *proof*, not only of the commencement of settlement and cultivation, but that that settlement and cultivation had been *continued* four consecutive years. Had the law, instead of using the words "who shall have resided upon and cultivated the same four consecutive years," as they occur in the 4th section, used the words "*actually* resided upon and cultivated the same for four consecutive years" &c., or had the language of the 7th section been, "shall prove in like manner, by two disinterested witnesses, the fact of continued actual residence and cultivation" &c., still the claimant would bring himself within the meaning of the law by proving that another man lived on the land, who cultivated it for the proprietor four years consecutively. That it may be seen that I am not speaking rashly, I cite as authorities in support of this position the case of *Henderson vs. Poindexter*, 12. *Wheat.* 530, and *Hickie et al vs. Starkie et al.* 1. *Pet.* 94. The latter case was a writ of error, to decree pronounced in the court of the last resort, by the State of Mississippi, directing the plaintiffs in error to convey to defendants, a certain tract of land, in the said proceedings mentioned. The plaintiffs in error alleged, that their title was secured by the compact entered into between the United States and Georgia, for the cession of the country in which the land was situated, and that the decree was in violation of that compact. The condition in the Cession Act, on which the plaintiffs in error relied, is in these words:—"That all persons, who on the 27th day of October 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants, legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain."

Chief Justice Marshall, in delivering the opinion of the Court, said:—"The plaintiffs produce a grant, legally and fully executed; but to bring the case under the treaty, they must also prove, that the ancestor or person under whom they claim, was an actual settler, on the 27th day of October 1795. The answer asserts, that the warrant of survey issued on the 27th day of February 1793, and the survey made on the 20th of July, in the same year, when possession was taken; and that the patent issued on the 3d of April 1794. James Williams deposes, that about the 3d of December 1795, he took possession of the tract of land in dispute, as overseer for James Mather (the person under and through whom the plaintiffs in error claim), the patentee, and understood from him, that he had gone to Natchez sometime before, to apply for land in the part of the country where the tract in controversy lies. This is the testimony furnished by the record, to prove that James Mather, the grantee, was an *actual settler* according to the requisition of the Cession Act of Georgia. In Henderson vs. Poindexter, 12 *Wheat.* 530, the term "actual settler" seems to have been understood as synonymous with the resident of the country. The case did not however require that the precise meaning of the term should be fixed, and the court is disposed to think, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor, should not reside in person on the estate, or within the territory. Had the settlement proved by Williams, been made at the day required by the Cession Act, it would, we think, have satisfied the requisition of that Act, and entitled the plaintiffs in error to the benefit of the condition."

This decision of Chief Justice Marshall is authoritative and conclusive upon the subject, because it was made in a tribunal of the last resort, and because moreover it was enunciated by a sage of the law whose hasty conclusions, to say nothing of his labored and learned expositions, command more respect, than the well considered opinions of almost any other man. The decision proceeded upon the maxim *Qui per alium facit per se* [illegible]. He who does an act through the medium of another party is in law considered as doing it himself. [illegible] Cession Act [illegible] residence, than it [illegible] in words any thing to prevent the claimant under the Act of Sept. [illegible] may bring himself within [illegible] proving, in the very language of [illegible] Justice Marshall, "a settlement made on the land by another person, who cultivated it for the proprietor." And this [illegible] "would be sufficient, though the proprietor should not reside in person on the estate, or within the territory."

I cannot imagine a case more directly in point than that just cited. The question was made and decided in the highest judicial tribunal of the nation, and the judgment was announced by a judge whose wisdom was regarded [illegible] and whose decisions [illegible] most profound respect by both the bench and bar throughout the whole [illegible] world. This being a [illegible] on a point of law, [illegible] because an authority [illegible] cause it is the highest [illegible] can have of the law [illegible] ject, and the [illegible] all judges are bound [illegible] notoriety [illegible] profession [illegible] those who consult them. If judicial decisions were to be lightly regarded, we should disturb and unsettle the great landmarks of property (16 John. Rep. [illegible] Id. 722. Lord Chancellor [illegible] Wm. 452. Ashhurst, J. 7 Term [illegible] Tenterden, 3 B & Adolph 17. [illegible] 8 Bingham, 586. Cowen, J., 20 W[illegible] Rep. 341. 1. Kent Com. 476.) [illegible] Jones (Essay on Bailments, p. 46), [illegible] "No man who is not a lawyer, would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate."

That there is such a thing as an implied residence, as well as an actual residence, and that a man may be a resident by the residence of his agent. See 1. [illegible] Com., p. 77.

In reply, then, to the second question, I answer that the words "and who shall have resided upon and cultivated the same for four consecutive years" in the 4th section do not require an actual and personal residence, in order to give the claimant a right to demand a patent; but that a settlement made on the land by another person or persons, who, during four years live on and cultivate the land for the proprietor, would be sufficient. This [illegible] at least is clearly within Chief Justice Marshall's decision and the principle on which it proceeded, *Qui facit per alium facit per se*.

In answer to the third question, I [illegible] that I believe that a claimant whose dwelling is not on the land, but who improves and cultivates by the application of his personal labor, or by that of his hired men, or a member of his family, can demand a patent at the expiration of four years. At least such a claimant is a "settler or occupant" within the meaning of the act of May 29, 1830, and that of June 1834, (see already cited and quoted opinion of Attorney General B. F. Butler, March 29, 1837.) The title of the act of 1830 is as follows:—"An Act to grant pre-emption rights to settlers on the public lands," not of the public [illegible] though the word "occupant" [illegible] in the title, yet the [illegible] statute were not construed [illegible] it of liberality which [illegible] pass the law granting [illegible] would necessarily [illegible] tler" to one who [illegible] resided on the public [illegible] acting clause of the Act of 1834, commence [illegible] "every settler or occupant [illegible] we have seen that [illegible] and phrases in [illegible] construed, [illegible] residence or inhabitancy [illegible]