SUPREME COURT OPENS WAY TO DISTRIBUTION OF O.-C. LAND ACREAGE

Settlement of Vast Areas in the State of Oregon Is Believed Finally to Be in Sight

S. P. RAILROAD BALKED

Final Opinion in Litigation Over Rights of Domain Sets Up Rule That Bars Railroad.

Washington, April 30.—(WASHINGTON BUREAU OF THE JOURNAL.)—The supreme court opinion in the Oregon & California land grant case is believed to put an end to efforts by the Southern Pacific company to obstruct the disposition of the lands under the Chamberlain-Ferris act, which, the court says, is the "execution of its judgment."

Taxes can now be paid, the classification of the lands completed, and settlement of the agricultural tracts speeded up.

The opinion was written by Justice McKenna, the California member of the court, who also penned the first decision of the court. All the justices joined in the opinion except Justice McReynolds, who did not sit in the case because he was attorney general during part of the time the case was pending.

Intervenors Disposed Of.

The cross-complainants and intervenors, the settlers and applicants to purchase, are disposed of in a footnote which says:

"There were cross-complainants and interveners, the first asserting that the provisos created trusts in favor of actual settlers, and the second that the trust had the scope of including all persons who desired to make actual settlement upon the lands. The decree of the district court and the decisions here were adverse to both contentions and this case has no further concern with them or with those who made them."

The first part of the opinion consists of a statement of the case, a repetition of familiar history. The court discusses its former judgment, and points out the essential features of District Judge Wolverton's decree. The opinion from that point forward, embracing all of the decision proper, is as follows:

We rejected the contention of the government; we rejected in part the contention of the railroad company, saying:

"Our conclusions, then, on the contentions of the government and the railroad company are that the provisos are not conditions subsequent; that they are covenants and enforcable."

Enforceable Covenants.

But how enforcable? And what was the remedy for breaches?—and breaches there were many, gross and determined. It was certainly not intended to be decided that these breaches, with all of their consequences, were to be put out of view and the railroad company only enjoined against future breaches.

Yet this, in effect, is the contention, and it is attempted to be supported by certain language in the opinion. Before quoting it, we may say in general that much that is cited from it must be considered in reference to the controversies which were presented, and that the granting acts and their provisos were necessarily construed as of the time of their passage.

Action under them and the breaches of them came afterward, and a consideration of the remedies to which the government was entitled. Keeping this comment in mind, we can more easily understand the language of the opinion in description of the grant and in regard to the relief that was awarded the government.

As to the grant, this was said—and it is much insisted on—"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, ar any amount not exceeding 160 acres.'"

Limitations on Railroad.

And we added, "It might choose the time of sale or its use of the grant as a means of credit, subject ultimately to the restrictions imposed"; and we may say, "restrictions imposed" to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos."

This declares the meaning of the words of the acts taken by themselves. It points out the power of the railroad company and that it was "limited only as prescribed" It does not point out the remedy of the government if the limit prescribed was transcended. For that we must look to other parts of the opinion.

We took pains to declare that the principles of the case were "not in great compass," that circumstances had given "perplexity and prolixity to discussion," but had not confused the simple words of the acts of congress regarded either as grants or as laws, and that they were both, and, as both, they conferred rights quite definite and imposed obligations as much so—the first having the means of acquisition; the second to them as laws and the necessity of obedience to them as such, the remission of their obligation to be obtained "through appeal to congress," and not by an evasion of them or a defiance of them.

Evasions Pointed Out.

The evasions and defiance we showed, and the extent to which they transcended the policy and purpose of the government expressed in the covenants. We contrasted the requirements of the grants of a sale to an actual settler of 160 acres (maximum amount) with sales of 1000, 2000, 20,000 and 45,000 acres to single purchasers, and the use of the lands for homes with their use for immediate or speculative purposes.

The relief the government was entitled to, we said, was not satisfied by preserving its rights to the lands sold, and we further said that "an injunction simply against future violations of the covenants, or to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the government."

Disregard of Covenants Alleged.

The reason was expressed. The government alleged that more than 1000 persons had applied to purchase lands from the railroad company in conformity with the covenants. The company, replying, said the applications were not made in good faith for settlement, but for speculation, the lands being valuable only for their timber, and not being fit for settlement, and further alleged that at no time had the lands fit for actual settlement exceeded 300,000 acres, in widely separated tracts, and had been sold during the construction of the road and prior to its completion to actual settlers in the prescribed quantities and at the prescribed price.

We have seen that other sales were made in excess of that prescribed by the statute, and not for settlement, at prices from $5 to $40 an acre, and that at the time the answer was filed there remained unsold over 2,000,000 acres, the reasonable value of which was $30,000,000. There was no intimation that the lands did not include the timber, and it was not only recognized, but asserted, that the lands were more valuable for the timber than for settlement.

Legislation Recommended.

Our judgment took care of the situation. It preserved the remedies of the government for past violations of the granting acts and recognized that new dispositions were necessary to secure the rights that had accrued to the government. We said that, owing to the "conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon and from cutting and removing any of the timber thereon, until congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads."

The design of this and its adequacy would seem to need no comment. It was intended to be a guide to the district court—indeed, a direction of the decree of the court. The decree complied with the direction. (See Southern Oregon Co. vs. U. S., Circuit Court of Appeals, Ninth Circuit, decided Feb. 13, 1917).

Congress Takes Action.

Congress, in execution of the policy it deemed fitting under the circumstances, as expressed in our opinion, enacted what is called the Chamberlain-Ferris act. The validity of the act is challenged, and both sides invite a determination of the challenge. The validity of the law may be said not to be involved.

The appeal is from the decree, and that being determined to be right, the appeal, it may be urged, is satisfied, the questions it presents decided. It, however, may be considered important in the execution of the decree, for we have seen that the granting acts were laws, subject to amendment if the right of amendment existed or accrued.

There was a reservation in them of the right of amendment or repeal, and if it could not be exerted to take back what had been granted and had vested, it could be exerted to accomplish the remedy which the court adjudged to the government for the violation by the railroad company of the provisions of the grants.

It is no answer to the exertion of the power and remedy to say that the acts of congress were initially complete and absolute grants. It is to be borne in mind that they carried with them covenants to be performed and necessarily an obligation to perform them, with remedies for breaches of performance.

Such was our judgment, as we have seen, and the judgment was adapted to the conditions created by the breaches, and for this legislation was deemed necessary.

Railroad Rests on Vested Rights.

But the railroad company says the legislation directed was to have its consent, and that such consent "was essential to the valid assumption or alteration of its vested rights," and that this was what this court meant when it said "that any legislation in the premises by congress should 'secure to the defendants all the value the granting acts conferred upon the railroads.'"

We have already answered the contentions.

The railroad company by pushing to view the rights conferred by the granting acts and putting out of view the wrongs committed by it, can easily build an argument upon and invoke the inviolability of vested rights; and to say that its consent was necessary to legislation is to say that it could dictate the remedy for its wrongs, preclude or embarrass the policy of the government.

The interest that the granting acts conferred upon the railroad company was $2.50 an acre. That secured to it "all the value the granting acts conferred" upon it was secured.

It is true it had the right of sale, selection of time and settler. If these were rights, they were also aids to the duty of transmitting the lands to settlers; and the duty having been violated, they became unsuited to the conditions resulting and obstructions to the relief which had accrued to the government.

In other words, by the conduct of the railroad company the policy of the granting acts had become impracticable of performance, and the new conditions, the land inviting more to speculation than to settlement, demanded other provision than that prescribed by the granting acts. This was the declaration and direction of our judgment, and the Chamberlain-Ferris act is the execution of it.

As Regards Union Trust Co.

The Union Trust company was one of the defendants in the suit and is one of the parties here. It was heard by its own counsel at the bar and through brief. In the main its argument is the same as that of the railroad company, varied somewhat in detail, and asserts that it has not only the rights of the railroad, but "in addition and especially, that even if it be possible for the government now to take away rights once conveyed to the railroad, it cannot take them except subject to the lien of the mortgage."

So far as the rights of the trust company coincide with those of the railroad company we have considered them, and they cannot be greater than those of that company. The railroad company, it is true, could use the lands as a basis of credit, but only to the extent of its interest in them, subject to the performance of its obligations and the power of the government to exact their performance.

We were careful to observe this subordination. We expressed the extent of the interest that the railroad company received and that "it might choose the time for selling or its use of the grant as a means of credit," but we also said, "subject ultimately to the restrictions imposed."

And further, we said, "restrictions imposed to reject the contention that an application of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos."

The case was responded to as it was presented and no phase of it was omitted in presentation or response that could influence its judgment. Of what was in the minds of counsel, determining and urging their contentions, of what was in the mind of the court in response to the contentions, the opinion leaves no doubt, and that after the fullest consideration of all that was involved of rights and remedies the judgment was pronounced.

Use and Sale of Timber.

A distinction is now attempted to be made between sale of the lands and use of them, including in the use of them the right to cut the timber upon them and extract minerals from them. Such use, it is asserted, is a necessary incident to ownership and that such use was not intended to be taken away nor could it have been taken away by our judgment.

To answer the contentions would be mere repetition. The distinction now made between the lands and their use is but the contention urged on the first appeal and rejected—that the provisos only applied to lands susceptible of actual settlement and not to timber lands.

The distinction then was between the lands, now between their constituting elements, and for the same reason: To give to the railroad company and the trust company what the granting acts did not give, or, rather, gave for the purpose of transmission to actual settlers. This transmission becoming impracticable, other disposition of the lands, including all that is signified by the word, was adjudged.

The trust company also attacks the Chamberlain-Ferris act and is assisted in the attack by a "friend of the court." The attacks have the same basis as that which we have noticed, that is, the rights of the railroad company are asserted to be vested and inviolable. The contention gets a semblance of strength from the ability of counsel.

To yield to it would be in effect to declare that covenants violated are the same as covenants performed—wrongs done the same as rights exercised—and, by confounding these essential distinctions, give to the transgression of the law what its observance is alone entitled to.

Cost Ruling Overturned.

The concluding paragraph of the opinion holds that the lower court erred in assessing $6,249.02 as costs against the railroad company. The company was obliged to appeal, it says, and the usual rule of taxing costs in favor of the prevailing party does not hold good when the United States is a party to the case.

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