The Liberal Republican.

DALLAS, SATURDAY DEC. 6.

LAMB-DAVENPORT DECISION.

Mr. Justice Miller delivered the opinion of the Court.

The bill in this case was filed in the Circuit Court for the District of Oregon by the present appellants, who claim an interest in the property as heirs of Daniel Lownsdale against other heirs of Lownsdale, for a partition of lots two, five, six, and seven, of block thirteen, of the city of Portland. The appellee, Davenport, who was in possession of the lots, and claimed to own them, was made a defendant on that account, In the progress of the suit, Davenport filed a cross-bill, in which, while admitting the legal title to the lots to be in the plaintiffs and the other heirs of Lownsdale before the Court, he asserted that he was the rightful and equitable owner of them, and prayed for a decree against the heirs of Lownsdale for a conveyance of the title.

The Court decreed as prayed by Davenport, and plaintiffs in the original bill bring this appeal.

The tract of land which includes the lots in controversy, was claimed by Lownsdale under the act of Congress called the Oregon Donation Act, passed September 27, 1850, 9 U. S. Statutes, 496; and a patent certificate issued to him in his lifetime. But before the patent was issued, both he and his wife died, and under the general act of Congress, applicable to such cases, the title vested in the Lownsdale heirs when the patent was delivered. There is, therefore, no question that at the commencement of the suit the legal title to the lots was in the appellees, the heirs of Lownsdale.

The equity which Davenport sets up in his cross-bill, arises from transactions antecedent to the issue of the patent certificate of Lownsdale, and indeed antecedent to the enactment of the donation law by Congress, under which Lownsdale's title originated.

It is not necessary to recite in this opinion all of those transactions It is sufficient here to say that several years before that act was passed, and before any act of Congress existed by which title to the land could be acquired, settlement on and cultivation of a large tract of land which includes the lots in controversy, had been made, and a town laid off into lots, and lots sold, and that these are a part of the present city of Portland. Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known and undisputed. But it was equally well known that these possessory rights and improvements placed on the soil, were by the policy of the Government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the Government, and its disposition to protect meritorious and actual setlers, who were the pioneers of emigration in the new territories, gave a decided and well-understood value to these claims. They were the subject of bargain and sale, and, as among the parties to such contracts they were valid. The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is acknowledged; but subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress had imposed restrictions on such contracts. (Sparrow vs Strong, 3 Wall, 97; Myers vs Croft, 13 Wall, 299; Davenport vs Lamb, 13 Wall, 418; Thredgill vs Pintard, 12 How., 24.)

Acting on these principles, the tract of land in question, valuable as a town site, seems to have become the subject of controversies, and of contracts and agreements, which culminated in an amicable arrangemement between Lownsdale, Coffin and Chapman, by which the rights of each were recognized and adjusted among themselves. The first of these agreements, reduced to writing and found in the record, was made before the passage of the donation law. The last seems to have been made in consequence of that enactment, and was evidently designed to give effect to their previous compromise agreements, to enable each to acquire under that act the title to the property, according to those agreements, and to protect each other and their vendees when the title should have been so acquired. We are satisfied that by the true intent and meaning of these agreements the equitable right to all the lots in conroversy had been transferred by Lownsdale to Coffin before the passage of the donation act, and that, as between Lownsdale, Coffin and Chapman, the equitable interest, such as we have described it, of the lots in controversy, was in Coffin or his vendees.

The record shows that this interest or claim, whatever it was, at the commencement of this suit was vested in Davenport, while the legal title was in the heirs of Lownsdale.

According to well settled principles of equity often asserted by this Court, Davenport is entitled to the conveyance of this title from those heirs, unless some exceptional reason is found to the contrary.

Counsel for appellants urge two propositions as inconsistent with this claim of right on behalf of Davenport.

1. It is said that the proviso to the fourth section of the donation act renders void the agreements between Lownsdale, Coffin and Chapman. The proviso referred to declares that all future contracts by any person or persons entitled to the benefit of this act for the sale of the land to which he may be entitled under the act before he or they have received a patent therefor, shall be void. The act was on its face intended to cover settlements already made, and the careful limitation of the proviso to *future* contracts of sale, that is, sales made after the passage of the act, raises a strong implication of the validity of such contracts made before the passage of the statute. It was well known that many actual settlers held under such contracts, and while Congress intended to protect the donee from future improvident sales, it left contracts already made undisturbed.

But counsel, resting solely on the latest written agreement between Lownsdale, Coffin and Chapman, insists that it was void because made after the donation act was passed.

That agreement was only designed to give effect to the previous contracts on the same subject, and is in accord with the spirit of the proviso. And if this latter agreement is rejected as altogether void, it is still apparent that by the contracts made prior to the donation act, the equitable right of Coffin to these lots is sufficiently established.

The same error is found in the argument that two of the lots in controversy were sold by Coffin after the passage of that act, and the sale is therefore, void. The answer is that Coffin is not the donee who takes title under the act of Congress, but Lownsdale, and Lownsdale had made a valid agreement by which his interest in them was transferred to Coffin, before that statute was passed.

2. The donation act provides that where the settler has a wife, the quantity of land granted is double that to a single man, and that one half of it shall be set apart to the wife by the Surveyor-General, and the title to it vests in her, and if either of them shall have died before the patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased.

Lownsdale's wife died first, and both before the patent issued. But prior to the death of either, Mrs. Lownsdale's half had been set apart to her, and did not include the lots now in controversy. It is said that the title vested in the heirs of Lownsdale under the peculiar provision of this statute, is one of purchase and not of inheritance, and that it comes to them directly from the Government divested of any claim of third parties under Lownsdale.

This proposition was much discussed in the case of Davenport vs Lamb, 13 Wallace, 418, already cited, but the court did not then find it necessary to decide it, as the only parties who were entitled to raise the question had not appealed from the decree of the Circuit Court.

Nor do we propose to decide now whether the title in the hand of the children and heirs of Daniel Lownsdale would be liable for his debts, or to what extent that title might be affected by the contracts of Lownsdale, concerning the land itself, made *after* the passage of the donation act, or after his assertion of claim under it. Nor do we decide whether the interest in the wife's share of the land which came to him by survivorship, would be affected by any contract of his or hers, made before her death at any time.

But we hold that as to the portion of the land which was alloted to him by the Surveyor-General, and the title of which vests in his heirs by the act of 1836, 5 U. S. Statutes, 31, without which the patent would be void, his contract of sale made before the donation act was passed, and while he was the owner of the possessory interest before described, was a valid contract, intentionally protected by the donation act itself, and binding on the title which comes to his heirs by reason of his death.

These considerations dispose of the case before us, and the decree of the Circuit Court is accordingly affirmed.

LEGAL ADVERTISEMENT.

SHERIFF'S SALE.

BY VIRTUE OF THE WARRANT appended to the delinquent tax roll of the County of Polk and State of Oregon for the year 1872 to me directed and commanding me that of the effects of the delinquent tax payer thereon named to collect the taxes due said County and State for said years of 1871 and 1872 and make due return thereof.

I have this day levied upon and will on MONDAY THE

8TH DAY OF DECEMBER 1873,

between the hours of 10 o'lock A. M, and 4 o'clock P. M., on said day, in front of the Court House door in Dallas, said County and State to the highest and best bidder for cash in hand sell at public auction the following parts and parcels of real estate to satisfy the taxes theron as hereafter appear, and for cost of and upon this execution to wit. The following to satisfy the taxes theron for eighteen hundred and seventy two the same being returned as the property of Ben Simpson.

All of the donation land claim of Thos H Hunsaker and Jane Hunsaker his wife being claim Number (71) seventy one Notification five thousand and sixty one and being situated in Township 6 South, Range 6 and 7 West Willamette Merridian Polk County Oregon and containing six hundred and forty acres of land.

Also all of the North East quarter of section twenty five Township six South, Range seven West and fifty one acres of the West end of the North West quarter of Section thirty in Township six south, Range6 West of Willamette merridian Polk County Oregon.

Also all of the following described premises to wit beginning at a post on the Western boundary of Jacob Doran land claim running thence west (80) eighty Chains thence North (40) forty chains thence East [80] eighty chains thence South (40) forty chains to the place of Beginning containing three hundred and twenty acres lying in section twenty six Township six South, Range seven West of the Willamette Merridian Polk County, Oregon. Amount of tax $66 56 with costs.

And the following described lands the same being returned by assessor as the property of Harlow Barney. Beginning at a post (7.70) seven and seventy one hundredths chains East and (15.50) fifteen and fifty one hundredth chains South of the North East quarter of section sixteen in Township seven South Range five west of the Willamette Merridian Thence North [9.60] nine and sixty one hundredths chains Thence West [87.50] eigty seven and fifty one hundredths chains Thence South [49.15] forty nine and fifteen one hondredths chains Thence East [47] forty seven chains Thence South [39.85] thirty nine and eighty five one hundredths chains Thence East (80) eighty chains Thence North [80] eighty chains Thence West [38.63] thirty eighty and sixty three one hundredths chains to the place of beginning containing (913.94) nine hundred and twelve and nine four one hundredths acres of land Also the following Premises to wit: The West half the Donation Land Estate of John H. Nichlon and wife the same having been purchased by said Barney from E, A. Graham and wife as appear upon record of said Polk County the same tobe more particularly described in certificate of sale Amount of tax $95 26 with costs.

All the above land to be sold subject to redemption as the law directs.

Dated at Dallas this 6th day of November A D 1873,

S. T. BURCH,
Sheriff of Polk County Orgon.
Nov8 4w 73.

ESRAY NOTICE.

TAKEN UP BY THE UNDERSIGNED, living three miles west of Independence, one Bay Mare, with small star in forehead with several saddle marks, left hind foot white, some white on right forefoot, right hip crooked down, supposed to be about eight years old, is very breachy. The owner is requested to call immdiately, prove property, pay all charges, and take the property.

A, NELSON,

September 20, 1873.

Appraised by J. A. Dempsey Justice of the peace, at $20. This 5th day of November, 1873.
Nov.15.4w.