THE HERALD.

WEDNESDAY, AUGUST 20, 1890.

W. C. BYRD.
CHAS. W. BYRD. } - - - - - Editors.

AN IMPORTANT DECISION.

UNITED STATES CIRCUIT COURT, DIST. OF OREGON,

Monday, July 28, 1890.

R. F. McConnaughy v. Sylvester Pennoyer, George W. Mcbride, G. W. Webb. No 1798. Suit for an injunction.

1. SUIT AGAINST A STATE: A suit by a citizen of California, to enjoin the presons constituting the board of land commissioners of the State of Oregon, from selling certain swamp lands, claimed by the plaintiff, as forfeited to the State for non-compliance with a condition of a former sale of the same lands by the State to the plaintiff's grantor, is not a suit against the State of Oregon, it appearing that the legislation under which the defendant claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the State with such grantor.

2. CONTRACT FOR SALE OF SWAMP LANDS. An application for the purchase of swamp lands under §3 of the act of October 26, 1870, for the selection and sale of swamp lands from the date of its receipt and filing by the land commissioner, constitutes a contract between the State and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to immediate possession thereof, and on the performance of the conditions subsequent of payment and reclamation, within the terms and requirements of said section, the applicant or his assigns is entitled to a patent therefor.

STATUTES OF OCTOBER 18, 1878, AND FEBRUARY 16, 1887.—Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, when there is no default in the payment of the 20 per centum of the purchase price as provided in said act of 1870, but if it does include such a case then it is unconstitutional and void, as impairing the obligation of the contract of the State with the applicant, which gave him until ninety days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie, to make such payment; and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the 20 per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the twenty per centum was paid when due, according to contract of sale, whether before or after said day in 1879, unconstitutional and void for the same reason.

DEADY, J.

By the act of March 12, 1860, congress granted to the State of Oregon the swamp and overflowed lands within its border.

On October 26, 1870, the legislature passed an act "providing for the selection and sale' of such lands. Sec. L., 54.

By this act it was made the duty of the governor, as land commissioner, to select such lands by means of deputies, who were required to return their selections to the commissioner for examination. Upon the selections being made in any county the commissioner was required to make out, in duplicate, maps thereof, one copy of which was to be filed in the office of the clerk of such county, the date of such filing was to be certified by said clerk to the commissioner, and thereupon the latter was required to give notice of such selection and filing, by publication in a weekly paper published in the county for four successive weeks.

The act also directed the commissioner to sell such lands at a price of not less than $1 per acre in gold coin.

Within 90 days from the date of the notice aforesaid, 20 per centum of the purchase money must be paid to the commission, who shall issue the applicant a receipt therefor." The balance of said purchase money shall be paid and proof of reclamation made within 10 years of said date, when a patent shall issue to applicant; but in default of such proof and payment the land "shall revert to the State and the money paid thereon shall be forfeited."

On October 1878, the selection, location and sale of State lands and the management and disposition of the proceeds arising therefrom, including swamp and overflowed lands, and the express repeal of sundry acts relating thereto; not including the act of 1870. Ses L., 41.

By this act the governor was appointed land comissioner for the State, with power "to locate all the lands to which the State is entitled under the laws of the United States," and the board of commissioners for the sale of school and university lands were authorized to sell the swamp and overflowed lands theretofore and thereafter "selected" not exceeding 320 acres to any one person at not less than $1 dollar per acre.

"All applicants for the purchase of swamp and overflowed lands * * * made previous to this act, which have not been regularly made in accordance with the law, or which were regularly made, and the applicants have not fully complied with the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever."

On February 16, 1887, the legislature passed a act entitled in part, "to declare void certain certificates of sale, and to forfeit certain lands" [Ses. L., 9], the first section of which declares as follows: "That all the certificate of sale issued by the board of commissioners for the sale of school and university lands and for the invesment of the funds arising therefrom, for swamp and overflowed lands on which the 20 per centum of the purchase price was not made prior to January 17, 1879, are hereby declared void and of no force or effect whatever; and said board of commissioners are hereby authorized and directed to cancel said certificates of sale." These certificates of sale are the receipts provided for in the act of 1870.

This suit is brought by the plaintiff, a citizen of California, to restrain the defendants, citizens of Oregon, constituting the board of commissioners of the State, to restrain them from selling certain swamp lands claimed by the plaintiff as having reverted to the State under section 1 of the act of 1887.

The cause was heard on a demurrer to the bill.

From the latter it appears that prior to October 18, 1878, Henry C. Owens had regularly applied, in pursuance of the act of 1870, for the purchase of certain swamp lands, theretofore certified to the State by the secretary of the interior, as swamp and overflowed under said act of 1860, including those now here claimed by the plaintiff; that thereafter, on November 23, 1881, and on April 3, 1884, and prior to the expiration of the ninety days from the date of the public notice provided for in the act of 1870, the said Owens duly paid to the board of land commissioners the 20 per centum, required by said act, on 43,207 60-100 acres of said lands, situated in Lake county, Oregon; that about October 15, 1884, the plaintiff purchased said last mentioned lands from Charles N. Felton, the grantee of Owen, and now occupies the same for hay and pasturage; and that he paid Felton for said land the sum of $30,000, and assumed to pay the State the remainder of the purchase price therefor when it becomes due that said defendants assuming to act as the board of land commissioners, and pretending the certificates of sale issued Owen, are void, for the reason that the twenty per centum of the purchase price was not paid before January 17, 1879, have canceled the same, and have ordered said lands to be sold under the act of 1887, as reverted to the State, and have actually sold about 1000 acres thereof.

It is alleged in the bill that the defendants are acting in this manner without authority of law; that the act of 1887, in so far as it declares the certificates given on the sales of the lands claimed herein by the the plaintiff because the 20 per centum of the purchase price was not paid prior to January 17, 1879, is void and of no effect, because it impairs the obligations of the contract with the State, under which the plaintiff claims for the sale of these lands which are the value of $50,000.

The demurrer of the bill is in substance, that the suit is in effect one against the State and therefore this court is without jurisdiction.

The question, is this a suit against the State, is the question in the case; and this involves the construction and validity of the State legislation on the subject.

Such a suit is forbidden by the Eleventh amendment of the constitution of the United States, which declares—"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

If the legislation under which the defendants assume to act—an act of the State of Oregon—then the defendants stand for and represent the State, which, although not a party on the record, is in substance and effect the real defendant, and therefore the suit is fobidden by the Eleventh amendment, otherwise not.

The experience of a century and more, has demonstrated that but for this wholesome restraint on the action of State legislatures, a contract with a State would be subject to modification or revision with every whim of public opinion or gust of popular passion.

In conclusion, the act of 1878, does not authorize the board to treat this land as reverted to the state, because the 26 per centum of the purchase price was not paid before it took effect, and would be unconstitutional and void if it did. The percentum was duly paid and accepted by the board when it was due.

This being so the defendants are acting without the authority of law—without the authority of the State They do not represent the State. The State is not a party to this suit either on the record or in substance or effect, and therefore the court has jurisdiction of the same, as a suit between private persons, who who are citizens of different State

The plaintiff is entitled to a perpetual injunction against the defendants and for costs.

Mr. Charles B. Bellinger, for the plaintiff.

Mr. Lewis L. McArthur, for the defendant.—Extracts from Oregonian.

HERALD'S WASHINGTON LETTER.

WASHINGTON, D. C., Aug. 13th, 1890.

Mr. Harrison will to-morrow leave for Boston where he hopes to make himself solid with the G. A. R., at its annual encampment. But perhaps a gentleman named Alger may have something to say about that. Several members of the Cabinet will go along to help their chief.

The River and Harber bill, by previous agreement, displaced the Tariff bill in the Senate to-day.

Speaker Reed will have many things to account for in the general day of reckoning, which comes to all men; but if he persists in his efforts to prevent an appropriation being made to erect a new Government printing office, and an accident occurs, and it is liable any time, in the present death trap resulting in the loss of many precious lives, that will be the most terrible of all. The old building now used has been pronounced dangerous to health and life by every competent architect who has examined it, and there have been a number of them. Its floors settle as much as three inches when heavily loaded, as they are almost constantly; its walls have cracks in them big enough to put a base ball into, and the whole structure shakes and shivers at every revolution of the machinery, and yet more than 2,000 men and women engaged in working for this great and wealthy Government are compelled to take their lives in their hands by working daily in this building. The Senate passed an amendment to an appropriation bill providing for a new building; but, by order of Speaker Reed the House refused to concur.

The subject of most interest before the lower house of Congress at present, is the code of Rules, for the government of that body.

The reply of Mr. Breckinridge to Gen. Henderson caused quite a sensation in the House, not only for what he said, but by his ability to attract ones attention. He said that friction between the Speaker and the members of the House had been predicted when the new code of Rules was adopted. He was not now surprised when the Speaker's partiality was called in question. But the true judgement of the country would be, that however well the Rules might produce political legislation, they had failed as to that great domain of legislation which lay outside of the fierce contest of party. They might carry through a jug-handled Tariff bill, but they did not carry through the general appropriation bills, necessary for the sustainance of the government. The majority, under these Rules, might put upon the statute books a force bill, iniquitous in its provisions and infamous in its object; but it could not obtain the commendation of the people for its action on the general legislation of the government. The force bill could not escape the fierce criticisms of the people; for on account of the absence of discussion of all matters of general importance in Congress there was necessity for discussion elsewhere in the press, at the fireside and the assemblages of the people. Of the bills which had passed under the Rules of the House few had become laws, and few of those which had, would, in his opinion, remain long upon the statute books.

There was great laughter in the House when he contrasted the difference of the ruling by Speaker Reed and those of Mr Carlisle and Randall.

He said that he had no criticism to make upon the Speaker. If the gentlemen, on the other side were satisfied with that officer "heaven forbid" that he should remove that satisfaction. If they were willing to accept the Speaker as a fair type of their party he would enter no dissent. The Spaaker had won his supremacy. He had exercised that supremacy. He had been the republican leader on the floor. The republicans had made him their leader in the chair, and he had exercised that leader-ship.

Mr. Peters, also protested against disturbing old issues and bringing, and creating a state of irritation in that deliberative body. Amongst other things this republican Representative said: "Why stir up these animosities? Why bring up these unpleasant questions that divide parties and separate the north from the south," (as if the democrats did it.) He was followed by Mr. Bouelle, in an effort to fawn like a hound before the speaker, and pretend to defend him; but every thing he said was too sickly, too be-scattered, too tiresome to write about, and was even too weakly delivered to listen to.

It is said that the Star-eyed Goddess looks seventeen years younger than she did before Secretary Blaine wrote his reciprocity letter.

Mr. McKinley's heart is swollen and sore, and his epiglottis sinks down with a pop, when he sees Mr. Blaine coming. The handwriting is on the wall in Kansas, in letters six yards high, and no higher than they are thick, and it has been observed by Senator Plumb after the people of that State took him by the nose and turned his eyes in the direction of the awful inscription.

Crop-Weather Bulletin No 22

Of the Oregon Weather bureau, cooperating with U. S. Signal Service Central Office Portland, Oregon. For the week ending Saturday, August 9th, 1890.

WEATHER.

The dry season continues. There has been an entire absence of rainfall throughout the state. The temperature has been slightly lower than usual at this season, ranging from 45 to 90 degrees. The mornings have been generally cloudy or partly cloudy, the afternoons cloudless and fresh north winds prevailed.

CROPS.

The weather conditions have been favorable to harvesting operations which continue. The fall wheat is nearly all cut and considerable of it has been threshed. The late sown spring wheat is almost ripe and promises a much larger yield that was expected. For the fall wheat it is simply maghificent. The berry is large, plump and dry and has exceeded all expectations. The yield bids fair to be the largest ever harvested. Columbia county reports say that the crop prospects are unprecedented in the annals of the county. The muskmelon crop of Washing county will not be as large as last years. Yamhill county sends in reports of a fine yield. Tillamook county reports the hay, barley and oat crop good. Polk county reports yields of 45 bushels per acre of No. 1 quality of wheat. Marion county has more than an average wheat crop, and it is freer from foreign matter than for many years. Benton, Linn and other valley counties report fine yields, some as high as 42 bushels per acre. At Albany some wheat has been sold for 64cts. and a small quantity of extra choice for 69cts. In Douglas and other counties of southern Oregon the wheat and other crops are turning out well, at Roseburg samples of club wheat showed from 100 to 105 grains to the head, and 75 bushels per acre is expected. Wasco, Sherman, Gilliam and Morrow counties have more than average yields, in these counties the berry is not so large and plump, as a tule, as in others. Umatilla and Union counties still claim to have one of the largest crops ever gathered and the threshing reports appear to justify the claim. In Wallowa, Baker and counties to the south the crops are fine. Yields more than average. Barley yields of 60 bushels per acre are reported from Crook county and 45 bushels of oats per acre is reported from Klamath county. The hay harvest through the stock country was good and there is more than enough hay for any demands. The second hay crop is being cut in some sections. Hops and fruit continue prrmising well.

B. S. PAGUE,
Observer, U. S. Signal Service.

Horses now Training for Burns Races.

John S., bay gelding, 3 yers old, sire, Prince of Norfork; dam, Minnie C. Owned by T. J. Silman.

Emma C., sorral filly, 3 years old, sire, Prince of Norfork, dam, Mollie Stockton. Owned by J. S. Devine.

Steen Mountain Belle, bay filly, 3 years old, sire, Prince of Norfork, dam unknown. Owned by Henry Long.

Cicero, bay gelding, 3 years old, sire, Connor, dam Sagehen. Owned by George Hayes.

The Flood mare, 4 years old, name Mollie B., sire, Connor, dam unknown.

Bay mare, owned by Cutting.

Dandy Jim, a quarter horse.

Split Ear, a quarter horse.

Iron Wood, a half mile horse.

Conswelo, thorough-bred, mile horse.

Harney Humbug, thorough-bred heat horse.

Steen Mountain Swell, thorough-bred heat horse.

The Little Daisy, half mile mare.

Woe Be Gone, quarter horse.

The hue cry about the population of Harney county is all on a false basis. The correct approximated population of that county is 2,525.

J. W. STRANGE,
Supervisor.

The Rev Dr. Talmage is said to have said that he "sees no harm in the sexes bathing together provided the devil does not hold court in the neighborhood." Notwithstanding his divinity the next Sabbath will take his place in the pulpit and tell you in plain words, that the devil is holding court everywhere, and at all times. Hightoned preachers and leading politicians go hand in hand, policy is politics and policy is religion.

The employees on the New York Central railroad struck, August 8. The road is tied up with strikes, and nobody seems to understand the reason why employees leave the trains at the hour appointed without any regard to stopping places. Vice-President Webb on being interviewed by a reporter, said the strikes extended to West Albany and, also, further stated he would fight the strikers to the bitter end. He said the strike was for higher wages, of which he was entirely ignorant at the time; the trains will be running by morning. J. J. Holland, of the excutive board of the Knights of Labor, expressed himself as firmly as did Webb, only that his way of putting it was that the trains would not start for several mornings.—Oregonian.

If any enterprise deserves success it is that of the West Shore. To publish such an elegant, high class illustrated weekly on the Pacific coast must take a greater supply of brains, hard work and perserverance than would be required in the more densely populated portions of the country. West Shore will celebrate its first anniversary as a weeekly by enlarging its page to admit of better artistic effects. This enlargement was made August 16, and the paper, printed in five colors, wil be the peer of any colored illustrated journel in the world. A new department is added for Boys and Girls, conducted by Emily A. Kellogg, a lady well known as a writer for juvenile publications. Ella Higginson, editor of the Woman's Department, has acquired a national reputation as a poet and writer, and her work in her work in West Shore is her best. The original humorous department is contributed to by the brightest wits of the country. Its independent and pithy editorials are giving it an enviable reputation in news paper circles everywhere. The Pacific coast has reason to be proud of West Shore, and it should be found in every house and place of business.

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