The Herald.

WEDNESDAY DECEMBER 1, 1892.

WAGON ROAD CASE.

JUDGE GILBERT'S DECISION.

The Titles Given by the Willamett Valley & Cascade Mountain Wagon Road Company are Good.

(CONTINUED FROM SIXTH PAGE.)

portion of the said road commencing and ending as designated on the map has been completed, as required by the act of congress." This would indicate, from the language used, that there had been no inspection of the road itself, and that the officer certifying declared only what the map expressed. The testimony shows, however, that the governor's agent had caused an inspection of this portion of the road, and that the certificate was made in pursuance of his report. It was the evident intention of the maker of this certificate to certify that the road had been completed according to law. It was so understood and accepted by the wagon road company, and it was so received by the officials of the United States. Moreover, if there were serious defect in its form, the error was subsequently cured by the 'omnibus' certificate issued by the governor in 1871, whereby the completion of the whole road was certified in due form.

The second certificate is alleged to be defective for the reason that instead of certifying that the portion of the road therein referred to has been completed, it states that the governor has "examined and accepted" the same. The difference is one of form and not of substance. The language employed is equivalent to a certificate that the road has been examined and has been approved and accepted, because found to be constructed according to law.

The evidence is clear that the defendants in purchasing the lands in 1871 relied upon the certificates as conclusive evidence that the road had been completed and the land grant earned. There is no evidence that they had notice of any fraud or misrepresentation on the part of the road company, or that any fact came to their notice that would have imposed upon them the duty of examining the road to see whether it had been constructed according to law. The purchase was made without secrecy and after open and extended inquiry as to the value of the lands. The price paid was not disproportionate to the market value of the lands at the time.

The contention of counsel for the United States that the defendants could not have occupied the position of innocent purchasers so long as patent for the land had not issued, is not supported by the authorities. The grant was a grant in praesenti. The language of the granting clause was "that there be and hereby is granted to the state of Oregon." This made it a present grant of an estate in fee upon condition subsequent, notwithstanding the fact that the lands were required to be subsequently selected. U. S. vs W. V. & C. M. W. R. C., 42 Fed., 357; Schulenberg vs. Harriman, 21 Wall, 44; Missouri Ry. Co. vs. Kansas Ry Co., 97 U. S., 491; Van Wyck vs. Knevals, 106 U. S., 360.

Patent was not necessary to convey the title, and when it issued it was only evidence of a title that had already passed. Rutherford vs. Greene's Heirs, 2 Wheat, 196; Wright vs. Roseberry, 121 U. S., 488; Van Wyck vs. Knevals, supra.

The defendants are clearly shown to be bona fide purchasers. As such their rights would be conserved in a court of equity under the general principles of jurisprudence governing the court irrespective of the statute, but in this case congress has seen fit to expressly declare, in the act authorizing the prosecution of the suit, that the interests of all such purchasers, if any there be, shall be protected.

The third defense is also established by the evidence. The act of congress of June 5, 1866, required the completion of the road within five years from that date, and it provided that thereafter no further land should be sold, but that the land then remaining unsold should revert to the United States. Only the grantee could take advantage of the non-performance of this condition subsequent. Until a forfeiture was asserted the title remained unimpaired in the grantee. Here the condition subsequent was attached to a private grant. The forfeiture, instead of being asserted by reentry, or its equivalent, as in the case of a private grant, could only be declared by the judicial proceedings—equivalent to an inquest of office at common law—or by legislative enactment amounting to an assertion of title for breach of the condition. Schulenberg vs. Harriman, 21 Wall., 44; United States vs. Repentigny, 5 Wall., 211.

There was no attempt to demand or claim a forfeiture of this land grant on the part of the United States until congress passed the bill which authorized the prosecution of this suit.

At any time prior to that time the guarantee could lawfully comply with the condition subsequent and thereby defeat the forfeiture. The evidence shows that this was done. In 1887 the whole road was repaired and completed by the erection of bridges and the construction of proper grades. The expenditure for that purpose was $89,000, and there can be no doubt that then, if not before, the road was completed in all respects in compliance with the terms of the granting act.

On exceptions to parts of the answer it was held that the defense of estoppel as pleaded therein was available to these defendants as against the United States, and it was unnecessary here to repeat the reasoning or authorities upon which that conclusion was reached.

It is shown by the evidence that defendants relied upon the action of congress as expressed in the act 1874, directing the issuance of patents, its subsequent treatment of the complaint against the road and its report that no action be taken, the result of the investigation of the secretary of the interior and the subsequent issuance of patents, and that in consequence they altered their relation to the subject matter of this suit by expending large sums in repairing the road, in paying fees to the government, in payment of taxes and expenses in caring for the lands, amounting in the aggregate to $142,315 38.

THE BILL IS DISMISSED.

These facts render it inequitable that the United States should at this late date, and after such long acquiescence and acquiescence, assert title to the lands or claim a forfeiture of the same for a failure to construct the road within five years succeeding the land grant of July 5, 1866. The bill will therefore be dismissed.—Oregonian.

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