

DEPARTMENT OF THE INTERIOR.

Washington, D.C., March 28, 1895.  
Willamette Valley and Cascade Mountain Wagon Road Co. v George W. Hagan.  
The Commissioner of the General Land Office,

Sir: This case comes before the department on the appeal of the Willamette Valley and Cascade Mountain Wagon Road Company from the decision of your office of November 16, 1893, rejecting the claim of said company to the N.  $\frac{1}{4}$  of the NE  $\frac{1}{4}$  and the NE  $\frac{1}{4}$  of the NW  $\frac{1}{4}$  Sec. 19, T. 16 S., R. 19 E., The Dalles, Oregon.

Upon the application of the company, I have considered with this appeal the cases of Edward R. Taylor and George L. Myers, now pending on the several appeals by said company from the decision of your office rejecting the claim of the company to the tracts involved therein, it being alleged that every important principle controlling the adjustment of this grant is involved in one or the other of said cases.

There are practically but two questions presented by these several appeals:

First, as to when the right of the company attaches to the odd sections granted.

Second, as to when the withdrawal for the benefit of the road becomes effective, and whether any claim to any of the odd sections withdrawn can be perfected as against the right of the company that was not initiated prior to the date of said withdrawal.

It is contended by the company that when the route of the road was definitely fixed, the granting act withdrew from entry every odd section within six miles on each side of the road, which was not expressly excepted or reserved by the grant, and that thereafter no right of pre-emption or homestead right could be subsequently acquired to any of the tracts withdrawn.

The position of counsel is predicted upon the theory that the act of July 5, 1866 (14 Stat., 89) making the grant to aid in the construction of this road, created a tenancy in common between the United States and the State of Oregon as to all of the odd sections within the limits of the grant, and that when the road was definitely fixed, there vested in the grantor and grantee, as tenants in common, the title to every odd section within the limits of six miles on each side of the road, not expressly excepted or reserved by the act.

It is apparent that this theory can not be sustained, without overruling the decision of the Department in the case of the Willamette Valley and Cascade Mountain Wagon Road Company v Rinehart (5 L. D., 650), in which it was distinctly held that the construction of the road and the filing of the map of definite location did not cause the grant to attach to any specific tract of land, or of its own operation withdraw the lands from entry, but that the grant only attached by actual selection of the specific tract.

An examination of this question has failed to disclose any reason for disturbing this ruling, but, on the contrary, I am convinced that it is

the true construction of the grant and is sustained by authority.

It is argued by counsel that this is a grant of an undivided interest in a tract of land; that the odd section granted, whether surveyed or unsurveyed, not having been segregated by selection, are held under the joint right of possession with the other odd sections, until selection is made by the company of the particular section.

The grant is of "alternate sections of public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road." It is not a grant of an undivided interest in any tract of land, nor is there any expression in the grant to indicate that a joint holding of any tract of land by the government and the State was contemplated.

As stated by the Secretary, in the case of Rinehart heretofore cited, "the act makes no provision for filing of map of definite location, nor for any withdrawal of lands from entry for the benefit of said road, but it is the completion of the road that gives position to the six miles limits within which selections may be made." After the line of the road is definitely fixed by actual construction, the right is given to the company to satisfy its grant by making selections, to the extent of three sections per mile from all the odd sections within six miles on each side of said road, unless excepted or reserved by the act.

That the land was unsurveyed at the date of the grant can make no difference. It was not a grant of a half interest in all the odd sections, nor of an undivided moiety in any tract of land, but right to select a given number of odd sections within defined limits. As stated by the Secretary, in the Rinehart case (page 653), "the lands that Congress granted or intended to grant could only be ascertained when they were actually selected within the limits of six miles of the road."

The distinction between a grant of an undivided moiety and the grant of a right to select from certain designated sections is illustrated by the opinion of the Attorney-General, in the Portage City case, 8 Ops. A. G., 255. That was a grant to the state of Wisconsin, for the purpose of improving the Fox and Wisconsin rivers, of "a quantity of land equal to one half of three sections in width on each side of the said Fox river." "Here" (as stated by the Attorney General) "is not a grant of land along arbitrary lines unascertained, like those of unlocated railroads, nor a grant at large in a whole State, but a grant within limits geographically determined by the act, and need only surveys according to established statute rules to possess absolute precision of locality, and then, requiring but to be equally divided between the United States and the State." In that case the State held as tenants in common with the United States the title to all lands within the limits "geographically determined by the act," for the reason that the grant to the State was for an undivided half interest in the quantity of lands thus designated. When the survey was made it gave absolute precision to the grant, but it did not indicate or determine the particular land that the State should hold in severalty. It might have selected either odd or even sections. It was seized of an interest in the entire estate,

which required partition to designate the land that each should severally hold.

No such estate was created by this grant. The right of the company did not attach to any particular section until after selection, and the construction of the road and filing of map of definite location did not operate to withdraw the lands from settlement and entry.

But a withdrawal of land by the Secretary, in the exercise of his authority, for the purpose of enabling the company to satisfy the grant by making selections in accordance with the granting act was equally as effective to withhold the lands from settlement and entry as if it had been provided by the act.

This withdrawal did not become effective, as held in the case of Rinehart, until it was filed in the local office, but after such withdrawal took effect it operated to reserve, for the benefit of the company, the odd sections within the six mile limits that were at the date of said withdrawal free from any claim or right, and thereafter the odd sections affected by such withdrawal would not be subject to settlement and entry under the homestead and preemption laws, nor could any right be acquired by settlement and occupation upon such lands that would defeat the right of the company to make selection of the same.

TO BE CONTINUED.

Persons who sympathize with the afflicted will rejoice with D. E. Carr of 1235 Harrison street, Kansas City. He is an old sufferer from inflammatory rheumatism, but has not heretofore been troubled in this climate. Last winter he went up into Wisconsin, and in consequence has had another attack. "It came upon me again very acute and severe," he said. "My joints swelled and became inflamed; sore to touch or almost to look at. Upon the urgent request of my mother-in-law I tried Chamberlain's Pain Balm to reduce the swelling and ease the pain, and to my agreeable surprise, it did both. I have used three fifty-cent bottles and believe it to be the finest thing for rheumatism, pains and swellings extant. For sale by druggists.

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