SMITH v. TOWNSEND

This document contains both the Oklahoma Supreme Court and U.S. Supreme Court decisions in *Smith v. Townsend,* a case arising from Alexander F. Smith's claim to a 160 acre tract as opposed to the claim of Eddie B. Townsend. Smith, an employee of the AT&SF Railroad, living with his family on the railroad's right-of-way prior to noon April 22, 1889, stepped off of that right-of-way and planted his stake on the adjoining land, using "railroad time," which was about 30 minutes earlier than Meridian time, even though that fact is not particularly discussed or important in either opinion.

As required by law, the initial claims were pursued within the US administrative court arena beginning at the local Land Office, then to the US General Land Office, and last to the Secretary of the Interior level. After those remedies were pursued and exhausted, as was required before proceeding to civil court litigation, Smith initiated litigation in the District Court, Oklahoma County, in which he also failed. He appealed that decision to the Oklahoma Supreme Court and, losing there, continued his appeal to the United States Supreme Court, where he lost, as well. The US Supreme Court, accepting "certiorari" jurisdiction which it was not required to do, finally resolved the status of a "legal sooner" by its April 3, 1893, decision in this case.

A "legal sooner" was a person who was legitimately present in Oklahoma country before 12 o'clock noon on April 22, 1889, and who made a property claim based upon his lawful presence in Oklahoma country before making his claim. In this case, the legal-sooner-claimant was an employee of the AT&SF railroad who was legally present on the railroad's right-of-way in Edmond. He maintained that his presence within that right-of-way was the legal equivalent of those who entered the country from the perimeter of Oklahoma country at 12 o'clock noon at points much more distant than he was on that day when he stepped off of the right-of-way to make his claim.

By this decision, the earlier law which opened Oklahoma country to settlement — the March 2 and 3, 1889, federal legislation and President Benjamin Harrison's March 23, 1889, Presidential Proclamation — arguably ambiguous due to its phrasing — was finally resolved.

— Doug Loudenback, Oklahoma City
November 28, 2010

OKLAHOMA SUPREME COURT DECISION
From the Oklahoma State Court Network

Smith v. Townsend, 1892 OK 5, 29 Pac. 80, 1 Okla. 117

SYLLABUS

¶0 1 PUBLIC LANDS–Issue of Patent – Equitable Jurisdiction – Where the officers of the United States land department, acting on a known state of facts, draw a conclusion of law and issue a patent for a portion of the public domain, a court of equity may entertain a complaint praying that the patentee be decreed a trustee for plaintiff, and that he be compelled to convey the legal title.

2. HOMESTEAD ENTRYMAN – Qualifications. – Under Act Cong. March 2, 1889, (25 U.S. St. at Large, p. 1005,) relating to the opening of certain land in Oklahoma for settlement, which provides that, "until said lands are opened for settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto," and under the proclamation of the president, declaring that the lands would be opened for settlement at the hour of 12 o'clock noon of the 22d day of April, 1889, an employee of the A., T. & S. F. R. R., who by virtue of his position, remains on the land from March 2, 1889, to noon of April 22d cannot take advantage of his presence

to select and claim a homestead.

Appeal from the district court of Oklahoma County, Hon. J.G. Clark, Judge.

Action by Alexander F. Smith against Eddie B. Townsend for the purpose of having defendant declared the trustee of certain land for plaintiff, and praying for a conveyance of the legal title. Decree for defendant. Plaintiff appeals. Affirmed.

Amos Green and J.L. Brown, for appellant.
John F. Stone and Johnson & Howard, for appellee.

The opinion of the court was delivered by

GREEN, C.J.

¶1 On the 30th day of April, 1891, appellant, Alexander F. Smith, filed his complaint in the district court of Oklahoma county, against the appellee, Eddie B. Townsend, for the purpose of having the appellee declared a trustee for the appellant as to the northeast quarter of sec. 35, in T. 14, N. of range 3, W., and for a conveyance of the legal title of said real estate by appellee to the appellant.

¶2 It is averred in appellant's complaint, *inter alia* that during the year 1889, he was a citizen of the United States, over the age of twenty-one years, and the head of a family, and, in all respects, qualified to enter public lands under the homestead laws of the United States.

¶3 That, during the years 1888 and 1889, the Atchison, Topeka & Santa Fe Railroad Co. was engaged in operating a railroad through the Indian Territory, and had set apart to its use a right of way through said territory, as provided by treaty with the various Indian tribes and the acts of congress, might be done; and, as a part of said right of way, was, during those years, holding a piece of ground, at Edmond station, in said territory, and had thereon station houses for the use of the necessary employees of said railroad company.

¶4 That, during the years 1888 and 1889, appellant was one of the persons employed by said railroad company, as one of its necessary employees, and was engaged as one of its track men to work upon and keep said rail road track in good repair; and, during all that time, appellant resided in a station house of said railroad company, located on said right of way, at Edmond, and, up to noon of April 22, 1889, remained continuously on said right of way, as by law required. That the dwelling of appellant on said right of way was commenced and carried on, and the labor on said railroad was performed, and appellant's coming within the Indian Territory was with no intention to take lands, but for the purpose of performing necessary labor on said railroad.

¶5 That, when the lands surrounding said station, at Edmond, were thrown open to settlement, under the acts of congress of March 1 and 2, 1889, under the proclamation of the president, of date of March 23, 1889, appellant was at Edmond station, and on said right of way, and, soon after the hour of noon, on April 22, 1889, went upon the northeast quarter of Sec. 35, in Tp. 14, N. of range 3, W., and settled on the same as his homestead, and with the intention of occupying the same as his homestead under the laws of the United States.

¶6 That, pursuant to said intention, he erected a house thereon and otherwise improved the same, and dwelt on it, as his home, as required by law, and, in further pursuance of said intention, duly made homestead entry of said land at the United States land office, at Guthrie, on the 23d day of April, 1889; and that he has, ever since, continued to reside on said land, and to occupy the same as his home, and now occupies the same as his home.

¶7 That, on the 22d day of June, 1889, the appellee filed in the land office a contest, asking that said homestead entry of appellant be cancelled, for the reason that appellant, had, after March, 2, 1889, and before noon of April 22, 1889, entered upon and occupied the lands described in, and declared opened to settlement by the president's proclamation of March 23, 1889; and that said contest was

heard in the land office at Guthrie, on the following statement of facts, made and filed by the agreement of appellant and appellee:

> "Alexander F. Smith had been for a long time, prior to March 2, 1889, in the employ of the A.T. & S.F. R.R. Co., as a section hand, and, on Jan. 30, 1889, came to Edmond, Ok. Ty., in that capacity bringing his family with him. He did not enter the Territory with expectation, or intention, of taking land in the Oklahoma country. He remained in the employ of the railroad company until noon of April 22, 1889, Santa Fe railroad time, when he removed his tent to a point about a hundred and fifty yards distance from the right of way of said railroad, and on the land in controversy, where he put it up and moved into it. From Jan. 30, 1889, Smith lived with his family in his tent on the right of way of the A.T. & S.F. railroad, where it passes through the land in controversy. Prior to April 22, 1889, Smith had indicated his intention to take the land in controversy, by stating the fact to his fellow workmen, but had done no act toward carrying out said intention. A notice was posted at the station at Edmond by the A.T. & S.F. R.R. Co., warning all employes that if they expected to take land they must leave the Oklahoma country, and this fact was called to Smith's notice. Smith has, since noon of April 22, 1889, continued to reside upon, cultivate and improve said land, in good faith, as a homestead, and now has-improvements thereon. Smith is a legal qualified home steader unless excluded by reason of his being in the Oklahoma country prior to April, 1889. Smith is at present, in the employ of the A.T. & S.F. R.R. Co., and has been, most of the time, since April 22, 1889."

¶8 That, on the trial of said contest, the local land office decided that, as a matter of law under the agreed facts, appellant was entitled to the land; and that appellee appealed from the decision of the local land office to the commissioner of the general land office who reversed the decision of the local land office, and ordered appellant's homestead entry to be cancelled. That appellant appealed to the Secretary of the Interior, who affirmed the decision of the commissioner, and on the 28th day of Feb., 1891, ordered the homestead entry of appellant to be cancelled; and that the same was cancelled; and that the appellee, on the 12th day of March, 1891, made homestead entry of said land.

¶9 That, on, or about, the 30th day of April, 1891, appellee made final proof on said land, and commuted the same, and paid to the land officers one dollar and a quarter per acre, and obtained his final receipt, and now holds the legal title, and is entitled to a patent.

¶10 That the commissioners and Secretary of the Interior committed error of law in said matter, and misconstrued the law in relation thereto in this: They held that, under the facts so agreed upon, appellant was barred from entering lands in Oklahoma, and had forfeited his right to enter a homestead in the land described in the president's proclamation of March 23, 1889, by being within said lands between March 2, 1889, and noon of April 22, 1889, that as matter of law, appellant was not disqualified to make homestead entry of land within said boundaries; and, had the law been properly construed, appellant's homestead entry would not have been cancelled; and that the value of said land is the sum of six thousand dollars.

¶11 The prayer of appellant's complaint is that appellee may be decreed to hold the land in trust, for appellant, and may be decreed to convey the legal title to appellant, concluding with the general prayer for equitable relief. And the complaint was duly verified by appellant.

¶12 On the 5th day of May, 1891, appellee appeared in the action and filed a demurrer to appellant's complaint stating as grounds of demurrer, first, that the court had no jurisdiction, and second, that the complaint did not state facts sufficient to constitute a cause of action, and the court sustained the demurrer and dismissed the complaint at the cost of the appellant; to which action of the court appellant excepted, and prayed an appeal to this court, and brings the record here and assigns for error the sustaining of the demurrer, and the dismissal of the complaint at the cost of the appellant.

¶13 The questions presented for the consideration of this court are questions of great importance, and their determination will affect interests of claimants in some of the most valuable land in the territory, but, whatever the results may be, the court, has but one duty to perform, and that is, to declare the

law as the court understands the law to be.

¶14 The first question presented by the demurrer challenges the jurisdiction of the district court as to the subject matter of the suit. That the district court had jurisdiction of the subject matter of the suit, cannot be, and is not, seriously questioned. It is a court of general jurisdiction in all cases at law and in equity. (Organic Act, §9.) And the question has been so frequently passed upon by the Supreme Court of the United States, that it is no longer open to discussion. (*Johnson v. Townsley*, 13 Wall. 72; *Rector v. Gibbon*, 111 U.S. 276, 28 L.Ed. 427, 4 S.Ct. 605.)

¶15 In *Rector v. Gibbon*, supra, the court, in speaking of *Johnson v. Townsley*, said,

> "This case is a leading one in this branch of the law, and has been uniformly followed. The decision aptly expresses the settled doctrine of this court with reference to the action of the officers of the land department, that, when the legal title has passed from the United States to one party, when in equity, and in good conscience, and by the laws of congress, it ought to go to another, a court of equity will convert the holders into a trustee of the true owner, aud compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of the misconstruction by those officers, be deprived of their rights."

¶ 16 In this case there are no controverted facts, as it was tried and determined before the officers of the land department, including the Secretary of the Interior, on the statement of facts agreed to, and which is copied at large in the complaint; but appellant's contention is, that the officers of the land department misconstrued the law, and thus gave the appellee the land that should have been given to appellant, and would have been given to appellant had the law been correctly applied to the admitted facts, and which brings this case clearly within the rule as to jurisdiction of a court of equity, announced by the decisions cited above.

¶17 The second ground of demurrer, that appellant's complaint does not state facts sufficient to constitute a cause of action, presents a most important question in this case, and one which is *res integra* in the courts, although it has been frequently passed on in the land department If the facts stated do not constitute a cause of action, it is because appellant was disqualified under the law to take the homestead in controversy, by reason of his being within the lands opened to settlement, between the second day of March, 1889, and noon of April 22, 1889. It is needless to say that this question can only arise with reference to the homestead settlement of the public domain in the Territory of Oklahoma.

¶18 A part of the public lands in the Territory of Oklahoma, that were open to settlement at noon of the 22d day of April, 1889 by proclamation of the president of the United States, were obtained by the United States from the Seminole Indians; and their lands lie between the north and south branches of the Canadian river; and a part of the lands so opened to settlement, were obtained from the Muscogee or Creek nation of Indians; and their lands lie between the north branch of the Canadian river and the south line of the Cherokee Outlet.

¶19 The act of congress, approved March 1, 1889, accepting, ratifying and confirming the article of cession and agreement with the Muscogee or Creek nation of Indians (U.S. Stat. at large, Vol. 25, p. 759), provides as follows:

> "Sec. 2. That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of §2301 of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are open to settlement by act of congress shall not be permitted to occupy or to make entry of such lands or lay any claim

thereto."

¶20 These provisions of the act of March 1, 1889, were, however, only applicable to the lands obtained from the Muscogee, or Creek nation of Indians; but by act of congress, approved March 2, 1889, (U.S. Stat. at large, Vol. 25, p. 1005) it was provided:

> "Sec. 13. That the lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only as herein provided, and sections sixteen and thirty-six of each township, whether surveyed or unsurveyed, are hereby reserved for the use and benefit of the public schools, to be established within the limits of said lands under such conditions and regulations as may be hereafter enacted by congress.
>
> "That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided. (Except that §2301 of the Revised Statutes shall not apply.) And provided further, that any person who having attempted to, but for any cause failed, to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law shall be qualified to make a homestead entry upon said lands. And provided further, That the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and as described in §§2304 and 2305 of the Revised Statutes shall not be abridged. And provided further, that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.
>
> "The Secretary of the Interior may, after said proclamation, and not before, permit entry of said lands for townsites, under §§2387 and 2388 of the Revised Statutes, but no such entry shall embrace more than one-half section of land.
>
> "That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians, including the provisions pertaining to forfeiture shall apply to and regulate the disposal of the lands acquired from the Muscogee or Creek Indians by articles of cession and agreement made and concluded at the city of Washington on the nineteenth day of January, in the year of our Lord eighteen hundred and eighty-nine."

¶21 In pursuance of the provisions of the act of March 2, 1889, the President of the United States, on the 23d day of March, 1889, issued his proclamation, therein citing the act of March 1, 1889, and the act of March 2, 1889, and declaring that the lands therein described would be opened to settlement, at the hour of 12 o'clock, noon, of the 22d day of April, 1889, and gave the following warning:

> "Warning is hereby again expressly given that no person entering upon and occupying said lands before, said hour of 12 o'clock, noon, of the 22d day of April, A.D., 1889, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto and that the officers of the United States will be required to strictly enforce the provisions of the act of congress to the above effect."

¶22 It is contended on behalf of appellant that his presence within the lands, declared open to settlement by the proclamation of the President, after March 2, 1889, and before noon of April 22, 1889, was lawful and that he did not enter upon and occupy any part of said lands before noon of April 22d, 1889, in violation of the act of March 2, 1889, and the President's proclamation; and that he was not disqualified to take the land in controversy under the provisions of the act of March 2, 1889.

¶23 The qualification of appellant to settle upon and enter the land in controversy, as a homestead, under the homestead laws of the United States, depends entirely upon the construction and meaning

to be given to the act of March 2, 1889. The prohibitory clause of the act is:

> "But until the said lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same; and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto."

¶24 There can be no doubt that congress has the power, in providing for the disposition of the public lands to prescribe the qualifications of homestead settlers; and only such persons as possess the qualifications prescribed can avail themselves of the benefits of the homestead laws. And the qualifications prescribed by §13 of the act of March 2, 1889, were within the power of congress to enact.

¶25 It is earnestly and ably contended that the prohibitory clause of the act of March 2, 1889, is a penal law, and must be construed strictly; and that before appellant can be held to be disqualified, his acts must come within the letter as well as the spirit of the clause. Such is the universal rule of construction of penal statutes, except when changed by statutory enactment, as has been done in some of the states.

¶26 But the clause under consideration is not a penal statute. It creates no crime and imposes no penalty or forfeiture. It simply prescribes the qualifications of homestead settlers on the public lands mentioned in the act. Penal statutes are those by which punishments are imposed for the transgression of the law, or the penalties are prescribed for the commission or omission of some act, which are recoverable in a criminal or civil action. (*Southerland on Stat. Con.*, §208; *Endlich on Interp*. Stat., §231.)

¶27 The question then, is, did appellant enter upon and occupy any part of the lands opened to settlement by proclamation of the President, after the second day of March, 1889, and before noon of April 22, 1889, within the meaning of the prohibitory clause of the act of March 2, 1889? And a solution of this question necessarily involves an interpretation and construction of the words enter upon and occupy as used in that act.

¶28 In §2 of the act of March 1, 1889, which prescribes the qualifications of homestead settlers upon the lands acquired from the Muscogee or Creek Nation of Indians, and which was approved one day before the approval of the act of March 2, 1889, the prohibitory clause provides:

> "Any person who may enter upon any part of said lands in said agreement mentioned, prior to the time that the same are open to settlement by act of congress, shall not be permitted to occupy, or to make entry of such lands, or lay any claim thereto."

¶29 As §2 of the act of March 1, 1889, and §13 of the act of March 2, 1889, are parts of two acts passed at the same session of congress, and were approved and took effect within one day of each other, and are *in pari materia*, they must be considered as parts of the same act, and must be read and construed together. Statutes passed on the same day, on the same subject must be construed as sections of the same act; and statutes passed at the same session on the same subject must be construed as one act. (*St. Martin v. New Orleans*, 14 La.Ann. 113; *People v. Jackson*, 30 Cal. 427; Cain v. State, 20 Tex. 355.)

¶30 When these statutes are read together as parts of one act, as they must be, is the language so clear and unambiguous as to leave no room for construction? Clearly not; and it becomes necessary to ascertain the intention of congress, and such intention must control in the construction of the prohibitory clauses of both acts. And the intention of congress must be gathered not only from the language of the acts, but from the cause, or necessity, of the enactments, and from other circumstances.

¶31 No clearer statement of the law which governs in the construction of statutes can be found than in the opinion of the court in *People v. Utica Insurance Co.*, 15 Johnson 358, where it is said:

> "That in construing a statute, the intention of the legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention is to be collected from the act itself, and other acts in pari materia. It may not, however, be amiss to state and keep in view some of the best established and well settled rules on the subject. Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause, or necessity, of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed, with reason and discretion, in the construction of the statute, although such construction seems contrary to the letter of the statute. Where any words are obscure, or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded."

¶32 It is conceded that the language used in the prohibitory clause of §2 of the act of March 1, 1899, is clear, and that the intention of congress was, that no person should enter upon, that is, go upon, any part of the lands mentioned in that act, prior to the time they were declared opened to settlement by act of congress, and that any person who did so enter, with the intention, or for the purpose, of settling on any part of the same, when they should be open to settlement, should not be permitted to occupy, or make entry of such lands, or lay any claim thereto.

¶33 By the provisions of this act congress absolutely excluded from within the limits of the lands all persons who desired, or intended, to avail themselves of the benefits of the homestead laws of the United States, until the time was fixed for their being opened to settlement, and disqualified any person who entered upon any part of the same, before that time, to occupy, or make entry, or to lay any claim thereto. Here the intention of congress is clear beyond all question.

¶34 But it is contended with much earnestness, and not without plausibility, that the act of March 2, 1889, prescribes a different rule, and repeals by implication, the act of March 1, 1889, so far as it defines the qualifications of persons who shall be permitted to settle upon and make homestead entry of such lands; and that more than an entry upon the lands is necessary to disqualify; that the party must have entered upon and occupied some of the lands, prior to the time they were opened to settlement, to come within the disqualifying clause of that act.

¶35 Repeals by implication are not favored in the law; and, as the two acts must be read and construed together as one act, it is the duty of the court to harmonize them and give effect to each one, if possible. It is clear that congress did not intend to repeal §2 of the act of March 1, 1889, by §13 of the act of March 2, 1889, and that both sections have been, and are still, in force.

¶36 After the approval of the acts of March first and second, 1889, and the settlement of all the lands opened to settlement by the proclamation of the President, congress, by act of May 2, 1890, providing a territorial government for the territory of Oklahoma, expressly recognized and declared §2 of the act of March 1, 1889, and §13 of the act of March 2, 1889, to be in force; and §18 of the act of May 2, 1890, provides:

> "The lands within said Territory of Oklahoma, acquired by cession of the Muscogee (or Creek) nation of Indians, confirmed by act of Congress approved March first eighteen hundred and eighty-nine, and also the lands acquired in pursuance of an agreement with the Seminole Nation of Indians by release and conveyance, dated March sixteenth, eighteen hundred and eighty-nine, which may hereafter be opened to settlement, shall be disposed of under the provisions of sections twelve, thirteen and fourteen of the 'Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes' approved March second, eighteen hundred and eighty-nine, and under section two of an 'Act to ratify and confirm an

> agreement with the Muscogee (or Creek) Nation of Indians in the Indian Territory, and for other purposes,' approved March first, eighteen hundred and eighty-nine, provided, however, that each settler under and in accordance, with the provisions of said acts shall, before receiving a patent for his homestead, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents per acre."

¶37 By §20 of the act of May 2, 1890, the provisions of §2 of the act of March 1, 1889, and §13 of the act of March 2, 1889, are made applicable to all entries in the Territory of Oklahoma; and the section provides as follows:

> "That the procedure in applications, entries, contests, and adjudications in the Territory of Oklahoma shall be in the form and manner prescribed under the homestead laws of the United States and the general principles and provisions of the homestead laws, except as modified by the provisions of this act; and the acts of Congress approved March first and second, eighteen hundred and eighty-nine, heretofore mentioned, shall be applicable to all entries made in said Territory, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof."

¶38 It cannot be presumed that congress intended to establish one rule of disqualification for the Muscogee lands and another rule for the Seminole lands, as it would be unreasonable to do so; but it is manifest, from a consideration of all the acts *in pari materia*, that congress intended the same rule should apply to both; and that congress meant and intended by the use of the words, enter upon and occupy, in §13 of the act of March 2, 1889, just what was intended and meant by the use of the words, enter upon, in §2 of the act of March 1, 1889; and thus all the legislation on the subject is harmonized and given effect.

¶39 It is useless to speculate upon the meaning of the words, enter upon, and, enter upon and occupy, for these words have no synonyms that convey their meaning more clearly than they do themselves. However, no person can occupy land, in the sense here used, without having entered upon it, and no person can enter upon land, in the same sense here used, without occupying some part of it for the time being. But it is enough that congress intended that all persons, who intended to avail themselves of the privileges and benefits of the acts of congress opening these lands to settlement, should remain without the limits of the lands until, by proclamation of the President, they should be permitted to go in and make homestead and townsite settlement upon them.

¶40 The construction here put upon the act of March 2, 1889, is in accord with the interpretation as made by the executive of the government, and found in that clause of the President's proclamation warning all persons not to enter upon and occupy the lands, before twelve o'clock, noon, of April 22, 1889, and requiring the officers of the United States to strictly enforce the act of congress. If all persons had been permitted to enter upon the lands, before the time appointed for opening the same to settlement, as is contended they had the right to do, it is difficult to perceive how the officers of the United States could have enforced the act of congress by preventing their occupying the lands upon which they had entered. In such case, to say that to enter upon is not, at the same time, to occupy, is as near the *reductio ad absurdu* as well can be.

¶41 The contention that, in order to disqualify a homestead settler, under the act of March 2, 1889, he must have entered upon and occupied some particular quarter section, in violation of that act, and that the disqualification attaches only as to that particular tract, is fully met by the construction which is here put upon that act, and needs no further discussion.

¶42 Much emphasis is placed by counsel for appellant on the following clause of §13 of the act of March 2, 1889:

> "That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians, including the provisions pertaining to forfeiture, shall apply to and regulate the disposal of the lands acquired from the Muscogee and Creek Indians by articles of cession

> and agreement made and concluded at the city of Washington on the nineteenth day of January in the year of our Lord eighteen hundred and eighty-nine."

¶43 And it is contended that the words, "including the provisions pertaining to forfeiture," apply to the prohibitory clause immediately preceding, and clearly show that congress intended to enact a rule of disqualification different from the one prescribed by §2 of the act of March 1, 1889, and to apply that rule to the Muscogee lands as well as the Seminole lands.

¶44 A careful reading of §12 of the act of March 2, 1889, will show that the words, "including the provisions pertaining to forfeiture," must be referred to the forfeiture declared by the last clause of that section which is as follows:

> "And all grants, or pretended grants, of said lands and interest, or right therein, now existing in, or on behalf of any railroad company, except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of condition."

And Congress intended that this clause declaring a forfeiture should apply to the Muscogee lands also.

¶45 Contemporaneous exposition of a statute is entitled to considerable weight in determining what construction should be put upon it by the courts.

¶46 "Great regard," says Lord Coke, "ought, in construing a statute, to be paid to the construction which the sages of law, who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time the law was made. And in the civil law the maxim was, *contemporanea expositio est fortissima in lege*. [Ed. note: the phrase roughly means that a contemporaneous exposition is the best and most powerful in the law.]

¶47 It is a part of the history of Oklahoma, of which the court takes judicial notice, that after the issuing of the President's proclamation, declaring the lands therein described opened to settlement at noon of April 22, 1889, and warning all persons not to enter upon and occupy the same before that time, by universal consent the act of March 2, 1889, was construed to prohibit the crossing of the lines and the entering upon any part of the lands by persons intending to make homestead settlement thereon, prior to the hour fixed by the President's proclamation. And in obedience to the law as thus interpreted, the thousands of homestead settlers, who came in at the time appointed for the opening, remained outside the limits of the lands until it was lawful for them to enter.

¶48 The stipulation of facts, set out at large in the complaint, shows that the appellant was at Edmond, a station on the A.T.& S.F. railroad, and within the lands described in the President's proclamation, on the date of the approval of the act of March 2, 1889, and at the date of the issuing of the proclamation, and continued there, as a section hand on the railroad, until noon of April 22, 1889, when he went immediately upon the land in controversy and made homestead settlement, and, afterwards, made homestead entry at the land office at Guthrie. Before the time fixed for the opening, he had formed the intention of settling upon this particular tract of land, and claiming the same under the homestead laws.

¶49 As appellant was lawfully at Edmond before and on the second day of March, 1889, and from that day to noon April 22, 1889, it is claimed he had a right to make homestead settlement on the land in controversy, at the time, and in the manner he did, and that he was not disqualified to do so under the provisions of the act of March 2, 1889.

¶50 For the purpose of laboring on the railroad, as a section hand, appellant was lawfully at Edmond; but for the purpose of taking this tract of land under the homestead laws of the United States, his presence at that place was forbidden by the acts of March first and second, 1889, and was unlawful. He had been warned by the railroad company to go out, but refused to do so, and his duties were not such as to require him to remain in up to the time of the opening; and he took advantage of his being at the land, and secured a settlement on it before others, who obeyed the law and remained outside, had an opportunity to reach it even by railroad transit.

¶51 Nothing is more apt, on the question under discussion, than the language of the Secretary of the Interior in the case of *Kingfisher v. Wood et al.*

> "Any special license to be present must have been for another and entirely different purpose. No license could be granted against the statute, and no one could successfully pervert his license or special employment to defeat the equal and just operation of the statute upon all alike. The permit was exhausted in protecting its possessor; it could not be used as a weapon against others. The moment such possessor of such special privilege formed his purpose to take advantage of his position for the selection and seizure of a tract of land, his license was valueless, and he became a trespasser from that moment. To hold that the few with permits, or especially engaged within the limits of these lands any more than those there without license, could pick out their claims in advance of the hour of the opening and pounce upon them at the very moment the signal was given to the others to start on their long race, would be to support pretension and favoritism and punish honorable obedience to authority. It is neither the law nor the equity of the case, and will not be allowed. He who, being within these lands by special authority as deputy, train hand, wagon master, or other, had the purpose to jump upon a particular tract, and who gave the evidence of his prior intent by his conduct immediately thereafter, violated this statute. Such persons had entered upon and occupied this Territory for the purpose of settlement—before the hour fixed in the proclamation—whatever license they may hold up or self-indulgent and self-deceiving pretext they may now present. They were not licensed or employed thus to defeat the law and injure their neighbors.
>
> "Both classes were prohibited from acquiring rights to these lands: Those who were in the Territory at and before the hour designated in the proclamation without pretense or special license; and those who were there by special authority or for a special purpose, but attempted to pervert their presence to secure claims before others held on the borders could arrive, even from the most distant parts thereof.
>
> "On the other hand, I do not think it was the intention of Congress that a man who happened to be legally in the Territory, but did not use his position to his own advantage, or to the disadvantage of his fellow citizens, should be forever prohibited from acquiring any rights in the Territory. Each case must be determined upon its own evidence and merits; but it may be generally said that the presence in the Territory before the opening, under the proclamation, and the actual settlement and entry at the land office must be so widely and obviously separated in every detail and circumstance as to render it impossible to reasonably conclude that the one was the result of the other, or in any wise dependent upon it."

¶52 As to the constitutional power of Congress to enact the law, under which appellant is held to be disqualified, there can be no doubt, and no discussion of the question would seem to be necessary at this time.

¶53 And it follows, that the district court committed no error in sustaining the demurrer to appellant's complaint and dismissing the same at the cost of the appellant, and the judgment should be affirmed.

¶54 Decree affirmed.

¶55 All the Justices concurring.

U.S. SUPREME COURT DECISION

Concerning the above Oklahoma Supreme Court decision, the United States Supreme Court accepted certiorari jurisdiction – accepting certiorari is permissive with and not mandatory by the U.S. Supreme Court. The decision below is reported at U.S. Supreme Court Center and is set out below.

Smith v. Townsend, 148 U.S. 490 (1893)

No. 1173

Submitted March 5, 1893

Decided April 3, 1893

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA

Syllabus

An employee of the Atchison, Topeka and Santa Fe Railroad, residing within the Territory of Oklahoma before, up to, and on the 22d day of April, 1889, was thereby disabled from making a homestead entry upon the tract of land on which he was residing.

On April 30, 1891, the appellant filed his complaint in the District Court of Oklahoma county, Territory of Oklahoma. In this complaint he alleged his citizenship and full qualification to enter public lands under the homestead laws of the United States. That during the years 1888 and 1889, the Atchison, Topeka & Santa Fe Railroad Company was engaged in operating a railroad through the Indian Territory, having a right of way therein granted by treaty with the Indians and acts of Congress. That during those years, he was employed as a section hand by said company, and resided in a stationhouse belonging to it, on the right of way at a place known as "Edmond Station." That he entered into the employment of the railroad company, and continued in such employment, and commenced living at said Edmond Station, without any intent to take lands within the Indian Territory, but solely to discharge his duties as an employee of the company. That when the lands surrounding said station were open to settlement under the Acts of Congress of March 1 and 2, 1889, and the proclamation of the President of March 23, 1889, plaintiff was at said Edmond Station, and on said right of way, and soon after the hour of noon on April 22, 1889, went upon the land in controversy and settled upon it as his homestead, and with the intention to occupy and enter it as his homestead under the laws of the United States. That, pursuant to such intention, he built a house thereon and otherwise improved the premises and dwelt upon it as his home, and on April 23, 1889, duly made an entry at the proper land office at Guthrie, Indian Territory. That on the 22d of June, 1889, the defendant filed in the local land office a contest, which contest was heard in such land office on the following statement of facts:

> "Alexander F. Smith had been for a long time prior to March 2, 1889, in the employ of the A.T. & S.F. R. Co. as a section hand, and on January 30, 1889, came to Edmond, Oklahoma Territory, in that capacity, bringing his family with him. He did not enter the territory with the expectation or intention of taking land in the Oklahoma Territory. He remained in the employ of the railroad company until noon of April 22, 1889, Santa Fe R. Co. time, when he removed his tent to a point about one hundred and fifty yards distant from the right of way of said railroad, and on the land in controversy, where he put it up and moved into it. From January 30, 1889, Smith lived with his family in his tent on the right of way of the A.T.& S.F. R. Co., where it passes through the land in controversy. Prior to April 22, 1889, Smith had indicated his intention to take the land in controversy by stating the fact to his fellow workmen, but had done no act towards carrying out said intention. A notice was posted at the station of Edmond by A.T.& S.F. R. Co., warning all employees that if they expected to take land, they must leave the Oklahoma country, and this fact was called to Smith's notice. Smith has, since noon of April 22, 1889, continued to reside upon, cultivate,

> and improve said land in good faith as a homestead, and now has improvements thereon. Smith is a legally qualified homesteader unless excluded by reason of his being in the Oklahoma country prior to April, 1889. Smith is at present in the employ of the A.T.& S.F. R. Co., and has been most of the time since April 22, 1889."

That on the trial of said contest, the local land officers decided in plaintiff's favor, but on appeal to the Commissioner of the Land Office he reversed their decision, which ruling of the Commissioner was subsequently affirmed by the Secretary of the Interior, and on February 28, 1891, plaintiff's homestead entry was cancelled, and that the defendant, on March 12, 1891, made a homestead entry of the land, which homestead entry was, on the 30th day of April, 1891, commuted, the land paid for at a dollar and a quarter per acre, and a final receipt issued therefor. Plaintiff claims that there was error of law in the ruling of the Commissioner of the Land Office and of the Secretary of the Interior, and prays that the defendant be decreed to hold the legal title to the land in trust for his use and benefit. To this bill of complaint a demurrer was filed, which, on May 16, 1891, was sustained by the district court, and the complaint dismissed. From the decree of dismissal an appeal was taken to the supreme court of the territory, which, on the 1st day of February, 1892, affirmed the decision of the district court. From that judgment of affirmance, the appellant has appealed to this Court.

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the Court.

This case turns on the construction to be given to the Acts of March 1 and 2, 1889, and the proclamation of the President of March 23, 1889. The Act of March 1, 1889, 25 St. pp. 757, 759, c, 317, was an act ratifying and confirming an agreement with the Muscogee (or Creek) Indians in the Indian Territory whereby a large body of their lands had been ceded to the United States. The second section of the act was in these words:

> "That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant, and the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

In the General Indian Appropriation Act, passed the next day, March 2, 1889, 25 St. pp. 980, 1005, c. 412, was contained this provision, applicable to these lands, as well as to lands acquired from the Seminoles:

> "And provided further that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

And the proclamation of the President of March 23, 1889, contained this warning:

> "Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of twelve o'clock noon of the twenty-second day of April, A.D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto, and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect."

26 Stat. 1546.

It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus, in *Heydon's Case*, 3 Rep. 7b, it is stated that it was resolved by the *Barons of the Exchequer* as follows:

> "For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:"
>
> "First. What was the common law before the making of the act?"
>
> "Second. What was the mischief and defect for which the common law did not provide?"
>
> "Third. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?"
>
> "Fourth. The true reason of the remedy."

And by this Court, in *United States v. Union Pacific Railroad*, 91 U.S. 72, 91 U.S. 79, it was said that

> "courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 115, 120 [argument of counsel – omitted]."

And in *Platt v. Union Pacific Railroad*, 99 U.S. 48, 99 U.S. 64, that,

> "in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

Pursuing an inquiry along this line, it will be seen that the Indian Territory lies between the State of Texas on the south and the State of Kansas on the north, and it is a matter of public history, of which we may take judicial notice, that as these two states began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians, and though the territory was reserved by statute for the occupation of the Indians, there was great difficulty in restraining settlers from entering and occupying it. Repeated proclamations were issued by successive Presidents warning against such entry and occupation. Thus, on April 26, 1879, President Hayes issued a proclamation containing this warning:

> "Now therefore, for the purpose of properly protecting the interests of the Indian nations and tribes as well as of the United States in said Indian Territory, and of duly enforcing the laws governing the same, I, Rutherford B. Hayes, President of the United States, do admonish and warn all such persons so intending or preparing to remove upon said lands or into said territory without permission of the proper agent of the Indian Department against any attempt to so remove or settle upon any of the lands of said territory, and I do further warn and notify any and all such persons who may so offend that they will be speedily and immediately removed therefrom by the agent, according to the laws made and provided, and, if necessary, the aid and assistance of the military forces of the United States will be invoked to carry into proper execution the laws of the United States herein referred to."

21 Stat. 797.

A similar proclamation was issued on February 12, 1880, 21 Stat. 798, another by President Arthur, on July 1, 1884, 23 Stat. 835, and a fourth by President Cleveland, on March 13, 1885, 23 Stat. 843. This latter proclamation recited a fact, which is also a matter of public history, as follows:

> "And whereas it is further alleged that certain other persons or associations within the territory and jurisdiction of the United States have begun and set on foot preparations for an organized and forcible entry and settlement upon the aforesaid lands, and are now threatening such entry and occupation."

And the urgency of the situation is disclosed by these closing words of the proclamation:

> "And if this admonition and warning be not sufficient to effect the purposes and intentions of the government as herein declared, the military power of the United States will be invoked to abate all such unauthorized possession, to prevent such threatened entry and occupation, and to remove all such intruders from the said Indian lands."

In addition to the fact disclosed by these proclamations of the long continued and persistent efforts to force an entry into this territory, it is well known that as the time drew near to the opening of it for occupation under and by virtue of the treaties with the Indian tribes, and in accordance with the laws of Congress, there was a large gathering of persons along the borders of this territory waiting the coming of the exact moment at which it would be lawful for them to move into it and establish homestead and other settlements. Under such circumstances as these this legislation was passed, and what, in view on the face of this legislation, evidently its purpose was to secure equality it purpose was to secure equality between all who desired to establish settlements in that territory. The language is general and comprehensive:

> "Any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement . . . shall not be permitted to occupy or to make entry of such lands or lay any claim thereto. . . . Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto."

No exception is made from the general language of these provisions, and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language.

It is urged that there is a penal element in each of these sections, and that therefore the statute must be strictly construed. This penal element is found in those clauses which debar one violating the provisions of the sections from ever entering any of the lands or acquiring any rights therein. But whatever of a penal element may be found in these parts of the sections does not extend to those which are simply declaratory of the conditions upon which entry and occupation may be made. Provisions of like character are frequently found in statutes and constitutions. The general homestead law gives a right of homestead to persons possessing certain qualifications, but it is in no sense therefore a penal statute as to those not possessing such qualifications. The Constitution of the United States restricts the presidency to natural-born citizens, and such as are thirty-five years of age, and have been residents of the county for fourteen years, but there is nothing in this of a penal nature as against those not possessed of these qualifications. If Congress sees fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrongdoer, but that does not give to the residue of the statute, prescribing the qualifications, a penal character. That portion which describes the qualifications for entry is to be liberally construed in order that no one be permitted to avail himself of the bounty of Congress unless evidently of the classes Congress intended should enjoy that bounty. This idea is expressed in 1 Bl.Com. 88, in these words:

> "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense by setting aside the fraudulent transaction, here it is to be construed liberally."

Construing the statute in the light of these observations, it will be noticed first that the provisions apply to the land collectively. The prohibition is against entering upon "any part of said lands," meaning thereby the whole body of lands, and in this body was included the right of way of the railroad company. The company had simply an easement, not a fee in the land. Its rights sprang from the Act of Congress of July 4, 1884, 23 Stat. 73, c. 179, granting the right of way to the Southern Kansas Railway Company, whose successor in interest was the Atchison, Topeka & Santa Fe Railroad Company. This act, by section 2, granted a right of way, and also provided that the land taken therefor should be used only for the construction and operation of railroad, telegraph, and telephone lines, and that whenever any portion thereof ceased to be so used, it should revert to the nation or tribe of Indians from which it was taken. The act further provided, section 7, that the officers and employees might reside on the right of way, but subject to the provisions of the Indian intercourse laws and such rules and regulations as might be established by the Secretary of the Interior in accordance therewith. And by section 10 the grant was made conditioned that neither the company nor its successors or assigns should aid, advise, or assist in any effort looking towards the change of the present tenure of the Indians in their lands or attempt to secure from the Indian nations any further grant of land or its occupancy. In other words, the entire body of lands still remained Indian lands, the fee continued in the Indians, and all that the company received was a mere right of way. So when the treaty of cession was made between the Creek nation of Indians and the government, it was a cession of all lands lying west of a certain line, with no exceptions, and it was this body of lands which was declared by the Act of March 1, 1889, to be a part of the public domain, and thereafter subject to homestead entries, and the proclamation of the President, naming the exact hour at which the lands should be open to settlement, describes a body of land by metes and bounds, and makes no exception of the railroad right of way, though it does of two acres specially described and reserved for governmental use and control. Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land. But whether this be so or not, it is enough that in the cession, in the acts of Congress, and in the proclamation of the President, the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands thus bounded which all parties were forbidden to enter upon who desired thereafter to enter any portions as a homestead.

Counsel contend that the words "enter" and "entry" have a technical meaning in the land laws; that the disqualification in the Act of March 1 from entering upon any part of said lands was modified by the Act of March 2 so as to make it consist in entry and occupation, both being essential; and, quoting from the brief,

> "this was done to relieve the thousands of persons, or 'boomers,' as they were called, from the disability they may have incurred by an entry alone; but to keep them from selecting and occupying – that is, living on any tract of land prior to the time when the land should be opened to settlement and entry under the proclamation which the Act of March 2d authorized the President to issue – the clause was inserted that 'any person entering upon and occupying the same' should be disqualified."

Their idea seems to be that parties might go wheresoever they pleased through this body of lands without subjecting themselves to the disqualification of the statute, providing only that before the date fixed for the opening of the lands for settlement they did not commence an actual living upon the particular tracts they desired to enter as homesteads. Under such a construction, anybody might go into the territory – every quarter section might be occupied by a resident – and all that would be necessary to prevent the operation of the statute would be that on noon of April 22, adjoining neighbors changed their residences. Thus it would be that each party entering upon and occupying any particular tract, entered upon and occupied it for the first time after noon of April 22, and so was entitled to perfect his homestead entry. But this is simply to emasculate the statute. It treats the Act of March 2 as repealed by that of March 1, and repeals by implication are not favored. It would destroy absolutely that equality which was evidently the intent of Congress in the legislation. Two parties might rightfully, immediately after the acts of Congress and the proclamation of the President, enter upon and occupy two adjoining tracts, and then change at the moment fixed, and thus create, as to those

respective tracts thus changed, a prior occupation as against all parties not reaching the territory until April 22. "Enter" and "entry" may be technical words in the statute, but the expressions "enter upon" and "enter upon and occupy" are used in the ordinary sense of the words, and have no technical significance in this statute. *The evident intent of Congress was by this legislation to put a wall around this entire territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came, the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.* [Emphasis supplied by Editor, not in original]

But is said that the appellant was rightfully on the railroad company's right of way; that he had the express sanction of Congress to be there, and that when the hour of noon of April 22 arrived, he had, as an American citizen possessing the qualifications named in the homestead laws, the right to enter upon any tract within the territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the general homestead law, he did not have the qualifications prescribed by this statute, and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there. It must also have known that many other persons were rightfully in the territory – Indian agents, deputy marshals, mail carriers, and many others – and if it intended that these parties, thus rightfully within the territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "any person who may wrongfully enter," etc., but "any person who may enter," "rightfully or wrongfully," is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the road, and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities.

It may be said that, if this literal and comprehensive meaning is given to these words, it would follow that anyone who, after March 2 and before April 22, should chance to step within the limits of the territory would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute, but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be said that if within the letter, he was not within the spirit, of the law, and therefore not disqualified from taking a homestead. Be that as it may – and it will be time enough to consider that question when it is presented – it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein.

The judgment of the supreme court of the territory was right, and it is

Affirmed.

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