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Letter of the acting Secretary of the Interior communicating, in compliance with the resolution of the Senate of the 23d instant, a copy of a letter addressed by the Department of the Interior to the Commissioner of the General Land Office, in relation to the right of the State of Kansas to certain lands sold to the United States by the Osage Indians under the treaty of September 29, 1865

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LETTER
OF THE
ACTING SECRETARY OF THE INTERIOR
COMMUNICATING,

In compliance with the resolution of the Senate of the 23d instant, a copy of a letter addressed by the Department of the Interior to the Commissioner of the General Land Office, in relation to the right of the State of Kansas to certain lands sold to the United States by the Osage Indians under the treaty of September 29, 1865.

JUNE 24, 1870.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 24, 1870.

SIR: Pursuant to Senate resolution of yesterday, I have the honor to transmit herewith a copy of a letter (bearing date of the 8th November, 1867) addressed by this department to the Commissioner of the General Land Office, "in relation to the right of the State of Kansas to certain alternate sections of the lands sold to the United States by the Osage Indians by the treaty of September 29, 1865."

I am, sir, very respectfully, your obedient servant,
W. T. OTTO,
Acting Secretary.

Hon. SCHUYLER COLFAX,
*Vice-President of the United States
and President of the Senate.*

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 8, 1867.

SIR: I have received your letter of the 14th September last, in which you ask for instructions in relation to the sale of the Osage Indian lands ceded to the United States by the treaty of September 29, 1865; also your letter of 29th August last, submitting the appeal of Hon. E. G. Ross from your adverse opinion to the right of the State of Kansas to the alternate sections of said Osage lands along the route of the Leavenworth, Lawrence and Galveston railroad.

As this was merely an opinion expressed in answer to certain inquiries addressed to you, I did not conceive that an appeal could be entertained, and I presumed that the question touching the right of the State would soon arise in a shape in which official action would be required.

Your letter asking for instructions requires me to examine the whole subject.

By the act of 3d March, 1863, (12 Stat., 772,) there was granted to the State of Kansas, for the purpose of aiding in the construction of a railroad and telegraph line from the city of Leavenworth, by the way of the town of Lawrence and via the Ohio City crossing of the Osage River to the southern line of the State, in the direction of Galveston Bay, in Texas, and for a branch down the Neosho Valley to the point where said road enters the said Neosho Valley, every alternate section of land, designated by odd numbers, for ten sections in width, on each side of said road.

By the act of 25th July, 1866, (14 Stat., 236,) a similar grant was made to the same State to aid in the construction of the Kansas and Neosho Valley railroad and its extension to Red River. The ninth section of this act provides that the same grants of lands through the Indian Territory are made as provided in the first section of the act, whenever the Indian title shall be extinguished by treaty or otherwise.

By article 1 of the treaty between the United States and the Great and Little Osage Indians proclaimed 21st January, 1867, said Indians in consideration of the sum of \$300,000, "grant and sell" to the United States the lands contained within certain described boundaries; said lands are to be "surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

The route of the Leavenworth, Lawrence and Galveston road has been definitely located as far as the northern boundary of these Osage lands and a map thereof filed in the department.

The Kansas and Neosho Valley road has signified its acceptance of the terms of the act of 25th July, 1866, as required by the seventh section thereof.

These roads are to pass through portions of the lands described in the first article of the treaty. The United States took no beneficial interest in the lands described in the second article. It constituted them a trustee with a naked power to sell and apply the proceeds arising therefrom in the manner therein set forth. The State, claiming under the United States, takes no title to such lands.

At the time of the passage of said acts, the Indian title and right of possession to the land mentioned in the first article were not extinguished.

Mr. Attorney General Black, in his opinion of 3d June, 1860, (9 Opinions, 346,) remarks:

Nothing, it seems to me, can be clearer than this proposition, namely, that when the United States, by legislative grant, give lands to a State, a corporation, or an individual, for public purposes, all the title which the United States had at the time of the grant, or may afterwards acquire, vests in the grantee, unless the grantee has done something in the meantime which estops him from claiming.

The grant, according to this opinion, attaches to the lands as soon as they are acquired, although some authorities affirm that when a grantor has, at the time of the grant, no estate in the thing granted, a subsequently acquired title will not pass by force of the grant, if there be no covenant or warranty annexed thereto.

In the case before Attorney General Black, the lands covered by the grant of 8th August, 1846, to the State of Wisconsin, were situate within the Stockbridge Indian reserve, the title to which was not extinguished until 1856.

Does the first article of the treaty make a disposition of these lands

which is inconsistent with the railroad grants, or which excludes, expressly or by implication, their operation and effect? You hold that it does; but upon a full consideration of the subject, I am constrained to differ with you in opinion.

Had the article been silent touching a sale of the ceded lands, they would, on becoming a part of the public domain, have been subject to the legislation disposing of it; and, in the view of Judge Black, to any pre-existing grant of a portion of them for public uses. The article is not so silent. It prohibits pre-emption settlements or homestead claims, and requires that the lands be surveyed and sold for cash as public lands are surveyed and sold under existing laws, "including any act granting lands to the State of Kansas," &c. The act and laws so mentioned are thus made applicable to the land. They must control the disposal of it, and receive such a construction as to give to their various provisions full force and effect, except as to homesteads and pre-emption privileges. The clause "including any act," &c., did not form a part of the article when the treaty was signed, but was inserted by the Senate as an amendment. It seems to have been designed to recognize, by express stipulation, the binding efficacy of prior grants, and to exclude any possible conclusion adverse to the rights thereby conferred, had the article remained in its original shape. If the amendment has not this effect, it is entirely misplaced and unmeaning.

Construing the article as it now appears in the treaty, I am of opinion that any grant to the State of Kansas, of the character named, must be allowed as fully as if, at the date thereof, the United States were the proprietor of the land, freed from the incumbrance of the Indian title. The grants are confined to alternate odd-numbered sections, within a certain width from the line of the road and each of its branches. Such line or route must, therefore, be definitely fixed before the particular sections covered by the grant can be ascertained and determined. The roads have not been located over these lands. Unless this be done, and a map of such location filed in this department, no part of the lands can be excepted from public sale.

I presume that the instructions which you request have reference only to the matters discussed in this communication.

The papers are herewith returned.

I am, sir, very respectfully, your obedient servant,

O. H. BROWNING,
Secretary.

HON. JOSEPH S. WILSON,
Commissioner of the General Land Office.