8-7-1894

Amending section 1 of the Act of May 14, 1890.

53D CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1379.

AMENDING SECTION 1 OF THE ACT OF MAY 14, 1890.

AUGUST 7, 1894.—Laid on the table and ordered to be printed.

Mr. MCRAE, from the Committee on the Public Lands, submitted the following

ADVERSE REPORT:

[To accompany H. R. 6414.]

The Committee on the Public Lands, to whom was referred the bill (H. R. 6414) to amend section 1 of the act of May 14, 1890, so as to harmonize the town-site acts and settle the question of jurisdiction, have had the same under consideration and report it back with the recommendation that it do not pass. The accompanying Department report is made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, July 14, 1894.

SIR: I transmit herewith the report of the Commissioner of the General Land Office on H. R. bill No. 6414.

I concur in the conclusion therein expressed.

The Supreme Court in the case of McDaid *v.* Oklahoma Territory (150 U. S. Rep., p. 209), in an opinion delivered by Mr. Chief Justice Fuller, has settled the question of jurisdiction and the proper mode of appeal in town-site cases. In that case it was held:

"Under the authority conferred upon the Secretary of the Treasury by the act of May 14, 1890 (26 Stat., 109, ch. 207), entitled 'An act to provide for town-site entries of land in what is known as "Oklahoma," and for other purposes,' it was entirely competent for the Secretary to provide for an appeal to the Commissioner of the General Land Office in cases of contest.

"When an appeal from a decision of the trustees appointed by the Secretary under the provisions of that act was duly taken it became the duty of the trustees to decline to issue a deed to the appellee until the appeal was disposed of."

I see no reason for any additional legislation upon this subject. The question of jurisdiction has been passed upon by the Department, and the law as it now stands I deem adequate for the objects in view. I therefore recommend that the bill do not pass.

Very respectfully,

HOKE SMITH,
Secretary.

Hon. THOS. C. MCRAE,
Chairman Committee on the Public Lands, House of Representatives.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
Washington, D. C., April 20, 1894.

SIR: I have the honor to acknowledge receipt, under date of April 3, 1890, by reference of the Department, of a letter addressed to you by Hon. Thomas C. McRae, chairman of the Committee on the Public Lands, transmitting "to you for your con-

sideration the bill (H. R. 6414) to amend section 1 of the act of May 14, 1890, so as to harmonize the town-site acts and settle the question of jurisdiction," and requesting "an early report thereon, with such suggestions and recommendations in reference thereto as you may see proper to make."

The said bill H. R. 6414 is before me, as an inclosure of the said letter of Hon. Thomas C. McRae, "for report thereon in duplicate and return of papers."

Any criticism of the language and provisions of the proposed bill must be governed by the purpose of the bill as declared in its title, i. e. "to harmonize the town-site acts and settle the question of jurisdiction."

There is nothing in the said bill to indicate wherein the act of May 14, 1890 (26 Stat., 109), which the bill proposes to amend in its first section, is *not* in harmony with other town-site acts of the United States which may be alleged to be operative in that district of the Territory of Oklahoma in which the act of May 14, 1890, is, by its terms, in its operation, confined.

That the details of execution of said town-site act of May 14, 1890, after entry made as provided, is not in harmony in many respects with provisions of the Territorial law of Oklahoma in town-site matters, may be admitted; but difference in such details, as shown by comparison, can not deprive the United States of its original and sole jurisdiction in the premises, nor confer an exclusive or concurrent, jurisdiction upon others to be exercised under said Territorial law.

Before such territorial town-site law can take effect as to towns built upon the public lands of the United States, situated within the operation of such law, and be exclusive (or concurrent), the land upon which said towns are built must first have been entered under the general town-site law of the United States, applicable in all the public-land States and Territories, or under some special act of Congress in the particular premises, and which special act provides for the exercise of the exclusive power of the State or Territory therein.

The general town-site laws of the United States are found in title 32, Chapter VIII, of the Revised Statutes, sections 2380 to 2390 inclusive.

In the absence, therefore, of legislation by the United States expressly transferring its jurisdiction in town-site cases, after entry made under its own laws, to the State or Territory, to be exercised in the premises by the duly authorized officers of such State or Territory, or of incorporated towns within it, there can be no conflict of authority with the United States and hence no "question of jurisdiction" can arise as to such lands which concerns said State or Territory. The question then is, has the United States in any of its legislation in town-site matters, in reference to Oklahoma Territory, empowered any public officer in that Territory to act solely (or concurrently with the United States) in the matter of town-site entries in any portion thereof?

This question, it may be said, has been attempted to be raised both before this office and the Department, the contention being that such legislation was enacted by the second proviso to section 17 of the act of March 3, 1891 (26 Stat., 989–1026), the question being as to the right of probate judges to make town-site entries in a certain part of Oklahoma.

In the case of "Choctaw City town site," reported in 16 Land Decision (p. 74), this question was considered by the Department, so far as it referred to the lands, a part of the present Territory of Oklahoma, which were opened to entry and settlement, pursuant to law, on the 22d of April, 1889, and the question decided adversely to the right of the probate judge to make such town-site entry therein, after a review of all legislation which had then been enacted by Congress in reference to Oklahoma.

A brief history of that legislation, and action thereunder which has been already had, in reference to the lands now embraced in the Territory of Oklahoma, given at this point, is pertinent to any conclusion of opinion on the bill before me, which history in part, in the language of the decision referred to (*supra*), is as follows:

By proclamation of the President of the United States of March 23, 1889 (8 Land Decision, p. 31), pursuant to the act of Congress of March 2, 1889 (25 Stats., 1004), lands within the present limits of the Territory of Oklahoma were opened to settlement and entry at 12 m., April 22, 1889, central standard time, and were the first of the lands in said Territory so opened to entry and settlement.

The act of March 2, 1889 (*supra*), among other things, provided that:

"The Secretary of the Interior may, after said proclamation, and not before, permit entry of said lands for town sites under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land."

Said section 2387, Revised Statutes, provides that—

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preemption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum

price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of lots in such town, and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

By section 2388 it is provided when, etc., under the preceding and above-quoted section of the Revised Statutes, entry shall be made.

Upon the aforesaid opening of Oklahoma lands, on April 22, 1889, there was no such officer as judge of the county court or probate judge in existence in said Territory to file application under the aforesaid section 2387, Revised Statutes, nor territorial government, nor towns having corporate authorities; hence, applications to make town-site entries were filed by parties, unauthorized by statute, selected in some instances by the settlers upon the tracts chosen as town sites, but said applications, however, were not acted upon by the Land Department.

This condition of affairs continued until May 2, 1890, when Congress passed an act entitled—

"An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes." (26 Stat., 81.)

The ninth section of said act provides "That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace."

This provision of law was the first recognition of the office of probate judge in said Territory, and by the act of the Territorial legislature, which took effect December 25, 1890, probate judges were given authority to make entries of the public lands for town-site purposes.

Section 22 of the act of May 2, 1890 (*supra*) provides—

"That the provision of title thirty-two, chapter eight of the Revised Statutes of the United States relating to 'reservation and sale of town sites on the public lands' shall apply to the lands open or to be opened to settlement in the Territory of Oklahoma, except those opened to settlement by the proclamation of the President on the twenty-second day of April, eighteen hundred and eighty-nine."

It is to be noted that, by the exception contained in the above quoted section of law, the operation of the general town-site laws of the United States was excluded from the lands only which had been opened to settlement and entry on April 22, 1889, and which for the time being were left without any law applying thereto whereby town-site entries could be made therein by any authority.

Reference to the act of May 2, 1890 (*supra*), which fixed the boundaries of Oklahoma Territory, shows that said Territory embraced a vast area of country in addition to that opened to settlement, etc., April 22, 1889, and to which vast area, no further and specific legislation being had in relation thereto, the general town site laws of the United States would have application under aforesaid section 22 (*supra*). By this said act of May 2, 1890, that part of Oklahoma known as "Public Land Strip" was opened to entry under the general land laws.

As the land, however, opened April 22, 1889, excepted from such general town-site laws, there was no intention on the part of Congress to leave it without the advantages of legislation allowing town-site entries therein, for on May 14, 1890, Congress passed the act (26 Stat., 109) which provided (and which is the act to which amendment is now proposed by the bill here)—

"That so much of the public lands situated in the Territory of Oklahoma, now opened to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes, as near as may be."

The only lands open to settlement on May 14, 1890, wherein entries were to be made by trustees appointed under said act, were those opened April 22, 1889, by proclamation (*supra*).

By proclamation of the President of date September 18, 1891, under the acts of February 13, 1891 (26 Stat., 758, 759, sec. 7), and March 3, 1891 (26 Stat., 989–1044, sec. 16), lands ceded by the Sac and Fox Nation, Iowa tribe of Indians, Citizen Band of Pottawatomie Indians, and Absentee Shawnee Indians, made a part of the Territory of Oklahoma, were opened to settlement and entry September 22, 1891, at 12 o'clock, central standard time. Also by proclamation of the President dated April 12, 1892, under act of March 3, 1891 (26 Stat., 989, sec. 16), lands ceded by the Cheyenne and Arapahoe tribes of Indians, and made a part of Oklahoma Territory, were opened to settlement and entry on April 19, 1892, at 12 o'clock noon, central standard time.

In the absence of any new specific legislation in relation to town-site entries in the lands so opened to settlement and entry under the acts of February 13 and March 3, 1891, such class of entries therein came clearly within the provisions of the general town-site laws of the United States (Revised Statutes), and as was provided in section 22 of the act of May 2, 1890 (*supra*).

By proclamation of the President of date August 19, 1893 (17 L. D., 230), under act of March 3, 1893 (27 Stat., sec. 10, p. 640), lands ceded by the Cherokee Nation of Indians, made a part of Oklahoma Territory, were opened to settlement and entry September 16, 1893.

By the second proviso of section 17 of the act of March 3, 1891 (*supra*), it was enacted:

"That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in town-site matters, and under such regulations as are provided by the laws of the State of Kansas."

By act of the Territorial legislature, taking effect December 25, 1890 (as before stated), probate judges were given authority to make town-site entries within Oklahoma Territory.

At the date of the proclamation, August 19, 1893, the lands described therein to be opened to settlement and entry as provided (as in the case of the lands so opened in 1891 and 1892), in the absence of any new special legislation governing town-site entries upon such lands, came also under the general town-site laws of the United States by virtue of the twenty-second section of the act of May 2, 1890 (*supra*), and the application of the above-quoted proviso of section 17 of the act of March 3, 1891 (*supra*), whereby probate judges have authority to make town-site entry in trust, etc., which entry being made the trust is executed under Territorial legislation authorized by that Federal law.

However, by joint resolution of Congress (Public No. 4), approved September 1, 1893, entitled—

"Joint resolution to make the provisions of the act of May fourteenth, one thousand eight hundred and ninety, which provides for town-site entries of lands in a portion of what is known as Oklahoma applicable to the territory known as the Cherokee Outlet, and to make the provisions of said act applicable to town sites in the Cherokee Outlet."

It was enacted, "That all of the provisions of an act of Congress approved May fourteenth, one thousand eight hundred and ninety, which provides for town-site entries of lands in a portion of what is known as Oklahoma, be, and the same are hereby, made applicable to the territory known as the Cherokee Outlet, and now a part of the Territory of Oklahoma; and that all acts or parts of acts inconsistent with this joint resolution be, and the same are hereby, repealed."

Therefore, by this special legislation, upon the date when said Cherokee Outlet was legally opened to settlement and entry, September 16 1893, as to town-site entries therein, it came wholly within the act of May 14, 1890 (*supra*), and there could be no application of section 22 of the act of May 2, 1890 (saving the provisos in said section), nor of second proviso of section 17 of the act of March 3, 1891 (*supra*), all entries in said Outlet to be made by trustees only, probate judges in Oklahoma, as to town-site entries by them under Federal law, being thereafter confined to those lands opened and made a part of the Territory of Oklahoma in 1891 and 1892.

All authority of State or Territorial legislatures now or heretofore exercised by them in the matter of town-site entries on the public domain and the exclusive jurisdiction of State or Territorial courts in said matter has been derived under those town-site laws of the United States expressly conferring such authority, and by necessary implication such jurisdiction, but only to have operation and effect where the United States had *first completely divested itself* of all title in the given premises by patent duly issued to a legally designated authority and in the manner prescribed by existing law.

In the case of Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, plaintiffs in error, *v.* The Territory of Oklahoma, on the relation of Winfield S. Smith and Stephen H. Bradley (Supreme Court of the United States, No. 785, October term, 1893), which was a proceeding in mandamus brought in the district court of the first judicial district of Logan County, in the Territory of Oklahoma, April 27, 1891, to compel the said McDaid, Merriweather, and Shanklin, as trustees of the town site of Guthrie, Okla. (which town was within the lands opened as aforesaid in 1889), appointed by the Secretary of the Interior under the act of May 14, 1890 (*supra*), to execute deeds for certain lots in said town site, it was held by the court, among other things, as to said act of May 14, 1890 (*supra*):

"By the scheme of this act the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the Government until the rightful claimants

and the undisposed-of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these Government appointees, and until the trustees conveyed the title did not pass beyond the control of the Executive Department in that regard."

The judgment of the district court was reversed and the case remanded with directions to dismiss the petition for mandamus, and the right of appeal to this office and the Department proper was recognized.

Until *conveyed* the title did not pass beyond the control of the Department is the holding.

As to the matter of the bill itself before me (H. R. 6414) the amendment proposed by the first section thereof to the act of May 14, 1890, limiting said act, when so amended to the "Cherokee Strip" (Outlet), it is submitted, should that amendment become law, thereafter no town-site entries by trustees could be made in that portion of Oklahoma which was opened to settlement and entry April 22, 1889, to which said act of May 14, 1890 now applies, and by reason of the limitation in the proposed amendment; nor could any town-site entries be made at all within said lands which were opened in 1889, as stated, since said lands were expressly excepted by section 22 of the act of May 20, 1890, (*supra*), from the operation of the existing general town-site laws of the United States, except that town-site entries might still continue to be made therein under the commutation proviso of section 22 of the act of May 2, 1890, which proviso is made applicable throughout the Territory.

Moreover, the alleged purpose of the proposed amendment is not made clear by reason of the obscurity of meaning in the words found in lines 12, 13, 14, and 15, of the bill.

Without further discussing the details of the said proposed amendment as to their propriety, etc., suffice it to say that the present act of May 14, 1890, operative in the "Cherokee Outlet" and in another portion of Oklahoma, being found satisfactory in its working in this office, and there being no real "question of jurisdiction" existing, as shown, between your Department and the Territorial courts under said act, your entire control in the said premises being fully recognized by the Supreme Court, as before stated, and for the other reasons stated by me, the proposed bill is emphatically disapproved.

That Congress has seen fit, in reference to certain areas of land in Oklahoma, to legislate specially therefor in a certain particular, thereby annulling the operation of its general laws therein in that particular, and for reasons deemed by Congress good and sufficient, and which reasons must still continue to exist, is no ground for complaint by the beneficiaries of that special legislation, it being competent for Congress to dispose of the public domain on whatever plan and conditions it pleases, and parties seeking the benefits of that legislation are charged with full notice of those conditions, and it is not to be presumed, in cases where by law it is reserved to the Government to execute a given law in the disposition of public lands, the title of which it has, that such matter of disposition of said lands can be better, more honestly, or effectively carried out by the State or Territory, and by securing a change to that end in the law itself.

The present method for disposing of lots within town sites under the act of May 14, 1890, by the Government is one in the interest of those who seek to acquire land honestly and in good faith, and tends greatly to guard against the acquisition of such lands fraudulently and the schemes of speculators and adventurers.

If any further town-site legislation is deemed advisable it should go no further than an extension of the present act of May 14, 1890, over the whole Territory of Oklahoma, and with the view of uniformity in Federal town-site laws operative therein.

In the absence of any peculiar reason for special legislation by Congress in the the matter of making town-site entries on the public domain, no sufficient reasons appearing for a specific act in any given case, the existing general town-site laws of the United States appear amply sufficient in that field.

Dissenting entirely from the proposed bill (H. R. 6414) the copy of it transmitted by you and accompanying papers are herewith returned.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

The SECRETARY OF THE INTERIOR.

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