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THE ADMINISTRATIVE DETERMINATION OF
PUBLIC LAND CONTROVERSIES

BY HENRY L. McCLINTOCK*

1. HISTORICAL SKETCH

THE administration of the disposition of the public domain has a history that goes back to a period before the formation of the federal government. During the entire life of the nation the problem of the proper disposal of the lands of the nation has occupied a considerable part of the attention of the government, and the distribution of these lands has profoundly affected our whole economic situation, and, through that, our political and legal history. In the beginning, when the policy was to sell the land for cash to the highest bidder, the administrative problems were simple but as the policy gradually changed to that of placing the lands in the hands of settlers, or other claimants, either free of charge, or for only a nominal price, and as the several acts under which the lands could be claimed were enacted, the administrative problems became increasingly complex, and new machinery had to be devised to handle them. From the very beginning, the policy of having the controversies between the government and the claimants decided by administrative officers or commissions, and not by the courts has been followed. As a result there has been developed a highly organized administrative machine which has now, perhaps, passed the period of its greatest activity because of the increasing scarcity of desirable public lands, but a study of which ought to yield many valuable suggestions for the organization and development of machinery to handle the different questions with which we are confronted by the new economic situation resulting, in part, at least, from the fact that we no longer have free lands available for those who are dissatisfied with their present lot. The features of this administrative system that are of special interest for this purpose are the machinery and technique for determining controversies, the power to make rules and regulations, and the control of the administrative agencies by the courts.¹

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¹For studies of the General Land Office as an administrative organ see White, *The Administration of the Land Office 1911*, an unpublished

The first step toward the general disposal of the public lands was taken by the resolution of Congress, Oct. 3, 1780² providing that the unappropriated lands ceded or relinquished to the United States should be disposed of for the common benefit of the United States and that "the said lands shall be granted or settled at such times, and under such regulations, as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them." By Ordinance of May 20, 1785,³ Congress provided for the survey of the public lands and for the drawing by the board of treasury of the lands remaining, after the secretary of war had drawn the quantity required for the bounty granted to the continental army, in the name of the thirteen states respectively according to the quotas in the last preceding requisition on all the states, and authorized the sale of the lands so drawn by the commissioners of the loan office of the several states. By a supplement to this ordinance, adopted July 9, 1788,⁴ it was recited that it had been found inconvenient to execute the provision that certain portions of lands be allotted to the several states, to be sold by the loan officers in each state, and, therefore, that provision was repealed and the board of treasury was authorized to sell the lands not already sold or drawn for the army. In the meantime the ordinance for the government of the Northwest Territory, adopted July 13, 1787,⁵ provided that the legislatures of the districts or new states to be formed in such territory should never interfere with the primary disposal of the soil by the United States in Congress assembled. By the time the new government was organized under the constitution the policy had, therefore, become settled, that the national government, and not the several states, was to control the disposition of the public lands, and that policy was embodied in the provision that:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."⁶

By the act which established the treasury department, act of

thesis for a doctor's degree in Widener Library, Harvard, and Conover, The General Land Office, 1923, being No. 13 of the Service Monographs of the U. S. Government, by the Institute for Government Research, Johns Hopkins Press.

²U. S. Public Land Laws, Instructions and Opinions, c. 9, cited hereafter as Pub. Lands.

³Ibid. c. 14.

⁴Ibid. c. 28.

⁵Ibid. c. 20.

⁶U. S. constitution, art. 4, sec. 3.

September 2, 1789,⁷ it was provided in section 2 that it should be the duty of the secretary of the treasury, among other things, to execute such services relative to the sale of the lands belonging to the United States as might be by law required of him.

The first local land offices, four of them all located in Ohio, were created by act of May 10, 1800.⁸ This act placed each land office under a register to be appointed by the president with consent of the Senate⁹ and also authorized payments for lands to be made to such person or officer as shall be appointed by the president with the consent of the Senate receiver of public moneys at each of the places where the public and private sales are to be made.¹⁰ The act prescribes in detail the duties of the register with reference to receiving applications for sale, keeping records and issuing receipts and certificates,¹¹ showing that the practice of making private sales of land on the application of individuals desiring to purchase was already established. No provision is made for the settlement of any controversies which might arise, except that section 7 provided that if two or more persons should apply at the same time for the same tract, the register should immediately, in the presence of the parties, determine by lot which of them should have preference.

Apparently up to this time few, if any, controversies had confronted those in charge of the disposal of the lands. The military bounties were administered by the War Department,¹² the refugees from Nova Scotia, who had been offered lands, were required to make proof of their claims before some federal or state judge, and on the basis of that proof the secretary of war, secretary of treasury and comptroller of the treasury were to decide the quantity of land to which the claimant was entitled.¹³ But only a little more than a year before the creation of the local land offices, Congress had granted a preference right to purchase, or a pre-emption right, to those who had contracted with John Cleve Symmes, a grantee of a large tract of land, to purchase lands which were outside of the tract as finally patented to the grantee,¹⁴ and by section 16 of the act creating those offices, a pre-emption right was granted

⁷1 Stat. at L. 65.

⁸2 Stat. at L. 73.

⁹2 Stat. at L. 73, sec. 1.

¹⁰2 Stat. at L. 73, 75 sec. 6.

¹¹2 Stat. at L. 73, 75-79, secs. 7-9.

¹²Ord. May 20, 1785. 1 Pub. Lands, c. 14, p. 15.

¹³Act of April 7, 1798, 1 Stat. at L. 547.

¹⁴Act of March 2, 1799, 1 Stat. at L. 728.

to persons who had erected or begun to erect grist-mills, or saw-mills on any of the lands therein directed to be sold.¹⁵ These pre-emption rights, and subsequent extensions of them to other classes, and finally to all settlers, were the principal sources of the problems in the disposal of the public domain which led to the development of the administrative system in the land office. Before this time, the only instructions from the secretary of the treasury which are preserved in United States Public Land Laws, Instructions and Opinions published in 1838,¹⁶ are directed to the receivers of public moneys and relate to the certificates to be issued and the records kept by such officers.¹⁷ Within five months after the enactment of the act of May 10, 1800, he was required to answer an inquiry from the register at Chillicothe as to the determination of claims for pre-emption under section 16 of that act. He says:

"It appears to me that questions relative to the rights of pre-emption secured by the sixteenth section of the law will generally arise under such circumstances as to be susceptible of decisions only in the courts of law. In other cases, justice and policy recommend that the act should receive an interpretation favorable to the claimants. So far, therefore, as the public rights are concerned, I recommend that the actual and continued occupancy of a mill seat, connected with improvements of any nature upon the land which clearly indicate an intention of erecting a saw-mill or grist-mill, will be considered as sufficient to vest a right of pre-emption."¹⁸

Here we see a recognition of the distinction between the determination of the rights of a claimant as against an adverse claimant and as against the government which has persisted throughout the history of the land department.

But it was in connection with claims for pre-emption by persons who had contracted with Symmes that the first provision was made for administrative machinery for the decision of controversies. By act of March 3, 1801,¹⁹ those persons were again given a preference right to purchase the lands contracted for and were required to file a notice in writing with the receiver of public monies at Cincinnati stating the nature of their claims or contracts. It was further provided that the receiver and two other persons, to be appointed by the president alone should be commissioners to

¹⁵Act of May 10, 1800, 2 Stat. at L. 78.

¹⁶Cited in this article as Pub. Lands.

¹⁷2 Pub. Lands 219.

¹⁸2 Pub. Lands 221.

¹⁹2 Stat. at L. 112.

ascertain the rights of such claimants. The commissioners were empowered "to hear and decide, in a summary manner, all matters respecting all such claims," to administer oaths, examine witnesses and other testimony and "determine thereon according to justice and equity, which determination shall be final."

By act of March 26, 1804, section 7,²⁰ it was provided that the register of the land office and receiver of public moneys at Cincinnati should perform the same duties, exercise the same powers and receive the same emoluments as were enjoined on or vested in the commissioners under the earlier act. The earlier sections of the same act had created land offices at Detroit, Vincennes and Kaskaskia and section 4 had made the register, and the receiver of public monies of those land offices commissioners to examine claims to lands under French or British grants, granting them powers similar to those granted the commissioners under the earlier act but requiring their decision to be laid before Congress and be subject to their decision thereon. During the next two decades numerous statutes were enacted for the settlement of private claims most of which required a reference to Congress, but a few of which gave the commissioners, or register and receiver as the case might be, authority to make a final determination.²¹ Other acts

²⁰2 Stat. at L. 277, 280, sec. 7.

²¹Lands in Detroit District: By act of March 3, 1807, (2 Stat. at L. 437) the register and receiver and the secretary of the treasury were given final authority to pass on claims of occupants to lands granted by that act; by act of May 11, 1820, (3 Stat. at L. 572) the powers of the commissioners to determine British and French claims were revived with the provision these decisions should be laid before Congress as provided in former laws. Louisiana: Act of March 2, 1805, (2 Stat. at L. 324) authorized the appointment of two commissioners who, with the register of the land office, should hear claims under Spanish and French grants and report to Congress; by act of March 3, 1807, (2 Stat. at L. 440) the commissioners were given power to decide finally all claims by residents to tracts not exceeding one league square and not containing a lead mine or a salt spring; act of March 10, 1812, (2 Stat. at L. 692) and act of April 14, 1812, (2 Stat. at L. 709) extending the time for claims before the commissioners required reference to Congress for final decision; act of March 3, 1819, (3 Stat. at L. 528) made separate provision for the determination of claims east of the Island of New Orleans by the register and receiver, requiring reference to Congress; act of May 11, 1820, (3 Stat. at L. 573) authorized the register and receiver to determine claims to land west of the Mississippi, with reference to Congress. Mississippi: Act of March 3, 1803, (2 Stat. at L. 229) authorized two commissioners with the register of the land office to determine British and Spanish grants, subject to reference to Congress for final determination; similar provision was made in the supplementary act of March 27, 1804, (2 Stat. at L. 303). Vincennes: Act of April 30, 1810, (2 Stat. at L. 590) authorized decisions by the register and receiver subject to final determination by Congress. Missouri: Act of June 13, 1812, (2 Stat. at L. 748) authorized the recorder of land titles for the territory to decide claims in the future with the same powers pos-

allowed pre-emption rights in certain cases without providing any method of determining controversies that might arise thereunder.²² Act of May 26, 1824,²³ granting pre-emption rights in Arkansas required the claimant to make proof of his claim to the satisfaction of the register and receiver.

In the meantime the General Land Office had been organized as part of the Treasury Department by act of April 25, 1812,²⁴ the chief officer being designated as commissioner, and being empowered to perform all acts touching the public lands as had theretofore been directed to be done by the secretary of state, secretary and register of the treasury, and the secretary of war, or as should thereafter be assigned to him. No provision was made in the act for the determination of any controversies relating to the disposal of the public lands.

By act of March 31, 1830,²⁵ pre-emption rights were granted to purchasers in possession of public lands whose lands had reverted to the United States for default in payment of the balance due thereon, and by act of May 29, 1830,²⁶ a pre-emption right was granted to every settler or occupant of the public lands prior to the passage of the act, who had cultivated any part of the land in the year 1829. Both acts required proof of the facts giving the right to be made to the satisfaction of the register and receiver of the land district in which the land lay, as required by rules to be prescribed by the commissioner of the General Land Office.²⁷ Sub-

essed by the commissioners under prior laws, subject to revision by Congress; (Public Lands (1838) contains no earlier statute relating to Missouri. Before the organization of the Territory it would be governed by the laws relating to Louisiana territory). By act of May 26, 1824, (3 Stat. at L. 52) claimants were authorized to petition the district court of the state for an adjudication of their claims. Florida: Act of May 8, 1822, (3 Stat. at L. 699) authorized the appointment of three commissioners to determine claims under British and Spanish grants, subject to revision by Congress in case of conflicting claims under different governments and in case of claims to an undefined area, or exceeding 1,000 acres; by act of March 3, 1823, (3 Stat. at L. 754) the commissioners were authorized to decide finally claims under the Spanish government not exceeding 3,500 acres. The requirement of references to Congress for final determination seems not to have been very material. All allowances by commissioners of claims were confirmed and by act of June 13, 1912 (2 Stat. at L. 748) claims disallowed by the commissioners for certain stated reasons were also confirmed.

²²For example act of Feb. 5, 1813, (2 Stat. at L. 797) giving a pre-emption right to certain settlers on land in Illinois.

²³4 Stat. at L. 39.

²⁴2 Stat. at L. 716.

²⁵4 Stat. at L. 390.

²⁶4 Stat. at L. 420.

²⁷By act of March 3, 1807, (2 Stat. at L. 455) it was provided that anyone settling on public lands before he was duly authorized by law

sequent acts allowed similar pre-emption rights to settlers on the land at later dates who had cultivated in subsequent years.

These acts provided for no appeal from the decision of the register and receiver, and no right to review such decision existed.²⁵ The only power of the commissioner to supervise the decision was his right to suspend the issuance of a patent until direction of Congress or the decision of a competent tribunal could be obtained.²⁹ By the act of July 4, 1836,³⁰ the General Land Office was reorganized and by section 1 of that act it was provided that the executive duties appertaining to the surveying and the sale of the public lands, or in any wise respecting such lands, and, also, such as relate to private claims to land and the issuing of patents for all grants of land should be subject to the supervision and control of the commissioner under the direction of the president.³¹ Under this act the practice was established in cases where an entry had been allowed on ex parte affidavits and the land was claimed by another, to return the proofs and opposing allegations to the register and receiver with instructions to call all the parties before the local officers for an inquiry, allowing each party an opportunity of introducing proofs and cross-examining the witnesses of the other and on the close of the investigation the register and receiver

should forfeit any claim to the lands, and be liable to a money penalty and to imprisonment on conviction, and it was made the duty of the marshal to remove them. That act and later acts authorized settlers to apply for leave to remain as tenants at will but they were required expressly to agree to give up possession when the lands were sold to another. Even after the pre-emption rights were given in 1830, jurisdiction over offenses under the act of 1807 was extended by act of March 2, 1833, (4 Stat. at L. 665). The second section of that act authorized the President to direct certain Indian agents to perform the duties of marshals under the act of 1807, and it may be the act was intended to meet a special condition. But the settlers were occupying the lands faster than they could be surveyed and were forming local land clubs for their mutual protection. (See Conover, General Land Office 19). Though their occupation of the lands was unlawful, it was a fact that must be recognized, and in the administration of Jackson it is not surprising that such recognition took the form it did, thereby securing to them the fruits of their settlement and improvement. For a reference to the power of these land clubs, see Smiley v. Sampson, (1867) 1 Neb. 56, affirmed 13 Wall. (U.S.) 91, 20 L. Ed. 489.

²⁵Wilcox v. Jackson, (1839) 13 Pet. (U.S.) 498, 511, 10 L. Ed. 264; Lytle v. Arkansas, (1850) 9 How. (U.S.) 314, 331, 13 L. Ed. 153.

²⁹3 Op. Atty. Gen. 93. 2 Pub. Lands 84.

³⁰5 Stat. at L. 107.

³¹By an order dated May 4, 1836, (2 Pub. Lands 92) President Jackson had directed that all questions in regard to issuing or suspending patents for public lands and in respect to which the Commissioner of the General Land Office required direction or his direction was objected to, should be presented to the secretary of the treasury for his decision and direction, subject, as in other cases, to the supervision of the president.

were to report the proceeding to the general land office, with their opinion as to the effect of the proof and the case made by the additional testimony. In *Barnard's Heirs v. Ashlay's Heirs*³² the Supreme Court held such supervision and control by the commissioner was authorized by the Act of Reorganization, 1836, "but if the construction of the act to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

Section 5 of the reorganization act provided for the appointment of a solicitor of the General Land Office to give an opinion on all cases involving questions of law referred to him and also to advise the commissioner on all questions which may be referred to him growing out of the management of the public lands.

The office of the solicitor was abolished by Act June 12, 1844,³³ which provided that the duties of the office should be performed by the recorder or other employee in the Land Office as the commissioner might direct.

It was the practice under these temporary pre-emption acts for the district officers to ask the commissioner for instruction on doubtful questions, and for him to refer the matter to the secretary of the treasury who could ask for an opinion by the attorney general. But if the subordinate officers were willing to make the decision, there was no way by which such decision could be brought before the superior officers for review. In fact the attorney general refused to render an opinion which was requested solely because the claimant desired it, it appearing that the department was satisfied with the decision rendered.³⁴

By act of September 4, 1841,³⁵ a pre-emption right was granted to every head of family or widow or single man, over 21 and a citizen, or who had declared intention to become a citizen, and who, since June 1, 1840, had made, or who should thereafter make, a settlement in person on public lands, thus establishing permanently the policy of encouraging the settling of those lands by giving the settlers the right to purchase at the minimum price. Section 11 of the act provided that all questions as to right of pre-emption arising between different settlers should be settled by the register and receiver, subject to appeal to, and revision by, the

³²(1855) 18 How. (U.S.) 43, 45, 15 L. Ed. 285.

³³5 Stat. at L. 662.

³⁴3 Op. Atty. Gen. 39.

³⁵5 Stat. at L. 453.

secretary of the treasury. Section 12 required proof of settlement and improvement to be made to the satisfaction of the register and receiver, agreeably to rules prescribed by the Secretary of the Treasury, and by section 13 the claimant was required to make oath as to his right.

Section 11 was amended by the act of June 12, 1858, section 10³⁶ so that appeals from the decisions of district officers in cases of contest between different settlers should thereafter be decided by the commissioner, whose decision should be final unless an appeal therefrom be taken to the secretary of the Interior. The General Land Office had been transferred to the Interior Department on the creation of that Department by act of March 3, 1849.³⁷

In the first circular of instructions issued under the authority of the Pre-emption Act of 1830,³⁸ the only rule as to proof required the facts of cultivation and possession to be established by the affidavit of the occupant, supported by such corroborative testimony as might be satisfactory to both the register and receiver. The evidence must be taken by a justice of the peace in the presence of the register and receiver and in answer to such interrogatories propounded by them as might be best calculated to elicit the truth. On June 21, 1836, Attorney General Butler rendered an opinion³⁹ that the provision that proof of settlement should be made agreeably to rules prescribed did not empower the commissioner to authorize the local officers to receive anything as proof which was not proof within the meaning of the word; he could not dispense with the requirement of proof nor make regulation as to the weight of proof; as a general rule proof did not include the oath of the claimant or other interested party and, therefore, entries where the corroborating testimony required by the rule did not amount to full proof were voidable. By act of July 2, 1836,⁴⁰ Congress confirmed all entries made in accordance with the instructions, if they were in other respects fair and regular. The pre-emption act of 1841, in section 12 contained a provision for proof in the same language as the act of 1830, and by the following section expressly required an affidavit by the applicant as to his qualifications to claim a pre-emption. The instructions under this act⁴¹

³⁶11 Stat. at L. 319, 326.

³⁷9 Stat. at L. 395.

³⁸2 Pub. Lands 539.

³⁹3 Op. Atty. Gen. 126.

⁴⁰5 Stat. at L. 73.

⁴¹Zabriskie, Land Laws 49.

required proof by disinterested witnesses as to the fact of settlement, expressly stating that the affidavit of the claimant as to that fact need not be required; that it was not legal evidence and should not form part of the proof in reference thereto. The instructions prescribed in considerable detail the method to be followed in the taking of proof, required notice to adverse claimants and authorized depositions in certain cases.

In other respects the power of the Commissioner to regulate the administration of the land system was not so strictly limited, even though it was not expressly conferred by statute as was the power to regulate the proof. From the very beginning the Commissioner had given instructions as to the proper construction of the land laws, frequently based on the opinions of the attorney general. Such instructions would have no binding effect in themselves, but they established the executive construction of the acts, which the courts followed in cases of doubt. Sometimes, even, new requirements were added. On January 1, 1836, a circular⁴² had been issued which provided that lands which had been ascertained to have been erroneously withheld from private entry, should not be entered or located until notice had been given for at least thirty days that applications therefor would be received. In response to a request for a construction of this regulation, the same Attorney General Butler stated⁴³ that no power to make the regulation was expressly given to the commissioner by any act of Congress, adding:

"I think, however, it is well warranted by the nature of the case, and the general powers of the executive under the constitution."

By Revised Statutes, section 2478 the commissioner, under the direction of the secretary of the interior was authorized to enforce and carry into execution by appropriate regulations every part of the provisions of the title (Public Lands) not otherwise specially provided for. The revisors gave no references to prior acts as the source of this section, indicating it was probably a formulation of the practice established without statutory authority.

By that time fairly complete sets of instructions for the disposal of lands under the several acts had been developed, and in addition a collection of practice rules.⁴⁴ In 1880 revised rules of

⁴² Pub. Lands 514.

⁴³ Op. Atty. Gen. 275.

⁴⁴ See various sets of instructions in *Zabriskie, Land Laws*, especially pp. 493-506.

practice covering litigated cases before the district officers and before the commissioner and the secretary were approved.⁴⁵

Thus there was developed before the middle of the nineteenth century a complete administrative machine for the determination of controversies under the public land laws, with an original and two appellate tribunals and with power to make rules governing its own procedure. But it was not, itself, sufficient for all purposes. When the proof showed a substantial compliance with the law, but there was a failure to observe some technical provision, the Land Office felt that it had no power to waive the objection, but in order to protect the entryman the question would be referred to Congress. In course of time these cases became so numerous that by act of Aug. 3, 1846,⁴⁶ a Board of Equitable Adjudication, as it came to be known, was created. By that act the commissioner was authorized to determine on principles of equity and justice, and in accordance with general equitable rules and regulations, to be settled by the secretary of the treasury (later the secretary of the interior), the attorney general and the commissioner of the General Land Office conjointly, all cases of suspended entries and to adjudge in what cases patents shall issue. The decisions must be approved by the secretary and attorney general, and cannot affect private rights of others. The original act was limited to two years and required a report to Congress showing the cases in which entries were confirmed or rejected but patents were to issue for those confirmed and the lands covered by those rejected were to revert to the public domain, so that Congress reserved no power to revise the decisions. By act of June 26, 1856,⁴⁷ the earlier act was made permanent and applicable to future entries, and its provisions were incorporated in Revised Statutes, sections 2450-2456; section 2452 which contained the requirement that the board report its decisions to Congress was repealed by the act March 2, 1895,⁴⁸ section 3.

Revised Statutes section 2457 provides that these sections shall apply to all classes of entries where the law has been substantially complied with and the error or informality arose from ignorance, accident or mistake which is satisfactorily explained, and where the rights of no other claimant are prejudiced or there is no adverse claim.

⁴⁵1 Copp's Pub. Land Laws 193.

⁴⁶9 Stat. at L. 51.

⁴⁷11 Stat. at L. 22.

⁴⁸28 Stat. at L. 807.

It is noteworthy that in creating this separate equity tribunal Congress did not give to it an unfettered discretion to determine each case solely on its own facts, but required the formulation of general equitable rules and regulations in accordance with which the discretion was to be exercised. Originally fourteen rules were promulgated,⁴⁹ but others have been added from time to time until now there are thirty-three.⁵⁰ Generally they cover some technical defect in the proof caused by the fault of the local officers, or excusable neglect or delay by the applicants. Apparently Rule 27, allowing a deserted wife and children to make final homestead proof, created a new right to acquire land, but in *Bray v. Colby*⁵¹ it was held that the wife could not make cash entry of the land after the homestead entry had been cancelled on contest, that she had no right to the land, but by rule 27 was permitted to make proof as her husband's agent when there was no adverse claim.

If the officers of the land department thought the case a proper one for submission to the board, they were required to specify the rule under which it was submitted or designate it as special. In *Hawley v. Diller*⁵² the Supreme Court held that the board need act only when the decision of the Land Department sustained the right and that the secretary acting alone could cancel an entry, which had been suspended to investigate a charge of fraud, on finding that the entryman was acting for another. In *In re Woodward*⁵³ it was held that reference of any case to the board rested within the discretion of the Land Department and could not be claimed as a right, even though a similar entry had previously been so referred. In that case a timber entry had been made without a personal examination of the land. Other cases in which a reference was refused were an entry by a member of the Missouri Home Guard, invalid for want of due military service;⁵⁴ a homestead commutation entry not supported by necessary proof of residence, and now claimed by a purchaser so that the non-alienation affidavit could not be made;⁵⁵ an application for patent verified by an attorney in fact when the applicant was a resident and physically able to verify, the decision adding that applicant

⁴⁹Zabriskie, Land Laws 422.

⁵⁰Zabriskie, Land Laws 425; Copp's Pub. Land Laws 1465; (1890) 10 Land Dec. 502; (1910) 39 Land Dec. 320.

⁵¹(1884) 2 Land Dec. 78.

⁵²(1900) 178 U. S. 476, 44 L. Ed. 1157, 20 S. C. R. 986.

⁵³(1913) 42 Land Dec. 437.

⁵⁴In re Carpenter, (1888) 7 Land Dec. 236.

⁵⁵In re Lockwood, (1895) 20 Land Dec. 361.

couldn't file a new application "for the reason that he has parted with all title, and for the further reason that he is dead,"⁵⁶ and a mining claim where the notice was posted 819 feet outside of the claim, which was not a substantial compliance with the requirement that it be posted on the claim.⁵⁷

The parallel with the development of courts of equity was continued when by act of September 20, 1922, Revised Statutes sections 2450 and 2451 were so amended as to vest all authority previously given to the board, in the secretary of the interior. In the report of the commissioner for the year ending June 30, 1923,⁵⁸ it is said this legislation was proposed by the department to expedite the disposition of the suspended claims.

In 1862 the first homestead law⁵⁹ was enacted. It required proof before the register and receiver and authorized the commissioner to make rules and regulations to carry it into effect. The only new procedural feature was the requirement of notice to the settler before cancellation of the entry on the ground of abandonment.

Subsequent laws for the disposition of the public lands have generally, either expressly or inferentially, committed the determination of controversies thereunder to the same organization that had been developed in connection with the pre-emption claims, but when the mineral land statutes were enacted a somewhat different plan was adopted. By act of July 26, 1866,⁶⁰ which first permitted title to mineral lands to be obtained from the government, it was provided that notice of application for patent to such lands must be posted and published and, in section 6, that if adverse claimants to any mine appeared, all further proceedings should be stayed until a final settlement and adjudication are had in the court of the rights of possession to such claim. The subsequent act of May 10, 1872,⁶¹ contained more detailed provisions governing the institution of suits in court by adverse claimants, which are now found in Revised Statutes section 2326. When the bill, which became the act of 1866, was being debated in the Senate,⁶² Senator Williams, of Oregon, who opposed the bill as a whole, objected to the introduction of confusion into the land laws by entrusting the

⁵⁶In re Drescher, (1913) 41 Land Dec. 614.

⁵⁷In re Equity M. & Inv. Co., (1914) 43 Land Dec. 396.

⁵⁸Page 26.

⁵⁹Act of May 20, 1862, 12 Stat. at L. 392.

⁶⁰14 Stat. at L. 251.

⁶¹17 Stat. at L. 91.

⁶²Cong. Globe, 1865-66, pt. 4, p. 3230. June 18, 1866.

determination of controversies to tribunals other than the Land Office, which determined them with reference to all other public lands. The provision was supported by Senators Stewart of Nevada and Conness of California, who were the principal advocates of the bill, on the ground that the general purpose of the bill was to follow the existing practice which was to have controversies as to rights of possession of mining claims determined in the state or territorial courts, that such controversies depended on local mining customs, and that it would be a hardship to compel the claimants to present their claims to a tribunal in Washington for decision. No charge was made that the administration of the other land laws by the Land Department had not been satisfactory.

What were the relations between the Land Department and the courts during this development of the administrative machinery for the determination of controversies over the disposition of the public domain? In the beginning there was an apparent endeavor to avoid any encroachment on the court's jurisdiction freely to determine controversies between private persons. The first instruction on pre-emptions stated that the questions would generally arise under such circumstances as to be susceptible of decision only in the courts of law.⁶³ Many of the statutes for the determination of private claims expressly provided that the decisions thereunder should not defeat the right of adverse claimants to proceed in the courts.⁶⁴ The first case to reach the United States Supreme Court in which the action of the Land Office was involved was *Matthews v. Zane's Lessee*,⁶⁵ a suit in ejectment against a patentee in which plaintiff claimed a prior purchase at a land office which had had jurisdiction over the lands, which purchase was made after the enactment of a statute for the division of the land district but before the organization of the new land office at which the statute directed the sales of the land in controversy to be made. In the briefs, it was insisted that the secretary of the treasury had construed the act as not preventing sales at the original land office before the organization of the new one and had issued patents based on such sales, the only reason for refusing to issue the patent to plaintiff being that the register failed to make proper return of the sale. Chief Justice Marshall in an opinion of one paragraph

⁶³2 Pub. Lands 221.

⁶⁴Act of April 21, 1806, 2 Stat. at L. 400; act of Feb. 28, 1809, 2 Stat. at L. 526; act of June 30, 1812, 2 Stat. 765; act of May 8, 1822, 3 Stat. at L. 699.

⁶⁵(1809) 5 Cranch (U.S.) 92, 3 L. Ed. 46.

merely stated that the lower court properly construed the statute, that the erection of the new district suspended the power of sale in the original district. Thereafter Matthews brought a bill in equity to compel the conveyance of the land to him, and again took the case to the Supreme Court.⁶⁶ This time he introduced direct evidence of the construction of the statute by the Secretary of the Treasury in accordance with his contention and again relied on the rule that the construction of a statute by the executive was persuasive, especially when property rights had been acquired thereunder. The chief justice wrote a somewhat longer opinion, adhering to the former construction of the statute, in which he replied to some of the arguments of plaintiff, but did not refer to the action of the secretary of the treasury. Thus in the first case to come before it, the Supreme Court not only failed to give any weight to the decisions of the Land Department, but even ignored the insistent argument of counsel based thereon.

In *United States v. Percheman*⁶⁷ the court was required to pass upon the finality of a decision of the register and receiver rejecting a claim under a Spanish grant in Florida. The court held that the language of act of May 8, 1822, section 4,⁶⁸ which apparently vested those officers with judicial powers to decide as a court in the first instance for or against title, must be construed in view of the purpose of the Act, as giving power only to determine speedily the location of claimed grants so as to make possible the sale of the rest, and the rejection was not a final judicial decision binding the title. In *Doe ex dem. Farmer's Heirs v. Eslava*⁶⁹ and *Doe ex dem. Farmer's Heirs v. City of Mobile*⁷⁰ a similar ruling was made with reference to the powers of the registers and receivers under act of May 8, 1822.⁷¹

The distinction between actions at law and suits in equity, so far as the effect of a patent was concerned, was drawn in *Bagnall v. Broderick*⁷² where a patent was held conclusive in an action of ejectment, even though there was a charge it had been obtained by fraud. The case was distinguished from *Ross v. Barland*⁷³ in which conflicting patents had been issued and evidence was ad-

⁶⁶(1822) 7 Wheat. (U.S.) 164, 5 L. Ed. 425.

⁶⁷(1833) 7 Pet. (U.S.) 51, 8 L. Ed. 604.

⁶⁸3 Stat. at L. 699, 700.

⁶⁹(1850) 9 How. (U.S.) 421, 13 L. Ed. 200.

⁷⁰(1850) 9 How. (U.S.) 451, 13 L. Ed. 212.

⁷¹3 Stat. at L. 699.

⁷²(1839) 13 Pet. (U.S.) 436, 10 L. Ed. 235.

⁷³(1828) 1 Pet. (U.S.) 655, 7 L. Ed. 302.

mitted to show that the junior patent had been based on a prior entry.

In *Wilcox v. Jackson*⁷⁴ plaintiff claimed by pre-emption allowed by the local land officers under the Pre-emption Act of 1834, while defendant, who commanded the troops in Ft. Dearborn, claimed the land was part of the military reservation. Plaintiff argued that the register and receiver acted judicially upon claims to the right of pre-emption and that, no appeal having been given, their decision is conclusive. Answering this contention the court said:

“This proposition is true as to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction where no appellate tribunal is created.”

The nature of the action of the land officers was not determined, however, because the court held that the land was reserved from pre-emption and that the officers in allowing a pre-emption right thereto acted beyond their jurisdiction so that their decision was not conclusive, even if they acted judicially in passing upon the questions submitted to them.

In *Lytle v. Arkansas*⁷⁵ the controversy was between a claimant of a pre-emption under the Pre-emption Act of 1830, whose claim was suspended until after the act of 1832 was passed, because the land was then unsurveyed, and the state claim under a grant of land to aid in constructing public buildings. After holding the pre-emption claim entitled to priority, the court held that the register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emption under it and if they acted within their powers, and their decision could not be impeached for fraud or unfairness, it must be considered final. Three justices dissented in this case.

In *Barnard's Heirs v. Ashley's Heirs*⁷⁶ the register and receiver, when the question was resubmitted to them on an adverse claim, had rejected Barnard's claim to pre-emption, but the Commissioner had reversed that decision and ordered a patent issued to him. The suit was to cancel patents issued to defendants, who claimed under a grant to the State and they contended that the decision of the register and receiver rejecting the pre-emption claim was final. The court held that under the Land Office Reor-

⁷⁴(1839) 13 Pet. (U.S.) 498, 10 L. Ed. 264.

⁷⁵(1850) 9 How. (U.S.) 314, 13 L. Ed. 153.

⁷⁶(1855) 18 How. (U.S.) 43, 15 L. Ed. 285.

ganization Act of 1836,⁷⁷ the Commissioner had power to supervise the decisions of the local officers so that it was no longer conclusive. An examination of the facts led the court to affirm the judgment for defendants on the ground that complainants had not satisfactorily shown settlement on the date claimed, thereby agreeing with the register and receiver.

In *Garland v. Wynn*⁷⁸ the question of the finality of the decisions of the local officers was again raised, both parties claiming pre-emption rights. Mr. Justice Catron, who had dissented in the case of *Lytle v. Arkansas*,⁷⁹ wrote the opinion of the court and held that:

"Where several parties set up conflicting claims to property with which a special tribunal may deal as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys v. Vasse*, 1 Pet. 212, and the case before us belongs to the same class of ex parte proceedings; nor do the regulations of the commissioner of the General Land Office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court. It was in effect so held in the case of *Lytle v. Arkansas*, 9 How. 328, *Cunningham v. Ashley*, 14 How. 377 and *Barnard v. Ashley*, 18 How. 44."

The effect of the holding in the *Lytle Case* is apparently the opposite of that reached in this case. There the parties set up conflicting claims and one answer directly charged that the proof to support the pre-emption claim was false. The majority stated that the decision of the register and receiver was final and did not discuss the sufficiency of the proof of settlement. The doctrine of this case had little opportunity to influence subsequent decisions because the Pre-emption Act of 1841, sixteen years before this decision, had given the Land Department authority to decide between conflicting claims of individuals to pre-emption of the same land. One of the claims in this case was based on the act of 1830 and the other on the act of 1838 so that the Act of 1841 was not involved.

In *O'Brien v. Perry*⁸⁰ it was held that errors of law by the register and receiver could be corrected in a suit at law to recover

⁷⁷Act of July 4, 1836, 5 Stat. at L. 107.

⁷⁸(1857) 20 How. (U.S.) 6, 15 L. Ed. 801.

⁷⁹(1850) 9 How. (U.S.) 314, 13 L. Ed. 153.

⁸⁰(1861) 1 Black. (U.S.) 132, 17 L. Ed. 114.

possession, brought in a state court where the equities can be set up as a defense.

In *Lindsay v. Hawes*⁸¹ complainant sought to have conveyed to him land patented to defendant after a pre-emption certificate under which complainant claimed had been cancelled by the district officers following a resurvey which showed that the claimant's residence was not on the land claimed. No notice was given of the resurvey or of the cancellation. The Supreme Court held that the cancellation was not conclusive on complainant's rights, but that equity might inquire into the proceedings and afford relief.

That case was followed in *Minnesota v. Batchelder*⁸² where a pre-emption on a school section was claimed under a special act by virtue of settlement thereon before survey. The register and receiver allowed the pre-emption and patent issued. The lower court refused to consider the charge of fraud on the ground that the decision of the district officers was conclusive on the courts, the remedy being by appeal to the commissioner or the secretary. This case arose, not only after the district officers were given the power to decide between adverse claimants, but also after the right of appeal to the commissioner and from him to the secretary had been granted. The Supreme Court held that a court of equity would look into the proceedings before the register and receiver, or even before the land office where the right of property of the party is involved and correct errors of law or of fact to his prejudice. The opinion further stated that the pre-emption laws did not contemplate notice to parties holding adverse interests nor a litigation between the applicant for a pre-emption and a third party, but that the question contemplated is between the settler and the government. The opinion places no limitation upon the questions the court can consider and accords no weight to the decision of the register and receiver. It is true the state alleged fraud, which some of the earlier cases had stated would be a ground for equitable relief from the decision of the district officers, but the only acts of fraud alleged were false statements in the affidavits of the applicant and his corroborating witnesses. That would not be such fraud as would permit equitable relief against a court judgment.⁸³ The reason given for the rule is that a consideration of such alleged fraud in a suit for equitable relief would generally

⁸¹(1862) 2 Black (U.S.) 554, 17 L. Ed. 265.

⁸²(1864) 1 Wall. (U.S.) 109, 17 L. Ed. 551.

⁸³Freeman, Judgments, 4th ed., sec. 489.

involve a retrial of the issues. That reason certainly ought not to prevail where there was, as in this case, no adversary proceeding before the register and receiver, so that the complainant had no opportunity of showing the falsity of the proof of his opponent.

In *Frisbie v. Whitney*⁸⁴ the question of the time of vesting of rights under the pre-emption laws was under consideration. The court stated that the construction by the attorney general, acquiesced in by the secretaries of the interior that no right vested until proof of settlement and improvement and payment of the price was sound. It was not stated that any weight was given to the conclusion of the executive.

Another method of judicial control had been attempted in *Castro v. Hendricks*,⁸⁵ in which mandamus was sought to compel the commissioner to issue a patent. Petitioner claimed under a Mexican grant in California which had been confirmed by the district court for a stated quantity of land. The surveyor-general had certified to the claimants more land than was covered by the grant or the decree of confirmation, and the commissioner refused to issue the patent, his decision being affirmed by the secretary. The court held that though the surveyor-general exercised quasi-judicial power, his acts were subject to the supervision of the commissioner and the refusal to issue the patent was an appropriate exercise of the functions of his office. The opinion did not discuss the question of the right to mandamus the commissioner.

The case of *Johnson v. Towsley*⁸⁶ was a suit by Towsley, the earlier settler, to compel Johnson, a later settler, to surrender a patent issued for the land in controversy. The register and receiver, after hearing both parties, had decided in favor of Towsley, the commissioner had affirmed their decision and issued patent to Towsley, but the secretary decided that, under act of March 3, 1843, sec. 4,⁸⁷ Towsley was not entitled to pre-emption, having filed a previous declaratory statement for other land which he abandoned because the land was not open to private entry, and ordered a patent to issue to Johnson. The state court decided in favor of Towsley and Johnson brought the case to the United States Supreme Court on writ of error. His counsel claimed that the secretary's decision was final, distinguishing this case from the

⁸⁴(1870) 9 Wall. 187, 19 L. Ed. 668.

⁸⁵(1859) 23 How. (U.S.) 438, 16 L. Ed. 576.

⁸⁶(1871) 13 Wall. (U.S.) 72, 20 L. Ed. 485.

⁸⁷5 Stat. at L. 620.

earlier ones on the provision of act of June 12, 1858, sec. 10,⁸⁸ that the decision of the commissioner should be final unless appeal be taken to the secretary, arguing that if the decision of the inferior is final unless appeal is taken, that of the superior on appeal must also be. He also stressed the fact that in most of the earlier cases the land office proceedings had been *ex parte* and fraud had been charged, while here there had been a full hearing of both parties and there was no suggestion of fraud. Mr. Justice Miller, who delivered the opinion of the court, said that the proposition that the decision of the Land Department was final was not a new one, but that the question had been presented with an earnestness and fulness of argument which it had not, perhaps, before received and with reference to statutes not theretofore considered by the court so that the occasion was appropriate to re-examine the whole subject. He had little difficulty with the argument based on the use of "final" in the act of 1858. The purpose of that act was merely to restore the supervisory power of the commissioner and the word "final" was merely to exclude further inquiry in the Department, except in case of an appeal. A much stronger argument was that founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. Applying this principle, and the recognized exceptions to it, it was considered: (1) That the action of the land office in issuing a patent for public land subject to sale is conclusive as to the legal title, and in courts where the legal title must control no inquiry can be permitted into the circumstances under which it was obtained; (2) that the power of courts of equity to inquire into and correct mistakes, injustice and wrong in both executive and judicial action when it invades private rights extends to decisions of the Land Department, whose proceedings are frequently *ex parte* and of such a nature as to be peculiarly liable to the influence of fraud, false swearing and mistake, and which frequently attempted to recall and cancel a patent, or issued conflicting patents each reserving the rights of the other party, thereby necessitating a determination of those rights by some other tribunal; (3) when the Land Department's officers decide controverted questions of fact, their decision, in the absence of fraud, imposition or mistake, is final except as it may be reversed on appeal in that department;

⁸⁸11 Stat. at L. 326.

(4) where the Land Department has misconstrued the law the courts can give relief; (5) the courts will not interfere with the discharge of the duties of the Land Department by mandamus or injunction so long as the title remains in the United States, but after the title has passed from the Government the courts can inquire whether, according to the established rules of equity and the acts of Congress, the party holding that title should hold absolutely as his own, or as trustee for another. The court then decided that the construction of the act of 1843 by the secretary was erroneous and affirmed the decision awarding the land to Towsley. Mr. Justice Clifford dissented on the ground that the acts of Congress had made the decision of the secretary final, except in cases of fraud or mistake not known at the time of the investigation by the Land Department.

In the course of the court's opinion it is said that what the court did in the case of *Minnesota v. Batchelder*⁸⁹ and *Silver v. Lada*⁹⁰ was to give relief from a misconstruction of law. The statement was true as to the latter case, but the former reversed the state court solely on the ground that it refused to consider the charge that the pre-emption patent was secured by fraud in presenting false affidavits. But both cases were those in which the right to equitable relief was recognized under the rules established in this case.

The principles laid down by Mr. Justice Miller determined the law as to the relation between the tribunals of the Land Department and the courts. Later cases have been decided by the application of these principles to the particular situation and belong to a discussion of the relation in detail, rather than to a sketch of the development of the Land Office administrative machinery.

It is noteworthy that in none of these cases was any question raised as to the constitutionality of any of these acts of Congress. In 1839, in *Wilcox v. Jackson*⁹¹ it had been assumed, if not decided, that the power of the register and receiver was judicial, yet none of the cases discusses the question of the delegation of judicial power to an executive department. This is the more striking in view of the fact that four of the cases involving the review of their acts originated in Arkansas and were decided in the years 1850-1857, and only two years later a statute of Arkansas giving

⁸⁹(1863) 1 Wall. (U.S.) 109, 17 L. Ed. 551.

⁹⁰(1868) 7 Wall. (U.S.) 219, 19 L. Ed. 138.

⁹¹(1839) 13 Pet. (U.S.) 498, 10 L. Ed. 264.

the swamp land agents power to determine conflicting claims to the state swamp lands was attacked as an unconstitutional delegation of judicial power.⁹² Neither the argument of counsel, as given by the reporter, nor the opinion over-ruling the contention referred to any federal statute or decision.

This immunity from attack on constitutional grounds while the law was being formed was undoubtedly of great importance in permitting the substantially complete development of administrative machinery, free from judicial control except as the effect its decisions might subsequently be corrected by courts of equity in adjusting the equities between the parties. By the time it became the custom to attack all new legislation on constitutional grounds, the organization and powers of the Land Department had been so long established that there could be no expectation that any attack on them would be successful.

(To be continued.)

⁹²Hempstead v. Underhill's Heirs, (1859) 20 Ark. 337.