School Lands, Unsurveyed Land, Title and Remedy of the State Against Persons Occupying Sections 16 and 36 Which Have Not Yet Been Surveyed by the Government.

Under the Enabling Act of February 22, 1889, sections 16 and 36 in each township in the State of Montana was, upon the admission of the State into the union, granted to the State for school purposes. The title to such lands vested in the State upon the admission of the State into the union, subject, of course, to any sales or bona fide settlements on any of such lands prior to the admission of the State.

As to the unsurveyed townships the State's right to the

lands is subject to any bona fide settlement made thereon under the pre-emption or homestead laws prior to thes urvey of such land by the government, as provided by the act of February 28, 1891, 26 Statutes at Large, 796. The State's right to unsurveyed lands attaching as of the date of the admission of the State, subject only to the rights of bona fide pre-emption and homsteaders made prior to survey, the State can maintain an action to enjoin trespass against any person going upon such unsurveyed school lands for the purpose of cutting the timber therefrom or removing stone or other valuable materials. In short the State can maintain such an action against any person going upon such lands, except bona fide settlers, as defined in said act of February 28, 1891.

April 14, 1905.

State Board of Land Commissioners, Helena, Montana:

Gentlemen:—I respectfully submit the following opinion in compliance with your inquiry as to the title of the State of Montana to Sections 16 and 36, where the same has not yet been surveyed by the United States government, and also as to what, if any, remedy the State of Montana has against persons who cut timber on such lands.

I find that the language used in Sections 10 and 11 of the Enabling Act, granting sections 16 and 36 in every township to the State of Montana, is very similar to the language used in the acts of congress granting lands to railroad companies, and especially is this true of the grant to the Northern Pacific Railroad Company, in which every odd section within certain limits is granted to such company.

Section 3 of the act granting lands to the Northern Pacific Railroad Company, 13 U. S. Statutes at Large, p. 367, reads, in part, as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, * * * every alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt * * * and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a **plat thereof filed** in the office of the Commissioner of the General Land Office."

Section 6 reads:

"That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall **not be liable to sale, or entry, or pre-emption before or after** they are surveyed, except by said company, as provided in this act;'

Section 10 of the Enabling Act, granting school lands to Montana, reads, in part, as follows:

"That upon the admission of each of said states (including Montana) into the union sections numbered 16 and 36 in every township of said proposed states, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto * * * **are hereby granted** to said states for the support of the common schools;"

And Section 11, of said Act, reads, in part, as follows:

"Such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether **surveyed or unsurveyed,** but shall be reserved for school purposes only."

The general rule of construction of grants to railroad companies, especially the grant to the Northern Pacific Railroad Company, is laid down as follows:

"It is a well-recognized rule that by the words 'there is hereby granted,' used in an Act of Congress, a grant **in Praesenti** and not one **in futuro** is imported. Such grant, however, is not at first absolute, but is in the nature of a float, and, as regards land within the place limits, the title becomes completely vested in the grantee only when the route of the road is **definitely fixed** by the location and adoption of its line and by filing a map thereof with the secretary of the interior. But when such conditions precedent have been performed, the title vests by relation as of the date of the act; provided there has not been an acquiremnt of any right by homestead or settlement after the date of the act and prior to the time the railroad company definitely located the line of its road."

(N. P. Ry. v. Majors, 5 Mont. 111; Nelson v. N. P. Ry. Co. 188 U. S. Rep. 110; Oregon, etc. Ry. Co. v. U. S. 189 U. S. 103; Am. & Eng. Enc. of Law (2nd Ed.) Vol. 26, note 1, page 326.)

It will be observed from the reading of the language in the grant of such lands to the State of Montana that it is very similar and subject to the same construction as that placed upon the grants by congress to railroads. In all such cases the above authorities have held that upon the signing of the act making the grant and the filing of the map definitely locating the line of the road the railroad company's interest in the land attaches as of the date that the grant was made, subject to **bona fide** settlements made prior to the date of definite location of the line.

The admission of the State of Montana was the condition precedent necessary to be complied with in order for the State's interest in such lands to attach, just as the filing of the map of definite location was necessary in the grants to the railroads. When that condition was complied with the State's interest to section 16 and 36 attached as of the date when the State was admitted into the Union, namely Nov. 8, 1899. The words "are hereby granted" used in Section 10 of the Enabling Act gave the State a present interest in such lands, whether they were surveyed or not. (Missouri Kansas Ry. Co. v. K. P. R. R. Co. 97 U. S. 496; 5 Mont. 111, **supra.**)

While it is true that in private transfers of real property a present

power of identification of lands is necessary, the same rule does not apply to congressional grants.

Mr Jus.tice Fields, in Missouri Kansas Railway Co. v. K. P. Ry. Co., 97 U. S. 497, referring to the necessity of present power of identification, says:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that when no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as well as in all other cases, to the legislative will."

From the above authorities construing railroad grants, I think it clear that Montana's interest attached to sections 16 and 36 in every township of the State, whether **surveyed or unsurveyed,** which had not been sold or otherwise disposed of by or under authority of any act of congress at the time the State of Montana was admitted into the Union, or that were not embraced in any reservations mentioned in Section 10 of the Enabling Act. It seems quite clear that the interest of the State, having attached to such lands on the date of the admission of the State, that the land could not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, from the language used in the latter part of Section 11 of the Enabling Act; provided there are no other acts of congress superseding or modifying such section of the enabling act. (See Butts v. Northern Pacific Railroad Co., 119 U. S. 55; Northern Pacific Ry. Co. v. Nelson, 22 Wash. 521; N. P. Ry. Co. v. Lilly, 6 Mont. 66.)

However, by the act of congress of February 25, 1891, 26 Statutes at Large, p. 796, Sections 2275 and 2276 of the United States statutes were amended.

Section 2275, as amended, reads, in part, as follows:

"Where settlements with a view to pre-emption or homestead have been or shall hereafter be made, **before** the **survey** of the lands in the field, which are found to have been made on sections 16 and 36 those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been granted, reserved or pledged for the use of schools or colleges in the state or territory in which they lie other lands of equal acreage are hereby appropriated and granted and may be selected by said state or territory in lieu of such as may be thus taken by pre-emption or homestead settlers * * *."

This act of 1891 materially changes the effect and force of Section 11 of the Enabling Act granting school lands to the State of Montana and practically repeals the Enabling Act insofar as it provides that settlers upon unsurveyed land shall have the preference right to such lands when

the same is surveyed, and that the State must select lieu lands in place thereof. While this is a general statute it has been held to apply to all school lands granted by special acts to the various states.

In the case of Johnston v. Morris, 72 Fed. Rep. p. 896, the court, in construing Sections 2275 and 2276, as amended by the act of 1891, used the following language:

"It was intended by the act of February 28, 1891, to provide a uniform rule for the selection of indemnity lands applicable to all the states and territories having grants of school lands."

And the same court further held in that decision that the enabling act of February 22, 1889, was superseded by said amendments to said Sections 2275 and 2276. Also, the Secretary of the Interior, in the case of State of Nebraska v. Town of Butte, 21 L. D. p. 223, used the following language in construing the Enabling Act of February 22, 1889, (and Sections 2275 and 2276, as amended by the act of 1891,) which is similar to that of the State of Nebraska, to-wit:

"The act of February 22, 1889 (25 Stat. 676), providing for the admission into the Union of North Dakota, South Dakota, Montana and Washington, and to make donations of public lands to those States, has a provision in Section 11 thereof similar in terms to Section 24 of the act of 1889 (supra), in that it provides that

'All lands herein granted for educational purposes * * * shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.'

This provision was in apparent conflict with the general act of February 26, 1889, supra (Sections 2275 and 2276, Revised Statutes), which preserved settlement rights upon the school sections when made prior to survey, and gave the State indemnity for the lands so settled upon.

In view, however, of the latter act of February 28, 1891 (26 Stat. 796), amending Sections 2275 and 2276 of the Revised Statutes, re-enacting the provisions validating the claim of a settler who, prior to the survey in the field, had made a settlement upon a school section with a view to pre-emption, and appropriating and granting other lands of equal acreage to the State in lieu of the lands so settled upon, the Department, in its instructions to your office dated April 22, 1889 (12 L. D. 400), held that in so far as the said act of February 22, 1889, conflicted with the general provisions contained in Sections 2275 and 2276 as amended, the same are superseded by the later act, and that the grant of lands to the new States mentioned in the act of February 22, 1889, 'are to be administered and adjusted under the provisions of the general law.'

The said act of February 28, 1891, being a general law, applies to the lands in question, and substantially maintains the provisions made by the act of 1889 (supra), protecting settlement rights made on school sections prior to survey, and granting other lands of equal acreage to the states in lieu thereof.' (See also instructions of the Secretary of the Interior, 12 L. D. p. 400).

Said Section 2275, provided that "where settlement with a view to

pre-emption or homestead have been or shall hereafter be made before survey of the land in the field," etc. Thereafter, on March 3, 1891, the pre-emption and timber culture laws were repealed. (U. S. Compiled Statutes of 1901, pp. 1379 and 1535.) Therefore, such amended Section 2275 will now only apply to homesteaders or settlements made with the intention of making a homestead entry when the land is surveyed. Under said amended Section 2275, as construed by the authority last above cited, it is clear that where a bona fide settler goes upon unsurveyed land, which, when surveyed, would be sections 16 or 36, without the knowledge of such fact, with a view of making a homestead entry thereon when the land is surveyed, he could hold such land as against the State of Montana, provided he complies with the law and makes his application for entry in due time after the land has been surveyed. However, a person to hold such unsurveyed land against the State must go upon the same in good faith with the bona fide intention of making a homestead settlement, and without knowledge that such lands will fall within sections 16 or 36 when survey thereof is made. A mere trespasser, or person going upon the land for the simple purpose of cutting timber, removing stone, or other valuable material from such land, without the bona fide intention of making the same his homestead, would not come under the provisions of said Section 2275, as amended.

It has also been held that where a settler goes upon unsurveyed land with the intention of making a pre-emption or homestead entry, he must, within three months from the date of the receipt at the district land office of the approved plat of the survey of the township wherein such land is situated, file his declaratory statement or homestead application, as provided by the United States statutes, Section 2266, and by the act of 1880, Section 3, United States Compiled Statutes of 1901, p. 1393.

It has been held that where a settler went upon unsurveyed land, which, when surveyed, would be in sections 16 or 36, and did not file his declaratory statement, or homestead application, within three months after the filing of the plat of survey in the district land office, that the title to such land at the end of the three months would then vest in the State, even though the settler had intended to make a pre-emption or homestead entry. (Gonzales v. French, 164 U. S. 345; Buxton v. Traver, 130 U. S. 235).

From the authorities construing the act granting lands to the Northern Pacific, and as Sections 10 and 11 of the Enabling Act of the State of Montana are susceptible of the same construction, I am satisfied that Montana's interest attached to sections 16 and 36 in each township of the State immediately upon the admission of the State into the Union, and can only be defeated by settlement thereon prior to survey by a person intending in good faith to make a pre-emption or homestead entry. In fact, since the repeal of the pre-emption and timber culture laws, on March 3, 1891, only such settlers as intend, in good faith, to make homestead entries, and who are not possessed of any knowledge as to the locus of the land upon which they settle, can defeat the State's rights to such school lands.

I am, therefore, of the opinion that the Enabling Act conveyed said sections 16 and 36 to the State of Montana, and that the State's interest attached to such sections, whether surveyed or unsurveyed, upon the date of the admission of the State into the Union, subject, only, to the rights of pre-emption and homestead settlers on such lands prior to the survey thereof, as defined by the act of February 28, 1891, amending Sections 2275 and 2276, United States statutes.

The next question to be determined is, what remedy, if any, has the State by virtue of its present interest in such lands against persons, not **bona fide** settlers intending to make homestead entries, but who are trespassing upon such land and cutting timber thereon, or removing therefrom stone, timber or other valuable property?

Again it is necessary to look to the decisions construing lands granted to the Northern Pacific Railroad. In the case of Northern Pacific Railroad Co. v. Hussey, 61 Fed. Rep. 231, the defendant, Hussey, went upon unsurveyed land in the State of Montana and proceeded to cut and haul off the timber growing thereon. This land was within the forty mile limit of the land grant to the Northern Pacific Railroad, and the Northern Pacific, under the grant from congress was the owner of the odd numbered sections within such limits. The land from which the timber was cut, not being surveyed, the position of the defendant was that there was no present power of identification sufficient to permit the Northern Pacific to maintain an action for trespass upon such lands. But the court held that under the construction that had been given to the grant of lands to the Northern Pacific Railroad Company, wherein it was held that their interest attached to such land as of the date that the line of the road was definitely fixed and plat thereof filed in the office of the Commissioner, that, although the lands were not surveyed, the railroad company had such an interest in the odd-numbered section as to enable it to maintain a suit to enjoin the defendant, Hussey, from cutting timber from the unsurveyed lands within the limits of its grant. And in the case of Northern Pacific Railroad Co. v. Soderberg, the railroad company brought suit for an injunction to restrain the defendant from working a granite quarry in unsurveyed lands which were within the limits of the Northern Pacific Railroad Company's grant and to prevent the defendant from removing and selling building stone taken from said quarry. The court held as follows:

"The complainant has an interest in the odd-numbered sections within its grant, entitling it, while questions as to its title are in abeyance, to preventive relief by an injunction to restrain the commission of waste, as by the cutting or destruction of timber, the mining and extracting of coal, the quarrying and removing of building stone, or the destruction of native grass giving value to lands for grazing purposes, or other like acts calculated to work irreparable injury to the land itself." (86 Fed. Rep. 50), citing with approval the case of R. R. Co. v. Hussey; also Olive Land & Development Co. v. Olmstead, 103 Fed. Rep. 579, which also cites and quotes with approval the case of R. R. Co. v. Hussey.)

In a recent decision of the supreme court of the United States, in the

case of U. S. v. Montana Lumber & Manufacturing Co., The Northern Pacific Railway, et al., 25 Supreme Court Reporter, p. 367 (Advance Sheets), the court held that until identification by government survey of the even and odd-numbered sections of the land within the limits of the grant to the Northern Pacific Railroad Company that the United States had such a property in the timber growing on the land as to enable it to recover the value of the timber cut and removed by the railroad company or its grantee. The court held, further, that a **private survey** is inadmissible in evidence in an action by the United States to recover the value of timber cut from unsurveyed lands to show that when surveyed by the government the land will be odd-numbered sections, and, therefore, included in the grant to the Northern Pacific Railroad.

However, there dots not seem to be any conflict between this decision and that of Northern Pacific Railroad Co. v. Hussey, supra. In fact in this decision the supreme court used the following language:

"There is nothing in Northern Pacific Railroad v. Hussey which militates with these views. In that case relief was granted by injunction against a trespasser upon unsurveyed land at the suit of the railroad company, its contingent interest being held sufficient for that purpose. The permanent control and property in the United States was not in question."

From the above authorities, construing the rights of the Northern Pacific Railroad Company against persons cutting timber upon unsurveyed land within the limits of its grant, it seems clear, and I am of opinion, that the State of Montana would have the same rights and could pursue the same remedies against persons who have gone upon the unsurveyed school lands in the State of Montana, not to settle with the **bona fide** intention of making homestead entries, but for the purpose of cutting the timber, quarrying and removing stone, or doing other acts calculated to work irreparable injury to the land itself. I think the State has such an interest in the lands as will entitle it to maintain alone a suit to enjoin trespassers who are cutting timber from such lands, if they are determinable, otherwise such action should be brought by the United States.

Respectfully yours,

ALBERT J. GALEN,

Attorney General.