THE OKLAHOMA DISTRICT

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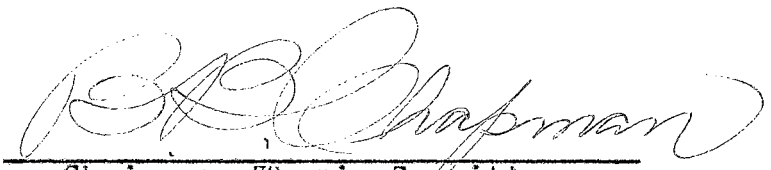

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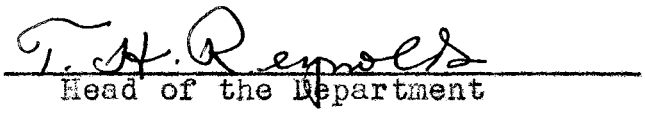

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PREFACE

Oklahoma district was the first public land opened to white settlement in what is now Oklahoma. The transfer of this land from public to private ownership is the subject of this study. The establishment of procedures and the formulation of policies for private ownership of land was attended by many difficulties and technicalities that tried the patience and endurance of both the public official and the settler.

The study traces the history of public lands acquired from the Indian tribes embraced in what is known as the Oklahoma district or Unassigned Lands on March 1, 1889, in their transfer from public to private ownership or until such time as a clear and rather definite policy for the transfer could through use be established. It is based primarily on contemporary governmental sources. Special attention is given to tracing the transfer of public lands through legal processes, a contribution new in the history of Oklahoma district.

Acknowledgments for aid in the preparation of this study are due many persons. The courteous consideration and wholesome advice from Dr. Berlin B. Chapman, Associate Professor of History in the Oklahoma Agricultural and Mechanical College, is duly appreciated. His untiring efforts and unlimited patience were extended far beyond reasonable expectation. The help given by Mrs. Wendell Haugh and Alta Kets, Assistant Document Librarians, Oklahoma Agricultural and Mechanical

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To my fellow teachers and to the students of the Hitchita High School, I am indebted for their assistance in typing, critical reading, and proof reading of the manuscript.

J. H. L.

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CHAPTER I

CREATION OF THE DISTRICT

Oklahoma district was a tract of "a little less than three thousand square miles"[1] within the Creek and Seminole cessions of 1866. It was bounded on the south by the Canadian River, on the east by the Indian Meridian and the Pawnee reservation, on the north by the Cherokee Outlet, and on the west by the Cimarron River and the ninety-eighth meridian. Early in 1889, it became clear that lands in this district which the "Freedmen's Oklahoma Association" had tried to secure in 1881, and which had been recommended by Commissioner Atkins four years later as a home for plains Indians, were to be the heritage of the Boomers.

An act[2] of March 1, 1889, ratified and confirmed an agreement with the Creek Indians for the complete cession to the United States of the land conditionally ceded in 1866. Section two of the act provided that lands acquired by the United States under the agreement should be a part of the public domain, but should only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. The act stated that any person who might "enter upon any part

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[1] Roy Gittinger, The Formation of the State of Oklahoma, p. 186.

[2] 25 Statutes, p. 759.

of said lands" in said agreement mentioned prior to the time that the same were opened to settlement by act of Congress should not be permitted to occupy or to make entry of such lands or lay any claim thereto.

Section twelve of the Indian appropriation act[3] of March 2 authorized the purchase of lands from the Seminoles, conditionally ceded by them to the United States in 1866. The area of lands acquired from the Creeks and Seminoles was 5,439,865.6 acres. All grants, or pretended grants, of said lands or any interest, or right therein, then existing in, or on behalf of, any railroad company to lands ceded by the Seminoles, except rights of way and depot grounds, were by section twelve declared to be forever forfeited for breach of condition. Section thirteen of the act provided that lands acquired by the United States from the Seminoles should be a part of the public domain, to be disposed of only as provided in the act. Sections sixteen and thirty-six of each township, whether surveyed or unsurveyed, were by the act reserved for the use and benefit of the public schools, to be established within the limits of said lands under such conditions and regulations as might be thereafter enacted by Congress. The section provided that lands acquired by conveyance from the Seminole Indians thereunder, except the sixteenth and thirty-sixth sections, should be "disposed of to actual settlers under the homestead

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[3] Act of March 2, 1889, 25 Statutes, p. 1005.

laws[4] only", except as otherwise provided in the act. It was provided further that any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what was known as the commuted provision of the homestead law,[5] should be qualified to make entry upon the lands.

Section thirteen of the act reserved to honorably discharged Union soldiers and sailors certain rights which they then possessed under sections 2304 and 2305 of the Revised Statutes of the United States.[6] In section 2304 the right was given to such soldiers and sailors to file a declaratory statement for land, which statement, when filed, should operate to reserve the land from any other filing for a period of six months. Other provisions of section 2304 changed the law in force previous to its adoption, to the extent only of permitting a soldier or sailor to file a declaratory statement instead of a homestead entry, which declaratory statement should operate to reserve the land for a period of six months, at which time the soldier or sailor might file a homestead entry therefor. To this extent it changed the law previously in force. Section 2305 provided that in no case should a patent be issued to a settler who had not

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[4] The homestead laws are in Revised Statutes, 1873, pp. 421-426.

[5] The "commuted provision of the homestead law" referred to section 2301 of the Revised Statutes, 1873, p. 424.

[6] Ibid., p. 424.

resided one year upon his homestead. It simply modified the law previously in force to the extent of allowing a veteran to have deducted from the five-year residence upon the land, required under the homestead law, the time not to exceed four years, which he had served in the Union army, navy, or marine corps. Section 2305 was intended to have no other application.

Section thirteen of the act of March 2 provided further that each entry should be in a square form as nearly as practicable;[7] and that no person should be permitted to enter more than one quarter section thereof; but, until said lands were opened for settlement by proclamation of the President, no person should be permitted to "enter upon and occupy" the same, and no person violating this provision should ever be permitted to enter any of said lands or acquire any right thereto. The provision regarding entrance and occupation was not a penal statute, but simply prescribed the qualifications of homestead settlers on public lands mentioned in the act.

The Secretary of the Interior might, after said proclamation and not before, permit entry of said lands for town sites, under sections 2387 and 2388 of the Revised Statutes,[8] but no entry should embrace more than one-half section of

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[7] Com. S. M. Stockslager to Register and Receiver, Kingfisher, May 14, 1889, H. Ex. Docs., 51 Cong. 1 sess., 11(2724), p. 102.

[8] Ibid., p. 99.

land. Section 2387 provided that whenever any portion of the public lands was settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, it was 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 was 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 the lots of such town, and the proceeds of the sales thereof, to be conducted under such regulations as might be prescribed by the legislative authority of the State or Territory in which the same might be situated.

Section 2388 provided that the entry of the land provided for in section 2387, or a declaratory statement of the purpose of the inhabitants to enter it as a town site should be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it was included, and the entry or declaratory statement should include only such land as was actually occupied by the town, and the title to which was in the United States.

Section 2301 of the Revised Statutes,[9] not generally

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[9] Revised Statutes, 1873, p. 424.

applicable to Oklahoma openings, was made non-applicable to lands ceded by the Creeks and Seminoles. The section provided that nothing in the homestead laws should be so construed as to prevent any person who had availed himself of the benefits of legal entry of unappropriated public lands, from paying the minimum price for lands entered, at any time before the expiration of the five-year residence period, and obtaining a patent therefor from the government, as in other cases directed by law, or making proof of settlement and cultivation as provided by law, granting pre-emption rights.

Section fourteen of the act of March 2, 1889 provided for a commission to negotiate with the Cherokee Indians and all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in Indian Territory, and for the opening of Cherokee lands to settlement by proclamation of the President, if a satisfactory agreement were made with the Cherokees. Section fifteen provided that the President might, whenever he deemed it necessary, create not to exceed two land districts embracing the lands which he might open to settlement by proclamation as above provided, and he was empowered to locate land offices for the same, appointing thereto, in conformity to existing law, registers and receivers, and for the purpose of carrying out this provision $5,000 was appropriated.

The provisions for the opening of lands ceded by the Creeks and Seminoles were tied together by a sentence in

section thirteen of the act of March 2 stating that all the above provisions with reference to lands to be acquired from the Seminole Indians, including the provisions pertaining to forfeiture should apply to and regulate the disposal of lands acquired from the Creek Indians by the agreement of January 19, 1889. This sentence so conjoined the two acts that the Creek and Seminole lands within Oklahoma district were regarded as one tract. The acts of March 1 and 2, as they relate to lands ceded by the Creeks and Seminoles, may well be considered as parts of the same act and should be read and construed together. Thus the provisions of twelve and thirteen of the act of March 2 relate to lands in the Creek cession as well as to lands in the Seminole cession. The language regarding entrance upon these lands is general and comprehensive. Its purpose was to secure equality among all who desired to establish settlements in the lands concerned.

Although the acts of March 1 and 2, as they relate to lands ceded by the Creeks and Seminoles, must be construed together, a brief analysis of each act may be proper. According to the act of March 1, persons who might too early "enter upon" lands ceded by the Creeks came under the disqualification provision. For lands in the Seminole cession, any person who should "enter upon and occupy" the lands too soon was disqualified. Some observers of this language contended that the presence of the words, "and occupy", in the latter act so distinguished it from the act of March 1,

that thousands of Boomers were relieved from the disability they might have incurred by a mere entry. It appeared to these observers that so long as Boomers refrained from selecting and occupying--that is, living upon any tract of land prior to the time when the lands should be opened to legal settlement and entry, they might go wheresoever they pleased through the body of lands without subjecting themselves to the disqualification of the statute. Such construction would emasculate the statute if it were stretched a little further and held that adjoining neighbors who were squatters on the lands, by changing their residences at noon on April 22, could each enter upon and occupy a particular tract of land for the first time and perfect a legal homestead entry. How could one occupy Creek land without having entered upon it? And how could one enter upon Seminole land without occupying part of it for the time being?

The word "upon" deserves the consideration given to it by Secretary Noble who wrote: "The words 'enter and occupy' are used in their ordinary acceptation. 'Enter' means to come or go into; and 'occupy' to take in possession, or to fill up. The language carefully avoids the technical expressions of the homestead laws, under which titles are to be obtained. In them, to 'enter' lands, means to make that particular declaration in writing at the land office that is called an 'entry'. It is a formal proceeding and somewhat technical. In such connection, the word 'upon' is not used

or appropriate. It is one thing to 'enter' a piece of land, and a wholly different act to 'enter upon' a great domain like Oklahoma. Evidently the latter expression was used to prevent the people from coming into the lands--the territory--and cannot reasonably be restricted to a technical 'entry' of a specific tract." But the acts of Congress did not forbid the communication of information relative to the character, the location and the best means of going from the boundaries of Oklahoma district to any tract therein; nor did the acts forbid any one from receiving such information; nor was one disqualified by receiving after March 2 information from one who had acquired it before that date. The acts did not disqualify one as a homesteader, regardless of how much examination he had made of lands in Oklahoma district prior to March 2, with the intention of selecting a future homestead there.

The words, "any part of said lands", were written into the act of March 1 in reference to the Creek cession. The Atchison, Topeka and Santa Fe Railroad Company[10] was the successor in interest to the right of way across lands in Indian Territory granted by Congress in 1884 to the Southern Kansas Railway Company. The railroad company had simply an easement, not a fee, in the lands of the right of way on

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[10] Preston George and Sylvan R. Wood, The Railroads of Oklahoma, Bulletin No. 60, (January, 1943), p. 37. Bought by A. T. & S. F. February 15, 1889.

which its trains were operated. Some officers and employees of the company legally resided on the right of way across lands ceded by the Creeks and Seminoles. Indian agents, deputy marshals, mail carriers and many other white persons were properly and rightfully on lands ceded by these Indians just prior to the time the same were opened to settlement by act of Congress. But the words, "any part of said lands", applied to the lands of the Creek cession collectively, and disqualified all prospective settlers, whether rightfully or wrongfully there, if such entrance proved advantageous in the race on April 22. In reference to the Seminole cession, the act of March 2 applied to the lands collectively when it stated that until the lands were legally opened to settlement, no person should be permitted to enter and occupy the same without subjecting himself to the disqualification clause.

According to the terms of the acts of March 1 and 2, 1889, the lands purchased from the Creeks and Seminoles, excepting the sixteenth and thirty-sixth sections, should be opened for settlement by proclamation of the President, and disposed of to actual settlers under the homestead laws only. But, as Secretary Noble reported,[11] "it was found upon careful examination" that of the 5,439,865.6 acres purchased from the Creeks and Seminoles, all the lands

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[11] Rpt. Sec. Int., 1889, H. Ex. Docs., 51 Cong. 1 sess., 11(2724), p. iv.

excepting Oklahoma district were in the possession and occupancy of various other Indian tribes, under laws, treaties or executive orders. Oklahoma district was surrounded on all sides by lands in the occupancy of Indian tribes, and was inaccessible, necessarily, except by passage over these reservations. Congress had provided no civil government for settlers in Oklahoma district, except as a new court established at Muskogee, or the United States courts in some adjoining states, had power to enforce the general laws of the United States.

In this condition of things, President Harrison[12] was quite reluctant to open the lands to settlement; but in view of the fact that thousands of persons, many of them with their families, had gathered upon the borders of Indian Territory with a view to securing homesteads on the ceded lands, and that delay would involve them in much loss and suffering, he issued a proclamation[13] on March 23, 1889, opening the lands of Oklahoma district to settlement at noon on April 22. The proclamation carefully described the boundaries of the district. By its terms an acre at Guthrie and one at Kingfisher were reserved for government use and control. The proclamation expressly declared and made known that, under its provisions, no other parts or portions of the

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[12] Message to Congress, Dec. 3, 1889, Messages and Papers of the Presidents, ix, p. 47.

[13] Ibid., pp. 15-18.

lands embraced within Indian Territory, than those in Oklahoma district, were to be considered as open to settlement. Warning was expressly given in the proclamation that no person entering upon and occupying lands in Oklahoma district before the hour of noon on April 22 would ever be permitted to enter any of said lands or acquire any rights thereto, and that the officers of the United States would be required to enforce strictly the provisions of the act of Congress of March 2, 1889 to the above effect.

CHAPTER II

LAND OFFICES OPENED

In pursuance of authority conferred upon him by section fifteen of the act of March 2, 1889, President Harrison on March 27, issued a notice[1] by which Oklahoma district was divided into two parts, designated as the "western land district" and the "eastern land district". The range line between ranges three and four west of the Indian Meridian was the dividing line between the two districts. The notice stated that the office for disposal of the lands in the "western land district" should be located at Kingfisher Stage Station, and that the office for the "eastern land district" should be located at Guthrie. Sites for these offices were reserved in the proclamation of March 23. In preparation for the opening of the offices, there were appointed registers and receivers for the respective offices. Secretary Noble directed[2] that no one be permitted to make an entry for any portion of the reservation in the present vicinity of Council, established for military purposes by order of the President on December 26, 1885. Two inspectors, Cornelius MacBride and John A. Pickler, were commissioned to have the land office buildings erected and to supervise and direct everything that would tend to the effectual

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[1] The notice is in Land Office Report, 1889, pp. 113-114.

[2] Instructions to registers and receivers, April 1, 1889, 8 Land Decisions, p. 336.

establishment and peaceful preservation of general law and order. The buildings for the land offices were prepared for erection, conveyed into Indian Territory, and were ready for use on April 22. On that day the offices were opened, the land officers and clerks were in their places, and the business of the government was promptly commenced and steadily performed.

In the spring of 1889 thousands of citizens gathered on the borders of Oklahoma district, each prospective settler being eager to gain an early and profitable claim under the homestead laws. To better regulate matters for the opening of the lands, a military force was detailed to keep the people on the northern boundary of the Cherokee Outlet and beyond the borders of Oklahoma district until noon on April 22. In March, President Harrison directed that officers of the military force cause the people to be fully informed of the provisions of the act of March 2, relative to persons who might enter upon and occupy lands in Oklahoma district during the prohibitory period. The officers were directed to take and preserve the names of all persons who might enter Oklahoma district in violation of the provisions so that the same might be enforced by the Interior Department when the lands were lawfully opened to settlement.[3] The

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[3] Asst. Adjutant-Gen. J. C. Kelton to Commanding General, Division of the Missouri, March 21, 1889, S. Ex. Docs., 51 Cong. 1 sess., ix(2686), no. 72, p. 2.

taking of names simplified the management of the settlers[4] by the troops on and before April 22.

The Cherokee Outlet, some sixty miles wide, was between Kansas and Oklahoma district. Early in April the commanding officer of troops in the Outlet was holding on the Kansas line numbers of prospective settlers who were waiting for the opening of the district.

A petition[5] signed by 194 of these "law abiding citizens" was addressed to the Secretary of the Interior on April 4 requesting permission to go to the northern border of Oklahoma district prior to the hour of the opening. The complaint was made that people on the Kansas line were at a disadvantage as compared with those who were allowed to remain in the Chickasaw and Pottawatomie countries. On April 8, the following question[6] was officially submitted to the War Department: "Shall intended settlers be permitted to cross Cherokee Outlet to northern line of Oklahoma before 22nd April?" After prompt consultation[7] with Secretary Noble, Redfield Procter, Secretary of War, directed that intendent settlers be allowed to move "by regular marches and in a quiet, peaceful, and orderly manner" upon and along

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[4] Official tel. of Brigadier Gen., Commanding, Wesley Merritt, April 26, 1889, Ibid., p. 12.

[5] The petition of April 4, 1889 is in OIA, 1928 Ind. Div. 1889. See also I. H. Bonsall to Sec. Int., March 30, 1889, 1760 Ind. Div. 1889 (Chapman's Collection).

[6] S. Ex. Docs., loc. cit., p. 2.

[7] S. Ex. Docs., loc. cit., p. 3.

the public highways, post or military roads, or established and customary cattle trails through the Outlet in going to Oklahoma district. He further directed that the movement should not be allowed to commence earlier then was necessary to give the settlers reasonable time to reach Oklahoma district at noon on April 22. The settlers were accordingly permitted to cross the Outlet to the northern border of Oklahoma district. Commissioner Oberly did not deem it an intrusion upon the Chickasaw nation for prospective settlers to approach Oklahoma district in a similar manner from the south.[8]

It is for every student of Oklahoma history to construct in his own mind as best he can the picture of that conglomeration of humanity encamped on the borders of Oklahoma district on the morning of Monday, April 22, and to picture the activities that took place within Oklahoma district on the afternoon of that day. The multitudes waiting on the borders of Oklahoma district came from various parts of the United States, and were composed of individuals of as diverse disposition as had ever assembled. The firing of cannon at different points was agreed upon as a signal of the hour of legal entrance upon the lands. A graduate student used this language: "At exactly twelve the blast from the bugle rent the air, an exultant shout came forth from the throats of the waiting 'boomers', the quivering steeds

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[8] Oberly to Sec. Int., April 6, 1889, OIA, L. Letter Book 183, pp. 61-62 (Chapman's Collection).

sprang over the line, and the race for homes was on."[9] Said Professor Dale: "The race was to the swift and the battle to the strong." Multitudes of people advanced rapidly, some by train, some by private conveyances, some on horseback, and many on foot, seized, and occupied their homesteads literally upon the run. It is estimated that not less than 20,000 persons entered Oklahoma district[10] on the afternoon of April 22. The House Committee on Territories[11] said: "The story of that occupation exceeds anything in history or in romance. When the sun went down that night almost every quarter section of land in Oklahoma had an occupant and claimant, and cities with 8,000 inhabitants had sprung into existence." He who first reached a tract of land and staked it was regarded as the prior settler. This kind of settlement generally was respected by the honest people who rushed into Oklahoma district, for as a matter of fact, to stake a claim, dig a hole, or put up a tent, was about all the great majority of people could accomplish in the afternoon of April 22. The opening of Oklahoma district was "the most important event for several years in the administration of

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[9] S. J. Buck, "The Settlement of Oklahoma", in Wis. Academy of Science, Arts, and Letters, Transactions, xv, p. 346. See also H. C. Peterson, "The Opening of Oklahoma from the European Point of View", Chronicles of Oklahoma (March, 1939), xvii, pp. 22-25.

[10] Ibid., p. 345. Governor Frank Frantz believed the number was 100,000 or more. Rept. Governor of Oklahoma, 1906. H. Documents, 59 Cong. 2 sess., xvi(5119), p. 300.

[11] H. Reports, 51 Cong. 1 sess., i(2807), no. 4, p. 1.

the affairs"[12] of the General Land Office. Commissioner Thomas H. Carter attributed the unusual demand for land, not to any special preference for the climate or soil, but to the very limited area of public land remaining, upon which settlers could raise crops without artificial irrigation.

John I. Dille, register of the land office at Guthrie, arrived at that location by train at "nearly dark Saturday evening", April 20. He found "hundreds of people" there.[13] According to Inspectors MacBride and Pickler, two car loads of people arrived at Guthrie on Sunday evening; and about three hundred persons were in and about Guthrie before noon on April 22. "This body of men", the inspectors wrote, "was composed of deputy marshals, land officials, railroad employees, railroad stowaways brought here in freight trains, deputy internal-revenue collectors, and a host which cannot be classified."[14] Not only at Guthrie, but elsewhere in Oklahoma district were claimants and non-claimants of land to be found, before the hour of noon on April 22.

General Wesley Merritt, in charge of troops to assist the United States marshals in case it became necessary,

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[12] Land Office Report, 1889, p. 60.

[13] Dille to Noble, May 9, 1889, S. Ex. Docs., 51 Cong. 1 sess., v(2682), no. 33, pp. 16-18.

[14] MacBride and Pickler to Noble, April 27, 1889, Cong. Record, 51 Cong. 1 sess., p. 1462. In regard to so-called internal-revenue deputies entering early and acquiring town lots and other advantages, see same to same, May 3, 1889, S. Ex. Docs., loc. cit., pp. 6-7.

reported[15] on April 22, that he anticipated no trouble which would require active interference of troops. And on the following day he reported that there had been no serious friction or disturbance of any kind, and that everything had progressed in an orderly and quiet manner.[16] MacBride and Pickler may have given vent to optimism and exaggeration when they wrote that "a more successful opening of a new Territory could not be conjured up by the imagination of man."[17] At any rate, President Harrison could properly say to the credit of the settlers that they very generally observed the limitation as to time when they might enter Oklahoma district; and that the American genius for self-government was well illustrated by settlers in the district.

Oklahoma district was not on the warm afternoon of April 22 a haven of peace and good will among men. Captain Daniel F. Stiles of the Tenth Infantry observed at Oklahoma Station what he called a "perfect pandemonium"[18] where con-

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[15] Tel. of April 22, 1889, S. Ex. Docs., 51 Cong. 1 sess., ix(2686), no. 72, p. 11.

[16] Tel. of April 23, 1889, ibid. See also Pickler to Noble, May 28, 1889, S.Ex. Docs., 51 Cong. 1 sess., v(2682), no. 33, p. 23. Gen. Merritt's "no serious friction" report is humorously illustrated by an eye witness story of an old pioneer relating how he watched one man digging a hole on his claim and his rival filling it up. This continued for three days. Indian Pioneer History, Vol. 74, p. 418, Foreman Collection in Oklahoma Historical Society.

[17] Letter to Noble, May 3, 1889, ibid., pp. 6-7.

[18] Stiles to the Post Adjutant, Dec. 20, 1889, S. Ex. Docs., 51 Cong. 1sess., ix(2686), no. 72, p. 51.

fusion and disorder prevailed. "Everywhere people were staking out lots," he said, "and many were quarreling and fighting about the same." According to Inspector-General Joseph P. Sanger[19] a crowd of people, estimated at 12,000, collected at Oklahoma Station at noon on April 22, and the scramble for lots commenced. Among the honest settlers seeking homes he reported that there was a class of dangerous lot-jumpers, land speculators, gamblers, and sharpers who pursued their ordinary vocation as law-breakers. MacBride said that the atmospheric condition of things on and before April 22 seemed to impel men, previously honorable and honest, to grab, catch, and hold everything in sight.[20] The Department of the Interior considered that an entryman's absence from the land covered by his entry was excusable, after he had received such threats of personal violence as to cause him to believe that he could not remain on the land except at the risk of his life.[21]

In 1889 army officers in Oklahoma district gave advice and assistance in settling contested land claims, and in

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[19] Sanger to Asst. Adjutant-Gen., Dept. of the Missouri, Nov. 7, 1889, ibid., pp. 22-26. See also the statement by Merritt, Oct. 2, 1889, ibid., p. 15.

[20] MacBride to Noble, May 8, 1889, S. Ex. Docs., 51 Cong. 1 sess., v(2682), no. 33, p. 12. Relative to condition at Edmond, see Pickler to Noble, May 14, 1889, ibid., pp. 19-20.

[21] Vaughn et al. v. Gammon, 27 L. D. 438 (1898). William Gammon, a timid old man, had removed from a quarter section on Chisholm Creek when William R. Vaughn, a rival claimant, made it clear to him that all he should have of the land was "2 by 6".

some cases they acted as arbitrators in disputes, with the understanding that no legal rights of contestants were prejudiced thereby. This means of temporary settlement doubtless prevented some contestants from settling disputes with Winchesters, and caused them to keep the peace without interfering with each other until the General Land Office could decide to whom claims belonged. Many of the people were too poor to make judicial appeals and long journeys to courts. "In truth," said Sanger, "for either of two or more claimants to go away would result in his being ousted by his rivals ere he returned."[22] Indications in April were such that Commissioner Strother M. Stockslager estimated that contested land claims would ultimately involve nearly every quarter section in Oklahoma district. Commissioner Carter observed that on the average, there appeared in Oklahoma district within twenty-four hours after the opening, at least two qualified entrymen for every desirable quarter section of land.[23] Governor George W. Steele said that when he arrived in Oklahoma district some thirteen months after the opening, there were many instances where two settlers claimed the same quarter section, and in some instances as many as

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[22] Sanger to Asst. Adjutant-General, Dept. of the Missouri, Nov. 7, 1889, S. Ex. Docs., 51 Cong. 1 sess., ix(2686), no. 72, p. 25.

[23] Land Office Report, 1891, p. 49. The Daily Times, Oklahoma City, May 18, 1889 expresses the opposite view: "Last week the officers of the land office reported that out of 10,000 quarter sections of land in Oklahoma available for homesteads less than one-fifth had been claimed."

five were upon a quarter section, all claiming it.[24] Conflicting claims resulted in long vexatious and expensive contests. In November, 1889, Oklahoma district had a population of about 60,000 people.

Section 5392 of the Revised Statutes provided that every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorized an oath to be administered, that he would testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed any material matter which he did not believe to be true, was guilty of perjury, for which crime proper punishment was provided. Secretary Noble directed that any person applying to enter or file for a homestead be required first to make affidavit in addition to other requirements that he had not violated the law by entering and occupying any portion of the lands of Oklahoma district prior to noon on April 22. The register and receiver of the land office at Guthrie did not look beyond the face of papers in receiving applications for land entries, and they left all other questions about land claims to be raised and determined by appeals, contests, and other legal means.[25]

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[24] Report Governor of Oklahoma, 1891, H. Ex. Docs., 52 Cong. 1 sess., xvi(2935), p. 450.

[25] Dille to Noble, May 9, 1889, S. Ex. Docs., 51 Cong. 1 sess., v(2682), no. 33, pp. 16-18.

Thomas Burch contested the homestead entry of Anton Caha on the ground that he entered upon and occupied lands in Oklahoma district during the period prohibited by law. On January 3, 1890, in the land office at Kingfisher, Caha testified that he was on a sand bar in the Canadian River at twelve o'clock noon on April 22, 1889. An indictment charging him with the crime of perjury relative to this testimony was returned against him on September 22, 1892. He was found guilty by a jury, and on March 31, 1893, he was sentenced to confinement in the Kansas State Penitentiary for a term of two years and assessed a fine of ten dollars. Caha made an unsuccessful effort to find relief in the Supreme Court of the United States.[26] The court observed that a place, an occasion, and an opportunity were provided by the regulations of the Department of the Interior, at which Caha committed the crime of perjury in violation of section 5392 of the Revised Statutes. The court said: "We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section."

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[26] Caha v. United States, 152 U. S. 211 (1894).

CHAPTER III

TOWN SITES ESTABLISHED

It has been explained that the act of March 2, 1889, provided that the Secretary of the Interior might permit entry of public lands, secured from the Creeks and Seminoles, for town sites under sections 2387 and 2388 of the Revised Statutes, but that no entry should embrace more than one-half section of land. There were in Oklahoma district, however, no corporate authorities, either city or county, who could make application for town-site entries. Secretary Noble on April 1 directed that if applications for town-site entries or filings be presented by parties in interest, the registers and receivers[1] of the local land offices should note the applications on their records, forward a report thereof to the Department of the Interior with any papers presented, and await instructions before allowing any entry of the land. On April 5, Commissioner Stockslager explained[2] that while there appeared to be no means by which town sites in Oklahoma district might be effected until Congress should provide for town and county organizations there, any lands actually selected as a site of city or town, or any lands actually settled and occupied for purposes of trade and business, and not for agriculture, by bona fide inhabitants,

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[1] See Instructions of April 1, 1889, 8 Land Decisions, 336. The circular of July 9, 1886, relative to town sites, is in 5 Land Decisions, 265.

[2] Stockslager to Senator G. G. Vest, April 5, 1889, H. Ex. Docs., 51 Cong. 1 sess., xi(2724), pp. 100-101.

were in a state of reservation from disposal under the homestead laws by sections 2258 and 2289 of the Revised Statutes, which would operate to preserve the claims of the inhabitants of towns from interposing adverse rights of settlers until such time as they might be enabled to secure legal title to their lots under future legislation.

Provisional city government was promptly established in Oklahoma district after the opening of the lands to settlement. The city council at Guthrie appointed a board of five arbitrators to settle the right of possession to lots in Guthrie.[3] The board awarded certificates of ownership to claimants whom they found to be entitled thereto, legally or otherwise. After an investigation,[4] Inspector Woodford D. Harlan reported that all the valuable lots in Guthrie and the principal towns in Oklahoma district were located by men who were in the district prior to noon on April 22, and that such persons obtained control of the affairs of the towns and organized the boards of arbitration. Harlan stated that the boards in determining the rights of persons to hold lots did not consider the entering of Oklahoma district during the prohibitory period as any bar against a person holding lots, and that certificates were given primarily to men who were in Oklahoma district in violation of law. It appears that

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[3] Pickler to Noble, May 18, 1889, S. Ex. Docs., 51 Cong. 1 sess., v(2682), no. 33, pp. 21-22. Same to same, May 19, 1889, ibid., p. 23. Same to same, June 21, 1889, ibid., p. 28.

[4] Harlan to Noble, June 13, 1890, H. Ex. Docs., 51 Cong. 2 sess., xi(2840), pp. cxli-cxlii.

certificates were freely traded and sold, and that a firm of gamblers at Guthrie acquired a large number of certificates for lots issued to such persons. Pickler explained that such certificates were not provided for by the Federal government and that in his opinion they would not be recognized by the government as any title. Thus, at the opening of Oklahoma district the homesteader could acquire a title to his home under existing law, but the town-site occupant could not acquire a title to his home without further legislation by Congress.

At a convention of delegates from the various town sites in Oklahoma district, held in Oklahoma City on November 19, a memorial[5] to Congress was adopted, suggesting the following remedies relative to adjusting unfortunate conditions at the town sites: (1) That all contests pending as to the right to enter town sites have precedence in the land department; that commissioners be appointed to enter the town sites, and that they be empowered to make such entries and to make deeds at once, subject to the rights of the homestead claimants; and if such contests were decided in favor of the contestants that the value of the tract as farm land be ascertained and assessed to the various lots as per value, and the sum so collected be paid to the successful contestant in lieu of his right to the land. (2) That such rules be provided for the government of the commissioner or trustee

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[5] The memorial, adopted Nov. 19, 1889, is in S. Misc. Docs., 51 Cong. 1 sess., ii(2698), no. 74.

as should be provided under like circumstances by a Territorial legislature, and that a court be established in the Oklahoma country with power to hear and determine all contests as to town lots with such other jurisdiction as Congress might deem proper. (3) That a period of limitation of thirty days from notice and application for deed be made, within which contests must be brought. (4) That provisions limiting town-site entries to 320 acres be repealed. John T. Taylor was chairman of the convention. The memorial was presented to the Senate on January 30, 1890.

By June 30, 1890, thirteen applications for town-site entries had been made in the Guthrie district and seventeen in the Kingfisher district. Since town-site entries were restricted to 320 acres, separate and distinct town and city organizations grew up about Guthrie and Oklahoma City. At Guthrie there were more than two full sections occupied and possessed for town-site purposes. There was "East Guthrie", "South Guthrie", "West Guthrie", "Capitol Hill", and "Guthrie" proper. At Guthrie and Oklahoma City, buildings costing from $15,000 to $30,000 were erected on grounds to which the builders had no title except[6] that resting on the

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[6] Rept. of H. Committee on Territories, Jan. 6, 1890, H. Reports, 51 Cong. 1 sess., i(2807), no. 4, p. 2. See also Mayor, etc., of City of Guthrie v. Territory, 31 Pac. 190 (1892). See The Oklahoma Chief, Col. 4, p. 1, May 25, 1889, "Boomlets". "The Overholser block, consisting of eight beautiful two-story buildings, on Grand Avenue, above Broadway, is rapidly nearing completion, plastering having begun a week since. This block is undoubtedly the finest in Oklahoma Territory." Clipping in Oklahoma Historical Society, Indian Archivist Division.

security and justice characteristic of frontiersmen in the absence of legalized government.

An act[7] of May 2, 1890, empowered the President to establish an additional land district in Oklahoma Territory and to locate a land office therein. In accordance with the act, the President on June 6, designated the portion of Oklahoma district south of the lines between Townships thirteen and fourteen north as Oklahoma City land district.[8] The district included the lands in Oklahoma district south of Edmond; the land office was opened September 1.

Section twenty-one of the act of May 2 provided that any person entitled by law to take a homestead in the Territory of Oklahoma, who had already located and filed upon, or should thereafter locate and file upon, a homestead within the limits described in the President's proclamation of March 23, 1889, and under and in pursuance of the laws applicable to the settlement of the lands opened for settlement by such proclamation, and who had complied with all the laws relating to such homestead settlement, might receive a patent therefor at the expiration of twelve months from date of locating upon said homestead upon payment to the United States of one dollar and a quarter per acre for lands embraced in such homestead. The period of twelve months was not related to the date of entry. Section twenty-one did

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[7] 26 Statutes, 81.

[8] Notice of the establishment of the district is in Land Office Report, 1890, p. 158.

not afford the right to locate military bounty warrants on lands in Oklahoma district, but commutation could be made under the section only by the payment of one dollar and a quarter per acre in cash.[9] The lands had been purchased from the Indians, and it was the policy of Congress, as expressed in section eighteen of the act, to reimburse the government for the said outlay. In 1892, Commissioner Carter explained[10] that parties making proof on homesteads for lands in Oklahoma district would not be required to pay for the land unless the proof was made under section twenty-one of the above named act. The commissions payable at final proof (in what were known as "five year homesteads") were $400.00, and in addition there was a fee of fifteen cents per one hundred words for testimony.

The act of May 2, 1890 had the effect of repealing all the provisions of Chapter Eight of the Revised Statutes, so far as the provisions of the chapter related to those in Oklahoma district. Hence, the act[11] of May 14, 1890 was the law by which the rights of claimants to lots or parcels of land embraced within the town sites should be determined. The latter act provided that so much of the public lands situated in Oklahoma district as might be necessary to em-

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[9] Asst. Sec. Chandler to Com. Gen. Land Office, Feb. 17, 1893, 16 Land Decisions, 160.

[10] Com. T. H. Carter to Ross Guild, Jan. 6, 1892, GLO, Oklahoma Letter Book, i, p. 145 (Chapman's Collection).

[11] 26 Statutes, 109.

brace all the legal subdivisions, covered by actual occupants for purposes of trade and business, not exceeding 1,280 acres in each case, might 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 provisions of section 2387 of the Revised Statutes as near as might be. It was provided that when such entry should have been made, the Secretary of the Interior should provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, blocks, and lots when necessary, or the approval of such survey as might already have been made by the inhabitants thereof.

The act of May 14 provided that any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site and subject to legal entry, should be taken as evidence of occupancy by the holder thereof of the lot or lots therein described, except that where there was an adverse claim to said property, such certificate should be only prima facie evidence of the claim of occupancy of the holder. The act provided that such certificates should not be taken as evidence in favor of any person who entered upon and claimed said lots in violation of law or of the proclamation of March 23, 1889.

CHAPTER IV

CONTESTED CLAIMS

We may now direct attention to those claimants who entered upon and occupied lands of Oklahoma district after March 2, 1889 and before the hour of noon on April 22.

The word "sooner"[1] meant the man or woman claiming land who had come into Oklahoma district during this interim. While the great body of prospective settlers were obeying the laws, waiting for the hour of noon on April 22 to make the run, and patiently submitting to a military patrol force they could have overpowered, there had crept into Oklahoma district a number of individuals who, before the hour appointed, selected town sites and homestead claims, and by this illegal opportunity, to the great disadvantage of others, attempted at the hour of noon on April 22 to establish these sites and claims in defiance of the act of March 2 and the proclamation of March 23. Other persons gained early entrance into Oklahoma district as officers of the government or on other pretense and attempted to use such entrance to advantage in appropriating to themselves choice lands. Secretary Noble opposed any legislation ratifying acts such lawbreakers had done in disregard of

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[1] Report Governor of Oklahoma, 1891, H. Ex. Docs., 52 Cong. 1 sess., xvi(2935), p. 450. See Indian Pioneer History, Vol. VIII, p. 314. The old pioneer said a "sooner" was one who had slipped in before the opening and picked out the best land and then had gone back over the line for the "run".

justice and fair treatment and to the injury of law-abiding citizens. "Care will be taken," said President Harrison, "that those who entered in violation of the law do not secure the advantage they unfairly sought."[2]

Commissioner Stockslager from the first was guided more by the spirit of the act of March 2, 1889, than by the letter thereof. Ten days before the opening of Oklahoma district he considered that when a person by proper authority was already within[3] the district on March 2, his presence there should not be regarded as a violation of the provisions of the act regarding entrance and occupation. If the person left Oklahoma district within a few days after March 2, and remained outside during the rest of the prohibited period, he was not by such presence disqualified as an entryman, where the facts did not raise any question as to the advantage he had gained thereby.[4] However, if he took advantage of his former presence in Oklahoma district, either through his own knowledge of the lands subject to settlement, or by collusion with another, to secure a tract in advance of others,[5] he was thereby disqualified as a settler in Oklahoma district. The examination and selection of a desired tract of land between March 2 and March 23, by a prospective

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[2] Messages and Papers of the Presidents, ix, p. 47.

[3] H. Ex. Docs., 51 Cong. 1 sess., 11(2724), p. 101.

[4] McMurray v. Darbro, 21 Land Decisions, 147 (1895).

[5] Sullivan v. McPeek, 17 L. D. 402 (1893).

settler disqualified him[6] from appropriating the same as a homestead. Information of a general character as to desirable lands, communicated by another prior to the opening did not disqualify the entryman.[7] Such information was too indefinite and vague to have been of much service to him. In a contest between applicants for land in Oklahoma district involving priority of settlement, the question of "soonerism"[8] was necessarily raised as to each party thereto, whether formally charged or not.

Decisions of the Supreme Court of the United States, the Supreme Court of the Territory of Oklahoma, and of the Department of the Interior constitute an indispensable part of the history of the lands of Oklahoma district. The cases and controversies therewith outlined are typical of those that grew out of the opening of the lands. The facts in the cases, the laws involved, and the logic of the judicial officers deserve careful examination. Congress conferred upon the Department of the Interior the express power to hear and determine all questions pertaining to the sale or transfer of the public domain to private individuals.[9] To avoid confusion and conflict Congress and the

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[6] Faull v. Lexington Townsite, 15 L. D. 389 (1892).

[7] Robb et al. v. Howe, 18 L. D. 31 (1894).

[8] Clark v. Renfro et al., 24 L. D. 61 (1897).

[9] Adams v. Couch, 26 Pac. 1009 (1891); Comanger v. Dicks, 28 Pac. 864 (1892); Gourley v. Countryman 90 Pac. 427 (1907); Shepley et al. v. Cowan et al., 90 U. S. 330 (1875).

courts were content to let the Department of the Interior perform that duty in regard to obtaining facts, and with a reasonable application of law. Great care was taken to weed out the "sooners" where possible.

Calvin A. Calhoun, an honorably discharged soldier of the Union army, claimed that in all general respects he was qualified to take a homestead under the act of March 2, 1889, and section 2304 of the Revised Statutes. Seeking to avail himself of this right, he entered, on April 23, 1889, at the land office at Guthrie lots six, seven, eight, nine, and ten of section three, township eleven north, range three west, situated at Oklahoma City. On May 21, Theodore W. Echelberger contested the entry on the ground that Calhoun had come into Oklahoma district before the time when by law he had a right to do so, if he were to qualify for a homestead. On May 27, 1890, James McCornack filed a contest against Calhoun and Echelberger, alleging that they were both disqualified as homesteaders because they had entered the district during the prohibitory period. On June 29, contest was also filed by Thomas J. Bailey, averring that he was the first legally qualified settler on the land and was entitled to it. On January 25, one Linthicum filed a contest against lot number ten on the ground that it was on the south side of the North Fork of the Canadian River, by the river was separated from the balance of the land embraced in Calhoun's entry, and that the entry could not lawfully cover land situated on both sides of the river.

In March, 1890, Oscar H. Violet filed a homestead entry for lot number ten, and some three years later, he received the receiver's final certificate for the tract.

On October 30, 1890, all the contestants were duly heard before the register and receiver of the local land office, and it was decided that both Calhoun and Echelberger were disqualified from taking land because they had gone into the district before the time fixed by law, and that McCornack was entitled to enter the land north of the river. Other claims to the land were rejected.

In the Supreme Court of the United States[10] Calhoun made an unsuccessful effort to secure a decree declaring Violet to hold the legal title to lot number ten in trust for him, and for his use and benefit. The court would not, in the absence of fraud, re-examine a question of pure fact, but considered itself bound by the facts as decided by the Land Department[11] in the course of regular proceedings, had in lawful administration of public lands. The court thus held that the fact[12] that Calhoun had entered the district prior to the legal time of entry had been "conclusively determined". The court further held that with regard to honorably discharged Union soldiers and sailors, the provisions of the act of March 2, 1889, were intended to give them

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[10] Calhoun v. Violet, 173 U. S. 60 (1898).

[11] Lee v. Johnson, 116 U. S. 48 (1885).

[12] Calhoun v. Violet, 47 Pac. 480 (1896).

equal right with others to acquire a homestead within the territory described by the act, but did not operate to relieve them from the general restriction, as to going into the territory, imposed upon all persons by the provisions of the law.

Alexander F. Smith had been for a long time prior to January 30, 1889, in the employ of the Atchison, Topeka, and Santa Fe Railroad Company as a trackman or section hand, and on that day he came to Edmond in that capacity, bringing his family with him. He did not enter Oklahoma district with the expectation or intention of taking land there. It appears that from March 2 to April 22, he remained continuously on the right of way of the railroad company, lived at Edmond with his family in his tent, and in the meantime and for many months thereafter remained in the employ of the railroad company. Prior to April 22, he indicated to his fellow-workmen his intention of taking a homestead, but did no act toward carrying out the intention. His attention was called to a notice posted at the station at Edmond by the railroad company, warning all employees that if they expected to take land, they must leave Oklahoma district. When the lands were opened to settlement, Smith was at Edmond, on the right of way. Soon after the hour of noon on April 22, he removed his tent about one hundred and fifty yards from the right of way and put it up on the northeast quarter of section thirty-five, in township fourteen north, of range three west. He improved his premises, made this quarter section

his home and on April 23, duly made an entry at the proper land office at Guthrie. For several weeks, he continued to reside on the lands he had chosen. He valued the lands at $6,000, or at the rate of $37.50 an acre.

On June 22, Eddie B. Townsend filed in the land office at Guthrie a contest, asking that Smith's homestead entry be cancelled for the reason that Smith had, after March 2 and before April 22, entered upon and occupied lands in Oklahoma district. In all other respects, Smith was a legally qualified homesteader; and the local land officers decided that he was entitled to the land on which he had settled. But Townsend found favor in the sight of the Commissioner of the General Land Office who reversed the decision of the local land officers. The Secretary of the Interior sustained the Commissioner, and on February 28, 1891, ordered that Smith's homestead entry be cancelled. The entry was cancelled March 9, 1891. Townsend, who had resided on the quarter section since the day of the land opening, made homestead entry for the land on March 12, 1891. On April 30, Smith filed a complaint in the District Court of Oklahoma County against Townsend, for the purpose of having him declared a trustee for Smith, and for a conveyance of the legal title to the land accordingly. Annually, for three years, Smith made an unsuccessful attempt to have his claim sustained in the courts. In 1892, Townsend paid $375 to have his claim to the northeast quarter of the land in question transmuted

into a cash entry.[13] The northeast quarter was embraced in the Edmond town site. Townsend's claim to the remainder of the land, or 120 acres, was commuted to cash in 1892 on the payment of $150.

The questions presented in the Smith case were of great importance, and their decision affected interests of claimants in some of the most valuable lands in Oklahoma Territory. Counsel contended that Smith did not enter and occupy any part of the lands of Oklahoma district before noon of April 22, 1889, in violation of the meaning of the prohibitory clause of the act of March 2 of that year. The Supreme Court of the Territory of Oklahoma[14] held that the words "enter upon and occupy" in reference to Seminole lands were equivalent to the words "enter upon" as used in reference to Creek lands. The interpretation was given that Congress intended that all persons who expected to avail themselves of the privileges and benefits of the acts of Congress opening these lands to settlement should remain without the limits of the lands until, by proclamation of the President, they should be permitted to go in and make homestead and townsite settlement upon them. It was observed that thousands of homestead settlers had remained outside the limits of the lands until it was lawful for them to enter. The court said

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[13] See GLO, Oklahoma Tract Book, No. 2, p. 168. Patent for the 120 acres was issued on January 12, 1893 and is recorded in GLO, Oklahoma Patent Records, Vol. 5, p. 245 (Chapman's Collection).

[14] Smith v. Townsend, 29 Pac. 80 (1892).

of Smith: "He had been warned by the railroad company to go out, but refused to do so, and his duties were not such as to require him to remain in up to the time of the opening; and he took advantage of his being at the land, and secured a settlement on it before others, who obeyed the law, and remained outside, had an opportunity to reach it, even by railroad transit." Although Smith was lawfully on the right of way of the railroad company, his presence there disqualified him as a homesteader on adjoining lands. He did not have the qualifications prescribed in the act of March 2, 1889.

The Supreme Court of the United States[15] held that Congress did not intend that persons on the right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside the right of way, and which would doubtless soon become the sites of towns and cities. The court said that the intent of Congress was to put a wall around Oklahoma district and disqualify everyone who was not outside the wall on April 22, from the right to acquire, under the homestead laws, any tract within its limits. "When the hour came," said the court, "the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads."

The Smith case must have been regarded by many "sooners" as a test case. It determined conclusively that a person

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

who was within the boundaries of Oklahoma district, subsequent to March 2, 1889, and prior to noon of April 22, and who, by reason of having been therein, gained an advantage over those who remained outside, was thereby disqualified from acquiring any land therein by homestead or town-site entry. If a prospective homesteader chanced to step within the limits of Oklahoma district between the dates mentioned, he might, under the letter of the law, have been disqualified from taking a homestead therein. But the court gave strong implication that if at the hour of noon on April 22, he was in fact outside of the limits of the district, his case would be different from the Smith case, and it might perhaps be said that he was not disqualified from taking a homestead, since he had acted within the spirit of the law.

Three months after the Supreme Court of the United States handed down the decision in the Smith case, the Supreme Court of the Territory of Oklahoma followed that decision in the case of Payne v. Foster et al.[16] Both cases rested on the same pivotal point. Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2, 1889. In pursuance to orders of his superior officer, he went, after March 23, to the locality of Guthrie for the purpose of preserving public order. He was there at noon on April 22, in discharge of his official duties. Immediately after twelve o'clock on that day, he

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[16] 33 Pac. 424 (1893).

entered upon and claimed as a homestead a quarter section of land, subsequently included in the city of Guthrie. At once, he commenced to dig a well on the land he claimed and on April 23, he appeared at the local land office and made his entry. He was a qualified homestead claimant, except for his entrance upon the lands of Oklahoma district during the prohibitory period. In holding that such entrance disqualified Payne as a homesteader, the Supreme Court of the United States said:[17] "Manifestly, Congress did not intend that one authorized to enter the Territory in advance of the general public, solely to perform services therein as an employee of the Government, should be at liberty, immediately on the arrival of the hour for opening the Territory to settlement, to assume the status of a private individual and 'actual settler', and make selections of a homestead, thus clearly securing an advantage in selection over those who, obedient to the command of the President, remained without the boundaries until the time had arrived when they might lawfully enter."

Shortly before April 22, 1889, Thomas W. Potter was appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The eastern boundary line of the reservation touched Oklahoma district. About

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[17] Payne v. Robertson, 169 U. S. 323 (1898).

eight or nine o'clock on the morning of April 22, Potter went across the line into Oklahoma district for the distance of a quarter of a mile and ordered off some persons who were camping on or by the northwest quarter of section four, township twelve north, of range seven west, near the present site of El Reno. He then returned to the line. At noon, he started in the race for a claim, and within a minute and a half, made settlement upon the land from which he had ordered off the campers. Potter was not unfamiliar with the tract of land on which he settled. Since 1883, he had been employed at the Cheyenne and Arapahoe agency, and had lived in close proximity to this tract of land.

In October, 1889, Gilman C. Hall, with his wife, settled upon part of the lands claimed by Potter, and made a homestead entry therefor. Potter filed a contest against him, alleging priority of his right. Not long thereafter, Hall died, but for more than a decade his widow continued the contest and continued to reside on the land. The possession of one hundred and forty acres of valuable land was the subject of contention.

The opinion of the register and receiver of the United States land office at Oklahoma City was that when Potter entered upon the lands of Oklahoma district before the legal hour, he became a trespasser, the same as any other person not clothed with authority. The Secretary of the Interior in sustaining the conclusion of the local officers, said of Potter: "He necessarily secured an opportunity to

observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim seekers." The Acting Secretary of the Interior in reviewing the decision of the Secretary, rejected the claim of Hall and sustained the right of Potter to the lands. In his opinion Potter "had nothing to gain or to learn" by the short excursion into Oklahoma district on the morning of April 22, 1889. He said that Potter neither gained nor sought advantage by such excursion and that it did not disqualify him as a homesteader. A patent was issued to Potter in consequence of this decision.

The Supreme Court of the Territory of Oklahoma[18] construed the act of March 2, 1889, literally, held that it meant just what it said, and concluded that Potter by his entrance of April 22 had disqualified himself as a claimant to the lands. The court said: "When he crossed the east line of the Indian reservation, and entered upon the lands which were about to be opened for settlement upon the same day, and entered upon the tract of land which he afterwards, and on the same day, undertook to occupy as a homestead, it was not in pursuance of the duty thus deputed to him by the

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[18] Potter v. Hall, 65 Pac. 841 (1901).

Indian agent. He was acting in excess of it. The Indian agent had no authority to authorize him to cross the line of the Indian reservation, and did not authorize him to do so. When he crossed that line, and entered upon the land in dispute here, he placed himself expressly under the prohibition of the statute against 'entering upon any part of said lands', and under the penalty which it provides that such person 'shall not be permitted to occupy or make entry of such lands or any part thereof' or 'acquire any right thereto'."

The Supreme Court of the United States decided the matter in favor of Potter.[19] The court distinguished between his case and those involving Smith, Payne, and Calhoun, all three of whom were within the inhibited territory at the time when the lands were opened for settlement. The Potter case introduced the question whether one who was outside of the territory at the moment of time when the lands were opened, lost his right to take part in the race into the territory in question.

The court observed that a rigorous adherence to the mere letter of the acts of March 1 and 2, 1889, and the terms of the proclamation would exclude every person from the right to enter and occupy within the prohibited territory, even though such person was outside of the territory, and therefore on an equality with all others if perchance such person

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[19] Potter v. Hall, 189 U. S. 292 (1903).

had accidentally or otherwise gone into the prohibited territory between March 2 and April 22. "But it is also true," said the court, "that if the provisions of the statute and proclamation be enforced, not according to their mere letter, but in harmony with the intention which may be fairly deducted from them, a contrary rule would result." The court did not construe the words "enter upon and occupy" to embrace the mere accidental or casual presence in the prohibited period between March 2 and April 22, as applied to one who was outside on April 22, and therefore in position of substantial equality with others seeking to make the race for land. It was observed that the settled rule applied by the Interior Department was that one who took part in the race for land on the day of the opening was not prohibited from taking land because of a prior entry into the territory unless it was shown that manifest advantage resulted to the entryman from his previous going into the territory. Said the court: "The rule thus for a long period and consistently enforced must obviously have become the foundation of many rights of property. And as we consider that the rule thus applied in the practical administration of the statute by the officials by law charged with its execution conforms to its intention, we are unwilling to overthrow it by a resort to a narrow and technical construction." The final conclusion of the Interior Department as to the ultimate facts was that Potter by his entrance had neither gained nor sought advantage, and this conclusion was a finding of fact not reviewable by the courts.

Charles A. Patterson entered Oklahoma district about February 25, 1889. He had no license from any one in authority to enter the district, or to remain there. The alleged purpose of his entrance was to find his son, who was supposed to be in the Cherokee Outlet. Patterson had a team and while in Oklahoma district he was engaged in moving other campers. And while there he formed the intention of taking and entering a tract of land as soon as the district was opened to settlement. His mind was not fixed upon any particular tract of land but he intended to settle on lands with which he was familiarizing himself in the present vicinity of Oklahoma City.

Patterson left Oklahoma district on March 28 and remained outside its borders until April 22. At noon on that day, he entered the race and settled on a tract of land within section six, township eleven north, range two west, which tract was in the vicinity where he had intended to settle. It appears that he established priority of settlement, and was in every respect qualified to hold the land, except for the fact that he had entered upon and occupied lands of Oklahoma district during the prohibitory period. Because of that fact the Secretary of the Interior[20] reversed a decision of the Commissioner of the General Land Office and held that Patterson was disqualified to acquire title to lands as a homestead claimant.

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[20] Potter v. Hall et al., 18 Land Decisions, 591 (1894).

The Supreme Court of the Territory of Oklahoma[21] sustained the decision of the Secretary of the Interior. The court, as in the case of Potter v. Hall decided on the same day, took the position that the act of March 2, 1889 meant just what it said. The court set forth the rule in regard to the interpretation of a statute, that where the words and language used in the act are free from doubt and ambiguity, and express clearly, plainly, and distinctly the intent of the lawmaking power, there is no occasion to resort to other means of interpretation. "It is never permissable," said the court, "to interpret that which has no need of interpretation."

The court held that the manifest purpose and scope of the act of March 2, 1889 was to prohibit every person who was within the limits of the entire country to be opened to settlement after the passage of the act of March 2, and prior to the opening of the country on April 22, from ever entering or acquiring title to any of said lands under the homestead laws. Moreover the court said: "But, even if the doctrine of advantage--which we do not approve--is applied in the interpretation of this statute, we think clearly that Patterson gained a decided advantage over those persons who remained without the limits of the country to be opened to settlement during the prohibited period. The fact that Patterson remained in the prohibited

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[21] Patterson v. Wilson et al., 65 Pac. 921 (1901).

country after the passage of the act of March 2, and several days after the proclamation was issued, and that he was in the immediate vicinity of the land in controversy, is per se an advantage over all persons who remained outside of the territory during the prohibited period."

John H. Wood had been in Oklahoma district some years before 1889. He left his home near Oklahoma Station on April 16 in charge of military transportation and went to Kingfisher. On the morning of April 22, he was hauling wood and working a mile east and somewhat north of the land office there. Within eight minutes after the opening of Oklahoma district, he was upon and claimed the northeast quarter of section fifteen at Kingfisher as his homestead. During the afternoon of April 22, the quarter section was occupied by town-site applicants for purposes of trade and commerce and was surveyed for a town site. The priority of settlement made by Wood was undoubtedly due to his presence near the desired tract, and he was lawfully within Oklahoma district.

Secretary Noble in an opinion[22] of October 1, 1890, set forth at length the "doctrine of advantage" in which he held that Wood had disqualified himself as a homesteader by using his official position as a mere instrument and means to secure, in an unjust way, a most valuable quarter section of land before other settlers arrived. Noble also said: "I

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[22] Townsite of Kingfisher v. Wood et al., 11 Land Decisions, 330 (1891).

do not think it was the intention of Congress that a man who happened to be legally in the territory, but did not use his position to his own advantage, or to the disadvantage of his fellow-citizens, should be forever prohibited from acquiring any rights in the territory. Each case must be determined upon its own merits and evidence: but it may be said generally, that the presence in the territory before the opening, under the proclamation, and the actual settlement and entry at the land office must be so widely and obviously separated in every detail and circumstance as to render it impossible to reasonably conclude that the one was the result of the other, or in any wise dependent upon it."

In February 1889, Warren Miller was within Oklahoma district without lawful authority, looking for a quarter section of land to be taken as a homestead. In March, he spent several days finding corners, running lines, and ascertaining the numbers and boundaries of many quarter sections, just east of the present site of Stillwater. One of these quarter sections he visited frequently during the prohibited period, and he took active steps to prevent its being taken by anyone else. The only excuse for his unlawful presence during the prohibited period was that he was ignorant of the law, and believed it was lawful for him, an old soldier, to select a homestead before the hour of noon on April 22, provided he did not take possession of it

and occupy it before that hour.[23] "Ignorance of the law is no excuse," said Secretary Hoke Smith in holding that Miller was not a qualified entryman.

William A. Marvel made a homestead entry for a quarter section near the present site of Jones. It developed however that just before the opening of Oklahoma district, his son went to this quarter section. On the afternoon of April 22, the son held it against all claimants until his father arrived and took possession of it. It appeared that the entryman followed a blazed trail to the tract where his son was waiting for him. Secretary Smith held[24] that the illegal assistance given Marvel by his son disqualified him as an entryman and that the entry should be cancelled. Smith subsequently held that a soldier's declaratory statement, filed for a tract of land in Oklahoma district by an agent who had entered the district prior to the time fixed therefor was illegal, and conferred no right on the claimant.[25] One who was lawfully or unlawfully within Oklahoma district prior to the time fixed for the opening of lands therein to settlement, and who took advantage of such presence to select land in advance of others, was disqualified thereby to make entry of land in the district, even though he

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[23] Smith v. Miller, 19 L. D. 520 (1894). See also Albin v. Hicks, ibid., p. 31.

[24] White v. Marvel, 18 L. D. 560 (1894).

[25] Mullen v. Porter, 20 L. D. 334 (1895).

subsequently went outside of the boundaries thereof and there remained[26] until the time fixed for the opening.

Veeder B. Paine produced satisfactory evidence that he was the first prospective settler leaving the border of Oklahoma district in the race of April 22, and establishing settlement on the southwest quarter of section nine, situated at the present site of Guthrie. He claimed the section as a homestead, although he knew that it would become part of the town site of Guthrie. It appears that he connived with persons who, on certain pretenses, entered Oklahoma district before the hour of the opening and that he established priority of settlement by aid of their assistance. Secretary Noble in holding[27] that Paine did not make a settlement in good faith under the homestead law used language that merits quoting.

"Two of his friends left during the morning for Guthrie, for the purpose of taking the train. The vehicle which carried them to this point also transported the camping outfit, provisions, an ax, and the coat of Paine. Another friend who desired to go to Guthrie to take the train started a little later on horseback over the road which would be traveled by Paine. It may be true that the departure of these men at this time was merely incidental--an accident

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[26] Dean v. Simmons, 17 L. D. 526 (1893).

[27] Guthrie Townsite v. Paine et al., 12 L. D. 653 (1891). See also Guthrie Townsite v. Paine et al., (on review), 13 L. D. 562 (1891).

of their ordinary business life, but however this may be, their acts of kindness rendered assistance to their friend Paine.

"In the meantime Paine was on the border of the Territory waiting for the moment to start; he was mounted on a fleet horse, possessed of great powers of endurance. When the signal was given the waiting crowd, consisting of hundreds of people, started, and Paine, thus unincumbered, by his camping outfit, provisions, coat, etc., so necessary to a person who was to make a settlement on the uninhabited plains, found that the confidence reposed in his horse had not been misplaced, for from the very start he took the lead and soon was out of sight of all others. Soon after leaving the border one of the saddle girths was broken, but the rider continued his rapid journey. He took no note of the many unappropriated tracts of agricultural lands over which he passed, tracts whereon he could have established a home as contemplated by the homestead law, he was only eager to reach the land in dispute.

"After riding about eight miles he overtook the friend who had preceded him on horseback, he had dismounted, and his horse was standing by the roadside eating grass. The friend saw the broken saddle girth and suggested an exchange of horses, which suggestion was instantly accepted and Paine pursued his journey to the desired tract, where one of his friends who had preceded him on the wagon, containing his effects, the ax, etc., was found, also a piece of board from

which he made stakes with the ax and drove them into the ground, marking thereon his name and the fact that he claimed the same as his homestead; he blazed a tree situated on the land, and made a similar notation, and thus he made settlement on what he alleges was a tract he intended for his homestead under the provisions of the homestead law.

"It can not be denied that the friends who entered the Territory prior to the hour fixed in the proclamation of the President, rendered Paine valuable and material assistance. It is denied by both Paine and his friend that the exchange of horses was made in pursuance of any prior arrangement, but that it was only incidental, resulting from the breaking of the saddle girth, but no explanation is given why the friend was waiting by the roadside with a horse that had become at least partially rested, nor, if Paine's horse was still fresh, why horses were exchanged instead of saddles; whether previously intended or not there was in effect a relay of horses, and this relay was made possible by entering the territory prior to the hour fixed by the proclamation.

"The assistance rendered by friends gave Paine an advantage over others, and this advantage was gained by unlawful means inasmuch as the aid was rendered by parties who entered the territory prior to twelve o'clock noon. Taking the whole history of this case, into consideration, I am unable to arrive at the conclusion that Paine, either in the conception or execution of his settlement on this land, acted in good faith, as a bona fide claimant under the homestead law, and

in the absence of good faith, no claim can be recognized. All the facts indicate that the claim was taken for speculative purposes only, to enable him to dispose of this land for townsite purposes, and that it was not taken for agricultural purposes, and for the purposes of a home, or at least for a home as contemplated by the homestead law... I can not assent to the doctrine that one who, in the manner here indicated, reached this tract a few minutes in advance of his fellows, shall be permitted to hold the advantage he has thus gained and speculate off, and enrich himself from, their misfortune, in being less fleet than he, and especially so, when I am firmly convinced that he had been planning and arranging, for days, how he might reach this townsite in advance of the people contemplating locating thereon, and enter it as a homestead and then sell it to them at his own price." Secretary Noble properly held that a town-site entry could not be allowed where it was apparent that the application was in the interest of a fraudulent speculation.

Vestal S. Cook came to the eastern boundary of Oklahoma district on April 20, 1889. On the night of Sunday, April 21, he and three friends sent two men with eight horses into the district. Four of the horses were to be stationed five miles from the border on the road to Oklahoma Station, and the other four were to be stationed five miles farther on. The relays were to aid Cook and his friends in reaching Oklahoma Station in the quickest possible time. Cook

insisted that this was done, not to take advantage of other persons who were to make the trip on horseback and in wagons, but to enable him and his friend to beat a certain railroad train which they heard was to run from the northern boundary to Oklahoma Station. He said that he paid his share of the fifty dollars paid by four of them to the two men who took the horses into Oklahoma district. They knew the law and cautioned the men that if they entered Oklahoma district before the opening, they thereby disqualified themselves from taking land therein. Cook by use of the relay of horses reached the southwest quarter of section twenty-seven, near the present site of Oklahoma City, and laid claim thereto as his homestead. All legal authorities found that Cook by arranging a relay of horses had disqualified himself as a homesteader in Oklahoma district because he "hired a man" to violate the law for him.[28] Secretary Chandler quoted a principle stated by Lord Coke to the effect that "he who does anything through another is considered as doing it himself."

Long before 1889, John G. Chapin entered Oklahoma district under lawful and proper authority. He obtained from the Commissioner of Indian Affairs on May 11, 1888, for the term of one year a license authorizing him to carry on the business of trading with the Cheyennes and Arapahoes. He lived on and occupied certain lands near Kingfisher in 1889

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[28] Blanchard v. White et al., 13 L. D. 66 (1891). See also McMichael v. Murphy, 197 U. S. 304 (1905); McMillan et al., v. Harris, 27 L. D. 696 (1898).

throughout the inhibitory period, and continued to reside there many months. In holding that Chapin was not disqualified[29] as an entryman for lands he occupied, Secretary Noble said: "He offered his homestead application for the tract on the 1st day of June, 1889; from noon on the 22nd day of April, up to that time the land was open to settlement and entry by any qualified person, without let or hindrance on the part of Chapin. To hold that under these circumstances the statute prohibited him from making the entry, would be to give it a construction not warranted by the language used, nor in harmony with the intention of Congress in enacting it, and certainly contrary to reason as well as the settled rules of construction. United States v. Kirby (7 Wallace, 482)."

Edgar Turner went into Indian Territory in 1886 where he found employment on a ranch and as a teamster. On April 22, 1889, he was south of the North Fork of the Canadian, and from four to six miles east of Fort Reno. About five o'clock he settled upon the northeast quarter of section seventeen, township twelve north, range four west, and attempted to secure the same as his homestead. Assistant Secretary Sims considered that it was immaterial whether Turner took advantage of his presence in Oklahoma district to establish priority of settlement, but quoted the language used by the Supreme Court of the United States in the case

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[29] Taft v. Chapin, 14 L. D. 593 (1892).

of Smith v. Townsend to the effect that one who was within the territorial limits of Oklahoma district at the hour of opening on April 22 was within both the letter and the spirit of the law disqualified to take a homestead therein. "Therefore," said Sims, "the case of Taft v. Chapin is hereby overruled."[30] It may be proper to observe however that if every case were to be determined upon its own merits and evidence as stated in the case of Townsite of Kingfisher v. Wood et al., there was considerable difference between the cases involving Turner and Chapin, especially as to the time when they laid claim to the respective tracts of land.

The case of Hershey v. Bickford et al.[31] casts light upon the matter of the presence of a prospective settler within Oklahoma district during the prohibitory period. Harvey L. Bickford had been within Oklahoma district for a long time prior to March 2, 1889 engaged in the business of government contractor and flour inspector, and during the prohibitory period he remained within Oklahoma district, engaged in said occupation. At noon on April 22, he was on the acre reserved for a land office at Kingfisher. Secretary David R. Francis held that Bickford was disqualified from making the run on the day of the opening, but was not necessarily disqualified from thereafter making entry of lands in Oklahoma district, if by his presence therein he

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[30] Turner v. Cartright, 17 L. D. 414 (1893).

[31] 23 L. D. 522 (1896).

secured no advantage over others. Francis considered it clear that the disqualification was confined to the day of opening of Oklahoma district. He also said: "Bickford did not enter upon and occupy any part of the territory opened. He was, on the day of opening, rightfully on the 'government acre', and remained there until after the hour of opening had passed."

George W. Jones went into Oklahoma district on April 17 or 18, 1889, to assist in hauling from Guthrie material for the building of the land office at Kingfisher, and to help put up the building. He was lawfully within Oklahoma district. On the morning of April 21, he and other prospective settlers started from Kingfisher on a roundabout way to go outside of Oklahoma district. One of the horses belonging to Jones got sick. It was decided to leave "wagons and extra horses" at a point within Oklahoma district until the next day. An examination of the evidence causes one to doubt whether Jones and those with him went outside of the district to take part in the race on April 22. Jones subsequently made an entry for a quarter section of land, and Assistant Secretary Chandler in 1893 found that he had taken no advantage of his former presence in Oklahoma district. The next year Secretary Smith set aside the decision, stating that he was convinced that Jones violated the letter and spirit of the law by his presence within

Oklahoma district during the prohibited period.[32] We may note in another case that M. M. Laughlin was thoroughly familiar with the lands of Oklahoma district prior to 1889. But he was within the district from March 2 to April 21 of that year, and Secretary Smith concluded that a sojourn of that duration disqualified him to secure title to lands therein,[33] unless it appeared that he was lawfully within the district.

S. W. Sawyer was at Oklahoma Station and Guthrie in March, 1889 trying to sell lumber, and he was also looking at the country. He did not select or attempt to select land for town-site or other purposes. In April, 1890, a year after the opening, he bought certain lots at El Reno from the Rock Island Railroad Company. The act of March 2, 1889, provided that no person who entered Oklahoma district during the prohibitory period should be permitted to "acquire any right" to lands there. Secretary Smith however held that Sawyer's entrance upon the lands did not disqualify him to acquire title[34] to the lots at El Reno. It appeared from the evidence that during the prohibitory period Sawyer was not within twenty-five miles of the land to which he later acquired title, and that in Oklahoma

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[32] Standley v. Jones, 16 L. D. 253 (1893); on review, 18 L. D. 495 (1894).

[33] Laughlin v. Martin et al., 18 L. D. 112 (1894).

[34] Young v. Severy, et al., 22 L. D. 121 (1896).

district he acquired during that period no advantage over prospective homesteaders.

Josiah Coplin for several years prior to 1889 was engaged in raising cattle near the boundary line between Oklahoma district and the Chickasaw country, and was familiar with all the lands in that vicinity. Twice during the period of inhibition, he entered upon lands in Oklahoma district for the purpose alone of removing his cattle therefrom, in obedience to an order of the military authorities. At the land opening, Coplin secured a homestead in the southwest corner of Oklahoma district, and Secretary Smith considered[35] that he was not disqualified by previous entrance upon lands of the district familiar to him. A similar case[36] involved Thomas McDade who during the year prior to the opening of Oklahoma district resided at Darlington, about two miles from the western line of the district. At least on one day in April, just prior to the opening, he was in Oklahoma district assisting in a "round up" of cattle. On April 27, 1889, he made homestead entry for certain lands in the vicinity of the "round up". Assistant Secretary Reynolds held that for McDade to sustain his claim to the lands, it was incumbent upon him to show that the purpose of his entrance into Oklahoma district during the inhibitory period

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[35] Roff v. Coplin, 18 L. D. 128 (1894).

[36] Kollar v. McDade, 21 L. D. 153 (1895). See also Metz v. Seely, 21 L. D. 148 (1895).

was not to acquire information about land, and that he did not seek or obtain such information.

For five months preceding the opening of Oklahoma district, James B. Jones resided in the Pottawatomie country on a ranch which he had leased from an Indian. Throughout the five months, he went back and forth to Oklahoma Station from his residence for his mail and to purchase provisions and other goods and for railroad accomodations, there being no other point available to him. In January, 1888, he selected the northwest quarter of section thirty-five, township thirteen north, range one west, as a site for his future home and built the foundation of a house there, intending to claim the land as soon as it should be opened for entry. The tract was located about three miles from his residence and about one mile northwest of the usual route traveled by him on trips to Oklahoma Station. The night before the opening he spent at the ranch and he remained without the limits of Oklahoma district until the opening of the lands, at which time he promptly settled upon the tract he had chosen, and in due time made a homestead entry therefor. Thus, he was, before the passage of the act of March 2, 1889, familiar with the tract in question and with the vicinity roundabout it. In regard to whether he had entered upon and occupied lands during the inhibitory period, Secretary Smith said of Jones: "His periodical visits to Oklahoma City, which was at once his post-office, his most convenient and accessible railway station, and his market town, do not

appear to have brought him any advantage over other persons seeking lands in the Territory, and his entrance therein upon the missions and for the purposes indicated by the evidence, it having been made affirmatively to appear that he reaped no advantage therefrom, should not, in my opinion, be held to disqualify him."[37]

A physician who entered Oklahoma district three times during the inhibitory period for the purpose of visiting a sick patient, and who by such visits neither sought nor obtained any advantage of any one, was not disqualified as a settler.[38]

Frederick W. Kittroll arrived near the west line of Oklahoma district in the evening of April 20, 1889. He went to a creek near-by to water his horses, when he saw a light at a distance of about two miles. He supposed "boomers" were camping there and he went to inquire of them where the west line of Oklahoma district was. He found the camp to be that of some surveyors who told him that he was within Oklahoma district and informed him as to the location of the western line. He returned immediately to his camp west of the line, where he remained until noon on April 22, at which time he successfully made the run with other prospective settlers. It was necessary to determine whether he had entered upon and occupied lands in

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[37] Cornutt v. Jones, 21 L. D. 40 (1895).

[38] Monroe et al. v. Taylor, 21 L. D. 284 (1895).

Oklahoma district during the inhibited period.[39] He had not intended to cross the line into the district, had no unlawful purpose in doing so, no one was injured thereby, and he gained no advantage in doing so. Assistant Secretary Chandler in holding that Kittrell was not disqualified by such entrance said: "To hold that one who has inadvertently crossed the line prior to the time named in the act is deprived from ever acquiring any title to any of the lands in said Territory, is placing a forced construction upon the act and proclamation, which does violence to their spirit."

Charles Cole was like Kittrell, in that he ignorantly and unintentionally entered upon lands of Oklahoma district during the inhibited period. About April 17, 1889 he left Arkansas City in company with five persons and traveled to the Iowa reservation by way of Ponca and Otoe Springs. It appears that I. N. Terrill who was acting as guide for the party confused the trails and led Cole and the others half way across the panhandle at the northeast corner of Oklahoma district before he realized that he had entered upon forbidden territory. It also appears that Terrill led the party promptly to the south border of the panhandle, and until that time Cole was not informed and did not know that he had been within Oklahoma district. Cole made a successful run on April 22. Chandler followed the decision in the

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[39] Connell v. Kittrell, 15 L. D. 580 (1892).

Kittrell case and held that Cole had not disqualified himself as a homesteader by entrance into Oklahoma district.[40] "It was impossible," said Chandler, "to deprive people who had been over the Territory, of the knowledge they had thus acquired, but it was the intention of Congress that persons should stay out of the Territory, after it had been secured as part of the public domain, until a certain hour." Chandler contrasted the innocent entrance of Cole with such intentional violations and attempted evasions of law as "to steal into the Territory, and look over the land for the purpose of selecting a particular tract; to send horses in advance, that one might have relays of horses in the race; to pretend to secure employment with a railroad company, to quit work within the Territory at noon; to secure a deputy marshalship, to be resigned at noon on the 22d of April; to go into the Territory on any pretense, prior to the time fixed, whereby the person sought to obtain unfairly an advantage over others."

The Cole case should be contrasted with that involving Samuel D. Martin[41] who apparently for his own advantage was conveniently ignorant of the location of the boundary line of Oklahoma district and crossed the northeastern panhandle just before the opening on April 22. He made a homestead entry for a quarter section of highly desirable land near

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[40] Golden v. Cole's Heirs, 16 L. D. 375 (1893).

[41] Laughlin v. Martin et al., 18 L. D. 112 (1894).

the present site of Langston. The crossing of the panhandle placed Martin in an advantageous position for the race, and being unable to establish the innocence and inadvertence of his presence within Oklahoma district, Secretary Smith directed that his entry be canceled.

During the hour preceding the opening, Robert W. Higgins drove his team across the eastern line of Oklahoma district a quarter of a mile, "where there was water and a lot of horses and men," watered his horses, and returned to the boundary line where he waited until noon. About two hours later, he reached a quarter section near the present site of Oklahoma City and immediately settled upon it. Secretary Smith observed that settlement was made far from the lake where Higgins had watered his horses, and he did not believe[42] that Higgins had disqualified himself as a homesteader within the spirit of the prohibition in the act of March 2, 1889.

Oliver N. Ratts and a number of prospective homesteaders began the race on April 22 from a sand bar, or island, in the Canadian River near the upper Barrow's Crossing. It appears that the sand bar was not over fifty yards from the south bank of the river nor over one hundred and twenty-five steps from the north bank. Secretary Smith held[43] that the southern boundary of Oklahoma district was

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[42] Higgins et al. v. Adams, 18 L. D. 598 (1894).

[43] Hurd v. Ratts, 22 L. D. 47 (1896).

the middle of the bed of the Canadian River, that the sand bar was not inside the district, and was a lawful point from which to start. On a charge that an entryman entered Oklahoma district before the hour of noon on April 22, it was incumbent upon the contestant to show such fact by a clear preponderance of testimony.

Mrs. Poisal, or "Snake Woman", a member of the Arapahoe tribe, was at her request in 1872 located upon certain lands about ten miles east of El Reno and near the present site of Banner. She was so located by the agent of the Arapahoes. The government built her a house, broke and fenced some ground for her. The lands she occupied were within the limits of the district opened to white settlement on April 22, 1889. For thirteen months prior to the opening Thomas Fitzgerald worked on the lands for her son. Mrs. Poisal could have had the lands reserved for herself prior to the opening, but did not. On April 30, Fitzgerald filed a homestead entry for the lands she occupied, and made an unsuccessful attempt to sustain his entry.[44] Assistant Secretary Chandler said in part: "Fitzgerald knew the land not vacant; knew this Indian woman, ignorant of the English language, seventy-six years old, decrepit and almost blind, lived there with her children, yet he drove her off the land, appropriated her improvements and her

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[44] Poisal v. Fitzgerald, 15 L. D. 19 (1892); on review, p. 584.

growing crop, and even attempted to defy the military authorities when a file of soldiers sought to place her back in her home. His conduct was wrongful from the beginning and the department will not aid him therein." Mrs. Poisal's rights were not affected by the provisions of the act of March 2, 1889. A prospective homesteader[45] could acquire no settlement right to lands in Oklahoma district by occupation of lands prior to President Harrison's proclamation of March 23, 1889, although the applicant had entered upon and surveyed the tract in controversy as early as 1884.

Peter Shields went into Indian Territory in 1873, and in 1878, he married Josephine Keith, an Arapahoe. Shortly thereafter, under the advice of Agent John D. Miles, he settled upon a tract of 320 acres[46] near the present site of Banner. Subsequently, it was ascertained that he had been erroneously located on land outside of the Cheyenne and Arapahoe reservation, and within Oklahoma district. He continued to cultivate and improve the land without having any lawful right thereto conferred upon him. In the spring of 1889, he applied to the Department of the Interior to know whether he was entitled to remain in Oklahoma district and retain the land. Secretary Noble on April 10, directed that Shields and other white persons

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[45] South Oklahoma v. Couch et al., 16 L. D. 132 (1893).

[46] Amy Houser et al., on review, 20 L. D. 46 (1895).

similarly situated should be permitted to remain in Oklahome district during the prohibitory period.[47] He also directed that they should be permitted to make homestead entries on 160 acres of the lands they had settled upon and improved; and that their Indian wives should be permitted to make entry for the lands they occupied to the extent of 160 acres each, under the provisions of section four of the General Allotment Act of 1887. Lands within Oklahoma district were not within the provisions of the General Allotment Act, but an allotment of such land made for the protection of the improvements of an Indian served to except the land covered thereby from settlement and entry.[48]

On April 22, Shields remained on the land where he had settled. He made homestead entry on April 27 for a quarter section of the land, and had his wife and children allotted lands at the same time. On November 11, 1890, Matthew L. Brown filed an affidavit of contest against the entry made by Shields, contending that the act of March 2, 1889 relative to entering upon and occupying lands in Oklahoma district was operative on all alike, and that Congress having made no exception in favor of any one, the Secretary of the Interior had no right to make an exception of Peter Shields, and other white men similarly situated, and to hold that they

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[47] OIA, Record Letters Sent, No. 59, pp. 343-344 (Chapman's Collection).

[48] Niels Esperson, 14 L. D. 235 (1892).

had rights superior to other white male citizens of the United States, and could rise above the equal action of the law. Acting Secretary Sims, in sustaining the entry[49] made by Shields, said: "The squaw men were allowed to make homestead entries in apparent violation of law, not alone because they were such, but for the reason that the government, through its agent acting in pursuance of the laws of the United States and of a treaty to which they were a party, had placed them in a situation that rendered supervisory and extraordinary action necessary in order to protect equities which grew logically and legitimately out of that situation. While it is accepted as true that the Secretary of the Interior may not wholly ignore a mandatory provision of a law given him to execute, it is not conceived that he is without the authority to mitigate its rigor in a special case."

Section two of the act[50] of May 14, 1880, provided that in all cases where any person had contested, paid the land office fees, and procured the cancellation of any preemption, homestead or timber culture entry, he should be notified by the register of the land office of the district in which the land was situated of such cancellation, and should be allowed thirty days from date of such notice to enter said lands. One purpose of the act was to secure to the

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[49] Brown v. Shields, 21 L. D. 101 (1895).

[50] 21 Statutes, 140.

successful contestant a reward for his services in aiding the government to expose fraud, by giving him a preferred right of entry. A second purpose of the act was to permit an inceptive right to be obtained, other than by filing an entry for the land. When a homestead entry of a disqualified entryman was cancelled, he who attempted to enter the land on the ground that the original entry was void, acquired no rights against one who had initiated the contest in the land office and obtained a relinquishment in his favor from the original entryman.

A homestead entry, valid upon its face, constituted such an appropriation and withdrawal of land as to segregate it from the public domain, and precluded it from subsequent homestead entry or settlement until the original entry was cancelled or declared forfeited, in which case the land reverted to the government as a part of the public domain, and became subject to entry under the land laws of the United States. The following case illustrates the principle. On April 23, 1889, Ewers White, who had entered Oklahoma district during the period prohibited by law, made a homestead entry for the southwest quarter of section twenty-seven,[51] near the present site of Oklahoma City. A few days later Charley J. Blanchard and Vestal S. Cook each filed in the local land office an affidavit of contest,

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[51] Cf. p. 49 above.

charging that White was disqualified as a homesteader. On July 16, the register and receiver of the land office recommended the cancellation of White's entry, and dismissed the contests of both Blanchard and Cook. All parties appealed their cases. On June 3, William T. McMichael had entered upon the land with a view of establishing his residence thereon, and initiating a homestead right to said land. On August 2, he was ejected from the land by the military at the instance of White. On August 31, he filed a contest, alleging that his rights were superior to those of White and of other claimants, and that he was the only qualified settler on the tract entitled to make entry therefor.

On November 29, 1890, while the case involving White, Blanchard, and Cook was pending before the Secretary of the Interior, White relinquished his homestead entry and Samuel Murphy entered the tract of land. The two events of that day may arouse suspicion that White, realizing the weakness of his case, sold his "rights" to the highest bidder at the expense of McMichael. The case henceforth was one between McMichael and Murphy. The Secretary of Interior held[52] that White's entry could not be regarded as void, but voidable only. He said that its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. If that had never been done the tract covered by the entry would

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[52] McMichael v. Murphy, 20 L. D. 147; on review, p. 535 (1895).

have remained forever segregated from the public domain. The Supreme Court of the Territory of Oklahoma held that White's entry, being prima facie valid, segregated the tract of land from the mass of the public domain, and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement.[53]

The court also said that McMichael acquired "no right whatever by his unwarranted intrusion or trespass upon the possessory rights of White;" that McMichael was "a mere intruder, a naked, unlawful trespasser", and that no right, either in law or equity could be founded thereon. The Supreme Court of the United States also agreed[54] that when White, from the first disqualified as an entryman, relinquished the entry he had made, the tract again became public lands, subject to the entry by Murphy.

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[53] McMichael v. Murphy 70 Pac. 189 (1902).

[54] McMichael v. Murphy 197 U. S. 304 (1905).

CHAPTER V

TOWN SITE CASES

We now consider a few leading town-site cases. Jones H. Cook reached Guthrie by train at 1:30 P. M. on April 22, 1889, and he was the first legal settler upon lot forty, block fifty-five in that city. He deposited his baggage on the lot, dug a trench for cooking, put up stakes bearing his name and date of occupancy, and erected a crude tent and slept there a few nights. It appears that on or about April 25, George H. Bennett forcibly entered upon the lot and attempted to improve and exercise ownership over it, and thanks to the assistance of a policeman sent by the chairman of the board of arbitration, or some city official, he succeeded in doing so. The board of arbitration, constituted by the provisional government of the city, on May 14, issued to Bennett a certificate for the lot. It appears that on May 20, the city council passed Ordinance forty-four, the second section of which made it a misdemeanor, in all contested cases, punishable by fine or imprisonment, or both, for any person other than the one to whom the award had been made by the board of arbitration to attempt to put any kind of improvements upon a lot.

More than a year later the town-site board for the city of Guthrie awarded Cook a deed for the lot. In the meantime such interest or claim as Bennett originally possessed had passed through the hands of three or four other persons in a somewhat shady manner. The legal question was raised

as to whether Cook had lost his claim to the lot by reason of abandonment. Both the Department of the Interior and the Supreme Court of the Territory of Oklahoma considered that he had never abandoned the lot.[1] Thus a town-lot claimant, who vacated a lot in obedience to an award made by a citizens' committee, could not be held by such action to have voluntarily abandoned his claim to the lot.

The board of trustees for Guthrie on August 2, 1890 entered the east half of section eight at that city in accordance with the provisions of the act[2] of May 14, 1890. On September 1, a patent was duly executed by President Harrison, by which said tract was conveyed to the trustees in trust for the several use and benefit of the occupants thereof according to their respective interests. Winfield S. Smith and Stephen H. Bradley claimed lots four and five in block fifty-six, as did also the heirs of John M. Galloway. The board of trustees on April 6, 1891 decided in favor of Smith and Bradley, but the heirs of Galloway were in possession of lots, were charged with being insolvent, refused to vacate the lots, and appealed the case to the Commissioner of the General Land Office. In order to evict the heirs, Smith and Bradley prayed that a writ of mandamus issue commanding the trustees to accept the fees tendered by them, and to execute a joint

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[1] Cook v. McCord, 60 Pac. 497 (1899).

[2] Cf. p. 26 above.

deed to them for the lots. The Supreme Court of the Territory of Oklahoma[3] examined the act of May 14, 1890 and found that the writ of mandamus was a legal and proper remedy for the eviction of the heirs. The court held that after the issue of the patent to the trustees, no appeal could be taken to the General Land Office or to the Secretary of the Interior from a decision of the trustees awarding the lands to Smith and Bradley, since the title had then already passed from the government. And the court held that the Secretary of the Interior could not provide by rule for an appeal. It was evident to the court that Congress never intended to burden the General Land Office or the Secretary of the Interior with "several thousand town-lot contests", but intended that adjudication by the board of trustees should be final, except in so far as the courts might properly review their acts and decisions. The Supreme Court of the United States reversed[4] the judgment of the Supreme Court of the Territory of Oklahoma, held that it was entirely competent for the Secretary of the Interior to provide for an appeal to the General Land Office in case of contest, and that it was the duty of the trustees to decline to issue a deed to Smith and Bradley until the appeal was terminated. The court said that by the scheme of the act of May 14, 1890, the title to lands was held in

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[3] McDaid v. Territory, 30 Pac. 438 (1892).

[4] McDaid v. Oklahoma, ex rel. Smith, 150 U. S. 209 (1893).

trust for the occupying claimants, and also in trust sub modo for the government until the rightful claimants and surplus lands were ascertained.

Henry H. Bockfinger claimed to have become entitled, under the homestead laws of the United States, to the southwest quarter of section eight at Guthrie, or to the south half of what was known as "West Guthrie". He brought suit in the district court of Logan county against the town-site trustees, seeking a decree that the trustees held the title in trust for his use and benefit, and that they be compelled to convey it to him. The courts[5] uniformly held that no such relief could be granted Bockfinger, because the trustees held the title in trust for the purposes named in the act of May 14, 1890, and because the real ownership of the land still belonged to the United States. The act having provided for the conveyance of title to the occupants of the town through its agents, no one could intercept that title until it was vested in the person or persons whom Congress intended, any more than he could prevent a conveyance by the United States to the persons direct. The trust held by the trustees was not in any sense of a permanent character. The trustees were simply government agents in the performance of an intermediary function. The United States retained its hold on the land until the title by proper conveyance passed absolutely from it, or from its

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[5] Bockfinger v. Foster, 62 Pac. 799 (1900); 190 U. S. 116 (1903).

officers or agents, the town-site trustees, to the occupants. However, a town-site occupant, after receiving title under the act of May 14, 1890 might be sued by any one claiming to have acquired under the homestead laws a right to the land prior and superior to that held by the trustees for the use and benefit of the town-site occupants. But he was obliged to wait at his own discomfort until after the government had parted with the absolute title and exhausted its supervisory power over the land embraced in the town-site entry.

At Guthrie on April 22, 1889, F. A. Morrison settled upon a portion of land on the east half of section eight, and was in the actual and undisputed possession of the same. On the following day, Henry C. Beamer for the sum of one hundred dollars purchased from Morrison all his right, title, or claim to the portion of land, entered into the peaceable and undisputed possession thereof, and claimed the same for the purpose of trade, business, and residence. Beamer fenced the land, built a hut on it, and remained there until May 20. On May 13, the mayor and councilmen of Guthrie had adopted for the city a plat, showing the lots, blocks, streets, and alleys. The land occupied by Beamer, according to the plat, was within Third Street where the same opened into Harrison Avenue. Beamer refused to abandon his location and on May 20, he was "thrown off" the land by J. A. Acklin, B. F. Daniels, and W. W. Angel, acting pursuant to orders of the city government. He protested against this action,

entered upon the land three times more, and was as many times evicted. The land was used as a street. On August 20, 1890, Beamer entered for a fifth time upon the land, and procured a temporary order of injunction restraining acting of the city officers from removing him.

On August 2, the three town-site trustees for Guthrie made proof and acquired title to the east half of section eight for the use and benefit of the occupants thereof. The trustees approved the survey and plat already made by the inhabitants of Guthrie. Beamer's qualifications to take land were unquestioned, no other person claimed the land he desired, but the trustees rejected his application for a hearing because of the location and use of the land. The question of law was whether Beamer had acquired such vested rights or interests in the land he claimed as would prevent it from being appropriated for the use of streets necessary to the laying out of the city. The Supreme Court of the Territory of Oklahoma[6] held that he had not acquired such rights or interests. The court observed that the policy of the government had been to consider possessory rights and improvements of meritorious actual settlers who were pioneers of emigration in the new territories. It also observed that until May 14, 1890, no legal entry could be made for town-site lands, that until such entry the power of Congress over the disposition of the lands was

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[6] City of Guthrie v. Beamer, 41 Pac. 647 (1895).

supreme, and that Congress might make such disposition of the lands as the lawmaking power might declare, although the disposition worked injustice or hardship to claimants for such lands.

Said the court: "It is well settled that, as between adverse claimants to public lands, he who is first in time--the law having been otherwise complied with--is first in right, but this rule has no application against the United States. The right of congress to dispose of the public lands is a power granted by the constitution, and every person who initiates a claim to any portion of the public domain takes such right subject to this power of Congress; and such power of disposal continues until the United States has estopped herself to divest such right by accepting something of value from the claimant, and permitting an entry of the land at the proper land office. When the secretary of the interior, or the trustees appointed by him, under his instructions, adopted and approved the plat of the town site of Guthrie, which the inhabitants had made long prior to the entry of the land by the trustees, the lands designated as public streets on such plats were dedicated to the public use; and the act of congress, and the action of the secretary under the power vested in him by said act, had the effect to divest any individual interest that might have been asserted to such portion of said land, and Beamer has no rights or interest in the public streets which can be conveyed to him by the trustees."

The court took notice of the fact that at Guthrie on April 22, 1889, there was no order or regularity in settlement, and that everything was chaos and disorder. The court said:

"Every person who attempted to settle upon said lands, in such chaotic state, established their settlement rights with full knowledge and notice of the fact that before the same could be entered as a townsite, or any title acquired from the government, such lands must, of necessity, be platted and laid off into blocks, lots, streets, and alleys, and took whatever of interest he acquired subject to this right, and whatever should result from it. Prior to such platting and subdivision, no person could acquire any interest in any definitely described or particularly bounded portion of said tract. There was no way by which it could be determined what the quantity of land would be that would fall to the portion of any settler or occupant. The title acquired by a town-site settler, and the interest acquired by such settler by occupancy or improvement, are in and to a lot or lots. Such lot or lots must be determined by a plat, survey, and subdivision adopted in some manner, and generally accepted. Recognizing this uncertain, chaotic, and disorderly condition of affairs, the experience and intelligence of the American people asserted itself; and they made a rule and law for themselves, and organized committees, by and with the consent of the settlers, and empowered them to make surveys and plats, and to bring order out

of confusion. The people generally acquiesced in this action, and adopted the result of their work, and conformed their settlements to the lines of the blocks, lots, streets, and alleys, as designated by such committees and the provisional government organized by the people for their own guidance and government. This step was necessary in order that the settlers might acquire some definite location, and become occupants of some definite portion of said tract; otherwise, a town site never could have been entered, or title acquired, as every portion of the tract was occupied and claimed by some person. When these surveys and plats were made, those who were so unfortunate as to have made their location in such portions of the tract as were required for streets were bound to give way, as they had taken their chances in the great lottery for a lot when they stuck their stake, and had drawn a blank. All could not be on lots, and this they all knew. Some were on lands that had to be used for streets in laying off a town, and this they all knew. Without streets and blocks and lots, there could be no town, and this they all knew. Hence, no specific interest could be acquired until there was a particular subdivision to which such right could be attached.

"The people were several days in bringing order out of confusion, and the provisional government, which had been organized with the consent of the governed, were charged with the duty of providing some means of communication between the various portions of the city. The stipulation shows that every portion of the lands embracing several

blocks in the vicinity of the disputed portion was claimed by occupants, and that there was no reservation or provision for streets. All knew this when they settled in this confused state, with no uniformity of action; and each must have known, when he staked a lot and erected a temporary structure of any kind, that, so soon as streets were laid off, those who were in the way of the march of progress would have to surrender their settlements. The laws, as enacted by our legislators, never contemplated such a condition of affairs. The mind of man had not conceived, or history recorded, the building of a city of 20,000 people in less than a day. At the crack of a gun and the waving of a flag, 20,000 enthusiastic people assembled in mass, without a commander, or subject to any local law, and within less than a day, with wondrous energy, intelligence, and enterprise, had laid the foundation and established the boundaries of the future capital of the most remarkable territory that had ever existed. This vast, struggling mass of intelligence, each seeking to secure for himself a portion of the tract upon which all recognized that a great trade center was to be builded, left no spot unoccupied. No ground was too poor, and no stone was rejected. To this condition of affairs no established rules were applicable. A new order of things was established, which called for additional legislation, or an application of old rules to the changed conditions, and none knew this better than the people who took part in the early settlement

of this town site. Congress recognized this fact, and, to meet the requirements of these conditions, passed the act of May 14, 1890. When Beamer purchased the settlement right of Morrison, and attempted to acquire a right to a particular portion of the town site by occupancy or improvement, he made such purchase and effected such settlement with full knowledge of the conditions that existed, and that no streets had been laid out, or subdivisions established, which were necessary in order to build a city or town; and he knew, furthermore, that when a survey and plat were made he, or some other settler, would be required, by the exigencies of the occasion, to vacate their claims, and give way to the requirements of the public. Knowing these facts, he voluntarily took his chances with all other settlers, and happened to be unfortunate in his location. He was deceived or misled by no one. There was no compulsion on him to act, and he is in no position to complain. He has no claims for equitable relief, and his cause should be dismissed."

At Oklahoma City on April 22, 1889, Frank McMaster legally entered upon and occupied a piece or parcel of ground in the southeast quarter of section thirty-three. On that day, the people occupying the town site platted the same into lots, blocks, streets, and alleys. On this plat, known as the "Dick plat", McMaster's land was designated as lots one and two in block twenty-four. The parties occupying the town site subsequently adopted and enforced

a different plat and arrangement of the streets, alleys, lots, and blocks, according to which plat the land claimed by McMaster was "thrown into the street in Grand Avenue". McMaster objected to the second plat, was forcibly removed from the land he claimed, and was for some years forcibly kept from occupying it.

Town-site trustees appointed under the act of May 14, 1890, approved on September 6 the second plat as to the location of Grand Avenue. For more than a year Grand Avenue, including the land claimed by McMaster, had been used exclusively as highway and street. McMaster brought suit against Oklahoma City for damages, and successfully sustained the suit in the District Court in Oklahoma County and in the Supreme Court of the Territory of Oklahoma, but not in the Supreme Court of the United States. The Supreme Court of the Territory of Oklahoma[7] held that McMaster was an occupying claimant as was recognized by the land laws of the United States, and that the trustees held the land he claimed in trust for him. "The government, by the conveyance by patent," said the court, "vested the title of this land in the trustees, for the express purpose of having the title conveyed to those who were entitled to claim as occupying claimants." The court held that as McMaster on April 22, 1889 had legally entered upon the land he claimed, and was occupying it in accordance with the rules and

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[7] City of Oklahoma City v. McMaster, 73 Pac. 1012 (1903).

regulations of the Department of the Interior, his interest and rights in the land attached at that time. The court said:

"When he had complied with the rules and regulations of the Land Department he was entitled to a deed; that he had a vested interest in these lots, and that any other occupying claimant, or any number of occupying claimants, who made up the town site, at that time or subsequent, had no right to change the plat as to take from him his interest in said lots, and put them into a public street or highway, without his consent. Such a proceeding would be in violation of the Constitution of the United States, and would be taking private property for public use, without compensation. The town-site trustees would have no right to deprive him of any property that he might have by virtue of his prior settlement in these lots, and devote it to street purposes, without his consent and without compensation." The court did not intend that this opinion should be at variance with the doctrine laid down in the Beemer case, and it observed that the facts in the two cases were different.

The Supreme Court of the United States held[8] that there was no unconditional vesting of title to the land chosen by McMaster on April 22, 1889, by tacit agreement of some of the settlers, even though a map had been made showing him in possession of a lot not in any public street of the city. The Court said: "The agreement upon the plat or map was

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[8] Oklahoma City v. McMaster, 196 U. S. 529 (1905).

liable to alteration; there was no absolute right to any particular lot, as it was subject to future survey. It was all in the air. When thereafter, the trustees, under the statute, made a survey of the land into streets, etc., or approved a survey already made by which the plaintiff's lot was placed in the public street of the city, it was his misfortune, when all had taken their chances, that he should draw a blank. The approval of a survey by the trustees, which placed this lot in a public street of the city, gives to the city the right to the possession of it, and to keep it open as such public street." The court also noted that as McMaster was not an occupant of the land at the time the trustees made entry for the lands of the town site, nor when the conveyance was made to the trustees by the government, he was not one of the parties included in the act of May 14, 1890, which directed the entry for the town sites to be made by the trustees "for the several use and benefit of the occupants thereof." The court was unable to see any real difference in the principle governing the McMaster case and the Beamer case, and said the court: "We think the Beamer case was rightly decided."

The annual statements of business transacted at the local land office[9] in Oklahoma district for the years 1889 to 1891 throw light on conditions during the first years of the opening. At the close of the fiscal year on June 30,

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[9] See Table I, page 92.

1889, there were no final homestead entries. During the next year, there were six, and in 1891 there were 102 final homestead entries. In June, 1890, three homestead entries were commuted to cash under section twenty-one of the act of May 2, 1890, and the next year the number was 376. During the three years ending June 30, 1891, the number of original homestead entries was 14,451, and the number of soldiers' and sailors' declaratory statements was 1,165. When we consider the area of Oklahoma district and the lands therein reserved for the use and benefit of public schools, the figures show that successive entries were made for some tracts of land. The number of acres of land[10] available for homestead entry on June 10, 1891, was very small. During the fiscal year of 1892, the three land districts in Oklahoma district were enlarged by including within their limits other lands opened to settlement. Henceforth, the trend of the lands of Oklahoma district to become completely the property of individuals is less easy to trace.

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[10] See Table II, page 93.

CHAPTER VI

CONCLUSION

The Oklahoma district was a large tract of 1,887,800 acres within the Creek and Seminole cessions of 1866. It was bounded on the south by the Canadian River, on the east by the Indian Meridian and the Pawnee reservation, on the north by the Cherokee Outlet, and on the west by the Cimarron River and the ninety-eighth meridian. By 1889, it became clear that these lands which had been desired by various organizations for many purposes were to become the heritage of the Boomers.

By the act of March 1, 1889, lands conditionally ceded by the Creeks in 1866 were ratified and confirmed. The act of March 2, 1889 authorized the purchase of lands conditionally ceded by the Seminoles in 1866. All of these lands in the district were to be opened to settlement except sections sixteen and thirty-six which were reserved for the public schools. The opening of this land to actual settlers was to be administered under the homestead laws. Union soldiers and sailors were given the additional right of filing a declaration of intention instead of a homestead entry, and the right to deduct time, not to exceed four years, served in the Union army, navy, or marine corps from the five-year residence required under the homestead laws. The declaratory statement reserved the land for a period of six months. Entries were to be made in square form not to exceed a quarter section. Town-site entries were not to

exceed one half section, and were to be made by the corporate authorities or by the county judge if there were no corporate authorities.

The Oklahoma district was surrounded on all sides by lands inhabited by other Indian tribes. The district could be reached only by crossing these reservations. President Harrison was quite reluctant to open the lands to settlement under these conditions. Many people had gathered on the borders and were suffering many hardships because of the delay. Therefore, a proclamation was issued March 2, 1889, opening the lands to settlement. By the terms of the proclamation, any person who entered the domain between March 2, 1889 and April 22, noon, would be forever barred from taking land in the district.

Two land offices were established, one at Guthrie for the "eastern land district" and one at Kingfisher for the "western land district". Inspectors and receivers were appointed, buildings erected, and everything put in readiness. At noon April 22, business of the government was begun and steadily performed. One acre was reserved by the government for each of these offices. On May 2, 1890, a third district was established with a land office at Oklahoma City.

Intended settlers which were assembled on the borders of occupied Indian lands surrounding the district were permitted to cross these Indian reservations under military escort to the borders of the district where an equal

advantage was assured. From these points, the race was formally made at noon April 22. Twenty thousand persons entered the district the first afternoon, cities of 8,000 sprang up, and by sundown almost every quarter section had an occupant and claimant. Law and order was administered by the United States Marshals assisted by the military. "Soonerism" was the chief cause of difficulties.

There being no corporate authorities who could make town-site entries, provisional city government was established until such time as future legislation by Congress would make it possible for settlers to obtain titles to lots in town sites. The act of May 14, 1890, cleared up this difficulty by providing for entries by trustees who might also issue certificates of occupancy. The certificates would not be taken as evidence favoring any person who entered upon lots during the prohibitory period.

A "sooner" was one who entered upon and occupied the land during the period between March 2, 1889 and the hour of noon on April 22. Every reasonable effort was made to prevent "soonerism" and the advantage thus unfairly sought. Persons legally within the district on March 2 and who left the district within a few days and remained outside the district during the prohibitory period were not by such presence disqualified as entrymen, provided no advantage was gained by such presence in the district.

The Department of the Interior was authorized by Congress to determine all questions pertaining to the sale and

transfer of the public domain to private individuals and corporate authorities. Congress and the courts were content with this disposition of authority. Great care was taken to eliminate the "sooners" as is shown by the large number of cases coming before the Department of the Interior and the courts for decision.

After examination of some of the cases that arose involving town-site and quarter section entries, it becomes reasonably clear that some of the early town sites and many of the quarter sections were "soonered"; and that adjustment through the regular channels was reasonably certain in cases where the fact could be clearly established.

No final homestead entries were made during the fiscal year closing June 30, 1889. Six final entries were made the next year. During the three years ending June 30, 1891, 14,451 original homestead entries and 1,165 soldiers' and sailors' declaratory statements had been made. This leads to the conclusion that successive entries were made for some of the tracts of land. In the fiscal year 1892, the three land districts in the Oklahoma district were enlarged by including within their limits other lands opened to settlement. From this time the trend of the lands in the Oklahoma district to become the property of individuals is less easy to trace.

TABLE I

The following table is compiled from the annual reports of the General Land Office for the years 1889-1891:

Land Office	Year	Homestead Entries Commuted to Cash Under Section 21 of Act of May 2, 1890	Original Homestead Entries	Soldiers' and Sailors' Declaratory Statements	Final Homestead Entries	Total Amount Received From All Classes of Entries
Guthrie	1889	none	3,049	390	none	$44,096.19
Kingfisher	"	"	2,714	304	"	39,223.94
Guthrie	1890	"	4,033	272	5	57,983.90
Kingfisher	"	3	3,000	167	1	42,823.47
Guthrie	1891	158	564	5	52	41,985.31
Kingfisher	"	47	495	18	15	17,247.11
Oklahoma	"	171	596	9	35	46,064.86
Total		379	14,451	1,165	108	$289,424.78

The 379 homesteads were not commuted to cash under section 2301 of the Revised Statutes. The annual reports of the General Land Office, 1889-1891 are not correct on that point.

The three entries commuted to cash in 1890 were at or near Kingfisher Stage Station. They were made by James D. Dent, Joseph P. Erwin, and William Grimes. Dent received 120 acres, while Erwin and Grimes received 160 acres each.

TABLE II

Lands Available for Entry or Filing June, 1891[1]

Land District	County	Surveyed Lands	Unsurveyed	Total Area
		Oklahoma District		
Guthrie	Logan	[g]417	----------	----------
	Payne	262	----------	----------
Total	----------	---------	----------	679
Kingfisher	Canadian	[h]40	----------	----------
	Kingfisher	11,740	----------	----------
	Logan	[i]50	----------	----------
Total	----------	----------	----------	11,839
Oklahoma	Canadian	[j]990	----------	----------
	Cleveland	880	----------	----------
	Oklahoma	108	----------	----------
Total	----------	----------	----------	1,978

[g] Total in Guthrie and Kingfisher districts, 467 acres.

[h] Total in Kingfisher and Oklahoma districts, 1,030 acres.

[i] See Guthrie district.

[j] See Kingfisher district.

[1] Report of Com. GLO, June 30, 1891, based on circular of June 10, 1891, directing district officers to report approximately quantities of public lands remaining unappropriated by filing or entry.

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