46TH CONGRESS, 3d Session. } SENATE. { REPORT No. 906.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 25, 1881.—Ordered to be printed.

Mr. DAVIS, of Illinois, from the Committee on Private Land Claims, submitted the following

REPORT:

[To accompany bill S. 1429.]

The Committee on Private Land Claims, to whom was referred the bill (S. 1429), entitled "A bill for the relief of Sarah McDonald," have had the same under consideration, and submit the following report:

Sundry papers have been laid before the committee, among them being a communication from the Secretary of the Interior, inclosing a report to him from the Commissioner of the General Land Office, touching the subject-matter of the bill.

It appears that Alexander McDonald, of whom said Sarah is the widow and sole heir, purchased from the Leavenworth, Lawrence and Galveston Railroad Company certain land in the State of Kansas, known and described as follows: Northwest quarter of section 11, and section 13 in township 29 south, of range 18 east, paying therefor $4,770.75, and that he purchased from the Missouri, Kansas and Texas Railway Company other land in that State, known and described as lots Nos. 1 and 2, paying therefor $135.50, and that the companies conveyed to him by deed in fee the land purchased of them, respectively.

The companies claimed title to the lands as follows: Congress by an act approved March 3, 1863 (12 Statutes at Large, 772), granted to Kansas lands in alternate sections to aid in the construction of certain railroads in that State. The latter, by her statute of February 9, 1864, accepted the grant, and designated the Leavenworth, Lawrence and Galveston Railroad Company to construct one of the projected roads, and receive the land grant upon the prescribed terms and conditions.

The governor of the State certified to the Secretary of the Interior, September 21, 1871, that the company had filed a map and constructed and equipped the road as required by the grant. Certified lists, which by statute (10 *id.*, 346) have the force and effect of a patent, were, with the approval of the Secretary of the Interior, made out by the Commissioner of the General Land Office for the alternate sections of land within the designated limits of the road, on the certificate of the governor, under date of September 21, 1871, that the road had been constructed and equipped as required by Congress. The governor, April 7, 1872, and March 21, 1873, conveyed the lands so certified to the railroad company.

The route of the road passed through the Osage Reservation, which the Secretary of the Interior decided, January 16, 1872, was not excluded from the operation of the grant. The latter, therefore, as it was con-

strued and executed by the Land Department, embraced all the lands of the reservation which are situate within certain specified limits on each side of the road, and, as we have seen, the company was furnished with the customary evidence of title to them. It then sold and conveyed to McDonald the section first above mentioned, situated within the reservation.

The United States subsequently filed a bill to establish its title to the lands within the reservation, which were certified to the governor of Kansas, and by him conveyed to the company. The latter was made a party defendant.

The Supreme Court, the case coming before it on appeal, decided that the grant did not embrace any part of those lands. The decree of the court of original jurisdiction enjoining the defendant from setting up any right or claim to them was affirmed. (Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States, 2 Otto, 733.)

The same remarks are applicable to the grant to the Missouri, Kansas and Texas Railway Company by the act of Congress of July 25, 1866. (14 Statutes at Large, p. 289.)

The Supreme Court, in 2 Otto, 760, again declared that the grant did not include any lands within the reservation. Lots Nos. 1 and 2, which McDonald purchased, are within it. The company's conveyance to him pass no title. McDonald was not a party to those suits, and is not thereby bound; but inasmuch as the decrees were rendered by the court of last resort, and the action of the Land Department in certifying the lands in question was pronounced to be without authority of law and ineffectual to pass any right whatever to the company, an attempt by his widow to maintain her title against the United States, or a party lawfully claiming under them, by a valid patent would be idle and unavailing. The only question, therefore, for determination is whether Mrs. McDonald is entitled to relief, and, if so, whether it should be such as this bill provides.

McDonald, no doubt, acted in the full conviction that the company had a good title. The conviction was founded upon the action of that department of the government which is intrusted with the supervision and control of the public domain and the execution of the laws respecting it. He paid full value for the lands, entered upon and improved them, surrounded most of them with a hedge, and appropriated the remainder for grazing purposes.

Under such circumstances, a purchaser in good faith, or his heir, presents a case which is entitled to the most favorable consideration, especially as his grantor is unable to respond in damages.

Precedents for the action of Congress can be found in our legislation. We need only refer to a recent and conspicuous instance. Congress by an act approved March 3, 1866 (12 Statutes at Large, 808), granted the right of pre-emption to certain purchasers on the "Soscol Ranch," in the State of California. That tract, covering about eighteen square leagues, was occupied by parties claiming under General Vallejo, to whom a grant was made by officers of the Mexican Government. The grant was pronounced by the Supreme Court at the December term, 1861, to be void. Congress immediately passed the act authorizing parties who had purchased from him in good faith to enter their land at the minimum price. By virtue of the act of Congress of March 3, 1851 (9 *id.*, 633), the land became on the final rejection of the claim a part of the public domain; but the right of such purchasers who complied with the requirements of the act of Congress and remained in possession were held by the Supreme Court superior to that set up by parties who

had intruded upon such possession and claimed a preference right to purchase under the general pre-emption laws.

Congress, by the act of August 11, 1876 (19 *id.*, 127), provided for the sale of the Osage ceded lands to actual settlers. It conferred upon those whose title is derived from either of the railroad companies, before February 25, 1874, and where the consideration money or a part thereof was paid, and who have made in good faith valuable and lasting improvements, the right to purchase the lands not exceeding 160 acres, to include their improvements. Their right to purchase is coupled with certain condition upon which it is not material that the committee should dwell. Their right attaches from the date of payment to the railroad companies. It is limited, it will be perceived, to 160 acres.

The case under consideration is one of peculiar merit. Mrs. McDonald, although her husband paid for the lands and she remains in possession of them, cannot under our laws perfect her title to more than 160 acres.

The committee are of opinion that she should be granted the right to purchase the lands conveyed by the railroad companies to her husband. The terms and conditions prescribed in the act as to purchase money should be enforced, except so much of them as relates to the quantity, or, in other words, that the limitation as to quantity for which that act provides should be removed.

It may be said, however, that other parties may have settled upon parts of the lands included in the McDonald purchase and taken the requisite steps to acquire a title thereto under the provisions of that act. As Mr. McDonald was in actual possession, which since his death has been continued by his widow, under color of title emanating from the Land Department, it may be somewhat questionable under the decision of the Supreme Court in Atherton *vs.* Fowler (6 Otto, 513) whether an adverse pre-emption right could have been acquired. That case asserts the doctrine that no right of pre-emption can be established by a settlement and improvement on a tract of public land where the claimant forcibly intruded upon the possession of one who had already settled upon, improved, and inclosed that tract. Such an intrusion, though made under the pretense of pre-empting the land, is declared by the court to be an unlawful trespass which cannot initiate a right of pre-emption. No interest is, in any event, vested in the settler before he has complied with all the requirements of the pre-emption laws and paid for the land. Until this has been done, it remains subject to the disposing power of Congress. It would seem, therefore, to be a grievous hardship to Mrs. McDonald to permit parties to enter upon the lands and appropriate the improvements put upon them by the money and labor of her husband.

The report of the Commissioner of the General Land Office accompanying the communication from the Secretary of the Interior recommends the passage of the bill, and the Secretary of the Interior concurs in that recommendation.

The committee, while concurring in the principle of the bill referred to them, find it defective in its present shape, and have instructed me to report a substitute for it, and to recommend its passage.