LYTLE v ARKANSAS

A DDSM WORKBOOK

Dan B. Robison, PS

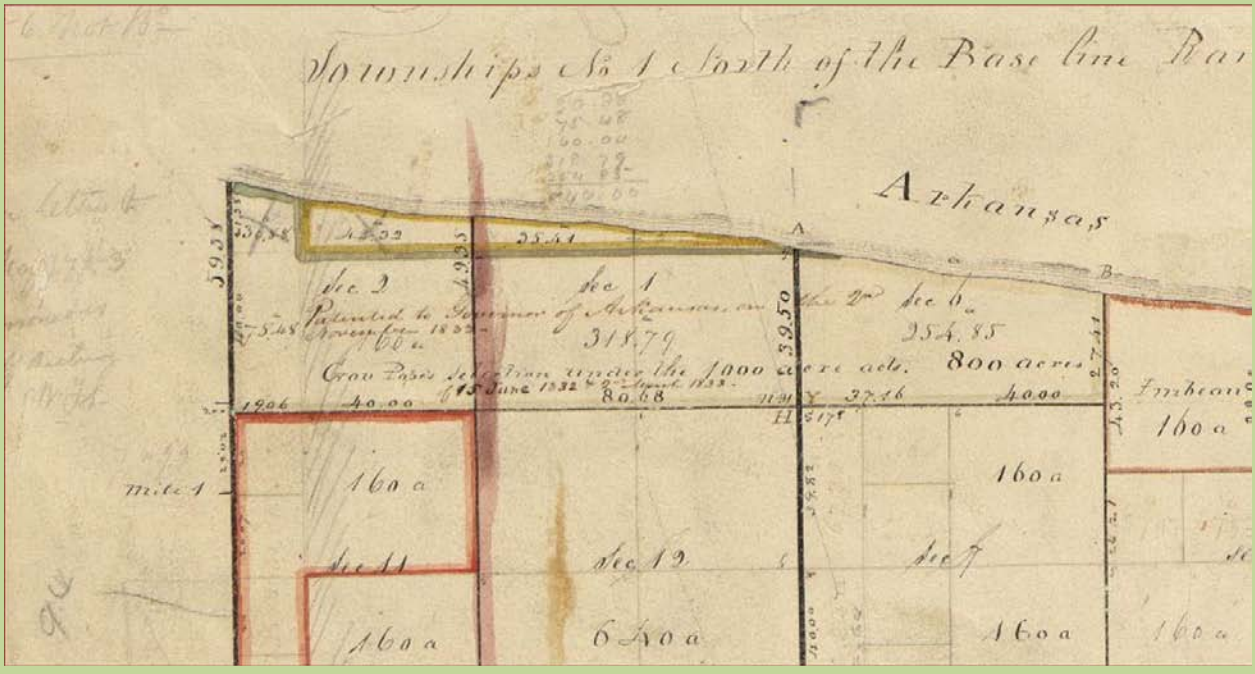
50 U.S. 314 (1850)

U.S. SUPREME COURT

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT BY THE REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

This case was brought up from the Supreme Court of the State of Arkansas, by a writ of error issued under the twenty-fifth section of the Judiciary Act. It involved the validity of an entry of four fractional quarter sections of land, one of which only, namely, the north-west fractional quarter section, number two in -township one of north range twelve west, was passed upon by this Court.



A PORTION OF THE 1834 PLAT

SYLLABUS

The Preemption Act of May 29, 1830, conferred certain rights upon settlers upon the public lands, upon proof of settlement or improvement being made to the satisfaction of the register and receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office.

The Commissioner directed the proof to be taken before the register and receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties.

Where the proof was taken in presence of the register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the Commissioner, this was sufficient. The Commissioner had power to make the regulation, and power also to dispense with it.

This proof being filed, there was no necessity of reopening the case when the public surveys were returned.

The circumstance that the register would not afterwards permit the claimant to enter the section, did not invalidate the claim.

The preemptioner had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled.

No selection of lands under a subsequent act of Congress could impair the right of a preemptioner, thus acquired.

This case involved the validity of an entry of four fractional quarter-sections of land, one of which only, namely, the northwest fractional quarter of section number two in township one north of range twelve west, was passed upon by this Court.

THE HISTORY OF THE CLAIM IS THIS.

The Act of Congress passed on 29 May, 1830 4 Stat. 420, gave to every occupant of the public lands prior to the date of the act, and who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section, to include his improvement, provided, the land shall not have been reserved for the use of the United States or either of the several states.

In the third section of the act it is provided, that, before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On 10 June, 1830, the Commissioner issued his instructions to the receivers and registers, under the above act, in which he said, that the fact of cultivation and possession required

> **"must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the evidence must be taken by a justice of the peace in the presence of the register and receiver."**

And the Commissioner directed, that, where the improvement was wholly on a quarter-section, the occupant was limited to such quarter; but where the improvement is situated in different quarter-sections adjacent, he may enter a half quarter in each to embrace his entire improvement.

Another circular, dated 7 February, 1831, was issued, instructing the land officers, where persons claiming preemption rights had been prevented, under the above circular, from making an entry

> **"by reason of the township plats not having been furnished by the surveyor general to the register of the land office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to 30 May next."**

And they were requested to

> **"keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish, to their entire satisfaction, the right of the parties, respectively, to a preemption,"**

&c.

> **"No payments, however, were to be received on account of preemption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."**

It may be here remarked, that the public surveys of the land in question were not completed until 1 December, 1833, nor returned to the land office until the beginning of the year 1834.

On 2 March, 1831, Congress passed an act 4 Stat. 473, "granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of government of said territory", but this act did not designate what specific tract of land should be granted for that purpose.

On 23 April, 1831, Cloyes filed the following affidavit in the office of the register, in support of his claim to a preemption right.

"***Preemption Claim, May 29, 1830***"

"NATHAN CLOYES' TESTIMONY, taken on 23 April, 1831, before James Boswell a justice of the peace for the County of Independence, in the register's office, in the presence of the register."

"QUESTION BY THE REGISTER. What tract of the public lands did you occupy in the year 1829, that you claimed a right of preemption upon?"

"ANSWER. On the N.W. fract. 1/4 of sec. 2, in township 1 north of range 12 west, adjoining the Quapaw line, being the first fraction that lies on the Arkansas River, immediately below the Town of Little Rock, and contains about twenty-eight or twenty-nine acres, as I have been informed by the County Surveyor of Pulaski County, and I claim under the law the privilege to enter the adjoining fraction or fractions, so as not [to] exceed one hundred and sixty acres, all being on the river below the before-named fraction."

"QUESTION AS BEFORE. Did you inhabit and cultivate said fraction of land in the year 1829; and if so, what improvement had you in that year in cultivation?"

"ANSWER. I did live on said tract of land in the year 1829, and had done so since the year 1826; and in the year 1829 aforesaid, I had in cultivation a garden, perhaps to the extent of one acre; raised vegetables of different kinds, and corn for roasting ears, and I lived in a comfortable dwelling, east of the Quapaw line, and on the before-named fraction."

"QUESTION AS BEFORE. Did you continue to reside and cultivate your garden aforesaid on the before-named fraction until 29 May, 1830?"

"ANSWER. I did, and have continued to do so until this time."

"QUESTION AS BEFORE. Were you, at the passage of the act of Congress under which you claim a right of preemption, a farmer, or in other words what was your occupation?"

"ANSWER. I was a tin-plate worker, and cultivated a small portion of the fraction before named for the comfort of my family, and carried on my business in a shop adjoining my house."

"QUESTION AS BEFORE. Do you know of any interfering claim under the law, that you claim a preemption right upon the fraction whereon you live?"

"ANSWER. I know of none. And further this deponent saith not."

"Nathan Cloyes"

"Sworn and subscribed to before me, the date aforesaid."

"J. Boswell, J.P."

On the same day, Cloyes filed also the corroborative testimony of **John Saylor, Nathan W. Maynor,** and **Elliott Bursey.**

On 28 May, 1831, the register and receiver made the following entry, and gave Cloyes the following certificate.

"*Preemption Claim, 29 May, 1830*"

"Nathan Cloyes, No. 24, N.W. fractional 1/4 2, 1 N. 12 W. granted for the above fractional 1/4, and reject the privilege of entering the adjoining fractions. May 28, 1831."

"*A. Boswell, Register*"

"*John Redman, Receiver*"

On 15 June, 1832, Congress passed an Act, 4 Stat. 531, granting one thousand acres of land to the Territory of Arkansas, "contiguous to, and adjoining the Town of Little Rock," for the erection of a courthouse and jail at Little Rock.

On 4 July, 1832, Congress passed another Act, 4 Stat. 563, authorizing the governor of the territory to select ten sections of land to build a legislative house for the territory.

On 14 July, 1832, Congress passed an Act, 4 Stat. 603, giving to persons entitled to preemption under the act of 1830, but who had not been able to enter the same within the time limited, because the township plats had not been made and returned, one year from the time when such township plats should be returned, to enter said lands upon the same terms and conditions as prescribed in the act of 1830.

On 2 March, 1833, Congress passed an Act, 4 Stat. 661, authorizing the governor of the territory to sell the lands granted by the Act of 15 June, 1832.

Under these acts of Congress, Governor Pope made a part of his location upon the fractional quarter-sections in question, upon 30 January, 1833.

It has been already mentioned, that on 1 December, 1833, the public surveys were completed, and returned to the land office in the beginning of the year 1834.

On 5 March, 1834, the heirs of Cloyes he being dead paid for the four fractional quarter-sections, and took the following receipt.

> "***Receiver's Office at Little Rock, March 5, 1834***"
>
> **"Received by the hands of Ben Desha, from Lydia Louisa Cloyes, Mary Easther Cloyes, Nathan Henry Cloyes, and William Thomas Cloyes, heirs of Nathan Cloyes, deceased, late of Pulaski County, A.T., the sum of one hundred and thirty-five dollars and seventy-six and 1/4 cents, being in payment for the northwest and northeast fractional quarters of section two, and the northwest and northeast fractional quarters of section one, in fractional township one, north of the base line, and range twelve, west of the fifth principal meridian, containing in all one hundred and eight 61/100 acres at $1.25 per acre."**
>
> **"$135.76 1/4** *P. E. Crutchfield, Receiver*"
>
> **"A part of the land for which the within receipt is given, to-wit, 'the northwest fractional quarter of section two,' forms a part of the location made by Governor Pope, in selecting 1,000 acres adjoining the Town of Little Rock, granted by Congress to raise a fund for building a courthouse and jail for the Territory of Arkansas, and this endorsement is made by direction of the Commissioner of the General Land Office."**
>
> "*P. E. Crutchfield, Receiver*"
>
> "***Receiver's Office at Little Rock, March 5, 1834***"

In 1843, the heirs of Cloyes filed a bill against all the persons mentioned in the title of this statement, who had purchased various interests in these fractional quarter-sections, and claimed title under Governor Pope. The bill was filed in the Pulaski Circuit Court of the state, setting forth the above facts, and praying that the defendants might be ordered to surrender their patents and other muniments of title to the complainants.

The parties who were interested in the northwest fractional quarter of section number two answered the bill. The other parties demurred.

The answers admitted that proof of a preemption right to the northwest fractional quarter of section two was made by Cloyes at the time and in the manner set forth in the bill, but deny that he had a valid preemption to it. They admit also, that Governor Pope selected said quarter in pursuance of the two acts of Congress of 15 June, 1832, and 2 March, 1833, but deny that he did so illegally or by mistake.

In July, 1844, the Pulaski Circuit Court sustained the demurrer of the parties who had demurred, and dismissed the bill as to those who had answered.

In July, 1847, the Supreme Court of Arkansas, to which the cause had been carried, affirmed the judgment of the court below, and a writ of error brought the case up to this Court.

It was argued by Mr. Lawrence and Mr. Badger, for the plaintiffs in error, and Mr. Sebastian, for the defendants in error.

The counsel for the plaintiffs in error said that the three following questions arose.

> **1. Was Cloyes entitled to have entered the land in question on 28 May, 1831, if the township plat had at that time been in the land office?**
>
> **2. Did the act of 15 June, 1832, granting to the Territory of Arkansas one thousand acres of land, generally, confer any specific right to this particular fraction before its actual selection by the governor?**
>
> **3. If not, then did not the act of 14 July, 1832, reserve this fraction from selection, location, and sale, until the expiration of one year from the return of the township plat to the land office?**

In regard to the first question, there is but one objection which can be urged with even a tolerable amount of plausibility in its favor, that which is made the first ground of demurrer by those who have demurred to the bill, namely, that the proof exhibited in the bill does not appear to have been taken in the presence of the register and receiver.

The circular dated June 10, 1830, from the General Land Office, contains, among other things, the following paragraph, *viz.:*

> **"The evidence must be taken by a justice of the peace, in the presence of the register and receiver, and be in answer to such interrogatories propounded by them as may be best calculated to elicit the truth."**

The caption of the testimony in the record is,

"Nathan Cloyes' testimony, taken on 23 April, 1831, before James Boswell a Justice of the Peace for the County of Independence, in the register's office, in the presence of the register."

It is maintained that this omission in the caption to make it appear that the evidence was taken before the register and receiver, destroys Cloyes' right of preemption. To this view several answers may be given. It does not positively appear that the receiver was not present, and the presumption of law is that a government officer has done his duty till the contrary appears. *Wilcox v. Jackson,* 13 Pet. 511; *Winn v. Patterson,* 9 Pet. 663; 1 Cooke, Tenn. 492; 3 Yerger 309; 2 Tenn. 154, 284, 306, 421. It does appear that both the register and receiver, on the same day, 23d April, 1831, admitted Cloyes' right to enter the land in question.

But suppose the proof was not taken in presence of both the register and receiver, still the land office circular was merely directory to the officers as to the manner of taking the proof, and any mere error or irregularity on the part of the officers cannot prejudice the rights of the preemption. 3 Johns.Ch. 275; 2 Cond. 237, 243; 2 Edw.Ch. 261; 4 How. (Miss.) 57; *Ross v. Doe,* 1 Pet. 655; *Pond v. Negus,* 3 Mass. 230; *Rodebaugh v. Sanks,* 2 Watts 9; *Holland v. Osgood,* 8 Verm. 280; *Corliss v. Corliss,* 8 Verm. 390; *People v. Allen,* 6 Wend. 486.

The Commissioner of the General Land Office, who issued the circular, by authorizing the receiver to take the payment offered by the heirs of Cloyes without taking any exception to the manner in which the proof had been taken, suspended *pro hac vice* the regulation, and sanctioned the mode in which it was in fact taken. **The regulation itself was full of inconvenience, was never fully carried out in fact, and was finally rescinded by the circular of 22 July, 1834, 2 Land Laws 589.**

The decision of the register and receiver was in favor of Cloyes' right to the northwest fractional quarter of section two, and it being upon a matter within their exclusive jurisdiction, and no appeal being given, that decision was final and conclusive. *Wilcox v. Jackson,* 13 Pet. 498.

Cloyes' right of preemption, then, was perfect, and he was only prevented from consummating it by the fact, that the township plat was not returned before the expiration of the preemption law of 1830.

2. The Act of 15 June, 1832, which was passed after the Act of 20 May, 1830, had expired, was only a general grant of one thousand acres of land in the vicinity of Little Rock, without any specification or description of any particular land whatever, "which lands," it provides, "shall be selected by the governor of the territory in legal subdivisions," &c.

We maintain that before such selection there was no appropriation of or lien upon any particular tract. It was the selection by the governor that was to withdraw any tract from the public domain. 46 U. S. 5 How. 10.

Covenant to settle particular lands, if for valuable consideration, creates a lien upon the lands, which will be enforced against all but a purchaser for value and without notice. 1 Vern. 206; 1 P.Wms. 282, 429.

But covenant to settle lands of a particular value, without mentioning any lands in particular, creates no lien on any of the covenantor's lands. 1 P.Wms. 429; 4 Bro.Ch. 468, Eden's note; *Russell v. Transylvania University,* 1 Wheat. 432.

Governor Pope did not make his selection until 30 January, 1833.

3. Prior to this selection, the Act of 14 July, 1832, was passed, giving to persons entitled to preemption under the Act of 29 May, 1830, but who had not been able to enter said lands because the township plats had not been made and returned, the right to enter said lands, on the same conditions in every respect, within one year from the time when said township plats should be returned.

It is clear, then, that if the grant of one thousand acres to Arkansas did not confer a specific right to any particular land, until selection made by its governor, and that selection was not made until after this act of 14th July, 1832, was passed, then the latter act reserved from any future selection lands which came within its provisions. **The northwest fractional quarter of section two could not be legally selected by the governor in 1833, because Cloyes had a right of preemption to it under the Act of 29 May, 1830, which the want of the township plat had alone prevented him from completing. That township plat was not returned until the beginning of the year 1834. The Act of 14 July, 1832, gave him until the year 1835 to make his entry, and within that time he made his payment and applied to enter the land.**

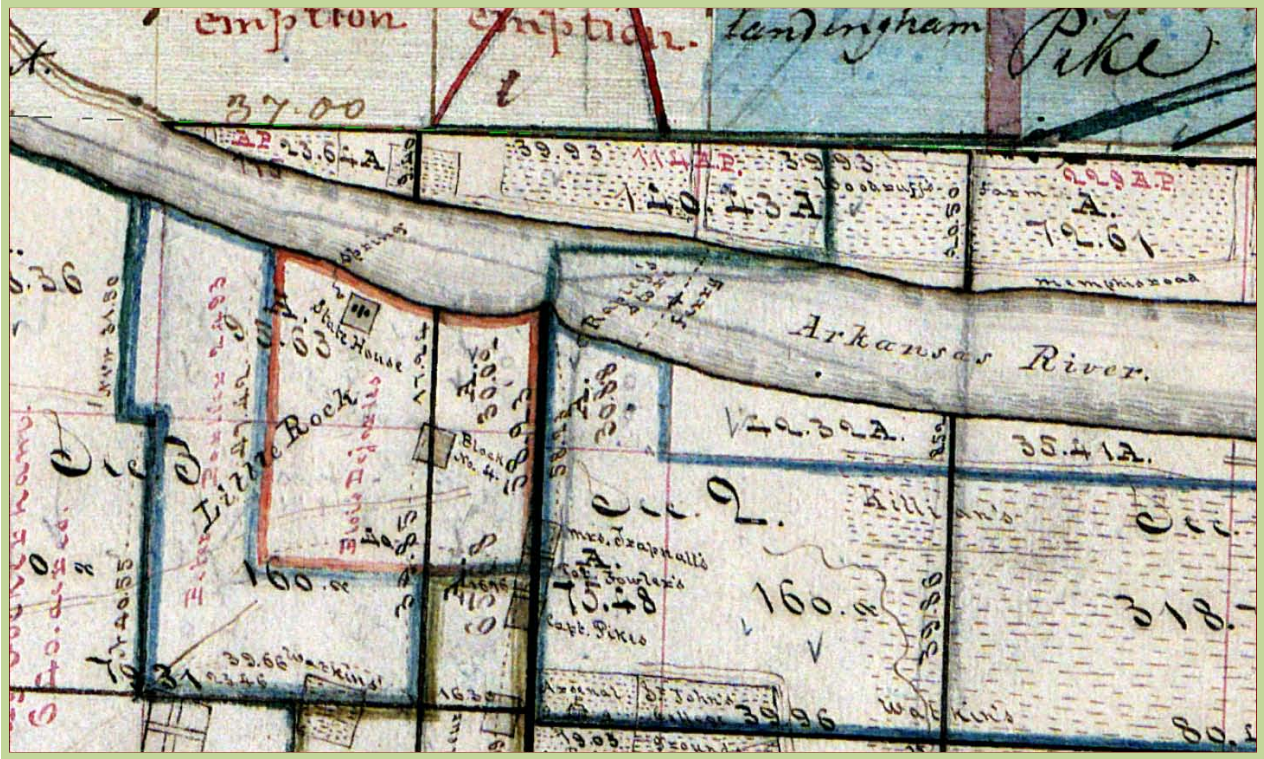
It is manifest, then, that the bill should have been sustained by a decree in favor of the right of Cloyes' heirs to the northwest fractional quarter of section two, on which his settlement and cultivation were proved.

As to the remaining fractional quarters, the parties interested have filed a demurrer to the bill, setting out several grounds of demurrer. The first and principal of these grounds has already been answered. Most of the other grounds are but different statements of a single objection -- namely that Cloyes, having proved his settlement upon one quarter fractional section alone, could not legally claim anything beyond the fractional quarter on which he was settled.

The Act of 29 May, 1830, does not restrict the right of preemption to the quarter-section on which settlement is made. The first section is

> **"That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession and cultivated any part thereof in the year one thousand eight hundred and twenty-nine, shall be and he is hereby authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one**

hundred and sixty, or a quarter-section, to include his improvements, upon paying," &c. 1 Land Laws, 173.



The only restriction which the law imposes is one hundred and sixty acres, to be entered by legal subdivisions, and to include his improvement. Within these conditions, he may enter any number of acres and any number of legal subdivisions. But we are told that the General Land Office put upon this law the construction that the claimant was to be confined to the fraction on which he settled. It is true that for a time this construction did prevail in the General Land Office, and, as we contend, without any warrant of law.

But that construction has long since been overruled in that office. It was overruled by express act of Congress. The second section of the Act of 14 July, 1832, provided

> **"That the occupants upon fractions shall be permitted in like manner to enter the same so as not to exceed in quantity one quarter-section, and if the fractions exceed a quarter-section, the occupant shall be permitted to enter one hundred and sixty acres, to include his or their improvement at the price aforesaid."**

Since that time a different construction has prevailed in the General Land Office. *See* Circular, March 1, 1834, 2 Land Laws, 587. *See also* the letter of Secretary of Treasury of October 31, 1833, 2 Land Laws, 572; also Circular of 7 May, 1833.

MR. JUSTICE MCLEAN **delivered the opinion of the Court.**

The complainants filed their bill in the Pulaski Circuit Court of that state charging that Nathan Cloyes, their ancestor, during his life, claimed a right of preemption under the Act of Congress of 29 May, 1830, to the northwest fractional quarter of section numbered two in township one north of range twelve west. That he was in possession of the land claimed when the above act was passed, and had occupied it in 1829. That he was entitled to enter, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying the minimum price for said land. That Cloyes, in his lifetime, by his own affidavit and the affidavits of others, made proof of his settlement on and improvement of the above fractional quarter, according to the provisions of the above act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office, and on 20 May, 1831, Hartwell Boswell the register, and John Redman, the receiver, decided that the said Cloyes was entitled to the preemption right claimed.

That on the same day he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre; also the northeast fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre; and also the northwest and northeast fractional quarters of section numbered one, in the same township and range, containing thirty-five acres and forty-one hundredths of an acre, the said fractional quarter-sections containing one hundred and eight acres and sixty-one hundredths of an acre, and offered to pay the United States, and tendered to the receiver, the sum of one hundred and thirty-five dollars seventy-six and a fourth cents, the government price for the land. But the register refused to permit the said Cloyes to enter the land, the receiver refused to receive payment for the same, on the ground that he could only enter the quarter-section on which his improvement was made. That the other quarter-sections were contiguous to the one he occupied.

That under the Act of 29 June, 1832, entitled, **"An act establishing land districts in the Territory of Arkansas,"** the above fractional sections of land were transferred to the Arkansas Land District and the land office was located at Little Rock, to which the papers in relation to this claim of preemption were transmitted.

The bill further states that under an Act of Congress of 15 June, 1832, granting to the Territory of Arkansas one thousand acres of land for the erection of a courthouse and jail at Little Rock, and under **"An act to authorize the governor of the territory to sell the land granted for a courthouse and jail, and for other purposes,"** dated 2 March, 1833, John Pope, then Governor of said territory, among other lands, selected, illegally and by mistake, for the benefit of the territory, the said northwest fractional quarter of section numbered two, for which a patent was issued to the governor of the territory and his successors in office, for the purposes stated.

JOHN POPE

That the said JOHN POPE, as governor, under an act granting a quantity of land to the Territory of Arkansas for the erection of a public building at the seat of government of said territory dated 2 March, 1831, and an act to authorize the governor of the territory to select ten sections to build a legislative house for the territory, approved 4 July, 1832, selected the northeast fractional quarter of section two and the northwest fractional quarter and northeast fractional quarter of section one as unappropriated lands and, having assigned the same to William Russell a patent to him was issued therefor, on or about 21 May, 1834, both of which, the complainants allege, were issued in mistake and in violation of law, and in fraud of the legal and vested right of their ancestor, Cloyes.

That after the refusal of the receiver to receive payment for the land claimed, an act was approved 14 July, 1832, continuing in force the Act of 29 May, 1830, and which specially provided that those who had not been enabled to enter the land the preemption right of which they claimed within the time limited in consequence of the public surveys' not having been made and returned should have the right to enter said lands on the same conditions in every respect as prescribed in said act within one year after the surveys should be made and returned, and the occupants upon fractions in like manner to enter the same so as not to exceed in quantity one quarter-section. And that the act was in full force before Governor Pope selected said lands as aforesaid. That the public surveys of the above fractional quarter-sections were made and perfected on or about 1 December, 1833, and returned to the land office the beginning of the year 1834. On 5 March, 1834, the complainants paid into the land office the sum of one hundred and thirty-five dollars and seventy-six and one forth cents in full for the above-named fractional quarter-sections. That a certificate was granted for the same, on which the receiver endorsed, that the northwest fractional quarter of section two was a part of the location made by Governor Pope in selecting one thousand acres adjoining the Town of Little Rock, granted by Congress to raise a fund for building a courthouse and jail for the territory, and that that endorsement was made by direction of the Commissioner of the General Land Office.

That the register of the land office would not permit the said fractional quarter-sections to be entered.

That the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes. And that the present owners of any part of these lands had also notice of the rights of the complainants.

The answer of the Real Estate Bank and trustees admits the proof of the preemption claim of Cloyes, but they say

> **"From beginning to end, it is a tissue of fraud, falsehood, and perjury, not only on the part of Cloyes, but also on the part of those persons by whose oaths the**

AMBROSE SEVIER

alleged preemption was established. And they allege, that the lots four, five, and six, in block eight, in fractional quarter-section two, claimed by the bank, were purchased of AMBROSE H. SEVIER in the most perfect good faith, and without any notice or knowledge whatever, either constructive or otherwise, of any adverse claim thereto."

That they have made improvements on the same which have cost twenty-five thousand dollars without ever having it intimated to them that there was any adverse claim, until all of said improvements had been completed.

JAMES S. CONWAY

JAMES S. CONWAY, in his answer, denies the validity of the preemption right set up in the bill, and alleges that it was falsely and fraudulently proved. And he says that when he purchased,

"he did not know that there was any *bona fide* adverse claim or right to said lots, or any of them, and he avers that he is an innocent purchaser for a valuable consideration, and without actual or implied notice except as hereinafter stated."

And he admits that he occasionally heard the claim of Cloyes spoken of, but always with the qualification that it was fraudulent and void, and had been rejected by the government.

SAMUEL A. HEMPSTEAD, in his answer, denies that at the time of the purchase of said lots or the recording of said deed, he had notice either in fact or law of the complainants' claim.

The other defendants filed special demurrers to the bill. The circuit court, as it appears, sustained the demurrers, and in effect dismissed the bill. The cause was taken to the Supreme Court of Arkansas by a writ of error which affirmed the decree of the circuit court.

The demurrers admit the truth of the allegations of the bill, and consequently rest on the invalidity of the right asserted by the complainants. The answers also deny that Cloyes was entitled to a preemptive right, and a part if not all of them allege that they were innocent purchasers for a valuable consideration, without notice of the complainants' claim.

The first section of the Act of 29 May, 1830, gave to every occupant of the public lands prior to the date of the act and who had cultivated any part thereof in the year 1829 a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty or a quarter-section, to include his improvement, provided the land shall not have been reserved for the use of the United States or either of the several states.

In the third section of the act it is provided that before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On 10 June, 1830, the Commissioner issued his instructions to the receivers and registers under the above act, in which he said that the fact of cultivation and possession required

> **"must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the evidence must be taken by a justice of the peace in the presence of the register and receiver."**

And the Commissioner directed that where the improvement was wholly on a quarter-section, the occupant was limited to such quarter, but where the improvement is situated in different quarter-sections adjacent, he may enter a half quarter in each to embrace his entire improvement.

Another circular, dated 7 February, 1831, was issued instructing the land officers, where persons claiming preemption rights had been prevented under the above circular from making an entry

> **"by reason of the township plats not having been furnished by the surveyor general to the register of the land office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May next."**

And they were requested to

> **"keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish to their entire satisfaction the right of the parties, respectively, to a preemption,"**

&c.

> **"No payments, however, were to be received on account of preemption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."**

Under this instruction, on 28 May, 1831, the register and receiver held that Nathan Cloyes was entitled to the northwest fractional quarter, as stated in the bill, but rejected the privilege of entering the adjoining fractions.

Several objections are made to this procedure. It is contended that the land officers had no authority to act on the subject until the surveys of the township were returned by the surveyor general to the register's office, and also that in receiving the proof of the preemption right of Cloyes, the land officers did not follow the directions of the Commissioner.

The first instruction of the Commissioner, dated 10 June, 1830, required the proof to be taken in presence of the register and receiver, and it appears that the proof was taken in the presence of the register only.

The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the Commissioner required the proof to be so taken. Having the power to impose this regulation, the Commissioner had the power to dispense with it for reasons which might be satisfactory to him. And it does appear that the presence of the register only in Cloyes' case was held sufficient. The right was sanctioned by both the land officers and by the Commissioner also, so far as to receive the money on the land claimed, without objection as to the mode of taking the proof. And, as regards the authority for this procedure by the land officers, it appears to be covered by the above circular of the Commissioner dated 7 February, 1831. In the absence of the surveys, the parties entitled to the benefits of the act of 1830 were "permitted to file the proof thereof," &c., identifying the tract of land, as well as circumstances will admit, any time prior to 30 May, 1831.

The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed preemptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final. The proof of the preemption right of Cloyes being "entirely satisfactory" to the land officers under the act of 1830, there was no necessity of opening the case and receiving additional proof under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. **Under those acts, Cloyes was only required to do what was necessary to perfect his right. But those steps within the law which had been taken were not required to be again taken.**

It is well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the preemptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the register would not permit him to do. This claim of preemption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done.

The claim of a preemption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. **The adventurous pioneer who is found in advance of our settlements encounters many hardships and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.**

It is insisted that the preemption right of Cloyes extended to the fractional quarter-sections named in the bill, the whole of them being less than one hundred and sixty acres. We think it is limited to the fractional quarter on which his improvement was made. This construction was given to the act by the Commissioner in his circular of 10 June, 1830. He says, "The occupant must be confined to the entry of that particular quarter-section which embraces the improvement." The act gives to the occupant whose claim to a preemption is established the right to enter, at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty. But less than a legal subdivision of a section or fraction cannot be taken by the occupant. It is contended, however, that several fractional quarter-sections adjacent to the one on which the improvement was made may be taken under the preemptive right, which shall not exceed in the whole one hundred and sixty acres. And the second section of the Act of 14 July, 1832, which provides "that the occupants upon fractions shall be permitted in like manner to enter the same so as not to exceed in quantity one quarter-section," it is urged, authorizes this view. But in the case of *Brown's Lessee v. Clements,* 3 How. 666, this Court said the Act of 29 May, 1830,

> **"gave to every settler on the public lands the right of preemption of one hundred and sixty acres; yet if a settler happened to be seated on a fractional section containing less than that quantity, there is no provision in the act by which he could make up the deficiency out of the adjacent lands or any other lands."**

Did the location of Governor Pope under the act of Congress affect the claim of Cloyes? On 15 June, 1832, one thousand acres of land were granted adjoining the Town of Little Rock, to the Territory of Arkansas, to be located by the governor. This selection was not made until 30 January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a preemption had not only accrued under the provisions of the act of 1830, but he had proved his right under the law to the satisfaction of the register and receiver of the land office. He had in fact done everything he could do to perfect this right. No fault or negligence can be charged to him. In the case above cited from 3 Howard, the Court said:

> **"The Act of 29 May, 1830, appropriated the quarter-section of land in controversy, on which Etheridge was then settled, to his claim, under the act**

> **for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter-section was not liable to any other claim,"**

&c. And the supplement to this act approved 14 July, 1832, extended its benefits. The instruction of the Commissioner, dated September 14, 1830, was in accordance with this view. He says

> **"It is therefore to be expressly understood, that every purchase of a tract of land at ordinary private sale to which a preemption claim shall be proved and filed according to law at any time prior to 30 May, 1831, is to be either null and void, the purchase money thereof being refundable under instructions hereafter to be given, or subject to any legislative provisions."**

By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the preemption of Cloyes.

The supreme court of the state, in sustaining the demurrers and dismissing the bill, decided against the preemption right claimed by the representatives of Cloyes, and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the state court is

Reversed and the cause is transmitted to that court for further proceedings before it or as it shall direct on the defense set up in the answers of the defendants that they are* bona fide *purchasers of the whole or parts of the fractional section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved, as equity shall require.

MR. JUSTICE CATRON, MR. JUSTICE NELSON, and MR. JUSTICE GRIER dissented.

MR. JUSTICE CATRON, dissenting.

The complainants allege that they have the superior equity to the fractional quarter-section No. 2, and to the other lands claimed by the bill, by virtue of an entry under a preference right, and that the respondents purchased and took their legal title with full knowledge of such existing equity in the complainants.

1. The defendants claiming section No. 2 or part of it deny that any such equity exists under the legislation of Congress.

2. That they purchased and took title without any knowledge of the claim set up, and being innocent purchasers, no equity exists as to them for this reason also, regardless of anything alleged against them.

3. That they expended large sums on the lands purchased and made highly valuable improvements thereon without any objection being made by complainants or notice of their claim being given to respondents, and therefore a court of equity cannot interfere with their existing rights.

The bill was dismissed, without any particular ground's having been stated in the decree why it was made for respondents, and in this condition of the record the cause is brought here by writ of error under the twenty-fifth section of the Judiciary Act.

The case made on the face of the bill was rejected, and the inquiry on such general decree must be whether the claim set up sought protection under an act of Congress or an authority exercised under one, so as to draw either in question, no matter whether the claim was well founded or not, and the fact being found that such case was made, then jurisdiction must be assumed to examine the decree, and this being clearly true in the present instance, jurisdiction must be taken, and the equity claimed on part of complainants reexamined.

If, however, the decree had proceeded on the second or third grounds of defense, regardless of the first, and had so declared, then this Court would not have jurisdiction to interfere, as no act of Congress or an authority exercised under it would have been drawn in question.

In regard to the lands claimed, except the fractional quarter-section No. 2, we are agreed that the bill should be dismissed. So far, the controversy is ended, and as to section No. 2, I think the bill should be dismissed also.

The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office having reference to that act. The act itself, the instruction given under its authority, and the proofs taken according to the instruction, expired and came to an end on 29 May, 1831. After that time, the matter stood as if neither had ever existed; nor had Cloyes more claim to enter, from May 29, 1831, to July 14, 1832, than any other villager in Little Rock.

July 14, 1832, another preemption law was passed providing, among other things, that when an entry could not be made under the act of 1830, because the public surveys were not returned to the office of the register and receiver before the expiration of that Act 29 May, 1831, then an occupant who cultivated the land in 1829, and was in actual possession when the act of 1830 was passed, should be allowed to enter under the act of 1832 the quarter-section he occupied, and also **adjoining lands to which the improvement extended**, in legal subdivisions, so as to increase his entry to a quantity not exceeding 160 acres. Under the act of 1832, the entry in controversy was offered and afterwards allowed for the purpose of letting in complainants, so that a court of justice might investigate their claim, although it had been pronounced illegal at the Department of Public Lands, the officers there acting under the advice of the Secretary of the Treasury.

The act of 1830 and the circular under it having expired, the Commissioner issued a new circular 28 July, 1832, 2 Land Laws and Opinions 509, prescribing to registers and receivers the terms on which entries should be allowed under the act of 1832, by which circular proof was required of cultivation in 1829, and residence on 29 May, 1830, and that this proof should be made after the legal surveys were returned to the office of the register and receiver, and the right to make the proof and to enter should continue for one year after the surveys were returned unless the lands were sooner offered at public sale, and that then the entry should be made before the public sale took place.

The necessity of this new proceeding is manifest. By the Act of April 5, 1832, all actual settlers at this date (5 April, 1832) were authorized to enter, within six months thereafter, one-half quarter-section, including their respective improvements. Such rights stood in advance of claimants under the Act of July 14, 1832. In the mutations of a new country, the fact was well known that improvements passed from hand to hand with great frequency by sale of the possessions, and one in possession April 5, 1832, could well enter an improvement cultivated in 1829, and held on 29 May, 1830, he having purchased such possession. If Cloyes, therefore, had sold out to another before the Act of April 5 was passed, then that other occupant, and not Cloyes, would have had the right to enter section No. 2, and therefore it was highly necessary to know who had the best right to a preemption at the time each entry was offered. A still greater necessity existed for new proof. Until the surveys were returned, it was usually improbable for the register and receiver to know what subdivision had been occupied, or to what land or how much the preemption right extended, and as all those who had a right of entry on lands not surveyed and legally recognized as surveyed were provided for by the Act of 14 July, 1832, and the act required them to make proof, and to enter, within one year after the surveys were returned, by legal subdivisions according to the surveys, it is hardly possible to conceive what other course could have been adopted at the land office than that which was pursued, as the surveys were the sole guide at the local offices where entries were made. But it is useless to speculate why the new circular was issued; the Commissioner had positive power to do so, and the act, when done, bound every enterer. Nor could a legal entry be made under the Act of 14 July, 1832, without the new proof, and an adjudication by the register and receiver founded on such proof, that the right of entry existed, and as no such proof was offered by the complainants, they had no right to enter even the 30 88/100 acres, and certainly not the 108 61/100 acres. That an entry could not be lawfully made, without new proof to warrant it, for the lesser quantity, is our unanimous opinion, and in this we concur with those conducting the General Land Office.

For another reason I think their claim should be rejected. Little Rock was the seat of the territorial government, at which certain public buildings were necessary, and on 15 June, 1832, an act was passed that there be then granted to the Territory of Arkansas a quantity of land not exceeding one thousand acres, 11 contiguous to and adjoining the Town of Little Rock, for the erection of a courthouse and jail in said town, which lands shall be selected by the Governor of the territory, and be disposed of as the legislature shall direct, and the proceeds be applied towards building said courthouse and jail.

On 30 January, 1833, the governor selected the land and filed his entry in the land office at Little Rock, which entry was received and forwarded to the General Land Office at Washington, and there ratified. The entry included the fractional quarter-section No. 2 now claimed by the heirs of Nathan Cloyes.

By the Act of March 2, 1833, the governor of the territory was required to furnish to the Secretary of the Treasury a description of the boundaries of the thousand acres, and the secretary was required to cause to be issued a patent therefor to the governor, in trust &c. And the governor was directed to lay off in town lots, as part of the Town of Little Rock, so much of the grant as he might deem advisable, and said governor was authorized to sell said lots and to dispose of the residue of said thousand-acre grant, and which sale was to be at auction, as regarded the town lots and the residue of the land. And he was also authorized to select and lay off three suitable squares, within this addition to the town, on which might be erected a statehouse, a courthouse, and a jail, one square for each building, for the use thereof forever, and for no other use.

The sales were to be for cash, and the governor was directed to make deeds to purchasers when the purchase money was paid. A patent issued to governor John Pope for the land. In October, 1833, he proceeded to sell at auction, in lots and blocks, the fraction No. 2, in part, to Ambrose H. Sevier, under whom most of the defendants on No. 2 claim. Those who have answered deny that they had any knowledge of the claim of Cloyes when they purchased and took title, and that complainants stood by, permitted the purchase, and saw great city improvements made, and large sums of money expended without objection or any intimation's being given that they intended to bring forward any such claim as the one now set up. But, as remarked in the outset, this Court has no jurisdiction of these matters, and must therefore leave them to the state courts for adjudication and final settlement.

How, then, did the claim of the complainants stand when the city lots were sold in 1833? Cloyes never offered to enter fraction No. 2 alone; he offered to enter, says the bill 28 May, 1831, with the register at Batesville, sectional quarter No. 2 for 30 88/100 acres, northeast fractional quarter for 42 32/100 acres, and northwest and northeast fractional quarters of section No. 1, containing 35 41/100 acres, making in all 108 61/100 acres. The proof made was that he resided on No. 2 for 30 88/100 acres. This entry was refused on a ground not open to controversy. By the act of 1830, only that quarter-section on which the improvement was could be entered, no matter what quantity it contained. In this we are unanimous now, and also that the entry allowed is void for all but the fraction No. 2. Here was an offer to enter in 1831 that could not be lawfully done at that time; then a refusal to receive the entry was proper. The claim to enter 108 51/100 acres was adhered to throughout by Cloyes and his heirs. The offer to enter the whole quantity of 108 61/100 acres was again made in 1834, and we agree in opinion that the entry could not be lawfully received at the latter period for this larger quantity; less than the whole was never claimed.

As already stated, the entry that was admitted in 1834 was made to enable the party to litigate his rights, if any existed, as against the city title, not because the claim to enter was lawful in

the estimation of the Secretary of the Treasury and the Commissioner of the General Land Office, for they had decided against its validity. The offer to enter being illegal, and the entry as received being illegal, it is not perceived on what ground a court of equity can uphold the claim even in part, and thereby overthrow a patent of the United States and oust purchasers who relied on such patent.

In the next place, when the Act of June 15, 1832, was passed authorizing the Governor of Arkansas Territory to locate the thousand acres, the act of 1830 had expired; no right of entry existed in Cloyes. The land appropriated to public use was to be taken "contiguous to and adjoining the Town of Little Rock;" all the land adjoining was reserved by the act, subject to a selection by the governor as a public agent; the grant was a present grant of the thousand acres, without limitation. Cloyes had no claim to interpose at that time, and on the selection's being made, it gave precision to the land granted, and the title attached from the date of the act. In the language of this Court in *Rutherford v. Greene's Heirs,* 2 Wheat. 206, the grant which issued to Governor Pope in pursuance of the Act of June 15, 1832, "relates to the inception of his title." That also was a present grant of 5,000 acres to General Greene made by an act of the Legislature of North Carolina, but unlocated by the act of assembly. It was granted in the military district generally, and ordered to be surveyed by certain Commissioners. Soon afterwards it was located by survey, and the question presented to this Court was as to what time the title had relation for the land selected, when it was held that the grant was made by the act directly, and gave date to the title, and of necessity overreached all intervening claims for the land selected.

This case is far stronger than that. Here the act of 1830 was made part of the Act of July 14, 1832; they stood as one act, and took date on 14 July. The act provides

> **"That no entry or sale should be made under the provisions of this act of lands *which shall have been reserved* for the use of the United States or either of the states."**

The land, to the quantity of one thousand acres adjoining the then Town of Little Rock, had been expressly reserved by the Act of 15 June, and stood so reserved when the Act of July 14 was passed, subject to selection in legal subdivisions. The Act of June 15 had no exception; the object was of too much importance to allow of any. If this villager could claim a preemption, so might any other, and the act of June would have been without value, as the whole grant might have been defeated by occupant claims and the seat of government transferred to private owners. This is manifest. Cloyes was a tinner, carrying on his trade in the edge of the town and next his dwelling; adjoining to his house and shop he cultivated a garden, and on this occupancy and cultivation his claim was founded. Others, no doubt, were similarly situated. The seat of government was located on the public lands, then unsurveyed, and if the act of July 14, 1832, conferred an equity on Cloyes to take 160 acres, so it did on others in his situation all around the then town and adjoining thereto. If the occupant could take the land adjoining, how was it possible for the governor to add lots and squares to the seat of government? The intention of Congress manifestly contemplated that the right of selection should extend to all lands

adjoining the then town, and that these were reserved for public use is, in my judgment, hardly open to controversy on the face of the Act of July 14. But when we take into consideration the fact that General Greene's title had been upheld on the principle that it took date with the act making the grant, and that the grant made in trust to Governor Pope depended on the same principle and equally overreached all intervening claims, no doubt, it would seem, could well be entertained, either at the General Land Office or by purchasers, that this occupant had no just claim and could not interfere and overthrow titles derived under the Act of June 15, 1832.

And this is deemed equally true for another and similar reason. If this preference of entry for public use could be overthrown by a subsequent preemption law, so may every other made to secure locations for county seats and public works. The reservation was quite as definite as where salt springs and lead mines were reserved or lands on which ship timber existed. In such cases, the President determines that the lands shall be reserved from sale, and this is always done after the surveys are executed and returned; and certainly, had such power been vested in him to reserve lands adjoining the seat of government of Arkansas, for the use thereof, he could have lawfully made the selection; and authority to do so having been conferred by Congress on the governor, his power was equal to that of the President in similar cases, where lands are reserved for public use by general laws.

For these reasons, I think the decree ought to be affirmed, and I have the more confidence in these views because they correspond with the accumulated intelligence and experience of those engaged in administering the Department of Public Lands and with the practice pursued at the General Land Office from the date of the Act of July 14, 1832, to this time.

ORDER

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Arkansas and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the said supreme court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said supreme court for further proceedings to be had therein in conformity to the opinion of this Court.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

DURING THE JULY TERM. A. D. 1851.

LYTLE ET. AL. V. THE STATE OF ARKANSAS ET. AL.

- The pre-emption act of May 29, 1830, conferred certain rights upon settlers upon the public lands, upon proof of settlement or improvement being made to the satisfaction of the Register and Receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office.
- The Commissioner directed the proof to be taken before the Register and Receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties.
- Where the proof was taken in the presence of the Register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the Commissioner, this was sufficient. The commissioner had power to make the regulation, and power also to dispense with it.
- The proof being filed, there was no necessity of re-opening the case when the public surveys were returned.
- The circumstance that the Register would not afterwards permit the claimant to enter the section, did not invalidate the claim.
- The pre-emptioner had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled.
- No selection of lands under a subsequent act of Congress could impair the right of a pre-emptioner, thus acquired.

This was a bill originally filed in the Pulaski Circuit Court, by Robinson LYTLE and wife, Elias HOOPER and wife and Nathan H. CLOYES, by Clayton, his guardian, heirs at law of Nathan Cloyes, deceased, ***against*** the STATE OF ARKANSAS, the REAL ESTATE BANK, the Trustees of said Bank, Richard C. BYRD, James PITCHER, and others.

A demurrer was sustained to the Bill, Complainants appealed to this court, and the dicision of the court below was affirmed. The case was then taken to the Supreme Court of the United States, by writ of Error, reversed and remanded. The case was heard in this court before the Hon. Thos. JOHNSON, Chief Justice, Hon. W.S. OLDHAM, Associate, and Hon. R. C. S. BROWN, Special Judge, and was argued by Fowler, for the appellants, and RINGO & TRAPNALL and WATKINs & CURRAN, contra. The State Reporter has thought proper to postpone the publication of the case in our Reports until the decision of the Supreme Court of the United

States should be sent down. The facts will appear from the statement made by the Reporter of the Supreme Court of the United States, and the opinions of the courts. **The State Reporter would be pleased to publish the able arguments of counsel in both courts, but it would require more space than can conveniently be given to the case in the volume.**

The opinion of this Court was delivered by OLDHAM, J., as follows:

This was a bill filed by the Appellants, as heirs at law of Nathan Cloyes, deceased, against the Appellees in the Pulaski Circuit Court. The bill charges that Nathan Cloyes, in his life time, by virtue of an act of the Congress of the United States of America, entitled "an act to grant pre-emption to settlers on the public lands," approved May 29th, 1830, as a settler and occupant of the public land, to-wit: on and of the north-west fractional quarter of section numbered two, in township numbered one, north of range numbered twelve west, in said county of Pulaski, prior to the passage of that act, being then in the possession thereof, and having cultivated some part thereof in the year one thousand eight hundred and twenty-nine, was and became thereby authorized and entitled to enter with the Register of the Land Office, for the district in which said fractional quarter of said section of land lay, by legal subdivisions, any number of acres not more than one hundred and sixty, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land, provided such land should not have been reserved for the use of the United States, or either of the several States in which any of the public lands might be situated, or reserved from sale by act of Congress, or by order of the President, or appropriated for any purpose whatever; that being so authorized and entitled by said act of Congress, the said Nathan Cloyes, in his life-time, on the 23d day of April, 1831, and whilst the said act was in full force, at the Land Office at Batesville, in said State of Arkansas, which was then the Land Office in and for the district in which said fractional quarter section of land was then situated, by his own affidavit and by the affidavit and evidence of John Saylor, Nathan Maynor and Elliott Bussey, made proof of his settlement and improvement on and of the said fractional quarter section of land, and of his right to a pre-emption thereof according to the provisions of said act to the satisfaction of the Register and Receiver of said Land District, agreeably to the rules prescribed by the Commissioner of the General Land Office, for that purpose; and on the 28th day of May, A. D. 1831, the said act of Congress being then still in full force, Hartwell Boswell, the Register, and John Redman, the Receiver of said land district, granted to the said Nathan Cloyes, then still living, the privilege of entering the said land upon which he had so established his right. The bill exhibits copies of the proofs of pre-emption with the endorsement of approval thereon by the Land Officers.

The bill then charges that having made said proof and been granted, and allowed the privilege of entering said quarter section of land, said Nathan Cloyes, on the 28th day of May, A. D. 1831, made application to the Register of said Land Office at Batesville, to enter the said north-west fractional quarter of section two, in township one, north of range twelve west, containing thirty acres and eighty-eight hundredths of an acre, and also the north-east fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre, and also the north-west and north-east fractional quarters of sections numbered one, in the same township and range, containing thirty five acres and forty one-hundreths of an acre; the said fractional

quarter sections containing together, one hundred and eight acres and sixty one-hundreths of an acre, and in legal subdivisions, and then and there offered to pay the said United States, and tendered to the said Receiver, the minimum price for said land, to-wit: the sum of one hundred and thirty-five dollars and seventy six and one-fourth cents, which said fractional quarter sections of land were not reserved at that time, or previously, for the use of the United States, or either of the several States in which any of the public lands were situated, nor were said lands reserved from sale by act of Congress, or by order of the President, or appropriated for any purpose whatever, but said Register refused to permit the said Nathan to enter said lands, and the Receiver refused to receive the payment so tendered therefor, because they alleged the said Nathan could only enter the fractional quarter section aforesaid, upon which he had settled and made his improvement, and because the public surveys of said four fractional quarter sections of land, which were all contiguous, had not been returned, according to law, and that said surveys had not then been made, perfected, and returned. That by virtue of an act of of Congress, entitled "an act establishing land districts in the Territory of Arkansas," approved June 25th, 1832, the said fractional quarter sections of land were transferred to, and made part of the Arkansas land district: the Land Office for which was located at Little Rock; and afterwards in pursuance of law, the papers and evidence relating to said pre-emption right, filed in the Land Office at Batesville, were transferred to, and filed in the said Land Office at Little Rock; that afterwards, by virtue of an act of Congress, entitled "an act granting to the Territory of Arkansas one thousand acres of land, for the erection of a Court House and Jail at Little Rock," approved, June 15th, 1832, and of an act entitled "an act to authorize the Governor of the Territory of Arkansas to sell the land granted to said Territory by an act of Congress, approved the 15th day of June, 1832, and for other purposes, approved March 2d, 1833, John Pope, then Governor of said Territory, selected illegally and by mistake for the benefit of said Territory, among other lands, the said north-west fractional quarter of section numbered two as aforesaid, containing thirty acres and eighty-eight hundreths of an acre, and for which, as complainants are informed, a patent was afterwards issued to the said Governor of said Territory of Arkansas, and his successors in office, for the purpose of erecting a Court-House and Jail at Little Rock: that said John Pope, as Governor, afterwards, and by virtue of or under pretence of an act of Congress entitled "an act granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of Government of said Territory," approved March 2d, 1831, and "an act to authorize the Governor of the Territory of Arkansas to select ten sections of land granted to said Territory for the purpose of building a Legislative House for said Territory, and for other purposes," approved July 4th, 1832, selected the said south-east fractional quarter of section two, and the said north-west fractional quarter and north-east fractional quarter of section one, as unappropriated lands, for the purpose of raising a fund for the erection of a public building at Little Rock, and having assigned the same to one **WILLIAM RUSSELL**, a patent was issued therefor on or about the 21st May, A. D. 1844: that both of said patents were issued in mistake and in violation of law, and in fraud of the legal and vested rights of said Nathan Cloyes: that after the application of said Nathan Cloyes to enter said lands, and after his tender of payment therefor had been refused as aforesaid, an act of Congress entitled "an act supplemental to the act granting the right of pre-emption to settlers on the public lands, approved the twenty-ninth May, A. D. 1830," was approved on the 14th July, 1832, authorizing settlers upon the public lands entitled to a pre-emption on public lands

under the act of 29th May, 1830, to enter the same under the provisions of said supplemental act: that said last mentioned act was approved and in force before the said Governor Pope selected said lands, and that the public surveys of said lands were made and perfected on or about the 1st December, 1833, and returned to the Land Office, in the beginning of the year 1834: that by virtue of said last mentioned act, said Nathan Cloyes, having in the meantime departed this life, the said complainants, as his heirs, applied to enter said four fractional quarter sections of land on the 5th day of March, 1834, at the Receiver's office, at Little Rock, by the hands of **BEN DESHA**, they paid to the Receiver the sum of $135.76 ¼ for the same, who granted a receipt and certificate therefor, and endorsed on said receipt that a part of the land for which said receipt was given, to-wit: the north-west fractional quarter of section two was a part of the location made by Governor Pope in selecting the 1000 acres aforesaid; and that said endorsement was made by direction of the Commissioner of the General Land Office. **The bill contains other allegations necessary for the introduction of parties, and prays relief, &c.**

Process having issued, a portion of the defendants appeared and answered the bill; and others appeared and filed demurrers. The demurrers being sustained, the complainants have appealed to this court. It is first urged, in support of the demurrer, that the bill is multifarious, and demurrable for a misjoinder of parties. This objection, we conceive, cannot be sustained. The claim asserted by the complainants is entire, accruing to them by the same right, and cannot be well separated or made the subject of different and distinct actions. Although the interests of the various defendants are separate and distinct, yet they all derive title from the same source, under two patents, which, as the complainants contend, were issued in violation of their rights. The complainants could not obtain complete relief to the extent of their claim, without asserting the whole of it in their bill, and consequently making every person a party holding under the adverse title which they seek to set aside. The relief of the complainants would be incomplete unless both patents should be set aside. This would effect the interests of all the defendants, and would not be binding upon them unless they were made parties with the privilege of defending their title. Besides, it is one great object with Courts of Equity to prevent a multiplicity of suits. Were a different rule to be observed, the complainants might be driven to a separate suit against each defendant, for the purpose of establishing their one entire title to the lands in controversy.

2: The next point to be considered, is, whether Cloyes was entitled to a pre-emption on any other lands, than the north-west quarter of section two, inasmuch as his entire improvement was confined to that tract. Upon this point we adopt the construction given to the act of Congress by the Commissioner of the General Land Office, as being well founded and proper. The Commissioner in his circular instructions, dated June 10th, 1830, and found in the land laws, (*Instructions, &c., Vol. 2, 539, No. 479*) says, **"when the whole of the improvement is embraced in the limits of a quarter section, the occupant must be confined to the entry of that particular quarter section."**

Again, the Commissioner in his letter to the Register and Receiver at St. Stephens, Alabama, dated May 31st, 1831, in the same *Vol. 554, No. 497*, says, **"if therefore all the improvements**

and cultivation of the settler are included in a fractional section or a legal subdivision containing less than one hundred and sixty acres, he can have no claim to enter any tract to make up the maximum allowance of the law."

This construction of the Commissioner, as before stated, we conceive to be the proper construction, and we give it our entire concurrence; and consequently Cloyes could not, by virtue of the occupancy and cultivation contained in the bill, claim a right of pre-emption beyond the fractional quarter section upon which such occupancy and cultivation were confined.

It has been held that the **"decisions of the Register and Receiver are conclusive as to all matters within their jurisdiction, in the absence of fraud; for the act of Congress, for many purposes, makes them judical officers, and gives them exclusive cognizance of a particular class of cases."** *Wilcox v. Jackson*, 13 Pet. 490. *Nicks' hrs. v. Rector*, 4 Ark. R. 250.

Allowing Cloyes to have been entitled by the act of Congress to a right of pre-emption, to the full extent of his claim, it is not within the province of a State Court of Equity to correct the Errors of the land officers, who are clothed with exclusive jurisdiction.

The Register and Receiver decided, that he was not entitled to a pre-emption beyond the fractional quarter section, which included his settlement and cultivation, and it is not the province of this Court to say that their decision was erroneous and that he was entitled to no more.

3: At the time, or shortly after, filing his proof to a right of pre-emption, Cloyes tendered payment for the whole of the land claimed by him, at the minimum price. The land at that time was not subject to sale by pre-emption, as the surveys had not been completed and the plats returned to the Land Office. After the establishment of the "Arkansas Land District," and a transfer of the books, papers, &c., to the land officer at Little Rock, and before the expiration of twelve months after the plats had been returned to the Land Office, the complainants, by Ben Desha, paid to the Receiver at Little Rock, the minimum price for the whole of the land claimed, and took his receipt therefor, upon which he made an endorsement under the direction of the Commissioner of the General Land Office: "That the north-west fractional quarter of section two forms a part of the location made by Governor Pope, in selecting 1000 acres of land adjoining the town of Little Rock, granted by Congress, to raise a fund for building a Court House and Jail for the Territory of Arkansas."

The Receiver has no legal authority to receive payment for any of the public lands, until a sale is made by the Register. In this case, the Register declared the lands not subject to entry by the complainants, and accordingly refused to permit them to enter the same.

<u>The receipt given by the Receiver therefore conferred no title whatever upon the complainants, and can be regarded only as having the operation and effect of a tender.</u> If at the time of making such payment to the Receiver, the complainants were entitled to a pre-emption to any

portion of the lands claimed, although the amount paid was greater than the price of the land, to which they were so entitled, yet it was good for the amount to which they were entitled. It was a mere precautionary measure and was intended for the whole land claimed, if entitled to the whole; and if not, then for as much as they might be entitled to. So are such tenders or payments regarded by the Commissioner of the General Land Office. See *Instructions,&c., Public lands, Vol. 2, 132, No. 84*. Whether such a tender would be good at common law, it is not necessary to enquire. Such a tender is regarded as sufficient by the General Land Office, which is charged by law for the protection of the General Government, and will be held good by this court against the government, and, consequently those claiming under her.

4: Having disposed of these preliminary questions, we will proceed to inquire whether, by the bill, Cloyes is shown to have been entitled to a pre-emption to the particular fractional quarter including his improvement. The act of Congress of the 29th May, 1830, section 3, *Provides*: **"That prior to any entries being made under the privilege of this act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the land district, in which such lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office, for that purpose."** The Commissioner, in his circular instructions to the Registers and Receivers, dated June 10th, 1830, already referred to, says, **"the evidence must be taken before a justice of the peace in the presence of the Register and Receiver, and be in answer to such interrogatories propounded by them, as may be best calculated to elicit the truth."** The regulations so prescribed by the Commissioner are as binding and obligatory upon the Register and Receiver as the law itself. The manner in which they are to receive satisfactory proof of a right of pre-emption, is not left to their discretion, but is fixed by definite rules, from which no one but the Commissioner himself can authorize a departure, and the Register and Receiver must conform to them. It devolves upon the Commissioner to prescribe the mode and nature of the proof; but after it is received, it is exclusively within the province and jurisdiction of the Register and Receiver to determine whether it is sufficient and satisfactory. They can acquire jurisdiction of the evidence and of the subject matter so as to adjudicate upon it, only in the manner pointed out by the rules made under, and in conformity with, the act of Congress. An allowance of a right of pre-emption upon the personal knowledge of the Land Officers, in the absence of proof, would be void against the United States, and consequently a claim to a right of pre-emption so granted would not affect or impair the adverse claims of persons holding under the United States; and such, we conceive, would be the case were a pre-emption granted upon proof not taken in the presence of the Register and Receiver, as prescribed by the Commissioner in conformity with the law.

This point, however, is only made in argument, as the bill alleges, **"that the proof was made to the satisfaction of the Register and Receiver, agreeably to the rule prescribed by the Commissioner of the General Land Office, for that purpose."**

The exhibit shows that **"the proof was taken in the presence of the Register."** The allegation contained in the bill is admitted by the demurrer. If it should be denied by answer, the exhibit becomes an instrument of proof under the issue so formed. The act of Congress, under which Cloyes made his proof, was approved the 29th May, 1830, and expired one year from its

passage, by limitation. During the existence of the law, he was unable to avail himself of the benefits and privileges which it conferred, because the surveys had not been completed and the plats returned to the Land Office. **With the expiration of the act, his right to a pre-emption ceased, and he had no right to claim the benefits of the law after it ceased to exist.** The act did not confer a vested legal or equitable interest, which could be enforced against the Government, but a mere gratuity or bounty, for the obtaining and protection of which, against those who would defeat the intention of the donor, courts will interfere and grant relief. Although the right of pre-emption granted by act of Congress to settlers upon the public lands, is a mere gratuity, yet it is one of sound policy on the part of the General Government, as a means of settling our extensive public domain with a hardy and enterprising population; and of actual benefit to the settler upon the public lands as a protection to him in the enjoyment of the labor which he may have bestowed upon such land. The subject, however, is completely within the control of Congress. - **The gratuity may be granted or withheld at pleasure, and if granted may be revoked, if done before the acceptance of and compliance with, the terms upon which it is offered.**

The 4th section of the act of 29th May, 1830, provides that, **"the right of pre-emption contemplated by this act, shall not extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."** The act, having expired by limitation, was revived by the supplemental act of **July 14th, 1832**. This latter act provides, **"that all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress, approved twenty-ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be enabled to make proof and enter the same, within the time limited in said act in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale on account of a disputed boundary between any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions in every respect as are prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established,"** &c.

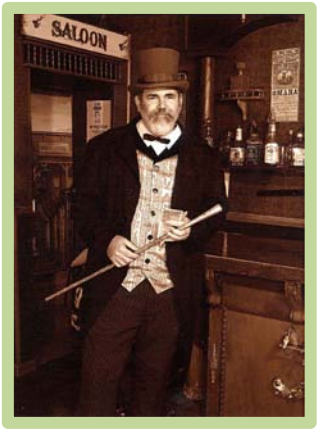
Although this act is general, and confers upon occupants coming within its perview all the benefits and privileges of the act of 1829, yet it does not confer a right of pre-emption to lands disposed of, or otherwise appropriated by act of Congress between the dates of its expiration and that of its revival, by the supplemental act. If the land, to which Cloyes claimed his right of pre-emption, remained undisposed of in any manner, at the time of the passage of the supplemental act, then he comes within the provisions of the act, and is entitled to the benefits which it confers; otherwise he is not.

On the **15th June, 1832**, an act was passed **"granting to the Territory of Arkansas, one thousand acres of land, contiguous to, and adjoining the Town of Little Rock, for the erection of a Court House and Jail in said town; to be selected by the Governor,"** &c. **This act was passed one month before the supplemental act of 14th July, 1832**, reviving the pre-emption

act of 1830, and consequently at the time of its passage there was no law in existence conferring upon Cloyes a right of pre-emption.

The Governor was authorized by the act to select any land belonging to the United States, unappropriated at the date of the act, "**contiguous to and adjoining the Town of Little Rock.**"

We will not enquire whether the supplemental act, passed on the 14th July, 1832, conferred a right of pre-emption on Cloyes which the Governor was bound to notice in selecting the one thousand acres. If there was not more than one thousand acres of unappropriated public lands, "contiguous to, and adjoining the Town of Little Rock," exclusive of the fractional quarter section claimed by Cloyes, then **that quarter section had at the time of the passage of the supplemental act been already appropriated by an act of Congress, for the building of a Court House and Jail in the Town of Little Rock, and he was not entitled to any pre-emption upon it.** This fact the bill does not show, and this court will not presume that there was a sufficiency of land which the Governor could select exclusive of the quarter section occupied by Cloyes. For this reason, we think the demurrer to the bill was properly sustained by the court below, and we **ACCORDINGLY AFFIRM THE DECREE**.



Dan B. Robison, Professional Surveyor and Director of Surveys at FTN Associates, Ltd. has been involved in land surveying, engineering and related fields since 1976, specializing in boundary retracement and boundary dispute resolutions and litigations. He is licensed in the State of Arkansas. In addition to his duties at FTN, Mr. Robison serves as an active mentor to the new generation of Arkansas Surveyors. He is a founding member of the Pantopragmatic Arkansas Land Surveyors (PALS). He is also a member of the Arkansas Society of Professional Surveyors (ASPS) having served on various committees. Mr. Robison takes an active role in education and legislative concerns of the profession.

Mr. Robison provides Expert Witness services and assistance to Attorneys, Title Companies, Developers and Land Owners. He can assist with the necessary title research, historical research and analysis of your land boundary or title problem. His insight and expert application of legal principles affecting the location of your boundary line or the rights, title or interests of your property will provide an element of certainty necessary for knowledgeable, informed decisions. Mr. Robison can provide input and assistance in the litigation process in the preparation of complaints, responses, interrogatories, and requests for production. Mr. Robison can prepare the surveys, reports, affidavits and exhibits necessary for presentation in the courtroom.

Dan B. Robison, PS