SAINT LOUIS AND IRON MOUNTAIN RAILROAD vs. WILLIAM H. CAYCE.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING.

In response to a resolution of the House, papers in the case of the Saint Louis and Iron Mountain Railroad vs. William H. Cayce.

JANUARY 6, 1889.—Referred to the Committee on the Public Lands and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, December 21, 1888.

SIR: I have the honor to state that the following resolution, passed by the House on the 8th of October, 1888—

That the Secretary of the Interior is hereby requested to transmit to this Congress all the papers and records in the case of Saint Louis, Iron Mountain and Southern Railroad vs. William H. Cayce, in contest concerning 120 acres of land in Miller County, Ark., to the end that the action taken by the Forty-fifth Congress, June, 1878, be called up and be reviewed by this Congress, wherein said land was declared to be public land of the United States and subject to pre-emption entry, and that pending said review by Congress the Secretary of the Interior be requested to take no further action in the case of said lands—

was received and referred to the Commissioner of the General Land Office, in which Bureau the papers in question were, with directions to report to this Department.

On the 12th instant a communication was received from the Commissioner, returning the resolution and stating that on the 11th instant, "at the urgent personal request of Hon. W. S. Holman, chairman of the Public Lands Committee, * * * in order to avoid the delay incident to a report in the usual manner," the papers and records requested in the resolution had been "transmitted direct to Congress."

I am now in receipt of a communication from the Commissioner of the General Land Office, dated the 21st instant, copy herewith, inclosing a letter from the Committee on the Public Lands to him, dated the 18th instant, as follows:

Acting in obedience to the following resolution adopted by the Committee on Public Lands of the House of Representatives, I herewith return the original papers in the case of W. H. Cayce vs. Saint Louis, Iron Mountain and Southern Railroad Company, receipted for by the chairman of this committee, viz:

"*Resolved*, That the original papers in the case of W. H. Cayce against the Saint Louis, Iron Mountain and Southern Railroad Company, such in answer to House

resolution of October 8, 1888, be returned, and the honorable Secretary of the Interior be requested to answer the said resolution by transmitting to the House, in lieu of the original papers, a copy of the proof made by the said Cayce before the register and receiver at Camden, Ark.; the last decision of the Commissioner in the case on the appeal to him; the decision of the Acting Secretary reversing the Commissioner; and the decision of the Secretary denying the motion for review."

I take the liberty to call your attention to the request of the committee expressed therein.

In response to the House resolution, above recited, and to the resolution of the Committee on Public Lands, the copies of papers desired are herewith transmitted.

Very respectfully,

WM. F. VILAS,
Secretary.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 21, 1888.

SIR: Referring to office letter of the 12th instant, reporting that the papers in the case William H. Cayce *vs.* Saint Louis, Iron Mountain and Southern Railroad Company, involving the SE. ¼ NE. ¼ and W. ½ NE. ¼ Sec. 30, T. 15 S., R. 28 W., Camden land district, Arkansas, had been transmitted to Congress, at the request of the chairman of the Committee on Public Lands of the House of Representatives, I have now to further report that said papers were returned to this office on the 18th instant, accompanied by a request (herewith inclosed) made pursuant to a resolution adopted by the committee, that copies of the proof submitted by Cayce before the register and receiver, of office decision of March 23, 1887, of Acting Secretary's decision of November 25, 1887, and of Secretary's decision of August 15, 1888, be furnished said committee.

The copies have been prepared and are herewith transmitted.

They are marked A, B, C, and D, respectively,

Very respectfully,

S. M. STOCKSLAGER,
Commissioner.

Hon. WM. F. VILAS,
Secretary of the Interior.

A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 23, 1887.

GENTLEMEN: The W. ½ NE. ¼ and SE. ¼ NE. ¼ Sec. 30, T. 15 S., R. 28 W., your district, is within the 6-mile (granted) limits of the grant by act of February 9, 1853, (10 Stat., 155), for the Cairo and Fulton, now Saint Louis, Iron Mountain and Southern, Railroad Company. The land was ordered withdrawn May 19, 1853, and the road was definitely located August 11, 1855. The records show that Sarah Nix filed pre-emption declaratory statement for the whole NE. ¼ of said section on April 22, alleging settlement April 1, 1853, and on the 31st of March, 1854, made pre-emption cash entry of the NE. ¼ NE. ¼ thereof. The remainder of the section, or the land now in question, was certified to the State of Arkansas, July 13, 1857, under the grant of February 9, 1853, for the Cario and Fulton Railroad Company. It appears that the railroad company conveyed the land to Thomas Allen (its president) on May 14, 1875 that Allen thereafter, on May 23, 1875, brought suit for possession against John Nix;

the son of Sarah Nix, who was living upon the tract entered by his mother and was cultivating a portion of each of the tracts in question. Also that Allen and wife reconveyed the land to the company on May 29, 1875.

The circuit court of the United States for the eastern district of Arkansas decided against Nix, who claimed under the settlement of his mother and under certain State laws. He appealed, and the Supreme Court, at its October term, 1884 (112 U. S., 129), affirmed the decree of the circuit court.

The Supreme Court held that while Mrs. Nix at the time of her entry could, under the provision of the act making the railroad grant which protected pre-emption claimants, have entered the whole NE. ¼. She failed to do so, and that when she entered the NE. ¼ NE. ¼ thereof, she exhausted her right under the pre-emption law, and abandoned the tracts now in controversy.

On December 8, 1884, William H. Cayce made application to enter said tracts under the homestead law. You rejected the application, for the reason that the land was not subject to homestead entry, and Cayce appealed. On February 19, 1885, this office affirmed your decision, but on June 1, ensuing, re-opened the case, vacated the decision of February 19, and ordered a hearing between Cayce and the railroad company. Under this order testimony was taken, and a large number of exhibits, relating chiefly to the contest between Nix and Allen's executors and the transfer of the land by the company, were filed.

Upon this testimony your office failed to render an opinion, and upon motion of Messrs. Britton and Gray to remand the case for your decision the papers were transmitted to your office with letter of November 24 last. After an examination of the testimony you decided that at the date of Cayce's application to enter the land was subject to homestead entry. The company appealed and the papers were transmitted with your letter of Februry 10, 1887. Cayce claims settlement in 1873, and bases his claim to the land upon the settlement of Mrs. Nix and the decision of the Supreme Court in Nix *vs.* Allen (*supra*). He quotes from said decision to show that the land was not any part of the grant for the railroad company, for the reason that at the date of said grant it was occupied by Mrs. Nix as a pre-emptor.

The court, after arriving at the conclusion that the claim of Nix had failed, both under the acts of Congress and of the State, said:

"This makes it unnecessary to consider whether the act of 1871 is constitutional. Good or bad, it is of no use to him. The same is true of the claim that the company has no title because at the time the grant was made the land in question was occupied by Mrs. Nix as a pre-emptor."

That is to say, whatever effect the occupany of the land by his mother may have had upon the grant for the railroad, it could be of no use to him.

What was the effect of the settlement of Mrs. Nix upon the railroad grant? For it is upon a determination of this point that the right of Cayce as against the railroad company depends.

The grant to the States of Arkansas and Missouri by act of February 9, 1853, is as follows: "That there be, and is hereby, granted to the State of Arkansas and Missouri, respectively, * * * every alternate section of land designated by even number for six sections in width on each side of said road and branches, but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent to be appointed by the governor of the State to select" other lands in lieu thereof within an additional territory not more than 15 miles from the line of the road.

These, as repeatedly held by the courts, are words of present grant, and cover all the lands intended to be granted which should be found on the location of the road to have been within the grant when it was made. The right to the granted lands did not depend upon such location, but attached at once on the making of the grant (Schulenberg *vs.* Harriman, 21 Wall., 44; Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States, 92 U. S., 733).

The tract in question, when the company's road was definitely located, was found to be within the limits of its grant. Was it such land as Congress intended to grant? For it is from the intention of the legislature that framed the law that its scope and effect must be determined. "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers" (1 Bacon Abr., 247).

The testimony taken at the hearing ordered by office letter of June 1, 1885, shows that Mrs. Nix settled upon the land in 1846 or 1847; that her house was situated on the NE. ¼ NE. ¼ of the quarter section, and that she continued to reside in said house and upon the land to the time of her death, which occurred in 1863. It also shows that she had upon said land, prior to the railroad grant, valuable improvements, consisting of a double log cabin, stable, horse lot, corn-crib, garden, and about 25 acres of land cleared, fenced, and planted in corn.

The Supreme Court of the United States in Winona and St. Peter Railroad Com-

pany *vs.* Barney (113 U. S., 618), in discussing a grant to Minnesota similar to that under consideration, said:

"The acts of Congress, in effect, said: 'We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of, or such rights may not have attached when the routes are finally determined. If, at that time, it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place within certain prescribed limits.'"

At the date of the grant for the company Mrs. Nix, as the testimony in the case shows, was residing and had valuable improvements on the land, and she subsequently asserted her right under the pre-emption law by filing in your office a declaration of intention to pre-empt the same.

The record therefore shows a pre-emption claim at the date of the railroad grant, and in accordance with the opinion of the court as expressed in the Barney case, lands covered by such claims did not pass under said grant, but, on the contrary, special provision was made for indemnity for them.

The nature of a claim which excepts land from a railroad grant is immaterial. The question is whether the land was granted to the railroad company. There is no difference between a pre-emption and a homestead claim in this respect (Winona *vs.* Barney, 113 U. S., 618; K. P. R. R. Co. *vs.* Dunmeyer, *ibid*, 629).

The period when a settlement right must be in existence to except land from railroad grants in general has been settled by judicial and departmental decisions to be the date of the granting act, or, if the land was free from claim at that date, and settlement rights were acquired before date of definite location, such right, then existing, also serves to except the tract from the grant.

In Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States (92 U. S., 733) the court said:

"I believe it was the intention of Congress to grant no lands to said company upon which actual settlement under the laws of the United States were found either at the date of the grant or the definite location of the road."

In White *vs.* Hastings and Dakota Railroad Company (6 Copp., 54) the Secretary said:

"If the title does not vest when the grant is made, in present grants, it can not vest afterwards."

In Perkins *vs.* Central Pacific Railroad Company (1 L. D., 357) the Secretary said:

"The grant is not held in abeyance to await the default of settlers, but the title vests at once, and so far as regards the land in which the title does not vest at once, the claim of the company is at an end."

Lands once excepted from a grant are always excepted, and it makes no difference what afterwards becomes of them. (Leavenworth, Lawrence and Galveston R. R. Co. *vs.* United States, 92 U. S., 733; Newhall *vs.* Sanger, *ibid.*, 761; White *vs.* Hastings and Dakota R. R. Co., 6 Copp., 54; Perkins *vs.* Central Pacific R. R. Co., 1 L. D., 357; Southern Minn. R. R. Co. *vs.* Gallipean, 3 L. D., 166; Emmerson *vs.* Central Pacific R.R. Co., 3 L. D., 117; Pointard *vs.* C. P. R. R. Co., 4 L. D., 353.)

In White *vs.* Hastings and Dakota Railroad Company, the Secretary said:

"It matters not what the condition of the tract may have been at the time the grant to the company took effect (by definite location); so far as the tract in question is concerned no grant of the same was ever made."

It is unnecessary to multiply citations. There are certain points covered by leading decisions of the Supreme Court of the United States and by repeated decisions of this Department, of which the cases referred to are a part. These points are:

(1) That in railroad grants *in præsenti*, an exception existing at date of grant is an absolute exception from the grant as well as an exception existing at date of definite location.

(2) That a pre-emption right excepts land from a railroad grant equally with a homestead right.

(3) That the validity of the claim as against the United States can not be challenged by the railroad company, nor can the company take advantage of an laches on the part of the settler. Its own claim must rest upon its own affirmative right, and not upon the weakness of the settler's case as against the Government.

(4) That when a claim that served to except a tract of land from a railroad grant is afterwards extinguished, the land reverts to the Government and does not inure to the grant, and the company can not therefore take advantage of a subsequent abandonment of the land to claim what was never granted to it.

In this case a valid pre-emption claim is proven to have existed at date of grant to the railroad company, and the same was existing in full force and effect at date of withdrawal for the railroad grant. Under the decisions cited, and many others, the

land was excepted both from the grant and withdrawal. It is claimed, however, in behalf of the railroad company that the certification to the State in 1857 passed the legal title to the tracts in question and extinguished the jurisdiction of this office and Department over the subject-matter.

This position is taken upon the authority of departmental decisions in Southern Minnesota Railroad Company *vs.* Kufner (2 L. D., 492); St. Paul, Minneapolis and Manitoba Railroad Company *vs.* Ballman (4 L. D., 206) and similar cases.

It is claimed, upon the other hand, that the case at bar is not analogous to the decided cases, being governed by a special statute applicable to this particular grant.

The lands in question were twice certified to the State of Arkansas, or, more correctly speaking, were included in two several lists, each of which purported to be a description of all the vacant and unappropriated lands in alternate even-numbered sections within the 6-mile limits of the Cairo and Fulton Railroad in Arkansas.

It appears that immediately after the date fixed as the date of the definite location of the road, and before any road whatever had been constructed, all the lands embraced in alternate sections, within both granted and indemnity limits, were certified to the State in the following form, viz:

"CAIRO AND FULTON RAILROAD.

"List of lands within the 6-mile limits granted to the State of Arkansas by act of Congress, approved February 9, 1853, entitled 'An act granting the right of way and making a grant of land to the States of Arkansas and Missouri, to aid in the construction of a railroad from a point on the Mississippi opposite the mouth of the Ohio River, via Little Rock to the Texas boundary near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi River,' being the vacant and unappropriated lands in the alternate sections designated by even numbers, for six sections in width on each side of the main stem of said road, within the State of Arkansas.

* * * * * * *

"GENERAL LAND OFFICE,
"*December* 18, 1855.

"I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing on pages 1 to 63, inclusive, is a true and correct copy of the original on file in this office, and the lands therein mentioned are now certified to said State in this manner in conformity with the provisions of the act of Congress entitled, 'An act to vest in the several States the title in fee of the lands which have or may be certified to them.

"'Approved, August 3, 1854.'

"In testimony whereof I have hereunto signed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, the day and year first herein above written.

[SEAL.]

THOS. A. HENDRICKS,
Commissioner."

It does not appear that this list was ever delivered to the State or railroad company, or that any use was made of it other than for purposes of comparison with the records of the local office and for revision and correction. At that time an actual delivery of certified lists was regarded as essential to their effect, whatever that effect might be.

A list of lands within indemnity limits was prepared at the same time as the foregoing list of lands within granted limits, and a similar certificate was attached thereto.

On February 16, 1856, a "diagram showing the 6 and 15 mile limits" of the Cairo and Fulton Railroad was transmitted to the register and receiver at Washington, Ark., together with the "lists of lands which appear by the records of this office to be vacant," etc., and the local officers were instructed to compare the same with their records and to report a list of swamp-land "conflictions," and also to report what tracts within the respective limits had been omitted from the lists so transmitted. On March 11, 1856, the register and receiver transmitted lists of conflicting indemnity selections, and on May 11, 1856, they transmitted list of unsold lands and list of reported swamp lands.

On November 14, 1856, in a letter addressed to the president of the railroad company, the Commissioner states as the reason why the lists had not been delivered that such lists had been three times prepared, but that the many changes made necessary by subsequent reports of conflicting swamp-land selections had prevented a final adjustment.

On April 3, 1857, the Commissioner addressed a letter to the Secretary of the Interior, reciting the granting and restrictive clauses of the granting act, and asking what rule should be adopted in reference to the delivery of certified lists; "that is,

whether, when the lists are made up, we can certify them at once for the grants in place and for the indemnity, taking care to refer to the provisions, as in the second and fifth sections of the act of 3d February 1853, in the official certificates to be appended to those lists, and which, in virtue of the act of 9th August 1854, vest the title; or whether they can only be delivered as the work progresses, whether with or without the 120 sections of lands included in any 20 miles of route before the work is commenced, that is, in advance of the completion of any portion of the road; or whether the lists are to be delivered only when the work is ultimately completed."

It will be perceived that the Commissioner assumed that under the act of August 3, 1854, certified lists, either of granted or indemnity lands, passed the legal title to the State, and his only question was in regard to the time when the conveyance should become complete by an actual delivery of the lists. The Commissioner's inquiry was, at his suggestion, submitted to the Attorney-General, who on June 7, 1857 (9 Op. 41), advised the Secretary that the act of August 3, 1854 (10 Stat. 346), "most manifestly does not apply in any manner whatever to the lands granted in 1853 to Missouri and Arkansas. That act (act of 1854) prescribes the duty of the Commissioner of the General Land Office in regard to legislative grants when the law does not convey the fee-simple title or require patents to be issued for the lands. The Missouri and Arkansas grants are not of that kind."

The Attorney-General held that the law vested the fee-simple title in the States to which the lands were given "except what is expressly excepted," and that "the definite location of the road will locate the grant upon the proper number of even sections on each side, with which the United States shall not previously have parted with the title; and the selections of the governor's agent will determine what sections or parts of sections are to be taken instead of those sold or subject to pre-emption. Then the title to each particular parcel will be as complete as if it had been granted by name, number, and description.

"The survey required by the first section of the law will enable you to know what lands are appropriated by the mere location of the route for the railroad, and I presume you will also be informed, in some authentic way, of the choice made by the governor's agent. I can see no objection to your furnishing lists of those lands to any person who desires to make a proper use of them, just as you would give other information from the records of your Department; but such lists can have no influence on the title of the States."

In view of the foregoing opinion, the Commissioner, on July 13, 1857, submitted to the Secretary for his approval new lists of lands, one of lands within the granted, and one of lands within indemnity limits, the former being a duplication, with certain corrections, of the list of December 18, 1855. In transmitting these lists the Commissioner said:

"As the opinion of the Attorney-General leaves us at liberty as to the form in which we may furnish information in regard to the lands granted by said act, I have concluded to give it in the shape of verified lists, and hence the present submission."

The list of granted lands was submitted in the following form:

"CAIRO AND FULTON RAILROAD.

"List of lands within the 6-mile limits granted to the State of Arkansas by an act of Congress approved February 9, 1853, entitled 'An act granting the right of way and making a grant of lands to the State of Arkansas and Missouri, to aid in the construction of a railroad from a point on the Mississippi, opposite the mouth of the Ohio River, via little Rock to the Texas boundary near Fulton in Arkansas, with branches to Fort Smith and the Mississippi River" being the vacant and unappropriated lands in the alternate sections designated by even numbers for six sections in width on each side of the main line of said road within the State of Arkansas.

"GENERAL LAND OFFICE,
"*July* 13, 1857.

"I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages 1 to 59 inclusive, is a true and correct list of the tracts of land within the 6-mile limits granted to the State of Arkansas, by the act of Congress approved February 9, 1853, entitled, "An act granting the right of way and making a grant of land to the States of Arkansas and Missouri, to aid in the construction of a railroad from a point on the Mississippi opposite the mouth of the Ohio River via Little Rock to the Texas boundary near Fulton in Arkansas, with branches to Fort Smith and the Mississippi River,' being the vacant and unappropriated lands in the alternate sections designated by even numbers, for six sections in width on each side of the main line of said road within the State of Arkansas; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of February 9, 1853, subject to all its conditions and to any

valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

"In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, the day and year first herein above written.

[SEAL.] "THOS. A. HENDRICKS,
"*Commissioner.*

"DEPARTMENT OF THE INTERIOR,
"*July* 13, 1857.

"Approved, subject to the conditions and rights above mentioned.

"J. THOMPSON,
"*Secretary.*"

It is this list which is now claimed as having passed the legal title of the United States to lands within granted limits, the list of 1855 having apparently been ignored as non-effective, and, under the opinion of the Attorney-General, void as to title. According to the same opinion the list of 1857 "had no influence on the title," and it is evident from the Commissioner's letter of submission that it was not at that time expected or supposed to have any such effect, but was furnished exclusively "as information from the records" merely.

The laws authorizing "information from the records" to be furnished to parties desiring the same, in existence at that date, were acts of January 23, 1823, and July 4, 1836 (now section 460, R. S.), providing for the making of certified copies of papers from the records and files of the General Land Office.

Section 981 (act of April 25, 1812) provides that certified copies of records, books, and papers in the General Land Office "shall be evidence equally with the originals."

The act of August 3, 1854 (section 244, R. S.), provides that certified lists of lands granted to States and Territories should be regarded as conveying the title to the proper lands in cases—

(1) When the law does not convey the fee simple;

(2) When the law does not require patents to be issued.

The opinion of the Attorney-General that in grants of this character the law passed the fee simple title of the granted lands, save as to excepted tracts, has been followed by this Department since that period, and this doctrine as to the early State grants has been asserted in leading decisions of the Supreme Court of the United States, notably in Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States; Schulenberg *vs.* Harriman; and Saint Paul and Saint Peter Railroad Company *vs.* Saint Paul and Winona Railroad Company. It must be regarded as settled law, under these decisions, that in this as in similar cases title passed by grant. This being so, a certificate was not needed to pass a title that had already passed by law.

The contemporaneous construction of the effect of certified lists is further evidenced by the records of this office showing the adjudication of pre-emption claims adverse to the grants, and the issue of patents thereon, without reference to the certified lists.

In 1857 Congress granted certain lands to the Territory of Minnesota for railroad purposes, in the usual form of grants in presenti of that period. These grants were afterward enlarged, and by the act of March 3, 1865, provision was made for the issue of patents under all grants to that State. A later act, July 13, 1866, provided that "all the lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads shall be certified to said State by the Secretary of the Interior, from time to time, whenever any of said roads shall be definitely located."

Under this provision of the law it was urged before this Department that lists of granted lands certified to the State of Minnesota after July 13, 1866, should be regarded as conveying the title. By departmental decision of September 29, 1874, it was held that as patents were required by the act of 1865, the certified lists authorized by the act of 1866 could not be regarded as of the class which by the act of 1854 were to be equivalent to a conveyance, but were simply "intended to inform the State in advance what land it will be entitled to have patents for when its road is built in accordance with law." This decision was re-affirmed by Mr. Secretary Chandler, December 2, 1875 (2 Copp., 134), upon a consideration at length of the proposition that lists certified under the act of July 13, 1866, carried title. This decision, followed by my predecessor in the cases of Kufner and Johnson (1 L. D., 370, 383), was overruled by Mr. Secretary Teller, March 23, 1883, in an elaborate decision in the Kufner case, in which he held that the act of 1866, authorizing certification, was a virtual repeal of the provision in the act of 1855 requiring the issue of patents to convey title to the State of Minnesota. He also held that the certification was an adjudication upon title, and no mistake or fraud being alleged, the cases could not be re-opened.

The decision of Mr. Secretary Teller has been followed by this Department in other cases arising under the Minnesota grants, and if it constitutes a general rule, appli-

cable to all State grants, it governs the action of this office in the present case unless there are special reasons why it does not apply to Arkansas. But it is urged before me that this decision was made under an exceptional statute applicable to Minnesota alone, and not to Arkansas or other States, while there is also a special statute of a different character applicable to Arkansas and Missouri which has been constructed by the Supreme Court of the United States, and under which statute and construction the present case should be adjudged.

My attention has also been called to the decision of the Supreme Court of January 5, 1885, in the case of Saint Paul and Saint Peter Railroad Company vs. Saint Paul and Winona Railroad Company (112 U. S. 720), in which the court, holding that certain lands which had been certified for the Saint Paul and Saint Peter Company belonged to the Winona Company, said:

"It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law, and this erroneous decision of his can not deprive the Winona Company of rights which became vested by its selection of these lands."

In this case the court did not enter a decree setting aside the certification, nor adopt or use any of the formalities customary in case of a judicial avoidance of title; it appears simply to have waived the certification as having "no influence on the title."

The special statute relied upon in the present case is the act of July 28, 1866 (14 Stat., 338), reviving and extending the provisions of the act of 1853 making a grant to the States of Arkansas and Missouri for the Cairo and Fulton and Little Rock and Fort Smith Railroads. The act of 1853 had expired by limitation, and no roads had been built. The act of 1866 declared that the lands granted by the act of 1853 had reverted to the United States, but by the later act (1866) Congress "revived" the act of 1853, "extended" it for the term of ten years from the date of the reverting act, "restored" the reverted lands and made an additional grant, all subject to certain conditions, among which were the following:

(1) All mineral lands within the limits of the original and additional grant were excepted out of the grant and reserved to the United States.

(2) The lands embraced in the additional and in the revised grant were to be disposed of by the State only after being patented to the State by the United States.

(3) That patents should be issued only upon proof satisfactory to the Secretary of the Interior of the completion of sections of ten consecutive miles of road.

In the case of the Iron Mountain and Southern (formerly Cairo and Fulton) Railroad Company vs. McGee (115 U. S., 469) the court said:

"This shows an intention to take advantage of the breach of the conditions of the original grant so far as was necessary to re-assert title to and reclaim possession of any mineral lands that may have been included in that grant, and to change the mode of passing title.

"The court held that the act was not in the nature of a declaration of forfeiture, but an extension of time upon certain conditions."

That Congress had power to impose these conditions will not be questioned, and the acceptance of the grant as revived, extended, and enlarged made such conditions binding upon the grantee.

In the McGee case the lands were certified to the State of Missouri, July 25, 1856, and sold by the Cairo and Fulton Railroad Company to McGee in 1859. These lands, with others, were patented to the State under the act of 1866 for the use and benefit of the Saint Louis, Iron Mountain and Southern Railroad Company (successors of the Cairo and Fulton Railroad Company), on July 23, 1877, and the court held that the patent inured to the benefit of McGee. Clearly, however, it was the patent that conveyed the legal title. No notice was taken by the court of the certification of 1856. Whatever, therefore, may be the effect of the departmental rule in the Kufner case upon railroad certifications elsewhere than in the State of Minnesota, and whatever may be the effect in any general or special case of the decision of the Supreme Court in Saint Peter and Saint Paul vs. Winona, it is apparent, as it seems to me, that the present case is ruled by the construction given by the court in the McGee case to the Arkansas and Missouri act of July 28, 1866.

This act changed the mode of passing title, not only as to the new lands granted, but as to all lands embraced in the original grant. All had been certified in the manner hereinbefore described, and if that certification or either of the certifications passed the legal title to or extinguished the jurisdiction of this Department over any of said lands, then the act of 1866 had nothing to operate upon so far as the original grant is concerned, and the provision that the lands embraced in this grant and in the grant revived by section 1 of this act should be disposed of only as follows, namely, after patent is issued upon proof of the completion of the road as prescribed, is a nullity. The Supreme Court, however, declares that this provision is not a nullity, but a vitality.

I am therefore inclined to hold, subject to the judgment of the appellate authority, that whatever effect the certifications of 1854 and 1857, or either of them, upon the

title of the State might be held to have been prior to the passage of the act of 1866, this act makes the issue of patents necessary for the conveyance of legal title; that if the jurisdiction of this Department ceased by such certification it was revived with the reviving act, and that the tracts in question, having been excepted from the grant of 1853 by a proven pre-emption claim in existence at date of grant, can not now be patented to the State or railroad company.

It has been suggested that if certified lists were not regarded as absolute conveyances, such view would tend to unsettle titles generally where lands have been embraced in such lists and thus lead to great wrong and injustice. If this were true as a general proposition, or in any sense apart from some special case in which a valid claim adverse to the claim of a railroad company should exist, it would be entitled to grave weight. But it is simply untrue in any such sense, and it would be equally untrue if all certified lists were treated as coming under the opinion of the Attorney-General and the rule of the courts in respect to present grants made to States by the early acts of Congress.

Under this opinion and the established rulings and decisions, the States received the title by virtue of their grants. They had the title before they got the certified lists. The only lands embraced in certified lists, the title to which could in any event be questioned, would be individual tracts covered by the excepting clauses in the lists, which the lists themselves if treated as conveyances did not purport to convey, and the legal title to which, if legal title had passed, might be set aside by the courts. There could therefore be no disturbance of valid titles even if the present were a general and not a special case.

In this case, if the railroad company sold or attempted to sell the lands after the passage of the act of 1866, and before the State had received the patent required by that act, it did so upon its own responsibility, and its purchasers took at their own risk. Both are chargeable with a knowledge of the law and with notice that under the act of 1866, upon which all the rights of the company depend, the company had no title to convey. Neither the company nor its vendees, if any, have therefore any equitable standing to defeat the application of the law.

For the reason stated herein the claim of the railroad company to the tracts in question is rejected, subject to the right of appeal. If this decision becomes final the right of Cayce to enter the lands, or any portion of the same, will be considered, as will also the application of the corporate authorities of the town of Texarkana to enter said lands as a town-site, which application was transmitted with your letter of April 29 last.

Give due notice of this decision to all interested parties. The attorneys for the railroad company will be advised by this office.

Very respectfully,

S. M. STOCKSLAGER,
Assistant Commissioner.

REGISTER AND RECEIVER,
Camden, Ark.

B.

Declaratory statement of a settler on lands subject to private entry at the date of settlement, required by the fifteenth section of the act of September, 1841, for cases where, at the date of the law, the land claimed was subject to private entry.

I, Sarah Nix, of La Fayette County, Ark., being the head of a family, over the age of twenty-one years, have since the first day of June, 1840, to wit, on the 1st day of April, A. D. 1853, settled and improved the NE. ¼, Sec. 30, T. 15 S., R. 28 W., in the district of lands subject to sale at the land office at Washington, Ark., and containing 160 acres, which land was subject to private entry at the passage of the act of 4th September, 1841; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841. Given under my hand this 20th day of April, A. D. 1853.

SARAH NIX.

In presence of Aquilla Carr.
Said pre-emption declaration bears the following indorsements, to wit:
218. Sarah Nix. Notice to register. Filed 22d April, 1853.

WM. H. ETTER,
Register.

UNITED STATES LAND OFFICE.
Camden, Ark., July 22, 1885.

I, Samuel W. Mallory, register, do hereby certify that the above and foregoing is a true, correct, and complete copy of the original declaratory statement and the indorsements thereon, filed by Sarah Nix upon the NE. ¼, Sec. 30, T. 15 S., R. 28 W., in the State of Arkansas, on the 22d day of April, 1853, as the same is now on file in my office.

Given under my hand as such register this 22d day July, 1885.

S. W. MALLORY,
Register.

[*In re* application of William H. Cayce to make homestead entry of W. ½ of NE. ¼ and SE. ¼ of NE. ¼ Sec. 30, T. 15 S., R. 28 W., Camden, Ark.]

CAMDEN, ARK., *July* 22, 1885.

SIRS: We respectfully place upon record before you our objections to a rehearing of this matter:

(1) Because the title to the land in question has passed from the United States, and hence the subject-matter is not within executive jurisdiction.

(2) Because the facts alleged in support of such application, if proven, are insuffient to dispute said outstanding title.

Very respectfully,

DODGE & JOHNSON,
Attorneys for Railroad and Owners under Railroad Title.

Hon. S. W. MALLORY, *Register*, and
Hon. A. A. TUFTS, *Receiver*.

[*In re* application of William H. Cayce to make homestead entry of W. ½ of NE. ¼ of NE. ¼, Sec. 30, T 15 S., R. 28 W., at Camden, Ark.]

It is hereby agreed by and between the parties to the above-entitled matter of application that the declaratory statement and proof for the pre-emption of the whole of the NE. quarter, above-mentioned section, made on the 22d day of April, 1853, is hereby admitted as a part of the record herein, and shall be used in this matter of application if any such declaration exists, saving all exceptions as to jurisdiction on rehearing.

WILSON & HENDERSON,
Attorneys for William H. Cayce.
DODGE & JOHNSON,
Attorneys for Railway and Owner.

UNITED STATES LAND OFFICE,
Camden, Ark., July 22, 1885.

Testimony in the matter of rejected homestead application of William H. Cayce to homestead, the SE. NE. ¼ and W. ½ NE. ¼ sec. 30, T. 15 S., R. 28 W., authorized by Commissioner's letter "F," June 1, 1885. Plea to jurisdiction filed by contestant.

THOMAS ORR, being duly sworn, deposes and says:

My name is Thomas Orr; I am acquainted with the NE. ¼ Sec. 30, T. 15 S., R. 28 W.; have known said land since May, 1865. In the fall of 1873, I think in October or November, at the instance of William H. Cayce I surveyed the SW. NE. ¼ 30, 15 S., 28 W., being then county surveyor of La Fayette County since which time Miller County has been formed, and the NE. ¼ 30, 15 S., 28 W. now lies in said Miller County. There was a small old clearing on the NW. NE. ¼, SW. NE. ¼, and SE. NE. ¼ of said NE. ¼ 30, 15 S., 28 W., being in one field and upon each tract. I found the center of the NE. ¼ of the section to be in the field and about 70 yards east of the west line of the fence and 50 yards north of the south line of the fence. I found about 5 acres of the NW. NE. ¼ in the field, about three-quarters of an acre of the SW. NE. ¼ in the field, and 2 or 3 acres of the SE. NE. ¼ in the field. I suppose at that time (1873) there were about 25 acres cleared upon the NE. NE. ¼, 30, 15 S., 28 W. I don't know how long it had been cleared, but had the appearance of having been cleared a number of years. When I surveyed the SW. NE. ¼ I did not find any one living there; it was all in the woods except the field above spoken of.

Some time in 1874, I saw some persons living on this land SW. NE. ¼, but do not know by what right they were there. For the past three or four years William H. Cayce has been living on this SW. NE. ¼; has a dwelling house and a two-story house used as an office. I refer to exhibit marked A as part of this depositon.

Cross-examined:

I don't know to whom the house belonged in which Cayce lived, referred to in the above. I never saw William H. Cayce living on this land earlier than the time above mentioned. At the time I made the survey, in 1873, I did not run off the cleared land, and the estimates I have made are based upon an opinion that I measured it with a chain in 1874 or 1875, and then stepped it day before yesterday.

THOMAS ORR.

Sworn and subscribed to before me this 22d of July, 1885.

S. W. MALLORY,
Register.

NAZARETH WILDER, being duly sworn, says:

I reside in Texarkana, Miller County, Ark.; am seventy-seven years old. I landed at this place, at Hill's Warehouse, on the 11th of February, 1844; have resided in Miller County going on eleven years. I am acquainted with the NE. ¼, Sec. 30, T. 15 S., R. 28 W.; have known it about eleven years. I have known of the land since 1847, at which time there was upon said land a double log cabin, stable, and horse lot, and about 25 acres of cleared land; there were no other improvements that I recollect. The cleared land was inclosed with a rail fence and planted in corn. Mrs. Nix was living on this land in 1847, and did live there to the date of her death; what time she died I do not recollect. I passed the place frequently during that time. Since then (say 1857) I saw a peach orchard, and apple trees in the yard. I passed this place frequently after 1847, and Mrs. Nix and her son John lived there. I was not acquainted with any other members of the family.

Cross-examined.

I never surveyed or run off the lines of the land in dispute. I do not know of my own knowledge where the lines run through the cleared land.

Recross-examined:

I was there on the land with Thomas Orr day before yesterday, and he pointed out a stake that he said he put there as county surveyor of La Fayette County, and agreeable to that the old original clearing was on a part of each of the four forties of the NE. ¼. In 1847 I went to the house above referred to, and Mr. Owens, afterwards sheriff of La Fayette County, asked John Nix where there would be a good place to camp. John says, "I will go and show you." As we passed off, John went on ahead of the wagons, and the old lady, standing in the yard, says, "My son, where are you going?" He says, "I am going to show these gentlemen round here to the spring where they can camp;" and he went around the old field to the spring, where we camped, and I recognized this road day before yesterday when going over the land. Have known this road ever since within a short time after I went to Texarkana.

NAZRETH WILDER.

Sworn and subscribed to before me this 22d July, 1885.

S. W. MALLORY,
Register.

CURTIS M. HOLMES, being sworn, says:

I am fifty-five years old; farmer; live 5 or 6 miles south of Texarkana, Miller County, Ark. I am acquainted with the NE. ¼ Sec. 30, T. 15 S., R. 28 W.; have known it since 1848; think, possibly, in 1847. In 1848 I was not personally acquainted with Mrs. Nix; she lived on this land with her family, four children—three daughters and one son—and a negro boy. The building was the kind usually put up to live in in those days; my recollection is it was a double log house, hewn down inside and out, ceiled inside, I think, as was usual. To left of the walk, from the gate to the dwelling, there was a smoke-house. A crib, and stable, with horse lot, was off to the left of the smoke-house, towards the creek; these I recollect of seeing in 1849, and north of east of the house there was a field cleared in 1848, say as much as 20 acres, perhaps more. I passed this place in the spring of 1852 and the Nix family, above referred to, was then living there.

In 1854, after I returned from California, I was at the Nix place, and I saw a peach orchard and one, may be two, apple trees; the peach trees seemed to be three years old. It used to be on my road to the town of Rondo, and I would pass it as often as twenty times a year, and then may be I would not pass it more than two or three times a year, up to 1860. From 1860 to about 1870 I was frequently on Mr. Nix's place; he did my blacksmithing for a number of years. I think Mrs. Nix lived on this place till she died; I heard from her son and neighbors that she died in 1863; her son, John B. Nix, occupied it after her death and still lives there; I don't know

it, only John B. Nix told me so the other day. I was born in what is now Miller County in 1830, and raised in Bowie County, Tex.; moved back to Arkansas in 1860, and have lived there ever since.

CURTIS M. HOLMES.

Sworn and subscribed to before me this 22d July, 1885.

S. W. MALLORY,
Register.

(Here is filed certified copy of supplemental proof of Sarah Nix, marked Exhibit A 1.)

PETER R. JOHNSON, being sworn, says:

I am sixty-two years old; farmer; reside in Miller county, Ark.; I knew Mrs. Nix in 1849 personally. I knew of her in 1846–'47, having passed the place where she lived at that time; she was then living in the NE. NE. ¼, Sec. 30, T. 15 S., R. 28 W. I think 1846; am positive in 1847. Mrs. Sarah Nix first occupied the land. She was the head of a family and citizen of the United States, and remained so till the date of her death, which I think occurred in 1863. When I first knew Mrs. Nix, in 1847, she resided on this land with her family, consisting of three daughters, one son, and a negro boy, I have been living in what is now Miller County since the year 1840; in the NE. NE. ¼ of said section; double log dwelling-house, smoke-house, horse lot, corn-crib and stable, garden and a field cleared and fenced; in 1848 I again saw it; Mrs. Nix and her family were still living there; again in 1849 I saw it, being asked there to help roll logs; I did help roll logs on the field above referred to; I then thought the field had about 25 or 30 acres cleared and in cultivation.

The exhibit marked A of Thos. Orr's deposition I have examined and find correct, showing the location of the house and the cleared land. I passed the place one time in 1850; I staid all night on the place in 1851; I passed the place in 1852 and 1853, and she was still living there then; that she lived upon and cultivated all the land shown to be in the field as shown by Exhibit A referred to above, from 1847 to date of her death in 1863. John B. Nix lived upon the land after his mother, Mrs. Sarah Nix, died, with his family, and claimed it under a pre-emption right, as he stated to me. Three or four years ago, Dr. Cayce moved upon this land; he had an office on the front of the street and a little house back of it, in which he lived.

John B. Nix held possession up to and during the year 1884.

Cross-examined:

Have known Dr. Cayce eleven or twelve years. I don't know whether he is a married man or the head of a family. I saw the compass set day before yesterday. saw that the fence extended over onto the NW.NE. ¼ about 1 acre and maybe a little more.

Recross-examined:

Dr. Cayce is over twenty-one years old and a citizen of the United States.

PETER R. JOHNSON.

Sworn and subscribed to before me this 22d July, 1885.

S. W. MALLORY,
Register.

EVIDENCE BY CONTESTANT.

(1) Contestant files in evidence certificate of the Secretary of the Interior confirming and approving selection of lands under the grant to the Cairo and Fulton Railroad Company. Marked No. 1.

(Applicant objects because it includes NE. ¼ Sec. 30, T. 15 S., R. 28 W.)

(2) Contestant offers duly-certified copies of articles of the consolidation of the Cairo and Fulton and Iron Mountain and Southern Railroad Companies, marked No. 2.

(3) Contestant offers a certified transcript of all the proceedings in an action of ejectment brought by Thomas Allen against John B. Nix in the United States circuit court for the eastern district of Arkansas for the lands mentioned in this controversy. Marked No. 3.

(Applicant objects because the applicant, William H. Cayce, was not a party to that nor any way connected therewith, and because it is irrelevant testimony.)

(4) Contestant offers articles of incorporation of the town of Texarkana, Ark.) Marked No. 4.

(Objected to as irrelevant.)

(5) Contestant offers certificate of the recorder of the town of Texarkana. Marked 5.

(Objected to as irrelevant.)

(6) Contestant offers certified plat of the town of Texarkana, Ark., filed in La Fayette County, July 8, 1874. (No. 6.)

(Objected, incompetent and irrelevant.)

(7) Contestant offers certified plat of the town of Texarkana, Ark., filed in Miller County, for record, December 13, 1880. (No. 7.)

(Objected, incompetent and irrelevant.)

(8) Contestant offers certified copy of deed from John B. Nix and wife to William H. Cayce. (No. 8.)

Contestant offers seventeen certified transcripts of deeds to various lots and blocks, part of the land in controversy, from the Iron Mountain and Southern Railroad. (Nos. 9 to 25 inclusive.)

(Objected, incompetent and irrelevant.)

Contestant offers eleven separate leases to parts of the land in controversy to parties occupying the lands. (Nos. 26 to 36 inclusive).

(Objected, incompetent and irrelevant.)

Contestant offers certified transcript of deed from Thomas Allen to Saint Louis, Iron Mountain and Southern Rrilroad. (No. 37.)

(Objected, incompetent and irrelevant.)

Contestant offers certified copy of letter from J. A. Williamson, then Commissioner United States General Land Office, dated March 25, 1878, addressed to register and receiver at Camden, Ark., marked No. 38.

(Objected, incompetent and irrelevant.)

Contestant offers certified transcript from the General Land Office, Washington, D. C., referring to the matters and things in controversy, marked No. 39.

(Objected, incompetent and irrelevant.)

THOMAS ESSEX, being sworn, says:

I am land commissioner for the Saint Louis, Iron Mountain and Southern Railroad for the State of Arkansas. Reside at Little Rock, Ark. I am acquainted with the lands in controversy. Saint Louis, Iron Mountain and Southern Railway has been paying taxes on this land since 1874. They were paid under my supervision. Most of this land is assessed in lots and blocks except a part of the SE. NE. which is assessed in acres and a part in lots and blocks. I herewith append a correct plat showing the line of railway and its property as located on the land in controversy, marked Exhibit K. I know John M. Moore. I recognize the letter handed me, dated Texarkana, November 22, 1884, signed W. H. Cayce, and addressed to J. M. Moore, as one received by me from Dodge & Johnson, the railway attorneys, which I attach to my deposition as Exhibit K 1.

(Objected, incompetent and irrelevant as to the letter and town plat.)

I made the leases offered in evidence here with the parties who were occupying the land at the date of the leases. The land in controversy, with the exception of the parts that have been sold off, is now in possession of the Saint Louis, Iron Mountain and Southern Railway Company. The court-house and jail of Miller County are located on block 46 of the land in controversy; a large planing-mill is situated in block 68 of the land in controversy.

THOS. ESSEX.

Sworn and subscribed to before me this 22d July, 1885.

S. W. MALLORY,
Register.

WILLIAM R. KELLY, being sworn, says:

I am circuit clerk and *ex officio* county clerk of Miller County, Ark.; have resided in Texarkana since 1876, on lots 15 and 16, block 69. Darigo has a store-house and dwelling-house; value, $800 to $1,000; he resides there. I think Dr. Cayce occupies lots 11 and 12, block 69; worth about $300 or $400. I think Mr. Sanderson is in lot 10, block 69; has a store-house worth about $300 or $400. On lots 7 and 8, block 69, dwelling-house owned by me, value, $150; on lots 4, 5, and 6, block 69, Mr. J. T. Hogan has dwelling-house and other buildings, value, $500 or $600. On lots 1, 2, and 3 are several houses worth about $300. On lots 5 and 6, block 55, are improved tenement houses; value, $300. The house between blocks 56 and 57 is worth about $250. The mill property located on block 68 is worth about $800 or $1,000.

WILLIAM R. KELLY.

Sworn and subscribed to before me this 22d July, 1885.

S. W. MALLORY,
Register.

C.

RAILROAD GRANT.—CONFLICTING SETTLEMENT CLAIM.

CAYCE *v.* ST. LOUIS & IRON MOUNTAIN R. R. CO.

The entry by a pre-emptor of a portion of the land settled upon, and filed for, is an abandonment and relinquishment of the land not included in the final purchase.

A settlement alleged subsequent to the grant, and abandoned prior to definite location, leaves the land subject to the operation of the grant, as the condition of land at definite location determines whether it will pass under the grant.

The effect of a residence confined to a forty-acre tract held under patent, can not by occupation and cultivation be extended to include the remainder of the quarter section.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 25, 1887.

This case involves the right to the W. ½ of NE. ¼ and SE. ¼ of NE. ¼ of Sec. 30, T. 15 S., R. 28 W., Camden land district, Arkansas, which was certified to the State of Arkansas July 13, 1857, under the grant of February 9, 1853, for the Cairo and Fulton Railroad Company.

On December 8, 1884, William H. Cayce made application to enter said tract under the homestead law, which was rejected by the local officers, for the reason that the land was not subject to homestead entry, and Cayce appealed. This decision was affirmed by the General Land Office February 19, 1885, from which no appeal was taken, but on June 1st ensuing you re-opened the case, vacated the decision of your predecessor of February 19, and ordered a hearing between Cayce and the railroad company. Upon the hearing the register and receiver held that the land was subject to homestead entry, and upon appeal you affirmed said decision. From this decision the company appealed to the Department.

The question of jurisdiction is raised in this case upon the ground that the fee simple to lands granted to the State of Arkansas, for railroad purposes, vested by force of the act itself, and without patent, and that the certification by the Department of this land to the company is evidence of the fact that it was subject to the operation of the grant.

I do not consider it necessary to pass upon that question, as it is clearly the duty of the Department to recommend that suit be instituted to cancel an outstanding title whenever it shall appear that lands have been illegally certified or patented under any public land grant. It is therefore my duty to consider the case on its merits.

It is admitted that in 1846 Mrs. Nix took possession of and settled upon the whole of the NE. ¼ of Sec. 30, which included the land in controversy, and that on the 22d of April, 1853, she filed her declaratory statement for the entire quarter section, alleging settlement thereon the first of April, 1853. On March 31, 1854, she made pre-emption cash entry of the NE. ¼ of said quarter section, fixing by her proof the first day of April, 1853, as the date of her settlement, the same as in her declaratory statement and patents issued to her for said tract.

There can be no question that the entry by Mrs. Nix of the one quarter of said NE. ¼ was a complete abandonment and relinquishment of the remaining three quarters. This is so well established that it is not necessary to discuss it further.

That part of the road opposite the tract in question was definitely located August 11, 1855. So it appears from her own statement, under oath, that her settlement with a view to pre-emption was not made until after the grant to the road, and having entered one quarter of said quarter section prior to definite location, the balance of said quarter-section was at that date—so far as her prior settlement had affected it—open public land.

Upon the hearing in this case it was shown that Mrs. Nix took possession of and occupied the entire quarter-section from 1846 to date of the grant, and hence it is argued that at that date she had the right to file for the entire quarter-section.

In the face of her declaratory statement and of the proof submitted in making entry, showing that her settlement under her pre-emption claim was not made until April 1, 1853, it may be questioned whether her occupancy of the premises prior to that date would have the effect to except said tract from the operation of the grant. But admitting that at the date of the grant a pre-emption claim by virtue of this settlement existed as to the entire quarter-section, it can not be questioned that at the date of definite location the tract in controversy, so far as her settlement had affected it, was open public land.

This was directly decided by the supreme court in the case of Nix *v.* Allen (112 U. S., 129), wherein the court, in passing upon this question, held that "the exercise of the right of pre-emption under the act of September 4, 1841 (5 Stat., 453) by an entry of one-quarter of a quarter-section of land, was an abandonment of the right to enter under that act for the remaining three-quarters of the section."

It is, however, insisted upon by counsel for Cayce, that the grant of February 9, 1853, took effect only upon such lands as were free from a pre-emption claim at the

date of the grant, and that although the lands might be free from such claim at the date of definite location, they would still be excepted from the operation of the grant unless they were in such condition at the date of the grant.

The grant in this case is of—

"Every alternate section of land designated by even numbers, for six sections in width, on each side of said road and branches, but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State to select, subject to the approval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, etc."

I can see no material distinction between this grant and the grants to other roads in this respect. The uniform construction of the courts and of the Department of similar grants has been that the condition of the lands at the date of definite location determines what lands pass by the grant. This construction must be held to apply in this case.

Cayce claims the right to make homestead entry of this tract by reason of the existing settlement and improvement of the land by Mrs. Nix at the date of the grant; but it is also argued that the settlement and cultivation of the tract by John B. Nix, both at the date of the grant and the date of definite location, also served to except the tract from the operation of the grant.

Every question as to the settlement of the tract in controversy and his right to the same was fully and completely disposed of by the decision of the court in the case of Nix v. Allen, *supra*.

On May 2d, 1858, Mrs. Nix conveyed the land she entered—to wit, the NE. ¼ of the quarter-section—to her son, John B. Nix, who arrived at full age during the year 1857, and who continued to reside with her on said tract, and also cultivated other parts of the quarter-section.

On May 14, 1875, the railroad company sold the W. ½ and SE. ¼ of said quarter-section to Thomas Allen, who brought an action of ejectment against John B. Nix to recover possession thereof.

In his defence, as shown by the record in the case, the facts as to the settlement of both Mrs. Nix and himself were fully set forth. Judgment was rendered in favor of Allen, and Nix afterward filed a bill in the circuit court of the United States for the district of Arkansas to enjoin the execution of that judgment and to obtain a conveyance of the legal title to the property, on the ground that Allen held it in trust for him. The court dismissed the bill, and Nix filed an appeal to the Supreme Court.

One of the claims set up by appellant was that he had a complete equitable title to the land under the acts of Congress as a pre-emptor.

Upon this point the court said:

"All the rights of pre-emption which the appellant sets up originated with his mother. In his application to enter the lands, made in 1878, he expressly bases his claim on her original settlement and his inheritance from her. He does not pretend that he made a settlement himself before the rights of the railroad company accrued. In fact, he could not have made such a settlement, because he remained a minor until 1857, and the lands were withdrawn from market in 1853, on account of the railroad grant. Only persons over the age of twenty-one years could become pre-emption settlers. Such is the express provision of the pre-emption act. If, then, his mother, had she been alive, could not have made a pre-emption entry in 1878, he could not."

Then, referring to the cultivation by Nix of the other part of the quarter-section, besides that portion purchased from his mother, and upon which he resided, the court said:

"Under the circumstances, his residence was, in law, confined to the land he owned. Seeing this difficulty, he applied for the purchase of the whole quarter-section, basing his claim apparently on the original settlement and declaratory statement of his mother for the pre-emption of that tract. In this way he sought to connect his residence upon the NE. ¼ with his occupation of the other quarters. That he can not do, as by the entry of the NE. ¼ his mother separated her residence from the rest of the quarter-section, and he has done nothing since to change that condition of things. It follows that the appellant is not entitled to the privileges of the act of 1871, and his claim, both under the acts of Congress and those of the State, has failed."

Every question that might now be presented seems to have been fully passed upon by the court in the decision referred to; but independent of this, from a careful review of the record now before me, I can see no ground for disturbing the action of the Department in certifying the land to the State for the benefit of said road, and hence the application of Cayce should be rejected.

Your decision is reversed.

D.

REVIEW—JURISDICTION.

CAYCE *v.* ST. LOUIS AND IRON MOUNTAIN R. R. CO.

The Department will not take jurisdiction where such action involves the consideration of a question finally determined by a decision of the Supreme Court of the United States.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

This record presents a motion for review, filed by William H. Cayce, in the case of Cayce *v.* St. Louis and Iron Mountain Railroad Company, decided by this Department November 25, 1887 (6 L. D., 356).

In that case it was held that the record presented the ground for disturbing the former action of the Department in certifying the tract in dispute to the State of Arkansas for the benefit of said road, and the application of Cayce to make homestead entry for the same was rejected. In reaching that conclusion the Department said: "Every question that might now be presented seems to have been fully passed upon by the court" in the case of Nix *v.* Allen (112 U. S., 129).

It appears that in 1846 one Mrs. Nix settled upon and took possession of the NE. ¼, sec. 30, T. 15 S., R. 28 W., Camden land district, Arkansas, and on April 22, 1853, filed her pre-emption declaratory statement, alleging settlement April 1, 1853; and that on March 31, 1854, she made pre-emption cash entry for only a portion of said tract, viz, the NE. ¼ of said NE. ¼, and a patent therefor issued to her. William H. Cayce herein seeks to make homestead entry of the remnant of Mrs. Nix's original claim, viz, the W. ½ and the SE. ¼ of NE. ¼ of said section, on the ground that said last described land was excepted from the operation of the railroad grant, within the limits of which it lies, by the claim of Mrs. Nix.

On February 9, 1853, Congress passed an act granting lands to the State of Arkansas to aid in building a railroad from a point on the Mississippi opposite the month of the Ohio to the Texas boundary line, near Fulton, in Arkansas. The grant was of even sections along the line and the land in controversy lies in one of such sections. The line of the road was definitely located opposite said land, as found by your office on August 11, 1855.

The granting clause of said act is as follows:

"That there be, and is hereby, granted to the States of Arkansas and Missouri, respectively, for the purpose of aiding in making the railroad and branches as aforesaid, within their respective limits, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which lands, being equal in quantity to one-half of six sections in width on each side of said road, the States of Arkansas and Missouri shall have and hold to and for the use and purpose aforesaid."

It will be noted that the only exception from the grant was of such of the even sections as should, upon definite location of the line, be found to be *sold* or to which the *right* of *pre-emption* had attached. The precise question presented, therefore, is: Had Mrs. Nix a right of pre-emption to this land on August 11, 1855, the date of definite location?

This question involves a further recital of the facts in the case.

It appears that on September 28, 1858, Mrs. Nix conveyed the forty-acre tract entered by her as above recited to her son, John B. Nix, who with his mother continued to reside on said tract, at the same time used and cultivated some parts of the adjoining tracts now in dispute. The actual residence of both, however, until the mother's death in 1863, and thereafter the home of the son, was on the 40-acre tract patented to Mrs. Nix as aforesaid.

On January 16, 1855, the State of Arkansas transferred said grant so far as it relates to this land to the Cairo and Fulton Railroad Company, of which the present claimant company is the successor.

On July 13, 1857, the Commissioner of the General Land Office certified the land here in dispute to the Cairo company, which company on May 14, 1875, sold and conveyed it to one Thomas Allen, who thereupon brought suit in ejectment against John B. Nix to recover possession of the same and obtained judgment against him.

Nix brought a suit in equity, in the circuit court of the United States, to enjoin

the execution of that judgment and the case reached the Supreme Court of the United States on appeal (*supra*).

After reciting the facts of the case that court said:

"The settlement and claim of Mrs. Nix were made under the act of September 4, 1841 (5 Stat., 453), and in that statute it was expressly provided (sec. 10) that 'no person shall be entitled to more than one pre-emptive right by virtue of this act.' When, therefore, Mrs. Nix, on the 31st of March, 1854, made her pre-emption entry of the NE. ¼ of the quarter-section on which she settled, and as to which she filed her declaratory statement in 1853, she, in law, abandoned her settlement on the other three-quarters of the quarter section for the purposes of pre-emption, and surrendered all the pre-emption rights she ever had in them. This is clearly shown by the provisions in sec. 13, 'that before any person claiming the benefits of this act shall be allowed to enter such lands' he shall make oath 'that he has never had the benefit of any right of pre-emption under this act.' The right of pre-emption is the right to enter lands at the minimum price in preference to any other person, if all the requirements of the law are complied with. The prior settlement, declaratory statement, and proof are not the pre-emption, but only the means of securing the right of pre-emption. By *entering* the forty acres in 1854 Mrs. Nix exhausted the one right of that kind which the law secured to her, and she could not claim another. She could have entered the whole one hundred and sixty acres at that time if she wished to, and had the money, but such an entry would have required two hundred dollars, and she had but fifty. The fifty would pay for forty acres, and so she bought that and gave up the rest. The law made no provision for entering a part of the quarter-section at one time, and saving a right to enter the remainder at another."

The court refused the injunction.

In view of that decision I am of opinion that the question whether Mrs. Nix had a right of pre-emption in said tract on the 11th day of August, 1855, is not open for me to pass upon. The Supreme Court of the United States have settled the exact question by deciding that she had no right of pre-emption at that time. It seems to me it would be somewhat strange after Thomas Allen had recovered in a suit of ejectment the possession of these three forties and turned Mrs. Nix's representative and heir out of possession and after the Supreme Court had refused at the suit of such heir to interfere with that decree, for the Department to take jurisdiction of the case and issue patent to somebody and start him into a lawsuit. I cannot regard it as within our jurisdiction at all.

Without entering further into other phases of the case, the motion for the reasons herein stated is denied.