# OPINION OF THE ATTORNEY GENERAL

## IN THE CASE OF THE

## "SOSCOL RANCHO."

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ATTORNEY GENERAL'S OFFICE,
*May* 26, 1866.

To Hon. JAMES HARLAN,
*Secretary of the Interior*:

SIR—According to the view I take of the case of the "Soscol Rancho," stated in your letter of the 21st inst., it is entirely unimportant to determine at what time that tract became open to settlement under the general pre-emption laws, since, in my opinion, Congress had full power to dispose of the lands claimed by settlers under the pre-emption laws at any time before the proof and payment required by those laws were made. The purpose and effect of the act of March 3, 1863, were to remove from entry at the Land Office, by persons claiming to be settlers under the pre-emption laws, all the land within the limits of the "Soscol Rancho," in California, until the expiration of twelve months after the return of the public surveys authorized by the statute to be extended over the tract of country embraced by that Rancho. During that period each purchaser from Vallejo or his assigns was authorized to enter according to the lines of the public survey, at a dollar and a quarter per acre, so much of the land purchased from Vallejo, or those claiming under him, as he had reduced into possession at the date of the adjudication of the Supreme Court, which determined the invalidity of Vallejo's title. It was not until the expiration of the time limited for the establishment of the claims of the purchasers from Vallejo that any part of the land in "Soscol Rancho" was liable, after the passage of the act of 1863, to be dealt with as other public land; and then only such lands as remained unclaimed by purchasers from Vallejo or his assigns, or were

embraced by claims of those purchasers which had been rejected by the register and receiver, were thrown open to entry under the general pre-emption laws. In this view of the purpose and effect of the statute of 1863, I have no difficulty in saying, in reply to your second inquiry, that a party who, prior to the passage of the act of March 3, 1863, commenced or continued a settlement in person upon a parcel of land within the "Soscol Rancho," and so complied with the terms and conditions of the pre-emption laws as to be entitled by virtue thereof, on making the proof and payment thereby required, to enter such parcel and obtain a patent therefor, is precluded from making such entry and obtaining such patent, if the parcel claimed forms a part of a tract of land which at the time of the adjudication referred to had been reduced to possession by a *bona fide* purchaser from Vallejo or his assigns, who within the period and in the mode prescribed by the statute of 1863, made claim to such tract, accompanied by the required proof showing his *bona fide* purchase, settlement, and reduction into possession of such tract.

It is not to be doubted that settlement on public lands of the United States, no matter how long continued, confers no right against the Government. It only gives the settler under the pre-emption laws, a right to enter the land occupied and improved when it is open to sale, and when he has complied with the conditions as to proof of settlement and improvement and payment of the consideration prescribed by the statutes. It is compliance with those conditions that alone vests an interest in the land.

The land continues subject to the absolute disposing power of Congress until the settler has made the required proofs of settlement and improvement, and has paid the requisite purchase money. Before those steps are taken for the designation and assertion of his claim, Congress may at any time intervene, and either exempt the land from entry, location, or appropriation, or dispose of it by grant to other parties. Before proof and payment are made, the only right which the settler has is an inchoate right of entry. When proof and payment are duly made, his right of entry becomes choate and he acquires (perhaps even before entry) a vested interest in the land. The question may be a delicate one, whether Congress can impair a vested right of entry; but there is no doubt that before the settler has taken the steps necessary to convert the privilege of pre-emption into a vested right of entry, by establishing the fact of his settlement and

paying the purchase money in the manner prescribed by law, Congress has absolute power to place the land beyond the operation of the statutes under which the settlement was made.

Pending the adjudication of the claim presented by Vallejo to the Board of Land Commissioners under the act of 1851, the lands embraced by his claim were not liable to be dealt with as public lands of the United States. The statute of 1851 declares, that "all lands (in California) the claims to which have been finally rejected by the commissioners * * or which shall be finally decided to be invalid by the district or Supreme Court * * * shall be deemed, held, and considered as a part of the public domain of the United States." When, therefore, the Supreme Court reversed the decree of the district court affirming the validity of Vallejo's claim to the "Soscol Rancho," the lands embraced thereby became public lands, and liable to be appropriated by Congress, under its general constitutional power over the subject.

It is not necessary to determine whether, immediately on the decision of the Supreme Court, or at any time after, the lands in question, by operation of any statutes, became subject to pre-emption; whether, in other words, there was any law under which persons not claiming under grants from Vallejo or his assigns could have acquired by settlement proof thereof, and payment of purchase money, a right to enter the lands at the land office, if such right had not been defeated by the statute of 1863.

I assume that the lands embraced by the Vallejo claim fell, upon the adjudication of the Supreme Court, under the operation of the general pre-emption laws, as other public lands, or were subject to the operation of special laws of that denomination, applicable to public lands in California. But under those laws settlers could acquire, as I have already stated, no interest, which it was not competent for Congress to direct, until they had taken all the steps necessary to perfect their right, to make entries of the lands settled and improved.

They were required not only to file declaratory statements within a time limited after the receipt at the district land office of the plats of the township embracing such settlements, but they were required also to establish their claims in the manner prescribed by law, and to pay the nominated consideration for the lands; and it was not until those proceedings at the land office had all been completed and consummated that any vested right or interest could be acquired

which it was incompetent for Congress to disturb or affect by its legislation.

Now, I understand from your statement of the facts of the case under consideration, that although there may have been persons claiming adversely to the Vallejo grantees, who had perfected a right by continued settlement to make proof and payment as required by law, and who would have been entitled to enter the lands at the land office, and to obtain patents if such proof and payment had been actually made, yet that, at the date of the statute of 1863, such persons had not complied with those conditions, on which their right to make entry depended, and was alone capable of being perfected.

On the passage of the act of 1863, the right of such persons to make proof and payment, and of necessity therefor to make entries of the lands claimed by them, was placed in abeyance, and, by the operation of that statute, remained in abeyance until it was ascertained in the manner designated by the act, that the lands claimed had not been, at the date of the adjudication of the Supreme Court, reduced into possession by a *bona fide* purchase from Vallejo or his assigns, either through the neglect of any such purchaser to present his claim to the register and receiver, within the time limited by the statute, or through the failure of any such purchaser to establish his title to the tract comprehending the lands claimed under pre-emption laws.

Congress, by the act of 1863, made new and different disposition of the property. It was passed in recognition of the high equities of the purchasers from Vallejo, whose claim was rejected on technical grounds by the supreme appellate tribunal, and was intended to afford such relief as not only a beneficent but a just government was bound to extend to persons in their situation.

It declared, without qualification, that every purchaser from Vallejo or his assigns, might buy at the minimum price as much of the land as he had reduced into possession under his deed of conveyance when the adjudication occurred, and it gave him twelve months after the return of the survey within which to prove his title under Vallejo, and the extent to which the land claimed was at that date in his possession. If, within the time limited for these proceedings, any such purchaser duly established his title under Vallejo, he was entitled to enter, and obtain a patent for all the land which he proved had been reduced into his possession at the date of the decree of the Supreme Court, although a part of such

tract was claimed by settlers who may have acquired before the passage of the statute of 1863, a right to enter the land they claimed, on making the proof and payment required by the pre-emption laws.

It would seem to be unnecessary, in view of the foregoing considerations, that I should make extended answer to the second question stated in your letter.

I have already said that a settler under the pre-emption laws, acquires and can acquire no vested interest in the land he occupies by virtue simply of settlement; and that no vested interest is obtained until the settler has taken all the legal steps necessary to perfect an entry in the land office. Before such steps are taken, he has nothing but a contingent, personal privilege to become, without competition, the first purchaser of the property which he may never exercise, or which he may waive or abandon.

During the interval between the institution of the settlement, and the establishment of the claim by proof, and payment of the consideration nominated in the law, Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make an absolute grant of the land to other parties, with or without consideration. There is no constitutional objection to the exercise by Congress of any power over the land after settlement made, but before right of entry has been perfected, that it was competent to exercise before the land was thrown open to pre-emption.

Entertaining these opinions, I cannot doubt that Congress might, as against persons who, before the passage of the act of 1863, had actually settled upon the land in question, but who had not perfected their right of entry in the manner indicated, confer upon claimants under Vallejo an absolute title to all the land which they might prove was purchased from him or his assigns, and was reduced to possession at the date of the decision of the Court.

This power, I am of opinion, also, Congress exercised by enacting the statute of 1863. It appearing, therefore, that a claimant under Vallejo was in possession, at the date of the decision, of any part of the land called for by his deed or purchase, his right to enter the tract so possessed, and obtain a patent therefor, is rendered absolute by the statute of 1863, and no supposed equity based upon simple settlement, set up by a claimant under the pre-emption laws, can prevail against that right, or should be allowed to interfere with the

full consummation of it, according to the intent of Congress.

The last point presented for my consideration is, whether a *bona fide* purchaser of a tract of this land from Vallejo or his assigns, is bound, in order to bring himself within the act of 1863, to prove an actual personal settlement on such tract at the date of the adjudication of the case, or whether a settlement at that date on such tract, by another person as the tenant of such purchaser is sufficient, although such purchaser be a non-resident of California.

The Supreme Court, in Hickie *et al. vs.* Starke *et al.*, (1 Peters, 98,) in giving interpretation to the words "*actual settlers*," in the cession act of Georgia, held that a settlement made on the land claimed by another person who cultivated it for the proprietor, was sufficient to satisfy the requisitions of the act, though the proprietor neither resided in person on the estate, or indeed, in the territory. Even if there were doubt upon principle as to the legal import of the term "*settlement*," as used in the statute of 1863, I should not hesitate, in view of this high judicial authority on the point, to determine that personal settlement at the date of the adjudication mentioned is in no case necessary to be proved by a claimant under the statute in order to satisfy its requirement. The better opinion I think is, that the two forms of expressions used in the statutes to indicate the particular relation to, or connection with, the land, on the part of the claimant necessary to be established by proof, are, considering their contexts, really convertible, and that the ideas involved in them are not distinguishable. The cardinal idea of the statute was the one conveyed by the expression "*reduced to possession*," the only one employed in section 2, which contains the words of grant on which the rights of the claimants depend. The maxim, *qui facet per alium, facet per se*, whether of universal application in cases of claims under the general pre-emption laws or not, (and I am inclined to agree with Mr. Attorney General Butler in the opinion that it is not,) expresses, in my opinion, the legal rule for the determination of claims under the special act of 1863. It was not the equity possessed by the claimants under Vallejo, derived from settlement, occupation, or cultivation alone of the lands they had purchased, which induced Congress to give the relief provided by that act. The act was passed in recognition of the view so ably and powerfully enforced by Mr. Justice Grier, in his opinion dissenting from the judgment of the Court, that the grant to Vallejo was a genuine grant for a consideration paid, and so universally acknowledged in the country of its origin, which the Mexican government

would never have disturbed on any of the grounds on which the invalidity was affirmed by the majority of the judges of the Supreme Court. That was the superior equity possessed by all *bona fide* purchasers from Vallejo or his assigns, which Congress deemed eminently worthy of protection. If the grant set up by Vallejo had been rejected as fabricated or spurious, there is no reason to believe that Congress would have extended protection to any who deduced title through such a grant, however strongly their claims as mere settlers or occupants of the land might have been commended to its consideration. Congress did not require the claimant to prove any connection with the lands which they had purchased earlier than the the date of the adjudication of the case; it was not thought that parties whose relations to the property were of earlier inception had superior rights to those possessed by persons who at that date had reduced the lands they claimed into their possession; nor were the equities of the latter deemed in any sense inferior to the equities of the former. The beneficent provisions of the statute were grounded upon a consideration higher and deeper than the settlement of the lands by the Vallejo claimants; they were suggested and framed in the belief that those claimants possessed an equity as purchasers of a genuine though defective title derived from Mexico, to which this government in good faith was bound liberally to extend protection.

I hold, therefore, that in view of the general policy of the statute, it is the duty of the department charged with its execution to give such construction and effect to its provisions as is most consonant with its reason, and will best promote its objects. I think it was plainly the intention of Congress to enable any *bona fide* purchaser from Vallejo or his assigns, whether resident or not of California, who should prove within the time limited that he had effected, either personally or through a tenant, a settlement of a part of the tract embraced by his claim, to acquire the title thereto from the United States.

I am, sir, most respectfully,

(Signed)

JAMES SPEED,
*Attorney General.*