SPOKANE FALLS & N. RY. Co. v. ZIEGLER.

(Circuit Court of Appeals, Ninth Circuit. April 12, 1894.)

No. 81.

1. PUBLIC LANDS—RIGHT OF WAY OF RAILROADS.
Act Cong. March 3, 1875, which provides that "the right of way through the public lands of the United States is hereby granted" to any duly-organized railway company which shall perform the conditions prescribed by the act, does not entitle such company to a right of way over lands which are in the possession of a qualified pre-emptor who has made final proof, tendered the purchase money, and demanded his final receipt.

2. EMINENT DOMAIN—COMPENSATION.
Under the laws of the territory of Washington which provide that where land is taken for the right of way of a railroad compensation shall be made to the owner "irrespective of any increased value thereof by reason of the proposed improvement," any question as to the value of the land before and after the road was built is irrelevant.

In Error to the Circuit Court of the United States for the District of Washington, Eastern Division.

This was an action by Ziegler against the Spokane Falls & Northern Railway Company, in which plaintiff had judgment and defendant brings error.

Jay H. Adams and McBride & Allen, for plaintiff in error.
George Turner, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This case comes on writ of error from the circuit court, for the district of Washington, eastern division. Defendant in error recovered judgment, after a verdict by jury, against plaintiff in error, for damages for an appropriation of a strip of land, part of the E. ½ of S. E. ¼, section 4, township 25, range 43 E., W. M. The defendant in error was, on the 1st day of May, 1889, in possession of said land as a pre-emptor, having the legal qualifications of such, and had made final proofs, and had tendered the purchase money, and demanded his final receipt. The money was not received, on account of a contest in the land office. The plaintiff in error, defendant in the court below, is a corporation under the laws of Washington, for the purpose of constructing and operating a railroad from the city of Spokane Falls, in a northerly direction, through the counties of Spokane and Stevens, to the Columbia river. The evidence also shows that plaintiff in error filed in the office of the secretary of the interior a copy of the articles of incorporation, and afterwards, in 1889, commenced the construction of its road, and surveyed and marked the line of its road, which line ran over the lands of the defendant in error, and, within 12 months after locating said line, filed a profile map thereof with the register of the land office of the district in which the land is situated, which map was approved by the secretary of the interior, and afterwards constructed its road; and the plaintiff in error therefore contends that under said acts, and under the act of congress ap-

proved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," it became the owner of a right of way across the land of the defendant in error, and that the circuit court erred in admitting proof of his entry of the land, and tender of payment therefor, and patent from the United States. The act of congress referred to above is as follows:

"That the right of way through the public lands of the United States is hereby granted to any railway company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad. Also ground adjacent to such right of way, for station-buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. * * * Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four. Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way. Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale."

The act did not operate as a present grant. Its words are: "That the right of way through the public lands is hereby granted to any railroad company." The opening words of section 4 of the Oregon donation act are: "That there shall be, and hereby is granted to every white settler, or occupant of the public land." In neither act is there a grantee, and the supreme court said, in construing the latter act, in Hall v. Russell, 101 U. S. 509: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee." And the court further said that, in all cases where a grant was given a present effect, a state, or some corporation having all of the qualifications specified in the act, had been designated as a grantee. In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named. The act, therefore, did not give a right of way presently, but entitled any company to obtain the right of way upon performing certain condi-

tions, and its right attached upon filing a profile map of its road, as provided in section 4. It will be observed that the provision of section 4 is that, after filing the profile of the road, all lands over which the right of way shall pass shall be disposed of subject to such right of way. Lands, therefore, which had been disposed of theretofore, were exempt. The pre-exemption laws are certainly a means of disposing of the public lands, and an entry of record under them, valid on its face, is such an appropriation of the tract entered as segregates it from the public domain, and precludes it from subsequent grant. Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350. An express reservation is not necessary. Wilcox v. Jackson, 13 Pet. 498; Leavenworth, etc., R. Co. v. U. S., 92 U. S. 745. That pre-emption claims are exempted from the grant is supported by section 3 of the act. It is as follows:

"Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

Counsel for plaintiff in error urges that by the words "possessory claims" congress intended only to protect the improvements of a settler. The explanation is not adequate. See, also, Enoch v. Railway Co. (decided by the supreme court of Washington; opinion filed May 24, 1893) 33 Pac. 966. The cases of Railroad Co. v. Baldwin, 103 U. S. 426, and Railroad Co. v. Tevis, 41 Cal. 489, do not militate with the conclusions we have reached. In the former case the grant was a present one, and necessarily, as the court said, all persons acquiring any portion of the public lands after its date took subject to the grant. In the case of Railroad Co. v. Tevis, the plaintiff was the successor of the Central Pacific Railroad Company, who had been granted by congress a right of way over the public lands Kerr claimed as a pre-emption, and though he had settled on the land, and had improved it, he had not filed a declaratory statement when the right of way attached. The court held that he was neither the owner nor a claimant of the land within the meaning of section 3 of the act granting the right of way to the railroad, which provided a means of ascertaining damages in case the owner or claimant of the land and the railway company could not agree. The facts of the case, therefore, and the one at bar are different.

The plaintiff in error claims that the circuit court erred in sustaining an objection to the following question:

"Q. How much less, if any, was this tract of land worth that spring (1889) after the road had been constructed over it, and with the road upon it as it is now constructed, than it was worth that spring before the road was constructed, and before it was known that the road was going to be constructed over it?"

The appropriation of the land was made on the 5th day of June, 1889, while Washington was a territory, and the law of the territory then was that compensation should be made to the owner of land taken "irrespective of any increased value thereof, by reason of the proposed improvement." In support of the relevancy of the question, plaintiff in error cites Railroad Co. v. Coleman, 3 Wash. St. 234, 28 Pac. 514. This case, however, was overruled in Enoch v. Railway Co. (filed May 24, 1893) 33 Pac. 966. The circuit court, therefore, did not err in sustaining objection to the question. Judgment is affirmed.

In re QUAN GIN.

(District Court, N. D. California. May 8, 1894.)

No. 10,948.

CHINESE MERCHANTS—FIRM NAME.

Act Cong. Nov. 3, 1893, provides that a Chinaman seeking entrance into the United States on the ground that he was formerly engaged as a merchant therein must show that his business was conducted "in his own name." *Held*, that such person must be excluded where it appears that the business was conducted under a firm name of which his own name was no part, though there is evidence that he was a partner, and that Chinese merchants do not, in general, conduct business in individual or partnership names.

Exceptions to Special Referee and Examiner's Report, recommending discharge. Exceptions taken by the United States. Exceptions sustained.

Thos. D. Riordan, for petitioner.
Charles A. Garter, U. S. Atty.

MORROW, District Judge. The petition in this case alleges that Quan Gin is unlawfully restrained of his liberty on board the steamship Belgic, on the claim made by the master of the vessel that Quan Gin is not entitled to land, under the provisions of the act of May 6, 1882, and the acts amendatory thereof and supplementary thereto. 22 Stat. 58, 23 Stat. 115, 25 Stat. 504, 27 Stat. 25. The petition alleges that these acts do not apply to him, and that he is entitled to land, and come into the United States, by reason of the fact that he is not a laborer, but a merchant, and a member of the firm of Yow Kee & Co., dealers in general merchandise at No. 17 Waverly place, and for more than one year prior to his departure was a member of the said firm.

A Chinaman claiming to be a merchant, and making application for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, is required by the act of November 3, 1893 (28 Stat. 7), to establish by the testimony of two credible witnesses, other than Chinese, the following facts: (1) That the applicant was engaged, in this country, in buying and selling merchandise, (2) at a fixed place of business; (3) that the business was conducted in his own name (4) for at least one year before his departure from the United States; (5) that during such

year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant.

In support of the petition, Quan Gin testifies that he came to this country, first, in the year 1878; that he went to China, the last time, on the steamer Gaelic, in November, 1892; that when he went to China he was in the firm of Yow Kee (general merchandise), No. 17 Waverly place; that the total capital of the firm was $11,000; that there are 10 partners in the firm, including himself, and his interest was and is $1,000; that he had been a member of the firm prior to his departure for China, for seven or eight years; that he was assistant bookkeeper and collector; that Lim You is the manager of the firm, and Lim Lung interpreter. Neither of these two persons so identified as being connected with the firm is produced as a witness, but a Chinaman named Lim See is called, who testifies that he has an interest of $1,000 in the general merchandise firm of Yow Kee, No. 17 Waverly place. This witness is not otherwise identified as belonging to the firm. He testifies, however, that Quan Gin had an interest amounting to $1,000; that Quan Gin was the outside man, and also kept the accounts. T. F. Scott, a drayman, testifies that he knows Quan Gin, who had a store on Clay street, and moved up to Waverly place; that the firm name was "Yow Kee." The witness understood that Quan Gin was a partner; saw him around the store, attending to the business of the firm, and performing such acts as a partner would perform. James W. Waldie, bookkeeper for the American Biscuit Company, testifies that he thinks he has known Quan Gin for six or seven years. He has been buying crackers from the company. He thinks the firm name was "Yow Kee," but whether Quan Gin was a member of the firm he would not swear to, inasmuch as he could not swear to any man being a member of a firm. M. W. Levy, a produce and commission merchant, testifies that he remembers Quan Gin. He had a store on Clay street, and afterwards at No. 17 Waverly place. He does not remember the store name, but, to the best of his knowledge and belief, Quan Gin was a member of the firm. He says he sold the firm potatoes for seed, beans, and strawberry plants, and other little things. No explanation is given why it is alleged in the petition that Quan Gin is a member of the firm of Yow Kee & Co., and no testimony submitted to support that allegation. It seems to be assumed that the testimony that he was a member of the firm of Yow Kee is sufficient, but no explanation is furnished as to how he could be a member of a firm designated by a single individual name. In the argument it was said that Chinese merchants select words of supposed lucky import for company or firm names, but there is no proof upon that point in the case; and the court is not advised, even by counsel, as to whether "Yow Kee" is a word or a name. The fact that in the petition the firm name is given as "Yow Kee & Co." would indicate that the name is not a word, but the business title of two or more individuals associated together. The law requires that, to establish the character of a merchant for a Chinese person seeking to enter the United States, it must appear,

among other things, that the business in which he was engaged "was conducted in his own name." As there is no proof in this case that Quan Gin conducted any business in "his own name," and no explanation is given of the fact that his name does not appear in the firm name, as is usual in partnerships in this country, he must be refused a landing, in accordance with the express direction of the statute. But the question submitted to the court for determination is as to the character of evidence required to establish the fact that a merchant is conducting business in his own name. Must his name appear, either individually or as a partner, in the conduct of the business? The attention of the court has been called to an opinion of the attorney general of the United States, dated April 6, 1894, in which he holds that:

"A Chinese person does not bring himself within the statutory definition of 'merchant,' unless he conducts his business either in his own name, or in a firm name of which his own is a part."

It is contended, in opposition to this view of the law, that such an interpretation will exclude nearly every Chinese merchant seeking to enter the United States, since, as before stated, it is claimed that Chinese merchants do not, as a rule, conduct their business affairs in individual or partnership names. This may be so, but, if it is so, it is a consideration to be addressed to the lawmaking power, and not to the court.

"The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by an act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene." Fong Yue Ting v. U. S., 149 U. S. 713, 13 Sup. Ct. 1016.

The attorney general gives a most convincing reason for his interpretation of the statute. He says:

"This requirement that a merchant must conduct the business in his own name can have but one purpose, to wit, that he who is a merchant in fact shall also be known to be such by the parties with whom he deals, and by the public generally. That purpose could readily be defeated if it were possible to conceal his identity by trading under an assumed name, or under the disguise of a 'Co.'"

When it is considered how easy it is for a Chinese person seeking admission into the United States to claim a small interest in the business of buying and selling merchandise, it is evident that the statute has been wisely framed to prevent the admission of Chinese persons into the United States upon the fictitious and fraudulent claim that they are merchants. In my opinion, therefore, when an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in business in this country as a merchant, he must, before being admitted, establish by the testimony of two credible witnesses, other than Chinese, among other things, that he conducted the business in which he was engaged, either in his own name, or in a firm name of which his own is a part. The exceptions of the district attorney to the report of the commissioner are sustained.

KRAFT v. UNITED STATES.

(Circuit Court, S. D. New York. April 20, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—PRINTED TISSUE PAPER.

Tissue paper having certain colors, in stripes and plaids, printed or stamped thereon, and not of one uniform color, *held* to be dutiable at 8 cents per pound and 15 per cent. ad valorem, under paragraph 419 of the act of October 1, 1890, as "tissue paper, white or colored," and not at 25 per cent. ad valorem, under paragraph 423, as "printed matter, not specially provided for."

Appeal by Importers from Decision of Board of United States General Appraisers. Decision affirmed.

The importations consisted of white tissue paper, printed on one side with colored stripes and plaids. The collector assessed duty thereon under paragraph 419 of the act of October 1, 1890. The importers duly protested, claiming same to be dutiable as "printed matter," under paragraph 423 of said act. The board of United States general appraisers sustained the collector's classification. The contention of the importers was that "colored" tissue papers were commercially confined to those dyed in a vat, and that the articles in suit were not known in trade and commerce as "colored," but as "printed tissues," "striped tissues," and "plaid tissues," and were "printed matter."

Stephen Greeley Clarke, for importers.
Henry C. Platt, U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). This is an appeal from the decision of the board of general appraisers classifying certain paper as "tissue paper" under the provisions of Schedule M, par. 419, of the tariff act of 1890. Certain colors and patterns have been printed or stamped on the paper in question. The importer claims that it should be classified as "printed matter," under paragraph 423 of said act. The decision of the board of appraisers is affirmed, because the method by which the paper was colored does not affect its character as "colored tissue paper," and, furthermore, because the article does not fall within the class of "books, etchings, maps, charts, and all printed matter," embraced within the provisions of paragraph 423.

PARK et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 3, 1894.)

CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—TRUFFLES.

Truffles *held* to be dutiable at 45 per cent. ad valorem, under paragraph 287 of the tariff act of October 1, 1890, within the clause, "Vegetables of all kinds, prepared or preserved, including pickles and sauces of all kinds, not specially provided for," and not at 40 per cent. ad valorem, under paragraph 271, as assimilating to "mushrooms, prepared or preserved in tins, jars, bottles or otherwise."

Appeal from Decision of Board of United States General Appraisers. Board.

Park & Tilford, in 1891, imported truffles in bottles. Duty was assessed thereon by the collector of customs at New York at 45 per cent. ad valorem, under paragraph 287 of the act of October 1, 1890.