

the person whose duty it is to repair the appliances of the business knows, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for his neglect. (4) If the jury believe from the evidence, under the foregoing instructions, that the boiler which exploded and injured plaintiff was defective and unfit for use by reason of the cracked and broken condition of the stay bolts that held same together, and that defendant's servants, whose duty it was to repair said machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such knowledge upon the part of its servants is imputable to the defendant, and, if said boiler exploded by reason of such defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted on plaintiff by such explosion, if plaintiff in no way, by his own neglect, contributed to his own injuries. (4a) If the boiler that exploded and injured plaintiff was reasonably safe for the purposes for which it was being used, and it exploded, not by reason of any defects in its stay bolts or rivets, but by reason of an excessive head of steam, then you will find for the defendant. (5) An employer of labor in connection with machinery is not bound to insure the absolute safety of the mechanical appliances which he provides for the use of his employes, nor is he bound to supply for their use the best and safest or newest of such appliances; but he is bound to use all reasonable care and prudence for the safety of those in his service by providing them with machinery reasonably safe and suitable for use, and the like care devolves upon the master to keep it in repair. (6) The burden of the proof is on the plaintiff throughout this case to show that the boiler and engine which exploded were improper appliances to be used on its railroad by the defendant; that, by reason of the particular defects pointed out and insisted on by plaintiff, the boiler exploded, and injured plaintiff. The burden is also on plaintiff throughout to show you the extent and character of his injuries, and the damage he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion (if the evidence convinces you that such there were), and that he did not, by his negligence, contribute to his own injury."

On the authority of our decision in *Railway Co. v. Barrett*, supra, these cases are affirmed.

SPEER, District Judge, dissents.

[The dissenting opinion of Judge Speer will be found in 71 Fed. 531.]

HARTMANN v. WARREN et al.

(Circuit Court, D. Minnesota. December 18, 1895.)

1. PUBLIC LAND—EFFECT OF ENTRY—WITHDRAWAL FROM SALE.

Land upon which an entry of record, valid on its face, was made under the treaty with the Chippewa Indians, dated September 30, 1854, was thereby appropriated and withdrawn from entry or sale as public land.

2. SAME.

The fact that the certificate or scrip under which the first entry was made may have been illegally issued by the commissioner of Indian affairs, and that the action of the secretary of the interior in instructing the register of the land office to permit location may have been unauthorized, would not alter the effect of the entry as withdrawing the land from further disposition or sale; the scrip being valid on its face, and the land office records showing an acceptance of the entry.

This was a bill by Emil Hartmann against James H. Warren and others.

D. P. Dyer and P. H. Seymour, for complainant.
James K. Redington and J. M. Wilson, for defendants.

NELSON, District Judge. The tracts of land which complainant seeks to recover in this suit were entered under a certificate or scrip in the nature of a float, issued to one Warren, as a beneficiary, under the seventh clause of the second article of the treaty of 1854 with the Chippewa Indians of Lake Superior (10 Stat. 1110).

A synopsis of the bill of complaint is as follows: September 30, 1854, a treaty was concluded at La Pointe, in the state of Wisconsin, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, by which said Indians ceded to the United States all the lands theretofore "owned by them in common with the Chippewas of Mississippi" lying east of a certain boundary line described in the treaty. By the seventh clause of the second article thereof "each head of a family or single person over twenty-one years of age at the present time, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the president, and which shall be secured to them by patent in the usual form." The defendant James H. Warren, a mixed-blood of the Chippewas of Lake Superior, as such, prior to the 21st day of January, 1875, made claim before the interior department that he was entitled to 80 acres of land under the treaty; and on January 22, 1875, the commissioner of Indian affairs, by authority of the secretary of the interior, issued a certificate to Warren that he was entitled to locate land thereunder. January 20, 1885, Warren executed to one Joseph H. Sharp two powers of attorney; one authorizing a location to be made in the name of said Warren for the 80 acres of land to which he claimed to be entitled; the other giving Sharp power to sell the land so to be located. On October 15, 1885, Sharp selected and located the premises in controversy, in the name of Warren, under the certificate, and on the same day conveyed the same lands to Kristian Kortgaard, one of the defendants herein. On March 11, 1889, and while the location of Warren was subsisting and pending, complainant, Hartmann, applied to the register and receiver of the land office at Duluth, Minn., to locate these premises with two Porterfield warrants; but the application was rejected, for the reason that the lands were embraced in the location previously made by Warren. March 19, 1889, Hartmann appealed from the decision of the local land officers, and at the same time filed his application to contest Warren's entry. On October 16, 1889, the commissioner of the general land office affirmed the decision of the register and receiver, and denied the application to contest the entry. The secretary of the interior, however, on appeal, held that the affidavits of Hartmann contained allegations sufficient to warrant a hearing; and upon the same being had at Duluth, in January, 1893, the land officers there decided that Warren was a beneficiary under the treaty; that he had power to sell his right in advance of location and patent, and to execute the powers of attorney before referred to. This decision, on appeal, was affirmed by the commissioner of the general land office and by the secretary of the interior. In December, 1894, a patent for the lands in suit was issued to Warren, and this title is the one in controversy. Com-

plainant then prays that the title be vested in him; for an injunction restraining defendants from entering upon or removing ore from the land, and for further and other relief. Separate demurrers are interposed by the defendants.

The particular facts alleged in the bill, in my opinion, decisive of this case, are: (1) That Warren is a mixed-blood of the Chipewas of Lake Superior; (2) that the tracts of land mentioned in the bill were located by Sharp for Warren, October 15, 1885, as a beneficiary under the treaty; (3) that the application of complainant to enter these lands with Porterfield warrants was not made until 1889, more than three years after the entry of Warren. The act of congress of April 11, 1860, under which the Porterfield warrants were issued, provided that they may be "located on any public lands which have been surveyed, and which have not been otherwise appropriated at the time of such location." The application of complainant to enter these lands was rejected by the local land officers at Duluth, for the reason that the premises were embraced in the previous location made by Warren. True, this decision rejecting complainant's application was reversed by the secretary of the interior in 1892, for the purpose of allowing a hearing upon the allegations of contest; but, after protracted investigation in the land department, Warren's location was sustained, and a patent issued.

The question presented is, what was the effect of Warren's entry upon the lands embraced therein? Were they public lands thereafter, not otherwise appropriated, within the meaning of the act of April 11, 1860? It is well settled that all land to which any claims or rights of others have attached does not fall within the designation of "public land." *Bardon v. Railroad Co.*, 145 U. S. 538, 12 Sup. Ct. 856. Lands originally public cease to be such when thus entered, and in no just sense can be said to be public after they have been entered at the land office, and a certificate of entry obtained. *Witherspoon v. Duncan*, 4 Wall. 218. The uniform decisions of the United States supreme court are to this effect, and as said by the court in *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112:

"The almost uniform practice of the department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated, and withdrawn from subsequent homestead entry pre-emption settlement, sale, or grant, until the original entry be canceled or declared forfeited."

The early case of *Cunningham v. Ashley*, 14 How. 387, is also to the same effect, as indicated by the opinion. In that case, New Madrid warrants had been located on the land, and these locations were controlled by the defendants. The complainant's entry was rejected on the ground of these previous New Madrid locations, and all subsequent attempts at entry were met with this same objection. The court, speaking of these applications, said: "But the locations of the New Madrid warrants were an obstacle then, as they had been on the first application." The reason for so holding is apparent. The lands embraced in these locations were segregated from the public lands, and were appropriated, so that they could not be dis-

posed of by the government until, by some means, the obstacle was removed. So long as these locations were sanctioned, the land department rejected all other applications to enter the lands embraced therein; but when the defendants procured for their own benefit entries of the land in controversy by virtue of certain floats, and relied upon this title only, the complainant's equity was found to be superior. Still, the court ordered that the decree should in no respect affect any right existing under the New Madrid locations.

It is urged by counsel that the certificate or scrip was illegally issued to Warren by the commissioner of Indian affairs, and that the action of the secretary of the interior instructing the register of the land office to permit location was unauthorized. But the scrip, upon its face, entitled Warren to locate it upon public land; and, when the entry was made, it was *prima facie* valid, and the lands became appropriated. The records of the land office showed an acceptance of Warren's entry; and until this obstacle was set aside, and the entry canceled, the land covered by it was not subject to further disposition or sale. Upon the face of the bill, therefore, the complainant has no equitable right or interest which can be enforced. There are other questions presented which would be decisive of the rights of the parties, but in the view I take of the case, as indicated above, it is unnecessary to consider them. The demurrers will be sustained, and a decree ordered dismissing the bill.

EDDY & BISSELL LIVE-STOCK CO. v. BLACKBURN.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1895.)

No. 385.

1. PLEADING—EQUITABLE RIGHTS.

Although, under modern systems of pleading, courts of law, where their remedies are adequate, may enforce equitable rights, it is stringently required that the proof must agree with and support the pleadings, and the relief granted must be within the prayer for relief, and within the grounds alleged and relied on to obtain it.

2. SALE—RECOVERING BACK PART PAYMENT—PLEADING.

Plaintiff and defendant entered into a written contract by which defendant agreed to sell to plaintiff a number of cattle, to be selected by plaintiff in the manner provided in the contract, for \$10 per head, of which \$2,000 was paid on the execution of the contract, and the remainder was "to be paid on the delivery of the cattle," which was to take place between the 10th and 15th days of October, 1893. Shortly after, plaintiff paid defendant \$1,000 more on account. On the 10th day of October plaintiff went to defendant's ranch and selected the cattle, but informed defendant that he could not pay the balance of the purchase money at the time fixed, but hoped to do so in a short while, claiming, at the same time, that the property in the cattle had passed to him, and he was entitled to their delivery without paying such balance. Defendant disputed this claim, but drove the cattle to plaintiff's ranch, tendered them to him, and, upon his failure to pay the balance of the purchase price, drove them back. Plaintiff afterwards sued defendant, setting up the contract and defendant's failure to deliver the cattle, and claiming a return of the \$3,000 paid, and damages for the advanced price of the cattle, and the loss of the use of the grass and water at his ranch, amounting to \$11,000, and alleging his ability and readiness, at the time of bringing suit,