

United States Vs. Gear

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Appellant : United States

Respondent : Gear

Judgement :

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United States v. Gear

44 U.S. (3 How.) 120

APPEAL FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF ILLINOIS

SYLLABUS

The act of Congress entitled "An act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26, 1834, does not require the President of the United States to cause to be

offered for sale the public lands containing lead mines situated in the land districts created by said act.

The said act does not require the President to cause said lands containing lead mines to be sold, because the 5th section of the Act of 3 March, 1807, entitled

"An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut Reserve and for other purposes"

is still in full force.

The lands containing lead mines in the Indiana Territory, or in that part of it made into new land districts by the Act of 26 June, 1834, are not subject, under any of the preemption laws which have been passed by Congress, to a preemption by settlers upon the public lands.

The 4th section of the act of 1834 does in no way repeal any part of the 5th section of the Act of 3 March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized

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the President to lease any lead mine which had been, or might be, discovered in the Indiana Territory for a term not exceeding five years.

The land containing lead mines in the districts made by the act of 1834 are not subject to preemption and sale under any of the existing laws of Congress.

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.

These two cases came up from the Circuit Court of the United States for the District of Illinois, and involved the right of Gear, the defendant, to a tract of land upon which there was a lead mine. The first was an action of trespass *quare*

clausum fregit on the common law side of the court, and the second a bill in chancery with a prayer for an injunction to stay waste on the equity side. The declaration charged Gear with having broke and entered the north half section 23, township 29 north, range 1 east, and the south half of fractional section 8, township 28 north, range 1 east, both being east of the fourth principal meridian, and then and there dug up the mineral lead ore &c.;

The defendant filed six pleas, all resting on the ground that he had settled, resided on, and occupied the land in question in the year 1827 and cultivated a part thereof, and had ever since remained, continued, and still was in the possession thereof, and was lawfully entitled to the preemption right to said quarter section, said premises being subject to preemption rights and not yet offered for sale by the President's proclamation, by reason whereof he, the defendant, dug lead ore or mineral, as he might lawfully do &c.;

To these pleas the plaintiffs replied, in substance, that the quarter-section of land was and always had been the property of the plaintiffs; that it contained a valuable lead mine, the existence of which was well known to the defendant before and at the time he settled upon the land &c.;

To these replications the defendant demurred generally, and the plaintiff's joined in the demurrer.

The same principles were involved in the chancery case, alleged, of course, in a different manner.

When the cause came up for argument in the court below, the judges were divided in opinion, and the questions duly certified to this Court. They are somewhat differently stated in the two cases, and it is proper to mention both.

In the chancery case they are thus stated:

1. Whether the act of Congress entitled "An act to create additional land districts in the States of Illinois, Missouri, and the territory north of the State of Illinois," approved June 26, 1834, so far repeals the 5th section of the Act of 3 March,

1807, entitled

"An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut Reserve and for other purposes,"

as to subject the lands mentioned in said act of June 26, 1834, containing lead mines, to be entered and

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purchased by preemption under any of the preemption laws of Congress?

2. Whether the said act (1834) requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion?

3. Whether lands containing lead mines are subject to be held or purchased under any of the acts of Congress granting the rights of preemption to settlers upon the public lands?

4. Whether the digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to the allowance of a writ of injunction to restrain?

In the common law case, they are thus stated:

1. Does the act of Congress, entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 16, 1834, require the President of the United States to cause to be offered for sale the public lands situate in the land district created by said act, containing lead mines?

2. Does the said act require the President to cause said lands, containing lead mines, to be sold, notwithstanding the 5th section of the Act of 3 March, 1807, entitled

"An act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut Reserve, and for other purposes?"

3. Are the said lands, containing lead mines, subject to preemption under any of the preemption laws which have been passed by Congress?

4. Does the 4th section of the said act of 1834 so far repeal the 5th section of the act of 1807 as to subject the public lands containing lead mines to be sold by the United States in the same manner as other public lands not containing lead mines?

5. Are the said lands containing lead mines subject to preemption or sale under any of the existing laws of Congress?

The acts of Congress referred to are the following:

On 3 March, 1807, an act was passed, 1 Land Laws 162, by the 5th section of which it was enacted,

"That the several lead mines in the Indiana Territory, together with the many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States, and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States shall be considered fraudulent and null. And the President of the United States shall be and he is hereby authorized to lease any lead mine which has been or may hereafter be discovered in the Indiana Territory for a term not exceeding five years. "

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At that time, the land now included within the State of Illinois was part of the Indiana Territory.

In 1827, Gear, the defendant, entered upon the north half of section 23, township 29 north, of range 1 east, erected a house upon it, cultivated and occupied it.

On 10 May, 1830, Congress passed "An act to grant preemption rights to settlers on the public lands," the first section of which was as follows:

"That every settler or occupant of the public land prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby, authorized to enter with the register of the land office for the district in which such lands may be, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land, provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states in which any of the public lands may be situated."

The 4th section declared that the sale of the public lands should not be delayed, nor should the act be available for those who failed to make proof and payment, and concluded as follows:

"Nor shall the rights of preemption contemplated by this act extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

The act was to remain in force for one year after its passage.

On 5 April, 1832, Congress passed an "act supplementary to the several laws for the sale of the public lands," which permitted the public lands to be purchased either in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections, and contained three provisions, the third of which was as follows:

"Provided further that all actual settlers, being housekeepers, upon the public land, shall have the right of preemption to enter, within six months after the passage of this act, not exceeding the quantity of one-half quarter-section, under the provisions of this act, to include his or their improvements, under such regulations as have been, or may be, prescribed by the Secretary of the Treasury,"

&c.;

On 14 July, 1832, Congress passed "An act supplemental to an act granting the right of preemption to settlers on the public lands, approved on 29 May, 1830," which is too long to be quoted. The purport of it was to extend to occupants and settlers the privilege granted by the prior act until one year after the surveys had been made, or the land had been attached to a particular land district.

On 2 March, 1833, an act was passed reviving that of

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April 5, 1832, extending the privileges granted by that act to the same period as those just mentioned, and placing the beneficiaries of the two acts of 5 April and 14 July upon the same footing.

In 1834, two acts were passed, one on 19 and one on 26 June. That of the 19th was to revive the act to grant preemption rights to settlers on the public lands, approved May 29, 1830.

The 1st section declared that every settler or occupant of the public lands prior to the passage of the act, who was then in possession, and cultivated any part thereof in the year 1833, should be entitled to all the benefits and privileges provided by the act of 29 May, 1830, which act was revived and continued in force for two years.

The Act of 26 June was entitled "An act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois."

The 4th section enacted

"That the President shall be authorized, as soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land offices in the respective districts in which the land so offered is embraced, reserving only section 16, in each township, the tract reserved for the Village Galena, such other tracts as have been

granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

On 22 June, 1838, an act was passed, the title of which was "An act to grant preemption rights to settlers on the public lands." It enacted that every actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper, by personal residence thereon at the time of the passage of the act and for four months next preceding, should be entitled to all the benefits and privileges of the act of May 29, 1830, which act was thereby revived and continued in force for two years. It contained a number of provisions, one of which was that it should not be so construed as to give a right of preemption to any land specially occupied or reserved for town lots or other purposes by authority of the United States.

By the Act of 1 June, 1840, the above act was continued in force until 22 June, 1842, subject to the exceptions therein contained.

On 4 September, 1841, an act was passed entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant preemption rights."

The 10th section granted preemption rights to actual settlers, with several limitations and exceptions, two of which were as follows, *viz.:*

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"No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes,"

and "no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

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MR. JUSTICE WAYNE delivered the opinion of the Court.

From the foregoing statement of all the acts of Congress having any bearing on the subject before us, we think it obvious it was not intended to subject lead mine lands in the districts made by the Act of 26 June, 1834, to sale as other public lands are sold, or to make them liable to a preemption by settlers.

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The argument in support of a contrary conclusion is that the reservations in the fourth section of that act, with the authority given to the President to sell all the lands in the districts, any law of Congress heretofore existing to the contrary notwithstanding, exclude lead mine tracts in those districts from the operation of the act of 3 March, 1807. At most, the language of the fourth section of the act of 1834 imparts only an authority to the President to sell, given in the same way as it has been conferred upon him in other acts providing for the sale of the public lands. Then the question occurs, whether the section of an act, in general terms to sell (certain reservations excepted) without any reference to a previous act, which declares that lead mines in the Indiana Territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead mine lands in a part of that territory are subjected to sale as other public lands are. Why should Congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead mine lands in the whole of the Indiana Territory, from 1807 to 1834, be supposed to have meant to exempt a portion of the lead mine lands in that territory from that policy, in an act, the whole purview of which was to create additional land sale districts? Besides, the reservations in the fourth section of the act of 1834, except the tract for the village of Galena, are no more than the reaffirmance of some of the provisions of other statutes respecting reservations made or to be made out of the public lands in other districts, and cannot, therefore, be considered as an enumeration in connection with the general power to sell all lands, any law of Congress heretofore existing to the contrary notwithstanding, repealing another act, providing for a reservation of a particular class of lands within the same land district to which the act of 1834 applies. The reservations in the fourth section of the act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power

of the President to sell lands, which, by law, he never had a power to sell, which have always been prohibited by law from being sold, and which never have been sold, except under the authority of a special statute, such as that of 3 March, 1829, 1 Land Laws 457, which authorized the President to cause the reserved lead mines in the State of Missouri to be sold.

In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject matter of such reservations. Authority, then, to sell all lands in the districts made by the act of 1834, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale, by force of law. The propriety of this interpretation of that section is more manifest, when it is considered, if a contrary interpretation

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is given, that the lead mine lands in one district of the same territory would be liable to sale and preemption, and those in another part of it would not be. Can anyone possible reason be suggested to sustain even the slightest intention upon the part of Congress, when it was passing the act of 1834, to make such difference in respect to lands within the same locality, as have just been mentioned? Could Congress have meant to say, under a power to sell, that it would be lawful to sell in the new land district what it was unlawful to sell in other land districts of the same territory of which the new land district was also a part? And that settlers upon the public lands within the new district should have a right of preemption in lead mine tracts, which settlers upon other lands within the same territory, but not within the new land district, could not have? The mere fact of a new land district having been made out of a part of the territory in which the lead mine lands had been reserved, with the authority to the President to sell all lands in the new district, can have no effect to lessen the force of the original reservation.

In truth, the acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, or to operate as a partial repeal of it. The rule is that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon. Thus, in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines, but a power to sell all lands, given in a law subsequent to another law expressly reserving lead mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation.

In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first -- each performing its distinct functions within the sphere as Congress designed they should do. But further, that the act of 1834 was not intended as a repeal of the act of 1807, in regard to lead mines, so as to grant a right of preemption in them to settlers, is manifest from the fact that an act was passed only seven days before it, reviving an act to grant preemption rights to settlers on the public lands, which excludes settlers from the right of preemption in any land reserved from sale by act of Congress. Thus reasserting, then, what had been uniformly a part of every preemption law before, and what has been a limitation upon the right of preemption in every act for

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that purpose since. We do not think it necessary to pursue the subject further except to say that the view we have here taken of the act of 1834, in respect to lands containing lead mines, and the right of preemption in them, is coincident with the opinion given by this Court in the case of [Wilcox v. Jackson](#), 13 Pet. 513.

That case was well and most carefully considered, and expressed in the deliberate language of this Court. We determined, then, the point being directly in the cause, that the act of 1834 had relation to a sale of lands in the manner prescribed by law, at public auction, and that a right of preemption was governed by other laws. The Court said

"The very act of 19 June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking (meaning the Act of 26 June, 1834), thus showing that the provisions of the one were not intended to have any effect upon the subject matter on which the other operated."

We seen no reason to change what was then the view of the Court. On the contrary, there is much in this case to confirm it. Let it be certified, therefore, to the judges of the Circuit Court of the United States for the District of Illinois that this Court is of the opinion that the Act of Congress, entitled "An act to create additional land districts in the States of Illinois and Missouri, and in the territory north of the State of Illinois," approved June 26, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act. 2d. That the said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the Act of 3 March, 1807, entitled

"An act making provision for the disposal of the public lands, situated between the United States military tract and the Connecticut Reserve, and for other purposes," is still in full force.

To the third question we reply that the lands containing lead mines in the Indiana Territory, or in that part of it made into new land districts by the Act of 26 June, 1834, are not subject, under any of the preemption laws which have been passed by Congress, to a preemption by settlers upon the public lands.

To the 4th question, we reply that the 4th section of the act of 1834 does in no way repeal any part of the 5th section of the Act of 3 of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United

States, by which grants for lead mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana Territory, for a term not exceeding five years.

To the 5th question, we reply that the lands containing lead mines in the districts made by the act of 1834, are not subject to preemption and sale under any of the existing laws of Congress.

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The foregoing answers apply also to the points upon which the judges were divided in opinion upon the bill in chancery, between the United States and the defendant Gear, except the fourth question certified in that case, and to that we reply, that digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.

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MR. JUSTICE Mc LEAN.

I dissent from the opinion of the Court.

The question certified, in my judgment, should be answered in the affirmative.

That it was the intention of Congress to sell at public sale the land in question is clear, if that intention is to be ascertained by their own language.

In the 4th section of the Act of 26 June, 1834, it is provided

"That the President shall be authorized, as soon as the surveys shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said

land districts, at the land offices in the respective districts in which the land so offered is embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

The land lies in one of the land districts above referred to, and is not within any one of the reservations named in the section. This being admitted, is there any ground to doubt that Congress authorized the President to sell all lands covered by the section and not reserved in it. They have said so expressly. The language of the section is so clear as to admit of no other construction. And it would seem to me that such must be our judgment, unless we can judicially say that when Congress speaks in the authoritative language of law, they do not mean what they say. Such a decision would constitute a new rule for the construction of statutes.

It is said that the land occupied by the defendant was reserved by the 5th section of the Act of 3 March, 1807. This is admitted. But the question is whether it was reserved by the act of 1834? The 5th section above referred to provides

"That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States, and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null."

Now the tract in question had on it a lead mine, and, being then within the Indiana Territory, of course, came within the reservation just cited. But such reservation was made only "for the future disposal of the United States." And the act of 1834 does authorize the President to dispose of this and all other tracts in the districts named not specially reserved in that act. This latter act then, by consequence,

repeals the act of 1807. In this respect, the acts are repugnant. They cannot stand together. The first act reserves the land for the future disposal of the United States, and the last act disposes of it. The President is undoubtedly bound within a reasonable time, after the surveys were executed, to issue his proclamation offering for sale, at public auction, the lands in the above districts. And after such sales, all the lands not sold or reserved were open for entry as the law provides. A failure of the President to execute a duty enjoined by law cannot affect any individual right involved in this case.

It is not doubted that if no other consequence resulted from the above construction of the act of 1834 than the mere authority of the President to sell the land, there would have been little or no diversity of opinion on the subject, but a preemptive right in the

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defendant may follow such a construction, and this creates the difficulty in the case. But when the law is clear we should follow it, without regard to consequences.

In my judgment, the preemptive right of the defendant, if he shall bring himself within the law, is as clear as that the President was authorized to sell the land.

By the 1st section of the Act of 29 May, 1830, it is provided,

"That every settler or occupant of the public lands prior to the passage of this act who is now in possession and cultivated any part thereof in the year 1829 shall be and he is hereby authorized to enter, with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land, provided, however, that, no entry or sale of any land shall be made under the provisions of this act which shall have been reserved for the use of the United States,"

&c.;

By the Act of 19 June, 1834, every settler prior to the passage of that act, then in possession, and who cultivated any part of the land in 1833, was declared to be entitled to the benefit of the act of 1830, which act was continued in force two years. And by the Act of 22 June, 1838, it is provided that every actual settler of the public lands, being the head of a family or over twenty-one years of age, who was in possession and a housekeeper by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of the above Act of 29 May, 1830. And that act was declared to be in force two years. In the same section, it was declared that said right should not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

As the Preemption Act of 19 June, 1834, passed seven days before the act which authorized the President to sell the land in question, and as, prior to this latter act, the land was reserved from sale by the acts of 1807 and 1830, the preemption right may not have attached to the residence of the defendant. But if this be admitted, the act of 1807 having been repealed, as above shown, by the 4th section of the Act of 26 June, 1834, there seems to me to be no doubt that the preemption right did attach under the law of 1838. After the land was authorized to be sold, it could no longer be considered as reserved from sale by the act of 1807, and the act of 1838 only excepted, from the right of preemption, such tracts as were at that time reserved by the authority of the United States. In this view, then, it would seem the right of preemption is in the defendant, if he were a resident on the land within the provisions of the act of 1838.

It is said the law authorizing the sale of these lands and the preemption

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laws, being all on the same subject, must be taken together, and so construed as to effectuate the intention of Congress. This is admitted. But does this rule of construction authorize the Court to say that where a subsequent law is repugnant

to a prior one, they may both stand. It is impossible to give effect to both, as they are inconsistent. The truth of this is forcibly illustrated by the acts in question. By the 4th section of the act of 1807, the lead mines are reserved for the future disposal of the United States. By the 4th section of the act of 1834, these with all other lands, not specially reserved in that section, are authorized to be sold. It is true the lead mines are not named in the section as authorized to be sold, but they are not reserved from sale by it, and the authority to sell all other lands not reserved in the section necessarily includes them. Now how are these two laws to stand together. The one reserves the lands for the future disposal of Congress, and the other disposes of them. Can effect be given to both of these laws? Can we say that this repugnancy does not necessarily repeal the act of 1807? A negative answer to this inquiry would add, as I think, a new principle to the construction of statutes. Instead of following the rule on this subject, which is obvious, sensible, and just, we should involve ourselves in the mysteries and uncertainties of the alchemist.

It is said Congress did not intend to dispose of the lead mines and the lands adjacent thereto by the act in question. To this I answer that I have no other mode of ascertaining the intention of Congress except by the plain and unequivocal language which they have used in the solemn form of law. Whether the lead mines were valuable or not, is not a matter of any importance in regard to a right construction of the act. We cannot go out of the law to

ascertain what is meant by it. If it were proper to investigate the policy of reserving dead mines, salt springs and mill seats, for the benefit of the United States, it would not be difficult to show that they had not been a source of revenue to the United States. In most instances, it is believed, if not in all, the expenses of superintendencies have absorbed the profits.

The case of *Brown v. Hunt*, decided at the present term, has a strong bearing upon the principles involved in this case.

It is contended that the main point in this case was decided in [*Wilcox v. Jackson*](#), 13 Pet. 509. In my judgment, that decision

has no bearing on the present question. Beaubean in that case set up a preemption right to the tract of land in controversy, having obtained from the register and receiver of the proper land office a certificate sanctioning his right. But the government showed that the land had been reserved for a military post in 1804, and was occupied as such until, in 1812, during the late war, the fort was taken by the enemy and the troops were massacred. It was reoccupied in 1816, and from that time the government continued to occupy it

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for a military post, as a trading establishment with the Indians and also for a lighthouse, which had been built upon the ground at an expenditure of five thousand dollars. This possession was continued by the government up to the time the preemption was claimed. But in addition to these facts, the 4th section of the act of 1834 specially reserved from sale such places "as the President shall deem necessary for military posts." So that here was not only an express reservation of the land from sale, in the above section, but a reservation in fact was shown of more than thirty years, and a continued possession by the government.

Now is there any similarity, as to the legal points, in the two cases? I can see none. It is true that Mr. Justice Barbour says,

"We do not consider this law (the Act of 26 June, 1834) as applying at all to the case. That has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of preemption, and governed by different laws. The very act of 19 June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, thus showing that the provisions of the one were not intended to have any effect upon the subject matter on which the other operated. But we go further and say that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it,

although no reservation were made of it."

But one of the points above stated was necessary to a decision of the case. The tract in question was reserved for a military post, and such reserves, by the 4th section of the Act of 26 June, 1834, were excepted from the lands to be sold. Now the reservation was fully proved by the evidence, and that, under the above section, ended the controversy. The remark that the above act had no application to the case, was correct in the sense only that it had no application to affect injuriously the title of the government, and that, it is presumed, was the sense in which it was used by the judge. It is strictly true, as stated, that the preemption right set up was assumed to be derived under a different law. But the statement that the above Act of 26 June, 1834, could have no effect upon the Preemption Act which was passed on the 19th of the same month, was not in the case, was unauthorized, and is wholly unsustainable. It was not in the case, because the 4th section of the act of the 26th did reserve the land. No court can deliberately say that an act which is wholly repugnant to a preceding act does not repeal it. And it can be of no importance whether the preceding act had been passed seven days or seven years before the last act; the effect is the same.

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There can be no doubt that when a tract of land is appropriated for a military post or for any other permanent object, it becomes separated from the mass of the public lands, and need not be specially reserved in the president's proclamation for the sale of lands in the same district. And the illustration of Mr. Justice Barbour shows his meaning. "Thus, in the Act of 26 June, 1834," he says, "there is expressly reserved from sale the land granted to individuals and the State of Illinois." "If such lands were sold," says the judge,

"could the purchasers hold them? Certainly they could not. Having been previously granted by the United States, the second grant would be void."

But what is the case now under consideration? There was no appropriation of the lead mines, of a permanent character, which separated them from the mass of the

public lands. "They were reserved for the future disposal, by the United States." And, as has been shown, the Act of 26, 1834, authorized the president to sell them. This, then, if there be any meaning in language, was a disposal of them within the act of 1807, by which they were reserved.

There seems to be an impression that preemption rights are without merit, and that the acts under which they arise should receive a strict construction. In my judgment, the acts granting these rights are remedial in their nature and policy, and should be so construed as to effectuate the intention of Congress. It is a right arising under the statute, and must, of course, be brought within it. But the policy of the statute was a benign one, and it was founded upon a meritorious consideration. That legislation which tends to make every citizen a freeholder cannot be unwise or impolitic.

This opinion has been submitted to MR. JUSTICE STORY, and MR. JUSTICE McKINLEY, who have authorized me to say that it coincides with their own views on the subject.