

At the time of the rendition of the decision of this Department all the facts relative to the contract entered into between Flannery and the company were not before this Department. For this omission it would seem that the company alone is responsible. It would appear, however, that sufficient showing has been made to warrant the reversal of the previous decision of this Department.

Flannery having entered into a contract with the company for the purchase of these lands prior to the selection of the same by the company, it must be presumed that the subsequent selection made by the company was on account of and for the protection of Flannery under his contract entered into as before stated. His subsequent actions show that he has relied upon the company's title since making said contract and he can not be held to have acquired any rights by his subsequent residence upon and improvement of this tract that would defeat the company's right under its selection made as before stated.

The previous decision of this Department directing the cancellation of the company's selection of the tract, on account of the settlement claim of Flannery is recalled and vacated, and said selection, if canceled upon your office records, will be re-instated. Flannery's application will stand rejected.

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RIGHT OF WAY—TOLL ROAD—SECTION 2477, R. S.

WASON TOLL ROAD CO. *v.* CREEDE TOWNSITE (ON REVIEW).

In recognizing a right of way claimed on behalf of a toll road under section 2477, R. S., the Department will not, in the absence of express statutory authority, determine the width of such right of way.

*Secretary Smith to the Commissioner of the General Land Office, February 10, 1896.* (P. J. C.)

I have before me a motion for review of departmental decision of October 31, 1895 (21 L. D., 351), filed by counsel for the townsite of Creede.

It appears that the mayor of the town of Creede submitted proof of settlement and occupancy of certain lands in Secs. 19 and 20, Tp. 42 N., R. 1 E., and Sec. 25, Tp. 42 N., R. 1 W., Del Norte, Colorado, land district, and sought to enter the same for the benefit of the settlers thereon. The Wason Toll Road Company protested, claiming a right of way of one hundred feet through the land for the operation of its toll road.

A hearing was ordered, and as a result the local office recommended a dismissal of the protest. On appeal, your office affirmed this action, and the Department, by its said decision, reversed the judgments below, holding that the road company, being the prior occupant of the land, was entitled to its right of way.

Review of this judgment is now asked, and the errors assigned are (1) that it was error to hold that the rule in the case of *Deffebach v. Hawke*, 115 U. S., 392, does not apply to this case; (2) in holding that the grant of the right of way was akin to the statutory grant of right of way to railroad companies; (3) in holding that there were no settlements at Creede prior to the location of the toll road; (4) in holding that the case of *Smith v. Townsend*, 148 U. S., 490, is an authority for or has any bearing on the case at bar; (5) in citing as authority the quotation from *6 Am. & Eng. Enc. of Law*; and (6) it is insisted "that there is nothing whatever in this case, as disclosed by the record, authorizing the right of way of this company to be one hundred feet wide."

It will be seen by an examination of the reported case that all of the questions suggested by this motion were given consideration, with possibly the exception of the last. The authorities cited and relied upon and the discussion in relation thereto will be adhered to.

The Department did not hold, as stated by counsel, that there was no settlement at Creede prior to the location of the toll road. What it did say was, that "there were but two or three cabins in what is now Creede, outside of the 'commissary' of the mine," at the time the road was surveyed and construction begun. It is conceded that at the time the road was constructed through the town, a considerable portion of it was occupied by settlers.

As to the last suggestion of counsel, it may be said that the Department did not decide that the road company was entitled to one hundred feet. What it decided was that "patent will issue to the townsite, if otherwise satisfactory, for the land claimed, subject, however, to the easement of the Wason Toll Company's right of way for the road through the land thus patented." It will thus be seen that the width of the right of way was not fixed. This was not accidental at all. This matter was considered, and it was determined that it was doubtful whether the Department would have jurisdiction to fix the width of the right of way in the absence of express authority by Congress. It was therefore deemed advisable not to decide this question, inasmuch as the State court, or authorities, after title had passed from the nation, had full power to settle this controversy.

It is true that the Road Company claims one hundred feet in width as its right of way, and, while the Department sustained its contention as to its right of way, the width thereof was not determined, and it was not intended to be.

The motion is therefore overruled.