LYTLE AND GREEN CONSTRUCTION COMPANY
WILLIAM DITTMAN

A–26849 *Decided August 20, 1954*

Rules of Practice—Service on Attorney—Homestead Entry—Land Containing Improvements of Unauthorized Occupant—Good Faith.

An appellant taking an appeal to the Secretary of the Interior complies with the Rules of Practice requiring service of notice of the appeal upon the adverse party by serving the attorney who represented that party in the proceeding before the Director of the Bureau of Land Management, even though the attorney has meanwhile been dismissed, where the record fails to show that the adverse party gave notice to the appellant of the attorney's dismissal.

The improvement of public land without authority of law or under any claim of right or color of title does not constitute an appropriation of the land that will take it out of the class of lands subject to homestead entry.

The Department cannot infer bad faith on the part of a homestead entryman from the mere fact that he knew several buildings belonging to a third party were on the land at the time he applied for entry.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William Dittman applied on December 16, 1950, for homestead entry on those portions of the E½SE¼ sec. 5 and of the SW¼ sec. 4, T. 3 N., R. 1 W., Copper River meridian, Alaska, lying west of the Richardson Highway. Entry was allowed by the acting manager of the Anchorage land office on January 10, 1951.

On July 23, 1951, the Acting Regional Administrator of the Bureau of Land Management, Region VII, issued the following decision, which was served on Mr. Dittman on July 26, 1951:

On January 10, 1951, William Dittman was allowed homestead entry to the SW¼ of Section 4, E½SE¼, Section 5, T. 3 N., R. 1 W., C. R. M. It appears from the field examination dated June 13, 1951 that at the time of the allowance of the entry and for approximately a year prior thereto, that a portion of the land comprising some five acres had been used as a construction camp by the Lytle and Green Construction Co., who had applied through the Land Office February 20, 1951 for a special land use permit to use these lands. They have constructed in the SW¼NW¼SW¼, N½NW¼SW¼SW¼, Section 4, T. 3 N., R. 1 W., C. R. M. a number of buildings of considerable value. These buildings were on the land prior to the application for homestead entry of William Dittman, and in Dittman's application for homestead entry no information was furnished that there were buildings on this land belonging to another.

It is a well established rule that no homestead entry will be allowed for land embracing the improvements of another and the burden of coming forth with this information at the time of the filing of the homestead application is squarely upon the applicant Dittman.

Therefore Dittman is requested to show cause within 30 days after receipt of this decision why the homestead entry should not be cancelled as to the land occupied by the Lytle and Green Construction Co. described as: * * * and why

a special use permit should not be issued to the Lytle and Green Construction Co. for the use of such land described supra.

Mr. Dittman answered as follows in a letter received in the Regional Office on August 28, 1951:

The "Decision" is opposed on the grounds that it is not made in accordance with proper procedure, that the facts upon which it is based are untrue, that the field report upon which it is based is improper and obviously prepared to accommodate Lytle and Green Construction Co., and that the contemplated action is contrary to law.

On September 11, 1951, the Regional Administrator issued a decision, the pertinent parts of which follow:

* * * While the answer was not filed within the time allowed, it will nevertheless be considered.

* * * * * * *

I find nothing improper in the procedure requiring the entryman to show cause. Moreover, the statement that the facts upon which the action is based are untrue, is negatived by the sworn statement made June 8, 1951, by the entryman, on file in the record, to the effect that the Lytle and Green Construction Company started their camp about August 15, 1950, and started erecting buildings on the place in September, and had constructed about 15 buildings on the ground before the winter, which occupancy by the company was prior to the filing of his homestead application December 16, 1950, allowed January 10, 1951. **Thus, this portion of the answer to the order to show cause is considered insufficient and may be disregarded.**

As to that part of the answer, which alleges that the contemplated action is contrary to law, it will be stated that it has long been a settled rule of law that public land in the actual possession and occupancy of one under claim of right is not subject to entry by another, and the fact that the occupant is not qualified to make homestead entry is immaterial (see *Lindgren* v. *Shull* (49 L. D. 653) and the cases therein cited).

An application to make entry presupposes good faith on the part of the applicant and when he seeks to enter land personally known to be occupied by another, is chargeable with bad faith, and the application to make entry may not be entertained (51 L. D. 584, 587). It is evidenced by the entryman's own sworn statement that he had personal knowledge of the occupancy by the construction company of the land at the time of making application to enter. It cannot therefore be said that Dittman acted in good faith in including the land in his application and entry.

In view of the foregoing, Dittman's entry, Anchorage 017548, is hereby cancelled as to the following described tract of land presently occupied by the Lytle and Green Construction Company, as a road construction camp in connection with its road work under contract with the Alaska Road Commission, and the company will be permitted the use of the tract for the purpose now occupied, under any applicable law: * * *.

Mr. Dittman appealed to the Director of the Bureau of Land Management, and, on January 12, 1953, the Associate Director reversed the Regional Administrator's decision. The Lytle and Green Construction Company has appealed to the Secretary of the Interior.

Mr. Dittman has submitted a motion to dismiss the construction company's appeal on the ground that a copy was not served on him within the 30 days allowed by the Rules of Practice. 43 CFR, 1952 Supp., 221.75(c). It appears that the Company served its notice of appeal in due time upon the attorney who represented Mr. Dittman in his appeal to the Director of the Bureau of Land Management, but that Mr. Dittman had meanwhile discharged this attorney. There is nothing in the record, however, to show that the Company had notice of the attorney's dismissal. The first notice the Department or the Bureau of Land Management had of this was by Mr. Dittman's motion to dismiss. Under the circumstances the Company was justified in assuming that the attorney still represented Mr. Dittman and in serving the required notice of appeal upon the attorney. 7 C. J. S., "*Attorney and Client*," sec. 123, note 32, p. 956, and cases cited; 43 CFR 221.85. The motion is accordingly denied.

We pass now to the merits of the Associate Director's decision.

The Associate Director wrote:

> The decision of September 11, 1951 citing *Lindgren* v. *Shull* (49 L. D. 653) states that it has been a settled rule of law that public land in the actual possession and occupancy of one under claim of right is not subject to entry by another, and the fact that the occupant is not qualified to make homestead entry is immaterial. However, the record does not show that the company was occupying the land under claim of right. This view is further buttressed by the fact that the company subsequently filed a special land-use application thus impliedly admitting that its previous occupancy rested upon no authority of law and that it was not occupying the land under claim or color of title.
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> The improvement of public land without authority of law or under any claim of right or color of title does not constitute an appropriation of the land that will take it out of the class of lands subject to homestead entry. *Wheeler* v. *Rodgers*, 28 L. D. 250 (1899); *Cf. Nichols et al.* v. *Stevens*, 51 L. D. 584, 586 (1926).

The Associate Director's understanding of the law, as set out in the paragraph quoted immediately above, is clearly correct. See, in addition to the cases cited in his opinion: *Powers* v. *Forbes*, 7 C. L. O. 149 (1880) (Interior Department Decision); *Stoddard* v. *Neigel*, 7 L. D. 340 (1888); *Norton* v. *Westbrook*, 9 L. D. 455 (1889); *Stovall* v. *Heenan*, 12 L. D. 382 (1891); *Jones* v. *Kirby*, 13 L. D. 702 (1891); *Thompson* v. *Holroyd*, 29 L. D. 362 (1899); *Roumagoux* v. *Erickson*, 45 L. D. 315 (1916).

The appellant cites *Bradford* v. *Danielson*, 11 Alaska 406 (1947), and similar Alaskan cases, for the proposition that one in possession of public lands in Alaska can hold them against all adverse claimants except the United States. Actually, this is no more than a local adaptation of the ancient rule in actions of trespass *quare clausum fregit* that holds a showing of title in a stranger to be no defense. 63

C. J., "Trespass," sec. 28, p. 910. These cases have no application here. The allowance of Mr. Dittman's entry segregated the area it embraced from the public domain. *Parsons* v. *Venzke*, 164 U. S. 89, 92 (1896). Thereafter, the Company was not asserting a possessory claim against another mere occupant of public land, but against the United States, which had appropriated the land to Mr. Dittman's use under the homestead law. *Cf. Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629, 644 (1885); *Hastings and Dakota R. Co.* v. *Whitney*, 132 U. S. 357 (1889). To prevail under such circumstances the Company would have to show not merely prior occupancy, but prior occupancy under authority from the United States. *Hosmer* v. *Wallace*, 97 U. S. 575 (1878). I have carefully examined the Company's appeal, as well as the case record, and fail to find even a claim of such authority. Consequently, in the absence of some other invalidating defect in Mr. Dittman's entry, the Associate Director's decision must be affirmed.

It is urged, however, in the words of the appellant, "that the homestead laws contemplate good faith on the part of applicants and from the record in this case, this element is definitely lacking." The record in this case contains several unproved charges by the Company against Dittman, and by Dittman against the Company. The only one we may accept as true, since it is admitted by the entryman, is that he knew that several of the Company's buildings were on a small part of the land on which he applied for homestead entry. The Department, however, cannot infer bad faith from this alone. *Wheeler* v. *Rodgers*, 28 L. D. 250, 252 (1899).

The appellant has shown no error in the Associate Director's decision.

Besides the Company's appeal, the present case file contains an appeal by Mr. Dittman from a decision of March 18, 1954, by the manager of the Anchorage land office. It appears that during the pendency of the Lytle & Green protest, two contests were filed against Mr. Dittman's entry, one by a certain Henry N. Kvalvik (No. 836?) and the other by a certain Fred Walker (No. 828?). The official records relating to these contests have apparently not been forwarded to Washington, for the only mention of them in the file now before the Department is contained in material submitted by Mr. Dittman. The only copy of the decision of March 18, 1954, in the file now before me is one submitted by Mr. Dittman. It appears this decision held Mr. Dittman's answer to the Kvalvik contest insufficient, and required an amended answer supplying certain facts.

Obviously the Kvalvik and Walker matters are not properly before the Department at this time. Accordingly, the file will be returned to the Bureau of Land Management so that Mr. Dittman's appeal from the manager's decision of March 18, 1954, may be considered by the

Director. Without determining what would constitute a sufficient answer to the Kvalvik contest, however, I do not believe it inappropriate to remark that the affirmative averments required from the contestee by the decision of March 18, 1954 (assuming the copy Mr. Dittman has supplied is genuine), clearly go beyond what should be required and appear to shift the burden of proof to the entryman. See 43 CFR 221.13; *Paris Gibson*, 47 L. D. 185 (1919); *cf. Crisp* v. *Maine*, 59 I. D. 406 (1947).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Associate Director of the Bureau of Land Management is affirmed.

J. REUEL ARMSTRONG,
Acting Solicitor.

APPEAL OF REALS ROOFING COMPANY, INC.

CA–199 *Decided August 30, 1954*

Contract Appeal—Construction Contract—Timeliness of Appeal—Liquidated Damages—Remission.

Failure of a contractor to file a timely appeal precludes a review of the findings of fact of a contracting officer, who assessed liquidated damages for delivery in the completion of a construction contract on Standard Form No. 23.

Where no timely appeal was taken to an assessment of liquidated damages by the contracting officer, the question could not be raised subsequently by the contractor, by objections to the deduction of the liquidated damages in a final payment estimate.

Relief from liquidated damages will not be granted merely because the Government failed to suffer an inconvenience or loss by reason of the delay.

The remission of liquidated damages is an extraordinary remedy which is exercised only in cases where the claim for relief is supported by substantial equities in the contractor's favor. There is no basis for remission where the contractor's delay in completing the contract is attributable to his failure to prosecute the work with reasonable diligence or because of his negligence in other respects.

ADMINISTRATIVE DECISION

The Reals Roofing Company, Inc., of Elmhurst, New York, has appealed from the assessment of liquidated damages in the amount of $2,460 under Contract No. I–56np–42 with the National Park Service. That contract, which was executed on the standard form for Government construction contracts (Form No. 23, Revised April 3, 1942), was entered into on April 26, 1950, and it provided that the contractor would furnish the materials and perform the work for the