

STEPHEN JOHNSTON AND OTHERS, HEIRS-AT-LAW OF
STEPHEN JOHNSTON.

DECEMBER 4, 1861.—Committed to a Committee of the Whole House, made the order of the day for to-morrow, and ordered to be printed. Subsequently the Committee of the Whole discharged, and referred to the Committee on Private Land Claims.

The COURT OF CLAIMS made the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

STEPHEN JOHNSTON AND OTHERS, HEIRS-AT-LAW OF
STEPHEN JOHNSTON, vs. THE UNITED STATES.

1. The petition of the claimants, with exhibits.
2. Original evidence of claimants transmitted to the House of Representatives; a printed copy transmitted to the Senate.
3. Original evidence for the United States transmitted to the House of Representatives; a printed copy transmitted to the Senate.
4. Claimants' brief.
5. United States solicitor's brief.
6. Opinion of the court adverse to the claim.
7. Motion to amend the petition filed by claimants refused by the court.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this third day of December, A. D. 1861.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

PETITION OF STEPHEN JOHNSTON, AND ELIZA WINANS AND STEPHEN WINANS,
HEIRS-AT-LAW OF STEPHEN JOHNSTON, DECEASED.

*To the honorable Judges of the Court of Claims of the United States of
America, at Washington city, D. C.:*

Your petitioners, Stephen Johnston and Eliza his sister, intermarried with Stephen Winans, citizens of the United States, and of the State of Ohio, respectfully represent that their father, Stephen Johnston, deceased, a citizen of the United States, and while engaged in the service thereof at Fort Wayne, in the State of Indiana, on the 28th day of August, 1812, having charge of a government store, and in the service of the United States, undertook to carry an express for the relief of said fort, (being then besieged,) and in the attempt was killed by the Pottawatomie Indians.

That said tribe of Indians, causing the death of said Johnston, made a treaty with the United States on the 16th day of October, 1826, by the provisions thereof, and in consequence of having killed the father of your petitioners, made to them a valuable grant of one half section of land, in the following words:—(See schedule of grants in said treaty.)

“To the children of Stephen Johnston, killed by the Pottawatomie Indians, one half section of land, to be located under the direction of the President of the United States.”

The treaty made with the said Indians conveyed to the United States two large and valuable tracts of country. One tract, situated in the Wabash and Eel River valley, of many miles in extent, embracing a scope of country unsurpassed in soil, timber, and water power, and which is now covered with a large population, prosperous towns, and includes the city of Logansport, containing a population of several thousand persons.

The other tract of country ceded by said treaty is situated at the margin of Lake Michigan, and includes lands of immense value, possessing advantages of a fertile soil, timber, and the harbors and commerce of the lakes, upon which there is a dense population and large and flourishing towns.

The grant made by said Indians in the treaty provided that the selection was to be made out of the above tracts of country “under the direction of the President of the United States.” The location was made by some persons unknown to your petitioners, they being at the time minors, under the age of sixteen years, entirely ignorant of their interests, and residing in the State of Ohio, at a point remote from the lands in question.

In the location of the land, under the provisions aforesaid, the interest of your petitioners was totally disregarded, and in consequence of which they sought relief by their petition to the Congress of the United States, upon which the following proceeding were had:

36th CONGRESS, 1st SESSION, REPORT No. 103, HOUSE OF REPRESENTATIVES.

Children of Stephen Johnston, deceased. [To accompany bill H. R. No. 99.]

MARCH 5, 1840.—Mr. WICK, from the Committee on Private Land Claims, made the following report:

The Committee on Private Land Claims, to whom was referred the petition of the heirs of Stephen Johnston, deceased, report as follows:

By a treaty made with the Pottawatomie tribe of Indians near the mouth of the Mississinewa river, upon the Wabash, on the 16th day of October, 1826, there was granted to the heirs of Stephen Johnston, killed by the Pottawatomie Indians, one half section of land, to be located under the direction of the President of the United States. By some inadvertence on the part of the agent of the government, a half section of land, containing less than the usual quantity, (to wit, only about two hundred and eighty acres,) and of an inferior quality, was selected. The committee are persuaded that the interest of the children of the said Stephen Johnston, deceased, was not successfully regarded in the said selection, because it is notorious that the large tract of most desirable country acquired by said treaty afforded numerous half sections of land, containing the full quantity of three hundred and twenty acres of land, choice in its quality, and possessing advantages of position, &c. The half section selected is not only short in quantity, but very inferior in quality.

The committee therefore report a bill, and recommend the passage thereof.

AN ACT for the relief of the children of Stephen Johnston, deceased.

SEC. 1. *Be it enacted by the Senate and House of Representatives of America in Congress assembled,* That the President, being satisfied that the claim of the children of Stephen Johnston, named in the treaty with the Pottawatomie tribe of Indians near the mouth of the Mississinewa, upon the Wabash, in the State of Indiana, on the 16th day of October, 1826, to a certain half section of land, in and by said treaty granted to them, the children of Stephen Johnston, has been, or may have been, relinquished to the United States, or that the same never has been selected for or accepted by them, he, the said President, is requested to cause the Commissioner of the General Land Office to issue to the children of the said Stephen Johnston and Elizabeth Johnston, or to their heirs, a certificate, receivable in payment at any land office in the United States, for any half section not subject to pre-emption.

SEC. 2. *And be it further enacted,* That this act shall continue in force and have effect until the 4th day of March, 1843, and no longer.

Approved July 20, 1840.

Petitioners represent that on the 2d day of February, 1841, they relinquished the land, and received the certificate authorized by said act.

Certificate under the "Act for the relief of the children of Stephen Johnston, deceased," approved July 20, 1840.

Whereas it has been made to appear to the satisfaction of the President of the United States, in virtue of the provisions of the act above quoted, that the claim of the children of Stephen Johnston, deceased, named in the treaty with the Pottawatomie tribe of Indians near the mouth of the Mississinewa, upon the "Wabash, in the State of Indiana, on the 16th day of October, 1826," to a certain half section of land, in and by said treaty granted to them, the children of said Stephen Johnston, has been relinquished to the United States by instrument of writing bearing date the second day of February, 1841, and placed on file in this office: Now, therefore, be it known that this certificate shall be receivable in payment at any land office of the United States for any half section of land not subject to pre-emption in the joint names of the heirs of the said Stephen Johnston, to wit: Stephen Johnston and Stephen Winans and Elizabeth Winans, his wife, late Elizabeth Johnston.

In witness whereof, I have hereunto subscribed my hand, and caused the seal of the General Land Office to be affixed, this [L. S.] 25th day of February, A. D. 1841.

JAMES WHITCOMB, *Commissioner.*

Petitioners represent that at the time of relinquishing the land selected for them under the treaty it was worth in cash from five to seven dollars per acre, having been selected and out of market fifteen years, being situated in a thriving and prosperous country, and near the present city of Logansport, in the State of Indiana; in consequence of which they were unwilling to relinquish said tract to the United States without acquiring the right to use said certificate in the purchase of any half section of land to be sold by the United States without restriction; that before they delivered said deed of relinquishment they made application, through the Hon. P. G. Goode, their representative, to the Commissioner of the General Land Office for his opinion in regard to their rights under the law, and upon his letter of construction, herewith, they delivered said deed of relinquishment.

Copy of letter referred to :

GENERAL LAND OFFICE, *February 25, 1841.*

SIR: I have received your letter of the 22d instant, in relation to the certificate authorized to be issued by this office in favor of the heirs of Stephen Johnston, deceased, in virtue of the act of Congress for their relief, approved July 20, 1840.

That certificate is now transmitted, annexed to this letter, and, in the words of the law, is made receivable in payment "at any land

office in the United States for any half section of land not subject to pre-emption," which language is understood at this office to admit the entry (should the heirs so desire to do, as you have intimated) of any half section of the alternate sections along the line of the Maumee canal, advertised to be sold in June next.

Very respectfully, your obedient servant,

JAMES WHITCOMB, *Commissioner*.

Hon. P. G. Good, *House of Representatives*.

Petitioners represent that they relied upon the official opinion of said Commissioner in the letter attached and made part of the certificate, and accepted that construction of the law, surrendered the lands selected for them, and they do most positively aver that they would not have relinquished said land upon any other condition than the right to purchase with said certificate ANY half section of land, the sale of which was authorized by the United States, without restriction or limitation, and in accordance with said letter attached; that as soon after the issuing of said certificate as they could find a suitable tract of land, they made selection of a certain tract (half section) in the "Wyandotte reserve," in the State of Ohio, the minimum price of which was two dollars and fifty cents per acre, and made application to the Commissioner of the General Land Office for the right to enter, which was refused; but they proceeded to the sale of said lands in September, 1845, and bid off said land at the rate of about twenty-five dollars per acre, and tendered their certificate in payment, which was again refused, as by the opinion of the Attorney General of the United States, a copy of which is as follows :

ATTORNEY GENERAL'S OFFICE, *September 25, 1845.*

SIR : I have received your communication of the 12th instant, with the accompanying papers, asking my opinion on two questions stated by the Acting Commissioner of the General Land Office, in a communication addressed to your predecessor on the 9th September, 1844, concerning the location of a certificate granted to the children of Stephen Johnston by the act of July 20, 1840.

The questions are thus stated :

1st. Whether an application could be legally made to locate lands before they were surveyed?

2d. If in the affirmative, is the application to locate the aforesaid certificate on the Wyandotte lands "legal and admissible?"

I do not see any reason to disturb the decision made in this case by the Hon. Robert J. Walker, Secretary of the Treasury.

1st. The certificate issued by virtue of the act of 20th July, 1840, was made "receivable in payment at any land office of the United States for any half section of land not subject to pre-emption." I am of opinion that this certificate could not be received in payment for lands at any land office for any land which was not prior to the 4th of March, 1843, in a condition to be sold.

I think the location must have been according to sectional lines,

and therefore that it could not be made before the survey of the lands. The recently decided case of Barry and Gamble, (3d How. 32) is not in conflict with this opinion. 2d. The act of 3d of March, 1843, clearly shows that the Wyandotte lands were to be offered at sale. No right of pre-emption or private entry existed, but the whole of the lands were to be offered at sale, and not to be sold, nor to be subject to private entry thereafter, at less than two dollars and fifty cents per acre.

I do not think it an unauthorized conclusion that the certificate authorized by the act of 1840 could be used in payment for those public lands only which were liable to pre-emption claims. Such claims could only be asserted as to lands at the minimum of one dollar and twenty-five cents per acre. The holders of the certificate were to have a half section of land not subject to pre-emption. The Wyandotte lands were not and could not be subject to pre-emption without further legislation.

The considerations which induced Congress to put them on a different footing are very obvious.

To authorize the location of this certificate on these lands would be inconsistent with that manifest purpose.

The question, it appears to me, was rightly decided by Mr. Secretary Bibb, and I do not perceive any ground on which his decision should be reversed.

I have the honor to be, respectfully, sir, your obedient servant,
J. Y. MASON.

Your petitioners represent that said certificate was duly tendered in payment for a certain half section of the said Wyandotte reserve, and, under the decision aforesaid, rejected. Whereupon they presented their petition to the Congress of the United States, praying the passage of a resolution authorizing the certificate to be receivable in payment for the land so bid off; and upon said petition the following proceedings were had:

REPORT No. 716, H. R

Stephen Johnston, heirs of. [To accompany joint resolution No. 38.]

JUNE 17, 1840.—Mr. MORRIS, from the Committee on Public Lands, made the following report:

The Committee on Public Lands, to whom was referred the petition of Stephen Johnston and Eliza Winans, late Eliza Johnston, report as follows:

“It appears that Stephen Johnston, (father of petitioners,) sub-agent of the United States, was killed by the Pottawatomie tribe of Indians in the year 1812, and that said Indians made a donation of one half section of land to the heirs of said Johnston, which was reserved from sale to the United States by treaty of the 16th of October, 1826, to be selected and located under the direction of the President of the United States, which was done by an agent appointed for that

purpose, but the land so selected was of an inferior quality, and deficient in quantity; in consequence of which, in the year 1840 Congress passed an act authorizing said heirs to relinquish said land to the United States; in view of which, the Commissioner of the General Land Office was to issue a certificate to said heirs, to be receivable in payment for any half section not subject to pre-emption; all of which has been done.

That said land has been relinquished to the United States, and that the certificate so issued was tendered by said petitioners in payment for one half section of land bought by the petitioners at the sale of the Wyandotte lands, and under the instruction of the Commissioner of the General Land Office the register and receiver refused to receive it.

The petitioners pray Congress to pass an act authorizing the Commissioner of the General Land Office to cause the register and receiver at Upper Sandusky, Ohio, to receive in payment the said certificate for the half section of land bought by said petitioners at said sale, provided the minimum price of said half section shall not exceed the price of each alternate half section along the Maumee canal. The committee, believing the claims of the petitioners to be just and equitable, report a joint resolution, and recommend its passage.

29th CONGRESS, 1st SESSION. H. R. 38. REPORT No. 1760.

JUNE 17, 1846.—Read and committed to the Committee of the Whole House to morrow.

Mr. MORRIS, from the Committee on Public Lands, reported the following joint resolution:

JOINT RESOLUTION for the relief of the children of Stephen Johnston, deceased.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That the Commissioner of the General Land Office cause the register and receiver at Upper Sandusky, Ohio, to receive a certificate of the heirs of Stephen Johnston, granted to them under "An act for the relief of the heirs of Stephen Johnston, deceased," approved July twentieth, eighteen hundred and forty, in payment for any half section of land in the Wyandotte reserve not otherwise appropriated, provided the minimum price of said half section shall not exceed two dollars and fifty cents per acre.

¶ Petitioners represent that said resolution passed and became a law, but during the tardy process of legislation, and while said resolution was pending in the Senate, the lands in question were brought into market with other lands and sold, without regard to the rights of the petitioners, and that during the pendency of said resolution; the certificate, having been filed with the petition, was lost or mislaid, and your petitioners were compelled to take the necessary steps, under the regulations of the Land Office department, to obtain the reissuing of their certificate; which was done on the 12th day of May, 1853, and the following certificate annexed thereto:

GENERAL LAND OFFICE, *May 12, 1853.*

I, John Wilson, Commissioner of the General Land Office, do hereby certify that the annexed letter, dated February 25, 1841, and certificate bearing same date, issued under the act of 20th of July, 1840, for the relief of the children of Stephen Johnston, deceased, are true and literal exemplifications from the record of the letter and of the certificate in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of [S. L.] Washington, on the day and year above written.

JOHN WILSON,
Commissioner of the General Land Office.

And also the following indorsement was entered on the back of said certificate :

GENERAL LAND OFFICE, *January 27, 1854.*

Satisfactory proof being made and filed in this office that the original certificate, of which the above and foregoing is a copy, has been lost or mislaid, and not used by the parties entitled thereto, or their assigns, in the purchase or entry of any tract or tracts of land: Now, therefore, be it known that this certified copy of said certificate is made receivable in payment for any half section of land according to the terms therein expressed, and as explained in the letter attached.

Given under my hand, at the city of Washington, the day and year above written.

JOHN WILSON, *Commissioner.*

Petitioners represent that, for the purpose of avoiding further difficulty in the purchase of land with their certificates, at their request the honorable B. Stanton addressed the following communication to the Commissioner of the General Land Office:

WASHINGTON CITY, *January 2, 1853.*

SIR: The bearer hereof, Stephen Johnston, requests your official opinion in regard to the extent of his right to locate the certificate authorized to be issued under the act of July 20, 1840, entitled "An act for the relief of the children of Stephen Johnston, deceased."

1st. He desires your opinion, as already intimated by you, that the certificate can be receivable in payment for any lands belonging to the United States and not held by pre-emption, which have been surveyed, and the sale of which is authorized by law and proclamation of the President, in accordance with the opinion of Commissioner Whitcomb.

2d. He desires your opinion as to his right to select 320 acres of land according to the legal subdivisions, so that he may, if necessary, select of fractional parts, so that the same are contiguous, a quantity of land equal to one half section.

Very respectfully,

B. STANTON.

Mr. JOHN WILSON, *Commissioner General Land Office.*

To which the Commissioner made the following reply :

GENERAL LAND OFFICE,
February 28, 1853.

SIR: In view of the provisions of the act of July 20, 1840, "for the relief of the children of Stephen Johnston, deceased," and the joint resolution of 3d of March, 1847, for the same purpose, I am of opinion that the certificate issued to these children under the act above mentioned by the Commissioner of this office may be received in payment for any compact body of land by legal subdivisions, not exceeding the quantity of a half section, the sale of which is authorized by law, and which is not actually settled and improved, provided the minimum price of said land does not exceed two dollars and fifty cents an acre.

Of course that certificate cannot be received in payment for any land reserved from sale by order of the President, act of Congress, or which may have been appropriated for any purpose whatever.

I am, sir, very respectfully, your obedient servant,

JOHN WILSON, *Commissioner*.

STEPHEN JOHNSTON, Esq.,
(Care of Hon. B. Stanton, H. R.)

Petitioners represent that on the 14th day of August, 1854, they made application to said Commissioner of the General Land Office for a letter of instruction to the register and receiver at Stillwater or Minneapolis, in the Territory of Minnesota, to receive in payment from said heirs their certificate for any half section of land in the former military reserve at Fort Snelling, then advertised for sale by proclamation of the President. To which the said Commissioner made the following reply by telegraph :

WASHINGTON, August 26, 1854.

To STEPHEN JOHNSON: Your certificate cannot be located on Fort Snelling land. All lands within that reservation must be offered at public sale under special provisions of law.

JOHN WILSON, *Commissioner*.

Petitioners proceeded to the Territory of Minnesota with the determination to select a tract of land and tender their certificate in payment for the same, and, if need be, resort to a court of proper jurisdiction to determine their right, and on the 18th day of September, 1854, made the following selection of land, for the express purpose of tendering their certificate in payment for the same, and which is described as follows, to wit: East half southeast quarter, section 22, township 29 north, range 24 west; fractional lot No. 2, in same section; southwest quarter of southwest quarter, section 23, in same township; fractional lot No. 9, in last-named section; fractional lot No. 10, in same section; fractional lot No. 11, in same section, and fractional lot No. 12, in same section, 23; that being the day for the sale of said tracts at the office of Minneapolis, in said Territory, said petitioners

presented themselves at said office for the purpose of tendering their certificate in payment for said land, the indorsement being then entered upon said certificate of the foregoing tracts of land.

That said sale of lands did not take place at that time nor since then, for the reason assigned by the register and receiver, that they had not obtained the plats and papers necessary to offer the lands for sale, or to receive any application whatever for said lands. Petitioners, after having made said location of land, again, on the 6th day of October, 1854, made application to the Commissioner of the General Land Office for instructions to said officers at Minneapolis to receive their certificate, said officers having then the necessary papers to make the entry and give petitioners title, which was refused; and on the 25th day of December, 1854, petitioners made the following application to the Secretary of the Interior:

WASHINGTON CITY, *December 25, 1854.*

SIR: Application having been made by the heirs of Stephen Johnston, deceased, to the Commissioner of the General Land Office, on the 14th day of August, 1854, for instructions to certain offices of the public lands in the Territory of Minnesota to receive in payment from said heirs their certificate, issued to them under the act for their relief, approved July 20, 1840, for certain lands in the former military reserve of "Fort Snelling," then advertised for sale under proclamation of the President, which application was refused by him. The application was for instructions to said offices to receive said certificate in payment for said land at any time thereafter, and before, or on the day of sale; it is admitted by the Commissioner that if said certificate was properly receivable in payment for said land, that the right to use the same at any time before the day of sale would have been granted. You are respectfully requested to cause the papers and application, therewith connected, to be brought before your honor for the purpose of reviewing the opinion of the Commissioner of the General Land Office.

Very respectfully,

S. JOHNSTON.

HON. SECRETARY OF THE INTERIOR.

Upon the foregoing application the honorable Secretary of the Interior directed the Commissioner to report his opinion in said case, which was done, and is as follows:

GENERAL LAND OFFICE,
December 3, 1854.

SIR: In accordance with your direction indorsed on the letter of Stephen Johnston, esq., of the 25th instant, I have the honor to report that the act of July 20, 1840, for the relief of the children of Stephen Johnston, deceased, directs the issue to the said children, or their heirs, of a "certificate receivable in payment at any land office

in the United States for any half section of land not subject to pre-emption," and also provides that the act shall continue in force until the 4th day of March, 1843, and no longer.—(See copy herewith, marked "A," of certificate issued under this act.)

This law was amended by the act of March 3, 1847, which directs the Commissioner of the General Land Office to cause the register and receiver at Upper Sandusky, Ohio, to receive said certificate in payment for any half section of land in the Wyandotte reserve not otherwise appropriated, provided the minimum price was not over \$2 50 per acre.

The original certificate issued under the act of 1840 was lost, and on proof being filed in this office of such loss, a certified copy of it was furnished Mr. Johnston on 12th May, 1858, and on the 27th January, 1854, a certificate was attached thereon, making the copy receivable in lieu of the lost original. Mr. Johnston, in August last, requested this office to instruct the land officers at Stillwater or Minneapolis to receive his certificate in payment for "any half section of the public lands situated within the former military reserve at Fort Snelling, not subject to pre-emption, at any time before or on the day of sale of such lands as are advertised for sale in September next."

And on the 26th of August he was advised by telegraph that the certificate could not be located on those lands, for the reason that they must be offered at public sale under special provisions of law. This request Mr. Johnston repeated in a letter to John McKeny, herewith submitted, and was again declined by letter from this office of 6th October, 1854. Copy enclosed.

The reason for refusing to instruct the land officers to permit this certificate to be located on lands within the former Fort Snelling reserve before those lands had been offered at public sale, as requested by Mr. Johnston, is, that the act of 26th August, 1852, (laws of 1852, pp. 36 and 37,) directs all of those lands, the sale of which is authorized by that act, "to be sold at public sale," under the direction of the President of the United States. This direction has been considered so pointed and positive as to exclude these lands from the operation of the pre-emption and town site laws, and, in fact, so far as the sale is concerned, from the operation of all laws of prior date, and, of course, from the claim of the children of Stephen Johnston.

The will of Congress on this subject is so plainly and pointedly expressed that there can be no doubt on the subject, and consequently there is no room for construction by the Executive. The lands must "be sold at public sale."

All of which is respectfully submitted.

JOHN WILSON, *Commissioner.*

Hon. R. McCLELLAND,
Secretary of Interior.

Petitioners received the following communication from the Commissioner of the General Land Office :

GENERAL LAND OFFICE,
January 16, 1854.

SIR : Herewith you will receive a copy of the letter, dated 6th instant, from the Secretary of the Interior, affirming the decision of this office respecting your application to locate on Fort Snelling lands the special certificate issued under the act of 20th July, 1840, from which decision you appealed to the department on the 25th ultimo.

Very respectfully, your obedient servant,

JOHN WILSON, *Commissioner*.

STEPHEN JOHNSTON, Esq., *Piqua, Ohio*.

DEPARTMENT OF THE INTERIOR,
January 10, 1855.

SIR : I have examined the questions submitted in your letter of the 29th ultimo, in relation to the application of Stephen Johnston for the issue of instructions to the land officers at Stillwater or Minneapolis to receive, in payment for a certain tract of land within the former military reserve at Fort Snelling, a certificate issued by your office under act of July 20, 1840, for the relief of the children of Stephen Johnston, deceased, and am satisfied that the views expressed by you on the subject are correct. Your decision in the case is therefore affirmed, and the papers are herewith returned.

Very respectfully, your obedient servant,

R. McCLELLAND, *Secretary*.

COMMISSIONER GENERAL LAND OFFICE.

The following are the provisions of the act of Congress authorizing the sale of the land, out of which said selection was made, to wit:

“An act to reduce and define the boundaries of the military reserve at St. Peters, in the Territory of Minnesota, approved August 26, 1852.

“SEC. 2. *Be it further enacted*, That the Commissioner of the General Land Office be, and he hereby is, required to cause to be surveyed, as soon as practicable, so much of the lands heretofore included in the military reserve aforesaid, but without the limits of said military reserve aforesaid, as defined by this act, as have not already been surveyed, and to cause the same, together with such lands as have been so surveyed, with the exception hereafter set forth, to be sold at public sale, under the direction of the President of the United States.

“Also, An act to establish additional land districts in the Territory of Minnesota, approved April 12, 1854.

“SEC. 3. *And be it further enacted*, That the President is authorized to cause the public lands in said districts, with the exception of such as have been, or may have been, reserved for other purposes, to

be exposed to sale in the same manner and upon the same terms and conditions as other public lands of the United States."

The selection made by petitioners is included within the district of Minneapolis, created by the act above quoted, and the foregoing are the only provisions made for the sale of said lands by Congress.

That upon the confirmation of the opinion of the Commissioner of the General Land Office by the Secretary of the Interior, your petitioners again presented their claim to Congress, setting forth the facts in relation to the land selected by them and herein described, which petition was presented on or about the 12th day of January, 1855, and referred to the Committee on "Public Lands."

The petition set forth the facts and prayed Congress to pass an act authorizing the entry to be made.

That on the 1st day of February, 1855, the House of Representatives, in Congress, passed a bill entitled "An act to amend an act, approved 26th August, 1852, entitled An act to reduce and define the boundaries of the military reserve, at St. Peter's river, in the Territory of Minnesota, and for other purposes." That said bill by its provisions extended pre-emption to any of said lands, claimed by pre-emption, under settlement and cultivation made prior to the passage of said act. That while said bill was pending in the Senate of the United States the following amendment was offered to the first section of said bill: "*Provided, also,* That the heirs of Stephen Johnston shall be, and they are hereby, confirmed in the location of the lands applied for under the certificate or warrant issued to said heirs in virtue of the provisions of the acts of July 20, 1840, and 3d of March, 1847, for the relief of said heirs, so far as the same did not interfere with the settlement and improvement of any actual settler or settlers at the time said location was applied for." That said amendment was rejected and the bill passed, as will appear by reference to the proceedings on the 3d and 4th of March, 1855, thus disposing of the rights of your petitioners to the lands selected by them.

That at the time of making the selection and the application to enter the same, said land selected was not claimed by any actual settler or settlers, but that the same was then advertised, and to be sold to the highest bidder, under proclamation of the President of the United States, which proclamation expressly excluded said lands from pre-emption. That the land selected by the petitioners was made in strict conformity with the letter of the Commissioner of the General Land Office, dated February 28, 1853, and addressed to your petitioners. The selection was made in a "compact body of land by legal subdivisions, not exceeding the quantity of one half section, the sale of which was authorized by law, and which was not settled and improved, (under the provisions of law,) the minimum price of which did not exceed two dollars and fifty cents per acre, and was not reserved from sale by the President, act of Congress, or appropriated for any purpose whatever."

That by the provisions of the act of March 6, 1855, persons unknown to your petitioners have taken possession of said lands, and

have filed their applications to enter the same at one dollar and twenty-five cents per acre, which applications are recognized by the Commissioner of the General Land Office as legal and admissible, in violation of the rights of your petitioners.

That since the issuing of their certificate, and the decisions of the departments, whereby the use of said certificate has been restricted to lands subject to private entry, a large quantity of valuable land has been disposed of by the United States, and that pre-emption has been extended to all the lands belonging to the United States, and that there are no lands now belonging to the United States the sale of which is authorized by law, which they could purchase with their certificate, that would afford them anything like indemnity for the land to which they were entitled under the treaty of 1826. That by the ruling of the Commissioner of the General Land Office they are now confined to the lands subject to private entry, and that they are without remedy, unless by the interposition of your honorable court and Congress of the United States relief shall be granted. That they are now the sole owners of said claim, and were justly entitled to the land selected by them, as set forth in this petition. They therefore pray that if, upon the hearing of this cause, it shall appear to your honors that the application for the land was legal and admissible, in behalf of the petitioners, and wrongfully rejected by the officers of the United States, that proof may be taken of the value of the land, and the amount so established shall be paid to them.

Signed by one of the claimants.

STEPHEN JOHNSTON.

THE STATE OF OHIO, *Miami County, ss :*

Personally appeared before me, a notary public in aforesaid county, Stephen Johnston, the above named, who, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

STEPHEN JOHNSTON.

Sworn to and subscribed by Stephen Johnston before me, and in my presence, this 18th day of October, 1855.

J. T. JANVIER,

[L. S.]

Notary Public, Miami County, Ohio.

STEPHEN JOHNSTON AND OTHERS vs. THE UNITED STATES.

List of papers for petitioner.

1. Certified copy of certificate, and letters of Commissioner of General Land Office accompanying the same.
2. Stipulation as to testimony in the case.
3. Depositions of A. C. Smith, C. L. Emerson, D. A. Lecompte, J. J. Nash, M. W. Irwin, and J. M. Defrees.
4. Letter from General Land Office, November 12, 1858.
5. Letter from the land office, March 3, 1858.

WASHINGTON, *January 10, 1859.*

DEAR SIR: I enclose the papers in Stephen Johnston's case. I have had the clerk add the indorsement on the back of the warrant, so that now the record will be complete. Please have the printing done as fast as possible.

Yours, very truly,

W. B. WEBB.

J. D. McPHERSON, Esq.

GENERAL LAND OFFICE,
March 3, 1858.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the records in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of [L. S.] Washington, on the day and year above written.

THOMAS A. HENDRICKS,
Commissioner of the General Land Office.

The Commissioner to Hon. P. G. Goode.

GENERAL LAND OFFICE,
February 25, 1841.

SIR: I have received your letter of 22d instant, in relation to the certificate authorized to be issued by this office in favor of the heirs of Stephen Johnston, deceased, in virtue of the act of Congress for their relief, approved July 20, 1840. That certificate is now transmitted, annexed to this letter, and in the words of the law is made "receivable in payment at any land office in the United States for any half section of land not subject to pre-emption," which language is understood at this office to admit the entry (should the heirs so desire to do, as you have intimated) of any half section of the alternate sections along the line of the Maumee canal, advertised to be sold in June next.

Very respectfully, your obedient servant,

JAMES WHITCOMB,
Commissioner.

Hon. P. G. GOODE,
House of Representatives.

Certificate under the "Act for the relief of the children of Stephen Johnston, deceased," approved July 20, 1840.

Whereas it has been made to appear to the satisfaction of the President of the United States, in virtue of the provisions of the act above

quoted, that the claim of the children of Stephen Johnston, deceased, named in the treaty with the Pottawatomie tribe of Indians, "near the mouth of the Mississinewa, upon the Wabash, in the State of Indiana, on the sixteenth day of October, in the year one thousand eight hundred and twenty-six, to a certain half section of land in and by said treaty granted to them, the children of the said Stephen Johnston," has been by them relinquished to the United States by instrument of writing bearing date the second day of February, one thousand eight hundred and forty-one, and placed on file in this office:

Now, therefore, be it known that this certificate shall be receivable in payment at any land office of the United States for any half section of land not subject to pre-emption, in the joint names of the heirs of the said *Stephen Johnston*, deceased, to wit: *Stephen Johnston* and *Stephen Winans* and *Elizabeth* his wife, late *Elizabeth Johnston*.

In witness whereof, I have hereunto subscribed my hand and caused the seal of the General Land Office to be affixed this [L. s.] twenty-fifth day of February, anno Domini one thousand eight hundred and forty-one.

JAMES WHITCOMB,
Commissioner.

GENERAL LAND OFFICE,
January 27, 1854.

Satisfactory proof being made and filed in this office that the original certificate, of which the above and foregoing is a copy, has been lost or mislaid, and not used by the parties entitled thereto, or their assigns, in the purchase or entry of any tract or tracts of land: Now, therefore, be it known that this certified copy of said certificate is made receivable in payment for any half section of land, according to the terms therein expressed, and as explained in the letter attached.

Given under my hand, at the city of Washington, this day and [L. s.] year above written.

JOHN WILSON,
Commissioner.

[The above is a copy from a copy of the certificate annexed to the certified copy of a certificate for the relief of the heirs of S. Johnston, &c.]

The Commissioner to Hon. B. Stanton.

GENERAL LAND OFFICE,
February 28, 1853.

SIR: I have the honor to enclose to your care a communication for Stephen Johnston, esq., on the subject of the special certificate issued

to the heirs of Stephen Johnston, deceased, under the act of July 20, 1840.

With great respect, your obedient servant,

JOHN WILSON, *Commissioner*.

Hon. B. STANTON,

House of Representatives.

P. S.—The papers in this case, enclosed in your letter of 22d ultimo, introducing Mr. Johnston, are returned to him through you herewith.

J. WILSON.

The Commissioner to S. Johnston.

GENERAL LAND OFFICE,

February 28, 1853.

SIR: In view of the provisions of the act of July 20, 1840, "for the relief of the children of Stephen Johnston, deceased," and the joint resolution of March 3, 1847, for the same purpose, I am of opinion that the certificate issued to those children under the act above mentioned by the Commissioner of this office may be received in payment for any compact body of land by legal subdivisions, not exceeding the quantity of a half section, the sale of which is authorized by law, and which is not actually settled on and improved, provided the minimum price of said lands does not exceed two dollars and fifty cents per acre. Of course that certificate cannot be received in payment for any lands reserved from sale by order of the President, act of Congress, or which may have been appropriated for any purpose whatever.

I am, sir, very respectfully, your obedient servant,

JOHN WILSON, *Commissioner*.

STEPHEN JOHNSTON, Esq.,

(Care of Hon. B. STANTON, House of Representatives.)

Stipulation for testimony.

STEPHEN JOHNSTON vs. THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without notice to the United States, provided that the testimony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witnesses, if he shall think proper to do so, after the return of the depositions.

JNO. D. MCPHERSON,

Deputy Solicitor

W. B. WEBB,

Solicitor for Plaintiff.

Deposition of A. C. Smith.

UNITED STATES OF AMERICA—UNITED STATES COURT OF CLAIMS.

STEPHEN JOHNSTON *et als.* vs. THE UNITED STATES.

Deposition of A. C. Smith, esq., taken by consent before J. J. Noah, esq., a commissioner for the Court of Claims for the Territory of Minnesota, taken at Minneapolis, Hennepin county, Minnesota Territory, September 22, 1857.

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Answer. My name is Abner C. Smith; I am register of the United States land office at Minneapolis, Minnesota; I am forty-three years of age, and have lived in Minnesota for the past year.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimants?

Answer. I have no interest, direct or indirect, therein, and I am in no degree related to the claimants.

Interrogatory 3. Can you state at what date the first declaration of intention to pre-empt the following tracts of land, to wit: "The east half of southeast quarter of section 22, township 29 north, of range 24 west; fractional lot No. 2, in same section; the fractional quarter of the southwest quarter of section 23, in same township; fractional lot No. 9, in section 23, last named; fractional lots Nos. 10, 11, and 12, in same section," was filed in the Minneapolis land office?

Answer. The first filing was that of Mr. Jackins, of date March 17, 1855, upon the southeast quarter of the southeast quarter of section No. 22, township 29 north, range 24 west, of 4th meridian. The residue of the above-described lands were filed upon by different persons after the date above mentioned, and before the 24th day of May, 1855. These facts appear of record in the United States land office at Minneapolis. I know of no other matters relative to the claim in question.

A. C. SMITH.

Sworn to and subscribed before me this 22d day of September, A. D. 1857.

J. J. NOAH,

*A Commissioner for the Court of Claims.*TERRITORY OF MINNESOTA, *County of Hennepin:*

On this 22d day of September, 1859, personally came Abner C. Smith, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, who then

subscribed the deposition in the presence of the commissioner. The deposition of Abner C. Smith, taken at the request of Stephen Johnston, and by consent of parties duly exhibited, (a copy of which is hereunto appended,) to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et als.*

J. J. NOAH, *Commissioner.*

Copy of stipulation.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without notice to the United States, provided that the testimony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witnesses, if he shall think proper to do so, after the return of the depositions.

JNO. D. McPHERSON,

Deputy Solicitor.

W. B. WEBB,

Solicitor for Plaintiff.

A true copy. Attest:

J. J. NOAH,

Commissioner.

Deposition of C. L. Emerson.

UNITED STATES OF AMERICA—UNITED STATES COURT OF CLAIMS.

STEPHEN JOHNSTON *et als.* *vs.* THE UNITED STATES.

Deposition of C. L. Emerson, esquire, taken by consent before J. J. Noah, esquire, a commissioner for the Court of Claims for the Territory of Minnesota, taken at the city of Saint Paul, Minnesota Territory, September 23, 1857.

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Answer. My name is Charles L. Emerson; aged forty years; I am surveyor general for the district of Minnesota, and have resided at St. Paul for the past six years.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any way or degree related to the claimants?

Answer. I have no interest, direct or indirect, therein, nor am I in any degree related to the claimants.

Interrogatory 3. Can you state what the real value of the following described lands, to wit: "East half of the southeast quarter of section 22, township 29 north, of range No. 24 west; fractional lot No.

2, in same section; the southwest quarter of the southwest quarter of section 23, township 29, range 24 west; and fractional lots Nos. 9, 10, 11, and 12, in the same section," was on the 18th day of September, 1854, and also the present value thereof, excluding in your estimate the value of all improvements upon said land, but judging the value of the same by reason of the general improvement of the country?

Answer. I should say that the value of the above-described lands was, on the 18th day of September, 1854, at a fair estimate, worth seventy-five thousand dollars. I should estimate the present value of the said lands to be, exclusive of all improvements, fairly worth eight hundred thousand dollars. I form both estimates exclusive of all improvements.

Interrogatory 4. Please refer to the plat marked "Exhibit A," hereunto attached, and describe the lands by reference to said plat, and its natural and local advantages.

Answer. The lands comprised within the yellow shaded lines, which delineate the above-described lands correctly, comprise part of the town site of Minneapolis, Hennepin county, Minnesota, which is an important and flourishing town. The said lands border on the Mississippi river at Saint Anthony's falls, and comprise a water power almost unlimited. The above-described lands contain three hundred and seventeen acres and four one-hundredths ($317\frac{4}{100}$.) I know of no other matter relative to the claim in question.

C. L. EMERSON.

Sworn to and subscribed before me this 23d day of September, A. D. 1857.

J. J. NOAH,

A Commissioner for the Court of Claims.

TERRITORY OF MINNESOTA, *County of Ramsey:*

On this 23d day of September, A. D. 1857, personally came Charles L. Emerson, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Charles L. Emerson, taken at the request of Stephen Johnston, and by consent of parties duly exhibited, (a copy of which is hereunto appended,) to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et als.*

J. J. NOAH, *Commissioner.*

Copy of stipulation.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without notice to the United States, provided that the testi-

mony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witnesses, if he shall think proper to do so, after the return of the depositions.

JOHN D. McPHERSON,
Deputy Solicitor.

W. B. WEBB,
Solicitor for Plaintiff.

A true copy. Attest :

J. J. NOAH,
Commissioner.

[EXHIBIT A.—For map see original.]

Deposition of D. A. Secombe.

UNITED STATES OF AMERICA—UNITED STATES COURT OF CLAIMS.

STEPHEN JOHNSTON *at als.* vs. THE UNITED STATES.

Deposition of D. A. Secombe, esq., taken by consent before J. J. Noah, esq., a commissioner for the Court of Claims for the Territory of Minnesota, taken at St. Anthony, Hennepin county, Minnesota Territory, September 22, 1857.

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Answer. My name is David A. Secombe; my occupation is a lawyer; I am aged thirty years, and have resided in St. Anthony, Minnesota, for the term specified.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimants?

Answer. I have no interest, direct or indirect, therein, and I am in no degree related to the claimants.

Interrogatory 3. Have you any knowledge of the selection of certain lands by the claimants, or any of them, described as follows, to wit: "East half of the southeast quarter of section 22, township 29 north, of range No. 24 west; fractional lot No. 2, in same section; the southwest quarter of the southwest quarter of section 23, township 29, range 24 west; fractional lot No. 9, in the last-named section; fractional lot No. 10, in same section; fractional lot No. 11, in the same section; and fractional lot No. 12, in same section—which lands are situated in the Minneapolis land district, in the Territory of Minnesota; and if you have any such knowledge please state the same.

Answer. I have some knowledge thereof. On the 18th day of September, 1854, at the instance and request of Stephen Johnston and

Stephen Winans, I made the selection for them of the lands described in the interrogatory, and entered the description of the said lands in a written statement which was annexed to a land certificate for a half section of land issued to the children of Stephen Johnston, deceased, and dated February 25, 1841, which said statement so annexed was marked "A." On the said 18th day of September, 1854, that being the day indicated in the proclamation of the President for the sale of the said lands, being part of the former military reservation of Fort Snelling, at the instance and request of the parties aforesaid, I, together with them, presented myself at the land office in Minneapolis for the purpose of tendering the said certificate in payment for the said lands. At the time when the sale should have been opened the register of said land office publicly and officially announced that the necessary papers for the sale had not been received by them, and that consequently the sale would not take place on that day, but that the sale would be by them adjourned from day to day during the time allowed by law for the continuance of the sale, and that if the papers arrived within the time the sale would take place. At the instance and request aforesaid I presented myself at the land office at Minneapolis from day to day, during the time within which the sale was authorized to be made by law, for the purpose of tendering the certificate in payment for the said lands as aforesaid, but the said time expired, and no sale took place.

Interrogatory 4. Can you state what the real value of the said tracts of land was on the 18th day of September, 1854, and also the present value thereof, excluding in your estimate the value of all improvements upon said land, but judging the value of the same by reason of the general improvement of the country?

Answer. I should say that the said lands were worth, on the 18th day of September, 1854, the average sum of five hundred dollars per acre; the present value of the said lands, exclusive of improvements, is not less than two thousand dollars per acre. The reasons I give for my valuation of the same are, that it is eligibly situated for a town site, separated only by the Mississippi river from the city of St. Anthony, which contained on September 18, 1854, a population of between 2,000 and 3,000, and now contains a population of about 5,000. In addition to this, these lands are the seats of an immense water power almost without limit. Sales have been made of single quarter-acre lots within the limit of the said tracts of land at as high a price as \$8,000, and I do not suppose that a single lot could be purchased within the limits of the said tracts of land for less than \$400. The site of the same was so eligibly located for a town that it has since obtained a population of 3,000 inhabitants. I have resided in St. Anthony for the last six years. I know of no other matter relative to the claim in question.

DAVID A. SECOMBE.

Sworn to and subscribed before me this 22d day of September, 1857.

J. J. NOAH,

A Commissioner for the Court of Claims.

TERRITORY OF MINNESOTA, *County of Hennepin* :

On this 22d day of September, A. D. 1857, personally came David A. Secombe, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of David A. Secombe, taken at the request of Stephen Johnston, and by consent of parties duly exhibited, (a copy of which is hereunto appended,) to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et als*.

J. J. NOAH,
Commissioner.

*Copy of stipulation.*STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without notice to the United States, provided that the testimony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witnesses, if he shall think proper to do so, after the return of the depositions.

JNO. D. McPHERSON,
Deputy Solicitor.

W. B. WEBB,
Solicitor for Plaintiff.

A true copy. Attest:

J. J. NOAH,
Commissioner.

Deposition of J. J. Noah.

UNITED STATES OF AMERICA—UNITED STATES COURT OF CLAIMS.

STEPHEN JOHNSTON *et al.* *vs.* THE UNITED STATES.

Deposition of Jacob J. Noah, esq., taken by consent before Henry J. Horn, a commissioner for the Court of Claims for the Territory of Minnesota, taken at the city of Saint Paul, Minnesota Territory, September 23, 1857.

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Answer. My name is Jacob J. Noah; aged thirty years; lawyer by profession; and have resided in the Territory of Minnesota for the last eight years. I am the incumbent of the office of United States commissioner for the Territory of Minnesota, and a commissioner for the Court of Claims, for said Territory.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimants.

Answer. I have no interest, direct or indirect, therein, nor am I in any degree related to the claimants.

Interrogatory 3. Can you state what the real value of the following described lands, to wit: "East half of the southeast quarter of section 22, township 29 north, of range 24 west; fractional lot No. 2, in same section; the southwest quarter of the southwest quarter of section 23, township 29, range 24 west; and fractional lots Nos. 9, 10, 11, and 12, in same section," was on the 18th day of September, 1854, and also the present value thereof, excluding in your estimate the value of all improvements upon said land, but judging the value of the same by reason of the general improvement of the country?

Answer. I should judge the aggregate value of the lands described in this interrogatory on the 18th September, 1854, to have been at least one hundred thousand dollars, and the present value thereof I should judge to be at least one million of dollars. I form both of these estimates exclusive of all improvements on the land, and from an intimate knowledge of the position and local advantages of the same. These lands comprise part of the town site of Minneapolis, an important and flourishing town on the Mississippi river, in this Territory, and embrace an almost unlimited water power.

Interrogatory 4. What was the value of the said lands in August, 1852?

Answer. I should judge the value of the said lands in August, 1852, to have been at least one hundred and fifty dollars per acre.

I know of no other matter relative to the claim in question.

J. J. NOAH.

Sworn to and subscribed before me this 23d day of September, 1857.

HENRY J. HORN,

A Commissioner for the Court of Claims.

TERRITORY OF MINNESOTA, *County of Ramsey, ss:*

On this twenty-third day of September, A. D. 1857, personally came Jacob J. Noah, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Jacob J. Noah, taken at the request of Stephen Johnston, and by consent of parties duly exhibited, (a copy of which is hereto appended,) to be used in the investigation of a claim against

the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et al.*

HENRY J. HORN,
Commissioner.

Copy of stipulation.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without giving notice to the United States, provided that the testimony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witnesses, if he shall think proper to do so, after the return of the depositions.

JNO. D. McPHERSON,
Deputy Solicitor.

W. B. WEBB,
Solicitor for Plaintiff,

A true copy. Attest :

HENRY J. HORN,
Commissioner.

Deposition of M. W. Irwin.

UNITED STATES OF AMERICA—UNITED STATES COURT OF CLAIMS.

STEPHEN JOHNSTON *et als.* *vs.* THE UNITED STATES.

Deposition of M. W. Irwin, esq., taken by consent before J. J. Noah, esq., a commissioner for the Court of Claims for the Territory of Minnesota, taken at the city of Saint Paul, Minnesota Territory, September 23, 1857.

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Answer. My name is Matthew W. Irwin; aged thirty four years; lawyer by profession; and have resided in Saint Paul for the last four years. I was the late incumbent of the office of United States marshal for the district of Minnesota.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimants?

Answer. I have no interest, direct or indirect, therein, nor am I in any degree related to the claimants.

Interrogatory 3. Can you state what the real value of the following described lands, to wit: "East half of the southeast quarter of section 22, township 29 north, of range 24 west; fractional lot No. 2, in same section; the southwest quarter of the southwest quarter of section 23, township 29, range 24 west; and fractional lots Nos. 9, 10, 11, and 12, in same section," was on the 18th day of September,

1854, and also the present value thereof, excluding in your estimate the value of all improvements upon said land, but judging the value of the same by reason of the general improvement of the country?

Answer. I purchased a claim which I believe was a part of the above-described lands in the month of June, 1854, and I also purchased a part of the claim west of said lands on or about the 18th day of September, 1854. I sold the one-half of my interest, which was thirty acres, or thereabouts, for about one hundred and eighty-seven dollars per acre. There was no title to the said lands, and I sold only the squatter's right thereto by quitclaim deed. None of this land laid upon the Mississippi river, but the body of it laid in section 26, as appears by the plat marked "Exhibit A," attached to the deposition of C. L. Emerson. This sale was for cash. With the title thereto, the above-described lands would have been worth, on the 18th day of September, 1854, at least the sum of two hundred and fifty dollars per acre. The present value thereof, without improvements, would be low at the estimate of eight hundred thousand dollars, (\$800,000.) I know of no other matter relative to the claim in question.

M. W. IRWIN.

Sworn to and subscribed before me this 23d day of September, A. D. 1857.

J. J. NOAH,

A Commissioner for the Court of Claims.

TERRITORY OF MINNESOTA, *County of Ramsey:*

On this 23d day of September, A. D. 1857, personally came Matthew W. Irwin, the witness within named, and after being first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Matthew W. Irwin, taken at the request of Stephen Johnston, and by consent of parties duly exhibited, (a copy of which is hereunto appended,) to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et als.*

J. J. NOAH, *Commissioner.*

Copy of stipulation.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that the testimony may be taken in this case by the petitioner without notice to the United States, provided, that the testimony so taken be not admitted in evidence until the solicitor shall

have had an opportunity to cross-examine the witness, if he shall think proper to do so, after the return of the depositions.

JNO. D. McPHERSON,
Deputy Solicitor.

W. B. WEBB,
Solicitor for Plaintiff.

A true copy. Attest :

J. J. NOAH, *Commissioner.*

BEFORE THE COURT OF CLAIMS, UNITED STATES OF AMERICA.

Deposition of James M. Defrees.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

Deposition of witness taken by the claimant under an agreement, a copy of which is herewith made, this 25th day of September, A. D. 1857.

James M. Defrees, of the city of Madison, county of Dane, in the State of Wisconsin, being by me duly sworn, as hereinafter certified, says:

Interrogatory No. 1. What is your name, occupation, age, place of residence for the past year?

Answer. My name is James M. Defrees; I am a druggist; am forty-nine years of age; have for the past year resided at Madison, Dane county, Wisconsin.

Interrogatory No. 2. Have you any interest in this claim, direct or indirect, or are you related to the claimant in any way?

Answer. I have no interest, direct or indirect, in this claim, nor am I in any way related to the claimant.

Interrogatory No. 3. State your acquaintance with the claimants, and also your knowledge of the character, location, and value of the lands ceded by the Pottawatomie tribe of Indians, by treaty with the United States, made October sixteenth, A. D. 1826, and also the value of the lands selected for said claimants under the provisions of said treaty.

Answer. I have been well acquainted with the claimants for forty years, having resided near them twenty-two years, from A. D. 1814 to A. D. 1836. I have resided on the lands ceded by said treaty from A. D. 1838 to A. D. 1853, during which time was auditor of Miami county, Indiana, for more than nine years. I have a good general knowledge of the lands ceded by said treaty, and more particularly in the Logansport country, and first described in said treaty, having resided thereon for about fifteen years. The lands are of superior quality, eligibly situated, possessing great natural advantages of soil, timber, water power, &c., and contain at present a dense population. I have examined the provisions of the treaty referred to, and do not hesitate to say that a judicious selection, such a one as the natural location of particular tracts would indicate, would have made the claimants independent, and, indeed, very wealthy, by the develop-

ment of the country. I have some knowledge of the lands selected for said claimants under said treaty; have resided in Peru, the seat of justice of Miami county, Indiana, about seven miles from said tract of land, and have been on the same, and would estimate the value, in A. D. 1839, at from five to seven dollars per acre, and in A. D. 1841 the value would have been increased.

By reference to a letter, hereto annexed, and made part of this deposition, written by me to one of the claimants at that time, I find that said land was charged on the tax duplicate of Miami county, Indiana, at the sum of fourteen hundred and eight dollars. I would state in this connexion that lands were not valued for taxation at their full cash value, and also that the cities of Logansport and Peru are both situated on those lands. I do not know of any other matter relative to the claim in question.

J. M. DEFREES.

Copy of stipulation.

STEPHEN JOHNSTON *vs.* THE UNITED STATES.

It is agreed that testimony may be taken in this case by the petitioner without notice to the United States, provided that the testimony so taken be not admitted in evidence until the solicitor shall have had an opportunity to cross-examine the witness, if he shall think proper to do so, after return of the deposition.

JNO. D. MCPHERSON,

Deputy Solicitor.

W. B. WEBB,

Solicitor for Plaintiff.

STATE OF WISCONSIN, *County of Dane*, ss :

On this twenty-fifth day of September, A. D. 1857, personally came James M. Defrees, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of James M. Defrees, taken at the request of Stephen Johnston, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston *et als. vs.* the United States, taken under the agreement copied herein.

THOMAS HOOD, *Commissioner.*

Fees of witness, — ; travel, — ; attendance, — ; commissioner's fees, \$3.

NEW YEAR'S BALL.

The company of Mr. S. Johnston and lady is respectfully solicited to attend a ball at the National House, on Tuesday evening, January 1, 1839, at 5 o'clock.

MANAGERS.

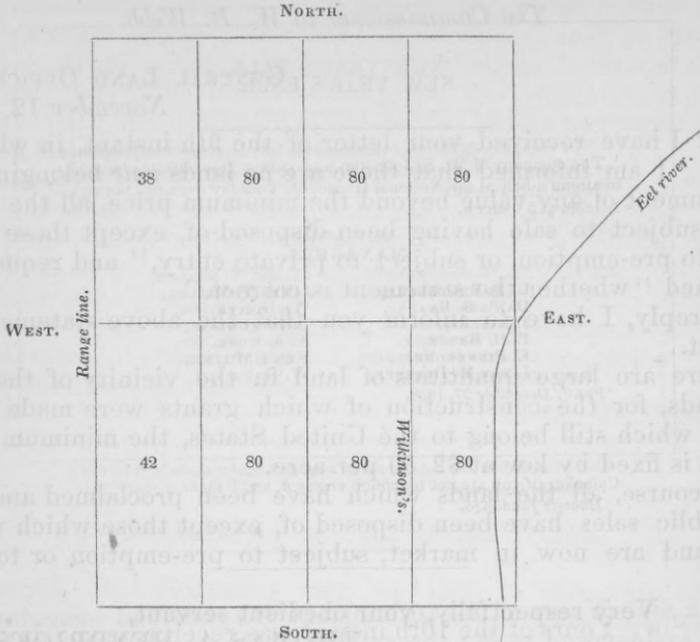
L. B. BERTHELET,
DAN'L R. BEARSS,
J. LINZEY,
E. H. BRUCE,
E. FINNEMORE,
JAMES M. DEFREES,

JAMES T. MILLER,
WM. SMITH,
L. D. ADKISON,
A. A. COLE,
SAM'L MILLER,
W. H. PRINCE,

PERU, December 27, 1838.

Call over, if you are not too much engaged, and "shake a foot" in a Hoosier fandango.

DEAR SIR: Yours of the 10th instant was received some days since. I have endeavored to get the information you ask for on the subject of your land. I have not as yet been able to obtain as satisfactory an account of the matter as I could have wished, but such as I have I hasten to give you. All persons with whom I have conversed agree in saying that the land is not first rate, and that the selection was a very injudicious one; that many much better ones might have been made at the time, as all the best land in that part of the Eel River country was vacant at that time, as far down as Logansport. But notwithstanding they all agree so well in this matter, yet they differ widely as to the probable value of the land. Some say it is, taking the whole tract together, worth about five dollars per acre; others say six or seven. Mr. Wilkinson, who lives on the southeast quarter of the same section, wishes to purchase it, but thinks that he cannot give more than three dollars per acre for it. He says he can pay four hundred dollars in hand, and the balance he would want a credit on—how long a one he did not say. At any rate he would like to know upon what terms you would sell. Mr. Wilkinson and others say that they believe your tract falls short near forty acres. The south half of the section is *minus* just thirty-eight acres, which is occasioned by the range line on the western boundary; but as the fractions decrease as you proceed north, the presumption is that the north half of the section is a little less than the south. The exact number of acres, I presume, could be ascertained by sending to the land office at Laporte. I send you a plat of section thirty as correctly as I can draw it from verbal information.



You will perceive by this that the river just touches the southeast corner of your land. I am told that General Tipton, instead of locating the land himself, as was his duty, trusted the selection to Washington Ewing, of Logansport.

I examined the assessor's duplicate and find you charged with tax for the present year to the amount of nine dollars and fifteen cents and two mills—valuation of the land is \$1,408. Whether it was assessed before the present year I cannot say, but think quite likely it was. I am at your service in this matter; anything that I can do for you will be done with the utmost pleasure. My respects to all, reserving a goodly share to yourself.

JAS. M. DEFREES.

W. B. Warr Esq.,
Attorney at Law, Washington, D. C.

The Commissioner to W. B. Webb.

GENERAL LAND OFFICE,
November 12, 1858.

SIR: I have received your letter of the 9th instant, in which you state: "I am informed that there are no lands *now* belonging to the government of any value beyond the minimum price, all the valuable lands subject to sale having been disposed of, except those that are open to pre-emption, or subject to private entry," and request to be informed "whether the statement is correct."

In reply, I have to inform you that the above statement is not correct.

There are large quantities of land in the vicinity of the several railroads, for the construction of which grants were made by Congress, which still belong to the United States, the minimum price of which is fixed by law at \$2 50 per acre.

Of course, all the lands which have been proclaimed and offered at public sales have been disposed of, except those which were not sold, and are now in market, subject to pre-emption or to private entry.

Very respectfully, your obedient servant,

THOMAS A. HENDRICKS,
Commissioner.

W. B. WEBB, Esq.,
Washington City, D. C.

The Commissioner to W. B. Webb.

GENERAL LAND OFFICE,
March 3, 1858.

SIR: As requested in your letter of 20th ultimo, I enclose herewith the following certified copies, viz:

Letter dated February 25, 1841: Commissioner Whitcomb to Hon. P. G. Goode, with special certificate issued under "act for the relief of the children of Stephen Johnston, deceased."

Letters dated February 28, 1853: Commissioner Wilson to Hon. B. Stanton, and to Stephen Johnston, care of same.

Letter dated February 23, 1841, from P. G. Goode to Commissioner Whitcomb, and letter dated January 22, 1853, from B. Stanton to Commissioner Wilson.

The relinquishment, dated February 2, 1841, is not found on the files of this office, and a copy cannot consequently be furnished.

Very respectfully, your obedient servant,

THOMAS A. HENDRICKS,
Commissioner.

W. B. WEBB, Esq.,
Attorney, &c., Washington, D. C.

Evidence for the United States.

S. JOHNSTON'S HEIRS vs. THE UNITED STATES.

The United States offer in evidence papers from the Land Office, transmitted by Commissioner Hendricks, March 11, 1857.

Deposition of Thomas T. Mann.

JOHN D. MCPHERSON,
Deputy Solicitor.

*Papers from the Land Office.*GENERAL LAND OFFICE, *March 11, 1857.*

SIR: In accordance with the request contained in your letter of 5th instant to be furnished a copy of the decision of this office on the subject of the application of Stephen Johnston to locate a certain special certificate, which application was rejected by the department, I enclose herewith copies of the several letters on the subject, viz:

Commissioner General Land Office to Hon. H. M. Nichols, January 27, 1854.

Commissioner General Land Office to Stephen Johnson, August 26, 1854.

Commissioner General Land Office to same, October 6, 1854.

Commissioner General Land Office to same, December 29, 1854.

Commissioner General Land Office to Secretary of the Interior, December 29, 1854.

Secretary of the Interior to Commissioner General Land Office, January 10, 1855.

Commissioner General Land Office to Stephen Johnston, January 16, 1855.

Commissioner General Land Office to Hon. S. P. Chase, February 17, 1855.

Commissioner General Land Office to same, February 16, 1855.

Very respectfully,

THOS. A. HENDRICKS,
Commissioner.

JNO. D. MCPHERSON, Esq.,
Deputy U. S. Solicitor Court of Claims.

The Commissioner to Hon. M. H. Nichols.

GENERAL LAND OFFICE, *January 27, 1854.*

SIR: I have the honor to return the letter of Stephen Johnston, esq., left by you some time since, and also to enclose to you for trans-

mission the certified copy of the special certificate issued in favor of the heirs of Stephen Johnston, deceased, with such an indorsement thereon as will make it available to said heirs in the location of the quantity of land therein called for.

With great respect, your obedient servant,

JOHN WILSON, *Commissioner.*

HON. M. H. NICHOLS,
House of Representatives.

The Commissioner to S. Johnston.

GENERAL LAND OFFICE, *August 26, 1854.*

SIR: Your certificate cannot be located on Fort Snelling land. All lands within the reservation must be offered at public sale, under special provision of law.

JOHN WILSON, *Commissioner.*

STEPHEN JOHNSTON, *Piqua, Ohio.*

[Per North American telegraph.]

The Commissioner to S. Johnston.

GENERAL LAND OFFICE, *October 6, 1854.*

SIR: Mr. John McKenny has referred to this office for reply your letter to him of 28th ultimo on the subject of receiving in payment for lands within the Fort Snelling reservation the certificate granted to the heirs of Stephen Johnston, deceased, and I have to inform you that the lands referred to must, under special provision of law, be first offered at public sale for cash, before they can be subject to entry of any kind, or with any description of certificate, warrant, &c., consequently, your special certificate can only be applied to the lands which may remain subject to private entry after the sales have closed, so far as the lands within that reservation are concerned.

Very respectfully,

JOHN WILSON, *Commissioner.*

STEPHEN JOHNSTON, Esq., *Piqua, Ohio.*

The Commissioner to S. Johnston.

GENERAL LAND OFFICE, *December 29, 1854.*

SIR: In compliance with your request, I herewith send, enclosed, a copy of my report of this date to the Hon. Secretary of the Interior, on the subject of your special certificate.

Very respectfully, your obedient servant,

JOHN WILSON, *Commissioner.*

STEPHEN JOHNSTON, Esq., *Present.*

Rep. C. C. 286—3

The Commissioner's report.

GENERAL LAND OFFICE, *December 29, 1854.*

SIR: In accordance with your direction indorsed on the letter of Stephen Johnston, esq., of the 25th instant, I have the honor to report that the act of 20th July, 1840, for relief of the children of Stephen Johnston, deceased, directs the issue to the said children, or their heirs, of a "certificate, receivable in payment at any land office in the United States, for any half section of land not subject to pre-emption;" and also provides that the act shall continue in force until the 4th March, 1843, and no longer.—(See copy herewith, marked A, of certificate issued under this act.)

This law was amended by the act of March 3, 1847, which directs the Commissioner of the General Land Office to cause the register and receiver at Upper Sandusky, Ohio, to receive said certificate in payment for any half section of land in the Wyandotte reserve not otherwise appropriated provided the minimum price was not over \$2 50 per acre.

The original certificate, issued under the act of 1840, was lost, and on proof being filed in this office of such loss, a certified copy of it was furnished Mr. Johnston on the 12th May, 1853, and on the 27th of January, 1854, a certificate was attached thereon, making the copy receivable in lieu of the lost original.

Mr. Johnston, in August last, requested this office to instruct the land officers at Stillwater, or Minneapolis, to receive his certificate in payment "for any half section of the public land situated within the former military reserve at Fort Snelling"—"not subject to pre-emption at any time before or on the day of sale of such lands as are advertised for sale in September next;" and on 26th August he was advised by telegraph that the certificate could not be located on those lands, for the reason that they must be offered at public sale, under special provision of law. This request Mr. Johnston repeated in a letter to Mr. John McKenny, (herewith submitted,) and was again declined by letter from this office of 6th October, 1854, copy enclosed.

The reason for refusing to instruct the land officers to permit this certificate to be located on lands within the former Fort Snelling reserve, before those lands were offered at public sales, as requested by Mr. Johnston, is that the act of 26th August, 1852, (laws of 1852, pp. 36 and 37,) directs all of those lands, the sale of which is authorized by that act, "*to be sold at public sale, under the direction of the President of the United States.*"

This direction has been considered so pointed and positive as to exclude these lands from the operation of the pre-emption and town site laws, and, in fact, so far as the sale is concerned, from the operation of all laws of prior date, and, of course, from the claim of the children of Stephen Johnston.

The will of Congress on this subject is so plainly and pointedly expressed that there can be no doubt on the subject, and, consequently,

there is no room for construction by the Executive, the lands must
 “be sold at public sale.”

All of which is most respectfully submitted.

JOHN WILSON, *Commissioner.*

Hon. R. McCLELLAND,
Secretary of the Interior.

The Secretary's decision.

DEPARTMENT OF THE INTERIOR,
 January 10, 1855.

SIR: I have examined the question submitted in your letter of the 29th ultimo, in relation to the application of Stephen Johnston, for the issue of instructions to the land officers at Stillwater, or Minneapolis, to receive in payment for a certain tract of land within the former military reserve at Fort Snelling a certificate issued by your office, under the act of July 20, 1840, for the relief of the children of Stephen Johnston, deceased, and am satisfied that the views expressed by you on the subject are correct. Your decision in the case is therefore affirmed, and the papers are herewith returned.

Very respectfully, your obedient servant,

R. McCLELLAND, *Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

The Commissioner to S. Johnston.

GENERAL LAND OFFICE, January 16, 1855.

SIR: Herewith you will receive a copy of the letter dated 6th instant from the Secretary of the Interior, affirming the decision of this office respecting your application to locate on Fort Snelling lands the special certificate issued under act of 20th July, 1840, from which decision you appealed to the department on 25th ultimo.

Very respectfully, your obedient servant,

JOHN WILSON, *Commissioner.*

STEPHEN JOHNSTON, Esq., *Piqua, Ohio.*

The Commissioner to Hon. S. P. Chase.

GENERAL LAND OFFICE, February 16, 1855.

SIR: In reply to your inquiries on the subject, I have the honor to state that Stephen Johnston, esq., a few months since applied to this office for instructions to be sent to the land officers at Stillwater, or Minneapolis, directing them to receive a special certificate, issued

under authority of an act of Congress for the relief of the heirs of Stephen Johnston, deceased, in payment for lands within the limits of the Fort Snelling reservation, in Minnesota Territory.

This could not be done for the reason that the act of 26th August, 1852, required the lands within that reserve to be sold at public sale, and such entry as Mr. Johnston desired to make would have violated that law.

Should the bill, No. 688, herewith returned, become a law, it will remove all difficulty in regard to these lands and enable Mr. Johnston to take any half section of them subject to sale and not settled upon, or claimed by pre-emption, or under the town site law of 1844.

With great respect,

JOHN WILSON, *Commissioner.*

Hon. S. P. CHASE, *Senate.*

The Commissioner to Hon. S. P. Chase.

GENERAL LAND OFFICE, *February 17, 1855.*

SIR: In answer to your oral inquiry of this morning I have the honor to state that the location for the heirs of Stephen Johnston, within the former limits of the military reserve at Fort Snelling, can be secured to them by the accompanying proviso, to come in at the end of the 1st section of House bill No. 668, without prejudice to valid pre-emption claims or *bona fide* actual settlers, and would therefore seem just and fair to all parties.

With great respect,

JOHN WILSON, *Commissioner.*

Hon. S. P. CHASE, *Senate.*

IN THE COURT OF CLAIMS.

STEPHEN JOHNSTON and others *vs.* THE UNITED STATES.

Testimony of Dr. Thomas T. Mann, for the United States, taken before Edmund F. Brown, commissioner for the District of Columbia.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

On the seventeenth day of March, A. D. eighteen hundred and fifty-nine, personally came Doctor Thomas T. Mann, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were

written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The adverse party was notified, did attend, and did not object.

EDM. F. BROWN,

Commissioner of the Court of Claims.

Fees of witness:

Travel, 5 miles, at 5 cents per mile.....	\$0 25
Attendance, 1 day, at \$1 50 per day.....	1 50
	<hr/>
	1 75
	<hr/> <hr/>

Commissioner's fees:

Taking testimony, 3 pages, 800 words, at 20 cents per 100...	\$1 60
Serving subpoena, 50 cents; 5 miles travel, 25 cents; oath, 10 cents.....	85
For assistance to deputy solicitor in arranging with counsel and witness.....	3 00
	<hr/>
	5 45
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The deposition of Doctor Thomas T. Mann, taken at the request of John D. McPherson, esq., deputy solicitor Court of Claims, before Edmund F. Brown, commissioner for the District of Columbia, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Stephen Johnston and others *vs.* United States.

First general interrogatory by the commissioner. Please to state your name, your occupation, your age, your place of residence the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant.

Answer. My name is Thomas T. Mann; my occupation, none; my age is over thirty-five years; my residence the past year, Georgetown, D. C.; I have no interest, direct nor indirect, in the claim which is the subject of inquiry; and am in no degree related to the claimant.

First interrogatory by the deputy solicitor. Have you knowledge of certain lands in Minnesota described as follows, viz: East half of southeast quarter of section twenty-two, township twenty-nine north, of range number twenty-four west, (29 N., 24 W.); fractional lot number two in same section; the southwest quarter of the southwest quarter of section twenty-three, township twenty-nine north, range twenty-four west; fractional lot number nine in the last named sec-

tion; fractional lot number ten in the same section; fractional lot number eleven in the same section; and fractional lot number twelve in the same section, which lands are situated in the Minneapolis land district in the State of Minnesota; and if so, do you recognize the location of the same upon the plat now exhibited to you? Are you acquainted with the value of said lands, and if so, what was their value on the 18th of September, 1854? State, also, the means and extent of your information upon this subject; what was the value of said lands in 1853, and in 1855 and what is now their value.

Answer. I have knowledge of said lands and recognize them on the plat now exhibited to me, purporting to be official.—(See original for plat marked Exhibit A.) I have a general knowledge of the value of those lands, comparatively speaking, and believe that their average value on the 18th of September, 1854, was three hundred dollars per acre; in 1853, three hundred dollars per acre; in 1855, four hundred dollars per acre; and in 1859, one thousand dollars per acre, without improvements; and if the said lands embraced all the advantages of the water-line of the river, to the extent of said tract, it would at least double the above value for 1859.

Second general interrogatory by the commissioner. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. Nothing at all.

T. T. MANN.

Sworn to and subscribed before me this 17th day of March, 1859.

EDM. F. BROWN, *Commissioner*.

GENERAL LAND OFFICE, *March 4, 1859.*

SIR: Agreeably to the request made in your letter of February 28, I send enclosed herewith the sketch or map of certain tracts of land in Fort Snelling reserve, as described in your letter.

I am, very respectfully, your obedient servant,

THOS. A. HENDRICK, *Commissioner*.

JOSEPH MCPHERSON, Esq.,

Office of Solicitor of Court of Claims, Washington, D. C.

IN THE COURT OF CLAIMS.

STEPHEN JOHNSTON ET AL. *vs.* THE UNITED STATES.

PETITIONERS' BRIEF.

The petitioners state that their ancestor, Stephen Johnston, was, in August, 1812, in the employ of the government of the United States,

and undertook to carry an express for the relief of Fort Wayne, then besieged, in which undertaking he was killed by the Pottawatomie Indians. That in October, 1826, these Indians made a treaty with the United States, in which, by way of reparation to the heirs of their ancestor, they granted to your petitioners one half section of land, amounting to three hundred and twenty acres. That the half section of land so granted was to be located under the direction of the President of the United States. That under the treaty the government acquired a large and very valuable tract of land, out of which the selection for your petitioners was to be made. That a selection was accordingly made, and that at the time your petitioners were minors, and resided at a distance from the land in question. They state, further, that in this condition of affairs their interests were entirely disregarded, and a track was selected and set apart to them deficient in quantity and inferior in quality.

Considering themselves aggrieved by this treatment, they came to Congress for redress, and on the 20th of July, 1840, an act was passed for their relief.—(Record, pp. 4 and 5.) By this act the President, upon being satisfied that they had relinquished the land selected for them, was directed to issue to the petitioners “a certificate, receivable in payment at any land office of the United States, for any half section not subject to pre-emption.”

The relinquishment was made and a certificate issued.—(Record, p. 5.) This (that is, the relinquishment) was made under the belief that under the certificate, and the official construction of it at the time, they would acquire something of greater value than that which they had relinquished; in other words, that by its terms it would be received in payment “at any land office for any half section not subject to pre-emption.”

Acting upon this belief, they made a selection in the “Wyandotte reserve,” and tendered their certificate in payment. It was rejected under a decision of the Attorney General, and the petitioners again applying to Congress, on the 3d day of March, 1847, a joint resolution was passed, directing the Commissioner of the General Land Office to cause the register and receiver at Upper Sandusky (the land office of the reserve) to receive the petitioners’ certificate in payment for any half section in the “Wyandotte reserve,” &c.—(Record, p. 7.) During the tardy process of legislation the Wyandotte lands were brought into market (including those selected by petitioners) and sold without regard to the petitioners’ rights. In the meantime their certificate having been lost or mislaid in the files of Congress, another was issued to them.—(Record, p. 8.)

Again, on the 18th day of September, 1854, petitioners made a selection of a half section of land in the former military reserve at Fort Snelling, and applied to the Commissioner of the General Land Office for instructions to the land officers having charge of that reserve to receive their certificate in payment for that selection, which was refused, and they were thereby denied a confirmation of said selection under their certificate.

The petitioners state that, by these several refusals, they have been

deprived of all advantage under their certificate ; that there are now no lands upon which, under the decisions of the Land Office, they can locate their certificate so as to be at all indemnified for the lands to which they were entitled under the treaty with said Indians. That they believe these several refusals and decisions to be in violation of their rights and contrary to law, and they ask at the hands of the court to be paid in money what by their proof they show to have been the value of the land which has been illegally and wrongfully refused to them by the government officers.

POINTS FOR PETITIONERS.

1. The grant was made to the petitioners by the Pottawatomie Indians under peculiar circumstances. It was to them as the children of a person who had been killed by these very Indians. The petition details the manner of their ancestor's death, and its allegations, in that regard, are not denied or disproved.—(Record, p. 3.) Under the treaty containing this grant, the treaty with the Pottawatomie Indians, 16th October, 1826, the United States agreed to grant to the said petitioners the quantity of land therein designated by the Indians. This, in fact, was a grant, and vested a perfect title in petitioners. A large tract of most desirable country was acquired by the United States under the treaty, encumbered with this among other grants. The government had undertaken to carry out the intention of the Indians with regard to these petitioners, and there was every consideration moving them to the most tender regard for their interests. The selection made for them was in entire disregard of the undertakings.—(See Record, p. 4 ; Mr. Wick's Report ; also, Mr. Marris's Report, Record, pp. 6 and 7 ; also, *United States vs. Brooks*, 10 H., 442 ; and *Wilcox vs. Jackson*, 13th Peters, 576.)

2. This act was passed July 20, 1840. It was then too late to make another selection for petitioners from the ceded lands, for the government had parted with its title to these lands ; but it was enacted that, if the petitioners would relinquish the location already made for them, a certificate should issue to them, which certificate should be receivable in payment at any land office in the United States for " any half section not subject to pre-emption."—(Record, p. 5.) The grant to the petitioners was one of the provisions of the treaty ; their title to it had been perfected ; no patent was required to vest the title in petitioners, because it was an express grant, and upon the relinquishment made to the government under the act of 1840, they, in fact, conveyed to the government the lands taken by them under that grant. This relinquishment was made upon the faith not only of the express provisions of the act of 1840, but also of the official interpretation of that act, to the effect that, with the certificate issued to them, they should be enabled to enter other and more valuable lands.—(Record, p. 6, *Wilcox vs. Jackson*, 13 Peters, 498.)

3. The certificate was to be receivable in payment for any half section "*not subject to pre-emption.*" This is the language of the act and

the certificate itself. What is there meant by these words is to be ascertained only from the laws of the United States, by which the right to pre-emption is created. In this certificate they are to control by what they meant at the time of the passage of the act under which the certificate was issued; that is to say, in July, 1840. Down to 1841 it is evident that "*pre-emption*" or, in other words, the right to priority of purchase, was restricted to such persons as had actually settled upon and were cultivating the public lands. By more recent legislation the right to pre-emption is one that can be acquired subsequently to the act creating it; so that when the act of 1840 was passed, the words "*not subject to pre-emption*" were meant to protect the actual settler, and not to limit or restrict the rights of the petitioners.—(4 Stat., 420; 4 Stat., 496; 4 Stat., 603; 4 Stat., 420; 4 Stat., 496; 4 Stat., 603; 4 Stat., 663; 4 Stat., 678; 5 Stat., 251; 5 Stat., 382; 5 Stat., 455.)

4. The language of the certificate is peculiar; it was to be "*receivable in payment for any half section*;" it does not give merely a right to *enter* lands, as all other special certificates or warrants do, nor is it limited, as such certificates and warrants are, to lands subject to private entry, but it is made an absolute payment at any land office for the quantity of land specified. The petitioners have a right to suppose that the special character of the legislation in their behalf grew out of the peculiar character of their case, and was made for the purpose of satisfying their just rights and demands.

For the interpretation of the language of the law relating to land grants, see *Chatard vs. Pope*, 12 Wheaton, 586; and for various private laws, 6 Statutes at Large, pages 237, 242, 269, 361, 374, 270, 385, 246, 254, 236, 816, 385, 443, 258, 285, 313, 329, 353, 343, 374, 380, 525, 530, 556, 557.

5. With their certificate, such as it has been shown to be, and to obtain which they had relinquished valuable lands already belonging to them, the petitioners having selected from the "Wyandotte reserve" a half section of land, offered their certificate in payment. It was refused. This refusal was in open violation of their rights.

1. The relinquishment made by them was based upon the official decision that the certificate to be issued to them would be received in payment for any lands "*not subject to pre-emption*," in which terms would be included the alternate sections along the line of the Maumee canal.—(Record, 5.) These alternate sections had been reserved from sale, withdrawn from market, and were not subject to pre-emption.—(5 Stat., 261; 5 Stat., 455.)

2. The lands in the "Wyandotte reserve" were in the same condition by the same special legislation.—(5 Stat., 455; 5 Stat., 624.) The words "*not subject to pre-emption*" had been officially interpreted, and the relinquishment required by the act of 1840 made upon the faith of that interpretation.—(Record, 5.) It is no answer to this claim to say that the "Wyandotte reserve" lands could not be subject to pre-emption, for neither could the alternate sections on the line of the canal, and yet they had been decided to be within the meaning of the act of July 20, 1840.

3. And if any further argument be needed on this point, it is afforded by the action of Congress itself. The resolutions of March 3, 1847, 9 Stat., 708, (Record, 7,) were passed to meet this very contingency. The whole matter was before Congress, and they ordered the Commissioner of the General Land Office to cause the register and receiver at Sandusky, the land office of this reserve, to receive this certificate. It was too late to work the benefit intended to these petitioners. But is this legislation to go for nothing? Does it mean nothing? Has it no weight as an interpretation of this certificate, the creation of their own legislation?

4. This legislative interpretation sustains the petitioners in the ground taken by them with regard to their certificate, to wit: that they may use it at any land office for any half section of land, so long as in so doing they do not interfere with any rights actually acquired by settlement and cultivation.—(See Record, p. 9.)

6. Driven from the "Wyandotte reserve," petitioners made another selection from among the lands in the "Fort Snelling reserve," tendered their certificate, and were again refused. In the meantime they had gotten another official interpretation of their certificate.—(See Record, p. 9.) To this last official interpretation they literally conformed, making their selection in a compact body by legal subdivisions, the sale of which was authorized by law, which was not settled or improved, the minimum price of which was \$1 25, and which was not reserved from sale.

By the acts of August 26, 1852, and April 12, 1854, these lands were to be sold, as were other public lands of the United States. The Commissioner finds "special provisions in these laws," by which the petitioners are excluded from these lands, in this, that they must be sold at public sale, and are not subject to pre-emption.—(Record, 11.) This decision is in conflict with his decision of February 28, 1853, (Record, 9,) and amounts to this: the heirs of Stephen Johnston can take no lands until they have first been offered at "public sale;" in other words, their certificate, with all the sanctions of special enactment and official interpretation, is only good for such refuse lands as may remain undisposed of at public sale. Had Congress meant this, why did they not use the words necessary to convey that meaning; they were familiar and well understood.—(Chatard vs. Pope; 12 Wheaton, 586; 10 Stat., 36; 10 Stat., 274; 10 Stat., 627.)

7. The act of 1840 was a contract on the part of the government to convey to the petitioners a half section of land. The consideration was the relinquishment on their part of the claim to lands already granted to them. On their part the contract has been performed, and the government has taken the relinquished lands. The government has refused to convey to these petitioners the land designated by the act of July, 1840, and has restricted the operation of that law to lands subject to private entry. This is a breach of the contract to convey. By the official interpretation of the certificate issued to petitioners, and by the legislation subsequent to the act of 1840, and by the ope-

ration of other causes, *i. e.*, the acts of the government, it is now out of the power of government to make the conveyance which by their contract they agreed to make. In this court, when a petition is presented, the United States occupy the position of an ordinary defendant in a suit at law.—(Todd *vs.* The United States, Dev., C. C., 129.) This, then, becomes the case of a breach of contract on the part of a vendor, by a failure on his part to make conveyance in accordance with his agreement.—(Lytle *vs.* The State of Arkansas, 9 Howard, 333; 2 Parsons on Contracts, 18, n. *h*; 1 Mass., 356; Charles River Bridge *vs.* Warren Bridge *et al.*; Judge Story's opinion, 11 Peters, 596, &c.)

8. There can be no principle better settled than that "when the common law gives a right, or prohibits an injury, it also gives a remedy by action," and "that every injury imports a damage." The rule is, growing out of the well settled doctrine, that damages are given as compensation for the injury received; that such damages should be precisely commensurate with that injury, neither more nor less.

The measure of damages has come of late years to be the subject of established rules, the great principle underlying them being, that for any invasion of right there is a remedy, that remedy being compensation. In this case the government having failed to convey as they contracted to do, and having placed themselves in such a position that they cannot now convey, the petitioners are entitled to have, by way of damages, the value of the lands for which they offered their certificate, and for which it was refused in payment.—(Hopkins *vs.* Lee, 6 Wheaton, 109; Baldwin *vs.* Munn, 2 Wend., 399; Patrick *vs.* Marshal, 2 Bibb, 40; Fisher's Heirs *vs.* Kay, 2 Bibb, 434; Newson, *vs.* Harris, Dudley's Georgia Reports, 180; Sedgwick on the Measure of Damages, 188, &c.)

The petitioners have taken testimony as to the value of the lands, and refer to Defrees' deposition, Record, p. 46; Secomb's, Record, p. 32; A. C. Smith's, Record, p. 22; Emerson's, Record, p. 26; Noah's, Record, p. 37; Erwin's, Record, p. 42; Letter of Defrees, Record, p. 50; and to the deposition of Doctor Thomas T. Mann, taken by the United States, Record, p. 71.

W. B. WEBB,
For Petitioners.

IN THE COURT OF CLAIMS.

STEPHEN JOHNSTON AND OTHERS *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for not permitting the petitioners to enter certain lands with a certificate issued by authority of Congress.

MATERIAL AVERMENTS IN THE PETITION.

1. That Congress, on the 20th of July, 1840, passed a law authorizing the petitioner to surrender certain lands in Indiana, and to receive "a

certificate receivable in payment at any land office in the United States for any half section not subject to pre-emption.—(6 U. S. L., 812.)

Said act was to continue in force “until the fourth of March, 1843, and no longer.”

2. That the petitioner surrendered said lands, and received a certificate in conformity with the said act, on the 25th of February, 1841.

3. That the petitioner, in 1854, presented the said certificate at the Minneapolis land office in Minnesota, and desired to be permitted to locate the same on a certain half section of the Fort Snelling reserve, which was refused, both there and at the General Land Office.

4. That the said land selected is of great value, and they pray to be allowed the value thereof.

5. That when the Wyandotte lands were sold, the petitioners bid some twenty-five dollars per acre for a half section, and offered the certificate in payment, which was refused.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. That in 1840 a law was passed, as set out in the plaintiffs' petition, authorizing them to relinquish a certain half section of land received under an Indian treaty, and to receive a certificate authorizing the location of the same upon only unsold land belonging to the United States not subject to pre-emption. This law was limited in duration to the 4th of March, 1843.

Second. That they made the surrender of said half section of land to the United States, and received in lieu thereof a certificate from the General Land Office, according to the terms of the said act, on the 25th of February, 1841, which certificate was lost, and renewed on 27th of January, 1854.

a. The government offered certain Wyandotte lands for sale about 1847, and the plaintiffs bid in a half section thereof at about \$25 per acre, and offered their certificate in payment, which was refused, and money was demanded, and, not being paid, the land was sold to others.

Third. That on the 26th of August, 1852, Congress authorized the survey of the military reserve at Fort Snelling, and the establishing certain boundaries, and requiring the Commissioner of the General Land Office to cause what should be left out of the reserve to be surveyed and “to be sold at *public sale* under the direction of the President of the United States.”—(10 U. S. L., 36, 37.)

Fourth. That on the 14th of August, 1854, the plaintiffs applied to enter one half section of the land thus ordered to be sold and surveyed, which was refused at the local and General Land Office, because the law required the same to be sold at public sale.

Fifth. That on the 2d of March, 1855, Congress passed an act amending the act of 1852, authorizing the sale of said land in the same manner as other lands, and subject to pre-emptions for three months. (10 U. S. L., 627.)

Sixth. That under this law the lands referred to were sold and disposed of, not having been applied for by the plaintiffs under said certificate, after the passage of said law and before they were purchased by other applicants.

LEGAL PROPOSITIONS.

FIRST. *By the act of July 20, 1840, the plaintiffs could not enter land under the certificate authorized thereby, after the 4th of March, 1843.*

The second section expressly limits the lifetime of the act to the fourth of March, 1843. The words are :

“SEC. 2. That this act shall continue in force and have effect until the 4th day of March, 1843, and no longer.”

It is clear that Congress did not wish to continue this matter open later than 1843. When the act expired it was dead for all purposes expressed in it. The power which it authorized the plaintiffs to exercise during its existence could not be exercised afterwards. The certificate as well as the act ceased to have effect after that time. If Congress had designed no limit to the period within which the surrender was to be made and the certificate be obtained, they would have said so instead of declaring the whole act at an end. The act conferred a power, but limited its exercise to a specified period. If any portion of the power extended beyond 1843, then the whole did so, and the surrender and procurement of the certificate could have been made after the 4th of March, 1843. Such a construction cannot be sustained. It follows that in 1854 this certificate could not have been legally located anywhere.

SECOND. *The certificate could only be located on land which had been surveyed.*

Until the land was surveyed there could be no half section upon which the certificate could be located. There is no law authorizing the public lands to be brought into market before they are surveyed. Those to which pre-emptors may be entitled to enter cannot be ascertained and designated before the survey. No patent can be issued for unsurveyed land. They could not be described without the survey, and before survey the land officers could not exercise any acts over them.

THIRD. *The location authorized by the act of 1840 and certificate was limited to lands then open to sale at a land office.*

There is nothing in the act that tends to show that lands subsequently brought into market were to be subject to location by this certificate. The act speaks in the present, and not future, tense. Congress consented to allow the plaintiffs to select from the lands then in market not subject to pre-emption. But they did not promise them that they might, in all future time, select such as might be surveyed and not subject to pre-emption. This construction would give them a right to enter gold and other mineral lands, and the grounds whereon the Capitol and our forts stand and navy yards are located, provided the ground was authorized to be sold. It would put all our lands owned by the United States in a situation to be taken on a certificate only intended

to permit the parties to select from the unsold lands in market such as best suited them. It follows that the lands surveyed and brought into market in 1854 were not subject to location under this certificate.

FOURTH. *The act and certificate did not authorize the location on lands not subject to entry at private sale at the land offices.*

The land laws do not permit private sales until—

1. After land has been surveyed.
2. Not before it has been offered at public sale.
3. Nor do they authorize sales of land purchased or reserved by the government for particular use.
4. They do not authorize the sale of mineral lands.

When the plaintiffs proceeded to make a location of their certificate, these four descriptions of land were not open to them under the general law of the land. The Fort Snelling reservation was not open for sale until after it was surveyed under the act of 1852, and it was then required to be sold at public sale. Congress having thus made special provisions concerning this reservation, and having pointed out a particular mode of sale, it could be sold in no other manner. The Land Office could not make any other disposition of it than the one directed by Congress, without violating law. Had that office attempted to confer a title upon the plaintiffs contrary to law, such title would have been a nullity, and of no possible value. Other parties could have acquired a valid title notwithstanding their location. The Land Office performed its duty in refusing the proposed location.

After the act of 1855 was passed authorizing pre-emptions and private sales of land at Fort Snelling, the plaintiffs did not apply to the Land Office to locate their certificate thereon. Consequently they cannot complain that others became the purchasers of all the lands there.

FIFTH. *The plaintiffs acquired no rights to land in the Wyandotte reservation.*

The Wyandotte lands were not open to entry at the time the plaintiffs sought to locate their certificate upon them. In the first instance, they appear not to have been surveyed. But when they were surveyed, the law required them to be offered at public sale, and they were offered and actually sold at about \$25 per acre. The plaintiffs purchased some of the lands, and offered their certificate in payment, instead of money. The Land Office was not authorized to receive it as money. The law required it to sell for money, and pay it into the Treasury. The plaintiffs' certificate did not represent the \$8,000 for which the half section sold. If the Land Office had received the certificate, instead of money, the transaction would not have been legal, and no title would have vested in the plaintiffs.

Congress, in passing the law authorizing the issuing the certificate in question, did not intend to change the general land laws so as to dispense with offering all public lands at public sale for money. After they had thus been offered, they designed to permit the plaintiffs to

select from what might remain, provided they should not interfere with pre-emptors. The law was passed to enable them to get rid of valueless land, and to acquire such as would not command more than a dollar and a quarter per acre.

It could not have been the intention of Congress to confer upon them the power to interfere with the regular mode of doing business at the Land Office, so as to enable them to obtain lands worth from twenty-five to eight hundred dollars per acre, in lieu of worthless lands which they gave the government. There was no reason why Congress should confer such advantages upon the plaintiffs. They had no claims upon the government at all. They asked a simple favor, which was granted, and now they seek to make that the means of taking from the government something like a quarter of a million of dollars. Such was not the intention of Congress, nor can the law bear a construction which will lead to such consequences. All that was intended was to enable the plaintiffs to obtain such lands as the government was selling at a dollar and a quarter per acre. This is all that they were ever entitled to.

R. H. GILLET, *Solicitor*.

Dated February 22, 1860.

IN THE COURT OF CLAIMS.

June 11, A. D. 1860.

STEPHEN JOHNSTON et al. vs. THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The Pottawatomie tribe of Indians, by a treaty between them and the United States bearing date the 16th day of October, A. D. 1826, ceded to the United States certain lands mentioned and described in the first article thereof. By the sixth article the United States agreed to grant to each of the persons named in the schedule annexed to the treaty the quantity of land therein stipulated to be granted; but it was provided that the land so granted should never be conveyed by either of the said persons or their heirs without the consent of the President of the United States. Among the grants mentioned in the schedule was the following: "To the children of Stephen Johnston, killed by the Pottawatomie Indians, one half section of land, to be located under the direction of the President of the United States."

In pursuance of the treaty, a half section of land was selected and located, under the direction of the President of the United States, for the children of Stephen Johnston; but they being dissatisfied therewith, at their instance Congress passed the following act:

"That upon the President being satisfied that the claim of the children of Stephen Johnston, named in the treaty made with the Pottawatomie tribe of Indians near the mouth of the Mississinnewa, upon the Wabash, in the State of Indiana, on the sixteenth day of October,

in the year one thousand eight hundred and twenty-six, to a certain half section of land in and by said treaty granted to them, the children of said Stephen Johnston, has been or may have been relinquished to the United States, or that the same never has been selected for and accepted by them, he, the said President, is requested to cause the Commissioner of the General Land Office to issue to the children of the said Stephen Johnston by their names, Stephen Johnston and Elizabeth Johnston, or to their heirs, a certificate receivable in payment at any land office in the United States for any half section of land not subject to pre-emption."

§ 2. "That this act shall continue in force and have effect until the fourth day of March, in the year one thousand eight hundred and forty-three, and no longer."—(6 Stat. at L., p. 812, ch. 96.)

Under this act of Congress the Commissioner of the General Land Office issued a certificate bearing date the 25th day of February, A. D. 1841, of which, omitting the caption and conclusion, the following is a copy :

"Whereas it has been made to appear to the satisfaction of the President of the United States, in virtue of the provisions of the act above quoted, that the claim of the children of Stephen Johnston, deceased, named in the treaty with the Pottawatomie tribe of Indians 'near the mouth of the Mississinnewa, upon the Wabash, in the State of Indiana, on the sixteenth day of October, in the year one thousand eight hundred and twenty-six, to a certain half section of land in and by said treaty granted to them, the children of the said Stephen Johnston,' has been by them relinquished to the United States by instrument of writing bearing date the second day of February, one thousand eight hundred and forty-one, and placed on file in this office :

"Now, therefore, be it known, that this certificate shall be receivable in payment at any land office of the United States for any half section of land not subject to pre-emption, in the joint names of the heirs of the said Stephen Johnston, deceased, to wit : Stephen Johnston, and Stephen Winans and Elizabeth his wife, late Elizabeth Johnston."

This certificate was annexed to a letter bearing date the same day therewith from the Commissioner of the General Land Office to the Hon. P. G. Goode, H. R., of which, omitting the date, subscription, and direction, the following is a copy :

"I have received your letter of the 22d instant in relation to the certificate authorized to be issued by this office in favor of the heirs of Stephen Johnston, deceased, in virtue of the act of Congress for their relief, approved July 20, 1840. That certificate is now transmitted annexed to this letter, and, in the words of the law, is made 'receivable in payment at any land office in the United States for any half section of land not subject to pre-emption ;' which language is understood at this office to admit the entry (should the heirs so desire to do, as you have intimated) of any half section of the alternate sections along the line of the Maumee canal, advertised to be sold in June next."

The petitioners allege that they relied on this opinion of the Commissioner, and, accepting that construction of the law, surrendered

the lands selected for them; and "that they would not have relinquished said land upon any other condition than the right to purchase with said certificate any half section of land, the sale of which was authorized by the United States, without restriction or limitation, and in accordance with said letter attached;" but they offer in support of this allegation no other evidence than the certificate itself and the Commissioner's letter to which it was annexed.

Subsequently the petitioners made application to the Commissioner of the General Land Office to enter a half section of the Wyandotte lands; but, under an opinion of the Attorney General that their certificate could not, under the law, be located on those lands, their application was rejected. It does not appear that the petitioners made any effort to locate their certificate on any half section of the alternate sections along the line of the Maumee canal. After their application to locate it on the Wyandotte lands was rejected, Congress, at their instance, by joint resolution approved March 3, A. D. 1847, provided "that the Commissioner of the General Land Office cause the register and receiver at Upper Sandusky, Ohio, to receive a certificate of the heirs of Stephen Johnston, granted to them under 'An act for the relief of the heirs [children] of Stephen Johnston, deceased,' approved July twentieth, eighteen hundred and forty, in payment of any half section of land in the Wyandotte reserve not otherwise appropriated: *Provided*, the minimum price of said half section shall not exceed two dollars and fifty cents per acre."—(9 *Stat. at L.*, p. 708, No. 13.)

The petitioners allege that "during the tardy process of legislation, and while said resolution was pending in the Senate, the lands in question were brought into market with other lands and sold, without regard to the rights of the petitioners;" but they have not sustained this allegation by proof. Still it does not appear that after the passage of the joint resolution they took any steps to avail themselves of its provisions. Nor, as regards the present claim, is it at all material that they should have done so, for those provisions are merely permissive.

On the 12th day of May, A. D. 1853, the Commissioner of the General Land Office issued an authenticated copy of his letter of February 25, A. D. 1841, and of the certificate annexed thereto; and afterwards, on the 27th day of January, A. D. 1854, made this indorsement thereon: "Satisfactory proof being made and filed in this office that the original certificate, of which the above and foregoing is a copy, has been lost or mislaid, and not used by the parties entitled thereto, or their assigns, in the purchase or entry of any tract or tracts of land: Now, therefore, be it known that this certified copy of said certificate is made receivable in payment for any half section of land according to the terms therein expressed, and as explained in the letter attached."

On the 28th day of February, A. D. 1853, the Commissioner of the General Land Office, in a letter to Stephen Johnston of that date, said: "In view of the provisions of the act of July 20, 1840, 'for the relief of the children of Stephen Johnston, deceased,' and the joint resolution of 3d March, 1847, for the same purpose, I am of opinion

that the certificate issued to those children under the act above mentioned by the Commissioner of this office, may be received in payment for any compact body of land, by legal subdivisions, not exceeding the quantity of a half section, the sale of which is authorized by law, and which is not actually settled on and improved, provided the minimum price of said land does not exceed two dollars and fifty cents per acre.

“Of course that certificate cannot be received in payment for any lands reserved from sale by order of the President, act of Congress, or which may have been appropriated for any purpose whatever.”

In the month of August, A. D. 1854, the petitioners requested the Commissioner of the General Land Office to instruct the land officers at Stillwater or Minneapolis to receive their certificate in payment for “any half section of the public lands situated within the former military reserve at Fort Snelling not subject to pre-emption at any time before or on the day of sale of such lands as are advertised for sale in September next;” but on the 26th day of that month the Commissioner informed them by telegraph that their certificate could not be located on those lands, and assigned as the reason therefor that they must be offered at public sale under special provisions of law. Nevertheless, the petitioners, on the 18th day of September, A. D. 1854, the day appointed by the proclamation of the President for the sale of those lands to commence, made a selection therefrom and entered a description thereof in a written statement, and presented themselves at the land office in Minneapolis for the purpose of tendering their certificate in payment therefor. They attended at that office for this purpose from day to day till the time limited for the sale expired; but the sale did not take place.—(See dep. of David A. Secombe.)

The petitioners repeated their request in a letter to John McKenny, dated September 28, A. D. 1854, and the Commissioner, in his reply thereto, dated October 6, A. D. 1854, said: “Mr. John McKenny has referred to this office for reply your letter to him of 28th ultimo on the subject of receiving in payment for lands within the Fort Snelling reservation the certificate granted to the heirs of Stephen Johnston, deceased, and I have to inform you that the lands referred to must, under special provision of law, be first offered at public sale for cash before they can be subject to entry of any kind, or with any description of certificate, warrant, &c.; consequently your special certificate can only be applied to the lands which may remain subject to private entry after the sales have closed, so far as the lands within that reservation are concerned.” And on the 10th day of January, A. D. 1855, this decision was affirmed by the Secretary of the Interior.

A. C. Smith testifies that a portion of the lands selected by the petitioners from the Fort Snelling reservation was claimed by one Jackins under a pre-emption right on the 17th day of March, A. D. 1855, and the residue of the lands so selected were claimed by other persons under similar rights after that date and before the 24th day of May, A. D. 1855.—(See Smith’s dep.)

When the petitioners relinquished to the United States their claim

to the lands which were selected for them under the treaty between the Pottawatomie Indians and the United States, those lands were worth from five dollars to seven dollars an acre.—(See dep. of James M. Defrees.)

The petitioners claim the value of the lands selected by them from the Fort Snelling reservation.

The act of Congress of July 20, A. D. 1840, in effect, offered to the petitioners a certificate to be issued by the Commissioner of the General Land Office, and made receivable at any land office in the United States in payment for any half section of land not subject to pre-emption, in exchange for the half section of land claimed by the petitioners under the treaty with the Pottawatomies. This was the whole purpose of that statute. As soon, therefore, as the offer was accepted by the petitioners, and their claim to the half section of land granted them by the treaty was relinquished to the United States, and the certificate was issued, all the offices of the statute were performed, and nothing more remained to be done under it. The petitioners had become the owners of the certificate, and the United States the owners of the half section of land which the petitioners had relinquished to them. The certificate, it is true, derived its whole value from the act of 1840, but that value consisted in its capacity to be used under other laws. To create it and impart to it that capacity was all that was designed to be done for it by that act; and that was done before the 4th day of March, A. D. 1843. We are therefore of the opinion that the objection taken by the solicitor, that the petitioners could not enter land under the certificate after that time, is not well founded.

To what extent the United States would be bound by the construction put upon the act of 1840 by the Commissioner of the General Land Office in his letter of February 25, A. D. 1841, to which the certificate was annexed when it was issued, if his were not the true construction of that act, we do not find it necessary to inquire. We concur in the Commissioner's construction, that the certificate was receivable in payment for any half section of the alternate sections of land along the line of the Maumee canal, advertised to be sold in June, A. D. 1840. The act of Congress, under which this sale was so advertised, provides as follows:

SEC. 1. "That after the State of Ohio shall have completed the selection of lands authorized by an act entitled 'An act authorizing the selection of certain Wabash and Erie canal lands, in the State of Ohio,' approved June thirty, eighteen hundred and thirty-four, the President of the United States shall be, and he hereby is, authorized to proclaim for public sale the residue of the lands reserved from sale by said act; which sale shall be governed by the same rules and regulations, impose the same duties, and give the same rights, which are provided by the existing laws in relation to other sales of the public lands by proclamation of the President: *Provided, however,* That no lands shall be sold at such sale for a less price than two dollars and fifty cents per acre,"

SEC. 2. "That after the expiration of the time fixed in the proclamation of the President for the sale authorized in the first section

of this act, any lands which may then remain unsold shall be subject to sale at private entry at the price of two dollars and fifty cents per acre, and not less ; and no lands hereby authorized to be sold shall be subject to entry under any pre-emption law of Congress."—(5 *Stat. at L.*, p. 261, ch. 165.)

The effect of this act was to restore the lands to which it applied to the mass of the *public lands* of the United States, and subject them to sale under the general laws relating to the sales of the *public lands*, except that the minimum price limited was two dollars and fifty cents, instead of one dollar and twenty-five cents *per acre*, and the lands were expressly exempted from entry under any pre-emption law of Congress. In saying, then, that the certificate issued to the petitioners admitted the entry of any half section of the alternate sections of land along the line of the Maumee canal, the Commissioner said no more than is plainly expressed on the face of the certificate and was authorized by the act of 1840. In using the terms "receivable in payment, at any land office in the United States, for any half section of land not subject to pre-emption," Congress meant to make it receivable in payment for any half section, not subject to pre-emption, of the *public lands* authorized to be sold and offered for sale under the general laws relating to the sale of the *public lands*. And this is not only what was, in substance, said by the Commissioner of the General Land Office in his letter of February 25, A. D. 1841, but also what we understand him to have said in his letter of February 28, A. D. 1853.

Whether the petitioners' application to enter a half section of the Wyandotte lands was properly rejected, is a question not involved in this case. The petitioners mention it as a part of the history of their case, but do not make it a subject of complaint here, or present it as a part of the basis of their present claim. The matter now complained of, and for which they now seek redress, is the rejection of their application to enter a half section of the reserve at Fort Snelling. The reason assigned for the rejection of their application to enter a half section of the Wyandotte lands was, that those lands were sold under the special provisions of the act of March 3, A. D. 1843, (*Stat. at L.*, p. 624, ch. 91,) and not under the general land laws. Whether this reason was justly applicable to the Wyandotte lands, we need not now inquire ; but it is clear, we think, that it is applicable to the portion of the reserve at Fort Snelling offered for sale under the act of August 26, A. D. 1852.—(10 *Stat. at L.*, p. 36, ch. 95.)

The first section of the act of 1852 provided that the military reserve at Fort Snelling should be reduced within certain limits therein particularly defined ; and the second section is as follows : "That the Commissioner of the General Land Office be, and he is hereby, required to cause to be surveyed, as soon as practicable, so much of the lands heretofore included in the military reserve aforesaid, but without the limits of the said military reserve aforesaid as defined by this act, as have not already been surveyed, and to cause the same, together with such of said lands as have been so surveyed, with the exceptions hereinafter set forth, to be sold at public sale, under the

direction of the President of the United States." Prior to the passage of this act, the lands thus authorized to be sold, though belonging to the United States, were not a part of the "public lands" of the United States, and this act did not restore them to the mass of those lands. It directed the lands embraced by it to be sold, not under the provisions of the general land laws, but in pursuance of its own special provisions. Before its passage these lands were the absolute property of the United States, not subject to the certificate of the petitioners, and in disposing of them in such a manner as not to subject them to that certificate they did no wrong to the petitioners. The sale was to be made under the direction of the President of the United States, and his discretion, and not the general land laws, was to govern the sale. It was to be a special sale, and, in this respect, was analogous to the sales authorized by the act of March 3, A. D. 1819, (3 *Stat. at L.*, p. 520, *ch.* 88,) and to the sales authorized by the act of April 28, A. D. 1828, (4 *Stat. at L.*, p. 264, *ch.* 41.) It is not and could not be pretended that the petitioners' certificate would be receivable in payment of a half section of land purchased at a sale made under either of these acts; but it is plain, we think, that there would be just as good ground for such a pretension as for that now set up by the petitioners under the act of 1852.

But it is supposed that the act of April 12, A. D. 1854, embraced the lands in question. That act was applicable only to "public lands," and the Fort Snelling reservation was not a part of the "public lands," and therefore did not fall within its provisions. The President's proclamation, offering them at public sale, was made under the act of 1852, and not under the act of 1854.

The act of February 1, A. D. 1855, has no application to this case, because it was passed after the petitioners made their selection from the reserve at Fort Snelling. If it is to be considered as having restored that reserve to the "public lands," then it is a legislative construction of the act of 1852 confirmatory of the views which we have presented; for if that reserve had been a part of the "public lands" already, its passage would not have been necessary to make them a part of those lands.

There can be no doubt that the petitioners' certificate has not been satisfied; but it is still valid, and may at any time be used by them in the purchase of any half sections of the "public lands" of the United States not subject to pre-emption which may be offered for sale under the general land laws. To effect this object no further legislation in their behalf is necessary. The claim now set up by them is not well founded.

Our opinion is that the petitioners are not entitled to relief.

IN THE COURT OF CLAIMS.

STEPHEN JOHNSTON *et al.* vs. THE UNITED STATES.

In this case the petitioners filed the following motion :

And now come the said petitioners and move the court for leave to file a supplemental petition in this cause, praying for other relief in

this, to wit : That a bill may be reported for the relief of said petitioners, making the tender of their said land certificate in payment for any half section of land belonging to the United States, and to which the Indian title has been or may be extinguished, and which is, or may not be, appropriated by the United States to any special purpose, conclusive as to title, and enabling said petitioners to enforce said title in the courts of the United States upon said certificate and the evidence of tender indorsed thereon.

And the court, being fully advised in the premises, overrule said motion and refuse said amendment.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

A true copy from record.

