

UNITED STATES *v.* PLOWMAN.

## ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 96. Argued January 20, 21, 1910.—Decided February 21, 1910.

The authority for cutting timber from the public domain under the act of June 3, 1878, c. 150, 20 Stat. 88, extends only to lands valuable for minerals and not to lands adjacent thereto and not actually valuable for minerals.

Although the purpose of a statute may be defeated by its qualifications, courts, in construing it, are bound by words that are explicit and unmistakable in meaning.

151 Fed. Rep. 1022, reversed.

THE facts are stated in the opinion.

*Mr. Assistant Attorney General Harr* for the United States.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover the value of timber cut from the public domain in Idaho. The defendant justifies under the act of June 3, 1878, c. 150. 20 Stat. 88. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain States and Territories, including Idaho, “and all other mineral districts of the United States,” to cut “for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, such lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry” in the State, Territory, or district of their residence. This authority is given subject to regulation by the Secretary of the Interior for the protection of the timber

and undergrowth, and is not given to railroads. The only question before us is how far the authority extends with reference to the specific land upon which the wood is cut.

There was a trial by jury and the issue is exhibited sufficiently by a passage or two from the charge, and the instructions asked on behalf of the Government but refused. The passages from the charge are as follows: "The law cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim." . . . "The law includes as mineral lands not only those tracts in which mineral has actually been discovered and which has been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts." . . . "Take, for instance, a large section of country. . . . There in the lower part of the map, as you will see, is a section of country about six miles square; the upper part indicates another section six miles square. We will suppose now there is found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground." . . . "The question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant." The Government asked for instructions that it was not sufficient to show that the land in question was adjacent to lands valuable for mineral purposes, but that the authority given by the act extended only to lands valuable for minerals. It is needless to set them forth at length. There was a verdict and judg-

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ment for the defendant. The ruling and refusals were excepted to, but the exceptions were overruled and the judgment affirmed by the Circuit Court of Appeals, 151 Fed. Rep. 1022, *S. C.*, 81 C. C. A. 682, on the authority of *United States v. Basic Co.*, 121 Fed. Rep. 504, and *United States v. Rossi*, 133 Fed. Rep. 380. The case then was brought to this court.

The instructions appear to us to have paid too little regard to the words of the act, defining the land on which it permits timber to be cut as "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." As was said in *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 366, 376, "The right to cut is exceptional and quite narrow," and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands "valuable for minerals" or containing "valuable mineral deposits." Rev. Stats., §§ 2318, 2319, 2302. See § 2320. The matter was much discussed in *Davis v. Weibbold*, 139 U. S. 507, and there it was said that the exceptions of mineral land from preëmption and settlement, etc., "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant," p. 519. A Land Department rule is quoted, with seeming approval, that "if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver," pp. 521, 522, citing *United States v. Reed*, 12 Sawy. 99, 104. Again it was said, "the exception of mineral lands from grant in the Acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction," p. 524. These are the tests to which the act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for

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minerals a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, have been in accord with our opinion and the language of the act.

*Judgment reversed.*

MR. JUSTICE MCKENNA dissents.

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SAXLEHNER *v.* WAGNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 81. Argued January 17, 1910.—Decided February 21, 1910.

The right to individual appropriation once lost is gone forever. Where a geographic or family name becomes the name for a natural water coming from a more or less extensive district, all are free to try to imitate it, and the owners of one of such natural springs cannot prevent the sale of an artificial water as being similar to that of the natural spring, where there is no attempt to deceive the public as to its being artificial.

Hunyadi is now in effect a geographical expression and the owners of the Hunyadi Janos Springs cannot prevent the sale of artificial Hunyadi water where there is no deception of the public as to its being an imitation.

157 Fed. Rep. 745, affirmed.