Statement of the case.

SILVER *v.* LADD.

1. In construing a benevolent statute of the government, made for the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, the words "single *man*" and "married *man*," may, especially if aided by the context and other parts of the statute, be taken in a generic sense. *Held*, accordingly, that the fourth section of the act of Congress of 27th September, 1850, granting, by way of donation, lands in Oregon Territory to "*every* white *settler or occupant*, ... American half-breed Indians included," embraced within the term single *man*, an unmarried woman.
2. The fact that the labor of cultivating the land required by the act was not done by the manual labor of the settler is unimportant, if it was done by her servant, or friends, for her benefit and under her claim.
3. Residence in a house divided by a quarter-section line, enables the occupant to claim either quarter in which he may have made the necessary cultivation.
4. In cases where relief is sought on the ground that the patent was issued to one person while the right was in another, the decree should not annul or set aside the patent, but should provide for transferring the title to the person equitably entitled to it.

ERROR to the Supreme Court of Oregon.

An act of Congress of 27th September, 1850, providing for the survey and for making donations to settlers of public lands in Oregon,—commonly called the Donation Act,—provides by a part (here quoted *verbatim*) of its fourth section as follows:

"There shall be, and hereby is, granted to *every white settler or occupant* of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of *his* intention to become a citizen, or who shall make such declaration on or before the first day of December, 1851, now residing in said Territory, or who shall become a resident on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land, if a single *man*, and if a married *man* the quantity of one section, or 640 acres; one-half to *himself* and the other half to his

wife, to be held in her own right, and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office."

The fifth section of the same act is thus:

"That to all white MALE citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of 21 years, emigrating to and settling in said Territory, between 1 December, 1850, and 1 December, 1853, and to all white MALE *American* citizens not hereinbefore provided for, becoming 21 years of age in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is granted, the quantity of one-quarter section, or 160 acres of land, if a single *man*, or if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming 21 years of age as aforesaid, then the quantity of one-half section, or 320 acres, one-half to the *husband* and the other half to the *wife*, in her own right, to be designated by the surveyor-general as aforesaid," &c.

With these provisions in force, Elizabeth Thomas, an aged widow, went with her son, an unmarried man, to Oregon Territory, and settled there. They lived in the same house. It stood upon the line dividing two parcels of land; the line running through the centre of the building. Cultivation was made on both tracts, one being claimed by the mother, the other by the son. On the 17th of May, 1861, the register and receiver of the proper land office issued a *donation certificate*, declaring Mrs. Thomas to have made the proof which entitled her to a patent for the tract which she claimed. The son received also a certificate for the adjoining tract, which he claimed. There was no dispute about that tract.

Mrs. Thomas had been a widow for more than twenty years when the settlement was made under which she received the certificate. The certificate granted to Mrs. Thomas was subsequently, June 25, 1862, set aside by the Commissioner

of the Land Office, on the ground that she was *not the head of a family*. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that she was *not a settler on the land*. In January, 1865 (Mrs. Thomas being now dead, and the land in possession of one Silver, legal representative of her son, and only heir, Fenice Caruthers, who died soon after her), the United States sold the land and granted a patent for part of it to one Ladd, and for the residue to a certain Knott. These brought ejectment against Silver in the Circuit Court of the United States upon the patent. Silver thereupon filed a bill in one of the courts of Oregon against them, setting forth the title of Mrs. Thomas, of her son, and of himself, representing that the patents were clouds on the true title, and praying an injunction against the suit at law. The prayer asked further:

"That the said patents may each be declared to be fraudulent, and as being procured by misrepresentation and fraud, and in favor of the rights of plaintiff, and that they be, and each of them, declared *cancelled and set aside*, and declared fraudulent and *void*, and that the claims of said defendants, and each of them, be adjudged fraudulent and *void*, and without authority of law, and that the title of the said premises be adjudged to be in the estate of Fenice Caruthers, deceased, and that the same be quieted, and that the possession thereof be decreed to the plaintiff."

The court in which the bill was filed dismissed it; and on appeal to the Supreme Court of Oregon the decree was affirmed; that court holding that the donation certificate was void, because Mrs. Thomas, having been an unmarried *female*, was not such a person as could take lands under the Donation Act. The question here now was the correctness of the affirmance.

Mr. J. S. Smith, for the plaintiff in error:

The grounds taken by the Commissioner of the Land Office and by the Secretary of the Interior seem to be without force. We reply to the argument of the Supreme Court of Oregon.

Argument for the plaintiff in error.

The word man is to be read in a generic sense, and as meaning person. There is probably not an essay or work of any considerable length published in the English language, alluding to the human race, that does not employ the word constantly in this way. The words "he" and "man" are used also frequently in acts of Congress to denote both males and females, especially in many prohibitory and penal sections. So, the naturalization laws—like this act a voluntary concession of favors—use the words "he," "him," and "man," constantly to denote and include both men and women. The expression "single man," in this act, points to the quantity of land rather than the classification of persons.*

The qualifications mentioned in section 4 are repeated in section 5, with the addition of the word "male," and with a further limitation of persons, by leaving out "American half-breed Indians." The age limit is also changed from 18 to 21 years. It is difficult to avoid the conclusion that the difference in phraseology of the two sections was intentional, and the word "male" was inserted in section 5 and omitted in section 4 for a purpose. To make a word which in common use has both a generic and specific meaning, assume its specific meaning when such meaning is not favored by its position in the context, and is repugnant to the manner in which the legislature have employed other words, would make Congress guilty of discriminating in language without a difference in meaning, and is opposed to the general spirit of the act. Everywhere, through all its parts, the act shows a liberal design and disposition toward making provision for women.

If our view is right, the patent must be cancelled as void. An idea seems to obtain that there is some magic about a patent of the United States which precludes investigation of its validity. But from the beginning, our State courts have entertained a bill to avoid a patent in favor of previously acquired rights, upon precisely the same principles that it would lie to avoid the deed of a private individual,

* Mick *v.* Mick, 10 Wendell, 379; Sutliff *v.* Forgey, 1 Cowan, 97.

Argument for the defendant in error.

and the United States Supreme Court has taken the same course without exception. The only debatable ground has been to what extent and upon what grounds a patent can be attacked in a court of law.

Messrs. Ashton, Coffey, and Lander, contra:

1. If the word "man," as used in section 4, is a generic term, and includes woman as well as man, then it must be a generic term when qualified in the same sentence by the adjective *single*, as well as when qualified by the adjective *married*. It cannot have two meanings in the same act, the same section, the same sentence. If by the word man, man alone is meant, the section and sentence have force and meaning; if both are included, the meaning of the clause is destroyed. It would read thus:

"There shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, &c. If a single man (or woman), and if a married man, (or woman), or if he (or she) shall become married within one year from the 1st of December, 1850, the quantity of one section, or six hundred and forty acres, one half to himself (or *herself*) and the other half to his *wife*, to be held by her in her own right."

This reading is absurd on its face.

2. The state of the Territory of Oregon at the time this law was passed, and the condition of its laws with reference to land, forbid the construction set up by the appellant. Oregon, by treaty, was open to the joint occupation of the subjects of Great Britain and the United States. Under the treaties, citizens of the United States, as is well known, had braved the dangers and endured the privations of an overland journey across the continent, and settled among tribes of Indians which were both hostile and treacherous. Without government or protection, they created a provisional government, and enacted a land law suitable to their wants, and proper to the condition of the country, where a man had to defend as well as to labor upon the land which he claimed

and allotted to himself. Under such circumstances, the words "any person," in the provisional land law, could hardly be intended to include a single woman. This court, in *Stark* v. *Starrs*,* goes far to sustain the doctrine that Congress had this land law in view when they passed the act of 27th of September, 1850. The construction put upon the act by the Supreme Court of Oregon, whose judgment it is now sought to reverse, is, in effect, an interpretation of a State law by the courts of the State itself.

3. Confessedly Mrs. Thomas was an old woman when she went to Oregon, how old don't clearly appear, but certainly aged. She could not have made the cultivation required. In fact she lived in her son's house; he made the settlement, if any was made, but confessedly *it* was not on this tract. He, not she, was the head of a family. The objections of the commissioner and secretary are, therefore, not without force, though less conclusive than those of the Supreme Court of Oregon.

Mr. Justice MILLER delivered the opinion of the court.

The donation certificate granted to Elizabeth Thomas was set aside by the Commissioner of the Land Office, June 25, 1862, on the ground that Elizabeth Thomas was not the head of a family. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that she was not a settler on the land. The Supreme Court of Oregon, whose judgment we are now to review, held the certificate void, because she was not such a person as could take lands under the act, being an unmarried female.

If, for any of these reasons, the action of the commissioner can be sustained, then the judgment of the Supreme Court of Oregon dismissing plaintiff's bill must be affirmed. If it cannot, then the patents issued to defendants after the certificate of Elizabeth Thomas was wrongfully set aside, must enure to the benefit of plaintiff, representing her equitable title.†

* 6 Wallace, 415.

† Lindsey *v.* Hawes, 2 Black, 554; Garland *v.* Wynn, 20 Howard, 8; Minnesota *v.* Bachelder, 1 Wallace, 109.

It is upon the application of the facts of this case to part of section four of the act of 1850, that the questions of construction already mentioned arise.

As there is nothing in this act which requires the settler to be the head of a family, that question may be dismissed without further consideration.

In reference to the question of actual settlement and residence on the land, we have only to refer to the case of *Lindsey* v. *Hawes*,* where this precise question is raised, and where it is said that a person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on both, and, consequently, on either of them, to which he may assert a claim. Nor is any importance to be attached to the fact that Mrs. Thomas was old and incapable of the manual labor necessary to cultivating ground. If it was done for her by hired servants, or by her son without compensation, it is equally available to her. In reference to this question and to the one next to be considered—namely, the right of unmarried women to the benefits of this statute—we may apply, with added force, the language used in *Lindsey* v. *Hawes*, that it concerns a construction of one of the most benevolent statutes of the government, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. In addition to this it may be said that the section of this statute which we are now considering was passed for the purpose of rewarding in a liberal manner a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement. These circumstances and the policy of this act are fully stated in the case of *Stark* v. *Starrs*,† decided at our last term.

Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the Territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled

* 2 Black, 554.

† 6 Wallace, 402.

to its benefits, is at variance with the manifest purpose of Congress.

With these views we approach the last and most difficult question in the case, namely, whether Mrs. Thomas is excluded from the benefit of this act because she was an unmarried woman.

The affirmation of this proposition is based upon that clause of the fourth section, which, in prescribing the quantity of land to be given to each actual settler, says it shall be "one-half section, or three hundred and twenty acres, if a single man, and if a married man," six hundred and forty acres. We admit the philological criticism that the words "single man" and "married man," referring to the conjugal relation of the sexes, do not ordinarily include females. And no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded.

But, conceding to it all the force it may justly claim, we are of opinion that it does not give the true meaning of the act, according to the intent of its framers, for the following reasons:

1. The language of the statute is, that there is hereby granted to "every white settler or occupant of the public lands, above the age of eighteen years," &c. This is intended to be the description of the class of persons who may take, and if not otherwise restricted, will clearly include all women of that age as well as men.

2. It is only in prescribing the quantity of land to be taken, that the restrictive words are used, and even then the words used are capable of being construed generically, so as to include both sexes. In the case of a married man it is clear that it does include his wife.

3. The evident intention to give to women as well as men, is shown by the provision, that, of the six hundred and forty acres granted to married men, one-half shall go to their wives, and be set apart to them by the surveyor-general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protec-

tion of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

4. But a comparison of the manifest purpose of Congress and the language used by it, in section four of this statute, with those of section five, will afford grounds for rejecting the interpretation claimed by defendants, which are almost conclusive.

The first of these sections applies, as we have already said, to that meritorious class who were then residing in the Territory, or should become residents by the first of December thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and it gives to each a half-section of land. The fifth section makes a donation of half this amount, and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words "white *male* citizens of the United States."

Now, when we reflect on the class of persons intended to be rewarded in the fourth section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more restrictive, in reference to quantity of land, to age of donee, citizenship, &c., they use apt words to express this restriction, and then use the word "white males" in reference to sex, we are forced to the conclusion that they did not intend, in section four, the same limitation in regard to sex, which they so clearly expressed in section five. The contrast in the language used in regard to the sex of the donees in the two sections, is sustained throughout by the other contrasts in

age and character of the donees, and in quantity of land granted.

The certificate of Mrs. Thomas was, therefore, properly issued by the register and receiver, and conferred upon her the equitable right to the land in controversy, and the decree of the Supreme Court of Oregon must be reversed.

But the language of the prayer of this bill for relief, and some remarks in the brief of counsel, call for comment on the proper decree to be rendered on the return of the case to that court.

The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, enured in equity to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways.* The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs.

The prayer for general relief in the bill in this case is sufficient to justify any or all these modes of relief, and the case is REMANDED TO THE SUPREME COURT OF OREGON for that purpose.

* Jackson *v.* Lawton, 10 Johnson, 24; Boggs *v.* Mining Company, 14 California, 363-4.