

1954

## William B. Mason v. Wayne N. Mason : Brief of Respondent

Utah Supreme Court

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Edward W. Clyde; Attorney for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

FILED  
JUN 30 1954

WILLIAM B. MASON,  
*Plaintiff and Respondent,*

— vs. —

WAYNE N. MASON,  
*Defendant and Appellant.*

Clerk of Supreme Court, Utah

Case No.  
8198

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## Respondent's Brief

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EDWARD W. CLYDE  
*Attorney for Respondent*

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— vs. —

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*Defendant and Appellant.*

} Case No.  
8198

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## Respondent's Brief

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### STATEMENT OF FACTS

This action arose out of a sale by the Government of thirteen 40 acre tracts of land in Boxelder County. Both William B. Mason, Respondent, and Wayne N. Mason, Appellant, claimed a preferential right to purchase the land. After various proceedings before the Bureau of Land Management, it finally determined that six of the 40 acre tracts should be awarded to the appellant and seven to the respondent. After patents issued, the respondent brought this action to have the court determine that the Bureau of Land Management had

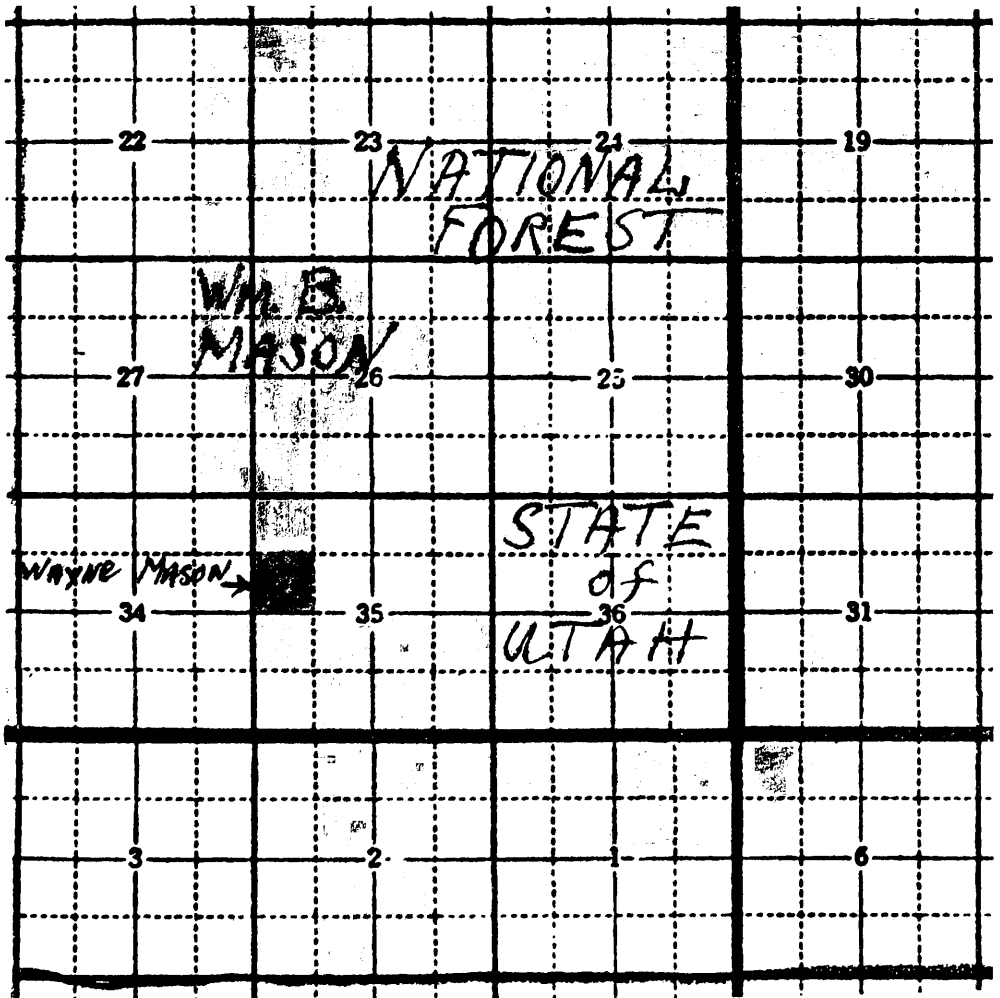
misapplied the law, and that the appellant held the six tracts awarded to him in trust for respondent. The trial court awarded three additional 40 acre tracts to respondent, and Wayne Mason appealed. Appellant contends that the trial court should not have disturbed the decision of the Bureau of Land Management. The Respondent takes the position that under the applicable federal statutes, none of the 13 tracts should have been awarded to the appellant, and urges this court, by way of cross-appeal, to award all 13 tracts to him.

The Statement of Facts by the appellant is not complete, and we deem it necessary to make a more detailed presentation. The court should note at the outset that the lands in question were offered for sale under authority of Section 2455 of the Revised Statutes, as amended, (43 U.S.C. 1946 Edition, Supplement 4, Section 1171), which authorizes the Secretary of the Interior to sell at public auction isolated or disconnected tracts of the public domain. The statute then expressly provides:

“For a period of not less than 30 days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered land at such highest bid price, and where two or more persons apply to exercise such preference right, the Secretary of the Interior is authorized to make an equitable division of the lands among such applicants.”

The application for the public sale of the lands here involved was made by respondent. (Ex. P-10). Pursuant to that application, the lands were offered for sale Sep-

tember 28, 1949, (Ex. P-10). At that sale the appellant made the high bid of \$2.05 per acre, (Ex. P-10). On October 11, 1949, respondent claimed his preferential right to purchase all of the land and submitted payment therefor. (Ex. P-10). Since the preferential right to purchase is based on the ownership of land contiguous to the public lands we reproduce here a map (Ex. P-6) which shows the land ownership.



The thirteen 40 acre tracts are shown in the center in white. The respondent is the owner of the Wm. B. Mason Ranch (colored blue). It will be noted that the William B. Mason Ranch abuts this land along the entire west side, with the exception of one 40 acre tract, which is colored in dark red. It is this one 40 acre tract upon which the appellant based his claim for a preferential right to purchase (Ex. P-10). It will also be noted that along the entire north and east sides the public tracts in question are surrounded by the national forest and lands owned by the State of Utah. The only other contiguous private land was owned by Jesse Lamb, and it abuts the public tract on the south. Lamb was not an interested bidder.

At the time of the public sale there was in effect a Regulation, 43 Code Federal Regulations, 205.11, which in part provided:

“(b) \* \* \* Such preferential right is not extended to the owner or owners of cornering lands.

“(1) A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous land (that is he must show that he had the whole title in fee) and must be accompanied by the purchase price of the land.”

At the time the application for public sale was made by respondent he owned all of the land shaded in blue in Exhibit P-6 (R. 57). The national forest lands are rather effectively separated from the tracts being offered for sale by rough terrain, and in the normal operation



of the lands cattle would not move from these tracts to and from the forest, (R. 81). Glen Mason, whose lands are shown in Exhibit P-6, only had lands which "cornered" with the public lands. Under the above regulation he would not have been a preferential bidder, and as indicated, neither Glen Mason nor Lamb asserted any interest. At the time of the application for public sale by respondent the appellant owned no land whatever in this area. On September 24th, four days prior to the date of the sale, appellant received a quitclaim deed, from one Nish, to a 40 acre tract which abutted one of the thirteen tracts being offered for sale, as is shown by Exhibit P-6, (R. 67). At the time Mr. Nish gave appellant the quitclaim deed he did not hold fee title to the land, but was merely acquiring the same under a contract of purchase from Union Life Insurance Company, (R. 67, 68, 69). The deed did not issue from the Union Life Insurance Company to Nish until October 4, 1949, 6 days after the sale, (Ex. 4). On September 24th, Nish still owed \$450.00 on the land. Wayne Mason, appellant, loaned Mr. Nish the payment (R. 67-69), and Union Life Insurance Company executed a deed conveying title to this 40 acre tract to Mr. Nish on October 4, 1949, (Ex. P-4). Mr. Nish continued to hold the deed from Union Life Insurance Company until March of 1950, at which time he executed a new deed to Wayne Mason, (Ex. D-13).

The 40 acre tract acquired in the manner set forth above by the appellant from Mr. Nish was of rather low economic value. Marcellus Palmer, who qualified as a

land use expert, testified that this particular land was gravelly and required considerable moisture in order to grow forage, (R. 83-84). Neither the 40 acre tract acquired by appellants, nor the lands being offered for sale, had any water supply, either for irrigation or for stock watering purposes, (R. 80, 81). The land can be used for grazing for a period of approximately three months of the year and will support one cow for each fifteen acres. (R. 84-85). Thus, on the 40 acre tract acquired by appellant, he could have run only three head of cattle for a period limited to three months of each year and he had no water supply on the land for any such cattle, (R. 88-89); nor was there any water on any of the land being offered for sale, (R. 80-81-88-89). There was water on the lands owned by William B. Mason and on lands owned by Lamb. William Mason and Lamb operated their cattle in common and they could utilize the public lands for grazing (R. 91). There was water on the national forest, but it was not available to these lands because of rough terrain. (R. 81).

The parties hereto are brothers and the ranch now owned by the respondent was acquired by their father and is known as the William B. Mason Ranch, (R. 127). The appellant had operated this ranch for a very substantial period of time, and during that time had filed homestead applications on part of these 13 40-acre tracts, (R. 127). He admitted that when he used the William B. Mason ranch, these tracts were used with it, and the ranch and these tracts were operated as a unit, (R. 128). The homestead applications were not perfected (R. 113-

114). William B. Mason made his primary living from the ranch (R. 98). It was upon this scene that the appellant interjected himself by getting a quit claim deed to a 40 acre tract four days before the public sale from a man who did not have fee title. It should also be noted that the lands have such a low economic use (three cows per 45 acres per season) as to make it uneconomic to fence the lands (R. 86). It should also be noted that by awarding the particular six tracts on the south end to Wayne Mason, it effectively prevented William Mason from getting from his ranch to the 640 acre school section, (R. 91-92) which he now leases (R. 61).

When both of the parties hereto asserted preferential rights, the Regional Administrator of the Colorado-Utah Region, Bureau of Land Management, determined that appellant should be permitted to purchase the one 40 acre tract directly abutting the 40 acres quit claimed to him. Upon this basis the manager of the Salt Lake Office on April 13, 1950 issued a formal decision apportioning the public tracts between appellant and respondent on the basis of 12 tracts to respondent and one to appellant, (Ex. P-10). An appeal was taken to the director of the Bureau of Land Management on September 12, 1950, and the director affirmed the twelve to one apportionment. Wayne Mason then took an appeal to the head of the department. The department head reversed the prior decisions, attempted to apportion the land equally between the parties and thus six of the 40 acre tracts were given to the appellant and seven to the respondent, (Ex. P-10). The opinion written by Mastin

G. White, Solicitor for the Department, ruled that the statute above set forth requiring an "equitable division" of the land required that it be distributed "equally". At the time of the sale, a department regulation (43 C.F.R. 250.11-b-3) interpreted the statute, providing that "the Secretary of the Interior is authorized to make an *equitable* division of the lands among such applicants," to mean that the "administrator will make a determination *equally* apportioning the various subdivisions among the claimants". Thereafter this interpretive regulation was amended so that at the time of the trial the interpretive regulation read as follows:

"(b) Preference right of purchase; declaration of purchaser. \* \* \*

"(3) Where there is a conflict between two or more persons claiming a preference right of purchase, they will be allowed 30 days from receipt of notice within which to agree among themselves upon a division of the tracts by subdivisions. In the absence of an agreement an equitable division of the land will be made taking into consideration such factors as (i) the equalizing of the number of acres which each claimant will be permitted to purchase, (ii) desirable land use, based on topography, land pattern, location of water, and similar factors, and (iii) legitimate historical use, including construction and maintenance of authorized improvements. If *equitable considerations dictate all of the subdivisions may be awarded to one of the claimants*. Where only one subdivision is offered for sale and it adjoins the lands of two or more preference right claimants, it will, in the absence of equitable considerations requiring otherwise, be awarded to the applicant for the sale if he is a qualified person who properly

asserts such a preference right within or prior to the 30-day preference-right period. The manager will make the award by declaring the appropriate claimant or claimants purchasers of the land. (R.S. 2478, 43 U.C.S. 1201)

DOUGLAS McKAY  
Secretary of the Interior

“June 4, 1953.”

The factual considerations which induced the trial court to make the award of three tracts to appellant and ten to respondent are set forth in Finding No. 8.

The trial court concluded that it was not equitable within the meaning of the governing federal statute to apportion the lands equally under the facts of this case, but that it was equitable to apportion the lands ten to the respondent and three to the appellant. The Court went on to state:

“\* \* \* that such an allotment gives both individuals a way into lands owned by the State of Utah in Section 36 and to the National Forest (Ex. P-6); that plaintiff is the owner of the water customarily used, and the only water readily available for use with the public lands offered for sale (R. 80, 81); that the defendant owns no water on any tract near the lands offered for sale (R. 80, 81), and there is no water on the lands being offered for sale; that historically the lands now being offered for sale have been used in connection with the lands now owned by the plaintiff (R. 127); that the plaintiff owns considerable land, as is described above, in the immediate vicinity of the lands offered for sale (Ex. P-6); that

the defendant owned only a 40 acre tract which was quit claimed to him only four days prior to the sale (R. 67) and some forest permits, which are separated by a rough terrain from the lands offered for sale (R. 81); that the plaintiff operates his cattle in common with others in the area; that the only water available for grazing these lands, other than the water owned by plaintiff, is located on the lands of the others with whom plaintiff operates (R. 81); that the lands have value primarily for grazing purposes (R. 84, 85); that such historical use as the defendant had in connection with these lands was at a time when he was the owner of the lands now owned and operated by the plaintiff (R. 127); that the lands, because of their limited forage, are not of sufficient value to make it economic to fence them and that these factors and the location of the particular lands of the plaintiff in relationship to the lands offered for sale make it equitable to award 10 of the 13 40-acre tracts to the plaintiff; that the forest permits and the one 40 acre tract owned by the defendant make it equitable to award three of the 40 acre tracts to the defendant; that the lands owned by the State of Utah in Section 36 were at the time of the sale leased to the defendant, but at the time of the trial were leased by the plaintiff; that these lands could be utilized through such an award of these public lands by either of the parties, if either of them should continue to lease or in the future should purchase said state lands.”

## STATEMENT OF POINTS

POINT I. THE DISTRICT COURT HAD JURISDICTION IN THIS CASE.

POINT II. WAYNE MASON WAS NOT ENTITLED TO ANY PREFERENTIAL RIGHT TO PURCHASE ANY OF THE LANDS IN QUESTION.

POINT III. "EQUITABLE DIVISION" AS REQUIRED IN SECTION 2455 OF THE REVISED STATUTES, AS AMENDED (43 U.S.C. 1946 Ed. Supp. 4, Sec. 1171) DOES NOT MEAN "EQUAL DIVISION."

The questions will be discussed in the order suggested in the foregoing Statement of Points.

## ARGUMENT

POINT I. THE DISTRICT COURT HAD JURISDICTION IN THIS CASE.

*Johnson vs. Towsley*, 80 U. S. 72, 13 Wall 72, 30 L. Ed. 485, is a square United States Supreme Court case involving the very same department as is involved here, to wit, the Land Department. There the Land Department had issued a patent to the defendant. The plaintiff claimed that the patent should have been issued to him, exactly as the plaintiff is doing here. The United States Supreme Court granted certiorari from a State Supreme Court decision and squarely held that the state court



had the power to correct the misapplication of the law by the United States Department of the Interior, Bureau of Land Management. The opinion of the Court stated, in part, as follows :

“That the action of the Land Office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings where the title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights ; and by virtue of this power the final judgments of courts of law have annulled or modified, and patents and other important instruments issuing from the Crown, or other executive branch of the Government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to this principle. \* \* \*

“And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, ‘A court of equity will,’ in the language of this court in the case of *Starks v. Starrs*, just cited,



‘convert him into a trustee of the true owner, and compel him to convey the legal title. \* \* \*

“... it is fully conceded that when those (land) officers decide controverted questions of fact, in the absence of fraud or imposition or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. \* \* \*

“This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceeding before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after title has passed from the Government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another.”

This principle has also been clearly recognized by the Utah Supreme Court. In the case of *Warren Irr. Co. v. Charlton, et al.*, 58 Utah 113, the Utah court quoted (page 123) with approval from the case of *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848, where the court held

that when mistake or fraud or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have relief in a court of equity; and *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, which held that if in the issuing of a patent the officers of that department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from either imperfect views of duty or corrupt motives, the party aggrieved cannot set up such matters in a court of law to defeat the patent. He must resort to a court of equity, where he can obtain relief, if his rights are injuriously affected by the existence of the patent, and he possesses such equities as will control the legal title vested in the patentee. See also *Steele v. Allison*, 33 Southwest 2nd, 842.

## POINT II. WAYNE MASON WAS NOT ENTITLED TO ANY PREFERENTIAL RIGHT TO PURCHASE ANY OF THE LANDS IN QUESTION.

The lands in question, consisting of thirteen 40 acre tracts, were offered for sale as isolated tracts under the provisions of Section 2455 of the Revised Statutes, as amended. (43 U.S.C.A. Sec. 1171.) The pertinent portion of that statute is quoted above and is requoted here for convenience.

Section 2455 in part provides:

“\* \* \* it shall be lawful for the Secretary of the Interior to order into market and to sell at public auction \* \* \* any isolated or disconnected tract or parcel of the public domain not exceeding

one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale \* \* \* ; Provided, that for a period not less than thirty days after the highest bid has been received, *any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price*, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants. \* \* \*

This is the language of the section in effect at the time of the sale in question.

In 43 Code of Federal Regulations, 250.11, it is provided:

“(b) *Preference right of purchase; declaration of purchaser.* The owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received, to purchase the land offered for sale at the highest bid price or at three times the appraised price if three times such appraised price is less than the highest bid price. Such preference right may also be asserted at any time prior to the commencement of such period. Such preference right is not extended to the owner or owners of cornering lands.

“(1) A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous lands (that is, he must show that he had the whole title in fee), and must be accompanied by the purchase price of the land.”

There have been numerous cases in which a person with less than the fee title has asserted a preference,

and the preference has been disallowed. It seems to be the settled interpretation of the statutes that a person, in order to assert the preference, must have the fee title, and that merely holding a contract of purchase or the equitable title is not sufficient.

In the following appeals to the head of the Department of Interior it has been held that anything less than the whole fee title is not sufficient upon which to base a preference: In the case of Louise Olson, Raymond V. Wagner, A-24143, February 16, 1943, unreported, one who asserts a preference right to purchase an isolated tract must own the complete fee title. In this case, the claim of preference was rejected on the ground that the applicant was merely a "joint owner" of the contiguous land. However, it was later granted on a showing that he was acting on behalf of a partnership. In the case of James L. McCreath, Vera Row, A-23942, October 13, 1944, unreported, although an applicant is permitted to assert his preference right claim prior to the date of sale, such as by the assertion of adjoining land ownership in the public sale application, he must, of course, continue to be a contiguous owner in fee at the time of the sale.

It is clear under Utah law that Wayne Mason was not the owner of any contiguous land either at the date of the sale or at any period within 30 days thereafter. The evidence is uncontradicted that Wayne Mason has no other land except the 40 acres which were quit claimed by Mr. Nish. On September 24th, the only thing Nish owned was a contract under which he was purchasing

the land in question. At that time he gave Wayne Mason a quit claim deed. The quit claim deed could not pass to Wayne Mason anything more than Nish owned. When Nish subsequently acquired the legal title between October 4th and October 8th, this title would not pass from Nish to Wayne Mason, because a quit claim deed will not pass an after acquired title. Wayne Mason, of course, recognized this and sometime during March of the following year got a new deed from Nish.

It seems to us, therefore, that the evidence requires a holding that Wayne Mason received a quit claim deed from a man who did not have the fee title; and that he did not get the fee title from Mr. Nish until March of 1950, nearly six months after the sale. Since he was not the owner of contiguous land on September 28, 1949, or within 30 days thereafter, Wayne Mason was not entitled, under the statute, to a preference. If he had no preference, all of the land, as a matter of law, should have been sold to William Mason, who admittedly did have a preference.

The cases to the effect that a quit claim deed will not pass an after acquired title are extremely numerous. See, for example, 26 C.J.S. Deeds, Section 118 on page 416, where it is stated that a quit claim deed will convey whatever title

“Or interest the grantor may have in the land at the time it is given and only such title or interest and excludes any implication that he has any title or interest. \* \* \* Of course, a quit claim



deed given at a time when the grantor has no title or interest does not convey anything, although it may operate as a contract to convey the title or interest subsequently acquired. \* \* \*

“An after acquired title by the grantor will not, as a general rule, inure to the benefit of the grantee under a quit claim deed. So a quit claim deed not purporting to convey any particular interest will not convey a possible future interest of the grantor.”

In *Nix v. Tooele County*, 101 Utah 84, 118 P. (2d) 376, the Utah Supreme Court said:

“Plaintiff’s title is founded upon quit claim deeds. Such deeds do not imply the conveyance of any particular interest in property. (Citing statutes) Plaintiffs acquired only the interest of their grantors, be that interest what it may.”

Also to this effect see 26 C.J.S. Deeds Section 105, page 385, which states that a deed which does not manifest a contention to convey after acquired title will not be construed to so do.

“Where the language is clear and unambiguous and there is no intention apparent from the instrument to convey after acquired property or title, the deed will not be construed as a conveyance thereof. In order to convey an after acquired interest, it is necessary either specifically to mention the intention of the grantor so to do or to make such recitals as will preclude him from thereafter disputing the full force and effect of his conveyance. \* \* \*

The abstracts of title (Ex. 1, 2, 3) clearly show that William Mason was the owner of several contiguous

tracts at the time of the sale and during the entire 30 day period thereafter. He testified that he asserted his preferential rights and paid the money. (R. 62). The decisions of the Department also recite that he asserted his preference and paid the money (Ex. P-10). Since he was the only "owner of contiguous land" within the meaning of the Federal statute, he is the only person entitled to a preference, and is the only person who should have been permitted to purchase any of the lands in question.

POINT III. "EQUITABLE DIVISION" IN SECTION 2455 OF THE REVISED STATUTES, AS AMENDED (43 U.S.C. 1946 Ed. Supp. 4, Sec. 1171) MEANS "JUST OR FAIR DIVISION."

The statute in question, Section 2455, expressly says that:

"\* \* \* where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an *equitable* division of the land among such applicants.

It is our contention that the distribution here made was not equitable. The record shows that the Department of the Interior treated the term "equitable" as though it meant "equal". The Department, therefore, gave Wayne Mason six 40 acre tracts and William Mason seven 40 acre tracts. The seventh went to William Mason because he initiated the sale proceedings.

There was at the time the sale was consummated an administrative regulation in effect which provided as follows: (43 C.F.R. 250.11 (b) 3)

“Where there is a conflict between two or more persons claiming a preference right of purchase, they will be allowed 30 days from receipt of notice within which to agree among themselves upon a division of the tracts in conflict by subdivision. In the absence of an agreement the regional administrator will make a determination equitably apportioning the various subdivisions among the claimants, ordinarily so as to equalize as nearly as possible the tracts they should be permitted to purchase. \* \* \*”

Since the hearing, a new Federal regulation has been adopted. The regulation now in effect provides as follows:

“Section 250.11 (b) (3) is amended to read as follows:

“§ 250.11 Action at close of bidding.  
\* \* \*

(b) Preference right of purchase; declaration of purchaser. \* \* \*

“(3) Where there is a conflict between two or more persons claiming a preference right of purchase, they will be allowed 30 days from receipt of notice within which to agree among themselves upon a division of the tracts by subdivisions. In the absence of an agreement an equitable division of the land will be made taking into consideration such factors as (i) the equalizing of the number of acres which each claimant will be permitted to purchase, (ii) desirable land use, based on topography, land pattern, location of water, and similar



factors, and (iii) legitimate historical use, including construction and maintenance of authorized improvements. *If equitable considerations dictate all of the subdivisions may be awarded to one of the claimants.* Where only one subdivision is offered for sale and it adjoins the lands of two or more preference right claimants, it will, in the absence of equitable considerations requiring otherwise, be awarded to the applicant for the sale if he is a qualified person who properly asserts such a preference right within or prior to the 30-day preference-right period. The manager will make the award by declaring the appropriate claimant or claimants purchasers of the land.  
“R.S. 2478, 43 U.S.C. 1201)

DOUGLAS McKAY  
Secretary of the Interior

“June 4, 1953.”

We think that it is important to note that these administrative regulations are nothing more than administrative “guesses” as to what the statute means. *There has been no amendment to the statute.* It is the *statute* which gives to the parties their rights. The Department of the Interior is simply an administrator to see that the rights granted by the statute are given to the parties. The statute itself now provides and has at all times material to this suit provided that:

“\* \* \* where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an *equitable* division of the land among such applicants.”

The issue is: What is the meaning of this statutory language? The administrative regulations interpreting

this statute represent only the Department's interpretation or "guess" at what the statute means. They have made at least two guesses as to its meaning. One of the guesses is contained in the regulation quoted first above, and is also quoted by the Solicitor in his opinion. The Department's present "guess" at what the language means is set forth in the second regulation quoted above. The Department's present opinion of the meaning of the statute is that "equitable" requires the Department to take into consideration the nature of the past useage, the topography, the water holes, the land holdings of each individual and permits the awarding of all the acreage to one of the parties if such would be equitable.

There is a square Utah Supreme Court opinion supporting our contention that these Department regulations are nothing more than administrative guesses as to the meaning of the statute. *The statute means the same now as it did when it was enacted.* The statute is not changed by erroneous administrative interpretations. This was very well stated by the Utah Supreme Court in a recent case entitled *Utah Hotel Company v. Industrial Commission*, 107 Utah 24, 151 P. (2d) 467. In that case the Supreme Court said at page 32:

"An administrative interpretation out of harmony and contrary to the express provisions of the statute can not be given weight. To do so would in effect amend the statute. Construction may not be substituted for legislation."

The Utah Supreme Court cited *Manhattan General Equipment Company v. Commissioner of Internal Rev-*

enue, 297 U. S. 129, 56 S. Ct. 397, in support of its holding and quoted with approval the following:

“The power of an administrative officer or Board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law \* \* \* but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity, and not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.”

The United States Supreme Court case involved a new regulation which was in harmony with the Federal statute. One of the parties who relied on an earlier regulation contended that the new regulation could not be retroactively applied to him. The court said:

“The contention that the new regulation was retroactive is without merit, since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented. *It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute.* \* \* \* *The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute.* \* \* \*”

Our Utah Supreme Court then went on to state:

“The case stands clearly for the doctrine that when an administrative tribunal makes an ‘initial

guess' as to what effect a statute has, that guess is not to any extent binding on the courts or upon the administrative tribunal which made said erroneous guess. When a new regulation is passed or when the statute is for the first time considered by the courts, it seems clearly correct to state that the new rulings are not retroactive, but that they are in fact but the first correct application of the law."

This holding was later followed by the Utah Supreme Court in the case of *New Park Mining Company v. Tax Commission*, decided in 1948, 113 Utah 410, 196 P. (2d) 485. The Utah Supreme Court stated:

"Even if there were an administrative interpretation such as plaintiff asserts, this court could not permit such an interpretation to stand in flat contradiction to the clear terms of the statute."

Thus, both the Utah Supreme Court and the United States Supreme Court have unequivocally stated that administrative interpretations of statutes are nothing more than administrative guesses about the meaning of the statute. The two Federal regulations quoted above are nothing more than that. The administrator has taken two "guesses" at what the statute means. Like the United States Supreme Court said in the case quoted above, "*it is the statute which gives to the parties their rights.*" The administrative officer is charged with administering those rights. In the ordinary course of administration, the administrative officer must take the first "guess" at what the statute means. Unless his "guess" is in harmony with the statute, it is as the Utah

Supreme Court has said, a “mere nullity”. Here the administrator passed one regulation which interpreted the word “equitable” to mean “equal”. He subsequently took another “guess” at the statute and said the word “equitable” means that all of the land can be passed to one individual if in consideration of historical useage, acreage holding, topography, water, etc., it was equitable to do so. If any weight whatever is to be given to these administrative “guesses”, we submit that the Department’s present interpretation of the statute should be given the greater weight.

Basically, however, as the Utah and United States Supreme Courts have stated, the meaning of a statute is a judicial question and no weight is given to administrative interpretations unless they are in harmony with the statute. Interpretations out of harmony are nullities.

In the instant case, there can hardly be any doubt that it is not equitable to give Wayne Mason six of the thirteen 40 acre tracts. From a standpoint of historical use, all parties admit that all thirteen tracts of the land in question were used as a unit with the William Mason Ranch. Wayne Mason, who at one time owned the William Mason Ranch, operated the two as a unit. Before and since he sold the William Mason ranch to the plaintiff’s predecessors in title, and they to the plaintiff, the lands have been operated as a unit. The only water which is available for use is located on William Mason’s private land. The topography is such that the lands can best be used by William Mason. In land acreage Wayne Mason has one 40 acre tract which he bought at the very

time of the sale for the sole purpose of interjecting himself into this picture. He has no water. His 40 acres of private land would only sustain three cattle for three months. The other users in the area have operated in common with their stock. They have large holdings, and they have had water at either end of their range, and it is indispensable to their operation that they be able to cross over some of the 40 acre tracts awarded by the administrator to Wayne Mason. It is not equitable to let Wayne Mason, who has no historical use, no water, no other lands that have been used jointly with these, to come in and take half the land and make a nuisance of himself in the middle of an established livestock operation. Whatever past historical use Wayne Mason had in connection with these lands, he had at a time when he was the owner of the William Mason ranch, and any historical considerations passed to William Mason when he purchased that ranch.

Any reference to a dictionary will demonstrate that the word "equitable" does not mean "equal". Black's Law Dictionary gives the following definition of "equitable":

"Just; conformable to the principles of justice and right.

"Just, fair, and right, in consideration of the facts and circumstances of the individual case.

"Existing in equity; available or sustainable only in equity, or only upon the rules and principles of equity."



Black's law Dictionary gives the following definition of "equal":

"Alike; uniform; in the same plane or level with respect to efficiency, worth, value, amount, or rights."

"Equitable" is defined in 30 C.J.S., page 297 as follows:

"Commonly defined to mean according to the principles of equity or characterized by equity or fairness; fair and just; marked by due consideration for what is fair, unbiased or impartial; reasonable or right. \* \* \*

"Equal" is defined in 30 C.J.S., page 292 as follows:

"as a verb: To make equivalent to, or to answer in full proportion, to recompense fully.

"As an adjective: The word generally refers to size or quantity, meaning like or same; even, sameness of quantity or degree, the same. \* \* \*"

In the case of *Van Horn v. Van Horn*, 119 P. 21, 825, 189 Oklahoma 624, the Court was concerned with the difference between the words "equitable" and "equal". It was a case in which a decree of divorce made no provision as to the division of property, which pursuant to an Oklahoma statute was to be divided equitably. Of this the Court said:

"Another rule which seems to have been violated by this decree and which is bonding on the Court irrespective as to whether the divorce is granted to the husband or to the wife, is that the defendant is entitled to a fair and equitable division of the property acquired during the marriage.

(Citing cases) This equitable division referred to in these decisions does not necessarily mean an equal division of the property, but means what it says, an equitable division. \* \* \*

“The rule is that a Court of equity in granting a divorce is required by statute to make a just and fair as well as an equitable division of the property. In doing so it is not required that the property be divided equally, but there should be a wide latitude as to how much shall be given to each.”

See also the cases of *Hughes v. Hughes*, 177 Oklahoma 614, 61 P. 2d 556, and *Van Schaick v. Astor*, 274 N.Y.S. 322.

## CONCLUSION

The District Court had jurisdiction to inquire into and correct errors committed by the Bureau of Land Management where such errors arose from misconstruction of the law and where they prejudiced private rights.

At the time of the above mentioned sale, and for more than 30 days thereafter, Wayne Mason did not own fee title to any lands contiguous to the isolated tracts here in controversy, and thus was not entitled to a preference right to purchase any of such tracts under the provisions of Section 2455 of the Revised Statutes, as amended. The District Court erred in holding that Wayne Mason did have such a preference right.

“Equitable Division,” in Section 2455 of the Revised Statutes, as amended, means a division which is “just,



fair, and right, in consideration of the facts and circumstances of the individual case.” The District Court was correct in holding that the Bureau of Land Management erred in construing “equitable division” to mean “equal division.”

Respectfully submitted,

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