

and the ground untrodden and soft and thickly covered with grass and other vegetation, the passage of the water—melted snow or rain—over the surface of the ground was thereby impeded. The result was that it sank into the soft earth, and percolated through the soil slowly to the level of the lake or marsh at an even flow, far into the summer, and thus kept the water therein at a uniform level for much of the year. But now, owing to the change in these conditions,—the destruction of the surface vegetation and the packing of the ground,—the water from the spring melt or freshet runs off into the low land, at once, and produces a great annual overflow which soon subsides. The water, being spread over a large space, is rapidly reduced by evaporation, and the result is, that for the most of the year the water or moisture stands at comparatively a much lower level than formerly.

It is a great misfortune to the country, that the secretary of the interior did not take the field notes of the surveys, as fast as they were made, and designate the lands inuring to the state as swamp at once. For more than a quarter of a century the land department has left the question to be wrestled with in a sporadic way by conflicting claimants under the swamp-land grant and the pre-emption and homestead acts, at a great sacrifice of money, time, and, probably, veracity. Let us hope that the end of the contention draws nigh, and that the department will proceed at an early day to designate the lands inuring to Oregon under this grant, and put the matter at rest. It were better the grant had never been made than that its extent and application should be the subject of continual contention between parties claiming under and against it.

There must be a finding for the defendant in accordance with this opinion, that at and before the cutting of the hay he was in the adverse possession of the premises whereon the same was cut, and that he is entitled to a return of the same, or the value thereof, at the rate of \$4 per ton, with legal interest for the detention thereof from the date of the replevy by the marshal.

McCONNAUGHY v. BENNETT. SAME v. HILL. SAME v. MORROW. SAME v. BOYD. SAME v. SLOANE.

(Circuit Court, D. Oregon. January 16, 1888.)

Rufus Mallory and *Charles B. Bellinger*, for plaintiff.

George H. Williams, *George H. Durham*, and *Lewis L. McArthur*, Dist. Atty., for defendants.

DEADY, J. These cases were heard with the foregoing and the circumstances of the entry, occupation, and character of the land are similar. The several tracts of land claimed by the defendants are all embraced within the sale of swamp lands by the state, as shown in the foregoing opinion, under which the plaintiff claims. They each claim one quarter section except one, who claims a half section. The settlement and improvement of each was

made in 1885, and in 1886 the hay, to recover which these several actions are brought, was cut and stacked on the land occupied by him. The land occupied by all the defendants is comprised in two tracts, not far distant, which lie on the margin and within the meandered line of Warner lake, near the south boundary of the state.

For the reasons given in the foregoing opinion, there must be a finding for defendant in each case.

AMERICAN F. L. M. Co. v. BENSON *et al.*

(Circuit Court, D. Nebraska. 1887.)

WRITS—SERVICE BY PUBLICATION—ACT OF 1875—ACT OF MARCH 3, 1887.

By the act of March 3, 1887, the right given by the eighth section of the act of March 3, 1875, to bring in non-residents by publication in certain cases is expressly continued.

Motion to Dismiss, and suppress service by publication.

In December, 1886, this bill was filed for the foreclosure of a mortgage, in which the mortgagor and subsequent incumbrancers were impleaded as defendants. Subpœna was issued, and return served upon the subsequent incumbrancers, but not upon the mortgagor. In March, 1887, after the passage of the act of March 3d of that year, the usual affidavit was filed, showing a proper case for an order for the publication of notice of the suit to the mortgagor. The publication was accordingly made, and the proof thereof filed in the court. Thereupon the mortgagor filed his motion to set aside the order for publication. The parties plaintiff and the parties defendant were citizens of different states. In support of the motion to discharge the order for publication, it was insisted that under the act of March 3, 1887, a non-resident defendant could not be brought into court by publication.

L. Q. C. Dosh, for complainant.

J. M. Woolworth, for defendants.

BREWER, J. The motion to dismiss this cause for want of jurisdiction, and suppress the service by publication, is overruled. The right to proceed against a non-resident defendant in certain cases is given by section 8 of the act of 1875. The act of 1887, § 5, expressly provides that nothing in this act shall repeal or affect any jurisdiction or right mentioned in said section 8; hence the same right exists now as before said act of 1887 to bring in non-residents by publication in cases mentioned in said section 8 of the act of 1875. That right is all that is attempted to be enforced in this case.