

GENERAL CORRESPONDENCE

1879 UNDATED

FOLDER NO.

11-15

JAMES J. HILL PAPERS

PLEASE RETAIN  
ORIGINAL ORDER

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*In the matter of the hearing, in respect to the bona fides of the preemption claim of J. J. Jackman to the s. w. qr., sec. 32, township 139, range 80, near Bismarck, D. T.*

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Argument of ~~the~~ Counsel in support of the charge of *bad faith* against John J. Jackman.

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CHAS. D. KERR,  
Of Counsel for Homestead Claimants.

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[See a map and 4 township plats of  
Pembina Land District, Dakota Territory  
relating to John Jackman case filed in  
9.2.1888 "Mab's"]



UNITED STATES LAND OFFICE, }  
BISMARCK, D. T. }

In the matter of the hearing in respect to the *bona fides* of the pre-emption claim of John J. Jackman, near Bismarck, D. T.

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ARGUMENT OF COUNSEL FOR O'NEIL & RENDER.

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*The pages referred to in this argument are those of the printed testimony.*

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Affidavits were filed in the Interior Department early in the year 1877, alleging bad faith on the part of J. J. Jackman, in his pre-emption claim to the SW quarter of Section 32, Township 139, Range 80. On the 4th day of August, 1877, the Hon. Secretary of the Interior ordered a hearing of this charge. In pursuance of this order, the Commissioner of the General Land Office, by letter of date ~~the~~ August 8th, 1877, directed the Register and Receiver of the Bismarck land office, to set apart a day for said hearing, and after a full and impartial investigation of the case; to send up the testimony, etc.

Such hearing has been had, and from the above orders it will be seen that its sole object was to determine the character, whether fraudulent or *bona fide*, of Jackman's pre-emption claim.

I am aware of *no* rule of law, or regulation of the Department, which would confer jurisdiction upon the R. & R. at this hearing to determine or take testimony upon any other question than the one thus specifically submitted to them.

*See Letter Secretary Interior, Copp's Land Laws, pp. 815-858*

This view will explain the refusal of witnesses, acting under my advice to answer questions pertaining to the O'Neil and Render additional homesteads, and other matters altogether extraneous to the question at issue, namely, Jackman's fraud or good faith.



To this one issue I shall endeavor to confine myself in this argument, deeming it sufficient simply to protest against the prejudicial inferences, which I presume counsel for Jackman will attempt to draw from our refusal to incumber the record with impertinent and irrelevant matter.

I think that the Register and Receiver were right in their ruling that Jackman should first introduce his testimony, instead of throwing upon us the burden of sustaining a negative.

*See Opinions Attorney Gen., 5 Opin., p. 114.*

I claim that the evidence in this case conclusively establishes three propositions, namely :

*First*—That the original settlement of Jackman, upon which his pre-emption claim in dispute is still based, was not made in good faith, within the meaning of the law, but for purposes purely speculative.

*Second*—That subsequently to such original settlement, Jackman abandoned the claim and was absent therefrom for more than six months without sufficient excuse.

*Third*.—That upon returning to the claim after such abandonment, Jackman attempted to secure it under the pre-emption law, in direct contravention of the terms of said law, not for his own exclusive use and benefit, but for speculative purposes, and under a contract and agreement with Hill & Robbins that they should share equally with him in the speculation.

## I.

As to the original settlement.

The proof upon this proposition is direct and positive.

Three witnesses, whose character for truth and veracity stands unimpeached, testify, without material conflict, to a state of facts which establish the character of the original settlement beyond all doubt or question.

They tell the story, with only sufficient diversity of expression to stamp it with the impress of truth, that Jackman entered into an arrangement with them and one J. H. Richards, and a man named Churchill, to take five pre-emption claims at the supposed crossing of the Northern Pacific Railroad over the Missouri river, where it was conceded there must grow up an important city.

That Jackman was the leading spirit in the enterprise; that he represented himself as having peculiar facilities for ascertaining just where the crossing would be, on account of his intimacy with certain of the company's engineers; that in proof of his superior knowledge, he informed them of the exact point where the company had then decided to cross, and which was indicated by what was known among the engineers as "Thom's Stake."



That each of the parties thus agreeing was to take a claim near this stake. That the five claims thus selected were to form a "pool," in the profits of which all were to equally share. So that, if only one should happen to strike the fortunate spot, all would be alike the gainers; that the expedition was to be conducted secretly and with the utmost dispatch, in order to distance others bent upon a like speculation, especially the hired pre-emptors of the Lake Superior and Puget Sound Co; that shortly before starting, Jackman concluded not to go just then in person, but did send in his stead to represent him and hold a claim for him, the witness Cory; that those who had no money were to furnish teams or other equivalent.

That the enterprise was so far carried out that the five claims were selected as agreed upon, at the point mentioned, one of which, namely, the claim here in dispute, was chosen by Jackman upon his arrival on the ground, about a month after his associates, as his share in the "pool," and finally that the original arrangement, so far as Jackman was concerned was in full force when he left his claim and the territory in which it is located in July, 1872, being then a good deal discouraged as to the profits of the speculation.

This story, in all its details, is positively denied by Jackman, but unfortunately for him in this case, his denials rest solely upon his own unsupported testimony.

There were two men connected with the enterprise, whose testimony is not taken, and who must have personally known the facts, namely, J. H. Richards and Churchill.

I will concede that perhaps Jackman could not readily have obtained the testimony of Churchill, for I exhausted all means in my power to ascertain his whereabouts without success, but the man Richards was present in Bismark during all this hearing, (see Jackman's testimony, p. 78,) and could have been called any moment.

I utterly repudiate the idea of Mr. Jackman's counsel, that this man's testimony on some former occasion, between different parties and upon different issues, can be interpolated into this case, and made a part of it, "*de bene esse*," or otherwise.

Before my clients can be affected by his testimony, they have a right to confront him, and I have a right to cross examine him.

In the Rules of Practice of the G. L. O., approved March 29th, 1875, it is expressly provided that: "Due regard shall be had in every instance to the necessity of giving opposing claimants the opportunity to confront and cross-examine the witnesses."

I assert my sincere and *well grounded* belief that all the persuasions and inducements that Jackman was able to, *and did* offer, were insufficient to induce Mr. Richards to appear upon the stand and deny under oath the sworn statements of Cory and Woods and Sanborn.

The perjury involved in such a denial would have been unmasked by Mr. Richards' own admissions which Mr. Jackman knew we were prepared to prove.

Surely so eminent and honest a lawyer, as Mr. Jackman's friends or good fortune have been able to secure for him as his counsel in this hearing, will not claim that he would have taken the chances of dispensing with Mr. Richards' testimony, had he dared to take the chances of producing it.



Suppose the accusing party here had contented themselves with simply *referring* to Maj. Wood's testimony on the former contest, and had not called him upon this hearing, or permitted any cross-examination by Jackman's counsel. I am almost envious of the eloquent scorn and contempt that the learned counsel's argument would have visited on my assumption, that the only reason for not calling the witness was to avoid profitless repetitions. It is fair to presume that I am addressing this argument to men of common sense, and viewed in that light there is one explanation only of Jackman's refusal to produce the witness Richards, under the circumstances.

Again, I claim that Jackman's history of this first settlement is against all the probabilities of the case, while the *admitted* facts are all consistent with the story of Cory, Woods and Sanborn.

I do not know what the ingenuity of counsel may be able to discover, but I can find no circumstance in the case tending to corroborate the story of Jackman, as to this first arrangement.

He was a capitalist in a small way, and not so very small either, considering the field of his operations on the frontier of Minnesota.

According to his story, he must then have had four or five thousand dollars of available funds, and credit for nearly as much more, and yet he deliberately formed the plan of moving into the wilderness with the view of securing by pre-emption 160 acres of land for agricultural purposes and for "a permanent home."

The idea of "*townsite*" had never crossed his mental vision, his association with other parties in the enterprise was for the purpose of mutual protection only, and no community of interest in the claims to be taken was ever contemplated.

I must say to Mr. Jackman that this story, standing alone, is highly improbable, but that if strictly true there was no possible reason for secrecy, and no conceivable cause for haste; yet it is admitted that the expedition was fully equipped in about six hours time, (not over a day,—see testimony of Jackman on page 75,) and started the same night and in the night time, and raced all the way to the Missouri river with the "hired pre-emptors," as Jackman calls them, of the Lake Superior and Puget Sound Company, whose business every one knew to be the jumping and holding of prospective townsites, (see testimony, pp. 11, 14, 74) It is asserted by our witnesses that the expense of the enterprise was to be borne in common, some furnishing teams, and others provisions, money, etc. The evidence conclusively shows that this arrangement was carried out. It will be observed that Jackman's team did not come, but he furnished money and provisions, (testimony pp. 76-7-8,) and they all worked in common after arriving on the ground.

Cory says that he was employed by Jackman to come out as his representative and to select and hold for him, Jackman, one of the five claims. Jackman vehemently denies this, and asserts that he simply hired Corey to drive his, Jackman's, team out.

Here is Jackman's language on that point, (testimony p. 76,). "I asked Mr. Farrell if he knew a man I could get to go to the Missouri



river with me and drive a team. He said he had a man living with him, who was idle, who would like to go out there; and he afterwards introduced me to Cory. Cory wanted to come out here to go to work on this end of the road, but would not come unless I would agree to furnish him a place to live, until he could get work. This I agreed to do and to pay him for coming out here with me. Under these conditions he agreed to come. He came with that party. I paid him something for coming out, but don't recollect how much; for half a month or a month. I think, I also told him, that if he got a good contract on the grade I would go in with him."

Now strange as it may seem after this testimony neither Jackman, nor *his team*, came out at all with that party. He followed with his team and his outfit about a month afterwards, and then employed another man, McCarty by name, to drive his team. These two moreover went through alone, (see testimony pp. (77-8,) yet, of course, it was necessary for the previous company of five to band together for "mutual protection," and of course Cory was paid by Jackman for driving his *team* out and wages for half a month or a month's service besides.

What could be clearer?

Again it is claimed by our witnesses that Jackman told them he knew where the crossing of the Missouri was to be, from his intimate acquaintance with the company's engineers; this Jackman denies, yet he admits that he himself was before that, in the employ of the company as chainman for an engineer party, and was acquainted and may have talked about said crossing with Churchill, one of the company's engineers, and one of the five who formed the pool as Woods and Cory state. (Testimony p.p. 59, 73 and 74). Jackman admits also that he may have heard of "*Thom's Stake*," but denies that he was ever informed where it was located, or that it was the point, where the road would probably cross the river, (testimony p. 78,) and yet immediately upon their arrival, the original party first sought for this "*Thom's Stake*" and found it precisely where Jackman had represented it would be, and Richards, who appeared in Jackman's absence to be the leading spirit in the party, selected his claim "right at said stake." (See testimony p. 11). Jackman arrived upon the ground with his team and his outfit about May 8th, 1872, and on the 28th of the same month, made his final selection of the claim here in dispute, as his share in the "pool;" after this he remained in the vicinity a little over two months, but made no permanent or adequate improvements on the claim in dispute, except the erection by himself and Woods of a "shack" or claim shanty. (Testimony p.p. 60, 61, 78, 5-). In the meantime the Lake Superior and Puget Sound company's claim jumpers, having been outstripped by the Jackman claim jumpers, the railroad company, which as every one knows, was simply the Puget Sound company, by another name, began to manifest an intention to cross the river at some other point than "*Thom's Stake*;" another line was surveyed and located, and the grading on same actually commenced, and things looked gloomy enough for the Townsite speculators. (Testimony p.p. 7, 11.)

(This is not denied by Jackman.)

At this juncture, Jackman left the vicinity and was gone nearly a year. In view of all these circumstances, am I over-confident in the



assertion with which I started out: that the facts establish the character of Jackman's original settlement, as fraudulent and speculative, beyond all doubt or question?

I am informed by Mr. Ball, who took the testimony of Woods, Cory and Sanborn at Bismark, that the notes kept by him and furnished to me for printing, are very meager, and that the testimony, as actually taken by the land officers, is much more satisfactory and complete. I would therefore respectfully refer the Hon. Commissioner of the General Land Office, to the testimony of Woods, Cory and Sanborn, as taken by the Register and Receiver, and ask that the same be read from their manuscript, as well as from the printed case.

If there is any truth in the story of Cory, Woods and Sanborn, the claim of Jackman, at its inception, was fraudulent and void, because made for speculative purposes; and inasmuch as he relies upon this original settlement in proving up, the taint of its fraud has never been removed.

No. 436, *Sec'y Int.*, 1 *Lester*, p. 390.

No. 441, *Sec'y Int.*, 1 *Lester*, p. 393

No. 445, *Sec'y Int.*, 1 *Lester*, p. 396.

No. 446, *Sec'y Int.*, 1 *Lester*, p. 397.

No. 450, *Sec'y Int.*, 1 *Lester*, p. 399.

*Myers vs. Croft*, 13 *Wall.*, 295.

11 *Opin. Att'y Gen.*, 492.

*Hutchings vs. Low*, 15 *Wall.*, 77.

## II.

The second proposition which I claim to be established is, that Jackman, after his first settlement, abandoned his claim.

Jackman admits that he left the claim, as hereinbefore stated, about the 27th of July, 1872, and remained away until sometime in May, 1873. The legal presumption always is that a person *intends* to do exactly what he does, and if different intentions are claimed, satisfactory proof must be produced to establish them.

We have Mr Jackman's unsupported word for it that he left solely for the purpose of procuring lumber with which to build him a house, and that he intended to return with the lumber in the course of a few weeks. (Testimony, p. 61.) *adding that he took only his "little hand satchel" with him.*

But here, again, the admitted circumstances of the case are against Jackman. The fact, undisputed by him, of his being deeply discouraged at the prospect of his enterprise, at the time of leaving, is a strong circumstance against him; and then if he went for *lumber*, why did he not take his team? How was he to bring the lumber back with him, as he says? Pre-emptioners with a team do not usually start for lumber with a "hand satchel."





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