

THOMAS B. KIMBALL

v.

WILLIAM HENRY SELBY

IBLA 75-192

Decided April 16, 1975

Appeal from decision (AA-2865-A) by John R. Rampton, Jr., Administrative Law Judge, dismissing a private contest against a homestead entry.

Affirmed.

1. Alaska: Homesteads -- Homesteads (Ordinary): Cultivation -- Homesteads (Ordinary): Final Proof

The breaking, planting or seeding and tillage for a crop which constitute cultivation of the soil of a homestead entry must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

Where it appears that land has been hand seeded and rolled with a log in a similar manner as used on other homestead entries in the area, and where it is not established that such seeding and rolling is not an unreasonable practice for the type of land and weather conditions involved, the entryman's acts may be found to have been calculated to produce profitable results, notwithstanding his efforts failed to produce a useful crop.

2. Alaska: Homesteads -- Homesteads (Ordinary): Contests -- Homesteads (Ordinary): Cultivation

A charge that the entryman failed to cultivate the required acreage in the

second entry year is not sustained where the contestant's evidence consists mainly of a general statement by a few persons concluding that the entryman's mode of cultivation was inadequate. In the face of testimony to the contrary by contestee's witnesses which leaves the evidence in equipoise, contestant has not met his burden of convincingly establishing the fact of the entryman's failure to cultivate in the second entry year.

Appearances: Richard F. Lytle, Esq., of Houston and Lytle, Attorneys at Law, Anchorage, Alaska, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE RITVO

Thomas B. Kimball has appealed from an Administrative Law Judge's decision of September 16, 1974, which dismissed his contest against the homestead entry (AA-2865) of Mr. William Henry Selby for failure to establish his charge that Selby had not perfected his cultivation in the second year of the entry.

The record shows that on May 16, 1968, William H. Selby filed an application for homestead entry under the Homestead Act of May 20, 1862, 43 U.S.C. § 161 et seq. (1970), for a tract of land containing 156.25 acres located in Sections 21, 22 and 28, T. 20 N., R. 9 E., Seward Meridian, Alaska. The entry was allowed September 10, 1968. On March 14, 1972, Selby filed his final proof in the Anchorage Land Office, alleging (1) cultivation of 20 acres for a crop of oats and vetch for the entry year 1970, (2) residence on the entry in 1968 and 1970, and (3) construction of improvements on the entry consisting of a habitable house, a cesspool, and a road which he valued at \$7,525. He claimed credit for his 2 years military service from April 11, 1944, to April 20, 1946, as a substitution for part of the required residence and cultivation. 1/

On November 15, 1972, Thomas B. Kimball, filed a contest complaint in the Anchorage Land Office charging Selby with failure to perfect cultivation as required by the homestead law. After the entryman responded with a general denial of the contest allegation, a hearing was held at Anchorage, Alaska, July 25 and 31, 1973.

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1/ The Land Office properly gave Selby credit for 2 years military service in lieu of 2 years residence and 1 year cultivation in accordance with the Act of September 27, 1944, as amended, 43 U.S.C. §§ 279-284 (1970), which provides that creditable military service may be construed as residence and cultivation for a period not exceeding two years

From the testimony and evidence presented at the hearing the Judge found that approximately 20 acres of the homestead were cleared in 1970 and approximately 6,000 pounds of a mixture of oats and vetch were broadcast by hand on the cleared acres after which the sown area was dragged with a log to cover the seed. He dismissed the complaint stating:

It is not necessary that a crop planted on a homestead entry be an unqualified success. The entryman must be in good faith and must cultivate in such manner that there is a reasonable expectation that a crop can be grown.

I find that he did so.

Kimball contends on appeal (1) no reasonable proof was given that the cleared land had been cultivated by Selby, (2) there were no crops actually grown on the Selby homestead, and (3) Mr. Selby did not cultivate his homestead in good faith.

The sole question for determination with this appeal is whether or not the work done by the entryman during the second entry year constituted an acceptable method of cultivation under the circumstances of this case to meet the cultivation requirements on his entry. The homestead laws and the pertinent Alaska homestead regulations, 43 CFR 2567.5(b), provide that there must be cultivation of 1/16 of the area of the claim the second year and 1/8 of the area during the third year and until submission of final proof. Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

The specific cultivation requirements for homestead claims in Alaska are no more restrictive than the general homestead requirements for the three-year proof of cultivation under 43 CFR 2511.4-3(a)(1).  
2/ See United States v. Grediagin, 7 IBLA 1, 5

2/ 43 CFR 2511.4-3 (formerly 43 CFR 2667.5) provides:

"(a) \* \* \* (1) Cultivation of the land in a manner reasonably calculated to produce profitable results is required for a period of at least 2 years. This must consist of actual breaking of the soil, followed by planting, sowing of seed, tillage for a crop other than native grasses, and, in areas where rainfall is inadequate, the application of such amounts of water as may reasonably be required to produce a crop \* \* \*

"(2) During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had \* \* \*."

(1972). In construing the cultivation requirements for agricultural entries in Alaska the Department has recognized the unusual problems attendant to the area such as extreme weather conditions, and short growing season. However, such difficulties must be accepted as hazards of homesteading in Alaska and homesteaders must contemplate compliance with the terms of the law notwithstanding. Gilbert v. Oliphant, 70 I.D. 128, 132 (1963).

[1] The Department has never attempted to lay down a fixed rule as to what constitutes satisfactory cultivation. It has long held, with respect to entries under both the Desert Land Act, 43 U.S.C. § 321 et seq. (1970), and the homestead laws, that the breaking, planting or seeding and tillage for a crop which constitute cultivation must include such acts and must be done in such a manner as to be reasonably calculated to produce profitable results and that a mere pretense of cultivation will not satisfy the requirements of the law. United States v. Garrett, A-31064 (May 28, 1970). See also Gilbert v. Oliphant, *supra*; Jess H. Nicholas, A-30065 (October 13, 1964), *aff'd Nicholas v. Secretary of the Interior*, 385 F.2d 177 (9th Cir. 1967). Moreover, the crux of a determination of whether an entryman has satisfied these requirements is not necessarily what results were obtained, but it is whether the method used was reasonably calculated to produce profitable results. Therefore, an entryman's failure to produce a useful crop does not in and of itself disqualify the entryman's acts as sufficient cultivation. United States v. Garrett, *supra*, p. 13.

In this case the entryman was required to show a minimum cultivation of 10 acres the second entry year. 3/ As indicated, the 20-acre requirement for the third entry year was satisfied by Selby's verified military service. As to the extent of the cultivation work the entryman's evidence was established by his own testimony and three other witnesses, Mr. William Strate, Mr. Bobby Otis Wilie, and a Mr. Milligan. 4/

Mr. Selby testified that he moved onto the homestead May 3, 1968, raised a garden, and did some building and clearing around the house. He took a leave of absence in 1969 because of his wife's illness. He cleared approximately 20 acres in the fall of 1970 by removing all of the tundra, grass and trees (Tr. 38, 40).

Selby stated he purchased and planted by hand 6,000 pounds of oats and vetch at a rate of 300 pounds per acre (Tr. 42, 59). He

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3/ The second entry year for Selby was from September 10, 1969, to September 9, 1970.

4/ Mr. William Strate (Mr. William D. Straight) and Mr. Milligan (Mr. William J. Millican) also witnessed Mr. Selby's final proof.

was helped by William B. Strate, Bobby Otis Wilie and Mr. Milligan. The cost of the seed was \$360 (Tr. 58).

To cover the seeds a log was dragged over the land with a weasel. Some problems were encountered because portions of the land were wet and the weasel got stuck several times (Tr. 41-42). He testified that although the land was not frozen at the time of seeding, few oats germinated. However, a crop of vetch was raised in 1971. He did not reseed the oats because he thought the oats might germinate in the spring of 1971 (Tr. 63). He said the vetch is still coming up and will replenish and reseed itself (Tr. 52).

As a boy on a farm in the States, Selby had used this same method to successfully raise crops. He was of the opinion that the cultivation by using a log to cover the seeds would work equally well in Alaska.

Mr. William D. Strate, who was employed by Selby to clear the land, testified he had experience in clearing land for many other homesteaders in Alaska (Tr. 71). He cleared approximately 20 acres and helped Selby sow the vetch and oats. He testified that in the summer of 1970 he cleared the fields and saw vetch and some scattered oats growing on the entry (Tr. 73).

Strate stated that in cultivating his own entry, he had disced after the clearing was completed (Tr. 86). However, he said the log serves the same purpose and is as good as a disc. He observed good crops on properties owned by Mr. Milligan and Mr. Wyman, who planted the same way as Selby (Tr. 98).

Mr. Bobby Wilie, who also helped Selby seed the entry testified that the largest portion of the entry was smooth. There were some rough spots, and the land was pretty wet (Tr. 103). He said he personally sowed eight to ten sacks of seed and was certain that Selby sowed at least as much as he did, if not more (Tr. 104).

Wilie was born and raised on a farm, and in his opinion, the ground was suitable for seed to take root.

Mr. Milligan also helped plant seed on the homestead. He testified that the caterpillar tracks would not be obliterated by cultivation. He said that the ground was muddy and the tracks were deep and that Selby had run a harrow over the ground (Tr. 118). He was on the cleared area in 1972 and saw some oats growing (Tr. 120).

Contestant, Thomas Kimball, testified he first saw the homestead in the summer of 1970 when he resided near the entry and had occasion to go by each day. He walked over all the property, and although he had never taken measurements, he estimated that between 10 and 15 acres had been cleared (Tr. 6-8).

In his opinion the soil was black dirt and would grow anything planted. He had seen no indication of any seeding of oats, or any type of planting of oats, or vetch, and concluded that the land had never been cultivated because the cat marks from the bulldozer used for clearing were still in the fields (Tr. 9-10).

Kimball admitted that he had never worked on a farm or helped prove up or plant on a homestead. He stated that his knowledge of different types of grasses was obtained through courses in college, and that his major in college was in business with a minor in biology. However, he could not describe the appearance of either brome grass or vetch (Tr. 19-20).

Mr. Farrar, contestant's first witness, testified he lives approximately a mile from the Selby homestead. He stated that he had gone by the homestead frequently. He had not walked over the boundaries but had been over the property numerous times while hunting on horseback, and he had flown over it in the fall of 1972. He found no evidence of a plow, or disc, or harrow, or any type of turning other than the cat used in the clearing. He saw no indication turning other than the cat used in the clearing. He saw no indication of oats or vetch on the Selby property (Tr. 22-23).

Mr. Christie, contestant's other witness, stated he has a patented homestead abutting the entry, is a pilot and runs an air taxi out of Glacier Park. During the summer months and hunting season he has flown over the homestead several times a day. He stated he had seen no remnants of oats but had seen a little vetch in a couple of spots or in scattered portions (Tr. 32).

He admitted that there could have been some seeding, but concluded it was not cultivated in the sense that the term means breaking the soil and seeding of the crop and tillage for a crop other than native grass.

From our review of the record we agree with the Judge's ruling that appellant did not sustain the charge as to lack of cultivation. Appellant attempts to make much of his observation that Selby's cultivation work failed to obliterate the cat tracks from the original clearing operation. Consequently, he concludes there was no breaking of the soil and no good faith cultivation. The facts do not necessarily dictate that conclusion.

Although Selby's results were admittedly not the best, there is ample testimony in the record that under the attendant circumstances his methods could be considered both acceptable practice and reasonably calculated to produce profitable results. The fact that Selby's efforts failed to produce a useful crop, without more convincing evidence, does not by itself establish a lack of good faith in his attempt to comply with the law. Selby's witnesses

established that there was a reasonable basis for his mode of cultivation. There was an indication from those familiar with the area, Strate and Milligan, that such methods could reasonably be expected to produce a crop. It was also established that this method had produced some sparse results with Selby's crop of vetch. In fact, Strate testified from his experience on his own entry that Selby's crop of vetch could be expected to reseed itself and come back stronger each year (Tr. 98).

Appellant stresses that Selby should have disced the soil to break the ground to achieve better results. Yet, this is merely his own conjecture. There is no guarantee that such methods would have proved better where the ground was extremely wet and soft. Selby's evidence was to the contrary that the log rolling served the same purpose. Appellant's opinion evidence in this instance is merely offset against the entryman's opposing view of equal substance, thus leaving the evidence in equipoise. In order to procure a cancellation of an entry the contestant must establish his case by a preponderance of substantial evidence. See Clarke v. Tabbytite, 72 I.D. 124, 129 (1965). Appellant has not met this burden. Although discing is one method of preparing the ground that may have eliminated the cat tracks from Selby's fields, this does not convincingly establish that Selby's method was unreasonable and merely a pretense of cultivation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Frederick Fishman  
Administrative Judge

